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CORRELATION BETWEEN LEGITIMACY AND LEGALITY – SELECTED PROBLEMS[1]

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ABSTRACT: The presented study is multi-disciplinary in nature. It combines elements of legal analysis, political science, as well as elements of the science of safety. This multi-faceted study has allowed us to not only to cover a wide field of research but also to make thorough descriptions and explanations provided *sense largissimo*. The text concerns the multi-faceted relationship between legality and the legitimacy of law in the perspective

[1] The text is a modified and extended version of a conference presentation. The broad discussion on the, apparently, fundamental issues results from a necessity to accept the basic challenge posed by a "different understanding of the same books", which emerged during the discussion. Therefore, the dispute regarded views and assessments and not facts. Consequently, we found it necessary to summarise fundamental legal terms and argumentations. The decision to present a "selection of problems" instead of an attempt at a complete discussion results both from the vast scope of the matter under discussion (and the consequent dilemma between a thick book and statements not supported by a legal analysis) and from the fact that the participants of the conference raised a number of significant issues (e.g. "*ex iniuria ius non oritur*" referred to by Professor Mik became the subject of a large paper by Menkes in the context of the Russian aggression against Ukraine (J. Menkes, *Ex iniuria*(?) *ius non oritur*(?) *Ex factis ius oritur* [in:] K. Karski (ed.) 'Kierunki rozwoju współczesnego prawa międzynarodowego' [Directions of development of contemporary international law], Bellona Warszawa 2015, at pp. 12-37).

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of international and national dimensions. The authors concluded that "justice" (as a rule and also a value) is a (different) *Grundnorm* in international law. The authors discuss the role of the international community, the principle of sovereignty and the essence of nomocracy, in shaping and changing the scope of the legitimacy of law.

Introduction

The organisers expressed their initial assumptions in the conference titled "Legality in the system of international law". Firstly, they *a priori* assumed that multiple perspectives and models of legality in individual legal branches may exist. Secondly, they assumed an intra-systemic nature of the principles of legality. We do not accept the assumptions nor their conjunction. Studying individual cases from the perspective of legal branches is correct. Nonetheless, the model of legality itself is above these branches. The assessment of the legal-illegal dichotomy is based on a test of compliance with the general principles of law, which decide what is legal and what is illegal. The participants of the above-mentioned conference differ in the way they understand the term "system of international law" so much that either each should begin with the definition they use (which is, understandably, pointless) or we will face a dissonance of opinions.

1. Legitimacy-legality – correlation models

In general, the following cases may occur:

- legal and legitimate – situation expressed by the formula "it applies because it is right", reflecting the desired *optimum*[2]. This way of determining the *optimum* results from the position of legitimacy in the international (as well as national) order, i.e. justified expectations;
- illegal but legitimate, "right" but not applicable. This not only implies that there is no (legal) claim for an action or omission, which is classified as illegal but also that there is a charge of illegality as to an action or omission. Nonetheless, reaching "justice", which is always

[2] I. Hurd, *Legitimacy and Authority in International Politics*, 'International Organizations' 1999, vol. 53, no 2, at pp. 379-408.

the purpose of applying law, is possible due to an action/omission. Both the Iraq war of 2003 (the invasion of Iraq by a US-led coalition undertaken as a pre-emptive war) and the NATO intervention in Kosovo are classified as such (illegal but legitimate);[3]

– legal but illegitimate; this may indicate either an axiological neutrality or "injustice" as a consequence of implementing a norm;
– non-legal and illegitimate; this is the case of creating a state classified as a "*non*-peace-loving state". The emergence of the state, which is a legal fact, is neutral to international law. Yet, this fact is not legitimate;
– non-legal and non-legitimate; this may be exemplified by the case of state formation as a result of secession – an act against territorial integrity of a country.[4] It may be also applied to the use of force

[3] A. Roberts, *Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?* [in:] P. Alston, E. Mcdonald, 'Human Rights, Intervention, and the Use of Force', Oxford 2008, at pp. 179-213.

[4] This view, even if intuitive, tends to be contested. Declaration of Judge Simma (case "Accordance with International Law of The Unilateral Declaration of Independence in Respect of Kosovo") "8. ... The Court's reading of the General Assembly's question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called *Lotus* principle. By reverting to it, the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable". Under these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court's answer in the slightest.

9. [...], the Court denied itself the possibility to enquire into the precise status under the international law of a declaration of independence. By contrast, by moving away from *"Lotus"*, the Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of *toleration*, something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be "tolerated" would not necessarily mean that it is "legal", but rather that it is "not illegal". In this sense, I am concerned that the narrowness of the Court's approach might constitute a weakness, going forward, in its ability to deal with the great shades of nuance that permeate international law. Furthermore, that the international legal order might be consciously silent or neutral on a specific fact or act has nothing to do with *non liquet*, which concerns a judicial institution being unable to pronounce itself on a point of law because it concludes that the law is not clear. The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate. There would be no wider conceptual problem relating to the coherence of the international legal order."

against *Daesh*.[5] A number of different factors determine what applies in a given situation. A significant factor is the law-making model: – repressive law guarantees only order; - autonomous law guarantees predictability; – only responsiveness allows feedback between law and society. The easiest way to achieve the *optimum* is self-regulation (which implies supporting self-regulation in the dispute between legislative intervention versus self-regulation).

In conclusion, it should be stated that – in a number of cases – separate correlation models of legitimacy-legality do not cope with the challenges of reality (cases) and, consequently, all cases that are difficult to classify are termed difficult ones.

2. "Justice" as a (different) *Grundnorm* in international law[6]

Positive international law includes *basic norms* that are real entities (rather than obligations justifying the binding force of norms in the relationship between *Sollen* (i.e. law) and *Sein*). The obligation to respect justice in the international order is a norm. Justice is a basic norm (in Hart's understanding), which has been confirmed by the Charter of the United Nations ("WE THE PEOPLES OF THE UNITED NATIONS DETERMINED ... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, ..."). The states have granted such a position to justice being aware of the potential priority conflict with peace. Thus, the United Nations shares President Theodore Roosevelt's view: "*if I must choose between righteousness and peace I choose righteousness*"[7]. Justice is the norm giving rise

[5] People/group describing themselves as the Islamic State of Iraq and the Levant.

[6] We use the notion of basic norm being fully aware of its connotations with the meaning assigned by Kelsen (H. Kelsen, *Pure Theory of Law,* The Lawbook Exchange, LTD Union, New Jersey 2002).

[7] This fundamental view was expressed by Roosevelt: "There are some well-meaning people, misled by mere words, who doubtless think that treaties of this kind do accomplish something. These good and well-meaning people may feel that I am not zealous in the cause of peace. This is the direct reverse of the truth. I abhor war. In common with all other thinking men I am inexpressibly saddened by the dreadful contest now waging in Europe. I put peace very high as an agent for bringing about righteousness. But if I must choose between righteousness and peace I choose righteousness. Therefore, I hold myself in honor bound to do anything in my power to advance the cause of the peace

to the positive legitimacy of norms that do not result in its violation. Striving to achieve justice in international relations, we use equity as an instrument to guarantee justice in a given case.[8] Achieving justice may be performed both *infra legem, praeter legem, or contra legem*[9]. In specific cases, justice may be maintained blunting the blade of legal norms or protecting against the *non liquet* (dispute settlement based on equity), or as a norm directly incorporated in an international text.

3. Illegitimacy as a basis for considering acts not prohibited by international law as illegal

A *sui generis* opposite relationship of "*illegal but legitimate*" is the implication of illegitimacy to legality. Due to the fact that compliance with the principles of international law is the basis for declaring legitimacy or illegitimacy, the latter results in regarding an act as illegal.

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of righteousness throughout the world. I believe we can make substantial advances by international agreement in the line of achieving this purpose and in this book I state in outline just what I think can be done toward this end." (*America and the World War* (1915) Inaugural Address of Theodore Roosevelt, and "Much has been given us, and much will rightfully be expected from us. We have duties to others and duties to ourselves; and we can shirk neither. We have become a great nation, forced by the fact of its greatness into relations with the other nations of the earth, and we must behave as beseems a people with such responsibilities. Toward all other nations, large and small, our attitude must be one of cordial and sincere friendship. We must show not only in our words, but in our deeds, that we are earnestly desirous of securing their good will by acting toward them in a spirit of just and generous recognition of all their rights. But justice and generosity in a nation, as in an individual, count most when shown not by the weak but by the strong. While ever careful to refrain from wrongdoing others, we must be no less insistent that we are not wronged ourselves. We wish peace, but we wish the peace of justice, the peace of righteousness. We wish it because we think it is right and not because we are afraid. No weak nation that acts manfully and justly should ever have cause to fear us, and no strong power should ever be able to single us out as a subject for insolent aggression." (4.3.1905) http://avalon.law.yale.edu/20th_century/troos.asp

[8] "Strictly it cannot be a source of law ("equity" – Author's note), and yet it may be an important factor in the process of decision. Equity may play a dramatic role in supplementing the law and appear unobtrusively as a part of juridical reasoning."; J. Brownlie, *Principles of Public International Law*, Oxford 1973, at p. 54.

[9] See also Separate Opinion of Judge Weeramantry in case of Maritime Delimitation, at paras 1952-73, http://www.icj-cij.org/docket/files/78/6761.pdf

a. An implied lack of consent to act. In international law, one of the fundamental elements of understanding state sovereignty is the autonomy of power – identified with the implied lack of imposed obligations other than legal constraints accepted voluntarily with regard to the execution of sovereignty. This view is based on the *argumentum a contrario* of the statement: "Practically, every treaty entered into between independent States restricts to some extent the exercise of power incidental to sovereignty. Complete and absolute sovereignty unrestricted by any obligations imposed by treaties is impossible and practically unknown.[10] Needless to say, there are widely recognised limits of absolutising sovereignty, which consist of:

- the correlation between the state and international law in the Westphalian order (international law is a creation of the states[11]; the states are a product of international law[12]);
- as well as the awareness that states are bound by *ius cogens*[13] norms and that the general principles of law recognized by civilized nations apply.

A view tends to be expressed that this does not constitute a reason to assume the existence of legal restrictions of the states other than those accepted or recognised.[14] This belief is so strong that no need to prove it is

[10] Dissenting Opinion Judges M. Adatci, M. Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M. Schücking, Jonkheer van Eysinga and M. Wang in case Regime douanier entre l'Allemagne et l'Autriche CPJI (A/B) No 41.

[11] "considérés avec raison comme le point de départ du développement historique du droit international actuel" D. Anzilotti, *Cours de droit international*, 1929, vol. 1, at p. 5.

[12] "state sovereignty came to be *accepted as a principle of international law* at the Peace of Westphalia, ending the Thirty Years' War" D. Pharand, *Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint,* 'Canada-United States Law Journal' 1994, vol. 20, at pp. 19-20.

[13] J. Menkes, *Article 53 of the Vienna Convention on the Law of Treaties – Codification or Development?*, 'Polish Review of International and European Law' 2013, vol. 2, no 2, at pp. 9-32.

[14] See also cases of SS "Lotus" ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed. (p. 18)") and Free Zones of Upper Savoy and the District of Gex ("not be enforceable as against Switzerland, which has not accepted it (p. 143)", "It follows from the principle that the sovereignty of France is to be respected in so far as it is not limited by her international

perceived. Nonetheless, the assumption that states are not limited in the exercise of their sovereignty is unreliable, which is shown by the acceptance of the Martens Clause. This clause was introduced into the preamble of the 1899 Hague Convention II and laid the foundation for the self-contained regime[15] of the laws of armed conflict and incorporated – as a principle – in international humanitarian law. It has been maintained to this day. According to the Martens Clause,

> (Until a more complete code of the laws of war is issued), the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience"[16].

Martens Clause laid the basis for the rejection of "war" by the UN Charter ("WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"). Consequently, the Martens Clause provides a legal basis for declaring illegitimate (norms and) acts illegal.

b. An implied prohibition to act. Contrary to the literal meaning of Article 19 of the Vienna Convention on the law of treaties, there is an implied prohibition of reservations that violate the hard core of human rights. Also in this case, denying (declaring illegality of) the right to formulate reservations against treaties is built on the foundation of illegitimacy.[17]

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obligations, and, in this case, by her obligations under the treaties of 1815 together with supplementary acts, that no restriction exceeding those ensuing from these instruments can be imposed on France without her consent. (p. 166)")

[15] Riphagen (Special Rapporteur ILC Draft on State Responsibility) "[a] self-contained regime' would then be a sub-system which is intended to exclude more or less totally the application of the countermeasures normally at the disposal of an injured party"; B. Simma, *Self-contained regimes*, 'Netherlands Yearbook of International Law' 1985, vol. 16, at pp. 111-136; PCIJ in the case of S.S. "Wimbledon" and ICJ in the Hostages case.

[16] R. Ticehourst, *The Martens Clause and the Laws of Armed Conflict*, 'International Review of the Red Cross', 30.4.1997, no 317.

[17] "one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged" R. Higgins, *Human Rights: Some Questions of Integrity,* 'Modern Law Review' 1989, vol. 1, no 52, at p. 12; "In general terms, the suggestion has

4. International society – international community

The indicated relationship between international law and the state in the form of feedback (the law as a creation of states; the states as a creation of the law) does not exhaust the catalogue of potential correlations. Nowadays, a case of violating the law by a state in external relationships by not respecting its duties resulting from sovereignty – a failure to guarantee protection (responsibility to protect[18]) provides a legal basis for its delegitimisation. In the past, when international law did not provide a legal basis to declare actions taken by a state (within its territory) that violated fundamental human rights and freedoms, the illegitimacy of violating fundamental rights and freedoms (i.e. of the state's conduct, not of the state itself) was expressed by asylum[19]. Hence, if the formation of a state becomes a fact, its delegitimisation is a legal consequence of its failure to perform duties recognised by international society. At the same time, the levels of legal expectations with respect to organised territorial entities are as different as such entities themselves. These differences affect the characteristics of multi-member groups. The rules constituting normative systems of international society and the international community (communities) are rights that derive from laws. These norms both establish certain groups and stratify international society leading to the

been made that human rights treaties have the character of jus cogens. There certainly exist a consensus that certain rights – the right to life, to freedom from slavery and torture – are so fundamental that no derogation may be made. And international human rights treaties undoubtedly contain elements that are binding as principles which are recognized by civilized states, and not only as mutual treaty commitments. Some treaties may focus almost exclusively on such elements – such as the Genocide Convention – while others may cover a wide range of rights, not all of which may have for the present a status which is more than treaty-base. This being said, neither the wording of the various human rights instruments nor the practice thereunder leads to the view that all human rights are jus cogens"; R. Higgins, *Derogation under Human Rights Treaties*, 'British Yearbook of International Law' 1976-77, vol. 48, at pp. 281-282.

[18] In this context, Henkin's view is significant: "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." L. Henkin, *How Nations Behave: Law and Foreign Policy*, New York: Praeger 1968, at p. 47; J. Zajadło, *Legalność i legitymizacja humanitarnej interwencji [Legality and legitimacy of humanitarian intervention]*, 'Państwo i Prawo' 2004, no 1, at p. 3-17.

[19] Article 14. 1 "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights and its executive Convention and Protocol relating to the Status of Refugees (GA Res 2198 (XXI)).

formation of internal communities. Legal norms lay the basis for the existence and legitimacy of communities. Yet, the state's behaviour in the area of respecting the law is correlated with their (reasonable) expectations of similar behaviour on the part of other states. The principle of *pacta sunt servanda*[20] is fundamental in international law.

It is necessary to highlight the distinction between international society and the international community, which has been assumed by the authors[21]. It seems justified to demonstrate the reasons, based on which the distinction has been made in the context of the discussed matter. Society is an entity in which the functioning of international legal norms must be secured by a number of prohibitions (and commands) in order to be effective, for there is no common unquestioned axiological core of internalised and well-socialised values. The origins of international society witnessed no (voluntary) acts of will as its existence derived from actual circumstances and the inability to change them (e.g. the formation of the state or the geographical and geopolitical situation of individual society members), whereas the main reason why individual actors of international society function in specific ways is determined by broadly understood interests. As a result, the normative system is at the level of the lowest common denominator, whereas its norms make up the catalogue of international law principles (Article 2 UN Charter). In fact, the legitimacy of international society is drawn from Article 2 of the UN Charter.

Society and the community differ by their method of regulating internal relationships. In the case of the former, prohibition is dominant and command is subsidiary. In the case of the latter, consent is dominant and command is complementary. The community is a supreme entity in terms of its origin, way of functioning, and purpose. It is rooted in the canon of common values that are understood in the same way and have been well internalised within the community. Belonging to the community is fully volitional and, principally, egalitarian. A conduct that is in line with the disposition of legal norms results from processes of axiological association and not from a potential or actual ability to use institutionalised coercion. The social binding force of law is developed in the framework of the community as a result of appulsive relationships towards the regulatory content of

[20] Article 2. 2 UN Charter, Article 26 Vienna Convention of the Law of Treaties.

[21] See also J. Zajadło, *Społeczność międzynarodowa czy wspólnota międzynarodowa [International community or international commonwealth]*, 'Państwo i Prawo' 2005, no 9, at pp. 34-50.

legal norms that cover certain values. Specific international communities, frequently called "security communities"[22], are the European Community in the legal formula of the European Union and the Atlantic Community in the legal formula of the NATO. In their case, the catalogue of common values has been included in the agreements establishing the cooperation institutions. This catalogue describes the social and legal system of participants, the states that can be/are members of the security community.[23] The "royal path" of each country willing to join the EU or NATO begins with membership in the Council of Europe.

As a result of these conditions, there are different consequences for the process of gaining legitimacy for individual legal norms but also for entire legal acts or even certain systems of power based on these norms and acts. The consequences may be even greater as the assessment of conduct of individual society or community members will, in fact, depend on the source, type, and strength of "ties" which link society or community members. The community will react much more strongly, clearly, and rigorously to insubordination of its member who does not observe the norms in force or betrays common values, as this conditions its further effective functioning.[24] The community exists as long as none of its members starts acting in a way that could jeopardise or eliminate the possibility of realising the agreed canon of values. The reaction to a member's conduct that is illegal or considered illegitimate by the community will most frequently result in suspending/excluding the member from the community, precisely in order to enable its further operation. The member will be, therefore, excluded in "necessary self-defence" of the

[22] K. Deutsch, et al., *Political Community and the North Atlantic Area; international organization in the light of historical experience*, Princeton 1957, at pp. 5-8.

[23] NATO: Preamble and Article 2; Treaty on the European Union Preamble and Article 2.

[24] A case of *de facto* suspending Austria in the EU in 2000 as a consequence of involving the government coalition in which one of the parties rejected the "common European values" as well as steps taken against Hungary under Orban's rule due to violating these values. The above cases may be generally assessed in the following way: "The legitimacy of a government is partially tied to respecting the rule of law. If a state openly violates the rule of law, it risks becoming a pariah on the international arena. In addition, respect for the rule of law increases the legitimacy of a government in the eyes of its citizens. Leaders who openly violate the rule of law also risk losing part of their standing among citizens". C. Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 'Law and Philosophy' 2005, vol. 24, at pp. 254.

community.[25] In the case of society, such a reaction may be and is most often weaker, less decisive, and ambiguous due to the fear of impeding or preventing the realisation of individual interests within the society. Society operates as long as each of its members is able to realise satisfactorily their own interests despite or at times because of illegitimate or even illegal actions of other society members.[26]

a. Ex factis ius oritur. International community/international law fails to make efforts that would be relevant to the challenges in dealing with the effects of considering the state as a factual circumstance with significant legal consequences. Deciding about accepting a new member state, the UN does not examine if the candidate observes Charter requirements. Contrary to Article 4 of the UN Charter, candidates that are not "peace-loving states", deny other countries' right to existence[27], or do not observe the borders of UN member states are allowed to join the organisation.

b. Ex factis ius non oritur. At the same time, the "uti possidetis" norm expressed in Article 3 of the Charter of the Organization of African Unity was used for many years as grounds to deny the right to self-determination of peoples/nations living in the OAU member states (or, more broadly, countries created as a result of decolonization).[28] The statement " [(S)ince] law is generally a conservative force"[29] may refer to these (and other) cases.

The subsumption of "state formation" under the norms set forth in both points (a and b) has a long record. Declaring their independence before the General Congress (July 4, 1776), Thirteen United States of America proclaimed the Laws of Nature as a foundation of the right to political

[25] TEU Article 7.

[26] See also C. Murphy, op. cit., at p. 254 with the quoted views of David Dyzenhaus and Meil McCormick.

[27] Bahrain, Bangladesh, Bhutan, Brunei, Comoros, Djibouti, Indonesia, Iraq, North Korea, Kuwait, Lebanon, Libya, Malaysia, Mali, Niger, Pakistan, Saudi Arabia, Somalia, Sudan, Syria, United Arab Emirates, and Yemen do not recognise Israel. The League of Arab States passed the Khartoum Resolution of 1.9.1967 expressing the obligation: "3. The Arab Heads of State have agreed …. This will be done within the framework of the main principles by which the Arab States abide, namely, no peace with Israel, no recognition of Israel, no negotiations with it, and insistence on the rights of the Palestinian people in their own country."

[28] Europe recognised the legal basis for changing the frontiers: "They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement." (Conference On Security And Co-Operation In Europe Final Act Helsinki 1975).

[29] L. Henkin, op. cit., at p. 49.

independence. The authors of the Declaration pointed to the repeated and gross violation of the law by the monarch as the direct reason for separation.[30] At the same time, the representatives of the United States of America "solemnly publish and declare" that the newly formed country will respect international law.[31] The Declaration of Independence rejected the foundations of not only imperial but also European socio-political system of values (the principle of "legitimate rule"). At the same time, it expressed the intent to maintain civilisation ties with Europe and a sense of common identity. Needless to say, this was a case of an "à la carte" community. On the one hand, the thirteen states expressed attachment to the ideals of the French Revolution and the English Civil War. On the other hand, understandably, independence deepened the divergence. However, the Atlantic Ocean did not divide the civilisation; history provides evidence for the existence of a transatlantic community. Relatively new evidence is furnished by the response of the U.S. President John F. Kennedy to the erection of the Berlin Wall ("*Ich bin ein Berliner*") and a similar reaction of the European allies to the 9.11 attacks.

Combining the matter contained in points "a" and "b", it may be stated that in either case there is (unfortunately?) continuation.[32] There is, namely, on the one hand, the principle of the rule of law, i.e. the foundation of the Westphalian order, and on the other hand, the right to self-determination (and its consequences), i.e. the foundation of (28th President of the US Thomas Woodrow) "Wilson's World". One can conclude the consequences of the above challenges with the truism that each consecutive case is a "hard case". Yet, we should remember not only Dvorkin's statement that "hard cases make bad law"[33] but also that in

[30] "…But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. … The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States"

[31] "…they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do".

[32] According to Holmes, the essence of common law is "that it decides the case first and determines the principle afterwards", O. W. Holmes, *Codes, and the Arrangement of the Law* [in:] S. M. Novick, 'The Collected Works of Justice Holmes', Chicago 1995, at p. 212.

[33] R. Dvorkin, *Hard Cases*, 'Harvard Law Review' 1975, vol. 88, no 6, at pp. 1057-1109.

international relations/international law, each case is a hard one.[34] (It should also be noted that international law was formed in response to the challenge of the *sui generis* "hard case" of the Thirty Years' Wars – the inability of the Protestant and Catholic States to peaceful coexistence in a universal order.

5. What is international society?

The narrative of lawyers specialising in international law with respect to international society directly reflects the idea present in sociology and political science. Starting from the descriptive definition that considers international society as

> a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in maintaining these arrangements[35].

This translates to frustration resulting from the present state of affairs or the expectation of its evolution. Both the frustration and the expectation refer to the paradigm defined by the distinction between *Gemeinschaft* and *Gesellschaft*.[36] This distinction is necessary from the sociological point of view; however, from the perspective of law (especially international law), it may be at most regarded as subsidiary. When referring to (applying) the category of international society in international law, it is necessary to recognise the fact that such a society is one of multiple diverse subjects. The unity of international society may be discussed only in the normative sense. The (one) international society reflects the actual legal status of the single international legal order that

[34] In the context of Lauterpacht's view of the international law as the "vanishing point of jurisprudence"; M. Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 'European Journal of International Law' 1997, vol. 8, no 2, at pp. 215-263.

[35] H. Bull, A. Watson, *The Expansion of International Society*, Oxford 1984, at p. 1.

[36] F. Tönnies, *Community and Society* (*Gemeinschaft und Gesellschaft*), New Brunswick and London 2004.

is respected by its subjects and other actors.[37] Therefore, international society is not and will not be the sum of its participants, but solely the system of actions regulated by the international order.

6. Nomocracy

International society both is and will be, for it has to be, based on the foundation of law that is respected in the internalised value system. In political language, it was expressed by the former Polish Minister of Foreign Affairs A. D. Rotfeld: "... the idea that puts [the world – Author's note] in order should consist in the democratic legitimacy to govern individual states, whereas in international relations, the democratic community of states would be authorised to exercise force in order to impose the application of law".[38] This determines the role and significance of the legal norms to and within the international society. The above statement expresses the expectation that the international society will submit to the rule of the international law more strongly and the international law will better represent the values that are recognised by international society as the desired ones. (Modern) international society, the legal society of civilised nations wants the law and believes in the law, because it is a worldwide society rooted in the tradition of the society ruled by the Roman law. At the same time, it is a universal society as it is not governed by a law for those entitled by birth (*ius civile – ius peregrinorum*), but by a law that forms a society of the participants of international relations and that provides admission to these relations – *ius gentium*. Roman law was a normative system of a solely formal law that existed within society. It transformed a homogeneous community distinguished from others by religion, customs, and language into an ethnic nation that constituted a prototype of the civil society. Neither is the international society a society of a (single) ethos or *Stamm* because nation states[39]

[37] This statement transposes Kelsen's concept of "nation" to international law; H. Kelsen, *Vom Wesen und Wert der Demokratie. Abhandlungen zur Demokratietheorie*, Mohr Siebeck, Tübingen 2006.

[38] A. D. Rotfeld, *Bezpieczeństwo międzynarodowe czasu przemian [International Security in the Time of Change]*, Belvedere lecture of the Diplomatic Academy, Ministry of Foreign Affairs of the Republic of Poland, Warszawa 20.1.2004.

[39] "...a grouping of people who share real or imagined common history, culture ...", *The New Oxford American Dictionary*, Oxford University Press 2005.

that together form the international society differ – from an national perspective – in everything. It is a society that seeks instruments to implement the model of *pax romana* in the multicultural world of the post-Westphalian era.[40] A normative instrument of organising international society is the "rule of law" or nomocracy.[41] The old maxim "*Ubi societas, ibi ius*" does not describe a social fact though, and even if it does, then in very short periods. Many times in the past, and according to a number of people also nowadays, this *sui generis* phrase has contained much more "society" than law. Nevertheless, it may be assumed that the maxim presented not a photograph but an element of a forecast (to a certain degree, a self-fulfilling one) as it expressed the expectations to create a society of law. These expectations have been in line with the Grotian tradition that the system of international relations should be based on the rule of law[42] – the law submitted to values (because *lex iniustissima non es lex*). The current expectations contain the will to continue the Grotian tradition and reject

[40] Scowcroft (former National Security Advisor of U.S. Presidents Ford and Bush) points that "But all of this comes at a time when the forces of change unleashed both by the end of the Cold War and by the onset of globalization make it much more difficult for individual nation-states, each on its own, to cope with the threats of this new world. National borders are eroding. …And this underscores the point that we need a new paradigm for international affairs. The major multilateral institutions, such as the United Nations, were crafted in a different era."; B. Scowcroft, *The Dispensable Nation?*, 'National interest' July-Aug 2007, http://www.nationalinterest.org/Article.aspx?id=14778.

[41] The term coined from two Greek words: *nomos* – law and *kratos* – power. It is used to describe the rule of law and it refers to the Jewish state or society that was governed by law (the Torah) at the onset (ca. 800 B.C.) of Judaism, according to H. H. Milman, *The history of the Jews: from the earliest period to the present time*, New York 1837, vol. 1, at pp. 136–137. At that period, the Israelites who lived in a diaspora developed rules (including the obligation of observing the religious calendar) with the aim to help the community survive (to protect it from the loss of its ethnic identity). These rules and the consequent practice together laid the foundation for *nomocracy*, a social system in which the observation of law by the society, lacking institutional structures (priests and the state), was the superior value (the law, which governed both religious and secular matters followed directly from God, and, as a consequence, violation of law was identified with insulting God. In the contemporary definition, it is the system of exercising power based on legal norms ("*Government in accordance with a system of law*", http://www.websters-online-dictionary.org/No/Nomocracy.html) – "the rule of law" is opposed to the "rule of individuals" ("government based on the rule of law rather than arbitrary will, terror, etc." – English Collins Dictionary – English Definition & Thesaurus).

[42] See also H. Lauterpacht, *The Grotian Tradition In International Law*, 'The British Yearbook of International Law' 1946, vol. 23, at pp. 1–56.

system whose members defended/where led by selfish interests, a system without order, a worldwide anarchy[43].

7. Sovereign in the international society

The frequently raised view about the immaturity of international society and international law (compared to national society and law) is based on the fact that the international society lacks an "authority/ruler" – the sovereign[44]. The lawyers who perceive international law in this way personify, perhaps unconsciously, the sovereign and deny both the concept that lays the basis for the state of liberal democracy and the fundamental norms of the state systems that impact international society in order to ensure the observation of law.[45] It seems necessary to repeat (after Thomas Paine)

[43] J. Menkes, M. Menkes, *Legitymizm versus efektywność. Nomokracja lub kritokracja, lub kritarchia – metody realizacji wartości [Legitimacy vs effectiveness. Nomocracy or kritocracy or kritarchy]*, [in:] 'Aksjologia współczesnego prawa międzynarodowego' [Axiology of Contemporary International Law], Wrocław 2011, at pp. 147-176.

[44] See also R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne [Public International Law],* LexisNexis, Warszawa 2005, at p. 16; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie [Outline of Public International Law]*, LexisNexis, Warszawa 2009, at p. 22.

[45] In this context, Schmitt's view seems noteworthy: "*A legislative state* is a state type governed by impersonal that is, general and pre-established, norms that are meant to be lasting and that have a definable, determinable content, a state type in which the law and legal application, lawmaker and officials responsible for legal application, are separated from one another..(...). In the general legality of all state exercise of power lies the justification of one such state type. A close system of legality grounds the claim to obedience and justifies the suspension of every right of resistance. In this regard, the specific manifestation of the law is the statute, while legality is the particular justification of state coercion." (...) At the other end of the spectrum from the legislative state stand *the governmental state*, which finds its characteristic expression in the exalted personal will and authoritative command of a ruling head of state. And yet there is still another conceivable state type, *the administrative state,* in which command and will do not appear authoritarian and personal, and which, nevertheless, does not seek the mere application of higher norms, but rather only objective directives. In the administrative state, men do not rule, nor are norms valid as something higher.". Historically, of course, linkages and mixtures continuously appear, because legislation, as well as adjudication, government, and administration, is part of every political system. In every state, there is not only obedience and command, but also the establishment of statutory norms and administration through internal directives.";

that the law is the sovereign in international society[46] – in international society, the law is king[47]. This view is confirmed by both the EU Treaty and the Washington Treaty but first of all by the constitutions of individual states, which are representative to international society.[48]

8. Conclusions

The paper is based upon assumptions that:

- instead of accepting an atomised model of legitimacy, analysed within autonomous branches of law, the rational legitimacy model should be holistic (i.e. encompassing different branches of law). Such an approach was tantamount to rejecting the approach embodied in the conference title "Legalism in international law system";
- the qualification of particular conduct as legal or illegal results from a conformity test with the general principles of law, but also stems from the interdependence of legitimacy and legality.

It has been showed that both acceptance and refusal in Polish academic discourse on legalism and legitimacy are predetermined by insufficient precision in defining and using these fundamental notions. Accordingly, the only viable solution was to define these basic terms for the purposes of the research.

C. Schmitt, *Legality and Legitimacy*, translated and edited by Jeffrey Seitzer, Duke University Press, Durham&London 2004, at p.4-5.

[46] H. H. Koh, *Why Do Nations Obey International Law?,* 'Faculty Scholarschip Series Paper' 1997, no 2101, at pp. 2599-2659

[47] T. Paine, *Common Sense,* 1776: "... But where says some is the King of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is." http://www.calhum.org/files/uploads/program_related/TD-Thomas-Paine-Common-Sense.pdf

[48] Poland (Constitution of the Republic of Poland of 1997) Article 2; Germany (Basic Law for the Federal Republic of Germany) Articles 25, 28; Sweden (Sweden's Constitution of 1974) Article 1.

The authors identified six correlation models between legitimacy and legality. The models are:

- legal and legitimate ("just hence legally binding") – this is socially the most preferable;
- illegal but legitimate ("desirable norms yet legally non-binding") – identified in numerous cases in international relations (for instance in the case of so-called pre-emptive wars);
- legal but illegitimate (can result from a lack of assessment or from injustice stemming from the implementation of law;
- alegal[49] and illegitimate. Such cases highlight rarely noticed consequences of certain legal facts, such as the creation of "non-peace-loving states"; even though from an international legal perspective only the very creation of a state is legally relevant, such a new entity does not enjoy legitimacy;
- alegal and alegitimsed[50].

A relationship between illegal and illegitimate was not covered in the research, as it is not relevant in light of the research goal.

The duty to present a conclusion would be most easily satisfied by the statement that the matter of legitimacy and legality is a broad and complex one and at most only partial conclusions may be drawn. One could add the statement that any possible assessment is encumbered with the error of presentism. Yet, this kind of conclusion would not meet the goal of closing the paper with a message. In fact, a significant element of (our) conclusions may be found under the term "correlation" used as a connector in the title. Therefore, we are convinced that there is feedback between legitimacy and legality. Moreover, we believe that any statement about the legitimacy and legality which exceeds semantics is formulated on the basis of assessments/values and refers to assessments/values. We do not succumb to the illusion, nor want to evoke the illusion that we are guided by objectivity; we have clearly pointed to the values we represent, from which we set out and which we expect to confirm.

[49] Legal nihillism, rejection of law and morality – is the meta-ethical view.
[50] Legitimate nihillism, rejection of law and morality – is the meta-ethical view.

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