IAC-10.E7.1.14

RE-THINKING RESPONSIBILITY IN THE LAW OF OUTER SPACE.

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Introduction

International Law, as many other branches of social sciences, is essentially dynamic. Just as the realities it intends to govern, it is constantly changing. New areas are appearing and, in general - with very few exceptions such as the law of outer space- law is following, rather than preceding, technological developments.

This paper discusses the need of re-thinking international responsibility and liability in the field of space law on the basis of the project on "Responsibility of International Organisations" United Nations International Law Commission (ILC).presently being developed in the framework of the

Having in mind that the above-mentioned rules of the ILC are not quite as advanced as those embodied in the 1972 Convention on International Liability for Damage caused by Space Objects, it may be valid to analyse whether the incorporation of these rules and their future application should be reviewed.

In brief, is it nowadays necessary to update the rules on responsibility and liability in the field of Space Law?

International Law, as many other branches of social sciences, is essentially dynamic. Just as the realities it intends to govern, it is constantly changing.

To a large extent, foreseeing social problems and finding solutions or, at least, realistic proposals, is today a great concern to lawyers and politicians.

In this sense, Space law is an exception which frequently pre-empted technological developments providing legal answers to potential future problems.[ii]

It should be noted that, by the time man set foot on the moon, the international community had already developed International Principles currently embodied in the basic structure of Space law.

Therefore, it would nowadays be possible to turn into problems hindering the dialogue between Space Law and traditional international law.

This hypothesis should be confirmed by this paper when discussing the international responsibility of international organizations and the legal standing of its member States. The United Nations International Law Commission (hereinafter the ILC), in fact, is currently working on a project on the Responsibility of International Organizations and internationally wrongful acts.

These Draft Articles lay down the regime for responsibility of International Organizations and somehow overlaps with the most relevant laws related to international responsibility for outer space activities.

For those reasons, an in order to improve the dialogue between both regimes, the first step is to verify whether such a dialogue is realistic enough.. That is to say, if these two systems are subject to comparison or assimilation.

This appears opportune since the ILC Articles, as well as those on state responsibility adopted by UNGA Resolution 56/83, deal with responsibility for wrongful acts whereas, in the field of space activities the issue concerns acts prohibited by international law. In fact, as the object of analysis is the relationship between international organizations (hereinafter the "IO") and their member States, the constituent act originating responsibility (wrongful in itself or derived from a wrongful act) does not seem to be a factor precluding comparison.

Consequently, the overlapping of the two regimes should be looked into, namely the ILC Articles and the Liability Convention together with the 1967 Space Treaty. Do they differ sharply from each other? Does the Liability Convention and or the Space Treaty need to be adapted to the ILC Draft? Which of them should prevail? Should it not be worthwhile to revisit the space rules on responsibility?

To this end, the regime of IOs shall be addressed first in the framework of the ILC Draft. Then, we will discuss the currently enforced legislation in the field of the space activities and, finally, some conclusions will be drawn in these issues.

The ILC Articles on International responsibility of IO. Legal standing of the State members.

During its 52nd period of sessions, the ILC included the topic: "Responsibility of

International Organizations" on its agenda as a long-term working issue.

The General Assembly, by means of Resolution 56/82, 12 December, 2001, requested the Commission to start working on that subject.

During its 54th Session the Commission included the subject on its programme and appointed Giorgio Gaja as Special Rapporteur.

The Special Rapporteur devoted the last part of his fourth report to the 58th Session of the ILC (2006) to address the subject in question, namely the responsibility of State members of an IO.

In his report, special attention was given to Article 29 which provides the following:

"Responsibility of a State member of an international organization for the internationally wrongful act of that organization.

1. Without prejudice to articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) It has accepted responsibility for that act; or

(b) It has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary"[iii].

Pursuant to Article 29 the general principle does not cover the international responsibility of the State members, except for the cases where the State member had previously accepted the responsibility for an internationally wrongful act or when it had led the injured party to rely on its responsibility.

Even if this were the case, the responsibility of State members would be subsidiary in nature.

The ILC also took into account two relevant legal precedents, the Westland Helicopters[iv] and the Tin Council Association cases[v].

The first had its origins in a request for arbitration made by Westland Helicopters Ltd, against the Arab Organization for Industrialization (AOI) and the four State members of that organization (Saudi Arabia, Egypt, Qatar and the United Arab Emirates).

The competence of the arbitral tribunal, according to the Chamber of International Commerce (ICC), was grounded on a contract between Westland Helicopters and the Arab Organization for Industrialization.

The arbitral tribunal examined, in an interim award, the issue of its own competence and the liability of the four State members concerning acts of the organization.

In this interim award, the arbitral tribunal stressed the following points: "*...A widespread theory, deriving moreover from Roman law... excludes cumulative liability of a legal person and of the individuals which constitute it, these latter being party to none of the legal relations of the legal person. This notion, which could be deemed "strict", cannot however be applied in the present case*". [vi]

However, given the particular features of the organization, and due to the absolute interdependence of the state members' decisions, the tribunal concluded that:

"*In default by the four States of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability. This rule flows from general principles of law and from good faith*"[vii].

"*One could equally compare the AOI to a cooperative which, in the absence of contrary provisions in existing legislation or within the articles, would leave subsisting the liability of the members*"[viii].

Even though the tribunal declared itself competent to hear in the case against the Organization and the State members, the tribunal award was later to be set aside by the Court of Justice of Geneva at the request of Egypt[ix].

The second case that caused and in-depth discussion of the responsibility member States followed the failure of the International Tin Council (ITC) to perform its obligations under several contracts.

In one of the cases before the High Court, the plaintiffs sued the United Kingdom Department of Trade and Industry, 22 foreign States and the European Economic Community (EEC).

In relation to the above mentioned case, Justice Staughton put forward the following: "*...It seems to me that the view of Parliament [...] was that in international law legal personality necessarily meant that the members of an organization were not liable for its obligations*"[x]

Regarding the same legal precedent, Lord Kerr also held the view that State members should not be bound by the obligations entered into by the IO. He observed that: "*he could not find any basis for concluding that it*

has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable – let alone jointly and severally"[xi].

Lord Gibson concurred and remarked: "*where the contract has been made by an organization as a separate legal personality, then, in his view, international law would not impose such liability upon the members, simply by reason of their membership, unless upon a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability has been assumed by the members*"[xii]

In addition to the above mentioned cases, the same conclusion was reached by the European Court of Human Rights in the case *Behrami and Behrami against France and Saramati against France, Germany, and Norway*[xiii], concerning the international responsibility incurred by the United Nations regarding Peace Keeping Operations.

In this case, the tribunal concluded that the State members (suppliers of military forces) were not to be held liable because the acts performed by them were under the control of the IO.

In a case closer to Space law, the Court of Strasbourg rejected an application against the Federal Republic of Germany where the European Space Agency (hereinafter ESA) had been involved.

In *Waite and Kennedy vs. Germany*[xiv] the plaintiff, -who worked for ESA- filed a complaint against Germany due to a denial of access to jurisdiction. For acting in such a manner, the local labour court considered that ESA had immunity of jurisdiction which was a stumbling block to court proceedings.

The tribunal concluded that: "*...in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation*"[xv]

Solutions in the field of Space law.

In the field of Space Law, international responsibility was defined by the 1967 Space Treaty, in Articles VI and VII , and in the 1972 Liability Convention, Article XXII.

The legal standing of State members of an IO according to Article VI of the Space Treaty is as follows: "*...When activities are carried on in outer space, 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.*"

Likewise, Article XXII of the Liability Convention establishes the following: "*...3. If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that:*

(a) Any claim for compensation in respect of such damage shall be first presented to the organization;

(b) Only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.

4. Any claim, pursuant to the provisions of this Convention, for compensation in respect of damage caused to an organization which has made a declaration in accordance with paragraph 1 of this article shall be presented

by a State member of the organization which is a State Party to this Convention"

The most interesting feature of Article XXII of the Liability Convention is that it explains the principle addressed in Article VI of the Space Treaty and stresses the fact that States members of an IO shall be jointly and severally liable for the damages incurred by an IO.

Paragraph 3 of that Article establishes provides that the IO shall be liable for damage in the first place. And only when the IO fails to compensate, the liability of the State members of the IO and the provisions of the Liability Convention may be invoked.

As a consequence, it could be understood that the responsibility of the States members of an IO engaged in space activities is subsidiary.

It should be had in mind, however, that Article XXII of the Liability Convention has been harshly criticised by a number of specialists of renown.

Among others, Williams quotes Cheng, who holds the opinion that to treat an IO party to a treaty in equal terms as if it were a State member when some of its members were not a party to that treaty would be the same as to allow a group of people to travel with the ticket of only one person[xvi].

ñThe International Law Association at its New Delhi Conference in 2002 [xvii]reached the conclusion that no amendments should be introduced to its current text and that concrete suggestions consisted in encouraging States to accept the binding nature of the Claims Commission decisions and awards, in accordance with Article XIX, paragraph 2 of the Convention and following the proposal made by the Austrian delegation to the Legal Subcommittee of COPUOS in 1998.

Conclusions and final questions.

According to the foregoing comments, two solutions could in fact coexist regarding the international responsibility of IOs.

The peculiarities regarding this topic might be that general international law and the International Law of Outer Space are leading to opposite solutions.

On the one hand, the Space legislation establishes a subsidiary regime of liability where the State members of an IO that are also members to the Liability Convention are held liable against third parties when the IO failed to compensate said third party.

On the other hand, the general legislation does not entail the liability of the State members of an IO except for the exceptional case where the State members accept this responsibility or if this could be understood as a consequence of their behaviour.

As a result, should the regime of international responsibility established by the Liability Convention be revised?

The legal standing of the State Members of an I.O. raises a conflict between general international law and space law, which opens the door for an interesting debate.

It is important to reflect upon this issue as cases of this nature may arise in the near future. For example, when and I.O, such as the European Space Agency were to be involved in wrongful acts, both regimes could be considered to find solutions. Yet, at the

same time, the answers may differ, and even be in conflict.

On the one hand, in the ILC project, State Members are not held responsible. Section 29 of the project is very clear on this point based on the precedents of the International Tin Council Asoc. and Westland Helicopters. In both cases, the claimants filed a complaint against the IOs and the State Members, whereby the State Members were not held responsible for failing to comply with the IOs obligations.

Article 29 provides that : "a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) It has accepted responsibility for that act; or

(b) It has led the injured party to rely on its responsibility

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary"

On the other hand, Space law establishes a system of subsidiary responsibility of Members States. This system is derived from Articles VI and VII of the Space Treaty and, in particular, from Article XXII of the Liability Convention.

In light of this dilemma, there are arguments against and for the amendment of the regime concerning responsibility of States members of an International Organization in the field of Space law, as follows:

Against the amendment:

a) Space law applies to a given field, namely, outer space. Therefore, it will be setting aside any legislation of a general nature. For this reason the clash of both legislations would have no relevant legal consequences.

b) Space law regulates a field –outer space- in clear departure from regulations applicable to activities on Earth. This is why it calls for a special regime, different from the general rules applicable to international responsibility.

c) Since space activities entail risk, it is recommended that State members be held subsidiarily liable when the IO fails to compensate. In this manner, the rights of the victims to an integral compensation are protected.

d) Given the complexity underlying the revision of an international treaty, such as the Liability Convention -which has a good number number of ratifications- a revision of this regime does not seem advisable.

In support of the amendment:

a) Space law, in the field of responsibility, should be adapted to the ILC Project in order to maintain certain coherence within the current international regime.

b) The regime established by Space law does not respect the objective personality of the IO.

c) Article XXII of the Liability Convention leaves a gap regarding the State members of the IO which are not parties to the Liability Convention.

One final remark. The central aim of this paper is to underline the absence of dialogue and the legal contradiction introduced by the rules of international responsibility of IO. Hopefully, these lines may be seen as a modest invitation to reflection.

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[i] The author gives special thanks to Professor Dr Maureen Williams for her cooperation in the preparation of this paper regarding material of difficult access and for her enriching opinions and ideas. Any mistakes contained herein are of exclusive responsibility of the author. The author is grateful to the University of Belgrano, Buenos Aires, Argentina, for the support provided to travel to Prague for this International Congress.

[ii] Scholars agree on this. See CHENG "Studies in International Space Law". Clarendon Press. Oxford. 1998.

[iii] Gaja, Giorgio. *Fourth report on responsibility of International organizations*. ILC, 58th session. Doc. A/CN.4/564/Add.2. 20/04/06

[iv] Interim award regarding jurisdiction in the arbitration between Westland Helicopters LTD and The Arab Organization for industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab British Helicopter Company. ICC. Case 3879. 5th March, 1984.

[v] *JH Rayner (Mincing Lane) LTD v. Department of Trade and industry and Others.*

[vi] op cit 2. Page 23

[vii] Ibid. Page 26

[viii] Ibid. page 27.

[ix] Judgment of 27th October 1987. International Law Reports, vol. 80, page 622.

[x] Judgment of 24 June 1987, International Law Reports, vol. 77, page 88.

[xi] Ibid. Page 109

[xii] Ibid. Page 172.

[xiii] Agim Behrami and Bekir Behrami vs France, Ruzhdi Saramati vs France, Germany and Norway. Judgment of 2 May, 2007. European Court of Human Rights, Grand Chamber.

[xiv] Waite and Kennedy vs. Germany. Judgment of 18 February, 1999. European Court of Human Rights.

[xv] Ibid. Page 16.

[xvi] WIILIAMS, S.M. *Derecho Internacional Contemporáneo*. Abeledo Perrot. Buenos Aires. 1990. Page 37.

[xvii] WILLIAMS, S.M. *Final report on the review of space law treaties in view of commercial space activities – concrete proposals*. ILA. Space Law Committee. New Delhi Conference (2002).