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Public International Law, Private Laws and Private International Law in the System of Space Liability

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Liability is a broad legal term connected very closely with the notion of responsibility. Various definitions of its general meaning prove this relation, even coincidence of the two terms: "Condition of being actually or potentially subject to an obligation – condition of being responsible for a possible actual loss, penalty evil, expense or burden." (1) "Liable in a legal context is to denote the fact that a person is responsible at law." (2) "Quality or condition of being liable – legally bound or responsible." (3) "responsibility: the state of being answerable for an obligation – the obligation to answer for an act done and to repair or otherwise make restitution for any injury it may have caused." (4)

The lexical meaning of **System** is "an orderly interconnected complex arrangement of parts." (5) The system of space liability is such a complex arrangement of elements derived from international and national law sources. First of all from the rules of international space law which cannot be separated from the rules of responsibility under general international law. (6) Needless to refer to basic principles of space law, e.g. that space activity should be carried on "in accordance with international law" (Space Treaty Art. VIII, Moon Agreement Art. II) or even to rules of space liability: settlement of damages "in accordance with international law" – all having merely declaratory character.

At the same time for details not regulated by international law municipal private laws necessarily contribute to the legal settlement of a damage caused by space activity.

The elements of the **space liability system** result in an incomplete mosaic-like picture characterized by insufficiencies, gaps, unsolved procedural and substantive law problems.

I

The most important **public international law** sources of space liability (jus speciale) the Space Treaty (S.T.) and the Liability Convention (L.C.) contain concepts of "international responsibility" and "international liability" different from rules of general international law (jus generale).

According to S.T. "States parties to the Treaty shall bear international responsibility for national activities in outer space... whether such activities are carried on by governmental agencies **or by non-governmental entities**, and for assuring that national activities are carried out in conformity with the provisions set forth in the present treaty." In respect of responsibility "national" is any activity carried on or authorized by the state, i.e. in latter case also undertakings of private entities.

In the sense of general international law the state may become responsible for breach of a treaty, in respect of the non-performance of contractual obligations. (7) Conformity of space activities with the principles set forth in the S.T. and other sources of space law is a treaty obligation under public international law. Responsibil-

ity in space law therefore operates no different in principle from state responsibility in general international law. (8) Moreover the S.T. holds states responsible for breaches of the treaty not committed by them. This special kind of responsibility may be rightly considered as a "codified exception" from the principle of public international law confirmed by the International Court that states are not responsible for conduct of private entities. (9)

The system of liability in the treaty law of space activity is focussed on damages caused by space objects. According to S.T. Art. VII each party to the treaty that launches or procures the launching of an object into outer space and each party from whose territory or facility an object is launched, is **internationally liable** for damage to another state party to the treaty or to its natural or juridical persons. The term "internationally liable" refers to the interstate character of space liability. Namely to the specific feature of settlement on this level. Only states have the right to set up a claim regardless of the fact who was the injurer: a "governmental agency" or "non-governmental entity" – a private company or even a private person.

Concerning these claims the L.C. stipulates uniform substantial law rules for the parties to the convention. This basically private law principles should be applied in relation of the states parties by force of public international law. Key issues of this treaty-private law are:

- Meaning of the term damage: loss of life, personal injury or other impairment of health, loss of or damage to property of states persons, intergovernmental organizations. (Art. I. a)

- Absolute liability to pay compensation for damage caused by a space object on the surface of the earth or to aircraft in flight.

- Fault liability for damage caused elsewhere than on the surface of the earth to a space object or to persons or property on board such a space object. (Art. III.)

- Joint and several liability of states involved in a case of damage to third state or to its nationals according to above double regime of absolute and fault liability. (Art. IV.)

- Joint and several liability of states launching jointly a space object. (Art. V. 1.)

- Compensation: in accordance with international law and the principles of justice and equity in order to provide such reparation in respect of the damage as will restore the claimant to the condition which would have existed if the damage had not occurred. (In integrum restitutio) (Art. XII.)

The obligations based on rules of L.C. were reaffirmed by subsequent space treaties. E.g. the Moon Agreement repeating the responsibility clause of the S.T. recognizes that detailed arrangements concerning liability for damage caused on the moon **in addition to the provisions of the L.C.** may become necessary as a result of more extensive activities on the moon. (Art. XIV) The Agreement on the Civil International Space Station establishes a cross-waiver of liability by the partner states and related entities – otherwise the partner states shall **remain liable in accordance with the L.C.** (Art.17)

Municipal space laws constituting jus speciale of general private and administrative laws of states follow various methods harmonizing rules of space liability rooted in public international law sources with the liability system of municipal law. Mainly in respect of consequences of private activities authorized by them.

National space acts include provisions for reimbursement by the licensee of any compensation paid by the licensing government due to the international liability of

the state concerned (S.T. Art. VII.). E.g. Outer Space Act 1986 of the United Kingdom: "A person to whom this Act applies shall indemnify Her Majesty's Government in the United Kingdom against any claims brought against the government in respect of damage or loss arising out of activities carried on by him to which this Act applies." Similarly the Act on Space Activities (1982:963) of Sweden: "...the persons who have carried on the space activity shall reimburse the State what has been disbursed on account of the... undertaking, unless special reasons tell against this." (10) The Space Affairs Act No.84, 1993 of the South African Republic among the conditions of licensing stipulates that the Council for Space Affairs may determine "liability of the licensee resulting from international conventions, treaties and agreements entered into or ratified by the Government of the Republic. (11)

The Australian Space Activities Act No.123, 1998 under the Title "Responsible party's liability to the Commonwealth" enumerates the obligations of the licensee for the case if in accordance with the L.C. or otherwise under international law a foreign country has presented a claim against Australia for compensation for damage – and Australia becomes liable to any extent to pay compensation for the damage – the responsible party is liable to pay to the commonwealth an amount equal to the amount of that compensation.

The Australian Act deserves attention also for another reason. Namely in Part 4 (Liability for damage by space objects) substantive law rules of liability are included following the principles of the L.C. and procedural guaranties for establishment of a Claims Commission in case of compensation claims by foreign countries (Part 4.– Division 4). (12) The Law on Space Activity of the Russian Federation of 1993 declares as a principle that the Federation shall ensure the fulfillment of the obligations it has assumed in the field of space activity and specially under the S.T. "If rules are laid down in an international treaty ratified by the Supreme Soviet of the Supreme Soviet of the Russian Federation other than those contained in this law and other legislative acts of the Russian Federation governing space activity, the rules of the international treaty shall preempt." (13)

Above examples demonstrate, that influenced mainly by the rapid development of private-commercial space activity, national space legislations take into account, confirm, acknowledge the rules of space liability included in public international law sources as a part of the "law of the land".

II

The place of **private laws** of states i.e. of municipal rules in the system of space liability depends on the relation of each state to the L.C. and/or S.T. Up to now 79 states ratified and 26 states signed the Liability Convention. The Space Treaty has been ratified by 94 states, signed by 27 states. (14) A considerable part, over half of all states are bound by the liability rules of the L.C. States being parties only to the S.T. accepted the responsibility-liability clauses of this instrument. For all other states both treaties are inter alios acta. They are not obliged to harmonize their municipal private laws with rules of liability embodied in these two international sources of space law.

In my humble opinion no provision of the L.C. do exclude the application of municipal private laws (tort laws) for details of space liability not regulated by the L.C. Moreover, as it appears to me, their applicability in the interpretation of the convention would be acceptable. Especially if this interpretation based on municipal private law corresponds to internationally accepted general norms.

Applicable law in a given case of liability: this is a question of **private international law** (conflict of laws) which itself is no international but municipal law. The Claims Commission (L.C. Art. XIV-XX) proceeds practically as an ad hoc international court

of arbitration. One of the conclusions of Professor K.-H. Böckstiegel to the question of how to find out which of the private international law systems has to be applied in the particular case is the following: the arbitrators try to find general principles of private international law common to all developed modern legal systems and they apply these general principles to their dispute. (15)

Whether the Claims Commission would accept the principle of party autonomy i.e. the choice expressed by the parties as to the applicable substantive law – this question, failing precedents, is for the time being unanswerable. The theory of private international law does not exclude this possibility in tort law, provided that the position of third persons by this choice will not be modified. (16)

In case of a claim pursued in the court of the launching state (L.C. Art. XI.2) the court will apply its municipal private international law (lex fori) to find out the applicable law. The principle generally accepted in tort law is the lex loci delicti commissi. E.g. according to Hungarian private international law "to tort liability applicable law is the governing law at place and time of act or omission causing the damage. In case it is more favourable for the injured, the law of the country is applicable where the damage occurred." (17)

The substantive (private) law provisions of the L.C. are undoubtedly imperfect, their wording is in some respects questionable. I do not share the peculiar opinion that vagueness of terms of space treaties which can sometimes lead to ambiguities among space lawyers is the strength of space law as it still applies relatively well in fundamentally changed circumstances. (18)

Unresolved details of space liability belong far more to the issues referred to in the statement of Professor C. Q. Christol: it was a conscious decision of the negotiators to avoid a specific approach. Had the negotiation moved in this direction, it is most unlikely that the L.C. would ever be completed. (19)

The definition of damage originates some of the open questions. Article I of the L.C. includes a single indisputable element: loss of life. "Personal injury or other impairment of health" raises the problem of moral damage. To "loss of or damage to property" in a given case the question of indirect damage would demand answer of the Claims Commission or the courts or administrative tribunals or agencies of the launching state (L.C. Art. XI.1). In my opinion such a decision could be based on an interpretation concluded from the applicable municipal private law, taking into consideration its definition of damage.

Concerning "moral damage" I put forward the question: restoring the person to the condition which would have existed if the damage had not occurred – in integrum restitutio – does it not comprise the reparation of moral damage? Especially considering "the principles of justice and equity" referred to in Art. XII of the Convention.

In case of a negative answer municipal private laws offer a diversity of meanings and legal treatment of moral damages. During the preparatory work of an agreement on liability a Hungarian proposal suggested the following formula to Art II. par.2: "A claim for damage may be advanced on the ground of loss of profits and moral damage whenever compensation for such damage is provided for by the law of the state liable for such damage." (20) At that time Hungarian law did not recognized the right to compensation for moral damage. The new Hungarian legal system by an amendment of the Civil Code extended the scope of liability to moral damage: "The person responsible for the damage shall restore the original situation. Should this be impossible, or should the injured person for some well-founded reason not desire restitution the responsible person shall give compensation for the material and non-material loss suffered." (21) The

meaning of non-material loss, failing a legal definition, depends on judicial discretion.

To the positive attitude in this question the U.S. position deserves attention. The spokesman of the Department of State in his testimony to the Senate Committee on Foreign Relations declared: "claims covering moral damage aspects are well-known in international legal and U.S. domestic practices and hence the U.S. would not hesitate to include them in claims we might present." (22)

Concerning indirect (consequential) damage the L.C. likewise left the question open. In individual cases the applicable municipal private law can give the answer -- if any. Strict distinction in municipal private laws between direct and indirect damages very rarely can be found.

A well-known illustration to this problem of the system of liability is the Cosmos-954 incident. (23) After the crash of this satellite, on board with NPS, Canada presented a claim to the Soviet Union demanding compensation for costs in respect of the operations which would not have been occurred had the satellite not entered Canadian territory. The claim was based on relevant international agreements and especially on the L.C. The Soviet Union did not acknowledged this legal basis of the claim since no physical or property damage had been suffered by Canadian citizens. The claim was settled without any reference to the L.C. by a formal protocol with an "ex aequo and bono" payment of compensation. (24) To-day the Civil Code of the Russian Federation stipulates that the damage inflicted to a person or a person's property is subject to full-scale indemnity by the person who inflicted the damage. (25) On the other hand the Russian municipal space law undoubtedly excludes the indirect damage from space liability. The Law of 1993 governing space activity enacts: "the Russian Federation shall guarantee compensation for **direct** damage inflicted as a result of accidents while carrying out space activity in accordance with legislation of the Russian Federation. (26)

In my introductory remarks I compared the system of space liability with a mosaic-like picture. **K.-U. Schrogl** mentions a "patchwork of national regulations which reveals that there is a need for a national regulation due to commercial and in particular private launch activities" – "incl. harmonization" (27) Latter in my mind would be indispensable for building an effective international space liability system. Perhaps as a first step towards a "Code Civil of Outer Space." (28)

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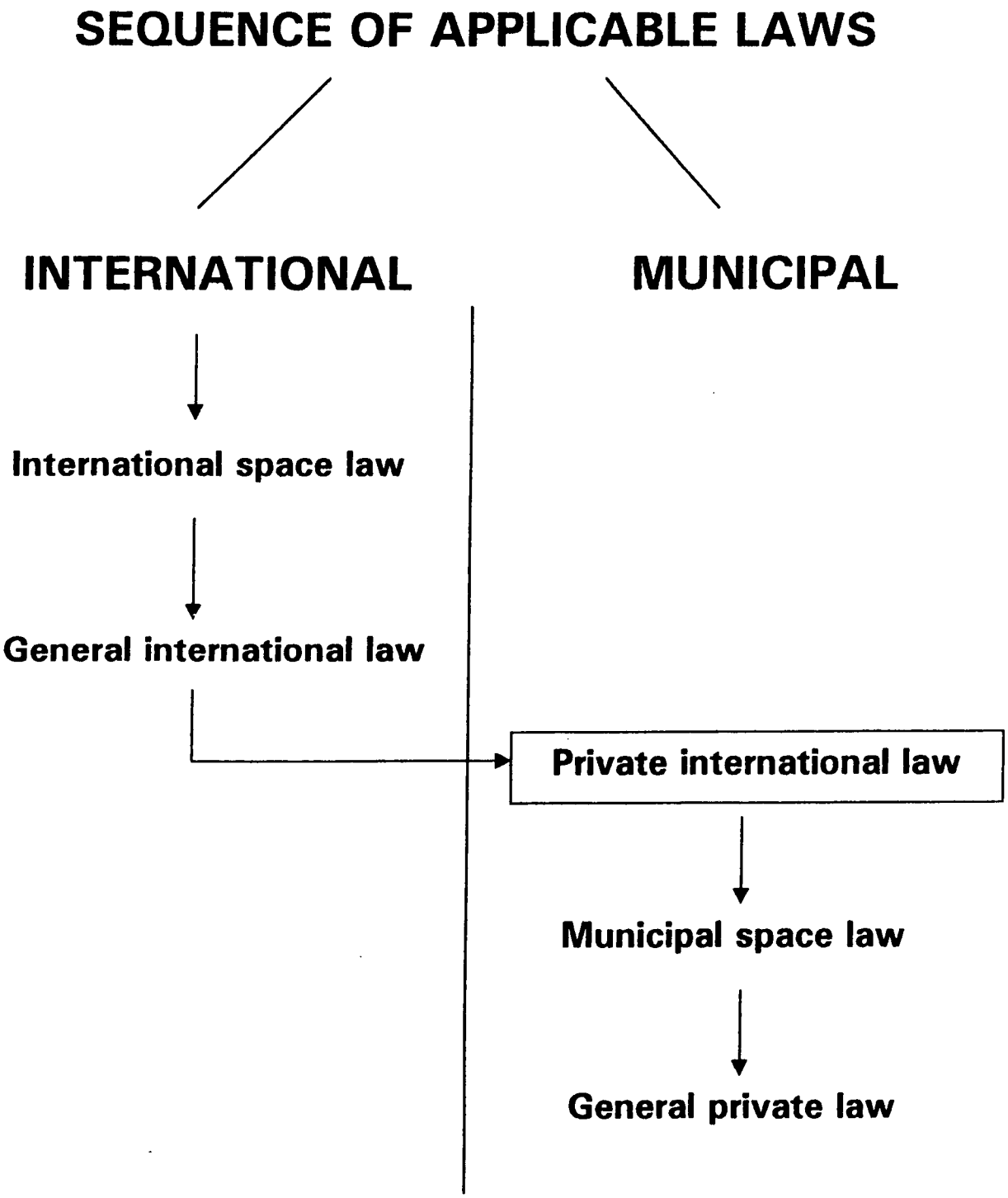
Otto Lilienthal (1848–1896) German pioneer of aviation died in a fatal accident. His famous last words: "Opfer müssen gebracht werden" (Sacrifices should be made). All revolutionary achievements of the technical civilization demanded sacrifices. Space exploration is no exception.

The regrettable accidents which occurred in the last decades of space activity caused damages in sense of L.C. Article I.: loss of life, personal injury, impairment of health, damage to property. To all these cases, however, the provisions of the Convention did not apply (Art. VII). Claims were settled in the framework of municipal law.

An analysis of international space liability is a mere theory without verification by practice. Discussions to the system of space liability are notwithstanding useful. They can contribute to clarifying unclear terms, filling gaps in the system, suggesting ideas for future law-making.



Footnotes

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21. Act XCII of 1993. Previously the Civil Code of 1959 and 1972, Section 356 defined "non-financial loss": difficulties in the participation of the injured person in social life or in his way of living lastingly and seriously"
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