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THE CONCEPT OF INTERNATIONAL RESPONSIBILITY OF STATE IN THE INTERNATIONAL PUBLIC LAW SYSTEM

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Abstract

The goal of the paper is to depict the international responsibility of state as the closest link to the core, axiology and teleology of the international law. The concept of international responsibility could be interpreted as an inter-phase, a stadium between the state sovereignty in internal sense, on one hand and the ultimate goal of realistically feasible implementation of the principles of the international law, saliently with coercion (as a paramount hierarchical level), on the other. The focus would be on the actions, capacities and attributes of state as an active and passive subject of paramount significance in the establishment of international legal touchstones for its international responsibility, as well as on the contextual correlation among the international community, the state and specific international legal subsystems. The issue of quantification of the gravity of the wrongfulness of the act is essential for differential determination of the international responsibility of state.

Key words: International responsibility of state; international law; international subject; sovereignty; coercion mechanisms.

INTRODUCTION

The evolutionary level of human consciousness indicates tendency towards behavior inspired by individual or joint interests, despite the ideal vision that entails voluntary fulfillment of obligations, compromise and *bona fide* relations and in that context the international law is forced to confine itself within the limits of the notions of coercion with the purpose of enactment of legal obligations and relations, as a historical-evolutionary imperative, all the while the possibility to engage the alternative types of coercive law-abidance is minimal. Primarily, the national states dispose of these executive organs and instruments that can carry out coercive measures, yet still the international legal system lacks such (organs and instruments) despite the options for enforcement of economic, political and military sanctions in certain circumstances upon certain subjects and states that had undertaken an international obligation and have breached it. In this context, the term "lacks" alludes once again to the confinement of the concept regarding the role of the state, its sovereignty and subsequently, its competencies, power and action areas, so the fulfilling of the international legal obligations undertaken is viable exclusively through the instruments and organs of a particular state as a direct regulator and enforcer. On the other hand, coercive mechanisms on the international scene that have evolved from various communities, organizations, as well as from variety of ideological, but also from pragmatical proveniences do exist and their development is a vivid process. Their spectral manifestations are also remarkable, ranging from an embargo, other types of economic

pressure, diplomatic note and pressure, abolishment of multi-resource aid for developing countries, financial penalties, international organization membership suspension etc. Ultimately, the effectiveness of these mechanisms also derives from the subject and the attributes of the state.

The theoretical, scientific disputes and opposite opinions regarding the issue of the quality of the effects and results of the international legal system, especially the ones that challenge the purpose and the effectiveness of the international law, find their place in the holistic picture of its interpretation, but their significance is diminished when brought at the junction with reality and the non-existent alternatives for regulating human relations and processes on a global level, aiming to providing general legal certainty. Still, even in a flawed, not perfect form, the existence of international legal system is necessary as an evolutionary phase which in perspective and as developing trend contains greater unification of global legal rules referring to numerous and layered social, economic and purely legal areas, as well as intensified cooperation among states, international organizations and other subjects emerging on the international scene.

The international responsibility of state is the closest link to the core and teleology of the international law and the establishment of an international legal order, in general, as a global system for introducing functional rules for conduct of the international subjects. The concept of international responsibility could be interpreted as a stadium between the internal law and state sovereignty in internal sense, on one hand and the ultimate goal of realistically feasible implementation of the principles of the international law, saliently with coercion (as a paramount hierarchical level), on the other. Namely, the international responsibility represents a stepping stone towards the ultimate point of the international law and international legal system, yet it does not represent this point *per se*. The ultimate issue and salient problem is the issue of the enforceability of international law, while the rules on international responsibility define the fundament for its establishment and as such represent an inter-phase, and based on such establishment of this category, foremost theoretically and normatively, then concretely and operationally, from case to case, the parameters of applicability and enforceability in this legal-political area will be defined, differentiating among each other by time, subjects and modi.

This field is vast and leaves space for a more holistic analysis or for deepening into some of the aspects – therefore, only several aspects are chosen, mainly to accentuate the role of the state and the position of the concept of responsibility of state in the developmental dynamics of the axiological, but also of the pragmatic teleology of the international law.

CODIFICATION AND LEVEL OF GENERALITY OF THE CONCEPT OF INTERNATIONAL RESPONSIBILITY OF STATE

The rules referring to the whole problematic of state responsibility have gradually developed throughout previous decades, but the firm establishment of this concept with strictly defined core is a recent phenomenon in the international law. The inception of the defining of the concept of responsibility of state is in 1928 when the Permanent Court for International Justice, in the *Chorzov* case points out that “as principle of the international law, the breach of each legal obligation means responsibility for repairment of the damage.” (Ortakovski and Milenkovska 2014, 120). The 1929 Harvard Draft Research for Responsibility of States for Damage Done in their Territory to the Persons or Property of

Foreigners is one of the first proposed codifications of the law of state responsibility, yet with modest scope. (Crawford 2015, 32).

Despite the international legal stand-points that promote reciprocity of rights and duties either among clusters of associated states or of states and international organizations, the international law has evolved in direction of acceptance of the multilateralism and global public interests, specifically the interests of the international community as a whole, for which the endeavors and stances of the International Law Commission have their merits in the area of responsibility and finding a regime for implementation of the interest of the international community as a whole. (Tams and Asteriti 2013, 7). State responsibility is one of the first fourteen areas, originally chosen by the ILC for the 'codification and progressive development.' The preparation of current acts regarding this matter has lasted for decades, resulting in several documents, out of which the key one is the Resolution 56/83 for International Responsibility of States for Internationally Wrongful Acts (further on, Resolution 56/83), adopted by the UN General Assembly in 2001. The ideological creator of the Draft-articles on international responsibility of states for internationally wrongful acts – the ILC, as well as the UNGA, through stipulation and transposition of these articles into the final end act – the Resolution 56/83 adopted on 12.12.2001, have become teleological determined for on one hand minimalistic, and on the other, unifying definition of state responsibility, thus establishing the ground standards for a steady formulation of previously undefined legal matter. They establish the general principle, while its elaboration is left to other numerous documents and areas of international law. By the commitment for unification of the definition of international responsibility of state, the ILC directly affects the world's perception for state responsibility. This intention receives its confirmation also when the General Assembly in an unusual manner launches this resolution, recommending it to the UN member states, regardless of their intention for its formal ratification and implementation in the internal, domestic legal systems.

Naturally, the question of justification of the generality of Resolution 56/63 contents poses itself, but in this case the automatic acceptance of the attribute 'generality' would be the adequate approach, for the sake of the principle of sovereignty of states and the objective development and position of the circumstances in the international law, from which this generality stems immanently. Namely, it represents a part of the secondary rules, which means it sets the concept of the state responsibility in a more generalizing manner, setting it on a level of principle, while the particular modi, types of breaches of international law, as well as the concrete sanctions are stipulated in detailed legal acts. For instance, the obligation to prosecute and punish individuals, including state officials (normally, ultimately connected to the establishment of state responsibility), is primarily a matter of primary rules, as well as the greatest number of legal acts that entail individual responsibility implicate state's obligation to prosecute. (Nollkaemper 2009, 17). The correlation between the action capacitiy of the international community, the state and particular international legal sub-systems is complementary to some extent, but these capacities can be in a conflict among themselves as well, which inevitably generates the necessity of generalitzation of the unifying document – Resolution 53/63.

The entirity of the legal process when determining state responsibility, its legal consequences and their legal effectualisation, which contains several elements including which would the primary rules be, which *lex specialis* would be applied, before which organ or institution would the process be conducted, which would the involved subjects be,

the issues related to legal remedies, periods, contents of the final decisions etc., depend on the particular international legal sub-system. Certainly, after the point of determining certain state's responsibility, the particular international system has the advantage in terms of enforcement of institutional decisions because of the more elaborate or effective coercion mechanisms it disposes of. That is the substantial functional aspect. Even formally, in terms of operative applicability, Article 55 of the Resolution 56/83 provides priority application of *lex specialis* stemming from international legal rules (UNGA Resolution 56/83, Art. 55), vis-à-vis this Resolution which is treated as *lex generalis*. An excellent, noticeable, highly functional, influential, even value-generating example for such advantage referring to the implementation is the functioning symbiosis of the European Court for Human Rights, based on the European Convention for Human Rights and the actions of the signatory states of this document. The international economic organizations have this kind of advantage as well, because their substance is constituted of more easily quantifiable relations.

CURRENT CONCEPT OF THE INTERNATIONAL RESPONSIBILITY OF STATE

The international responsibility of state is a reflection of the limitation of external state sovereignty, in terms of establishing international responsibility when a state commits an internationally wrongful act, i.e. when it breaches an obligation undertaken with a treaty while causing loss or damage to another state. (Ortakovski and Milenkovska 2014, 122).

Precondition for the existence of the concept of international responsibility of state is the principles related to the notions of state sovereignty and equality of states. (Ortakovski and Milenkovska 2014, 122). The current document from which this definition originates is the aforementioned Resolution 56/83, so the analysis of the concept of international state's responsibility could be greatly identified with the analysis of this particular document. In this respect, a segmented review of the initial definition is necessary, while the order of the elaborated category is not indicative for its gravity or significance. Primarily, a review of the state as a subject of the international law then determining international responsibility of state would take place, as well as a review of the wrongfulness of the acts, their effects and time of performance.

The state as a subject of the international law

In a structurarily complex and multilevel international system of numerous relations, circumstances and processes, the regulation of the most of the aspects of the international responsibility is necessary. The Resolution 56/83 refers exclusively to the responsibility of the state as a unitary, monolithic, sovereign subject, but the progressive normative efforts are evident in the tendencies of the ILC and its 2011 Draft-Articles for international responsibility of international organizations (further on: 2011 Draft-articles), as well. The perspectives of the international law incorporate re-conceptualization of specific categories and rights for particular participants on the international scene (such as the physical persons and the international organizations), especially in the human rights area in the international law or in some international institutional systems such as the legal and political system of the EU etc. Still, this paper would elaborate and focus on the actions, capacities and attributes of state as an active and passive subject in the

establishment of international legal touchstones for its international responsibility. Today, this basic rule can be found in the Resolution 56/83, where it is set down as a general principle by the Article 1 which provides: "every internationally wrongful act of a State entails the international responsibility of that State." (UNGA Resolution 56/83, Art. 1) Furtheron in the same Resolution, Article 4 determines the definition of an act of a state, which is 'the conduct of any legislative, executive or judicial organ of any state, whatever its character as an organ of the central or of the local government, whose status as a state organ is determined according to the internal law of the state. (UNGA Resolution 56/83, Art. 4). In the next several articles the modi of various subjects' actions on behalf of the state are précised. The state will bear responsibility exclusively for the conduct of the organ or the official of the state that originates from its prerogatives when exercising its/his state authority, not including these acts in the private sphere. The international responsibility established with this Resolution refers exclusively to the states as equal subjects in the international law, but not to individuals and other subjects, despite the fact that the individual responsibility determined contrary to that state's knowledge or the scope of competencies that have been vested in that individual by the state, can exist alongside with the vicarious responsibility of the state. (Ortakovski and Milenkovska 2014, 127).

Taking into consideration that the responsibility of the international organizations is separate, equally complex thematic, in function of the focus topic, the attention will be kept exclusively to the rules coming from the 2011 Draft-articles that treat the subject of the state when determining its international responsibility. Namely, in these Draft-articles as counterparts of the Resolution 56/83 provisions, in the most general manner and completely in the spirit of the above mentioned resolution, the international responsibility of the state is brought in correlation with an internationally wrongful act connected with the conduct of an international organization. (ILC DARIO 2011, Art. 1, Par. 2). More precisely, the articles 58-62 of the 2011 Draft-articles for responsibility of international organizations by the ILC regulate this matter, but of particular significance for defining the distinction between the subjectivity of these two types of entities (the state and the international organization) are the Articles 59, 61 and 62 because they infer to the nature of these subjects, their inter- relations, simultaneously involving the concept of the state's sovereignty in contemporary terms – concept of a relative, i.e. non-absolute sovereignty of state, based on the Weber's definition, yet distanced from it, as well as the differentiated leveling of the sovereignty between the member-states and the international organization, depending on the constitutive provisions and legal acts of the respective international organization. For instance, Article 59 of the 2011 Draft-articles provisions that the state that directs and controls an international organization in the commission of an internationally wrongful act done by the latter is internationally responsible for that act if the state has done it with knowledge of the circumstances of the wrongful act. (ILC DARIO 2011, Art. 59). Article 61 Paragraph 1 of the 2011 Draft-articles stipulates that "a state member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit and act that, if committed by the state, would have constituted a breach of that obligation." (ILC DARIO 2011, Art. 61) The plurality of responsible subjects could be brought into this context, stipulated in the Article 48 of the 2011 Draft-articles, stating that when an international organization and one or more states or other international

organizations are responsible for the same internationally wrongful act, the responsibility of each state or organization may be invoked in relation to that act. (ILC DARIO 2011, Art. 48).

On the other hand, the responsibility in case of hypothetically possible overlapping of the effective control of the state and the international organization is regulated, as well – according to Article 7 of the 2011 Draft-articles, "the conduct of an organ of a state that is placed at the disposal of an international organization shall be considered under international law as an act of the organization that exercises effective control over that conduct." (ILC DARIO 2011, Art. 7). With this provision an elementary distinction is made between the act of the state and the act of the international organization that had had at its disposal the state's organ or official, which would be basis for further determination of the distinction between the competencies and subsequently, the responsibilities of these two international legal subjects.

Quantifying the gravity of wrongfulness of the act and the inflicted damage

The characterization of an act of a state as internationally wrongful is governed by international law, irrespective by the characterization of the same act as lawful by internal law. (UNGA Resolution 56/83, Art. 3). The differentiation between grave (systemic and grave breach of *jus cogens*) and "regular" breach of international law, i.e. breach of an international obligation, opens space for quantitative and qualitative distinction when setting down the consequences of the respective wrongful act.

At a previous point in time, the ILC thought the difference ought to be expressed as one between serious breaches, labeled "crimes" and ordinary breaches, labeled "delicts", but the terminology that classifies an act in a criminal category remained subject of controversial debates which have prevented the ILC from discussing the implications of the crime-delict dichotomy. (Tams and Asteriti 2013, 17). In other words, the general manner of formulation is accepted, tied to a previous legal-lexical international consensus referring primarily to the category *jus cogens* (with its fundaments in the 1969 Vienna Convention on the Law of Treaties), but also concerning contextual definition of civic and criminal responsibility. To be emphasized, this generalizing formulation refers only to the international responsibility of the states, but not to the one of the international organizations and individuals, for which assignment of criminal act is possible. On the other hand, penalties of criminal legal nature are possible for the individuals that are in governing positions in the moment of the commission of the wrongful act of the state. According to the international law, usually the state, and not the individual is held responsible, but all combinations are possible, which means the individual can be held responsible, precluding state responsibility when state officials and citizens of a state commit internationally wrongful acts against the civil population, but a joint - state and individual responsibility can be invoked, as well. (Posner and Sykes 2006, 62). The standpoint of the ILC and subsequently of the UNGA, for serious breach of international obligation is reflected in its definition in Article 40 of the Resolution 56/83 where the gravity of the breach is differentiated according to whether a peremptory norm of *jus cogens* is breached, especially accentuated in situations when such breach is gross or systemic, i.e. perpetual. (UNGA Resolution 56/83, Art. 40). There are several legal situations that preclude the wrongful act, but under any circumstances, the compliance with the peremptory norms *jus cogens* must not be brought into question, especially taking in consideration that in the Resolution 56/83

there are several provisions stipulating that the obligations of the responsible state (the state responsibility) might concern or to be owed to the whole international community (*erga omnes*), which means that the occurrence of legal situations with greater gravity of state responsibility is possible and that these are connected to the legal interest of all the countries because of its *jus cogens* concerning, which raises other questions presented further in the paper. The tight conceptualization of the category 'serious breach', mainly because of the relatively mild and vague consequences could be subjected to criticism that it disavows the contents and the gravity of this type of breach. In this context the effects of the countermeasures are inevitable to mention. The countermeasures as form of acting that precludes the wrongfulness of the act do not have a retributive aim and the tendency of the international law rhetoric is to reduce or disregard the pejorative title "retorsion". Two principles established with the Resolution 56/83 clash – the possibility of every state to invoke responsibility if the wrongful act concerns fundamental values of the international community formulated in the peremptory norms and the possibility to use countermeasures as a valid instrument for making a point internationally. Although it is accepted that in order the state's responsibility to exist, previous breach of international obligation must had occurred and damage (material or moral) must have been inflicted, there is still a vivid debate in legal theory regarding the measurement of the damage as a standard in international law (Crawford 2015, 58). Namely, in specific contexts the question is posed of whether any kind of damage is sufficient for such defining or is "significant" damage (Crawford 2015, 58) necessary, which would the parameters for determining significant damage be etc, but that is currently an open question in the science of international law. Still, certain international legal tendencies can be identified. Generally, overlooking or neglecting minor breaches, although unprincipled, it is in positive correlation to the level of globalization of the system and the central organizations constituted to regulate particular questions, in order to ensure relative stability in the relations between factors and subjects that are complex and leveled in their core; and not always consistent, principled reaction, even for the sake of correction of the breach of the obligation, is beneficial for the global and long-term picture of the relations. The damage must be proven by the damaged state, i. e. the burden of proof lies on the party that claims that a certain country should bear responsibility, but the problem is that such proof-providing might be difficult in numerous areas. Depending on the gravity of the accusation, the need for the solidity and conclusiveness of the proof varies accordingly, while the case gets exceptional gravity when a peremptory norm *jus cogens* is breached. (Shaw 2008, 567). Proving a causal link between the breach of the international obligation and the act of commission or omission itself is of essential importance for determining the state's responsibility. There is a variety of international obligations from numerous fields in which the damage done to other states could not be expected, would be difficult to prove or is not the substance of the obligation. Such examples are several areas such as environmental protection, disarmament and other preventive obligations in the field of peace and security, but the most remarkable is the area of human rights, for which France has put a reserve on the Resolution 56/83. (Crawford 2015, 57). The wrongfulness of the act is configured not just directly *ex delictio*, but also *sine delicto*, if concerning acts that are not *de jure* forbidden by international law, but from the substance of the circumstances and the context of the treaties regulating specific areas such as environmental conventions, it turns out that if damage to the environment is done and that reflects to other states, the state that has inflicted the damage will be held

internationally responsible. (Ortakovski and Milenkovska 2014, 123). To emphasize that despite the invocation of the latter type of responsibility entails certain level of indirectness and implication, still, the international obligation itself must exist and the state that had undertaken it must have been bound itself or made that commitment before the moment of committing the wrongful act, in order a real state's responsibility to be determined and not to charge a country retroactively, which as a legal principle is in function of legal certainty and the rule of general international legality. To resume, even though secondary rules are in question, the concept of damage has room for legal concretization in direction of differentiation several types of damage by areas of legal regulation (environment, trade relations, criminal acts, etc.) with the possibility of emphasizing or defining exceptions for specific legal situations.

Setting the wrongful act of state in time

In order to establish the wrongful act, it is necessary for it to be brought in chronological correlation with the undertaking of the obligation. Article 13 of the Resolution 56/ 83 resolves this, by stipulating that "an act of a state does not constitute a breach of an international obligation unless the state is bound by the obligation in question at the time the act occurs." (UNGA Resolution 56/83, Art. 13). This article obviously is not explicitly formulated as a forbidden retroactivity, yet regardless of the form, the time positioning of the wrongful act and its correlation with the time of undertaking the obligation by the state points directly to the principle of forbidden retroactivity (forbidden enactment of norms with retroactive force, i.e. *ex post facto* laws). This principle is not necessary applicable to other international legal areas in general, because despite its recognition by the positive law of most of the civilized nations, this principle has relative nature in international law, is characterized with many exceptions and there is no rule of general customary international law forbidding the enactment of norms with retroactive force. (Frick and Oberprantacher 2009, 103).

CONSEQUENCES FROM INTERNATIONAL RESPONSIBILITY OF STATE

The international law does not distinguish between contractual and tortuous responsibility, so that any violation by a state of any obligation of whatever origin gives rise to state responsibility and consequently to the duty of reparation (Shaw 2008, 567). The legal consequences that occur for the state that has done the wrongful act, do not release that state from the initial obligation ("do not affect the continued duty of the responsible state to perform the obligation breached") (UNGA Resolution 56/83, Art. 29), which means that the existence of legal consequences for breach of obligation is consistent and parallel to the duty of performing the obligation and is not mutually exclusive. The state responsible for the internationally wrongful act is under the obligation primarily to cease that act and to offer appropriate assurances and guarantees of non-repetition. (UNGA Resolution 56/83, Art. 30). Furtheron, one of the forms of reparation takes place or certain combination of theirs. The responsible state is under the obligation to make full reparation for the injury (material and moral) caused by the internationally wrongful act. (UNGA Resolution 56/83, Art. 31). As a broader definition of the concept reparation is considered the statement of the Permanent Court for International Justice in *Chorzow* case, which is that "reparation must, as far as possible, annul all the consequences of the illegal act and

reestablish the situation which would, in all probability, have existed if that act had not been committed." (ILC DARSWA commentaries 2001, 91).

There are three basic forms of reparations based on commission of internationally wrongful acts which are: restitution, compensation and satisfaction, but their combination is also possible. (UNGA Resolution 56/83, Art. 34). Reparations may vary qualitatively, but they do not have retributive caracter. The priority is assigned to the restitution, i.e. returning to previous condition *restitutio in integrum* as far as possible, while the area that cannot be covered by the institution of restitution, compensation will be paid. (Ortakovski and Milenkovska 2014, 130) which entails paying damages for financially estimated damage, which on its own integrates the types *damnum emergens* and *lucrum cesans.* (UNGA Resolution 56/83, Art. 36). Restitution is relatively unattainable ideal situation, so the compensation is the most common form of reparation (Posner and Sykes 2006, 46). In the cases when the effect of the wrongful act cannot be repaired by restitution and/or compensation (UNGA Resolution 56/83, Art. 39, Par. 1) and yet moral damage is inflicted by causing feeling of injustice, the reparation is performed in the form of satisfaction, which means with public acknowledgment of the breach, an expression of regret, formal apology or a promise that the wrongful act will not be repeated. (Ortakovski and Milenkovska 2014, 131). A viable option is the combination of these types of reparation, as well, which is due to the fact that simultaneous or paralel, or intertwined infliction of material and moral damage is possible. A specified type of consequences that originate from the gross injury of the peremptory norms envisaged in the Article 40 of the Resolution 56/83 and serve as a corrective of such injury, are the ones provisioned with article 41 of the Resolution 56/83 – cooperation among states based on lawful means, directed towards cessation of the gross injury; then, prohibition both for recognizing a situation as lawful if it is created by a serious breach and for rendering aid or assistance in maintaining that situation. Key for this point is the Paragraph 3 of the Article 41, according to which the former acts or restrains are without prejudice to other consequences envisaged for the breach of the international obligation. (UNGA Resolution 56/83, Art. 41). This kind of narrow conceptualization of possible reactions in these articles infer to the point that for a gross injury, there is no substantial consequences of appropriate nature or of greater gravity, because the provisioned consequences even for cases of grave injury are still within the confines of the reparations, cessation of the wrongful act etc, but the real difference can be detected in the fact that third countries that are not directly injured, are not only given the possibility, but are obliged to react and not to be passive bystanders. (Tams and Asteriti 2013, 17), i.e. to polarize and effectuate their attitude towards the wrongdoers that breach international obligations that derive from *jus cogens*. Still, with such position, these obligations for third countries are vague, with level of ambiguity and lack of definition, which naturally, would subsequently reflect on an irregular or inconsistent empirical implementation.

PROCESSING, EFFECT AND IMPLEMENTATION OF THE RULES FOR INTERNATIONAL RESPONSIBILITY OF THE STATE

The relation, interdependence and apparent differences between the domestic and international law find their place in the problematic concerning responsibility of state - in the defining or establishing certain acts and their characteristics as wrongful according to

international substantial law, as well as in the procedural issues such as the effect of the norms and application of legal remedies. The former aspect is depicted in the Article 3 of the Resolution 56/83 according to which in a most general manner is envisaged that the characterization of an act of the state as an internationally wrongful one is regulated by the international law and is not affected by the characterization of the same act as lawful by internal law. (UNGA Resolution 56/83, Art. 3). Although many acts are considered as wrongful both according to international and domestic law, often the international law imposes obligations that do not exist under domestic law and the international remedy for harmful acts that violate international law is then exclusive. (Posner and Sykes, 25).

Still, when the treatment of the wrongful behavior is determined as such according to the domestic law, the problematic question for implementation and enactment of international law and the usage of international remedies is greatly absolved – in some cases explicitly, with the rules that stipulate necessary exhaustion of all domestic legal remedies before bringing the claim before international court such as the case with the preconditions for bringing a claim before the European Court for Human Rights, compliant with the Article 35 of the European Convention on Human Rights. However, in some cases the necessity for previous exhaustion of domestic remedies is not explicitly mentioned, but is implied from the general principle of international customary law (Shaw 2008, 597) for exhaustion of domestic remedies and this principle is based on the core of the act itself, its regime according to domestic and international law and to the sub-system in international law according to which the regulations are applied. For instance, presumably such provision should be contained in the UN Charter and the Statute of the International Court of Justice, but such explicit formulations that regulate this issue do not exist – only remotely and indirectly can the intention of the legislator be identified by the fact that the Statute mentions the sources according to which the ICJ decides, such as international conventions, customs etc, so presumably the treatment of the issue concerning exhaustion of domestic remedies is contained in some specific sources. In practice, there are controversial stances and actions regarding this issue which bring into contradiction for example, the states sovereignty, the rules for state immunity, rules for priority of usage of remedies and the rules for state's responsibility, especially in the cases when international criminal tribunals are established where this relation of the aforementioned constitutively complex aspects is an exceptional challenge to be resolved.

Anyhow, in the case of duality of remedies, internal and international, for the equally defined wrongful act, due attention should be paid to the stance that domestic remedies are superior for several reasons, but key is that the domestic legal systems dispose of greater coercive authority to enforce court decisions (Posner and Sykes 2006, 26) and of other procedural control mechanisms (for example, preliminary ensuring measures, etc.) The weaknesses of this standpoint are also insurmountable where special substance would be assigned to the argument of the subjective perception and the ethnocentric state interests when enacting the rules for responsibility of state, as well as the overlapping and contradiction of the rules for responsibility of state with the rule *nemo judex in causa sua*. Despite the complexity, the dichotomies and contradictions regarding this issue, the Resolution 56/83 in the Article 44 stipulates that the responsibility of state may not be invoked if the claim is one to which the rule of exhaustion of local remedies applies. (UNGA Resolution 56/83, Art. 44).

The concepts *erga omnes* and *jus cogens* affect the application of international responsibility. (Tams and Asteriti 2013, 27). *Erga omnes* concept has had an impact on the legal rules governing the implementation of responsibility. (Tams and Asteriti 2013, 16). Influenced by the erga omnes concept, contemporary international practice has embraced different forms of "public interest enforcment" in response to breaches of fundamental obligations of international law. (Tams and Asteriti 2013, 27). This has broadened the circle of states and international organizations, entitled to respond against an internationally wrongful act. (Tams and Asteriti 2013, 27). The injured state has the option to choose to dismiss its right to invoke other state's responsibility for injury of an *erga omnes* obligation, but the former state cannot inhibit other countries to bring such claims based on the Article 48 of the Resolution 56/83.

The initial open question referring to establishment of *erga omnes* principle in context of invocation of responsibility when peremptory norm is breached, after the 1969 Vienna Convention on the Law of Treaties, was whether the *erga omnes* principle would be applicable in practice, but the numerous cases throughout the years, until nowadays, have proven that the frequency of its referral is irrefutably functional. (Tams and Asteriti 2013, 2). As far as the active legitimacy as a subject of discourse is concerned, it was mentioned that in the Resolution 56/83, the implementation of the peremptory norms was emphasized, through the provisions stipulating that the obligations of the responsible state, might affect the whole international community. Namely, when breach of a peremptory norm has occurred, legitimacy, i.e. the right to invoke responsibility, is assigned to any country, despite the fact that it hasn't experienced direct legal consequence. This setting of the legal creator (the ILC and the UNGA) is also indicative for determination of hierarchy of legal acts and by that for the positioning of the legal rules concerning the responsibility of state. Although in the Resolution 56/83 is explicitly expressed the hierarchical superiority of *lex specialis* in relation to this legal act as *lex generalis*, the point that isn't expressed and that we extrapolate of the overall international law, is that when an peremptory norm *jus cogens* is contained in a treaty, such treaty has the advantage. (Ortakovski and Milenkovska 2014, 55) in comparison to these general rules for determining responsibility of state.

In practice, claims for responsibility are raised at many different levels of government, depending on their seriousness and on the general relations between the states concerned, moreover, the International Court of Justice has on occasion proved itself satisfied with rather more informal methods of responsibility invocation. (Crawford 2015, 68). The immunity of states, although by its contents originates from a fundamental principle – sovereign equality of states, practically represents a procedural impediment and is directly conflicted with the determination of state's responsibility. Even though in the Resolution 56/83 the states' immunity is implicitly waived when gross injury of *jus cogens* is concerned, still this remains an imprecise issue. The basic standpoint of the international law is that still, a general rule that would impose duty for immunity waiving does not exist, not even for the breaches of peremptory norms of international law (Tams and Asteriti 2013, 22), but it is rather predictable that there is a possibility in future to introduce waiving immunity in order to process the problematic of the area of the peremptory norms.

In addition, the question regarding the effect from the determined international state's responsibility over the implementation of such responsibility is set – more precisely, what the power of certain international institutions and factors in context of fragmented

system of international law to impose restitutive justice is. For completion of the depiction, the argumentation referring to fragmentation of international law and relations is intriguing.

Fragmentation is a subject to multi-aspect critiques and one of the main arguments is the fact that it represents an effect of the endeavors of the powerful international factors (states, trade subjects, international organizations of various nature and area) to preserve their position on the international legal and political scene as well as the possibility to influence all types of relations, processes and world trends (economic, social, military, peace-keeping, etc.).The arguments for this position are that this tendency for conserving the dominant position of some states and for diminishing the uniformity of the international law are directly affected by the negative effects of the fragmentation. (Benvenisti and Downs 2007, 596). The most remarkable effects of that kind would be: creation of narrow, functionalistic institutions with limited scope of multilateral agreements which leads to decreased possibilities for the weaker actors to connect on many common grounds, thus diminishing their influential potential, but ever-present is also the effect of the absence of ultimate goal, ambiguous or variable confines and overlapping jurisdictions that enable absolution from responsibility of the powerful states for various reasons. (Benvenisti and Downs 2007, 597). Certainly, the counterarguments are valid, as well, those being for example, the exponentially succecful regulatory coordination among institutions, the expression of international political pluralism and the possibility to achieve higher results in the development of the international law and politics through competitiveness. (Benvenisti and Downs 2007, 597).

The answer is compound. Still, the fragmentation is a result of objectively inevitable processes and circumstances. It is partially due to the small number of integrative, holistic treaties, in contrast to the greater number of agreements with specific purpose and narrower concept, directed towards regulating exclusive area, i.e. segmented regulating of particular types of relations. This international practice stems from pragmatical needs, which means for the sake of functionality of the most frequent international legal traffic – the international agreements in the field of economy and more concretely of the trade, reparation of damage, labor relations etc; it is necessary to currently activate the subjects and forecast specific circumstances, therefore logically the necessity for myriad of trade agreements arises. While on the other hand, the strategic agreements (treaties), especially the ones with integrative concepts and broader platforms, the ones with elements of constitutional nature, as well as the ones that do not have predecessor in the tradition of international cooperation of the particular subjects that are signatories or are involved in the concept of the treaty are fewer in number and are characterized with a level of abstraction, with the tendency to establish general axiological and legal principles. In these group of legal documents can be enlisted those that penetrate in the sphere of codification and progress of international law. Hence, the realization of the responsibility of the state has multilateral and relative character, dependent on the international legal subsystem which infers to a direct causal link between the fragmentation and the concept of international responsibility of state. Exceptional primary factors of influence on the realization of such state's responsibility, originating from fragmentation are: the enhanced success of dominant countries to proliferate and impose their own permanent interests as a negative point in correlation to the weaker subjects; but also, there is the factor of effectiveness of the instruments of the subsystems (as the case of ECtHR), as a positive one. These factors directly affect the undermining of the ILC efforts for uniformity and balanced concept of international responsibility of state.

CORRELATION BETWEEN THE STATE INTERNATIONAL RESPONSIBILITY AND THE INTERNATIONAL PUBLIC LAW

Gradual introduction of activity and significance of non-state actors in the action mechanisms of the international law diminishes the importance of the exclusive subjectivity of state and attracts academic attention, yet still, the state has the pedestal in this sphere, so indubitably stirs the interest concerning its place in the development of public law regimes.

The concept of state responsibility in international law basically refers to the protection of public rights, but the states enter into contractual interactions both with physical and legal persons, thus penetrating into private rights and obligations, so the question is to what extent may these be protected under the rules of state responsibility? (Crawford 2015, 74). The acts of state can equally affect private as well as public rights, so the differences arise from the applicability and enforceability of the law. (Crawford 2015, 74). Private rights can be elevated to the international level only if there is some special mechanism that converts the private law in public law (as in the case of diplomatic protection) or if a specific system or procedure is involved where jurisdiction of international court, arbitrage or tribunal is established (Crawford 2015, 74). In either case, the consent of the state against which enforcement of the private right is sought is to some extent required. (Crawford 2015, 75).

Another aspect that implies strong correlation between international and domestic public legal and political processes is the perspective according to which some cases of criminal acts of the state might lead to an obligation of the responsible state to change its domestic constitutional structure, to change its government, the constitution itself and to hold free elections in order to prevent the recurrence of criminal acts. (Nollkaemper 2009, 27). The ratio behind this standpoint is solid. On the other hand, beside the fact that domestic changes would undermine or eventually remove causes of international crimes, the prevailing opinion would be that there is a lack of data of state practice that would prove the necessity of a causal link between the previous criminal acts and the constitutional changes. (Nollkaemper 2009, 27).

In summary, it can be concluded that regardless of the nature of the concerned right with international connotation regarding state responsibility, the participation of the subject of the state as medium is necessary, with its instruments and capacities, in order to directly establish or to influence the specific international legal situations, relations and processes.

CONCLUSION

In conditions of the current international law system which is in a construction process, where numerous legal formulations are characterized with level of vagueness, ambiguity, generalization, even with dichotomies, and the ultimate instruments for implementation and coercion, which means consistent application of international law are greatly with problematic, disputable implementation and enforceability; the state's responsibility is a concept closest to establishment of an international legal order which would be based on clear rules for action. State responsibility represents a link and inter-phase between the state sovereignty and the teleology of international law and the establishment of the international legal order in general, as a global system for introducing functional rules of conduct of the international subjects.

When determining the international responsibility of the state, the quantification of the wrongfulness of the act done by the state is achieved according to the rules of international law. The peremptory norms *jus cogens* are of exceptional significance and gravity – their character directly affects the determination of active legitimacy of other states as subjects of the international law, as well as the categorization of the level of injury done by the state, according to international law and this significance is of special extent in the context of non-existent distinction between criminal and tortuous responsibility. Still, the narrow conceptualization of the category gross injury, mainly because of the relatively mild and vague consequences should be subjected to critique that it disavows the contents and the gravity of this type of injury. In this context, although the Resolution 56/ 83 entails secondary rules, the notion of damage has space for legal concretization in direction of differentiation of several types of damage by areas of legal regulation (environment, trade relations, criminal acts, etc.), with the possibility to accentuate or define exceptions for specific legal situations.

Since the determination of international responsibility of the state is done according the rules of international law, it is theoretically independent or preclusive regarding the domestic law, but on the other hand its implementation is dependent of the capacities and the instruments of the state. As far as the duality of legal remedies, domestic and international, for the same wrongful act are concerned, the domestic ones are superior and the internal legal systems dispose of greater coercive authority and procedural control mechanisms for enforcing decisions. Yet, regardless of the nature of the relevant right with international connotation tied to the concept of state responsibility, the participation of the subject of the state as a medium is necessary, with its instruments and capacities in order to directly establish or to influence the specific international legal situations, relations and processes. Hence, the role of the state is paramount. The reason for this is the fact that the international community is still based on the classical-modern conceptions regarding the state, the sovereignty and international cooperation and not on the postmodernism.

Concurrent to the previous conclusion is the one that both the determination and the implementation and enforcement of the rules regarding international responsibility of state are directly subjected to the conditions of fragmentation of the system of international law.

An upside of the fragmentation is that it offers possibilities for regulation of certain areas of international legal traffic, thus creating a picture resembling climate of loyal competition in the economy. The negative implications are that the fragmentation only represents an opportunistic, alternative fashion of domination of world powers with the tendency of absorbing greater area of influence, in circumstances where the formal equality of states and the principle of respecting the state's sovereignty do not allow the great factors to aggressively impose their will in an unified international legal system, so they achieve their position by creation of stratum and functionalistic regulation of relations, where, in specific spheres they pose themselves as hegemons to a certain extent. From this second perspective, fragmentation gets pejorative attribute and we can conclude that it has negative influence on the uniformity and consistency of the concepts of certain categories of the international law. The legal systems vary in their contents and a unifying conception is necessary so that under equal circumstances, similar rights and obligations of same genesis should be realized. In this context, the UNGA and the ILC have made an effort for unification, if not for egalitarization of the definition of international responsibility of state by adopting general, secondary rules, thus affecting world's perception for this concept; yet the enactment of the rules regarding the state's responsibility is negatively influenced by

the fragmentation. On the other hand, the fragmentation offers benefits in terms of more effective operative instruments of some of the specific international legal subsystems, in comparison to what is offered by the general system of international law of the international community as a whole.

The correlation among the international community, the state and specific international legal subsystems are complementary to some extent and offer superior possibilities for international regulative and actionable coordination, but are also concurrent or in mutual conflict to some extent, which irrefutably generates the need for generality and unification of the legal documents and practice.

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