RESPONSIBILITY AND LIABILITY: A REQUIREMENT TO CHANGE OUR PERCEPTIONS

Reference No: IAC-07-E6-.2.01.

Author: Mr. Anubhav Sinha
Kolkata, West Bengal, India,
Luthra and Luthra Law Offices
anubhavsinha90@gmail.com

ABSTRACT

The Outer Space Treaty, 1967 in Articles VI and VII provide for liability of the state for any of its national activities in outer space whether such activities are performed by itself or by any other non-governmental agency. Further a state will bear responsibility if it launches a space object which (or any part thereof) subsequently causes any damage to any other state or juridical entity. I would argue in this paper that we need to change our perception of responsibility and liability as provided in the Outer Space Treaty and there cannot be any liability if there are launchings from a state or if damage is caused by commercial entities not involved in any national activity. My first argument would be based on the situation that is about to develop in the future. As commercialization of space and its commercial exploitation gathers momentum, the space activities will no longer be based on national needs or be directed according to national space agencies. In such a scenario it would be preferable to have an amended treaty provision whereby states are not held responsible for any commercial activity by any entity. I would argue that liability in cases where such commercial entities are involved is more a case of international private law than international public law. I would suggest that the way forward would be to define the terms "national activities" and include a provision as how

the Liability Convention would be applicable even in private disputes, under private international law, in relation to causation. My second argument would be that as commercialization of space increases, cost effective launching would become an important consideration. Keeping this in mind, I would argue, that if a stern liability issue is ever present then many of the smaller countries, who may have geographically excellent launching locations, would not be agreeable to launches from there countries. Further, I would argue, that as many of the countries do not have the required technology to monitor any subsequent failings of a space object to be launched, it is an unreasonable burden which is being thrust on them.

In this paper, hence, I would conclude that the liability and responsibility provisions as contained in the Outer Space Treaty needs to be reassessed and changed.

FULL TEXT

Overview

The aim of the paper would be to show that the law relating to liability for space related activities as provided under the space treaties need to be re-looked and our perception of them should be changed. As the basic understanding of liability (in case of space related activities) permeates from the Outer Space Treaty, I would try to show the problems which the present understanding of liability in the treaty may trigger. This paper would be divided into three basic parts. The first section would explain, in brief, the existing scheme of liability under the Outer Space Treaty. The second section would deal with the problems such a mechanism would have to endure in the changing world of space activities and the concluding section would provide a few ideas on how we may look to overcome the hurdles and change our perception of liability for space activities.

A. The Liability Regime

Basic Provisions

In the present circumstance, liability under international law for space activities can accrue from three distinct sources. The obvious one being the Liability Convention (1972), followed by he mechanism suggested under The Outer Space Treaty (1967) and finally under Public International Law, through the understanding of reparation.

The basic norms of liability were provided by the Outer Space Treaty.[1] Article VI of the convention established the principle of responsibility of individual States for national activities on outer space.[2] The provision clearly suggests that the national state is bound to exercise jurisdiction in order to ensure that all activities carried under its internationally accepted jurisdiction confirm to the principles set out in the treaty.[3] The State parties to the treaty are under an obligation to exercise jurisdiction in outer space and on celestial bodies over "national activities" carried out by "governmental agencies or by non-governmental entities."[4] The onus, hence, would be on the municipal law of a particular state to term and determine what activities within its jurisdiction would be considered as "national activities."[5] The State party

---

[1] E.R.C. van Bogaert, Aspects of Space Law, Kluwer Law and Taxation Publishers, Deventer, 1986 at 163.

[2] *Id.* Also see: M. Smirnoff, 'The Problem of Security in Outer Space in Light of the Recently Adopted International Convention on Liability in Outer Space', J.S.L., 1973 at 122. He explains that the basic norms for all space treaties were provided by the Outer Space Treaty and the drafting of the Liability Convention also followed the same procedure.

[3] Imre Anthony Csabafi, The Concept of State Jurisdiction in international Space Law, Martinus Nijhoff, 1971 at 122.

[4] Imre Anthony Csabafi, The Concept of State Jurisdiction in international Space Law, 1971 at 122. See generally: B.A.Hurwitz, State Liability For Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damage Caused by Space Objects, 1992.

[5] *Id.*

may stipulate the requirement of any kind of authorization or consent for any non-governmental organization within its jurisdiction to engage in space activities.

The second leg of the mechanism rests on Article VII of the treaty. It provides that the State which launches or procures the launching, or from whose territory or facility the space object is launched, is internationally liable for damage to another State.[6] While the provision formally established the principle of liability for damage, it did not specify the conditions under which liability is to be assessed and paid.[7] The focus of the provision is somewhat narrow[8]. The provision seems to address only instances of physical harm of the kind that would result from collisions with space objects or aircrafts, or from impacts on individuals or their property on the earth. It has been suggested that it is inadequate, as it does not cover electronic harm or possibilities as environmental harm or events producing pollution in outer space.[9] However, a joint reading of Articles VI and VII would open up the possibilities, which were later specifically included under the Liability Convention, [10] that State parties would still be responsible and liable to other States for any kind of environmental as well as electronic damage on the surface of the earth or in

---

[6] Imre Anthony Csabafi, The Concept of State Jurisdiction in international Space Law, 1971 at 123.

[7] Carl Christol, 'International Liability for Damage Caused by Space Objects', in 74 *AJIL* (1980). Also see: Carl Q. Christol, Space Law, 1991 at 215.

[8] Carl Q. Christol, Space Law, 1991 at 215.

[9] *Id.*

[10] See generally: W.F. Foster, 'The Convention on International Liability for Damage Caused by Space Objects', 10 *Canadian Y.B. Int'l L* 137, 159 n. 73 (1972); E.R.C. van Bogaert, Aspects of Space Law, 1986 pp 163-176.

It is submitted that the Liability Convention may be applied to instances where damage has been caused by space debris. See generally: Gabriella Catalano Sgrosso, 'Liability for Damage Caused by Space Debris', *XXXVIII Colloquium on the Law of Outer Space,* 78, 1995 at 82.

outer space in relation to space activities.[11]

Scope of the Liability Regime

The system of liability is limited to damage to foreign States, their nationals or property. The rule that damage to the nationals of the launching State will not be within the scope of the Treaty, is an application of a traditional rule of international law.[12] It is only the State which would be entitled to decide on the rights and duties of its nationals.[13] The aforementioned rule is a consequence of the right of sovereignty.[14]

Article VII also excludes foreign nationals from the scope of the Convention on the basis that they had been invited by the launching state for such launch or were participating in the launch.[15] It is further explained that the underlying assumption for their exclusion is that they voluntarily agreed to accept the risks associated with such launches.[16] Therefore, what emerges is that damages are an appropriate remedy in cases where the injured State party or its national were not associated or did not consent to some space activity which resulted in the specific injury.

B. Problems with the Existing Framework

The problems with the existing structures may be manifold. In this paper, I would, however, draw attention to two critical areas.

National Activities

The entire focus of liability towards State parties comes from the uninterrupted idea that all space

[11] It should further be noted that the concept of launching state would also be included within the responsibilities accorded under Article VI.

[12] E.R.C. van Bogaert, Aspects of Space Law, 1986 at 164.

[13] B. Cheng, 'Liability for Spacecraft', *Current Legal Problems,* 1970 at 101.

[14] L. Oppenheim, ed. H. Lauterpacht, International Law, Vol. 1, 1947 at 254. See generally: Malcolm Shaw, International Law, 4th ed., 1997.

[15] B. Cheng, 'Liability for Spacecraft', *Current Legal Problems,* 1970 at 101.

[16] E.R.C. van Bogaert, Aspects of Space Law, 1986 at 164.

activities are linked with the sovereign acts of a State. It is true, at the time when the treaty provisions were discussed and came about, the activities were so. However, the situation has gradually changed. The future promises even more startling changes. Private enterprise has taken over most of the hitherto works of the States. Furthermore, space activities itself have undergone a sea of change. Commercial exploitation of the outer space resources has opened a channel which perhaps was not conceived at the time of framing the rules.

As commercialization of space and its commercial exploitation gathers momentum, the space activities will no longer be based on national needs or be directed according to national space agencies. In such a scenario it would be preferable to have an amended treaty provision whereby States are not held responsible for any commercial activity by any entity.

Injuries caused by such private parties, in pursuit of commercial gain, to other parties or property in some other country cannot be understood to be matters relating to public international law. Most of the private entities may have state approval for a particular space activity, however, may not be under any kind of control of the state machinery. In a world which has seen rapid liberalization of the economy, it would be draconian to suggest that there should be complete control of the state over space activities of a private entity. This would also the cloud the space industry from growing at a much needed rapid pace.

The ideal solution would perhaps lie in limiting and defining the scope of the words "national activity" in the Outer Space Treaty as to those acts which are directly involved with the government or government sponsored agency of a State. All acts of non-governmental organizations and even commercial acts of government entities should be excluded from the understanding. The remedy would perhaps lie in the realms of private international law. In case of damage being caused proceedings should be based on civil law and as per private international law principles.

Launching State Liability

As discussed above liability accrues under the Outer Space Treaty for any damage caused by a space object to any

State party involved in the launching of the particular space object. This is another fallacy we need to look into. There are three aspects to this problem.

Actual launching state:

The launching states, in many a case, are small countries or nations who have nothing to do with the space object concerned. As commercialization of the outer space spreads private entities would be looking for easier launching sites and profitable launching facilities. In such a scenario, launching facilities itself would develop to be a huge industry. To facilitate such a development it is imperative that strict codes of liability are removed from the treaty provisions.

The vestiges of such understanding can be found in the era where there were few space faring nations who developed their own space launching facilities. That era has long gone. As commercialization of space increases, cost effective launching would become an important consideration. However, if a stern liability issue is ever present then many of the smaller countries, who may have geographically excellent launching locations, would not be agreeable to launches from their countries. Further, as many of the countries do not have the required technology to monitor any subsequent failings of a space object to be launched, it is an unreasonable burden which is being thrust on them.

More developed countries too would be in a dilemma to provide their launching facilities to other entities unless elaborate contractual arrangements are processed and more bureaucratic and diplomatic hurdles eased. It would be far simpler if launching states were not made liable and liability was restricted to the owners of the space object.

Part Builders:

A corollary problem would also emerge from the understanding that States which procure the launching of a space object would also be liable for any damage caused by such space object. This would invite trouble where parts of the space object are being made constructed by different entities and also in case of agencies which are set up to facilitate the launching without having any other technical input into the space object. In all such situations there may be a possibility that the individual manufacturer or the agency involved may be at fault. However, prudence

would suggest that it would be far better for the private parties to engage themselves risk management and apportionment of damages than by going through any mechanism of State liability under public international law.

Launch from High Seas:

A combination of the above two issues would be at display in cases of launches from the High Seas. A plethora of issues from state control to ownership of the launching site/vehicle would cloud our judgement. It also show cases the problem the present understanding and perception of liability provides us with. In order to find the party liable we would not only have to go to the owner of the space object but into all deliberative questions of public international law relation to state jurisdiction and liability in the High Seas among others. In short, instead of a easier process we would be winding around a mountain of legal queries.

The Free Rider

The primary basis of liability, as discussed above, is that damages are an appropriate remedy in cases where the injured State party or its national were not associated or did not consent to some space activity which resulted in the specific injury. When we see the framework of the space treaties, especially the Outer Space Treaty and the Moon Treaty, there appears to be a strange contradiction. Whereas, as provided, the outer space resources has to be shared or used for the betterment of the entire world (as per the understanding of the Province of Mankind and Common Heritage of Mankind principles) the risks, forgetting the costs, of bringing such benefits would have to be borne by the State which attempts to bring such benefits. This is also an understanding of an era where private commercial enterprise was not in vogue in case of space activities. The perception of risk allocation within the State parties would run counter to the application of the Province of Mankind and Common Heritage of Mankind principles. To prevent the erosion of the aforementioned principles it is perhaps beneficial to shift the understanding liability to the private sphere than including it in realms of public international law.

C. Solutions and a New Regime

The solution to the aforementioned inadequacies can come through various means. I, however, feel that the rules and understanding of liability has become too embedded in our understanding of the law to mandate a wholesome overhaul.

As suggested above, the definition of "national activities" in outer space needs to be curtailed to include direct State activities like military usage etc. and the prescription against launching states for damage caused by space object should be removed. Liability should flow towards the owner of a specific space object.

Another feature of a new perception of liability will be the position of private enterprises. In case of private enterprises, the rules regarding private international law rather than public international law would need to be used.

A new legal regime would need to be established whereby the member States of the Liability Convention would have to legislate and incorporate the provisions of the Liability Convention within their domestic laws.[17] Further to that, the principles private international law would be applied in cases of disputes between private entities and any injured person.

[17] This will be required in dualist countries only.