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Subjectivity and liability of state in law and international relations- the outline of issue.

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Abstract: The subject of international public law is defined as that, who appears in international relations, which procedings are regulated by international law. International liability of the state is born as a result of its violation of international law.

The concept of subject in international relations seems to be necessary for the discussion of the concept of international legal subjectivity. The legal approach to international relations is that the subject of international law is state and some international organizations, in turn the philosophical approach proclaims, that the subject of international relations should be considered as physical entity[1]. A realistic approach considers this issue in terms of each element of society, which plays an independent role in international relations. This includes states, international organizations and, in specific cases, natural persons, legal entities, national minorities, classes, a group of natural persons such as international public opinion[2].

The subject of international public law is defined as that, who appears in international relations, which procedings are regulated by international law [3]. Legal and international subjectivity is the ability to acquire rights and incur international obligations. The creation of this subjectivity can not exceed the framework of the law specifying relations between states[4]. The matter of the subject of international law refers to the question whether individual or group entities of international relations use their legal capacity and capacity for legal action, possibly to what extent[5].

The concept of international law as the regulator of international relations enriches
the concept of subject, applied in other branches of law, by two elements. The first

[1] J. Gilas, *Prawo międzynarodowe,* Wydawnictwo Comer, Toruń 1995, p. 117.
[2] Ibidem.
[3] Ibidem.
[4] A. Klafkowski, *Prawo międzynarodowe publiczne,* Państwowe Wydawnictwo Naukowe, Warszawa 1979,
p. 133.
[5] Ibidem.

one is based on the assumption that the rights and obligations arising from the development of international relations fall within the competence of the state, and therefore are connected with its sovereignty. So the subjectivity of international law is identified with sovereignty. The second element points to the fact that an entity governed by international law simultaneously creates standards of that law, and no other subject of law, except this state, undertakes this task[6].

The notion of an entity governed by international law is inextricably linked to sovereignty as an integral part of the state. Sovereignty is a key feature that distinguishes international law from the rest of the law[7]. This feature means that international law only specifies relations between states, and does not deal with relations between a state and an individual or between individuals. The definition of international law clearly defines who can be the subject of international law, pointing to the state[8]. It is the addressee of most of its standards, and is the subject to law regulations. It is the sole sovereign, original and full subject of international law, that is, ipso facto a full subject of international law becomes at the moment of its inception[9]. However, this does not contradict the possibility of the existence of another subject of international law. Since the state constructs international law, it also has the power to appoint the new legal institutions, it may, therefore, based on an international agreement, create another body of international law, bearing in mind the observance of relevant legal norms[10]. This applies to such creatures as: the Holy See [11], autonomous territories, insurgent communities and international

[6] Ibidem.
[7] Ibidem.
[8] Ibidem.
[9] W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, Wydawnictwa Prawnicze PWN, Warszawa 1998, p. 122.
[10] A. Klafkowski, *op. cit.*, s. 133.
[11] *The Holy See*- head of the Catholic Church and its subordinate curial offices. The activity of the Holy See as an entity governed by international law is based on the recognition of the sovereignty of the pope as the head of the Catholic Church. The Apostolic See has a passive and active law of legation, contains with Catholic countries international agreements, called concordats, and maintain diplomatic relations under the terms of the Vienna Convention of 1961. An important element of the subjectivity of the international law of the Holy See was the acquisition of symbolic territory by the Lateran Treaty, signed with Italy in 1929, and the appointment of a sovereign state, called State-City-Vatican. Rights: representation of the Holy See, international agreements, the establishment of diplomatic relations, appointment and dismissal of diplomatic representatives, the acceptance of letters of credence from ambassadors of other countries remain at the sole discretion of the pope.
See more in: R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, LexisNexis, Warszawa 2005,

organizations.Although each of these categories stands out against the rest, all are quasi-state creations [12]. They function as non-sovereign, incomplete and derivative entities of international law. The states have created or accepted their subjectivity as well as they have acknowledged their scopes [13]. The Holy See joins the Vatican State, autonomous territories may be equipped with foreign powers, which brings them closer

to the states, some insurgent communities are perceived as states in statu nascendi, international organizations have arisen by linking certain countries with an international agreement[14].

These categories are different in status. Only states can boast of a sovereign character, the Apostolic See is on a comparable position to them[15]. Autonomous territories and insurgent communities face the problem of obtaining sovereignty. International organizations form non-sovereign entities, in their case, it is said to confer on the subject of international law

by the state rather than recognition [16].

The ability of states to set up optional categories of subjects of international law has its limits[17]. The norms of international law, in terms of their nature and content, adapt to the nature of the relationships between organized sovereign or autonomous human communities, and therefore natural and legal persons are not considered as subjects of international law,

However, international agreements may provide a source of rights and duties for them.

The status of subjects of international law is not available to individuals who are subject to penal liability for violation of international law, regardless of the mode of implementation

of liability.[18].

The subjects of international law should not be mixed up with the beneficiaries

of the rights deriving from international norms. This group consists of persons holding

the function of state organs, among others. diplomatic representatives, or included

p.137-138; J. Sutor, *Prawo dyplomatyczne i konsularne*, LexisNexis, Warszawa 2013, p.111-114.

[12] A. Klafkowski, *op. cit.*, s. 133

[13] W. Góralczyk, *op. cit.*, s. 122.

[14] L. Antonowicz, *Podręcznik prawa międzynarodowego*, LexisNexis, Warszawa 2011, p.23.

[15] Ibidem.

[16] Ibidem.

[17] Ibidem.

[18] Ibidem, s.24.

in the composition of state organs like prisoners of war[19].

Legal and international subjects are defined by having rights and duties, deriving from the norms of international law. The study of international law has borrowed the civil concept of distinguishing respectively:

- legal and international capacity- the ability to have international rights and obligations[20],
- ability to perform international activities- ability to acquire rights and international commitments by means of its own actions [21], according to which a subject of international law can undertake all legal activities, it initiates and develops relations with other countries through appointed state organs (consular and diplomatic service), signs biltilateral and multilateral international agreements uses procedural capacity - it may be party to the process before the International Court of Justice and takes all the means of peaceful settlement of international disputes, bears civil liability for caused damages[22].

The rights of states as subjects of international law can be divided into two groups[23]:

- fundamental laws of the state, connected with its essence as an entity, they appear with the birth of the state and serve until the end of its existence,
- acquired rights of the state resulting from the legal actions performed by this state in international relations.

Although no one has codified issues of legal and international subjectivity, the Vienna Convention on the Law of Treaties of 23 May 1969 speaks of states and other subjects of international law without mentioning them[24]:

- *„[...] Article 1. The present Convention applies to treaties between States [...]"*[25],
- *„[...] Article 2.1.(g). Party" means a State which has consented to be bound*

[19] Ibidem.
[20] Ibidem.
[21]Ibidem., s. 22.
[22] A. Klafkowski, *op. cit.*, p. 137.
[23] Ibidem, p.141.
[24] L. Antonowicz, *op. cit.*, p. 22.

[25] See more in: *Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969. Article 1,* [in:] Official website of the United Nations Treaty Collections: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (access: 19.09.2017)

by the treaty and for which the treaty is in force[…]"[26],

- *„[…] Article 3. The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:*

  (a) The legal force of such agreements;

  (b) The application to them of any of the rules set forth in the present Convention

  to which they would be subject under international law independently

  of the Convention; (c) The application of the Convention to the relations of States

  as between them selves under international agreements to which other subjects

of international law are also parties […]"[27].

State liablity is one of the fundamental principles of international law, deriving

from the nature of the international legal system andQ32W the doctrines of state sovereignty

and equality of states. According to its assumptions, when the state commits an international act as an illegal act against the other country, there will be international responsibility. Violation of the obligations entails the need to repair the damage[28].

International liability of the state is born as a result of the violation by it international law. Such a violation is called an international tort[29]. Because of the discrepancies in defining and naming this violation, most often it is represented by the elements, that make up the violation. The tort is therefore considered to have been committed by a state, not permitted, violating international law, committed by the state from which the damage is caused to another state [30].

[26] See more in: *Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969. Article 2.1.(g),* [in:] Official website of the United Nations Treaty Collections: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (access: 19.09.2017)

[27] See more in: *Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969. Article 3,* [in:] Official website of the United Nations Treaty Collections: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (access: 19.09.2017)

[28] M. Shaw, *Prawo międzynarodowe*, Książka i Wiedza, Warszawa 2000, p. 414.

[29] A. Klafkowski, *op.cit.*, p. 172

[30] Ibidem.

Any subject of international law is recognized as the subject of international tort, since only it has the legal ability and capacity to act, it has to fulfill its specific rights
and obligations[31].

The practice of state establishes the subject of tort, and science organizes it[32]. It is generally accepted, that the subject of delict is an act of state breaching international law, which is contrary to its obligations, based on its international agreements or customary law. Any violation or misuse of international law is considered as a tort[33].

Regardless of international delict, there is also the issue of the responsibility of states for the individual actions permitted by international law, but which may harm other states [34]. The Convention on International Liability for Damage Caused by Space Objects took notice to that[35]. In Article 2 of this document it is written, that: *„[…] A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface*
of the earth or to aircraft in flight […][36]. This concept has been developed in Article 3:

„[…] In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible […]"[37].

The state is responsible for its own conduct, including the conduct of the organs
by which it exercises its power [38]. All state bodies are considered here, regardless of their nature, place and role in the country's structure, including legislative, judicial and executive bodies, but executive and administrative bodies, like the head of state,

[31] Ibidem, p.173.
[32] M. Shaw, *op. cit.*, p. 414.
[33] Ibidem.
[34] L. Antonowicz, op.cit., p. 25.
[35] *Convention on the International Liability for Damage Caused by Space Objects,* [in:] Official website
of the Institute of Air and Space at the McGill University:
https://www.mcgill.ca/iasl/centre/research/space-law/liability-convention (access: 19.09.2017)
[36] *Convention on the International Liability for Damage Caused by Space Objects. Article 2,* [in:] Official website of the Institute of Air and Space at the McGill University: https://www.mcgill.ca/iasl/centre/research/space-law/liability-convention (access: 19.09.2017)
[37] *Convention on the International Liability for Damage Caused by Space Objects. Article 3,* [in:] Official website of the Institute of Air and Space at the McGill University: https://www.mcgill.ca/iasl/centre/research/space-law/liability-convention (access: 19.09.2017)
[38] L. Antonowicz, *op. cit.*, p. 26.

the government as a whole, his boss and members as individuals, diplomatic representatives, consular officers and armed forces, play here a special role. The state is responsible for its own bodies, even if they are over-competing[39].

The state does not respond internationally to the actions of individuals, but is guilty of omission that has led to violations of international law by such persons.

Individuals who have exceeded the norms of international law should stand before the court

of the jurisdiction within which they operate[40]. Both internal and international law clarify this jurisdiction. International law can thus establish a direct basis for the criminal jurisdiction

of the state against natural persons who have committed an act incompatible with international law, and this applies both to nationals and foreigners[41].

It is the responsibility of the state, which commited an infringement of international law, to redress the damage done to other states. The fulfillment of the international responsibility of the state is called reparation. It can occur in three forms[42].

Material responsibility can take the form of restitution, that is, restoring the state of affairs before committing delict. In the event that no restitution can be made, compensation for the resulting damage may occur in the form of compensation in nature or in monetary form[43].

There is also satisfaction as a form of compensation for intangible damage, where

the damage-maker deplores the deed, apologizes and promises, that similar facts will no longer take place in the future[44].

Individuals, who have committed acts contrary to international law may also be sanctioned, either individually – made by any retaliatory measures at the disposal of states

in the event of violation of their interests by other states- or collectively- used by an international organization[45].

Retaliatory actions by the state in defense of its interests threatened by the action

of another state, not in violation of international law, are called retoral. The principle

[39] Ibidem.
[40] Ibidem.
[41] Ibidem.
[42] Ibidem.
[43] Ibidem.
[44] Ibidem, p. 27.
[45] Ibidem, p. 27.

of proportionality demands, that the state should use the same or similar remedies that have caused retaliation[46]. The retaliatory steps of a country targeted at another state as a response to actions incompatible with international law are called repressions. They are also subordinated to the principle of proportionality.[47].

The Charter of the United Nations allows organizations to use as a whole organizational, political, economic and military sanctions. Organizational sanctions include, among others. exclusion from the membership of the organization[48]. In addition, the UN Security Council may impose sanctions that do not involve the use of armed forces and military sanctions- in the Article 41 of the Charter of the United Nations it is said, that. *„[…] The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relation […]"*[49]. Further explanation of this idea is contained in the Article 42 -„[…] *Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations […]"* [50].

As early as in the 18th century, representatives of the German school of history believed that the idea of responsibility of states was in contradiction to the principle of sovereignty. However, in the nineteenth century, the principle of responsibility of the states was finally adopted, pioneering attempts at codification of norms relating to the responsibility of states[51]. The first international act that deals with part of the responsibility of the state is the

[46] Ibidem.
[47] Ibidem.
[48] Ibidem, p.28.
[49] *Charter of the United Nations. Article 41,* [in:] Official website of the United Nations: http://www.un.org/en/sections/un-charter/chapter-vii/index.html (access: 19.09.2017)
[50] *Charter of the United Nations. Article 42,* [in:] Official website of the United Nations: http://www.un.org/en/sections/un-charter/chapter-vii/index.html (access: 19.09.2017)
[51] J. Gilas, *op.cit.*, p. 165.

Resolution on Claims and Diplomatic Intervention, accepted at the First American Conference (Washington, 1889-1890). It outlines the principle, that the state does not own or recognize foreigners' responsibilities or obligations different from those established. in the constitutions and laws of the states for the benefit of their own citizens. The second American conference (Mexico, 1902) resulted in the recognition of the sole responsibility of the state for the losses which foreigners suffered in the result of the insurgents' activities[52].

The attempt to codify the state's liability in the League of Nations is the most widely known, although the planned codification was intended only to be liable for damage arising in their territory or the property of foreigners.[53]. On this issue, at the codification conference of 1930, work Third Committee chaired by J. Basdevant. It approved at first reading 10 articles, but the discrepancies and lack of time prevented the presentation of the text to the plenary commission[54]. At the same time, attempts were made to create private codification. In 1927, the Institute of International Law and in 1929 the Harvard University were involved in this. In 1925, the American Institute of International Law adopted two projects relating to government and diplomatic care[55].

The problem of international responsibility is addressed not only by the State, but also by the International Law Commission. In 1975, it accepted a draft of articles addressing the responsibilities of states, consisting of three parts: the first refers to the origin of international responsibility, the second to the content, form and degree of international responsibility, the third to settle disputes and implement international responsibility[56].

Part I was adopted on a provisional basis as early as 1980. Then the works on Part II and III were started[57].

The Article I of the draft articles of the Committee on International Law, addressing the question of the responsibility of states, legalizes the general rule that an unlawful international act of the State brings effect in the form of international liability, when the Article 2 states, that states must take into account the possibility of accusing them

[52] Ibidem.
[53] Ibidem.
[54] Ibidem.
[55] Ibidem.
[56] M. Shaw, *op. cit.*, p. 414.
[57] Ibidem.

of committing an unlawful international act involving international liability[58]. The Article 3. emphasizes the assumption that an international unlawful act arises when

"[...] the conduct of the act or omission may be attributed to the State under international law and that such conduct constitutes a breach of the obligation of the international State [...]"[59].

The Polish term of responsibility applies to phenomena that are expressed in English using two different terms: responsibility and liabilty. Responsibility is used for the consequences of internationally unlawful acts (delict) and liability for the consequences of acts not in violation of the norm of international law[60].

The legal and international capacity of the subject determines the existence of capacity for legal and international activities. An entity governed by international law may have legal and international capacity and may not exercise it or do so to a limited extent[61]. The sovereign state has legal and international capacity and the capacity for legal and international activities. A subsidiary state uses its legal and international capacity,

but its capacity for legal and international activities is limited [62].

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[58] Ibidem.
[59] Ibidem, p. 415.
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