TOMASZ WIDŁAK

FROM INTERNATIONAL SOCIETY TO INTERNATIONAL COMMUNITY

THE CONSTITUTIONAL EVOLUTION OF INTERNATIONAL LAW

WYDAWNICTWO UNIWERSYTETU GDAŃSKIEGO

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COORDINATOR OF THE SERIES

GRZEGORZ WIERCZYŃSKI

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Maria Kosznik

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Andrzej Taranek

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Michał Janczewski

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Introduction

"International society" and "international community" are two terms commonly used in the language of contemporary world politics and international law. Additionally, they have found their way permanently into the language of the mass media. The expression "international community" seems to have become ubiquitous, virtually a time-honoured key word for all sorts of discussions, journalistic analyses and comments on various international problems and matters. The scale of this phenomenon can be readily appreciated by searching the Internet for the phrase "international community", which produces 27.5 million results containing the expression.[1] The changes in the intensity of usage of the expression during the last few decades of globalization are equally impressive. The easiest way to observe this process is by browsing the archives of the influential newspaper *The New York Times*. During its first 129 years, between 1851 and 1980, there were 1556 texts containing the expression "international community", whereas during the following thirty years (1981–2011) it appeared in the newspaper's columns over 6300 times.[2] Anyone even moderately interested in international affairs is familiar with the typical context in which the phrase is used; therefore every day we read: "African Union urges international community to help Somali people",[3] "Somalia famine relief poses

[1] Google reports about 19 600 000 results for "international community", see: http://www.google.com, accessed 6 September 2015.

[2] In the articles published from 1 January 1981 to 21 February 2012 there are 6362 items containing the phrase "international community", "The New York Times", Global Edition, http://global.nytimes.com/, accessed 21 February 2012.

[3] Panapress, http://www.panapress.com/AU-urges-international-community-to-help-Somali-people---12-789218-32-lang4-index.html, accessed 6 September 2015.

challenges for international community",[4] "international community struggles to confront Syrian bloodbath"[5] or even that "Google has asked international community to step up in defence of freedom of expression"[6] and the like. Very often the media merely cite politicians, who use the expression in many ways and contexts, even further blurring its indeterminate meaning. Probably the most serious attempt to define and ascribe a specific political meaning to the phrase "international community" in the language of world politics was in a speech by Tony Blair in Chicago in 1999, on the occasion of the fiftieth anniversary of NATO.[7] In connection with the intervention of the Alliance in Kosovo, Britain's then prime minister aimed at formulating what he called the "Doctrine of International Community". The main theme of Blair's idea of international community was faith in the interdependence and shared responsibility of states, the need and necessity of cooperation and taking up joint efforts in the name of defending common values, such as freedom, rule of law and human rights – all deemed to be universal in the post-sovereign world.[8] This apotheosis of the idea of humanitarian intervention as a vehicle of liberty and the indisputable primacy of western, liberal democracy was characteristic of the 1990s – the era of the "end of history", before the events of 11 September 2001. It is disputable, however, whether the "Doctrine of International Community" has succeeded in providing a single clear understanding of the term "community" or "society", apart perhaps from establishing a certain point of reference. Despite the fact that the phrase is still often associated with western political rhetoric, fifteen years after the Chicago speech world leaders rep-

[4] Voice of America, http://www.voanews.com/english/news/africa/east/Challenges-to-Somalia-Famine-Relief--126132404.html, accessed 6 September 2015.

[5] Global Post, http://www.globalpost.com/dispatch/news/regions/middle-east/110802/international-community-struggles-confront-syrian-bloodbath, accessed 6 September 2015.

[6] Business & Human Rights Resource Centre, http://business-humanrights.org/en/international-community-should-defend-online-freedom-of-expression-google, accessed 6 September 2015.

[7] *Tony Blair speech to Chicago Council on Global Affairs*, The Office of Tony Blair, http://www.tonyblairoffice.org/speeches/entry/tony-blair-speech-to-chicago-council-on-global-affairs/, accessed 2 February 2015.

[8] See also: R. Jackson, *The Global Covenant. Human Conduct in a World of States*, Oxford University Press, New York 2003, p. 355–360.

resenting different political systems use and abuse the expression in order to justify their ends, which often stand contrary to the values espoused by Tony Blair. Needless to say, it is also true that the devaluation of the "language of the international community" may also be attributed to Mr Blair himself who – alongside George W. Bush – is still believed to be the main figure responsible for the controversial decisions and actions taken in the case of Iraq. Currently, it seems quite obvious that – at least in the media and in political discourse – the notion of "international community" or "society" has grown to be no more than another cliché, deprived of determinate meaning or relevant axiological reference. In the light of this, the policy of the UK's influential *Financial Times*, which is said to have forbidden its editors to use the term on the grounds that it is meaningless and even harmful,[9] may be regarded as symptomatic.

At this point, one may query the very sense or scholarly aim of a book that intends to reconstruct the meaning of an allegedly meaningless phrase – "international community". Looking at the matter from the perspective of a lawyer, however, there is at least one simple and important argument for the purposefulness of this exercise – "international community" is a legal term. It can be found in the texts of several formal and informal sources of international law; moreover, it is extensively used by the doctrine of international law, which is evident from a brief study of almost any public international law textbook. Therefore, since the primary interpretation rule in international law is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (…)",[10] the problem of the meaning of the expression "international community" or "international society" has to be considered an issue of utmost importance not only for the theory, but even more for the practice of international law. Secondly, the abovementioned popular vision of the international community has to be seen as somehow shallow, simplified and separated from the rich philosophical and historical tradition in which the notion is embedded. This heritage undoubtedly includes the classics of the doctrine of international law from the turn of the nineteenth and twentieth centuries, although the very idea of international

[9] A. Gowers, *The Power of Two*, "Foreign Policy" 2002, vol. 132, p. 32.

[10] Article 31, Vienna Convention on the Law of Treaties (1969), http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, accessed 2 February 2015.

society has been present in political and legal thought for at least as long as the concepts of sovereignty and international law itself.

However, it would be a mistake to limit this research to the views of the doctrine of international law, which has not yet established any in-depth, systematic research of its own on the issue of international society or community.[11] Significant achievements in this matter are owed to the representatives of political science and the field of international relations. One influential current in particular, called the English school of international relations, has managed to invent the international society as its main research paradigm. However seen, it is impossible to deny that the question of what is an international community does not boil down to linguistic analysis or the problem of the proper, *lege artis* interpretation of a legal text. Undoubtedly, the concept implies a powerful idea, related to the most fundamental legal and philosophical questions about the nature of international law, the architecture of world order, the rights of individuals, the ontology of the international society and the identity and self-determination of its most fundamental members, both state and non-state actors. Seen in this context, the issue of international community seems to be much wider than what one could *prima facie* expect. Thus, it is a question about the most pivotal problems of contemporary international relations and the challenges faced not only by international law, but also by law and socio-political philosophy in general.

Nonetheless, this book is not to be regarded either as a proposal for a consistent scholarly theory of international community, or as an attempt to propose definite solutions to the most significant challenges to contemporary international law and relations. Taking into consideration the multidimensionality of the issues concerned, the aim of this book is much more modest. The purpose is rather to reconstruct the concept of "international community" and to provide a general picture sketched from the perspective of a bird's-eye view of the theory and philosophy of international law. The aim is not so much to define international community but rather to attempt to understand the phenomenon in its wider normative, historical, cultural and socio-political context. Thereby, the book draws the reader's attention to the significance of an issue generally neglected by the science of law as well as to the relation of the

[11] One of the notable exceptions is the book by A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, C.H. Beck, München 2001.

notion with the array of crucial problems of international law. Obviously, this does not imply that some *de lege ferenda* proposals are not to be found across the pages of this book. Indeed, there are many reflections on future trends and the directions of possible further evolution of the community.

The book consists of four general chapters, representing at the same time the major planes of analysis: linguistic, axiological, institutional (structural) and normative. It is common for the representatives of the doctrine of international law to associate studies on the international community intuitively either with historical studies or with the issues of membership and the typology of the subjects of international law, which are related to the abovementioned structural or institutional questions. While the book fully respects this view and explores these issues, it also takes a considerably wider approach.

The first chapter concentrates on the presentation of the concept of international society from the perspective of the contemporary doctrine of international law. A few remarks are devoted to what has become known as "terminological chaos" manifesting itself in inconsistent and alternating usage of the terms "society" and "community" both by the doctrine of law and in the primary sources of positive international law. Subsequently, the chapter moves to a broad discussion and assessment of the concept of international society in the light of research in the field of political science and international relations. Particular attention is given to the legacy of the so-called English school of international relations, which has developed since the 1950s at the meetings of a group of scholars and practitioners from the leading academic institutions as well as the Foreign Office, known as the British Committee on the Theory of International Relations. The group subsequently created the first school of thought within the social sciences, which has seriously taken up a systemic, theoretical analysis of the phenomenon of international society in a broad research perspective. In terms of method, the English school has also worked out a characteristic, eclectic research approach (standing in clear-cut opposition to American-style scientism) as well as terminology based on the conceptual triad: international system, international society and world society. The book puts emphasis on the virtues of the English school approach, which is considered as a continuation of the "Grotian tradition" of thought, being close to the hearts and minds of a considerable number of legal scholars.

The second chapter concentrates on axiology as a theory of the values of international society. The aim is not, however, as it may seem, to provide something like a specific catalogue of values of a particular (the contempo-

rary) international society. There are two major reasons for this: first of all, it would provide only a static picture of this society, and secondly, the usefulness of such an approach would be considerably limited due to the perennial dispute between axiological objectivism and relativism. Nonetheless, not keen to abandon the normative reality *hic et nunc* either, the author has devoted some attention to values of the present international community. This does not, however, change the fact that in the context of models proposed by different traditions of thought, the main current of the discussion in this book concentrates on the nature of values in international community in general. First of all, the book explores the relations between the major meta-values of order and justice, as well as asking questions on how values and their protecting norms are changed and sustained within society. As a major fruit of the analysis in this part, the book brings out two fundamental models of international society based on the criteria of the degree of intensity and the way of sharing values among its members. Firstly, according to a weaker, more pluralistic interpretation, international society is a loose community of states, sharing the minimum of values necessary for survival of the individual members, that concentrates on co-existence, avoiding potential collisions of interests and basing itself on negative principles of inter-state justice. In this version, the international society is close to a *Gesellschaft* – a notion drawn from the terminology applied by Ferdinand Tönnies – meaning a society in which members "stay apart in spite of all that binds them". Secondly, in a stronger version, there can be a *Gemeinschaft* – a solidarist community building itself on a thicker and denser layer of common values, interests and norms, which is not oriented so much toward co-existence but rather to reaching common goals in the interest of the whole – accordingly to the logic of *raison de système* – and implementing the positive principles of supra-national and trans-national justice. This division into society and community constitutes a major theoretical distinction within the concept of international community *sensu largo*. It builds up the major analytical tension in the theoretical analysis of the concepts of international society and community, which is also visible in the book's other two chapters on structural and normative aspects.

Chapter III, titled "Structure", concentrates mainly on the analysis of the issue of membership of an international community and confronts it with another legal category, that of a subject (person) of public international law. Assuming that, in spite of many important changes in the contemporary in-

ternational community over the last two decades, the state is still the major and most important member of the community, this chapter devotes some attention to the role and meaning of the state. In this context, the analysis presents three essential models of the role played by the state in the structure of international community: as a fundamental provider and guarantor of security, as a fiduciary of public goods, and finally as a post-modern, post-sovereign entity. Another type of member, or prospective member, discussed is represented by several non-state actors; international organizations (including NGOs), multinational corporations and individuals. The review of the structural aspect is completed by an analysis of possible configurations between the categories of members, concentrating on the issue of the relations between the international and world societies. Finally, the discussion addresses the question whether, in the structural context, there is only one encompassing international society or multiple, narrower solidarist communities of a regional or functional character. The most important conclusions of Chapter III are, among others, that the state continues to play the central role and has a crucial significance within the structure of international community, although its ever-changing character and the evolution of the concept of sovereignty have to be taken into consideration. Secondly, there are considerable differences between the two categories of a subject of public international law, on the one hand, and a member of the international community, on the other. These are not without consequences for the law itself, however, and it is possible to observe in this setting a clear trend of gradual redefinition of the notion of international legal personality and subjecthood.

The closing Chapter IV, on "norms", deals with two kinds of relations between international society and international law; the role of law in international community and the function of the concept of international society (international community) within international law itself. The first issue considered in this part is the place of law as an element of the international community's normative structure; in other words, law is considered as one of the major normative systems running the international community and can be compared to other regulators like politics, morality, praxeology (rules of prudence) and courtesy. The second part of this chapter turns to the issue of the constitutionalization of international law – a phenomenon that is a logical consequence of the development of the *jus* in relation to its ever more complex *societas*. The constitutional paradigm was used to point out the place and the role of the international community in international law

and its normative concept as a community of law, seen from the perspective of vibrant changes taking place within that law itself.

In the conclusion of the book the discussion aims eventually at answering the question of the interpretative meaning of the term "international community" in international law. There is reflection not only upon the primary term, and its variations such as "international community as a whole", but also upon the kindred notions of the legal language such as "humanity", "common heritage of mankind" or "world heritage". As a result of the analysis, five major possible meanings of the term "international community" in international law are enunciated and presented: (1) as a simple sum of existing states, (2) as a synergic body consisting of states and other recognized members, (3) as a system of the United Nations and its subsidiaries, (4) as a world community of individuals, and finally (5) in the non-ontological interpretation, as a common discursive *agora* or a moral idea including a potential of shared responsibility for the fate of humanity, individual beings and the planet itself.

Last but not least, what remains to be answered is the terminological question in relation to the title of this book. Two similar terms are used to name the subject matter of the book; international society and community. Synonymous as they may seem to be, they are however used consciously of fundamental differences that have been pointed out above with regard to the contents of Chapter I. Following the important distinctions made in sociology by Tönnies and in political philosophy by the English school of international relations, the book takes the general stance that these are separate notions, although the difference is less of a semantic and more of an axiological nature. Not to repeat what has already been written above in this summary, it needs to be underlined once more that "international society" should refer mainly to a more functional and procedural understanding of a society based on the maximum pluralism of values, whereas "community" implies a more demanding understanding, referring to a material union, closer in values and actions, serving maximalist rather than minimalist aims. Nevertheless, the broad review of literature shows that "international community" is not only more customary in use but may also be *sensu largo* associated with the broadest possible meaning of the phenomenon without referring to any particular axiological position. This broadest and neutral meaning also serves in this book whenever the author wishes to point to the object of his examination in the most general way. If it is intended to explore the dichoto-

my between the two general, pluralistic and solidarist stances, this is done by using the terms in a clear context or by additional designations. At this point, then, it remains to explain the title of the book, *From International Society to International Community: the Constitutional Evolution of International Law*. On the one hand, adopting this sequence of terms in the title is a way of manifesting the author's support for the solidarist constitutional model of international community as generally the best solution for the development of international law. On the other hand, the title reflects the conviction, that is one of the conclusions of this book, that the advancing constitutionalization of pluralist international society towards a true solidarist community is the most probable and in general desirable direction of evolution of international relations in the future.

Chapter I

The Concept of "International Society" and "International Community" in International Law and International Relations

1.1. The concept of international community in the doctrine of international law

Any lawyer remembers almost subconsciously the principle *ubi societas, ibi jus* and certainly international lawyers are no exception in this regard.[1] Apart from the lack of a world state, this is perhaps one of the main reasons why the notion of the international community is so immanently associated with the foundations of international law. This link is clearly visible in the construction of the simplest possible definition of international law equating it with "entirety of normative standards in force in the international society".[2] Thus almost each textbook on the subject, usually on one of its first few pages, refers to the issue of the international society or community, although in most cases merely in a casual manner. It also appears that few authors reflect more deeply on the concept, usually contenting themselves with generally laconic reference to "the sum of all states" or the like. The situation is not being improved by the distinction that sometimes appears between the two

[1] See: J.L. Brierly, *The Law of Nations*, 6th ed., Oxford 1963, p. 41 [in:] D.J. Harris, *Cases and Materials on International Law*, 6th ed., Sweet & Maxwell, London 2004, p. 5.

[2] S.E. Nahlik, *Wstęp do nauki prawa międzynarodowego*, PWN, Warszawa 1967, p. 11.

terms connected with the analysed notion; namely "international society" and "international community".[3]

Lassa Oppenheim, one of the most influential scholars of international law of the late nineteenth and early twentieth centuries, understood the international community by analogy to the social relations connecting individuals and considered whether it is possible to talk about a universal international community of states in a similar sense.[4] He was one of the first to arrive at the conclusion that the bonding factor for this society is not so much the earlier Christian idea of a "civilization", but rather a pragmatic community of interests:

> Though the individual States are sovereign and independent of each other, though there is no international Government above the national ones, though there is no central political authority to which the different States are subjected, yet there is something mightier than all the powerful separating factors: namely, the common interests. And these common interests and the necessary intercourse which serves these interests, have long since united the separate into an indivisible community. For many hundred of years this community has been called "Family of Nations" or "Society of Nations".[5]

Appeal to the international community as the "family of nations" or the aggregation of all states as the primary entities in international law is essentially a permanent and unchanging part of its definition, repeated by most authors up to the present day. Stanislaw E. Nahlik observes that the constitutive element of the international community is primarily states.[6] He further clarifies that these are only sovereign states, which was still fairly new criterion for membership of the international community at that time, having replaced the discriminatory "standard of civilization".[7] The work of this author also

[3] J. Zajadło, *Społeczność międzynarodowa czy wspólnota międzynarodowa*?, "Państwo i Prawo" 2005, no. 9, p. 34.

[4] L. Oppenheim, *International Law. A Treatise*, 3rd ed., The Lawbook Exchange Ltd., Clark 2005, p. 8.

[5] *Ibidem*, p. 10.

[6] S.E. Nahlik, *op. cit.*, p. 11. Even today some authors still support this view, see: L. Antonowicz, *Podręcznik prawa międzynarodowego*, 11th ed., LexisNexis, Warszawa 2008, p. 16–17.

[7] S.E. Nahlik, *op. cit.*, p. 12–15.

considers an attempt to break down this universal international community into "narrower international communities", for which the criterion of distinction is clearly of an axiological nature. It is either a political outlook fostered by particular nations or a socio-economic model of the states being members of such a community or even a "lifestyle" of its inhabitants.[8] Therefore, according to Stanislaw Nahlik, one can talk about the community of European, capitalist, socialist, non-engaged states, whereas these divisions reflect the political reality of the dates when the author wrote.[9]

Likewise, the contemporary textbooks on the subject concentrate on the state element in their attempts to define international community or international society. However, there is an emerging tendency to include also other non-state members – actors of international relations.[10] Taking this view, Remigiusz Bierzanek and Janusz Symonides distinguish the wider and narrower understanding of the international community:

> In a narrower meaning international society is the entirety of sovereign states maintaining mutual relations under international law. In a wider sense international society includes also non-sovereign subjects or all actors of international relations having the capacity to act on the international plane and whose rights and obligations are defined by international law.[11]

The above view is shared by other authors,[12] wherein Jan Białocerkiewicz emphasizes the role of efficiency and realism in defining the scope of the membership in the international community, noting that international law has traditionally not included ephemeral entities among the members of the

[8] *Ibidem*, p. 15.

[9] *Ibidem*.

[10] For instance, W. Góralczyk and S. Sawicki admit that contemporary international law does regulate the relatons between states and other subjects of international law, however, "The international community is basically a society of states which is reflected in fundamental characteristics of international law". See: W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, 12th ed., LexisNexis, Warszawa 2007, p. 16.

[11] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, LexisNexis, Warszawa 2003, p. 13.

[12] For instance also from a younger generation of researchers: J. Barcik, T. Srogosz, *Prawo międzynarodowe publiczne*, C.H. Beck, Warszawa 2007, p. 3–4.

community of states, and therefore it is in fact the criterion of the actual ability to maintain relations with others that "incorporates a state into the club of the members of the international community".[13] These definitional attempts are supplemented in the literature by references to certain specific characteristics, which distinguish the international community among other communities. Most frequently mentioned are: a relatively small number of states, reliance on the principle of equality of members in their mutual relations, not very advanced degree of internal organization of the community and the lack of mandatory judiciary.[14]

These attempts to delineate the concept of international community as a certain space in which international law operates are quite clearly focused on the aspect of membership, and therefore depend on the answer to the question who belongs to it and who does not. In general, however, these definitions do not touch upon more complex issues of its axiological nature or the type of social ties on which it is based. As for the second aspect, it seems that the analysis of the use of the expression by the doctrine of international law supports the thesis presented by Bruno Simma and Andreas L. Paulus that the international community constitutes primarily "an international community of law" (*Völkerrechtsgemeinschaft*).[15] International law is in this case not only the essential bond connecting the states together, but it also creates the necessary normative framework. Thus, as was aptly noticed by these authors, it is not only so that *ubi societas, ibi jus,* but also – and perhaps in the case of the international community, above all – that *ubi jus, ibi societas.*[16] However, it is also difficult not to share the doubts expressed by the abovementioned authors whether such a view is not perhaps overestimating the force of the norms of international law as the exclusive social

[13] J. Białocerkiewicz, *Prawo międzynarodowe publiczne. Zarys wykładu*, Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego, Olsztyn 2005, p. 17.

[14] R. Bierzanek, J. Symonides, *op. cit.*, p. 15–16; W. Góralczyk, S. Sawicki, *op. cit.*, p. 22–26.

[15] B. Simma, A.L. Paulus, *The "International Community": Facing the Challenge of Globalization*, "European Journal of International Law" 1998, vol. 9, no. 2, p. 267.

[16] *Ibidem.* Also, one has to agree with the authors that this approach to the nature of the international community reveals a logical error in definition (*circulus in definiendo*). The international community as a group of states exists in international law, which is at the same time the product of this international community of states – since *ubi jus, ibi societas*, then also *ubi societas, ibi jus*.

bond.[17] Regardless of the special characteristics of the international community, it does not seem to be an "artificial" structure, basing its existence almost exclusively on formal legal norms, not to mention that few authors would be willing to risk a statement about its autonomous personality and legal subjecthood in the light of international law.[18] In other words, there is no reflection on the deeper reason for the existence and functioning of the international community, over its axiological base as well as over pragmatic foundations and the sociological nature of the relationship between its members, regardless of whether the membership directory is limited to states or not.

The attempt to fill this axiological gap is to some extent reduced to making the above-mentioned distinction between "the international society" and "the international community", found in the more recent literature. However, as Jerzy Zajadło has rightly pointed out, the various criteria for this distinction presented by different authors can hardly be considered as persuasive or consistent.[19] For example, according to the abovementioned Bierzanek and Symonides, the international community is "a group of states with stricter bonds of political, economic and military nature".[20] They may be regional communities (e.g. the Nordic Council) or functional ones (e.g. NATO), and that division entails a distinction between universal standards and regional standards in force within a given community, where the latter can potentially be "more advanced".[21] Generally, this distinction is headed in the right direction, however, it still lacks an explanation of what would be the axiological or social separateness of these "communities", especially in the regional sense. If peaceful coexistence were to be used as a sort of a measure of the quality of relationships within each community, it is worth recalling that from the historical point of view the bloodiest international conflicts were – and according to all indications they still are – of a regional or even internal character. There may be also equal doubts whether the institutional criterion is

[17] *Ibidem*, p. 267–268.

[18] See in this regard: B. Mielnik, *Kształtowanie się pozapaństwowej podmiotowości w prawie międzynarodowym*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2008, p. 234–254.

[19] See: J. Zajadło, *Społeczność międzynarodowa…*, p. 34–35.

[20] R. Bierzanek, J. Symonides, *op. cit.*, p. 17.

[21] *Ibidem.*

sufficient for justification of the use of the term "community" in contrast to "society", since the functional nature of membership can have very different grounds, including those limited to the very particular purposes of individual members, which do not necessarily stand for the existence of common interests within the group. In such a case, one might as well use the term "society" and simply talk about "narrower international societies" as did Nahlik.[22] On the other hand, authors such as Białocerkiewicz base the distinction between a society and the international community on the criterion of the type of membership, whereby respectively in the case of the international community the membership could be seen as mandatory, whereas when it comes to a society, it would be voluntary.[23] In this case however, we still continue to focus on the formal criterion of subjecthood, which does not offer much more knowledge about the social nature of the relationships within the relevant society and community beyond the detailed analysis of the types and categories of members. Moreover, it should be noted that neither historically nor today was the absolutely universal character of the international community an unquestioned assumption, not to mention any compulsory aspects of membership. Membership may be simply a matter of fact, having its roots in the universal concept of an international community, in which case it is independent from the will and decision-making power of the state member itself, or alternatively it is entirely a subjective idea, dependent on the decision of any territorial entity which can decide for itself about the degree to which it separates itself from the mainstream of international life (activity on the forum of international organizations) or even provokes its own exclusion (as in the case of the so-called rogue states).[24] Either way, a division based on subjective or objective criteria of membership may be neither disjunctive nor complete.

Against this background, it seems that the observations made by Janusz Gilas are most relevant. His criterion for distinguishing between international society and international community is based on the work of the German sociologist Ferdinand Tönnies, who in 1887 published a work titled *Gemein-*

[22] See: S.E. Nahlik, *op. cit.*, p. 15.

[23] J. Białocerkiewicz, *op. cit.*, p. 17–18; J. Zajadło, *Społeczność międzynarodowa…*, p. 35.

[24] See: B. Simma, A.L. Paulus, *op. cit.*, p. 268.

schaft und Gesellschaft.[25] The main thesis of the book was the qualitative distinction he made between "community" (*Gemeinschaft*) and "society" (*Gesellschaft*). The criterion for this division, according to Tönnies, is based, first of all, on the nature of the ties between the members of the community and society respectively, and secondly, on the mental intensity of this bonding.[26] The element of free will is discussed here as well, as far as the issue of membership is concerned – it is compulsory in the case of society and largely voluntary with respect to community. It seems, however, that it is rather more about the possibility of gradating the intensity of the subjective sense of belonging to a society or a community than the issue of coercive duty in the strict sense. In the case of a community, the bonds between the members are much stronger, which means that there is an important mental factor present, which essentially may be lacking in the case of a society. This view is well summarized by Tönnies himself, when he writes that: "In *Gemeinschaft* they [the members – T.W.] stay together in spite of everything that separates them; in *Gesellschaft* they remain separate in spite of everything that unites them".[27] Further he adds: "nothing happens in *Gesellschaft* that is more important for the individual's wider group than it is for himself".[28] In the case of a community (*Gemeinschaft*), in contrast, members not only interact with the group out of their own self-interest, but also, and perhaps above all, in the interest of the entirety because of the strong sense of ties connecting them. Hence, in the case of a community "the more this group is threatened from the outside, the more bonding together will be likely to occur".[29] As examples of community bonds Tönnies considers relations between mother and child, between siblings or "between a man and a woman as a couple, as this term is understood in its natural or biological sense".[30] It should also be noted that even the author himself sees his findings as transferrable also to the more complicated aggregation levels of large socio-political group relations. The views of Tönnies are therefore aptly interpreted and summarized by Jerzy Zajadło:

[25] F. Tönnies, *Community and Civil Society*, Cambridge University Press, Cambridge 2001.

[26] J. Gilas, *Prawo międzynarodowe*, Pracownia Duszycki, Toruń 1999, p. 11–12.

[27] F. Tönnies, *op. cit.*, p. 52.

[28] *Ibidem.*

[29] *Ibidem*, p. 24.

[30] *Ibidem*, p. 22.

> In this sense, a "community" has a strong axiological tone, is based on the organic relationships between its members and does not have a character of a random collectivity. […] A "society" in turn, is largely an incidental collection – as a result, its internal structure is atomized and is not organic in its nature. The purpose of this structure is to a lesser extent the realization of common interest, and to a much greater one – regulation of the relations between its members.[31]

The distinction proposed by Tönnies has remained current in the theory since the author made his proposal. It is also well suited as a starting point to describe the different forms of the international community, given that it is not so much regarded as a sharp division, but is rather aimed to determine the typology of models.[32] The important feature of both the *Gesellschaft* and *Gemeinschaft* types of community is after all the gradation of the intensity of social ties.

Unfortunately, this valuable analytical criterion derived from Tönnies has not always been used consistently either in terms of theory or terminology. Jerzy Zajadło points to an even more serious problem, however. One may gain the impression of a terminological chaos prevailing in both the doctrine and the positive international law, especially in particular languages. Whilst there may be significant differences between society and community, as clearly follows from the above considerations, the terms "international society" and "international community" are used quite freely and interchangeably. In the German-language literature, according to Zajadło, there are two interchangeable notions of *Internationale Gesellschaft* (international society) and *Internationale Gemeinschaft* (international community).[33] English-language jurisprudence is not much different; obviously one encounters both "international community" as well as "international society" in some contexts, although it seems that in this case, the former dominates. That inconsistency is surprising not only because of the fact that, following Tönnies, more often nowadays we are talking about an axiologically "denser" and more normatively inclined international community rather than the looser

[31] J. Zajadło, *Społeczność międzynarodowa…*, p. 38.
[32] See: *ibidem*.
[33] *Ibidem*, p. 35.

"society of coexistence".[34] It may also be that these subtle differences have not yet been well assimilated by the jurisprudence of international law, the more so that the use of these terms has a certain tradition and may also be based on well-established conventions.

Such an explanation would undoubtedly be satisfactory, if not for the fact that in the legal texts of positive international law, the phrase "international community" is more often used than the notion "society", which is apparent in the use of the fixed term "international community as a whole".[35] Having set aside deeper reflections on the meanings of the concept in the normative language, at least at this point, it has to be stressed that the term "international community", on the pragmatic grounds of the traditional international legal language usually means interchangeably both "community" *sensu stricte* and "society" as well. In other words, the language of the legal sources does not differentiate. However, axiological analysis of some modern international legal instruments, such as the Statute of the International Criminal Court,[36] shows that increasingly often the term's meaning is that of a "community" as understood by Tönnies. The awareness of the difference therefore may be growing, especially as far as major constitutional treaties of the international community are concerned. At the same time, there are unfortunately problems of translation in various languages. For example, in Polish legal language there is a surprising inconsistency in the translation of these documents. The term "international community" is often translated as "*społeczność międzynarodowa*", which is clearly the equivalent of "international society" or even sometimes it is simply left out. Either way this leads to serious normative perversions of the meaning and grave axiological misunderstandings of the philosophical and legal foundations of these instruments.[37]

[34] This is a sort of a *prima facie* thesis here, it will be the object of analysis further on in the book.

[35] Texts in French in both cases use the same term, *communauté internationale*, see: J. Pieńkos, *Glosariusz terminologii stosunków międzynarodowych i prawa międzynarodowego*, Zakamycze 2004, p. 288; J. Zajadło, *Społeczność międzynarodowa*…, p. 36.

[36] The Rome Statute of International Criminal Court, Rome, 17 July 1998.

[37] See: J. Zajadło, *Społeczność międzynarodowa*…, p. 37.

1.2. The concept of international society in the theory of international relations and political science: the English School of international relations

The concept of "international society" has undergone the widest and most systematic theoretical elaboration and development in the field of international relations, and particularly within the mainstream of international political thought referred to as the English school of international relations,[38] which has discovered it as one of its major paradigms.[39]

The English school of international relations was established in 1959[40] with the inauguration of meetings of a group of theorists and practitioners of international studies associated mainly with the London School of Economics and the British Foreign Office.[41] This body began regular sessions under the name of the British Committee on the Theory of International Relations. The chairmen of this group, until formal termination of meetings in 1985, were in turn: Herbert Butterfield, Martin Wight, Adam Watson and Hedley Bull.[42] The Committee's activities began with the presentation of an essay

[38] The term "English School" was used first by Roy E. Jones in 1981, in his article titled *The English School of International Relations: a Case for Closure* ("Review of International Studies" 1981, vol. 7, no. 7) where – paradoxically – he argued for the discontinuation of this tradition of thinking about international relations, see: T. Dunne, *Inventing International Society. A History of the English School*, Palgrave Macmillan, New York 1998, p. 3; about the English School see also: A. Linklater, H. Suganami, *The English School of International Relations: A Contemporary Reassessment*, Cambridge University Press, New Jork 2002, p. 108.

[39] The English School was also called the "international society tradition", see: T. Dunne, *Inventing…*, p. 4.

[40] The first meeting of the Committee was held in January 1959, and the first members such as Desmond Williams and Martin Wight were invited to participate in May 1958, see: *ibidem*, p. 89–91.

[41] J. Czaputowicz, *Angielska szkoła stosunków międzynarodowych i jej stosunek do integracji europejskiej*, "Polska w Europie" 2003, no. 1 (43), p. 62. Scholars from Oxford and Cambridge Universities, Keele University and Australia National University also participated in the meetings, see: T. Dunne, *Inventing…*, p. 12.

[42] See: T. Dunne, *Inventing…*; J. Czaputowicz, *Angielska szkoła…*, p. 62.

by Martin Wight: "Why there is no International Theory",[43] which aimed at provoking a discussion on the Committee's methodological assumptions and the research agenda. One of the characteristic features of the British Committee on the Theory of International Relations, from the inauguration of the meetings, was that the discussion was always independent of current political events of the era, such as the progressive decomposition of the British Empire, the Suez war, the Cuban missile crisis or the Cold War arms race.[44] Instead, the participants of the meetings of the Committee focused their attention on the notion of "international society", its structure and rules according to which it is instituted, as well as on the meaning diplomats and politicians give to their actions in the international arena.[45] This initial phase in the history of the English school of international relations lasted until 1966 and was the first of four phases that have been identified in the literature.[46] The second phase, labelled "consolidation", includes the following decade of 1966–1977, during which the English school focused its research primarily on international society in a historical context, as well as on the nature and values of the western international society. Another turning point came with publication of one of the fundamental works – and one of the most widely known achievements of the English school – the book authored by Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (1977).[47] This third period concluded with another important work, by Adam Watson, *The Evolution of International Society* (1992).[48] During this third phase, called "regenerative" and covering the period of 1977–1992, the attention of the English school was mainly focused on historical comparative studies of international society.[49] The period covering the first three phases, and the work of its best known scholars, may be defined as the classic English school of in-

[43] T. Dunne, *Inventing…*, p. 94. The essay was published in: *Diplomatic Investigations. Essays in the Theory of International Politics*, ed. H. Butterfield, M. Wight, George Allen & Unwin Ltd., London 1966, p. 17–34.

[44] T. Dunne, *Inventing…*, p. 96.

[45] *Ibidem*.

[46] See: J. Czaputowicz, *Angielska szkoła…*, p. 64.

[47] H. Bull, *The Anarchical Society. A Study of Order in World Politics*, 3rd ed., Columbia University Press, New York 2002.

[48] A. Watson, *The Evolution of International Society. A Comparative Historical Analysis*, Routledge, New York 1992.

[49] J. Czaputowicz, *Angielska szkoła…*, p. 64.

ternational relations. After 1992 one can talk about the fourth phase as one of expansion, during which the English school and its tradition of thinking has been dominated by a new generation of researchers who have brought about the self-consciousness of the school's distinctiveness as a separate line of thinking in international relations. Among the new generation one can point to scholars such as B. Buzan, T. Dunne, O. Waever, N. Wheeler, A. Linklater, T. Nardin[50] and M. Walzer[51] as well as, among others, D.A.G. Best, M. Ceadel, I. Clark, M. Donelan, J. Doneelly, R. Epp, M. Forsyth, G. Gong, A. Hurrell, Ch. Hill, R. Jackson, A. James, P. Keal, B. Kingsbury, T. Knudsen, R. Little, S.M. Makinda, J. Mayall, C. Navari, B. Porter, I.B. Neumann, J.L. Richardson, A. Roberts, H. Suganami, J.M. Welsh and P. Wilson.[52] For these scholars, the main point of concern is largely the search for a new identity of the English school (which may turn out to be not so strictly "English" any more, given the different nationalities of the abovementioned individuals) and an attempt to redefine its position against the dominant currents in political theory: realism (neorealism), constructivism and globalism (neoliberalism).[53] It should also be added that in the recent literature on the so-called English school of international relations the debate is largely focused on the proposals for a new research agenda.[54]

A very important and crucial characteristic of the English school, from both the epistemological and methodological points of view, is the demand to recognize the heterogeneity of international relations. On the one hand, this resulted in a methodological pluralism, because for the English school researchers the study of international relations is not – as for some other

[50] Martin Griffiths claims T. Nardin can be named as a representative of "international society theory", see: M. Griffiths, *Fifty Key Thinkers in International Relations*, Routledge, New York 1999, p. 151 et seq.

[51] *Ibidem*, p. 162 et seq.

[52] These researchers can be considered as the members of the English school line of thinking about international relations, according to T. Dunne, *Inventing*…, p. 22, note 56.

[53] See: J. Czaputowicz, *Angielska szkoła*…, p. 64.

[54] See: *International Society and Its Critics*, ed. A.J. Bellamy, Oxford University Press, New York 2005. On the newer research of the first decade of the twenty-first century described as the continuation of the English school, see: T. Dunne, *New Thinking on International Society*, "British Journal of Politics and International Relations" 2001, no. 3, p. 223–244.

contemporary authors, especially Americans – the field of political science, but is rather located at the crossings of many disciplines such as political science, economy, law and sociology.[55] On the other hand, this assumption of heterogeneity of international life, together with extensive historical reflection, leads the protagonists of the English school constantly to emphasize the trialectic present in their theories as an inherent part of the tradition of thinking about international society.

1.3. The trialectic of the English school of international relations

Martin Wight was the author who clearly founded the paradigm of the English school on the existence of three distinct traditions of political thought in international relations. He reconstructed them as the "three Rs" – realism, rationalism and revolutionism.[56] The first one, the realist tradition, according to Wight, is closely connected with such mechanisms as the balance of power, war and hard struggle between states for particular and narrowly defined national interest in a generally hostile environment of international relations dominated by *Realpolitik*. According to this perspective, the ideas of law and morality are applicable exclusively within the borders of the particular state or community. The international sphere, however, is considered to be superior to any such limitations; only the rules of prudence and expediency rule this realm.[57] For realists, there is really no such thing as international society, because the state is the only ultimate moral community of humankind.[58] According to Hedley Bull there are two variants of this tradition: a Hobbesian one, according to which in political life and moral considerations there are two separate and distinct alternatives, and the milder Hegelian version,

[55] J. Czaputowicz, *Angielska szkoła*…, p. 63. In the Polish theory of international relations this view seems to be the dominant one. It is represented among others by J. Kukułka, who describes the science of international law as the "widest field of humanities", see: J. Kukułka, *Wstęp do nauki o stosunkach międzynarodowych*, Oficyna Wydawnicza ASPRA-JR, Warszawa 2003, p. 33–50.

[56] J. Czaputowicz, *Angielska szkoła*…, p. 65.

[57] H. Bull, *The Anarchical Society*…, p. 24.

[58] M. Wight, *Western Values in International Relations* [in:] *Diplomatic Investigations*…, p. 92–93.

whose proponents admit that there exist moral imperatives in international relations, but that they are incapable of limiting the states in their actions.[59]

At the other end of the spectrum, the revolutionist tradition appeals to the unity of humanity (or to transnational social relationships), the good of human beings as the ultimate and most important criterion for world politics as well as to the denial of the primacy of the state as the central ontic category in international relations. Within this tradition one of the most fundamental postulates seems to be the idea of replacing the system of sovereign states with a cosmopolitan community of the residents of the world and the introduction of moral imperatives to international relations, in order to restrict the unlimited freedom of action of states.[60] Therefore, the concept of an international society of states is in this case an obstacle to the realization of a true universal community of human beings.[61] The revolutionist tradition is thus clearly motivated by the liberal faith in human progress and an attempt to resolve the dilemmas of particularism and anarchy in international relations by way of appeal to the universalist project, being in fact a reminiscence of the Roman Empire or medieval Christendom, at least according to a western mind.[62] At the same time, however, it is completely secondary what concrete form this "community of all people" should take. This view may include projects, which propose a world federation, world government, the international proletarian revolution, or a community based on the same faith (*respublica Christiana, Dar al-Islam* etc.).[63] The key element here is the achievement of harmony and eternal peace through the dissolution of the brutal system of states in a type of single, global community – a *cosmopolis*.[64]

Against this background, rationalism presents itself as an intermediate tradition between these two extremes. On the one hand, in the rational-

[59] H. Bull, *Society and Anarchy in International Relations* [in:] *Diplomatic Investigations…*, p. 37–38; on Hegel see: A. Gałganek, *Historia teorii stosunków międzynarodowych*, PWN, Warszawa 2009, p. 502–541; R. Kwiecień, *Między wartością wspólnoty a wspólnotą wartości. Studia i szkice z filozofii prawa idealizmu niemieckiego*, Oficyna Wydawnicza Verta, Lublin 2007, p. 68–71.

[60] H. Bull, *The Anarchical Society…*, p. 25.

[61] M. Wight, *Western Values…*, p. 93–94.

[62] H. Bull, *Society and Anarchy…*, p. 38.

[63] M. Wight, *Western Values…*, p. 93–94.

[64] *Ibidem*, p. 94.

ist view the states remain the major players on the international stage, but on the other hand their actions are not understood solely in terms of naked power. Aside from the rules of prudence and expediency, which are the only limits to the actions of states in the realistic tradition, in the rationalist perspective they are accompanied by many other limits, such as international law, diplomacy and the need for international cooperation as a way of achieving common goals. Therefore, the states create a society of states, whose goals reflect a compromise between the interests of all members, whereas the rules and institutions of the society limit the full freedom of action of the states. As Andrew Linklater observed, rationalists engage with the elements of realism as well as with the threads of what Wight called "revolutionism". However, in fact they agree neither with one nor the other approach, which makes rationalism a kind of *via media* between the other two views.[65] According to this position, on the one hand rationalism does not focus on either the pure struggle for power and survival, war or brutal rivalry nor on the other hand does it fall into excessive optimism about the possibility of achieving a coherent moral community of humankind or other vague universalist project. Moreover, it also avoids too far-reaching normative considerations. Rationalists focus therefore on the functioning of the social mechanism in play between the participants of international relations. In other words, the main subject of their research is the international community.[66] This view assumes that an autonomous state can benefit from the order provided by an organized community or society, without the need to construct empires, a global superstate or other forms of hierarchy in international relations.[67]

In the terminology proposed by Bull,[68] the three traditions were named respectively after their most characteristic precursors: realism or "the Hobbesian tradition",[69] internationalism or "the Grotian approach", and univer-

[65] A. Linklater, *Rationalism* [in:] S. Burchill et al., *Teoria stosunków międzynarodowych*, trans. P. Frankowski, Książka i Wiedza, Warszawa 2006, p. 141.

[66] *Ibidem*.

[67] *Ibidem*, p. 145.

[68] H. Bull, *The Anarchical Society…*, p. 23.

[69] The analysis of this tradition as well as the political philosophy of Hobbes was published in H. Bull's essay, *Hobbes and the International Anarchy*, "Social Research" 1981, vol. 48, no. 4, p. 17–38, see: K. Alderson, A. Hurrell, *Hedley Bull on International Society*, St. Martin's Press Inc., New York 2000, p. 198–215.

salism or "the tradition of Kant". Wight figuratively illustrated this trialectical vision by describing the existence of tensions between the political order, which is connected with realism, the legal system related to rationalism and moral order, referring to revolutionism.[70] On another occasion, he pointed out eloquently that realism is the story of "immoral men of blood and iron", rationalism is the tale of "law, order and people adhering to promises", and revolutionism of "subversion, liberation and missionaries".[71] Similarly, Jacek Czaputowicz observed that, for the author of this trialectic concept, rationalism was indeed the civilizing factor, revolutionism an animating one, and realism the controlling and disciplinary element.[72]

1.4. International system, international society and world society

The consequence of the application of the abovementioned trialectic paradigm to the research of the English school was the elaboration of three key ontological concepts: the international system, international society and world society.[73]

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[70] See: J. Czaputowicz, *Teorie stosunków międzynarodowych. Krytyka i systematyzacja*, PWN, Warszawa 2007, p. 269.

[71] B. Buzan, *From International to World Society?*, Cambridge University Press, Cambridge 2004, p. 33.

[72] J. Czaputowicz, *Angielska szkoła*…, p. 66. It is worth noting that, firstly, pointing to different "traditions" in the history of international relations thought has a wider dimension and is not limited to what Wight or Bull proposed (A. Gałganek, *op. cit.*, *passim*). Secondly, the division into three traditions proposed by Wight faced a number of criticisms. The most important to note seems to be the observation that each tradition has its own internal criteria of assessment, which do not apply to the others (for instance, the pattern of "natural virtues" in realism and "moral virtues" in idealism), which in fact does not allow the researcher critical, objective verification "from the outside". It seems only possible to argue with the assumptions of each tradition, engaging them in a constructive dialogue is not possible because of differences in the normative language and assumptions of each of the traditions (see: A. Gałganek, *op. cit.*, p. 66).

[73] See: B. Buzan, *From International…*, p. 6 et seq.

1.4.1. International system

The international system refers to the tradition of Hobbes, or realism. It is created only and exclusively by states, which are like billiard balls on the table of international affairs. They continually participate in the game of survival on this international arena. From the point of view of a state, international interaction is important only in so far as the actions of other countries affect its relative position in the whole system; the mechanism functions like a system of connected vessels. Hedley Bull defines it as follows:

> A system of states (or international system) is formed when two or more states have sufficient contact between them, and have sufficient impact on one another's decisions, to cause them to behave – at least in some measure – as parts of a whole.[74]

There is also a somewhat more elaborate definition quoted in the literature:

> Formation of an international system takes place when states enter into regular contact with each other, as a result of which the degree of interaction is created which causes that the behaviour of states becomes a factor relevant in the calculations and the decision making processes of all the other states.[75]

Obviously, this definition already *prima facie* demonstrates that the modern international system is global, as it would be difficult to imagine that the decisions and actions of any state could be completely indifferent to the others. However, as observed by Bull, from a historical point of view this does not have to be so obvious. For example, pre-Columbian America did not create an international system with any state in Europe before 1492.[76] These interactions may have a differentiated character – they may be not only political, but also economic, social and strategic in nature.[77]

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[74] H. Bull, *The Anarchical Society…*, p. 9.

[75] Citing after: J. Czaputowicz, *Społeczność międzynarodowa* [in:] *Słownik społeczny*, ed. B. Szlachta, Wydawnictwo WAM, Kraków 2004, p. 1314. This is also how the concept is defined by Ch. Tilly, *Coercion, Capital, and European States AD 990–1990*, Blackwell, Oxford 1990, p. 162.

[76] H. Bull, *The Anarchical Society…*, p. 9.

[77] *Ibidem*. Buzan and Little talk about four types of interactions: military, political, economic and socio-cultural, See: B. Buzan, R. Little, *International Systems in World*

It is also worth mentioning two distinctions made by Wight in relation to the concept of international system. The first one concerns that between an "international system of states" and a "suzerain-state system".[78] In the first case we are dealing with an international system composed of sovereign or independent states. In the second case, however, the system is based on political subordination and dependency of several states to one suzerain state, which may be for example a creation of an imperial type. There is a very important restriction, however; Adam Watson noted that as a supreme power or suzerain type system Wight and Bull consider only such a configuration, where the subordinate states actually do voluntarily accept the supremacy as fully legitimate.[79] However daunting it may seem to be, one should therefore not confuse the suzerain type of system with hegemony. The latter somehow still falls within the concept of an international system of states, although the position of one of the sovereign states dominates the balance of power on the international stage in a way that allows this sole power to legislate effectively or rule the system by setting rules and standards.[80] Therefore, the hegemon organizes the external relations between the members of the system, but it does not interfere within their internal sovereignty. Moreover, hegemony does not have to be exercised by one country, it can also be, for example, a double hegemony, as in the case of Athens and Sparta after the Persian wars, or even a collective one, as was in the case of the distributed hegemony of the "concert of Europe" created by the European powers after the Vienna Congress of 1815.[81] The hegemon constantly meets with opposition from rivals who are in their own view strong enough to challenge its power (hegemony is transitive within the system), whereas in the case of the suzerain power, its domination is persistent and – due to practical reasons – undisputed.[82] Historical

History. Remaking the Study of International Relations, Oxford University Press, New York 2000, p. 90–98.

[78] M. Wight, *Systems of States*, Leicester University Press, Leicester 1977; A. Watson, *op. cit.*, p. 3.

[79] A. Watson, *op. cit.*, p. 15.

[80] *Ibidem*.

[81] *Ibidem*, see: I. Clark, *Towards an English School Theory of Hegemony*, "European Journal of International Relations" 2009, vol. 15, no. 2, p. 203–228.

[82] H. Bull, *The Anarchical Society…*, p. 10–11.

examples of this type of suzerain system can be found in the forms of Sino-centric tributary system in South-East Asia.[83]

The distinction proposed by Martin Wight can be further expanded by the classification underlying the historical analysis of Adam Watson. Aside from the system of sovereign states, hegemony and suzerain-system, this author distinguishes two other forms: dominion and empire.[84] In the former case, a dominant entity interferes to some extent with the internal sovereignty of the dominated communities, setting out a range of conditions for the functioning of their governments, while still they retain a substantial part of their individuality and identity. When it comes to empires, however, there is always a direct management of all subordinated states by the imperial power centre without any political or legal restrictions.

Wight makes an additional division of the international system into a "primary" and a "secondary" system.[85] The difference between them is that the primary system is composed of states, while the secondary one is a kind of meta-system consisting of multiple primary systems of states and often even of suzerain-state systems. This category, according to Wight, may be used to describe the relationship between the medieval Eastern (Orthodox) Christianity, Western Christianity and the Abbasid Caliphate.[86] The global international community of the Cold War era may also be considered to have been a secondary system, since the axis of interaction was the relations between the international community of the Western democracies and that of the socialist states.

In the Polish literature there is yet another important distinction as far as the term "international system" is concerned.[87] First of all, the notion can be conceptualized in the widest meaning, which also includes the international community as a special type of system. In this sense, each particular "international society" is an international system in itself or part of it, but it cannot be so that an international society or community exists without an

[83] T. Widłak, *Sino-centryczny system międzynarodowy* [in:] *Chiny w oczach Polaków*, ed. J. Włodarski, K. Zeidler, M. Burdelski, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2010, p. 451–467.

[84] See: A. Watson, *op. cit.*, p. 14–16.

[85] A. Linklater, H. Suganami, *op. cit.*, p. 192.

[86] H. Bull, *The Anarchical Society…*, p. 11.

[87] See: J. Czaputowicz, *Społeczność międzynarodowa…*, p. 1314–1315.

international system (international system in the broad sense). Secondly, in a narrower, realist meaning, it has been called an "anarchical international system" (or alternatively it can be described simply as the international system in the strict sense). In this understanding, the international system is closely related to the Hobbesian tradition of political thought. It is a system reminiscent of the "*status naturalis*", therefore the "struggle of all against all" (*bellum omnium contra omnes*), the politics of force and nationalist interests dominates its environment. This meaning puts the category of "international system" in explicit opposition to the concept of "international society".

1.4.2. International society

While the category of an "anarchic international system" features relationships between states in almost purely mechanical and material terms, in the case of the "international society" the normative element becomes predominant. According to the widely accepted classic definition by Bull:

> A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.[88]

In my view, this definition of the international society may be essentially subdivided into three parts: structural, axiological and normative-institutional.

Firstly, as far as the structure of the international society is concerned, the mere use by Bull of the term "society of states" as equivalent to "international society" indicates that the understanding given to this concept by the first generation of the English school does not challenge the traditional state-centric view in the study of international relations and international law. Therefore, in ontological terms, the international society and the international system may belong to the same category, because in both cases it is the state that is the basic unit of analysis.[89] However, the question that arises

[88] H. Bull, *The Anarchical Society…*, p. 13.

[89] J. Czaputowicz, *Społeczność międzynarodowa…*, p. 1315; also: A. Linklater (*idem*, *Rationalism…*, p. 140) underlines the strong connection between the English school and realism with its dominant thesis on state-centrism in international relations.

is whether in the contemporary international community it is empirically justified to deny entities belonging to other categories membership of this community. This problem will be examined in further parts of this book.

As for the axiological dimension of the definition by Bull, the condition for the creation of the international society is the subjective element of the existence of "shared interests and values". Therefore, for the international society to be created there is the need to secure an axiological compromise among the states as to the system of professed values and an awareness that certain goals to which the different states aspire must necessarily not be contradictory or mutually exclusive.

Last but not least, the natural consequence of the recognition of this axiological dimension of the international society is its externalization and implementation in the form of normative and institutional structures, that is, in the form of cooperation between the states within the international society through common rules and institutions. These three elements of the definition of international society together constitute the features of this concept as described by the English school, and are also present in the alternative expressions of the definition of the international society or community in the works of other writers of this school of thought. For instance, a group of states (the structural element), even in some way engaged in joint institutions, such as certain contacts of a diplomatic or consular nature, and thus relying on some set of common rules (normative and institutional component), however not sharing common goals and values (lack of the axiological ingredient) may be closer to an international system than an international society. As an example of this kind of relationship, one may point to the relations between the European international community and Turkey. Despite the fact that, since the sixteenth century, Turkey has participated in European international politics, forging alliances, waging wars and taking part in the balance of power on the continent, it was not until the Treaty of Paris in 1856[90] that it was recognized, and some believe that it actually happened only after the Treaty of Lausanne in 1923[91] after which date Turkey started

[90] Traité de paix et d'amitié entre la France, la Grande-Bretagne, la Russie, la Sardaigne et la Turquie, Paris 30 mars 1856 [in:] M.É. Gourdon, *Histoire du Congrès de Paris*, Paris 1857, http://bit.ly/1xHLRXx, accessed 11 November 2014.

[91] Treaty of Peace with Turkey Signed at Lausanne, 24 June 1923, http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne, accessed 11 November 2014, see also:

to be effectively considered a full member of the international community, sharing the common goals and values.[92] The correct reconstruction of the notion of international society using the theoretical framework developed by the English school will therefore require in-depth analysis of all three above-mentioned elements.

International society is, therefore, in the view of the English school, the embodiment of the above-mentioned rationalist tradition. Despite its substantial reliance on the rule of sovereignty of member states, the *sine qua non* requirement of its creation and existence are mutual recognition, peaceful cooperation, the primacy of the principle of *pacta sunt servanda* and the predictability of actions within the framework of common institutions such as diplomacy and international law. Hedley Bull observes that, due to the necessity of the existence of the community in the axiological, normative and institutional dimensions, historically existing international societies have often been based on a common intellectual culture and values, and at least on some elements of the same civilization, such as language, shared epistemology and way of understanding the world, religion, ethics or common aesthetic or artistic traditions.[93] This is undoubtedly a factor encouraging and tightening the bonds within those societies or communities. However, the contemporary international community may also include states that do not belong to the same civilization, because the foundations of international societies are predominantly built on pragmatism and on what Bull calls "international diplomatic culture".[94] On the other hand, for Wight, the international society cannot possibly exist without "some degree of cultural unity" between its members.[95] Examples may again be found in history and include the city-states of ancient Greece, the Hellenistic kingdoms of Asia, China during the Warring States period or the ancient Hindu system of states, not to mention medieval and modern Europe.[96] Undoubtedly, these common elements of civilization and culture facilitate the creation and operation of the

D. Zimmermann, *Lausanne Peace Treaty (1923)* [in:] *Max Planck Encyclopedia of Public International Law*, www.mpepil.com, accessed 4 June 2010.

[92] See: H. Bull, *The Anarchical Society…*, p. 13–14.

[93] H. Bull, *The Anarchical Society…*, p. 15.

[94] *Ibidem*, p. 304–305, see: A. Linklater, *Rationalism…*, p. 145.

[95] Citing after: B. Buzan, *From International…*, p. 112; see: A. Linklater, *Rationalism…*, p. 144.

[96] H. Bull, *The Anarchical Society…*, p. 15.

international community through better communication and understanding between the states, as well as an in-depth sense of common interest, and thus – by the working of common rules and institutions – move the international community as a society farther and farther away from a pure system of states.[97] At this point one may even ask to what extent the support that the international community has in the foundations of the common civilization and culture may facilitate a process of drawing it towards the third category indicated by the English school – the world society.

1.4.3. World society

The global community is an ontological breach in the triad of key concepts of the English school. By using the concept of "world society", we move the discussion to the global level of analysis of the world as a whole.[98] However, the standard unit of analysis in this case is no longer the state, but individuals – human persons or other non-state entities. Therefore, what is at stake here is the effort to "overcome the division of the existing geopolitical space into states" and to view international relations from the transnational perspective.[99] That transcendence of the existing state-centric world order refers expressly to the above-mentioned revolutionist or universalist tradition. According to the different perspectives, the world society can be seen as a "cultural homogenization and amalgamation of different communities"[100] or a global civil society. Political consequences of the creation of a world society uniting all of humanity across national and state borders could be the trend of the international system evolving to an unspecified form of *imperium mundi*.

[97] *Ibidem*.

[98] J. Czaputowicz, *Teorie stosunków…*, p. 261. However, the term "world society" does not necessarily mean its universal global reach. B. Buzan indicates that it is a mistake of many authors tacitly to assume global reach of each of the three categories: international system, international society and world society (see: B. Buzan, *From International…*, p. 16–18). Each of these categories, as shown by A. Watson's historical analysis (A. Watson, *op. cit*., *passim*) can have a limited geographical range. Bull admits also that each of the three elements may dominate in relation to a "geographical arena" (H. Bull, *The Anarchical Society…*, p. 39). Therefore, I believe we can also speak of. e.g., a world society of the European Union.

[99] J. Czaputowicz, *Teorie stosunków…*, p. 261.

[100] See: B. Buzan, *From International…*, p. 45.

In the history of political thought the concept of "world society" as such appeared only after World War I, but it seems that the more serious scientific research was not carried out until after 1945. According to Ian Clark,[101] for some the concept was simply synonymous with the international society, but in a global dimension, or it was identified as a product of a globalizing economy. One of the noteworthy views was proposed by Raymond Aron, for whom the world society consisted of relations between individuals, as defined from the point of view of the interstate dimension. This kind of world society, according to Aron,[102] was still imperfect and ultimately required the functioning of a more institutionalized international society of states, however, it was supposed be able to "generate shared beliefs". Interestingly, in this view the legal system that was meant to regulate the functioning of world society was private international law.[103] Besides the English school, noteworthy research on world society was also conducted by the so-called Stanford school[104] as well as by the World Society Research Group. The Stanford school depicts world society in the context of sociology, claiming that at least since the mid-nineteenth century, there is a "universalist […] level of cultural and organizational formation, functioning as a constitutive environment for states, businesses, groups and individuals".[105] That world culture shapes and defines the activities in the transnational dimension, to the extent that one may even talk about the existence of the notion of "world citizenship".[106] In turn, characteristic of the work of the World Society Research Group is an attempt to reach the essence of world society by overcoming the analytical division between state and non-state actors, as well as the analysis of the differences between the concepts of "society" and "community".[107] As far as the English school is concerned, Bull seems to hold quite ambivalent views on the nature of world society. On the one hand, he believes that the world society is a sort of connection between

[101] I. Clark, *International Legitimacy and World Society*, Oxford University Press, New York 2007, p. 22–23.

[102] R. Aron, *Peace and War: A Theory of International Relations*, Doubleday & Company Inc., London 1966.

[103] I. Clark, *International Legitimacy…*, p. 23.

[104] Cf. J.W. Meyer, J. Boli, G.M. Thomas, *World Society and the Nation-State*, "The American Journal of Sociology" 1997, vol. 103, no. 1, p. 144–181.

[105] I. Clark, *International Legitimacy…*, p. 27.

[106] *Ibidem*.

[107] *Ibidem*, p. 28; cf. B. Buzan, *From International…*, p. 74–76.

the different parts of the human community around the world, with their own goals and interests, on which common rules and institutions can be built.[108] On the other hand, he is very sceptical about the idea that supposedly the world society is indeed an existing entity, mainly because it does not possess anything like its own political system.[109] Even in the early 1980s Bull warned that "the cosmopolitan society", known from the discourse on the universality of human rights, in reality exists only as an ideal, and therefore we expose ourselves to many dangers when we act as if the world society already had its own social and political structure. Nevertheless he believed that it is an idea that should in fact influence the creation of international politics.[110]

The view of world community from the perspective of membership provides yet another clarification of the concept. In contrast to the international society, supposed to be composed mainly of states, according to many authors the world society is based on a complex matrix of individuals (citizens), non-state entities and transnational organizations (trans-national associations, TNAs).[111] Barry Buzan believes that a definition constructed using such terms is currently the most widely accepted one and serves as a common denominator of views on the nature of world society, though there are other authors, such as Raymond J. Vincent and Tim Dunne, who have attempted to break through this ontological barrier between the international society and the world society in order to achieve a synthesis in this regard.[112] Essentially there are two broad groups of views on the world society (both are represented within the English school). First, it may be considered a category that includes all non-state transnational actors defined in opposition to the state. Second, it could be a holistic category covering the widest possible community there is and within which relations between states, or anything else that is referred to by the adjective "international", conceptually constitutes only a certain subset.[113]

Of the three concepts, the world society seems to be the least specific one and the most theoretically underdeveloped by the English school, which makes the term appear in different contexts and meanings. It may be con-

[108] H. Bull, *The Anarchical Society…*, p. 279.
[109] I. Clark, *International Legitimacy…*, p. 25–26.
[110] *Ibidem*, p. 26.
[111] B. Buzan, *From International…*, p. 44.
[112] *Ibidem*.
[113] I. Clark, *International Legitimacy…*, p. 30–31.

nected to the idea of a universal world order based on the community of humankind or just point at the universal principles and values that are supposedly common (universal) to the whole world (human rights), or may be even sometimes wrongfully associated with the idea of a world government or another universal political organization.[114] Under the notion of "world society" various trends and ideologies are conceived, such as transnationalism, cosmopolitanism and other universalist ideologies, as well as any other elements which were not attributable to the international system or the international society.[115] Therefore, not without reason Buzan believes that, in methodological terms, the authors of the English school have made world society a kind of "a place where they deposited the things, which they did not want to talk about".[116] Perhaps this criticism seems to be overexaggerated, but the fact is that it is difficult to determine the clear relation that links the category of "world society" with the other two terms, and in particular with the international society. This issue is still one of the most important points on the research agenda of the new generation of scholars of the English school.[117] Referring to this problem, Buzan poses two fundamental questions that all contemporary authors who identify themselves with the English school's legacy must answer. The first one is whether the international society and the world society are mutually exclusive (which may represent a conflict of sovereignty versus cosmopolitanism), or whether they are mutually dependent or perhaps there is some connection? If, however, these are opposing or competing concepts, which constitute distinct normative and axiological systems, then is one of them in the process of being supplanted by the other?[118] Secondly, it may be worth asking whether the world society is not by any chance just another kind of manifestation of hegemonic domination (in this case, westernization), and therefore merely an epiphenomenon of the overall structure of power in the international system?[119] Relations between the international and the world societies will be discussed further below.

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[114] J. Czaputowicz, *Teorie stosunków…*, p. 261.

[115] B. Buzan, *From International…*, p. 27.

[116] *Ibidem*, p. 28.

[117] *Ibidem*, p. 290, see: A. Hurrell, *Foreword to the Third Edition: The Anarchical Society 25 Years On* [in:] H. Bull, *The Anarchical Society…*, p. 17.

[118] I. Clark, *International Legitymacy…*, p. 32–33.

[119] B. Buzan, *From International…*, p. 30.

Chapter II

Values in the International Community: Between Pluralism and Solidarism

2.1. Pluralist and solidarist models of international society and community

After having *in grosso modo* determined the importance of the concept of the international community and its place on the theoretical map of international relations and the study of international law, let us more closely consider its axiological content.

Since, according to the definition by Hedley Bull, the "international society" is a group of states conscious of certain common interests and common values (axiological element of the definition), a fundamental question arises – how great is the "space" and burden of what the members of the community consider being common. In other words, it needs to be discussed what are the proportions between, on the one hand, the particular interests and values of each state, and on the other, those interests and values that could be considered common to all members of the community. This question has divided the authors of the English school of international relations, leading them to a gradual clarification of the two main positions: pluralist and solidarist.[1]

If the theory of the international society is to be consequently considered as a *via media* between realism and cosmopolitanism, then the pluralist version will occupy a place closer to the former, while solidarism will push the international society towards a broader world society or to another form

[1] See: J. Czaputowicz, *Angielska szkoła…*, p. 74–81; cf. A. Linklater, H. Suganami, *op. cit.*, p. 128.

of *universitas*. According to Robert Jackson, pluralism refers to two aspects. Firstly, the world is built of many sovereign territorial entities, and secondly, pluralism suggests the axiological diversity of the international community, since each state member has the ability to create and sustain its own system of values.[2] Therefore, the rudimentary assumption of pluralism, which is represented within the English school primarily by Bull,[3] is the tendency of the system of states to move towards particularism, despite the obvious (from the perspective of the international community) founding of international relations on mutual interaction and co-existence of states. Bull himself defined the concept of a pluralistic international community as one in which the states are capable of cooperation only as far as certain minimum goals are concerned, the most important of which are the principle of non-intervention and the mutual recognition of sovereignty of states.[4] Pluralists acknowledge the ontological priority of the state to the international community with all the consequences of this fact. The basic constitutive principle in international relations is sovereignty, while others such as *pacta sunt servanda* or the restriction of violence are only secondary, although obviously heavily protected by institutions such as diplomacy, international law and the balance of powers. Sovereignty plays the priority role, "promotes the pluralism of values, because it allows the existence of a constitutionally protected territorial space, free from external intervention, where such [axiological – T.W.] choices can be made".[5] In this understanding, pluralist sovereignty is a pre-juridical concept as understood in the Hobbesian tradition of thinking. However, it does not necessarily mean that the international community and common values in principle always yield to sovereign power of the state. It is rather more accurate here to appeal to the Schmittean concept of the

[2] R. Jackson, *The Global Covenant…*, p. 178–179 et seq.

[3] During the later years of his scholarly work before his premature death in 1985, H. Bull was growing increasingly supportive of the solidarist concept of international society. This tendency can be seen in his "Hagey Lectures"; H. Bull, *Justice in International Relations: The 1983 Hagey Lectures* [in:] K. Alderson, A. Hurrell, *Hedley Bull on International…*, p. 216–255; cf. N.J. Wheeler, T. Dunne, *Hedley Bull's Pluralism of Intellect and Solidarism of the Will*, "International Affairs" 1996, vol. 72, no. 1, p. 106; A. Linklater, *Rationalism…*, p. 160.

[4] N.J. Wheeler, T. Dunne, *op. cit.*, p. 94.

[5] R. Jackson, *The Global Covenant…*, p. 181–182.

sovereign – the one who decides on the state of exception.[6] Pluralist vision of the international community empowers the state to hold to its ultimate authority to make value judgements and choices on issues it deems existential. Consequently, the normative scope of the international community becomes limited; it operates as an instrumental tool for the protection of order in international relations and for arranging only the most necessary rules of peaceful coexistence between states. This kind of *societas* is clearly contractual and functional in its nature. This vision is illustrated by Vincent's famous comparison of international society to a carton of eggs. The eggs symbolize the states or their governments. The norms and institutions of the international society, especially positive international law, are like the cardboard packaging and are merely intended to act as a buffer between the conflicting interests of the states and to prevent the risk of collision between them.[7]

While the existence of the international community seems to be merely an adequate condition for the peaceful coexistence of states in the pluralistic interpretation, in the solidarist version it takes a form of a *conditio sine qua non* for the proper functioning of international relations. A solidarist international community, also known as the Grotian international community,[8] in contrast to the pluralistic concept, assumes that states strive for universalism rather than particularism. Therefore, in this perspective, the necessary basis for the international community is the existence of a certain community of culture and civilization, prompting its members to develop a basic common framework of morality.[9] The state no longer has ontological primacy before the international community, which ceases to be merely an instrumental tool for the provision of some kind of world order and begins to constitute a value in itself. Therefore, using the terminology of Tönnies, it seems to constitute the international community – *Gemeinschaft*, rather than the looser society. It is a true community of culture, and the states share the approved norms

[6] C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. G. Schwab, The University of Chicago Press, Chicago–London 2005, p. 5.

[7] J. Mayall, *Democracy and International Society*, "International Affairs" 2000, vol. 76, no. 1, p. 75.

[8] See: H. Bull, *The Grotian Conception of International Society* [in:] *Diplomatic Investigations…*, p. 51–73.

[9] Cf. A. Linklater, H. Suganami, *op. cit*., p. 135–145.

and "civilization standards" referring to the relationship between the citizen and the state, such as human rights.[10]

Sovereignty within the solidarist concept seems to lose its priority and is definitely subject to restrictions and rationalization arising from the will of the international community. One of the best examples of it may be the recognition of the institution of Responsibility to Protect (R2P) or humanitarian intervention as acceptable, while pluralists are categorically opposed to it.[11] According to Bull, the inherent feature of a solidarist international community is that it seeks to subdue the use of force in international relations to its "collective will".[12] The tendency to reduce the primacy of sovereignty in the solidarist view is also reflected in the assumption that individuals are also sometimes accepted as subjects of international relations,[13] which apparently brings the solidarist international community closer to the idea of a world society.

It can be observed that the basic difference between the pluralist and solidarist approach is what meaning the shared values, norms and institutions have in the international community. For solidarists, this shared space "weighs" more than for pluraists, or to put it differently – using the terminology of the English school of international relations – for them the international community is normatively "thicker".[14] States are therefore interrelated and bound by much stricter and denser network of shared values, norms and institutions. It seems at the same time that this type of international community has the inherent potential to develop and deepen especially the axiological dimension of integration among its members. In turn, in the pluralist vision, one of the main features that distinguish the international community from other forms of social organization is its procedural and

[10] J. Czaputowicz, *Angielska szkoła…*, p. 77.

[11] *Ibidem*, p. 77–78; J. Zajadło, *Dylematy humanitarnej interwencji. Historia – etyka – polityka – prawo*, Arche, Gdańsk 2005, p. 216; cf. A.J. Bellamy, *Humanitarian Intervention and the Three Traditions*, "Global Society" 2003, vol. 17, no. 1, p. 3–20.

[12] N.J. Wheeler, T. Dunne, *op. cit.*, p. 95. Bull also believed that the thesis that war should be waged only if there are "justified" reasons has a Grotian or solidarist origin. See: H. Bull, *The Grotian Conception…*, p. 54.

[13] J. Czaputowicz, *Angielska szkoła…*, p. 77.

[14] T. Dunne, *Society and Hierarchy in International Relations*, "International Relations" 2003, vol. 17, no. 3, p. 306; B. Buzan, A. Gonzalez-Pelaez, *International Community after Iraq*, "International Affairs" 2005, vol. 81, no. 1, p. 35.

therefore non-developmental character.[15] Pluralists are focused on certain basic requirements states have to meet, that aim rather at constraining them in matters necessary to maintain the minimum conditions for the existence of the international community. Therefore, I believe that in the pluralist approach the international community has a "negative" character because – apart from absolutely necessary restrictions applied by the society's very existence – states as the supreme and ultimate moral communities are fully competent in carrying out their interests and in safeguarding the rights of their citizens. While pluralism focuses on building such a practical international society, solidarism – with its much more extensive catalogue of common values, norms and institutions – is rather a purposive community.[16] By actively building standards that constitute the international community that pursues its own goals and by focusing on the community of states as a separate entity, the solidarist vision creates a "positive" international community. Underlining the rights and obligations of individuals makes the pluralistic "morality of states" questionable in comparison with the attempt by the solidarist international community to create at least a minimum of "international" or "transnational" morality.

2.2. Values in the international community: axiological objectivism and relativism in the international community

Solidarity in the sense described above is based on the assumption that countries share certain common values that go beyond the interests of their individual survival or the needs of mere technical cooperation and are sufficient to participate in the implementation of far-reaching common goals or enable the community to evolve in the direction of a certain homogeneity in accordance with the Kantian ideal. One can thus raise the two most important questions for the international community as far as values are concerned. The first one is: which or what kind of values are shared by the community (and therefore it is a question about the "static" axiological dimension of the

[15] J. Mayall, *World Politics: Progress and its Limits*, Polity Press & Blackwell Publishers, Cambridge 2000, p. 14.

[16] See: F. Robertson-Snape, *Moral Complexity and the International Society*, "Global Society" 2000, vol. 14, no. 4, p. 516.

international community), while the second one is why and how are they shared by its members (this one attempts to grasp the axiological dynamism of the international community).[17]

Of course it is not easy to identify specific values, whose widespread acceptance in the international community or the rank they are given determines the extent to which the community is solidarist. Besides, there is a catch here. Usually, by listing the specific values of the international community, we do not really so much prove the extent to which it is a solidarist community or not, but instead by this exercise we in fact make an appeal to an idealized model of solidarism, a specific type or vision such as, for example, the liberal international community model.[18] When discussing values, one is in fact balancing on the borderline between the Kantian theoretical and practical reason – between stating how matters are and the normative question of how they should be.[19]

This observation is closely associated with the problem of reflection on the very nature of values in a community. It is possible to distinguish two basic positions in this matter, determined by the ontological perspective through the prism of which the researcher observes the values in a community or a society.[20] The subjectivist, non-cognitivist approach to value is associated with the view that values are always the product of a process of evaluation, which occurs in a particular community and in a specified time. Values are therefore subject to continuous discovery or human creation, the result of cultural and historical processes. This does not mean, of course, that they cannot be relatively permanent and fixed, but certainly there is no dispute about the possibility of or even the need for their evolution and change. Values remain always relative to a specific community and culture,

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[17] B. Buzan, *From International…*, p. 152.

[18] *Ibidem*, p. 158.

[19] J. Zajadło, *Po co prawnikom filozofia prawa?*, Wolters Kluwer, Warszawa 2008, p. 14.

[20] See: P. Sut, *Aksjologia a prawo* [in:] *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, ed. Zajadło J., C.H. Beck, Warszawa 2007, p. 4; T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, C.H. Beck, Warszawa 2003, p. 25–26; M. van Roojen, *Moral Cognitivism vs. Non-Cognitivism* [in:] *The Stanford Encyclopedia of Philosophy*, ed. E.N. Zalta, http://plato.stanford.edu/archives/fall2014/entries/moral-cognitivism/, accessed 11 November 2014.

even the whole civilization, existing in a given place and time.[21] On the other hand, the objectivist stance understands values in a much more static way. Proponents of this view consider them self-contained entities, existing independently of the human will, the influence of culture or a specific historical context. Therefore, they may constitute a durable frame of reference not only for each individual, but also for entire communities. The epistemological consequence of such a position is cognitivism, which assumes that being objective and immutable entities values can and should be the subject of scientific study.

A *prima facie* conclusion can be made that the axiological absolutism associated with the objectivist position does not fit the results of the analysis of specific values in such a special society as the international community of states. Even in its moderately solidarist version the international community does not seem to be deprived of its contractual character. Distinctiveness in terms of the cultural and political identity of the members of the international community does not advocate for an objective, permanent and unchanging character of the values. Anyway, the very historical evolution of the types of international communities indicates that the thesis of the absolutism of value is not sustainable. Also the critique of axiological objectivism raised in the context of the argument of democracy remains current. The assumption of the immutability of values is at odds with the democratic character of the decision-making processes, which after all most of the time concern the choice among competing values or about establishing hierarchies between them.[22] It is difficult to imagine the existence of such a version of a solidarist international community where its members have no right to decide on the values shared by the community through the democratic discourse, or that they have almost no influence on the fundamental assumptions of the social structure they constitute. In other words, it can be concluded that adopting a hard axiological absolutism would mean a *de facto* elimination of political mechanisms being a platform for the clash of different doctrines and ideologies on the functioning of the international community, which would in turn reduce the whole concept *ad absurdum*.

[21] On different ways of defining values see: R. Ingarden, *Uwagi o względności wartości* [in:] M. Środa, *O wartościach, normach i problemach moralnych – wybór tekstów*, PWN, Warszawa 1994, p. 260–273.

[22] See: P. Sut, *op. cit.*, p. 6.

However, the subjectivist view of values in the international community also raises some important questions. This approach provokes the question how to define a catalogue of common values shared by the international community: where to draw them from, what would be the common interpretation of these shared values and, above all, who sets them in place as dominating ones and, therefore, on what basis are they established and taken into consideration by all members of the community? Since the assumption of axiological relativism is that values are not given once and for all, then in what way can they evolve, and be redefined by this community? How to determine the moment, in terms of time, space and political momentum, when there is a qualitative change within the community coming, which bestows legitimacy (upon whom?) to make the "axiological turn", if only that which took place after the end of the Cold War? The example of the historical development of the present international community is raised against axiological absolutism and indicated as a source of arguments supporting the position of subjectivism. However, even in the historical context there exists an axiological substance of the international community, which admittedly took different versions and forms, but it always gravitated towards the realization of certain invariant goals of the community, such as the survival of the system.[23] It is noteworthy that axiological relativism does not necessarily mean the completely individualistic nature of the values in the community, and it does not challenge the rooting of at least some of them within the particular community. Such "soft relativism" is coming closer to the middle position, which constitutes a certain compromise. It rests on a view that certain basic values by their very nature are immutable or relatively permanent in their substance (in theory and philosophy of law the known examples would be legal certainty, equity or justice), while others are generally volatile and relativized to a specific community, existing in a particular time and space.[24]

Given the above, there is a need to make yet another, key distinction between values and two other axiomatic categories: valuations and norms. Firstly, norms may play a functional role in relation to values. As one accurate observation states: "Each value carries within it a postulate of its implementation, and the norm is directed to realize this value".[25] Therefore, interchange-

[23] See: H. Bull, *The Anarchical Society…*, p. 16–19.

[24] T. Stawecki, P. Winczorek, *op. cit*., p. 26.

[25] P. Sut, *op. cit.*, p. 5.

able use of the terms referring to these two categories would be incorrect. This is especially important in the context of the international community. The abovementioned definition of international society by Bull and the concept of the international community in general seem to separate the normative sphere (common rules and institutions, or the normative-institutional part of the definition) clearly from its axiological base. It is characteristic of the international community that the same or similar values constituting its foundation may justify ontologically different, often complementary, normative systems, which regulate its functioning, such as law, praxeological norms (rules of prudence) or international morality. In this perspective, values are the final goals or benchmarks for the international community and do not have a normative character in the sense that they do not set any directives of conduct directly or even indirectly.

Secondly, it is necessary to distinguish values from valuations. The latter is a phenomenon belonging to a logical-linguistic plane,[26] an act of valuation, and therefore the process, not the outcome. In the literature, it is noted that the question about the nature of the valuation is essentially a question of how we attribute values to certain beings and is fundamentally different from the concept of value itself and its substantive nature.[27] Joel J. Kupperman makes a noteworthy point that nowadays increasingly the concept of "value" is understood through the prism of what is socially or morally acceptable, hence, in this perspective, one's "values" embody judgements about morality or about the acceptability of certain social practices.[28] This undoubtedly too wide understanding of the term "value" is the typical result of the confusion of values with evaluations.

These considerations do not, however, bring us closer to the formulation of a single, specific, and widely acceptable definition of a value, that could be applied in the context of a community, especially the international one. Moreover, defining value is an issue subject to never-ending disputes and is one of the central questions of ethics or philosophy of axiology. For centuries

[26] *Ibidem*, p. 6.

[27] M.J. Zimmerman, *Intrinsic vs. Extrinsic Value* [in:] *The Stanford Encyclopedia of Philosophy,* ed. E.N. Zalta, http://plato.stanford.edu/archives/win2010/entries/value-intrinsic-extrinsic/, accessed 11 November 2014.

[28] J.J. Kupperman, *Value… and What Follows*, Oxford University Press, New York 1998, p. 3.

philosophers have tried to sort out the map of human values, pointing to the most fundamental ones[29] and trying to find the common denominator of the axiology of human existence. Some schools of thought tried to reduce the essence of value to the feeling of pleasure (e.g. hedonists or utilitarian thinkers such as John Stuart Mill), yet others opted for happiness as the ultimate value (a classical reference here is the Aristotelian *eudaimonia*[30]). There were also views according to which all of what is called value can be reduced to the experience comprehended by an intelligent being.[31]

Zygmunt Ziembiński proposed two basic ways of defining the term "value" which may be important in the discourse between lawyers as well as other social science scholars. First of all, value can be understood as "determination of the characteristics of items, which are positively or negatively evaluated by someone".[32] This understanding refers to the position of axiological relativism. As Ziembiński emphasizes, in this sense when we think of values considered in the social perspective – which is the most interesting in the context of the international community – we are referring to the "sufficiently established" or "particularly momentous" evaluations from the perspective of a certain group, which should be precisely specified. Secondly, the author states that "the value can also be understood as a distinguishing characteristic of the class of items equally valuable in some respect or globally equally valuable from someone's point of view".[33] Therefore, this definition refers to the objective side of the abovementioned understanding of the term "value".

In the Polish philosophical literature, Henryk Elzenberg distinguished between two different understandings of the concept of value: namely value "in the utilitarian sense" and a "perfect value".[34] The former meaning of the concept of value is closely associated with utilitarianism. Value is an attribute

[29] See: K. Starczewska, *Wartości podstawowe*, "Etyka" 1978, no. 16 [in:] M. Środa, *op. cit*., p. 232–244.

[30] See: W. Tatarkiewicz, *Historia filozofii*, vol. 1, PWN, Warszawa 2007, p. 130–131.

[31] See: J.J. Kupperman, *op. cit.*, p. 6–12.

[32] Z. Ziembiński, *Wstęp do aksjologii dla prawników*, Wydawnictwo Prawnicze, Warszawa 1990, p. 58.

[33] *Ibidem*, p. 59.

[34] See: H. Elzenberg, *Wartość i powinność*, "Etyka" 1992, no. 25 [in:] M. Środa, *op. cit.*, p. 202–210.

ascribed to everything that brings pleasure,[35] is desirable or necessary for existence, and thus value is always intrinsically relative to a particular person. As far as perfect value is concerned, it is always absolute. In this understanding, when we grade or compare values, we need not to refer to the entity from whose perspective this evaluation is done. A perfect value cannot be desired or needed, and it cannot be the source of experiencing pleasure.[36] Trying to build a substitute definition, Elzenberg refers to the concept of obligation and concludes that a valuable object in the perfect sense "is as it ought to be". However, perhaps more useful is the author's attempt to derive synonyms for the concept of a perfect value, among which he lists "dignity" (*dignitas*) or "nobility" (*nobilitas*). This suggests an appeal to an idealistic conception of the Platonic kind.

Last but not least there is yet another noteworthy distinction within the concept of value. Elzenberg also highlights the existence of ultimate and instrumental values. The essence of the ultimate value lies in the fact that the designation to which this value is assigned possesses it directly or indirectly and – as the author aptly observes – without any further reason.[37] If "something" (a designation) has instrumental value, it means that it is ascribed this value so that "something else" (another designation) can possess ultimate value. This is a clear reference to the distinction between intrinsic and extrinsic values – raised by George E. Moore in his *Principia ethica*.[38] Moore proposed a test of isolation, which would be helpful to contrast these two categories. To verify whether "something" has intrinsic value, one needs to imagine a world where there is only this "thing" existing in absolute isolation, and in the second step to ask oneself a question about whether its existence is good in itself. For example, if one imagines that any and all existing pleasure is good in isolation from the rest of the world, and all and only pain is bad, then one takes the position of hedonism, regarding pleasure as an intrinsic value.[39]

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[35] *Ibidem,* p. 204.

[36] *Ibidem*, p. 205. In order to illustrate this meaning the author uses the example of the statement, "spirit is of a greater value than matter" in which "value" is understood as a perfect value.

[37] *Ibidem*, p. 211.

[38] G.E. Moore, *Principia ethica*, Cambridge University Press, Cambridge 1959.

[39] M.J. Zimmerman, *Intrinsic vs. Extrinsic*…

2.3. Basic values in the international community according to the English school

At this point the reader may wonder in what ways the above general considerations about the nature of values and valuations are relevant in the context of "shared values" being a definitional element of the concept of international community. The scholars of the English school displayed no particular concern with definitional issues nor did they see any major ontological and epistemological problems in the discussions on values.[40] They rather had a habit of building positivist and authoritative judgements about what is and what is not an important value in the international community according to their view.[41] In this spirit, formulating his propositions *a priori* and without explanations as to his epistemological position, Bull gives his account of values in his book *The Anarchical Society*. He mentions three fundamental and universal goals, whose attainment is in the common interest of all members of every community: first, all communities seek to ensure that life and physical survival are protected against all forms of violence, second, every community sees to it that promises are complied with, and finally, a community must make sure that property is secured with a certain degree of stability and protected.[42] Later in the argument Bull elaborates on this thesis in the context of the international community and shows how these basic objectives are developing in the context of international relations. According to him, the goals of the international community are: the survival of the community itself, the preservation of independence and sovereignty of its individual members and, last but not least, the maintenance of peace.[43] In spite of the term "goal" used here, there is no doubt that Bull understands it as synonymous with the concept of "value".[44] He clearly emphasizes that these three

[40] A. Linklater, H. Suganami, *op. cit*., p. 110.

[41] *Ibidem*.

[42] H. Bull, *The Anarchical Society*…, p. 4–5. Other authors usually name a similar catalogue of fundamental values. It may be order, prosperity, justice and peace (see: M.N. Shaw, *Prawo międzynarodowe*, Książka i Wiedza, Warszawa 2006, p. 34) or freedom, justice and peace (T. Jasudowicz, *Zagadnienia wstępne* [in:] *idem* et al., *Prawa człowieka i ich ochrona*, Dom Organizatora TNOiK, Toruń 2005, p. 29).

[43] H. Bull, *The Anarchical Society…*, p. 16–17.

[44] See: *ibidem*, p. 5, where H. Bull describes society's goals as "values".

values, which he names in turn the values of life, truth and ownership, are of an elementary character.[45] This means, that they are somehow the conditions *sine qua non* for the existence of any possible community, and therefore it must be concluded that these are typical utilitarian values. He calls them the primary ones in the sense that all other goals of the community need these goals to be achieved first, at least to a certain extent.[46] It seems, therefore, that Bull does not perceive them as ultimate values but rather as completely instrumental ones, in spite of their large semantic capacity and a high degree of generalization. Finally, he considers them universal in the sense that all existing communities take them into account. This last feature is therefore just another empirical justification for the basic nature of these values.

An important question remains whether the abovementioned values of the international community as defined by Bull are objective or subjective, and therefore whether Bull considers them from the position of absolutism or axiological relativism. On the one hand, the attributes of these values such as their universal or fundamental character are undoubtedly derived from the tradition of legal naturalism and may indicate a clear aim to objectify them. On the other hand, the utilitarian nature of the three values and their unmistakable instrumentalism lurking behind what Bull calls their "primary character" raise questions about what could be the ultimate values standing behind the values of life, truth and ownership. Without knowing the ultimate values behind them, it cannot be concluded, beyond doubt, whether these instrumental values actually constitute the only objective way of development for any international community, or perhaps they are relativized to a particular community existing at a given time. Andrew Linklater and Hidemi Suganami put forward the thesis that Bull apparently believed that the values within the international community could be divided into two categories; some of them being objective, others subjective.[47] It is a noteworthy observation that Bull seems to have assigned objective values to the category of "order" and the subjective values to the category of justice.[48]

[45] *Ibidem*.

[46] *Ibidem*.

[47] A. Linklater, H. Suganami, *op. cit*., p. 112.

[48] *Ibidem*; see for a similar interpretation of H. Bull's views: T. Nardin, *Justice and Coercion* [in:] *International Society*…, p. 247–248.

2.4. Order and justice in the international community

Order is without doubt one of the main determinants of world politics. Its key importance for the international community was underlined by Bull in *The Anarchical Society*, which was not without reason subtitled "A Study of Order in World Politics".[49]

Bull believed that order in social life has a purposive character. It is not merely any proper arrangement, but only such a system of relations between individuals and groups that leads to a specific objective of achieving and maintaining certain values, in particular those fundamental ones distinguished by Bull: the values of life, truth and ownership.[50] Accordingly, the international order is defined by him as the arrangement made to fulfil the basic objectives (values) of the community of states, which take the form of the survival of the community, the preservation of independence and sovereignty of state members and the maintenance of overall peace.[51] It was aptly pointed out by Ian Harris[52] that in Bull's conception order takes on a double form – it is simultaneously a fact, part of the reality and a value for the international community, because we tend to attach value to greater predictability of human behaviour, which is a consequence of adaptation to the basic or primary purposes of coexistence.[53]

It should be noted that this definition of the international order according to the English school comes with completely different assumptions than those of the realist tradition. Order is in this case universal and objective, while the interest of the particular members of the international community is closely linked to the interest of the whole. In the neo-Hobbesian

[49] Many contemporary influential authors and thinkers concentrate their work on the notion of "order" or "world order". Examples include – to name just a few – F. Fukuyama, *State-Building: Governance and World Order in the 21st Century*, Cornell University Press, New York 2004; A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton 2004 or the recent book by H. Kissinger, *World Order*, Penguin Press, New York 2014.

[50] H. Bull, *The Anarchical Society*…, p. 3–4.

[51] *Ibidem*, p. 8.

[52] I. Harris, *Order and Justice in 'The Anarchical Society'*, "*International Affairs*" 1993, vol. 69, no. 4, p. 725–741.

[53] H. Bull, *The Anarchical Society.*…, p. 7.

Realpolitik tradition, however, the issue of the international order is closely bound to the subjective perspective of the interests of a particular state. Order is a configuration of international relations that secures the position of a state or a group of states, possibly created by the hegemonic power, against which smaller powers try to orient their own interests; therefore it has a national character. In addition, for a neo-realist, the international order has a rational and instrumental character; it is a natural product of the game between the sovereigns, the product of the principle of balance of power, which by analogy works like the "invisible hand of the market" in the classical liberal economic doctrine.[54] In this understanding, therefore, there can be many alternatives, multiple "international orders" constantly competing against each other. In Bull's view, this logic of *raison d'état* is replaced by thinking in terms of *raison de système*,[55] and therefore a potentially stable international order in which the interests of the members of the community coincide with the interests of the whole. At the same time, Bull remains a strong supporter of a strongly accentuated principle of sovereign equality of states, which means his vision is firmly anchored in the international reality.

However, Bull's concept of order, although more optimistic and complete than the realistic version, still remains, as noted by Andrew Hurrell, quite minimalist.[56] It cannot be said that the three main objectives of the international community mentioned by Bull and intended to be the pillars of the international order constitute a particularly extensive catalogue of values. The main role that order is intended to play in this vision is nevertheless the survival of the international community of states, whose real ambition is to maintain the *status quo* rather than aspiring to transfer their relations to a morally higher level. As observed by Hurrell, Bull was rather thinking about the international order in the categories of how states and other groups should behave in relation to each other in order to cause minimum harm to each other and for humans to survive as a species in the era of weapons of mass destruction rather than in a way humanity could create international

[54] T. Dunne, *Review Article: Ordering International Society*, "*Global Society*" 2000, vol. 14, no. 1, p. 127.

[55] The phrase is used by A. Watson, *op. cit.*, p. 9.

[56] A. Hurrell, *On Global Order. Power, Values, and the Constitution of International Society*, Oxford University Press, New York 2007, p. 25–26.

cooperation embodying all our aspirations to justice.[57] Therefore, the conception of order presented in *The Anarchical Society* should definitely be regarded as a conservative and pluralist one.

Hedley Bull's argument boils down to the perception of order as a fundamental value of an instrumental character (an extrinsic value) for every international community. For Bull, the order is a condition *sine qua non* for the implementation of all other possible values, including justice.[58] This axiomatic foundation seems to be nevertheless quite frail. It includes only these goals or values (survival of the system, the sovereignty of states and peace), which Bull considered to be objective, being the result of a difficult compromise between members of a minimalist pluralistic society, resembling a ceasefire rather than an evolving and future-oriented arrangement. This kind of order is conservative and gravitates towards a *status quo*. Other values of an ultimate kind which the order is meant to realize, such as justice and equality, are inherently subjective in their character, perceived very differently by the particular members of the international community. Realization of these values must therefore be preceded by a complex discourse as to their nature, often taking the form of a conflict. This state of affairs, in turn, is often seen by some members of the international community (usually minorities fearing their position is being undermined) as a threat to the order (understood as the *status quo*) and it causes them to pull the emergency brake of international security, by calling upon the sacrosanct principle "international order before everything else". This causes a kind of feedback effect – the order creates the conditions for widening the axiological foundations of the international community, but when inevitably the natural conflict about new subjective values arises among the members, it is eliminated in the name of fear of losing the very order in the first place. This means that the order as a part of an objective reality often becomes in the eyes of the community a value in itself, and therefore, using the terminology of Elzenberg, turns into a perfect value. Tim Dunne has also noted this when he wrote that the order is seen as universal value, which is obviously good *per se*.[59]

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[57] *Ibidem*, p. 26.

[58] H. Bull, *The Anarchical Society…*, p. 93.

[59] T. Dunne, *Review Article…*, p. 129.

A question arises whether, given the above, the conflict between order and justice is inevitable on the international level? It should be emphasized that the very formulation of the problem in such a way is progress in itself in relation to the orthodox realist way of interpreting international relations, because it highlights the issue of justice. The quintessence of the already mentioned realist outlook has been in fact most succinctly and accurately summarized by Thucydides in the famous dictum from the Melian Dialogue that "the strong do as they can, and the weak suffer what they must".[60] Nevertheless, it seems that nowadays in the era of the growing importance of human rights such an absolute disregard of justice on the international level has become impossible even for the hardline realists.[61] However, as far as justice in the international dimension is concerned, whether and how it should be implemented as a value, as well as its relation to the international order, remains open to question. The framework of this book does not allow for an in-depth analysis of this issue since – as it has been rightly observed – the tensions between order and justice have created and shaped a huge area of research in the international studies literature.[62] It seems useful however, for the sake of understanding the concept of "international community", to mention just a few basic problems.

2.4.1. The notion of justice in the international community

The answer to the questions about the relationship between order and justice requires us to reflect upon different ways of comprehending this very hetero-

[60] Thucidydes, *The History of the Peloponesian War*, 5.89.1 [in:] Perseus Digital Library, Tufts University, http://bit.ly/11iE4W5, accessed 11 December 2014; see: A. Linklater, *The Evolving Spheres of International Justice*, "International Affairs" 1999, vol. 75, no. 3, p. 473. However, it is worth taking note of H. Bull's remark, that the argument of the Athenians was not based on the simple observation that might is right. According to Bull, the Athenians said only that the problem may arise due to weighing of arguments only in a case where both parties were equal in terms of power, which was not the case; see: H. Bull, *Society and Anarchy*…, p. 44.

[61] See: A. Roberts, *Order/Justice Issues at the UN* [in:] *Order and Justice in International Relations*, eds. R. Foot, J. Gaddis, A. Hurrell, Oxford University Press, New York 2003, p. 79.

[62] A. Hurrell, *Order and Justice in International Relations: What is at Stake?* [in:] *Order and Justice*…, p. 24.

geneous concept of justice in the international dimension.[63] In contrast to the authors of elaborate theories of justice, such as John Rawls, Hedley Bull did not make an effort to define justice even close to that which he demonstrated in his discussions around the concept of "order".[64] Already at the beginning of his considerations relating to justice, he states that basically it is a term that can be given only certain "private or subjective definitions".[65] Bull does, however, make a certain conceptual distinction when he writes that justice belongs to the class of "moral ideas, ideas which treat human actions as right in themselves and not merely as a means to an end, as categorically and not merely hypothetically imperative".[66] Immediately after this statement follows the positivist assertion that reflections on justice as such should be separated from considerations about the law and rules of prudence, interest or necessity.[67] It can be concluded that Bull treats justice as a final (intrinsic) value.

Further in the course of the discussion Bull recalls the classical theoretical divisions of the concept of justice into material and formal or commutative justice *versus* distributive justice.[68] Bull's more interesting proposition, however, is to distinguish three types of justice in international relations that recall the characteristic trialectic of the three traditions of thought proposed by the English school. First of all, Bull mentions international or interstate justice. This is a kind of justice relating solely to relations between states or nations as actors in international relations. As the author puts it himself, it is about "the moral rules held to confer rights and duties upon states and nations".[69] An example of this type of rules would be the principle of equal treatment of the member states of the international community arising from

[63] J. Zajadło, *Teoria sprawiedliwości międzynarodowej: prawa człowieka contra suwerenność?*, "Polski Przegląd Dyplomatyczny" 2005, vol. 5, no. 3 (25), p. 104; M. Soniewicka, *Granice sprawiedliwości, sprawiedliwość ponad granicami*, Wolters Kluwer, Warszawa 2010.

[64] Nevertheless, Bull saw the necessity of working on such a theory in order to supplement his lecture on international society (H. Bull, *Justice in International*…, p. 216 et seq.). This might have been the case if not for Bull's premature death.

[65] H. Bull, *The Anarchical Society*…, p. 75.

[66] *Ibidem*.

[67] *Ibidem*.

[68] See: *ibidem*, p. 76–78; cf. J. Zajadło, *Sprawiedliwość* [in:] *Leksykon współczesnej teorii*…, p. 316–318; T. Stawecki, P. Winczorek, *op. cit*., p. 225–230.

[69] H. Bull, *The Anarchical Society*…, p. 78.

their sovereign equality. It seems that this understanding of justice is present in contemporary debates regarding the regime of non-proliferation of nuclear weapons and international control of atomic energy use, when in terms of political rhetoric the fact of possession of weapons of this type by the nuclear powers and the denial of access to it to others or enhanced control of certain activities in this area is being called "unjust". Secondly, Bull distinguishes the so-called individual or human justice. This is no more or less than simply justice, in which the subject is an individual. This category includes, therefore, a reflection on human and civil rights, as well as debates on the international criminal responsibility of war criminals. The author sees this element as "hidden" and "potentially subversive" in regard to the requirements of international justice. This description is clearly marked not only by the influence of the dogmas and ideas of classical international law, but also the then current context of Cold War power politics. Finally, the third type of justice, which operates internationally, is a cosmopolitan or world justice. Considerations of justice in this understanding refer to imaginary *civitas maxima*, or the world community of all people. It assumes the existence of such common interests and a common public good which could be shared by humanity as a whole.[70] The difference between this and the previously mentioned type of justice lies in the assumption that the world justice is not a simple sum of justice in the individual dimension, but rather it is a certain new collective quality defined in terms of community of interest of the whole humanity. The detailed material rules of this type of cosmopolitan justice, the specific rights and obligations of the individual members, are determined by their belonging to the *civitas maxima*, and by the notion of the common good of the entire world community, in a manner analogous to that in which the rights and obligations of justice in the case of an individual are determined by the moral good of the narrower community to which he or she belongs and whose boundaries are also the borders of justice (i.e., a state, nation, etc.). On this occasion, Bull discredits the notion of world justice, and believes that it is a myth unrelated to reality in any way. In his opinion, talking about the universal society of all mankind is at least premature, if only because it does not have any means or remedies of political articulation, aggregation or political socialization. There is also no effective political representation besides the "self-appointed spokesmen of the common good

[70] Cf. *ibidem*, p. 81.

of the spaceship Earth".[71] After criticizing this (in his opinion) utopian idea, he concludes that although the previously discussed two types of justice play a dominant (international justice) or at least some (individual justice) role in political discourse, the role of world justice is negligible. However, if we look at Bull's example of cosmopolitan justice being, for instance, issues relating to the ecological and environmental problems facing humanity, then it is certain from the contemporary perspective that exactly these issues – climate change, the so-called intergenerational equality or sustainable development – have gained immeasurably greater importance in the legal and political international debate than they had three or four decades ago. The contemporary reader of Bull's book will easily observe that the proportions of significance between the three types of justice highlighted in *The Anarchical Society* have substantially changed since the first edition of the book in 1977.

The typology of justice proposed by Hedley Bull is echoed in contemporary debates on the topic. In the recent Polish literature on the topic Marta Soniewicka, in her book titled *Granice sprawiedliwości, sprawiedliwość ponad granicami* (Boundaries of justice, justice beyond borders), conducts an in-depth analysis and classification of the modern liberal conception of justice.[72] According to her, at the highest global level of analysis, one can outline three main visions of the global world, separated by their approach to the concept of justice. In the first, the implementation of the principle of justice can be delegated to the forces of the global free market; accordingly the neoclassical paradigm of liberal economics is that the market is the best regulator as far as the processes of distribution of goods is concerned.[73] Secondly, one can distinguish a fair world of communities. According to the author, this includes the concepts that derive from the real divisions between people on a global scale; consequently we have to deal with a just world of nations (nationalism), cultural groups (multiculturalism) or states (state-centrism), whereas in each case, the boundaries of a particular community seem to be the moral boundaries of accepted principles of justice, and redistribution on a global level takes place only between these communities, and never between individuals.[74] Last but not least, there is place for a cosmopolitan vision – a just

[71] *Ibidem*, p. 82.
[72] M. Soniewicka, *op. cit.*, *passim*.
[73] *Ibidem*, p. 109–178.
[74] *Ibidem*, p. 179–261.

world of individuals, where every human being is the basic moral subject.[75] The last two of these conceptions of justice seem to correspond respectively to the cosmopolitan justice (world justice) and individual (human) justice within the community in the typology proposed by Bull. In turn, his idea of international justice could be regarded as a kind of meta-concept of the fair world of communities, because it concerns redistribution of goods, burdens and competences between collective groups (e.g. the states) and not between individuals.

Buchanan and Golove also propose an interesting dichotomy, introducing a distinction between transnational justice and international justice.[76] In the understanding of these authors, the second type of justice seems to be to some extent consistent with what Bull had in mind when he was writing about international justice. It is distributive justice, governed by the rules of international law, which is primarily applicable in the relations between states, but – and here lies an important difference – the parties may be also individuals or groups of people (a community) living in different states.[77] On the other hand, in the case of transnational justice we have to deal with the basic principles also regulated by international law, but concerning the internal affairs of particular states.[78] Therefore, the semantic nature of the prefix "trans-" is especially important, as it stresses that these principles are a kind of transition from international justice in the meaning of Bull, for which the primary point of reference is the boundaries of states, to the new type of justice that permeates this barrier. An example of this type of justice is the principles of human rights, which according to the logic of the "Helsinki effect", escalate and migrate in an uncontrolled and versatile manner from the international dimension to the largely so far autonomous axiological area of the internal forum of particular states. It is therefore more the kind of justice that, starting from the international normative sources, penetrates

[75] *Ibidem*, p. 261–307.

[76] A. Buchanan, D. Golove, *Philosophy of International Law* [in:] J. Coleman, S. Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, New York 2002, p. 887–934; similar concepts are proposed by authors in the international relations theory: A. Linklater, H. Suganami, *op. cit.*, p. 182–183 and literature cited.

[77] A. Buchanan, D. Golove, *op. cit.*, p. 887–934; see also: J. Zajadło, *Społeczność międzynarodowa…*, p. 44–45.

[78] *Ibidem*.

or even abolishes the borders and gravitates towards cosmopolitan justice within a world society.[79]

These different classifications of justice in the international dimension – those presented by Bull, the contemporary ones such as the concept of Buchanan and Golove,[80] or philosophical currents of liberal thought systematized by Soniewicka – all basically illustrate the evolution of the perception of justice over the last half century, as well as a varying, dynamic relationship to the international order. Justice is present as a fact, on the one hand, and on the other, as a value in the international community. In a world that had emerged from the horrors of World War II, naturally order more quickly became a priority, and the prevailing axiomatic climate of that period was reflected in the basic provisions of the UN Charter, which granted the first place to the principle of sovereign equality of states and reinforced in an unprecedented manner the principles of non-intervention and the prohibition of the use of force in international relations. Admittedly, the UN Charter also promoted human rights and declared their protection as one of the primary goals of the organization, however – as rightly observed by Michael Ignatieff – non-intervention in internal affairs was expressed in a categorical manner, while the commitment to promote human rights was phrased using far more permissive language.[81] States were more encouraged to promote human rights, rather than prohibited from their violation.

Of course, this does not mean that the issue of justice did not play any role in global politics in the era of the Cold War. The 1960s and '70s were marked by the process of decolonization and the almost universal support for the principle of self-determination of peoples.[82] There was a growing debate on

[79] For example, Linklater defines transnational justice as justice among individuals within the world society; see: A. Linklater, *The Evolving Spheres*…, p. 473–474.

[80] See similar conclusions in: B. Brian, M. Matravers, *Justice, International* [in:] *Routledge Encyclopedia of Philosophy*, ed. E. Craig, Routledge, London 1998, http://www.rep.routledge.com/article/S033SECT4, accessed 27 March 2007.

[81] M. Ignatieff, *Human Rights, Sovereignty and Intervention* [in:] *Human Rights, Human Wrongs. The Oxford Amnesty Lectures 2001*, ed. N. Owen, Oxford University Press, Oxford–New Jork 2002, p. 52, cited after: J. Zajadło, *Teoria sprawiedliwości*…, p. 99.

[82] See: Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV) of 14 December 1960, UN Doc. A/4684 (1960), 66, http://bit.ly/11iKapr, accessed 11 December 2014.

economic inequality and unfair distribution of global goods (one of the most obvious examples was the establishment of the Group of 77 in 1964, created by the developing nations in order to implement the postulate of overcoming economic inequalities between industrialized nations and the so-called Third World).[83] Because justice, as a category relating to individuals, was in that time analysed and used only within the context of national borders, the realization of the idea of justice in the international dimension could rely almost exclusively on the application of the principles of distributive interstate justice. In the bipolar world of the post-colonial era the states perceiving themselves as victims of a past unjust order, reflecting on the harm they had suffered, considered it fair to renegotiate or abolish unequal treaties, remove all forms of extraterritoriality, terminate the supremacy of the Westerners and build capacity for self-determination.[84] Their own sovereign state organization, modelled after the European pattern, was perceived in the light of the principles of classical international law as the best guarantor of their rights in the international plane. This conviction followed not only from the experience of the colonial era, but also from the desire to maintain maximum political freedom in a bipolar world divided by the Cold War conflict and threatened by a high risk of nuclear war. This was a somewhat paradoxical situation, as states or nations which for centuries were excluded from the western international community, often conquered, enslaved and colonized by its members, have found a way to change this unfavourable situation and secure justice for themselves, not by questioning or fighting the "European" international law or the international community built by it, but by entering these institutions on *de jure* equal terms.

Of course, in these circumstances, it was possible to talk about the existence of the international community only if its pluralistic dimension, oriented on coexistence and well suited to the requirements of sustaining international order and focused on carrying out a formal interstate justice, was far more strongly emphasized. Although in this ideologically deeply divided world of the Cold War it was indeed difficult to be optimistic regarding the possibility of moving towards solidarism, more universal concepts of material and not only formal justice were being developed simultaneously. Their sources were the many emancipatory social movements and revolutions

[83] See: R. Foot, *Introduction* [in:] *Order and Justice…*, p. 4.

[84] See: H. Bull, *Justice in International Relations…*, p. 209–211; R. Foot, *op. cit.*, p. 4.

which swept in waves over the liberal western society at this time, aiming to remove the many discriminatory divisions that existed.[85] People started talking about justice among individuals and groups, including the international dimension, and mainly in the context of human rights, which at least in rhetoric had already begun slowly to constitute a permanent part of world politics. Unfortunately, the fundamental problems of the geopolitical world often prevented practical realization of "justice across borders". As aptly put by Rosemary Foot, in a world where political alliances were seen in terms of a zero-sum game, preferential economic and political treatment concerned those states that could add strategic advantage to one or the other side of the bipolar system, and not those who treated their societies reasonably well.[86] Thus, in the era of the Cold War order was treated as a priority,[87] especially with respect to justice in the cross-border dimension, implementation of which was limited for political and strategic reasons. This concerned also the requirements of interstate justice. Its implementation, although officially supported by the nuclear powers, was treated in a quite selective way.[88] Examples of this behaviour can be, on the one hand, the widespread support for decolonization and self-determination of peoples, and on the other, interventions in Korea, Vietnam, Hungary or Afghanistan. As a result, order started to be treated and seen as an end in itself, that is, not as an instrumental value, but as an ultimate one.

During the Cold War, many of the abovementioned demands concerning the implementation of interstate justice not only retained their relevance, but also took on a new dimension, especially in the context of the debate on the global economy, the redistribution of goods and the political-economic relations on the rich North-poor South axis.[89] However, the ending of the bipolar ideological war opened up new opportunities for a wider axiological consensus in the international community.[90] One of the characteristic

[85] R. Foot, *op. cit.*, p. 5.

[86] *Ibidem*, p. 6.

[87] A. Roberts, *op. cit.*, p. 53.

[88] *Ibidem*, p. 61–62.

[89] See: E. Haliżak, *Północ w stosunkach międzynarodowych*; *idem*, *Południe (państwa rozwijające się – Trzeci Świat)* [in:] *Stosunki międzynarodowe. Geneza, struktura, dynamika*, eds. E. Haliżak, R. Kuźniar, Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2006, p. 435–481.

[90] R. Foot, *op. cit.*, p. 7.

highlights of this neo-liberal optimism during this period is the example of a well known argument by Francis Fukuyama about the end of history. This atmosphere was connected with the apparent ultimate triumph of the set of values associated with the liberal western democracies, which was especially evident in Central and Eastern Europe in the 1990s. The accompanying globalization processes in both the economic and technical dimensions further strengthened this effect, widening the field of discussion on common problems and values, which was evidenced by a role of the UN Security Council that was significantly deeper and far more active than in the previous era on matters relating to world peace.[91] The effect of these changes in the axiological dimension seems to be twofold: first, the very understanding of justice has been problematized and, secondly, there has been a redefinition of the relationship between the international order and justice.

2.4.2. The relation between order and justice

Along with the significant changes in the paradigm of justice in the international dimension comes also a redefinition of its relationship with order. In the traditional sense, as has already been mentioned above, both concepts are perceived as standing in opposition to each other. This antinomy can be solved in two ways – by adopting an orthodox conservative view for the benefit of order understood in minimalist terms or according to the revolutionary position for the benefit of justice, in accordance with the principle: "Let there be justice though the world perish" (*fiat iustitia, pereat mundus*).[92] Last but not least, there is a third way representing the liberal or progressive view, which rejects the claim that there is any inherent conflict between order and justice, and tries to reconcile these two values.[93] In the opinion of some authors[94] nowadays there is a revival of the liberal view, which certainly is related both to the end of the Cold War and the growing importance of human rights and humanitarian law as well as to the processes of globalization in general.

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[91] *Ibidem*.

[92] H. Bull, *The Anarchical Society…*, p. 90; J. Zajadło, *Łacińska terminologia prawnicza*, Wolters Kluwer, Warszawa 2009, p. 31.

[93] H. Bull, *The Anarchical Society*…, p. 90.

[94] R. Foot, *op. cit.*, p. 2; similarly H. Bull, *The Anarchical Society*…, p. 91.

According to such an interpretation, order and justice represent two sets of closely related and mutually dependent values and any attempts to antagonize or oppose them against each other are misconceived. This is evident in the political language, where these two values are most often inherently related and coexist – usually we talk about a just or unjust world order. Bull himself observed that, on the one hand, every configuration of power or a *status quo* regime in both global as well as in internal politics must take into account the requirements of justice or implement its postulates at least to some extent.[95] Otherwise, it is threatened by exceeding its critical mass, with the risk of one or another form of revolution or collapse, for which the unmet demands of justice often prove to be the perfect breeding ground. On the other hand, calls for progress in implementing justice must take into account the framework of the international order, because if reforms are adopted, the safest way to address them is by incorporating them within a given existing order, since only then can they count on protection, including legal protection.[96] Revolutionary and radical changes to the applicable principles of justice, carried out at the expense of ruining the existing order, can lead to the actual distortion of the original intentions of the initiators of the change – in accordance with the principle that revolutions devour their own children. Of course, this does not mean that there cannot exist an international community for which order so narrowly understood is the main value of an intrinsic nature; for example, the global international society at the height of the Cold War. But it would be a very fragile society of a pluralist character, where the possibilities of attaining common objectives are limited. Order in such conditions is characterized by a rather high risk of instability and conflict, because its maintenance is supported only by power and fear. As Bull observes, the international community, which has reached a consensus not only on basic issues of order, but also on a much wider range of views on international, individual and perhaps even world justice, is in a stronger position to maintain a framework for minimum order or coexistence than any other international community that has not done so.[97]

[95] See: H. Bull, *The Anarchical Society*…, p. 91–92.

[96] *Ibidem*.

[97] *Ibidem*, p. 91.

It follows from the observations above that justice should be considered as an immanent part constituting the concept of order.[98] There are at least three arguments in support of this thesis. Firstly, as argued by Bull, order is based on three fundamental values: life, truth and ownership. Therefore, maintaining order equals a statement that realization of these goals is good *per se* for a community. Thus, those who seek to protect them behave, *ceteris paribus*, in a just way. Secondly, as a consequence, the possibility of effective implementation of these objectives means that efforts towards protection of order are simultaneously part of the system of maintaining justice. Thirdly, one of the arguments for respecting order that will be convincing for a given particular member of the international community is the recognition by other members of the community of such a state of matters safeguarding those values as right and therefore fair.[99] From such a perspective on the relation between order and justice in international relations follows a very important conclusion. If order (an instrumental value) is just some form of realization of justice (ultimate value) and at the same time a form of justice itself, it means that the question of the relationship between the two concepts was posed in the wrong way from the beginning. The contrast between order and justice is in fact a problem of the relationship between different forms of justice.[100] A conflict of values in the international community flows from competition between different conceptions of justice, where one of them protects currently dominant system of values better than the others. For example, it can be a dialogue between international and transnational justice. The shape of the historically existing international order at a particular time is, therefore, only the embodiment of a *hic et nunc* dominant concept of justice. Basic values mentioned by Bull in his discussion on order, namely: the survival of the community of states, the sovereignty of its members or peace among them, are simply an expression of the principle of interstate justice, which was clearly dominant in the second half of the twentieth century, when *The Anarchical Society* was published.

[98] I. Harris, *op. cit*., p. 731–732. This view is also shared by A. Hurrell (see: *idem*, *On Global Order…*, p. 296).

[99] I. Harris, *op. cit.,* p. 732.

[100] *Ibidem*.

2.5. Clash of values

Does the above mean that there are no essential conflicts between different values within the international community? The answer to this question must of course be negative, because the conflict of values is inherent in any moral system and is often created even locally within the same culture, and all communities need to look for ways to cope with this diversity. Naturally, the international community is not an exception. Moreover, in this case the task of managing the conflict of values is far more difficult because of the enormous social, cultural, and religious diversity at the global level.[101] In the end it is nothing else than a conflict of values that is at the root of all moral, social, religious and legal disputes in international relations and thereby fuels the clash of different concepts of justice. However, various strategies for managing this conflict will depend on the particular model of the international community.

A pluralistic international community would in such case act rather passively, according to the principle "live and let others live". If a conflict of values is a potential source of most flashpoints in the international community, then particular groups representing different value systems (mainly states or groups of states) should be allowed autonomy of values and culture in the largest possible degree. This should reduce potential "collisions" of values.[102] In other words, the best solution according to pluralism is to apply the lowest common denominator strategy in moral matters and thereby attempt at avoiding conflict by not pushing for any over-ambitious form of "common morality". Hence, in normative terms the principle of non-intervention and the strong support for the principle of sovereignty will dominate.[103] The consequence of this approach is a belief that states, when acting on the global level, should put aside deep axiological commitment to international institutions and instead concentrate on negotiating more limited particular interests.

A solidarist international community, on the other hand, will also avoid a conflict of values, but it will take a proactive stance by emphasizing the widest possible set of common standards. This view is of course based on the assumption of the existence of a "common morality" in the international

[101] A. Hurrell, *On Global Order*…, p. 40.

[102] *Ibidem*, p. 47.

[103] *Ibidem*.

dimension, which boils down to the existence of a set of moral standards limiting and complementing, but not replacing, the moral or legal practices of the particular local communities.[104] Members of a solidarist community are aware that in the long run it is impossible to escape from the conflict between values. One also cannot ignore the evolution of international law in the direction of increasing anthropocentrism and intensifying globalization processes that cause state boundaries to cease to be effective moral barriers. Therefore, a solidarist community is committed to its institutional dimension. According to the constructivist view, institutions provide a forum where representatives of states are constantly confronted with new standards and values. In this way international institutions become a channel through which a process of spreading and promoting of standards takes place (e.g. in this way the so-called Bretton Woods institutions have become promoters of the economic doctrine of neo-liberalism), or channels serving to strengthen the already entrenched standards.[105] Therefore it can be concluded that these active forums of the international community, which provide room for socialization processes to occur and influence the elites of different states, constitute the way of draining axiological conflicts between the members of the community, as well as allowing for dissemination and internalization of those values[106] that are in the stage of gaining support through the complex processes of interaction.

This raises an important question about the ways in which a solidarist international community maintains shared values. Are they shared only and solely on the basis of a belief in them by the members of the community, as it is likely to be seen by the supporters of a liberal and cosmopolitan vision? Alexander Wendt believes that there are three ways of maintaining a system of values within the community, which he simultaneously perceives as models and degrees of their internalization. They are: coercion, calculation and belief.[107] The first of these – coercion – is of course the shallowest and the least sustainable scheme of maintaining respect for values. In this case, the system of values and usually a certain social structure along with them

[104] T. Nardin, *op. cit.*, p. 262.

[105] A. Hurrell, *On Global Order…*, p. 70.

[106] *Ibidem*, p. 70–71.

[107] A. Wendt, *Social Theory of International Politics*, Cambridge University Press, New York 1999, p. 268–278.

are externally imposed on the community. They are not internalized, and the crisis within the imposing hegemonic power can very quickly lead to their overthrow and therefore a sudden and fundamental axiological change, as happened in the case of the collapse of the USSR.[108] Calculation, on the other hand, comes down to internalization of some of the values by the members of a community due to the account of self-interest and possible benefits – the values are kept in place as long as it benefits the majority of members of the community.[109] Unfortunately, it is not clear whether this calculation is based on a more selfish way of thinking in terms of pure *raison d'état*, or possibly it can also base on more solidarist logics of *raison de système*. Thirdly, the most mature and most stable way of maintaining values within a community is belief. In this case, the legitimacy of the system of values and the whole social order shaped by it is based on a sense of a common identity.[110] It seems that this scheme is the most axiologically stable, as the members usually do not distinguish between the internal, external or imposed values and tend to treat all of them equally as their own. Deep internalization based on belief may cause so far-reaching sustainability of the value system which may survive for a long time after the collapse of the political structures in which it was born. As an example, one may recall the great religious, cultural and moral systems of Christianity after the fall of Rome or Islam after the collapse of the Abbasid dynasty.[111]

The first impression from Wendt's triad would be that it fits perfectly the trialectics of the English school, and that his ways of maintaining values neatly match the three models of structure in international relations according to Bull's or Wight's view, namely: coercion fits most properly the international system, calculation fits a pluralistic international society, and belief fits a solidarist international community or world society. However, Wendt argues that each of these ways of value management can occur in any type of community system and in various configurations.[112] This means that, for

[108] B. Buzan, *From International…*, p. 103.

[109] *Ibidem*, p. 103.

[110] *Ibidem*.

[111] *Ibidem*.

[112] See: *ibidem*, p. 104. Wendt does not take the three traditions framework directly from the English school, however, his three kinds of social structures may be considered as their equivalent. He names them Hobbesian, Lockean and Kantian structures (A. Wendt, *Social Theory…*, p. 246–312).

example, in the so-called Kantian type community, which has solidarist ambitions, belief is not necessarily always the dominant mode of maintaining and internalizing values. It may well be so that it is replaced by coercion, as was the case of the Soviet Union and the communist "brotherhood" of states (which was undoubtedly a highly solidarist project, at least by ambition of the hegemon).[113] In turn, for example, in a pluralistic international society, in addition to the dominance of calculation there can also on occasion occur a hegemonic coercion or deep belief in the inalienable and common values as a prevailing factor, as was the case in the modern era of the European *grande république*.[114]

In light of the above we can see that a solidarist international community especially is faced with difficult moral problems concerning the management of conflicts of values. The consensus on values beyond the basic ones concerning survival and coexistence (to which a minimalist or pluralist international society limits itself) is in principle reached through their diffusion, communication between the members of the community and progressive internalization of the values. However, modes of upholding common values in the international community may be based not only on belief in them (in which case the community shows the deepest and most stable dimension of solidarism), but also on calculation or even coercion.[115] The latter however, creates for a solidarist community a problem of moral dualism, which is used against it as criticism by the pluralists. From a moral point of view it is important not only which particular values are to be shared as common (e.g. think of the problem of the universality of human rights), but also how they should be maintained and enforced.[116] A very good example of this dilemma is widely discussed in the literature. The problem of humanitarian intervention raises the question of whether using in principle "bad" means (coercion taking the character of violence or war) one can achieve "good" goals, especially when these usually *ad hoc* measures even temporarily adversely affect or undermine the same values which they were intended to protect from large-scale violation in the first place.[117] Therefore, it might

[113] B. Buzan, *From International…*, p. 104.
[114] A. Hurrell, *On Global Order…*, p. 40.
[115] B. Buzan, *From International…*, p. 153–154.
[116] *Ibidem*, p. 152–153.
[117] J. Zajadło, *Dylematy humanitarnej interwencji…*, p. 297 et seq.

be helpful to introduce a few organizing principles into the international community inspired by multiculturalism and the idea of communicative community. They are mutual recognition principle, communication and the symmetry of relation between members of the community.[118] Each member of the international community, no matter what is its ontological status (states, individuals), should be treated equally and freely in its relations with other members and has an obligation to be responsible for the other on the condition of reciprocity.[119] This allows different individual members or sub-communities within the international community to exchange perspectives on values and thus ultimately reach a mutual compromise on common values or at least stay convinced of "value and authenticy of different cultures and lifestyles even in situations when they do not share its self-understanding".[120]

In the context of the debate about values in the international community, it is also worthwhile to ask more questions about what it means that certain values are "shared" by the community or may be considered as "common". Undoubtedly, one should have in mind only these values which in some way came out "victorious" from the abovementioned clashes of values as a coherent whole, able to represent particular concept of international justice. According to Barry Buzan, community of values means that they are at least shared by the political leadership of states (a minimalist view) or even that there is a broad support for these values among the elites, and up to existence of a popular belief in them by the whole society (a maximalist view).[121] Naturally, therefore, the international community will have a varied axiological base, where some values will be ingrained deeper, reaching to the roots of global civil society, while others will be shared only by the elite and it seems that therefore their sustainability would be lesser. It is worth noting at this point that a peculiar situation may arise, resulting in a strong axiological conflict, when a set of values is shared and promoted by leaders or

[118] B. Wojciechowski, *Justyfying Punishment in Multicultural Societies* [in:] *Between complexity of law and lack of order. Philosophy of law in the era of globalization*, eds. B. Wojciechowski, M. Zirk-Sadowski, M.J. Golecki, Wydawnictwo Adam Marszałek, Toruń–Beijing 2009, p. 257–262.

[119] *Ibidem.*

[120] *Ibidem*, p. 262.

[121] B. Buzan, *From International…*, p. 155.

narrow elites, while the masses are convinced to believe in opposing social values. A good example is the disputes over the neo-liberal economic values essentially pushed through and intensively promoted at the turn of the millennium by a group of political and international business leaders of major financial institutions, that is, to put it in the words of Samuel Huntington, representatives of the so-called "Davos culture".[122] These elites were opposed by alter-globalists or more recently by the "Outraged" or the "Occupy Wall Street" protesters aspiring to the role of representatives of the mass global society. This example brings to mind another important criterion in the debate over the level of solidarity of the international community. It should be kept in mind that particular values can be shared at different levels of intensity and commitment – from conservative belief, or even only nominal support with a considerable dose of scepticism, up to fanaticism.[123] Unfortunately, in this case, it is difficult adequately to measure the level of this rather subjectively perceived conviction.

2.6. Conclusion

Summarizing this outline of relations between values in the international community, we should return to the question whether a solidarist international community requires the existence of a common culture, or even civilization. For the scholars from the circle of the classic English school, who saw the cradle of the international community in the community of the European nations, which subsequently spread to the whole international system on a global scale, the answer to this question seems to be affirmative.[124] This view is moreover deeply rooted in the European history of political thought. At least since the eighteenth century, the European *grande république* was seen as a certain whole – a cultural community. This conviction was strong enough to allow many lawyers as early as the nineteenth century to believe that international law was a specific cultural product of this community, and not merely – as a later theory proclaimed – the effect of the concurrence of

[122] See: S. Huntington, *Zderzenie cywilizacji – i nowy kształt ładu światowego*, trans. H. Jankowska, Muza SA, Warszawa 2003, p. 79.

[123] See: B. Buzan, *From International*…, p. 156.

[124] See: A. Watson, *op. cit.*, p. 317–318.

will and a fruit of understanding between the sovereign states.[125] It seems that such an axiological evolution towards a common culture or even global civilization not only means a more stable base of values in the international or transnational dimension, but also that it can lead to a progressive homogenization between the members of the international community in axiological terms. If the view that the Kantian concept of perpetual peace is classified as a type of a deep advanced solidarism, then perhaps the path to such a solidarist community leads through the emergence of the common culture. This would probably also require progress in the dimension of the world community. As mentioned above, the deepest strengthening of particular values within the international community occurs when a belief in them is shared by the broader civil society at the global level (world community element) and not just by the political elites (international society element).

Looking through the prism of the role of a common culture, a question arises whether the whole debate about shaping of common values of the international community is not simply – as Samuel Huntington[126] and before him Arnold Toynbee[127] would have imagined – a clash, or a form of interaction between already well established and fairly axiologically consistent great culture blocks or civilizations? Obviously, Huntington's argument met with suspicion of too far-reaching simplifications, because first of all the category of "civilization" seems too complex and heterogeneous to yield to the logic of functioning as a single entity.[128] Secondly, in fact the particular players on the world political stage often present conflicting views as to the fundamental issues, and cracks occur not necessarily along cultural or civilizational lines. For instance, the row over the International Criminal Court between the United States and most of its European allies, or even between the member states of the European Union on issues such as the Iraq war, where all these states can be classified as belonging to the broad culture of the West. However, this vision may raise doubts as to whether the process of European expansion of the international community in the twentieth century is really followed by a formation of the new axiology of the international commu-

[125] A. Hurrell, *On Global Order*…, p. 41.

[126] S.P. Huntington, *op. cit*., *passim*.

[127] A.J. Toynbee, *Studium historii*, trans. J. Marzęcki, Państwowy Instytut Wydawniczy, Warszawa 2000.

[128] See: A. Hurrell, *On Global Order*…, p. 43–44.

nity, or rather by a slow offensive of the liberal values of western culture, so closely connected with the historical roots of the present international society. Has the new global international community any chance for its own, autonomous cultural and axiological foundations? This question also applies to the methods by which the values of the community are adopted and maintained – whether it is actually a process of free diffusion (and in which direction, whether by chance not from the civilizational "centre" to the cultural peripheries) and internalization according to the constructivist model, especially among the economically weaker members of the community (the poor South). Or maybe, in fact, their acceptance is a compromise with respect to the hegemonic position of the United States, China and lesser powers? As mentioned above, the values that add up to constitute the dominating concept of justice in the international dimension and are thus the backbone of the existing international order, being continually challenged, are maintained in different proportions by coercion, calculation and belief. However, there is yet another possibility mentioned above – a perspective of "soft multiculturalism" based on a moderate cultural relativism that may be a third way between pluralist and universalist extremes.[129]

To complete this analysis another key subjective aspect has to be considered – the question of who becomes the main propagator or guarantor of these values, and when. Is it the international community as a whole, or does an uneven distribution of potential and power between its members play a crucial role? If it is the former, then has this community developed appropriate institutions and regulatory tools that facilitate its ability to influence and control the members? The subjective aspect (or the structural element in the definition of the international community) will be examined in the next chapter.

[129] B. Wojciechowski, *Justyfying Punishment*…, p. 262; cf. *idem*, *Interkulturowe prawo karne. Filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych*, Wydawnictwo Adam Marszałek, Toruń 2009.

Chapter III

Structure: The Actors of the International Community

3.1. Relation between membership and structure of the international community

The major part of the debate on the international community revolves around the question of its subjective dimension, which is often considered to be the key, defining aspect. The question of membership in the international community is not only the problem of defining the boundaries, that is the question of who belongs to it, and who, under what conditions, and whether at all, does not. Also, and perhaps above all, this question has an ontological character. As already mentioned in the previous chapter, the ontological argument was often used as the main criterion for distinguishing between the central concepts of the English school of international relations, such as the "international society" and the "world society". Therefore, it is certainly of significance in this context to explore carefully the types of different entities that may qualify as the members of the international community. Naturally, one should bear in mind their potential heterogeneity even within the same category and consequently also their likely evolutionary nature. Such analysis should enable us to formulate some answers to the question of the structure or potential structures that can be formed between the actors of the international community on the basis of their relationships.

Analysis of these issues can also become a starting point for an attempt critically to verify one of the well established paradigms about the flat and anarchic structure of the international community. According to this view, the mutual relations between states in the international community are

based on the principle of equality and sovereignty understood in terms of the principle of *par in parem non habet imperium*.[1] Of course this assumption is not only a far-reaching simplification of the actual image of the international community, but is also consciously fictitious, especially as far as the concept of sovereign equality is concerned.[2] Nevertheless, in the dogmatic views of many international lawyers or politicians this principle appears as an "inviolable" legal institution lined with a thick layer of rhetoric, which often unnecessarily places international law in conflict with the requirements of pragmatic political solutions. The equivalent of the legal-dogmatic thesis about the equality of states in the international relations theory is the assertion that there is no hierarchy or functional differentiation between states, and the relative distribution of power naturally occurs between the participants of international relations (which may be manifested, for example, in the operation of the principle of equilibrium of powers as a typically pluralist institution of the international society).[3] This vision of the structure of the international community was supported by a leading neo-realist, Kenneth Waltz, who relied on the basic distinction between premodern and modern society proposed by the classic sociology of Émile Durkheim (1859–1917).[4] Premodern societies were characterized by a lack of formal institutional hierarchy, and their members did not show the high degree of differentiation of knowledge and skills needed for far-reaching division of labour. A completely different situation occurs in modern societies, which manifest "organic solidarity" and thus are far more advanced in the division of labour, and also in the normative complexity of their structures.[5] The international community in its structure and degree of organization would represent Durkheim's premodern society model, where the overriding organizing principle is an-

[1] See: R. Bierzanek, J. Symonides, *op. cit.*, p. 15; M.N. Shaw, *Prawo międzynarodowe…*, p. 28–32; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, 2nd ed., C.H. Beck, Warszawa 2004, p. 1–8.

[2] See: J. Zajadło, *Teoria sprawiedliwości…*, p. 95–117.

[3] H. Spruyt, *Microhistorical Comparisons and the Westphalian Moment* [in:] Y.H. Ferguson et al., *What is The Polity? A Roundtable*, International Studies Association 2000, Blackwell Publishers, p. 12.

[4] See: É. Durkheim, *The Division of Labor in Society*, The Free Press, New York 1997. On Durkheim in this context see also: R. Wacks, *Philosophy of Law – a Very Short Introduction*, Oxford University Press, Oxford–New York 2006, p. 76–78.

[5] See: H. Spruyt, *op. cit*., p. 12 et seq.

archy, and the states are much more interested in fighting for survival than in reflecting on their conduct.[6] However, such an interpretation of Durkheim, and at the same the vision of international relations, is extremely static and ignores the processes of change that continually seem to occur within the international community. According to some scholars,[7] Durkheim was primarily interested in the mechanisms leading to the transformation of societies from the premodern to modern. He emphasized the fact that the growing dependencies and intensification of interactions between the members enable this evolution and, consequently, the qualitative change to a modern society. Therefore, his theory can be equally well used as a counterargument against the realists. Others argue that Durkheim dealt only with complex communities of individuals, and not with other types of societies, thus extrapolating his theory by neo-realists to a much more complicated normativly dimension of international relations is unjustified.[8]

The response of the liberal wing of international relations theory to the problem of membership of the international community and its structure is quite different. Not only is it highlighted that the international community has considerably diversified and broadened its membership and that it no longer includes only states,[9] but also that a continuously expanding agenda of challenges that face the international community forces changes in its organization, structure and mechanisms of interaction between members.[10] It is worth recalling that, in the framework of the classical English school of thought, the international community is identified primarily as a community of states.[11] However, this does not mean ignoring the role of non-state actors. Even though non-state actors are traditionally considered to belong rather to the dimension of "world society",[12] in a broader discourse such entities are identified as a part of the wider international community. Given that even in the recent literature of international law, at least some non-state actors are

[6] S. Burchill, *Realism and neorealism* [in:] S. Burchill et al., *op. cit.*, p. 124–125.

[7] Cf. H. Spruyt, *op. cit.*, p. 13.

[8] *Ibidem*.

[9] See: B. Mielnik, *op. cit.*, *passim*.

[10] See: A. Hurrell, *On Global Order.…*, p. 6.

[11] J. Czaputowicz, *Teorie stosunków.…*, p. 259–263.

[12] However, some interpretations of the English school include non-state actors within the solidarist interpretation, cf. K. Anderson, *Introduction* [in:] K. Alderson, A. Hurrell, *Hedley Bull*…, p. 19–20.

treated as subjects of public international law,[13] a division of the international community should be made into the community of states (or international society in the understanding of the English school of international relations) and the international community in the broad sense, including three basic groups of entities "playing the game": states, transnational actors and individuals.[14] In the remainder of this chapter, the phrase "international community" refers to this broad interpretation.

The attempt to answer questions about the membership aspect of the international community will require, above all, analysis of the status and role of the contemporary state in the international community. This is due to a consensus among representatives of such diverse disciplines as international law, international relations, sociology and philosophy about the unchanging and central position of the state in the international system: a foundation upon which other types of members – defined negatively in contrast to the state (non-state actors) – are added. Since, however, as indicated above, even in the eyes of the doctrine of international law the state is beginning slowly to lose its absolute monopoly in favour of the growing role of non-state actors,[15] it will be important to analyse the importance of these entities and their membership in the community, with particular emphasis on international organizations, NGOs, international companies and individuals.

3.2. The state as primary member of the international community

The state has been the primary and undisputed subject of law and international relations,[16] at least from its birth in the modern era (in the seventeenth

[13] B. Mielnik, *op. cit*., *passim*. This tendency is seen in newer textbooks on international law: J. Barcik, T. Srogosz, *op. cit*., p. 1; cf. M.N. Shaw, *Prawo międzynarodowe…*, p. 134–135.

[14] I take this typology from B. Buzan, *From International…*, p. 119.

[15] See: M. Wagner, *Non-State Actors* [in:] *Max Planck Encyclopedia of Public International Law*, http://www.mpepil.com, accessed 1 June 2010.

[16] It should be noted, however, that while the primary character of the subjectivity of the state does not raise any controversy in the doctrine of international law, some scholars of international relations classify the state as a secondary subject, after the nations, which are considered to be primary; see: J. Kukułka, *Wstęp do nauki…*, p. 104. Nevertheless, some acts of international law could be read as supporting the

century). In recent decades there have been many voices in the literature prophesizing the decline of the era of states and their fall as major participants of international relations.[17] However, the proclamation of the alleged death of the state turned out to be definitely premature. On the contrary, its role in recent years seems to be growing again, naturally alongside the process of its diminishing autonomy on behalf of inter- and transnational forces.[18] The concept of the state as the basic category is also closely related to the English school of international society, not only in the writings of Bull, for whom it was simply a "society of states", but also in the work of other authors in earlier periods.[19] That ontological indissolubility of the relations between the state and international politics, stamping its mark on every normative debate and still determining the mindset of the international community, has been aptly summarized by MacCormick when he asserted that the vision of the world order that we have inherited is dominated by the concept of nationhood.[20]

The consequence of the central importance of the state both for international law and international relations theory is the attempt to define it. Within the theory of the state (*Allgemeine Staatslehre*, *theorie générale de l'état*), the most widely accepted definition is the one formulated by the German classical legal positivist George Jellinek.[21] This characterizes the state by

argument that the nation may, in certain circumstances, gain priority in relation to the state as the most rudimentary member of the international community. One such example is provided in UN Security Council Resolution No. 794 (1992), in which the Security Council addressed directly the Somali people because of the *de facto* termination of the Somali government (J. Zajadło, *Prawo międzynarodowe…*, p. 12).

[17] See: S.P. Sałajczyk, *Zmierzch lewiatana? Spór o pozycję państwa we współczesnych stosunkach międzynarodowych* [in:] *Państwo we współczesnych stosunkach międzynarodowych*, eds. E. Haliżak, I. Popiuk-Rysińska, Fundacja Studiów Międzynarodowych, Warszawa 1995, p. 160–174.

[18] A. Peters, *Membership in the Global Constitutional Community* [in:] J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, Oxford University Press, New York 2009, p. 197–198.

[19] See: T. Widłak, *Zarys historii myśli o społeczności międzynarodowej*, "Gdańskie Studia Prawnicze" 2009, t. 20, p. 349–369.

[20] N. MacCormick, *Liberalism, Nationalism and the Post-sovereign State*, "Political Studies" 1996, vol. 44, p. 554.

[21] A. Sylwestrzak, *Historia doktryn politycznych i prawnych*, LexisNexis, Warszawa 2002, p. 302.

referring to its three constituent elements: territory, inhabitants (people) and authority. This definition focuses essentially on the external and objective elements,[22] however this makes it particularly useful for the classical doctrine of international law, which is still strongly influenced by the realist tradition. Therefore, the doctrine of international law, at least in its classic version, does not need to explore the qualities and criteria that define the state from within. Law and international relations are a game, in which, like in billiards, only the kinetic energy of the interaction between the billiard-balls counts. This concept of state defined by Georg Jellinek found its way into the positive law, *inter alia*, in the judgment of the Polish-German Mixed Court of Arbitration, in *Deutsche Continental-Gesellshaft v Poland* (1929)[23] as well as in the Inter-American Convention on the Rights and Obligations of States, signed in 1933 during the Seventh International Conference of American States in Montevideo.[24] The latter document added to Jellinek's triad a fourth element, namely, the ability to maintain relations with other countries. According to some authors, the fourth criterion properly limited the too-broad original definition, allowing elimination of entities or communities which are not states under international law. Some scholars, however, among them the Polish professor of international law Alfons Klafkowski, were of the opinion that the fourth element is merely a manifestation of regional American particularism, and a result of specific circumstances in South and Central America, namely the frequent coups and revolutions, as a result of which many governments unable to maintain effective relations with others were created.[25] This in turn caused the need to eliminate such ephemera from the legal and diplomatic discourse. Setting aside these regional particularities, one could agree with a general view that the ability to maintain relations with other countries is a consequence of international legal subjecthood of the state, not its premise.[26]

[22] P. Winczorek, *Nauka o państwie*, Liber, Warszawa 2005, p. 61.

[23] R. Bierzanek, J. Symonides, *op. cit.*, p. 120.

[24] W. Czapliński, A. Wyrozumska, *op. cit.*, p. 133.

[25] R. Bierzanek, J. Symonides, *op. cit.*, p. 120. The fourth element is also recognized by W. Góralczyk and S. Sawicki, *op. cit.*, p. 115. A different view, restricted to the three elements, is represented by W. Czapliński, A. Wyrozumska, *op. cit.*, p. 133, note 3; J. Gilas, *Prawo międzynarodowe…*, p. 120; P. Winczorek, *op. cit.*, p. 61; A. Klafkowski, *Prawo międzynarodowe publiczne*, PWN, Warszawa 1979, p. 139.

[26] W. Czapliński, A. Wyrozumska, *op. cit.*, p. 133.

Although each of the above three constitutive elements of the definition of the state is necessary for its actual existence, the question may arise which of them has a decisive impact on the recognition of the political existence of an entity as a *de jure* member of the international community. This critical element is not necessarily the territory or population inhabiting it. Both of these components are in fact objective, and their real existence is undisputed. Nowadays, we are not dealing with any *terra incognita* that could be considered to be a *res nullius*, and which could in fact be subject to appropriation by the means of effective occupation. Similarly, in case of the population it is impossible to question its physical existence and the resulting fundamental human rights of its individual members. However, what is often subject to contestation in international relations is in fact the right to self-determination of a nation, and thus – in short – the third of the elements of the Jellinek's triad, which is authority.

In fact, all the problems associated with membership of states in the international community boil down to the question of the effective functioning of their governments. An example is the problem of the so-called failed states – political entities, which due to an implosion of the system of government became the antithesis of a state *par excellence*.[27] According to various

[27] See: J. Zajadło, *Prawo międzynarodowe…*, p. 3–20; also the recent literature on failed states: *Failed States and Fragile Societies: A New World Disorder?*, eds. I. Trauschweizer, S.M. Miner, Ohio University Press, Athens, OH 2014; D. Acemoglu, J. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, Crown Business, New York 2013; A. Ghani, C. Lockhart, *Fixing Failed States. A Framework for Rebuilding a Fractured World*, Oxford University Press, New York 2008; A. Hironaka, *Neverending Wars. The International Community, Weak States, and the Perpetuation of Civil War*, Harvard University Press, Cambridge 2008; *State Failure and State Weakness in a Time of Terror*, ed. R.I. Rotberg, The World Peace Foundation, New York 2003; *Collapsed States. The Disintegration and Restoration of Legitimate Authority*, ed. I.W. Zartman, Lynne Rienner Publishers, London 1995; I. Liebach, *Die unilaterale humanitäre Intervention im 'zerfallen Staat'*, Carl Heymanns, Köln–Berlin–München 2004; *Making States Work: State Failure and the Crisis of Governance*, eds. S. Chesterman, M. Ignatieff, R. Thakur, United Nations University Press, Tokyo–New York–Paris 2006; P. McLean, *Colombia: Failed, Failing or Just Weak?*, "The Washington Quarterly" 2002, vol. 25, no. 3, p. 123–134; M. Chege, *Sierra Leone: The State that Came Back from the Dead*, "The Washington Quarterly" 2002, vol. 25, no. 3; T. Widłak, *Contemporary International Law and the Problem of Failing States in the*

authors, in countries such as Somalia, Sierra Leone, Liberia, Sudan, Congo, Haiti and Burundi there has been, to varying degrees, a disintegration of the legitimate authority and a collapse of law and order.[28] As a result, these states have become dangerous flashpoints for the entire international community. Because of the lack of effective authority, a fierce rivalry between different groups occurs there, which takes the form of neo-Hobbesian war of all against all (*bellum omnium contra omnes*). The worst mass violations of human rights and safe havens for international terrorists, drug producers and traffickers are characteristic of these places.[29] The problem with failed states is that *de jure* they remain subjects of international law, because at the time of their creation, often in the process of decolonization, they apparently seemed to meet all the criteria of statehood. At the other extreme there are the so-called *de facto* regimes, whose statehood is generally questioned by some or most of the members of the international community only *de jure*, as there is no actual possibility of ignoring their authority, power or control over a certain territory if only for economic or military reasons. Entities such as Taiwan (the Republic of China) are not lacking any of the properties of a highly efficiently organized state, although their full acceptance among the international community is not possible because the element of their authority over a given territory or population is, for political reasons, legally questioned by other states. Yet another category is such pariahs of the international community as the Democratic People's Republic of Korea (North Korea). This state, despite its formal recognition, and even membership of the UN, politically and economically remains *de facto* outside the body of international community or at most on its distant periphery.

Does the principle of effectiveness then indeed have a crucial and overwhelming importance as a criterion for defining the state as a member of the international community? It should of course play the very pragmatic role of integrating the realities of power and politics with international law,[30] which

Light of the Case of Liberia, "Ordo et Iustitia – Zeszyty Naukowe Forum Badań ONZ" 2005, vol. 1: *Wybrane problemy praw człowieka*, ed. T. Widłak.

[28] R. Koskenmäki, *Legal Implications Resulting from State Failure in the Light of the Case of Somalia*, "Nordic Journal of International Law" 2004, vol. 73, no. 1, p. 2.

[29] See also: T. Widłak, *Rola społeczności międzynarodowej w odbudowie państw upadłych*, "Politeja" 2007, no. 1(7), p. 485–504.

[30] A. Peters, *Membership*…, p. 180.

is positive, on the one hand, because it harmonizes the law with the objective facts of international political life, but on the other hand, however, it carries the risk of weakening the role of the law, as the principle of effectiveness often requires accepting to some extent the argument of power at the expense of normative theory. However, the abovementioned examples of the opening gap between the legal and the actual make clear that, in a constitutionalizing legal order of the international community, law often refuses to step down before facts that are the result of operation, or just the opposite – non-operation, of the principle of effectiveness. It is therefore necessary to add that from the perspective of the international community the effectiveness of state authority is a necessary but not sufficient condition to qualify a state as a member of the international community; adding other complementary requirements is not only allowed but also indispensable.[31] If international law is the normative basis for the international community, it is self-evident that the emerging new state member is bound to meet other fundamental standards set forth by the law. The principles at stake here are foremost the prohibition of unlawful use of force and of violation of the right of nations to self-determination, but also other preemptory standards of the international human rights law and international humanitarian law.[32] The establishment of the state, contrary to the views of the classic doctrine of international law, is not limited to objective evidence of effective control over a defined territory and population, but must also take into account the social context in which this new entity is formed and in which it would act, and therefore its acceptance by the international community becomes essential. This social perspective emphasizes the principles of legality and legitimacy of the creation of a state, applied in the act of its universal recognition by other members of the international community.

3.3. The role of the state in the structure of the international community: three models

Reflection on different voices arguing for the prevailing central role of the state as a member of the international community may lead us to a few ob-

[31] *Ibidem*.

[32] *Ibidem*, p. 180–181.

servations. First of all, it still remains a timely assertion that, since its birth in the modern form until the present day, the state has remained the primary actor on the international stage. In fact, the presence of the state as a major structural element has a decisive influence on the very ontological nature of the international community. Therefore, the representatives of the English school are right in defining it primarily as a "community of states". It seems that scholars who claim that the proclamation of the "end of the state" is clearly unjustified or at least premature are not mistaken. However, it is also true that the world of states is often, on the one hand, unable to address the many economic, natural, political or cultural problems of the twenty-first century, and, on the other hand, incapable of meeting the expectations of citizens who are becoming ever more conscious consumers of public goods.[33] Jo-Anne Pemberton is right that the state remains the dominant subject of world politics and continues to hold its legitimacy as a form of political organization, not only because of the lack of viable alternatives to the concept of sovereignty, but also because it still enjoys wide support among citizens as an idea.[34] In spite of the visions of the prophets of the "end of history", in the first decade of the twenty-first century, the state has increased its importance[35] especially in the context of international military and economic security. The continuing dominance of the state as the primary political category in the international arena does not however mean that its character, identity and – consequently – the perception of its function and place in the international community remain unchanged.

The role that the state plays in the international community obviously affects its shape and character. Of course, states differ from each other objectively in their geographical, social, political, economic and military potential.[36] Perhaps, however, the social changes in the self-identification of the state, the intersubjective perception of its place in the international system,

[33] See: Y.H. Ferguson, R.W. Mansbach, *Introduction* [in:] Y.H. Ferguson et al., *op. cit.*, p. 1; cf. J. Symonides, Państwo w procesie globalizacji [in:] *Państwo w teorii i praktyce stosunków międzynarodowych*, eds. M. Sułek, J. Symonides, Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2009, p. 157–176.

[34] J.-A. Pemberton, *Sovereignty: Interpretations*, Palgrave Macmillan, Houndmills–New York 2009, p. 2–3.

[35] *Ibidem*, p. 2.

[36] See: G. Stern, *The Structure of International Society. An Introduction to the Study of International Relations*, Pinter, London–New York 2000, p. 97–102.

and the continuous redefinition and recreation of its own identity have had even more serious impacts on the differences between states and, therefore, on the heterogeneity of the whole category of "state" as the basic entity of the international community. In fact, these continuous evolutionary processes may serve as the point of departure in constructing the basic typology of states that could serve as a conceptual model. First of all, states may see themselves as the primary factor in ensuring security in the wider sense (agents of order). In this classical approach, just like a police officer, the state plays the basic role of the primary regulator of social life in almost every dimension, with the task – in the first place – to protect itself as an organization and the social order it represents against any possible manifestations of a neo-Hobbesian chaos and anarchy. Historically, this is probably the primary function of the state, but there are dozens of states in the international community who still define their identity primarily through this prism by choosing authoritarian forms of government and strongly emphasizing the orthodox understanding of sovereignty. This conception echoes the vision of Max Weber, who emphasized the bureaucratic power of the state, which has a monopoly on using organized violence and is seen as an anthropomorphic actor, operating independently of its society.[37] This kind of state usually appeals to the classical concept of sovereignty, and treats international law predominantly as an instrument for achieving its defined objectives in international relations, or at best as a tool to protect its sphere of exclusive competence. It is not uncommon with this type of state for international law to be systematically ignored when it creates uncomfortable situations or in order to avoid legal obligations in the international arena in general. The type of community or society built by this kind of state – if it exists at all, as they are better prepared to function in an international system – is a strongly pluralistic and instrumental one.

Secondly, one can distinguish a model of state that abandons the ambition to organize all social relations. The function of a "policeman" who guarantees order in this case gives way to the role of a "fiduciary" of certain political and social goods, whose ultimate beneficiary is the citizen. This model refers to a totally different understanding of exercising the authority as an agency[38] by the state acting as a representative in the name and on behalf

[37] See: A. Wendt, *Social Theory*…, p. 199–200.

[38] A. Hurrell, *On Global Order*…, p. 65.

of someone else (in this case, citizens, groups, communities or the common good), and not in its own separable interest (understood as the interests of the ruling group or bureaucratic structures of power). The fiduciary state therefore focuses on providing citizens with all kinds of public goods and performs its tasks aware that the attribute of sovereignty is only a tool to further this objective that rests in fact in the hands of those social beneficiaries and not the state itself. Nonetheless, the state retains its potential and plays a crucial and dominant role in these tasks. Sovereignty is not treated here in as absolutist a manner as in the previous model, because the activities of the state are subordinated to the higher purpose of the general good of individuals. It rather constitutes a legally protected area of the freedom of the state, consisting of specific rights. The *domaine réservé* of the state is limited and subordinated to international law, whose legitimacy or normative character is not questioned by the state. This kind of state entity typically forms a stable pluralistic international community based on the coexistence and domination of national interests. Depending on the degree of self-centredness[39] of the fiduciary states a weaker version of solidarism is even possible in this case, wherein smaller functional or regional solidarist international communities are more likely.

Last but not least, there is also a third type of a postmodern state, which has no permanently assigned function.[40] It does not perceive itself as a personification of the sovereign power, nor does it act as an agent on behalf of the common good, but it is rather a kind of framework for various public and private institutions and persons (economic and social actors), competing amongst themselves and cooperating with each other in providing the most effective solutions to emerging problems. Thereby they support the state not so much in governing, but more in governance and other management duties. In this way, the functions of the state, in accordance with the principle of subsidiarity, may be delegated to different levels – to local governments, to the private sector (e.g. public-private partnerships), and even to external

[39] This problem is widely discussed by A. Wendt (*idem*, *Social Theory*…, p. 295), who believes that the liberal states of the "Lockean culture" are characterized by a relatively low degree of socialization, as manifested often by them jealously guarding their own sovereignty and forcing their own point of view on the international community of states.

[40] A. Hurrell, *On Global Order*…, p. 114.

entities of transnational or supranational character, where the efficiency and responsibility for the ultimate prosperity of the state as a whole and the individual citizens are fundamental criteria in deciding on the allocation of powers. The sphere of sovereignty is not an area isolated from international law, since it is generally not seen as being in any opposition to the interests of the state. Sovereignty as responsibility for individuals is integrated with the international law of human rights and is fully consistent with its standards. According to another slightly different approach, sovereignty traditionally conceived takes on a typically contractual nature.[41] Paraphrasing a popular concept from commerce, one could even perhaps speak of the outsourcing of sovereignty. It may be understood, on the one hand, as a devolution of sovereign competences using the subsidiarity principle to other levels above and below the state, where their excercise could be most effectively secured, and on the other hand as a possibility to derive legitimacy directly from the international community in the event of shortages in crisis situations (e.g. in the case of responsibility to rebuild).

It would be difficult to give clear examples of states capable of being unambiguously classed in each of these types. It seems that present-day states may identify themselves as having various elements of the three models. The liberal western democracies typically show more features belonging to the type of state-fiduciary and the postmodern state. The authoritarian regimes, in turn, are usually more police-state types, focusing on "hard" attributes of power. These three types of statehood do not necessarily constitute an evolutionary timeline model, nor do they represent stages in a historically changing moral purpose of the state, but coexist in different states of the international community, and sometimes even mingle within the same state at the same time.

3.4. Non-state actors as the members of the international community

There is probably no agreed definition of what global governance actually is.[42] Although there is controversy both as to the meaning of "global" as well

[41] *Ibidem*, p. 115. See also: A. Peters, *Membership*…, p. 187.

[42] See: L.S. Finkelstein, *What Is Global Governance?*, "Global Governance" 1995, no. 1, p. 367–372.

as "governance", most accounts would probably agree that the theatre where this play titled "global governance" is performed may be identified as "the international community". This is of course a specific kind of performance in which many actors take part having an inherently double role: both as performers and spectators at the same time. What the participants aim to do is of course to exercise authority and project power[43] in that arena, since, according to a conventional formulation of global governance, it is primarily all about authority and rule making.[44] Those who are able to exercise authority effectively are also in a position to set a global order in place. But there is yet a deeper aspect to that; almost any attempt to theorize the notion of global "order" in the international realm appeals in some way to the common values of the international community. No matter what the particular institutions or empirical patterns of global governance would be, they are always underpinned by what James N. Rosenau named a basic level of inter-subjective shared social understandings,[45] among which shared values evidently play the most eminent role. No matter what one's position on the issue of whether there exists a catalogue of fundamental values pertinent to any society at any point of time,[46] it is undoubted that a competitive "market" of values which aspire to be "universal" exists in the contemporary international community, since values of governance seem currently to be subject to cultural contestation in an increasingly multi-polar world.[47] These values are created, pro-

[43] I agree with the fundamental distinction between authority and power; the main difference lays in that authority is legitimized or regarded as legitimate by subjects to this authority, whereas power is generally not institutionalized in this way; see e.g.: *The Emergence of Private Authority in the International System*, eds. R.B. Hall, T.J. Biersteker, Cambridge University Press, Cambridge 2002, p. 4–5.

[44] See: I. Clark, *Legitimacy in a Global Order*, "Review of International Studies" 2003, vol. 29, no. 1, p. 76.

[45] J.N. Rosenau, *Governance, Order, and Change in World Politics* [in:] J.N. Rosenau, E.-O. Czempiel, *Governance Without Government: Order and Change in World Politics*, Cambridge Univeristy Press, Cambridge 1992, p. 14–18.

[46] See e.g.: H. Bull, *The Anarchical Society*…, p. 16–19.

[47] Take into account e.g. R. Jackson's claim that the debate around "humanitarian intervention" is in fact a debate about the values of international society and their hierarchy; R.H. Jackson, *The Global Covenant*…, p. 291. The mediation of value conflict is regarded as one of the major challenges for a stable and legitimate international society in view of A. Hurrell; see: A. Hurrell, *On Global Order*…, *passim*.

moted and embodied in rules and norms by the actors, aptly named "agents of order".[48] Therefore, the central question of who are the agents of order, the main *dramatis personae* of this play about a new global order performed on the stage of the international community, is a fundamental one.

Identifying the actors is only the first step, however, because what is crucial for global governance in the twenty-first century is the meaningfulness of this actor structure of international community in relation to the already existing and deeply rooted normative regulators and institutions of global governance, centring around the state as the primary actor, on the one hand, and international law on the other. It is particularly interesting how law, as the primary normative regulator of the state era, responds to the changing structure of the international community. It is enough to mention that the semantics of the notion of "international law" already seem somehow insufficient; after all, the prefix "inter-" followed by "national" may imply the regulation only of relations between states. How good then is international law, with its paradigms and current theoretical framework concerning its subjects or legal persons, at accommodating the new agents of order?

Before any preliminary conclusions to this otherwise immensely deep and inherently philosophical problem may be outlined, a cursory analysis of the major non-state actors and their status both as members of international community as well as alleged subjects of international law needs to be developed. I have indicated above that the main defining characteristics of legitimate non-state agents of order would be in my view two-fold: they are either those actors who effectively and meaningfully contribute to, and influence law-making (or even in a broader view: rule-making) in the international plane, or those who are in a position to contribute to the "market of values" and thus actually have a considerable influence on the axiology of the international community.[49] Nonetheless my ontological catalogue of non-state actors is rather conventional; the entities analysed are intergovernmental or-

[48] *Ibidem*, p. 6.

[49] I am aware of the imprecision of these criteria, therefore I treat them rather as means of approximation of the notion of a "member of international community" rather than a testable definition. This would inherently depend on a coherent vision of the international law itself – for example, how the values underpin legal norms, what is the nature of participation in the process of law making and how a legal "norm" is different from a "rule".

ganizations (IOs), non-governmental organizations (NGOs), multinational corporations (MNCs), failed states and individuals.[50]

3.4.1. Intergovernmental Organizations

International intergovernmental organizations are obviously the most familiar species of non-state actors from the point of view of international law, not only because of their relatively long historical record. Most often they are referred to as "secondary" (*vis-à-vis* states), limited and non-sovereign subjects of international law,[51] but they are generally accepted to have a stable legal status and legal personality under international law. The adjective "secondary" needs to be understood here in strictly legal terms, meaning that the states are the primary subjects, able to create and thus confer powers on intergovernmental organizations by the virtue of their exclusive sovereign status.[52] This of course has nothing to do with any sort of historical order, because ironically many of the most important contemporary IGOs, such as the International Labour Organization (established 1919)[53] are in fact much older than most of the existing states themselves.

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[50] This choice of categories may seem arbitrary, as for example various armed groups, liberation movements and transnational criminal networks were not included. This is mainly due to the limits of this book and a secondary meaning of these actors from the major point of analysis. Besides, obviously groups of a criminal or terrorist character cannot be granted any status as members of the international community in the meaning employed here. Similarly, some specific entities recognized as subjects of international law, such as the Holy See, the Sovereign Military Order of Malta and territories with contested status or subject to international administration, were excluded.

[51] J. Barcik, T. Srogosz, *op. cit.*, p. 145.

[52] However, it is worth mentioning that existing IGOs are also often capable of creating or participating in the creation of new IGOs, for example, the World Conservation Union, which consists of states, governmental agencies and NGOs; see: S. Charnovitz, *Nongovernmental Organizations and International Law*, "American Journal of International Law" 2006, vol. 100, no. 1, p. 351–352.

[53] The first IGOs created in modern times date back to the early 1800s; for instance, the Commission centrale pour la navigation du Rhin (CCNR) established in 1815 is often given as an example of one of the oldest IGOs; J. Kukułka, *Wstęp do nauki…*, p. 110.

This neat and rather cursory statement about the legal nature of IGOs does not obviously illustrate the hidden theoretical controversies. The standard indicators of legal "subjecthood" in the theory of international law are widely considered to be three characteristics that a subject needs to possess: (1) the right of lawmaking under international law – *jus tractatuum*, (2) the right to conduct recognized direct diplomatic relations – *jus legationis/missionis* and (3) standing before international judiciary bodies – *jus standi*.[54] States, quite obviously, possess all three attributes in full capacity. As far as the category of IGOs is concerned, they are also generally regarded as being in possession of those three attributes. Three important legal sources may be called in evidence of that: the 1986 Vienna Convention on the Law of Treaties Concluded with or between International Organizations, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, and the often cited *Reparation for Injuries* opinion (ICJ Reports 1949)[55] by the International Court of Justice (ICJ) concerning the UN's right to bring judicial claims for damages against a state before courts. However, these documents demonstrate only the general view on the issue of subjecthood and in consequence the legal personality of IGOs. Obviously not all IGOs even have the possibilities and capacities to make use of all these attributes; not all of them send and receive diplomatic envoys or missions and, in the case of lawmaking, Article 6 of the Vienna Convention explicitly proclaims "the capacity of international organizations to conclude treaties is governed by the rules of the organization". As for the *ius standi*, IGOs are nevertheless excluded as a party in contentious proceedings before the ICJ since the Article 34 of the Statute of the ICJ could not be clearer in stating that "[o]nly states may be parties in cases before the Court".[56]

These impediments to the capacities of IGOs flowing from the general international law have in turn caused doubts as to the exact nature of the legal personality of IGOs both generally and in particular cases.[57] At some point,

[54] See: J. Klabbers, *An Introduction to International Institutional Law*, Cambridge University Press, New York 2002, p. 43–48; R. Bierzanek, *Współczesne stosunki międzynarodowe*, Państwowy Instytut Wydawniczy, Warszawa 1972, p. 175.

[55] ICJ Reports, 1949, http://bit.ly/1BqqcJl, accessed 14 November 2014.

[56] For analysis of these three indicators of subjecthood of IGOs in international law see: J. Klabbers, *An Introduction*…, p. 42–48.

[57] As Jan Klabbers accurately points out, the debates on this issue are largely underpinned by two contending theories explaining the genesis of the legal personality of

however, the discussion actually becomes quite fruitless. The essential question to ask is whether a denial by any state of the legal personality of any IGO actually deprives it of its status.[58] One can go even further and ask, why would the states that create IGOs afterwards deny their legal personality and thus their general ability to act under international law? Why then would such a state create an IGO in the first place? Similarly, non-recognition or denial of an IGO by a non-member state is legally no different from denial of recognition of another state (a situation which is anyway not so uncommon within the international community) and essentially is not pertinent to the question of the legal status or personality of the unrecognized entity, provided that the denial of recognition is not near universal. This shows that the very notion of the international legal personality of IGOs is normatively empty, and the discussion on the nature of its limitations or of a status "secondary" to that of states' legal personality brings in a vicious-circle kind of a purely legal-theoretical discussion. In essence, the sole fact that the founders of an IGO have explicitly endowed it with a legal personality by putting a clause in the treaty establishing the IGO does not bear any legal consequences by itself.[59] It is also worth noting that in practice there is no need for a theory explaining the nature of the "limitations" of the international legal personality of IGOs since they do not seek to challenge them, nor do they aspire to the full capacities of states. IGOs are naturally limited in their capacities and their activities are directed, because unlike states they are purposive and functional creations. Therefore preferably one should not speak about any sort of "limited legal personality", as that leads to unintentional domestic analogies with private law, but rather about a qualitatively different type of personality; nonetheless it is a personality and therefore, consequently, indisputably confers the status of a subject of international law.

The legal controversies surrounding the status of IGOs are rather minor and, as it seems, long gone from the mainstream of international legal de-

IGOs. Under the "will theory", the will of the founding states is decisive for the fact of an IGO possessing legal personality; therefore they may bestow it or withhold it from the organization, according to their wish, in the founding treaty. The other theory is the "objective theory", that the acquisition of legal personality is independent of the will of other actors, it is recognized by international law as soon as the organization constitutes itself and fulfils all the requirements as the matter of general international law; *ibidem*, p. 52–57.

[58] W. Czapliński, A. Wyrozumska, *op. cit.*, p. 334–335.

[59] J. Klabbers, *An Introduction*…, p. 57.

bate. The primary feature of IGOs is that states create them and states are their members. By virtue of that, consequently their status as actors on the international stage is commonly accepted, although I believe that for most lawyers it is a sort of intuitive presumption (to be rebutted in a particular case if needed) rather than a well theoretically- and normatively-grounded argument.[60] Nonetheless, undoubtedly they are a *sui generis* category of international legal subjects, not only *de facto*, but surely also *de jure*. Is it, however, enough to qualify them as members of the international legal community?

The problem essentially centres on the degree of the independence of IGOs from their creators and members. It is convenient for IGOs to be empowered and legitimized by states themselves, however, in order to be regarded as meaningful actors they need to possess a *volonté distincte*, their own will separable from the will of their members. Whether such a feature is possessed by IGOs is a matter of doubt by some, who believe that IGOs are more important as "places for harmonization of policies, the exchange of ideas and even the making of friends than as centers of power in the international system".[61] The proponents of this vision of the role of IGOs in the international community seem to incline towards a view that, in some aspects, IGOs often become indistinguishable from their members, or more importantly their most powerful members, to such an extent that even a careful observer cannot tell in a particular case who is it really acting: the IGO itself or just its members *en groupe*.[62] Accordingly, the primary role of the IGOs is functional and technical – they provide a useful forum for cooperation and co-existence, facilitation of problem solving by states but not exercising power or taking a real part in global governance.[63] On the contrary, others argue for a substantial role of IGOs not only as

[60] See the argumentation of the ICJ in the *Reparation for Injuries* case (supra note 313); so it seems to work in everyday practice of international law; J. Klabbers, *An Introduction*…, p. 57.

[61] D.J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, "Virginia Journal of International Law" 1996, vol. 36, p. 371, also cited by J. Klabbers, *An Introduction*…, p. 58.

[62] See: J. Klabbers, *An Introduction*…, p. 41. This of course may bear a lot of legal problems as to the process of international law making or liability of IGOs for their acts etc.

[63] M. Barnett, M. Finnemore, *The Power of Liberal International Organizations* [in:] *Power in Global Governance*, eds. M. Barnett, R. Duvall, Cambridge University Press, New York 2005, p. 161.

lawmakers,[64] but also as institutions that help to transform the sources of international obligations and the very understanding and perhaps the nature of international law itself through deep institutionalization.[65] The argument goes so far as to claim that the evolution of international law towards normative hierarchy and the emergence of *jus cogens* and *erga omnes* types of international norms is attributable to the impact IGOs have had on the international scene.[66] This kind of norm in turn causes the idea of "community of states as a whole" to evolve from pure semantics towards a more real and legally tangible idea of international community. Therefore, these IGOs are themselves a necessary factor in the creation of the international community, aside from the question of their status as members. The fact that they are not sovereign entities means essentially that they are not territorial, but it does not mean they are not autonomous; their power and influence may simply be projected in a more long-term and less direct mode. The accusations of their impotence or indistinctiveness from members often seem to result from a neo-realist type of thinking in terms of projection of hard power, whereas liberal IGOs seem to exert their influence more via not so spectacular means of communication, consultation and persuasion. In fact, in many areas they virtually dictate rules and standards which no state dares to question, as is the case of more technocratic IGOs in telecommunications or aviation. Other organizations such as the ILO, the International Monetary Fund (IMF), the World Health Organization (WHO) or the International Atomic Energy Agency (IAEA) have deeply penetrated into what was once regarded as the "internal affairs" or *domaine réservé* of each state and are able to influence policies as well as to ensure the transparent application of international norms in the domestic forum. General IGOs, which are situated more centrally in the political crossfire, such as the UN, are often perceived as feeble and impotent actors serving at best as the arenas and tools of great powers and their politics. However, if the UN Security Council were regarded as merely a discussion forum of great powers, why would the world's

[64] See at length J.E. Alvarez, *International Organizations as Law-Makers*, Oxford University Press, New York 2005.

[65] J.E. Alvarez, *International Organizations: Then and Now*, "American Journal of International Law" 2006, vol. 100, no. 2, p. 326.

[66] *Ibidem*, p. 326–327. On the normative hierarchy, as well as evolution of *jus cogens* and *erga omnes* obligations see: D. Shelton, *Normative Hierarchy in International Law*, "American Journal of International Law" 2006, vol. 100, no. 2, p. 291–323.

most powerful state of the day seek its formal authorization on military intervention in Iraq and other issues so intensively despite the actual *fait accompli* policy?[67] In fact, some species of IGO are so powerful in undertaking their own effective decisions that they are said to be evolving towards a "supranational" model, and obviously the European Union is the most notable example.

The overall picture is that not only are IGOs members of international community, but they are also historically the first step towards creating this community via the process of international institutionalization, promotion of more democratic treaty-making processes, as well as restructuring of international law. They do not simply have the authority that has been conferred on them by states at their disposal; IGOs also project authority of their own, which is generated from the social interactions they autonomously have with other members of international community.[68]

3.4.2. Non-Governmental Organizations (NGOs)

What NGOs actually are is far more puzzling than IGOs. There is no concise legal definition in international law and therefore disagreements emerge as to what entities actually may be counted as NGOs. Some definitions are very broad, including even the multinational corporations or what has been distilled as transnational business corporations and national liberation movements, which is obviously incorrect and leads to confusion within the whole umbrella category of non-state actors.[69] The problem is that the attempts to build a straightforward positive definition of an NGO have so far proved futile. It seems that the easier way is to define NGOs in terms what they are not. A proposal of such a negative distinction made by Menno T. Kamminga is worth citing in full here:

> First and foremost, NGOs are private structures in the sense that they are not established or controlled by states [although in some cases states may be members of NGOs – T.W.]. This distinguishes NGOs from inter-govern-

[67] See: J.E. Alvarez, *International Organizations: Then and Now*…, p. 335.

[68] See: M. Barnett, M. Finnemore, *op. cit.*, p. 162.

[69] M.T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* [in:] *Non-State Actors and Human Rights*, ed. P. Alston, Oxford University Press, New York 2005, p. 95.

> mental organizations (IGOs). Secondly, NGOs do not seek to overthrow governments by force. This distinguishes them from liberation movements and armed opposition groups. Thirdly, while NGOs may seek to change government policies they do not aim to acquire state power themselves. This distinguishes NGOs from political parties. Fourthly, while NGOs may be engaged in fund raising and merchandizing activities, they do not seek financial profit for their own sake. This distinguishes NGOs from companies. Fifthly, while some NGOs may occasionally engage in civil disobedience, they are generally law-abiding. This distinguishes them from criminal organizations.[70]

This way of defining NGOs in negative terms is also characteristic of existing legal definitions in international law. In this line, ECOSOC Resolution 1296 (XLIV) of 23 May 1968 states explicitly that "any international organization which is not established by intergovernmental agreement shall be considered as a non-governmental organization for the purpose of these arrangements".[71]

The legal position of NGOs under international law seems to be considerably weaker than that of IGOs, at least *prima facie*. Technically, on the ground level, virtually all NGOs are registered and operate under national law, whether Swiss, English, German or any other, depending in most cases on the place where they are seated. This means that they can enjoy their legal personality and consequently legal capacity (such as judicial standing) only on the territory and under the law of the host state (as a rule), which makes them equal with other, non-internationally oriented legal persons such as political parties and other associations. This in turn may be quite inconvenient for NGOs for at least two reasons: first of all, they need to ask a particular government for legal status (personality) under the conditions provided by that state's law and, secondly, their lawful activities may be thus limited only to the territory of that state. These drawbacks have been largely overcome in recent decades since the whole association movement has acquired protection from international human rights agreements[72] setting

[70] *Ibidem*, p. 96.

[71] ECOSOC Resolution 1296 (XLIV) of 23 May 1968 [in:] Economic and Social Council Official Records Forty-Fourth Session, Supplement no. 1, p. 21, http://bit.ly/1xRamFh, accessed 23 November 2014.

[72] See e.g.: Art. 20 of the Universal Declaration of Human Rights, Art. 11 of the European Charter of Human Rights, Art. 22 of the International Covenant on Civil and Political Rights, Art. 16 of the American Convention of Human Rights.

basic standards for NGO autonomy in domestic law (e.g. subjecting them to independent judicial rather than administrative review as a rule). On the other hand, NGOs themselves have exercised a sort of forum shopping, choosing the most suitable legal jurisdictions, such as Switzerland. When states do not recognize the legal (especially judicial) standing of foreign-seated NGOs (even IGOs may have their judicial standing contested),[73] larger NGOs tend to set up local branches by incorporating their agencies under different jurisdictions.[74]

The important question, however, is about the international legal personality of NGOs. This seems to be null, as by definition NGOs are not granted any international legal capacity by the primary subjects – states –, as is case of IGOs. NGOs draw their legitimacy under international law primarily from Article 71 of the UN Charter, which provides that "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence". In the absence of any general international treaty on NGOs,[75] Article 71 has become a *de facto* constitution for NGOs and a foothold for them not only in the UN system itself, but also in international law generally. It seems that this provision and its implementations by the abovementioned 1968 ECOSOC Resolution and the present 1996 Resolution (UN 1996)[76] have considerably shaped the role of NGOs in the international system as well as their very identity as, foremost, advocacy agencies. Not only has Article 71 taken on an importance far broader than its own text, but it has also influenced other bodies and agencies of the UN (UNESCO, ILO, FAO) to

[73] A good example is the case of *Arab Monetary Fund v Hashim*, where the House of Lords recognized this IGO's legal standing in England, however, as J. Klabbers shows, this was legally controversial issue. See: J. Klabbers, *op. cit.*, p. 50–51.

[74] E.g. Greenpeace has offices in 48 countries, http://bit.ly/1175cXe, accessed 14 November 2014.

[75] Such efforts have been only partially successful in Europe, where the European Council enacted the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (1986); however it is a regional instrument only.

[76] Resolution 1996/31 on consultative relationship between the United Nations and non-governmental organizations, http://bit.ly/11751Lr, accessed 14 November 2014.

grant consultative status to NGOs,[77] similar to that they have in ECOSOC.[78] Moreover, this practice has spilled over to institutions outside the UN system such as the Council of Europe, the Organization of American States (OAS) or the African Union, where NGOs were granted their role, at least normatively in the constitutive Treaties.[79] This process may even suggest that a customary legal norm of a duty to consult NGOs as representatives of international civil society may be emerging or has already emerged.[80]

Nevertheless, the abovementioned legal grounding of NGOs in the UN Charter and the UN system at large does not give a clear answer as to their legal personality or subject status under general international law. This calls for a quick review of the already mentioned three doctrinal indicators: *jus tractatuum*, *jus standi* and *jus legationis*. As for the first of these, it is beyond argument that NGOs, in contrast to IGOs, do not have a capacity to conclude treaties with states, although some limited activity in that matter has been observed in regard to the International Committee of the Red Cross.[81] The formal lack of *jus tractatuum* has even been made explicit by the ECOSOC 1996 Resolution on NGOs, which explicitly states that participation of NGOs in an international conference "does not entail a negotiating role". It is however peculiar that the ECOSOC took such an explicit stand on the issue. The answer may be hidden in what is the reality of much treaty making these days – the tremendously influential and constantly growing role of NGOs, sometimes surpassing that of IGOs themselves. This role may range from stimulation and prompting, through complex information and expertise services (as the extent of the subject matter of international law has been not just expanding but rather snowballing) to breaking deadlocks and pushing negotiations

[77] However, notably the major UN institutions show a considerable degree of hesitation, and this includes particularly the General Assembly which has granted observer status only to the International Committee of the Red Cross (GA Res. 45/6 of 1990) and to the International Federation of Red Cross and Red Crescent Societies (GA Res. 49/2 of 1994); see: M.T. Kamminga, *op. cit.*, p. 99.

[78] S. Charnovitz, *op. cit.*, p. 358–359.

[79] *Ibidem*, p. 359.

[80] Similarly see: *ibidem*, p. 368–372.

[81] The ICRC is a party to the so-called headquarters agreements (which, for instance, grant certain privileges and immunities to the ICRC and its personnel) concluded with Switzerland as well as with numerous other states; M.T. Kamminga, *op. cit.*, p. 98.

to a successful conclusion.[82] In some cases, it is even reported that NGOs virtually take over the treaty-making process from drafting to negotiations and conclusion of treaties, as well entering into informal coalitions with like-minded states to support a draft, which in turn enables them to overcome the opposition of even the most powerful states. This seems to have been the case of the 1998 Rome Conference on the Statute of an International Criminal Court. As far as *jus standi* is concerned, NGOs do not have many formal possibilities either. There is no general norm of international law giving them standing before courts on the international plane; most importantly they do not have any capacity to bring contentious or any other sort of cases before the ICJ.[83] However, just as in the case of treaty making, they demonstrate immense activity in the judicial area, influencing the actors who have *jus standi*, as well as even exerting pressure on the judges themselves. Probably the most notable example to date was the ICJ's advisory opinion on the legality of nuclear weapons.[84] NGOs were exerting such considerable pressure on the UN organs in order to induce them to refer a request for an advisory opinion, that the Court had doubts as to its admissibility on the grounds that the *de facto* requesting party was a coalition of NGOs which alone had no such legal capacity before the court.[85] Even more disturbing, a letter-writing campaign aimed at the judges followed and in turn caused the Court's president, Judge Gilbert Guillame, to address the matter publicly[86] – a rather extraordinary move for an international judge, but illustrating the magnitude of the problem. On the other hand, specific regional regimes (especially in the area of human rights) often provide the possibilities for NGOs either to

[82] See: *ibidem*, p. 101–105.

[83] Article 34.1 of the Statute of the ICJ provides explicitly that "Only states may be parties in cases before the Court".

[84] Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, http://bit.ly/1175X2o, accessed 14 November 2014; see also in that matter: R.A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, "American Journal of International Law" 1997, vol. 91, no. 1, p. 64–75.

[85] See: M.T. Kamminga, *op. cit.*, p. 93.

[86] *Ibidem*. See also: S. Charnovitz, *op. cit.*, p. 364. According to Charnovitz, Judge Guillame wrote in a dissenting opinion: "I dare to hope that Governments and intergovernmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media".

file claims (Article 34 of the European Convention on Human Rights), bring complaints before various committees or deliver *amicus curiae* briefs (in both the European Court of Human Rights and the Inter-American Court of Human Rights). Last, and probably least, is the *jus legationis* of NGOs. This capacity is technically non-existent as far as NGOs are concerned, besides the abovementioned case of the ICRC's status under Swiss law. As far as the UN is concerned, the representatives of affiliated NGOs are partly covered by a sort of immunity as to any possible interference with their free passage to and from the UN headquarters in New York that could occur on the part of the United States government.[87]

Quite clearly in the case of NGOs, their full legal status as subjects of general international public law is doubtful and their formal international legal grounding, unlike that of IGOs, is rather weak. However, it does not change the fact that under many specific treaties they have been ascribed certain roles,[88] in some instances they have gained an international judicial standing and can sue states, as well as having considerable influence in treaty making and even virtually authoring some instruments in areas such as human rights law, humanitarian law, disarmament or environmental law. It seems therefore that NGOs have succeeded in penetrating international law in terms of their legal status as far as numerous specific regimes, substantive areas and local treaties are concerned. This does not mean, however, that they are even close to attaining full legal recognition, but they are not complete outsiders and mere lobbyists either. The importance of these changes for the doctrine of international law can be demonstrated by one of the propositions of Anne Peters, who indicates that international institutional law sees the emergence

[87] The Agreement between the UN and the USA regarding the Headquarters of the United Nations of 26 June 1947 states that US "shall not impose any impediments to transit to or from headquarters district of […] representatives of […] non-governmental organizations recognized by the United Nations for the purpose of consultations under Article 71 of the Charter"; *The Avalon Project*, http://bit.ly/1177gON, accessed 14 November 2014.

[88] The most notable and often-cited example is the role of the ICRC under 1949 Geneva Conventions and the 1977 Protocols, also in the International Labour Organization trade unions and organizations of employers are actors possessing a role equivalent to the states; in Art. 45 of the Convention on the Rights of the Child they are referred to as "other competent bodies" that may be consulted when expertise as well as help in the implementation of the Convention is needed.

of the "principle of openness". This means that it is no longer possible to assume that diplomatic talks are generally closed to actors representing civil society, rather entry depends on the discretion of the states or the intergovernmental organizations.[89] In any case, NGOs cannot be excluded from participation in important international talks, especially those involving global processes of lawmaking, without sufficient justification, or providing them with alternative meaningful forms of participation and control of the decisions taken. Admittedly, this principle of openness is still a *de lege ferenda* postulate, however, at least in some regimes of international law it is coming to be seen as the nascent norm of law (*in statu nascendi*).[90]

Are NGOs then regarded as members of the international community? The answer must be positive, especially considering the ways in which NGOs have shaped the development of international law. First and foremost, it is said that NGOs have brought civil society into international decision making with all the consequences, among which increased transparency of the international system has become one of the most important. NGOs have provided increasingly important and highly specialized expertise and knowledge on many of the specific issues, which any individual state was not able to muster alone.[91] Being very entrepreneurial, mobile and autonomous, let alone possessing high moral authority, they can sometimes acquire information and travel to areas that are beyond the reach of official circles.[92] NGOs, due to their autonomous status, have turned out to be very creative in seeking solutions and ideas, and promoting courses of action that would not otherwise even be articulated by states or IGOs,[93] so often limited by political and economic self-interest.[94] Finally, the most concrete outcome of their activities is that some of the most important norms of international law are largely due to NGOs' contribution, from the abolition of slavery to the banning of antipersonnel land mines. It is also often forgotten that they have in many cases

[89] A. Peters, *Membership*…, p. 222.

[90] *Ibidem.*

[91] This feature of NGOs may amount even to the rank of a source of their legitimization; see: V. Collingwood, *Non-governmental Organizations, Power and Legitimacy in International Society*, "Review of International Studies" 2006, vol. 32, p. 448.

[92] S. Charnovitz, *op. cit.*, p. 362.

[93] *Ibidem*, p. 361.

[94] *Ibidem*, p. 361–363.

successfully initiated the creation of IGOs and typically inter-state organs,[95] therefore solidifying their own positions and replicating support for their values and civil society culture in the international community.

For the reasons given above it is undoubted that NGOs play a role as legitimate actors of the international community. The fact that they have at their disposal rather more moral than strictly legal legitimacy does not stop them from playing an independent role in international decision making. The problem with NGOs is that, due to their special status, they exercise little or none of the classical political and legal power (in the traditional positivist meaning) that can be readily apprehended by the existing state-centric apparatus of general international law. Instead, they create a not easily definable nimbus of softer political actions around the hard core of international law and hard power, which are, using Alexander Wendt's terminology, addressed more to the *belief* and sometimes *calculation* rather than to the *coercion* level of supporting and internalizing values in the international community. Nevertheless, a grain of criticism and doubt as to the much celebrated idea that NGOs "confer badly needed legitimacy on the international system" by acting as the missing element of "international civil society" has also been expressed.[96] Not going to full length with the plethora of arguments and deliberations in this regard,[97] it needs to be indicated that not all NGOs in fact are such autonomous and idealistic champions of the cause. What guarantees that a particular new NGO is not just an extension of another actor or a state? They are sometimes not very democratic and transparent themselves in terms of internal statutes and most importantly, in many cases they not representative enough to justify their claims of being advocates of international civil society.[98] There are thousands of NGOs and the thresholds for their participation in conferences are not always high enough. However, these deficiencies seem rather to be the problem of heterogeneity and diver-

[95] The role of NGOs in creating and supporting the idea of the International Criminal Court has been often underlined; similarly NGOs actively propagated the establishment of the UN High Commissioner of Human Rights; A. Clapham, *Creating the High Commissioner for Human Rights: The Outside Story*, "European Journal of International Law" 1994, vol. 5, p. 556.

[96] See: M.T. Kamminga, *op. cit.*, p. 110–111.

[97] See: V. Collingwood, *op. cit.*, p. 448–450.

[98] S. Charnovitz, *op. cit.*, p. 365.

sity of the whole NGO category and do not change the overall conclusions as to the status of this type of actors.

3.4.3. Multinational Corporations (MNCs)

Similarly to NGOs, multinational corporations are non-state-created private entities that extend their business activities into the transnational plane, which means that they transcend boundaries in their production processes, supply chains and outlets. However, MNCs would not count as NGOs since, as observed by Steve Charnovitz,[99] the quality of being a profit-seeking corporation is a clear boundary between the two. It should be consequently stated that the most important criterion of this distinction is the purpose; while NGOs' objectives and motives are, or at least should be, typically political, the interests and thus objectives of the activities undertaken by the transnational business actors are economic. The latter of course does not exclude business engagement by MNCs primarily within the political domain, however, the ultimate objective is profit seeking. When there is a clear deviation from this pattern and what is organized as a business corporation starts clearly acting as a political agent, as it is for instance in the case of some Russian corporations such as Gasprom (*Газпром*),[100] then the entity needs to be considered only as a state subsidiary and an extension of state action, regardless whether it is formally state-owned or not.

Primarily the legal status of MNCs is similar to that of NGOs, that is, they are always incorporated under a specific national law, most typically the law of the jurisdiction where the company is seated. However, the reality of MNCs is in fact much more complicated, as the world of the global economy offers a far more sophisticated web of connections than the world of global politics and somewhat ironically, is far less transparent, as the recent financial crisis has exposed. It is argued that their structures are multinational and heterarchical rather than hierarchical,[101] which means that there may be

[99] *Ibidem*, p. 350.

[100] Taking into account the Russian-Ukrainian 2009 conflict over gas supplies; see: *Pipe down*, "The Economist" 8 January 2009; *War-war, not jaw-jaw*, "The Economist" 15 January 2009 (www.economist.com).

[101] C. Wells, J. Elias, *Catching the Conscience of the King: Corporate Players on International Stage* [in:] *Non-State Actors*…, p. 149.

many centres of decision making on the same level, but under different laws and in different states. This sometimes amounts to very complicated and unclear structures where direct responsibility is often hard to locate – in reality MNCs function in different states and under different legal regimes at the same time and many times may end up with an ability to escape any effective supervision by any state, at least as one uniform entity.

The legal standing under general international law, which is already residual in case of NGOs, is virtually non-existent in the case of MNCs. Most public international law textbooks simply skip the problem of MNCs and the three indicators – *jus legationis*, *jus standi* and *jus tractatuum* – seem to be totally inadequate to characterize the status of MNCs. One author has thus aptly observed that a MNC lacks "concrete presence in international law […] it is an apparition […] its actuality sifted through the grid of state sovereignty into an assortment of secondary rights and contingent liabilities".[102] However, MNCs, in contrast to NGOs, do not seem to be worried about this non-presence under international law and are not interested in campaigning to acquire a formal status. The reason seems to be obvious – the "non-status" means less accountability, which would be otherwise unavoidable under the broad umbrella of general international legal norms.[103] Instead, MNCs benefit from forum shopping and very often conveniently collude with not-so-nice regimes in not-so-nice places, which may offer MNCs many possibilities and even attributes of a *de facto* sovereignty in exchange for direct investments. At the same time MNCs can achieve all of their goals under more specific recognition for limited purposes.[104] Therefore, for example, lack of legal standing before international courts is an advantage rather than a drawback – MNCs do not sue states for any reasons apart from economic ones and if they seek indemnity, they have a growing empire of arbitration tribunals at their disposal. Most legal disputes between MNCs and states or IOs such as the EU are therefore settled very quickly and effectively on the

[102] J.E. Fleur, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Theory*, "Melbourne University Law Review" 1994, vol. 19, p. 893.

[103] See: J.I. Charney, *Transnational Corporations and Developing Public International Law*, "Duke Law Journal" 1983, no. 4, p. 767 as cited in: A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: a Crisis of Legitimacy*, "Review of International Studies" 2001, vol. 27, p. 142–143.

[104] A. Claire Cutler, *op. cit.*, p. 142–143.

basis of commercial contracts or in the framework of Bilateral Investment Treaties.[105] On the other hand, when it comes to holding MNCs accountable under human rights law or environmental law, they suddenly become very elusive and often hard to locate nationally. The awareness of "corporate accountability", that is, the problem of MNCs as potential violators of human rights law, especially when their activities are carried on in jurisdictions having poor human rights record themselves, has grown considerably in recent years.[106] In fact MNCs are no longer national actors that could be ascribed to a particular state,[107] nor has international law accepted them as international or transnational persons. They even lack a uniform international body of company law on which substantively to base their activities.

On the other hand, MNCs long ago escaped the effective supervision of any state and have clearly become full-fledged actors on the international scene and members of the international community, exerting considerable influence on the state of international affairs. MNCs project a potential power, which is, as far as its direct influence on the international system is concerned, similar only to that of the most powerful states. To investigate this, it is worth comparing the revenues of some MNCs presented by *Fortune* magazine with the World Bank data on the gross domestic product (GDP) of some states. This shows that in the midst of the global financial crisis, in the very difficult year of 2010, only twenty-three states reached a GDP higher than the highest private income of the Wal-Mart Stores group. Companies such as Exxon Mobil, Royal Dutch Shell, BP and Toyota Motors, obtained annual revenues higher than the GDP per annum of countries such as Ireland, Chile, the Czech Republic, Hungary, Romania, Slovakia, Pakistan and the Philippines, to name just a few examples.[108] Moreover, modern states directly ben-

[105] For the definitions, analysis and a list of Bilateral Investment Treaties currently in force, see the UNCTAD website: http://bit.ly/117cCtx, accessed 14 November 2014.

[106] See e.g.: R.G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria* [in:] *Non-State Actors…*; O. De Shutter, *The Accountability of Multinationals for Human Rights Violations in European Law* [in:] *Non-State Actors…*; D. Weissbrodt, M. Kruger, *Human Rights Responsibilities of Business as Non-State Actors* [in:] *Non-State Actors…*

[107] A. Claire Cutler, *op. cit.*, p. 145–146.

[108] See: *Global 500 Report*, "Fortune", http://fortune.com/global500/, accessed 23 November 2014; World Bank, *Gross Domestic Product 2010*, http://siteresources.

efit from and base their own hard power on the hardest of all soft-power types generated in the international community by MNCs. Tax incomes, investments, loan and lending options and employment are only the tip of the iceberg. This gives the MNCs immense possibilities, and *de facto* negotiation power exceeding that of many states and NGOs. It even allows them to act as political and military actors wherever their profits or interests are under threat – Shell's close co-operation with the Nigerian military government in suppressing resistance in Ogoniland is only one of the many examples.[109] Questions have been raised on the role of MNCs in providing help in sustaining regimes or oppressive political systems; for example, Google's self-censorship in China or Yahoo's cooperation in supplying data related to dissidents to the Chinese government.[110] On the other hand, however, and this is probably the most worrying from the perspective of a meaningful international community, MNCs may be at the same time very weak. This seems to be due to their ability to inflate their power and influence just as they inflate markets. We have already seen giants like WorldCom evaporating in just a few weeks. The bankruptcy of institutions such as Lehman Brothers came as a shock and is further evidence of the consequences for the international community of an unconstrained non-state power exercised nakedly.

3.4.4. Failed States

The analysis of MNCs brings us to a completely different type of actor, of which a full and detailed description is not possible here. Nevertheless, the crux of the matter in this case is very illustrative for the present analysis. State failure means "implosion of effective government, usually connected with an internal armed conflict".[111] This outlook underlines the legal dimension of

worldbank.org/DATASTATISTICS/Resources/GDP.pdf, accessed 23 November 2014.

[109] C. Wells, J. Ellias, *op. cit.*, p. 143–144.

[110] See e.g.: BBC News, http://news.bbc.co.uk/2/hi/technology/4645596.stm, accessed 21 October 2015; "The Guardian", http://www.guardian.co.uk/technology/2007/jan/27/news.newmedia, accessed 21 October 2015; "The New York Times" http://www.nytimes.com/2006/04/23/magazine/23google.html, accessed 21 October 2015.

[111] R. Koskenmäki, *op. cit.*, p. 2.

the phenomenon and suggests that if one were to juxtapose a "failed state" with the well established triad of the criteria for statehood (that is: authority, territory and population), the point of difficulty is definitely the authority element. Indeed, in most cases of failed states, such as Somalia, Sierra Leone or Liberia, the major problem lies not in the loss, or any other dysfunction, of territory,[112] nor in any dramatic changes in the structure or the composition of the population (though such changes may be the result of the process of state failure), but crucially in some sort of deficiency of effective authority. This lack, or rather fragmentation and disintegration of official power and subsequent filling of the resulting power vacuum by non-official factors, causes a sort of "chronic authority deficiency" syndrome. This turns such entities into "shells of sovereignty", that is, completely ineffective polities, unable to administer and perform their sovereign powers towards both their own citizens and any external actors. From full members of the international community they suddenly devolve into dangerous, inaccessible and instable "black holes" situated on the peripheries of the international law system.

International public law is not familiar with the notion of a failed state – a term almost completely alien to legal language. It results in a strange legal fiction whereby failed states remain officially simply states, protected with the whole arsenal of international norms blind to the fact of the state's virtual non-existence. Thus Somalia, where recently pirates seem to have become the most visible "representatives" of any effective power,[113] has a formal right to conclude treaties and even be diplomatically represented worldwide as well as in the UN. This bears dozens of theoretically and practically complicated legal questions about personality and the notion of statehood itself, which are very inconvenient and in fact compromising for the international law.[114]

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[112] Inability to control territory may be a clear hint of weakness, however – see: *When States Fail – Causes and Consequences*, ed. R.I. Rotberg, Princeton University Press, New Jersey 2004, p. 15.

[113] See e.g.: BBC News 2005, http://news.bbc.co.uk/2/hi/africa/4363344.stm; also *Somalia's Pirates Flourish in a Lawless Nation*, "New York Times", 30 October 2008, http://www.nytimes.com/2008/10/31/world/africa/31pirates.html, accessed 29 October 2014.

[114] For an excellent analysis of possible legal problems and dilemmas connected with state failure, see: R. Koskenmäki, *op. cit.*, p. 1–36.

3.4.5. Individuals

Although there has been considerable progress in the normative position of individuals under public international law as a result of the intensified growth of international human rights law and the emergence of international criminal law,[115] technically, under general public international law, individuals are not granted the status of its subject. The argument of conservative legal scholars is that individuals do not play any active role in the creation of international law, so they do not "fit" into the structure and logics of international law, which norms are adapted for regulating duties and rights between the states or, if needed, state-like actors.[116] More progressive lawyers would at very best build such concepts as "passive subjectivity" (*passive Völkerrechtssubjekt*) under international law that could accommodate individuals.[117] The irony of this theoretical helplessness of international law in the face of the era of human rights has been critically exposed by R. Higgins, when she has observed that if individuals are not subjects, "[t]hey must, therefore, be objects: that is to say, they are like 'boundaries' or 'rivers' or 'territory' or any of the other chapter headings found in the traditional textbooks".[118]

Of course, it is not true that individuals are deprived of any possibility of meaningful direct action and legal standing under international law. In fact they are addressees of many rights and duties, although very selectively, which is similar to the situation of MNCs as legal persons. Therefore, individuals are in a position to file petitions and have a legal standing before the European Court of Human Rights; they can also bring their cases before other human rights bodies such as the Committee of Human Rights, relatively recently they have been subjected to the jurisdiction of the International Criminal Court,[119] they also have some duties and rights under specific regimes, for instance in the UN Convention on the Law of the Sea.[120] In the

[115] J. Barcik, T. Srogosz, *op. cit.*, p. 158–159.

[116] L. Antonowicz, *Zagadnienie podmiotowości prawa międzynarodowego*, "*Annales UMCS*" 1998, vol. 45, p. 25.

[117] A.L. Paulus, *Die international Gemeinschaft*…, p. 233.

[118] R. Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford 1994, p. 49.

[119] J. Barcik, T. Srogosz, *op. cit.*, p. 158–161.

[120] *Ibidem*. See in particular Article 153 of the United Nations Convention on the Law of the Sea of 10 December 1982, http://bit.ly/117eUJ2, accessed 14 November 2014.

EU individuals have direct access to EU law, as well as legal standing before courts in all matters concerning EU law.[121]

The concept of each and every individual being treated as a member of the international community is encroaching upon the very meaning of the notion "international community" or "international society". As already mentioned above, from the point of view of the English school such an idea would need to employ yet another, more cosmopolitan concept of a world society.[122] However, leaving aside these theoretical distinctions not to be discussed here, it is worth mentioning that some individuals also may be regarded as meaningful actors on the stage of the international community in the sense that is discussed here. As recent research suggests, individuals may become one-person institutions, individual entrepreneurs of international norms and values, with an influence and moral authority sometimes exceeding that of many NGOs; those who particularly come to mind are winners of the Nobel Peace Prize.[123] On the other hand, much harm may also be caused to the international community in consequence of the influence and actions of individuals such as, for instance, Bernard Madoff.[124] Last but not least, individuals are effectively the most important players on the international stage if we take into account the fact that other actors, states in particular, are in fact legal fictions. In the last instance there are always individuals or small elites that undertake actions on the international stage on behalf of states, NGOs or MNCs etc.[125]

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[121] In that regard, see especially the two milestone judgments of the European Court of Justice: ECJ Judgment of 5 February 1963 in Van Gend & Loos (C-26/62) and ECJ Judgement of 15 July 1964 in Flaminio Costa v. ENEL (C-6/64).

[122] For a detailed account see: B. Buzan, *From International…*, *passim*.

[123] For a discussion at length see: R.P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Enterpreneurs*, "Virginia Journal of International Law" 2008, vol. 49, no. 1, p. 62–152.

[124] See e.g.: *Madoff: The man who sold the world*, "The Independent", 21 December 2008, http://ind.pn/117gD16, accessed 14 November 2014; *Con of the century*, "The Economist", 18 December 2008, http://econ.st/117gRW0, accessed 14 November 2014.

[125] See in this regard e.g.: R. McCorquodale, *An Inclusive International Legal System*, "Leiden Journal of International Law" 2004, vol. 17, p. 482–483.

3.5. Legal subjecthood and membership of the international community

Analysis of the identity of the actors in the international community shows that their status and legitimacy to act as agents of this community are not always conferred and recognized by international law. It has become a cliché to claim that international law is inherently state-centric; yet the consequences of this position go far beyond the law itself. By operating a category of legal personality, as well as the subject-object distinction,[126] international law aims at monopolizing legitimacy of norm and value setting exclusively for the state and its subsidiaries. It builds up a centrist, hierarchical structure of legitimacy that flows exclusively from states as its source. It rejects the view that there may be different ways and directions of conferring legitimacy in the international community; that for instance NGOs draw legitimacy also from other sources than positive legal authority, that they can reproduce it and even lend credence to states themselves. Instead, for international law, any input of values on which the international community bases its rules is subject to each state's internalization and authorization and the output, in the form of the legal norms of international law, is subjected to what lawyers call a test of pedigree; lawmaking can only come from the state or with the state's legitimate consent. The rule is simple: if you are a non-state actor, then the closer you are to a state both typologically and genetically, the greater your chance of satisfying the test of personhood and subjecthood under international law and thus the closer you are to legitimacy being conferred.

However, even a cursory look at the agents actually influencing the decision-making processes within the international community, either directly or indirectly by communicating their values or by actually exercising a degree of authority beyond the reach of states, shows that these two constructs – international legal subjectivity and a meaningful membership of the international community – are drastically divergent. The consequences are basically twofold: for the international community it seems to be a lack of coherence and transparency in structure, which brings legal uncertainty because the considerable power and authority of non-state actors is often exercised in an unchannelled, naked way, and that in turn gives rise to difficulties with

[126] Which has been frequently criticized, see e.g.: *ibidem*, p. 481.

holding them accountable for misconduct. However, for the international law the consequences are potentially even graver and further reaching, as it simply risks being compromised and finding itself enclosed in an ivory tower. The normative void left by international law will be quickly filled with rival normative systems, some of them being rules of conduct of private or informal character, a process that has been going on for a while. This way international law simply loses its authority and thus its impact, making itself prone to criticism such as "[t]ake international law, a very weak instrument as we know […] [w]ell international law is, in many respects, the instrument of the powerful: it is a creation of states and their representatives".[127]

Nevertheless, although it is true that "[w]hen the participants fail to recognize the legitimacy of law through their practices, the law's claim to authority is challenged and potentially undermined",[128] still the most important feature of all law must be kept in mind and that is its normative character. This has been eloquently captured by Jan Klabbers: "Law must also distance itself from […] society in order to be normative, for a law that only says what social actors already do anyway is, again, not very suitable as a regulatory instrument. Instead, it amounts (at best) to little more than descriptive sociology".[129] This is to say that in spite of criticism of the fundamental apparatus of international law as confronted with the structure of international community, the propositions of the reform cannot simply go too far. Above all, it is important to stress that these should not result in an attempt to deny the state and its role. In fact, its central role in the international community is justified and the claim that it was the state that has had (and continues to have) the greatest influence does not run counter to the evidence.[130] Moreover, calls that have been expressed in the literature in recent years to bring the state back in politically, "as a guarantor of existing social compacts against the depredations of the global economy"[131] – or read it simply as a need to constrain some non-state actors – have been clearly given a new meaning in the face of the recent global financial slump. It must be underlined that

[127] R.F. Barsky, *The Chomsky Effect: A Radical Works Beyond the Ivory Tower*, MIT Press, Cambridge 2007, p. 179.

[128] A. Claire Cutler, *op. cit.*, p. 147.

[129] J. Klabbers, *An Introduction…*, p. 335.

[130] See: A. Hurrell, *On Global…*, p. 115.

[131] I. Clark, *International Legitimacy…*, p. 77.

the interaction between states and non-state actors in the international community is not a zero-sum game in which either one side gains or loses and an increasing influence of non-state actors does not equal a decrease of influence of states.[132] Actually, there is a good deal of evidence, including that presented in this book, that states often benefit from serious partnership with non-state actors, gain more influence and strengthen their positions by extending their options to much more diverse kinds of soft power. In a nice phrase Charnovitz stated that "NGOs act as a solvent against the strictures of sovereignty",[133] which I believe can be extended in this context to all non-state actors.

3.6. International community and world community

As it has been already mentioned above, several authors have made a distinction between the international community and the world community, according to the ontological criterion of the type of the dominant entities – members of each of those communities. The "transnational society", composed of NGOs, international companies, individuals and various other types of transnational informal groups, communities or associations, is supposed to constitute the backbone of a would-be world community. It can naturally be in opposition to the traditional international community relying primarily on the states as its members or, alternatively, it may complement it. This in turn raises the question whether the two communities co-exist with each other or whether the world community has ambitions to replace the international community.[134]

If this ontologically-based distinction is well founded, and given the above analysis of international legal subjectivity, one could argue that the currently dominant traditional criterion of division into state and non-state entities should be considered inadequate.[135] Non-state actors are in fact presently ef-

[132] See: S. Charnovitz, *op. cit.*, p. 362.

[133] *Ibidem*, p. 348.

[134] Cf. I. Clark, *International Legitimacy…*, p. 21.

[135] This dividing line is the most widely accepted in the literature of the English school of international relations as a compromise in the face of difficulties in defining the nature of the world community, see: B. Buzan, *From International…*, p. 30–44.

fective members of the international community. On the one hand, they adopt methods of representation, interaction and mutual communication similar to that which is characteristic of a community of states (e.g. *jus legationis* of international organizations), and on the other hand they introduce new ways specifically for themselves, adopting and modifying the rules of procedure in the community. From the point of view of international legal theory it would be more adequate to apply the criteria of division at the level of individuals and non-individuals. If the argument by Ian Clark that the world community manifests its will and standards via the traditional international community is correct,[136] then in fact individuals are the ultimate source of the norms and values, and only individuals are able to manifest "will" properly understood. The actions of states or organizations are merely derivative of the decisions made by individuals.[137] It is equally obvious that not only in civil law, but also in the general legal system, only the human being has natural personality, and any other collective entities are kinds of artificial beings of a functional nature. Moreover, the merits of their continued existence, as opposed to natural persons, may be discussed, questioned or justified. Therefore, the international community would consist of the state and those non-state actors which have been admitted as its members, while the concept of a world community would include all human beings, which could make it conceptually close to yet another well known notion of "humanity". Since the transnational actors have grown to become "sources of international order" and they *de facto* participate in global governance on a par with the states as well as at least some of them having become effective actors in this order, what are the reasons not to put these entities in the same ontological category as states?[138] On the one hand, it seems that too much attention was attached to the historically determined dichotomy of "state" versus "non-state". Admittedly, it may have some advantages of an analytical nature, but above all, it seems to have no moral justification. Drawing the line of distinction along the division between indi-

[136] See: I. Clark, *International Legitimacy*…, p. 33.

[137] This line of reasoning refers to the views that A. Wendt (*idem*, *Social Theory*…, p. 199–200) calls a "pluralist" conceptualization of the theory of the state. It is a view in opposition to Weber's model, because it assumes that the state is not really an independent and autonomous actor and that all its actions are reducible to the interests and activities of individuals and groups forming it.

[138] B. Buzan, *From International*…, p. 118–138.

viduals versus other collective organizations, institutions and the state, has the clear advantage that it better reflects the anthropocentric axiology of both the international and world communities.

On the other hand, the arguments for placing some of the non-state actors, especially NGOs, as well as some influential informal groups and associations, in the category of world community are also compelling. The NGO movement was founded mainly as an attempt to influence the state and counterbalance its omnipotence towards individuals and, therefore, its identity was built in the opposition to the *Leviathan*. Humanity, meaning the union of all individual persons, does not have any suitable direct methods of political articulation, nor the creation and promotion of values within the international community, as rightly argued by Hedley Bull. What is more, some even argue that it is this kind of community in which members often do not have any awareness of participation.[139] Such a broad community needs a more direct representation to exert its influence, if even axiological. It sometimes finds it in the person of some states or – more accurately speaking – through the states,[140] however nowadays its activity is most likely manifested in the activity of transnational NGOs. Their identity has been constructed based on the very belief of their representativeness of the interests of this world community or what is also called a "global civil society". Such a property does not occur in the case of intergovernmental organizations (IGOs), which are often the emanation of strictly interstate relations or alternatively play the role of the actors representing the more traditional institutional international community as a whole. Other transnational actors

[139] See: I. Clark, *International Legitimacy*…, p. 193. In this regard, the prevailing view is that the sense of belonging to a community is naturally strongest in a close family, or community, or at best a national scale, but most people have little or no sense of identity or belonging to a transnational worldwide community. Therefore, there is a significant problem that the majority of the communities ultimately define themselves in opposition to the other groups. However, in the case of the widest possible community of all people there is no "external" factor, which impairs its ability to define itself subjectively.

[140] A historical example is the efforts of the world community to realize its values through Great Britain as the dominant power in the nineteenth century. The abolition movement acting as an active element of the world community led first to condemnation and then to the gradual elimination of the slave trade by the international community under the leadership of the United Kingdom; see: *ibidem*, p. 37–60.

(such as multinational companies) are usually yet another kind of autonomous actors, acting in their own name and interest.

The choice between the two positions described above is an important dilemma reflecting in part the difficulty of drawing a distinction between the international and the world community. This Gordian knot even leads some authors to propose the rejection of this division and grouping all actors under one category.[141] The argument goes that the world community is supposed to be a holistic category, which includes the international community within its borders. Others are looking for solutions in abandoning the dichotomy and examining three separate communities: interstate, transnational-national and inter-human.[142] In connection with the deficient standing as compared to that of states, which under international law NGOs and individuals seem to have, there are attempts to explain it by claiming that although NGOs do not constitute true members of the community, instead they may be considered as its participants.[143] Ian Clark[144] believes that there is a continual, gradual process of engaging the international community with the world community in one common field of political activity. Based on historical research, demonstrating nearly 200 years of interaction between these communities, manifesting itself in the form of exchange of values and mutual stimulation into the development of new standards, Clark argues that a gradual blurring of boundaries and merging between the two communities is taking place. According to this approach, however, there is no question of replacing one community by the other. They co-exist with each other in a symbiotic relation; the world community uses the politico-legal instruments of the international community, and in turn, becomes the source of value and legitimacy for the latter. Both interact with each other, constantly redefining their social identity by way of this engagement. As a result, we can see how the interests and values of the community of states are constantly changing, of which the evolution towards the international protection of human rights can be a good example.

To summarize these considerations it must be noted that, as far as making some distinction between the international community and the world

[141] See: A.J. Bellamy, *International Society…*, p. 286–287.

[142] B. Buzan, *From International…*, p. 158–160, 197–204.

[143] *Ibidem*, p. 202–204; cf. A. James, *System or Society*, "Review of International Studies" 1993, vol. 19, no. 3, p. 288.

[144] Cf. I. Clark, *International Legitimacy…*, p. 199–214.

community is feasible, it is almost impossible to seperate these two concepts clearly based on the criterion of membership. It can be concluded that the international community is primarily a community of states and other non-state actors recognized as its members. It is an institutionalized community that has developed political and legal mechanisms for creating and enforcing legal standards. At the same time, what is called the world community lacks forms of political representation and therefore it protects its values through the international community. It can be seen as a rudimentary community of all individual persons, or a formal and informal network of NGOs operating in the transnational realm. On the one hand, these transnational institutional actors are self-conscious about their belonging to this world community, and on the other hand they are trying to represent it *vis-à-vis* the states and intergovernmental organizations and they undertake efforts to build its self-identity through their active participation in the international community. They operate in the main areas of intersection and merger between the two communities, mediating between them in the flow and internalization of values. Therefore, the criterion of a "subject of international law" does not appear to be limited and reserved for the international community. As follows from the above considerations, the specific transnational actor may simultaneously be functionally a part of the world community and a participant in the international community, using the institutions of international legal subjectivity. Bearing in mind the conclusions of the previous part of this book, one can add to this picture the criterion of the degree and manner of internalization of common values, extending from belief through calculation to coercion and from the "thick" to the "thin" community. In this way a new typology can be proposed; a morally fundamental, non-institutionalized world community, a new international community in the broad sense, which includes effective transnational actors and a classical international community of states, including intergovernmental organizations (the international community in the strict sense).

3.7. International community or communities?

The problem of the structure of the contemporary international community in geographic context has not yet been thoroughly examined.[145] The primary

[145] Cf. B. Buzan, *From International*…, p. 205–207.

level of analysis remains the global dimension, although no research agenda can ignore questions about regional implications. However, in the theory of international relations, apart from a few exceptions, the subject of regionalization is oversimplified or even treated with a certain degree of hostility. As far as the doctrine of international law is concerned, although a distinction between the global level international community and regional international state "communities" (e.g. Latin American countries, Central American, European, Middle Eastern) is common, little space is devoted to the analysis of the nature of relationships and interactions between the global and these regional structures.[146]

Barry Buzan[147] outlines the most widely accepted version of depicting the "geographical" dimension of the international community by taking as the starting point the discussion between the solidarists and pluralists. There is no doubt that nowadays we are dealing with a rudimentary universal international community on a global scale, encompassing the states and other actors without any geographic restrictions. This is one of the central theses of the English school of international relations. However, it is still a relatively "thin" society in the sense of the weight of the common interests, values, rules and institutions binding together its members in this culturally heterogeneous postcolonial world. Due to the necessity of bringing the institutions of the international community to the smallest common denominator, it still operates with a largely Westphalian understanding of sovereignty, territoriality and international law as well as maintaining only a necessary minimum of values in common, which places it rather closer to the pluralist end of the spectrum.[148] However, this universal international community develops a superstructure of "thicker" regional communities, whose members share more values, interests or rules (regional international law) in common, and even have clearer cultural links with each other.[149] These communities are gener-

[146] J. Gilas, *op. cit.*, p. 11–12.

[147] Cf. B. Buzan, *From International…*, p. 205–227.

[148] *Ibidem*, p. 208.

[149] The reasoning of M. Wight seemed to be going in a similar vein – he believed that in the context of the historical development the international community could be presented in the form of two overlapping circles: the widest one covering the whole of humanity under the rule of natural law and the internal area of *Corpus Christianorum* under the law of Christ. The inner circle represents the solidarist community of European Christian nations and the wider area included the Ottoman Empire;

ally more solidarist in nature than the global community, in which of course they are also participants. Such a view may overlap with other observations that the pluralist international community can be heterogeneous and at the same time possess solidarist enclaves or "pockets" of solidarism.[150] It seems that these centres of solidarism may manifest themselves not only as certain self-contained regimes,[151] but also, and perhaps above all, at the regional level. An obvious example of the most solidarist, and at the same time most heavily institutionalized, regional international community is the EU.

3.8. Conclusions

The above analysis has shown that the growing importance of non-state actors does not necessarily downplay the role of the state which, in spite of the changing nature of sovereignty, is still central in the structure of the international community. The interaction or even competition between the state and the non-state actors does not necessarily have to be to the detriment of either party, and it is the expanding international community as a whole that seems to be the greatest game winner of all. The emergence of these new types of actors may also be conceived as an emanation of yet another category – world community. By using the agency of non-state actors, the world community communicates and couples its activities with the international community, thereby creating the primary axiological and moral base. This reminds the traditional members of the international community that the ultimate beneficiary of their actions and very existence should be human beings. This globalist face of the international community does not necessarily mean lack of possibilities of regional diversification; it is not monolithic politically or economically. The awareness of the existence of one universal international community and multiple narrower, regional international communities allows new light to be cast also on the problem of the pluralist and solidarist divide. It justifies the thesis that the broadest international community is

see: B. Devlen, P. James, Ö. Özdamar, *The English School, International Relations and Progress*, "International Studies Review" 2005, vol. 7, no. 2, p. 177.

[150] A. Linklater, H. Suganami, *op. cit.*, p. 66.

[151] Cf. A. Wiśniewski, *Fragmentaryzacja prawa* [in:] *Leksykon współczesnej teorii*…, p. 96–99.

now closer to the pluralist type model, while regionally, especially in Europe, it may manifest its solidarist version, characterized by a greater density of shared values based on belief rather than purely on calculation or coercion.

All the complicated internal links between members of the international community, including the problem of the role of the great powers, eventually led to questions about the existence and nature of the subjectivity of the "international community as a whole" itself from the point of view of international law. However, coming closer to answering the questions both about the identity of the international community in the light of the international law and the role of the law in the functioning of this community is not possible without considering these issues in a broader normative perspective, which will be discussed in the next chapter.

Chapter IV

Rules: The Constitution of the International Community

4.1. Introduction: the normative structure of the international community

International law naturally stands at the centre of the normative plane of the discussion about the international community. It is legitimate to say that the mere existence of internationally recognized legal standards also means that there must exist common interests, shared values and common institutions,[1] or – putting it in other words – the international community. However, it needs to be noted that the notion of a "norm", in the sense of a rule of conduct, is not limited solely to the legal sphere. It is therefore important, even from the methodological point of view, that the special place and role of international law in the international community is seen in a broader normative context of rules.

The functioning of the international community is governed by five basic normative systems: international law, international morality, international politics and the rules of prudence (praxeology), as well as international comity (*comitas gentium*). The criterion of distinction between these normative systems is not only the nature of the binding force of these standards, but also their axiological basis. It can be argued that each of these normative systems is justified by its function of supporting and implementing different values within the international community. In the case of law these values are primarily justice, legal security and expediency, in the case of morality – right-

[1] A.C. Arend, *Legal Rules and International Society*, Oxford University Press, New York–Oxford 1999, p. 192.

eousness, as far as politics and praxeology are concerned – effectiveness and usefulness, and last but not least regarding comity – respect. To illustrate the relations between these normative systems Janusz Gilas proposed a model of "rotating and intersecting circles of unequal size", each of which represents the extent of the impact of each of the abovementioned normative systems.

That kind of "bird's-eye" perspective of the role of international law in the international community is in fact only an introduction to the discussion on the nature of international law. Although very different views on this issue are possible,[2] the paradigm of the international community presented in this book opens up a new door to the theoretical discussion of the constitutional structure of international law. It is also a debate on the central aspect of the normative question – the constitution of the international community. There appears to be a special discursive relation between the two categories of the international community and its constitution, creating the core of the dynamics of the normative plane, which is the subject of this analysis. On the one hand, the concept of the international community raises the question of the existence and the form of its constitution, ordering a vast area of international law. On the other hand, if indeed international law is subject to changes in the direction of constitutionalization, then the process must in that case take place around a particular structure being its subject – the international community.

4.2. International law as the primary normative system of the international community

Some contemporary scholars and commentators draw attention to the progressive process of "juridicization" or "legalization" of public life in the international sphere, which in turn leads to an increase in the importance of law as the fundamental regulator of the normative international community. Moving the discussion in this direction may be a proof of the fact that international law has largely successfully defended itself against the most serious criticism, namely an attempt to cast doubt on its legal nature.[3] However,

[2] See: *International Society. Diverse Ethical Perspectives*, eds. D.R. Mapel, T. Nardin, Princeton University Press, Princeton 1998.

[3] Currently, the legal nature of international legal norms is not disputed; J. Barcik, T. Srogosz, *op. cit*., p. 7.

it should be noted that echoes of the discussion initiated by John Austin's famous assertion that international law is not law, but a form of "positive morality" at most, followed by H.L.A. Hart's question: "is international law really law?",[4] still resonate in the literature.[5]

A comprehensive defence of the idea of international law being a true system of legal norms[6] is beyond the scope of this work. However, it is worth taking note of a few threads of this discussion. Significant problems and doubts in this regard appear in the main "dimensions" of the operation of international law which are: its creation, validity, interpretation, application and compliance.[7] They arise mainly from the nature and the structure of the international community, being at the same time the creator, an addressee and the executor of the norms of international law.

First of all, Austin argued that international law could not have a legal nature due to the lack of a sovereign, who could serve as the source of rules. According to him, the lack of a world legislature analogous to national parliaments undermines the effectiveness of a legal rule at the stage of its creation. This thesis can be easily rejected by indicating the many different ways of legal norm creation generally accepted in the theory of law. They are not necessarily limited only to centralized acts, but include means such as the de-

[4] H.L.A. Hart, *Pojęcie prawa*, trans. J. Woleński, PWN, Warszawa 1998, p. 287.

[5] See: M. Lachs, *Rzecz o nauce prawa międzynarodowego*, Zakład Narodowy im. Ossolińskich, Wrocław–Warszawa–Kraków 1986, p. 23–24; M. Akehurst, *A Modern Introduction to International Law*, 6th ed., Allen & Unwin, London 1987, p. 3–4 [in:] *Prawo międzynarodowe. Materiały do studiów*, ed. B. Wierzbicki, 4th ed., Temida 2, Białystok 2008, p. 34–38.

[6] It is worth noting that the understanding of international law as a system of norms is not the only possible approach. In the philosophy of international law in the last decades the approach of the so-called New Haven School (represented by M.S. McDougal and H.D. Lasswell), has been particularly influential, which appealed to H. Bull (*idem*, *The Anarchical Society*…, p. 122), or the views of R. Higgins (*idem*, *op. cit*.) who sees internatonal as a process rather than a system of norms; cf. J. Ciechański, Prawo międzynarodowe – normy i regulacja [in:] *Stosunki międzynarodowe*…p. 329.

[7] On the five "dimensions" of the phenomenon of law, see: J. Zajadło (*idem*, *Fascynujące ścieżki filozofii prawa*, LexisNexis, Warszawa 2008, p. 10). Similarly, five characteristics of law that can be useful in discussing the legal nature of international law are cited by A.C. Arend (*idem*, *op. cit.*, p. 29).

velopment of law by way of legal precedents, contract law making, customs or opinions of the doctrine of law.[8] Each of these ways indicates that the true creator of the law in sociological and axiological terms is ultimately the community, which does not necessarily have to take the form of a centralized and personified authority. Nothing stands in the way of the claim that the source of international law could be the uncentralized international community.

At the level of the validity of law, the underlying problem is the uncertainty of the limits of the system of international law. Apart from the special nature of Article 38 of the Statute of the International Court of Justice, the complete catalogue of sources of international law remains contentious, as is the content of customary international law.[9] On the one hand, according to the traditional view, there is no hierarchy of sources in international law (which does not mean, however, that specific rules may not be placed in hierarchical order relative to each other),[10] although there are increasing demands for revision of this position.[11] On the other hand, some authors pose far more fundamental questions about the theoretical and axiological foundations of validity of law and the nature of the compulsory character of international legal norms.[12] The range of possible explanations extends from the voluntarist theories (among them the doctrine of self-limitation, common will theory and the doctrine of delegation of domestic law)[13] to the objectivist theories, consisting of the positivist doctrine, the natural law doctrine,[14] as well as the sociological theory of solidarity.[15]

Assuming that the state remains the fundamental subject of international law, the boundary between the application of law and compliance with law

[8] Cf. S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Przedsiębiorstwo Wydawnicze Ars Boni et aequi, Poznań 2001, p. 128–132.

[9] Cf. A.C. Arend, *op. cit*., p. 29–30.

[10] See: J. Barcik, T. Srogosz, *op. cit*., p. 5; J. Białocerkiewicz, *op. cit*., p. 56–57.

[11] For more on the hierarchization in international law see: J.H.H. Weiler, A.L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, "European Journal of Internaional Law" 1997, vol. 8, p. 545–565.

[12] See: E. de Rávago Bustamante, *The Compulsory Character of International Law*, "International Legal Theory" 2005, vol. 11, p. 69–86.

[13] Cf. M.N. Shaw, *op. cit.*, p. 31.

[14] See: R. Bierzanek, J. Symonides, *op. cit.*, p. 21–23.

[15] E. de Rávago Bustamante, *op. cit.*, p. 69–86; cf. M. Szyszkowska, *Teoria i filozofia prawa*, Elipsa, Warszawa 2008, p. 187.

is blurred in the case of international law. On the one hand, the states are the major competent lawmakers authorized to perform conventional acts and thereby to apply the law, on the other hand, states are the main addresees who are to comply with the bans and prescripts encoded in the rules of international law.[16] Moreover, the boundaries between the creation and application of and the compliance with international law are equally blurred. It is not, however, the matter of the presence of elements of the case law system, which is visible in international law, but mainly it is due to the fact that the state has a double role of legislator and addressee of the majority of both material standards and rules of competence. In the face of the ambiguous character of the sources of international law, every act of application or compliance with the law may simultaneously become an act of its creation if only through state practice. This situation may even lead to such paradoxical propositions as that of the American philosopher Allen Buchanan, who coined the term "illegal legal reform", a concept that boils down to the argument that sometimes the only way to reform international law is by way of violation of its norm by the state seeking to change the legal reality.[17]

Both the application and compliance with international law are connected with particularly serious problems, distinguishing international law from the national law model. First of all, there is no mandatory judicial system in the standard meaning of the term.[18] Instead, the international community operates a variety of alternative means of dispute resolution having a mediatory and conciliatory character rather than juridical and imperious one. Similarly, there is no system of administrative institutions, which could effectively enforce the norms of general international law. The only relevant institution – the UN Security Council – is limited in the scope of its powers to enforcing the judgments of the ICJ (Article 94 of the UN Charter) and sanctioning violations of law as far as the threats to international order and peace in the world are concerned (Article 48 of the UN Charter). Admittedly, as will be discussed below, the role and impact of the UN Security Council on the international

[16] See: S. Wronkowska, Z. Ziembiński, *op. cit*., p. 197–198, p. 213–214.

[17] A. Buchanan, *Reforming the International Law of Humanitarian Intervention* [in:] *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe, R.O. Keohane, Cambridge University Press, New Jork 2003, p. 136; as cited in: J. Zajadło, *Dylematy humanitarnej interwencji*…, p. 328–329.

[18] W. Góralczyk, S. Sawicki, *op. cit.*, p. 24–25.

system appears to be steadily increasing, however, just as often it remains divided in its decisions concerning the task of maintaining international peace and security and therefore ineffective.[19] The result is that when thinking about the two features that legal rules can be theoretically assigned – persuasiveness and coerciveness – as far as international law is concerned, only the former is observable. Lack of compulsory judicial apparatus and a developed system of law enforcement makes international law only an argument when settling conflicts of political interests: albeit decisive in terms of fairness, in general destitute of any real manifestation of the punishing arm of justice.

It may well be concluded that a more modern model of law enforcement, built on the basis of argumentative and discursive theories,[20] is capable of providing a much better explanation of this process in international law. Regardless of the arguments raised above, it should be noted that the international system itself shows evolutionary trends towards greater coerciveness and enforceability of international law. It is more evident in its newer branches, such as international criminal law, as well as in those international regimes that are equipped wth relatively autonomous systems of application of legal rules as well as with special principles on state responsibility for their infringement.[21] A process of "proliferation of international judiciary" is also clearly visible, covering more and more areas of international legal reality.[22]

The classic critique of international law was based, *inter alia*, on the argument of the absence or indeterminacy of sanctions in international law.[23]

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[19] Cf. A.C. Arend, *op. cit*., p. 30.

[20] See: L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, 4th ed., LexisNexis, Warszawa 2005, p. 199–208.

[21] See: B. Simma, D. Pulkowski, *Of Planets and the Universe: Self Contained Regimes in International Law*, "European Journal of International Law" 2006, vol. 17, no. 3, p. 483–529.

[22] See: W. Czapliński, *Multiplikacja sądów międzynarodowych – szansa czy zagrożenie dla jedności prawa międzynarodowego* [in:] *Rozwój prawa międzynarodowego – jedność czy fragmentacja?*, eds. J. Kolasa, A. Kozłowski, Konferencja Katedr Prawa Międzynarodowego, Karpacz 10–12 maja 2006, Wrocław 2007, p. 77–130; E. Socha, *Kilka uwag o proliferacji międzynarodowego sądownictwa karnego* [in:] *Rozwój prawa międzynarodowego…*, p. 269–275; see also: B. Simma, *Universality of International Law from the Perspective of a Practitioner*, "European Journal of International Law" 2009 vol. 20, no. 2, p. 278–297.

[23] A.C. Arend, *op. cit*., p. 29–30.

This allegation was refuted by pointing to the specific construction of a rule of international law. While it would be indeed difficult to discern a tripartite structure (hypothesis, disposition, sanction) as far as the typical international legal norm is concerned, it can also be quite well described by means of the concept of the coupled norms model.[24] Most of the rules of this system actually are built only on hypotheses (when and to whom the rule is to be applied) and dispositions (what the addressee is obliged to do). However, it can be assumed that next to these so-called sanctioned norms the system also includes "collective" sanctioning norms, which have broad hypotheses encompassing transgression of multiple sanctioned norms. In this way, a specific system of few sanctioning norms binds together the whole system of international law. The interesting fact about the nature of sanctions is that in international law, apart from the organized legal sanctions (organizational sanctions, corrective measures, direct coercion used by the UN Security Council),[25] there are also unorganized, non-legal ones, whose place is *de facto* outside the law and occupying the sphere between the law and international morality or political standards. Such sanctions may include sociological, psychological or retaliatory measures, such as retaliation and reprisals.[26] The fact that the sanctions available in international law are often scattered and informal as opposed to the focused and formal sanctions traditionally attributed by jurisprudence to the realm of law, does not deprive them in this case of effectiveness in any way.

In the case where there existed a hypothetical global *imperium mundi*, compliance with the law dictated by the hegemonic power on the part of other, relatively autonomous political entities (states) would have followed directly either from coercion or conformity.[27] However, in the case of sovereign states operating within the international community, it is not entirely clear how to answer the question why they tend to respect international law in the face of all the abovementioned "imperfections" of this normative order. The most common explanation is by reference to the supposedly natu-

[24] See: J. Niesiołowski, *Norma* [in:] *Leksykon współczesnej teorii*…, p. 201–203.

[25] Cf. J. Barcik, T. Srogosz, *op. cit.*, p. 8–13.

[26] *Ibidem*.

[27] Assuming of course that such a body of rules, created *de facto* by the hegemonic power, can still be called law. More in that regard see: A. Segura-Serrano, *The Transformation of International Law*, Jean Monnet Working Paper 12/09, www.JeanMonnetProgram.org, p. 28–31.

rally opportunistic attitude states demonstrate towards international law. States do observe the law, because they calculate that the benefits from general compliance prevail over the restrictions the law imposes on them, or they believe that the negative consequences of violating the rules that can be applied as sanctions by the rest of the international community may prove to be too severe for them to sustain.[28] This attitude is related to the three theories that seek to explain the lawful behaviour of states in the international community.[29] First, the neo-liberal theory of rational choice, tied to the methodology of game theory, assumes that states respect international law in different situations and participate in international cooperation since in this way they gain relatively greater benefits than when they only engage in seemingly rational selfish behaviour, which, however, in the long term cannot produce optimal results.[30] In the case of functional theory, the role of international law is to reduce political losses, or expenses incurred (transaction costs) – states respecting the rules gain the trust of partners, which makes it easier for them to reach compromises. At the same time the costs and risks of unregulated and uncooperative behaviour increases.[31] Last but not least, the organizational theories underline that the nature of states and their acts of will as individual international actors is far from unitary. They constitute large and complex organizations that are torn by various internal forces and processes, and therefore naturally they have a tendency to adhere to various rules, principles and standards. International law, by the definite character of its norms, simplifies and facilitates international reality and therefore makes it easier for complex organisms to function in the system.[32]

4.3. Constitutionalization of the law of the international community

While analysing the relationship between international law and the international community, it is impossible to ignore the discussion on the constitu-

[28] See: G. Stern, *op. cit.*, p. 154.
[29] See: J. Ciechański, *op. cit.*, p. 331–332.
[30] *Ibidem*, p. 331; cf. J. Czaputowicz, *Teorie stosunków…*, p. 222–227.
[31] J. Ciechański, *op. cit.*, p. 332.
[32] *Ibidem*, p. 332.

tionalization of international law. The paradigm constructed by this debate is the most insightful modern approach into the nature of this dynamic relationship, and is by far the most accurate in explaining its legal nature, while being inclusive of the deliberations on values and structure in the international community. For obvious reasons, the debate on the constitutionalization at the supranational level has been pertinent mainly as to the sphere of EU law.[33] However, recently, especially in the German jurisprudence, there has been a growing interest in this phenomenon also in relation to the general international law and the international community. Prominent Austrian lawyer Alfred Verdross was one of the early commentators and visionaries of the constitutionalization of international law as early as 1926.[34] Nowadays, the latest boost to the debate about global constitutionalization may be attributed to, among others, yet another German philosopher, Jürgen Habermas, who linked his project of international constitutional structure on three levels – global, regional (continental) and national – to the universalist philosophy of Immanuel Kant.[35]

The analysis of international constitutionalism may commence with a thesis: international law as a system is no longer a *ius inter gentes* (law between nations), but through the modern processes of constitutionalization and hierarchization of norms it is being gradually converted into the law of the international community. This process is closely related to the changing nature of the community, which evolves from a loose pluralistic family of nations towards more closely interconnected community of values, objec-

[33] See e.g.: T.T. Koncewicz, *Zasada jurysdykcji powierzonej Trybunału Sprawiedliwości Wspólnot Europejskich*, Wolters Kluwer, Warszawa 2009; G. Frankenberg, *The Return of the Contract: Problems and Pitfals of European Constitutionalism*, "European Law Journal" 2000, vol. 6, no. 3, p. 257–76; R.A. Wessel, *The Multilevel Constitution of European Foreign Relations* [in:] *Transnational Constitutionalism – International and European Models*, ed. N. Tsagourias, Cambridge University Press, New York 2007, p. 160–206.

[34] A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, J. Springer, Wien–Berlin 1926.

[35] See: J. Habermas, *Does the Constitutionalization of International Law Still Have a Chance?* [in:] *The Divided West*, Cambridge University Press, Cambridge 2006, p. 115–193; *idem*, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, "Constellations" 2008, vol. 15, no. 4, p. 444.

tives, institutions and norms. Along with it, as suggested by some authors, international law has also evolved from the law of co-existence, through co-operation to constitutionalization.[36] The subject matter of further considerations in this chapter will be an attempt to make some preliminary remarks to verify this thesis, with particular emphasis on answering the question whether and in what sense we are now dealing with the process of constitutionalization of international law. For this purpose, first of all it will be necessary to look at the characteristic features of "constitution" and "constitutionalism" in the theory of law in general.[37] Secondly, it is essential to consider whether the existing conceptual apparatus is appropriate to describe the processes taking place in international law, as well as what meanings the idea of constitution and constitutionalism can have at the global level. Thirdly, it will be useful to look at the examples of sample processes and manifestations of the constitutionalization of international law, as well as to contrast them with counter-examples of anti-constitutional trends and critiques of the idea of global constitutionalism.

4.3.1. The language: "constitution", "constitutionalism" and "constitutionalization"

The term "constitution" and other concepts derived from it, such as "constitutionalism" or "constitutionalization" can have very different meanings not only in particular legal systems but also in the different political and cultural contexts in which they are often used. However, it is worth noting, that at least in legal terms, these notions bear generally positive connotations and are associated with the legitimization of jurisdictions which are subject to the processes of constitutionalization.[38]

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[36] A. Peters, *The Function and Potential of Fundamental International Norms and Structures*, "Leiden Journal of International Law" 2006, vol. 19, p. 581 (p. 580 and references cited therein).

[37] See: S. Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. J.L. Dunoff, J.P. Trachtman, Cambridge University Press, New York 2009, p. 381–384.

[38] Cf. A. Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, "Leiden Journal of International

"Constitution" is mainly associated with the most obvious understanding of this concept as "the act of determining the institutional foundations of the state"[39] or "rules and practices defining the composition and functions of state bodies and local self-government and governing the relationship between the individual and the state".[40] In a formal sense, constitution is a kind of legislative act, which is characterized by a unique legal authority, formally the highest in the legal system, and thus introduces normative hierarchy in the particular system of law. Usually, the constitution consists of a single written act, however, as is well known, this is not a *sine qua non* requirement. The complex constitutions of France, Sweden, the Czech Republic or Denmark are exceptions to the rule of uniformity, whereas the constitutional regimes of Great Britain, New Zealand and Israel are the most famous examples of unwritten constitutions.[41] Last but not least, the rank of a constitution is usually highlighted by the unique nature of the constitutional legislator (e.g. constituent assembly), a special procedure for its adoption and change, which usually differs from the standard legislative process.[42] More important, however, seem to be the material content qualities of a constitution, which gives it special significance. The scope of this so-called constitutional matter historically expanded with successive generations of constitutions.[43] At its narrowest, the essential content of a constitution, deriving from the eighteenth-century tradition of constitutionalism, can be seen as a catalogue of fundamental constitutional rights, including the basic institutional guarantees of what will be later labelled as "the rule of law", such as the tripartite division of political powers. Therefore, axiologi-

Law" 2006, vol. 19, p. 579–610; R. Kwiecień, *Konstytucja społeczności międzynarodowej w perspektywie aksjologii prawa międzynarodowego* [in:] *Aksjologia współczesnego prawa międzynarodowego*, ed. A. Wnukiewicz-Kozłowska, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2011.

[39] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Lieber, Warszawa 2002, p. 31.

[40] E.A. Martin, *Constitution* [in:] *A Dictionary of Law*, ed. E.A. Martin, 5th ed., Oxford University Press, Oxford–New York 2002, p. 108.

[41] M.M. Wiszowaty, *Konstytucja* [in:] *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, ed. A. Szmyt, Warszawa 2010, p. 127–137.

[42] Cf. E.A. Martin, *Constitution*…; A. Peters, *Global Constitutionalism Revisited*, "International Legal Theory" 2005, vol. 11, p. 43–46.

[43] L. Garlicki, *op. cit.*, p. 32–33.

cally it equals a certain basic ideal of the early western liberal-democratic constitution. In a broader, functional and at the same time traditional sense, the constitutional matter reaches beyond the catalogue of rights to determine the foundations of political legitimacy, the essential rules of the organization and interplay of political, social and economic realms, as well as setting the boundaries for containing political power and acts as an integrating agent for the underlying community (nation).[44] Finally, as argued by Anne Peters, in the broadest possible meaning, the constitution can be seen as a legal cornerstone, organizing and institutionalizing the given political organization.[45] In this view, it is all the more about comprehending the constitution not as a text but rather as a kind of *Grundnorm* or as a source of political order and legitimacy of the legal system.[46] In this sense, we talk about the constitution in the material sense, meaning a set of basic rules and a framework for "arranging" the community.

The idea of constitutionalism seems to refer mostly to this latter understanding of a constitution. As indicated in the literature, this term can be comprehended in various ways – as a theoretical model of a political arrangement, a certain kind of ideology, ending with a normative theory.[47] Usually, however, it is identified with the general idea of a *Rechtstaat* – the rule of law, where the operation of political authority and even of the democratic mechanisms themselves is, firstly, regulated by law, and secondly, limited by the

[44] Cf. A. Peters, *Compensatory Constitutionalism*…, p. 585; P. Uziębło, *Konstytucjonalizm* [in:] *Leksykon współczesnej teorii*…, p. 156; see also: D. Vanheule, who writes about four functional types of constitution: (1) constitution as a Charter for Government, (2) Constitution as a Guardian of Fundamental Rights, (3) Constitution as a Covenant, Symbol and Aspiration, (4) Costitution as Sham, Cosmetic or Reality (D. Vanheule, *Comparative Constitutional Law: deel I*, IELSP, Antwerpia 2005, p. 12–13).

[45] A. Peters, *Global Constitutionalism*…, p. 46; *eadem*, *Compensatory Constitutionalism*…, p. 584.

[46] S. Besson, *op. cit.*, p. 385.

[47] *Ibidem*, p. 387. Uziębło notes that both in the Anglo-American and European doctrines of natural law the prevalent view is that constitutionalism is an ideology characterized by two elements: (1) the place of the individual rights at the forefront of the legal legitimacy of the political system and (2) the reference to the constitution, as an act of guaranteeing these rights; see: P. Uziębło, *op. cit.*, p. 153; cf. P. Kierończyk, *Konstytucjonalizm* [in:] *Leksykon prawa konstytucyjnego*…, p. 194–199.

fundamental principles of constitutional legal rights.[48] It is also worth noting that "constitutionalism" means something more than just a "constitution". It is an emanation of the underlying substantive and procedural institutions of the constitution; it means that the state (community) owns a particular type of meaningful constitution.[49] By way of contrast, the paradoxical phenomenon of a "constitution without constitutionalism" has been described in the literature to exist in some non-democratic countries. This occurs when the basic law serves only as a façade, a guise (a "sham constitution").[50] In such a sense, "constitutionalism" seems to aspire to the status of a specific philosophy of constitutional ideas. It may even be said that it provides an ideological context in which constitutions arise and the process by which constitutionalization operates.[51] The guiding theme of constitutionalism is the concept of the primacy of a constitution over the rest of the normative order.[52]

Last but not least, it is not less challenging to capture the essence of the concept of "constitutionalization". This notion suggests the existence of a process that leads to the development of constitutional order in a legal system, or alternatively it may mean the promotion and spread of consti-

[48] See: L. Morawski, *Wstęp do prawoznawstwa*, Dom Organizatora TNOiK, 12th ed., Toruń 2009, p. 199–207. There are differences in the meaning between the German (continental) concept of *Rechtstaat* and the Anglo-Saxon concept of the rule of law, but it is assumed that they have a common fundamental core of meaning (S. Wronkowska, Z. Ziembiński, *op. cit.*, p. 248, note 7). On some of the problems with the importance and possibilities of the use of the concept of the rule of law in the international dimension; see e.g.: G. Palombella, *The Rule of Law beyond the State: Failures, Promises and Theory*, "International Journal of Constitutional Law" 2009, vol. 7, s. 442–467. On the emerging rule of law in the areas of international trade, safety, labour and environmental law see; B. Zangl, *Is there an Emerging International Rule of Law?*, "European Law Review" 2005, vol. 13, sup. 1, p. 73–91.

[49] Cf. A. Peters, *Compensatory Constitutionalism*…, p. 582.

[50] See: H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox* [in:] *Constitutionalism and Democracy: Transitions in the Contemporary World*, eds. D. Greenberg et al., Oxford University Press, Oxford 1993, p. 65–82; this case is also called a "semantic constitution", cf. M.M. Wiszowaty, *op. cit.*, p. 128.

[51] N. Tsagourias, *Introduction – Constitutionalism: a Theoretical Roadmap* [in:] *Transnational Constitutionalism…*, p. 1.

[52] Cf. P. Uziębło, *op. cit.*, p. 154; P. Kierończyk, *op. cit.*, p. 197.

tutionalism as a way of thinking about law.[53] "Constitutionalization" may also communicate the process of formation of a constitution (its specific type, consistent with the doctrine of constitutionalism) and consequently, of constitutional law, as well as the acquisition of constitutional features by the existing legal acts.[54] Constitutionalization may therefore imply the existence of a transitional stage on the way to the constitution or constitutionalism in a specific time. Therefore it means a dynamic transformation. Some authors believe that constitutionalization as a process does not necessarily have to lead to the emergence of a stable constitutional foundation in the international community.[55] In this sense it may remain an unfinished process, a normative tendency, while the emergence of a full model constitution of the international community is also influenced by other factors, primarily axiological. Anyway, looking at constitutionalization from the perspective of a process, one may also argue that a dynamic, never-ending process of constitutionalization may in itself constitute a certain form of constitution of international law.[56]

4.3.2. Constitution at the international level

The basic constitutional terms described above have their relatively established doctrinal definitions in the jurisprudence of the constitutional law of national legal systems. However, the question arises whether they can refer to the system of international law. The most controversial point is perhaps the very concept of the international "constitution" because traditionally a constitution as a normative device is associated closely with the state.[57] However, as the protagonists of the idea of global constitutionalism sometimes emphasize, this concept as well as the idea of a constitution was never reserved exclusively for national use, and none of its features excludes con-

[53] Cf. A. Peters, K. Armingeon, *Introduction – Global Constitutionalism from an Interdisciplinary Perspective*, "Indiana Journal of Global Legal Studies" 2009, vol. 16, no. 2, p. 389.

[54] *Ibidem*.

[55] See: R. Kwiecień, *Konstytucja społeczności międzynarodowej…*

[56] See: *idem*, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Difin, Warszawa 2011, p. 154–155.

[57] See: A. Peters, *Compensatory Constitutionalism…*, p. 581.

sideration of a constitution in a transnational context.[58] Moreover, the idea of a global constitution does not have to imply any assumption that there is or should be a world state.[59] As rightly pointed out by Habermas, it is more promising to read Kant's idea of a cosmopolitan constitution on an adequate level of abstraction in order to release the concept of constitutionalization of international law from the idea of the world republic, which is rightly rejected.[60]

This way it is possible to locate the constitutionalization of international law and the hypothetical constitution of the world itself in a supranational sphere, which is not necessarily a universalistic realm such as a world community or a politically unified *imperium mundi*. It is rather associated with the rationalist tradition of a liberal international community, which despite the participation of non-state actors remains essentially a community of states. The process of constitutionalization of international law would therefore be concerned with placing the international community as a new collective subject of law at the political and axiological centre of global processes. The end result of constitutionalization would be the establishment of the constitution of the international community, understood primarily as an international legal community, ruled not by force (or not only by force), but by the law and existing in the normative dimension.

It is however necessary to answer the question about the characteristics of the international constitution. Just as in the case of national constitutions, the debate on global constitutionalism takes into account the division of constitutions into formal and substantive ones. This distinction, analysed below, is however a purely conceptual one and is not intended as an argument for

[58] *Ibidem*; cf. K. Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, "Indiana Journal of Global Legal Studies" 2009, vol. 16, no. 2, p. 422.

[59] See: B. Fassbender, *The Meaning of International Constitutional Law* [in:] *Transnational Constitutionalism*…, p. 311; cf. P. Capps, *The Rejection of the Universal State* [in:] *Transnational Constitutionalism…*, p. 17–43; A. Peters, *Compensatory Constitutionalism*…, p. 610. However, there are also influential voices representing the opposite position in the literature, see: A. Wendt, *Why a World State is Inevitable*, "European Journal of International Relations" 2003, vol. 9, no. 4, p. 491–542.

[60] J. Habermas, *The Constitutionalization*…, p. 444.

a fundamental possibility of complete separation of the form from the content of constitutional law at the international level.[61]

4.3.3. Formal conception of the constitution of international law

Proponents of the formal perspective on constitutionalism trace the direct analogy between the national constitution and the international dimension. The best-known proposal is to treat the UN Charter as a counterpart of a constitution in the system of international law.[62] Bardo Fassbender believes that the process of constitutionalization of international law takes the form of the UN Charter, which *ab initio* was designed as the constitution of the post-war international community and only disguised – for political reasons – in the plain clothes of "just" a treaty.[63] The very name "charter" was meant to emphasize its peculiar constitutional character. In support of this thesis, the author states that the UN Charter can be said to meet at least some of the formal requirements of a constitution according to the functional approach.[64] Namely, it constitutes both vertical and horizontal governance systems in international law; it defines the membership of the international community, and recog-

[61] I must agree at this point with A.L. Paulus that it is impossible to separate completely the form and the substance of a constitution. On the one hand, the existence of a constitution implies functioning of certain substantive standards that are valid within the entire legal system. On the other hand, in order to gain efficiency, the constitution also requires effective implementation mechanisms. See: A.L. Paulus, *The International Legal System as a Constitution* [in:] *Ruling the World?…*, p. 87–88.

[62] See: B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, Martinus Nijhof Publishers, Leiden–Boston 2009, *passim*; *idem*, *The United Nations Charter as Constitution of the International Community*, "Columbia Journal of Transnational Law" 1998, vol. 36, p. 529–619; J. Kolasa, *Normatywne podstawy jedności prawa międzynarodowego. Zarys problem* [in:] *Rozwój prawa…*, p. 11–38; T. Jasudowicz et al., *Prawa człowieka i ich ochrona*, Dom Organizatora TNOiK, Toruń 2005, p. 47–48; M. Kałduński, *Godność człowieka* [in:] *Leksykon ochrony praw człowieka. 100 podstawowych pojęć*, eds. M. Balcerzak, S. Sykuna, C.H. Beck, Warszawa 2010, p. 182–183.

[63] B. Fassbender, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order* [in:] *Ruling the World?…*, p. 133.

[64] See: J.L. Dunoff, J.P. Trachtman, *A Functional Approach to International Constitutionalization* [in:] *Ruling the World?…*, p. 3–35.

nizes its own priority of application before the obligations under other treaties (Article 103 of the UN Charter). Also, like any constitution, the Charter poses formal limitations on the possibilities of its amendment (Article 109 of the UN Charter), therefore aspiring to the status of a timeless or at least lasting legal document.[65] It is also believed that the UN Charter breaks the principle of *pacta tertiis nec nocent, nec posunt* (Article 2 paragraph 6 of the UN Charter), excludes any possibility of raising treaty reservations against the validity of its provisions, and requires that statutes of regional treaties and organizations are compliant with its objectives and principles (Article 52 paragraph 1 of the UN Charter).[66] An important feature is the presence of a transnational (as opposed to international) element in the institutional architecture of the United Nations system created by the Charter. It introduces the concept of separation of powers (competence) between the six primary organs of the UN. Also, in the case of Security Council decision-making processes, only weighted majority rather than consensus is needed.[67] Supporters of the view of the Charter as the constitution of international law show that international practice places the United Nations Charter at the centre of the international legal normative order. The Charter of the Organization of American States, the Statute of the Council of Europe, the North Atlantic Treaty, the Statute of the International Criminal Court, the Vienna Convention on Diplomatic Relations (1961) or the Convention on the Law of the Sea (1982) – these are just some of the most important treaties declaring compliance with the UN Charter or banning any breaches of its provisions.[68] This is just one out of many manifestations of the constant and consistent development of the legal and institutional system of international law by the Charter, through the Charter and under the auspicies of the UN.[69] The constitutional view of the UN Charter has serious consequences, since it means that this treaty is a framework for the whole international legal system and constructs a higher level in the hierarchy of normative standards of inter-

[65] See: B. Fassbender, *Rediscovering a Forgotten Constitution*…, p. 140; cf. M. Kałduński, *Karta Narodów Zjednoczonych* [in:] *Leksykon ochrony praw człowieka*…, p. 182.

[66] T. Jasudowicz et al., *op. cit.*, p. 47–48.

[67] See: M.W. Doyle, *The UN Charter – a Global Constitution?* [in:] *Ruling the World?*…, p. 115.

[68] *Ibidem*, p. 141–143.

[69] J. Kolasa, *op. cit.*, p. 14.

national law.[70] Consequently, as Bardo Fassbender admits, there is no place for the category of "general international law" existing outside of the UN Charter.[71]

However, the conception of a formal constitution of the international community clearly has serious flaws – for example, although the UN Charter includes the basic objectives and principles of the United Nations and provides minimal axiomatic foundations and determines the rights of states as the traditional members of the international community, it fails to include an international bill of rights, which is characteristic of almost every constitution.[72] Moreover, many other instruments of international law (including human rights covenants, the Statute of the International Criminal Court, the Convention on the Law of Treaties, and the Convention on the Prevention and Punishment of the Crime of Genocide) may also have legitimate claims to be granted the rank of constitutional documents, hence the UN Charter is certainly not an exhaustive "constitution" in the formal sense. The literature on constitutionalization has even created the concept of "world order treaties",[73] which pertains not only to the Charter. The proponents of the concept of the Charter as the constitution of the international community, however, do not see these arguments as undermining their view, because – as claimed by Bardo Fassbender – the Charter should be seen as part of a more general and global constitutional process within the international community. It is only a "framework constitution" of the international community, supplemented by other sources.[74] The "world order treaties" systematically

[70] B. Fassbender, *The Meaning*…, p. 324.

[71] *Ibidem*.

[72] Of course, the lack of a catalogue of specific human rights in the UN Charter was the result of a political compromise. However, a reference to the catalogue of human rights in Art. 1, par. 3 of the UN Charter can be considered as their blanket inclusion into the text of the Charter. See: T. Jasudowicz et al., *op. cit.*, p. 48–49.

[73] One of the protagonists of this concept is Ch. Tomuschat, who defines *world order treaty* as a treaty concretizing and developing the constitutional principles of the international legal order; see: Ch. Tomuschat, *Obligations Arising for States Without or Against their Will*, "Recueil des Cours" 1993, vol. 241, p. 248; B. Fassbender believes, however, that treaties of this type are only subsidiary towards the UN Charter and calls them "Constitutional By-Laws"; i.e., acts of a constitutional rank building upon the provisions of the UN Charter. See: B. Fassbender, *The United Nations*, p. 588–589.

[74] See: B. Fassbender, *Rediscovering*…, p. 145–146.

and genetically depend on the UN Charter, as they build on its provisions, therefore not having themselves a fully autonomous constitutional nature. However, further issues arise at this point, since it turns out that the UN Charter is a not primary source for the entire constitutional international law in accordance with the ideal of the constitution as a *Grundnorm* of the legal system, and neither is the whole international law dependent on the law-making activities of the United Nations.[75] Instead, the UN Charter seems only to reflect the fragmented and decentralized nature of the international legal order.[76] Other disadvantages of the UN Charter as a potential constitution have been pointed out, such as deficiencies in terms of the principles of separation of powers in the international community, lack of judicio-constitutional control of the law-making activities of the bodies of the United Nations, or difficulties in the effective institutional protection of human rights by these agendas.[77] This implies a rather sceptical attitude of the doctrine of international law towards the idea of the constitutional nature of the Charter. It is rather at most a nascent (*in statu nascendi*) type of constitution.

4.3.4. Substantive conception of the constitution of international law

The substantive perspective of the constitutionalization of international law does not depend on the existence, or not, of the formal constitution as a single act or group of acts, or at least considers this aspect as secondary. In the case of the substantive view, it would probably be equally correct to talk about the international constitutional law of the international community in place of a constitution. It can be understood as a set of substantially and formally superior rules of international law that constitute the normative basis for all other special regimes and norms of international law.[78] Substantive constitution refers to the most important and institutionalized standards governing

[75] See: M.W. Doyle, *op. cit*., p. 113–114.

[76] *Ibidem*, p. 114.

[77] R. Kwiecień, *Konstytucja społeczności…*; also: *idem*, *Teoria i filozofia…*, p. 166–167. A serious critique in this regard was presented by J.L. Cohen, *Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)*, "Humanity: An International Journal of Human Rights, Humanitarianism and Development" 2011, vol. 2, no. 1, p. 135 et seq.

[78] See: S. Besson, *op. cit*., p. 387.

the functioning of the international community in a broad sense (including not only the states but also other subjects of international law).[79] It does not seem relevant whether these rules and principles are written down and how many legal acts contain them, if at all, as they equally may fall under the category of customary international law. This lack of codification unity is not a problem, since even in the case of national constitutions there are sources of constitutional standards found in a variety of acts. Alternatively, domestic constitutions may even be unwritten – the case of the United Kingdom may once again be recalled as a popular example.

The problem with the substantive concept of constitutionalism is with the uncertainty of the constitutional matters and a plethora of positions concerning its scope – from constitutional minimalism to the view of the constitution as an ultimate source of legitimacy of the whole legal system. Alfred Verdross believed that the constitution of the international community consists of fundamental principles and rules concerning the sources of law, subjects of law and jurisdictional division of powers between the different countries.[80] Similarily, the followers of the functional approach agree that constitutional norms would certainly include those rules of international law which constitute the actors of law (i.e., the minimal attributes of states and international organizations), the meta-norms on the sources of law (the law of treaties, rules of recognition in customary international law), and the fundamental norms of international human rights law, seen as the limitation for the government or the supranational institutions.[81] Undoubtedly constitutional matter should also include symbolic norms, bonding the international community axiologically and teleologically – *inter alia*, those taken from the UN Charter.[82] Bardo Fassbender believes that this catalogue of fundamental constitutional norms of the international community can be compared to the contents of a general lecture on international law, in contrast to the rules of the specific legal regimes of the system, such as the law of the sea or diplomatic law.[83] There is also, however, the issue of criteria for clear demarcation of constitutional norms from other "ordinary" standards that also perform

[79] Cf. A. Peters, *Compensatory Constitutionalism*…, p. 582, 585.
[80] Cited in: B. Fassbender, *The Meaning*…, p. 315.
[81] Cf. A. Peters, *Compensatory Constitutionalism*…, p. 599.
[82] Cf. *ibidem*.
[83] Cf. B. Fassbender, *The Meaning*…, p. 316.

these functions in the system of international law. This is problematic, since neither the criterion of a "fundamental character" of the norms nor the functional approach, referring to their creational, organizational, integrational character or their function of delimiting the spheres of competence, is sufficiently clear.[84] Some interpretational indications may be drawn from the concept of the well known distinction between primary and secondary rules as proposed by H.L.A. Hart, where the constitutional norms of international law would have a secondary character and would be concerned primarily with issues of validity and change of the primary rules (the other rules of international law).[85] However, it seems these approximations are not sufficient to separate clearly the rules of constitutional status from others, because such a distinction would be possible only in the case of a formal constitution of the international community in place.

4.3.5. Global constitutionalism?

Regardless of whether one favours more the formal or the substantive concept of a constitution of the international community, it seems clear that in any case it is not a complete or full constitution, at least when judged by the standards of classical constitutionalism. Even if there is some nascent form of constitution and constitutionalization taking place at the international level, most likely we can talk only about a global "constitutionalism" written with a small "c" instead of a capital "C".[86] It substantially differs from its historical cousin, national constitutionalism, especially in terms of its ideological and axiological aspirations. International constitutionalism is primarily an attempt to describe international law as a coherent legal system, to systematize it, to distinguish an internal normative structure and hierarchy within it, and perhaps to redefine the validation rules of this legal order or part thereof.[87] International constitutionalism may have the potential to pursue some tra-

[84] Cf. A. Peters, *Compensatory Constitutionalism*…, p. 599.

[85] Cf. B. Fassbender, *The Meaning*…, p. 315–316; see: J. Oniszczuk, *Filozofia i teoria prawa*, C.H. Beck, Warszawa 2008, p. 487–488.

[86] See: M. Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and between the State* [in:] *Ruling the World?*…, p. 260.

[87] Cf. *ibidem*.

ditional goals of a legal system, such as containing power through the rule of law and the formation of a legal coherence of the system through the widely accepted normative category of the principles of international law.[88] However, it does not seem that global constitutionalism aims anyhow at identifying a supposed sovereign, generating hierarchies of power in the international system or creating one overarching and coherent political structure within – in this case – the international community.[89] This does not necessarily mean that global constitutionalism is a worse, poorer or evolutionarily earlier version of national constitutionalism. It often becomes a victim of too simple comparisons to the latter, which, due to the different nature of the international community should not be made.[90] Global constitutionalism and the whole idea of constitutionalization of international law, despite the obvious terminological similarities and the analogy with national constitutionalism, should nevertheless be understood as an autonomous concept, and not as an extrapolation of national constitutional law or constitutional traditions of a particular country.[91] The same may be said about the idea of a constitution as such, which at the level of the international community is not necessarily, and probably never will be able to meet all the requirements of a constitution *par excellence*.

4.3.6. The symbiosis of global and national constitutionalism: *Verfassungskonglomerat*

The above-mentioned autonomy of constitutional processes at the international level does not mean, however, that a possible separation of the international constitutional sphere from the domestic one is easy.[92] Along with the changing face of the international community the nature of the state as its basic member is also transforming. As a result, a number of constitutional issues, including in particular the protection of human rights, and even

[88] Cf. W. Werner, *The Never-ending Closure: Constitutionalism and International Law* [in:] *Transnational Constitutionalism*…, p. 348–351.

[89] Cf. M. Kumm, *op. cit*., p. 260; N. Tsagourias, *Introduction – Constitutionalism*…, p. 2.

[90] Cf. N. Tsagourias, *Introduction – Constitutionalism*…, p. 4–5.

[91] Cf. B. Fassbender, *The Meaning*…, p. 325.

[92] Cf. A. Peters, *Compensatory Constitutionalism*…, p. 591.

the standards of the political system (especially in the area of economics or finance), is subject to the requirements, evaluation, and often sanctions by international factors, including the rules of international law as well as the technical and research activities of international organizations.[93] The result is often the ever-increasing interference of international law directly with national constitutional law,[94] in the areas of individuals' rights, environmental protection, criminal jurisdiction or the sources of law. One of the most interesting examples of such processes in recent decades is the new federal constitution of Switzerland of 1999. It provides that any changes in the law of Switzerland cannot violate the peremptory norms of international law.[95] The constitutional legislator lost omnipotence in the process of shaping the constitutional matter a long time ago. The process of devolution of competence to shape these standards increasingly takes place at the international level, for instance, through governmental and nongovernmental organizations (NGOs).[96] Furthermore, as mentioned above, constitutionalization in international law is not complete by the standards of national constitutionalism, mainly due to structural differences between the national state and the international community, as well as to the slightly different objectives of the national and global

[93] An interesting example showing the potential scale of "rebound" effects of international technical standards developed by an international organization was the situation in Poland at the end of 2009, when the late Dr. Janusz Kochanowski, Polish Ombudsman for Civil Rights, put forward questions to the government about the policy of preventive vaccination against influenza A / H1N1 (the Polish government refused to buy and use vaccines during the climax of media discussion at that time). The Ombudsman raised allegations of possible violation of the rights and freedoms guaranteed by the Constitution of the Republic of Poland. In support of his views and position on the matter he relied on the findings and recommendations of the World Health Organization at that time. See: *Wystąpienie dr. Janusza Kochanowskiego, Rzecznika Praw Obywatelskich, na konferencji prasowej poświęconej obecnej sytuacji epidemiologicznej kraju, ze szczególnym uwzględnieniem grypy A/H1N1*, 13 November 2009, http://www.rpo.gov.pl/pliki/12581077090.pdf, accessed 18 November 2014.

[94] Cf. A. Peters, *Compensatory Constitutionalism…*, p. 591.

[95] Cf. Articles 193 and 194 of the Constitution of the Swiss Confederation, http://bit.ly/1HgJuBj, accessed 18 November 2014; see also: B. Fassbender, *The Meaning…*, p. 318.

[96] A. Peters, *Compensatory Constitutionalism…*, p. 591–593.

constitutionalisms. All this can lead to the view that both types of constitutional orders infiltrate each other and can be regarded as being subsidiarily complementary. Since the universalist world federal state is not, in fact, present or necessary, or even desirable, there is also no need for any hierarchy between the national constitution and the global one. In return, it is possible that they form a transnational constitutional rather symbiotic network[97] and compensate the mutual deficiencies, creating a full constitutional protection at different levels of global governance.[98] This complementary arrangement is even necessary, because it may be a response to the shifting burden of decision making in the public sector from the national to the international level.[99] Erica de Wet called this phenomenon *Verfassungskonglomerat*, which can be translated as a "constitutional conglomeration" and defined as a system of national and postnational (international and regional) constitutional arrangements that complement each other. This structure allows for control over the political process in an increasingly integrated international legal order.[100] The most obvious and well developed example of this constitutional symbiosis appears to be the human rights law, which bases itself on national constitutional protection measures as well as on the direct application of international instruments, such as, for example, the European Convention on Human Rights.

4.3.7. Constitutional processes in the international community

Regardless of the discussion on the specific forms and effects of constitutionalization of international law, the form of the constitution of the international community and its relationship with national constitutionalism, some of the phenomena taking place in the contemporary international legal community, which could be described as "constitutional processes" have to be pointed out. They may be a symptom of a not-always-coordinated action of constitutional forces in international law, reflecting the need for a greater

[97] Cf. *ibidem*, p. 591, 601–602; see also: A. Peters, *Global Constitutionalism…*, p. 63–64.

[98] Cf. A. Peters, *Global Constitutionalism…*, p. 41–42.

[99] E. de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, "Leiden Journal of International Law" 2006, vol. 19, p. 612.

[100] *Ibidem*.

cohesion and coherence of the system and its consolidation around the international community.

4.3.7.1. The *jus cogens* norms, *erga omnes* obligations and the hierarchization of international law

The peremptory norms (*jus cogens*) defined in Article 53 of the Vienna Convention on the Law of Treaties are undoubtedly one of the main contributions to the constitutional interpretation of international law. Unfortunately, there is no consensus as to the catalogue of *jus cogens* norms. Undoubtedly, it includes the prohibition of the threat or use of force in international relations, the prohibition of unauthorized intervention, the right to self-determination, the prohibition of genocide, torture, slavery and piracy.[101] More systematic and fuller analysis of the complex nature of *jus cogens* norms is not the subject of this book.[102] Despite the general uncertainty of *jus cogens* norms, which is mainly the result of a rather conservative attitude of the ICJ towards this legal concept, the recent literature discusses, among others, such paramount issues as the limits for UN Security Council resolutions set out by their supposed subordination to the *jus cogens* norms[103] or the close relationship between the regime of human rights protection and the peremptory norms.[104] The particular importance of the *jus cogens* norms, which underpins their special character and primacy over all other norms of international law[105], seems to rely on the fact that they perform the function of protection

[101] See: J. Barcik, T. Srogosz, *op. cit.*, p. 82; M.N. Shaw, *op. cit.*, p. 101–102; cf. A.L. Paulus, *The International Legal…*, p. 88–89.

[102] For comprehensive analysis of the *jus cogens* norms in the contemporary literature see: A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, New York 2006; *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, eds. Ch. Tomuschat, J.M. Thouvenin, Martinus Nijhoff Publishers, Leiden–Boston 2006.

[103] See e.g.: A. Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, "European Journal of International Law" 2005, vol. 16, no. 1, p. 59–88.

[104] See e.g.: A. Bianchi, *Human Rights and the Magic of Jus Cogens*, "European Journal of International Law" 2008, vol. 19, no. 3, p. 491–508.

[105] The relationship between the concept of the *jus cogens* norms and the priority of the UN Charter as expressed in Art. 103 of the UN Charter may raise some concerns.

of the most fundamental common values which are critical to the security of the entire international community, becoming thereby the core of "public interest norms" in international law.[106]

While the peremptory norms are invoked as one of the major arguments for the existence of a rudimentary hierarchy of rules in international law[107], a different concept – obligations *erga omnes* – puts emphasis on the public interest, elevating international law above its traditional contractual character. As in the case of the *jus cogens* norms, in the case of *erga omnes* the obligation is incurred in relation to the international community as a whole.[108] Violation of such an obligation undermines the interests of the international community as a whole, a supra-national public interest. The catalogue of recognized *erga omnes* obligations overlaps with the standards of *jus cogens* to a significant extent.[109] However, there is a different criterion of distinction of both of these categories and certainly there is no consensus about the view that all the *erga omnes* obligations are simultaneously peremptory norms.[110] Moreover, international human rights law by its very nature, and according to its rationale standing behind it, in the majority of cases creates and operates obligations *erga omnes*.

However, the opinion prevails that the peremptory norms always take precedence, even before the standards of the UN Charter. This was a position taken by ICJ judge E. Lauterpacht in the Bosnia opinion (Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993, ICJ Rep. 4, 440, § 100); A. Peters, *Compensatory Constitutionalism…*, p. 598; M.N. Shaw, *op. cit.*, p. 102; J. Kolasa, *op. cit.*, p. 29–32.

[106] On the concept of a "public interest norm", encompassing more than only the *jus cogens* norms see: A. Peters, *Compensatory Constitutionalism…*, p. 601.

[107] For more analysis see: D. Shelton, *op. cit.*, p. 291–323.

[108] W. Czapliński, A. Wyrozumska, *op. cit.*, p. 4.

[109] According to the ICJ case law, the category of the obligations *erga omnes* includes among other rules: prohibition of aggression and genocide, protection from slavery and racial discrimination, prohibition of torture and the right of peoples to self-determination; see: M.N. Shaw, *op. cit.*, p. 101.

[110] The need to differentiate between the *iuris cogentis* and the *erga omnes* has been highlighted among others by W. Czapliński, *Odpowiedzialność za naruszenia prawa międzynarodowego w związku z konfliktem zbrojnym*, Wydawnictwo Naukowe Scholar, Warszawa 2009, p. 209.

As mentioned above, in the recent literature, both the construction of *jus cogens* norms and obligations *erga omnes* has been connected to the emergence of "community interests" in international law as a special category of protected legal interest.[111] According to Santiago Villalpando, the increasingly self-aware international community has discovered that many of the shared values it refers to are the so-called "public goods" which can be defined through the prism of the language of economics as benefits that are indivisibly dispersed in the whole community.[112] They include peace, the environment or humanity itself. They are referred to in many specific areas, such as the fight against poverty, development, disarmament, the fight against epidemiological threats or in telecommunications.[113] The fact that the "community goods" argument is sometimes also extended to those areas of international law that have been shaped predominantly by the bilateral method of regulation does not mean that it completely displaces or denies the individual interest. Even where the interests of the international community as a whole are clearly visible, the interests of individual states can be just as strong and vital.[114] The most prominent example is international peace and security, which is obviously of value to the entire international community, but always in the context of the particular sovereign rights of its members. Although the relationship between the interests of the community and the individual interests is not necessarily contradictory, it needs to be a key task of the constitutionalizing international legal order skilfully to find and maintain a balance between these two categories. The anxiety about maintaining this equilibrium is the root cause of a still conservative and prudent approach to the *jus cogens* norms and obligations *erga omnes*.

4.3.7.2. Supranationalism and the new role of the Security Council

In the period before 1989 the problem with the UN system was predominantly the lack of decision making, passivity and, in consequence, the inef-

[111] See: S. Villalpando, *The Legal Dimension of the International Community: How Community Interests are Protected in International Law*, "European Journal of International Law" 2010, vol. 21, no. 2, p. 390–394.

[112] *Ibidem*, p. 392.

[113] *Ibidem*, p. 395.

[114] See: *ibidem*, p. 411.

fectiveness of the Security Council. Over the last two decades, the situation has changed dramatically. The Security Council has finally undertaken its mission of the protection of international peace and security, even in too activist fashion, according to the opinions of some.[115] There is a strong legislative activity on the part of the Security Council, which is using the general legal basis of Article 25 of the UN Charter in conjunction with a more flexible interpretation of the term "threat to the peace" in Article 39 of the UN Charter to create rules that may in some cases replace or circumvent the treaty law. Importantly, the consequences of these acts may directly affect the rights of individuals within the Member States of the United Nations.[116] This legislation includes, among others, Resolution 1267 (1999), which forms a monitoring committee drafting the list of entities suspected of terrorist activity, a far-reaching Resolution 1373 (2001) aiming to build a global regime of prosecution of persons suspected of terrorism or Resolution 1540 (2004) on weapons of mass destruction in the hands of non-state actors. Some of these resolutions of the UN Security Council through their implementation in national law have led to the *de facto* collision with the regional human rights standards.[117] The best example is the very widely commented *Yassin Kadi* case.[118] Mr Kadi is a Saudi citizen placed by a UN committee on the list of terrorist suspects under the Security Council Resolution 1267 (1999). As a consequence of this Resolution, the EU Council of Ministers (EC) adopted Regulation 467/01 of 6 March 2001 and Regulation 881/02 of 27 May 2002 implementing among others, the above-mentioned Resolution 1267 into the EU Common Foreign and Security Policy. This resulted in freezing the assets of Mr Kadi located in the territory of the EU. In response to these actions, Kadi accused the EU authorities of the infringe-

[115] See: J.L. Cohen, *A Global State of Emergency or the Further Constitutionalization of International Law: a Pluralist Approach*, "Constellations" 2008, vol. 15, no. 4, p. 456–484.

[116] See: *ibidem*, p. 458–459.

[117] See: ECHR judgment *Bosphorus Hava Yollari Turizm Ticaret Anonim Sirketi v Ireland*, 30 June 2005, no. 45036/98; cf. M. Kumm, *The Cosmopolitan Turn…*, p. 279–283; C. Costello, *The Bosphorus Ruling of the European Court of Human Rights and Blurred Boundaries in Europe*, "Human Rights Law Review" 2006, vol. 6, no. 1, p. 87–130.

[118] *Yassin Abdullah Kadi & Al. Barakaat International Foundation v EU Council & EU Commission*, joint cases no. C-402/05 P and C-415/05 P, ECR I-6351 (ECJ).

ment of his fundamental rights to protection of property, to a fair trial and to seek effective legal remedies. The dispute found its finale in the two opposite rulings delivered in turn by the Court of First Instance (CFI) and then the Court of Justice of the EU (CJEU). The first of these courts came up with a surprising and far-reaching decision, opting for a unitarist vision of a global legal order. It found that, due to the contents of Article 103 of the UN Charter, obligations of states in respect of the Charter outweigh their obligations towards other standards (including EU law and the European Convention on Human Rights). Despite this, the Court of First Instance, relying on the doctrine of *jus cogens* norms, recognized its jurisdiction over the issue of compliance of the Regulations, and therefore, indirectly, of the UN Security Council Resolutions, with the peremptory norms of public international law. In the end, no inconsistencies were found between the investigated acts and the *jus cogens* norms, which resulted in a ruling that was unfavourable to Mr Kadi. The case was then appealed to the CJEU, which based its analysis on the assumption that it is not international law, but rather EU law that constitutes a complete and autonomous legal system of a constitutional nature. The regime of EU law is, according to the reasoning of the CJEU, independent of public international law and therefore from the obligations imposed on the EU by external bodies. As a result, the Regulations, and thus indirectly also the Security Council Resolutions, were checked for compliance with the constitutional principles of the EU law, which naturally include guarantees of the fundamental rights of individuals.[119] As expected, the result of the case, which was now favourable to Mr Yassin Kadi, was applauded by many commentators in Europe. However, far more important are the legal views of both EU courts. On the one hand, the problem with the reasoning employed by the Court of the First Instance was obviously the recognition of the hierarchical primacy of the criticized UN Security Council decisions before EU law, which was almost intuitively detrimental to the European culture of human rights constituting one of the foundations of the EU legal order. On the other hand, the CFI judgment is an excellent example of a new, open constitutional thinking about international law as a global system, along with the EU law as an integrated

[119] Cf. J.L. Cohen, *Constitutionalism*…, p. 138–141; J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, Oxford University Press, New York 2009, p. 1–3.

subsystem. The ruling of the Court of Justice, even though it generated the substantially correct and generally desired effect in this particular case, may also be regarded as slightly disappointing because of its conservatism and particularism. It further consolidates the EU law as a closed and special legal regime and reinforces the old thesis of the far-reaching autonomy of the EU law from the general international law.

Setting aside serious and at the same time potentially negative consequences of the UN Security Council decisions[120], it needs to be emphasized that they are a sign of a steady departure of the international community from voluntarism and consensus decision making towards a more centralized and constitutionalized system[121] which seeks to create more quasi-regulatory bodies. National sovereignty begins to lose its capacity to block international decisions or avoid their consequences, and the only effective veto seems to lie in the hands of the great powers – the permanent members of the UN Security Council. There is also a growing supranationalism in various international organizations, where more and more key decisions are taken by majority voting. In many regional organizations, especially in Europe, Member States are increasingly being bound by the rules set up by organs of these organizations not necessarily with the explicit permission of the representatives of these states. In practice, many rules are imposed on the state by international bureaucracy.[122] "Supranationalism" can be defined simply as a transition from international to above-national decision-making mode, which also may be a manifestation of the formation of an international community aware of its separate identity. Supranationalization manifests itself in the delegation of certain functions of the state executive to an international authority, in the devolution of sovereign powers, and, thirdly, by empowering certain organizations or institutions to act in the name and on behalf of the state or a group of states.[123]

[120] Some even say that, thanks to the almost complete discretion available to the Security Council in accordance with the provisions of the UN Charter, especially Art. 39 thereof, there is no rule of law in the international security system, but rather the rule of the Security Council (A.L. Paulus, *The International Legal*…, p. 98).

[121] Cf. A. Peters, *Compensatory Constitutionalism*…, p. 589.

[122] Cf. J. Ciechański, *op. cit.*, p. 345–349.

[123] M.W. Doyle, *op. cit.*, p. 115–116.

4.3.7.3. Miniconstitutions or world order treaties

Another interesting development is the perception of the treaties founding important international organizations as their constitutions.[124] This type of treaty, also known as "world order treaties" have been created in the areas of human rights, the law of the sea, environmental law, commercial law and international criminal law.[125] These regimes are characterized by almost universal membership and focus on protecting values common to the entire international community instead of being based on the reciprocity characteristic of classic international law.[126] Their "constitutions" are generally semi-autonomous structures within the broader international legal order.

One of the most important international organizations undergoing the process of constitutionalization is the World Trade Organization (WTO).[127] In the WTO law there are a few important "constitutional manifestations". First of all, the basic constitutional function of this law is to neutralize any protectionist rules creating obstacles to international trade at the national level,[128] by which the WTO strongly interferes with national trade policies, becoming a normatively superior legal order in this regard. Moreover, WTO law has actively contributed to strengthen and give a new meaning to the two basic constitutional principles of international law – the principle of sovereignty and the peaceful settlement of disputes.[129] Having in mind the latter of these principles, one of the strongest arguments in favour of the constitutional interpretation of the legal regime of the WTO is the creation of an efficient, quasi-arbitral dispute settlement system run through the panel process and

[124] A. Peters, *Global Constitutionalism*…, p. 44.

[125] *Ibidem*, p. 52; B. Simma and D. Pulkowski (idem, *op. cit.*) propose that such regimes include the international system of human rights protection, EU law and the law of the WTO.

[126] Similarly W. Werner, *op. cit.*, p. 337.

[127] On the different dimensions and aspects of the constitution of the WTO and their interrelationships see: J.P. Trachtman, *The Constitutions of the WTO*, "European Journal of International Law" 2006, vol. 17, no. 3, p. 623–646.

[128] A. Peters, *Compensatory Constitutionalism*…, p. 596.

[129] P. Lamy, *The Place of the WTO and its Law in the International Legal Order*, "European Journal of International Law" 2007, vol. 17, no. 5, p. 974–977.

the Appellate Body.[130] It is worth noting that this is a compulsory mechanism for all members of the WTO, which is a phenomenon in the system of international law, as it does not use a compulsory judiciary in principle.[131] In addition, each member of the WTO may initiate the procedure in the interest of the entire international community, even if it is not directly involved in the dispute, which makes *actio popularis* admissible in the WTO law – another novelty in the international legal order. The integrity of this unique dispute settlement system has also given rise to an extensive case law. Some researchers even point out that there are conventional constitutional techniques in use in the WTO system, such as proportionality.[132]

4.3.8. Criticism and anti-constitutional trends in international law

Paradoxically, the contemporary international system also provides significant examples of forces acting in a completely opposite direction than towards constitutionalization of international law. They can be seen as evidence of a process that is perhaps not quite contradictory, but certainly contrary to the global constitutionalism; the fragmentation of the international law.

Fragmentation of international law is a phenomenon associated with the process described above as mini-constitutionalization of the particular international legal regimes and in fact is the other side of this coin. These regimes and international organizations build their own specific standards or even methods of regulation, and above all create various judicial and quasi-judicial dispute resolution systems in the subject matters covered by their "constitutional" treaties. In particular, the proliferation of international tribunals can be seen as a threat to the unity of international law.[133] Atom-

[130] For more about the characteristics of the WTO dispute settlement system see: B. Simma, D. Pulkowski, *op. cit.*

[131] Cf. P. Lamy, *op. cit.*, p. 976.

[132] See: D.Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, "European Journal of International Law" 2001, vol. 12, no. 1, p. 42; critically on this topic cf. J.P. Dunoff, *The Politics of International Constitutions: The Curious Case of the World Trade Organization* [in:] *Ruling the World?…*, p. 178–205, especially p. 190–192.

[133] More on proliferation of international tribunals see: W. Czapliński, *Multiplikacja sądów…*, p. 77–130.

ized autonomous networks of international courts, not related to each other in terms of instance control, can lead to conflicting case law, at least in so far as they refer in their judgments to general international law. On the one hand, this leads some authors to doubt the continuing existence of general international law, while others consider this situation to be proof that the whole system is not consistent and is only a loose network of interrelated rules.[134] On the other hand, it has to be taken into account that decentralization has been a natural element of the system of international law since its begining.[135] It is emphasized that normative conflicts between the regimes of international law either have in fact occurred only rarely[136], or are easily detectable and it is possible to eliminate them.[137] Besides, the international institutions seldom perceive their law-making and judicial activity in total isolation from the general international law or other systems and draw extensively from the jurisprudence of other bodies, particularly the ICJ, which they try to implement in their own practice, as in that of the WTO.[138] Therefore it can be concluded that as long as the international adjudication bodies under the specific regimes in their judicial review and law-making activities do not exceed the boundaries of their respective subject matter normative interests as well as applying general international law in harmony with the jurisprudence of relevant UN bodies, there is no substantial threat to the unity of international law. In this case a "unity in diversity" or "flexible diversity" can be said to exist.[139] This argument is indeed the starting point for a "global constitutional pluralism" type of approach, according to which the essence of constitutionalization of international law is in these partial constitutions, and which rejects the need and the necessity to overcome the fragmentation and decentralization by introducing a unitary constitution of the international community (e.g. the UN Charter).[140] The argument about fragmentation of international law based primarily on self-contained re-

[134] See: A.L. Paulus, *The International Legal…*, s. 82.

[135] W. Czapliński, *Multiplikacja sądów…*, p. 77.

[136] A. Peters, *Compensatory Constitutionalism…*, p. 602; A.L. Paulus, *The International Legal…*, p. 86.

[137] W. Czapliński, *Multiplikacja sądów…*, p. 130.

[138] Cf. A.L. Paulus, *The International Legal…*, p. 84–86; P. Lamy, *op. cit*., p. 944–947.

[139] A. Peters, *Compensatory Constitutionalism…*, p. 602.

[140] See: K. Milewicz, *op. cit*., p. 435; cf. A. Peters, *Compensatory Constitutionalism*…, p. 602–603.

gimes is in fact a reflection of a more pluralist face of the international community, appealing to more in-depth cooperation in specific, limited areas of common interest instead of pursuing the grand plan of building a unified community around a set of general common values. However, this does not mean that the international community is not experiencing the more soildarist approach within these regimes, but it is rather a limited sort of solidarity *à la carte*, rather than an all-encompassing solidarist, constitutional international community *par excellence*.

Yet another anticonstitutional trend often mentioned is the problem of the presence of a hegemonic power in the international system. It should be noted, however, that this is a much deeper systemic problem, since the political unipolarity of the world arising from the activity of the superpower may not only adversely affect the constitutionalization process, but even more importantly act to the detriment of the whole structure of the international system and threaten the existence of the very international community as a whole. Even if there is only an informal empire and *de jure* the structure of the international community is not affected and states as well as other members retain their relative freedom of action, a question arises to what extent the values, norms and objectives of the community stay common. In the literature on international relations theory there seems to be a consensus that every empire or even a hegemon tends to impose its own legal rules and axiological preferences on the international system.[141] However, even assuming that the ambitions of the superpower do not reach such extreme unilateralism, anyway even regular actions undertaken by the hegemon in relation to its own obligations under international law and within its own sovereign competence, can powerfully resonate in the international system and have very far-reaching consequences for the direction of the development of international law. Examples from recent history could include the negative attitude of the United States of America towards the International

[141] See: M. Beeson, R. Higgott, *Hegemony, Institutionalism and U.S. Foreign Policy: Theory and Practice in Comparative Historical Perspective*, "Third World Quarterly" 2005, vol. 26, no. 7, p. 1174. The phenomenon of the hegemonic international law was discussed in the literature of international law; J.E. Alvarez, *Hegemonic International Law Revisited*, "American Journal of International Law" 2003, vol. 97, no. 4, p. 873–888; N. Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of an International Legal Order*, "European Journal of International Law" 2005, vol. 16, no. 3, p. 369–408.

Criminal Court and its jurisdictional regime, which has resulted in significant undermining of the system of international criminal law. In this case it was an active measure undertaken by the superpower in the form of conclusion of Bilateral Immunity Agreements with some allies or forcing the adoption of Resolution 1422 (2002) by the UN Security Council.[142] Other examples include refusal to ratify a number of other important international agreements, of which the Ottawa Treaty outlawing anti-personnel mines is one of the most prominent.[143] Of course, this does not automatically mean that the United States or any other future superpower will always, in principle, constitute an obstacle to the process of constitutionalization of international law. A lot also depends on historical and political circumstances, the nature and political character of the process itself and its perception by the most influential and powerful members of the international community. It is worth remembering that it was none other than the United States that was the main architect and sponsor of the UN system, and previously the originator of the League of Nations.[144]

[142] W. Werner, *op. cit.*, p. 344–345. Resolution 1422 (2002) *de facto* excluded the possibility of prosecuting members of military forces of the states not party to the ICC Statute and participating in UN peacekeeping missions. The resolution was adopted for a period of 12 months and then extended for another year. The USA has made its support for the extension of the UN peacekeeping mission in Bosnia-Herzegovina dependent on the adoption of the Resolution 1422.

[143] See: *ibidem*, p. 343. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, opened for signature on Dec. 3rd 1997, entered into force March 1st 1999.

[144] Generally, the attitude of US lawyers towards the debate on the constitutionalization of international law is rather sceptical (see: A. Segura-Serrano, *op. cit.*, p. 14–16). This idea is genetically linked to continental Europe, mainly to German legal and philosophical thought. Among the authors who publish on the subject there are many German or German-speaking scholars: B. Fassbender, A.L. Paulus, A. Peters, B. Simma, H. Brunkhorst, A. von Bogdandy, T. Giegerich, Ch. Walter. The "German Law Journal" has published their discussion on the constitutionalization of international law in response to J. Habermas's book (*idem*, *The Divided West*…) – see: A. von Bogdandy, S. Dellavalle, *Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms*; T. Giegerich, *The 'Is' and the 'Ought' of the International Constitutionalism: How Far Have We Come to Habermas's Road to a 'Well Considered Constitutionalization of International Law'?*; R. Kreide, *Preventing Military Humanitarian Intervention? John Rawls and Jürgen Habermas on a Just Global*

The criticism of the concept of constitutionalization of international law goes in different directions and there is no way to summarize all of its aspects here.[145] Pluralists can accuse supporters of constitutionalization of a hidden desire for normatively denser solidarism or even universalism. According to their view, constitutionalization is a threat to the desired pluralism of values within the international community and consequently eliminates political pluralism, and this in turn may pave the way for the global state or even a global tyranny. For others, the whole discussion on the constitution of the international community is ineligible due to the fact that constitutionalism is too organically and inextricably linked with the state.[146] In connection with this view, one may point to the argument about the democratic deficit; how can we talk about international constitutionalism when democratic mechanisms generally do not operate at the level of the international community or – at best – are limited to a rudimentary form?[147] The question is whether one can rely on the idea of a constitutional order, having in mind the ultimate goal of protection of the rights of societies and individuals, if these "citizens of the world" often do not even have formal influence on the emerging power structures at the global level. As pointed out by Anne Peters, even if all the states – members of the international community – were truly democratic, that still would not solve the issue. Therefore, a two-tier action is needed: not only does internal democracy need to be built or reinforced in states all over the world, but also actions are

Order; R. Tinnavelt, T. Mertens, *The World State: a Forbidding Nightmare of Tyranny? Habermas on the Institutional Implications of Moral Cosmopolitanism* (all in: "German Law Journal" 2009, vol. 10, no. 1); cf. also: Ch. Walter, *Constitutionalizing (Inter) national Governance*, "German Yearbook of International Law" 2001, vol. 44, no. 170; A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, "Harvard International Law Journal" 2006, vol. 47, no. 223.

[145] On various kinds of arguments critical of global constitutionalism and their rejection see: A. Peters, *The Merits of Global Constitutionalism*, "Indiana Journal of Global Legal Studies" 2009, vol. 16, no. 2, p. 397–411.

[146] See: W.E. Scheuerman, *All Power to the (State-less?) General Assembly!*, "Constellations" 2008, vol. 15, no. 4, p. 485–492; cf. H. Brunkhorst, *State and Constitution – a Reply to Scheuerman*, "Constellations" 2008, vol. 15, no. 4, p. 493–501; M. Kumm, *op. cit.*, p. 258–259.

[147] The democratic deficit is in fact one of the central problems of contemporary international politics; see on that topic: A. Peters, *Dual Democracy* [in:] *The Constitutionalization…*, p. 263–341.

necessary aimed at creating democratic accountability of the institutions of the international community directly to the citizens of the world.[148]

Last but not least, some researchers indicate many subtle pitfalls associated with the constitutional project of the international community, putting forward accusations, that it is merely a sort of intellectual experiment by European scholars.[149] We still lack suitable intellectual tools for maping power in the post-Cold War world order.[150] Therefore, we use the constitutional paradigm, which comes with a set of ready answers and ideas about the constitutional balance of power. However, the problem is that the constitutional institutions are not necessarily always efficient under the domestic conditions, not to mention their ability to adapt to such an unusual and complex structure as the international community. Imposing this conceptual and axiological framework on the international reality can have serious consequences, e.g. it may put at the centre of the system some older, petrified structures and institutions (UN, WTO) at the expense of new, future, and perhaps better solutions.

4.3.9. Three planes of perception of the constitutionalization of international law

Attempting to summarize the discussion on constitutionalization of international law, one can point essentially to three different levels of comprehension of this phenomenon. First of all, constitutionalization may be seen as an objective process occuring within the international community. Secondly, it can be approached as a hermeneutic way of interpreting international law[151] and thirdly, as a normative project of reconstruction of the legal system. The following will discuss each of these variants.

4.3.9.1. Constitutionalization as a real process

The transformations that have taken place so far in international law can be interpreted in accordance with the thesis proposed at the outset of this chap-

[148] *Ibidem*.

[149] D. Kennedy, *The Mystery of Global Governance* [in:] *Ruling the World?*…, p. 65.

[150] *Ibidem*.

[151] A. Peters, *Global Constitutionalism*…, p. 39–40.

ter that international law as a system is no longer law between nations, but through the process of constitutionalization it is being gradually converted into the law of the international community as a whole. Arguments in favour of a gradual constitutionalization of international law are the result of progressive institutionalization, rudimentary hierarchization of rules, the emergence of common values and interests, the growth and strengthening of the universal human rights catalogue as a charter of rights for the entire international community, and the reshaping of the structure of this community, which is no longer merely a society of states.[152] Of course, from this perspective, the question of who are the subjects of an international constitution, who is the "sovereign" and, therefore, the nature of this constitutional international community, is crucial. The type of more solidarist international community, where the space for shared goals, interests and values is larger, will probably have a more coherent and more comprehensive substantive constitution. This vision stands in opposition to a limited, formal constitution, which is now available to the narrow and pluralistic society limited to coexistence between the states in the form of the UN Charter and the guiding principle of sovereign equality. As to the former version of constitutionalism, one of the main problems it faces is the fact that this broad and solidarist international community is not yet able to constitute itself as the subject of constitutional rights. In other words, there is no self-awareness on the part of the community of its own identity as separate from the sum of identities of all of its members, and this would actually be necessary in order to be able to speak of a "constitution".[153] This problem stems from the fact that it is very difficult for such a diverse grouping, consisting of states but also of non-state actors, and perhaps even individuals, to transform from the legal to the political community. One of the solutions to this problem is the concept of a "constitutional network" inspired by J. Habermas,[154] based on the principle of constitutional subsidiarity and assuming a distribution of the constitution among the various levels: supranational, regional and national. A comprehensive and

[152] S. Besson, *op. cit*., p. 393–396; B. Mielnik, *op. cit*., *passim*.

[153] S. Besson, *op. cit.*, p. 398; P. Allott, *Eunomia: New Order for a New World*, 2nd ed., Oxford University Press, New York 1990, p. 418, cited by: B. Fassbender, *The United Nations*…, p. 531.

[154] About Habermas's concept of three levels of the global governance see: W.E. Scheuerman, *op. cit*., p. 485–486.

all-encompassing global constitution is not the only option – there seems to be an alternative in the form of a framework constitution at the global level, which is complemented at other levels of political aggregation.

What remains open is the question whether the constitutionalization process is unitary in its character – e.g., under the aegis of the UN Charter and associated constitutional treaty systems in the area of general international law – or whether we are dealing rather with a constitutional pluralism, and therefore parallel constitutionalization of the self-contained regimes, such as the WTO, humanitarian law, environmental law, etc. According to the proponents of the second view, the constitutional process is closer to a multicentric and decentralized nature of international law, and the relationships between the parallel "constitutions" not necessarily have to disturb the unity of general international law.

4.3.9.2. Constitutionalization as a hermeneutic method of interpretation of international law

Methodological hermeneutics assumes that the interpretation and understanding of the consequences of the legal text does not boil down merely to a strict reconstruction of contents encoded in a legal provision. The final understanding of the interpreted law is also affected by the social context of interpretation, and above all by the creative element brought in by the interpreter.[155] Critical in all currents of legal hermeneutics is the notion of "pre-understanding" (*Vorverständnis*) which means a kind of interpretative hypothesis, a condition of appropriate understanding[156] or otherwise certain set of beliefs, expectations, language connotations and generally cultural background, which the interpreter brings into the understanding and interpretation of the text.

Taking into consideration the hermeneutical assumption that there is always a kind of a draft sense of the understanding of the text concerning selected parts of it, as well as the whole,[157] the idea of constitutionalization of

[155] See: J. Oniszczuk, *op. cit.*, p. 674; cf. P. Goodrich, *Legal Hermeneutics* [in:] *Routledge Encyclopedia of Philosophy*, ed. E. Craig, Routledge, London 1998, http://www.rep.routledge.com/article/T016, accessed 1 December 2009.

[156] J. Oniszczuk, *op. cit.*, p. 676–677.

[157] M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kantor Wydawniczy Zakamycze, Kraków 2000, p. 89.

international law can be perceived as a draft constitutional reconstruction of its meaning. What the proponents of the idea of global constitutionalization are proposing is nothing less than to endow the interpretation of international law with the pre-understanding related to the tradition of constitutionalism and constitutional language. The constitutional paradigm imposes a certain cognitive framework on the international legal reality, making it easier to understand, although burdening it axiologically at the same time. Assuming that law does not exist before interpretation and arises only in the process,[158] one can reformulate the entire understanding of the law according to the constitutional paradigm, even without having to make extensive legislative changes in the legal texts.

Against this background however, one can observe that the discussion of the constitutionalization of international law may become schizophrenic as far as the use of the language and concepts of constitutional law is concerned. On the one hand, the supporters of constitutionalization use the terms "constitution", "constitutionalism" and others typical of the legal tradition, which are particularly rich in their meaning, involving almost the entire ideology, if not a philosophy, of law. If that was not enough, the burden of meaning is different for every legal culture.[159] This "transplantation" of the constitutional tissue into the fabric of the international community faces a number of difficulties associated with the differences between the legal and linguistic reality in which they were formed, and the new one, in which it is meant to operate. On the other hand, as already mentioned, the remedy sought in an attempt to break away from this deadlock is promoting a view that "constitution" and "constitutionalism" are autonomous concepts under international law.[160] Nonetheless, it has to be remembered that legal concepts cannot be completely separated from the natural language in which they occur, because their meaning is relative to the context of other legal notions and professional grammar.[161]

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[158] See: J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 1999, p. 128.

[159] See: D. Kennedy, *op. cit.*, p. 61.

[160] See: B. Fassbender, *Rediscovering*…, p. 145.

[161] M. Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, "Theoretical Inquiries in Law" 2007, vol. 8, no. 1, p. 20–21.

Trying to use the constitutional rhetorics and simultaneously to detach oneself from many of its intrinsic connotations, is like wanting to eat the cake and have it at the same time. However, the use of the terms "constitution" and "constitutionalism" cannot be precluded under international law. One only needs to be clear about their meanings and the construction of a new constitutional language on the international level seems to be a viable project.

4.3.9.3. Constitutionalization as a normative project

Last but not least, constitutionalization can be seen as a normative proposal of the future construction of the international order and, therefore, as a *de lege ferenda* postulate.[162] Looking into the future through a lens of constitutionalization may bring in an enormous creative potential of identifying and understanding the many ongoing normative processes and changes within the international community, the effects of which will be apparent only in the future. It has been observed that this aspect of global constitutionalism can provide a powerful critical yet constructive potential to the process of reform in international law. Constitutionalization of international law can be used as a double-edged sword: as a source of unauthorized legitimization of international law and the international community through the abuse of constitutional language or, on the contrary, as a tool for exposing the lack of proper democratic legitimacy of the international legal order.[163] One may however agree with the view that there exists an acceptable and beneficial third way. The paradigm of global constitutionalism can be used to demonstrate that it is possible for the international community to function under conditions of sufficient legitimacy of international law and accordingly with

[162] As indicated by D. Kennedy, constitutionalization is not the only scholarly attempt to clarify the nature of changes in international law. Other influential trends in this respect include, *inter alia*, the socio-legal project conducted at the Australian National University (Peter Drahos, John Braithwaite), a project of global administrative law originating from New York University (Richard Stewart, Ben Kingsbury) and the Frankfurt School inspired by Niklas Luhmann's systems theory, led by Gunther Teubner; see D. Kennedy, *op. cit.*, p. 48–50.

[163] See: A. Peters, *The Merits*…, p. 410.

the principle of the rule of law on a global level without the need for recourse to the construct of a global state.[164]

4.4. Conclusion

The editorial limits of this chapter make it difficult to address many other aspects and topics of the fascinating and extremely complex issue of global constitutionalism or constitutionalization of international law, while others could be presented only at a necessary level of generalization. Although the legal dimension of the international community in general and the controversial concept of international constitutionalism in particular raise a number of critical comments, surely no one interested in the future of international law and the new face of the international community can walk away from it or remain completely indifferent to this debate. It is worth quoting here a reflection made in this regard by Bardo Fassbender that "the international community may in fact have advanced towards its constitutionalisation more rapidly than the doctrine of international law and the common wisdom of governments have perceived. Mainstream international law may be defending a world already gone.".[165]

[164] Cf. *ibidem*.

[165] B. Fassbender, *The Meaning*…, p. 321.

Conclusion

Five Meanings of the Notion "International Community" in International Law

The legal language of positive international law is much more prudent when making references to the international community than the language of the media and politics. However, international law cannot ignore this other, more dynamic discourse, and in particular the statements made by world leaders, which may, in some cases, constitute unilateral acts, and therefore advance to the rank of the sources of law. This issue concerns especially such a specific term as the international community. If a serious discussion about the catalogue of subjects of international law that go beyond the club of states is nowadays allowed, then more than ever it has to be considered what the wider international community, or even the "world community", has to say for itself. Moving outside the orthodox, positivist paradigm of law implies that all opinions and assessments the international community or its individual constituent elements hold about themselves are normatively important. One cannot assume that the interpreter of the text of an international treaty where the phrase "international community as a whole" is used does not presuppose certain meanings of the term, or does not take into account the discourse that is taking place around this concept. Although everyday media talk may often seem to be superficial and trivial, it has to be taken into account. It is perhaps worth considering a proposal made by Ludwig Wittgenstein, that one should always examine how an expression is used, before conclusions are drawn as to its meaning.[1]

[1] See: M. McGinn, *Routledge Philosophy Guide Book to Wittgenstein and the Philosophical Investigations*, Routledge, London–New York 1997, p. 12–16.

In my opinion, the analysis of even a small fraction of the huge reservoir of normative statements that use the term "international community" in a strictly legal or political context allows the selection of five basic meanings that can be attributed to the expression in the language of international law. Firstly, the international community can be identified with the sum of all countries, or secondly, it can be interpreted as a collective, informal society, which is not, however, a single entity, nor a simple set of states. The third way is to equate the international community with the universal international organization, such as the United Nations. Fourthly, the term "international community" might be linked to the universalist concept of humanity, which is a meaning closer to the term "world community" used by the representatives of the English school of international relations theory. Last but not least, it is possible to attempt to build a non-ontological meaning of the concept and see it as an interpretative presumption.

5.1. International community as a sum of all existing states

In the classical literature of international law, the term "international community" refers to at least the sum of all or most of the states in the world, recognized as full members of this community.[2] This statement refers, of course, to the traditional concept of a "Vattelian" international community of states as equals *qui iudicem communem nullum habent* (which "have no common judge").[3] This view is still supported by more traditionally minded scholars and lawyers, but seems to be increasingly questioned, especially by the conclusions of the debate over the issues of subjecthood in international law. It also seems that the results of an analysis of the normative material in contemporary international law does not support this theory.

Supporters of the meaning of the term "international community" as referring exclusively to the sum of all states often point to the two important treaties: the 1969 Vienna Convention on the Law of Treaties (with special

[2] See: S.E. Nahlik, *op. cit.*, p. 11–16; *Prawo międzynarodowe w pytaniach i odpowiedziach*, ed. S. Sawicki, LexisNexis, Warszawa 2009, p. 21; R. Bierzanek, J. Symonides, *op. cit.*, p. 13.

[3] H. Mosler, *The International Society as a Legal Community*, Sijthoff & Noordhoff International Publishers B.V., Alphen aan den Rijn 1980, p. 1.

attention to Article 53 thereof), as well as the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[4] Both instruments use the phrase "international community of States as a whole" without much doubt referring to the very classic understanding of the international community, exclusive even of international organizations.[5] However, it should be noted that the major point of reference of these provisions is the category of *jus cogens*, i.e. the peremptory norms of international law, and both conventions aim to secure states' monopoly of their creation. It was not the aim of the drafters or the International Law Commission (ILC) to build a definition of the international community or to create such a normative category anew. It is enough to say that the original version of the draft articles of the 1986 Vienna Convention proposed by the ILC (Article 50, which later became the basis for the text of Article 53 in the final version of the Convention), does not even contain the phrase "international community".[6] This provision was in fact referring only to the effects of non-compliance with the peremptory norms of international law. Moreover, the classic interpretation of the notion "international community" contained in Article 53 of both Vienna Conventions is largely a historical one and does not fit into contemporary normative reality. Currently, it would be difficult to argue that at least some international organizations, such as the European Union, do not count as separate members of the international community, actively participating in the development of international law.[7] This is evident in the more recent work of the ILC on the responsibility of states. In the commentary to Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC states:

> […] there are no international obligations of a subject of international law which are not matched by an international right of another subject or sub-

[4] See: the United Nations Office of Legal Affairs, http://bit.ly/1AhVq3N, accessed 19 November 2014.

[5] See: *Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations* [in:] "Yearbook of the International Law Commission" 1982, vol. 2, part 2, p. 56, § 3, http://bit.ly/1AhVHE0, accessed 19 November 2014.

[6] *Ibidem*.

[7] Cf. J. Crawford, *Responsibility to the International Community as a Whole*, "Indiana Journal of Global Legal Studies" 2001, vol. 8, issue 2, p. 303–322.

> jects, or even of the totality of other subjects (the international community as a whole).[8]

It is striking to observe that other, newer fundamental instruments of international law, when referring to the term "international community", have not repeated the exact wording coined in the two conventions on the law of treaties. The UN Convention on the Law of the Sea (1982) in Article 59 refers only to the interests of "the international community as a whole". Similarly, the Rome Statute of the International Criminal Court (1998) points to the "most serious crimes of interest to the international community as a whole".[9] The same line is maintained by the ILC in the above-cited draft articles on Responsibility of States for Internationally Wrongful Acts,[10] which repeatedly uses the phrase "international community as a whole". Interestingly, in all these cases, the word "states" previously present in the wording of the Vienna Conventions was abandoned. This may indicate a clear trend towards departure from limiting the meaning of the term "international community" only to the sum of states.

5.2. International community as a synergic collective

Since the meaning of the term "international community" does not equal the simple sum of all states as the primary subjects of international law, the

[8] *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, "Yearbook of the International Law Commission" 2001, vol. 2, part 2, p. 35, § 8, http://bit.ly/1AhWKDS, accessed 19 November 2014.

[9] The Polish translation of Article 5 of the Rome Statute of the ICC completely ignores the expression "most serious crimes of concern to international community as a whole" and uses as an alternative the formulation "most serious crimes of international concern", which changes completely not only the literal wording of the provision, but also the teleology of the entire Statute because the central axiological point of reference is the concept of crimes that are detrimental to the "common good" or the international public interest as referred to by the concept of the international community as a whole.

[10] "Draft Articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, A/56/10"; cf. "Draft Articles on Responsibility of States Acts with commentaries", *op. cit*.

question arises what other qualitively different entity it may denote. For the purpose of answering this question it is useful to focus more attention on a phrase usually coexisting with the term "international community", namely the expression "as a whole" (German: *Die internationale Gemeinschaft als Ganzes*, French: *L'ensemble de la communauté internationale*, or Spanish: *La comunidad internacional en su conjunto*). It has been used, for instance, in the aforementioned 1998 Rome Statute of the ICC or in the Article 59 of the 1982 Convention on the Law of the Sea.[11] It is also used in the jurisprudence of the ICJ,[12] as well as by other international tribunals,[13] often coexisting

[11] Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002, http://bit.ly/1AhYCMQ, accessed 19 November 2014.

[12] In addition to the *Barcelona Traction* case, the phrase "international community as a whole" has been used in many crucial decisions of the ICJ, such as the judgments of 18 November 2008 (*Croatia against Serbia and Montenegro*), 27 February 2007 (*Bosnia and Herzegovina v Serbia and Montenegro*) on the Convention against the Crime of Genocide (*Oxford Reports on International Law*, ICGJ 25, IGCJ 70); *Advisory Opinion of 21 June 1971 on Namibia* (ICGJ 220), judgment of 30 June 1995 concerning *East Timor* (*Portugal v Australia*); in the dissenting opinion of Judge Korona in the case of the Wall in the Palestinian Territories, judgment of 9 July 2004 (ICGJ 203), judgment of 18 December 1951 (*United Kingdom v Norway*) on fisheries, as well as in the order of interim measures of 2 June 1999 (*Yugoslavia v Belgium, the Netherlands, US, Portugal, Canada, United Kingdom, Spain, France, Italy, Germany*, respectively ICGJ 32, 42, 49, 44, 34, 47, 46, 36, 40, 38), judgment of 20 December 1974 on the French nuclear tests in the Pacific (*New Zealand v France ICGJ 137*), judgment of 24 May 1980 on US diplomatic and consular personnel in Tehran (*United States against Iran*, ICGJ 124, ICJ Rep. 3, 1980).

[13] The phrase "international community as a whole" can be found, for example, in the arbitration case law in *CMS Gas Transmission Company v Argentina*, the International Centre for Settlement of Investment Disputes, ICSID Case No ARB / 01/8, the Oxford Reports on International Investment Claims IIC 65 (2005); also in *Sempra Energy International v Argentina*, ICSID Case No ARB / 02/16 IIC 304 (2007); as well as in the case law of criminal tribunals in cases *Prosecutor v Tadic*, judgment of the International Criminal Tribunal for the former Yugoslavia on 2 October 1995, Case No IT-94-1AR72, *Oxford Reports on International Criminal Law*, ICL 36 (ICTY 1995); in the *Prosecutor v Mucic and ors*, the decision of the ICC for the former Yu-

along the term "international community" phrased without additional qualifications. If we assume that the very notion of "international community" already contains the implicit assumption that its meaning includes at least all states recognized and accepted as members of the community, then the additional phrase "as a whole" can bestow on this term the following meaning.

The use of the phrase "as a whole" may be explained by referring to its linguistic meaning of "an entity or a complex system consisting of interdependent parts".[14] In English language the idiom "as a whole" means that the relevant referent is to be treated "as one thing or piece and not as separate parts".[15] Another source reports that the expression refers to "something that consists of a number of parts, but is considered as a single unit: two halves make a whole".[16] Relying on these definitions may lead to the conclusion that the phrase "as a whole" strongly emphasizes the collective nature of the international community, and indicates that its members together form a new quality. This is important because seeing the international community as a unit, or a conglomerate of its members, from a logical point of view has a different meaning than the vision of an international community of states as a set in the distributive sense.[17] Members of the "international community as a whole" do not constitute an atomized grouping for the purpose of the moment or a particular action. They are not "all states", but a separate unit,

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goslavia of 20 February 2001, Appeal Judgment, Case No IT-96-21-A, ICL 96 (ICTY 2001); the *Prosecutor v Kupreškić and ors*, the decision of the ICC for the former Yugoslavia on 14 January 2000, Case No IT-95-16-T, ICL 98 (ICTY 2000); the *Prosecutor v Kallon and Kamara*, the judgment of the Special Court for Sierra Leone on 13 March 2004, Case No SCSL-2004-15-AR72 (E), ICL 24 (SCSL 2004).

[14] Such a definition of the word "whole" as a noun is given by *The Free Dictionary*, http://www. thefreedictionary.com/as+a+whole, accessed 20 February 2012.

[15] "As one thing or piece and not as separate parts: Is the collection going to be divided up or sold as a whole?": *Oxford Advanced Learner's Dictionary of Current English*, ed. J. Crowther, Oxford University Press, Oxford 1995.

[16] "Something that consists of a number of parts, but is considered as a single unit: Two halves make a whole": *Longman Dictionary of Contemporary English*, ed. M. Rundell, 3rd ed., Longman Group Ltd., Harlow 1995.

[17] See: O. Nawrot, *Wprowadzenie do logiki dla prawników*, Wolters Kluwer, Warszawa 2007, p. 60–61; Z. Ziembiński, *Logika praktyczna*, PWN, Warszawa 2001, p. 33–34; cf. *Logika dla prawników*, ed. A. Malinowski, LexisNexis, Warszawa 2005, p. 49–51.

created by the merger of its elements which are not necessarily homogeneous. Thus, the members of the international community as a collective may belong to different ontological categories – they include not only states, but also international organizations, NGOs etc. Since the community constitutes a new quality, it is a relatively permanent collective and the elements of which it is composed do not lose their identity or autonomy while remaining parts of the whole. This character of the international community is reflected in the aforementioned constructs, such as the *erga omnes* obligations and the peremptory norms of international law, which are the normative foundation of an understanding of the international community as a separate entity and an axiological community. They can be seen as direct evidence of the existence of common values, interests and rights of this collective entity.

As the title of this section suggests, the discussed version of the meaning of the term "international community" may be interpreted with reference to the adjective "synergistic". It captures well the elusive character of the international community as a non-institutionalized and not fully recognized entity, which differs strongly from the simple sum of its component parts (mainly states). Synergism (Greek *synergos*) is a term widely used in science for the determination of the combined effects of individual elements cooperating with each other.[18] It is often referred to by a statement that "the whole is more than the sum of its parts" or by metaphorical representation of an equation "2 + 2 = 5".[19] In particular, it is worth noting that the synergistic effect in any sphere of life or science always supervenes on the dynamic relationship between the whole and its parts, where the individual elements never lose either their autonomy or their ability to exist outside of the whole they create together. Similarly, the state and other entities make up the international community, which becomes a set in the collective sense having synergistic effects. Exactly this meaning can be ascribed to the term "international community as a whole". The interests and values but also the

[18] P.A. Corning, *The Synergism Hypothesis. On the Concept of Synergy and Its Role in the Evolution of Complex Systems*, "Journal of Social and Evolutionary Systems" 1998, vol. 21, no. 2, http://www.complexsystems.org/publications/synhypo.html, accessed 19 November 2014.

[19] *Ibidem*; cf. *Słownik języka polskiego PWN P–Ż*, ed. M. Czekaj, PWN, Warszawa 2007 – defines synergism in the basic sense of "interaction of various factors, more effective than the sum of their separate actions".

efforts and actions undertaken by this community are not merely the sum of the influence of the individual members. In the problem areas, where the members are aligned and focused on the long-term goals and on securing the fundamental common values, they synergize to create a collective will of the international community.

5.3. The United Nations System as an international community

In one of his articles Kofi Annan wrote that the international community exists and it even has its own address.[20] Although the former UN Secretary General did not express it explicitly, it is not difficult to guess what he implied – the concept of international community should be identified directly with the organization led by him and which is probably one of the very few that can be considered as truly global and universal in terms of membership. This view is not isolated.[21] In fact, combining the ideas of the international community with the specific institutional structure of an international organization operating at the global level is an idea that has been present in the doctrine of international law for a long time, reaching back at least the period of the League of Nations. For example, one might refer to the results of the 37th Conference of the International Law Association in 1932. The participants of this elite meeting proposed full institutionalization of the "International Community" by way of establishing appropriate legislative and executive authorities besides the already existing Permanent Court of International Justice.[22] Today too, the identification of the United Nations with the idea of a global international community enjoys some support,[23] and indeed in many cases, the term is sometimes used colloquially as a synonym for the United Nations.[24]

[20] K. Annan, *Problems Without Passports*, "Foreign Policy" 2002, vol. 132, p. 31.

[21] Cf. e.g. N. Chomsky, *The Crimes of 'IntCom'*, "Foreign Policy" 2002, vol. 132, p. 34; S. Ogata, *Guilty Parties*, "Foreign Policy" 2002, vol. 132, p. 39.

[22] See: Ø. Heggstad, *The International Community*, "Journal of Comparative Legislation and International Law" 1935, vol. 17, no. 4, p. 265–268.

[23] E.g., R. Jackson believes that the international community after 1945 can be defined as a community concentrated in the United Nations and defined by the UN Charter standards; R. Jackson, *The Global Covenant…*, p. 344.

[24] See: N. Chomsky, *op. cit.*, p. 34.

Such an association can be considered fairly intuitive – were there to exist an institutionalized, transnational structure of the international community, we would probably look for it in the institutions of the UN system.[25] Similarly, if the dominant element in the structure of the international community were the states, it would also seem natural to identify their representation with the most universal international organization in the world.

However, it seems that the interpretation identifying the international community with the United Nations should be approached with a great deal of scepticism.[26] The analysis of the content of norms of international law provides no basis to assert such claims. It is enough to observe that the UN Charter, being the statute or even a constitution of the United Nations Organization nowhere makes use of the term "international community" or "international society". The ILC, acting within the framework of the United Nations, has never identified the term international community with the United Nations. Similarly, the ICJ has never explicitly commented on the status of the UN as an international organization, far from identifying the UN with the international community or any other such entity.[27] A clear distinction can also be observed in the texts of the normative statements made by the Security Council: for example, in Resolutions 1865 (2009) and 1886 (2009) it refers to "United Nations system *and* the international community", while in Resolution 1366 (2001) it declares that "the United Nations and the international community can play an important role in the national efforts to deter conflict".[28] In fact, if it were synonymous with the United Nations the term "international community as a whole" would not have appeared in many important international agreements prepared under the auspices of the

[25] According to R. Kuźniar, the United Nations is a legal and institutional infrastructure within which the international community takes actions to solve common global and regional problems; R. Kuźniar, *System Narodów Zjednoczonych* [in:] *Stosunki międzynarodowe*…, p. 376.

[26] The doctrine of international law has for long been sceptical towards such concept. Considering this possibility with respect to the UN, Nahlik wrote: "There is no possibility to put the sign of equality between the 'international community' and 'international organization'"; see: S.E. Nahlik, *op. cit.*, p. 16.

[27] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion, I.C.J. Reports 1949, p. 174 et seq.

[28] S/RES/1366 (2001) § 2; S/RES/1865 (2009); S/RES/1886 (2009), http://www.un.org/en/documents/index.shtml, accessed 19 November 2014.

UN – it would have been replaced by the name "United Nations". Therefore, from the normative point of view, putting an equal sign between the international community and the United Nations is too strong an interpretation.

Nevertheless, the UN is a very important forum for verbalization of the opinion and the will of the international community. In particular the General Assembly is probably the most representative international body. An important role is also played by the UN Economic and Social Council, which acts as a mediator between the community of states and other non-state actors, being the most representative forum for communication from their perspective, and constituting the link with the wider United Nations system.[29]

5.4. The international community as a world society

The very use of the term "international community" instead of "international society" in the language of international law might suggest, in accordance with the basic distinction made by sociologists and theorists of international relations between a *Gemeinschaft* and *Gesellschaft* (community and society),[30] that there is an implicit intention of giving the term a stronger, more solidarist meaning by the international lawmaker. As already mentioned, part of the doctrine of international law moves in the direction of this interpretation, making a distinction between the global international society and the more axiologically dense "international communities".[31] However, given that the legal language uses the term "international community" almost exclusively, the degree of axiological solidarism of this entity remains open to question. If it is theoretically possible to read this concept both in the pluralist version presented above as a grouping of states and as a closely related, solidarist synergic consortium of international actors, then one must also allow for a cosmopolitan interpretation proposed by the revolutionist approach within the English school of international relations. In other words, it is possible to support a hypothesis that the term "international community" might point to the widest possible community, which in principle includes all people – the entire world community.

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[29] R. Kuźniar, *op. cit.*, p. 383–384.

[30] See: F. Tönnies, *Community…*, *passim.*

[31] J. Gilas, *op. cit.*, p. 11–13.

This view seems to enjoy support in important literature on international law. In his widely read book *Eunomia*, Phillip Allott advocates a new ideal of the international community as a global community, covering the whole of humanity, or "the community of all communities".[32] In Article 1 of his Treaty establishing the international community the author proposes that this community should include all human beings, as well as all their communities, including the nation and various corporations.[33] The definition of international law in Article 2 as "the law of the international community embodying the common interest of all mankind" is also consistent with this assumption.[34] Of course, there have been attempts to discredit Allott's proposal as a utopian vision of the post-Cold War political enthusiasm predominant in the rather short era of the "end of history".[35] However, more recent literature is not lacking similar proposals. The author of one of them is Rafael Domingo, who postulates the existence of a global law not as a replacement, but rather operating next to or above international law in the strict sense as law between states.[36] Global law is another transnational dimension placed above the international; it is literally the law of the international community – an extremely complex *communitas* of the whole of humanity.[37]

A common feature of these cosmopolitan concepts is their ultimate anthropocentrism. Based on the normative constitution of the international community of humanity understood as the community of all human beings, this interpretation aims at extrapolation of the "effect of human rights" onto the whole structure of international law and international order. This is evident in the views of Rafael Domingo, who bases his entire pyramidal structure of global law on the human being as the new "*Grundnorm*" of this order.[38] The source of this cosmopolitan interpretation of the international

[32] P. Allott, *Eunomia*…

[33] *Ibidem*, p. 35.

[34] *Ibidem*.

[35] *Eunomia* was first published in 1990. The author refers to this criticism in the preface to the second edition (2001). See: *ibidem*, p. 7–34.

[36] R. Domingo, *The New Pyramid of Global Law*, Selected Works, http://works.bepress. com/rafael_domingo/1, accessed 19 November 2014; see also: R. Domingo, *The New Global Law*, Cambridge University Press, New York 2010.

[37] R. Domingo, *The New Pyramid*…, p. 11.

[38] *Ibidem*.

community lies in the axiology of human rights and in the whole normative system of international protection of human rights.

The rationale behind this cosmopolitan vision of public international law in general, and the international community in particular, is the evolving "language of world society", increasingly influential in positive international law. It is in wide use in both hard law and soft law instruments, especially in some branches of international law, such as the law of the common heritage of mankind, space law, cultural and natural heritage law or international environmental law. It may take on an even stronger cosmopolitan undertone than the term "international community" itself. At the forefront of this new language are the concepts of "humanity" (or "mankind")[39] and the "common heritage of mankind".[40] However, after closer examination, one can also find

[39] "Humanity", "mankind" or "humanity as a whole" is mainly found in the Preamble of the UN Charter ("[…] to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"), and also included in Art. I and V Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, drawn up on 27 January 1967 (http://bit.ly/1uR9eyU; accessed 19 November 2014); in the Preamble and Articles 136 and 143 of the United Nations Convention on the Law of the Sea, signed at Montego Bay, 10 December 1982 (http://bit.ly/1uRc46X, accessed 19 November 2014); in the Preamble to the Resolution of the General Assembly of the United Nations No. 2749 (XXV) of 17 December 1970 on the principles of management of the seabed and ocean floor and the ground beyond the reach of national jurisdiction (UN Doc. A/C.1/544); in the Preamble to the Antarctic Treaty, signed in Washington on 1 December 1959 (http://bit.ly/1uRcEBD accessed 19 November 2014); the World Charter of Nature, 1982 (UN Doc. A/RES/37/7; http://bit.ly/1uRcSsJ, accessed 19 November 2014); in the Preamble to the African Convention on the Conservation of Nature and Natural Resources, 1968 (http://bit.ly/1uRdcYi, accessed 19 November 2014); in the Preamble, Art. 1 and 2 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 17 November 1972 (http://bit.ly/1uRdAWK, accessed 19 November 2014), in the Preamble and Art. 21 of the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988 (http://bit.ly/1uRedj4, accessed 19 November 2014); in Article 3 of the UN Framework Convention on Climate Change of 1992 (http://bit.ly/1uReC5f, accessed 19 November 2014); see also: *Prawo międzynarodowe. Materiały*…, p. 445–482.

[40] "Common heritage of mankind" appears, *inter alia*, in the UN General Assembly Resolution No. 2749 (XXV) – available on-line http://bit.ly/1uRFodN, accessed 19

and identify such phrases as "common concern of mankind",[41] "common interest of all mankind"[42], or "world heritage".[43] Most of these and similar terms forming the cosmopolitan legal language find their common denominator in the notion of humanity, which in this case becomes a specific key word. The use and meaning of this concept is of interest to doctrine since the wording referring to it gradually began to appear in the language of law after the World War II.[44] On the other hand, it seems that despite this long legal history there is still a lot of confusion among lawyers and lack of consensus about its meaning. Opinions range from the simple statement that "humanity" is not a legally defined category and should be equated with the term international community, to the empowering of humanity as a subject of rights and obligations in the context of the idea of the third-generation human rights.[45] There are also views identifying "humanity" as the grouping of all states or all "peoples".[46] However, the most widely accepted and intuitive is the con-

November 2014; in the Preamble and Art. 136 of the United Nations Convention on the Law of the Sea (http://bit.ly/1uRc46X, accessed 19 November 2014); see also: *Prawo międzynarodowe. Materiały…*, p. 447, 450, 451.

[41] The phrase "common concern of mankind" in this context is used, *inter alia*, in: Preamble to the Convention on Biological Diversity of 1992 (http://bit.ly/1uRH4nk, accessed 19 November 2014) as well as in the UN Framework Convention on Climate Change of 1992 (http://bit.ly/1uReC5f, accessed 19 November 2014); see also: *Prawo międzynarodowe. Materiały…*, p. 479.

[42] For instance in the Preamble to the Protocol on Environmental Protection to the Antarctic Treaty – the so-called Madrid Protocol (http://bit.ly/1uRIrT2, accessed 19 November 2014).

[43] The term "world heritage" is present in Article 6 of the Convention Concerning the Protection of World Cultural and Natural Heritage of 1972 (http://bit.ly/1uRdAWK, accessed 19 November 2014); see: *Prawo międzynarodowe. Materiały…*, p. 465.

[44] See e.g.: H.W. Jones, *Law and the Idea of Mankind*, "Columbia Law Review" 1962, vol. 62, no. 5, p. 753–772; Q. Wright, *Towards a Universal Law of Mankind*, "Columbia Law Review" 1963, vol. 62, no. 3, p. 435–458; J. Stańczyk, *Pojęcie wspólnego dziedzictwa ludzkości w prawie międzynarodowym*, "Państwo i Prawo" 1985, no. 9, p. 55–65; K. Baslar, *The Concept of the Common Heritage of Mankind in International Law*, Kluwer Law International, The Hague 1998.

[45] See: B. Gronowska, *Systematyka międzynarodowo chronionych praw człowieka* [in:] T. Jasudowicz et al., *op. cit.*, p. 192.

[46] See: K. Baslar, *op. cit.*, p. 72–73.

clusion derived from the lexical meaning of the noun "humanity", according to which the notion includes, or should include, a collective of all people. In other words, it is a collective community, which can include every human being. It should also be noted that this community apparently has a timeless character. Since the preservation of the common heritage of mankind for posterity is one of the main principles of international law,[47] the very concept of humanity must then include in its meaning not only the present but also past and future generations.

Apart from the question about the scope of the meaning of the term "mankind", one of the main problems that arise in the doctrine of international law in connection with the notion's legal framework is the issue of representation. Stephen Gorove asks how one country or group of countries or international organization may be the spokesperson or representative of the whole of humanity without a formal act of authorization or a mandate empowering such representation.[48]

Quite naturally, the above question is one of the first thoughts that must arise in the mind of a positivist international lawyer. This problem is determined by the state-centric thinking in traditional international law and its structural constraints connected with the subject-object dichotomy. The question arises whether concepts such as the "common heritage of mankind", "crimes against humanity" or the qualification of astronauts as the "envoys of mankind in outer space"[49] appear only as political, philosophical or moral ornaments?[50] More compelling, however, is the view that the entry of the term "humanity" into the international legal language as a concept axiologically and historically associated with the natural law doctrines is the direct consequence of the growing importance of human rights and of itself is

[47] See: J. Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space and Antarctica: Will Developed and Developing Nations Reach Compromise?*, "Wisconsin International Law Journal" 2003, vol. 21, p. 409 et seq.

[48] S. Gorove, *The Concept of 'Common Heritage of Mankind': a Political, Moral or Legal Innovation?*, "San Diego Law Review" 1971, no. 9, p. 390 et seq., cited in: *Prawo międzynarodowe. Materiały…*, p. 448.

[49] Art. 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, *op. cit*.

[50] S. Gorove, *op. cit.*, cited in: *Prawo międzynarodowe. Materiały…*, p. 448.

a proof of the weakening position of the traditional positivist school.[51] It is even believed that "humanity" as a legal concept symbolizes the transition from state-centric to anthropocentric international law and from the law of nations to humanity's law.[52] Anchoring global community in international law through the use of the term "humanity" is not devoid of legal significance, if we take into account the conclusions presented in Chapter III on the structural relationship between the world community and the international community. The idea of "humanity" as the ultimate community of interests legitimizing the international legal order cannot be seen literally in terms of a legal subject. It is clear that probably it never will be able to overcome the problem of the democratic deficit in its capacity to represent all individuals, not to mention its institutionalization or even reaching full self-awareness. However, a morally fundamental world community finds its representation and expresses its will through the institutions of the international community. Hence, the "international community" interpreted in combination with the concept of "humanity" can denote a solidarist type of international community, strongly associated and based on its cosmopolitan, legitimizing foundation in the form of the world community. After all, mankind has for long been speaking through governments acting unanimously as the international community. This axiology can be seen in the preamble to the UN Charter itself: it was not the states, but the "peoples of the United Nations", determined to save succeeding generations from the scourge of war, which twice has brought untold sorrow to mankind, who decided to unite their efforts and establish the United Nations Organization. Governments acted only as fiduciaries and executors of the will of the world community.

Given this brief analysis, it can be concluded that the interpretation of the term "international community" as referring to the cosmopolitan conception of a universal community of all people has its normative foundations. However, it is probably still too early, and the progressive changes in international law are not yet advanced enough, for such an interpretation to become sufficiently widely accepted in the jurisprudence and practice of the states, or more importantly, in the minds of policy makers.

[51] See: K. Baslar, *op. cit.*, p. 70–71.

[52] *Ibidem*, p. 71.

5.5. Non-ontological concept of international community

The above interpretations and a wealth of possible designates of the term "international community" are not always convincing. Due to the substantial lack of consensus as to the meaning of the term, some even avoid using phrases like "the international community should consider […]" or "the international community should take action […]".[53] It is also a fairly popular view that the term "international community" is essentially an empty one, since such an entity does not exist. This opinion, if it is not merely an intellectual provocation, can in fact be regarded as a certain shorthand. The international community may not necessarily be regarded as having a specific legal, material and institutional form, but it may also be comprehended in reference to a complex of moral and intellectual structures as a tool for legal, political and scientific description and explanation of the nature of international reality. In other words, one can imagine a non-ontological concept of the "international community" without referring it to any existing subject. The former UN High Commissioner for Refugees Sadako Ogata synthetically presented this view, when he explained that the idea of the international community takes shape because of the importance of what it aspires to become, rather than because of what it is.[54]

Therefore, a non-ontological interpretation of the international community relates to the axiological dimension of the international community or even of the world community. It is an indirect reference to the alleged common will of the states and their political elites, based on the shared catalogue of fundamental values and moral goals. In this sense the international community is the totality of the rules, procedures and mechanisms designed to protect the collective interests of humanity, based on the perception of shared values.[55] Therefore there is no need for the international community to have a *de jure* legal personality, separate subjecthood or a dedicated institutional infrastructure. It is only important that its members (especially the states) have these "material" tools at their disposal, and make use of them precisely because they see themselves as members of

[53] See: A. Gowers, *op. cit.*, p. 32.

[54] S. Ogata, *op. cit.*, p. 39.

[55] C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, "Recueil des Cours" 1999, vol. 281, p. 88.

the international community. It may thus constitute a sort of personification of international law and its increasingly solidarist axiology. Seeing this interpretation from the perspective of the debate on the constitutionalization of international law, one can say that the existence of a particular political entity, full-fledged *societas*, is not necessarily a *sine qua non* for the birth of its constitution in the broad sense.[56] One can also share the view of Bardo Fassbender that the emerging community and the constitution should be seen as connected in a mutual discursive relationship, in which they continuously mutually create, define and reinforce each other. We are not compelled to decide between the primacy of the constitution and the primacy of the community as a determining factor.[57] The essence of the international community may well lie in the *lien constitutionnel*, a sense of "constitutional bonding" between its members and not in the existence of specific forms or institutions.

It is characteristic that the international community does not have to be, and usually is not noticeably, present in the everyday political-legal reality. Usually, however, it reveals its presence only in the face of various crises and disasters, such as when "acts of barbarity shock the conscience of humanity". This ephemeral nature of the "community of conscience" immediately raises associations with the idea of transnational justice, which is known to be more easily definable using the language of *philosophia negativa* rather than *philosophia positiva*. In the reality of a specific case, it is a much simpler task to determine what constitutes a blatant injustice than to define the constitutive requirements of the state of universal justice.[58] Therefore, it is definitely easier to determine the international community as a moral community *modo negativo*, which means that only its denial, the challenging of its values, the denial of *erga omnes* rules – which is usually what happens in the case of the so-called mass violations of human rights – generally reveals its existence and shows its face when an event "shocks the conscience of humanity".

Last but not least, the non-ontological concept of the international community may be approached by reference to discursive and argumentative

[56] B. Fassbender, *The United Nations Charter*…, p. 64–65.

[57] See: *ibidem*.

[58] See: J. Zajadło, *Dylematy humanitarnej interwencji*…, p. 213; *idem*, *Po co prawnikom filozofia*…, p. 121.

theories of law.[59] If one accepts that the essence of the international community lies in the fact that it is more than the political landscape of consciousness or legal formation,[60] then speaking of the international community in legal language, one is in fact referring to a paradigm of the social world where the intersubjective understanding of a concept is the result of a consensus reached in the course of a discourse between the members of the community. This discourse should of course meet certain requirements. As aptly put by Bartosz Wojciechowski:

> In contemporary communicative society, each true participant of a speech act assumes that communication is based on three fundamental principles. Firstly, the speaker does not tell lies. Secondly, he communicates with others by using true sentences in such a sense that the interlocutor acknowledges his speech to be reliable (correct). Finally, the speaker's statement must be right in the sense that the participants of communicative actions accept his statement in the established axiological system. Communicative actions are also based on the assertion that the discourse participants are equal, free and able to act without restrictions.[61]

Therefore, one does not deal with members of the international community in terms of legal and institutional personality but with participants in a discourse and the specific communicative community (society) created by their activity. They undertake intensive communication activities among themselves, which result in building consensual concepts of social institutions at the international level, and one of them is undoubtedly the international community.[62] The term "international community" could in this case be regarded as a symbol[63] of the institution, developed in the course

[59] See: M. Zirk-Sadowski, *op. cit.*, p. 111–131. Attempts have been made to use argumentative and discursive theory in explaining the nature of international law and its place in international politics; T. Risse, *'Let's argue!': Communicative Action in World Politics*, "International Organization" 2000, vol. 54, p. 1–39; F.W. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, Cambridge 1991.

[60] A. Appadurai, *Broken Promises*, "Foreign Policy" 2002, vol. 132, p. 43.

[61] B. Wojciechowski, *Justifying*…, p. 286.

[62] Cf. M. Zirk-Sadowski, *op. cit.*, p. 119.

[63] Cf. *ibidem*.

of this discourse. In such an interpretation, the concept of the international community is simply a response and attempt to describe the changing social reality of the international and transnational dimension, and an attempt to recognize and name this reality.

5.6. International community as a legal subject *in statu nascendi*?

The doctrine of international law, seeing the growing importance of the international community as an autonomous factor, has started to discuss its possible legal personality.[64] One of the aims of this book is an attempt to answer the question whether and to what extent the international community as a "community of law"[65] may become an independent entity and acquire a legal personhood. Undoubtedly, as a collective entity it does not meet the traditional criteria of subjecthood: it has no standing before courts and tribunals, it does not bear international legal responsibility, and one of the most serious problems is the issue of its legal representation.[66] However, if seen from the perspective of the criteria set out in Chapter III above, at least partially the international community seems to have started developing as a separate entity. First of all, as has been shown in this book, it is undoubtedly the addressee, even if only a passive one, of international legal rules. A variety of traditional sources of international law refer to the "international community" or "international community as a whole" as a subject of rights and obligations (e.g. in the context of *erga omnes* norms). Secondly, it may be regarded as an international legislature, at least indirectly and with particular reference to the creation of *jus cogens* or peremptory norms of international law. The most questionable in the case of the international community is the efficiency requirement. Doubts are raised whether it can be considered to possess its own autonomous will (*volonté distinct*), which is independent of the will of other subjects, especially the states. There are many sceptical opinions in this regard, such as the one expressed by Noam Chomsky, that "international community" (irreverently renamed by him as "Intcom") is in fact just another disguise of the United States, its allies and "clients" in a vari-

[64] See: B. Mielnik, *op. cit.*, p. 234–254.

[65] H. Mosler, *op. cit.*, *passim*.

[66] Cf. B. Mielnik, *op. cit.*, p. 248–252.

ety of configurations,[67] or more broadly the so-called "Western civilization". Although in the light of the analysis of the normative legal material this type of opinion should surely be considered as exaggerated, nevertheless it points to the lack of clarity of the concept of the international community primarily in terms of its institutional representation. Claims to speak on behalf of the international community are too often put forward by various states, groups and communities, who lack the appropriate degree of moral or democratic legitimacy. This applies also to the UN, which despite the strongest mandate in this respect is lost in defining its own political identity and a clear vision of reforms, and therefore cannot be taken seriously as a strong candidate for the personification of the international community. On the other hand, it is also true to say that the UN cannot be denied a unique authority that comes with the universal character of the United Nations system, nor its achievements in the field of human rights. Therefore, it has done a lot to develop the axiological foundations of the contemporary international community. It is also impossible to ignore the institutional and legal framework created by the UN in the form of such bodies as the ILC and the Security Council, or its efforts in codifying international law, which after all has become the grounds for the development of the "language" of the international community. All of this builds the important role the UN has to play, at least as an important reference point in any discussion about the will of the international community. However, there is no doubt that the very nature of the international community is bigger and broader than that. What has been proposed above is the systematization of the different views and several visions of the possible meanings of the term, without prejudging the ultimate validity of any of them. It seems though that the concept of the international community as a simple sum of the states is normatively outdated and has not kept pace with the changes in international law. The most pragmatic and normatively best corresponding with reality is the vision of the international community as a collective synergy. The most optimistic and full of hope for the future is the appeal to the meaning of the term "international community" as the world community of all human beings, because this vision is axiologically powerful, confirming the anthropocentric nature of international law. The future of the international community as a specific normative project is dependent on essential elements included in three of these interpretations. It can be imag-

[67] N. Chomsky, *op. cit.*, p. 34.

ined as a synergistic collective of international actors with strong axiological reference to the moral foundations of the world community, and resting on a particular institutional support of the global organization.

These different meanings of the term "international community" are also supported by the contemporary view of international law according to the constitutional paradigm. The important discussion about the constitutionalization of international law, despite all of its complexities and problems, is nevertheless the evidence that "something is happening" in the architecture of the whole international legal order, and that this "something" is a fundamental change. Perhaps the essence of constitutionalization is the empowerment of the international community as the new central paradigm of international law in the place of the old, state-centric model built on the traditional principle of sovereignty.[68] If this process actually occurs, then perhaps in the future, the international community will become a separate entity in a much richer sense than just limited to the discussion on one or other form of its legal personality.

Despite the clear and strong premises for drawing the conclusion that the international community is currently at least a nascent subject of international law, it also needs to be noted that its normative character goes far beyond the traditional framework of international law. It has been shown in this book that the meaning of the term "international community" can also be comprehended in a non-ontological way, which in turn renders the discussion about its legal personality pointless. Similarly, it seems clear that international law is not the only source and regulator of constitutive and normative rules in force within the international community. In addition to law we also have to deal with a variety of other systems, such as the principles of international morality, praxeology (rules of prudence), courtesy or policy requirements. The nature of the international community is normative in the broad sense, not just limited to the legal aspect. Without a doubt however, international law is both its basic foundation and the instrument through which it carries out its goals.

[68] B. Fassbender, *The United Nations Charter…*, p. 8.

About the Author

Tomasz Hubert Widłak, PhD in law, assistant professor at the Department of Theory and Philosophy of Law and the State, Faculty of Law and Administration, University of Gdańsk, Poland. He graduated as Master of Laws both from the University of Gdańsk and from the University of Antwerp (International and European Legal Studies Programme, *maxima cum laude*). In 2011 he obtained a PhD degree from the University of Gdańsk. Widłak's main research interests revolve around the issues of theory and philosophy of law and international law. He is also the author or co-author of articles and book chapters on the issues of general jurisprudence, public international law as well as medical law and ethics. He is a Member of the International Association for Philosophy of Law and Social Philosophy (IVR) and European Society of International Law (ESIL). Widłak is also a qualified lawyer, Vice-Chairman of the Provincial Committee for Adjudication on Medical Events in Gdańsk.

e-mail: tomasz.widlak [at] prawo.ug.edu.pl
www.tomaszwidlak.pl

Bibliography

Literature

Acemoglu D., Robinson J., *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, Crown Business, New York 2013.

Akehurst M., *A Modern Introduction to International Law*, 6th ed., London 1987 [in:] *Prawo międzynarodowe. Materiały do studiów*, ed. Wierzbicki B., 4th ed., Temida 2, Białystok 2008.

Aksjologia współczesnego prawa międzynarodowego, ed. Wnukiewicz-Kozłowska A., Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2011.

Alderson K., Hurrell A., *Hedley Bull on International Society*, St. Martin's Press Inc., New York 2000.

Alford R.P., *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Enterpreneurs*, "Virginia Journal of International Law" 2008, vol. 49, no. 1.

Allott P., *Eunomia: New Order for a New World*, 2nd ed., Oxford University Press, New York 1990.

Alvarez J.E., *Hegemonic International Law Revisited*, "American Journal of International Law" 2003, vol. 97, no. 4.

Alvarez J.E., *International Organizations as Law-makers*, Oxford University Press, New York 2005.

Alvarez J.E., *International Organizations: Then and Now*, "American Journal of International Law" 2006, vol. 100, no. 2.

Annan K., *Problems Without Passports*, "Foreign Policy" 2002, vol. 132.

Antonowicz L., *Podręcznik prawa międzynarodowego*, 11th ed., LexisNexis, Warszawa 2008.

Antonowicz L., *Zagadnienie podmiotowości prawa międzynarodowego*, "Annales UMCS" 1998, no. 45.

Appadurai A., *Broken Promises*, "Foreign Policy" 2002, vol. 132.

Arend A.C., *Legal Rules and International Society*, Oxford University Press, New York–Oxford 1999.

Aron R., *Peace and War: A Theory of International Relations*, Doubleday & Company Inc., London 1966.

Barcik J., Srogosz B., *Prawo międzynarodowe publiczne*, C.H. Beck, Warszawa 2007.

Barnett M., Finnemore M., *The power of liberal international organizations* [in:] *Power in Global Governance*, eds. Barnett M., Duvall R., Cambridge University Press, New York 2005.

Barsky R.F., *The Chomsky Effect: A Radical Works Beyond the Ivory Tower*, MIT Press, Cambridge 2007.

Baslar K., *The Concept of the Common Heritage of Mankind in International Law*, Kluwer Law International, The Hague 1998.

Bederman D.J., *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, "Virginia Journal of International Law" 1996, vol. 36.

Beeson M., Higgott R., *Hegemony, institutionalism and U.S. foreign policy: Theory and practice in comparative historical perspective*, "Third World Quarterly" 2005, vol. 26, no. 7.

Bellamy A.J., *Humanitarian Intervention and the Three Traditions*, "Global Society" 2003, vol. 17, no. 1.

Besson S., *Whose Constitution(s)? International Law, Constitutionalism, and Democracy* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Białocerkiewicz J., *Prawo międzynarodowe publiczne. Zarys wykładu*, Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego, Olsztyn 2005.

Bianchi A., *Human Rights and the Magic of Jus Cogens*, "European Journal of International Law" 2008, vol. 19, no. 3.

Bierzanek R., *Współczesne stosunki międzynarodowe*, Państwowy Instytut Wydawniczy, Warszawa 1972.

Bierzanek R., Symonides J., *Prawo międzynarodowe publiczne*, LexisNexis, Warszawa 2003.

Bogdandy A. von, *Constitutionalism in International Law: Comment on a Proposal from Germany*, "Harvard International Law Journal" 2006, vol. 47, no. 223.

Bogdandy A. von, Dellavalle S., *Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms,* "German Law Journal" 2009, vol. 10.

Brian B., Matravers M., *Justice, international* [in:] *Routledge Encyclopedia of Philosophy*, ed. Craig E., Routledge, London 1998, http://www.rep.routledge.com/.

Brunkhorst H., *State and Constitution – A Reply to Scheuerman*, "Constellations" 2008, vol. 15, no. 4.

Buchanan A., Golove D., *Philosophy of International Law* [in:] Coleman J., Shapiro S., *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, New York 2002.

Bull H., *Hobbes and the International Anarchy*, "Social Research" 1981, vol. 48, no. 4.
Bull H., *Justice in International Relations: The 1983 Hagey Lectures* [in:] Alderson K., Hurrell A., *Hedley Bull on International Society*, St. Martin's Press Inc., New York 2000.
Bull H., *Society and Anarchy in International Relations* [in:] *Diplomatic Investigations. Essays in the Theory of International Politics*, eds. Butterfield H., Wight M., London 1966.
Bull H., *The Anarchical Society. A Study of Order in World Politics*, 3rd ed., Columbia University Press, New York 2002.
Bull H., *The Grotian Conception of International Society* [in:] *Diplomatic Investigations. Essays in the Theory of International Politics*, eds. Butterfield H., Wight M., George Allen & Unwin Ltd., London 1966.
Burchill S. et al., *Teoria stosunków międzynarodowych*, trans. Frankowski P., Książka i Wiedza, Warszawa 2006.
Buzan B., *From International to World Society?*, Cambridge University Press, Cambridge 2004.
Buzan B., Gonzalez-Pelaez A., *International Community after Iraq*, "International Affairs" 2005, vol. 81, no. 1.
Buzan B., Little R., *International Systems in World History. Remaking the Study of International Relations*, Oxford University Press, New York 2000.
Capps P., *The Rejection of the Universal State* [in:] *Transnational Constitutionalism*, ed. Tsagourias N., Cambridge University Press, New York 2007.
Cass D.Z., *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, "European Journal of International Law" 2001, vol. 12, no. 1.
Charney J.I., *Transnational Corporations and Developing Public International Law*, "Duke Law Journal" 1983, no. 4.
Charnovitz S., *Nongovernmental Organizations and International Law*, "American Journal of International Law" 2006, vol. 100, no. 2.
Chege M., *Sierra Leone: The State that Came Back from the Dead*, "The Washington Quarterly" 2002, vol. 25, no. 3.
Chiny w oczach Polaków, eds. Włodarski J., Zeidler K., Burdelski M., Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2010.
Chomsky N., *The Crimes of 'IntCom'*, "Foreign Policy" 2002, vol. 132.
Ciechański J., *Prawo międzynarodowe – normy i regulacja* [in:] *Stosunki międzynarodowe. Geneza, struktura, dynamika*, eds. Haliżak E., Kuźniar R., Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2006.
Clapham A., *Creating the High Commissioner for Human Rights: The Outside Story*, "European Journal of International Law" 1994, vol. 5, no. 1.

Clark I., *International Legitimacy and World Society*, Oxford University Press, New York 2007.

Clark I., *Legitimacy in a Global Order*, "Review of International Studies" 2003, vol. 29, no. 1.

Clark I., *Legitimacy in International Society*, Oxford University Press, New York 2005.

Clark I., *Towards an English School Theory of Hegemony*, "European Journal of International Relations" 2009, vol. 15, no. 2.

Cohen J.L., *A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach*, "Constellations" 2008, vol. 15, no. 4.

Cohen J.L., *Constitutionalism beyond the State: MythorNecessity? (A PluralistApproach)*, "Humanity: An International Journal of Human Rights, Humanitarianism and Development" 2011, vol. 2, no. 1.

Collapsed States. The Disintegration and Restoration of Legitimate Authority, ed. Zartman I.W., Lynne Rienner Publishers, London 1995.

Collingwood V., *Non-governmental organizations, power and legitimacy in international society*, "Review of International Studies" 2006, vol. 32, no. 3.

Con of the century, "The Economist" 2008, http://www.economist.com/node/12818310.

Corning P.A., *The Synergism Hypothesis. On the Concept of Synergy and It's Role in the Evolution of Complex Systems*, "Journal of Social and Evolutionary Systems" 1998, vol. 21, no. 2.

Costello C., *The Bosphorus Ruling of the European Court of Human Rights and Blurred Boundaries in Europe*, "Human Rights Law Review" 2006, vol. 6, no. 1.

Crawford J., *Responsibility to the International Community as a Whole*, "Indiana Journal of Global Legal Studies" 2001, vol. 8.

Cutler Claire A., *Critical Reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy*, "Review of International Studies" 2001, vol. 27.

Czapliński W., *Multiplikacja sądów międzynarodowych – szansa czy zagrożenie dla jedności prawa międzynarodowego* [in:] *Rozwój prawa międzynarodowego – jedność czy fragmentacja?*, ed. Kolasa J., Kozłowski A., Konferencja Katedr Prawa Międzynarodowego, Karpacz 10–12 maja 2006, Wrocław 2007.

Czapliński W., *Odpowiedzialność za naruszenia prawa międzynarodowego w związku z konfliktem zbrojnym*, Wydawnictwo Naukowe Scholar, Warszawa 2009.

Czapliński W., Wyrozumska A., *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, 2rd ed., C.H. Beck, Warszawa 2004.

Czaputowicz J., *Angielska szkoła stosunków międzynarodowych i jej stosunek do integracji europejskiej*, "Polska w Europie" 2003, no. 1 (43).

Czaputowicz J., *Społeczność międzynarodowa* [in:] *Słownik społeczny*, ed. Szlachta B., Wydawnictwo WAM, Kraków 2004.

Czaputowicz J., *Teorie stosunków międzynarodowych. Krytyka i systematyzacja*, PWN, Warszawa 2007.

Devlen B., James P., Özdamar Ö., *The English School, International Relations and Progress*, "International Studies Review" 2005, vol. 7, no. 2.

Diplomatic Investigations. Essays in the Theory of International Politics, eds. Butterfield H., Wight M., George Allen & Unwin Ltd., London 1966.

Domingo R., *The New Global Law*, Cambridge University Press, New York 2010.

Domingo R., *The New Pyramid of Global Law*, Selected Works, http://works.bepress.com/rafael_domingo/1.

Doyle M.W., *The UN Charter – A Global Constitution?* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Dunne T., *Inventing International Society. A History of the English School*, Palgrave Macmillan, New York 1998.

Dunne T., *New Thinking on International Society*, "British Journal of Politics and International Relations" 2001, no. 3.

Dunne T., *Review Article: Ordering International Society*, "Global Society" 2000, vol. 14, no. 1.

Dunne T., *Society and Hierarchy in International Relations*, "International Relations" 2003, vol. 17, no. 3.

Dunoff J.L., *The Politics of International Constitutions: The Curious Case of the World Trade Organization* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Dunoff J.L., Trachtman J.P., *A Functional Approach to International Constitutionalization* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Durkheim É., *The Division of Labor in Society*, The Free Press, New York 1997.

Elzenberg H., *Wartość i powinność*, "Etyka" 1992, no. 25.

Failed States and Fragile Societies: A New World Disorder?, eds. Trauschweizer I., Miner S.M., Ohio University Press, Athens OH 2014.

Falk R.A., *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, "American Journal of International Law" 1997, vol. 91, no. 1.

Fassbender B., *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Fassbender B., *The Meaning of International Constitutional Law* [in:] *Transnational Constitutionalism*, ed. Tsagourias N., Cambridge University Press, New York 2007.

Fassbender B., *The United Nations Charter As Constitution of the International Community*, "Columbia Journal of Transnational Law" 1998, vol. 36.

Fassbender B., *The United Nations Charter as the Constitution of the International Community*, Martinus Nijhof Publishers, Leiden–Boston 2009.

Ferguson Y.H. et al., *What is the Polity? A Roundtable*, International Studies Association, Blackwell Publishers 2000.

Fleur J.E., *The Invisibility of the Transnational Corporation: An Analysis of International Law and Theory*, "Melbourne University Law Review" 1994, vol. 19.

Foot R., *Introduction* [in:] *Order and Justice in International Relations*, eds. Foot R., Gaddis J., Hurrell A., Oxford University Press, New York 2003.

Frakes J., *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space and Antarctica: Will Developed and Developing Nations Reach Compromise?*, "Wisconsin International Law Journal" 2003, vol. 21.

Frankenberg G., *The Return of the Contract: Problems and Pitfals of European Constitutionalism*, "European Law Journal" 2000, vol. 6, no. 3.

Fukuyama F., *State-Building: Governance and World Order in the 21st Century*, Cornell University Press, New York 2004.

Gałganek A., *Historia teorii stosunków międzynarodowych*, PWN, Warszawa 2009.

Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Liber, Warszawa 2002.

Ghani A., Lockhart C., *Fixing Failed States. A Framework for Rebuilding a Fractured World*, Oxford University Press, New York 2008.

Giegerich T., *The 'Is' and the 'Ought' of the International Constitutionalism: How Far Have We Come to Habermas's Road to a "Well Considered Constitutionalization of International Law"*, "German Law Journal" 2009, vol. 10, no. 1.

Gilas J., *Prawo międzynarodowe*, Pracownia Duszycki, Toruń 1999.

Goodrich P., *Legal hermeneutics* [in:] *Routledge Encyclopedia of Philosophy*, ed. Craig E., Routledge, London 1998, http://www.rep.routledge.com/.

Gorove S., *The Concept of 'Common Heritage of Mankind': a Political, Moral or Legal Innovation?*, "San Diego Law Review" 1971, no. 9.

Gourdon M.É., *Histoire du Congrès de Paris*, Libraire Nouvelle, Paris 1857, http://bit.ly/1xHLRXx.

Gowers A., *The Power of Two*, "Foreign Policy" 2002, vol. 132.

Góralczyk W., Sawicki S., *Prawo międzynarodowe publiczne w zarysie*, 12th ed., LexisNexis, Warszawa 2007.

Griffiths M., *Fifty Key Thinkers in International Relations*, Routledge, New York 1999.

Gronowska B., *Systematyka międzynarodowo chronionych praw człowieka* [in:] Jasudowicz T. et al., *Prawa człowieka i ich ochrona*, Dom Organizatora TNOiK, Toruń 2005.

Habermas J., *Does the Constitutionalization of International Law Still Have a Chance?* [in:] *The Divided West*, Cambridge University Press, Cambridge 2006.

Habermas J., *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, "Constellations" 2008, vol. 15, no. 4.
Habermas J., *The Divided West*, Cambridge University Press, Cambridge 2006.
Haliżak E., *Południe (państwa rozwijające się – Trzeci Świat)* [in:] *Stosunki międzynarodowe. Geneza, struktura, dynamika*, eds. Haliżak E., Kuźniar R., Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2006.
Haliżak E., *Północ w stosunkach międzynarodowych* [in:] *Stosunki międzynarodowe. Geneza, struktura, dynamika*, eds. Haliżak E., Kuźniar R., Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2006.
Harris D.J., *Cases and Materials on International Law*, 6th ed., Sweet & Maxwell, London 2004.
Harris I., *Order and Justice in 'The Anarchical Society'*, "International Affairs" 1993, vol. 69, no. 4.
Hart H.L.A., *Pojęcie prawa*, trans. Woleński J., PWN, Warszawa 1998.
Heggstad Ø., *The International Community*, "Journal of Comparative Legislation and International Law" 1935, vol. 17, no. 4.
Higgins R., *Problems and Process. International Law and How We Use It*, Clarendon Press, Oxford 1994.
Hironaka A., *Neverending Wars. The International Community, Weak States, and the Perpetuation of Civil War*, Harvard University Press, Cambridge 2008.
Huntington S., *Zderzenie cywilizacji – i nowy kształt ładu światowego*, trans. Jankowska H., Muza SA, Warszawa 2003.
Hurrell A., *Foreword to the Third Edition: The Anarchical Society 25 Years On* [in:] Bull H., *The Anarchical Society. A Study of Order in World Politics*, 3rd ed., Columbia University Press, New York 2002.
Hurrell A., *On Global Order. Power, Values, and the Constitution of International Society*, Oxford University Press, New York 2007.
Hurrell A., *Order and Justice in International Relations: What is at Stake?* [in:] *Order and Justice in International Relations*, eds. Foot R., Gaddis J., Hurrell A., Oxford University Press, New York 2003.
Ignatieff M., *Human Rights, Sovereignty and Intervention* [in:] *Human Rights, Human Wrongs. The Oxford Amnesty Lectures 2001*, ed. Owen N., Oxford University Press, Oxford–New York, 2002.
Ingarden R., *Uwagi o względności wartości* [in:] Środa M., *O wartościach, normach i problemach moralnych – wybór tekstów*, PWN, Warszawa 1994.
International Society and Its Critics, ed. Bellamy A.J., Oxford University Press, New York 2005.
International Society. Diverse Ethical Perspectives, eds. Mapel D.R., Nardin T., Princeton University Press, Princeton 1998.

Jackson R., *The Global Covenant. Human Conduct in a World of States*, Oxford University Press, New York 2003.

James A., *System or Society*, "Review of International Studies" 1993, vol. 19, no. 3.

Jasudowicz T. et. al., *Prawa człowieka i ich ochrona*, Dom Organizatora TNOiK, Toruń 2005.

Jones H.W., *Law and the Idea of Mankind*, "Columbia Law Review" 1962, vol. 62, no. 5.

Jones R.E., *The English School of International Relations: A Case for Closure*, "Review of International Studies" 1981, vol. 7.

Kałduński M., *Godność człowieka* [in:] *Leksykon ochrony praw człowieka. 100 podstawowych pojęć*, eds. Balcerzak M., Sykuna S., C.H. Beck, Warszawa 2010.

Kałduński M., *Karta Narodów Zjednoczonych* [in:] *Leksykon ochrony praw człowieka. 100 podstawowych pojęć*, eds. Balcerzak M., Sykuna S., C.H. Beck, Warszawa 2010.

Kamminga M.T., *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* [in:] *Non-State Actors and Human Rights*, ed. Alston P., Oxford University Press, New York 2005.

Kennedy D., *The Mystery of Global Governance* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Kierończyk P., *Konstytucjonalizm* [in:] *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, ed. Szmyt A., C.H. Beck, Warszawa 2010.

Kissinger H., *World Order*, Penguin Press, New York 2014.

Klabbers J., *An Introduction to International Institutional Law*, Cambridge University Press, New York 2002.

Klabbers J., Peters A., Ulfstein G., *The Constitutionalization of International Law*, Oxford University Press, New York 2009.

Klafkowski A., *Prawo międzynarodowe publiczne*, PWN, Warszawa 1979.

Kolasa J., *Normatywne podstawy jedności prawa międzynarodowego. Zarys problemu* [in:] *Rozwój prawa międzynarodowego – jedność czy fragmentacja?*, eds. Kolasa J., Kozłowski A., Konferencja Katedr Prawa Międzynarodowego, Karpacz 10–12 maja 2006, Wrocław 2007.

Koncewicz T.T., *Zasada jurysdykcji powierzonej Trybunału Sprawiedliwości Wspólnot Europejskich*, Wolters Kluwer, Warszawa 2009.

Koskenmäki R., *Legal Implications Resulting from State Failure in the Light of the Case of Somalia*, "Nordic Journal of International Law" 2004, vol. 73, no. 1.

Koskenniemi M., *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, "Theoretical Inquiries in Law" 2007, vol. 8, no. 1.

Kratochwil F.W., *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, Cambridge 1991.

Kreide R., *Preventing Military Humanitarian Intervention? John Rawls and Jürgen Habermas on a Just Global Order*, "German Law Journal" 2009, vol. 10, no. 1.

Krisch N., *International Law in Times of Hegemony: Unequal Power and the Shaping of an International Legal Order*, "European Journal of International Law" 2005, vol. 16, no. 3.

Kukułka J., *Wstęp do nauki o stosunkach międzynarodowych*, Oficyna Wydawnicza ASPRA-JR, Warszawa 2003.

Kumm M., *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and between the State* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Kupperman J.J., *Value… and What Follows*, Oxford University Press, New York 1998.

Kuźniar R., *System Narodów Zjednoczonych* [in:] *Stosunki międzynarodowe. Geneza, struktura, dynamika*, eds. Haliżak E., Kuźniar R., Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2006.

Kwiecień R., *Konstytucja społeczności międzynarodowej w perspektywie aksjologii prawa międzynarodowego* [in:] *Aksjologia współczesnego prawa międzynarodowego*, ed. Wnukiewicz-Kozłowska A., Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2011.

Kwiecień R., *Między wartością wspólnoty a wspólnotą wartości. Studia i szkice z filozofii prawa idealizmu niemieckiego*, Oficyna Wydawnicza Verta, Lublin 2007.

Kwiecień R., *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Difin, Warszawa 2011.

Lachs M., *Rzecz o nauce prawa międzynarodowego*, Zakład Narodowy im. Ossolińskich, Wrocław–Warszawa–Kraków 1986.

Lamy P., *The Place of the WTO and its Law in the International Legal Order*, "European Journal of International Law" 2007, vol. 17, no. 5.

Leksykon ochrony praw człowieka. 100 podstawowych pojęć, eds. Balcerzak M., Sykuna S., C.H. Beck, Warszawa 2010.

Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, ed. Szmyt A., Warszawa 2010.

Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć, ed. Zajadło J., C.H. Beck, Warszawa 2007.

Liebach I., *Die unilateralehumanitäre Intervention im 'zerfallenStaat'*, Carl Heymanns, Köln–Berlin–München 2004.

Linklater A., *Rationalism* [in:] Burchill S. et al., *Teoria stosunków międzynarodowych*, trans. Frankowski P., Książka i Wiedza, Warszawa 2006.

Linklater A., *The Evolving Spheres of International Justice*, "International Affairs" 1999, vol. 75, no. 3.

Linklater A., Suganami H., *The English School of International Relations: A Contemporary Reassessment*, Cambridge University Press, West Nyack 2002.

Logika dla prawników, ed. Malinowski A., LexisNexis, Warszawa 2005.

Longman Dictionary of Contemporary English, ed. Rundell M., 3th ed., Longman Group Ltd., Harlow 1995.

MacCormick N., *Liberalism, Nationalism and the Post-sovereign State*, "Political Studies" 1996, vol. 44.

Madoff: The man who sold the world, "The Independent" 2008, http://www.independent.co.uk/news/business/analysis-and-features/madoff-the-man-who-sold-the-world-1206091.html.

Making states work: State failure and the crisis of governance, eds. Chesterman S., Ignatieff M., Thakur R., United Nations University Press, Tokyo–New York–Paris 2006.

Martin E.A., *Constitution* [in:] *A Dictionary of Law*, ed. Martin E.A., 5th ed., Oxford University Press, Oxford–New York 2002.

Mayall J., *Democracy and International Society*, "International Affairs" 2000, vol. 76, no. 1.

Mayall J., *World Politics: Progress and its Limits*, Polity Press & Blackwell Publishers, Cambridge 2000.

McCorquodale R., *An Inclusive International Legal System*, "Leiden Journal of International Law" 2004, vol. 17.

McGinn M., *Routledge Philosophy Guide Book to Wittgenstein and the Philosophical Investigations*, Routledge, London–New York 1997.

McLean P., *Colombia: Failed, Failing or Just Weak?*, "The Washington Quarterly" 2002, vol. 25, no. 3.

Meyer J.W., Boli J., Thomas G.M., *World Society and the Nation-State*, "The American Journal of Sociology" 1997, vol. 103, no. 1.

Mielnik B., *Kształtowanie się pozapaństwowej podmiotowości w prawie międzynarodowym*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2008.

Milewicz K., *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, "Indiana Journal of Global Legal Studies" 2009, vol. 16, no. 2.

Moore G.E., *Principia ethica*, Cambridge University Press, Cambridge 1959.

Morawski L., *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, 4th ed., LexisNexis, Warszawa 2005.

Morawski L., *Wstęp do prawoznawstwa*, Dom Organizatora TNOiK, 12th ed., Toruń 2009.

Mosler H., *The International Society as a Legal Community*, Sijthoff & Noordhoff International Publishers B.V., Alphen aan den Rijn 1980.

Nahlik S.E., *Wstęp do nauki prawa międzynarodowego*, PWN, Warszawa 1967.
Nardin T., *Justice and Coercion* [in:] *International Society and Its Critics*, ed. Bellamy A., Oxford University Press, New York 2005.
Nawrot O., *Wprowadzenie do logiki dla prawników*, Wolters Kluwer, Warszawa 2007.
Niesiołowski J., *Norma* [in:] *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, ed. Zajadło J., C.H. Beck, Warszawa 2007.
Non-State Actors and Human Rights, ed. Alston P., Oxford University Press, New York 2005.
Ogata S., *Guilty Parties*, "Foreign Policy" 2002, vol. 132.
Okoth-Ogendo H.W.O., *Constitutions without Constitutionalism: Reflections on an African Political Paradox* [in:] *Constitutionalismand Democracy: Transitions in the Contemporary World*, ed. Greenberg D. et al., Oxford University Press, New York 1993.
Oniszczuk J., *Filozofia i teoria prawa*, C.H. Beck, Warszawa 2008.
Oppenheim L., *International Law. A Treatise*, 3rd ed., The Lawbook Exchange Ltd., Clark 2005.
Orakhelashvili A., *Peremptory Norms in International Law*, Oxford University Press, New York 2006.
Orakhelashvili A., *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, "European Journal of International Law" 2005, vol. 16, no. 1.
Order and Justice in International Relations, eds. Foot R., Gaddis J., Hurrell A., Oxford University Press, New York 2003.
Oxford Advanced Learner's Dictionary of Current English, ed. Crowther J., Oxford University Press, Oxford 1995.
Palombella G., *The rule of law beyond the state: Failures, promises and theory*, "International Journal of Constitutional Law" 2009, vol. 7.
Państwo w teorii i praktyce stosunków międzynarodowych, eds. Sułek M., Symonides J., Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2009.
Paulus A.L., *Die internationale Gemeinschaftim Völkerrecht. Eine Untersuchungzur Entwicklung des Völkerrechtsim Zeitalter der Globalisierung*, C.H. Beck, München 2001.
Paulus A.L., *The International Legal System as a Constitution* [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, ed. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.
Pemberton J.-A., *Sovereignty: Interpretations*, Palgrave Macmillan, Houndmills–New York 2009.
Peters A., *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, "Leiden Journal of International Law" 2006, vol. 19.

Peters A., *Dual Democracy* [in:] Klabbers J., Peters A., Ulfstein G., *The Constitutionalization of International Law*, Oxford University Press, New York 2009.

Peters A., *Global Constitutionalism Revisited*, "International Legal Theory" 2005, vol. 11.

Peters A., *Membership in the Global Constitutional Community* [in:] Klabbers J., Peters A., Ulfstein G., *The Constitutionalization of International Law*, Oxford University Press, New York 2009.

Peters A., *The Merits of Global Constitutionalism*, "Indiana Journal of Global Legal Studies" 2009, vol. 16, no. 2.

Peters A., Armingeon K., *Introduction – Global Constitutionalism from an Interdisciplinary Perspective*, "Indiana Journal of Global Legal Studies" 2009, vol. 16, no. 2.

Pieńkos J., *Glosariusz terminologii stosunków międzynarodowych i prawa międzynarodowego*, Zakamycze 2004.

Power in Global Governance, eds. Barnett M., Duvall R., Cambridge University Press, New York 2005.

Prawo międzynarodowe. Materiały do studiów, ed. Wierzbicki B., 4th ed., Temida 2, Białystok 2008.

Prawo międzynarodowe w pytaniach i odpowiedziach, ed. Sawicki S., LexisNexis, Warszawa 2009.

Rávago Bustamante E. de, *The Compulsory Character of International Law*, "International Legal Theory" 2005, vol. 11.

Risse T., *"Let's argue!": Communicative action in world politics*, "International Organization" 2000, vol. 54.

Roberts A., *Order/Justice Issues at the UN* [in:] *Order and Justice in International Relations*, ed. Foot R., Gaddis J., Hurrell A., Oxford University Press, New York 2003.

Robertson-Snape F., *Moral Complexity and the International Society*, "Global Society" 2000, vol. 14, no. 4.

Roojen M. van, *Moral Cognitivism vs. Non-Cognitivism* [in:] *The Stanford Encyclopedia of Philosophy*, ed. Zalta E.N., 2009, http://plato.stanford.edu.

Rosenau J.N., *Governance, Order, and Change in World Politics* [in:] Rosenau J.N., Czempiel E.-O., *Governance Without Government: Order and Change in World Politics*, Cambridge Univeristy Press, Cambridge 1992.

Routledge Encyclopedia of Philosophy, ed. Craig E., Routledge, http://www.rep.routledge.com/.

Ruling the World? Constitutionalism, International Law and Global Governance, eds. Dunoff J.L., Trachtman J.P., Cambridge University Press, New York 2009.

Sałajczyk S.P., *Zmierzch lewiatana? Spór o pozycję państwa we współczesnych stosunkach międzynarodowych* [in:] *Państwo we współczesnych stosunkach międzynarodowych*, eds. Haliżak E., Popiuk-Rysińska I., Fundacja Studiów Międzynarodowych, Warszawa 1995.

Scheuerman W.E., *All Power to the (State-less?) General Assembly!*, "Constellations" 2008, vol. 15, no. 4.
Schmitt C., *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. Schwab G., The University of Chicago Press, Chicago–London 2005.
Segura-Serrano A., *The Transformation of International Law*, Jean Monnet Working Paper 12/09, www.JeanMonnetProgram.org.
Shaw M.N., *Prawo międzynarodowe*, Książka i Wiedza, Warszawa 2006.
Shelton D., *Normative Hierarchy in International Law*, "American Journal of International Law" 2006, vol. 100, no. 2.
Shutter O. de, *The Accountability of Multinationals for Human Rights Violations in European Law* [in:] *Non-State Actors and Human Rights*, ed. Alston P., Oxford University Press, New York 2005.
Simma B., *Universality of International Law from the Perspective of a Practitioner*, "European Journal of International Law" 2009, vol. 20, no. 2.
Simma B., Paulus A.L., *The "International Community": Facing the Challenge of Globalization*, "European Journal of International Law" 1998, vol. 9, no. 2.
Simma B., Pulkowski D., *Of Planets and the Universe: Self Contained Regimes in International Law*, "European Journal of International Law" 2006, vol. 17, no. 3.
Slaughter A.-M., *A New World Order*, Princeton University Press, Princeton 2004.
Słownik języka polskiego PWN P–Ż, ed. Czekaj M., PWN, Warszawa 2007.
Socha E., *Kilka uwag o proliferacji międzynarodowego sądownictwa karnego* [in:] Kolasa J., Kozłowski A., *Rozwój prawa międzynarodowego – jedność czy fragmentacja?*, Konferencja Katedr Prawa Międzynarodowego, Karpacz 10–12 maja 2006, Wrocław 2007.
Soniewicka M., *Granice sprawiedliwości, sprawiedliwość ponad granicami*, Wolters Kluwer, Warszawa 2010.
Spruyt H., *Microhistorical Comparisons and the Westphalian Moment* [in:] Ferguson Y.H. et al., *What is The Polity? A Roundtable*, International Studies Association 2000, Blackwell Publishers.
Starczewska K., *Wartości podstawowe*, "Etyka" 1978, no. 16.
State Failure and State Weakness in a Time of Terror, ed. Rotberg R.I., The World Peace Foundation, Washington 2003.
Stawecki T., Winczorek P., *Wstęp do prawoznawstwa*, C.H. Beck, Warszawa 2003.
Steinhardt R.G., *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria* [in:] *Non-State Actors and Human Rights*, ed. Alston P., Oxford University Press, New York 2005.
Stelmach J., Sarkowicz R., *Filozofia prawa XIX i XX wieku*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 1999.
Stern G., *The Structure of International Society. An Introduction to the Study of International Relations*, Pinter, London–New York 2000.

Sut P., *Aksjologia a prawo* [in:] *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, ed. Zajadło J., C.H. Beck, Warszawa 2007.

Sylwestrzak A., *Historia doktryn politycznych i prawnych*, LexisNexis, Warszawa 2002.

Symonides J., *Państwo w procesie globalizacji* [in:] *Państwo w teorii i praktyce stosunków międzynarodowych*, eds. Sułek M., Symonides J., Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2009.

Szyszkowska M., *Teoria i filozofia prawa*, Elipsa, Warszawa 2008.

Środa M., *O wartościach, normach i problemach moralnych – wybór tekstów*, PWN, Warszawa 1994.

Tatarkiewicz W., *Historia filozofii*, vol. 1, PWN, Warszawa 2007.

The Emergence of Private Authority in the International System, eds. Hall R.B., Biersteker T.J., Cambridge University Press 2002.

The Free Dictionary, http://www.thefreedictionary.com/.

The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes, eds. Tomuschat Ch., Thouvenin J.M., Martinus Nijhoff Publishers, Leiden–Boston 2006.

Thucidydes, *The History of the Peloponesian War*, 5.89.1 [in:] Perseus Digital Library, TuftsUniversity, http://www.perseus.tufts.edu.

Tilly Ch., *Coercion, Capital, and European States AD 990–1990*, Blackwell, Oxford 1990.

Tinnavelt R., Mertens T., *The World State: A Forbidding Nightmare of Tyranny? Habermas on the Institutional Implications of Moral Cosmopolitanism*, "German Law Journal" 2009, vol. 10, no. 1.

Tomuschat Ch., *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, "Recueil des Cours" 1999, vol. 281.

Tomuschat Ch., *Obligations Arising for States Without Or Against their Will*, "Recueil des Cours" 1993, vol. 241.

Toynbee A.J., *Studium historii*, trans. Marzęcki J., Państwowy Instytut Wydawniczy, Warszawa 2000.

Tönnies F., *Community and Civil Society*, Cambridge University Press, Cambridge 2001.

Trachtman J.P., *The Constitutions of the WTO*, "European Journal of International Law" 2006, vol. 17, no. 3.

Transnational Constitutionalism, ed. Tsagourias N., Cambridge University Press, New York 2007.

Tsagourias N., *Introduction – Constitutionalism: a theoretical roadmap* [in:] *Transnational Constitutionalism – International and European Models*, ed. Tsagourias N., Cambridge University Press, New York 2007.

Uziębło P., *Konstytucjonalizm* [in:] *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, ed. Zajadło J., C.H. Beck, Warszawa 2007.

Vanhuele D., *Comparative constitutional law: deel I*, IELSP, Antwerpia 2005.

Verdross A., *Die Verfassung der Völkerrechtsgemeinschaft*, J. Springer, Wien–Berlin 1926.

Villalpando S., *The Legal Dimension of the International Community: How Community Interests are Protected in International Law*, "European Journal of International Law" 2010, vol. 21, no. 2.

Wacks R., *Philosophy of Law – A Very Short Introduction*, Oxford University Press, Oxford–New York 2006.

Wagner M., *Non-State Actors* [in:] *The Max Planck Encyclopedia of Public International Law*, www.mpepil.com.

Walter Ch., *Constitutionalizing (Inter)national Governance*, "German Yearbook of International Law" 2001, vol. 44, no. 170.

Watson A., *The Evolution of International Society. A Comparative Historical Analysis*, Routledge, New York 1992.

Weiler J.H.H., Paulus A.L., *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, "European Journal of International Law" 1997, vol. 8.

Weissbrodt D., Kruger M., *Human Rights Responsibilities of Business as Non-State Actors* [in:] *Non-State Actors and Human Rights*, ed. Alston P., Oxford University Press, New York 2005.

Wells C., Elias J., *Catching the Conscience of the King: Corporate Players on International Stage* [in:] *Non-State Actors and Human Rights*, ed. Alston P., Oxford University Press, New York 2005.

Wendt A., *Social Theory of International Politics*, Cambridge University Press, New York 1999.

Wendt A., *Why a World State is Inevitable*, "European Journal of International Relations" 2003, vol. 9, no. 4.

Werner W., *The never-ending closure: constitutionalism and international law* [in:] *Transnational Constitutionalism*, ed. Tsagourias N., Cambridge University Press, New York 2007.

Wessel R.A., *The Multilevel Constitution of European Foreign Relations* [in:] *Transnational Constitutionalism*, ed. Tsagourias N., Cambridge University Press, New York 2007.

Wet E. de, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, "Leiden Journal of International Law" 2006, vol. 19.

Wheeler N.J., Dunne T., *Hedley Bull's Pluralism of Intellect and Solidarism of the Will*, "International Affairs" 1996, vol. 72, no. 1.

When States Fail – Causes and Consequences, ed. Rotberg R.I., Princeton University Press, New Jersey 2004.

Widłak T., *Contemporary international law and the problem of failing states in the light of the case of Liberia*, "Ordo et Iustitia – Zeszyty naukowe Forum Badań ONZ" 2005, vol. 1: *Wybrane problemy praw człowieka*, ed. Widłak T.

Widłak T., *Rola społeczności międzynarodowej w odbudowie państw upadłych*, "Politeja" 2007, no. 1(7).

Widłak T., *Sino-centryczny system międzynarodowy* [in:] *Chiny w oczach Polaków*, eds. Włodarski J., Zeidler K., Burdelski M., Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2010.

Widłak T., *Zarys historii myśli o społeczności międzynarodowej*, "Gdańskie Studia Prawnicze" 2009, vol. 20.

Wight M., *Systems of States*, Leicester University Press, Leicester 1977.

Wight M., *Western Values in International Relations* [in:] *Diplomatic Investigations. Essays in the Theory of International Politics*, ed. Butterfield H., Wight M., George Allen & Unwin Ltd., London 1966.

Winczorek P., *Nauka o państwie*, Liber, Warszawa 2005.

Wiszowaty M.M., *Konstytucja* [in:] *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, ed. Szmyt A., Warszawa 2010.

Wiśniewski A., *Fragmentaryzacja prawa* [in:] *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, ed. Zajadło J., C.H. Beck, Warszawa 2007.

Wojciechowski B., *Interkulturowe prawo karne. Filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych*, Wydawnictwo Adam Marszałek, Toruń 2009.

Wojciechowski B., *Justyfying Punishment in Multicultural Societies* [in:] *Between complexity of law and lack of order. Philosophy of law in the era of globalization*, ed. Wojciechowski B., Zirk-Sadowski M., Golecki M.J., Wydawnictwo Adam Marszałek, Toruń–Beijing 2009.

Wright Q., *Towards a Universal Law of Mankind*, "Columbia Law Review" 1963, vol. 63, no. 3.

Wronkowska S., Ziembiński Z., *Zarys teorii prawa*, Przedsiębiorstwo Wydawnicze Ars Boni et aequi, Poznań 2001.

Zajadło J., *Dylematy humanitarnej interwencji. Historia – etyka – polityka – prawo*, Arche, Gdańsk 2005.

Zajadło J., *Fascynujące ścieżki filozofii prawa*, LexisNexis, Warszawa 2008.

Zajadło J., *Ideał (idea) prawa* [in:] *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, ed. Zajadło J., C.H. Beck, Warszawa 2007.

Zajadło J., *Łacińska terminologia prawnicza*, Wolters Kluwer, Warszawa 2009.

Zajadło J., *Po co prawnikom filozofia prawa?*, Wolters Kluwer, Warszawa 2008.

Zajadło J., *Społeczność międzynarodowa czy wspólnota międzynarodowa?*, "Państwo i Prawo" 2005, no. 9.
Zajadło J., *Sprawiedliwość* [in:] *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, ed. Zajadło J., C.H. Beck, Warszawa 2007.
Zajadło J., *Teoria sprawiedliwości międzynarodowej: prawa człowieka contra suwerenność?*, "Polski Przegląd Dyplomatyczny" 2005, vol. 5, no. 3 (25).
Zangl B., *Is there an emerging international rule of law?*, "European Law Review" 2005, vol. 13, sup. 1.
Ziembiński Z., *Logika praktyczna*, PWN, Warszawa 2001.
Ziembiński Z., *Wstęp do aksjologii dla prawników*, Wydawnictwo Prawnicze, Warszawa 1990.
Zimmerman M.J., *Intrinsic vs. Extrinsic Value* [in:] *The Stanford Encyclopedia of Philosophy*, ed. Zalta E.N., http://plato.stanford.edu.
Zimmermann D., *Lausanne Peace Treaty (1923)* [in:] *Max Planck Encyclopedia of PublicInternational Law*, www.mpepil.com.
Zirk-Sadowski M., *Wprowadzenie do filozofii prawa*, Kantor Wydawniczy Zakamycze, Kraków 2000.

Table of Cases

ECHR: Judgment in *Bosphorus Hava Yollari Turizm Ticaret Anonim Sirketi v Ireland*, 30 June 2005, case no. 45036/98
ECJ: Judgement of 15 July 1964 in *Flaminio Costa v. ENEL* (C-6/64)
ECJ: Judgment of 5 February 1963 in *Van Gend & Loos* (C-26/62)
ECJ: *Yassin Abdullah Kadi & Al. Barakaat International Foundation v EU Council & EU Commission*, joint cases no. C-402/05 P and C-415/05 P, ECR I-6351
ICJ: Advisory Opinion of 21 June 1971 on Legal Consequences for States of the Continued Presence of South Africa in *Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970), http://bit.ly/14Ep59G
ICJ: *Barcelona Traction, Light and Power Company*, Limited, Judgement, I.C.J. Rep. 1970
ICJ: Judgment of 18 December 1951 concerning fisheries (*United Kingdom v Norway*), Summary of the Judgment, http://www.icj-cij.org/docket/files/5/1811.pdf
ICJ: Judgment of 18 November 2008 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia and Montenegro*), Summary of the Judgment, http://www.icj-cij.org/docket/files/118/14913.pdf
ICJ: Judgment of 20 December 1974 on the French nuclear tests in the Pacific (*New Zealand v France*), Summary of the Judgment, http://bit.ly/14Eq7Tb

ICJ: Judgment of 24 May 1980 on US diplomatic and consular personnel in Tehran (*United States v Iran*), ICGJ 124, ICJ Rep. 3, 1980, Summary of the Judgment http://bit.ly/14EqwFb

ICJ: Judgment of 27 February 2007 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) Oxford Reports on International Law, ICGJ 25, IGCJ 70

ICJ: Judgment of 30 June 1995 concerning East Timor (*Portugal v Australia*), Summary of the Judgment, http://bit.ly/14EpicY

ICJ: Judgment of 9 July 2004 concerning the Wall in the Palestinian Territories, ICJ Rep. 2004 (9 July 2004)

ICJ: Reparation for Injuries Suffered in the Service of the United Nations, Advisory opinion, I.C.J. Rep. 1949

ICJ: The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 http://bit.ly/1175X2o

ICSID: *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB / 01/8, the Oxford Reports on International Investment Claims IIC 65 (2005)

ICSID: *Sempra Energy International v Argentina*, ICSID Case No ARB / 02/16, the Oxford Reports on International Investment Claims IIC 304 (2007)

ICTY: *Prosecutor v Kupreškić and ors*, the decision of the ICC for the former Yugoslavia on 14 January 2000, Case No IT-95-16-T, ICL 98 (ICTY 2000)

ICTY: *Prosecutor v Mucic and ors*, the decision of the ICC for the former Yugoslavia of 20 February 2001, Appeal Judgment, Case No IT-96-21-A, ICL 96 (ICTY 2001)

ICTY: *Prosecutor v Tadic*, judgment of the International Criminal Tribunal for the former Yugoslavia on 2 October 1995, Case No IT-94-1AR72, Oxford Reports on International Criminal Law, ICL 36 (ICTY 1995)

Special Court for Sierra Leone: *Prosecutor v Kallon and Kamara*, the judgment of the Special Court for Sierra Leone on 13 March 2004, Case No SCSL-2004-15-AR72 (E), ICL 24 (SCSL 2004)

USA: Court of Appeals of Arizona, Division 1, Department E., *Arab Monetary Fund, Plaintiff/Appellee, v. Jafar HASHIM and Maryam Hashim*, husband and wife, Defendants/Appellants, No. 1 CA-CV 07-0550, Decided: August 12, 2008

Table of Treaties and Other Instruments

American Convention of Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969

Charter of Fundamental Rights of the European Union (2000/C 364/01), Official Journal of the European Communities C 364/1, 18 December 2000

Charter of the United Nations, 26 June 1945, San Francisco
Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949
Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949
Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949
Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 17 November 1972, http://bit.ly/1uRdAWK
Convention Concerning the Protection of World Cultural and Natural Heritage, Paris 16 November 1972, http://bit.ly/1uRdAWK
Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocols No. 11 and No. 14, 1 June 2010, Council of Europe
Convention on Biological Diversity, Rio de Janerio, 5 June 1992, http://bit.ly/1uRH4nk
Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly Resolution 260 III (A), 9 December 1948, UN Treaty Series, vol. 78, p. 277
Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988, http://bit.ly/1uRedj4
Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989
Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, part II, p. 35, § 8., http://bit.ly/1AhWKDS
Draft Articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, A/56/10
Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations [in:] *Yearbook of the International Law Commission*,
1982, vol. II, part II, p. 56, § 3, http://bit.ly/1AhVHE0
European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Council of Europe, Strasbourg, 24 April 1986
Federal Constitution of the Swiss Confederation of 1999, http://bit.ly/1HgJuBj
International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI) of 16 December 1966

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005

Protocol on Environmental Protection to the Antarctic Treaty – the so-called Madrid Protocol, Madrid, 4 October 1991, http://bit.ly/1uRIrT2

Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, http://bit.ly/1AhYCMQ

Statute of the International Court of Justice, annexed to the Charter of the United Nations, 26 June 1945, San Francisco

The African Convention on the Conservation of Nature and Natural Resources, 1968, http://bit.ly/1uRdcYi

The Antarctic Treaty, signed in Washington on 1 December 1959, http://bit.ly/1uRcEBD

The Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III) adopted in Paris on 10 December 1948, http://bit.ly/14Ex070

The World Charter of Nature, UN General Assembly Resolution of 28 October 1982, UN Doc. A/RES/37/7, http://bit.ly/1uRcSsJ

Traité de paix et d'amitié entre la France, la Grande-Bretagne, la Russie, la Sardaigne et la Turquie, Paris 30 mars 1856, http://bit.ly/1xHLRXx

Treaty of Peace with Turkey Signed at Lausanne, 24 June 1923, http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, drawn up on 27 January 1967, http://bit.ly/1uR9eyU

UN Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV) of 14 December 1960, UN Doc. A/4684 (1960), 66

UN ECOSOC Resolution 1296 (XLIV) of 23 May 1968, Economic and Social Council Official Records Forty-Fourth Session, Supplement no. 1, p. 21, http://bit.ly/1xRamFh

UN ECOSOC Resolution 1996/31 on consultative relationship between the United Nations and non-governmental organizations, http://bit.ly/11751Lr

UN Framework Convention on Climate Change of 1992, http://bit.ly/1uReC5f

UN General Assembly of the United Nations Resolution No. 2749 (XXV) of 17 December 1970 on the principles of management of the seabed and ocean floor and the ground beyond the reach of national jurisdiction (UN Doc. A/C.1/544)
UN General Assembly Resolution 45/6 of 1990
UN General Assembly Resolution 49/2 of 1994
UN General Assembly Resolution No. 2749 (XXV), http://bit.ly/1uRFodN
UN Security Council Resolution No. 1366 (2001)
UN Security Council Resolution No. 1865 (2009)
UN Security Council Resolution No. 1886 (2009)
UN Security Council Resolution No. 794 (1992)
United Nations Convention on the Law of the Sea of 10 December 1982, http://bit.ly/117eUJ2

Internet Sources

Annual Reports of the International Court of Justice, http://www.icj-cij.org/
BBC News, http://news.bbc.co.uk/
Business & Human Rights Resource Centre, http://business-humanrights.org
"Fortune", *Global 500 Report*, http://fortune.com/global500/
Global Post, http://www.globalpost.com
Max Planck Encyclopedia of Public International Law, http://www.mpepil.com/
Office of the Polish Ombundsman, http://rpo.gov.pl/en
Panapress, http://www.panapress.com/
Perseus Digital Library, Tufts University, http://www.perseus.tufts.edu/hopper/
"The Economist", http://www.economist.com/
"The Guardian", http://www.guardian.co.uk/
"The Independent", http://www.independent.co.uk/
Jean Monnet Working Paper 12/09, http://www.JeanMonnetProgram.org/
"The New York Times", Global Edition, http://global.nytimes.com/
The Office of Tony Blair, http://www.tonyblairoffice.org
The Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/
United Nations Office of Legal Affairs, http://legal.un.org/ola/, http://untreaty.un.org
Voice of America, http://www.voanews.com
World Bank, *Gross Domestic Product 2008*, http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf

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The purpose of this book is to reconstruct the concept of "international community" and to provide a general picture sketched from the perspective of a bird's-eye view of the theory and philosophy of international law. The aim is not so much to define international community but rather to attempt to understand the phenomenon in its wider normative, historical, cultural and socio-political context. Thereby, the book draws the reader's attention to the significance of an issue generally neglected by the science of law as well as to the relation of the notion with the array of crucial problems of international law. The title reflects the conviction, that the process of constitutionalization of international law is convergent with the advancement of pluralist international society towards a true solidarist community.

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