State responsibility, jurisdiction and private space activities

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Article III of the Outer Space Treaty (OST) obliges states Parties to carry on activities in the exploration and use of outer space in accordance with international law. State responsibility in general international law referred to in and incorporated by this Article means responsibility for "internationally wrongful acts" towards another state. Decisive elements of international responsibility are: 1. breach of an international obligation of the responsible state, 2. breach attributable to this responsible state under international law.[1]

The second condition is an essential criterion of customary law of responsibility. Attributability to a *subject of international law* means that internationally wrong act or omission can not be attributed directly to individuals or juridical persons. They are bearers of rights and duties under domestic law. As a general rule: states are not responsible for the conduct of private entities.[2]

The system of space law has been from the very beginning of law-making state-oriented. The main principles were elaborated in a time when the economic-political structure of one of the two space-powers excluded all private activities in space research and uses of outer space. The system of responsibility of space law as a compromise between state monopoly and admissibility of private undertakings accordingly differs from corresponding rules of general international law. [3]

Article VI and VII establish a system of responsibility and liability as a *jus speciale* of this general international law – at least in respect of States Parties to the Treaty:

1. They shall bear international responsibility for national activities in outer space whether such activities are carried on by governmental agencies or by non-governmental entities,
2. For activities by international organizations responsibility shall be borne both by the Organization and the participating State;
3. For assuring that national activities are carried out in conformity with the provisions set forth in the OST;
4. Activities of non-governmental entities shall require authorization by the appropriate state;
5. A state that launches or procures the launching of an object into outer space and a State from whose territory of facility an object is launched, is internationally liable for damage caused by such object or its component parts.

Concerning responsibility for acts or omissions of state agencies, organs, employees this system corresponds to above principles of general international law. Responsibility for space activities of non-governmental private entities on the other hand constitutes an exception to the principle that internationally wrongful act is a *breach of duty or non-performance by a state* of an international rule of conduct.

The second condition of state responsibility in general international law, attributability to the state in the *lex specialis* of OST in case of wrongful conduct of non-governmental,

private entities is funded upon Article VI. Professor **F. G. von Dunk** in an excellent analysis of liability and responsibility in space law[4] pointed out, that in deviation from the general law of state responsibility states according to this Article are directly responsible for non-state activities, instead of merely due care as no difference is made by the OST 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. Due care (due diligence) responsibility namely is an exception to the principle that a state can not be held responsible for acts of private persons done in private capacity.[5]

States bear international responsibility for assuring that activities of non-governmental entities are carried out in conformity with the provisions of OST (Article VI.) "To ensure" means to take all necessary and reasonable measures to secure this conformity. Non-fulfillment of treaty obligations concerning authorization, registration, continuous supervision and control would substantiate due care responsibility of states for non-governmental space activities. Instead of this the appropriate state is responsible for the activity of non-governmental entities in outer space as if has conducted it itself.[6]

How to comply with the requirement of authorization and supervision the choice of legal means has been left to the discretion of the appropriate state. In the theory methods were suggested from minimal regulation to the rewriting of OST into domestic law.[7] The responsibility system of OST promoted considerably national space legislations. Jurisdiction retained by the state of registry means the applicability of domestic space acts. OST-regulation in this way is confirmed by national space acts incorporating international space law in general terms and sometimes listing obligations from space treaties and conventions.

The Russian Law on Space Activities e. g. in this way declares that the Russian Federation shall ensure the fulfillment of the obligations it has assumed in the field of space activity especially under the OST.[8] The main obligations are specified among the principles to be followed by Russian space activity: such as prohibition of putting into orbit around the Earth weapons of mass destruction; to test such weapons in outer space; to use space objects as means of influence upon the environment for hostile purposes, to use the Moon or other celestial bodies for military purposes, to make harmful contamination of outer space or other space activities which are prohibited by international treaties of the Russian Federation.[9] These all constitute a catalogue of obligations within the international responsibilities of the Federation as subject of international space law.

The Australian Space Activities Act states among others as its object to implement Australia's obligations under the U. N. Space Treaties (Article 3c). The text of the Treaty and Conventions are set out in Schedules Nr. 1–5.

In South Africa one of the functions of the Council for Space Affairs is to supervise and implement conventions, treaties and agreements entered into or ratified by the Government of the Republic (5./3/ c)

The United Kingdom's Outer Space Act stipulates that the Secretary of State may grant a license for an activity in outer space if it will be consistent with the obligations of the U.K. (4.2.b)

The Commercial Launch Act 1984 of the U.S. should be carried out by the Secretary "consistent with any obligation assumed by the U.S. in any treaty, convention or agreement" (Sec.21/d)

The system of international liability for damage caused by non-governmental participants of space activity inclined domestic legislations to adopt appropriate methods of legal "self-defense". The need for alleviating the burden of responsibility is one of the reasons why national legal frameworks have been established (**Kopal**).

Provisions for reimbursement of compensation paid as a consequence of international liability claims in domestic space law serve

this purpose. E.g. in the Swedish act: if the Swedish State on account of undertakings in international agreements has been liable for damage which has come about as a result of space activities carried on by persons other than the Swedish State, the person who have carried on the space activity shall reimburse the State what has been disbursed on account of the above mentioned undertakings – unless special reasons tell against this.[10]

Most of the domestic space laws have similar clauses of reimbursement: the Outer Space Act 1986 of the United Kingdom[11], the Space Affairs Act 1993 of the South African Republic[12], the Space Activities Act 1998 of Australia[13]. The Russian Law of Space Activity 1993 provides differently. It declares that the international responsibility of the state for space activity under its jurisdiction is one of the principles which should be respected in space activities. Otherwise the compensation shall be paid by the organizations and citizens responsible for exploitation of the space hardware involved. *The Russian Federation shall guarantee full compensation for direct damages inflicted as a result of accidents.*[14]

The provisions of OST unequivocally establish a system of direct responsibility of sates for private space activities. Article VI, however, do not give any directives to basic rules of them.[15] They do not clarify such problems as the dividing line between wrongful act in sense of domestic law and international space law, especially needed for the today very intensive commercial space activity.

Distinguished authors ironically stated that "vagueness of terms of the space treaties is the strength of space law as it still applies relatively well in fundamentally changed circumstances"[16]. This insufficiency to my mind do not belong to the strength of space law.

The 1982 U.N. Convention on the Law of the Sea (Montego Bay Con.) establishes a more realistic system of "Responsibility to ensure compliance and liability for damage" than contemporary space law (Art 139). The responsibility of States Parties includes the obligation to ensure that activities in the Area i.e. sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction shall be carried out in conformity with the legal regime established by the Convention – whether performed by States, state enterprises, natural or juridical persons having the nationality of States Parties or controlled by them or their nationals. The same responsibility applies to international organizations for activities in the Area.

Concerning liability for a damage caused by the failure of a State Party or international organization to carry out its responsibility under this Part of the Convention, shall entail liability. A State Party, however, shall not be liable for damage caused by a person whom it has sponsored "*if the State has taken all necessary and appropriate measures to secure effective compliance*" under the relevant provisions of the Convention (Part. XI. The Area)

Professor **V. Kopal** stated correctly that the different approaches to responsibility and liability in the OST and the Liability Convention on the one hand and the Montego Bay Convention on the other hand are due to different conditions of space and seabed activities at the time of negotiating the relevant instruments. Namely space activities were mostly privilege of states, while it was expected since the very beginning seabed activities would be performed by state enterprises or natural juridical persons possessing the nationality of States Parties or controlled effectively by them.

Today this difference of conditions does not exist anymore. Regarding the overwhelming participation of non-governmental entities in highly commercialized space activities the adaptation of space law responsibility to general international law sooner or later seems to be reasonable.

Footnotes

1. U.N. ILC Draft Articles on State Responsibility, Art 3.
2. *J. G. Starke*: Introduction to International Law, VIII. ed. London 1977, p. 323. G. *Schwarzenberger*: A Manual of International Law VI. ed. London 1976, pp. 141-142.
3. *A. Bückling*: Der Weltraumvertrag, Köln – etc. 1980. p. 41
4. *F. G. von der Dunk*: Liability versus Responsibility in International Law: Misconception or Misconstruction. IISL XXXIV. Coll. 1991 Proceedings pp. 366-367
5. U.N. ILC Draft Articles, Art 11 (2), 23
6. *A. Kerrest*: Special Need for National Legislation: the case of Launching. Proceedings of the Project 2001 – Workshop on National Space Legislation. Munich 2000, p. 25.
7. *H. Bittlinger*: Private Space Activities: Questions of International Responsibility. IISL XXX. Coll. 1987 Proceedings p. 193. V. S. *Vereschetin*: Space Activities of Non-governmental Entities, Issues of International and Domestic Law. IISL XXVI. Coll. 1983 Proceedings p. 263
8. Section VI. International Cooperation, Art. 26.2
9. Section I. General Provisions, Art. 4.2
10. Act on Space Activities (1982:963), Section 6.
11. Outer Space Act 1986, Chapter 38
12. Space Affairs Act, No. 84 of 1993. 14.(1)b
13. Space Activities Act 1998. 74. Responsible party's liability to the Commonwealth
14. Art. 4.1, Art. 30.1.2
15. *V. Kopal*: International and National Space Law. Proceedings Note 6, pp. 186-187
16. *O. M. Ribbelink – P. H. Tuinder*: A Launch is a Launch? IISL XLII. Coll. 1999 Proceedings p. 339