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# HETEROGENEITY, COMPLIANCE AND ENFORCEMENT OF PUBLIC INTERNATIONAL LAW REMARKS ON SANCTIONS AND COUNTERMEASURES

## LEGAL THEORY AND THE SOCIOLOGY OF LAW APPROACH

### ABSTRACT

This paper discusses issues with law enforcement and compliance in the area of public international law. It presents the conditions affecting the quality of the application of legal norms of public international law. Analysis of the problem is multifactorial. While presenting the law enforcement process, attention is drawn to the question of the standards of execution of international legal norms that run contrary to national law. This phenomenon has been identified as and called by the authors “discovering law (legal norms) through sanctions”. The main issue concerns theoretical and legal philosophical issues: the legal responsibility of states, coercive measures against states, sanctions and countermeasures in public international law and in international relations. The authors criticize the contemporary model of the legal responsibility of states, pointing to a feedback loop between the concept of sanctions and the principle of the sovereignty of a state. Homogenization and globalization processes overlap only slightly in public international law. Also, institutionalization and constitutionalization have slowed. We argue that the PIL system is threatened by the effects of *sui generis* rejection of legal norms by a state in relation to certain countries while claiming that these legal norms apply to other countries. The system is

also under threat by the effects of strong nationalist tendencies among PMP actors, as well as the international community itself. The conclusion and recommendation of the authors suggest that the lack of analysis of socio-legal public international law is undesirable and harmful to that area of law. We claim that it negatively affects macro-social efficiency and, above all, the supranational and interstate (intergovernmental) level of effectiveness. It impairs the process of institutionalization of public international law and hinders the process of socialization, *sensu largissimo*.

**Key words:** institutionalization and heterogeneity of public international law, legal sociology and axiology, international community, sanction and counter-measures, legal international liability of public international law, legal responsibility of states

## INTRODUCTION

Public international law (PIL) may be synthetically defined as a system of norms (subordinated to the axiology expressed in the UN Charter) binding in the relations among its subjects (who consider themselves members of the community governed by international public law), and expressing the values and will of those subjects, while ensured by coercion measures applied individually or collectively. In defining the catalogue of (formal) sources of PIL, one should refer to Article 38 of the Statute of the International Court of Justice, which enumerates the formal bases for the adjudication of international agreements, international custom and the general rules of PIL; the catalogue in Article 38 does not mean that the list of formal sources is closed – it encompasses, i.e., unilateral acts and resolutions of international organisations. Within the present study, we do not refer to the controversy among representatives of the doctrine over the question whether the above-mentioned sources of PIL constitute a list of examples or an exhaustive catalogue. We must state, however, that negative verification of the hypothesis of *numerus clausus* in the above-mentioned catalogue of the sources of PIL is based on the fact that after the Statute of the International Court of Justice took effect, legislative resolutions of international organisations started to be unobjectionably counted among the important sources of PIL, while the International Law Commission of the UN concluded works on unilateral acts.

A few theoretical and practical assumptions have been made for this study. First, we favour the concept of law that considers the law to be an aspect of the political co-existence of the community.<sup>1</sup> Second, we share the opinion that PIL, despite its rather specific and non-hierarchical system of sources (not to be confused with the lack of a hierarchy of norms), is a specific application process and, even more, that specific

<sup>1</sup> Such an understanding of the law was represented by Aristotle, who considered the legislative art as well as judicial art, both practical reasoning, constitute a type of politics. For more, see: Aristotle, *Etyka nikomachejska*, transl. by D. Gromska, Warszawa 2012, Book VI, 1142a.

enforcement measures – without an institutionalized coercive system – are law. Third, we adopted the assumption that PIL is systemic in nature and its elements, such as the great number of norms *lex imperfecta*, the lack of an institutionalized systematization of second-degree rules, and the lack of hierarchical international courts and tribunals endowed with universal jurisdiction, are not prerequisites to state the asystemic character of that law. Fourth, the legal international liability of PIL subjects in *sensu largo* indicates that they operate within the dispositions of the norms of the PIL system, as they are accountable for the infringement of any element of the system, and that this responsibility (for acts prohibited by PIL) is independent from liability (for acts not prohibited by PIL). Notably, we need to stress that in the field of the theory and doctrine of PIL, there have appeared and still appear opposite views that undermine the legal character of the norms of PIL,<sup>2</sup> and mostly they have denied and do deny the collection of those norms their systematic character.<sup>3</sup> We are in favour of the view that the sheer potential, that is, the possibility for a subject to bear negative consequences for infringement of a norm of PIL, is indeed one of the reasons that make PIL law to its fullest extent.<sup>4</sup> Moreover, we are observing at present a transformation of the character of the norms of PIL, as well as of its entire system, both in the construction/structure of the sources of the law, and on the axiological and pre-axiological levels, through a redefinition of the goals of that law and its real functions. Also, the very construction of the norms undergoes changes – more and more frequently they comprise measures of enforcement. In this first layer, PIL is undoubtedly going through a constitutionalizing process (which may be summarized as the evolution from a multicentral horizontal structure to the raising of a “quasi-hierarchical” structure). In the second level (axiological and pre-axiological), in turn, we observe an inflection point sometimes defined as: *Kant’s Copernican revolution, which may be simply presented as a transition of PIL from state law to the law of states and nations [...] in which international law also becomes an instrument of protection of the common goods of the entire international community.*<sup>5</sup>

<sup>2</sup> See, for example, J. Austin, for whom international law is not law *sensu stricto* but at most, positive morality: J. Austin, *The Province of Jurisprudence Determined; and The Uses of The Study of Jurisprudence*, London 1954, p. 126.

<sup>3</sup> See, for example, A. Pellet, who formulates these statements based on the question of primal responsibility of the subject of international law (of the states): A. Pellet, “The Definition of Responsibility in International Law”, in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press 2010, p. 4 and following.

<sup>4</sup> See, for example: B. Simma, “Self-Contained Regimes”, *Netherlands Yearbook of International Law*, vol. 16 (1985), p. 135.

<sup>5</sup> See: L. Morawski, “Suwerenność i prawo międzynarodowe – od prawa państw do prawa ludów”, *Forum Prawnicze*, no. 1 (2001), pp. 13-14.

## USE OF SANCTIONS IN THE ASPECT OF SYSTEMIC EFFECTIVENESS – DISCOVERING NORMS THROUGH SANCTIONS

In PIL, to follow a legal norm that forms the basis to ascribe legal-international responsibility, and to apply a negative consequence envisaged by the norm (without settling here the type: countermeasure, sanctions, acts of reprisal, retaliation measures, boycott, breaking diplomatic relations, or others), allows one to conduct the process of identification of legally protected goods or values. Hence, the mechanism of that legal construction may operate in a reverse direction in comparison with domestic law. In PIL, a modified procedure of settling and imposing negative consequences is plausible and has already been applied. It consists of the identification of legally protected but infringed goods and values only during the stage of the application of law.<sup>6</sup> We observed such a situation during the Nuremberg trials, where only at the verdict stage did the Tribunal determine legally protected values.<sup>7</sup> Therefore, there is a normative and factual possibility to assign to a subject of PIL the legal responsibility for infringement of values and goods that members of the international community universally accept as requiring protection, done through actions which until the moment of infringement have not been covered by the content of binding PIL norms. We are dealing then with a situation in which the adjudications of international courts and tribunals fulfil the role of an auxiliary instrument of the determination of legal norms<sup>8</sup> (their existence and their content), and specifically, in our opinion, of the content regulating the norm.

Conceptualization of the phenomenon of discovering a norm through sanctions, within the process of the divergence of legal systems, including strengthening nation-states, with a simultaneous questioning – on the domestic level – of the universal and common inter-state, trans-state, and supra-state legal order as an objective, common determinant of international legal standards for all states (and most of all, for those that in the 20<sup>th</sup> century have been called “civilized nations”), is a process that, in our view, occurs on an even deeper level, because it concerns the axiological layer (foundation of the norm) of PIL. We are dealing here with a case of a formal and official normative axiological determination<sup>9</sup> (mainly in the law of treaties, where the number of

<sup>6</sup> Thanks to such a solution, it has become possible for the International Law Commission to adopt the “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001”, *United Nations*, 2008, at <[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)>.

<sup>7</sup> See, for example: M. Lachs, “Prawne gwarancje praw człowieka”, *Nowa Polska* (Londyn) no. 4 (1946). Quote after T. Cyprian, J. Sawicki, *Prawo norymberskie. Bilans i perspektywy*, Warszawa–Kraków 1948, p. 478, footnote 44. *The Nuremberg sentences will be a great precedent. By establishing the penalty, it will determine legally protected goods.*

<sup>8</sup> See, for example: L. Damrosch, “Art. 56”, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice. A Contemporary*, Oxford 2006, pp. 1188-1189, referring to the content of Art. 38, paragraph 1 of the ICJ Statute.

<sup>9</sup> *The axiological determination of law; precisely: value determination of law*: K. Palecki, “Neutralization

axiological justifications is very high), as well as with a factual axiological neutralization<sup>10</sup> (especially at the stage of application of PIL as justification for the use of sanctions or countermeasures). Both processes are the result of the antinomy of values at the axiological core of the formation/body defined in PIL as “international society”<sup>11</sup> (IS). IS is a derivative and heterogenic body without proper (as in original/congenital) values or values-goals. Neither is this society a holistic body but a simple sum of the actors operating within it. The subjectivity of this formation is also complicated, as both in its methodological and analytical aspects it is simultaneously a subject and an object. The empowerment of potential actors of PIL would require the activation of legal processes originating from a higher level of the normative model than those within which the composing subjects (actors) function, that is, processes from the level of “creative society”. IS has not elaborated any group of institutions or instruments allowing a factual, and not only formal, guarantee of the coherence and axiological, teleologic, and pre-axiological unity for legally relevant (to PIL) behaviors of its actors.

All the above-mentioned premises constitute determinants of the quality of the process of enforcement of PIL. The quality is also determined by the type and intensity of the nuisance of possible (legal) sanctions. This quality fails definition or even proper description *sui generis*, as it functions jointly with the phenomenon of law and spheres of its actualization, and is the essence of a permanent, dynamic, nonconclusive process of “becoming”, a type of a permanency. This statement is legitimate also in relation to the quality of other spheres of PIL actualization<sup>12</sup>. The law has to be, and is, related to the processes as they rationalize it (they fulfil its expediency), give it structure, and condition it. It is thanks to these processes that the law can “act” and shape its quality. It is, after all, their largely understood course that sets the law’s level of quality, in the legal sphere of a state, intra-state, supra-state and trans-state. We also believe that the quality of the process is not, as it might seem *prima facie*, determined by the character of PIL norms. Explicitly, it is about the effectiveness of the norm – its compliance and enforcement, that is, not decided by the fact that the norm constitutes *lex imperfecta*. We are thus inclined to share the opinions of those who consider *leges imperfectae* within the context of a specific legal and factual possibility of “sanation”

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of Values in Law – An Outline of the Concept”, in idem (ed.), *Neutralization of Values in Law*, Warszawa 2013, p. 50.

<sup>10</sup> *The neutralization of values in law is precisely that entire body of manipulations and its outcomes that make it difficult or impossible to establish a functional relationship between the content regulating any legal decisions whatsoever and the real axiological foundation for those decisions.* Ibid., p. 58.

<sup>11</sup> The science of PIL knows the controversy whether its participants should use the term international “society” or “community”, and it is not a semantic quarrel but rather a debate about the sense and character of the inner bond, identity, and axiological characteristic of the group. This differentiation refers to the concept by F. Tönnies comprised in his seminal work “*Gemeinschaft und Gesellschaft*” from 1887. Contemporarily, for more on the possible criteria for distinguishing between those two notions and on the terminology chaos they incite for PIL, see: J. Zajadlo, “Społeczność czy wspólnota międzynarodowa?”, *Państwo i Prawo*, no. 9 (2005), pp. 34-50.

<sup>12</sup> On the quality of law in relation to the law-making process, see: S. Kaźmierczyk, “O trzech aspektach jakości prawa”, *Studia z Polityki Publicznej*, no. 1 (2015), pp. 81-93.

(remediation) or else compensation for the lack of sanctions by way of a “loan” from different regulations formulating the sanctions and, when put together, forming the content of the decoded legal norm. We assume that material norms are in a way “secondary” (by which we mean that they are decoded from the content of legal regulations), and even if in a single regulation the element of sanction is missing, together with other regulations that served to decode the whole entity, it nonetheless will constitute a legal norm that will be provided, with sanctions missing in the original construction of the regulation.<sup>13</sup>

## SANCTIONS AS VOLITIONAL MEASURES OF INTERNATIONAL LEGAL COERCION

As the basis for our deliberation serves the obvious but essential statement that the notion of sanction in PIL cannot be identified with the notion of sanction in national law, consequently, we do not apply semantic categories perpetuated in the theory of national law to elucidate PIL.<sup>14</sup> The traditional concept of sanctions in PIL refers to the distinction between sanctions *sensu largo*<sup>15</sup> and *sensu stricto*,<sup>16</sup> and based on the criterion of the purpose of the sanction, we may classify them as repressive or preventive sanctions. J. Symonides and R. Bierzanek, in turn, adopted as the criterion the type and mode of application of the sanction in the international agreement. According to them, sanctions are *a negative reaction of the international society directed at a state infringing the norms of international law*.<sup>17</sup> Hence, in PIL, a sanction is understood to be a wide range of reactions of the subjects of the international legal order, incited by an infringement of any norm deriving from that order, aimed less at penalization of the wrongful subject, but mostly at re-establishment of the observance of the disrupted law and at ensuring the effectiveness of international commitments. Also, in specific cases a sanction may endeavor to incite the wrongdoer to perform a previously breached obligation (*facere*) or to restrain from breaching an obligation (*non facere*). Therefore, the range of

<sup>13</sup> See, for example: S.L. Paulson, “An Empowerment Theory of Legal Norm”, *Ratio Iuris*, vol. 1, no. 1 (1988), pp. 58-70.

<sup>14</sup> The perspective of our study is exterior in relation to international law; to read more on the internal perspective on the sanctions, see: J.L. Kunz, “Sanctions in International Law”, *The American Journal of International Law*, Vol. 54, No. 2 (Apr., 1960), pp. 324-347; J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge, UK 2007.

<sup>15</sup> In this sense, sanctions belong to the whole system of PIL rather than to its particular norms, thus they are – as suggested by H. Hart – secondary norms, or norms of the second degree. They encompass all types of mechanisms ensuring compliance with international law, such as public opinion pressure, invalidation of an international agreement, state responsibility, countermeasures, retorsions and reprisals, self-defence, or use of force.

<sup>16</sup> These are reprisal measures based on the collective decision of an organ endowed with due competence by international society. Sanctions in this sense must represent three features: coercive in character, injurious consequences, and application stemming from a prior collective decision.

<sup>17</sup> R. Bierzanek, J. Symonides (eds.), *Prawo międzynarodowe publiczne*, Warszawa 2003, p. 24.



meaning of the notion of legal international sanction encompasses various legal consequences deriving from a breach of the PIL order, in particular, consequences allowing the legal use of coercion against a wrongdoer.

Sanctions have been defined as volitional coercion means,<sup>18</sup> since every use is decided by individual states, groups of states, or international organizations. Sanctions in international law constitute an instrument to re-establish the order in international relations. In the contemporary world, international sanctions (political, economic<sup>19</sup>) became the only legally incontestable form of pressure on a particular PIL subject (state or international organization) and they were aimed at enforcing compliance with the established international norms<sup>20</sup>. Such was the function assigned, for example, to the sanctions on the Russian Federation<sup>21</sup> in reaction to the violation of rules and norms of international law through its military aggression against Ukraine.<sup>22</sup> The sanctions encountered a response from the Russian Federation in the form of retorsion – countersanctions.

## SANCTIONS AND COUNTERMEASURES IN PUBLIC INTERNATIONAL LAW

In PIL communication, the term “sanction” is rarely used (substituted by synonymous terms), a practice that derives from states’ reluctance towards the use of the word. The term “sanction” in legal language (and as a result, in juridical language) has been substituted (according to the International Law Commission in its Draft Articles on Responsibility of States for Internationally Wrongful Acts) by “countermeasures”, used synonymously. The synonymous character of this word is stressed in the Commentary: *In the literature concerning countermeasures, reference is sometimes made to the application of a ‘sanction’, or to a ‘reaction’ to a prior internationally wrongful act; historically, the more usual terminology was that of ‘legitimate reprisals’ or, more generally, measures*

<sup>18</sup> Such a position in Polish science is represented, for instance, by Michał Nowicki. For more, see: idem, “Sankcje jako wolicjonalny środek wywierania presji na państwa naruszające ład międzynarodowy”, *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, no. 406 (2015), pp. 391-400.

<sup>19</sup> More: J. Menkes, “Prawne i polityczne determinanty sporu wokół Oświadczenia Rządu PRL z dnia 23 sierpnia 1953 roku w sprawie zrzeczenia się reparacji od Niemiec”, in idem (ed.), *Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa Profesor Renaty Sonnenfeld-Tomporek*, Warszawa 2006, pp. 403-422.

<sup>20</sup> R. Caruso, “The Impact of International Economic Sanctions on Trade. An Empirical Analysis”, *Peace Economics, Peace Science and Public Policy*, vol. 9, no. 2 (2003), p. 2.

<sup>21</sup> For more, see: C. Cohen, J. Gabel, “2015 Global Forecast. Crisis and Opportunity”, *CSIS*, at <<https://www.csis.org/analysis/2015-global-forecast>>, and J. Zarate, “After the Sanctions, Prepare for the Russian Counterattack”, *Kyiv Post*, 25 September 2014, at <<https://www.kyivpost.com/article/opinion/op-ed/juan-zarate-after-the-sanctions-prepare-for-the-russian-counterattack-365903.html>>.

<sup>22</sup> J. Menkes, “Ex iniuria(?) ius non oritur(?) Ex factis ius oritur”, in K. Karski (ed.), *Kierunki rozwoju współczesnego prawa międzynarodowego*, Warszawa 2015, pp. 12-37.

of 'self-protection' or 'self-help'. ... At least since ... the term 'countermeasures' has been preferred, and it has been adopted for the purposes of the present articles.<sup>23</sup>

In 2001 the International Law Commission adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: ILC Draft Articles).<sup>24</sup> Among others, they settle the institution of countermeasures – individual retaliation measures applied in response to the prior infringement of the law to rouse the wrongful state to perform the pending duty; they also define the material and procedural conditions of its application. According to the ILC Draft Articles, these consequences are: maintaining in force the duty and obligation of its performance (continued duty of performance<sup>25</sup>), obligation to cease the wrongful acts and provide assurance of non-repetition (cessation and non-repetition),<sup>26</sup> various forms of reparation such as restitution, compensation, or satisfaction,<sup>27</sup> and last, the possibility to use certain forms of coercion towards the wrongdoer, in particular retaliation measures (countermeasures), with the purpose for the injured subject to enforce compliance with the law and the re-establishment of the legal order disturbed between the victim and the culprit.<sup>28</sup> Article 42 of the ILC Draft Articles, which determines the invoking of responsibility by the injured state, also decides that the directly injured state will apply countermeasures at its own expense, regardless of the type of obligation from which derives the right to use this sub-group of sanctions. Countermeasures are indeed solely a sub-group of sanctions, and the semantic range of the notion “countermeasures” is narrower than that of the notion of “sanction”.

In the literature, we repeatedly encounter statements claiming that the effectiveness of sanctions in international law is inversely proportional to the frequency and universality of their application. Some authors bluntly and pointedly say that sanctions are as popular as they are ineffective. Similar opinions are to be found, for instance, in the Report of the British House of Lords: *The Impact of Economics Sanctions*. Volume 1: Report from 2007, or in the works of Wallenstein.<sup>29</sup> Numerous authors draw our attention to the finding that sanctions not only do not restrain the wrongful state from further infringing on international law but also present a series of inexpedient effects, including social ones. Thus, it is hard not to share the opinion expressed by Heillebrand and Bervotes, who claimed the existence of a paradox: in the literature, the ineffectiveness of sanctions has been discussed for years, but political

<sup>23</sup> “Draft articles on Responsibility of States...”; Text *Yearbook of the International Law Commission*, vol. 2, pt. 2 (2001), at <[https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_2001\\_v2\\_p2.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf)>.

<sup>24</sup> Ibid., pp. 20-143.

<sup>25</sup> Ibid., see Art. 29.

<sup>26</sup> See Art. 30.

<sup>27</sup> See Arts 31 and 34-37.

<sup>28</sup> See Arts 49-54 on the responsibility of states.

<sup>29</sup> P. Wallenstein, *A Century of Economic Sanctions. A Field Revisited*, Uppsala 2000 (*Uppsala Peace Research Papers*, no. 1), p. 1.



decision-makers eagerly use sanctions as soon as any breach of the international order happens.<sup>30</sup> The statement *the nuisance entailed by the sanctions for the citizens of the state they are imposed on, will result in pressure they will impose on the domestic political decision-makers urging them to introduce changes demanded by the subject imposing the sanctions*<sup>31</sup> must be considered counterfactual. Observation of the political relations and application of sanctions within PIL indicates, forcibly, that they have been, and still are, most frequently applied to authoritarian states where the citizens/inhabitants already do not enjoy any normative or factual possibility of pressure on political decision-makers, and even less so on their actions undertaken in the international arena.

## FEEDBACK LOOP: SANCTIONS – THE RULE OF STATE SOVEREIGNTY

A state is a sovereign organisation<sup>32</sup> which according to L. Ehrlich signifies its self-governance and whole-governance; that is, it has the competence to shape all relations within the state.<sup>33</sup> *In the literature – and in the literature on international law – frequent are the use of expressions such as ‘the rule of sovereignty’ or ‘the rule of state sovereignty’. These expressions are particularly inadequate on the grounds of international law because they could be treated as support for the thesis of the subordination of sovereignty to international law.*<sup>34</sup> A notion strictly related with the notion of state sovereignty is “state immunity”. By its force, no state can extend its jurisdiction to another state, expressed by the fact that no state is subject to another state’s courts. This rule emanates from the ancient rule of Roman Law: *Par in parem non habet imperium* (“equals do not have authority over one another”). In the theory of international public law, there exists a dualistic concept of a state’s immunity,<sup>35</sup> divided into complete immunity and

<sup>30</sup> E. Heillebrand, J. Bervotes, *Economic Sanctions and ‘The Sanctions Paradox’: A Post-Sample Validation of Daniel Drezner’s Conflict Expectations Model*, p. 1, at <[http://www.uky.edu/~ehill2/dynpage\\_upload/files/Economic%20Sanctions%20and%20The%20Sanctions%20Paradox.pdf](http://www.uky.edu/~ehill2/dynpage_upload/files/Economic%20Sanctions%20and%20The%20Sanctions%20Paradox.pdf)>.

<sup>31</sup> M. Oechslim, “Targeting Autocrats: Economic Sanctions and Regime Change”, *NCCR Trade Working Paper*, no. 31 (2013), p. 1.

<sup>32</sup> In the context of the factual execution of sovereignty and accomplishment of international law by the state, the PIL science uses the non-normative notion of “failed State”. For more on that topic, see: J. Zajadło, “Prawo międzynarodowe wobec problemu ‘państwa upadłego’”, *Państwo i Prawo*, no. 2 (2005), pp. 3-20.

<sup>33</sup> L. Ehrlich, *Prawo narodów*, Kraków 1947, pp. 104-105. See also: T. Łoś-Nowak, *Wstęp do teorii stosunków międzynarodowych*, Poznań 1999, p. 127 and following.

<sup>34</sup> J. Tyranowski, “Suwerenna równość i interwencja w prawie humanitarnym”, in C. Mik (ed.), *Pokój i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji sześćdziesiątej rocznicy urodzin Profesora Janusza Gilasa*, Toruń 1997, p. 399.

<sup>35</sup> The criterion of that division is the range of the immunity. It forms the basis to analytically distinguish two types of state immunity: absolute (unlimited) and relative (limited). The first, also called “complete”, is based on the traditional and conservative reception of the previously evoked rule *par*

limited immunity. Within the limited form, states enjoy immunity with reference to acts of *iure imperii* (by the right of the sovereign; the authority's acts deriving from the sovereign entitlements of states). We believe that until sovereignty constitutes the main feature of a state in international law, a state will enjoy a "monopoly" to determine the grounds for the effectiveness of international norms on its internal order.<sup>36</sup> Coincidentally, we can observe that the very paradigm of sovereignty has been particularly transformed.<sup>37</sup>

### CASUS OF STATE RESPONSIBILITY IN INTERNATIONAL LAW<sup>38</sup>

The UN Charter confirms that states are sovereign geopolitical entities (apt to be subjects of international relations).<sup>39</sup> We assume that legal state responsibility ought to be perceived as part of the category of general sanctioning norms within PIL, and its performance is conditioned by (is grounded on) the legal-international subjectivity of the primary PIL actor. What is more, this responsibility is treated simultaneously as an attribute and a consequence of the rule of equality among sovereign states, members of IS. Enforcement of legal-international responsibility is hindered, and sometimes even prevented, by still quite conservative functioning of the rule of sovereignty of equal states, members of IS. As a result, invoking a state to international responsibility in front of international organs endowed with this function (courts and tribunals) is consensual; that is, it requires the prior consent<sup>40</sup> of states potentially the targets of

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*in parem non habet imperium*. In turn, the concept of limited immunity is the most universal and widespread in the contemporary world, and is also dominant in the sciences of PIL, politics, and international relations.

<sup>36</sup> R. Kwiecień, *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, Warszawa 2000, p. 50.

<sup>37</sup> Same: J. Zajądło, "Śluzna przyczyna jako przesłanka legitymizacyjna interwencji humanitarnej. Studium z filozofii prawa międzynarodowego", *Kwartalnik Prawa Prywatnego*, vol. 5, no. 1-2 (2005), p. 37.

<sup>38</sup> We adopt the tri-partite definition of state formulated by G. Jellinek, highly significant in international law, serving as the basis for the distinction between a state and other organisations participating in the life of international society. For more, see: G. Jellinek, *Ogólna nauka o państwie*, transl. by A. Peretiatkowicz, Warszawa 1921, p. 50.

<sup>39</sup> A complement to the above-mentioned way of treating a state are its attributes defined in the Inter-American Convention on Rights and Duties of States, from 26<sup>th</sup> of December 1933, which enumerates, e.g., population, determined territory, government, and the capacity to maintain relations with other states.

<sup>40</sup> Consent may be expressed in three ways: 1. by means of inclusion of a compromissory clause in the relevant treaty concluded before the dispute that is to be adjudicated; 2. by virtue of a declaration by a state recognizing the jurisdiction of the ICJ, based on Art. 36 (2) of the ICJ Statute; 3. by the conclusion of an agreement to submit a given dispute to the ICJ, thus recognizing its jurisdiction. For more, see: C. Greenwood, "The Role of the International Court of Justice in the Global Community", *University of California Davis Journal of International Law and Policy*, vol. 17, no. 2 (2011), pp. 243-245.

adjudication and the possible legal consequences, such as sanctions. Article 36 of the ILC's Draft Articles on Responsibility of States does not point to any function of penalization or the purpose of imposing penalties on states responsible for breaches of their PIL obligations. The concept of penal responsibility of states has never gained support and still is not popular, neither in the practice of state functioning nor in the doctrine of PIL.

State Responsibility in International Law (for actions prohibited by PIL) plays a rudimentary part in the system of PIL – as a guarantee of compliance and application of the norms of international law.<sup>41</sup> Responsibility is not only a rule, but a *sui generis* institution of PIL, featuring a universal character derived from the subjective and objective range of use and from the axiological foundation that gave it the grounds to function within PIL. States and IS, however, are under a positive obligation – within the range of application of the rule/institution – towards not only themselves and other PIL actors but also, and maybe even mostly, towards other states. States, by accepting the regulations of PIL *de jure* and *de facto*, restrain the exercise of their sovereignty for the benefit of the accomplishment of universal and general values-goals, recognized as common and international. These obligations concern the respect without exception of PIL norms, refrainment without exception from breaching PIL, prevention of failure to comply with PIL, and homogenous and coherent sanctioning without exception of legal infringements. Most of all, however, the obligation is to do so with the maximum respect for national identity and legal, axiological, teleological autonomy in the international functioning of states. The idea of the obligation is to empower the states to draw effective advantages from rights and freedoms that the states are entitled to within their right to self-determination. Determination of the range and degree of realization of positive obligations is very significant. To recognize that a state has failed to comply with a positive obligation may lead to the conclusion that a breach of the norms of the treaty in the given affair occurred.<sup>42</sup> The term “responsibility” ceased being understood univocally in PIL, in particular since the ILC extracted in its documents the notion of *state liability* as a separate research problem (state responsibility in international law for wrongful acts of PIL subjects, acts that are not included in the scope of those prohibited by the norms of PIL). We may state a broadening of the semantic extent or rather a multiplication of meanings of the notion of “responsibility” (different but interconnected meanings) in PIL, even though its traditional understanding remains up-to-date and socialized.

The consent of a state mentioned above is required, although all UN members are parties to the ICJ Statute. The legal construct that conditions the possibility to execute

<sup>41</sup> On the topic of the possibility to qualify a state's activity as a premise for international responsibility, see: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2000. Nb. 502.

<sup>42</sup> See, for example: C. Mik, “Teoria obowiązków pozytywnych państw-stron traktatów w dziedzinie praw człowieka na przykładzie Europejskiej Konwencji Praw Człowieka”, in J. Białkocerkiewicz, M. Balcerzak, A. Czeczko-Durlak (eds.), *Księga Jubileuszowa profesora Tadeusza Jasudowicza*, Toruń 2004, p. 257.

a law towards an addressee with the consent of that addressee seems schizophrenic.<sup>43</sup> For a state that breaches the norms of international law to invoke consent to accept responsibility and submit itself to the appropriate negative consequences of the wrongful act, as judged by an international court, is a prerequisite that, in our view, makes PIL in terms of state responsibility:

- Pre-axiologically unjustifiable,
- Teleologically irrational, because it fails to provide us with the real possibility to achieve recognized values-goals due to factual functioning according to the rule of *iudex in causa sua*,
- Only illusory, thus ineffective, and therefore providing solely the potential for action without ensuring the factual possibility of action,
- Inconsistent with the remaining norms of PIL,
- Destabilizing, thus making the system unpredictable for all subjects of PIL concerned with the question of responsibility, not only primary ones but also secondary actors who are directly and indirectly concerned with the effects of (or lack of) state responsibility, as they determine their existence and real method and range of functioning.

Judging from all the above-mentioned effects of state responsibility, we need to state that they constitute a very strong counter-systemic and pathogenic element of the PIL system. We claim that the lack of a redefinition and adequate modification of the construction of state responsibility will end in the apoptosis of the PIL system. This way of making legal constructions in PIL, as well as accepting their legality and legitimizing the way they function, which in reality is faulty and ineffective, will diachronically lead to the self-destruction of the system of international law. The first stage of this breakup will be to render its norms ineffective, followed by the appearance of *desuetude* (more and more frequent and popularizing until the universality of non-application of the norms of PIL occurs), and concludes with the substitution of its norms by alternative regulations made by groups of socially, economically and politically linked states. The whole process may be called apoptosis – a programmed “death” of the construction and tools, leading to the nonexistence of the system. We place hope for saving international law and ensuring its effectiveness in the gradual, constantly progressing institutionalization<sup>44</sup> of the settlement of legal international disputes, while discerning the fact of the simultaneous completion of PIL and its regime through international governance. These two tendencies co-exist without mutual restriction or inhibition. Another virtue of institutionalization is to effectively limit the possibility for a state to demonstrate that the hypothesis of a norm undermining the largely understood state interests does not, in reality, correspond to a concrete situation (which is, according to a state, a situation legally irrelevant) nor formulates (in its dispositions) directly and unequivocally

<sup>43</sup> It is even more apparent in the case of jurisdiction – compliance with the Rome Statute of the ICJ.

<sup>44</sup> For more on the process of the institutionalization of legal-international conflicts, see: J.I. Charney, “The impact on the International Legal System of the Growth of International Courts and Tribunals”, *New York University Journal of International Law and Politics*, vol. 31, no. 4 (1999), pp. 697-698.

an interdiction on the conduct committed by the state in question, nor foresees sanctions for the given conduct (*lex imperfecta*). However, the lack of an effective institutionalized system results in the use of countermeasures and collective countermeasures by states, grounded on subjective evaluations of facts and which may be entirely inadequate to the real set of facts. PIL norms treating state responsibility and decoded from the ILC Articles indicate that the addressees of the law are: injured states, states committing infringements, and third states (the latter in a situation in which the norms of *ius cogens* type were infringed); at the same time, they point to a premise excluding the possibility to invoke countermeasures. This premise – conforming with Art. 52 (3b) of the ILC Draft Articles – is effective submission of the dispute to the jurisdiction of an international court, in the act named *lis pendens*. In turn, a positive aspect of the functioning of PIL is that most of its norms are observed by an important portion of its subjects; consequently, those subjects identify, recognize and comply with the dispositions of those norms. We are facing then both behavioral and final effectiveness within the norms of PIL<sup>45</sup>. At the same time, PIL norms are followed in a manner that is observed as law, and not as for example political norms, politeness principles, customs, or courtesy.<sup>46</sup>

## PIL AND THE HOMOGENIZATION OF LAW

At present, the thesis on the globalization<sup>47</sup> of values and the convergence<sup>48</sup> of legal norms and cultures, as well as the legal and political standards of applying and enforcing the norms of PIL by its actors, seems false and counterfactual. What is dominant and escalating nowadays is a divergence of norms and legal cultures founded on univocally nationalistic axiological separatisms in the field of the legal sub-system of our interest. This tendency includes an absolutist and universalist creation and the perpetuation of a superordinate system of legal norms and rules – a myth for some, dogma for others – of individual jurisdictions, but one not based on state or community (i.e., following the criterion of citizenship) but *stricte* of national or national and religious character.

Additionally, a significant group of PIL actors disagrees with being bound by (adamant) obligations because they lack sufficient guaranties that the others will comply

<sup>45</sup> On the effectiveness of law, see: J. Wróblewski, “Skuteczność prawa i problemy jej badania”, *Studia Prawnicze*, no. 1-2 (1980), pp. 10-13.

<sup>46</sup> See, for example: W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, Warszawa 2006, p. 145.

<sup>47</sup> Z. Bauman (...) *we are being globalised, and being globalised means the same thing for all concerned by the process*. Idem, *Globalizacja. I co z tego dla ludzi wynika*, transl. by E. Klekot, Warszawa 2000, p. 5; P. Sztompka treats globalization as a *collection of processes that make the social world one*. Idem, *Socjologia. Analiza społeczeństwa*, Kraków 2002, p. 582.

<sup>48</sup> Seyom Brown formulated a thesis that communication and economy that go beyond national borders have a unifying influence on cultural diversity. Idem, *New Forces, Old Forces, and the Future of World Politics*, Glanview, IL 1988, pp. 75-78.

with the binding obligations; thus, the attraction of the (anarchic?) commitments of the CSCE/OSCE system. Consequently, bound by the PIL norms, some states restrain the enactment of their sovereignty without being able to count on the factual equivalency of the self-restriction of other actors, while other states consent to the binding norms of PIL but observe them only in relation to selected states, and others still commit breaches or failures to comply.

## PIL AND THE SOCIAL DIMENSION OF THE INTRA-SUPRA AND TRANSNATIONAL LAW

The analysis we have conducted does not disregard the fact that the international legal order was created by nations characterized by their national identity and not by states (state or states are the creators and products of PIL). This national identity on the grounds of international relations becomes an instrument to perpetuate “self-preservation” tendencies. Furthermore, the PIL norms are heteronymic and, in a way, secondary in relation to the norms of national legal order, and so they are perceived by PIL actors as a form of oppression, one to which they are often unwilling to agree. As a result, treaties are frequently not ratified and agreements are left unsigned or signed and then revoked (in a diachronic aspect). Consequently, we have three groups of states: first, states who consent to be bound by the norms of PIL and observe them; second, states who refuse to be bound by these obligations; and third, states who agree to be bound by the norms of PIL but leave it unsure whether they will comply with them or abandon their dispositions and breach the international legal order. In the social and legal perspective, the question is whether we will deal with a *sui generis* axiological auto-internalization consisting of the acceptance by a state of the existence of a concrete normative pattern (a PIL norm) while recognizing solely the other states’ duty to observe it. What is important is a correct vision of PIL, and in particular, of sanctions and countermeasures as tools of enforcement of the law in case of breaches, a vision that takes into account the normative character of political authorities inextricably implied with the execution of these legal norms (in all five spheres) and one that considers the truth that the international legal reality represents the fullness (apogee) of the social diversification played on the inter-state level within IS, and secondly, impacts state societies by means of a feedback loop (with negative effects also for IS and PIL). This particular interaction – among PIL actors – closely determines the existence, the type, and the range of social legitimization for use by a state (by its political decision-makers) of sanctions or countermeasures in international legal relations. In this way, the political decision-makers who invoke immunity in the name of the state and who factually enact sovereignty in the name of the nation (consistent with the political authority they have been granted) – in exactly this way they create official axiological justifications for the decision of the use of countermeasures or sanctions. Already in this way, they exactly make the neutralization of values in law. That is the full axiological determination of the act of the application of PIL and simultaneous



factual axiological neutralization, for the designates of officially invoked values are *de facto* interests and goals, which only by unbridled principles of fantasy or even phantasmagoria could be considered consistent with the semantic scope of the invoked values. The effect of this is, in our view, a triad of parallel processes that take place in contemporary PIL on three levels: first, as far as values are concerned, we observe a process of rejection of universalism and of the general character of the values lying at the foundation of the norms of PIL; second, considering the norms (system of laws), we observe a reforming of the content that shapes the norms of PIL; third and last, with respect to execution, there is the process of westernization<sup>49</sup> of sanctions and countermeasures, used by PIL actors in international relations as a consequence of breaches of PIL norms. These processes confirm the thesis of the exogenic and endogenic heterogeneity of PIL that we have demonstrated, and which should be studied within the social functioning of this law.

## CONCLUSIONS

In our opinion, the rule *par in parem non habet imperium*, according to which one subject legally entitled to execute sovereignty cannot extend jurisdiction over another sovereign subject, is not only the grounds for the doctrine of immunity but also sets the matter of sanctions dangerously close to the junction with state sovereignty, and therefore induces the need to restrict – and not generalize – the regulations and reflections on sanctions. Both “sanctions” and the quoted rule gave birth to the doctrine *acta iure imperii* (Act of State Doctrine) – a norm of substantive law that is the basis for immunity as a legal right.<sup>50</sup> This rule determines the necessity to adopt another rule, according to which it is inadmissible in international law to presume a “sanction”, recognizing at the same time that in PIL, sanctions are made and regulated for every case independently from other regulations, peculiarly anew. That is the decisive reason for the lack of approved exposition within the doctrine of PIL on the topic of sanctions in international law, and even if we witness a process of a re-definition of that rule<sup>51</sup>, it seems that the law and the doctrine of PIL are still far from

<sup>49</sup> As comprehended by S.P. Huntington, “Westernisation” is a process of accepting and adopting cultural patterns from countries with a western culture. S.P. Huntington, *Zderzenie cywilizacji i nowy kształt świata*, transl. by H. Jankowska, Warszawa 2007, pp. 105-115. In our understanding, the process is not based on the criterion of western and non-western (not only eastern) civilizations, but according to a criterion resulting from four factors: democratization of the public life of a state, extent of oppression of the legal order inside of a state, level of economic development and homogeneity or heterogeneity of the society.

<sup>50</sup> A. Redelbach, S. Wronkowska, Z. Ziemiński, *Zarys teorii państwa i prawa*, Warszawa 1994, p. 143 and 150. See also: Z. Ziemiński, *Teoria prawa*, Warszawa–Poznań 1978, pp. 35-42 and 154-160.

<sup>51</sup> See: United Nations Draft Articles of the Convention on Jurisdictional Immunities of States and Their Property, and European Convention on State Immunity (Basle, 16<sup>th</sup> of May 1972). Ad. 1–Preamble: *Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law*; Art. 5: *State immunity. A State enjoys*

achieving a general rule – referring to the entire system of regulations of “sanctions”. Admittedly, the Polish doctrine of PIL is particularly archaic in this respect,<sup>52</sup> but the problem itself is much larger. Thus, at the present stage of development of PIL and of reflection on the doctrine, only the reconstruction of sanctions within individual regulations of PIL and its sub-systems may be scientifically correct, while remaining aware of the fact that the final effect will not present a complete image and that any generalisation of the studied cases must be more than careful. At the same time, the perception of sanctions in PIL is then co-dependent on the definition of relations regulated by PIL as international relations and of international law as (one of the) instruments of their regulation. The very substance of international relations restrains – often against the common sense of justice – the possibility (taken in the category of rationality) to use a sanction as an instrument of reprisal, of penalization for breaching the law, leaning towards the sanction as an instrument of enforcement of respect of the law (in the future).

## POSTSCRIPT

Considering the above, we believe it is necessary to modify the paradigm of theoretical, dogmatic and legal research on international public law. An attempt to recognize only one outlook on the nature and functioning of PIL, as well as on the rules and mechanisms of application of countermeasures and sanctions, would be impossible and unjustified. We need to look at the sanctions from a distance and from a perspective outside of PIL. Not even for the purpose of setting up a common position from a methodological, dogmatic and legal point of view, but mostly to point at their diversity and multiplicity. The scarcity of legal and social analysis of international public law is adverse and pernicious for the law. As a consequence, the process of the institutionalization of this law is impaired and the process of its socialization – understood *sensu largissimo* – is quite hindered, which directly impacts its macrosocial and, most of all, its supra-national and intra-national (intra-governmental) effectiveness.

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*immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention; and, Ad. 2–Preamble: Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts (nevertheless, the immunity is confirmed a contrario by dispositions of the articles from Chapter 1 of the Convention).*

<sup>52</sup> We formulate this opinion despite statements existing in the scientific discourse such as: J. Ryszka, *Sankcje gospodarcze wobec podmiotów zewnętrznych w prawie i praktyce Unii Europejskiej*, Toruń 2008, and M. Menkes, *Stosowanie sankcji gospodarczych. Analiza prawnomiędzynarodowa*, Toruń 2011, which significantly modifies the state of that discourse.

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