General Introduction

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International responsibility is undoubtedly one of the most interesting, but also one of the most complex issues in the study of international law. Unquestionably, it is also increasingly significant from the point of view of the practice of applying international law. The possibility of effective enforcement of responsibility is an important determining factor for the functioning of international law as a specific, separate legal system. It can be claimed that international responsibility is both a principle and an institution of the international legal system. If perceived as a principle, international responsibility means that any violation of international law incurs an obligation to remedy the effects of the violation, and as such, international responsibility is a general sanctioning norm in the international legal order. On the other hand, international responsibility perceived as an institution of international law constitutes a catalogue of norms intended to put this principle into practice. As such, it defines the rights and obligations which are at the core of the legal relations arising out of any violation of international law.[1] Therefore, international responsibility is understood as a principle sanctioning potential and actual violations of the international legal order. Such a definition determines the rules which are meant to implement this principle in practice. Those rules, on the other hand, are shaped by the specificity of the international legal order. This specificity is determined by numerous factors, one of the most important of which is the issue of international law entities, as well as the legal relations between them. It should also be emphasised that the issue of international responsibility should be discussed in a broad context. Analysing it in such a broad context requires making reference to the most basic theoretical foundations and institutions of the whole international legal order, including its subjects, sources, mechanisms of law-making and applying the law, as well as the consequences of its violations. Undoubtedly, the nature and functioning of many of the most basic institutions of international law is determined to a large extent by the notion of subjectivity. The entities of international law determine all other elements of the international legal order, such as the subject and content of international obligations, including those arising under international responsibility. There-

1 A. Czaplińska, *Odpowiedzialność organizacji międzynarodowych jako element uniwersalnego systemu odpowiedzialności międzynarodowoprawnej*, Łódź 2014, p. 218.

fore, the specific notion of subjectivity in international law has a significant impact on the way in which international responsibility is regulated and enforced.

International law has been defined in particular in the context of its subjects. As a result, the evolution of subjectivity of international law has clearly influenced its redefinition. Undoubtedly, the evolution of international law has been determined by several different factors, which have also had an impact on setting the boundaries of international law. These boundaries have never been clear-cut in terms of the objective scope of international law, as the expansion of international law has been a rather natural process, whereby the scope of its regulation has started to extend onto new specific areas of international cooperation. This means that the boundaries of international law have expanded to cover certain newly emerged situations requiring legal regulation. From this point of view, it can be claimed that the boundaries of international law are not limited, and that the subsequent stages of its development are determined by the needs of international community at a given point in time. However, a much more controversial process has always been the "internationality" of international law in its subjective aspect. It is exactly the subjective scope of international law that is the most important factor determining the "internationality" of international law. It is the existing and potential subjects of international law that delineate the current and future conceptual boundaries of international law in the most distinct way.

These boundaries have expanded significantly due to the activity of entities engaging in international relations that have started to acquire international legal personality, enabling them to directly affect the shape and content of the international legal framework. This has become even more evident with the emergence of international organizations. The dynamic development of institutions of international cooperation has contributed to a significant re-evaluation and redefinition of "internationality" of international law in view of its subjective scope. This stance is substantiated by the fact that previously for centuries of international law development, only states were considered subjects of international law, which was a tenet supported by the fact that only states had inherent, primary sovereignty. This tenet, which was reinforced by 19th century legal positivism, clearly indicated that international law only regulated the relations between states, i.e. the only sovereign entities being the participants of international relations. This tenet also had a deeper meaning, namely that with regard to its subjective scope, "internationality" of international law meant that having international legal personality had to be synonymous with being sovereign.[2]

2 T. Gadkowski, *Podmiotowość prawno międzynarodowa organizacji międzynarodowych a ich zdolność traktatowa*, Poznań 2019, p. 10 et seq.

Overriding this tenet was not easy even when the International Court of Justice (ICJ) in its fundamentally important 1949 advisory opinion in the *Reparation for injuries suffered in the service of the United Nations* case stated that: *"[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States."*[3] It is believed that in the context of the above-mentioned advisory opinion, states, which had been thus far the sole entities enjoying international legal personality, gave up a portion of their subjectivity to the United Nations, and ultimately also to other international organizations. However, this advisory opinion carries much more weight. The stance taken by the ICJ did not only pave the way to the acknowledgment that the United Nations and other international organizations had international legal personality, but it also constituted a solid foundation for the theoretical concept of the legal personality of international organizations in general. It seems that the acceptance by states in particular that international organizations also enjoy international legal personality was the major breakthrough in the evolution of contemporary international law, a real paradigm shift and a fundamental redefinition of international law.[4] This meant that the era of stats being the sole actors in the international legal order came to an end following a centuries-long process of international law evolution. It has paved the way towards inviting other entities to start being present in the area of international law.

Therefore, it is the subjectivity of international law that goes beyond the states, existing undoubtedly at least for international governmental organizations, that constitutes the definition of "internationality" of contemporary international law, the boundaries of which are not clearly cut especially for the future. However, despite these transformations and re-definitions of the subjectivity of international law, which have resulted in an expanded circle of its subjects, state-centricity still remains the characteristic feature of this law, and will certainly remain in the future. What state-centricity means these days is that even though the state might no longer be the sole entity with international legal entity, its role still continues to be dominant, as the state is the only primary, sovereign entity being the subject of international law to

3 ICJ Reports 1949, p. 178

4 L. Antonowicz, *Zagadnienie podmiotowości prawa międzynarodowego*, "Annales UMCS", vol. XII, 1997, p. 7.

the full extent.[5] Regardless of which stage of development the subjectivity of international law currently undergoes, sovereignty remains the sole attribute of the state as well as its most distinctive feature in the international legal framework. International law-making is no longer the exclusive domain of states, although states are the primary law-makers in the area of international law. They also remain the most important, albeit not the sole, addressees of international legal norms. Therefore, the following stance can be proposed: it is not possible to make and apply international law without states, but also states cannot function within the international community without international law.

The contemporary (or actually: today's) international community, within which the international legal order is in place, can no longer be referred to just as the "*international community of States as whole*", as stipulated in art. 53 of the 1969 Vienna Convention on the Law of Treaties.[6] Instead, we should refer to the "*international community as a whole*", as stated in the ICJ's 1970 judgment in the *Barcelona Traction, Light and Power Company, Limited* case.[7] This stance was formulated by the ICJ in the context of the nature of peremptory norms of international law and *erga omnes* obligations. It was also confirmed by the International Law Commission (ILC) in its 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.[8]

However, when defining international law, it should be borne in mind that the subjective scope of contemporary international community should be outlined as precisely and unambiguously as possible. The international community should be understood not just as a community of all current beneficiaries of the international legal system, but as a community of such beneficiaries enjoying the special privilege and status of having international legal personality. Such reasoning should be accompanied by the awareness of the fact that both the subjective and objective scope of international law is changing dynamically and will continue to expand in the future. A good justification for such reasoning is the fact that there is an ongoing and increasingly serious discussion about the status of individuals as potential subjects of international law.

It should be noted that no regulation of international law contains any definition of international law subjectivity, nor a more or less precise catalogue of its subjects. Every legal system has certain theoretical concepts relating to its subjectivity. Similarly, in international law subjectivity exists as a theoretical

5 R. Kwiecień, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Warszawa 2011, p. 67 et seq.

6 UNTS vol. 1155, p. 331.

7 ICJ Reports 1970, p. 32.

8 UN Doc. A/56/10, p. 43-59.

concept, or a certain model structure which determines the subject's establishment, duration, and end, as well as equips it with a certain active legal role in the international community.[9] The subjectivity of international law is, therefore, a merely theoretical concept, hence the norms of this law do not directly regulate this issue. The concept of subjectivity in international law is, therefore, a concept of the legal language, although it is already present in the language of treaties, such as the codifications prepared by the International Law Commission. While discussing subjectivity as a theoretical concept, it should be borne in mind that without understanding its essence it is impossible to grasp and define the extremely complex nature of international law. Subjectivity as such is not only "art for art's sake", but it has very serious consequences in international legal practice, especially when it comes to the actual status and the possibility of effective action to be undertaken by both state and non-state entities of international law. In the case of non-state entities, we are dealing with a newly-emerged category of international law subjectivity – one that is separate from sovereignty.

Subjectivity of international law should, therefore, be seen and understood as a certain academic generalisation, a theoretical concept, developed outside the existing legal order, under which this concept has not been defined.[10] It should also be understood taking into account its character as a historical category, i.e. one that undergoes changes due to various processes and transformations, as well as re-evaluations taking place in the international community, and as a result, within the international law.

The fact that intergovernmental organizations are entities of international law is unquestionable today, despite the fact that they are not the primary entities in this system of law and their subjectivity is derived from the will of the states and in spite of intergovernmental organizations not being sovereign entities, unlike states. This subjectivity enables them to take various important actions which have legal effects in the area of international law. On the one hand, the state of international organizations being entities of international law is subjective, as it is derived from the will of the states. However, on the other hand, it also exists objectively, especially when we look at it in opposition to the states which are also entities of international law. The attributes of such subjectivity of international organizations can be understood as the minimum of their competence and delineate the actual scope of their capacity to act in international relations. It should be emphasised that the principle of specific competences, commonly known as the principle of speciality, defines both the

9 M. Perkowski, *Podmiotowość prawa międzynarodowego współczesnego uniwersalizmu w złożonym modelu klasyfikacyjnym*, Białystok 2008, p. 70.

10 W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, Warszawa 2011, p. 104.

scope of the attributes of subjectivity of international organizations and the intensity of their use in practice. To describe these attributes most generally, within their minimal competence, the most important ones are related to creating the norms of international legal order, establishing and maintaining relations with other entities, as well as facing the legal consequences of own actions and enforcing certain actions on others. Therefore, it can be said that these attributes are related to international responsibility.

In the context of the present research, it should be noted that *ius standi*, understood as the ability to be the subject of responsibility, is a particularly important attribute of subjectivity of international organizations. It covers both the ability to bear responsibility and to enforce responsibility on other entities.[11] This includes both contractual and tort liability. It also includes the responsibility of international organizations for the actions of their officers, as well as their bodies or branches operating under their control. It seems that such responsibility is a special attribute of international organizations which clearly results from their law-making capacity, as well as the ability to enter into international obligations.[12] Some authors contend that the attribute of having such an independent international responsibility is the key to their subjectivity, as well as the ultimate proof that international organizations are separate, independent entities of international law.[13] The 1949 International Court of Justice (ICJ) advisory opinion in the *Reparation for injuries suffered in the service of the United Nations* case clearly laid out the connection between international responsibility and subjectivity by emphasizing that the United Nations was an 'international person' and arguing that, as a consequence, the United Nations (UN) was "*a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims*".[14] In the procedural aspect, this attribute implies the ability to be an active or passive participant in the process of carrying out the diplomatic and judicial mechanisms of seeking and enforcing international responsibility.[15] Regardless of

11 P. Sands, P. Klein (eds), *Bowett's Law of International Institutions*, London 2009, p. 512; N. D. White, *The Law of International* Organizations, Manchester 2005, p. 28 et seq.

12 A. Pellet, *International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations*, [in] M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* Leiden-Boston 2013, p. 41 et seq.

13 A. Czaplińska, op. cit., p. 101.

14 ICJ Reports 1949, p. 9.

15 A.A. Cançado Trindade, *Some Reflections on Basis Issues Concerning the Responsibility of International Organizations*, [in] M. Ragazzi (ed.), op. cit., p. 3 et seq.

the actual possibility of using their *ius standi* in practice, and irrespective of the forms and measures in which their *ius standi* is realised, it remains to be a very important attribute of international organizations testifying to them having international subjectivity. This is mainly because their *ius standi* has a significant impact on their legal situation and relations with other entities of international law. In this context, A. Pellet writes that the ability to bear responsibility by international organizations is "*both an indicator and a consequence of their legal personality under international law*".[16] This means that international organizations' responsibility must be considered a necessary corollary of their capacity to act under international law.

Because international subjectivity and international responsibility had been for a long time only ascribed to states, the study of international law was also dominated by the issue of state responsibility. In this respect international norms were shaped as a result of the international practice of states, which created international custom. These norms were codified, the result of which are the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission (ILC) in 2001.[17] Since international responsibility is an institution of universal international law, it would be safe to assume that the fundamental principles of responsibility applying to states could also be applied to international organizations. However, when it comes to international organizations, new problems and doubts may arise due to the different nature of their international subjectivity, and lack of sovereignty. The specific relations between an international organization and its member states also need to be taken into account. Therefore, the International Law Commission has undertaken to study these problems in the context of international responsibility and adopted the *Draft Articles on Responsibility of International Organizations* in 2011.[18] In view of several subsequent UN General Assembly Resolutions, the draft articles will be debated at the Assembly in order to consider the final form that the ILC Articles should take.[19]

16 A. Pellet, *The Definition of Responsibility in International Law*, [in] J. Crawford, A. Pellet, S. Olleson (eds), *The Law of International Responsibility*, Oxford 2010, p. 4.

17 ARSIWA – *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ILC Report 53rd Session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (UN Doc. A/56/10), p. 43-59.

18 DARIO – *Draft Articles on Responsibility of International Organizations*, ILC Report 63rd session (2011), U.N. Doc. A/66/10, Chapter 5; see: M. Möldner, *Responsibility of International Organizations – Introducing the ILC's DARIO*, "Max Planck Yearbook of United Nations Law" vol. 16, 2012, p. 281 et seq. and E. Lis, *Kodyfikacja odpowiedzialności organizacji międzynarodowych*, "Studia Iuridica Lubliniensia" vol. 21, 2014, p. 82 et seq.

19 A/RES/72/112.

Therefore, in this situation, taking into account the specific subjectivity of international organizations, a question arises whether the principles related to international responsibility, adopted by the ILC in relation to states and referred to in the case-law of international courts, can be applied, by analogy, to international organizations. Art. 57 ILC Draft on State Responsibility affirms that the provisions of this draft are without prejudice to any question of the responsibility under international law of an international organization, or of any state for the conduct of an international organization. However, if an international organization violates its obligations under international law, it is not only accepted that it may be held responsible, but that the rules of state responsibility are applied by analogy, albeit with some variations, to the responsibility of international organizations.[20] It should also be emphasised that the elements of the responsibility of an international organization are similar to those of a state. The responsibility of the organization is established if there is a breach of an obligation under international law and if this breach is attributable to the international organization. These elements of responsibility have also been confirmed by the ILC *Draft Articles on Responsibility of International Organizations* which is closely based on the ILC *Draft Articles on State Responsibility*.[21]

As a consequence, if we assume that there is one common international responsibility regime, we need to accept also the unity of the law of international responsibility. This, in turn, is an important argument against its fragmentation, as well as against the fragmentation of international law in general. Such fragmentation would allow multiple legal regimes, also with regard to international responsibility. It is worth noting that the International Law Commission has been addressing the issue of fragmentation in its analyses of the responsibility of states and the legal regimes associated with it, including the so-called *self-contained regimes*.[22] However, due to the specificity of the notion of subjectivity with regard to international organizations, it might not be entirely possible to draw an analogy to states. Therefore, a question arises as to how and to what extent the principles and premises of responsibility with regard to international organizations should be created. These questions are

20 Article 57 is a '*saving clause*' which reserves two related issues from the scope of the articles. These concern – any question involving the responsibility of international organizations, and – any question concerning the responsibility of any state for the conduct of an international organization.

21 M. Hartwig, *International Organizations or Institutions, Responsibility and Liability*, [in] R. Wollfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford 2011, p. 64 et seq.

22 E. Cała-Wacinkiewicz, *Fragmentacja prawa międzynarodowego*, Warszawa 2018, p. 102 et seq.

important not only from the point of view of the international law study, but particularly from the point of view of the international practice, in which international organizations play a very active role. Their responsibility, including liability for the actions of their institutions (bodies) and their officers, as well as for acts performed without legal authority, i.e. *ultra vires* are just a few examples of particularly important issues encountered in the daily functioning of international organizations.

These issues are particularly pertinent to the European Union (EU) in the context of the principles and premises of its non-contractual liability for normative acts, individual and factual acts which is exercised with respect to the abundant case-law of the Court of Justice of the European Union (CJEU). The EU's non-contractual liability for damages is an important element of the legal protection of individuals under EU law. The Union must compensate for damage for which it is responsible. Such damage may, for example, be caused by a servant of the EU in the performance of their duties. It may also result from the legislative activities of the European institutions, such as the adoption of a regulation. According to art. 340(2) of the Treaty on the Functioning of the European Union (TFEU), interpreted jointly with art. 268 TFEU, private entities were granted *ius standi* in EU courts for damages caused by EU institutions or employees during the performance of their duties. The purpose of this is to allow the EU to compensate individuals for any damage caused by an act or omission of an EU institution, body or organizational unit, even if the acts undertaken by them were not unlawful. The non-contractual liability of the Union complies with uniform rules which have been developed by the case-law of the CJEU. Actions may be brought by individuals or Member States who have suffered damage and wish to obtain compensation. Similarly important are the procedural aspects related to bringing claims for damages before EU courts, as well as the issue of convergence of responsibility of the EU and the Member States for violating EU law. An analysis of treaties and extensive legal practice, in particular the case-law of the CJEU will allow the authors for a comprehensive, multi-faceted view of the issues discussed in the present study, and will enable them to put forward interesting research hypotheses. The issue of non-contractual liability will then be presented on the example of the Caribbean Community (CARICOM) and its functioning in practice. These considerations will be presented with references to the experiences of the EU in this respect, where justified. These detailed analyses of the issue of non-contractual liability in the context of both international organizations will be preceded by more general remarks presenting a critical analysis of the issue of responsibility of international organizations in the International Law Commission's codification works. Despite the fact that all parts of the present mon-

ograph are interrelated in terms of content, each of them can be considered individual complete work, culminating in the author's conclusions.

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