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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<sup>1</sup> 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

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<sup>1</sup> 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 50<sup>th</sup> 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.<sup>2</sup>

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<sup>2</sup> According to the Committee on the Peaceful Uses of Outer Space, as of 28 March 2022, 98 States 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](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.<sup>3</sup>

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.<sup>4</sup> Nonetheless, during the negotiations preceding the adoption of the ARSIWA and ARIO and 2006 Draft Principles, respectively,<sup>5</sup> 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<sup>6</sup> 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

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<sup>3</sup> 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.

<sup>4</sup> Hereinafter: IOs

<sup>5</sup> 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).

<sup>6</sup> 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.<sup>7</sup> Nonetheless, legal scholars commonly agree that one of its main features is the absolute liability<sup>8</sup> for any damage caused to states and their residents by a space object on the Earth's surface and to an aircraft in flight.<sup>9</sup>

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*.<sup>10</sup> 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.<sup>11</sup>

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-

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<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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).

<sup>11</sup> B.A. Hurwitz, 1992, *op. cit.*, p. 48.

als.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup>

The general outline of the development of the law of international responsibility was also discussed elsewhere.<sup>18</sup> Although the ILC began its work on this topic in the mid-1950s, it was not completed until 2001.<sup>19</sup> 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-

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<sup>12</sup> 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.

<sup>13</sup> B.A. Hurwitz, 1992, *op. cit.*, p. 52.

<sup>14</sup> *Ibid.*, p. 49 ff.

<sup>15</sup> *Ibid.*, p. 52 ff.

<sup>16</sup> 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.

<sup>17</sup> 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)).

<sup>18</sup> 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).

<sup>19</sup> *Ibid.*

tioning the responsibility of states for wrongful acts,<sup>20</sup> the Commission opened the door to the delineation between their responsibility and liability, where the latter entails reparation for injuries caused by acts not prohibited by international law.<sup>21</sup> In hindsight, the opening for signature of the Liability Convention could have accelerated this trend in international legal thought. In any case, just a year later, the ILC noted that *the Commission fully recognizes the importance, not only of questions relating to responsibility for internationally wrongful acts but also of those concerning liability for possible injurious consequences arising out of the performance of certain lawful activities; especially those which because of their nature give rise to certain risks. However, the Commission takes the view that questions in this latter category should not be dealt with jointly with those in the former category.*<sup>22</sup>

In 1978 the ILC established the Working Group to consider the topic of *International Liability for injurious consequences arising out of acts not prohibited by international law*.<sup>23</sup> From this year onwards, the Commission's works on codification and progressive development of responsibility and liability irrevocably took two different paths. As stated above, the ILC completed its works on the responsibility of states and IOs in 2001 and 2011, respectively, when ARSIWA and ARIO were adopted. The Commission's work on state liability took a different course, partially because this topic has particular importance in the context of rising environmental concerns.<sup>24</sup> Interestingly, as early as 1978, the ILC stated that although "*it would not be appropriate in this report to try to survey the range of recent materials that are or may be, relevant to the development of the new topic*, it included, among other things, *measures of international co-operation*

<sup>20</sup> This provision states that *every internationally wrongful act of a State entails the international responsibility of that State*. A. Pellet, *The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts*, (in:) J. Crawford, A. Pellet, S. Olleson, K. Parlett (eds), *The Law of International Responsibility*, Oxford 2010, p. 77.

<sup>21</sup> For more on the misconceptions deriving from this terminology see A. Boyle, *Liability for Injurious Consequences of Acts Not Prohibited by International Law*, (in:) J. Crawford, A. Pellet, S. Olleson, K. Parlett (eds), *The Law of International Responsibility*, Oxford 2010, p. 95 ff.

<sup>22</sup> See A/9010/Rev.1 Report of the International Law Commission on the work of its twenty-fifth session, 7 May – 13 July 1973, Official Records of the General Assembly, Twenty-eighth session, Supplement No 10. Extract from the Yearbook of the International Law Commission 1973, Vol. II, p. 169, para. 38.

<sup>23</sup> A/33/10. Report of the International Law Commission on the work of its thirtieth session, 8 May – 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10. Extract from the Yearbook of the International Law Commission 1978, Vol. II (Part 2), p. 6, para. 9

<sup>24</sup> *Ibid.*, (see Annex, Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, p. 151, paras 14 and 18). See also A/35/10. Report of the International Law Commission on the work of its thirty-second session, 5 May – 25 July 1980, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10. Extract from the Yearbook of the International Law Commission 1980, Vol. II (2), p. 159, para. 132.

*undertaken in relation to (...) regime of outer space*<sup>25</sup> on the list of such materials. Thus, it was decided from the outset that the international law of outer space and – more importantly – the Liability Convention would play a significant role in the ILC’s future works on state liability. In 1997, however, after almost 19 years of difficult discussions within the Commission, the ILC divided the topic into two parts. From then on, the Commission discussed the issue of prevention separately.<sup>26</sup> In effect, two Draft Principles were elaborated by the ILC, the first concerning prevention,<sup>27</sup> and the latter focused on states’ liability.<sup>28</sup>

Parallel to the ongoing works of the ILC on responsibility and liability, states adopted many sectoral agreements imposing the liability for damages caused by some specific acts not prohibited by international law. The Convention is one of them, but it has never been an isolated case. Moreover, its provisions relied heavily on the 1967 Outer Space Treaty and the so-called “Nuclear Treaties” regulating liability for damages caused by nuclear accidents.<sup>29</sup> Later on, after 1972, states have concluded many other similar treaties.<sup>30</sup>

Against this backdrop, it is noteworthy that the ILC’s draft articles and draft principles mentioned above are composed of general rules or principles that determine some basic standards of states or IO responsibility and liability. Therefore they are without prejudice to the treaties mentioned above, as they seek to go beyond the sectoral dimensions imposed on states by such agreements as e.g. the Nuclear Treaties or the Liability Convention. Besides, none of the articles

<sup>25</sup> A/33/10, p. 150, para. 12.

<sup>26</sup> A/CN.4/479, sect. C, A/CN.4/481 and Add.1,1 A/CN.4/L.536. International liability for injurious consequences arising out of acts not prohibited by international law, A/CN.4/SER.A/1997. Yearbook of the International Law Commission 1997, Vol. I, Summary records of the meetings of the forty-ninth session, 12 May-18 July 1997, UN, Geneva, November 1999, p. 155, para. 71.

<sup>27</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. 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, United Nations, New York/Geneva 2007, pp. 146-148.

<sup>28</sup> 2006 Draft Principles.

<sup>29</sup> B.A. Hurwitz, 1992, *op. cit.*, p. 27 ff., claims Article II of the Liability Convention should be interpreted as the outcome of the inspiration derived from two sources. On the one hand, these were the Outer Space Treaty’s Articles VI and VII, because both these provisions introduced – as general principles – the responsibility and liability of states for damage resulting from activities carried out in outer space. On the other hand, some conventional liability regimes that had predated 1972, notably the “Nuclear Treaties” adopted in the early sixties, could have informed the Liability Convention’s drafters (the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy (951 UNTS 264), the 1962 Convention on the Liability of Operators of Nuclear Ships (not yet in force, ‘American Journal of International Law’ 1963, No. 57(1)) and the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1063 UNTS 265)). Also Hurwitz’s argument, the terminology of the 1972 Convention (notably the definition of “damage”) was at least partially modeled upon the 1960 Convention (see B.A. Hurwitz, 1992, *op. cit.*, p. 13) is convincing.

<sup>30</sup> See e.g. Convention on Civil Liability for Damages Resulting from Activities Dangerous to Environment (1993, not yet in force, ETS, No. 150);

mentioned above (the ARSIWA, the ARIO, and the 2006 Draft Principles) are legally binding upon states, even though assuredly, the ARSIWA reflects (to a large extent) international customary law. However, the same is not true of the 2006 Draft Articles, which seem to incorporate progressive and future-oriented tendencies in the current trends in international law.<sup>31</sup>

The liability treaties mentioned above were usually opened for signature many years before 2001, decades before the ILC's work on the responsibility of states was eventually completed. Therefore, during the discussions within the Commission on state liability and responsibility, they were given due attention by the Special Rapporteurs and other ILC Members. As one of these agreements is the Liability Convention, it is the analysis of its impact upon these discussions on the state liability regime eventually laid down in the 2006 Draft Principles we must turn to now.

## PART II

When one looks at the text of the 2006 Draft Principles, the first impression is that it was probably not influenced by the Liability Convention, and if so, to a limited extent only. Still, this issue appears more complex at closer examination, notably when exploring the ILC's preparatory work history in-depth.

As Hurwitz notes, from 1970 onward, the topic of "*International Liability for Injurious Consequences Arising Out of Acts not prohibited by International Law*" has been on the ILC's agenda<sup>32</sup>. Still, its anchorage on the list of the ILC's priorities was never solid, as the concept of state liability, from the outset, has been considered controversial.<sup>33</sup> Thus, at the early stage of its work on this topic,

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<sup>31</sup> K. Schmalenbach, *International Standards for National Environmental Liability Regimes*, (in:) P. Gailhofer, D. Krebs, A. Proelss, K. Schmalenbach, R. Verheyen (eds), *Corporate Liability for Transboundary Environmental Harm. An International and Transnational Perspective*, Springer Cham 2023, p. 155 ff.

<sup>32</sup> B.A. Hurwitz, 1992, *op. cit.*, p. 146 quoting: Yearbook of the International Law Commission 1970, Vol. II, Documents of the twenty-second session including the report of the Commission to the General Assembly, UN, New York 1972, A/CN.4/SER.A/1970/Add.1, pp. 307-308, para. 74.

<sup>33</sup> As Boyle noted, *It remained unclear whether activities which caused transboundary harm were or were not prohibited in international law. Nor was it clear that the cases and precedents on which the Special Rapporteurs sought to rely really did support a concept of liability for acts not prohibited by international law rather than responsibility for breach of obligation* (A. Boyle, 2010, *op. cit.*, p. 96). Many states and legal scholars believe the liability has been adequately dealt with in the ARSIWA (see A. Boyle, 2010, *op. cit.*, p. 97). This skepticism has always been present among scholars, e.g. Reuter (B.A. Hurwitz, 1992, *op. cit.*, p. 151). See also Evensen's opinion expressed during the session of the ILC: J. Evensen, Yearbook of the International Law Commission 1984, A/CN.4/SER.A/1984, p. 226, para. 27. For more recent positions see K. Schmalenbach, 2023, *op. cit.*; G. Laganière, 2022, *op. cit.* Moreover, in the 1980s, some governments (e.g. the USSR) considered this topic unnecessary, for when states wanted to regulate the liability for specific kind

the problem the ILC faced was to find some legal acts supporting the counter-argument against this mostly skeptical attitude. Against this backdrop, at first glance, the law of outer space seemed to offer a solid basis that made it at least plausible that the state liability concept was not of a purely hypothetical character. Most notably, it delivered the evidence that state liability could exist in international legal order, even if it had not emerged yet as a general rule or principle.<sup>34</sup> From this perspective, the Liability Convention's function was peculiar. Firstly, by replicating in its preamble the concept laid down in the preamble of the 1967 Outer Space Treaty,<sup>35</sup> it constituted visible proof that a state may be held internationally liable for damages it causes by its permissible acts. Secondly, and more importantly, the liability it incurs can be absolute.<sup>36</sup> This peculiar feature of the Convention allows an understanding of why in the 1980s, the Convention was often quoted as the *sui generis* parameter of delineation between "responsibility" and "liability," considered as two interrelated but separate legal concepts.<sup>37</sup> As the first Special Rapporteur Robert Quentin – Baxter observed: *The distinction is best illustrated by the archetypal conventional regime contained in the Convention on Damage caused by Space Objects (...), because its Article 2 establishes for the States parties a "primary" obligation to pay compensation for injurious consequences arising out of acts not prohibited by international law. By virtue of a "secondary" rule, failure of a State party to meet its liability to pay compen-*

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of damage they were free to do so with a treaty (B.A. Hurwitz, 1992, *op. cit.*, pp. 155 and 178). The US position was also not supportive (*id.*, p. 157).

<sup>34</sup> R. Quentin–Baxter, Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, 1980, A/AC.4/344 and Add.1 and 2. Reprinted in A/CN.4/SER.A/1980/Add.1 (Part 1). Yearbook of the International Law Commission 1980, Vol. II, Part One, Documents of the thirty-second session (excluding the report of the Commission to the General Assembly), New York 1982, see most notably p. 255 para. 28 (hereinafter: Preliminary report).

<sup>35</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (from now on Outer Space Treaty), 27 January 1967, 610 UNTS 205.

<sup>36</sup> B.A. Hurwitz, 1992, *op. cit.*, p. 10. This view was shared – among others – by the first Rapporteur Robert Quentin Baxter (see Preliminary report, p. 263, para. 56). During the 30 years of works on the 2006 Draft Principles some others ILC Members also saw the Liability Convention not as an isolated case but a reflection of a more general trend making states liable for any damage produced within the jurisdiction of other states (see e.g. the statement of the PRC's representative Ni from 1984 going in the same direction, Yearbook of the International Law Commission 1984, p. 207, para. 12).

<sup>37</sup> *The Special Rapporteur based his decision to accept the differentiation between "responsibility" and "liability" on a previous decision of the United Nations Committee on the Peaceful Uses of Outer Space to separate the two within the context of the 1967 Outer Space Treaty where, as will be recalled, Article VI deals with international responsibility, and Article VII deals with international liability for outer space activities* (B.A. Hurwitz, 1992, *op. cit.*, p. 148, quoting Yearbook of the International Law Commission 1978, Vol. II, Part Two, p. 151, para. 178, and Preliminary report, para. 11).

sation constitutes a breach of an international obligation of that state, thereby entailing its international responsibility. (...) Obligations arising in respect of acts not prohibited are the product of particular “primary” rules: the violation of these or other “primary rules” brings into play the “secondary” rules of State responsibility for wrongful acts.<sup>38</sup>

This fragment and other excerpts from Quentin-Baxter Reports<sup>39</sup> prove that the Liability Convention was often quoted to persuade the skeptics that state liability had already attained “theoretical maturity,” making it ripe for a codification effort. It allowed the ILC to continue its works against the strong opposition that had persisted until the very end of the Commission’s proceedings.<sup>40</sup> Nonetheless, it is also true that in 1990s, the role of the Convention as a reference point furnishing inspiration to the ILC grappling with states’ liability had met some objective and intransgressible limits. As a result, its utility for the Commission began to vanish. What were the factors that – step-by-step – eliminated the Convention from its previous function to an almost non-existing historical footnote unable to determine the 2006 Draft Principles’ content more decisively? Numerous reasons explain this radical departure, but the most important are the following.

Firstly, the problem of state liability was added to the list of the ILC agenda primarily to answer the increasing environmental concerns.<sup>41</sup> Thus, the problem of prevention was equally important in the works of the Commission as the issue of liability. But as the former is mentioned only once in the preamble to the Liability Convention, it could barely inform the ILC on this issue.<sup>42</sup>

<sup>38</sup> B.A. Hurwitz, 1992, *op. cit.*, p. 149, quoting Preliminary report, para. 21.

<sup>39</sup> Cf. his opinions on relations between the duty of care and the liability of states. A/CN.4/346 and Add.1 & 2. Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur. Extract from A/CN.4/SER.A/1981/Add. 1 (Part 1). Yearbook of the International Law Commission 1981, Vol. II (Part One). Documents of the thirty-third session (excluding the report of the Commission to the General Assembly), New York 1983, p. 123 para 90.

<sup>40</sup> Even in 2003 Sir Ian Brownlie or Allain Pellet attacked the topic as not ripe for codification A/CN.4/SER.A/2003. Yearbook of the International Law Commission. Summary records of the meetings of the fifty-fourth session, 5 May–6 June and 7 July–8 August 2003, UN, New York and Geneva 2009, p. 95 ff.

<sup>41</sup> See Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, A/CN.4/SER.A/1978/Add. 1 (Part 2). Yearbook of the International Law Commission 1978, Vol II, Part Two, Report of the Commission to the General Assembly on the work of its thirtieth session, New York 1979, Chapter VIII (Other Conclusions and Decisions of the Commission), A/CN.4/SER.A/1978/Add. 1 (Part 2), Annex, p. 150, para. 10.

<sup>42</sup> B.A. Hurwitz, 1992, *op. cit.*, pp. 32 and 68. As it is generally acknowledged, just because the Convention is silent on environmental matters, it does not apply to every case arising under a collision of debris with a space object. For more on this issue see e.g. P. Stubbe, *State Accountability for Space Debris A Legal Study of Responsibility for Polluting the Space Environment and Liability for Damage Caused by Space Debris*, Leiden/Boston 2018, p. 418. See also E. Kisiel, *Law as an Instrument to Solve the Orbital Debris Problem*, ‘Environmental Law’ 2021, No. 51(1);

Secondly, states did not hurry to accept strict liability as laid down in Article II as the general rule of their future liability regime.<sup>43</sup> Some representatives argued that the solution of Article II should have been accepted only when effective prevention measures did not exist for some particularly hazardous activities.<sup>44</sup> Thus, such drastic consequences did not fit a commonplace situation where the damage results from a steady accumulation of pollution, which must attain a significant level to become harmful to life, health, property, or the environment.<sup>45</sup> Other representatives argued that the Liability Convention is unique in its character, and – for this reason – it could not serve as a model for further works of the ILC.<sup>46</sup> Thus, as the first Special Rapporteur, Owen Baxter, proposed extending the strict liability of states as a rule applicable to all cases arising under the future state liability regime, his proposal was received with visible reluctance and hesitations.<sup>47</sup>

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G. Laganière, 2022, *op. cit.*, p. 31. But see Baxter's general remark: *Sometimes, as in the case of damage caused by space objects, regulation can precede the development of the activity to which it relates* (A/CN.4/383 and Add.1. Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur (Report published in: A/CN.4/SER.A/1984/Add.1 (Part 1). Yearbook of the International Law Commission 1984, Vol. II (Part One), Documents of the thirty-sixth session, New York 1986, see p. 166, para. 29)). See also A/47/10. Report of the International Law Commission on the work of its forty-fourth session, 4 May – 24 July 1992, Official Records of the General Assembly, Forty-seventh session, Supplement No. 10. Extract from the Yearbook of the International Law Commission 1992, Vol. II(2), p. 43, para. 288.

<sup>43</sup> Although one should note here that this view was not shared by all states: cf. Koroma's statement in A/CN.4/SR.2018. Summary record of the 2018th meeting. Extract from the Yearbook of the International Law Commission 1987, Vol. I, p. 153, para. 25

<sup>44</sup> A/CN.4/SR.1686. Summary record of the 1686th meeting. Extract from the Yearbook of the International Law Commission 1981, Vol. I, p. 222, para. 8.

<sup>45</sup> As it is generally well known, 2006 Draft Principles are applicable only when the damage is "significant" (Cf. Article 2(a))

<sup>46</sup> A/CN.4/SR.1685. Summary record of the 1685th meeting. Extract from the Yearbook of the International Law Commission 1981, Vol. I, p. 217, para. 3. Cf. statement from the ILC Member Bernhard Graefrath, A/CN.4/SER.A/1987. Yearbook of the International Law Commission 1987, Vol. I., Summary records of the meetings of the thirty-ninth session, 4 May-17 July 1987, United Nations, New York 1989, p. 144, para. 31.

<sup>47</sup> A/42/10. Report of the International Law Commission on the work of its thirty-ninth session, 4 May – 17 July 1987, Official Records of the General Assembly, Forty-second session, Supplement No. 10. Extract from the Yearbook of the International Law Commission 1987, Vol. II (Part Two), p. 48, paras 181 and 182, and p. 52. It seems that this reluctance was persistent, although even in 1990 there were numerous states which were ready to support the view that a State should be in principle directly liable for any damage originating from its territory or areas under its jurisdiction (see A/45/10. Report of the International Law Commission on the work of its forty-second session, 1 May – 20 July 1990, Official Records of the General Assembly, Forty-fifth session, Supplement No. 10., 1990 Vol. II (Part Two), p. 100, para. 509). However, despite this pressure, most states did not depart from their previous positions on this proposal (*ibid.*). See also *ibid.*, p. 103, para. 524.

Thirdly, and more importantly: after the end of the Cold War, a state's role in economic life decreased significantly. This factor also contributed to the ILC's loss of interest in seeking inspiration from the Liability Convention. As the Second Special Rapporteur Julio Barboza aptly put it, in the light of its provisions, *the state becomes the only actor relevant in the entire regime: (...)*. That is, it is *absolutely liable if the damage is caused on the surface of the Earth or to aircraft in flight as well as liable for damage caused due to its fault to a space object of another launching State*.<sup>48</sup> The problem was that in the 1990s exploration of outer space appeared sufficiently profitable to attract private investors<sup>49</sup> and this shift entailed radical changes to ILC's previous attitude. As the general assumption that only State organs or state-controlled agencies undertook activities in outer space exploration was behind the curve, this shift entailed a change of perspective which until then had been dominated by a state-centric approach. Not coincidentally, in 2003, Zdzisław Galicki, the Polish representative in the ILC, argued that *the liability and obligation to compensate should be first placed at the doorstep of the person most in control of the activity at the time of the accident or incident occurred*.<sup>50</sup>

In essence, Galicki's opinion was not an entirely new one.<sup>51</sup> Still, his remark is interesting as it indirectly mirrored another shift that had taken place step-by-step within the Commission that concerned dispute settlement procedures applicable to cases engaging state liability. The Commission knew, of course, that the treaty practice predating the Liability Convention developed a model that channelled the liability for damage sustained to the operator of an installation.<sup>52</sup> What is more,

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<sup>48</sup> A/49/10. Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement. Extract from the Yearbook of the International Law Commission 1994, Vol. II(2), p. 155, paras 366 and 367.

<sup>49</sup> In this vein: R.J. Lee, *The Liability Convention and Private Space Launch Service. Domestic Regulatory Responses*, 'Annals of Air & Space Law' 2006, No. 31(351), p. 352 ff.

<sup>50</sup> A/CN.4/SR.2765. Summary record of the 2765th meeting. Extract from the Yearbook of the International Law Commission 2003, Vol. 1, p. 99, para. 43. Galicki also thought that the Convention created a self-contained regime, and its norms were of an exceptional, not general, character. Therefore, he believed that the future rules on liability should focus on non-state actors' liability, *ibid.*, para. 44.

<sup>51</sup> In the late 1980s already some ILC Members argued that the Convention was *drafted on the assumption that all future space activities would be carried out by States or under their control; that assumption did not exist in respect of the present topic. Absolute liability of States could not, therefore, be extended in respect of activities which were essentially private. The solution assigning sole liability to the operator also had drawbacks: for example, harm might be so substantial as to result in insolvency on the Part of the operator, thus leaving the victim without adequate compensation or even with no compensation at all*. See A/46/10 Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10. Extract from the Yearbook of the International Law Commission 1991, Vol. II (Part Two), p. 115, para. 239.

<sup>52</sup> As early as in 1978 the ILC Working Group noted that *It has become the practice of States to establish conventional regimes to regulate liability for these dangers, on a subject-by subject*

some Members of the ILC Commission believed such a construction of Liability Treaties was standard treaty practice. In this perspective, the Liability Convention, which openly recognized the direct liability of a state for damage caused by a lawful act (including the act of a private person as an act attributable to it), seemed to have been an exception, not a rule.<sup>53</sup> Compared to Article II, mentioned above, this new/old approach was significantly different, as the Convention made the launching state liable for any damage caused by the space object launched from its territory on the surface of another state. However, the new approach, which primarily drew back on the Nuclear Treaties, placed an originating State as the guarantor for payment of compensation rather than the subject principally liable.<sup>54</sup>

For all these reasons, by the mid-1990s at the latest, it had become clear that the Commission was no longer in a position to defend the Liability Convention as the key reference point in the discussion on the future attribution of liability between states and operators.<sup>55</sup> This change in the general approach resulted in differences between the Convention's regime and the 2006 Draft Principles, which have not been insignificant and should never be disregarded. To name but the most important: under Article II of the Convention, the launching state bears the strict liability, while it is never the case of damage arising under the 2006 Draft Principles.<sup>56</sup> Under the Liability Convention, a state is liable for any dam-

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*basis. The regimes differ very widely in their content, which tends to be governed by the needs of the particular situation, rather than by any doctrinaire view about the nature of the responsibility of States. In some cases, a liability is accepted by States themselves; in others liability is placed solely on the operator, and remedies are made available within the ambit of municipal law. There are intermediate solutions, including some that place primary liability on the operator, but envisage a recourse to the State as guarantor. See A/33/10 (see, Annex, Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, p. 151, para. 21).*

<sup>53</sup> A/42/10. Chapter IV, International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, p. 47, para 180 ff. (hereinafter: A/42/10). See also A/46/10. Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10. Extract from the Yearbook of the International Law Commission 1991, Vol. II (Part Two), p. 116, para. 242.

<sup>54</sup> Preliminary report, p. 261, para. 48. At the end, this concept was accepted and is laid down as Principle 4(5) in the 2006 Draft Articles.

<sup>55</sup> A/49/10., p. 155, para. 368. Cf. also the ILC's Commentary to the Article C [9 and 10] in: A/50/10. Report of the International Law Commission on the work of its forty-seventh session, 2 May – 21 July 1995, Official Records of the General Assembly, Fiftieth session, Supplement No.10. Extract from the Yearbook of the International Law Commission 1995, Vol. II (Part 2), p. 98, para. 30 (where the Commission also stated that *the Convention is further unique in that it allows the injured party the choice as to whether to pursue a claim for compensation through domestic courts or to make a direct claim against the State through diplomatic channels*).

<sup>56</sup> Even though Article 3(b) pursued to materialize the “polluter pays” concept in cases of impairment inflicted to the environment it did not based its scope upon the strict liability principle. (see 2006 Draft Principles, p. 74, paras 14-16).

age caused by an object's outer space activities impacting the Earth's surface. The same is not entirely true of the 2006 Draft Principles<sup>57</sup> because, as the ILC noted, *before identifying the elements of damage, it is important to note that the damage, to be eligible for compensation, should reach a certain threshold*;<sup>58</sup> that is, it must be *significant*.<sup>59</sup> Moreover, compared to the Convention's provision, the 2006 Draft Principles are more environmentally-oriented.<sup>60</sup> It is also not less accurate that in a situation like the one described in Principle 6(1) and (2) of the 2006 Draft Principles, it is recommended that the victim seek compensation through the judiciary channels of the state of origin while under the Convention's Article XI, this is just an option. But, against this backdrop, another question arises in light of the findings above. If so, is it possible to state that the Convention's impact on the international liability principles stopped halfway through the 1990s without any traces or legacies detectable in the text of the 2006 Draft Principles? The answer to this question is simple: no, it did not.

Firstly, the drafters of the Conventions and the drafters of the 2006 Draft Principles faced the same philosophical and moral dilemma of balancing the freedom of states to act and their duty not to injure.<sup>61</sup> And it is enough to compare the text of the Convention and the 2006 Draft Principles to conclude that at the theoretical level, both legal acts go in the same direction as some of their preamble fragments and specific provisions are similar or even the same. Both are victim-oriented and seek to find an equilibrium between the competing interest of industry and potential victims.<sup>62</sup> Both are based on the premise that the precautionary principle, even if meticulously implemented, cannot guarantee that harm or injury not be inflicted by the activities falling within the respective scope of their regulation.<sup>63</sup> And despite visible differences in the definition of the term

<sup>57</sup> 2006 Draft Principles, p. 77, para. 3.

<sup>58</sup> *Ibid.*, p. 64, para. 1.

<sup>59</sup> *Ibid.*, p. 65, para. 2.

<sup>60</sup> Cf. Principle 2, paras (a)(iii) – (v).

<sup>61</sup> This dilemma was also known to Robert Quentin Baxter, see his Preliminary report, para. 11

<sup>62</sup> Cf. Recital 5 of the Preamble to the Liability Convention and Article 3(a) of the 2006 Draft Principles. However, in the Convention text, this effort seems to be more visible. Cf. the Liability Convention's Preamble *Recognizing the need to elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention of a full and equitable measure of compensation to victims of such damage*. Against this backdrop, see comment by Hurwitz (B.A. Hurwitz, 1992, *op. cit.*, p. 10) on the 2006 Draft Principles – see Principle 4. Prompt and Adequate Compensation read together with the ILC's commentary, where the Commission noted that *as long as compensation given is not arbitrary of grossly disproportionate to the damage actually suffered, even if it is less than full, it can be regarded as adequate. In other words, the adequacy is not intended to denote "sufficiency"*.

<sup>63</sup> Cf. B.A. Hurwitz, 1992, *op. cit.*, p. 10 (underlying that the Preamble of the 1972 Convention states, i.e., *Taking into consideration that, notwithstanding the precautionary measures to be taken (...) damage may on occasion be caused by such objects*. Cf. in this context the 2006 Draft

“damage”, some similarities do exist concerning the protection of life and property.<sup>64</sup> Also, the prompt and adequate compensation standard is understood along similar patterns.<sup>65</sup> Finally, and perhaps most importantly, commenting on Principle 6(4),<sup>66</sup> the ILC underlined that sometimes, given the bureaucratic obstacles, the longevity of proceedings, or their prohibitive cost, the traditional diplomatic way may, at the end of the day, appear more expeditious and efficient for potential claimants than formal judicial proceedings.<sup>67</sup> Thus, it does not seem to be a pure coincidence that the Commission, in its Commentaries, directly invoked the case *Cosmos 954* as proof that such a method of dispute settlement is not only legitimate but, sometimes, the most satisfactory for the victims.<sup>68</sup>

### PART III

The ILC deliberately divided its works on the liability and responsibility of states into two separate topics.<sup>69</sup> One could expect that in the wake of this decision, the crossovers were eventually set to the effect the ILC works on responsibility and liability could not have informed each other. This conventional wisdom

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Articles Preamble which states *that incidents involving hazardous activities may occur despite compliance by the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities*).

<sup>64</sup> See 2006 Draft Principles. It is interesting to observe that even though the loss of income is not mentioned in either these provisions as compensable, it is nonetheless a common opinion among commentators that claimants may claim not only the direct damage but also the loss of profit. Cf. B.A. Hurwitz, 1992, *op. cit.*, p. 15 and 2006 Draft Principles – Commentaries, p. 68, para. 8.

<sup>65</sup> Cf. Recital 5 of the Preamble to the Liability Convention and Article 3(a) of the 2006 Draft Principles. However, this effort seems to be more visible in the text of the Convention. Cf. the Preamble of the Liability Convention: *Recognizing the need to elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention of a full and equitable measure of compensation to victims of such damage*. Against this backdrop, see Hurwitz’s comment (B.A. Hurwitz, 1992, *op. cit.*, p. 10). When it comes to the 2006 Draft Principles see *Principle 4 Prompt and Adequate Compensation* read together with the ILC’s commentary, where the Commission noted that *as long as compensation given is not arbitrary or grossly disproportionate to the damage actually suffered, even if it is less than full, it can be regarded as adequate. In other words, the adequacy is not intended to denote “sufficiency”* (quotation after Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries 2006. Yearbook of the International Law Commission 2006, Vol. II Part 2, Report of Commission to the General Assembly on the work of its the fifty-eighth session, United Nations, New York/Geneva 2013, A/CN.4/SER.A/2006/Add.1 (part 2), p. 78 para. 8.

<sup>66</sup> This paragraph states the following: *States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses*.

<sup>67</sup> 2006 Draft Principles – Commentaries, p. 87, para. 10 and p. 88, para. 12.

<sup>68</sup> *Ibid.* (see footnote 475).

<sup>69</sup> See Part I of the present article.

is, to a greater extent, true, but not entirely. Some Special Rapporteurs (notably R.Q. Quentin-Baxter) believed that some provisions of the Liability Convention became customary rules of international law over time. These were notably Article I(c), read together with Article V that introduced joint and several responsibility of states for damage caused by the space object launched by them.<sup>70</sup> As these rules originated from the Liability Convention, not surprisingly, they were thoroughly examined by the ILC within the framework of its proceedings on the liability of states.<sup>71</sup> Still, regarding the shift discussed in Part II, Articles IV and V of the Convention were not incorporated into the 2006 Draft Principles.

Nonetheless, even though the Commission deliberately excluded the liability of states from the scope of the work concerning the responsibility of states for wrongful acts, Special Rapporteur James Crawford included in his commentary the following general remark: *Phrases like “joint and several responsibility” or “joint and several liability” were incorporated in treaties, as in the case of the Convention on the International Liability for Damage Caused by Space Objects.*<sup>72</sup>

To be sure, Crawford cautioned against some interpretative problems arising from the different understanding of this mechanism (deeply rooted in the various domestic legal systems).<sup>73</sup> Furthermore, some ILC Members were openly opposed to the quotation of the Liability Convention in the commentary.<sup>74</sup> Despite these objections, “joint and several responsibility” was incorporated into Article 46 of the ARSIWA. It is also noteworthy that Article 47, concerning the plurality of responsible states, introduces the mechanism of joint and several responsibility of injuring states modelled on Article IV of the Liability Convention. Even though the differences between both provisions are apparent, it is clear that the Commission paid due attention to it when it drafted Article 47.<sup>75</sup>

<sup>70</sup> See Baxter’s Fifth Report, *op. cit.*, p. 159, para. 12.

<sup>71</sup> A/45/10, *op. cit.*, p. 102, paras 517 and 518 (see also footnote 356 on the same page) and A/49/10, *op. cit.*, p. 158, para. 378.

<sup>72</sup> A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1. Yearbook of the International Law Commission 2000. Report of the Commission to the General Assembly on the work of its fifty-second session, New York/Geneva, 2006, p. 45, para. 249.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, p. 48 ff., paras 272-274.

<sup>75</sup> Article IV(2) introduces rules on apportionment of compensation between the liable states, whereas Article 47(2b) ARSIWA states simply that the right of the injured state to claim damages from any injuring state is *without prejudice to any right of recourse against the other responsible States*. Therefore the ILC in its commentary stated overtly that Article IV(2) is *clearly a lex specialis, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles. At the same time, it indicates what a regime of “joint and several” liability might amount to so far as an injured State is concerned. Ibid.*, p. 125, para. 5. See also *ibid.*, p. 125, para. 10.

Moreover, Article 39 of the same Draft Articles concerning contribution to the injury<sup>76</sup> was modelled on Article VI of the Liability Convention. As the ILC noted in its commentary to the ARSIWA, *not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as willful or negligent, i.e. which manifest a lack of due care on the Part of the victim of the breach for his or her own property or rights.* And in the footnote at the end of this fragment, the ILC added that *This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.*<sup>77</sup>

The question of the extent to which the Liability Convention could have informed the rules of responsibility and liability of international organizations is the issue that begs for additional results. On the one hand, Articles XXIV to XXVII excluded the possibility of accession of international organizations to this agreement. On the other hand, as early as the 1980s, Robert Quentin Baxter suggested that Article XXII could deliver a model for future solutions concerning the liability of international organizations and their member states for damage caused by acts not prohibited by international law.<sup>78</sup> Thus, it does not seem to be a coincidence that the Commission invoked precisely Article XX(3) of the Liability Convention when the ILC began working on the responsibility of international organizations.<sup>79</sup> After all, even though the ILC Commentary failed to admit it openly, Articles 47 and 48 of the ARIO are constructed along the same (Article 47) or similar pattern (Article 48) as those of provisions of the Convention quoted above.<sup>80</sup>

## CONCLUSIONS

So what lessons do we learn here about the relations between the Liability Convention and some other legal instruments codifying or progressively developing international rules on responsibility and liability? They are numerous.

Firstly, when it comes to the liability of states, it seems probable that if the Commission did not drop the topic from the list altogether, this resulted from

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<sup>76</sup> Article 39 entitled *Contribution to injury* is as follows: *In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*

<sup>77</sup> See ARSIWA, *op. cit.*, p. 110, para. 5 (see footnote 626 on the same page).

<sup>78</sup> See Baxter's Fifth Report, *op. cit.*, p. 169, para. 36.

<sup>79</sup> A/CN.4/SER.A/2002/Add.1 (Part 2). Report of the Commission to the General Assembly on the work of its fifty-fourth session. Yearbook of the International Law Commission 2002 Vol II, Part. II UN, New York and Geneva 2009, p. 94, para. 468.

<sup>80</sup> See ARIO, *op. cit.*, p. 88 ff.

the conviction that the previous works on state liability reached the “point of no return.” Moreover, this point could have been probably unreachable had 1972 the Liability Convention not entered into force, as the protagonists of the state liability concept would have been deprived of a powerful argument in favor of their general claims. One can only guess the extent of the outcome of the ILC, had a more robust practice around the applicability of the Convention arisen. Undoubtedly, however, during the first phase of the preparatory work in 1978-1997, its role was considered by some authors so significant that they were ready to believe a state liability convention inspired by provisions of the Liability Convention was politically feasible.<sup>81</sup>

Secondly, it is not less accurate that – because of the broader shift after the end of the Cold War and the radical change it entailed in the ILC approach – the Convention could no longer influence the 2006 Draft Principles more decisively. However, the legacies of the 1980s, when the Convention played a significant role in the ongoing discussions on international liability, could not have been entirely eradicated. Thus, it should not be overlooked that both the Liability Convention and the 2006 Draft Principles are victim-oriented. Both regimes make the state responsible for the activities of individuals, although – to be sure – the tasks and duties placed upon states in the Liability Convention differ from those laid down in the 2006 Draft Principles. Some of the terminology used in the latter can be traced back to the Liability Convention,<sup>82</sup> even though, to some authors, its lack of clarity is deeply frustrating.<sup>83</sup> Therefore, it is apparent that despite the shift mentioned above, which took place from 1997 onward and dramatically influenced the final shape of the 2007 Draft Principles, at least some legacies of this first decade of the ILC work on state liability seem durable.

But perhaps the most striking and a bit ironic is this Convention’s limited but multidimensional impact upon the later development of the law of responsibility. Even though the ILC purposed to draw a line between responsibility and liability, this effect was not fully achieved. Firstly, during the works of the Commission on Responsibility of States, the Liability Convention – although to a limited extent – continued to inform the drafters of the ARSIWA, as its Articles 46 and 47 were modelled on the analogous provisions of the Liability Convention. What is more, both these articles informed the drafters of the ARIO during the ILC proceedings on the rules of responsibility of international organizations.

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<sup>81</sup> Cf. B.A. Hurwitz, who believes that it will be therefore very surprising if the Commission does not succeed in drafting a convention on international liability which will be endorsed by both developed and developing countries (B.A. Hurwitz, 1992, *op. cit.*, pp. 194). In another place in the same book he also strongly advocates the Liability Convention as a top reference point in future works of the ILC on different aspects of international liability (*ibid.*, p. 207). See also his notes on p. 143.

<sup>82</sup> B.A. Hurwitz, 1992, *op. cit.*, pp. 207.

<sup>83</sup> M. Forteau, 2010, *op. cit.*

Finally, on a more general plane, in the context of the general theory of international law, these conclusions seem to support two additional propositions. Firstly, even though a conventional regime is drafted as self-contained (as is the case of the Liability Convention), it does not preclude it (at least not entirely) from inspiring the ILC when drafting the provisions of a more general character. Secondly, sometimes the intellectual inspiration is not wholly prevented, even when the Commission draws a more or less strict line between the two topics to avoid confusion on the theoretical and practical levels. The history of the Convention's Articles IV and V that managed to cross these borders to get eventually incorporated into the ARSIWA illustrates this point.

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