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EFFECTIVITY OF PUBLIC INTERNATIONAL LAW

A NEED FOR PARADIGM CHANGE

ABSTRACT

Last century was significant for public international law, which has developed rapidly, bringing some improvements in protecting human rights despite the fact it faces huge challenges regarding its effectivity. On the one hand, the whole international community agrees on such values as a ban of use of force and peaceful settlement of international disputes or human rights, but on the other hand, there are international armed conflicts that cause some of the gravest human rights violations of the 21st century. The purpose of the article is to scrutinize and identify ways through which public international law can become more effective in order to realize common values of international community enshrined in the Charter of the United Nations. Through descriptive, normative, and critical methods of research, the article attempts to show that there is a need for a paradigm change in order to make public international law more effective. But what should the new paradigm be? How can the effectivity of the public international law be increased? To answer these questions, the detailed inspection of the term of effectivity, as well as creation and the enforcement processes of the public international law norms, is needed. Research shows common consent of states, a legitimate constitutive act, authority, as well as appropriate enforcement, are pillars, based on which the public international law can uphold its effect. And some international actors should take a lead on forming a new paradigm in international law in order to make a more effective international legal order happen. However, it will take some time.

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1. INTRODUCTION

The Public International Law has achieved fascinating progress since its development in the 20th century. Thinking back to around 2100 BC when a solemn declaration inscribed in stone was signed between Lagash and Umma, the city states placed in Mesopotamia (Nussbaum, 1954), to Hugo Grotius as the father of modern Public International Law (Nussbaum, 1954), up to Westphalian Peace in 1648, which established the modern international (European) order on the basis of sovereign equality of states (Von Arnauld, 2014), the establishment of a basic understanding for the need of the public international law order has demanded centuries.

But development in the 20th century has progressed relatively fast. In the establishing of the UN Peace System and International Criminal Court, the WTO dispute decision order, as well as International Center for Settlement of International Disputes, one can see development, not only in public international law, but also new specific fields have arisen, such as International Law on the Sea, International Economic Law, and International Environmental Protection Law. We are witnesses of new players at the international level, including individuals. The main cause for these recent developments might be globalization – the intensification of global interconnectedness in which capital, humans, images, and ideologies move across distances with increasing speed and frequency (Giddens, 2000).

Despite this tremendous progress, mankind faces huge challenges that affect individuals and their fate. We still see people suffering from international armed conflicts that result in millions of refugees try to cross borders for physical survival, even when they acknowledge the high risk of losing their lives during this attempt as migrant crises of the last decade especially on the EU border have shown.

The most dedicated peaceful efforts of the international community, unfortunately, have less effect in certain cases. While the international community, or a part of it, makes efforts according to current norms and tries to maintain international peace and security, the violator states or non-state actors decide on the fate of ordinary people.

A question arises, whether this modern public international law system, based on common goals and principles as stated in the Art. 1 and Art. 2 of the Charter of the United Nations, is effective, or whether there is a need for a paradigm change in order to protect those values, directed to uphold international peace and human rights protection. In a nutshell, the end effect of this whole international system, especially after the World War II, should serve the well-being of individuals.

The purpose of this article is the identification of the main challenges to the effectivity of public international law and the modest attempt of the author to propose the point of view on how public international law can unfold its effect in a better manner for peace and security, as well as for human rights protection. The second part of the article examines in detail, what the main challenges of modern public international law are in relation to effectivity, also defining what this term means. The third part points out reasons for these challenges, while the fourth part focuses on the need for a paradigm change and offers a proposal on how modern public international law order could be arranged. The fifth part sums up key findings of the article.

2. EFFECTIVITY CHALLENGES FACING THE PUBLIC INTERNATIONAL LAW

2.1. WHAT IS EFFECTIVITY?

There are different interpretations on what effectivity in public international law means. For example, d'Aspermont considers that effectivity evokes an inward process whereby facts are integrated into rules, institutions, and narratives as a condition of the operation of law, and thus a condition of valid legal reasoning. The idea of effectivity is what allows doctrines to operate outside the closed world of ideas of international law (d'Aspermont, 2014).

Taki uses the term of effectiveness arguing that this term has been used in international law since the mid-20th century, at times ambiguously, and with various meanings. Primarily, it refers to the efficacy (actual observance) of law as distinguished from the validity (binding force) of law (Taki, 2021). According to Kelsen, the efficacy of entire legal order is a necessary condition for the validity of every single norm of the order. The principle that a legal order, as a whole, must be by and large effective in order to be valid is itself a norm. Man ought to behave in conformity with the legal order, which as a whole, is by and large effective (Kelsen, 2003).

According to some scholars, effectivity shows, how international law changes states' behavior. The impact of International Law on states is often discussed in terms of "compliance" with international law. Often some legal scholars move rather quickly from the high rate of compliance to the conclusion that international law changes state behavior. Henkin, who contributed a historical line in international scholarship arguing that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time," is unfairly accused in confusing compliance and effectiveness (Guzman, 2008).

Effectivity is measured by efficacy of the whole system, and it can change state behavior. But effectivity also includes one more component – the real effect the existence of norm or system of norms reaches. The norm or system can be considered as effective if it can uphold its true effect, reach its aim, and accomplishes real outcomes. If there is a legal order, which only remains as a set of declared principles without real results, it can hardly be considered as effective. Effectivity is broader than a simple compliance or changing behavior of some states. If particular states comply with norms and even if the behavior of some of them is changed, it will have less effect as not all subjects comply with norms. The public international law will be effective when, paraphrasing Henkin, all nations observe all principles of international law and all their obligations all the time.

For modern reality, it means that, despite the fact that fundamental norms of the public international law declare peace, security and human rights protection as core milestones for public international law at the global and regional level, different parts of the world still face the horror of armed conflicts and hostilities causing unimaginable human catastrophe, as well as extreme poverty. Therefore, a logical question arises about the effectivity of such a system.

Firstly, the process of creation of norms, and secondly, the implementation of these might be considered as the main challenge of the effectivity of the Public International Law.

2.2. PUBLIC INTERNATIONAL LAW CREATION PROCESS

The nature of international law differs from domestic law. In democratic societies, people need to consent ex ante on their legislators through a voting system. After elections, legislators are not bound by the consent of their constituents for each new legal rule. The enforcement is centralized and is not in the hands of individuals (Kantorowicz-Reznichenko, 2020). Domestic law is above individuals in domestic systems, but international law only exists between the states and other international law subjects (Shaw, 2014). International law has no legislature, and even the decisions of the General Assembly of the United Nations are not binding. As a matter of fact, it is not always clear what the international law norm is (Aust, 2005).

Some years ago, a small group of cosmopolitan-minded lawyers translated the diplomacy of states into the administration of legal rules and institutions. This was a progressive, liberal project, conceived originally in 19th century Germany on which immigrants such as Lassa Oppenheim and Hersch Lauterpacht brought it into the English-speaking world. Everybody agreed that statehood was important and problematic at the same time. Lawyers sought to deal with those problems by thinking of states as intermediate stages in a historical trajectory that would lead to the liberalization of individuals enjoying human rights in a global federation under the rule of law. But the new developments in the law did not lead to unity (Koskenniemi, 2007).

A wide variety of bilateral, plurilateral and multilateral treaties came into force which have an effect only between parties (Schweisfurth, 2006). Traditional understanding of international law is pushed aside by a mosaic of particular rules and institutions, each following its embedded preferences (Koskenniemi, 2007). Notwithstanding the fact that there are some universal treaties and customary international law norms, states themselves sign treaties and engage in action that they may or may not regard as legally obligatory. International law would appear to consist of a series of rules from which states may pick and choose (Shaw, 2014). This could be expressed under the term of fragmentation (International Law Commission, 2006).

The development of special spheres of public international law made international order less coherent. Specializations in different fields of international law started to reverse established legal hierarchies in favor of the structural bias in the relevant functional expertise. Even though this process was often organized through intergovernmental organizations, the governmental delegations were composed of technical experts from different fields (economic, environmental, legal). As a result, the functional differentiation of the national level was transported onto national plane (Koskenniemi, 2007).

Fragmentation creates the danger for conflicting and incompatible rules and practices. But at the same time, it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques. Fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world. But it may as well cause conflicts between rules and regimes in the way that might undermine their effective implementation (International Law Commission, 2006).

Even the most successful stories in the public international law could be ineffective in relation to other state parties. For example, 123 countries are state parties of the Rome Statute. Unfortunately, some influential powers have not ratified or signed it yet. All crimes that

would fall under jurisdiction of the ICC if it was ratified by those countries remain beyond criminal prosecution under international criminal law in a majority of cases if we don't take ad hoc international criminal tribunal into account, which is not very often the case. The European Convention on Human Rights, which creates one of the most effective human rights enforcement mechanisms – the Court of Human Rights, is another good illustration. It is effective only regionally in Europe, while it could be a very good model for other countries beyond Europe as well. The effect of the mentioned Convention and the Court can be enjoyed only by those who fall under jurisdiction of the state parties, thus failing those who are not.

In both mentioned cases, state parties of the Rome Statute as well as the European Convention on Human Rights comply in general with their obligations. However, a considerable number of states and therefore hundreds of millions of humans are left behind those rules, i.e., without protection in situations of human rights violations. And this applies to all international law spheres fragmented in the labyrinth of public international law.

There is no identifiable institution to establish rules (Shaw, 2014). There is no unified norm setting system, and many constellations in different spheres are left behind regulations at the international level. International Law faces a fragmentation challenge. This reduces effectivity of the public international law.

2.3. ENFORCEMENT OF EXISTING PUBLIC INTERNATIONAL LAW NORMS

The challenge of the enforcement of public international law can be seen in two directions affecting the effectivity of the latter. Firstly, as a result of decentralized order, no unified enforcement mechanisms exist. Secondly, even within the decentralized system, subjects of international law do not follow norms they have once themselves obeyed.

As mentioned above, modern public international law is decentralized in different (also self-contained) regimes and spheres. Logically it follows, in such a case, that enforcement mechanisms are also decentralized and suited to single regime specifics. Thus, it cannot be surprising that there is no unified system of courts.

The International Court of Justice exists at the Hague, but it can only decide upon cases when both sides agree, and it cannot ensure that its decisions are complied with if the state party refuses. Above all there is no executive or governing entity. The Security Council of the United Nations which was intended to have such a role in a sense, is bound by veto power of the five permanent members (Shaw, 2014).

Certainly, there are always cases when public international law and self-contained regimes fulfill each other in order to create harmony and outline legal boundaries of state conduct. But concerning the matter of the decentralized character of public international law, some self-contained regimes, on the other hand, feature huge differences.

Causes for fragmentation of International Law come not only from the specialized and decentralized methods of norm creation, which represent special sub-societies, but also from diversification process of courts, quasi-courts and tribunals, which apply their own regime (Kläger, 2011) and therefore support advancing of a new case law, but within the regime. These judicial bodies typically lack subordinated structure and make their decisions on the basis of specific agreements, which give them right to operate within the narrow scope of this particular agreement (Thiele, 2008).

Much more obvious is the one of main challenges of public international law in which its subjects violate their obligations upon which they have given their consent once. Unfortu-

nately, one can bring mirid examples, beginning with violations of ceasefire agreements, use of unlawful force and occupation, following creeping occupation towards Rohingya, grave human rights abuses, and failure to follow multilateral treaties.

Lack of unified enforcement system, as well as violation of international law obligation by states decrease the overall effect of public international law as of the system.

3. REASONS CAUSING EFFECTIVITY CHALLENGES

In order to identify the ways of problem solution, it is necessary to discuss reasons causing above mentioned challenges.

3.1. STATES MOTIVATION

While talking about reasons, first of all, motivations of states to obey or not to obey, comply or not to comply with public international law norms should be discussed. Different authors have developed different arguments during the last two centuries. Some scholars see the norms, values, and a social structure of international society as helping to form the identity of actors who operate within it. Nations thus obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance (Koh, 1997). A good deal of the influence of compliance with international rules derives from the relationship between individual rules and the broader pattern of international relations: states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community (Hurrel, 1993). A small part of scholars presents the reason of functioning of Public International Law on the basis of bona fides (Verdross & Simma, 2010), or their international reputation which can be damaged in the eyes of such international players as other states or international NGOs (Schweisfurth, 2006). All mentioned theories cannot explain that many states do not care about reputation or bona fides when it concerns their self-interests. International law is not always built on ideals, but the play of different factors.

According to one particular opinion, one accents the fairness of international rules (Frank, 1995) while another one sees that compliance with international law is best implemented, at least within treaty regimes, by a "managerial model." Nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong. A fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public (Chayes & Handler Chayes, 1995). Both theories omit a thoroughgoing account of transnational legal process: the complex process of institutional interaction whereby global norms are not just debated and interpreted but ultimately internalized by domestic legal systems (Koh, 1997).

Some scholars see sanctions as central argument for appropriate functioning of international law (Kunz, 1960). It cannot be a sufficient argument that the power states do not need to worry about sanctions, especially from less powerful countries (Schweissfurth, 2006).

Some consider states interests as socially constructed by commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse (Finnemore, 1996). It is a very abstract argument. Nations such as South Africa, Argentina and Chile are neither permanently liberal nor non-liberal but make transitions back and forth from dictatorship to democracy, prodded by norms and regimes of international law. Identity analysis leaves unanswered the critical, constructivist question as to what extent compliance with international law itself helps to constitute the identity of a state as a law-abiding state, and thus, a "liberal" state. Furthermore, the notion that "only liberal states do law with one another" can be empirically falsified, particularly in areas such as international commercial law, where states tend to abide fastidiously by international rules without regard to whether they are representative democracies. Moreover, like the discredited "cultural relativist" argument in human rights, the claim that non-liberal states somehow do not participate in a zone of law denies the universalism of international law and effectively condones the confinement of non-liberal states to a realist world of power politics (Koh, 1997).

According to another opinion, some states use it as mechanism for pushing their interests forward and they comply with international law not because they internalized the public international law norms or have a habit of complying with it, or drawn by its moral pull, but because they simply act out of self-interest. Customary international law, as well as treaties, can use genuine cooperation or coordination between pairs of states or among small groups of states. In other cases, it can reflect self-interested state behavior that through coercion produces gains for one state and losses for another. Much of customary law is simply a coincidence of interests. Cooperation and coordination by custom, as well as by treaties, can have its limits. These limits are determined by a configuration of state interests. So, some global problems can remain without a solution. International law rhetoric prevails international relations. (Goldsmith & Posner, 2205) But this theory does not recognize that, in norm creation and compliance process, there are not only winners and losers but also mutual or multilateral win-win situations. If the interests of states change after some time through government change or other circumstances, the particular international law norm still should be implemented (Schweisfurth, 2006).

Each of the mentioned opinions include a grain of truth. In international law, states are driven by different motivations. For example, states valuing international law or taking care of their reputation at the international level in general can act in their self-interest in particular case, damaging at the same time their reputation. States can be motivated by several reasons at the same time as well. While acting on the basis of bona fides or reciprocity and in belief of fairness of a particular norm, the compliance with this norm could be in self-interest of the state as well, bearing in mind that it is beneficial for this state. Less powerful countries might act or omit action and comply with particular norm in a concrete situation because of fear of sanctions and at the same time in anxiety that others will not fulfill their obligation based on the principle of reciprocity.

The decisions and motivations of the countries do not always appear on the surface, and they can remain uncovered from the rest of the world community. Decision-making is very tightly connected not only with international processes but on a wide scale with national ones. Therefore, the hidden motivation is difficult or even impossible to understand in some cases. Different constellations may occur, and states can be driven by one or any number of reasons as to why they obey public international law. It can differ from state to state, from

norm to norm. It is rather important to research the motivation of the state in each particular case, and there is no state which theoretically would be excluded from consideration of any of these reasons. The motivation determines the effectivity of public international law.

3.2. LAW AND POLITICS

In any society, the law is a result of complex political processes in a domestic system. In international law, it is distinguished between formal sources defining legal and procedural issues for creation of international law and material sources dealing with content and substance of international law. Formal sources are international treaties and customary international law (Egede & Sutch, 2013), and material sources are everything that forms the material content of international law norms (Verdross & Simma, 2010). Herein are included all interests of states, whether it is of material or ideal character, and representatives of which see it important to uphold these interests at the level of public international law (Schweisfurth, 2006). In short, it is about state policy, which is the main drive for setting up legally binding international law norms defined by the motivation of a state.

It is clear that there can never be a complete separation between law and policy. No matter what scholars argue, the inextricable bond linking law and politics must be recognized. Politics is much closer to the heart of the system than it is perceived within national legal orders, and a power much more in evidence. This interdependency between public international law and politics is much more complex and difficult to unravel. Power politics stresses competition, conflict and supremacy and adopts as its core the struggle for survival and influence. International law aims for harmony and the settlement of disputes. It attempts to create a framework to balance interests (Shaw, 2014).

As far as the politics is the basis towards creation of norms at the international level, it can also have a negative impact in two cases: when the state is not willing to obey specific norms and when the state has obeyed a given norm in the past but violates the same norm currently.

Politics play a huge role when it is about the "weight" and "importance" of countries. As the Charter of the United Nation states, all countries are equal. In reality, the sovereign equality of states is a relative term. The veto right of five nations for Security Council decisions can serve as a good example to argue that states notwithstanding of their formal de jure equality differ from each other according to their de facto weight. The powerful countries can better enforce their interests based on the international legal norms against less powerful countries than vice versa (Schweisfurth, 2006). One can see the traces of this inequality in the enforcement of international norms and at the end on the effectivity of public international law.

Politics creates room for negotiations and compromise. This is not negative at all as a means of communication and mediation between nations. Parties are not required to commit themselves to the substance of agreement. They can maintain their positions and agree on compromise. The latter cannot be regarded as negative. The value of politics is not judged on whether it is done by compromise, but whether they can bring good results (Yasuaki, 2013).

The basis of reasons motivating a state to participate in a norm creation process or complying with it is politics. All these motivations render the complex processes both at the national as well as at the international level, mirror politics: be it the state decision-makers taking into consideration possible economic sanctions causing economical decrease and deepening poverty in the own country, which might result in change of government; be it the

self-interest of the state to strengthen military or political positions of "super power" in strategically important regions and not to take care of economic or reputational damage caused by economic sanctions as well as earning the name of occupant in the eyes of an international community.

Not only in the creation of Westphalian Peace or Vienna Congress in the past, but also in modern public international law, the ghost of politics to drive genuine subjects of international law-states in legal relations defines the effectivity of international law. Even behind setting up human rights protection standards inspired through high moral values, hides politics concerned for the scourge of both the world wars.

In defining challenges of the effectivity of public international law and in searching for keys to their solution, it is inevitable to take politics into consideration as the main basis for reasons why states choose to join or not join, comply or not comply with international law norms, therefore affecting effectivity of public international law in a positive or negative light.

3.3. COORDINATION, NOT SUBORDINATION LAW

The structure of public international law is axiomatically described to be horizontal, but it is derived from the absence of authority above a state (Vos, 2013). From the absence of an institution like the state above states, the structure of public international law is inferred (Vos, 2013). There is no souverain. The states create their own norms and obey themselves to these norms; therefore, it is coordinative, not subordinative law (Schweisfurth, 2006). In the absence of subordination to an authority able to enforce norms, the coordination character affects the effectivity of public international law in a negative way.

3.4. LACK OF ENFORCEABLE SANCTIONS

Sanction is a form of the exercise of coercive power which is not prohibited by international law (d'Aspermont, 2015). Present-day international law is still far away from an advanced international legal order; whether it is, as Jenks believes, the "common law of mankind" in an early, imperfect and precarious stage of its development, it cannot yet be determined with scientific authority. In the present difficult international situation, it is necessary to "muddle through" by all kinds of devices to prevent a third world war. However, the goal cannot be "law without force," but an effective international legal order, and that means also enforceable sanctions (Kunz, 1960). Lack of centralized means of enforcement has provided many critical and cynical comments as to the value and effectiveness of international law. International law is easily qualified as "primitive" or a "self-help system" in political and legal science (Noortmann, 2005).

3.5. INDIRECTNESS

In the classical sense of public international law, historically individuals are not directly but rather indirectly affected by the law. For violations against an individual, there is a remedy of diplomatic protection from the state. But the last decades and the further development of international legal order brought the paradigm change in some fields. Individuals are owners of rights at the international level, and they can carry them against the violator state. At the same time, individuals could be assigned to criminal responsibility due to various interna-

tional permanent and ad hoc tribunals (Von Arnauld, 2014). There is clear evidence of relativization of the indirectness of public international law at least in human rights and criminal law. Despite that fact, individuals still cannot enjoy directly the full scale results of public international law. That is why indirectness decreases its effectivity.

4. A NEED FOR PARADIGM CHANGE

4.1. A NEED FOR A NEW PARADIGM

International law needs improvement in order to increase its effectivity. It remains as the single, generally accepted means to solve world problems. The challenges will not be solved through armed conflicts or the imposition of a single ideology or religion (O'Connel, 2008). The increasing of effectivity should be seen in the prism of globalization that constitutes a central driving force behind social, political and economic changes that gradually reshape modern societies and world order (Hirsch, 2004). Globalization is a multifaceted concept that encompasses technological, political, economic, and social trends which refer to widening, deepening, speeding up of worldwide interconnectedness in all aspects of contemporary social life (Held et.al., 1999). The rapid changes in technology, economic activity and governance increased the speed and decreased costs of international communications; as well, transport and cross-border flows have reached unprecedented levels (Hirsch, 2004). This new reality is naturally accompanied by increased connectivity between individuals as well as different societies. Therefore, people are significantly affected by processes and developments in other states and societies (Held et.al., 1999). One should bear in mind that internet and social networks, as well as digital money, make a huge impact on modern international relations. Those who do not take part in this process and try to lock their boundaries fully or in wide scales, face such results as North Korea.

These new circumstances require new developments in public international law. Challenges mentioned above will not solve themselves by chance but can be overcome only through searching and finding new ways to bring the public international law to the next stage of its development. It is not an easy task, and it might relate to certain difficulties; this will take decades or in the worst case – centuries. But the development is an irreversible process, and sooner or later, the international community will come to the right solution to make international law effective.

In the next subchapter a modest attempt will be undertaken to discuss how the modern public international law can overcome challenges mentioned above in order to increase effectivity and decrease human suffering.

4.2. HOW PUBLIC INTERNATIONAL LAW CAN INCREASE ITS EFFECTIVITY

4.2.1. COMMON CONSENT OF STATES

Bearing in mind the dependence of state motivation on different factors, as argued above, the key to raising effectivity of the public international law logically lies in taking all these factors into consideration in order to achieve the maximum effect. First of all, the will of states towards the paradigm change has to be present. For some countries an idealistic motivation

for reaching international peace and security, human rights protection and prosperity for the mankind might work, but for some states it could be simple, pragmatic interest to benefit from effectivity of public international law. It does not matter what motivation countries have. The only goal should be that states achieve common consent, which can launch an effective international system, thereby guaranteeing better protection for international peace and human rights.

It will be difficult to have common consent for all subjects in charge of creation of the new paradigm of international law. We cannot simply start assuming that politics could be discussed so that in the end everyone should agree (Koskenniemi, 1990). But the modern international society may reach common consent of states, driven by one's own, no matter whether ideal or mercantile motivation, which can guarantee an effective international legal order.

Some scholars consider that the EU is a great experiment with precisely this type of system, although one underpinned by a unique history and culture generating the necessary domestic political will and economic and social forces. At the same time, this opinion recognizes that the world is not likely to replicate this experience in terms of actual political and economic integration monitored by coercive supranational institutions. But to the extent that the European way of law uses international law to transform and buttress domestic political institutions, it is a model for how international law can function and will and must function to address the twenty-first century international challenges (Slaughter & Burke-White, 2006).

Firstly, this opinion misconceives that all the EU countries share more or less common values, culture, historical development that create a good basis for the modern European Unity. But the world societies face huge differences in values, historical developments, cultural and social spheres. It will be very difficult to reach such a unity of countries of the world as the EU represents. Secondly, there is no evidence that the majority of states would give up their sovereignty in such a scale as the EU model needs. The international law development is an evolutionary, not a revolutionary process. It has to progress in certain steps. An idealistic approach today could put achieving developmental results under question. If we are still talking about the effectivity difficulties of the existing system and rules because some actors are not ready to fulfill even existing obligations, it seems to be unrealistic to give up a relatively bigger piece of sovereignty by majority of states such as the EU model requires.

The new paradigm seems to work better if it is focused on the goals of the United Nations through enhancing the existing system in one big step forward in an evolutionary, not revolutionary manner. There is a need for common consent about Legitimate Constitutive Act, which defines the major principles and rules of the system functioning, the public authority as well as enforcement mechanisms for implementing effective international legal order based on the mentioned principles and rules.

4.2.2. LEGITIMATE CONSTITUTIVE ACT

There is a need for a fundamental founding act which can be called a Constitutive Act reflecting all fundamental principles, conceptualizing the mechanism for the functioning of the international legal order. International law can become effective with the precondition that decentralized spheres of international law are unified under a legal umbrella. They should aim at maintaining international peace, security and the protection of human rights. It can be considered as the classical domestic constitution unifying general principles and the legal

mechanism framework for functioning of different directions of state life. Exact description of principles and mechanisms should be an object of further detailed research.

The thesis that any legal rule, principle or the world order will only seem acceptable when stated in an abstract and formal fashion (Koskenniemi, 1990), cannot be considered as plausible, based on the fact that too much "abstract" and "formal" always leaves room for subjective interpretation. As far as international law is based on politics, wide interpretation could possibility lead to new conflicts and disagreements that should be avoided for effectivity purposes. It should contain formulations of major principles and rules essential to keep public international law operational. It should be clear enough not to leave much space for different subjective interpretations. Otherwise, the system cannot function.

It is advisable to include in the constitutive act all relevant major issues regarding the functioning of the authority, which is the subject of discussion in the following part of this article.

4.2.3. AUTHORITY

Effectivity of international law necessarily raises a question regarding authority. The public authority should be based on understanding, which affects the freedom of others in pursuance of a common interest. The authority maintains a connection between legality and legitimacy through the idea that law necessarily claims legitimate authority (Roughan, 2016). A good understanding of the legality implies explaining how international law may claim legitimacy and could be capable of possessing authority (Besson, 2009).

The legitimacy of the authority will be discussed in two directions: firstly, the authority giving founding power to a constitutive act, and secondly, the authority is able to make the new paradigm system operational.

The main argument for the legitimacy of any authority is that by subjecting himself to the authority, a person is more likely to act successfully for the reasons which apply to him as if he does not subject himself to this authority (Ratz, 1986). If we use that formula for subjects of international law, states, as primary subjects of international law (Shaw, 2014) creating the climate at the international level, we can identify that the legitimacy of international authority can be affirmed when states obey it. As states are the original law-makers at the international level and they make it for themselves in a horizontal system (Besson, 2009), they could be the main source of the legitimacy of the authority. When an international court, a treaty-based dispute resolution system, or the UN Security Council purports to bind a state, it purports to give the state what Raz calls an exclusionary reason for action (Roughan, 2016). On the other hand, the fear if both the international and the state authority claim to be supreme and comprehensive, and either outweighing or exclusionary of the other, they cannot both be right (Roughan, 2016), could be contradicted with the argument of state sovereignty, as well as in private law paradigm in international law. If there is a state consent to set rules for regulation of such relationships, it might easily work if there is enough motivation of state parties.

It is noteworthy to discuss another base of legitimacy of the authority. It could be problematic to discern whether individuals can be a source of legitimacy for the international authority for modern international law system. As partial subjects of international law, individuals can be at the same time holders of rights and obligations at the international law level. In an ideal case, according to the modern western understanding of democracy, if we are talking about a legitimate authority, it should be based on individuals, as at the state level, through

elections. But the modern international law mirrors totally different structures, where states play a major role and individuals are involved only indirectly or partially. If we applied the thesis that the state veil should be lifted (Besson, 2009), it would result in chaos, and the idea of authority could not be fulfilled, at least in the nearest future. Firstly, it would be difficult to have a consent on what the democracy exactly is (Burchill, 2001). Secondly, it is important to define how individuals can participate in the establishing or functioning of the authority. One may argue that democracy is an inevitable criterion for states (Wheatley, 2011), but in modern international law, states are considered as subjects of international law according to Georg Jellinek formula (Jellinek, 1914, p. 183). Different states understand or claim to understand democracy and participation of individuals in different ways, and this is based sometimes on values and sometimes on simple political interests. If the common understanding of democracy and participation is not realistic, lifting the state veil cannot be an argument for functioning of the authority. For the European Union democratic representation and participation of individuals functions because all the state parties in general have a common understanding of democracy and values, which is not a fact for some other parts of the world. That is why the same solution will not function for the world model.

International authority poses a question about its legality as well. The account of the relationship between legality and democratic consent resolves the tension between them by adopting the metaphor of sequence; first there is consent to basic law, and then, that law governs democratic choice (Whyte, 1987, p. 1). The legality can be derived from the Constitutive Act mentioned above.

The modern international law characterized with the horizontal structure, as it was already discussed in detail, faces a significant challenge of effectivity. In this horizontal conception, the most significant danger inherent in these new functions of international law, however, lies in the potential of national governments to co-opt the force of international law to serve their own objectives (Slaughter & Burke-White, 2006, p. 347). This strictly horizontal conception of international legal order should be supplemented by more vertical structures, (Von Bogdandy et al. 2017, p. 128) whereas the decisions of the latter should uphold its binding effect – for law is enforcing because it is binding (Fitzmaurice, 1956, p. 2). A Constitutive Act may contain such a new concept because par in parem non habet imperium is a general principle of international law (Dinstein, 1966, p. 407), and if states can reach common consent, this system can work.

4.3. ENFORCEMENT

The question of the authority of a legal system presents itself as a question of its enforcement because it is the binding character that creates for those concerned the obligation to obey the law; this recreates the authority that causes them to obey it in fact (Fitzmaurice, 1956, p. 1). The characteristic of rules of law is that they shall be enforced by external power (Oppenheim, 1955, p. 8). Law should be considered a coercive order providing for socially organized sanctions, and these can be clearly distinguished from a religious or merely moral order. As a coercive order, the law is that specific social technique which consists in the attempt to bring about the desired social conduct of men through the threat of a measure of coercion which is to be taken in case of legally wrong conduct (Kelsen, 2003, p. 5). The question of the authority of a legal system, whether municipal or international, is largely connected with a question of enforcement. A rule or a system has authority only if it is enforceable or nor-

mally will be enforced. Otherwise, it has, or may have, comparatively little authority, or if it nevertheless does have it, such authority must derive from other sources (Fitzmaurice, 1956, p. 1).

Two points should be taken into consideration when talking about enforcement: decision-making on the sovereign equality bases and coercion.

Decisions should be made on the basis of the sovereign equality of states. If we take an example of the Security Council of the United Nations, the veto right of five nations make each decision a matter of political speculations and hinders decision-making especially on the ground of Art. 41 of the UN Charter while these decisions or real threat of decision-making for violators, could lead to effective prevention of breach of international peace. Such mechanisms as veto decrease the effectivity of the public international law. It is fully understandable, that this was a product of consensus between big powers after World War II, but it is clear from today's perspective that a new paradigm should take a lead in order to reach goals set by the Charter, i.e., by the international community.

The public international law and domestic law as legal orders feature differences as well as similarities in many directions. What makes national law work? There have always been individuals, who obey the legal order as a result of their values, beliefs and trust. It was the case throughout the history of civilized mankind. And here arises a logical question: whether the legal order is carried through only due to beliefs and values of such human beings. The answer is definitely negative. There is no effective national legal order without consequences for unlawful acts, if necessary, including the use of legitimate force. The same model is to apply on the international law, notwithstanding the differences regarding the norm creation process. The public international law can never reach a degree of understanding of all countries concerning the same ideal values. If countries do not fear sanctions, i.e., legal and factual consequences, not "comfortable" for different state players, there will not be any effectivity of the public international law. It will stay as an old dog without teeth which cannot even bark. Effective sanctions, unified under one legal umbrella, can make the public international law really work, as it does in domestic systems.

Conspicuous features of the world social process today include the increasing unity of demand among most of the peoples of the world for achievement in the international arena of public order, in its widest as well as in its narrowest sense, and the increasing awareness that efficient world institutions for the optimum creation and distribution of values depend upon the securing of minimum order. Subjecting the processes of coercion and violence among nation-states to effective community controls is thus the most fundamental contemporary problem for all who seek a world public order honoring, in action as in rhetoric, human freedom (McDoughal & Feliciano, 1959, p. 1058).

Peaceful settlement of disputes has no alternative. It is an inevitable means of what all parties should follow. But what happens if a state does not obey this principle and breaches international peace and commits an act of aggression or other violation of international law?

The maintenance of public order, when it is conceived in its minimal sense as community control and prevention of private violence, is commonly and appropriately regarded as the first indispensable function of any system of law. The securing of a public order, understood in a broader sense, as embracing the totality of a community's legally protected goal values and implementing institutions, which seek, beyond an effective community monopolization of force, the richest production and widest sharing of all values, is today also commonly pro-

jected as appropriate aspiration by most mature territorial polities. Effective prevention and repression of private violence are necessary prerequisites to establishing appropriate institutions for the most rewarding pursuit of other values. Conversely, a full opportunity to pursue individual and community values through peaceful procedures, by lessening predispositions to coercion and violence, may be expected to further the continued maintenance of minimal order (McDoughal & Feliciano, 1959, p. 1058).

This argument could also be plausible for public international law, which faces a wide variety of means of international disputes settlement and enforcement mechanisms. A detailed definition of all means is not our purpose, rather underlying two of them, which can define functionality and raise effectivity of public international law: physical coercion and International Court.

One of the issues that has given rise to the most significant skepticism as to effectiveness of the prohibition of the use of force is the question whether breach of the law on the use of force is cost-free, and whether states may break the law without impunity (Gray, 2008, p. 27). If state A uses unlawful force against state B, the victim state is too weak to use self-defense mechanism and as a result, the whole world sees humanitarian catastrophe in state B; at the same time, the Security Council is not able to overwhelm the veto right of one of its members. Even if post factum ad hoc International Criminal Tribunal will be established or the case goes to ICC and all offenders will be driven to criminal responsibility, the damage (especially lives and dignity of humans) will not be restored. This situation shows the degree of ineffectiveness of the current public international law norms regarding the use of force and human rights. In this situation, when all peaceful means are exhausted and the violator states use unlawful force against another state, and in addition violate international humanitarian law norms, the only effective measure can be using coercive mechanisms by international community. Otherwise, innocent people will suffer.

One of the major reasons why NATO is functional is Art. 5 of its founding Treaty. Because states should fear a high "cost" for breaching peace, it guarantees safety for all the NATO members. And NATO has used Art.5 in only several cases in almost 70 years.

Certainly, it should not be understood in a way that all disputes should be solved by coercive means. On the contrary, our approach serves to decrease the use of force and physical coercion through ensuring the possibility of the use of coercion as a preventive mechanism, as it is defined regarding NATO.

The International Court should have jurisdiction regarding disputes between subjects. It is the most effective way to solve problems if the Constitutive Act grants such jurisdiction for all relevant cases and states follow decisions. In the case of non-compliance of the latter, the real enforcement mechanisms should be present.

4.4. HOW CAN THE PARADIGM CHANGE HAPPEN?

The increase of effectivity of public international law can come true if a country or a group of countries takes "leadership" towards the initiative of paradigm change. This will require substantial effort from their side. It is not unrealistic, especially after recent developments regarding aggression against Ukraine and the failure of modern international system, when the ghost of war came back to Europe again in the 21st century and the huge challenge showed itself once again in reality of the modern world. The "leader" state or a group of states can

work on drafting a new Constitutive Act in parallel with increasing awareness and motivation of other states to join such kind of new order.

5. CONCLUSIONS

It is clear that the current public international law cannot solve all problems of relation between subjects of international law at the moment, and if we want to stay realistic, neither can it prevent outbreaks of potential conflicts. But the aspiration towards ideal international order is the basis for future solutions to reach concrete results step-by-step in preventing conflicts, ensuring peace, prosperity and human rights protection for each individual. This can be reached only through the paradigm change. If the status quo of international legal order, notwithstanding the fact that almost all international norms are followed, cannot prevent suffering of children, women and others in need, which is an unfortunate fact, the international community cannot be satisfied. The fulfillment of even the majority of international norms even by the majority of international actors does not help those who suffer because of the violation by few international actors. We need a new paradigm to make a better world for tomorrow.

As the research of the Article has shown, the challenge of modern public international law regarding its effectivity is based on motivation of states. The states either choose or pick norms which they want to obey or do not fulfill its already accepted obligations. It is very tightly connected with politics as well as the coordination character of public international order and lack of enforceable sanctions. In order to achieve real results in regard to values declared in the United Nations Charter ensuring international peace and human rights protection, the international community needs a unified system of public international law based on Constitutive Act defining all spheres under one umbrella of principles and system, as well as legitimate authority with enforceable mechanisms. States parties should fear for "costs" of violations; otherwise this international public order cannot be functional and effective. This system is unimaginable without states consent, which needs motivation of states parties. At the same time, a state or a group of states should undertake steps at the international level to work on a new concept considering the mentioned criteria. They need to elaborate on a draft Constitutive Act and work with other members of the international community in order to raise awareness and gain supporters. It might take decades and many efforts, but it is a worthy effort for the sake of more effective public international law.

What gives hope is that peoples of the world, and therefore states representing their own nations, have natural aspiration towards development. But it requires time. One century ago, an effective and strong European Unity could be hardly imaginable. But the European nations found common interests, notwithstanding the fact they were fighting each other for centuries. This can come true in the case of public international law for ensuring the well-being of each individual of the world.

REFERENCES

Aust, A. (2005). *Handbook of International Law*. Cambridge University Press.

Besson, S. (2009). The Authority in International Law – Lifting the State Veil, *Sydney Law Review*, *31*, 343–380.

Burchill, R. (2001). Developing International Law of Democracy. *Modern Law Review*, *64*, 123–134. https://www.jstor.org/stable/1097142

d'Aspermont, J. (2014). Effectivity in International Law: Self-Empowerment Against Epistemological Claustrophobia. *American Society of International Law*, *108*, 165–168. https://doi.org/10.1017/S2398772300001963

d'Aspermont, J. (2015). The Collective Security System and the Enforcement of International Law: Or the Catharsis of Austinian Imperatival Complex of International Lawyers. In M. Weiler (Ed.), *The Oxford Handbook of the Use of Force in International Law* (pp. 129––156). Oxford University Press.

Dinstein, Y. (1966). Par in Parem Non Habet Imperium. *Israel Law Review*, *1*(3), 407–420. https://doi.org/10.1017/S0021223700013893

Chayes, A., & Handler Chayes, A. (1995). *The New Sovereignty Compliance with International Regulatory Agreements*. Harvard University Press.

Council of Europe Parliamentary Assembly. (2021). Implementation of Judgements of the European Court of Human Rights. Resolution 2358.

Egede, E., & Sutch, P. (2013). *The Politics of International Law and International Justice*. Edinburgh University Press.

Finnemore, M. (1996). *National Interests in International Society*. Cornell University Press.

Fitzmaurice, G. (1956). The Foundations of the Authority of International Law and the Problem of Enforcement. *Modern Law Review*, *19*(1), 1–13. https://doi.org/10.1111/j.1468-2230.1956.tb00340.x

Frank, T.M. (1995). *Fairness of International Institutions*. Clarendon Press.

Goldsmith, J.L., & Posner, E.A. (2005). *The Limits of International Law*. Oxford University Press.

Giddens, A. (2000). *Runaway World: How Globalization Reshaping Our Lives*. Routledge.

Gray, C.D. (2008). *International Law and Use of Force*. Oxford University Press.

Guzman, A.T. (2008). *How International Law Works: A Rational Choice Theory*. Oxford University Press.

Held, D., McGrew, E., Goldblatt, D., & Perraton, J. (1999). *Global Transformations: Politics, Economics and Global Culture*. Polity Press.

Hirsch, M. (2004). Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives. In E. Benvenisti, & M. Hirsch (Eds.), *Impact of International Law on International Cooperation: Theoretical Perspectives* (pp. 166–193). Cambridge University Press.

Hurrell, A. (1993). International Society and the Study of Regimes: A Reflective Approach. In V. Rittberger, & P. Mayer (Eds.), *Regime Theory and International Relations*. Clarendon Press.

International Law Commission. (2006). Conclusion of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of the International Law. UN Doc A/61/10.

Jellinek, G. (1914). *Allgemeine Staatslehre*. 3. Aufl. O. Häring.

Kantorowicz-Reznichenko, E. (2020). The Enforcement of International Law. In M.O. Hosli, & J. Selleslaghs (Eds.), *The Changing Global Order: Challenges and Prospects* (pp. 361––384). Springer.

Katselli Proukaki, E. (2010). *The Problem of Enforcement of Public International Law: Countermeasures, Non-Injured States and the Idea of International Community*. Routledge.

Kelsen, H. (2003). *The Principles of International Law.* The Lawbook Exchange.

Kläger, R. (2011). Fair and Equitable Treatment in International Investment Law. Cambridge University Press.

Koh, H.H. (1997). Why Do Nations Obey International Law? *Yale Law Journal*, *106*(8), 2599–2660. https://doi.org/10.2307/797228

Koskenniemi, M. (1990). The Politics of International Law. *European Journal of International Law*, *1*(4), 4–32. https://doi.org/10.1093/oxfordjournals.ejil.a035781

Koskenniemi M. (2007). The Fate of Public International Law: Between Techniques and Politics. *Modern Law Review*, *70*(1), 1–30. https://doi.org/10.1111/j.1468-2230.2006.00624.x

Kunz, J.L. (1950). Sanctions in International Law. *American Journal of International Law*, *54* (2), 324–348. https://doi.org/10.2307/2195251

McDoughal, M.S., & Feliciano, F.P. (1959). Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective. *Yale Law Journal*, *68*(6), 1057––1166. http://hdl.handle.net/20.500.13051/14490

Noortmann, M. (2005). *Enforcing International Law: From Self-Help to Self-Contained Regimes*. Routledge.

Nussbaum, A. (1954). *A Concise History of the Law of Nations*. MacMillan.

O'Connell, M.E. (2008). *The Power and Purpose of International Law: Insights of Theory and Practice of Enforcement*. Oxford University Press.

Oppenheim, L. (1955). *International Law: A Treatise. Vol. 1, Peace*. Longmans, Green & Co.

Ratz, J. (1986). *The Morality of Freedom*. Clarendon Press.

Roughan, M. (2016). Mind the Gaps: Authority and Legality in International Law. *European Journal of International Law*, *27*, 329–352. https://doi.org/10.1093/ejil/chw021

Schweisfurth, T. (2006). *Völkerrecht*. Mohr Siebeck.

Shaw, M.N. (2014). *International Law. Vol. 1*. Cambridge University Press.

Slaughter, A.M., & Burke-White, W.W. (2006). The Future of International Law is Domestic (or the European Way of Law). *Harvard International Law Journal*, *47*(2), 327–352. https://doi.org/10.1093/acprof:oso/9780199231942.001.0001

Taki, H. (2021). Effectiveness. In R. Wolfrum (Ed.), Max Planck Encyclopedia of Public International Law. Max Planc Institute for Comparative Public Law and International Law. http://www.opil.ouplaw.com

Thiele, C. (2008). Fragmentierung des Völkerrechts als Herausforderung fuer die Staatengemeinschaft. *Archiv des Völkerrechts*, *46*(1), 1–41.

Verdross, A., & Simma, B. (2010). *Universelles Völkerrecht: Theorie und Praxis*. Dunckler&Hublot.

Vos, J.A. (2013). *The Structure of Public International Law*. Asser Press.

Von Arnauld, A. (2014). *Völkerrecht*. CF Müller.

Von Bogdandy, A. (2008). General Principles of International Public Authority: Sketching a research Field. *German Law Journal*, *9*(11), 1909–1939. https://doi.org/10.1017/S2071832200000699

Von Bogdandy, A., Goldman, M., & Venzke, I. (2017). From Public International to International Public Law: Translating World Public Opinion into International Public Authority. *European Journal of International Law*, *28*(1), 115–144. https://doi.org/10.1093/ejil/chx002

Wheatley, S. (2011). A Democratic Rule of International Law. *European Journal of International Law*, *22*(2), 525–548. https://doi.org/10.1093/ejil/chr022

Whyte, J.D. (1987). Legality and Legitimacy: The Problem of Judicial Review of Legislation. *Qeen's Law Journal*, *12*(1), 1–20.

Yasuaki, O. (2003). International Law in and with International Politics: The Functions of International Law in International Politics. *European Journal of International Law*, *14*(1), 105–131. http://www.ejil.org/pdfs/14/1/402.pdf