

**Roman Kwiecień, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane (Theory and Philosophy of International Law. Selected Problems)*, Difin, Warsaw 2011, pp. 238**

In the recent years in world literature there has been a steep rising interest in the philosophical aspects of international law, which can be attested by the increasing number of publications. The process involves both works devoted directly to the philosophy of international law<sup>1</sup>, as well as the philosophy of law in general<sup>2</sup>. However, this has not so far concerned Polish science of law. Therefore, the reviewed book by Roman Kwiecień needs to be welcomed with utmost satisfaction.

The book under review is titled “Theory and Philosophy of International Law. Selected Problems” and consists of six chapters, which will be summarized in turn. In Chapter I, the author undertakes to specify the object of his research by reflecting on the question of what actually constitutes theory and philosophy of international law. First of all, he refers to the discussion on the problem of differentiating between theory of law and philosophy of law and in this regard he supports the view that drawing a demarcation line between the two disciplines is not possible. Therefore, he concludes that there is a need of “merging the research on law under the common name of theory and philosophy of law” (p. 21),

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<sup>1</sup> E.g. F.R. Tesón, *A Philosophy of International Law*, Westview Press, Colorado–Oxford 1998; A. Carty, *Philosophy of International Law*, Edingurgh University Press, Edinburgh 2007; S. Besson, J. Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Law, Oxford–New York 2010.

<sup>2</sup> E.g. D.A. Reidy, *On the Philosophy of Law*, Thomson-Wadsworth, Belmont 2007, Chapter VII, *On International Law*, at pp. 185–210.

because the mere theoretic approach is not sufficient and there is a real demand for complementing it with philosophical reflection. According to the author, philosophy of law constitutes a “metatheory of law”, whereas the theory of law should be understood as a “minimalist philosophy of law”. Based on these assumptions, the book then moves on to specifying the subject matter and the definition of theory and philosophy of international law. In this regard, the major problem seems to be the identification of the very nature of the philosophy of international law – should it be treated as a philosophy built on the dogmatic research in the area of public international law or maybe it needs to be created “from the outside” as a part of a general philosophical perspective on law. According to the author, undoubtedly the later approach is not sufficient since working in the field of philosophy of international law first requires knowledge of the elementary theoretical constructs and notions of the international law itself. This in turn constitutes a *sine qua non* requirement for being able to formulate the subject matter and questions of the research correctly and precisely. For this reason, concentrating on constructing the philosophy only from the external perspective would merely be – according to the author – an example of wishful thinking about international law. Seeing however that there are clear advantages of the general philosophical approach, which flow out from it being based on the wider social and political context enabling an overcoming of certain fixed dogmatic limitations, the author eventually recommends mixing together and using both perspectives. Nevertheless, after coming to these generally acceptable conclusions, in his further deliberations concerning the division between theoretical philosophy of the *Sein* and the practical philosophy of the *Solen* in international law, the author seems to be somehow withdrawing from his previous findings. This is due to the fact that at this point, the priority seems to be given clearly to the former *Sein* perspective – the philosophy of analysing and explaining the what is (as in opposition to what should be), which in other words means concentrating mainly on *de lege lata* issues. Admittedly, the author gives some credit to the role the practical philosophy plays by stating that it is undoubtedly needed (p. 24), however he does not specify his position. Besides concluding that “approaching philosophy in a manner that stresses (...) its moralizing perspective considerably impoverishes its subject” (p. 25), he does not indicate any specific role the practical philosophy could

play. Eventually, the author concludes that the main subject of theory and philosophy of law is deliberating on the nature of international law which means undertaking an attempt to answer the question what in past was and what now constitutes international law. The last part of the first chapter briefly reminds the history of philosophical thought on international law and relations, building an argument in favour of reviving the philosophical dimension in the course of research of international law.

In chapter II titled “Internationality of law: history and modernity”, the author deals with origins of international law in the context of the historical evolution of international society. He formulates two proposals – first of all, that international law need not to be the only normative system within the international society and secondly, that it is the nature of any given historical international society what determines the character of the international law in force (p. 33). Afterwards, the book presents a brief historical outline of the forms the international society had been taking over the centuries, particularly stressing the problems of hegemonialism and eurocentrism in the context of the discussion on the European roots of the modern international law. Against this historical background, in the third part of chapter II, the author also presents the problem of doubts on the juridical nature of international law that have been reappearing in the doctrine ever since John Austin first advanced them. Besides Austin’s view, a careful analysis have been given by the author to the findings of Hegel, the realist school as well as more recent approach represented by J.L. Goldsmith and E.A. Posner<sup>3</sup>. Eventually, the author dismisses this critique taking a stand in defence of the juridical character of international law, although admitting and emphasising at the same time its inter- rather than supra-nationality. The subject of further analysis is the semantics of the term “international law” along with the relations between the scopes of the designations such as “transnational law”, “world law”, “common law of mankind” or “supranational law”. Attempting at the delimitation of these notions, the author endeavours to specify the substantial limits of the international law as set against the contents of national (municipal) law or another legal system to which he refers – the common municipal law. A detailed analysis is also devoted

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<sup>3</sup> J.L. Goldsmith, E.A. Posner, *The Limits of International Law*, Oxford University Press, Oxford–New York 2005.

to the idea of supranationality and autonomy of the law of the European Union. The author defends the rather sceptical position of the Polish Constitutional Court as to the matter of the primacy of the EU law. Emphasizes that EU the law is only a subsystem of general international law and consequently the author supports the dualist stance as far as the question of the relations of these legal orders is concerned. The chapter is summarized by a proposal of a following, rather traditional definition of international law:

“international law consists of principles of law, i. e. norms of universal scope of operation within an international community, as well as the bilaterally or multilaterally established legal norms that regulate the public relations of states, international organizations and other participants in international relations which they recognize as subjects of international law, applicable to events transcending the borders of individual states, the violation of which results in the international responsibility of their addressees, i. e. responsibility before the organs operating based on the law made by at least two subjects possessing the treaty-making capacity”.

The third chapter concentrates on the aspect of unity and universality of international law. General international law is the law of and for the international community as a whole where its universality is to be understood as a “communitization” of certain accepted rules and values within this international society. This needs to be comprehended together with the unity of international law, which means its exclusiveness towards other, competitive legal regimes. Apart from these definitions, the author conducts further analysis of other possible understandings of universality of international law, among which two are particularly important: the view of international law as a system, as well as the idea of common law of mankind. The second part of chapter III attempts at defining the normative foundations of universal international law, which consists of three kinds of rules and principles: those, which are regarded as *jus cogens*, those which were not granted this status but are generally non-abrogative and finally the rules of general international law that are abrogative in confrontation with a *lex specialis* rule of international law. Following this reconstruction, the author then discusses the most important threats to the universality and unity of international law, which are: hegemonic

aspirations in international relations, fragmentation of international law by self-contained regimes and proliferation of international courts.

Chapter IV extensively deals with the issue of legitimacy and legitimization of international law. First of all, the author distinguishes two major meanings of “legitimacy”: in the normative and in the sociological sense and discusses the major doubts concerning the international law as a legitimate order, taking into account the positivist influences on the philosophy of law. After this introduction to the problem, the book moves to a detailed analysis of different theories concerning the foundations of legitimization of the international legal order. The author discusses in turn the theory of self-limitation of the sovereign will (the voluntaristic explanation) in the view of Hegel, Jellinek and H. Triepel as well as on the grounds of the *Lotus case* judgement of the PCIJ. This general positivist theory is then criticised and put in context of the contemporary meaning of sovereignty in international law. Having dealt with the voluntaristic paradigm, the author approaches non-positivist theories of the legitimacy of international law, which are identified as an “axiological interpretation”. According to the author, this external view on legitimacy of international law is closely connected to the ideas of natural law school and the Grotian tradition of international law. The findings of the brief overview of the axiological explanation leads the author to the analysis of the inherent conflict between legitimacy and legality, within which he positions himself in favour of legality, denying any concept of legitimacy that could defy the law in force at the particular moment. Encountering problems with the axiological explanation, the author returns to the idea of inter-systemic explanation of the rule of law in international law by moving to the concepts developed by H. Kelsen and T. Franck. After concluding that in fact none of the abovementioned theories gives a satisfactory explanation to the sources of legitimacy in international law, the author finally moves to elaborate on the Kantian vision of the problem, considering it to be essentially the third way, which substantially avoids the conflict of *Moralität* vs. *Legalität*. The Kantian concept of acting legally, that is according to law, being at the same time a moral rule and basing itself on the fundamental, universal notion of freedom, seems also to be the most optimal model for explaining the legitimacy of international law.

In chapter V the author turns his attention to the recently much debated issue of constitutionalization of international law. He starts

with briefly presenting the idea of constitutionalization of international law and the reasons of its popularity both in contemporary as well as in older (Alfred Verdross) doctrine of international law. This is followed by the clarification of the key concept of constitution and its functions in the context of international rule of law. In order to facilitate the understanding of the paradigm of constitutionalization of international law the author distinguishes between several meanings of “constitution”: in normative and descriptive, as well as in substantial (material), institutional-procedural and formal sense. The main function of any constitution is primarily to play the integrative role within the enacting political community. One needs also to differentiate between the notions of international constitutional law and constitutional international law (*droit constitutionnel international*), as these are not, according to the author, synonymous. Different historical as well as contemporary usages of these notions may point to the fact that there is a possibility of approaching the topic not only from the point of view of the international law but also to take it as a certain perspective of constitutional principles common to different nations. In the end, this seems to transform rather into a discussion between the dualist and monist visions of international law. After making several terminological distinctions, the author finally moves to analysing three most prominent candidates aspiring to the role of more or less formalized international constitution. These are: the UN Charter, the *jus cogens* norms and the customary international law. As to the UN Charter, the author takes the position that it can be described as a constitution of international law only in a formal sense but by no means does it play the role in a substantial (strong) sense. The two most important reasons for that are: the lack of constitutional court (ICJ denied this kind of jurisdictional activity) as well as no effective division and separation of powers. Surprisingly however, the analysis of the other mentioned elements, which could be seen as carriers of an international constitution, that is the *jus cogens* and *erga omnes* norms, as well as the customary law or the so-called world order treaties (human rights treaties, Geneva conventions, the Statute of the WTO etc.) do not lead the author to a conclusion that they are or could become an alternative to the UN Charter, as they are all in fact subordinate to it. Therefore, the conclusion of this chapter seems to be that there is no international constitution in a strong sense (normative or substantial in the author’s terminology).

Finally, chapter VI deals with the crucial topic of the axiology of international law, meaning – as one would expect – the philosophy of values. Indeed, the author starts his discussion in this part by distinguishing three meanings of axiology as either a general philosophical reflection on values or a particular philosophy of values of one kind (aesthetic, religious, legal etc.) or in the strictest sense as a personalized system of values of one school of thought. Here, the axiology of international law is intended to be seen as a “philosophy of values lying at the foundations of international legal order, which takes specified normative form, basing on the assumed ontological and cognitive presuppositions” (p. 177). In the following part of this chapter titled “moral values and law” it becomes all too clear that the author in fact identifies his notion of a “value” with some sort of a moral rule and the major tension of the axiological question for him concerns the separation thesis known very well from the debate of legal positivism with the natural law schools. Possible configurations are grouped into four models of relations between “values” and legal rules, which in fact closely resemble the different variants of interactions between law and morality<sup>4</sup>. After discussing these general issues, the author concentrates on the issue of values in international law. In this regard, he considers if and which values could be recognized as the basic fundamental value or values of the international legal order. While sketching a rather sceptical landscape of international society bedevilled by major axiological ferment, which makes it almost impossible to point out the most basic common values, the author nevertheless makes an effort to consider peace and justice to be the two most serious candidates for this role. Eventually the ending part of the last chapter summarizes the discussion on the axiology of international law by discussing the seemingly inherent conflict of justice and peace in the context of humanitarian intervention and responsibility to protect (R2P). Despite author’s solemn declarations supporting the fundamentally correct argument that there is no inherent conflict between human rights and sovereignty (p. 203, 205), the book comes to the

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<sup>4</sup> In this regard see J. Zajadło, *Pozytywizm prawniczy*, in: J. Zajadło (ed.), *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, C.H. Beck, Warszawa 2007, p. 253.

conclusion that in fact peace, representing order and not justice or human values, essentially constitutes the hard core value of international law.

The book under review is undoubtedly a very up to date and valuable publication, especially on the Polish publishing market. Regardless its high appraisal, it is nonetheless possible to formulate a few critical and polemic remarks. Due to the editorial limitations of this review, they are only exemplary and by no means exhaustive.

First of all, unlike in the case of the abovementioned works of A. Carty, F.R. Tesón, S. Besson and J. Tasioulas, the reviewed book is meant to deal not only with the “philosophy of international law” but also with its “theory”. Obviously, this requires from the author quite precise explanation of what are both the “theory of law” and the “philosophy of law” and what are the relations between them *in genere*, as well as what is meant by “theory and philosophy of international law” *in specie*. As reported above, R. Kwiecień undertakes this effort in the first chapter of his book (p. 17–29), however in our opinion he has not reached any convincing conclusions. The whole reasoning in this regard is rather cursory and the division of possible positions on the matter into two groups – those that “support the existence of a clear separation between theory and philosophy of law” (p. 19) and those which do “show a difference between theory and philosophy” but otherwise point that “the boundaries between them are blurred” (p. 20) – does not in fact explain anything. Such an image does not at all reflect the current research presented in world literature (particularly German) as well as in Polish jurisprudence<sup>5</sup>. Although a reader of the book can form some opinion of her own (albeit only partially) as far as the crucial problems of the “philosophy of international law” (as to the ontology, epistemology and axiology) are concerned, it will be very hard to find answers to the question of the essence of the nature of “theory of international law”. This influences the contents of the whole book – indeed, there is a lot of “philosophy”, however almost no “theory” in it. This is even more so, when by “theory of international law” one understands a set of ordered statements overbuild on the specific dogmatic disciplines of law (including

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<sup>5</sup> P. Jabłoński (ed.), *Czy koniec teorii prawa?*, Acta Universitatis Wratislaviensis 2011, Vol. CCCXII, No. 3337, see esp. J. Zajadło, *Filozofia prawa a teoria prawa we współczesnej jurysprudencji niemieckiej*, at pp. 225–240.

the dogmatic science of international law) and concerning all of its dimensions: creation, application, interpretation, validity and observance. In this sense, “theory of international law” is the application of the system of instruments developed by general theory of law in the course of researching international law. The author is admittedly correct when writing that “international law undoubtedly needs systematic and systemic philosophy” (p. 25). If this is true however, a question immediately arises: what about the theory of international law? The more so, that such a theory exists, has a very substantial literature and has been built basing on the international legal acts in force like UN Charter, The Vienna Convention on the Law of Treaties or the European Convention on Human Rights. Meanwhile, there is certain methodological chaos in the book. The author falls in a tautological trap when he writes that: “philosophy has two planes, it is either a theoretical philosophy analysing and explaining what is there (the *Sein* sphere) or a practical philosophy dealing with acts and duties linked to them (the *Sollen* sphere)”. This distinction, intuitively derived from Kant’s division into practical and theoretical reason means that actually both “theory” and “philosophy” are paradoxically parts of... “philosophy”. Indeed, it is possible to come across such view in the literature, however it is much more precise methodologically than somehow unclear position of R. Kwiecień. This has been proposed in German literature by D. von der Pfordten<sup>6</sup>, however this author derives out of it certain specified proposals. According to him, the philosophy of law covers both the generalization of the law as it is (theory of law – the Kantian theoretical reason), as well as the critique of the law from the point of view of how the law should be (the ethics of law – the Kantian practical reason). This methodological precision is however missing in the reviewed work. It is even more surprising since the author himself writes that his book “aspires to the role of a systematic lecture, characteristic of handbooks” (p. 16). Provided that the book’s title “Theory and philosophy of international law” is taken seriously, those aspirations need to be summarized as exaggerated. The work under review constitutes rather – according to its subtitle – an analysis of the selected problems

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<sup>6</sup> D. v. der Pfordten, *Was ist und wozu Rechtsphilosophie?*, Juristenzeitung, 2004, No 4, at pp. 157–166.

of the “philosophy of international law” rather than systematic lecture on “theory and philosophy of international law”.

Secondly, in the very introduction to his book the author states: “during the last two decades we have been observing far reaching changes within international law”. At the same time he doubts “whether this justifies talking about the formation of a ‘new’ international law” (p. 15). Further on (p. 23) he is citing works of A. Buchanan, F.R. Tesón, J. Zajadło<sup>7</sup> and others proposing the necessity for establishment of a new philosophy of international law, referring to them very critically. The author accuses them of succumbing to the temptation of “wishful thinking about international law and reforming what one has not even attempted to learn well”. He also adds to this that such proposals are very one-sided from the point of view of philosophy of law as they stress only the *Sollen* sphere of international law and completely ignore the factual *Sein* plane. It seems that this critique is not justified and in part results from the methodological chaos mentioned above. In fact, aforesaid authors form their “reformative philosophies of international law” (p. 23, note 18) basing on this dimension, which has been called the “ethics of law” by D. von der Pfordten. Nonetheless, this does not mean that they have turned off their theoretical reason, because they “don’t even attempt to learn well the existing international law”. On the contrary, they propose to build a new philosophy of international law in the ethical dimension<sup>8</sup> precisely for the reason that they acquainted themselves with the shortcomings of creation, application, interpretation, validity and observance of international law in its theoretical dimension all too well. According to C.W. Henderson, “understanding international law” is not only “making the world more lawful”; it is also “making the world safer”, “making the world better”, as well as “making the future”<sup>9</sup>. This process

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<sup>7</sup> A. Buchanan, *Justice, Legitimacy, and Self-Determination*, Oxford University Press, Oxford–New York 2004; F.R. Tesón, *op. cit.*; J. Zajadło, *Filozofia prawa międzynarodowego?*, Państwo i Prawo, 2007, No. 2, at pp. 16–29.

<sup>8</sup> In the ethical dimension, there has been a real revolution going on both in international law and international relations – D. Boucher, *The Limits of Ethics in International Relations. Natural Law, Natural Rights, and Human Rights in Transition*, Oxford University Press, Oxford–New York 2009.

<sup>9</sup> C.W. Henderson, *Understanding International Law*, Wiley-Blackwell, Malden–Oxford 2010.

of creating a new dimension of the philosophy of international law means also opening international law and its jurisprudence to such disciplines as ethics, political philosophy or theory of international relations. This is also the direction taken by the authors of modern international law handbooks, unfortunately not the ones published in Poland<sup>10</sup>. The author of the reviewed work seems to perceive this intuitively since the analysed “selected problems of the theory and philosophy of law” on the pages of this book refer to issues such as “universality and unity of international law”, “legitimacy of international law”, “constitutionalization of international law” or “axiology of international law”. It is not entirely clear how to comprehend the nature of these phenomena without including in the “systematic and systemic” (p. 25) philosophy of law the achievements of ethics, political philosophy and theory of international relations.

Thirdly, serious doubts arise also as to the conclusions of the last chapter on axiology. In fact, it concerns mainly the implications of the classical dispute between legal positivism and the law of nature in the context of international law. R. Kwiecień cites the work of P. Dutkiewicz<sup>11</sup>, reminding that this author is critical about the “one-sidedness and superficiality of the analysis of axiological problems in the Polish science of law” (p. 178, note 4). Indeed, P. Dutkiewicz writes that:

“entering into the area of axiology means stepping in the research field that is more general both to law and morality and the discussions on these subjects are a source of many misunderstandings as to the ambiguity in comprehending such terms as ‘law’, ‘morality’ and ‘value’, as well as ‘norms’ and ‘valuations’ and the relations between them”<sup>12</sup>.

Particularly, the confusion of “norms” with “values” is therefore responsible for a methodological chaos and is precisely the kind of common mistake that has been made also by the author of the reviewed book. Dutkiewicz reminds about this quite explicitly when he writes that differentiating between the three crucial terms – “value”, “norm” and

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<sup>10</sup> See e.g. D. Armstrong (ed.), *Routledge Handbook of International Law*, Routledge Taylor and Francis Group, London–New York 2009.

<sup>11</sup> P. Dutkiewicz, *Problem aksjologicznych podstaw prawa we współczesnej polskiej filozofii i teorii prawa*, Wydawnictwo UJ, Kraków 1996.

<sup>12</sup> *Ibidem.*, at p. 26.

“valuation” is a “condition of pursuing axiology in a proper way”<sup>13</sup>. This view is currently also shared by the majority of the Polish theory and philosophy of law<sup>14</sup>. However, the author of the reviewed book seems to confuse these notions when he writes about the separation between “norms” and “values” as a major point of contradiction between positivist and non-positivist stances (p. 181–190). He puts it explicitly: “Norms of which the legal system consists and values are treated as two normative orders materially independent of each other (...)” (p. 189). This position, repeated throughout the whole chapter, is an example of what in formal logic is known as a category mistake; “values” do not constitute a normative system or order, as only norms can build systems of norms and values are not norms. There is no opposition between “legal norms” and “values”; instead what the author seems to have on mind when elaborating on the separation thesis in the context of legal positivism is the tension between legal norms and moral norms, not values. Values are not directives of conduct. The relation between norms and values is rather that norms assume values and aim at implementing and realizing them<sup>15</sup>. This is true for different kinds of norms and normative systems, not only law but also morality – in other words, the same value may lay at the foundations of both a legal and moral norm. In this context, the following deliberations of the author on the axiological foundations of international law do not seem to be entirely convincing. The author again accuses philosophers of law of “wishful thinking” and even more importantly of the naturalistic fallacy (p. 195). According to him, they are responsible for undermining the value of peace, which is relativized by the attempt to prioritize justice. R. Kwiecień writes: “one cannot value international law basing on one’s point of view how the law should be” and “the other way around, one cannot infer from the state of the international law as it is about its *Sollen* without raising accusations of naturalistic fallacy” (p. 207). Provided that by referring to “naturalistic fallacy” – as it may seem – the author means the so-called Hume’s law, the argument has been misused. The error of naturalistic fallacy takes place only if one infers statements about the *Sollen* – that is the philosophical foundations

<sup>13</sup> *Ibidem*, at p. 32.

<sup>14</sup> See P. Sut, *Aksjologia a prawo*, in: J. Zajadło (ed.), *Leksykon...*, *op. cit.*, at pp. 5–6.

<sup>15</sup> P. Dutkiewicz, *op. cit.*, at p. 33.

of morality or law – from the statements of facts about observable nature that can be true or false<sup>16</sup>. It does not however cover, as the author seems to suggest, the situation when one infers the *Sollen* statements from other *Sollen* statements (i. e. from norms of international law as they are one infers how otherwise they should be). This is an ordinary exercise of the assessment and critique of norms of international law (which are norms, not statements of facts – they cannot be either true or false), aiming at formulating *de lege ferenda* conclusion and in short this is exactly what philosophy is about. In other words, the author accuses the philosophers of cultivating philosophy.

To some extent, the book by R. Kwiecień is somehow unique in Polish science of international law, as there is still not enough attention paid by it to the problems of theory and philosophy of law. Partially, this may flow out of a certain fear that philosophy may encroach on the hard core of international law, based mainly on the notion of sovereignty – which is also visible in the reviewed book. However, in this context, the famous saying of Pope John Paul II should be paraphrased and cited – *Non abbiate paura!* Contemporary philosophy of international law is not about impairing the hard core of international law; the aim is rather to spot the new quality in it, the quality the existence of which is a fact. In the contemporary international relations, international law should not only be a carrier of the value of order but also of the value of justice<sup>17</sup>. As a result, many authors would not share R. Kwiecień's concerns that we do not have in fact a “new” international law functioning aside the “old” one. The case is open whether it is e.g. “New Global Law” according to R. Domingo<sup>18</sup> or “Humanity's Law” as proposed by R. Teitel<sup>19</sup>. The crucial point is that the centre of the “new law” is not any more occupied by the sovereign state but by the human being or the humanity as a whole.

Tomasz Widlak, Jerzy Zajadło\*

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<sup>16</sup> See O. Nawrot, *Błąd naturalistyczny*, in: J. Zajadło (ed.), *Leksykon...*, *op. cit.*, at pp. 29–30.

<sup>17</sup> R. Foot, J.L. Addis, A. Hurrell (eds.), *Order and Justice in International Relations*, Oxford University Press, Oxford–New York 2003.

<sup>18</sup> R. Domingo, *The New Global Law*, Cambridge University Press, Cambridge 2010.

<sup>19</sup> R. Teitel, *Humanity's Law*, Oxford University Press, Oxford–New York 2011.

\* University of Gdańsk.