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THE METHOD OF NEW POSITIVISM AS ELABORATED BY LUDWIK EHRLICH

Abstract:
This article is an attempt to identify the essence of new positivism, described by Ludwik Ehrlich as a method of interpretation of international law. The evolution of his views on international law is examined with respect to the place of this method from the beginning of 1920s until his retirement in 1961. The article expounds on both the theoretical and methodological aspects of new positivism, according to which judicial decisions should be taken into account in addition to international treaties and customs for the determination of international law. The question of the obligatory force of international law is discussed as being related to the principle of good faith, which is at the core of Ehrlich's views on international law. The article offers suggestions on how the method of new positivism might be used and what tasks it can fulfil today. It also makes an attempt to critically analyse Ehrlich's method and to characterize it both in general and in the context of the theory of international law.

Keywords: Ludwik Ehrlich, Polish science of international law, principle of good faith, new positivism, case law, international responsibility

INTRODUCTION

Despite the fact that the science of international law emerged almost a half-millennium ago, so far there are still a lot of discussions among scholars about whether international law is "law" in the narrow sense and what is the most effective way of understanding it. The theoretical significance of these issues is apparent, and one cannot deny that their consideration also affects the manner in which relations between states are regulated in general. On one hand, the sharp contradictions between naturalists and positivists in the past do not seem so relevant from the standpoint of the present state of affairs in international law. Nevertheless legal positivism still remains a rather

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meaningful concept, which is given a particular meaning and role by each scholar. Actually, this article is devoted to the method of "new positivism" elaborated by Ludwik Ehrlich, whose personality and achievements most probably do not require introduction to the readers of the present journal devoted to international law. Although the name of his method might seem at first glance to constitute a variation of legal positivism, after thoroughly scrutinizing its theoretical aspects such a presumption might be put in doubt.

Several important issues for the science of international law are considered in the present study. Their relevance is determined in large measure by the need for the development of the system of international law as a body of norms, striving to ensure order and security in international relations and relying on existing ideals. At the same time, the international legal doctrine serves as an important – if not the most important – basis for recognizing such ideals. What's more, it facilitates bringing them into effect. In fact, both in the past as well as today many writers have tried to discover and disclose the nature of international law in general, leading to making a distinction between the two classic approaches mentioned above as early as in the 17th century. These approaches have gone through many different modifications and interpretations since then. There are also plenty of recent works on the methodology of international law which have deepened its theoretical foundations taking in account the present situation.[1] In general positivism, which is one of the theoretical foundations, encompasses a number of different theories that understand law in the way in which it exists, while naturalism encompasses a search for the ideal way. From the methodological point of view, a positivist approach relies on two key elements: dogmatism ("the law in force is undisputedly taken for granted"); and formalism ("legal phenomena are limited to the texts of sources of law").[2] The research of Jianming Shen even contained an explanation of so-called 'neo-positivism' as a contemporary doctrine, although it differed slightly from the 'new positivism' which is the focus of this article.[3] At the same time, a number of features of Ehrlich's method, as well as his approach to international law in general, have not been described before in the legal science, and their appraisal against the background of the 20th century international law scholarship has not been appropriately formulated. In particular, the scope of the research undertaken in this article also deals with the issue of court decisions as sources of international law. Although the jurisprudence of the International Court of Justice (ICJ) cannot, by any means, be seen as a primary source according to Art. 38 of its Statute, there are fewer and fewer doubts about the fact that the ICJ does affect the future of interstate relations. It is worth mentioning

[1] *E.g.* A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, Oxford University Press, Oxford: 2017; J. D'Aspremont, J. Kammerhofer (eds.), *International Legal Positivism in a Post-Modern World*, Cambridge University Press, Cambridge: 2014.

[2] O. Merezhko, *Введение в философию международного права. Гносеология международного права* [Introduction to the philosophy of international law. Gnoseology of international law], Юстиниан, Киев: 2002, p. 21.

[3] J. Shen, *The Basis of International Law: Why Nations Observe*, 17 Penn State International Law Review 287 (1999), pp. 330-333.

that scholars representing the various existing groups of legal systems have contributed to this discussion in recent years.[4]

Ehrlich's way of legal thinking was very specific. After being educated in the traditions of the civil law system he moved to Oxford, collaborating there with Paul Vinogradoff, whose concept of law had been expanded by the common law usage of legal precedents.[5] Afterwards, Ehrlich worked at the University of California (Berkeley), but his works there were dedicated more to political questions than legal ones. Thus, his establishment as a scholar during the 1913-1920 period was determined by common law concepts. Moreover, he was not just a brilliant theoretician, publishing one of the best textbooks on international law in Eastern Europe, but also a distinguished practitioner, with experience in carrying out the duties of a judge in the proceedings of the Permanent Court of Justice.

The personality of Ehrlich is gaining more and more interest among not only contemporary Polish but also contemporary Ukrainian scholars. Adam Redzik conducted a study in order to determine the circumstances in which the Faculty of Law at the Jan Kazimierz University developed throughout the second quarter of the 20th century.[6] Moreover, he presented the idea of diplomatic studies, initiated by Ehrlich in 1930.[7] Based on LRSA materials,[8] he put much effort into making both some biographical data as well as the scientific contributions of Ehrlich available to the public. In addition, Redzik was the author of the first biographical note on Ehrlich in the Ukrainian language.[9] Tomasz Pugacewicz, another modern Polish scholar, has been deeply engaged in exploring Ehrlich's heritage. He showed Ehrlich's life path and achievements in more detail, assessing his remarkable contribution to the development of both the Polish and European science of international relations.[10] Owing to unfortunate historical circum-

[4] *See* A. Von Bogdandy, I. Venzke (eds.), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance*, Springer, Heidelberg: 2012; A. Von Bogdandy, I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford University Press, Oxford: 2014; P. Webb, *International Judicial Integration and Fragmentation*, Oxford University Press, Oxford: 2013; K. Alter, L. Helfer, M. Madsen (eds.), *International Court Authority*, Oxford University Press, Oxford: 2018.

[5] *See* P. Vinogradoff, *Common Sense in Law*, Henry Holt and Company, New York: 1914.

[6] *See generally* A. Redzik, *Wydział Prawa Uniwersytetu Lwowskiego w latach 1939–*1946 [The Faculty of Law of the Lviv University in 1939-1946], Towarzystwo Naukowe KUL, Lublin: 2016.

[7] A. Redzik, *Lwowska szkoła dyplomatyczna. Zarys historii Studium Dyplomatycznego przy Wydziale Prawa Uniwersytetu Jana Kazimierza we Lwowie (1930–1939)* [Diplomatic school of Lviv. The outline of the history of the Diplomatic Studies at the Faculty of Law of Jan Kazimierz University in Lviv], 5 Polski Przegląd Dyplomatyczny 121 (2006).

[8] LRSA stands for the Lviv Region State Archive, where one can find archival materials related to Ehrlich's study and work at Jan Kazimierz University.

[9] A. Redzik, *Ерліх (Ehrlich) Людвік* [Ehrlich Ludwik], in: O. Vakarchuk et al. (eds.), *Encyclopedia. Львівський національний університет імені Івана Франка: в 2 т. Т. 1.: А – К* [Encyclopedia. Lviv National Ivan Franko University, in two volumes. Vol. 1: A – K], ЛНУ імені Івана Франка, Львів: 2011, p. 482.

[10] T. Pugacewicz, *Dorobek badawczy i organizacyjny Ludwika Ehrlicha na tle rozwoju nauki o stosunkach międzynarodowych w Polsce do 1950 roku* [Scientific heritage and organizational achievements of Ludwik Ehrlich against the background of the development of the science of international relations in Poland after

stances, the Polish science of international law still has many blank spots concerning the first half of the 20th century. But one recent study in the form of a monograph has shed some light on the past of international law within the confines of the University of Lviv.[11] Ihor Zeman is one of the few Ukrainian scholars who works at this university and draws attention to the history of the science of international law therein. He dedicated a part of his monograph to the formulation of Ehrlich's school of international law (as he called it). The research interests of this school include the theory of international law, international justice, the law of international security, the subjects of international law, human rights protection, the law of international treaties, and air law.[12] Moreover, the personality of Ehrlich was mentioned in the articles on the history of the Polish science of international law by such Ukrainian writers as Oleksandr Merezhko,[13] Myroslav Kurtynets,[14] and Volodymyr Lysyk.[15] Some of his theoretical concepts have also been described by the author of the present article.[16] It should be added that the number of works related to the heritage of Ehrlich will increase in the near future due

1950], 1 Przeszłość – Teraźniejszość – Przyszłość. Problemy badawcze młodych politologów 133 (2010); T. Pugacewicz, *Ludwik Ehrlich (1889-1968): prekursor nauki o stosunkach międzynarodowych w Polsce* [Ludwik Ehrlich (1889-1968) as a precursor of the science of international relations in Poland], 3 Politeja: Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego 173 (2011); T. Pugacewicz, *Nauka o stosunkach międzynarodowych w koncepcji Ludwika Ehrlicha* [The science of international relations in the concept of Ludwik Ehrlich], 54 Stosunki Międzynarodowe 231 (2018).

[11] I. Zeman, *Наука міжнародного права у Львівському університеті* [The science of international law in the University of Lviv], *ЛНУ імені Івана Франка*, Львів: 2015.

[12] *Ibidem,* pp. 166-204.

[13] A. Merezhko, *Польская наука международного права: история и современность* [The Polish science of international law: its history and the present state], 3 *Альманах международного права* 111 (2011).

[14] M. Kurtynets. *Зародження сучасної науки міжнародного права у Польщі в міжвоєнний період* [The emergence of the modern Polish science of international law in the interwar period], 3 Форум права 234 (2010).

[15] V. Lysyk, I. Zeman. Развитие науки международного права в Львовском университете [The development of the science of international law in the University of Lviv], 3 Альманах международного права 78 (2011).

[16] A. Hachkevych, *Теорія природного договору як підстава обов'язкової сили норм міжнародного права (на основі поглядів Людвіка Ейрліха)* [The theory of social contract as the basic obligatory force of international law norms (based on the views of Ludwik Ehrlich], 3 *Право України* 120 (2009); A. Hachkevych, *Теорія «протилежних течій» у міжнародному праві* [The theory of fundamental differences in international law], 38 *Актуальні проблеми політики* 392 (2009); A. Hachkevych, *Основні права та обов'язки держав: концепція Л. Ейрліха* [Fundamental rights and the duties of states in the concept of L. Ehrlich], 2 Проблеми міжнародних відносин 54 (2011); A. Hachkevych, *К вопросу о правосубъектности вольного города Гданьска (на примере трудов Л. Эрлиха)* [The Free City of Gdansk: the question of legal personality in the works of L. Ehrlich], 18 Humanities and Social Sciences 41 (2013); A. Hachkevych, *Ludwika Ehrlicha koncepcja podmiotowości prawnomiędzynarodowej (wybrane aspekty)* [Selected issues on the concept of Ludwik Ehrlich of international legal personality], 5 Prawo i Polityka 138 (2014); A. Hachkevych, *Життєвий шлях і наукова спадщина Людвіка Ерліха* [The life and scientific heritage of Ludwik Ehrlich], 1 *Порівняльно-правові дослідження* 74 (2014); A. Hachkevych, *Ludwik Ehrlich. Krakow Period of His Life (1940-1968),* 22 Humanities and Social Sciences 85 (2017).

to the outcomes of scientific events honouring his legacy.[17] This in no way seeks to diminish the value of the studies associated with the name of Ehrlich conducted in the second half of the 20th century.

1. THE FOUNDATIONS FOR THE DEVELOPMENT OF NEW POSITIVISM IN EHRLICH'S EARLY STUDIES

The formation of Ehrlich as a scholar was shaped by the traditions of both civil law and common law academic institutes in the process of his studies in Lviv (1907-1912), Halle (1912-1913), Berlin (1913) and Oxford (1913-1915). A list of the subjects he was lectured on at Jan Kazimierz University includes the most important branches of law and some rather theoretical disciplines related to the science of law. During academic courses students were encouraged to learn textbooks by heart and to obtain knowledge of the provisions of legal acts, whereas hardly any attention was paid to court decisions. Considering his development in political sciences and administrative law following his graduation, it would seem unexpected that Ehrlich became an international lawyer. In this regard one fact is worth pointing out. For half a year in 1912 he edited a monthly students' journal called "Prawnik", where the article "Żywe prawo ludów Bukowiny" – written by another famous Ehrlich (Eugen) – was published in a Polish translation.[18] In Germany (1912-1913) he attended courses by the renowned German scholars Edgar Loening and Gerhard Anschutz, who specialized in administrative and constitutional law, respectively. There was an interesting interconnection between them, because Loening was a mentor of Anschutz and a student of Johann Kaspar Bluntschli, an internationally-recognized Swiss scholar in the field of international law.[19] Moreover, the primary fields of Ehrlich's research covered issues of academic management along with the structure of the University of Oxford,[20] the constitution of the Halych elderships[21],

[17] By virtue of persistent efforts on the part of the Institute of International Relations at the University of Warsaw, The Polish Institute of International Affairs, and the Faculty of International Relations at the University of Lviv, a conference "The force of law instead of the law of force. Ehrlich's school of the science of international relations and international law" ("Siła prawa zamiast prawa siły. Ehrlichowska szkoła nauki o stosunkach międzynarodowych oraz prawa międzynarodowego") was held at Lviv and Sanok from 17-19 May 2018. In addition, Ehrlich's contributions to the science of international law have been discussed at several conferences since the beginning of the 21st century, including one organized by the Leipzig Centre for the History and Culture of East-Central Europe and the Ivan Franko National University of Lviv (26-29 August 2015).

[18] E. Ehrlich, *Żywe prawo ludów Bukowiny* [The living law of Bukovina's people], 5 Prawnik. Miesięcznik wydawany przez Bibliotekę słuchaczów prawa we Lwowie 155 (1912); E. Ehrlich, *Żywe prawo ludów Bukowiny (Dokończenie)* [The living law of Bukovina's people (Conclusion)], 6 Prawnik. Miesięcznik wydawany przez Bibliotekę słuchaczów prawa we Lwowie 191 (1912).

[19] M. Stolleis, *Public Law in Germany 1800-1914*, Berghahn Books, New York: 2001, pp. 275, 332.

[20] L. Ehrlich, *Zarys organizacyi uniwersytetu w Oxfordzie* [Outline of the organizational structure of Oxford University], II Prawnik. Miesięcznik wydawany przez Bibliotekę słuchaczów prawa we Lwowie 463 (1914).

[21] L. Ehrlich, *Starostwa w Halickiem w stosunku do starostwa Lwowskiego w wiekach średnich (1390-1501)* [Relationships between the Halych Elderships and the Lviv Eldership in the Middle Ages (1390-1501)], Towarzystwo dla Popierania Nauki Polskiej, Lwów: 1914.

Polish cultural identity,[22] the history of the Slavic people,[23] etc. In the course of the First World War he became interested in its impact on political science[24] and the effect of British wartime legislation.[25] His first scientific paper generalizing the consideration of case law was presented in collaboration with Paul Vinogradoff (in two volumes).[26] They summarized the jurisprudence of the period of the reign of Edward II and provided the translation of judicial decisions from Latin or French into English. Ehrlich also made great efforts to contribute to the shaping of the powers of the new Polish state by calibrating the principles of distribution of power and separation of powers to the then-present day circumstances.[27] At the beginning of the 1920s he supported the idea of applying the theory of precedents to Polish public law.[28] Ehrlich stated that the principle of uniformity, by which he most probably meant recognition of the law-making function of the judge, was opposite to the principle according to which "the judge was nothing but a blind machine for automatically announcing the consequences of an actual situation as determined by law."[29]

His earliest views on international law emerged under circumstances which were favourable toward increasing its role both in Poland and the rest of the world. Firstly, the regaining of Polish independence posed the need to seek legal ways to protect its national interests on the international arena, using all available means. Secondly, consequences of the First World War highlighted the need for a special regime – one established by the international society – to ensure international justice and to avoid further wars. At that time Ehrlich was not sufficiently acquainted with international law as a science, as his previous scope of research had encompassed very different issues. At the same time, he was given a great impetus toward international law by the experience of his teachers Oswald Balzer and Stanislaw Starzynski, along with the international recognition of his close relative Shymon Rundstein (who was deemed to be one of the most outstanding lawyers in Europe and regarded as a comprehensively educated

[22] L. Ehrlich, *Poland, Prussia and Culture*, Oxford University Press, Oxford: 1914; L. Ehrlich, *Modern Poland*, The University of Berkeley, Berkeley: 1917.

[23] L. Ehrlich, *The Slavs, Past and Present,* 19 University of California Chronicle 418 (1917).

[24] L. Ehrlich, *The War and Political Theory,* 6 California Law Review 418 (1918); L. Ehrlich, *The War and Political Theory*, 7 California Law Review 33 (1918).

[25] L. Ehrlich, *British Emergency Legislation during the Present War,* 5 California Law Review 433 (1917); L. Ehrlich, *The War and the English Constitution*, 19 University of California Chronicle 250 (1917).

[26] P. Vinogradoff, L. Ehrlich (eds.), *Year Books of Edward II: Volume XIII. 6 Edward II. A.D. 1312-1313,* Quaritch, London: 1918; P. Vinogradoff, L. Ehrlich (eds.), *Year Books of Edward II: Volume XIV. Part I. 6 Edward II. A.D. 1312-1313,* Quaritch, London: 1921.

[27] L. Ehrlich, *Podział władz i rozdział władzy. Uwagi z okazyi obrad nad Konstytucyą* [The separation of powers and the distribution of power. Some notes on the discussions of the Constitution], 1 Przegląd Prawa i Administracji 39 (1921).

[28] L. Ehrlich, *Jednostajność w orzecznictwie Najwyższego Trybunału Administracyjnego. Uwagi z powodu nowego regulaminu NTA* [Uniformity in the jurisprudence of the Highest Administrative Tribunal of Poland. Some notes on the Rules of HAT], 1 Przegląd Prawa i Administracji 253 (1923).

[29] *Ibidem,* p. 262.

legist[30]). Shortly after Ehrlich started work at Jan Kazimierz University, he published an article in one of the most authoritative local journals related to the current situation in the evolution of international law.[31] Attaching particular importance to the judicial practice in international law, he took the provisions of Art. 38 of the Statute of the Permanent Court of International Justice as a basis for implementation the practices of the Great Britain, United States, and France concerning the legal recognition of national court decisions as generally binding in the system of international law. Additionally, he found a meaningful provision in the 1921 Treaty of Arbitration and Conciliation between the Swiss Confederation and German Reich. He posited that when legal gaps were observed, the tribunal was obliged to resolve a dispute applying legal principles which were expected to be considered as norms of international law, as derived from both doctrine and judicial practice.[32]

Ehrlich claimed that:

> The law of nations develops in a normal way not only through the codification of abstract ideas or principles, but also through the derivation of legal norms from events and relations.[33]

He warned that a lawyer who believed in the supreme power of legislation and rejected the necessity to apply legal precedents should change his perceptions; otherwise there was a threat of being excluded from the list of experts in international law.[34] We can assume that Ehrlich took into account the case-based approach to international law that prevailed in the legal science of the United States and the United Kingdom, in this way trying to undermine the belief of many continental lawyers that the principle of *stare decisis* was not binding.

2. THEORETICAL ASPECTS OF EHRLICH'S NEW POSITIVISM

It is important to note that the essence of a *method* of international law is connected with the notion of a *theory* of international law, and acquires radically different meanings in the various scholarship sources concerning international law. Steven R. Ratner and Anne-Marie Slaughter explained this interconnection as follows:

> The link between a legal theory and a legal method is thus one between the abstract and the applied. By organizing a symposium on method, we seek to provide a greater grasp of the major theories of international law currently shared by scholars, but to view these

[30] K. Kuźmicz, *Immanuel Kant jako inspirator polskiej teorii i filozofii prawa w latach 1918-1950* [Immanuel Kant as an inspirer of the Polish theory and philosophy of law in 1918-1950], Termida 2, Białystok: 2009, pp. 131-140.

[31] L. Ehrlich, *Chwila obecna w ewolucji prawa narodów* [The current moment and the evolution of international law], 1 Przegląd Prawa i Administracji 105 (1924).

[32] *Ibidem,* pp. 110-111.

[33] *Ibidem,* p. 111.

[34] *Ibidem.*

> theories in the most direct way – by seeing how they establish what the law is, where it might be going, what it should be, why it is the way it is, where the scholar and practitioner fit in, how to construct law-based options for the future, and whether it even matters to ask those questions. A method used by a writer on international law may correspond to one theory of international law or to more than one if an author chooses to apply different theories.[35]

For the purposes of this research, a method of international law refers to the manner in which a scholar applies a theory (or theories) addressing actual issues.

Before discussing the essence of Erlich's method, it may be useful to explain the criteria he defined which should be met in order to make a method scientific. He was invited to deliver a lecture about the new positivism in international law at the University of London in 1937. It was printed the next year in Lviv as the first scientific paper on this method[36] (it should be noted however that he had already published two editions of a textbook on international law, wherein he presented his ideas on some relevant issues[37]). He did not describe the requirements which were mandatory to all methods related to research in different areas, including objectivity, comprehensiveness, and scientific validity. Instead he formulated the principal postulates that led to the expediency of application of his new positivism.

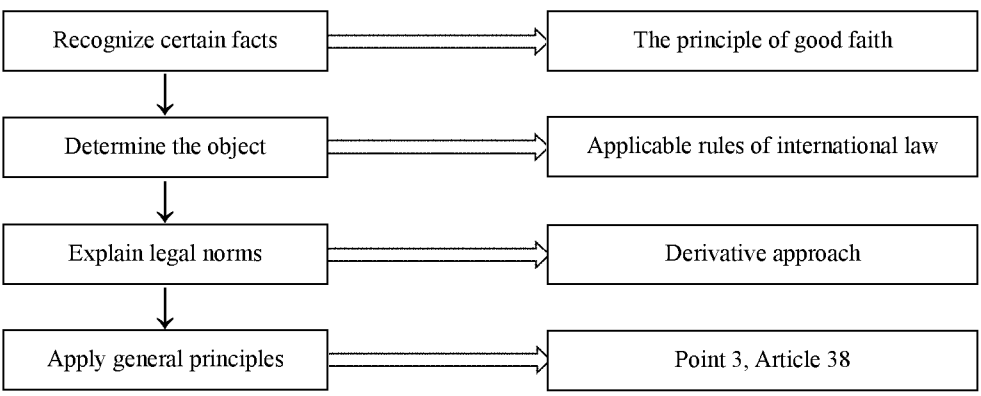

Figure 1: Overview of Ehrlich's principal postulates set out as criteria to apply new positivism

Firstly, he explained the nature of good faith in international law, which was derived from the co-existence of fully sovereign and absolutely independent states:

> Start with certain facts of international relations which are the social background of international law. Such is the fact of the co-existence in the modern world of sovereign

[35] S. Ratner, A.M. Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers,* 93 The American Journal of International Law 291 (1999), pp. 292-293.

[36] L. Ehrlich, *The new positivism in international law,* Institute of Constitutional and International Law John Casimir University, Lwów: 1938.

[37] L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1927. L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1932.

> States and, consequently, the conceptions of the State and of sovereignty. Such is, again, the metaphysical conception of the will of the State. Such is, finally, the conception of good faith which in international law can mean neither more nor less than that each sovereign State is bound in its relations with other States only by its own will, but that by its own will it is fully bound.[38]

Secondly, he identified the object of research interest as "the rules of international law which are applied whether we find them applied in judicial decisions or in other acts of international practice."[39] Thirdly, he used an approach that can be called "derivative", which considered the body of international law to be a logical system, whereby one element (a certain legal norm) is derived from another. Moreover, he stated that:

> The derivation of a rule from some other rule or fundamental principle on which the law is based leads us to the statement of this more fundamental rule which is in itself again a phenomenon to be investigated. We thus arrive at a system which is both inductive because our inferences based on judicial decisions and other precedents, and deductive because we can and indeed must, derive from established principles and rules the consequences to which they lead, although our reasoning is inductive again because we must test the truth of our deductions with the help of precedents.[40]

Such an explanation resembles the positions of scholars representing the "neo-positivist" school, also known as the "Vienna school of jurisprudence".[41] For Hans Kelsen, its founder, law was a kind of hierarchy, whereby the binding force of any norm resulted from the obligatory character of the most important norm (the fulfilment of which is the aim of the whole established system). Kelsen's approach is widely known as normativism.

Finally, Ehrlich insisted on the application of the general principles of law recognized by civilized nations. In his international law textbook he understood general principles as the foundation of legal reasoning, expected to be applied in international law as well as in other systems of law, and he gave examples of some of them: *nemo plus juris in alium transferre potest quam ipse habet; nemo potest commodum capere de injuria sua propria; lex specialis derogat generali.*[42]

The entire method is founded on the key idea of the positivistic approach. According to this idea the will of a state was the reason for any norm to be binding in relations with other states, assuming mutual consent had been reached. Therefore, it seems obvious, that:

> The New Positivism ... recognizes the binding force of the will of states as expressed in treaties, as well as in regulations issued by virtue of authority conferred by treaties.[43]

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[38] Ehrlich, *supra* note 36, p. 12.

[39] *Ibidem.*

[40] *Ibidem,* pp. 12-13.

[41] *See* Shen, *supra* note 3, pp. 330-334.

[42] L. Ehrlich, *Międzynarodowe prawo* [International law], Wydawnictwo Prawnicze, Warszawa: 1958, p. 24.

[43] *Ibidem,* p. 13.

But according to Ehrlich, international treaties were not the only mode by which states could limit their behaviour. He made an unexpected observation that a common law existed in international relations and it could be found in existing documentary evidence of international practice, especially in judicial decisions.[44] What's more, he suggested that that common law was a part of the body of international law that was found by courts and by legal scholars (writers):

In other words the body of international law consists of:

1. Enacted rules (*règles constituées*), i. e. treaties and regulations.
2. Common law (*règles constatées*) as found:
   a) by international courts (primarily the Permanent Court of International Justice, courts of arbitration of high standing, other international courts) as well as certain State courts; the rules are established by precedent, or by the practice (custom) accepted as law;
   b) by writers.[45]

He added that the nature of each rule was very important and it might be explained by usage of the rule mentioned above. Such a statement and approach built bridges between the theory of Ehrlich and the anchor of normativism. A further detailed explanation was provided by Ehrlich at the beginning of 1960s, while preparing an article published in 1962 in a distinguished legal journal.[46] He described three periods in the history of the science of international law: the canonistic period; the period of naturalists and positivists; and the transition period. He pointed out that international law was in the stage of neo-postivism at the (then-)observed moment. This stage began after the adoption of the Convent of the League of Nations and the establishment of its judicial body, which was granted some law-making functions. He turned to the works of Carl Baron Kaltenborn von Stachau,[47] who was not very widely known in the field of international law but had been – according to Erlich – ahead of his times:

> In 1847 Carl von Kaltenborn characterized the sources of international law in a way which was far ahead of actual conditions and anticipated developments which resulted in the formulation of art. 38 of the Statute of the Permanent Court of International Justice.[48]

Moreover, while representing continental law Kaltenborn stated that the permanent application of a particular legal rule by courts led to the establishment of an international custom. Consequently, the assessment of the role of court decisions from the angle of sources of international law also became one of the most controversial methods in Ehrlich's study. One may ask: Were those decisions used as auxiliary sources exclusively

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[44] *Ibidem.*

[45] *Ibidem,* pp. 13-14.

[46] L. Ehrlich, *The development of international law as a science,* 105 Académie de droit international public. Recueil des cours 173 (1962).

[47] *See* M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960,* Oxford University Press, Oxford: 2001, pp. 24-27.

[48] Ehrlich, *supra* note 46, pp. 246-247.

for the establishment of customary norms as formally provided by Art. 38? Or did they really lay down rules mandatory for states to be used in the future, and, thus, generated kinds of precedents? These issues are considered below.

On one hand, Ehrlich did not fully agree that the functions of a judge were limited to the confirmation of the existence of a customary norm. Courts were capable of going beyond the recognition of international customs, evidenced by current practices.[49] He expressed doubt whether the suggestion of Kaltenborn ("judicial decisions consistent as to a rule of law may ultimately lead to giving that rule the force of customary law"[50]) was still proper and comprehensive following the adoption of the Statute of the Permanent Court of International Justice. Moreover, Art. 38 became the legal grounds for Ehrlich's point of view that court decisions were considered somehow equal to legal precedents:

> The Court may rely on a previous decision as a basis for the application of a rule of law found applicable in that previous decision. This opens the door for the application in international law of the principle of stare decisis as now prevailing in some countries, and in particular in Anglo-American law ... Whereas in the nineteenth century and up to the organization of the Permanent Court of International Justice textbooks laid down what their authors or the latters precursors thought the law to be, and mentions of arbitral decisions were made comparatively infrequently, the two Courts have applied certain principles which later have been followed in practice but for which it would have been most difficult to obtain the assent of all or most of the states in an international conference ... It may be claimed that international law to-day, in addition to conventions binding on smaller or larger numbers of countries, and to general practice accepted as law and evidenced, for instance, by consistent decisions of national courts of various countries, consists of rules which are applied as international law by the International Court of Justice.[51]

On the other hand, by recognizing the subsidiary character of court decisions he denied the mandatory effect of a rule established and applied in the course of a legal proceeding. A court, in his opinion, was entitled to refuse the application of relevant norms in the future if it came to a conclusion that their establishment was no longer grounded or they were not obligatory.[52] In addition, in his textbook Ehrlich explained that both the decisions of international tribunals and the teachings of scholars could not constitute indisputable evidence that a state had expressed its consent – of a mandatory nature – to a particular norm, although under certain circumstances they could be recognized as assertions of the presumed approval of a state.[53]

The theoretical background of Ehrlich's new positivism leads us to the foundations of the American legal realism that emerged after the First World War, a school considered

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[49] *Ibidem*, p. 255.

[50] *Ibidem.*

[51] *Ibidem*, pp. 255-256.

[52] L. Ehrlich, *Suwerenność a morze w prawie międzynarodowym* [The sovereignty and the sea in international law], Wydawnictwo Prawnicze, Warszawa: 1961, p. 73.

[53] Ehrlich, *supra* note 42, p. 27.

as being contrary to the traditional positivistic approach. The realists did not perceive law as consistent and rationally defined. They thought that the circumstances of a case were more important for a judge than the provisions of legal acts, which was the reason why the study of law should be based on cases. The essence of American legal realism seems to be inapplicable to the way of thinking of European lawyers. Nevertheless, it still draws attention from scholars,[54] even in the field of international law.[55] Karl Llewellyn, who was widely considered as one of the founders of American legal realist school, paid his respect to Eugen Ehrlich, whose his ideas he considered as progressive and valuable.[56] Realists did not absolutely support either the positivist or naturalist approaches. Instead, their legal ideals might be regarded within a "social legal theory", which explained law as a phenomenon of practical application. Nowadays, realism is even considered as a third pillar of jurisprudence, alongside natural law and legal positivism. This is has been described by B. Tamanaha as follows:

> This third theoretical stream constitutes a long-standing and coherent alternative to natural law and legal positivism and the theoretical discussion of law will benefit from recognizing it as such. Recognition of this third branch of jurisprudence will create a framework that facilitates the incorporation of insights currently at the margins of discussions of the nature of law, including insights about legal institutions, legal functions, legal efficacy, legal change, legal practices, legal development, legal pluralism, legal culture, and more. This jurisprudential tradition, labeled "social legal theory" for reasons that will become evident, is characterized by a consummately social view of the nature of law.[57]

3. A PRACTICAL APPLICATION OF NEW POSITIVISM IN THE WORKS OF EHRLICH

Ehrlich applied the method of new positivism in order to deliberate on topical issues related to the domain of international responsibility. Undoubtedly, for a long time has been considered problematic with regard to ensuring an effective international legal order in the face of a lack of an effective and comprehensive normative legal framework which – despite the adoption of the Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission – is still questioned today. With the help of judicial practice Ehrlich determined several important legal rules long before 2001, when the Articles were submitted to the General Assembly. He contributed to the development of the theory of international responsibility, as its rules had evolved

[54] *E.g.* M. Green, *Legal Realism as Theory of Law,* 46 William & Mary Law Review 1915 (2005); F. Leeuw, *American Legal Realism: Research Programme and Policy Impact,* 13 Utrecht Law Review 28 (2017).

[55] G. Shaffer, *The New Legal Realist Approach to International Law,* 28 Leiden Journal of International Law 189 (2015).

[56] *See* M. Hertogh, *Living Law: Reconsidering Eugen Ehrlich,* Hart Publishing, Oxford: 2009.

[57] B. Tamanaha, *The Third Pillar of Jurisprudence: Social Legal Theory*, 56 William & Mary Law Review 2235 (2015), pp. 2237-2238.

in all four editions of his textbook on international law. He also made a great effort to facilitate international judges' decision-making in disputes concerning internationally wrongful acts of states. One may only surmise how much Ehrlich would have done for the science of international law with regard to the responsibility of international organizations had he lived a half a century later!

Ehrlich took an extremely practical approach to the study of international responsibility for a clear reason. He represented Poland as the Permanent Court of Justice's *ad hoc* judge in the legal proceedings concerning reparation for the illegal expropriation of the factory in Chorzów in 1927, in the course of which Poland's obligations and liability were discussed. Ehrlich attached two dissenting opinions.[58] The *Chorzów Factory* case was taken as a framework for the study of the peculiarities of international responsibility. First of all, the fundamental principle that underpinned the relations between states in cases of international wrongdoings, which was proven by the practice of international courts, was introduced:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in. all probability, have existed if that act had not been committed.[59]

Moreover, it was decided that the indemnity for an internationally wrongful act could be carried out in such forms as restitution in kind, payment of a sum equal to restitution in kind, or compensation for damages in another way. For the purpose of estimation of the value of both material and non-material losses, Ehrlich suggested to calculate their actual or the most likely value, assessed by a state against which such an act had been directed, but at the same time that state was forbidden to be enriched by the process.[60]

In cases when damage was caused by delayed payments, adequate reimbursement could have been calculated by the means of a calculated value, for example, interest on arrears. This question was raised in the course of a judicial process initiated by Russia against Turkey, known as the *Russian Claim for Interest on Indemnities*. It was settled by the Permanent Court of Arbitration after Russia had appealed in order to obtain compensation for the damages caused by Turkey during 1877-1878 war. The decision reiterated the obligation and commitment of a state to be responsible for a delay in payment of a sum due, "unless the existence of a contrary international custom" was established.[61]

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[58] PCIJ, *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction) (Germany v. Poland)*, Judgement, 26 July 1927, 1927 PCIJ Series A, No. 9, p. 35; PCIJ, *Case Concerning the Factory at Chorzów (Merits) (Germany v. Poland)*, Judgement, 13 September 1928, 1928 PCIJ Series A, No. 17, p. 75.

[59] PCIJ, *Case Concerning the Factory at Chorzów (Merits)*, p. 47.

[60] Ehrlich, *supra* note 42, pp. 649-650.

[61] *Russian Claim for Interest on Indemnities (Damages Claimed by Russia for Delay in Payment of Compensation Owed to Russians Injured During the War of 1877-1878), Award of the Tribunal (Unofficial English Translation)*, available at: https://bit.ly/2QxNA2t (accessed 30 May 2019), p. 10.

Ehrlich provided solid grounds for the conclusion that a sum of money which was expected to be paid due to an indemnity claim must be paid in the currency of the delinquent state, unless otherwise provided by the consent of the interested states.[62] That rule was reaffirmed in the Pious Fund Case 1902 between the United States of America and Mexico, decided by the Permanent Court of Arbitration.[63] This judgment was related to the question of annuities accrued in the Mexican currency for the period of 1869-1902, a period during which the Mexican Government had refused to pay an award in favour of the United States confirmed by the arbitral sentence of Edward Thornton in 1875.[64] But Ehrlich found an exception to the above-mentioned legal principle in the case of the S.S. "Wimbledon", resolved by the Permanent Court of International Justice in 1923. That case dealt with a prohibition against passage by a British steamship through the Kiel Canal.[65] Although Germany was adjudicated as a delinquent because of its unlawful prohibition, the compensation was required to be paid in the French currency. There was also a necessity to identify the moment from which Germany was obliged to pay interest. After having analysed judicial practice, Ehrlich outlined three possible actions to consider: formulation of a requirement; determining that a wrongdoing had been committed; and issuing a decision.[66] He explained why the proceedings listed above were so significant, as follows:

> The case of the *Pious Fund of the Californians*, the *Russian Indemnity* case and so forth could similarly be quoted among many others as laying down numerous rules which have been applied in later practice. Moreover it is instructive to contrast the various principles applied by the Permanent Court of International Justice in the *Chorzów* cases and later adapted by the science of international law, with the unsuccessful attempts of the Hague codification Conference of 1930 to formulate rules concerning the responsibility of a State for damage illegally suffered in its territory by foreigners.[67]

CONCLUSIONS

Ehrlich's elaboration of his method was guided by the need to understand what international law was and where it came from. He described new positivism from the methodological point of view at the end of the 1930s, and applied it consistently in his textbooks on international law, first and foremost explaining the peculiarities of

[62] Ehrlich, *supra* note 42, p. 652.

[63] *See* H. Levie, *Final Settlement of the Pious Fund Case*, 63 The American Journal of International Law 791 (1969).

[64] *The Pious Fund Case (United States of America v. Mexico), 14 October 1902,* IX Reports of International Arbitral Awards 1 (2006).

[65] PCIJ, *Case of the S.S. Wimbledon (United Kingdom, France, Italy & Japan v. Germany),* Judgement, 17 August 1923, 1923 PCIJ Series A, No. 1, p. 15.

[66] Ehrlich, *supra* note 42, p. 651.

[67] Ehrlich, *supra* note 36, p. 15.

international responsibility. He saw the essence of the method in the examination of judicial practice, and associated it with the evolution of international law. Although his theoretical concept was based on the recognition of states' consent as the fundamental premise for the obligatory force of international law (the principle of good faith), according to the core of new positivism courts, and especially international tribunals, possess some law-making functions. Furthermore, these functions "go beyond" the existence of customary law (in cases of both national courts' and international tribunals' judgments). He denied that these judgments had the force of precedents, but at the same time he found some real rules (in the terms of American legal realism) therein. When considering the works of Ehrlich, one can come to the conclusion that his attitude towards international law was not homogeneous seen through the lenses of legal philosophy. He built his own paradigm for understanding international law, which combined elements of the "three major pillars of jurisprudence", especially positivism and social legal theory.

The arguments of Ehrlich the scholar were ahead of his times (just like Kaltenborn's suggestion) and might be regarded as being grounded more in the present state of affairs in most of the continental European states, which is very likely intrinsic to international law as well. Although judicial precedent does not belong to the list of sources of law – neither in the international law (in terms of Art. 38) nor in the civil law system states (a few exceptions to this rule have occurred) – court decisions have been ever more often making impacts on the development of domestic and international legal orders.

But in fairness, Ehrlich should not be unquestionably recognized as the creator of the method which he called "new positivism". A thorough analysis of this method's theoretical aspects leads us to the core ideas of American legal realism, which in a broader sense resembles a sociological approach to law. In addition, Ehrlich did not go against the spirit of positivism, finding obligatory rules in traditional sources of international law. It is important to note that Ehrlich made an effort to substantiate the need to apply previous court decisions in a manner corresponding to the legal values of the civil law system. For this purpose, he relied on written evidence and used logical arguments like lawyers from the Romano-Germanic legal family had done in order to explain what the law was. But the approach, which he supported, was the product of the common law system and lawyers therein had not bothered to look for detailed explanations *why* a rule settled by a precedent existed. They merely took it at face value. These distinctions might be helpful in considering the provisions of Ehrlich's method not as contradictory, but rather holistic.

As he declared: "[i]f I am told that this method is utopian and cannot be applied, my reply will be that it must be applied because it corresponds best with the nature of international law as we know it."[68]

[68] Ehrlich, *supra* note 36, p. 17.