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Frans G. von der Dunk

University of Nebraska - Lincoln, fvonderdunk2@unl.edu

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LIABILITY VERSUS RESPONSIBILITY IN SPACE LAW: 
MISCONCEPTION OR MISCONSTRUCTION?

Frans G. von der Dunk
International Institute of Air and Space Law, Leiden University, 
The Netherlands

Abstract

The relation between the two legal notions of 'responsibility' and 
'liability' in space law has never been dealt with in a comprehensive 


The two principles seem nicely divided, no 
fulfilling the definitions specified by the 
which are the following three elements of the concept. State responsibility, 
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In this respect it must be added that the question of breach of an international obligation is in each particular case to be answered by reference to the relevant legal relation between the states involved, i.e. by finding out what treaty or customary rules, and sometimes also general principles of law, do apply. As a second element for our analysis however, a special problem concerning the question of attributability indeed is much more relevant. A state is responsible for 'acts of the state', however defined but always involving (a degree of) state authority through some state organ or another, whereas it can not be held responsible as such for acts of private persons done in a private capacity. The exception here is provided by the famous principle of 'due care' (or 'due diligence') responsibility meaning a state can incur responsibility in case of private acts taking place on its territory or being perpetrated by its national, and amounting to violations of international obligations, if the state could reasonably have prevented such acts. This is the logical consequence of the jurisdiction of a state over its territory (through the territorial sovereignty principle) and its nationals, natural or juridical (through the active nationality principle); a duty to use this jurisdiction as far as reasonable to prevent other state's rights from being infringed. Thirdly and finally, another important aspect of the doctrine of state responsibility must be mentioned. To be sure, the ILC has not yet finished the part of its Draft articles dealing with this aspect, which deals with the consequences of state responsibility once it has arisen. Instead therefore we must summarily look at customary law as it has developed to a greater extent in this field, and numerous judgements of courts and tribunals. Most famous among the latter of course is the Chorzów Factory Case, decided by the PCI in 1928.

A breach of an international obligation incurring state responsibility according to customary law and jurisprudence can be repaired (the Chorzów Factory judgement speaks of 'reparation') theoretically in three ways. The first and most logical way is that of restitution in, i.e. of undoing the wrongdoing and restoring for the full 100% the preexisting situation. If restitution in inconsiderable is impossible (for instance, if damage has arisen as a consequence of the breach which turns out to be irreparable, such as the death of nationals) or senseless (for example in the case of nationalization of foreign assets), compensation, usually in monetary form, is an accepted substitute. That compensation is conceptually a substitute is clear from the fact that compensation is juridically (through the active nationality principle) a duty to use this jurisdiction as far as reasonable to prevent other state's rights from being infringed.

The borderline drawn by the ILC between liability and responsibility, including or excluding immaterial or indirect damage. All in all, the concept of liability thus was, as simply, the duty to wipe out the liability itself, by repairing the damage. The borderline drawn by the ILC between liability and responsibility, by means of defining them as primary respectively secondary obligations, however, is purely artificial. If the primary obligation, to pay for damage under liability-rules, would not be fulfilled, the secondary obligation to repair for this wrongful act of an international obligation to pay would come into play - logically consisting of a duty to pay for the damage by way of monetary compensation! Compensation could also mean so-called punitive damages, whereas these would be excluded under liability because there would have been no violation of an international obligation which was to be punished for. At what point furthermore, in time or otherwise, the primary obligation becomes the secondary obligation, unless specified in treaties on liability, can only be a matter of arbitrariness. An extra complication could moreover arise if damage would mean different things under the two different principles, in the sense e.g. of including or excluding immaterial or indirect damage. All in all, the ILC thus perhaps manages to prevent the confusion of liability and responsibility, however at the cost of having two clearly different concepts whose alternative nature therefore depends on a non-existing borderline and is thereby far from clear.

Finally the second element of analysis as dealt with in relation to responsibility, of the special problem related to attributability, the question of due care obligations, must be dealt with here. In respect of state responsibility, in a sense the doctrine of due care forms a certain divergence from the general theory, perceived by the ILC as being objective fault being no criterion. Here 'fault or negligence becomes an element of state responsibility simply because the due care obligation itself requires negligent conduct before this obligation can be
said to have been breached.35 Thus, "Draft Article 23 [containing the
due care with respect to state responsibility] (...) embraces all sorts of
primary duties in the category 'to prevent an event',"36 and therefore
due care is itself a secondary obligation as defined by the ILC.

When turning to liability, the ambiguity once more becomes clear.
Here, due care must be seen as a primary duty to prevent harm and
damage as the consequence of acts persons under its jurisdiction
- where according to the ILC the mere fact of harm arising already
means that the duty has been violated, that the "care" taken was less
that was "due". That means, that even if maximum care would have
been taken, as soon as damage occurred the due care obligation would
have been violated,36 which of course makes the use of the word "due"
superfluous and hollow, and effectively turns due care liability into
some kind of risk liability. Thus, it really shifts the attribution where
under the doctrine of state responsibility a state can only become
directly responsible for its own acts, and due care responsible for
private acts only if it failed to take due care, under the doctrine of
international liability a state is obliged to pay as the liable entity, no
matter whether it concerns damage arising out of its own acts or out
or private acts, and even if the state in question had taken all reasonable
measures in the latter case to try to prevent such damage from arising!
Both state responsibility and international liability for non-state acts
can concern persons as well as territory under the jurisdiction of the
state in question. Therefore, the ILC's borderline is necessary to
prevent overlap where responsibility, potentially leading to a duty to
repair by means of monetary compensation, could be taken away when
due care was proven, but where liability, potentially leading to a duty to
pay for the damage, could not be excused.

At the same time of course, it suddenly makes the semantic analyses of
how exactly a certain international obligation was phrased, of far from
academic importance - and the fact, that the ILC's creation of a
distinction by speaking of primary and secondary obligations turned out
to be an arbitrary and therefore by definition non-legal distinction, a
fundamental practical problem. For whether a state is according to a
certain rule to be held liable for damage resulting out of a perfectly
legal act (and has to pay for that damage) or for a breach of international
law resulting in damage or itself consisting of the infliction of damage
(and has to provide reparation for such damage in the form of compensation) can now make all the difference, if responsibility and liability are invoked in respect of acts perpetrated by its nationals or from its territory. The best example under international law once more is the field of environmental pollution emanating from within a certain state's territory: since the famous Trail Smelter Arbitration the borderline between state responsibility and
private acts only could be bought off and thus was allowed if only compensated for, and
environmental harm that amounted to an international wrong for which
compensation was due, has tend to get lost time and again during
analysis.37

4. The ILC's matrix: misconstruction or misconception?
The ILC's effort to use the term 'liability' exclusively for acts not
prohibited as such under international law indeed draws a clear
borderline between cases where responsibility was involved and those
involving liability - in theory. This distinction was illustrated by the
provisional title of the Draft articles on International liability as
proposed by ILC Rapporteur Queatin-Baxter,38 and supported by the
incorporation of the rule that acts precluding wrongfulness under the
doctrine of state responsibility did not thereby exclude liability for
damage, damage which then must have been considered to be
consequential to an act as such not unlawful.39

In effect, it created a definitional matrix, which could become the new
rule in respect of general international liability if the scheme is to be
continued in the final draft. The matrix would build upon damage and
breach as the two relevant criteria, in each case attribution really
being taken for granted. An act of a state involving no breach and no
damage would be no problem, international law would not become
involved any further. A breach but no damage would invoke responsibility, with the reparation in any case not being of the compensation type. A breach and damage also would invoke responsibility, this time the reparation at least including compensation.

No breach but damage finally would invoke liability, with the duty to
compensate as a necessary corollary.

On closer look, however, the problem turned out to only have been
shifted by creation of the matrix, not solved. It remained semantics, as
the precise formulation of the relevant rule would provide for the
decision whether to apply responsibility or liability, which in the case of
damage could of acts persons under its jurisdiction in terms of paying
for the damage yet to different outcomes as to what damages would in
the end have to be paid. At the same time, the artificial borderline
drawn by the ILC between liability and responsibility turned out to be
even more arbitrary itself, which of course compounded that problem.
And finally, these conclusions turned out to be more than academic, as
an analysis of the problem of responsibility and/or liability for non-state acts, by means of due care, made clear that under responsibility states
could be exempted from paying for damage if they have proven due
care to try prevent the damage arising on the hands of their nationals or emanating from its territory, whereas under liability states
have to pay for damage as soon as it arises, even if they had done their
utmost to prevent it.

The ILC has thus perhaps managed to avoid the misconstruction of
liability and responsibility as two overlapping concepts, without
borderlines and not easily distinguishable while being presented as if
they were, which creates a lot of confusion by making it possible
to apply two different but intricately interlinked notions to the
same case - with different and therefore conflicting results. On the
other hand and at the same time, this turns out to be at the cost of the
misconception that having two clearly distinguishable concepts would
solve the problem as their alternative application would thereby
become clear, whereas in actual fact this alternative application turns
out to hinge on semantics and vague or even non-existing borderlines. The two concepts therefore could still lead to
different results in respect of cases of damage, especially as far as non-state activities would be concerned.

Damage would still need to be paid for in the case of state activities,
whether as compensation for an internationally wrongful act or as
consequences of established liability. Even here, however, different
cases of damage in regards of responsibility or liability respectively
could lead to different results. A thorough analysis of the semantic
problem (being the basis of the problems resulting from the ILC's
approach), in order to conclude in each case of international damage
whether responsibility or liability should take account of that damage,
and which could possibly rectify the misconception, has meanwhile
become impossible due to the traditional misconstruction whereby both
terms have been used for decades almost interchangeably in many
cases and at any rate undefined most the time, by courts and expert
authors as well as by treaty-negotiating governments and treaty-making
diplomats.

5. The starting point: liability in space law

Now we leave this earthbound realm and enter into the lofty areas of
space law, where of course responsibility and liability are also two
fundamental, much discussed principles. This time it is easiest to start
analysis with liability, which is in regard of space law (and in contrast
to general international law) the most elaborated of the two principles
as a special Liability Convention40 was devoted to develop the
provisions of Article VII of the Outer Space Treaty.

Article VII, of course, itself provides the basis. States are
internationally liable for damage41 to other States, their property or
persons, as far as caused by the former States' space objects - which
for our purpose may be considered for a moment as being equal to
damage resulting from an activity in space. As to the necessary
ingredients for space liability, this leads us to the same conclusion as in
respect of international liability: damage is the only, indispensable
criterion,42 nor breach of an international obligation (objective fault),
or subjective fault in the sense of intent or negligence are necessary to
invoke liability - in respect of damage on the earth or to an aircraft to
begin with.43

Things at first sight seem to lie differently in respect of damage
inflicted in space, to (another) space object,44 (which means it only
relates to part of the liability-under-space-law concept) where fault

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seems to play a role. For liability-purposes, the assessment of relative fault on the hand of the state inflicting the damage when compared to the state whose object is damaged (and most probably the states involved are both victim and inflictor of damage) is important. It is on an altogether different level however, namely between two participants in the same business, that it becomes relevant, and it has nothing to do with a breach of an international obligation, with objective fault; and in effect it also does not have therefore the impact of making subjective fault a necessary criterion. The fault meant here, is not latent or negligence in respect of a rule of international law, but intent or negligence in respect of someone else active in space; here it becomes however, namely between two participants space. Fault in respect of damage inflicted in space is automatic, is a fault a necessary criterion. The fault meant here, is not intent or negligence in respect of something which makes states internationally responsible for non-state acts. Much has been written about this subject, where a summary suffices. Article VII of the Outer Space Treaty together with Article I(c) of the Liability Convention provide for a famous fourfold definition of a "launching state", which is liable for the damage caused by the space object in question. Only one of the four ("a state which launches") points exclusively to an act of the state, the other three could very well (partially) include non-state acts for which the launching state(s) still can be held liable.

What must be noted especially here is again the similarity to the traditional concept of international liability which on this point has been duly elaborated by the ILC's Draft. For the application of liability it makes no difference, under the fourfold definition of "launching state", whether the launch was in many aspects a private activity or completely a state affair. As soon as damage occurs, it has to be paid for, not so much amount of due care taken in respect of private activities causing the damage can excuse the launching state in this respect. Once more, the term "due care" seems to be not really appropriate. Summarizing, liability under space law has, as much as under traditional general international law, damage as its sole criterion (apart from attributability of course); neither subjective fault (culpa, intent, negligence), nor objective fault (i.e. a mere breach of law) are necessary for liability to come into play. Logically then, the two other elements of analysis do not differ either: the only consequence of liability is the duty to pay for the damage, and due care liability is not so much contingent upon due care as it is contingent upon damage. Thus, space law in regard of liability as a whole does not conform to the ILC's matrix, but rather to the traditional concept of international liability. The consequences of adhering to that misconception will become clear when we now turn to responsibility as it exists in space law.

6. The confusion: responsibility in space law

Of course, responsibility in space law bases itself upon Article VI of the Outer Space Treaty, which states internationally responsible for national space activities. The term "responsibility" is used in this very basic principle of space law in the same sense as in general international law, as it is being codified at the moment by the ILC, because it is added that states are responsible for these activities to be in conformity with the rules of the Outer Space Treaty (and therefore to the whole body of space law which after all is an extension and elaboration of this treaty) and international law; in other words, with the lex specialis of space law and the lex generalis of public international law.

International state responsibility, in space law as much as elsewhere, therefore arises in case of activities being in violation of relevant legal obligations, those being primary obligations of (space) law. It is thus dependent, to begin with, on the first criterion, that of an internationally wrongful act. Damage (as much as subjective fault) is not a criterion, although here as much as elsewhere damage is not excluded either. The overlap arising out of this inconsistency thus will already become apparent.

The second criterion necessary for state responsibility is also included in Article VI: the question of attributability, and thereby we arrive at our second element of analysis. This is taken care of by the formula of "national activities in outer space", whatever its precise definition; Article VI itself only speaks of national activities as being either activities of "governmental agencies" or of "non-governmental entities". It is as far as the latter is concerned, that the question of due care responsibility arises. In deviation from the general law of state
responsibility, states here however are directly responsible for non-state activities, instead of merely due care, as no difference is made by Article VI in respect of the kind of responsibility to be applicable in the case of "governmental agencies" on the one, respectively "non-governmental entities" on the other hand. This smacks of the "due care" liability, both under space and under general law, as even if the "care" taken is found "due", responsibility will not thereby cease to exist. One effect of the misconception created by the ILC's matrix, in the sense of creating a difference between due care responsibility and due care liability in this respect, at least has however prevented in space law. Neither under responsibility, nor under liability are states able to dodge a potential duty to pay for damage by claiming to have taken due care, whereby the question of whether to apply the one or the other becomes of less practical relevance. An exception, however, already exists here in respect of remote sensing activities, where international responsibility apparently only applies for state activities, and classical due care should take care of non-state activities.

Nevertheless, in view of the familiarity of due care responsibility for private activities either personally or territorially emanating from within the state's jurisdiction with the responsibility arising under Article VI for activities of non-governmental activities, linked as it is to the duty of authorization and continuing supervision by "the appropriate state" implying such jurisdiction, this may help to solve the longstanding discussion in space law as to what should be read for it in this respect, at least has, in the light, national activities must be deemed to encompass both activities by nationals, whether natural or juridical and activities undertaken from within the territory of the state in question. Responsibility can arise for the appropriate state to the extent that those activities thus fall under its jurisdiction, for which authorization and continuing supervision as provided for by Article VI are some minimum requirements. This definition of national activities of course implies that in respect of a specific activity there can be more than one appropriate state - namely to the extent that jurisdictions overlap; this problem of concurrent jurisdiction however exists in general international law as well, and various methods and techniques exist there to solve it. We need not go into that problem any further, suffice it to state here that not following this line of reasoning would both seem unlogical, and not solve the problems when the comparison with liability is made - if it not even leads to more problems.

For this reason we now turn to the third element of analysis, the consequences once state responsibility has arisen. Article VI itself is silent in this respect, therefore one cannot do anything else than to turn to general international law once more to look for an explanation. Here we arrive once more at the doctrine of reparation: whatever the kind of activity as a component part of state responsibility for space activities however is not. It could, in contrast to the former, other forms of immaterial damage, indirect damages, or even punitive damages. It remains important therefore to decide on application of the one or the other - and this is exactly what the misconception turns into a haphazard and arbitrary affair. Moreover, so far we have considered only cases where damage would fall, in principle, under both categories. What, however, if the damage occurred outside of state jurisdiction? This is to say, if damages should not be compensated for twice, once under the heading of state responsibility, once under the heading of international liability. The misconception however would seem to point exactly in that direction. If logic would prevent it nevertheless, what would then be necessary? Should one choose? Luckily enough, the problem regarding due care at least would not be important for such a choice since state law as it would not become customary. Of course, under international law. The field of environmental pollution will not pose basic problems in this respect; in other words, it does not matter so much whether privately caused pollution leads to due care responsibility or to due care liability.

Unluckily, however, the same does not hold good in respect of the definitions of damage. Damage regarding liability is pretty well-defined in space law; damage as a component part of state responsibility for space activities however is not. It could, in contrast to the former, other forms of immaterial damage, indirect damages, or even punitive damages. It remains important therefore to decide on application of the one or the other - and this is exactly what the misconception turns into a haphazard and arbitrary affair. Moreover, so far we have considered only cases where damage would fall, in principle, under both categories. What, however, if the damage occurred outside of state jurisdiction? This is to say, if damages should not be compensated for twice, once under the heading of state responsibility, once under the heading of international liability. The misconception however would seem to point exactly in that direction. If logic would prevent it nevertheless, what would then be necessary? Should one choose? Luckily enough, the problem regarding due care at least would not be important for such a choice since state law as it would not become customary. Of course, under international law. The field of environmental pollution will not pose basic problems in this respect; in other words, it does not matter so much whether privately caused pollution leads to due care responsibility or to due care liability.

Thus it is necessary to look once more at the definition of 'national activities' and 'appropriate state'. If the definition of 'appropriate state' would completely coincide with the definition of 'launching state' as provided for, the problem of overlap at least would have been relegated to the realm of theory. If there were indeed to coincide, however, an explanation would be necessary for the fact that 'activities' can become so remotely linked to a launching state that it would make little sense to link responsibility so directly to a launch (although the same would hold good for liability to a large extent as well); that responsibility in space law only covers activities in outer space, where liability in space law includes launchings as far as taking place on earth also (and even launchings that never really leave earth and trajectories through air spaces following the launchings); that Article VI and Article VII most assuredly use different language; and most important, why a specific concept of liability as different from responsibility would be needed - when its cases would turn out to be almost completely covered by the other...
concept. Thus, the misconstruction would continue in the sense of creating confusion whether to apply one or the other of two different but intricately interlinked and partially overlapping concepts to one and the same case, with potentially conflicting results as e.g. to (the amount of compensation due for) the damage. And here again the field of environmental pollution would be a special example of these problems, the borderline between damage, allowed-if-paid-for, and damage, not allowed and thus to be compensated, being undiscernible in this field.

The difference between Articles VI and VII of the Outer Space Treaty, between 'appropriate state' and 'launching state' was elaborated before, being based on the logical interpretation of 'national activities' as arising out of general international law. In this light, it is however certain that all possible damage under the heading of state responsibility in cases where they can not do so under the heading of international liability. One need not even think of future spaceplanes or space stations to which notions of 'launching' and 'launching state' may no longer be found to, or decided upon not to apply; one can think of all space activities by non-governmental entities with respect to space objects launched from launch sites outside of territory or facilities of the state to which those activities belong and without that state being the launch or launching herself. Those activities, of course, very well fit into the notion of 'national activities'. Therefore, perhaps the matrix of the ILC is to be preferred: liability, Article VII and the Liability Convention only becoming invoked as long as the damaging activity in itself is in conformity with international law, in other cases damage remaining to be redeemed through compensation for internationally wrongful acts. Apart from other difficulties with such an approach as analyzed before, once more especially the fact that the misconstruction that had arisen for the first time by the drafting of the Outer Space Treaty has taken root so forcefully through the Liability Convention itself, will however prevent the ILC's matrix from becoming reality. And even if that were not the case, it would make the matrix malfunctioning by creating misconceptions, as the borderlines between application of the one or the other principle would depend on semantics and vague or non-existing borderlines - and the Liability Convention to a large extent would become useless!

Perhaps then, finally, it would be the best idea to amend the Liability Convention in order to widen its scope to all activities one way or another under the jurisdiction of an appropriate state, and delete the notion of launching state as far more activities then suggested or permitted can involved in space law where the actual link to the launching seems very remote. By thus making the jurisdiction of a state the pivotal point of attribution, the second element of analysis, that of attributability including due care, would have been taken care of.

At the same time, Article VI of the Outer Space Treaty should be elaborated to the extent that for material damages, recourse would have to be had to Article VII of the Outer Space Treaty plus the Liability Convention, whereas for other kinds of damages, including immaterial damage caused by the mere violation of a legal obligation of one state towards another, Article VI itself then would remain effective to the extent of providing for possibilities of restitution in integrum, compensation for non-material damage (including for instance punitive damage) - which need not be monetary compensation - and satisfaction. This would solve the problems arising from the third element of analysis, that of the consequences of responsibility and liability.

It is the other way round from what the ILC's misconception would suggest - which would amount to a need for equalizing the appropriate state to the launching state - whereas it would solve the present misconstruction: liability would not become a different principle, it would become part of the principle of state responsibility, taking care of all the latter cases where (material) damage occurs. This in turn would take care of the first element of analysis, that of the difference in constituent elements of the respective notions of responsibility and liability. At the same time it would turn around the ILC's method of construction in another sense than previously alluded to as well, for it would make rules of liability secondary, (or perhaps 'subsidiary' is a better word) to rules of responsibility instead of the other way round, by asking whether liability - a subprinciple of responsibility - itself would simply become applicable only once responsibility has already been found to be involved, as the main trigger, and, as a second criterion, read secondary trigger, material damage was seen to be involved. The fundamental doctrine of 'sic utere tuo ut alienum non laedas', famous under general international law,9 would step in to make causation of harm or damage from within one state's jurisdiction to another state's territory, property, nationals, or nationals' property, as such an international wrongful act, triggering responsibility and, by the very reason of causing damage, consequently liability therefore - just as is already in fact more or less the case in respect of transboundary environmental pollution.

The practicality and chance of realization of such a turnaround, both in general international law and in space law, may be a matter for discussion; the simplicity of this construction to my opinion preventing both the misconstruction of space law and the misconception of the ILC seems appealing and is certainly worth further attention.

Notes


5. Perhaps it may be added, that the Dutch language, although not an authentic language as far as the Outer Space Treaty is concerned, is also confusing in this respect. Whereas 'responsibility' should be translated as 'verantwoordelijkheid' and 'liability' as 'aansprakelijkheid', 'international state responsibility' turns out to be always translated as 'staatsaansprakelijkheid'!


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12. Art. 3, Draft articles on State responsibility, Part 1. See also e.g. Shaw, pp. 411-412; Brownlie, pp. 445-454.

13. See e.g. Jiménez de Arechaga, pp. 534-536; Shaw, pp. 409-410; Brownlie, pp. 439-441.

14. As to the role of damage in respect of state responsibility, cf. e.g. Jiménez de Arechaga, p. 534, who includes damage as a constituent element, however, then goes on to define damage in this respect in such a broad manner that it effectively amounts to the mere fact of breach of an obligation: "the concept of damage does not however have an essentially material or patrimonial character. Unlawful action against non-material interests must receive adequate reparation, even if they have not resulted in a pecuniary or material loss for the claiming state".

15. Cf. the sources of international law, as defined in Article 38(1) of the Statute of the International Court of Justice; also Shaw, pp. 57-59; Brownlie, pp. 3-29, and also pp. 443-444 on the relation between the general principles relevant here and the specific situations where they can apply. The ILC defined this as questions concerning primary rules, whereas the obligations arising out of state responsibility, to be dealt with in that framework, were secondary rules of international law; cf. e.g. II-1 Y.B. Int'l L. Comm'n 179, para. 11 (1970); also Art. 17, Draft articles on State responsibility, Part 1.

16. See Artt. 5-15, Draft articles on State responsibility, Part I. See also once more e.g. Brownlie, pp. 445-454; Shaw, pp. 411-414; Jiménez de Arechaga, pp. 544-564.

17. See e.g. Art. 11(2), Art. 23, Draft articles on State responsibility, Part 1; Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v. Iran), 1980 ICJ Rep. 3, paras. 61-68. Also Horbach, p. 55; Brownlie, pp. 433-434; Jiménez de Arechaga, pp. 560-561.


20. See e.g. Brownlie, pp. 457-464; Shaw, pp. 415-417.


23. "International Liability for the Injurious Consequences Arising out of Acts Not Prohibited by International Law" (italics mine), see II-2 Y.B. Int'l L. Comm'n 14 (1978). See also Horbach, pp. 49-51, and Quentin-Baxter's Second Report on International Liability, II-1 Y.B. Int'l L. Comm'n 62, Article 1, section 1, cited on p. 62: liability covers "any human activity within the territory of control of one state which gives rise or may give rise to loss or injury to persons or things within the territory or control of another state" (italics mine).


25. Cf. Trail Smelter Case (USA v. Canada), 3 RIAA 1905 (1938 & 1941), in Part Three of the 1941 décision: "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property or persons therein" (italics mine); Corfu Channel Case (UK v. Albania) (Merits), 1949 ICJ Rep. 4, at 23: "Albania is responsible under international law for the explosions which occurred (...) in Albanian waters, and for the damage and loss of human life which resulted from them" (italics mine); or the general principle sic utere tuo ut alienum non laedas, "i.e. the duty to exercise one's rights in ways that do not harm the interests of other subjects of law"; Magraw, p. 308. See also Cheng, *Encyclopedia*, pp. 299-301.

26. See, once more, the provisional title of the ILC's Draft articles on this topic, supra, note 23; also Horbach, pp. 51-53.

27. Even if, in many cases, national as much as international, a limit was often placed on the compensation possibly due.


29. See the analysis of Horbach, pp. 51-53.


31. As to space law, the Liability Convention does not provide for such a specification.

32. After all, this was in general of course also an indispensable element for liability, by taking care of the causal link between damage and inflictor of the damage.

33. Horbach, p. 51. Once more, the exact formulation of a certain obligation becomes of fundamental importance. Once more as well, the problematic field of transboundary environmental pollution is one example where many obligations for states are
actually phrased as due care obligations. See e.g. the citation from the Trail Smelter Case, supra, note 23, esp. as to 'permit the use'.

34. Horbach, p. 56; see also the comment of the ILC on Draft art. 23, II-2 Y.B. Int'l L. Comm'n 82-83 (1978), cited on p. 55.

35. See Horbach, pp. 56-57.

36. See supra, note 25.

37. Cf. also the so-called 'Stockholm Principles' of the Declaration of the UN Conference on the Human Environment, of 16 June 1972, where Principle 21 announces that 'States had (...) the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States (...)'.


40. See supra, note 3.

41. See also Artt. II, III, IV and V, Liability Convention.

42. Apart from, of course, the question of attributability; but this is self-evident as a state can only be liable for damage it caused itself. See also Cheng, Encyclopedia, p. 299, speaking of no-fault liability and fault liability.

43. The same analysis applies, at least for the time being, to damage caused on the moon or other celestial bodies; cf. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (hereafter Moon Agreement), of Dec. 18, 1979, entered into force July 12, 1984, text in 18 ILM 1434 (1979); see Art. 14(2).

44. See Artt. III and IV(1,b), Liability Convention.

45. Objective fault plays a minor role in one aspect only, as Art. VI(2), Liability Convention, states: '[a] no exonerating whatever [from absolute liability] shall be granted in cases where the damage has resulted from activities conducted by a launching state which are not in conformity with international law (...). It only makes a distinction, once liability has been accepted therefore.

46. Pfeifer, falling in the overcrowded trap of using liability and responsibility as interchangeable terms (he states that 'a State is liable for any violation of international law'), nevertheless effectively makes clear that the fault applicable in regard of liability is not to be considered as being of the same kind as fault in regard of responsibility, although he terms the former kind of fault "subjective fault" because he does not really distinguish intent or negligence with regard to a rule from intent or negligence with regard to the consequences of an act, in order not to be prevented from seeing fault as a necessary criterion for liability in the first place: J. Pfeifer, 'Internationale Liabiliy for Damage Caused by Space Objects', Zeitschrift für Luft- und Weltraumrecht 30 (1981), pp. 215-257, at pp. 224 ff.

47. Cf. e.g. the definition of the situation given by M.G. Bourély, "Quelques Particularités du Régime de la Responsabilité du Fait des Activités Spatiales", Annales de Droit Aérien et Spatial XV (1990), pp. 251-274, at p. 260, when he speaks of a "so-called third being a victim" for whom "the general regime of liability" (i.e. of strict liability) applies, and consequently speaking of a "specific regime" when the inflictor of damage and the victim participate together in a space activity.

48. One should also closely read Art. XII, Liability Convention, in this respect, which makes the same blunt, theoretically inconsistent impression.

49. Art. XII, Liability Convention; see also Art. VIII.

50. And in this respect, of course, the ILC's matrix is not different; in case of liability arising, once more paying for the damage is the only way of redemption.


52. Cheng, Journal of Space Law, p. 21, even suggests that 'this article has already passed, through general acceptance, from being a mere treaty provision binding only upon the parties into the realm of general international law binding on all States', which would illustrate only a fortiori the application of the general international legal principle of state responsibility to the realm of space. See also Cheng, Encyclopedia, p. 259.


54. See Bittlinger, pp. 191, 193; Dragiev, pp. 314-315. The same holds good, mutatis mutandis, for the special cases of moon and other celestial bodies: cf. Moon Agreement, Art. 14(1).

55. See also Dragiev, p. 315, who however does not manage to escape from the misconstruction in his analysis.

56. See also Bittlinger, p. 191.


58. See supra, para. 1; also note 51 and literature mentioned therein; furthermore Cheng, Journal of Space Law, pp. 36-39; Bittlinger, pp. 192-193.

59. See also Cheng, Encyclopedia, p. 300.

60. Cf. again Cheng, Encyclopedia, p. 300; Bittlinger, pp. 191-192; Dragiev, p. 314.


64. Cf. e.g. Gorove, p. 109, when speaking of "international responsibility for damages" (sic!).

65. See Art. I(a), Liability Convention.


68. One recognizes of course the fourfold definition of 'launching state' invoking liability in the first place; Art. I(c), Liability Convention.

69. Thus, rules of liability should perhaps become 'tertiary obligations' under international law.

70. See supra, note 25.