

The Final Frontier: responsibility of international organizations for outer space activities*

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*The responsibility of international organizations for internationally wrongful acts is by no means a field of international law that is ruled by consensus even on the level of the most basic norms of responsibility. This confusion is even more prevalent when an international organization acts in outer space. International law applicable for outer space activity is sometimes regarded as *lex specialis* to general norms of responsibility without much further considerations. The aim of this contribution is to examine whether this statement has merit, in light of the Outer Space Treaty and the Liability Convention and the Articles of the Responsibility of International Organizations drafted by the International Law Commission. Based on a theoretical analysis—due to the lack of practice—, it can be concluded, that the joint and several responsibility regime created by the Outer Space Treaty, and the liability and—at the same time—international responsibility system of the Liability Convention are indeed *lex specialis* and this responsibility is by default shared in nature. This conclusion is valid only for damage caused by illegal space activity by space objects on the surface of the Earth and to aircraft in flight.*

Keywords: ARIO, international organization, responsibility, outer space activity, lex specialis

1. Introductory Remarks

The primary agents of human activities in outer space, from the accessibility of the technology until recently, have been exclusively states.¹ However, nowadays we cannot speak of such exclusivity, as on the one hand, the private sector has achieved remarkable success in the commercial utilization of space,² and on the other hand—and this holds greater significance for this article—international (intergovernmental) organizations also possess significant presence in space. In support of this latter statement, we can refer to classic international organizations such as the International Telecommunication Satellite Organization, established in 1962 and since then privatized, or the European

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Gy. Gál, *Világűrjog*, Közgazdasági és Jogi Könyvkiadó, Budapest, 1964, p. 250.

² To illustrate this question, it is sufficient to refer to the American company SpaceX, which in 2012 became the first private company to deliver supplies to the International Space Station. Furthermore, in 2020, it became the first to send humans into space using its own designed and built spacecraft. See A. Edl, *A világűr-politika fejlődése és irányai*, in B. Bartóki-Gönczy & G. Sulyok (Eds.), *Világűrjog*, Ludovika Egyetemi Kiadó, Budapest, 2022, pp. 73-74.

Space Agency, established in 1975 and still functioning as a classic international organization.³ Additionally, there are international organizations that have recently begun notable space activities, such as the European Union, which has been formulating its own space policy since the Lisbon Treaty and through the treaty, gained the capacity to realize a European space program, although excluding the harmonization of Member State laws.⁴ Within this framework, the Galileo satellite navigation and positioning system was implemented, which commenced its high-precision services in January 2023.⁵

The existence and increasing importance of international organizations engaged in outer space activities naturally raise the question of how international law pertaining to the responsibility of international organizations are applicable in this specific area. Should these norms be assessed through the 2011 Draft articles on the responsibility of international organizations (hereinafter referred to as ARIO),⁶ developed through the codification and progressive development work of the International Law Commission, which is considered to be a collection of general international legal norms, or should the issue be assessed based on the treaty or since then (possibly) customary international law norms? In this article, I primarily seek to answer this question by comparing the rules of outer space law applicable to international organizations—primarily in light of international treaties concluded by states—with the general provisions of ARIO in order to determine whether the liability model for outer space law can be considered as *lex specialis*. My standpoint is that an affirmative answer must be given to this question (Section 2). Subsequently, I address a specific question: can shared responsibility exist between international organizations engaged in outer space activities and states, with particular attention given to whether shared responsibility can exist with states other than member states. Again, I take an affirming position (Section 3). At the end of the paper, I briefly summarize my findings and draw conclusions regarding the issue of responsibility arising from the activities of international organizations in outer space (Section 4).

2. Outer space responsibility/liability—a *lex specialis*?

The ARIO, similar to its big brother, the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission (hereinafter referred to as ARSIWA),⁷ provides that the rules contained in the document do not need to be applied when the issue of responsibility is regulated by a special rule of international law.⁸ This principle is

³ M. Ganczer, *Nemzetközi intézményrendszer*, in B. Bartóki-Gönczy & G. Sulyok (Eds.), *Világűrjog*, Ludovika Egyetemi Kiadó, Budapest, 2022, pp. 121-124.

⁴ Treaty on the Functioning of the European Union (hereinafter: TFEU) Arts. 189(1)-(2). Since then, the EU has established the European Space Program Agency as the successor of the European GNSS Agency, and significant cooperation has been formed between the European Union and the European Space Agency within the framework of the Union's space program. The European Space Agency has various responsibilities in the implementation of the space program. See, Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU, OJ L 170, Arts. 1 and 30.

⁵ Galileo High Accuracy Service goes live! <https://www.euspa.europa.eu/newsroom/news/galileo-high-accuracy-service-now-operational> (30 January 2023).

⁶ GA. Res. 66/100, Responsibility of international organizations, 9 December 2011. (hereinafter: ARIO). The resolution was brought to the attention of the states by the United Nations General Assembly, but it did not result in an international treaty, similar to the final draft on state responsibility that was adopted 10 years earlier.

⁷ GA. Res. 56/83, Responsibility of States for internationally wrongful acts, 12 December 2001. (hereinafter: ARSIWA). Art. 55.

⁸ ARIO, Art. 64. According to the ARIO, such special rules can be included in the internal regulations of the international organization itself.

coined as *lex specialis*. The commentary to ARSIWA expressly highlights that the rule of joint and several responsibility for damage caused by space objects, as provided in the 1972 Convention on International Liability for Damage Caused by Space Objects (hereinafter referred to as the Liability Convention),⁹ clearly constitutes *lex specialis* and deals with the concept of liability for lawful activities carried out in outer space rather than state responsibility.¹⁰ I will return to this question of delimitation later. In contrast, the commentary to ARIO does not address outer space law issues.

Naturally, all of this provided sufficient ground for a scholarly debate, in which some accept outer space law as *lex specialis*¹¹ for the responsibility of international organizations without further examination, while others take a contrary position.¹² To resolve this question, it is necessary to compare the rules of outer space law and ARIO's rules on responsibility in order to determine whether a special responsibility framework indeed applies in the relevant area of international law.

Considering that the International Law Commission intended ARIO to be a document regulating the responsibility of international organizations in general, it is advisable to outline the international responsibility system of these organizations based on that first. Similar to ARSIWA, ARIO also establishes responsibility based on the simultaneous existence of two conjunctive conditions: the conduct of the international organization—which can be an act or an omission¹³—must, on the one hand, constitute a breach of an existing international legal obligation of the organization, and, on the other hand, be attributable to the organization.¹⁴ Therefore, the responsibility of international organizations presupposes both a breach and the attribution of such conduct.¹⁵ The breach by an international organization can arise from any obligation imposed on it, whether derived from an international treaty or a general rule of international law.¹⁶ It is worth emphasizing that, just like in the case of state responsibility, damage¹⁷ and fault¹⁸ do not form the basis for establishing responsibility.

⁹ 1972 Convention on International Liability for Damage Caused by Space Objects (hereinafter: Liability Convention).

¹⁰ ARSIWA Commentary, p. 125. para. 5.

¹¹ Pablo Mendes de Leon and Hanneke van Traa, for example, firstly emphasize that outer space law is *lex specialis* compared to ARSIWA. They then establish that the system of ARIO visibly differs from the rules of outer space law. From this, in my opinion, one can draw the conclusion that the authors consider it as *lex specialis* not only in the context of outer space law and state responsibility but also in relation to the responsibility of international organizations. See, P.M. de Leon & H. van Traa, *Space Law*, in A. Nollkaemper & I. Plakokefalos (Eds.), *The Practice of Shared Responsibility in International Law*, CUP, Cambridge, 2017, p. 455. and pp. 465-466.

¹² Sienho Yee argues, for instance, that the rules of outer space law cannot be considered as special rules because, they should be regarded as general rules that regulate the responsibility of international organizations instead of the ARIO. See, S. Yee, 'Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations, in M. Ragazzi (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, The Hague, 2013, p. 335.

¹³ ARIO Commentary, p. 53. para. 2.

¹⁴ ARIO, Art. 4.

¹⁵ Attribution of conduct and attribution of responsibility are two separate and distinct notions. See J.D. Fry, *Attribution of Responsibility*, in A. Nollkaemper & I. Plakokefalos (Eds.), *Principles of Shared Responsibility in International Law*, CUP, Cambridge, 2014, pp. 102-107.

¹⁶ B. Kis Kelemen & Á. Mohay & A. Pánovics, *A nemzetközi szervezetek felelőssége: koncepcionális és értelmezési kérdések*, in G. Kajtár & P. Sonnevend (Eds.), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században. Tanulmányok Valki László tiszteletére*, ELTE Eötvös Kiadó, Budapest, 2021, pp. 289-290.

¹⁷ ARIO Commentary, p. 53. para. 3.

¹⁸ Although this question is not addressed in the ARIO commentary, I believe that *mutatis mutandis* it should also be applied to the responsibility of international organizations, see, ARSIWA Commentary, p. 36, para. 10. The commentary assumes that *mens rea*, the mental or psychological element behind the violation, is present in the concept of fault, such as the intention to cause harm. Additionally, in my opinion, nothing excludes the adoption of borrowed terminology from Hungarian civil law and simply stating that it is not a requirement for the international organization (or the state) to act as would generally be expected in the given situation.

Regarding the issue of attribution, ARIO contains seemingly different rules from ARSIWA: on the one hand, the conduct of the organs or agents of the organization is attributable to the international organization if they perform their functions and duties within the organization (Article 6), and, on the other hand, the conduct of governmental organs as well as organs or agents of other international organizations placed at the disposal of the international organization will also be attributable to the international organization (Article 7), and finally, conduct recognized by the international organization as its own is also attributable to the organization (Article 9).¹⁹

The comparison is also significantly influenced by the so-called circumstances precluding wrongfulness. ARIO, just like ARSIWA, lists six circumstances precluding wrongfulness. These are consent, self-defense, countermeasures, force majeure, distress, and necessity.²⁰ These circumstances precluding wrongfulness essentially serve the same function as the grounds for exemption in civil law claims for damages.²¹

After this brief overview, let us examine how the issue of responsibility unfolds in terms of international legal rules concerning space activities. International outer space law primarily consists of treaty law sources, five of which deserve special mention: the Outer Space Treaty, the Rescue Agreement, the Liability Convention, the Registration Convention, and the Moon Agreement.²² Among these, the provisions of the Outer Space Treaty and the Liability Convention will be relevant to our topic, from which two, at least the fundamental provisions of the Outer Space Treaty have reached the level of customary international law²³ and I see no reason why the same should not be true for the Liability Convention as well. It is also necessary to note that, naturally, international organizations are also bound by general international law and thus by the rules of customary international law.²⁴

¹⁹ ARIO, Arts. 7-9. Cf. ARSIWA, Arts. 4-11. For a comparison of the attribution norms of ARSIWA and ARIO, see. B. Kis Kelemen, *Responsibility for Human Rights Violations of Private Military and Security Companies on EU Borders: A Case Study of the Contracts of the European Asylum Support Office*, in D. Duić & T. Petrašević (Eds.), *EU and Comparative Law Issues and Challenges Series (ECLIC 4)*. EU 2020 – lessons from the past and solutions for the future, Josup Juraj Strossmayer University of Osijek, Osijek, 2020, pp. 155-180.

²⁰ ARIO, Arts. 20-25. ARSIWA, Arts. 20-25.

²¹ N. Tóth, *Ismeretlen vizeken. Nemzetközi jogi felelősségi szabályok az uniós jogban?* Jogtudományi Közlöny, Vol. 77, No. 10, October 2022, pp. 385-394.

²² G. Sulyok, *Nemzetközi jogi szabályozás*, in B. Bartóki-Gönczy & G. Sulyok (Eds.), *Világűrjog*, Ludovika Egyetemi Kiadó, Budapest, 2022, pp. 84-104.

²³ U. M. Bohlmann, *Article XIII*, in S. Hobe & B. Schmidt-Tedd & K. U. Schrogl (Eds.), *Cologne Commentary on Space Law*, BWV, Berlin, 2017, p. 687. para. 12; C. F. Amerasinghe, *An Assessment of the ILC's Articles on the Responsibility of International Organizations*, in M. Ragazzi (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, The Hague, 2013, p. 75. When it comes to the question of establishing customary international law, it is advisable to proceed with caution, considering, on the one hand, the relatively young nature of these treaties and, on the other hand, the fact that the United States, for example, has taken a persistent position of opposition regarding the transformation of the provisions of the Moon Agreement into customary law, see, Sulyok 2022, p. 106.

²⁴ N. Blokker, *International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?* *International Organizations Law Review*, Vol. 14, No. 1, June 2017, pp. 1-12; K. Daugirdas, *How and Why International Law Binds International Organizations*, *Harvard International Law Journal*, Vol. 57, No. 2, Spring 2016, pp. 325-381. See also in the case-law of the International Court of Justice “ „[...] general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.” *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3. para. 63. See also „[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.” *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I. C.J. Reports 1980, p. 73. para. 37.

The 1967 Outer Space Treaty comprehensively regulates the exploration and use of outer space, including the Moon and other celestial bodies. One of the most significant provisions of the treaty is that it designates outer space as a territory of a status of *res communis omnium usus*.²⁵ By January 2022, a total of 112 states gave consent to be bound by the international treaty, while 23 states have only signed the document.²⁶ Although before the conclusion of the treaty, the Soviets wanted only states to be entitled to engage in outer space activities,²⁷ international organizations appeared already in the first U.S. draft on the principles,²⁸ and they ultimately appear in two places in the Outer Space Treaty, namely in the form of international organizations and intergovernmental organizations.²⁹ To avoid conceptual confusion, it must be noted that the distinction between international organizations and intergovernmental organizations is not justified in this context, as all provisions of the Outer Space Treaty are applicable only to intergovernmental organizations,³⁰ which is consistent with the personal scope of ARIO as well.³¹

Article VI of the Outer Space Treaty states, that

“[...] When activities are carried on in outer space, 6 including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.”

This means that both the international organization and states parties will be responsible for violations of the provisions of the Outer Space Treaty.³² In terms of the nature of this responsibility, it is joint and several,³³ meaning that states and international organization jointly bear responsibility towards the injured state, but there is no rule on the distribution of responsibility among the responsible states and international organizations. In the absence of a specific norm, it can be presumed that it follows the system of the Liability Convention, where the parties can agree on the allocation of financial obligations among themselves.³⁴ In the absence of such an agreement, in my opinion, it is justified to apply a liability model based on fault between the parties, or if this cannot be determined, then an equal distribution of damages based on the model of Article IV(2) of the Liability Convention.

It is easy to see that this provision is not compatible with ARIO, which, apart from the narrow exceptions it defines, excludes the responsibility of member states for the unlawful conduct of international organizations.³⁵ While the Outer Space Treaty creates joint and several responsibility between member states and the international organization in an absolute manner, ARIO establishes

²⁵ 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter: Outer Space Treaty) Arts. I-II.

²⁶ Status of International Agreements relating to activities in outer space as at 1 January 2022. 28 March 2028. A/AC.105/C.2/2022/CRP.10* p. 10.

²⁷ B. A. Hurwitz, *State Liability for Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damage caused by Space Objects*, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1992, p. 70.

²⁸ Gál 1964, p. 251.

²⁹ Outer Space Treaty, Arts. VI and XIII.

³⁰ M. Gerhard, *Article VI*, in S. Hobe & B. Schmidt-Tedd & KU. Schrogl (Eds.), *Cologne Commentary on Space Law*, BWV, Berlin, 2017, p. 429. para. 81.

³¹ ARIO, Art. 1. According to the ARIO, an international organization is “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.” See, ARIO, Art. 2(a)

³² Gerhard 2017, pp. 429-430. para. 82.

³³ Bohlmann 2017, pp. 685-686. para. 10.

³⁴ Liability Convention, Art. VI.

³⁵ ARIO Commentary, p. 81. para. 1.

the exclusive responsibility of the international organization as the main rule. The Outer Space Treaty also states that

“The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the Moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international intergovernmental organizations. Any practical questions arising in connection with activities carried on by international intergovernmental organizations in the exploration and use of outer space, including the Moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty.”³⁶

The commentary attached to the treaty emphasizes that this provision was created to prevent states from evading their responsibility for outer space activities through the use of international organizations.³⁷ Ultimately, this provision makes the application of the most fundamental, treaty rules of outer space law obligatory for international organizations that are not parties to the treaty itself. However, it should be noted that the Outer Space Treaty does not allow for international organizations to accede to the agreement, nor does it allow them to unilaterally declare acceptance of the treaty, dissimilar to later universal international agreements related to outer space.

After reviewing the provisions of the Outer Space Treaty, it seems appropriate to conduct a more thorough examination of the Liability Convention, but for this, it is necessary to clarify some preliminary questions regarding the distinction between liability and international responsibility.

It is important to draw attention to the fact that the treaty uses the term ‘liability’³⁸ instead of ‘international responsibility’, as used in the ARIO.³⁹ However, these two concepts are not synonymous, as pointed out by the International Law Commission in the commentary on ARSIWA,⁴⁰ which was consistently reaffirmed in the commentary of the ARIO as well.⁴¹ Accordingly, under the concept of liability, it is necessary to understand responsibility for damages caused by conduct that is not prohibited by international law.⁴² On the other hand, as stated above, international responsibility refers to the conduct of a state or an international organization that violates their international legal obligations.⁴³ This distinction is emphasized in international legal literature. For example, Nikolaos Voulgaris highlights that the rules of liability belong to the primary rules of international law, while liability rules are considered secondary norms.⁴⁴ However, it should also be noted, as emphasized by Sienho Yee, that the distinction between international responsibility and liability is relatively recent, dating back to the 1972 Liability Convention. Therefore, it can also be argued that the liability mentioned in the treaty encompasses both liability for damages resulting from lawful conduct according to contemporary interpretation and international responsibility as enshrined in the ARSIWA and the ARIO.⁴⁵ In my opinion, the correct interpretation lies in the latter, which is supported by an overview of the provisions of the treaty. Therefore, it is justified to conduct a slightly more detailed examination of the treaty to determine the overlap between liability under the Liability Convention and international responsibility according to ARIO.

³⁶ Outer Space Treaty, Art. XIII.

³⁷ Bohlmann 2017, p. 679. para. 1.

³⁸ See for instance Liability Convention, Arts. II and III.

³⁹ See, e.g.: ARIO, Art. 1(1).

⁴⁰ ARSIWA Commentary, p. 125. para. 5.

⁴¹ ARIO Commentary, p. 48. para. 5.

⁴² *ibid*

⁴³ ARSIWA, Art. 2 and ARIO, Art. 4.

⁴⁴ N. Voulgaris, *Allocating International Responsibility Between Member States and International Organisations*, Hart, Oxford, London, New York, New Delhi, Sydney, 2019, pp. 66-67.

⁴⁵ Yee 2013, p. 334.

The Liability Convention establishes three main regimes of liability. On the one hand, there is absolute or strict liability, which allows for exemption, introduced by the formula ‘absolutely liable’ in the treaty.⁴⁶ This liability form is applicable when damage occurs in outer space, on the surface of the Earth, or to an aircraft in flight.⁴⁷ In this case, exemption may be possible if the launching state or international organization proves, that

“[...] the 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.”⁴⁸

On the other hand, there is another form of liability based on fault,⁴⁹ which according to the treaty is applicable when damage occurs in the space object of a launching state, or in persons or property present therein, elsewhere than on the surface of the Earth. This liability is fault-based because in this case, the injured party must prove that the damaging state caused the damage through its own fault or through the fault of a person for whom it is otherwise responsible.⁵⁰

Finally, mention should be made of the third and final form of liability, which can be characterized as absolute liability, without allowing for exemptions.⁵¹ The Liability Convention regulates this form of liability seen as below:

“No exoneration whatever 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 including, in particular, the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.”⁵²

This provision is derived from the revised Hungarian draft,⁵³ and its significance lies in the fact that it does not provide for any exemptions regardless of the source of the obligation if the damage results from the breach of international legal obligations by the liable state or international organization.⁵⁴ However, the provision raises some interpretational questions as it is not clear whether liability for damage caused by unlawful space activities can only be established under the regime of absolute liability, *i.e.*, in cases of damage caused on the surface of the Earth or in aircraft in flight, or if fault-based liability, *i.e.*, liability for damage between space objects outside the surface of the Earth, also applies. The grammatical and logical interpretation of the Liability Convention,

⁴⁶ Liability Convention, Art. II. G. Kecskés, *Az űrtevékenység felelősségi jogi kérdései*, in G. Sulyok & B. Bartóki-Gönczy (Eds.), *Világűrjog*, Ludovika Egyetemi Kiadó, Budapest, 2022, p. 140. K. Schmalenbach, *Convention on International Liability for Damage Caused by Space Objects*, 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. 528. It should be noted that the author only distinguishes between two liability regimes and uses the term ‘strict liability’ alongside absolute liability. However, Bruce A. Hurwitz applies strict liability only in cases where there is no defense available for the liability forms. See, Hurwitz 1992, p. 42.

⁴⁷ Liability Convention, Art. II.

⁴⁸ Liability Convention, Art. VI (1).

⁴⁹ Kecskés 2022, p. 140. Schmalenbach 2023, p. 528.

⁵⁰ Liability Convention, Art. III. Schmalenbach 2023, p. 530. It should also be highlighted that the interpretation of the phrase “the fault of persons for whom it is responsible” in the treaty is questionable. It is possible that the reference to responsibility is made in terms of general international responsibility rules, *i.e.*, those established by ARSIWA and ARIO. However, it is also possible that the specialized rules of outer space law should be applied in this context. According to the author, the latter is the correct interpretation. *ibid* p. 529.

⁵¹ Kecskés 2022, p. 140.

⁵² Liability Convention, Art. VI (2).

⁵³ Hungary: revised draft Convention concerning Liability for Damage caused by the Launching of Objects into Outer Space. (A/AC.105/C.2./L.10/Rev.1) Art. V.

⁵⁴ Hurwitz 1992, p. 42.

through the use of formulas such as “[n]o exoneration whatever shall be granted [...]”⁵⁵ from liability and “[...] exoneration from absolute liability shall be granted to the extent that a launching State establishes that the 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,”⁵⁶ indicates that the rule excluding exemption from liability applies only in cases of absolute liability. This argument is likely accepted by Gábor Kecskés and Kristen Schmalenbach.⁵⁷ In contrast, János Bruhács considers the form of liability which allows no exoneration (according to his terminology, absolute liability) to be applicable to all unlawful space activities.⁵⁸ Bruce A. Hurwitz, on the other hand, seems to operate based on complete inconsistency in his 1992 monograph. While he argues that “[...] the Liability Convention denies exoneration”⁵⁹ in cases of unlawful space activities, the example he provides leads to a different conclusion. Hurwitz illustrates the rule by stating that if the Soviet Union (now the Russian Federation) were to launch a nuclear-armed space object, it would clearly violate Article IV of the Outer Space Treaty. If as a result, the United States were to render the object uncontrollable, resulting in damage to the United States, its citizens, or permanent residents, the Soviet Union would be liable, regardless of whether the damage was caused by the intervening conduct of the United States.⁶⁰ Therefore, Hurwitz seemingly makes no distinction as to where the damage occurs, thus considering this absolute liability construct without exemptions applicable in both situations. Considering that the application of the Liability Convention has not yet been supported by state practice, it is certain that the question cannot be definitively answered. However, in such situations, I personally find a restrictive interpretation⁶¹ more appropriate.

These questions have significant importance when establishing the liability of international organizations, particularly in determining a *lex specialis* liability regime for outer space activities. First, it should be noted that under the ARIIO, the liability of an international organization can be established if the act is both unlawful and attributable to the international organization. In contrast, the Liability Convention establishes liability for lawful conduct under both the regime of absolute liability with exemptions and the fault-based approach. There is only one exception to this, which pertains to damage caused by unlawful space activities in an aircraft in flight or on the surface of the Earth, for which the launching state and international organization are fully liable. This means that international liability, which applies not only to international organizations but also to states, and the liability for damage caused by outer space activities, constitute separate but intersecting categories in terms of their material scope, as illustrated in the following diagram:

⁵⁵ Liability Convention, Art. VI (2).

⁵⁶ Liability Convention, Art. VI (1).

⁵⁷ Kecskés 2022, p. 141. Schmalenbach 2023, p. 530. o.

⁵⁸ J. Bruhács, *Nemzetközi jog II. Különös rész*, Dialóg Campus, Budapest, Pécs, 2011, p. 130.

⁵⁹ Hurwitz 1992, p. 42.

⁶⁰ Ibid p. 42-43.

⁶¹ “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” See 1969 Vienna Convention on the Law of Treaties Art. 31 para 1. J. Bruhács, *Nemzetközi jog I. Általános rész*, Dialóg Campus, Budapest, Pécs, 2011, p. 113.

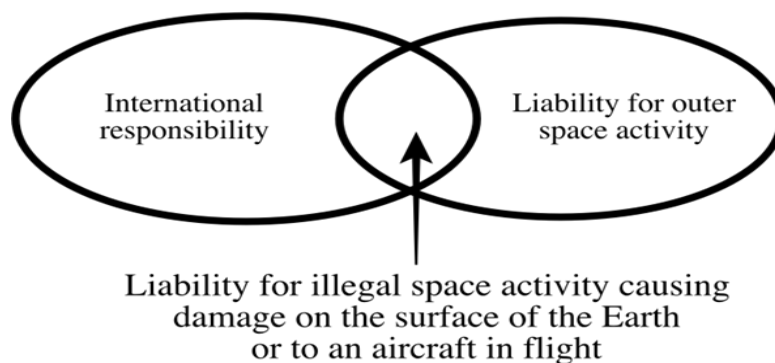


Diagram No. 1.

*Relationship between international responsibility and liability for outer space activity*⁶²

Based on this, I will compare the rules of international responsibility and at the same time liability for damage caused in an aircraft in flight or on the surface of the Earth by unlawful acts, which can be found at the intersection of the ARIO and liability regime of outer space law. The goal of the comparison is to determine whether liability differs from ARIO and thus qualifies as *lex specialis*.

After discussing the preliminary questions, I will now turn to the status and main provisions of the Liability Convention. Similar to the Outer Space Treaty, the convention has a large number of parties, with 98 state parties as of January 1, 2022, supplemented by 19 signatory states and four international organizations that have accepted the rights and obligations arising from the convention.⁶³ The latter is made possible by Article XXII of the Liability Convention, which states, that its norms excluding those, which are pertaining to the technical details of concluding the treaty (Articles XXIV-XXVII) are also applicable to international organizations, when

“[...] if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.”⁶⁴

The four international organizations that have accepted the Liability Convention are the European Space Agency (ESA), the European Telecommunications Satellite Organization (EUTELSAT), the European Organization for the Exploitation of Meteorological Satellites, and the International Telecommunication Satellite Organization (INTERSPUTNIK).⁶⁵ Although the numerical change is not significant, it is worth highlighting that in 1989, only two international organizations made similar statements.⁶⁶ Among these, EUTELSAT has been privatized to such an extent that the international organization now only oversees the operations of Eutelsat S.A., a private company that took over the formers assets.⁶⁷ INTERSPUTNIK has also been partially privatized, but in my opinion, this should not affect its rights and obligations under the treaty.⁶⁸ The privatization is a significant issue in this regard because if an international organization, like EUTELSAT, loses its status as an

⁶² The diagram was prepared by the author.

⁶³ A/AC.105/C.2/2022/CRP.10* p. 10.

⁶⁴ Liability Convention, Art. XXII (1).

⁶⁵ A/AC.105/C.2/2022/CRP.10* p. 10.

⁶⁶ Hurwitz 1992, p. 71.

⁶⁷ Ganczer 2022, p. 128.

⁶⁸ Following the privatization of INTERSPUTNIK, the organization’s space segment continues to belong to the international organization, based on ownership or leasing arrangements. See, *ibid* p. 125.

international organization conducting space activities, the provisions of the Liability Convention would not apply to it. This assertion is supported by the commentary to Article XIII of the Outer Space Treaty, which states that the relevant provision does not apply to organizations that have lost their international organization status.⁶⁹ Therefore, among the four mentioned organizations, in my opinion, this can only be established in the case of EUTELSAT, and the remaining three organizations are subject to the provisions of the international treaty. Furthermore, if we attribute customary force to the provisions of the Liability Convention, they could be applicable to other international organizations engaged in space activities, such as the European Union, which, based on the consistent case law of the Court of Justice of the European Union, is also bound by customary international law.⁷⁰

In line with the above reasoning, in order to determine the nature of *lex specialis*, it is necessary to examine the rules of liability for damages caused by unlawful outer space activities, which also give rise to international responsibility when such damages occur on the surface of the Earth or an aircraft in flight.

First, it is worth making some explanatory remarks regarding relevant concepts such as damage and launching state or international organization. The Liability Convention defines damage as the loss of life, personal injury, impairment of health, as well as the loss and damage to property of states—and international organizations—and individuals.⁷¹ This concept of damage includes mental health impairment, and some scholars also include indirect damages within its scope.⁷² As for the launching entity, the Liability Convention refers to the launching state, which naturally includes the launching international organization as well. Therefore, any international organization that launches or procures the launching of space objects or uses its facilities for the launching of space objects qualifies as a launching international organization.⁷³ As a supporting argument for the *lex specialis* character of this field, it is also possible to refer to the fact that by applying the category of ‘launching state’ with the aforementioned content, the Liability Convention departs from the attribution rules that would otherwise be applicable according to the ARIO. In its resolution on the launching state adopted in 2005, the United Nations General Assembly drew the attention of states to conclude agreements in accordance with the Liability Convention through cooperation.⁷⁴ ESA fulfilled this requirement as early as 1977 when it adopted a resolution on the organization’s liability, which regulated the sharing of responsibility between member states, other states, and the international organization.⁷⁵

It is clear from this that an international organization can be a launching entity that incurs both international responsibility and liability for damages caused unlawfully on the surface of the Earth or in an aircraft in flight.⁷⁶ According to the Liability Convention, in such cases, the international

⁶⁹ Bohlmann 2017, pp. 682-683. para. 6.

⁷⁰ Á. Mohay, *A nemzetközi jog érvényesülése az uniós jogban*, PTE ÁJK Európa Központ – Publikon Kiadó, Pécs, 2019, pp. 83-100.

⁷¹ Liability Convention, Art. I(a).

⁷² Schmalenbach 2023, p. 531.

⁷³ Liability Convention, Art. I(c). According to the provision in question, as stated in para. 2, the state whose territory is used for the launch is also considered a launching state. Considering that international organizations do not possess territory, this norm, in my opinion, does not apply to them.

⁷⁴ GA. 59/115, Application of the concept of the „launching State”, 25 January 2005. para. 2.

⁷⁵ Resolution of the Council of the European Space Agency on the Agency’s Legal Liability. Adopted on 13 December 1977. ESA/C/XXII/RES.3.

⁷⁶ Liability Convention, Art. II, VI (2) and XXII (1).

organization and its contracting member states are jointly and severally liable.⁷⁷ This seemingly contradicts the rules of the ARIO, which only allow member state responsibility for the actions of the international organization in a limited scope.⁷⁸ The specialty of the regulation of outer space responsibility/liability is further reinforced by the fact that according to the Liability Convention, the request for compensation must be initially submitted to the international organization, and member state responsibility is only ‘activated’ if the organization fails to pay the amount of damage within six months.⁷⁹ In essence, we can say that the responsibility of international organizations takes precedence over that of states.⁸⁰ This is in direct contradiction with Article 48(1) of ARIO, which states

„Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.”⁸¹

It should be noted, however, that the ARIO also states that the invocation of subsidiary or secondary liability is only possible if the invocation of primary liability did not lead to a result.⁸² This provision would be in line with the Liability Convention if the ARIO did not narrowly interpret secondary liability and only deemed it acceptable if a member state of an international organization accepted its responsibility towards the injured party or induced the injured party to invoke the responsibility of the member state.⁸³ In the framework of the Liability Convention, it can ultimately be concluded that the injured state will always be able to claim compensation from another state,⁸⁴ as opposed to the rules of the ARIO.

After reviewing the above, it must be determined whether the presented special rules are sufficient to characterize the liability of international organizations in outer space as *lex specialis*. Kristen E. Boon defines a four-element test to determine the existence of *lex specialis* norms: a) an actual collision between rules, b) one legal regime being more specific, c) the sources leading to the collision support the applicability of *lex specialis*, and d) it does not affect the rights of the parties to the agreement.⁸⁵

In my opinion, the above-mentioned framework for the liability of international organizations in outer space easily meets the requirement of an actual collision between rules. This is undoubtedly proven by the detailed argumentation above. Although the question of the specialty of the rules is the most difficult to prove,⁸⁶ still, I believe that the rules established in the framework of outer space law qualify as special rules, at least from the perspective that it regulates international responsibility according to the ARIO and ARSIWA only *per tangentem* and, it creates a more specific liability system, that partially overlaps with the general international responsibility rules. It is also questionable what has primacy of application, whether the ARIO as a codification effort and at the

⁷⁷ Ibid Art. XXII (3).

⁷⁸ ARIO, Part Five.

⁷⁹ Liability Convention, Art. XXII (3).

⁸⁰ M. Lachs, *The Law of Outer Space. An Experience in Contemporary Law-Making*, Sijthoff, Leiden, 1972, p. 123.

⁸¹ ARIO, Art. 48 (1).

⁸² ARIO, Art. 48 (2).

⁸³ ARIO, Art. 62 (1.)

⁸⁴ F. Tronchetti & L. J. Smith & A. Kerrest: *Article XII (International Intergovernmental Organizations) LIAB*, in S. Hobe & B. Schmidt-Tedd & K. U. Schrogl (Eds.), *Cologne Commentary on Space Law Vol. II*, Carl Heymanns Verlag, Köln, 2013, p. 206. para. 385.

⁸⁵ K. E. Boon, *The role of lex specialis in the articles on the responsibility of international organizations*, in M. Ragazzi (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, The Hague, 2013, p. 141.

⁸⁶ Ibid p. 142.

same time a development of international law, or a treaty or customary law provision. According to Boon—who considers the ARIO solely as new development of international law, not a codification of existing rules—international treaties always enjoy primacy over the ARIO.⁸⁷ In my view, the question cannot be settled so easily. On the one hand, the ARIO can be considered to have a customary nature in certain aspects—for example, regarding the determination of international responsibility. On the other hand, we can only partly identify a ‘hierarchy’ between international treaties and customary international law.⁸⁸ When states concluded their relevant international treaties concerning outer space, they ‘contracted out’ of the application of general rules among themselves, so in their relations, treaty norms take precedence over customary norms. However, considering that the majority of the Outer Space Treaty is of customary nature, and there is no reason to doubt that this is the case for the Liability Convention as well, this does not pose a problem in establishing the existence of *lex specialis*. As a third condition, it should be mentioned that Article 64 of the ARIO supports the existence of *lex specialis* norms when it provides that the ARIO does not need to be applied if a special rule of international law is applicable to the determination or implementation of international responsibility. Article XXIII(1) of the Liability Convention also states that the convention does not affect other international agreements of the parties. Although this provision would presumably be applicable to other international treaties, it may indicate to us that the convention does not exclude the applicability of other norms. Therefore, this means that the ARIO allows for the application of special norms, such as the Liability Convention, and the latter also allows for the application of other more general rules. Finally, it should be mentioned that outer space responsibility/liability does not affect the applicability of the general rules of international responsibility; it only complements them, similar to the interaction between international humanitarian law and the international human rights system.⁸⁹ In this form, we cannot argue that any claimant has fewer rights due to the continued applicability of the special rules.

Based on these considerations, I believe it can be reasonably argued that the responsibility of international organizations in outer space, based on the general and liability rules of outer space law is established as *lex specialis* compared to the general rules of international responsibility.

3. Shared outer space responsibility/liability

Shared responsibility, according to André Nollkaemper, encompasses situations where multiple actors contribute to one harmful outcome, and the responsibility for that outcome is divided among the contributing actors.⁹⁰ Shared responsibility can arise through the attribution of responsibility, such as when a state assists another in committing a violation, as well as through the attribution of conduct, where an activity or omission is attributed to two international legal entities.⁹¹

The liability of international organizations for space activities raises the possibility of shared re-

⁸⁷ Ibid

⁸⁸ A treaty prevails over customary international law only to the extent that the states parties ‘contract out’ of it, but it does not affect the rights and obligations of other states. See C. Greenwood, *Sources of International Law: An Introduction*, https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (2023.02.08.) p. 5.

⁸⁹ Boon 2013, p. 144. Of course, the relationship between international humanitarian law and international human rights law is a much more complex issue. See, S. P. Marks, *Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflict*, in K. Vasak (Ed.), *The International Dimensions of Human Rights*, UNESCO – Greenwood Press, Westport, Paris, 1982, p. 193 and pp. 200-201.

⁹⁰ A. Nollkaemper, *Introduction*. in A. Nollkaemper & I. Plakokefalos (Eds.), *Principles of Shared Responsibility in International Law. An appraisal of the State of the Art*, CUP, Cambridge, 2014.

⁹¹ S. Ø. Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State*, *Oslo Law Review*, Vol. 6, No. 3, December 2019, pp. 179-197.

sponsibility from two perspectives. Firstly, as mentioned above, both the Outer Space Treaty and the Liability Convention speak of joint and several responsibility,⁹² meaning that the responsibility is shared between the international organization conducting the space activity and its member states.

However, shared responsibility can also arise in the case of space activities carried out by international organizations involving third states other than their member states. It can be easily conceivable that international organizations, without their own territory, always rely on at least one launching state for the launching or procurement of the launching of their space objects.⁹³ According to Article I(c) of the Liability Convention, not only the state that launches the space object is considered a launching state but also the one that practically performs this launch and the state whose territory or facility is used for this purpose. Consequently, it can be concluded that the international organization, as a launching state, is jointly and severally responsible (*i.e.* shared responsibility is established) with those states whose territory or infrastructure is used for the launch.⁹⁴ Since these states may not necessarily coincide with the member states of the international organization, this can be considered as a separate form of shared responsibility.

4. Conclusions

Based on the above, it can be concluded that specific *lex specialis* rules apply to the liability of international organizations regarding activities conducted in outer space. The joint and several responsibility rule of the Outer Space Treaty contradicts the ARIO, which emphasizes the primacy of the international organizations' responsibility. On the other hand, the Liability Convention primarily regulates a liability, in contrast with the general international responsibility regime of ARIO. However, it should also be noted that liability under the Liability Convention and the international responsibility of international organizations according to ARIO intersect, particularly concerning unlawful damages caused on the surface of the Earth or in aircraft in flight. The argument for *lex specialis* is further reinforced by the fact that the concept of the 'launching state', which deviates significantly from ARIO's attribution rules. This concept needs to be applied to international organizations as well.

Finally, and following from the concept of the launching state mentioned above, it should be noted that the international responsibility and liability of international organizations is inherently a shared responsibility for their activities in outer space. This shared responsibility is based on the principles of joint and several liability, both concerning their member states and third states other than their member states. In the latter case, provided that both third states different from the member states and the international organization qualify as launching states according to the provisions of the Liability Convention.

⁹² Outer Space Treaty, Art. VI. Liability Convention Art. XXII (3). It needs to be noted however, that liability of international organizations has primacy according to the Liability Convention.

⁹³ An exception from this would be if the international organization launches its space objects with its own infrastructure from the High Seas. See, Schmalenbach 2023, p. 528.

⁹⁴ Liability Convention, Arts. V (1) and (3).