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INTERNATIONAL LEGAL PERSONALITY OF THE STATE IN THE AGE OF *MULTILEVEL GLOBAL GOVERNANCE AND RESPONSIBILITY TO PROTECT* – CONTINUITY OR CHANGE OF THE PARADIGM?

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„The intellectual process is essential but it involves dangers. The more wedded we become to a particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which hampers progress toward the ever needed new solutions of problems whether old or new".

Philip C. Jessup**

1. Introduction: problems connected with the status of States in contemporary international law

Theories, and the ideas underpinning them, systemise the knowledge on the reality being studied. Given the changing reality or the occurrence of new events, current knowledge is subject to ongoing transformations.

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** *Transnational Law*, Yale University Press, New Haven 1956, p. 7.

Thus, as a result of their critical confrontation with the world being discovered, ideas are subject to evolution; or may even be rejected altogether at times. This also pertains to the fixed collections of ideas and entire theories underlying a given science and expressing internalised beliefs of a given scientific group, i.e. paradigms, as once described by Thomas Kuhn.[1] They may be subject to far-reaching transformations that lead to profound changes in the science. At such times one may speak about, to use another of Kuhn's expressions, 'scientific revolutions'.

The conception of the personality of the State has been one of the leading paradigms of the science of international law. In light of this paradigm, States are the main, or as once thought the only, subjects of international law. Today, even without deeper study, one may speak of a change in the doctrinal approach to the legal status of the State. It is a transition from the axiomatic approach of the Permanent Court of International Justice (PCIJ) which essentially appropriated international law for States, and which was expressed by the famous *dictum* in the *S.S. Lotus* judgment,[2] to the increasing strength in doctrinal tendency towards relativizing the central significance of the international legal personality of States. Is it possible to speak here of a paradigm shift? In attempting to answer this question, it is worthwhile bearing in mind the interdependence between the idea of international law and the conception of personality in such law. These are, as some scholars note, 'two mutually dependent things'.[3] A question thus arises as to whether legal personality, and thus the catalogue of subjects of this law, stems from the concept of international law or, alternatively, whether the

[1] See T.S. Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago–London 1962, at pp. 54–58; *idem*, *Second Thoughts on Paradigms*, [in:] *idem*, *The Essential Tension: Selected Studies in Scientific Tradition and Change*, University of Chicago Press, Chicago–London 1977, at pp. 293–299.

[2] "International law governs relations between independent States". The case of the S.S. Lotus (France v. Turkey), PCIJ Judgement of 7.9.1927, *PCIJ Publ 1927,* Series A, No. 10, at p. 18.

[3] L. Antonowicz, *Uwagi o pojęciu prawa międzynarodowego w polskim piśmiennictwie naukowym [Remarks on the concept of international law in Polish scientific literature]*, 'Annales UMCS' 2002, Vol. XLIX, sectio G, at p. 8. See also: *idem*, *Zagadnienie podmiotowości prawa międzynarodowego [On international legal personality],* 'Annales UMCS' 1998, Vol. XLV, sectio G, at pp. 7, 28–29. See also: R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne [Public international law]*, ed. 5, PWN, Warszawa 1997, at p. 18.

existing subjects of international law determine its conceptual borders. The concept of international law seems to be logically primary and semantically broader than that of personality, since it is legal personality which constitutes an element of the legal order and not the other way round. A collection of legal rules and norms may only be considered to constitute a legal order if they include meta-rules similar to Hart's secondary rules of recognition, indicating *inter alia* the scope of its subjects. Consequently, the study of international legal personality is also a study of the very nature of this law. With this in mind, one should not be surprised by changes in the perception of a State's legal status that result from attempts to reconceptualise international law itself.

Given the central legal position of States, which is increasingly frequently questioned in the contemporary science of international law, the thesis considering international law as comprising exclusively interstate law is certainly no longer axiomatic, even amongst legal positivists. The intensification of economic processes and the related growing importance of transnational corporations, the increased activity of non-governmental entities in international and internal relations, the spectacular activity of governmental international organisations, and the emotive function of the ideology of human rights, undermine the leading, as it might seem, social, political and legal role of States. In this light, it is no surprise for the science of international law to pose questions concerning the consequences of this relativisation of the significance of the State for its future position within international law.[4] The postulates for rejecting the ontology of statehood either in favour of the consolidation of the role

[4] See e.g. F. Hoffmann, *In Quite a State: The Trials and Tribulations of an Old Concept in New Times*, [in:] R.A. Miller & R.M. Bratspies, 'Progress in International Law', Martinus Nijhoff Publishers, Leiden–Boston 2008, pp. 263–287; M. Koskenniemi, *The Future of Statehood*, 'Harvard International Law Journal' 1991, Vol. 32, pp. 397–407; M. Muszyński, *Państwo w prawie międzynarodowym. Istota, rodzaje i atrybuty [The State in international law. Essence, kinds and attributes]*, ed. 2, Wydawnictwo STO, Bielsko-Biała 2012, *passim*; M. Reismann, *Designing and Managing the Future of the State*, 'European Journal of International Law' 1997, Vol. 8, No. 3, pp. 409–420; J. Salmon, *Quelle place pour l'État dans le droit international d'aujourd'hui?*, 'Recueil des cours' 2010, Vol. 347, pp. 9–78; O. Schachter, *The Decline of the Nation-State and its Implications for International Law*, 'Columbia Journal of Transnational Law' 1998, Vol. 36, pp. 7–23; S. Sur, *The State between Fragmentation and Globalization*, 'European Journal of International Law' 1997, Vol. 8, No. 3, pp. 421–434.

of subjects other than the State[5], or with the aim of fuller legitimization of international society understood as 'society of all human beings',[6] are growing bolder and bolder.

The questioning of the leading role of the State in international law stems from a few complementary factors. Firstly, the change in the perception of State sovereignty; secondly, the noticeably increased role of *non-State actors* in international law, which is reflected in, for instance, the idea of *multilevel global governance*; and thirdly, the humanisation of international law, manifested in the ever stronger tendency towards the empowerment of individuals. A spectacular political and legal manifestation of this tendency is today the doctrine of 'responsibility to protect', which presents the functions of State sovereignty as ancillary to the rights of individuals. From a doctrinal perspective, this is not a new idea. A novelty, however, is its great political capacity that presents considerable opportunities for its practical realisation. Its legal status would be tantamount to the legitimacy of State sovereignty by human rights, whereas the construction of, as sometimes claimed, a legal order oriented at the protection of individuals, i.e. 'individual-centred system',[7] could crown this ideological turning point in international law.

The fourth source of the criticism of statehood lies in the ideological distrust towards the State, which is primarily rooted in Marxism and its contemporary variants. It describes statehood as 'morally unfounded egotism' responsible for creating artificial divisions among members of the human community, and legalising the repressive apparatus towards individuals. Yet another type of criticism derives from sociological observations resulting in the conclusion that contemporary States are unable to face global problems, or even ensure their own safety, which compels States themselves to establish stronger and stronger forms of institutionalised cooperation that reduce their sovereign powers.[8] In light

[5] E.g. S. Jodoin, *International Law and Alterity: The State and the Other*, 'Leiden Journal of International Law' 2008, Vol. 21, No. 1, pp. 1–28, esp. at pp. 19–26.

[6] See particularly Ph. Allott, *The Health of Nations. Society and Law beyond the State*, Cambridge University Press, Cambridge 2002, *passim*.

[7] E.g. A. Peters, *Humanity as the A and Ω of Sovereignty*, 'European Journal of International Law' 2009, Vol. 20, No. 3, pp. 513–544.

[8] M. Koskenniemi, *The Wonderful Artificiality of States*, 'ASIL Proceedings' 1994, vol. 88, p. 22.

of the above, the statement that the contemporary 'State as an institution becomes ultimately vulnerable to an essentially instrumental critique: either it does its job and can be justified on that basis, or it doesn't and can't',[9] seems rather accurate.

Questioning the ontology of the State, that used to legitimise international law, results in the search for new criteria for statehood within the science of this law. This is because certain features that, for a long time, seemed unquestionable in that respect, i.e. territory, population and superior authority exercising full territorial and personal power, are no longer recognised as exhaustive within contemporary academic literature on the subject.[10] The criteria for statehood in today's international law and its science are not, in other words, anything obvious and trouble-free. Additionally, if we take into account the theoretical and practical controversies concerning the recognition of the State and self-determination, these being classical problem of international law, the question on what is the State and its legal status, seems to be still, even more clearly, valid and deserving attention.

Two concepts, that are present in the title of this study, particularly motivate consideration of the question of continuity or change of the traditional paradigm of State personality in international law. These are *multilevel global governance* and *responsibility to protect*. They attack, at least at first glance, the central legal position of States from various angles. The former concept draws attention to the phenomenon of multilevel global governance that is present in contemporary international relations owing to the activities of non-State actors, whereas the latter stresses, as already mentioned, the personalistic dimension of international law. The former simultaneously raises clear questions as regards classical international law as the paradigm of the law of the international community. Within the doctrine of multilevel global governance, it is not only the law that is applied by the International Court of Justice in the light of Art. 38

[9] M. Craven, *Statehood, Self-determination, and Recognition*, [in:] M. Evans (ed.), 'International Law', 3rd ed., Oxford University Press, Oxford 2010, at p 247.

[10] *Cf*. the critical review of the criteria for statehood: J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press 2006, at pp. 37–95; M. Craven, *op. cit.*, at pp. 217–229; H. Ruiz-Fabri, *Genèse et disparition de l'État à l'époque contemporaine*, 'Annuaire français de droit international' 1992, Vol. 38, p. 153, especially at pp. 163–169.

of its Statute. If the phenomenon of *multilevel global governance* does, in fact, accurately explain a new normative quality, then one will need to question the legitimacy of identifying the international legal order with international law based on the central legal position of States, and consequently to assume the existence of other legal regulations in this order, operating alongside traditional international law. Accordingly, discussion of multilevel global governance also contributes to study of the nature of the law of the international community.

The present study consists of several parts. It includes a brief description of the traditional paradigm of international legal personality (part 2). The subsequent two parts present the doctrines of multilevel global governance and responsibility to protect as well as the position of the State within these doctrines (parts III–IV). The observations contained in the final part aim to answer the question posed by the study's title (part V). They, thus, attempt to determine whether the proposals offered by the aforementioned doctrines result in a change of the paradigm of State international legal personality.

2. The classical paradigm of State personality in international law

In early modern times, the approach to the legal position of the State in international law was characterised by considerable pluralism. This stemmed from a varied understanding of international law itself which, in turn, resulted from the ideological diversity of the doctrine. In the nineteenth century, such pluralism was pushed aside in consequence of international legal discourse being dominated by legal positivism. It is such positivism that offers intellectual support to the classical paradigm of international legal personality of the State. The above paradigm describes the State as the main – and in the past, due to the identification of personality with sovereignty, the only – subject of international law. The stability and firmness of this paradigm was also confirmed by its acceptance by some well-known critics of legal positivism.[11] In many

[11] Let us mention here, for instance, Hersch Lauterpacht, a supporter of the idea of a *common law of humanity*, in which the central position is held by human rights. See H. Lauterpacht, *The Organization of Peace and the Revision of the Status Quo*, [in:]

textbooks on international law, we can still find definitions of such law formed by means of reference to the legal position of States.[12]

The classical paradigm does not so much grants all international legal personality to States, since it creates a hierarchy thereof by distinguishing between full and primary personality, i.e. the personality of States, and that of other members of international community. The personality of the State stems from specific criteria of statehood and is formed by the consequences thereof which are, *nota bene*, frequently perceived as the characteristic (systemic) features of international law. Among the most important of these are: full legal capacity of States, significance of the contractual mechanism for creating international legal obligations, presumption of freedom of action of States in the absence of clear prohibiting norms, equality of States with respect to sovereignty, absence of obligatory jurisdiction, absence of automatism of organized sanctions, and jurisdictional and executive immunity of States.[13] The above consequences

E. Lauterpacht (ed.), *International Law. Being the Collected Papers of Hersch Lauterpacht*, Vol. 1, Cambridge University Press, Cambridge 1970, at p. 444. H. Lauterpacht writes here: "International law is and must remain a law of independent, autonomous States". See also *idem*, *Règles Générales du Droit de la Paix*, 'Recueil des cours' 1937, Vol. 62/IV, at p. 416. Elsewhere Lauterpacht defines international law as "the body of rules of conduct enforceable by external sanctions, which confer rights and impose obligations primarily, though not exclusively, upon sovereign States[...]". *Idem*, *The Definition and Nature of International Law and its Place in Jurisprudence*, in: *Collected Papers*, *op. cit.*, at p. 9.

[12] See e.g. L. Antonowicz, *Podręcznik prawa międzynarodowego [Handbook of international law]*, ed. 11, LexisNexis, Warszawa 2008, at pp. 17–18; R. Bierzanek, J. Symonides, *op. cit.*, at p. 19; I. Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations*, Martinus Nijhoff, The Hague–London–Boston 1998, at pp. 14–15; J. Combacau, S. Sur, *Droit international public*, 4 éd., Montchrestien, Paris 2002, at p. 15, 17; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe [Public international law. Systemic aspects]*, ed. 2, Beck, Warszawa 2004, at p. 5; L. Ehrlich, *Prawo międzynarodowe [International law]*, ed. 4, Wydawnictwo Prawnicze, Warszawa 1958, at p. 6; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie [Outline of public international law]*, ed. 13, LexisNexis, Warszawa 2009, at p. 16; R. Jennings, A. Watts, *Oppenheim's International Law*, 9th ed., Vol. 1, part 1, Longman, London–New York 1996, at p. 4; И.И. Лукашук, *Международное право. Общая часть*, БЕК, Москва 1996, at p. 1; С.В. Черниченко, *Теория международного права*, Vol. 1, Нимп, Москва 1999, at p. 106, 110; M. Shaw, *International Law*, 6 ed., Cambridge University Press, Cambridge 2008, at p. 2.

[13] *Cf.* J. Crawford, *op. cit.*, at pp. 40–42.

of statehood are expressed by the idea of sovereignty, which thus becomes the first and primary object of criticism with respect to the position of the State for this part of the doctrine that aims to reform the *status quo* currently existing in international law. There is yet another consequence of the international legal position of States as grounded in the traditional paradigm, i.e. the powerful capacity of States to establish new subjects of international law by means of acts of recognition or granting Statehood. It is the above capacity which causes the hierarchisation of personality in international law and, consequently, the State-centred nature of international law, possible. Seen from the perspective of the international community's structure, the capacity of States to establish new subjects of international law is the basic consequence of their legal personality and thus may be considered as the main rule for identifying legal personality in international community.

Do the concepts of 'multilevel global governance' and 'responsibility to protect' threaten the presented paradigm of the personality of the State? If so, do they really offer a new normative quality in the international community that would justify undermining the existent *status quo*? It is interesting to consider whether these concepts offer validation rules going beyond the limits of existing international law and whether, consequently, they change the legal status of States. Of particular importance in the context of the traditional paradigm of States is whether the aforementioned concepts reject or retain the constitutive feature of this paradigm, i.e. the role of States in establishing new entities in the international community.

3. The Legal Position of States within the Doctrine of Multilevel Global Governance

The international community is subject to constant evolution due to *inter alia* new forms of subjective activity. One of the most noticeable transformations in the contemporary international community is the increased actual and standard-creating activity of *non-State actors*. These comprise public institutions (intergovernmental international organisations), private institutions (e.g. non-governmental organisations or multinational corporations), or mixed institutions (such as, for

instance, international sports associations). As a consequence of their standard-setting function, *non-State actors* have gained a certain degree of factual and legal control over the subjects of national legal orders. This phenomenon is described as *multilevel governance*. In the past, the phenomenon of the growing role of non-State entities in the international community would be explained within the framework of the concept of *transnational law,* or *common law of mankind*. A common characteristic of these doctrinal concepts is that they challenge classical international law that is identified with the model of legal relations between States, and question the dichotomic division of legal regulations into 'domestic and international', or 'internal and external' ones.

Within the scope of European integration, the existence of *multilevel governance* has been asserted for quite a long time. It is claimed that, in the process of intensifying integration, authority is exercised at three levels: subnational, national and supranational. It is claimed that, in this process, the control of governance progresses from the national to the supranational level, and is exercised by the European institutions, as a consequence of which States have lost their previously exclusive control over entities subject to their original jurisdiction. Although the sovereignty of States is not directly questioned in this process, a further consequence, is – as claimed by the supporters of *European multilevel governance* – 'the dilution' of such sovereignty in consequence of the collegiate decision-making process among member States themselves, and the autonomic role that is played in the integration by the European Parliament, the European Commission and the Court of Justice.[14] Within European integration, not only *multilevel governance* but also *multilevel constitutionalism* have been mentioned for more or less a decade. The latter concept attempts to highlight the existence a European constitutional system based on national constitutional traditions, yet remaining centred around supranational public authority.[15]

[14] See e.g. G. Marks, L. Hooghe, K. Blank, *European Integration from the 1980s: State-Centric v. Multi-level Governance*, 'Journal of Common Market Studies' 1996, Vol. 34, No. 3, at p. 341 *ff*., particularly at pp. 347–356, 361–366; S. Piattoni, *Multi-level Governance in the EU. Does it Work?* available at: www.princeton.edu/smeunier/Piattoni.

[15] See particularly I. Pernice, *Multilevel Constitutionalism in the European Union*, 'European Law Review' 2002, Vol. 27, at p. 511 *ff*.

The concept of *multilevel governance* goes beyond the sphere of regional integration and is global in nature. Accordingly, the concepts of *multilevel governance* and *global governance* as legal and political doctrinal notions are sometimes used interchangeably. Their semantic borders are not, at any rate, clearly defined. They are frequently used intuitively. Nonetheless, the concept of *multilevel global governance* appears to be developmental in nature, which is reflected in the idea of *global administrative law* that has been supported for several years and which attempts to explain the phenomenon of law in the globalized/ing world. The phenomenon of globalization, for obvious reasons, remains of fundamental importance to *global governance*, which is its consequence. According to supporters of the concept of *multilevel governance*, globalization questions the legitimacy of viewing international law as the only possible legal paradigm in the international community and extends beyond the dualistic (i.e. national/international) approach to legal reality.[16] Seen from the perspective of *global governance*, the main pillars of international law are becoming increasingly fragile and incapable of facing the so-called 'challenges of globalisation'. What is particularly stressed is the gradual erosion of the sovereign equality of States, weak legitimisation of the consent of States as the classical basis of the binding force of international law and the growing role of 'soft' forms of making and applying law.[17]

The growth in the standard-setting activity of regional and universal international organisations, increased the phenomenon of mutual influence and complementing legal standards established at national, regional and universal levels. The various expressions used to describe this fundamental phenomenon as regards multilevel global governance, include the 'internationalisation of national law', 'Europeanisation of international law', 'internationalisation of European law' and 'nationalisation of international law'. They reflect the multi-dimensionality of mutual

[16] See e.g. A. von Bogdandy, *Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme*, 'Zeitschrift für ausländisches öffentliches Recht und Völkerrecht' 2003, Vol. 63, at pp. 853, 854–857; *idem*, *Globalization and Europe: How to Square Democracy, Globalization and International Law*, 'European Journal of International Law' 2004, Vol. 15, No. 4, at p. 885 *ff*.

[17] N. Krisch, B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 'European Journal of International Law' 2006, Vol. 17, No. 1, at p. 1.

relations in the world of multilevel governance. It is not always that the international level prevails, since the national level also takes the upper hand on some occasions. At any rate, multilevel governance may be claimed to demonstrate the absence of one distinct centre of legislation. Thus, it places the emphasis not on government, but rather on *governing* or *governance*.

There are two dimensions of multilevel global governance that deserve to be stressed. The former, i.e. the aforementioned *governance without government* dimension, indicates the phenomenon of numerous public tasks being performed by entities other than the classical governmental institutions of national States. The latter dimension is the so-called *governance beyond the State*, which accentuates the complexity of global governance at numerous levels, not necessarily connected with the exercise of public authority by States. The multi-level nature of governance, as claimed by its doctrinal supporters, refers to the multiple forms of decision-making, exercising power, establishing policies of cooperation, regulating, organising, etc., that are characterised by a complex nexus of actors acting at various levels of formal jurisdiction, competence and administrative authority, from local to national, regional or global levels.[18] This phenomenon evokes significant problems concerning the legitimisation of authority and the decisions thereof, and responsibility towards private entities. It also pertains to the marginalisation of the significance of State authorities as a result of the status of the subjects of national law being regulated by standards, not always formally legally in force, that are set by *non-State actors*, including private actors, or those not exercising, at least at the first glance, public authority. From the legal perspective, the interdependence existing between the above-mentioned levels of regulation, results, according to the supporters of this idea, in the phenomenon of *multilevel regulation*.[19]

To a considerable extent the above phenomenon has been caused by the activities of intergovernmental international organisations. They remain greatly involved in the normative process, which both *de iure*

[18] R.A. Wessel, J. Wouters, *The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres*, 'International Organizations Law Review' 2007, Vol. 4, No. 2, at pp. 259, 261.

[19] *Ibidem*, at p. 261.

and *de facto* exerts an increasing influence on States, individuals, NGOs, multinational corporations and other organisations. It is their activities that greatly contributed to the aforementioned phenomenon of decreased the omnipotence of the State as regards the regulation of the status of subjects of national law. This was a consequence of not only legally binding *pro foro externo* resolutions, but also formally non-binding acts. It is mainly within their scope that organisations perform the above-mentioned *standards-setting* function.[20]

What may perhaps be of even greater importance for the origin of multilevel governance has been the occurrence, in the global arena, of a new type of social actions taken by subjects that remains beyond the control of States. Their activities question the intergovernmental model as the pattern of international relations, according to which States are seen as the main subjects entitled to make and execute decisions. New forms of activity of *non-State actors* entail the problem of redefining the State's role not only within international relations, but also within the domestic sphere where standards set without the participation of public authorities become increasingly effective. This is a phenomenon which leads to the previously mentioned 'dilution' of authority on a global scale given the absence of a clear centre of legislation and, consequently, to the prevalence of *governance* over *government*. *Governance*, as claimed by its supporters, became a 'multi-actor game',[21] the participants in which are statutory and auxiliary bodies of governmental international organisations, agencies consisting of representatives of States, yet not formally acting on behalf of States (e.g. Basel Committee), a growing number of non-governmental international organisations of various types and applying various methods of action, and multinational corporations. The position of States in this process varies. Whilst in some areas of international relations States continue to retain their decision-making and executive monopoly, in others they are increasingly forced to cooperate with *non-State actors,*

[20] *Cf*. *ibidem*, at pp. 262–270; I.F. Dekker, R.A. Wessel, *Governance by International Organizations: Rethinking the Source and Normative Force of International Decisions*, [in:] I.F. Dekker, W.G. Werner (eds.), 'Governance and International Legal Theory', Nijhoff, Leiden 2004, at pp. 215–236; J.E. Alvarez, *International Organizations as Law-makers*, Oxford University Press, Oxford 2005, at pp. 184–268.

[21] R.A. Wessel, J. Wouters, *op. cit.*, at p. 269.

and in others they have ceased to play a significant role in *global governance* altogether. The latter is the case when so-called international standards, in respect of which States did not directly participate in their establishment, directly influence internal relations. Let us mention here a few such examples. In this context, among the rules established by governmental international organisations, special attention should be given to the standards set by such agencies as the WTO, the World Anti-Dumping Agency, the OECD and UNESCO.[22] Among non-governmental entities, a particularly visible influence on national relations is exerted by decisions of the ICANN (Internet Corporation for Assigned Names and Numbers), the ISO (International Standardization Organization) and various international sports organisations. The decisions of the latter spectacularly describe the situation of not only their members and sports participants, but also public authorities in States.[23] Consequently, there are at least three areas of legal regulations established without, or with extremely limited, direct participation by States that are visible today. These are: *lex mercatoria*, *lex digitalis* and *lex sportiva*. This leads certain authors to claim the existence of 'something like global law without the State and in some areas States do not play any role in global regulation'.[24]

Let us pose here a question that is important to the present study. Has the noticeably increased activity of *non-State actors* undermined the competence monopoly of States as regards establishing and controlling new subjects of international law? Actually, it is clear that we are witnessing a phenomenon whereby a considerable element of the global process of regulation and the actors participating therein, is slipping

[22] Spectacular and telling is the example of the influence of placing the Dresden Elbe River Valley on the UNESCO World Heritage, on the construction of a bridge in Dresden that was supported by the local population voting in a local poll. UNESCO threatened to remove the Dresden Elbe River Valley from the list if they proceeded with construction of the bridge. The dispute was settled by the German Federal Constitutional Court. See the Bundesverfassungsgericht's decision in 2 BvR 695/07 of 29.5.2007, available at: www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html (9.3.2012).

[23] See broadly in this respect P. Szwedo, *Poland at the Gates of EURO 2012 – Global Sport Governance and the Limits of the State's Autonomy*, 'Sports and Entertainment Law Journal' 2011 (Fall), at p. 57 *ff*., available at: www.law.du.edu./documents/sports-and-entertainment-law-journal/issues/11/FINAL-SZWEDO-FALL-2011.pdf.

[24] R.A. Wessel, J. Wouters, *op. cit*., at p. 276.

beyond the authority of States. In the global context, we are witnessing the Janus-like quality of States. On the one hand, they establish governmental international organisations, confer upon them the authority to perform a regulatory function, and undertake to ensure effectiveness in their orders of legal regulations established within this function. On the other hand, the process of international correlations occurring at different levels tends to spiral beyond their control. This happens not because of any violation of the principle of 'conferred powers' by those organisations but, rather, from the real influence of formally non-binding rules and States' acceptance, for utilitarian reasons, of the effects of the activity of certain non-governmental organisations, on national relations. Consequently, what transpires to be effective in these relations are the regulations that formally are neither a source of international nor national law. Given this, what kind of law are we witnessing on a worldwide scale? Is one legal order, and thus one homogeneous catalogue of subjects thereof, in force here? There are three possibilities: 1) we continue to deal with one universal international law, the boundaries of which are flexible enough to assimilate transformations within the international community. In this paradigm, international law would be a synonym of the law of the international community, the main subjects of which would continue to be States; 2) the international legal order has undergone fragmentation that involved the autonomisation of legal regimes functioning within its borders. A legal manifestation of this process may be, so to say, a sectorial constitutionalisation of international law.[25] In some of these regimes, States maintain their central legal position, whereas in others, their position is equal to that of *non-State actors*; 3) we are dealing with new phenomena within the international legal order which are better characterised by the term 'global law' than international law. Within this concept, international law is merely one of the levels of legal regulations, while States are, at best, entities that are equal to other members of the international community.

[25] See e.g. E. de Wet, *The International Constitutional Order*, 'International and Comparative Law Quarterly' 2006, Vol. 55, at p. 53 *ff*. By *international constitutional order* de Wet understands the order being created which consists of national constitutional regimes, regional integration areas (e.g. Council of Europe) and sector international legal systems (e.g. the WTO system).

The last of the above possibilities offers a new perspective for the law of the international community and arouses greater and greater interest of the doctrine. Recent years have witnessed attempts to provide a more precise definition of the term *global law* by means of the concept of *global administrative law* (GAL).[26] This concept is neither the first nor the sole attempt to form an alternative to classical international law which explains the phenomenon of the globalisation of law. Other concepts previously considered as such included the *common law of mankind* (Lauterpacht, Jenks), *world legal order* (New Haven School) or *transnational law* (Jessup). Certain comparative references to them are, thus, to be found later in the present study.

GAL questions the main pillars of the international legal order given the ongoing blurring of the boundaries between 'national' and 'international' law, 'soft forms' of law-making becoming increasingly widespread, the importance of the principle of sovereign equality of States decreasing and, consequently, the consent of States as the basis for legitimizing law in the international community eroding. For these reasons, GAL, according to its authors and supporters, is better at explaining the changes occurring within the international community than international law based on the State-centred paradigm. GAL asserts the existence of 'global administrative space' that rejects the clear-cut division into 'national' and 'international' regulation. Within GAL, *governance* is based on 'administrative regulation' performed at various

[26] See. J.E. Alvarez, *op. cit.*, at pp. 244–268; B. Kingsbury, N. Krisch, R.B. Stewart, *The Emergence of Global Administrative Law*, 'Law and Contemporary Problems' 2005, Vol. 68, at p. 15 *ff.*; N. Krisch, B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 'European Journal of International Law' 2006, No. 1, at p. 1 *ff*. In the Polish literature, this concept is discussed by P. Szwedo, *O pojęciu globalnego prawa administracyjnego [On the concept of global administrative law]*, 'Forum Prawnicze' 2011, No. 4–5, at p. 60 *ff.*; M. Zieliński, *O pojęciu międzynarodowego prawa administracyjnego [On the concept of international administrative law]*, 'Państwo i Prawo' 2008, No. 9, at p. 16 *ff.*; *idem*, *Pojęcie i zasady globalnego prawa administracyjnego [The concept and principles of global administrative law]*, [in:] E. Dynia (ed.) 'Prawo międzynarodowe i wspólnotowe wobec wyzwań współczesnego świata' [International and Community law against the challenges of the modern world], Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów 2009, at p. 377 *ff.*; *idem*, *Międzynarodowe decyzje administracyjne [International administrative decisions]*, Wyd. Uniwersytetu Śląskiego, Katowice 2011, at pp. 228–241.

levels with interdependence between various actors. This 'administrative regulation' takes place not only due to the sources of law familiar to international and national law, but also with the extensive participation of formally non-binding legal instruments.[27]

The authors of the concept of GAL prefer to use the adjective *global* rather than *international* for several reasons. Firstly, due to the presently ongoing mutual penetration of what was in the past dualistically classified as 'national' and 'international'. Secondly, due to the increased effectiveness of legally non-binding instruments within the multi-level global legal space. Thirdly, given the significant activity of *non-State actors* therein.[28] Viewing the inspirations and preferences of GAL's authors from a negative perspective, we should emphasise their scepticism towards international law as an order based on 'intergovernmentality' and the consent of States, and, consequently, their criticism of the leading role of statehood in the contemporary world.[29] The space within which GAL functions is primarily a *beyond-the-State* space. What unambiguously stems from this concept is that the globalisation of law, in the best meaning of the expression, may only occur alongside the removal of States from their position as main political decision-makers and main participants within the international legal order.

'Global administrative space' is, thus, characterised by the pluralism of subjects and the diversity of legal measures, ranging from decisions of the Security Council and resolutions of other intergovernmental international bodies, through formally non-binding memorandums of understandings, national administrative acts passed as a result of actions taken at the universal level (e.g. WTO), to decisions adopted by private or mixed (public-private) entities, such as the aforementioned ICANN, ISO or international sports associations.[30] These entities are neither legislative bodies nor dispute settlement bodies and they actually act as administrative and governing bodies in the global legal space.[31] Their

[27] B. Kingsbury, N. Krisch, R.B. Stewart, *op. cit.,* at p. 15; N. Krisch, B. Kingsbury, *op. cit.*, at pp. 1–2.

[28] N. Krisch, B. Kingsbury, *op. cit.*, at p. 5.

[29] *Ibidem*, at pp. 10–13.

[30] *Cf.* M. Zieliński: *Pojęcie i zasady…*, *op. cit.*, at pp. 384–385.

[31] N. Krisch, B. Kingsbury, *op. cit.*, at p. 3. See also J. Alvarez, *op. cit.*, at pp. 244–245.

activities result in regulations which frequently have a direct impact on national law entities and often exert a direct effect on national legal orders. In many areas of global governance, as claimed by GAL supporters, there are mechanisms being formed that aim to strengthen the *accountability* of global regulatory decision-making bodies. The administrative character of global law stems from mechanisms which are formed within its boundaries and which are based on rules analogical to those of national administrative law, particularly *transparency*, *participation* and *review*.[32] The difference between the international administrative character of actions and administrative actions at a national level lies primarily in the so-called self-regulation occurring at the former level, i.e. frequent identity of authors and addressees of regulations.

The GAL concept, as previously mentioned, undermines the legitimacy and adequacy of the traditional paradigm of international law in the global legal space. One may have the impression that international law acts peripherally within this area, whereas the global legal order is governed by measures that are typical of administrative law. Therefore, it is advisable to focus on the idea of law that stems from the GAL concept. It certainly extends beyond the formally recognised sources of international law. Indeed, it opposes both the positivistically-understood international law based on the consent of States and the traditionally-viewed national law.[33] The notion of law is very broad here, for several reasons. Firstly, within GAL's approach to law, attention is paid not only to the formal validity but also to the significance of law, i.e. the weight of regulations. GAL rejects the binary 'binding/non-binding' division used by legal positivists. Deriving from the concept of law as 'a social practice', the status of law is attributed to what is capable of effective governance of the actions of the entities within the legal order.[34] Thus, in GAL, law is understood in the spirit of legal realism and encompasses not only binding legal norms but also the standards, guidelines, etc., that formally

[32] B. Kingsbury, N. Krisch, R.B. Stewart, *op. cit.*, at p. 17; N. Krisch, B. Kingsbury, *op. cit.*, at p. 4. *Cf.* also P. Szwedo: *O pojęciu*..., at pp. 74–76; M. Zieliński, *Pojęcie i zasady*..., at pp. 393–395.

[33] B. Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 'European Journal of International Law' 2009, Vol. 20, No. 1, p. 23, at p. 26; N. Krisch, B. Kingsbury, *op. cit.*, at p. 10.

[34] B. Kingsbury, *op. cit.*, at p. 27.

do not bind their addressees, yet, in practice, effectively influence their activities. Secondly, the concept of law within GAL is not, as stressed by its authors, ultimately determined, since it evolves alongside changes in legal reality.[35] Thirdly, the understanding of law within GAL is determined not only by ontological and methodological considerations, but also considerations of a political nature. The choice from among the available concepts of law is a choice entailing obvious political consequences,[36] as emphasised by Benedict Kingsbury, one of the main authors of GAL.

As mentioned above, the concept of law in GAL departs both from the consensual paradigm of international law and the fixed approach to law in the State. It particularly departs from the model of law as the legislator's imperative. Although it is not the main aim of the present study to attempt a critical analysis of the concept of law in GAL, it seems legitimate to focus here on two issues. Namely, it is difficult to determine the criteria of coherence and identity of law in GAL.[37] Without such criteria, anything may transpire to be law. Such a claim undermines any novelty of this concept. This difficulty is, indeed, also recognised by some authors of GAL themselves. They are aware of the existence of a merely rudimentary outline of a coherent concept of law that is merely on the verge of description and theory, which necessitates drawing upon the intellectual output of the past. Kingsbury, for instance, opts to apply Hart's concept of secondary rules in order to determine what law is in GAL.[38] Another objection concerning law in GAL, as if derivative from the one mentioned above, is connected with the issue of the absence of clear criteria of its 'publicness' and, thus, its constitutional core.[39] This question makes the authors of GAL realise the difficulties resulting from the omission of States in the global legal space. Accordingly, some of them remain willing to recognise States as the its most important

[35] *Ibidem*, at p. 26.

[36] *Ibidem*, at p. 26.

[37] Critically on GAL's anti-formalism, see also J. d'Aspremont, *Droit administratif global et droit international*, available at http://ssrn.com/abstract=2004699, at pp. 7–8.

[38] See *ibidem*, at pp. 29–31.

[39] *Cf*. *ibidem*, at pp. 31–33 and A. von Bogdandy, Ph. Dann, M. Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 'German Law Journal' 2008, Vol. 9, p. 1375, at pp. 1380–1381.

public entities.[40] The public character of non-State entities does not stem from *a priori* accepted criteria of 'publicness', which GAL lacks, but from international agreements, domestic State law, or delegation by existing public entities. The above does not, in the least, discredit the position of the State in GAL. On the contrary, it refers to the traditional legal mechanisms based on the power of the State. This generates a question about the normative novelty of GAL, and particularly about its autonomy from international law. The above questions will be discussed in the final part of the present study.

5. *Responsibility to Protect* and the State

In its origins, the concept of *responsibility to protect* (R2P) developed by the International Commission on Intervention and State Sovereignty, was a political doctrine established at the initiative of the Canadian government.[41] The report submitted by the Commission aimed to present

[40] B. Kingsbury, *op. cit.*, at p. 55.

[41] *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, December 2001, Annex to the letter dated 26 July 2002 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General (UN doc. A/57/303). The main idea of this report was adopted by UN member States in a resolution passed in 2005. See The Outcome Document of the 2005 World Summit (A/Res/60/1). It also found confirmation during a three-day debate in the United Nations General Assembly in July 2009, based on the UN Secretary – General's report *Implementing the Responsibility to Protect* (UN doc. A/63/677). The concept of 'responsibility to protect' was also referred to by the Security Council. See res. 1674 (2006), res. 1704 (2006), res. 1894 (2009), res. 1973 (2011). The literature on the concept is already quite extensive. See for instance G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, The Brookings Institution Press, Washington DC 2008; A. Orfond, *International Authority and the Responsibility to Protect*, Cambridge University Press, Cambridge 2011; S. Zifcak, *The Responsibility to Protect*, [in:] M. Evans (ed.), 'International Law', 3 ed., Oxford University Press, Oxford 2010, pp. 504–527. In Polish literature see A. Makarewicz, *Interwencja humanitarna czy „odpowiedzialność za ochronę"? [Humanitarian intervention or responsibility to protect?]*, 'Polski Przegląd Dyplomatyczny' 2003, No. 2, pp. 71–91; J. Symonides, *Przyjęcie zasady „odpowiedzialności za ochronę" w procesie reformowania Narodów Zjednoczonych [Adoption of the principle of responsibility to protect in the proces of the reform of United Nations]*, [in:] J. Menkes (ed.), 'Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa

an effective strategy of the international community in the event of a mass-scale violation of human rights. Its catalysts were, on the one hand, the negligence, and its far-reaching consequences, on the part of the international community in the 1990s with respect to the humanitarian disasters in Bosnia and Rwanda, and on the other hand, the controversy related to the military action conducted in Kosovo in 1999, that was justified by humanitarian considerations.

Nowadays, R2P is clearly evolving from a political doctrine into a, perhaps not-too-distant, norm of customary law. At any rate, this concept may be seen as significant evidence of the so-called humanisation of international law. This process involves the increased role of the protection of human rights and the responsibility of States for violations thereof, the enforcement of international criminal responsibility, and the importance of *human security* which is increasingly reflected in legal documents. At least at first glance, one may think we are dealing with a phenomenon that has been postulated in academia for some time now, i.e. the redefinition of international law, involving its transition from the position of a law of States to a law of peoples. Within academia, these two concepts of international law have been confronted many times, and consequently contrasted, based on the ideological distrust towards the State as an institution capable of the organised repression of individuals. Consequently, full empowerment of the latter was linked with the weakening of the position of the State within the international community. Such an approach remains present in literature on the philosophy of law or international law and manifests itself in the opposition drawn between State sovereignty and human rights. R2P, however, rejects this superficial opposition, quite contrarily basing itself both on human rights and State sovereignty as its two main pillars. R2P assumes their coexistence, as opposed to their juxtaposition. Thus, even at this point of the discussion,

Profesor Renaty Sonnenfeld-Tomporek' [International law – problems and challenges. Professor Renata Sonnenfeld-Tomporek's memory book], Warszawa 2006, pp. 514––527; J. Zajadło, *Koncepcja odpowiedzialności za ochronę (Responsibility to Protect) – nowa filozofia prawa międzynarodowego? [Concept of responsibility to protect – a new philosophy of international law?]*, [in:] J. Kranz (ed.), 'Świat współczesny wobec użycia siły zbrojnej. Dylematy prawa i polityki' [Modern world's attitude towards the use of force. Dilemmas of law and politics], Warszawa 2009, at pp. 243–296.

it can be claimed that R2P does not change the *status quo* with respect to the legal position of States within the international community.[42]

The R2P doctrine is based on claims that new circumstances have emerged within the international environment involving, *inter alia*, increased interdependence among States and the growing role of *non-State actors* [paras. 1.12–1.15]. The key concept of the doctrine is that of *human security*, which signifies physical security, social and political well-being and respect for human dignity. As such, it remains at the heart of human rights protection. The protection of *human security* and the enforcement of responsibility violations thereof is supposed to be one of the main aims of contemporary international institutions. Primarily, however, the protection of human security depends upon the existence of stable sovereign States, since the main threat to individuals is posed by States that are fragile, failing, weak and maintaining relative stability of their internal structure due to their oppressive policy towards their population, which results in serious violation of human rights [para. 1.21].

Human rights – as emphasised by the report of the International Commission on Intervention and State Sovereignty – have become the main element of international law and the responsibility for the observance thereof has become a central issue within contemporary international relations. Despite criticism of the significance of State sovereignty in international law, sovereignty has a great role to play within such relations. The authors of the report rightly note that, in a world characterised by inequalities in the power and political significance of States, together with unequal access to natural resources, sovereignty remains, to many States, the best, and at times the only, line of defence of their legal status. To States and their nations, sovereignty constitutes recognition of their equal value and equality before the law, whilst simultaneously confirming their right to shape such law in the future. Given these considerations, State sovereignty still matters. The construction of a coherent, peaceful

[42] There are, however, diverse views expressed in academic writings. For instance, A. Peters thinks that it is *inter alia* due to the *responsibility to protect* doctrine that State sovereignty in international law has become a mere 'second-order norm'. A. Peters, *op. cit.*, at pp. 513, 514, 517, 544. A contrary view, similar to the one adopted by the author of the present study, is expressed by, for instance, R. Jackson, *Suwerenność. Ewolucja idei [Sovereignty. Evolution of the idea]*, tr. J. Majmurek, Warszawa 2011, at pp. 129–150.

system of international relations bodes well if the participants therein are sovereign strong States, and not internally weak [paras. 1.32, 1.34].

Since the emergence of international legal instruments concerning the protection of human rights, the conditions of the exercise of sovereignty have, however, changed. The development of the concept of *human security* has resulted in additional expectations towards States, concerning the conduct of authorities towards their populations [para. 1.33]. Accordingly, the meaning of sovereignty in international law cannot entail unlimited authority of the State as regards the treatment of own population. Sovereignty entails double responsibility for every State. Externally, it is the obligation to respect the sovereignty of other States, whereas internally it is the obligation to respect the dignity and the fundamental rights of all individuals within the State [para. 1.35]. The authors of the report object to juxtaposing these two aspects [para. 2.13]. On the contrary, they consider them to constitute two mutually supplementary parts of a single whole. Such an understanding of sovereignty is of key significance developing a strategy for effectively reacting to mass violation of human rights, known simply as *responsibility to protect* (to speak more strictly, it should rather be described as a 'duty to protect').

The aforementioned report confirms the role of sovereignty in showing respect for the consequence of sovereignty, by justifying the legal identity of law and the legal protection of each State's position, as expressed in the norm of non-intervention [paras. 2.7–2.8]. This norm does not, however, protect the State where the authorities commit illegal acts. This stems from a shift of emphasis in the understanding of sovereignty, from control and coercion to the responsibility for the actions of State authorities in internal and international relations.[43]

[43] The concept of 'sovereignty as responsibility' present in the report, is not terminologically new. In this respect it refers to the work by M. Deng, I.W. Zartman, D. Rothchild, *Sovereignty as Responsibility: Conflict Management in Africa*, New York 1996. It is noted by A. Etzioni, *Sovereignty as Responsibility*, 'Orbis – A Journal of World Affairs' 2006, Vol. 50, No. 1, at p. 71; J. Zajadło, *Aksjologia prawa międzynarodowego a filozofia prawa (uwagi na marginesie doktryny* Responsibility to Protect*) [Axiology of international law and the philosophy of law (remarks on the margin of the doctrine of responsibility to protect)]*, [in:] A. Wnukiewicz-Kozłowska (ed.), 'Aksjologia współczesnego prawa międzynarodowego' [Axiology of contemporary international law], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2011, at p. 315.

Within R2P, sovereignty as a responsibility has a threefold significance. Firstly, it creates the obligation for State authorities to protect the safety and lives of citizens. Secondly, it signifies the internal responsibility of State authorities (*vis-à-vis* their own citizens) and their responsibility towards the international community in the event of human rights violations. Thirdly, it entails the responsibility of particular agents of State authorities for their actions and negligence towards their own population [para. 2.15]. In this way, the humanisation of international law which occurs in consequence of the consolidation of human rights protection therein, facilitates the transition from a 'culture of sovereign impunity' to a 'culture of national and international accountability', a manifestation of which is the development of international criminal tribunals and the formation of the principle of universal jurisdiction [paras. 2.18–2.19].

R2P doubly emphasises the subsidiarity of international community actions in relation to the actions of States as regards human security. On the one hand, it indicates the internal relations of States to be the main plane of human rights protection [para. 2.20] while, on the other hand, it places the 'responsibility to protect' primarily on those States whose citizens suffered the violation of their rights. It is only in situations where the State does not wish, or is unable, to fulfil the duty to protect its own population that this duty passes to the community of the member States of the United Nations and/or regional organisations [paras. 2.29–2.31]. The above stipulations of the R2P report constitute a basis for establishing three pillars of 'responsibility to protect', which are '*responsibility to prevent*', '*responsibility to react*' and *'responsibility to rebuild*'.

6. Continuity or Change of the Paradigm of State Personality in International Law?

The answer to the question posed in the title of the present study requires investigation of the very nature of international law, since the problems of personality and understanding of a legal order are, as previously mentioned, interrelated.

The classical frames of international law have not slackened within R2P. The international community is based here on States acting both individually and collectively, in the form of the bodies of common and

regional international organisations. Thus, the central significance of State personality in international law has been maintained. A great advantage of the R2P doctrine is the fact that it questions the allegedly destructive significance of State sovereignty to the international community and 'human security'. Accordingly, the doctrine does not share the criticism of sovereignty voiced by a significant element of the contemporary science of law and philosophy of law, which frequently oppose State sovereignty to human rights. The authors of R2P are convincing in claiming that State sovereignty poses no threat to the international legal order, since it does not legitimise authoritarian actions involving the violation of human rights that are protected by this order. In other words, the report rejects the perception of sovereignty as justifying a State's violation of the very law it is bound by. It needs to be stressed that the report demystifies State sovereignty. A strong sovereign State, as unambiguously implied by R2P, guarantees *human security*, since it is the State and its authorities that are primarily intended to protect people and, consequently, to be held responsible for failure to fulfil this obligation.

What seems much more problematic, with respect to the legal position of the State in the international community, is the idea of *multilevel global governance* and the concept of GAL developed within the framework thereof. It is not really known, at least at the current stage of development of these ideas, whether it is a description and an attempt to explain an existing legal reality, or merely a certain blueprint for change. Another doubt is connected with the risk, and thus the feasibility, of the normative unification of the world's various political, economic and social complexities[44]. What speaks against the treatment of law within *multilevel global governance* as a new normative quality in the international community is the absence of clear rules of recognition identifying both the sources of law and the entities of law. Let us also note the similarity between *multilevel global governance* and GAL, and the concept of 'transnational law', found in legal writings since the 1950s, that in fact analyses similar phenomena. The authors of GAL are not particularly willing to compare their concept to the concept of transitional law. Is, however, the idea of

[44] *Cf.* D. Kenedy: *The Mystery of Global Governance*, [in:] J.L. Dunoff, J.P. Trachtman (eds.), 'Ruling the World? Constitutionalism, International Law, and Global Governance', Cambridge University Press, Cambridge 2009, at p. 42.

GAL original enough for such comparisons to be unjustified? It would be advisable to closely investigate their mutual references.

What the concepts of transitional law and GAL have in common is that they question the legitimacy of considering international law, understood primarily as interstate law, to be a sufficient framework for legal relations within the international community. The main proponent of the concept of transnational law – Philip Jessup – has already noted the increased activity and significance of *non-State actors* (i.e. international organisations, commercial corporations and individuals) in the international community. According to Jessup, the law of the international community goes beyond 'intergovernmentness', since it regulates not only international relations but all legal phenomena outside the borders of particular States. Thus, law becomes transnational and, as such, it pertains to all problems involving a so-called foreign element.[45] This law encompasses all norms of international origin that affect the sphere of international and interstate relations, as well as those material provisions of domestic law regulating cases that involve foreign entities. The idea of *multilevel global governance* seems to be merely a new name for a phenomenon analysed by Jessup over fifty years ago and by Jenks, as merely one example, within the framework of the *common law of mankind*.[46] Therefore, GAL only supplements the concept of transnational law by increasing the significance of the administrative method of regulation in the global legal order. Does, however, this circumstance and the broader quantitative scale of phenomena, the existence of which was stated over half a century ago, really justify claims of a new normative quality? What has clearly taken place within GAL is a certain shift of emphasis towards a monistic image of legal reality. Namely, Jessup acknowledged a border between national and international law, however fragile and flexible it was in his opinion,[47] whereas the supporters of GAL claim that any

[45] Ph. Jessup, *Transnational Law*, Yale University Press, New Haven 1956, at pp. 1–3. See also a contemporary critical analysis of this concept by J. Combacau, S. Sur, *op. cit.*, at pp. 8–14.

[46] See C.W. Jenks, *Common Law of Mankind*, Stevens & Sons, London 1958, *passim*. It was already at that time that Jenks emphasised the standard-setting role and significance of *non-State actors*, particularly governmental international organisations, in consolidating the commonness of international. See *ibidem*, at pp. 172–230.

[47] Ph. Jessup, *op. cit.*, at p. 26.

such border has been obliterated. Thus, it is impossible for GAL to view international law as a counterweight to national law. The dualist paradigm of explaining these relations is a relic of the past, according to the authors of GAL. In their opinion, there is one global legal order where various entities act at various mutually-intertwined levels. Their mutual relations are not determined by a hierarchy, but rather a heterarchy. Accordingly, it is little wonder that States are unable to retain a privileged legal position.

Therefore, has a new legal order, alongside national and international ones, been developed within *multilevel global governance?* A positive answer would require indication of the rules of recognition identifying its principles and legal norms, and thus setting a framework for a new paradigm of the law of international community. An alternative to the above would be to consider *multilevel global governance* and GAL as mere attempts at describing (without clear normative consequences) the existence within the international community of several levels of regulation stemming from diverse legal entities, with such levels, given the intensification of contacts between public and private entities, bound to interact, complement, or even sometimes contradict one another. These questions seem to be of key significance to the legal status of the State within the international community, since it is the concept of legal order which constitutes the source of the catalogue of entities and the scope of their legal capacity.

One feature which argues against the recognition of GAL as a new legal order is the absence of any rules of validation. In this respect GAL, on the one hand, resorts to the rules of validation characteristic of international law whereas, on the other hand, it is forced to accept the autonomy of validation rules within national law. The direct effectiveness of international regulations from various sources, including those from outside the classical catalogue of international law, in the jurisdictory sphere of the State, is not tantamount to the lack of consent in this respect on the part of national law. Therefore, it does not necessarily determine a monoistic interpretation of legal reality. When analysing the concept of transnational law at one point in the past, Robert Jennings not illegitimately opted to treat it rather as an idea that "is probably better used to identify a class of problems rather than a distinct body of law".[48]

[48] R. Jennings, *International Law*, [in:] R. Bernhardt (ed.), 'Encyclopedia of Public International Law', Vol. 2 (1995), North-Holland, at p. 1163.

Such an appraisal is quite correct and may be equally applied to *global governance* and GAL. They do not constitute a new legal order, and thus do not constitute an alternative to international law, despite their holistic attempts to encompass all contemporary legal processes with one concept.[49] At best they offer merely an original method of interpreting a certain group of legal phenomena occurring within the international community, which are connected with the increased activity of *non-State actors*. There is no reason, however, why this interpretive method should not be applied within the framework of classical international law.

If we assume the consent of States to be the only rule of recognition of international law, we will identify this law with the law of relations between States where, naturally, States irrefutably represent the primary entities. Hereby, however, we will condemn such a law to marginalisation within the international community, where it would be merely one of multiple legal orders. I wish to present a broader understanding of international law, where the consent of States is one, but by no means the sole, rule of recognition. This approach is based on the pluralism of international law entities, while at the same time emphasising the central role of the legal position of States therein. Accordingly, it opts for continuity of the traditional paradigm of international legal personality of the State.

Nineteenth-century legal positivism is incapable of exhaustively justifying the legitimacy of international law. By expounding the will of the State as the exclusive basis of its binding force, positivism contributed to its dogmatisation, which resulted in an almost axiomatic approach to international law as interstate law based on the consent of States. This was reflected, for instance, in the famous *dictum* of the PCIJ statement in the *Lotus* case, referred to earlier in this study. Such an understanding of international law remains, yet mostly in a pejorative context. Thus, it is sometimes utilised as negative inspiration by critics of the international legal order based on the leading position of States. Instances of the above are the previously discussed concepts of *multilevel global governance* and GAL. They relativise the significance of State sovereignty, question the autonomy of national legal orders and, consequently, undermine the hierarchy of international legal entities based on the paradigm of the

[49] Similarly J. d'Aspremont, *op. cit.,* at pp. 2, 4, 8.

original and full personality of the State. International practice, however, has for many years proved that international law is more than merely a horizontal legal order. It has a normative potential that makes it capable of regulating not only interstate relations. In particular, the legal norms contained in its sources may also be effective in a vertical order, as noted by the PCIJ as early as 1928.[50] International law, in other words, is a legal order which is sufficiently flexible to become truly global law, as its borders get expanded along with new, previously unparalleled, legal phenomena occurring as a result of the activities of new entities.[51]

The International Court of Justice has been aware of this flexibility of international law for a long time now. It was expressed by the Hague Court in 1949 in a well-known advisory opinion concerning *The reparation for injuries suffered in the service of the United Nations*. Let us quote a passage from the above opinion, concerning personality:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.[52]

What becomes visible here is the 'casket' construction of international law, where States remain at its core. As being the only to possess full authority to determine own competence, which is expressed by the idea of their sovereignty, it is States that, via international agreements or unilateral acts, create the personality of other participants in international relations and define the scope thereof by determining its international legal capacity. The structure of the international community may be compared to overlapping circles drawn in the shape of a pyramid. The foundations

[50] See Jurisdiction of the Courts of Danzig, PCIJ advisory opinion of 3.3.1928, *PCIJ Publ. 1928*, Series B, No. 15, at pp. 17–18.

[51] Such a view has been expressed in the science for quite a long time. See e.g. A. Verdross, *Règles générales du droit international de la paix*, 'Recueil des cours' 1929/V, Vol. 30, at p. 311; *idem*, *On the Concept of International Law*, 'American Journal of International Law' 1949, Vol. 43, No. 3, at p. 438.

[52] Reparation for Injuries Suffered in the Service of the United Nations, ICJ advisory opinion of 11.4.1949, *ICJ Reports 1949*, at pp. 174, 178.

of such a diagram would be the legal space determined by interstate relations. Legal relations between States and other entities, and the mutual relations among these other subjects, would be based thereupon. Thus, whilst it would be too narrow for contemporary international law, being the law of international community, to be described as interstate law, interstateness nevertheless represents its constitutive feature, since rules of recognition shaping the systemic identity of international legal order are connected with interstateness.

Yet, a consensual explanation of the nature of international law seems to be too narrow. Consensualism is undoubtedly a mechanism that adequately explains the development of particular legal obligations. Its legislative effect stems, however, from meta-rules (rules of recognition), the role of which is played by general rules of law, whose juridical significance cannot be explained by consensualism. It is such general rules of law that are a point of reference for the legal awareness of States. From such rules stems, for instance, the legislative effect of the consent of States. The development of contemporary international law has become possible due to establishment of the rule of recognition which linked interstateness with the lack of legal subordination to other entities. Its consequence is the rule of *par in parem non habet imperium*, from which stems the legislative autonomy of States. This autonomy is questioned by GAL which, nonetheless, is incapable of indicating alternative rules of recognition that would justify the existence of a new legal order alternative to international law. There is no need, in fact, to search for such an order, since these legal phenomena occurring outside interstate relations, particularly the spectacular expansion of the activity of international organisations, can be explained by traditional mechanisms of international law.

A challenge to the legislative autonomy of States that is immanently connected with their full international legal personality is, however, the activity of private, private-public and intergovernmental entities in international relations. The effects of their activity shape the internal legal relations of States. One advantage of the concepts of multilevel global governance and GAL is that they pay attention to this phenomenon. It is difficult, on the one hand, to explain this phenomenon within classical international law yet, on the other hand, it seems unnecessary to refer in this respect to the hypothesis that a new legal order exists. What is

primarily meant here are the entities acting within the areas previously described as *lex sportiva*, *lex digitalis* and *lex mercatoria*. Certain of these, as a result of being registered in particular States, are subjects of national law, whereas others are bodies of the recognised subjects of international law, i.e. governmental international organisations. The traditional dichotomic division of legal regulations therefore remains current. One challenge for international law is, however, the direct effectiveness of their decisions within national legal orders, which directly affects the status of individuals, or even State authorities. Well-known examples here are the Security Council's resolutions concerning the 'war on terrorism' which affect legal and material relations in States, the UNESCO decisions concerning State infrastructure (the spectacular case of the construction of a bridge in Dresden), changes in educational and health policies in States due to OECD and WHO reports, the influence of the decisions of international sports associations concerning the organisation of sports competitions on public authorities in States, and the granting of domain names by ICAAN or quality certificates by ISO. These decisions shape national relations in the absence of any clear consent within domestic law. Contrary to the views expressed within the GAL doctrine, they may, however, be explained within existing concepts and mechanisms of international law. This is possible because certain of the aforementioned institutions act on the basis of treaty law established by States, whilst others are entities of national law whose transborder effects of their activities are accepted by other national legal orders. States are not helpless against such influences.[53] The actual autonomy of the decisions of private and/or public-private entities from the public authorities of States does not result from their superiority to national legal mechanisms but, rather, from specific factual circumstances not infrequently stemming from social expectations.

The concept of multilevel global governance does not, therefore, undermine the central legal position of the State within the international community, since it does not question international law's capacity

[53] An instance is the German Federal Constitutional Court's decision in the case concerning the construction of a bridge in Dresden, which stipulated that a decision by an international organization (UNESCO) cannot undermine the will of the local population expressed in a local poll. See *supra* note 23.

for acting as the law of the global international community. Neither does it undermine States' capacity for establishing legal entities in the international community, since it does not underplay the role of the acts of recognition and granting personality by States. The idea of global governance, in turn, rightly notes the development of new areas of legal activity where, as investigated by the GAL concept, the fundamental role is played by the administrative method of regulation. It does not, however, push States into the background, despite how it may appear at the first glance. This is because the drawbacks of *global governance,* as voiced by the GAL doctrine itself, in the form of democratic deficiency and absence of clarity, insufficient control over decisions and limited accountability of the decision-makers, are difficult to eliminate without State participation. These drawbacks were revealed as a result of the conservative, as may be assumed, withdrawal of States from some areas of global governance, and the related premature announcement by Gabriel García Márquez, paraphrasing Jean Salmon,[54] of 'the chronicle of a death foretold' of the State within certain academic circles.

[54] J. Salmon, *op. cit.*, at p. 19.