ATTRIBUTION OF CONDUCT TO A STATE-THE SUBJECTIVE ELEMENT OF THE INTERNATIONAL RESPONSIBILITY OT THE STATE FOR INTERNATIONALLY WRONGFUL ACTS

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Abstract
In order to establish responsibility of states for internationally wrongful act, two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time. For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. States can act only by and through their agents and representatives. In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

Keywords*: international responsibility, internationally wrongful acts, state, attribution of conduct to a state, the subjective element.*

1. Introductory aspects

Responsibility in international law is an old topic that has been the subject matter of the study of various entities, but it is also current. The studies conducted by experts with a view to codification have led to the identification of several directions of action. Thus it has been considered a responsibility of the states for internationally wrongful acts, but also a responsibility for prejudices triggered by activities allowed by international law, and also the intention has been to codify the responsibility of the international organizations. Each type of responsibility has raised various problems, which have led to long periods of time taken for conducting the works of the International Law Commission (I.L.C.) of UNO.[1] The completion of the works has been achieved by adopting various draft articles, which are subject to the works of the UNO General Assembly in order to establish the form that these articles should take. The same as the other types, the responsibility of the states for internationally wrongful acts has brought into discussion various aspects identified in the practice of the states and international case law. Establishing the elements necessary to triggering the responsibility for internationally wrongful acts and the identification of the concrete cases brings into discussion the chargeability of the internationally wrongful acts and the breach of the international obligation of the state. The chargeability (attribution) of the internationally wrongful act to the state – the subjective element of the responsibility of the states for internationally wrongful acts – involves

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[1] Dumitra Popescu, Felicia Maxim, *Drept internațional public-curs pentru învățământul la distanță (Public International Law – course of lectures for distance learning)*, Editura Renaissance (Renaissance Publishing), (Bucharest 2010), p.329.

the research of a big number of cases that will be analysed below with a view to the identification of the cases where a state can be held liable at international level.

The study of the chargeability of the internationally wrongful acts has led to various controversies which the ILC experts have tried to resolve also considering the guidelines of the international practice in the field by preparing a draft that reflects the position of the governments of the UNO member states.[2] It is known that the subjective element consists in the conduct of a person or group of persons, which due to certain characteristics needs to be attributed to the state as a subject of international law, and not to the person or group of persons that have initiated it. In attributing the wrongful act to the state, there shall be taken into account firstly the identification of the legal connection existent between the persons that engage the conduct and the state; secondly, we will consider the state as subject of international law; and thirdly, the attribution of the wrongful conduct shall be done in accordance with the international law norms.

The state is an organized entity that acts in the international field by means of certain bodies and persons that has governmental authority, that is why, the state is charged with the acts of those who represent it and that have been committed in their official capacity.[3] It is thus necessary to determine the individual behaviours that can be considered acts of the state and those that, on the contrary, need to be considered actions or omissions of the private entities.

Thus, the state will be responsible for the wrongful act of a body of the state power or of another entity that has the capacity to exert the prerogatives of public power. It is also attributed to the state the conduct of a person or of an entity that is not a body of the state power, but that is enabled by it to exert prerogatives of public power, or act under its management or control, even if this conduct is in breach of the instructions received, as well as the conduct of a body made available to a state by another state and that exerts public power on the behalf of the latter, the conduct of a person or group of persons that exerts in fact the prerogatives of public power in case of an absence of the official authorities, as well as the conduct of an insurrectional movement that becomes the new government of a state or that creates a new state.[4]

In respect of the wrongful acts conducted by private persons, the specialized literature claims that there is a generally applicable principle, according to which the state is not responsible for the acts of the private persons as such are not committed on the behalf of the state.[5] The facts of private persons trigger the responsibility of the state if they have been committed as a result of actions or omissions arising from bodies of state power, cases that may occur in the event of facts that affect the representative offices of foreign states or citizens of such foreign states. In such cases, the state has the responsibility for its own omissions, such as the failure of taking measures to prevent the respective acts, measures which the international law obligates the state to take or measures of repression conformant with the execution of its international obligations.[6]

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[2] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001,*Yearbook of the International Law Commission, 2001*, vol. II, Part Two.; Felicia Maxim, *Dreptul răspunderii statelor pentru fapte internaţional ilicite (Responsibility of the States for Intrnationally Wrongful Acts)*, (Editura Renaissance, 2011),p.79-126.

[3] I.Anghel,V.Anghel, *Răspunderea în dreptul internaţional (Responsibility in International Law)*, (Editura Lumina Lex, Bucureşti, 1998), p.31.

[4] I.Diaconu, *Tratat de drept internaţional public (Treatise on Public International Law)*, vol. III, (Editura Lumina Lex, Bucureşti, 2005), p.340.

[5] Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alains Pellet, *Droit international public*, 8 edition, (LGDJ, 2010), p.869; Cazul *Tellini*- League of Nations, Official Journal, 4th Year, No.11(November 1923), p.1349.

[6] D.Popescu, A.Năstase, *Drept internaţional public (Public International Law)*, Ediţie revăzută şi adăugită, (Casa de editură şi presă „Şansa" S.R.L., 1997), p.311; Raluca Miga Beşteliu, *Drept internaţional public-curs universitar (Public International Law- university course)*, vol.II, (Editura C.H.Beck, 2008), p.34;Felicia Maxim, op. cit.,p.123.

The process of charging the wrongful act is conducted mandatorily by observing two important rules, namely: the attribution of the wrongful act to the state as subject to international law and classification of the wrongful act in accordance with the norms of international law.

2. State Authorities

First, mention must be made of the fact that it is not relevant the position of the state body within the internal organizational structure and neither does the internal hierarchy.[7] This mention is important as in specialized literature there have been expressed opinion according to which the responsibility of the state can be triggered only in case of wrongful conduct of state bodies. Thus, it is well known the theory that claimed that only an act or omission of the body responsible for the foreign affairs of the state (head of state, minister of foreign affairs, diplomatic) can represent a wrongful act of the state. Thus it has been claimed that the state is responsible for the acts of the of the internal bodies, for instance, bodies that exert legislative power, administrative of judicial bodies, only indirectly, if the acts of the internal bodies had affected or prevented the acts of the bodies with foreign responsibilities.[8]The theory starts from the confusion between the acts of the state bodies in international realm, which are perfectly valid acts, and the wrongful acts that trigger the responsibility of the state, which are, in fact, breaches of the international obligations. Case law and international practice have constantly proven that the relevant difference cannot be supported. The issue that has dominated the specialized literature has been whether the responsibility of the state can be determined by a wrongful act engaged by any of the state bodies or organs that can be excluded from this category. The differences have been eliminated by an analysis made per each category of body. In fact, so far there have not been identified any arbitral or judicial decision to establish whether the state will not be responsible for instance for the wrongful acts engaged by the legislative of judicial bodies, on the contrary, there are decisions confirming the responsibility of the state or the wrongful acts engaged by the state bodies, irrespective of their position in the state organizational structure.

In conclusion, the international responsibility of the state is triggered in case of charging a state with an act of bodies belonging to the internal organizational structure. Further to analysing the existent doctrine and case law, it can be said that the notion of "state body" is used *lato sensu*, so that the preparation of a regulation in general terms would not lead to controversies. It is of no interest the internal organization of the state, what is of interest is only the capacity of state body. Still, the specialists in international law and international bodies with attributions regarding the codification of international law have deemed it necessary to mention each category of bodies, in order not to give way to interpretations. As a result, the conduct of each body of the state shall be considered that an act of the state, irrespective of the fact that that body belongs to the legislative, executive, judicial power or have other capacities, irrespective of the position held in the organizational structure of the state and independent of whether it is part of the central governmental bodies of the state or of the local units of the state. A body includes any person or entity that has this capacity in agreement with the internal law of the state.[9]

The law making authority is the vital organizational structure of a state, the problem under scrutiny regards the case where the body that exerts the legislative power can breach international obligations, thus triggering the international responsibility of the states.

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[7] T. Hillier, *Sourcebook on public International law*, (London, 1998), p.340.

[8] Yearbook of the International Law Commission, vol.II, Part One, 1971, p.243; C. Eagleton, *The Responsibility of States in International Law, (*New York University Press, 1928), p.54-55.

[9] See in this respect art. 4 of the Draft regarding the responsibility of the states for internationally wrongful acts; The *Salvador Commercial Company Case* -United Nations, Reports of International Arbitral Awards, vol. XV, 1902, p.477;W.T.O. Panel Report, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services,WT/DS285/R, 2004, para.6.128.

In the international legal practice it has been considered that a state is responsible internationally both when the legislative bodies adopt a normative act that infringes an international obligation, and when it does not adopt such an act necessary for the execution of this obligation.[10]

The bodies that exert the executive power present certain particularities within the state organizational structure, bringing into discussion aspects related to the way of distributing the attribution, the position of the public servants, as well as aspects related to the local collectivities determined by the administrative-territorial of the state.

The predominant opinion, which is also currently valid, claims that no distinction is made between the acts of the official superiors and subordinates, if they act based on their official capacity, it is no doubt that the official at an inferior level may have a reduced activity, not being in a position to make the final decision.

The theory has been also taken over by the International Law Commission, being introduced in the regulation at article 4 under the phrasing "irrespective of the position held in the organizational structure of the state".

Being faithful to the opinion expressed in the specialized literature, as well as the ones formulated in the codification works, it is normal to assert that in case of the executive bodies it is of no importance the position held by the state representative or the level of the respective bodies, local or central.[11] Irrespective of whether it is a minister involved or a mere public servant with the local administration, the responsibility of the state is triggered when such persons commit wrongful acts based on their official capacity. The state is responsible for the wrongful act of a public servant when the government has been informed of the public servant's intention and has not acted in due course or in the event where the wrongful act has been committed and the government does no punish the respective public servant.

The state is responsible for the wrongful acts attributed to the central bodies, but also for the wrongful acts committed by the local communities[12]. In this case, it will be considered the way of administrative-territorial division of a unitary state, but also federative states part of a federation.

The principle starts from the concept of unitary state regarded as a subject of international law. As subject of international law the state appears as an entity "equipped" with a complex system of bodies that act under the its control and authority. In respect of the federal state, the internal organizational structure which is different from of a unitary state does not affect in any way the principle of the responsibility of the state for internationally wrongful acts.[13] The component states of the federation, although they have a certain domestic autonomy according to the constitutional provisions, do not have legal personality of international law, do not have the capacity of signing treaties and cannot be held responsible internationally. In the cases where the component units can sign treaties in own name[14], the other party needs agree to limit its recourse to the component unit that has assumed commitments, in the event of infringing an obligation. In such a case, the responsibility of the federal state cannot be invoked as we are not under the scope of the rules regarding the responsibility of the states for wrongful acts. Another possibility provides for the responsibility of the federal state according to the provisions of a treaty, a responsibility which is however limited by a federal clause inserted in the treaty[15]. The cases mentioned above are considered exceptions to the general rules regarding the application of the treaties between the states that are parties to them.

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[10] G.Geamănu, *Drept internațional public (Public International Law)*, vol.I, (Didactic and Pedagogical Publishing House, Bucharest,1981), p.333.

[11] *Moses Case* -International Arbitrations, vol.III, 1871, p.3127.

[12] James Crawford, *The international Law Commission's Articles on States Responsibility, Introduction, text and Commentaries,* (Cambridge University Press 2002), p.97.

[13] Germany v.Unites States of America, I.C.J.Reports, 1999,p.9.

[14] art 56(3),172(3) Swiss Constitution of April 18, 1999.

[15] art. 34 of the Convention on the protection of world cultural and natural heritage in Paris from 1971.

Consequently, the legal provisions focus on the responsibility of the states for wrongful acts engaged by communes, provinces, regions, cantons or component states of a federal state, entities which from a linguistic point of view can be called former bodies of the states.

Judicial authority is independent from the law making and executive power, according to the principle of separation of the state powers; however, it is a state authority that acts on the behalf of such state. From this point of view, the case of a court, which would infringe the norms of international law, could trigger the responsibility of the state. The responsibility of the state for acts of judicial bodies can be triggered when court decisions are adopted that run counter the norms of international law (solutions that ignore the immunity of jurisdiction of a diplomat or the right to be protected of a citizen, or disregarding an extradition treaty) and when the behaviour of the court can be referred to as a denial of justice (refusal to allow access to the court, denying foreign citizens the protection of their rights, delay in the administration of justice, the expedite conducting of judicial procedures, refusal to execute a court decision that is favourable to a foreigner).

3. Persons or entities that act on the behalf of the state

The organizational structure of the states is different and complex, thus beside the category of the state.

It is attributed to the state the behaviour of a person or entity that is not a state body, but that is enabled to exert prerogatives of public power, even if this behaviour infringes the instructions received, or acts under its management or control, as well as the behaviour of a person or group of persons that exert in fact prerogatives of public power in case of an absence of the official authorities.

It has been asserted that the principle of the responsibility of the state for wrongful acts engaged by its state bodies is not necessarily absolute or exclusive.[16] On the contrary, the analyse of the principle would include in the category of the acts attributed to the state, also the acts of persons or groups of persons that do not fall under the category of state bodies. In order to understand more correctly the concept of an entity authorized to exert services of public character or governmental authority, we will analyse the category of the para-state bodies, which can include public corporations, semi-public entities, all types of public agents and even in special cases private companies, on condition that in each case the entity should be empowered to exert public functions, which normally should have been exerted by the state bodies. For instance, in some states, private security companies can be contracted to operate as prison guards and in such case can exert public powers, such as maintaining the state of detention, discipline and tasks regarding the compliance with the prison regulation. The state or private air services can be delegated to exert undoubtedly functions regarding the immigration control or imposing quarantine.

When an entity is attributed powers in order to exert elements of governmental authority, its nature is not taken into account, in the sense that it is disregarded whether the entity is public or private, or it is disregarded the state's participation in the equity or the type of ownership over the goods.

Such entities are empowered by exerting the elements of governmental authority according to domestic law. Against this background, mention must be made that there are taken into account only the activities performed that are not related to state functions and no other private or commercial activities in which such entities can be engaged. Thus, for instance, the management of a railway company involving the ensuring of safety activities is regarded as an activity of the state according to international law, other activities, such as the distribution of tickets, do not fall under the category of the activities analysed.

To international law, it is relevant the connection established between entities and the state in order to be able to analyse the chargeability of the wrongful acts committed on the behalf of the state.

[16] Yearbook of the International Law Commission,1971,vol.II, Part One, p.254.

Considering the claims by the practice and doctrine of international law, I.L.C. has instated the rule mentioned in art.5, thus: the conduct of a person or entity that is not a body of the state according to art.4, but that is empowered according to domestic law to exert elements of governmental authority, can be considered an act of the state according to international law, specifying that the person or entity acts in a specific case.

The legal provision regulates the position of the entities analysed above, the category mentioned not being provided for in art.4 that refers only to the entities that act as state bodies, irrespective of the position held in the organizational structure of the state. The wording is general and the state entities and activities that can be exerted are to be determined by the way of internal organization of the state, by the tradition instated and last but not least by the historic evolution of the concepts.

We have pointed out that the wrongful act can be charged to the state due to the wrongful conducts engaged by the state bodies or by the wrongful conducts engaged by entities that exert elements of governmental authority. Further on, we will focus on the cases where the wrongful acts are engaged by persons or groups of persons that do not have a well-defined position within the organizational structure of the state, but that can determined, by their wrongful acts, the international responsibility of the state.

There is a considerable number of cases, where a person or even a group of persons that, although they do not hold an official position according to the internal order can find themselves in a position to exert certain functions, which are normally exerted by state bodies. As we know, the conduct of private persons is not attributed to the state, thus the wrongful acts engaged by private persons cannot trigger the international responsibility of the state unless under special conditions. It is worth mentioning the role played by the principle of effectiveness in international law, which focuses on the real relation established between an individual or group of individuals and the mechanisms of the state. According to the domestic law, the state often assumes responsibility for the acts committed by private persons that exceptionally exert public functions in the stead of lawful public servants, who omit to exert such functions or are faced with an impossibility to do that. Similarly, the state is considered responsible for the acts of the persons authorized to perform especially public services, or for the acts of individuals or groups of individuals that have been authorized to carry out missions for the state.

The state, in its capacity of subject of international law, could be responsible for the wrongful acts committed by various categories of persons that are not authorized to perform activities, directed, controlled missions or missions according to the instructions of the state. The performance of the specified missions in an improper manner leading to infringing the international obligations assumed triggers the international responsibility of the state. The effectiveness principle, asserted strongly in the analysis made, requires the setting of clear cut criteria showing in a certain manner the relation between the mechanisms of the state and the conduct of the respective person. An act by a person empowered with legal capacity is not necessarily an act of the state, if the respective person acts in private capacity. Similarly, it is but logical that the acts of a private person who in one way or another conducts activities or missions under the coordination of the state can be considered acts of the state and can trigger the international responsibility.

Charging the states with the authorized conduct of persons or groups of persons is recognized by international practice usually in the cases where persons or groups of persons are used as forces ancillary to the armed forces or sent as volunteers to the neighbouring countries, but also in the cases where the persons are charged with certain missions in foreign territories.[17]

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[17] United Nations,Reports of Interational Arbitral Awards,vol VI,1925, p.160- cazul *Zafiro;* United Nations, Reports of International Arbitral Awards, vol.IV, 1927, p.267- *Stephens* case *;* American Journal of International Law, Washington, vol.25, No.1, 1931,p.147; UNRIAA, vol.VIII, 1930, p.84 şi UNRIAA,vol.VIII, 1939, p.225- *Black Tom şi Kingsland* cases.

In respect of the aspect presented above, in some cases there has been developed the concept of the *de facto* official, and, in order to justify the concept mentioned above, it has sometimes been invoked the theory of appearance, some other times, the theory of necessity or *negotiorum gestio*[18]. However, there are of no interest the various justifications of the validity of the acts performed according to the internal law of the state, as this has to do with international legal order. Considering the acts committed as acts of the state according to international law is independent from the attribution of the acts according to the domestic law, even is common aspects might exist. As an example of a *de facto* official, we may refer to a person that assumes public offices without being expressly appointed to a position; they might have been appointed occasionally or although they conducted a regular activity, they have been suspended for a certain period of time. In such cases, it has been asserted that the respective person only apparently exert this position in a regular manner, these acts are not of the officials', but can exceed official capacities or may be unlawful, as the person that acts is not a person with an official capacity. According to the facts above this is a private person that exerts public offices. Nevertheless, the acts and decisions are perfectly valid, according to domestic law, as against a third person. That is why it is normal that such acts should be considered acts of the state according to international law. Such a conduct is attributed to the state only if it is directly controlled, directed, a specific operation, and the challenged conduct has been an integral part of the operation conducted.

The principle does not extend to a conduct that has been only incidental or to a certain extent associated with the operation or when the operation has broken loose from the direction or control of the state. Thus, establishing the degree of control that can be exerted by the state so that the conduct should be attributed to it has been the key of resolving the case *Military and Paramilitary Activities in Nicaragua*.[19]

The above clearly show that the responsibility of the state for the acts of the persons or groups of persons is triggered only when such persons or groups of persons act according to the instructions or under the guidance or control of the state to meet the conditions of the conduct.

Closely following the principles derived from the international practice, I.L.C. has aimed, throughout its activity of codifying the responsibility of the state for internationally wrongful acts, at regulating the principle stating that a conduct charged against a person or group of persons can be considered an act of the state, if such persons or groups of persons act according to the instructions or guidance or control of the state.[20]There are considered three variants, namely – instruction, guidance, control -, being enough to establish one single variant in order to have a wrongful act attributed to the state.

4.*Ultra vires* Acts

The problem is whether it is possible to attribute to the state the conduct of its bodies, which act in their official capacity, but exerting in excess the competencies attributed according to the domestic law has been a matter of interest for the specialists in international law for a rather long period of time. The difficulties have been determined first of all by the concept supported by older theoreticians, who based on the premise that state organization is determined exclusively by the domestic law of the state have been wrong to say that it is impossible to attribute to the state the action of entities that are not state bodies or that although they have this capacity do not act according to the provisions of the domestic law. The analysis regarding the conditions under which an action or

[18] Administrarea afacerilor altuia (Other business administration).

[19] Martin Dixon, Robert McCorquodale,*Cases and Materials on International law*,fourth edition, (Oxford University Press, 2003),p.415.

[20] The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct-Article 8- Conduct directed or controlled by a State

omission by a body of the state that acts in excess authority or contrary to the instructions received triggers the responsibility of the state, will be made by a diligent research of the practise of the states, judicial decisions and specialized literature.[21] The rule invoked involves the need for clarity and security of the international relations.

The practise of the states' existent in the second half of XIX century seems to be in agreement, on both sides of the Atlantic, to assert the idea that the states need to accept the responsibility for the facts of their bodies, even if the acts committed are manifested outside the attributed competencies or run counter to the legal provisions. Although in principle the states on the European continent had a rather similar position to that of the United States, there still existed differences on the basis of triggering responsibility. It was claimed that the responsibility of the states for the *ultra vires* acts of the officials is determined by the position of the body in the hierarchical structure of the state, the European States being against such a distinction.

In XX century, it was noted a recognition of the rule, as being a principle of international law.[22] During the preparing works for the Hague Conference, the government of the member states were questioned with regard to the principle according to which the responsibility of the state is triggered in case of committing wrongful acts by the state bodies that act contrary to the legal provisions or in excess of authority. The participants in the Conference adopted an article that established that the international responsibility is chargeable to the states if the damage incurred by a foreigner are the result of unauthorized acts of the officials acting officially, if the actions run counter to the international obligations of the states.

The criteria that prevailed in the Codification Conference in Hague did not suffer big changes, the practice of the states from 1930 to date has proven the recognition of this principle.[23] Constantly, it has been established that the responsibility of the states is engaged for the acts of the military, if force had resulted from an official duty and the military acted under the command of an officer. It has been proven in numerous cases that what is chargeable to the state is the negligence of the officer that exerts control over the soldiers under their command.[24]

As a result, it is recognized the theory according to which it is chargeable to the state internationally its responsibility for the wrongful acts committed by its officials or bodies that act contrary to the orders received or in excess of authority.[25] Wrongful acts committed by the bodies or agencies of the state trigger responsibility, even if there has been no specific authorization. The type of responsibility under scrutiny cannot find its basis in the general principles and we refer here to the principles that govern the internal organization of the state (an allegation supported by the older theoreticians of international law). An action performed by the bodies or agencies of the state is considered an action of the state only if it is performed according to the legal provisions and it remains within the limits of the regulated competency. Thus, an action performed outside the competency, is not an action of the state and will not trigger the responsibility of the state. International life is, however, much more complex and uncertain and accepting the exclusion of the responsibility of the state for the wrongful acts of the state bodies that exceed the attributed competency or run counter the instruction received would make difficult the conducting of international rapports. That is why it has been considered correct to establish the responsibility of the state for the wrongful acts committed by its bodies or agents or organisms that exert public offices, establishing the objective character in order to guarantee the international security. In order to allow the triggering of the objective responsibility, the actions taken by the bodies that act outside the

[21] Fourth report on State responsibility, by Mr. Roberto Ago, A/CN.4/264 And Add.1,p. 4.
[22] Digest of International Law, vol.V, p.570-571.
[23] Cazul *Youmans*-Reports of International Arbitral Awards, vol.IV, (1926), p.115-116; Cazul *Caire*- Reports of International Arbitral Awards, vol.V, 1929, p.531.
[24] John O'Brien, *International Law*, (Cavendish Publishing Limited, London, 2001), p.368.
[25] M.Shaw, *International Law,* 4th Edition, (Cambridge, University Press, 1999), p.549.

competency need to be actions that create the appearance that those bodies act in official capacity or have used methods and powers outside the official competency.[26]This theory was at the basis of the arbitral decision ruled in the Caire case.

This rule was reaffirmed in the *Mosse* case*,* which states: even if it had been noted that the officials acted outside the legally established competency, it could not be admitted that the request is ungrounded. It would be necessary to establish whether in international order the state could be considered responsible for the actions taken by the officials apparently within the limit of their positions, according to a conduct that was not fully contrary to the instructions received.[27]

The responsibility of the state for the internationally wrongful acts committed by state bodies outside the competency attributed or contrary to the instructions received has been recognized also by the International Courts and Tribunals of Human Rights.[28] For instance, the Inter-American Court of Human Rights established in the *Valesquez Rodriquez* case that the breaching of the Convention was independent of whether the official had acted contrary to the provisions of the domestic law or above the limits of the authority conferred, in international law the states being considered responsible for the actions or omissions of the agents that acted according to their official capacity, even if the agents acted outside the attributed authority or breached the norms of the domestic law, as they acted under the appearance of the official capacity.[29]

At first sight, further to analysing the theories mentioned above, winning position seems to be held by the traditional theory according to which the state is not responsible for the actions of the bodies or entities that exert elements of government authority, actions that have been taken contrary to the instructions received or in excess of authority, as this would be contrary to the principle that establishes the way of internal organization of a state. However, the reference is international order and not domestic order and in international realm the state is considered responsible for the acts committed by its bodies or agents, as the state has failed to take all the necessary measures to eliminate such cases. It is important to clarify whether the officials have acted based on the state authority or whether the action does not correspond to the set of functions held and then another case comes into attention, namely the status of the private actions that are not attributed to the state. The distinction between the acts not authorized but performed under an official capacity and the private conduct is difficult to make and involves a careful analysis of each case.

The opinions expressed in the specialized literature, the practise of the states and rich case law have helped ILC in its efforts of codification to form a grounded opinion and to assert that the rule is worth introducing in the draft regarding the responsibility of the states and thus it refers to the conduct of a body of the state or of a person or entity empowered to exert elements of governmental authority and mentions that this conduct can be considered an action of the state according to the international law, even if the body, person or entity acts in excess of authority or contrary to the instructions received.

We note that an essential condition is the legal relation between the entities that act and the state, this relation determining essentially the responsibility. Entities are state bodies, irrespective of their place in the organizational structure, or persons or entities empowered with elements of the governmental authority. It therefore results that several conditions are met: a set of attributions, a competency established according to the legal provisions and entities that act exceeding their legal competencies or contrary to the instructions received without, however, having any authorization in this respect. It can thus be considered that the theory of appearance supported by the United States from the very beginning finds its applicability in the cases where the provisions of art. 7 are

[26] R. McCorquodale, M. Dixon, op.cit., p.413.

[27] M. Shaw, op.cit., p.549.

[28] European Court of Human Rights, Grand Chamber, Ilaşcu and others v. Moldova and Russia, 2004, para.319.

[29] Yearbook of the International Law Commission, vol.II, Part Two, 2001, p.102.

applicable. We point out that if the appearance of official position did not exist, then it would be obvious that the entities mentioned above would act in a private capacity. It is obvious that the aim is not to formulate justifications to avoid the cases of responsibility of the states, but neither should we exaggerate in considering all the wrongful acts committed as acts of the state.

5.Conduct manifested in the absence or lack of official authorities

This principle is manifested as legitimate in art.4, paragraph A(6) of the Geneva Convention of 12 August 1949 regarding the treatment of the war prisoners, as well as other legal international instrument. The recognition of this principle does nothing else than bring back to the attention of the specialized literature the existence of the rule *levee en masse,* which can be identified with the cases of legitimate defence of the citizens in the absence of the regular forces, it is a form of "agency of necessity". Practice has proven that there can be identified such cases, thus raising the problem of assuming responsibility. In the *Yeager v. The Islamic Republic of Iran* case*,* the position of the Revolutionary Guards or the "Komitehs" immediately after the revolution in Iran was treated based on the rule analysed by the Court set up upon that occasion. The Court granted compensations for the acts of expelling, but in this case the acts were performed by the Revolutionary Guards after the success of the revolution. Although the Revolutionary Guards did not have at the time the capacity of official bodies of the Iranian state, it was established that they exerted the governmental authority, this aspect being known and approved, thus triggering Iran's responsibility for the actions of the Guards.[30] In a different development, in the *Rankin v. The Islamic Republic of Iran* case, the Court noted that the claimant failed to prove that he had left Iran after the revolution as a result of the actions of the Iranian government or of the Revolutionary Guards or that he had simply left Iran due to the difficult life conditions existent during the revolution. As such, the responsibility of the Iranian state could not be engaged.[31]

As it can be seen, the setting up of the respective entities is determined by special circumstances arisen in case of revolutions, armed conflicts, foreign occupations, when the legal authorities are dissolved or suppressed becoming non operative. The circumstances need to be such as to generate the necessity of exerting the elements of government authority by private persons. The exerting of elements of government authority can be determined by the absence or actual lack of the official authorities legally constituted, which leads to a complete collapse of the state apparatus or partial collapse by losing the authority over a part of the territory.[32]

In this respect, we welcome the rule instated by the draft articles, meant to cover a wide range of cases identified in practice, according to which the conduct of a person or group of persons can be considered an act of the state, according to international law if the person or group of persons exert in fact elements of governmental authority in the absence or lack of official authority in circumstances that require the exercise of such elements of authority.[33]

From the analysis of the provisions presented above we consider that there can be identified three conditions that need to be met in order to engage the responsibility of the state: the conduct should actually reflect the exerting of the elements of governmental authority; the conduct should be exerted in the absence or lack of official authority; the existing circumstances should require the exertion of governmental authority.

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[30] M.Shaw, op.cit.,p.552.

[31] Idem.

[32] Such a case should not be mistaken for the situation of the *de facto* governments, the latter being part of the state structure and replace the governments that existed before them.

[33] Art.9 of the Draft articles regarding the responsibility of the state for internationally wrongful acts.

6. Insurectional movements or other internal unrest

The possibility of the responsibility of the state for wrongful acts committed by bodies of insurrectional movement is analysed generally in relation to the problem of the responsibility of the state for the acts committed by private persons during the internal unrest, the violent rallies. The movement is in essence a "temporary" topic, the length of its existence coincides with the length of the fight against the state, thus, if the fight is suppressed, its existence is finalized and its organizational structure is dissolved. If the movement is victorious, two cases may arise: the insurrectional movement may take over the control over the organizational structure of the old state or a new state may appear.[34]

The first case elaborates on the annihilated insurrectional movement, a case where the specialized literature has identified certain particularities. As a general principle, the acts of some insurgents that violate international law (harming representatives of foreign states, diplomatic missions, foreign citizens and their properties) cannot be charged to the states, as this case resembles, from this point of view, the acts of private persons. Still, the state is responsible also in such cases for the lack of "*due diligence"* in adopting – if possible – adequate measures of protection or repression.[35] A wide scope support of the principle is included in arbitral case law.[36] Although the case of exoneration from responsibility might constitute a principle, the doctrine claims that it could not be applied to cases where the state has the obligation of due diligence.[37]

We mention that there is no difference between the case where negligence of the state occurs before the insurrectional movement should have an active existence and the subsequent case, where, for instance, the internal restoration took place and the state authority has omitted to punish the authors of the acts committed during the insurrectional movements.

The elimination of the international responsibility for the wrongful acts of the state can be justified in case where it acts with a view to annihilating the insurrectional movement, the case of the internal conflict might constitute an event of force majeure. The rule is easy to support with arguments, but difficult to apply in the context of the general rules under scrutiny.

In conclusion we can say that the annihilated insurrectional movement does not trigger the responsibility of the state for the wrongful acts committed by the agents of the insurrection during the rebellion, apart from the case where it can be invoked the fact that the state had the obligation of due diligence and failed to meet this obligation.[38] On the other hand, the state is not responsible for the actions committed during the military operations conducted in order to annihilate the movement, only if it has caused damage which is not justified in the given circumstances. Thus the defeated insurrection does not engage the responsibility of the state for the acts of the rebels, but the state is, however, responsible for the acts of its agents.[39] The elimination of responsibility can be achieved by invoking the existence of internal unrest, which may constitute an event of force majeure. This conclusion is also shared by the International Law Commission which states that the acts of the insurrectional movement cannot be attributed to the state, they can be charged only if they are classified as acts of the state (as per art. 4 to 9[40]).

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[34] Gerhard von Glahn, James Larry Taulbee, Law among Nations, 8th Edition, (New York, San Francisco, Boston, 2007), p.328;(Yearbook of the International Law Commission, 1972), vol.II, p.129.

[35] Gerhard von Glahn, James Larry Taulbee, op.cit., 2007, p.328; I.Brownlie, *Principles of Public International Law*, (Oxford, 1998), p.162.

[36]Report of International Law Commission, 2001,p.112; M.Shaw, op.cit.,p.551; caz *Sambaggio*- United Nations, Reports of International Arbitral Awards, vol. X, 1903, p.512-513.

[37] J.O'Brien, op.cit., p.371.

[38] I.Anghel,V.Anghel, op.cit.,p.35.

[39] R. Miga-Beşteliu,op.cit., 2008, p. 34;Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alains **Pellet**, op.cit,p.869.

[40] Yearbook of International Law Commission, vol.II, Part Two,2001,p.112.

The success of the insurrectional movement can lead to radical changes to the state against which is has fought, the result being the affecting of the continuity of the state and major changes to its identity. The organizational structure of the pre-existent state ceases to exist, forming a new state on the same territory, with an international personality different from the one of the state that has disappeared. On the other hand, the victory of the insurrectional movement can lead to the apparition of a new state on a part of the territory of the pre-existent state or within the territory under the administration of the state.

The basic principle regarding the attribution of the conduct of the victorious movement or of another movement to the state, according to the international law, is determined by the relation between the movement and the governmental bodies. We mention that the word "conduct" regards the conduct of the insurrectional movement and not the conduct of the members of the movement that can act in own interest.

In case where the insurrectional movement, as new form of government replaces the prior form, the organizational rules of the insurrection become organizational rules of the new state. The continuity existent between the newly established state and the victorious insurrectional movement constitutes a thorough justification to be able to attribute to the new state the acts committed by the insurrection during the fight. In such a case, the state does not cease to exist as subject of international law, it remains the same entity, in spite of the changes occurred, being reorganized and adapted from an institutional point of view. We point out that the acts attributed to the new state are acts committed by the insurrection with a view to winning the fight and forming the new government.

Another form of continuity considers the case where the bodies of the insurrectional movement become bodies of the new state established further to decolonization on a part of the territory of the predecessor state or on the territory under the administration of the predecessor state. The notion of territory needs to be understood as being a part of the territory of the predecessor state over which the movement has obtained sovereignty as a result of the fight conducted or any territory that was under a regime of dependence.

The practice of the states, the arbitral decisions and the specialized literature have confirmed the two cases.[41]

The decisions of the international courts and recent practice undoubtedly confirm the application of the principle of the responsibility of the state for the wrongful acts committed by the victorious insurrectional movement. The *Short vs. Iran case*, settled by The Iran-United States Claims Tribunal with decision of 1987, proves the possibility of applying the rule under scrutiny only when all the specific circumstances are identified in the case. Thus, the plaintiff, Mr. Short, claimed damages for losing the benefits of the workplace and personal property caused by his forced expulsion from Iran further to the Islamic Revolution of 1978-1979. The plaintiff invoked the acts committed by the revolutionaries trying to attribute the responsibility for these acts to the government that was instated further to the success of the revolution. Still, there were not identified the persons that acted as agents of the revolutionary movement and that forced him to leave the Iranian territory. The acts of the supporters of a revolution cannot be attributed to the government instated further to the success of the revolution, the same as the acts of the supporters of the previous government cannot be attributed to the new government[42], which can also be found expressed in the ILC draft[43]-art.10.

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[41] United Nations, Reports of International Arbitral Awards, vol IX, 1903, p.453.

[42] Iran-United States Claims Tribunal, (1987-III) 16 Iran-US CTR 76; B. Onica-Jarka,C. Brumar, D.A.Deteşean, *Drept internaţional public (Public International Law),* Caiet de seminar, (Editura C.H.Beck,Bucureşti, 2006), p.180.

[43] Article 10. Conduct of an insurrectional or other movement:1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international

The term of insurrectional movement used by the ILC in para.1,art.10 does not cover all the categories of manifestations in practice of these movements. That is why, under para. 2, it is attempted an extension of the concept, and art.10, para. 1 covers the case where the victorious movement substitutes the organizational structure of the predecessor state, by the phrase "which becomes the new government", by designating the consequences.

However, the provisions mentioned above do not cover the case where the conflict ends by a national reconciliation between the authorities of the state and the leaders of the insurrectional movement. We consider that this case can be classified legally, according to the terms of the national reconciliation, if the reconciliation regarding the maintaining of the governmental authorities of the predecessor state or the takeover of power by the leaders of the movement, this leaving room for joint liability. If the power is taken over by the leaders of the movement, the case can be classified under the scope of the provisions of art. 10, whereas in case of the continuity of the predecessor state, the problem is more difficult to deal with, that is why another separate legal provision would have been necessary in this respect.

There is no distinction between the categories of movements, considering the legitimacy of the acts undertaken in order to form the new government.

The analysis of the text of art. 10 shows that the responsibility of the insurrectional movements or of other similar manifestations does not fall under the scope of the purpose pursued by the Draft regarding the international responsibility of the states for wrongful acts. However, the existence of the responsibility of the defeated insurrectional movement cannot be denied, although it is not regulated. For instance, such an entity could be considered responsible for the violation of the rules of the international humanitarian law by its forces.

7. Responsibility of the states for wrongful acts engaged by bodies of other states.

The development of the international society, by adaptation to various historical periods has led to the apparition of a big number of subjects of international law, resulting in the diversification and intensification of the rapports between them. The most numerous rapports are recorded between the states, thus a state can make available to another state a certain category of bodies or can participate in conducting activities of common interest with other states. The rapport created have international consequences, in this respect, considering the topic under scrutiny, we will deal with the consequences vis-a-vis the international responsibility.

The first case that we will subject to analysis is that in which a state makes available to another state certain bodies, be them individual or collective, so that the respective state can use them in order to perform certain activities or public functions. In practice, such cases may for instance take one of the following shapes: a state makes available to another state a police contingent or a contingent of armed forces so that together with the forces of the beneficiary state it can resist the insurrectional movements or foreign aggression; a state may send to another state a detachment that ensures the medical services, a hospital or bodies that ensure other types of services in order to give assistance in case of an epidemic or a natural disaster; the authorization of the officials of a state to ensure on the territory of a third state services for another state whose officials cannot provide for various reasons.

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law;2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an

act of the new State under international law; 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

A different case is when the bodies of the sending state travel on the territory of the beneficiary state in order to give aid or assistance, but the directions, control or instructions are still given by the state to which the bodies belong.[44]

The cases presented above underscore the fact that the delimitation of the activities needs to be carefully made also according to the circumstances existent on case by case basis. This should not be mistaken for the cases of the states which given the situation they were in – dependence, protectorate, under mandate, military occupation – had to accept the presence of the bodies of another state on their territory or had to make available their own state bodies to the state to which they were subordinated.

The authors of public international law have supported the principle, as it has been justified by the international practice and case law. Brownlie and Durante have been the only ones that have paid a greater attention to explaining the principle of the responsibility of the states for the wrongful acts committed by the bodies made available to another state. Without pointing out the existing particularities, Brownlie claimed that the beneficiary state was responsible,[45] on the contrary, Durante underscored the importance of proving the subject that coordinated and controlled the activity of the engaged bodies. It is important to note that the international practice and case law have left a defining mark. Thus, the principle was applied by the arbitral decision dated 9 July 1931 in the C*hevreau* de by Judge Beichmann, who rules his decision on the basis of the compromise signed in London on 4 March 1930 by France and Great Britain.[46]

The phrase "made available to another state" expresses the essential condition that needs to be proven so that the wrongful act engaged by the respective body should be attributed to the beneficiary state and not to the state to which it normally belongs. Performing various activities under the control or directions of another state involves unequivocally the determination of the activities performed, namely their type and the time span in which it is acted in order to fulfil the functions entrusted by the requesting state, exclusively under the direction and control of the beneficiary state. The bodies in question need to have the capacity of bodies of the sending state, on the one hand, and on the other hand the conduct engaged should involve elements of the governmental authority of the beneficiary state. As a result, private entities and individuals cannot have the capacity of state bodies. For instance, the experts made available to another state according to a program of technical assistance do not have the capacity of state bodies.

The deriving conclusions is the following: in case of wrongful conduct engaged by the bodies of a state, the beneficiary state will be responsible, if the respective bodies had the capacity of bodies of the sending state and if they exerted elements of governmental authority in the beneficiary state, being an integral part of its internal organizational structure.

The analysis cannot be concluded here, as the practice and case law of international law have also identified the case of the states that act jointly triggering the responsibility of a state with regard to the act of another state. It has been claimed that the existence of a wrongful conduct is often determined by the joint action of several states, the cases where a state acts alone being less frequent.[47] There are also cases where several states act independently, but with a view to achieving a common goal or cases where the states acted by means of a common body. The wrongful act may be generated in cases where a state acts on the behalf of another state in fulfilling the respective tasks. There are also circumstances where the wrongful conduct of a state depends on the independent action of another state. A state can engage a conduct together with another state already involved,

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[44] Xand Z v. Switzerland, (Yearbook E.C.H.R.,372, 1977), p.402-406.

[45] I.Brownlie, *Principles of public international law*, (Oxford University Press, 1998), p.376.

[46] United Nations Reports of International Arbitral Awards, vol II, (1931), p.1115-1116.; I.Brownlie,op.cit., 1998, p.458.

[47] I.Brownlie, *System of the Law of Nations: State Responsability (Part I),* (Oxford, Clarendon Press, 1983),p.189-192.

thus the conduct engaged by the intervenient state can be relevant or even decisive in determining the existence of infringing the international obligation by the first state. We mention that it is considered the responsibility triggered by the wrongful conducts committed within the international organizations.

There can be brought into discussion also the responsibility of a state that deliberately forced another state to commit an wrongful act. In such cases, the responsibility of the forcing state towards the third state derives from the acts of forcing, the responsibility being determined by the wrongful conduct committed by the action of the forcing state. There can be identified two different rapports: the first rapport arises between the state that commits the acts of forcing and the forced state and the second rapport arises between the forced state and the state victim as a result of the wrongful act committed by the forced state.

With regard to these aspects, the comments on the draft articles regarding the responsibility of the states say that the cases of forcing can equal the invoking of an event of force majeure. Forcing that equals force majeure can determine a cases of absence of the wrongful act of the forced state. As a result, the act of the forced state cannot be considered wrongful act, however, it can be considered an act committed under the control of directions of another state. As a result, by invoking the directions or control exerted by another state, the responsibility of the forcing state could be triggered. On the contrary, if the forcing state was not found guilty, the victim state would be disadvantaged as it would not be able to cover the damage caused. In practice, the forcing is manifest under various forms starting from the use of force, the intervention in the internal affairs of another state or serious economic pressure, forms that can unequivocally lead to committing wrongful acts.

In such a case, where it is invoked the forcing by another state, Romania was also subject to. In the dispute between Romania and the United States, the request of the American government regarding the destruction of the oil storage facilities that belonged to an American company at the request of the Romanian government during World War II was initially formulated against the British government. The prejudice was effected when Romania was at war with Germany, which was preparing to invade Romania. Thus, the United States asked the Romanian authorities to cooperate with Great Britain in order to take the necessary measures. The British government denied responsibility saying that its influence exerted on the Romanian authorities had not exceeded the limits of good counselling between the governments of the states associated in such cases. The central point of the dispute was not represented in fact by determining the responsibility of a state for the wrongful acts committed under the pressure of another state, but rather the existence of forcing.[48]

In this field, the ILC draft includes norms of international law that generate controversies even today. For instance, the case of a body made available to a state by another state has been introduced in Chapter II, which has aimed at codification[49]special circumstances determined by the subjective element of responsibility. With regard to the responsibility of the state in respect of the act of another state, a lengthy analysis has led to the preparation of a separate chapter. Chapter IV thus includes in four articles rules regarding: the responsibility of the state in case of giving aid or assistance to another state; the responsibility of the states when they have exerted directions and control with a view to committing a wrongful act by another state; the case of engaging a wrongful conduct by a state forced by another state, as well as the effects of the respective norms.

The research of the practice of states, international case law and doctrine has led to many divergent opinions even if we are talking about a 50-year long experience.

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[48]Hackworth Green Haywood, *Digest of Internațional Law*, vol V, (U.S.Government Printing Office, Washington,1943),p.702 .

[49] Article 6. Conduct of organs placed at the disposal of a State by another State-The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

A part of the authors of international law has criticized rather harshly the approach of ILC. Thus, it is claimed that articles 4-11 approach these matters by the term "attribution", which indicates when an act should be considered an act of the state. These rules are generally traditional and reflect mainly a codification of the existent customary law, rather than a significant development of law. In spite of the apparent concrete character, the standards established under some rules lead to important ambiguities and their application will often require finding significant facts and rationales. For instance, the phrases "government authorities" or persons "under the guidance and control of the state" have been explained by resorting to the decisions ruled by international tribunals that have approached these matters in rather different manners. The state authorities are defined as being all the categories of bodies that are part of the internal organizational structure of a state according to the internal law. But internal law may be an imperfect or incomplete guide or may not include any relevant provisions, so that particular circumstances will be determined outside the national law. The extent to which states should be held responsible for the behaviour that involves private actors is a contemporary topic with an increased significance. Still, the attribution rules as established represent only the tip of the iceberg in respect of the cases where private acts may trigger the responsibility of the state. Thus, the compliance by the state with the environmental agreements depend in most cases not only on the action of the state, but also on the action of private parties whose incapacity of reducing pollution to the levels required by an agreement may lead to the violation of the obligation by the state.[50]

Conclusions

The analysis of the subjective element of the wrongful act makes us adopt a rather uncertain position expressed by the phrase "too much or too little". The purpose is to identify general elements that should determine the preparation of a convention or document of a general character. The identification of particular cases, from our point of view, and their introduction in the content of a general approach cannot be considered as correct. Subsequently, a point may be reached where there may be identified other cases of a special character leading to the possibility of invoking the fact that the state is not responsible. Mention must be made that the aim is to prepare a set of rules regarding the responsibility of the state, irrespective of whether it is about an action or omission, irrespective of whether it is a victorious revolutionary movement or a defeated one, etc. If the intention is to identify other entities that should be responsible for improper international conduct, then it should firstly be established whether these entities can have or not the capacity of subject of international law or in what capacity they are responsible internationally.

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