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THE RELATIONSHIP BETWEEN MEMBER STATE LIABILITY IN DAMAGES FOR BREACH OF THE EUROPEAN UNION LAW AND STATE RESPONSIBILITY FOR BREACH OF INTERNATIONAL LAW

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Abstract. *This article analyses that state responsibility in international law is contractual liability, as a state infringes its obligations to another state (states), stemming out of international law. Member State liability in damages to a private party for breach of European Union law is, contrarily, non-contractual liability to a private party. Having analysed the elements of internationally wrongful act, it is stated that the elements of internationally wrongful act can be used to determine the elements of breach of the European Union law. Thus if an international court declares that a state committed an internationally wrongful act, it would be possible to maintain that the elements of breach of the European Union law are met as well. The author of this article notes that it is very important to identify a particular state institution, which has infringed the European Union or international law, as not attributing to the state the acts of the state institution under the European Union or international law, there should be no possibility to apply state liability in damages to a private party for breach of the European Union law or state responsibility in international law – the state can be liable only for acts of its institutions. This article also analyses the cases where application*

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of both Member State's liability in damages to a private party for breach of the European Union law and state responsibility in international could be possible. In such case a private party can suffer damages if a Member State breaches an international agreement, concluded by the European Union, imposing particular obligations on that Member State. Therefore, it is ascertained that a private party should not have to prove the second condition of liability – sufficient seriousness of the breach[1] – if an international court foremost states that a Member State commited an internationally wrongful act – breached its obligation arising out of an international agreement entered into by the European Union. Such an infringement would be considered to be as sufficiently serious per se.

Keywords: *state liability in damages, infringement of EU law, recovery of damage, state responsibility, internationally wrongful act, elements of an internationally wrongful act, elements of breach of EU law.*

Introduction

This article analyses that *state liability* is being recognised both in the European Union (hereinafter referred to as the *EU*) and international law. *State responsibility*[2] in international law can be understood in a broad sense and a narrow sense. It is emphasised that in its *broad sense*, state responsibility in international law comprises three institutes: firstly, state responsibility for internationally wrongful acts; secondly, state responsibility for the damage caused by lawful acts; thirdly, liability of natural persons for the crimes against peace, humanity and war crimes. With regard to state responsibility in *a narrow sense*, we take into consideration *state responsibility for internationally wrongful acts*[3].

It can be seen that Member State liability in damages for the breach of EU law (hereinafter referred to as *state liability in damages*) is related to state responsibility for internationally wrongful acts (hereinafter referred to as *state responsibility*). This conclusion is drawn from the fact that state liability for damages and state responsibility are invoked in case the infringement of law is being proved. Since the Treaty on the Functioning of the European Union[4] (hereinafter referred to as the *Treaty*) establishes a possibility for the EU to conclude various international treaties, which can impose particular duties on Member States, situations when a Member State infringes both EU and international law can arise in practice. The Court of Justice of the European Union

1 The subject matter of this article is not the analysis of conditions of state liability in damages to a private party for breach of the European Union law. The conditions for liability are: the rule of the European Union law infringed confers rights on private parties; the breach is sufficiently serious; there is a direct causal link between the breach and the damage.

2 With regard to state liability in international law, we usually use the term *state responsibility*.

3 Vadapalas, V. *Tarptautinė teisė* [International law]. Vilnius: Eugrimas, 2006, p. 382; Dixon, M. *Textbook on International Law*. Fourth edition. Oxford: Oxford University Press, 2000, p. 260.

4 Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal,* C 2008, No. 115-1.

(hereinafter referred to as the *Court*) has also stressed the relationship between state liability in damages and state responsibility[5]. Therefore, the link between the above-mentioned two types of liability must be comprehensively disclosed.

The subject-matter of this research is relevant in both scientific and practical approaches. It has to be stressed that the legal authors, e.g. P. Kūris, V. Vadapalas, V. Valančius, M. Dixon, I. Brownlie, K. Zemanek, M. Bedjaoui, R. Wolfrum and others analysed the topic of state responsibility, however, they did not examine the issues of the relationship of state liability in damages and state responsibility. Some aspects of the relationship between state liability in damages and state responsibility are being distinguished by G. Conway and P. Gasparon, but this analysis is not comprehensive, a detailed scientific research is missing. Thus the problems of the relationship between state liability in damages and state responsibility are not identified, the methods of their resolution are also not clear. According to what has been said, it can be emphasised that the research conducted in this article comprehensively examines the above-mentioned issues.

The aim of this research is to analyse the relationship between state liability in damages and state responsibility comprehensively and thoroughly, diclose crucial theoretical and practical problems related to these two types of liability.

The subject-matter of this research is the relationship between state liability in damages and state responsibility according to the jurisprudence of international courts, the Court, legal doctrine, the Treaty, Draft articles on responsibility of states for internationally wrongful acts (hereinafter referred to as *Draft Articles*)[6]. This subject-matter can be attained using logical-analytical, systemical analytical, theological, comparative, historical, linguistic methods, the method of analysis of cases of international courts and of the Court.

1. The Terms *State Liability* and *State Responsibility*

The first question that must be determined when analysing the relationship between state liability in damages and state responsibility concerns the definitions used in order to define these two types of liability.

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5 Case C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame,* ECR I-1029; para. 34; Case C-224/01, *Köbler v. Austria,* ECR I-10239, para. 32.

6 Draft articles on responsibility of states for internationally wrongful acts, with commentaries [interactive]. [accessed 12-01-2012]. <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. It must be noted that the Draft Articles were annexed to the Resolution of the Assembly General of the United Nations, but at present the Draft Articles is not an obligatory document. However, this document is a very important source applying state responsibility for internationally wrongful acts and is invoked in the jurisprudence of international courts. See, for instance, the following cases: *Barcelona Traction (Belgium v. Spain) (Judgment, I.C.J. Reports 1970)*, p. 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, I.C.J. Reports 1986)*, p. 14; *Vienna Convention on Consular Relations (Paraguay v. United States of America) (Order, I.C.J. Reports 1998)*, p. 246; *Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgment, I.C.J. Reports 1997)*, p. 7; *Difference Relating to Immunity from Legal Process of a Special Rapporteuer of the Commission on Human Rights (Advisory Opinion, I.C.J. Reports 1999)*, p. 62; *LaGrand (Germany v. United States of America) (Merits, I.C.J. Reports 2001)*, p. 466.

With regard to the terms used for defining state liability in damages for breach of EU law in the English language, the terms such as *member state liability, state liability, state liability in damages* are found in the case-law of the Court[7]. The same definition is being used in the English legal doctrine[8]. In the Draft Articles[9], state liability for internationally wrongful acts is referred to as *state responsibility* (in the English language). The term *state responsibility* can be encountered in the case-law of international courts[10], and in the English legal doctrine as well[11].

According to K. Zemanek, the terms *state liability* and *state responsibility* are identical, therefore, they can be used as synonyms. That author states that the term *state responsibility* is a classical one, which is used in the doctrine of international law. The term *state liability* is used in international law for the purpose of stressing the application of state liability for lawful acts or in case it is referred to only one form of liability – the recovery of damages[12]. This point of view is reflected in the Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, prepared by the International Law Commission[13].

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7 Case C-278/05, *Robins and other,* ECR I-1053, para. 69; Case C-452/06, *Synthon,* ECR I-7681, para. 35.

8 Harlow, C. *Francovich* ant the Problem of the Disobedient State. *European Law Review*. 1996, 2: 199–225; Marson, J. Holes in the Safety Net? State Liability and the Need for Private Law Enforcement. *Liverpool Law Review*. 2004, 25: 113–134; Köck, H. F.; Hintersteininger, M. The Concept of Member State Liability for Violation of Community Law and Its Shortcomings. An Analysis of the Case Law of the European Court of Justice on this Matter. *Austrian Review of International and European Law*. 1998, 3: 31–35; Gasparon, P. The Transposition of the Principle of Member State Liability into the Context of External Relations. *European Journal of International Law*. 1999, 10(3): 605–624.

9 Draft articles on responsibility of states for internationally wrongful acts, with commentaries, *supra* note 6. It must be noted that the Draft Articles were annexed to the Resolution of the Assembly General of the United Nations, but at present the Draft Articles is not an obligatory document. However, this document is a very important source applying state responsibility for internationally wrongful acts and is invoked in the jurisprudence of international courts. See, for instance, the following cases: *Barcelona Traction (Belgium v. Spain) (Judgment, I.C.J. Reports 1970)*, p. 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, I.C.J. Reports 1986)*, p. 14; *Vienna Convention on Consular Relations (Paraguay v. United States of America) (Order, I.C.J. Reports 1998)*, p. 246; *Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgment, I.C.J. Reports 1997)*, p. 7; *Difference Relating to Immunity from Legal Process of a Special Rapporteuer of the Commission on Human Rights (Advisory Opinion, I.C.J. Reports 1999)*, p. 62; *LaGrand (Germany v. United States of America) (Merits, I.C.J. Reports 2001)*, p. 466.

10 *Rainbow Warrior (New Zealand v. France)*. UNRIAA, volume XX (1990); *Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgment, I.C.J. Reports 1997)*; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment, I.C.J. Reports 2002)*.

11 Dixon, M., *supra* note 3, p. 230–261; Conway, G. Breaches of EC Law and the International Responsibility of Member States. *European Journal of International Law*. 2002, 13(3): 679–695; Brownlie, I. *Principles of Public International Law*. Sixth edition. Oxford: Oxford University Press, 2003, p. 419–456.

12 Bedjaoui, M. Responsibility of States: Fault and Strict Liability. In: *Encyclopedia of Public International Law*. Volume four. Amsterdam: North Holland Publishing, 2000, p. 212; Zemanek, K. Responsibility of States: General Principles. In: *Encyclopedia of Public International Law*. Volume four. Amsterdam: North Holland Publishing, 2000, p. 220.

13 Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries [interactive]. [accessed 12-01-2012]. <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf>.

Taking into consideration all the referred above, it can be stated that the terms *state liability* and *state responsibility* in English, must be distinguished in international law. The term *state responsibility* is considered to be broader than the term *state liability*, because state responsibility comprises not only the recovery of damages, but other types of liability (not only pecuniary) as well – restitution, satisfaction, countermeasures[14]. The term *state liability*, in its turn, is being used only in terms of damage caused by lawful acts of the state itself.

In the German as well as in the English international legal terminology, different terms are used for defining state responsibility for internationally wrongful acts and state responsibility for the damage caused by lawful acts, namely *Staatenverantwortlichkeit* and *Staatenhaftung*[15]. When analysing the EU legal doctrine and the case-law of the Court in German language it can be seen that the term *Staatshaftung* defining state liability in damages is used[16].

In the Court's judgments and the legal doctrine in the French language, the only term, *La responsabilité de l'Etat* is used for stressing state responsibility for internationally wrongful acts, state responsibility for the damage caused by lawful acts and state liability in damages for breach of EU law[17].

In the Lithuanian legal literature different terms can be found: the term *state liability in damages for the breach of EU law*[18] and the term *state rasponsibility for the breaches of international law*[19].

It is obvious that all above-mentioned terms, defining state responsibility in international law, show a different nature of this type of responsibility, the purpose of its application in comparison to state liability in damages. Consequently, *state responsibility* must be understood in a broader sense than *state liability in damages*, because it comprises many different types of liability (not only monetary) and is not limited only to the recovery of damages.

2. Other Differences Between State Liability in Damages and State Responsibility

The International Law Commission stresses that state responsibility creates a legal relationship in accordance with international law, for illegal acts of the state between

14 Draft articles on responsibility of states for internationally wrongful acts, with commentaries, *supra* note 6.

15 Müller, J. P.; Wildhaber, L. *Praxis des Völkerrercht*. Stämppfli Verlag Bern, 2001, p. 485; Zemanek, K. Die völkerrechtliche Verantwortlichkeit und die Sanktionen des Völkerrechts. In *ÖHBVR*. 4th edition. 2004, p. 2682.

16 Ohlinger, T.; Potacs, M. *Gemeinschaftsrecht und Staatliches Recht. Die Anwendung des Europasrechts im Innerstaatlichen Bereich*. 3 aktualisierte Auflage. Wien: Lexis Nexis, 2006, p. 195; Arndt, H. W.; Fischer, K. *Europarecht*. 9 Auflage. Heidelberg: C. F. Müller Verlag, 2008, p. 190.

17 Bedjaoui, M., *supra* note 12, p. 212.

18 Valančius, V., *et. al. Procesas Europos Bendrijų Teisingumo teisme: preliminarus nutarimas* [Procedure in the Court of Justice of the European Communities: preliminary ruling]. Vilnius: Teisinės informacijos centras, 2006, p. 39–40.

19 Vadapalas, V., *supra* note 3, p. 382.

the state, which suffered damage, and the state, which made an internationally wrongful act. This legal relationship can also affect other actors of international law and can be asserted as the duty of the state, which infringed international law, to apply restitution or compensation or confer a right to apply a sanction, allowed by an international law, for the guilty state[20]. State liability in damages encompasses a legal relationship between the state, which infringed EU law, and the private party, who suffered damage due to the breach of EU law. Obviously, from this point of view state liability in damages and state responsibility differ as well.

Attention must be paid to one more aspect of the interplay of state liability in damages and state responsibility. State liability in damages is a non-contractual (tortious) liability to a private party: the actors of this legal relationship are not linked with any contractual obligations. On the contrary, state responsibility shows various infringements of the duties falling on the states under international law: breaches of contractual (bilateral, multilateral), other obligations arising from international law (for example, international customs, decisions of international courts)[21]. P. Kūris states that the infringement by the state of the legal norm of international law is called an international tort (delict)[22]. In the opinion of the International Law Commission, an English term *tort (delict)* cannot be used in this context as this is the term of national law that can be found in private law. For this purpose a French term *fait internationalement illicite* (*internationally wrongful act*) can be used, which shows that a state breached its international obligations by illegal acts. It is also important to stress that according to the legal provisions of the Draft Articles, state responsibility is applied not only for having infringed the interests of the state, but also for having infringed the interests of the whole community of states – principles of international law important for all the states (*jus cogens* legal norms)[23].

In summary, it can be alleged that state responsibility is a contractual liability, as a state infringes its obligation (obligations) to another state (states), stemming from international law. This legal obligation may be written or unwritten. To the contrary, state liability in damages is a non-contractual liability to a private party.

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20 Draft articles on responsibility of states for internationally wrongful acts, with commentaries, *supra* note 6.

21 *International Fisheries Company*. UNRIAA, volume IV (1931), p. 701; *Dickson Car Wheel Company*. UNRIAA, volume IV (1931), p. 678; *Armstrong Cork Company.* UNRIAA, volume XIV (1953), p. 163; *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands, Federal Republic of Germany v. Denmark) (I.C.J. Reports 1969)*, p. 38 ir 39; *Barcelona Traction (Belgium v. Spain) (Judgment, I.C.J. Reports 1970)*, p. 46; *Nuclear Tests (New Zealand v. France) (Judgment, I.C.J. Reports 1974)*, p. 457; *Nuclear Tests (Australia v. France) (Judgment, I.C.J. Reports 1974)*, p. 253; *United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran) (Judgment, I.C.J. Reports 1980)*, p. 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, I.C.J. Reports 1986)*, p. 14, 95 ir 98; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) (Judgment, I.C.J. Reports 1989)*, p. 50; *Rainbow Warrior (New Zealand v. France).* UNRIAA, volume XX (1990), p. 251; *Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgment, I.C.J. Reports 1997)*, p. 7.

22 Kūris, P. *Atsakomybės tarptautinėje teisėje problemos* [Problems of responsibility in international law]. Vilnius: Vilnius university, 1970, p. 20.

23 Draft articles on responsibility of states for internationally wrongful acts, with commentaries, *supra* note 6. It must be stressed that Article 40 of the Draft Articles is applied for determining severe breach of obligations, established by international imperative legal norms. These are not international crimes causing international criminal liability of natural persons.

3. Similarities of State Liability in Damages and State Responsibility

Despite the above-mentioned differences of state liability in damages and state responsibility, these two types of liability are interrelated. It must be noted that the Court linked these two types of liability in its judgments in *Brasserie* and *Köbler* cases. The Court ruled that when applying state responsibility, a state can be understood as an unanimous formation irrespective of what state institution (legislative, executive or judicial) infringed international law. This rule, according to the Court, can be obtained in EU law as well when the question of the application of state liability in damages is being adjudicated, as all state institutions must observe the requirements of EU law[24]. This position is also supported by advocate general Leger in his opinion in *Köbler*. The advocate general stressed that acts of any state institution must be considered as acts attributable to the state under international law, irrespective whether this institution is legislative, executive or judicial, what place it holds in the system of state institutions, and whether it belongs to central or local (territorial) government (authority)[25]. Therefore, it is obvious that the most important similarity unifying state liability in damages and state responsibility, is the concept of the state as an unanimous formation. It is undoubted that such a broad definition of the term *state* is intercepted in EU law from international law, namely state responsibility for internationally wrongful acts.

In order to explain the meaning of the term *state*, the term *internationally wrongful act* must be analysed. According to Article 1 of the Draft Articles, state responsibility arises for the commitment of *an internationally wrongful act.* This is the basis of the application of state responsibility, no special conditions for liability must be proved[26]. With reference to article 2 of the Draft Articles, a state commits an internationally wrongful act if its *acts (both actions and omissions) can be attributed to this state under international law* and *constitute a breach of an international obligation of the state*. Consequently, it can be affirmed that an internationally wrongful act comprises two integral parts, which must be proved for the state responsibility to apply. Firstly, the acts must be attributed to the state under international law. Secondly, these acts infringe international obligations of the state. In legal doctrine, those parts of internationally wrongful acts are called *elements of internationally wrongful act*, and not conditions for liability, thereby stressing the differences of state liability in national and international law[27]. In consideration of that, the term *elements of internationally wrongful act* is further used in the text of this article.

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24 Case C-46/93 ir C-48/93, *Brasserie du pêcheur and Factortame*, ECR I-1029; para. 34; Case C-224/01, *Köbler v. Austria,* ECR I-10239, para. 32.

25 Opinion of advocate general Leger, delivered in Case C-224/01, *Köbler v. Austria,* ECR I-10239, para. 47.

26 Wolfrum, R. Reparation for Internationally Wrongful Acts. In: *Encyclopedia of Public International Law*. Volume four. Amsterdam: North Holland Publishing, 2000, p. 1398–1403; Bedjaoui, M., *supra* note 12, p. 213–214.

27 Vadapalas, V., *supra* note 3, p. 398.

In order to establish whether the same elements of the breach of EU law can be used when solving the question of application of state liability in damages, it is essential to properly disclose the content of such elements.

3.1. The First Element of an Internationally Wrongful Act – Acts Attributable to the State under International Law

This element of an internationally wrongful act is embeded in Chapter II (Articles 4–11 of the Draft Articles), it shows that particular acts can be attributed to the state. After analysing those provisions, it can be seen that attribution of acts to the state helps answering the question whether a particular subject can be considered as a state institution that infringed international law, and for what acts of state institutions state responsibility can be invoked.

Article 4 of the Draft Articles confirms that the main criterion for the determination of whether a particular party can be considered to be a state institution, is the performance of state functions (*functional criterion*). For that reason, this term comprises all major state institutions – legislative, executive and judicial, which ordinarily perform state functions in that state. Other provisions of the Draft Articles extend the term *state institutions* to include such persons, the group of persons or other subjects who according to the law are delegated to execute particular state functions and who examine state functions under the control of the state (*regulatory criterion*). Thus, the main criterion for deciding whether a particular subject is considered to be a state institution, is the examination of state functions, which are being defined taking into account the fact whether such a person examining the particular actions behaved as the representative of the state[28]. If the examination of state functions is delegated to such a person according to the law and that person was controlled by the state, it could be concluded that the person acted as a state institution.

Thus, neither the position of a state institution in the system of state institutions nor the execution of acts delegated by another state institution is important to conclude that particular acts of a state institution should be attributed to the state. Even the violation of the limits of competence of a state institution is not important for stating that particular acts of a state institution should be attributed to the state – this is established by Article 7 of the Draft Articles and confirmed in the practice of international courts[29] and the legal doctrine[30].

Some authors maintain that state responsibility is possible only in cases where the state institution acted within the limits of its competence (the limits of competence should be determined according to national law[31]). It should be purposeful to approve the opinion that state responsibility is possible also in case a state institution exceeded the

28 *Mallen.* RIAA, volume IV (1925), p. 531. See also Dixon, M., *supra* note 3, p. 235.

29 *Stephens.* RIAA, volume IV (1927); *Caire.* RIAA, volume V (1929); *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (Judgment, I.C.J. Reports 1989).

30 Zemanek, K., *supra* note 12, p. 224.

31 Dixon, M., *supra* note 3, p. 235.

limits of its competence as, by contrast, the state would be able to evade its responsibility. Thus it should be possible to apply state responsibility both when state institutions acted within the limits of their competence and when the limits of competence were exceeded, for instance, a state institution exercised the functions that had to be executed by another state institution.

In order to attribute particular acts to the state, it is essential to answer the question as to the acts of state institutions for which state responsibility could be applied. Both the Draft Articles and the practice of international courts confirm that international law can be infringed by legislative[32], executive[33], judicial[34], local (regional) authorities[35], the institutions of federal subjects[36], any person or group of persons[37], the rebels acting in such situations, where there are no state institutions or where they exercise no activities[38]. Obviously, it is possible to apply state responsibility for the acts of many different subjects considered to be state institutions.

The first element of an internationally wrongful act is called *subjective* as it helps identifying a particular state institution that has commited an internationally wrongful act and whose acts can be attributed to the state[39]. Thus it is stressed that international law was infringed by the state, but not by any other subject of international law. As R. Wolfrum states, it is in all senses important to pay attention to the fact, whether a particular state institution can be recognised as acting[40]. Consequently, no doubts should exist as to whether a particular state institution exercised particular actions infringing international law.

In summary, it is also very important to identify a particular state institution that has infringed EU law, as having not attributed the acts of the state institution to the state under EU law, there should be no possibility to apply state liability in damages – the state can be liable only for the acts of its institutions. When applying state liability in damages, the term *state institution* must also be interpreted broadly and should not be

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32 *German Settlers in Poland (Advisory Opinion, P.C.I.J. Reports 1923)*; *Rights of Nationals of the United States of America in Morocco (France v. United States of America) (Judgment, I.C.J. Reports 1952)*.

33 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, I.C.J. Reports 1986)*, p. 14.

34 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion, P.C.I.J. Reports 1932)*, p. 24; *Ambatielos (Greece v. United Kingdom) (Merits, I.C.J. Reports 1953)*, p. 21 and 22.

35 *Heirs of the Duc de Guise (France v. Italy).* RIAA, volume XIII (1964), p. 161.

36 *Dispute concerning the interpretation of article 79 of the Treaty of Peace. UNRIAA*, volume XIII (1955), p. 438.

37 *Hyatt International Corporation v. Government of the Islamic Republic of Iran*. Iran-ESCTR, volume 72 (1985), p. 88–94; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, I.C.J. Reports 1986)*, p. 14. See also Sperduti, G. Responsibility of States for Activities of Private Law Persons. In: *Encyclopedia of Public International Law*. Amsterdam: North Holland Publishing, 2000, p. 216.

38 *Bolivar Railway Company*. RIAA, volume IX (1903), p. 453; *Aguilar-Amory and Royal Banko f Canada (Tinoco case).* RIAA, volume I (1923), p. 381–382; *French Company of Venezuelan Railroads*. RIAA, volume V (1928), p. 353.

39 Bedjaoui, M., *supra* note 12, p. 213.

40 Wolfrum, R., *supra* note 26, p. 1399.

limited to acts in breach of EU law of only three main state institutions – legislative, executive and judicial.

3.2. The Second Element of an Internationally Wrongful Act – Breach of an International Obligation of the State

The second element of an internationally wrongful act, which should be proved for the state responsibility to apply, is the breach of an international obligation of the state (Articles 12–15 of the Draft Articles). The breach of an international obligation of the state occurs when acts of the state are not in conformity with what is required of it by that obligation, *regardless of its origin or character.* This element of an internationally wrongful act is called *objective,* as it stresses that both – the infringement of an international obligation, *regardless of its origin or character*[41] and the breach of the state of a *particular (concrete) international obligation*[42] – are important.

According to the International Law Commission, the term *origin* in this context must be understood as the process, in which an international obligation is being created. That can be an international treaty[43], international custom[44], common law principle (*jus cogens* legal norm) establishing obligations for all the community of the states[45], unilateral act of the state[46], decision of international court or another institution, named in the international treaty[47]. The international obligation of the state can also be infringed both by actions or ommissions[48]. Consequently, the origin of international obligation shows the external form of expression of this obligation. It is irrelevant what international obligation of the state was infringed. The most important fact is that having commited such a breach, state responsibility should be invoked against the state.

In order to determine the term *breach of an international obligation*, the International Law Commission distinguishes all obligations according to *obligations of conduct* and *obligations of results*[49]. International courts use a similar classification by distinguishing *international obligations of conduct, obligations of performace* and *obligations of result*[50]. Accordingly, if the origin of an international obligation shows the form of this obligation, then the character of such an obligation reflects the content of the legal provisions of the obligation – duties of the state.

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41 Wolfrum, R., *supra* note 26, p. 1402.

42 Bedjaoui, M., *supra* note 12, p. 213.

43 *Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgment, I.C.J. Reports 1997)*, p. 46.

44 *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands, Federal Republic of Germany v. Denmark) (I.C.J. Reports 1969)*.

45 *Barcelona Traction (Belgium v. Spain) (Judgment, I.C.J. Reports 1970)*, p. 46.

46 *Nuclear Tests (Australia v. France) (Judgment, I.C.J. Reports 1974)*, p. 253; *Nuclear Tests (New Zealand v. France) (Judgment, I.C.J. Reports 1974)*, p. 457.

47 Draft articles on responsibility of states for internationally wrongful acts, with commentaries, *supra* note 6.

48 *United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran) (Judgment, I.C.J. Reports 1980)*.

49 Draft articles on responsibility of states for internationally wrongful acts, with commentaries, *supra* note 6.

50 *Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgment, I.C.J. Reports 1997)*.

State responsibility arises regardless of the duties imposed on the state by a particular international obligation. R. Wolfrum draws attention to the fact that the breach of obligations established in civil contracts between a state and a private party is not a breach of international obligation of the state. For that reason, state responsibility cannot be invoked for non-execution of such obligations[51]. That is a correct remark, as having infringed civil contracts, the forms of liability established in national law are being applied (forfeit, recovery of damages, interest), and state responsibility cannot be invoked for the infringements of civil legal norms.

Taking into consideration the above, the following conclusions can be made. Firstly, having ascertained that a particular subject is considered to be a state institution, whose acts can be attributed to the state, it is essential to establish that that state institution has infringed the duty of the state imposed by the EU. Secondly, in the event of failure to prove the infringement of the duty imposed by the EU, there should be no possibility to apply state liability in damages, as the state can be liable only for the obligations incumbent on that state under EU law. Thirdly, state liability in damages could also be applied irrespective of the infringed duties arising from the EU law.

4. Cases when Both State Liability in Damages and State Responsibility Can Be Applied

Having determined the elements of an internationally wrongful act and ascertained the way that they help defining the breach of EU law, it is useful to exclude cases where both state liability in damages and state responsibility can be applied.

According to the Article 216(2) of the Treaty, international treaties concluded by the EU, become obligatory for EU institutions and the Member States. Thus, such international treaties form an integral part of the EU legal system and therefore are mandatory for the Member States. Therefore, if a Member States fails to comply with the legal provisions of such an international treaty, which imposes upon a Member State, as the member of the EU, particular duties and a private party suffers damage due to that fact, state liability in damages can arise. From another point of view, this international treaty, being an important source of such international obligations, imposes duties on that Member State as a subject of international law. Consequently, if a Member State fails to observe the duties established in such an international treaty, the responsibility of that state for internationally wrongful act may arise.

The Court has never examined cases where both state liability in damages and state responsibility should arise. By generalising the opinions of different legal authors, the following cases can be distinguished:

1) *A Member State breaches a duty arising out of an international treaty, which is concluded by the EU and this Member State from one side*[52]. One of the most

51 Wolfrum, R., *supra* note 26, p. 1402–1403.

52 Conway, G., *supra* note 11, p. 683–684.

common international treaties entered into by the EU are the so-called *mixed agreements,* concluded by both the EU and the EU Member States from one side[53]. Such international agreements impose concrete obligations not only on EU, but on EU Member States as well[54]. Hence where a Member State breaches the legal provisions of the above-mentioned treaties, state liability in damages for a private party can arise.

2) *A Member State infringes a duty arising from an international treaty, which is concluded by the EU only from one side.* EU also enters into such international treaties, which are concluded by the EU on one part, and third countries of the other part (Member States are not parties to such international agreements). If it is established that a Member State infringed its particular duty enshrined in such international treaty, the question of application of state liability in damages could be solved[55].

Taking into consideration the above, it could be stated that the aforesaid cases, where both state liability in damages and state responsibility could be applied, are related to a failure by the Member States to execute their duties stemming from EU law. If such obligations (enshrined in an international treaty) have been breached, damage can be suffered not only by a private party, as such an infringement could affect the legal rights and interests of other states (both the EU Member States and third countries). Therefore, it is possible that the question of the breach of a particular obligation arising out of such an international agreement, could be solved both in international court by applying state responsibility and in national court by applying state liability in damages. In that case a private party should not have to prove the second condition for liability[56] – sufficient seriousness of the breach – if an international court foremost states that a Member State commited an internationally wrongful act – breached its obligation arising out of an international agreement entered into by the EU. Such an infringement would be considered as sufficiently serious *per se.*

Conclusions

1. The term *state responsibility* in international law is considered to be broader than the term *state liability*, for the reason that state responsibility comprises not only the recovery of damages, but also others types of liability (not only monetary) – restitution, satisfaction, countermeasures. The term *state liability*, in turn, is being used when we talk only about the damage made by lawful acts of the state itself. State responsibility is a contractual liability, as a state infringes its obligation (obligations) to the other state

53 Case C-53/96, *Hermes,* ECR I-3603; Case C-416/96, *Nour Eddline El-Yassini*, ECR I-1209; Case C-265/03, *Igor Simutenkov*, ECR I-2579; Case T-30/99, *Bocchi,* ECR II-943.

54 Conway, G., *supra* note 11, p. 684–685.

55 *Ibid.*, p. 684–685.

56 As mentioned above, the analysis of conditions for state liability in damages is not the subject-matter of this article.

(states), stemming out of international law. To the contrary, state liability in damages is a non-contractual liability to a private party.

2. The elements of an internationally wrongful act can be used to determine the elements of the breach of EU law: attributing the acts of a state institution to the state (the breach of EU law was committed by the state institution, whose acts can be considered as acts of the state under EU law) and establish the infringement of the duty of the state, arising from EU law. Thus, in case an international court declares that a state committed an internationally wrongful act, i. e. the above-mentioned two elements of an internationally wrongful act are satisfied, it would be possible to maintain that the elements of the breach of EU law are met as well.

3. It is very important to identify a particular state institution that has infringed EU law, as having not attributed the acts of the state institution to the state under EU law, there should be no possibility to apply state liability in damages – the state can be liable only for the acts of its institutions. When applying state liability in damages, the term *state institution* must also be interpreted broadly and should not be limited to EU law infringing acts of only three main state institutions – legislative, executive and judicial.

4. Having ascertained that a particular subject is considered to be a state institution, whose acts can be attributed to the state, it should be essential to establish that this state institution has infringed the duty of the state imposed on it by the EU. In the event of failure to prove the infringement of the duty imposed by the EU, there should be no possibility to apply state liability in damages, as the state can be liable only for what is obligatory for that state under EU law. Thirdly, state liability in damages could also be applied irrespective of the infringed duties arising from EU law.

5. Cases where both state liability in damages and state responsibility could be applied, are related to a failure by the Member States to execute their duties stemming from an international treaty concluded by the EU. If such obligations (enshrined in an international treaty) have been breached, damage can be suffered by a private party. In that case, a private party should not have to prove the second condition for liability – sufficient seriousness of the breach – if an international court foremost states that a Member State commited an internationally wrongful act – breached its obligation arising out of an international agreement entered into by the EU. Such an infringement would be considered as sufficiently serious *per se*.

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VALSTYBĖS ATSAKOMYBĖS UŽ ŽALĄ PAŽEIDUS EUROPOS SĄJUNGOS TEISĘ RYŠYS SU VALSTYBĖS ATSAKOMYBE UŽ TARPTAUTINĖS TEISĖS PAŽEIDIMUS

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Santrauka. *Šiame straipsnyje nagrinėjama, jog valstybės atsakomybė pripažįstama tiek Europos Sąjungos* (*toliau – ES*), *tiek tarptautinėje teisėje. Nurodoma, jog valstybės atsakomybė tarptautinėje teisėje yra suprantama plačiau nei valstybės atsakomybė už žalą asmeniui ES teisėje, nes valstybės atsakomybė tarptautinėje teisėje apima ne tik žalos atlyginimą, bet ir kitas atsakomybės formos* (*nebūtinai pinigines*) *– restituciją, satisfakciją, atsakomąsias prie-*

mones. Valstybės atsakomybė už žalą asmeniui ES teisėje suprantama siauriau – tik kaip valstybės pareiga atlyginti asmeniui žalą, kurią padaro valstybės institucijos, pažeidusios ES teisės reikalavimus. Valstybės atsakomybė tarptautinėje teisėje yra sutartinė atsakomybė, nes valstybė pažeidžia savo pareigas kitai valstybei (valstybėms), kylančias iš įvairių tarptautinės teisės šaltinių. Valstybės atsakomybė už žalą asmeniui ES teisėje, priešingai, laikytina nesutartine (deliktine) atsakomybe.

Straipsnyje analizuojama, kad tarptautinio įsipareigojimo pažeidimo elementai gali padėti apibrėžti ES teisės pažeidimo elementus: priskiriant valstybės institucijos veiksmus valstybei ir nustatant konkrečios pareigos, kylančios iš ES teisės, pažeidimą. Taigi, jeigu tarptautinis teismas konstatuotų, jog valstybė pažeidė savo tarptautinį įsipareigojimą, t. y. būtų įrodyti pirmiau minėti abu tarptautinio įsipareigojimo pažeidimo elementai, būtų galima teigti, kad yra tenkinami ir ES teisės pažeidimo elementai. Straipnyje pabrėžiama, jog visais atvejais labai svarbu identifikuoti konkrečią valstybės instituciją, pažeidusią ES teisę, nes nenustačius, kad konkretų ES teisės pažeidimą įvykdė valstybės institucija, nebus galimybės taikyti valstybės atsakomybės už žalą asmeniui. Terminas valstybės institucija šiame kontekste turi būti aiškinamas plačiai neapsiribojant tik trijų pagrindinių valstybės instituciją – įstatymų leidžiamosios, vykdomosios ir teisminės – veiksmais.

Straipsnyje prieinama prie išvados, jog nustačius, kad konkretus subjektas yra laikytinas valstybės institucija, kurios veiksmus galima laikyti valstybės veiksmais, būtų svarbu nustatyti, kad ši valstybės institucija pažeidė valstybės pareigą, kylančią iš ES teisės. Jeigu tokio pažeidimo nebūtų konstatuota, nebūtų galimybės taikyti valstybės atsakomybės už žalą asmeniui, nes valstybė gali būti laikoma atsakinga tik už tai, kas jai yra privaloma pagal ES teisę. Valstybės atsakomybė už žalą asmeniui taip pat turi būti taikoma nepriklausomai nuo to, kokios valstybės pareigos, kylančios iš ES teisės, buvo pažeistos.

Atlikus tyrimą, galiausiai daroma išvada, jog praktikoje galima situacija, kai taikytina tiek valstybės atsakomybė už žalą asmeniui ES teisėje, tiek valstybės atsakomybė už tarptautinės teisės pažeidimą. Šie atvejai yra susiję su valstybių narių įsipareigojimų, kylančių iš ES sudarytos tarptautinės sutarties, nevykdymu. Jeigu šie įsipareigojimai, kylantys iš tokios tarptautinės sutarties, yra pažeidžiami, asmuo taip pat gali patirti žalos. Tokiu atveju asmuo neprivalėtų įrodyti antrosios atsakomybės sąlygos – pažeidimo pakankamo akivaizdumo – jeigu tarptautinis teismas pripažintų, kad valstybė narė pažeidė savo įsipareigojimą, kylantį iš tarptautinės sutarties, kurią sudarė ES. Toks pažeidimas būtų laikomas pakankamai akivaizdžiu pats savaime (per se).

***Reikšminiai žodžiai**: Valstybės atsakomybė už žalą, ES teisės pažeidimas, žalos atlyginimas, valstybės atsakomybė už tarptautinės teisės pažeidimus, tarptautinės teisės pažeidimas, tarptautinės teisės pažeidimo elementai, ES teisės pažeidimo elementai.*

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