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FROM THE SECTORAL ANGLE TO THE GENERAL RULES OR HOW THE CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGES CAUSED BY SPACE OBJECTS[1] INFLUENCED THE DEVELOPMENT OF THE INTERNATIONAL LAW OF STATE RESPONSIBILITY AND LIABILITY?

Abstract

This article discusses the impact the 1972 Liability Convention exerted upon the further discussion on state responsibility and liability rules within the UN International Law Commission. The question it seeks to answer is the issue of how, and to what extent, its provisions influenced the development of international law on the responsibility of states and international organizations and the institution of international liability of states. Most notably, the present article demonstrates how the Liability Convention served as a reference point for the International Law Commission's works struggling to codify the general rules of states' liability. It also examines the factors that, from the mid-1990s onward, have steadily diminished its role in the ongoing debate and how it finally informed the final shape of the 2006 *Draft principles on the allocation of loss in the case of transboundary harm arising from hazardous activities*. Furthermore, it analyses the

[1] Convention on International Liability for Damages Caused by Space Objects, 29 March 1972, in force from 1 September 1972, 961 UNTS 187 (hereinafter: Liability Convention or simply Convention).

2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the 2011 Articles on Responsibility of International Organizations (ARIO). With this in mind, it is put forward that the differences mandate strict differentiation between international responsibility and international liability at the theoretical level. Nonetheless, the Liability Convention could furnish patterns based on which, notably, the institution of joint and several responsibility of states and international organizations, respectively, have been modelled.

Therefore, it is concluded that the *lex specialis* and the self-contained character of the regime established under this Convention effectively limit its impact on the development of international regimes of responsibility and liability of states and international organizations. However, they do not eliminate them altogether. Ironically, in practical terms, the Convention marked the 2001 ARSIWA and, indirectly, the 2011 ARIO more decisively than the 2006 Draft Principles, even though the Convention – similar to the DP 2006 – addresses states' liability, not their responsibility.

KEYWORDS

liability of states, responsibility of states, Liability Convention, outer space, space objects.

SŁOWA KLUCZOWE

odpowiedzialność państw, Konwencja o odpowiedzialności państw za szkody wyrządzone przez obiekty kosmiczne, przestrzeń kosmiczna, obiekty kosmiczne.

1. INTRODUCTION

The 50th anniversary of the entry into force of the Liability Convention gives good food for thought on its significance for developing international law theory and practice. Undoubtedly, the number of reported cases that arose under its provisions is not particularly impressive, and neither is its ratification status.[2]

[2] According to the Committee on the Peaceful Uses of Outer Space, as of 28 March 2022, 98 Sates taken altogether agreed to be bound by this treaty. 4 other states deposited the declarations of acceptance of rights and obligations (See Committee on the Peaceful Uses of Outer Space. Legal Subcommittee, *Status of International Agreements relating to activities in outer space as at 1 January 2022*, A/AC.105/C.2/2022/CRP.10 (accessed 1 March 2023, https://www.unoosa.org/res/oosadoc/data/documents/2022/aac_105c_22022crp/aac_105c_22022crp_10_0_html/AAC105_C2_2022_CRP10E.pdf).

Therefore, its direct effect on international outer space practice development is not apparent.[3]

Still, in the current research, little attention has been paid to the more subtle and indirect impact the Convention could have exerted on the law of international responsibility and liability of states and international organizations.[4] Nonetheless, during the negotiations preceding the adoption of the ARSIWA and ARIO and 2006 Draft Principles, respectively,[5] it served several years as a vital reference point for Special Rapporteurs. It was also invoked during the discussion at the ILC meetings, and it could inform the final shape of the draft articles mentioned above. Therefore, the primary goal here is to determine whether (and if so, to what extent) the Convention influenced the UN International Law Commission's[6] works on the institution of responsibility and liability in international law and – in this way – to fill these lacunae.

The present contribution is divided into three parts. Part I restates the Liability Convention's provisions most frequently invoked in the international responsibility and liability debate. It also lists the most important legal acts regulating states' and IOs' responsibility and liability in international law. It also touches upon the milestones in the development of these institutions. Part II discusses the role of the Liability Convention in the works of the ILC on state liability. It also examines the issue of the influence of provisions of this Convention exerted upon the final shape of the 2006 Draft Principles. Part III addresses the same issues concerning

[3] Setting aside the famous old instance Cosmos 954, which sparked many controversies in the literature, it would be rather tricky to indicate other cases where Article II of the Convention was invoked. (For more on this incident and the legal effects it produced see J. Burke, *Convention on International Liability for Damage Caused by Space Objects: Definition and Determination of Damages After the Cosmos 954 Incident*, 'Fordham International Law Journal' 1984, No. 8(2); B.A. Hurwitz, *State Liability for Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damages Caused by Space Objects,* Dordrecht/Boston/London/the Netherlands 1992. For recent and critical comments concerning the interpretation of this incident, see G. Laganière, *Liability for Transboundary Pollution at the Intersection of Public and Private International Law,* London 2022, p. 31.

[4] Hereinafter: IOs

[5] Responsibility of States for Internationally Wrongful Acts, A/CN.4/SER.A/2001/Add.1 (Part 2). Yearbook of the International Law Commission 2001, Vol. II (Part Two) Report of the Commission to the General Assembly on the work of its fifty-third session, UN, New York and Geneva 2007, p. 26 (hereinafter: ARSIWA); Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities 2006, A/CN.4/SER.A/2006/Add.1 (Part 2). Yearbook of the International Law Commission 2006, Vol II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-eighth session, United Nations, New York and Geneva 2013, p. 58 (hereinafter: 2006 Draft Principles); Draft articles on the responsibility of international organizations 2011, CN.4/SER.A/2011/Add.1 (Part 2). Yearbook of the International Law Commission 2011, Vol. II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-eighth session, United Nations, New York/Geneva 2018, p. 40 (hereinafter: ARIO).

[6] Hereinafter: "the ILC" or simply "the Commission".

the origins and the outcome of the ILC's works on the responsibility of states and international organizations. In the conclusions, I claim that the place the Liability Convention occupied on the list of the ILC reference points has changed over time. Moreover, for the reasons discussed below, the Convention's impact on the liability and responsibility regimes elaborated by the ILC has been unequal and somewhat pretty limited. Nonetheless, some concrete legacies or traces this Convention left on the ARSIWA, ARIO, and the 2006 Draft Principles are easy to detect. Thus, despite its *lex specialis* character, the Liability Convention could inform the ILC's work on the general regime of IOs' and states' responsibility and liability, even though this effect could have appeared to a limited extent only.

PART I

This discussion does not aim to comment extensively on the provisions of the Liability Convention, as its content has already been discussed elsewhere.[7] Nonetheless, legal scholars commonly agree that one of its main features is the absolute liability[8] for any damage caused to states and their residents by a space object on the Earth's surface and to an aircraft in flight.[9]

As Foster notes, it was *the first time that an international agreement has sought to impose such a liability regime on states in their capacity as states*.[10] Moreover, under the system established under the Convention, no State-Party to it may avoid liability for damages resulting from outer space activities, even if the latter are carried out not by its organs but by private companies.[11]

Furthermore, in the light of Articles IV and V of the Convention, states can bear liability severally and jointly for damage caused to a third state or its nation-

[7] See most notably: W.F. Foster, *The Convention on International Liability for Damage Caused by Space Objects*, 'Canadian Yearbook of International Law' 1972, No. 10 p. 137; B.A. Hurwitz, 1992, *op. cit*., pp. 9-82; M. Forteau, *Space Law,* (in:) J. Crawford , A. Pellet, S. Olleson, K. Parlett (eds), *The Law of International Responsibility,* Oxford 2010, p. 905.

[8] It is true that Article VI(1) of the Convention states that a launching state can exonerate its liability if *damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents*. Still, even if the prevailing opinion that the Liability Convention introduces absolute liability for the state liable for damage is not totally correct, it is nonetheless very close to the truth.

[9] See Article II of the Convention. For more on the issue see W.F. Foster, 1972, *op. cit*., p. 150; M. Forteau, 2010, *op. cit*., p. 903.

[10] W.F. Foster, 1972, *op. cit*., p. 150. As it was to appear later, this first time turned out to be the last one, which made the ILC's works on states liability much more complicated (see the next chapter).

[11] B.A. Hurwitz, 1992, *op. cit*., p. 48.

als.[12] One should also never forget that Article XI(1) deliberately omits the local remedy rule as the precondition which must be met before any State will acquire the right to lodge a claim against another State on behalf of the victims or their relatives.[13] As Hurwitz correctly notes, the Convention introduces a modified version of the diplomatic protection for nationals with all inconveniences such a system entails for individuals seeking efficient redress against the damage they have incurred.[14] Therefore, Article XI introduces an innovative approach by granting individuals the right to lodge their claims against the launching states before the domestic judiciary of those states.[15] This procedure is optional by allowing an individual to seek compensation through the domestic judiciary channels of the launching state liable for damage caused to the claimant. Ultimately, it is up to the injured persons to decide whether to trigger this clause or seek compensation through traditional diplomatic channels.[16]

Last but not least, Article XXII of the Convention also deserves a mention here. Although under its final clauses (Articles XXIII – XXVII) no accession of an international organization is possible, the Convention can produce its effects on damage resulting from activities undertaken by such an organization in outer space if the conditions laid down in Article XXII are met. In practical terms, in the case of damage caused for which an IO could be liable, this IO is held liable severally and jointly with its member states if the specific conditions are met.[17]

The general outline of the development of the law of international responsibility was also discussed elsewhere.[18] Although the ILC began its work on this topic in the mid-1950s, it was not completed until 2001.[19] In the context of the present analysis, it is worth noting that initially, the ILC considered the damage as a necessary premise entailing any state responsibility, be it for acts prohibited by international law or for acts permissible under it. By the late 1960s, the ILC had changed this attitude. Deleting the damage from the list of premises condi-

[12] As Hurwitz observed, Article V was not a novelty, as the institution of joint and several liability had been known to some other international agreements predating the 1972 Convention. B.A. Hurwitz, 1992, *op. cit*., p. 38.

[13] B.A. Hurwitz, 1992, *op. cit*., p. 52.

[14] *Ibid.,* p. 49 ff.

[15] *Ibid.,* p. 52 ff.

[16] As demonstrated in Part II, the procedures securing the efficient measure for victims to get compensated for damage originating from another jurisdiction were pivotal in the intellectual shift in the second half of the 1990s to the state liability problem.

[17] These are the following: (a) any claim for compensation in respect of such damage shall be first presented to the organization; (b) only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum (see Article XXII(3)).

[18] J. Crawford, *State Responsibility. The General Part,* Cambridge/New York 2013 (see notably subchapter 1.4.1 pp. 35-37 concerning the works of the ILC).

[19] *Ibid.*