AN ANALYSIS TO DETERMINE FAULT UNDER THE LIABILITY CONVENTION 1972

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ABSTRACT

With the development in space forum, the determination of various aspects has been quite essential. Damages and injuries caused in the Outer Space has become one of the major problems. The Liability Convention of 1972 deals with the determination of liability in the outer space. The paper will assess the scope of fault liability under Article III of Liability Convention 1972 in terms of determining and interpreting it under fault liability and risk liability for collision with space debris.

The Convention, among other things, calls for evidence of state "fault" before responsibility may be incurred, but it defines ambiguously and does not prescribe a standard of care for those engaging in extraterrestrial operations. The extent of 'fault' under this convention and the interpretation of it in the international customary laws is the subject matter of this paper. It also discusses the scope of state's responsibility and state's liability for a collision in the outer space.

It is contended that the criteria for determining liability under Article III of the Liability Convention, 1972 does not take International customary laws with respect to state responsibility.

The Convention recognizes a need for revised international provisions that are solely based on the fault regime and development of provisions farther from soft laws. The liability Convention of 1972 also fails to examine various other aspects of space accidents and incidents.

Keywords: Liability Convention 1972, Space Collision, Fault, Liability, State responsibility, International customary laws.

INTRODUCTION

The outer space forum presents various opportunities for humankind, but hazardous risks are involved with these opportunities. The Outer Space Treaty is the principal guide for dealing with outer space incidents. The scope of liability in the Outer Space Treaty has been expanded by the Convention on International Liability for Damage caused by Space objects[i], which lays down conditions and provisions for the consideration of liability in terms of damages caused by space objects. The problems with the accidents in the space forum are caused by celestial objects or space debris, which is an artificial particle in outer space. Space debris is a growing concern, as even tiny particles can be very destructive in a collision due to their high orbital speed.[ii] For the damages caused by space debris and space objects, the Liability Convention of 1972 governs the scope and quantum of liability of the same.

Article III Liability Convention 1972:

In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible[iii]

The provisions provided under Article III of the Liability Convention, 1972 creates conceptual and terminological confusion with reference to defining 'fault' for the collision of space debris. Article III applies to a situation where the fault of the launching state causes damage. The provisions of the Convention fail to determine the terms of causation in relation to injuries caused. The fault must be proven with a string of causation to determine whether the state must be responsible.

While the International Court of Justice has interpreted 'fault' as a strict liability to determine state responsibility, the conception of intention is essential.

It is contended that the criteria for determining liability under Article III of the Liability Convention, 1972 does not take International customary laws with respect to state responsibility.

RESEARCH METHODOLOGY

The paper helps determine the scope of causation for defining 'fault'. It focuses on interpreting the extent of liability in such cases. The paper draws an analysis with the help of provisions under the Liability Convention, 1972 and the Vienna Convention on the law of treaties[iv]. And also examines various judgements by the International Court of Justice in reference to the interpretation of 'fault'.

The author seeks to adopt doctrinal research to understand the depth of the problem. The research aims to analyze the primary qualitative data regarding the International Customary laws, articles and existing research in space laws. The author obtained information from secondary sources and reputable databases, including the official website of International Conventions, treaties and agreements, Westlaw for case laws, JStore, Heine Online, Springer and other well-known databases of journal articles.

THE CURRENT STANCE ON LIABILITY

Liability can be referred to as a legal obligation imposed upon one when an injury or damage is caused for which someone is held liable. Liability in the international aspect can be viewed as a hazardous activity causing massive damage and injury.

The Outer Space Treaty is the guiding factor for all outer space-related incidents. The scope of liability under the Outer Space Treaty is narrow; the scope has been broadened in the Liability Convention of 1972. Liability Convention of 1972 provides merely a recommendary provisions and not mandatory provisions.

Initially, the Outer Space Treaty's liability provisions mainly depended on International Customary laws. According to Article III of the Outer Space Treaty, "*States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.*"

With the introduction of the Liability Convention in 1972, the scope of liability has been broadened, and the quantum of liability or compensation has been provided for in the convention.

In terms of liability in the international forum can be observed in two aspects - fault-based liability and no-fault liability. No-fault liability is of two types that are Strict liability and Absolute liability. In the international forum, only strict liability can be examined as it denotes a cause-and-effect relationship where the only relevant factors are causation and damage, and the fault is not contested.[v] Under contemporary appreciations of state responsibility, fault does not reside in the regime of state responsibility for wrongful acts per se but, instead, at the level of the primary rules of international law, which are the substantive obligations incumbent upon states whose breach attracts the secondary rules of state responsibility[vi].

The International Court of Justice is one of the main principle organs of the United Nations that gives out judgements for all international disputes. The decisions given out by the ICJ to determine liability in the international forum will be considered as precedence and contribute to the International Customary law.

The *Cosmos 954*[vii] incident was the first instance in space exploration where one of the sovereign nations made a claim against another for damages caused by space objects. This case was one of the first to decide whether the laws of the claimant state or the launching state should govern the nature of the damage. Here the concept of international customary laws played a vital role, as there were no standard provisions dealing with liability in the international forum.

The trial Smelter case was used as a precedent in the Cosmos 954 case. The *Trial Smelter case*[viii] is an international landmark case dealing with Sulphur dioxide pollution. It is an environmental case that sets precedence in terms of the quantum of liability in relation to the quantum of injury caused. The *Corfu Channel* decision establishes a general due diligence obligation in relation to a state's territory, there are more specific primary rules requiring due diligence obligations tailored to particular situations[ix].

SPACE COLLISION UNDER LIABILITY CONVENTION 1972

Man-made satellites are space objects, representing one of the most common uses of outer space. There are over 1,400 satellites currently in orbit around the earth. Satellites are primarily used for television broadcasting, earth observation and remote-sensing imagery, telecommunications, weather satellites, navigation, and global positioning systems[x].

Space collision is a generic term that has not been defined but can be understood as a collision between two or more space objects. Space debris contribute to the maximum of space collisions, natural or artificial.

The Convention on International Liability for Damage caused by Space objects deals with recognizing the need to elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention of a complete and equitable measure of compensation to victims of such damage, believing that the establishment of such rules and procedures will contribute to the strengthening of international co-operation in the field of the exploration and use of outer space for peaceful purposes..[xi]

The Liability Convention requires that claims be made by one state against another state. The convention was established as an addition to any future or current national legislation compensating those affected by space activities. In contrast to other national legal systems, where one person or entity may file a claim against another person or entity, the Liability Convention only permits claims to be brought at the state level. Accordingly, if someone is hurt by a space object and seeks monetary compensation under the Liability Convention, they must arrange for their country to file a claim against the nation that launched the space item that caused the harm.

ANALYSIS OF FAULT

The provisions of the Convention particularly Article III discusses the term 'fault' with respect to damages caused by the launching state to another. In the international space forum, fault with respect to the state responsibility is guided by Article III, which is narrow in scope. The correct interpretation of fault for the purposes of the Liability Convention is unclear[xii]. Therefore, it is necessary to have recourse to the relevant rules on treaty interpretation as outlined in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[xiii].

According to the provisions provided by the VCLT, the concept of International customary laws must be used for further interpretation. The interpretation of fault for determining liability will either be in accordance with Article III or according to the international customary law.

Therefore, with little clarity as to the meaning of fault coming from customary international law, as well as the fact that the ordinary meaning of fault is ambiguous under the Liability Convention, space law, as a special regime of international law, does not appear to contain a solution to the current problem of interpretation.[xiv]

The outer space does not have a lot of legislations and provisions for each and every aspect. It is a growing field of law that is required to adapt from the other fields of international laws. The analysis of fault is required to have a criterion of causation which is impossible to prove. Causation is required to show the existence of intention; fault has been interpreted in terms of other international precedence set with regards to liability.

Liability can be observed in various aspects that provided an opportunity for the international customary laws to interpret the same. In various cases such as *Cosmos 954 case*[xv], *Gabjikovo Nagymaros project case*[xvi], *Trial Smelter case*[xvii], *Corfu Channel Case*[xviii], *Barcelona Traction case*[xix], are few cases where the international customary standards have either been applied or have been set.

In terms of determining fault under the fault liability and risk liability, the courts have interpreted 'fault' in terms of strict liability. The courts in terms of establishing liability have chosen strict liability irrespective of absence of causation for the damages caused. The courts fail to examine the aspect of risk-based liability in terms with determining 'fault'. Risk based liability would be a situation where there was no direct fault involved but due to the risks involved to party would become liable for putting the other at risk.

STATE'S RESPONSIBILITY WITH RESPECT TO LIABILITY

State responsibility is an act or omission that is wrongful in nature and that breaches the international obligation of a state. A state may be held responsible for the same. State responsibility and state liability go hand in hand, where with a breach of responsibility, the liability is imposed.

According to Rapporteur Roberto Ago, the term 'responsibility' in the context of the ILC's Articles on State Responsibility denotes: "The principles which govern the responsibility of States for internationally wrongful acts [, the Articles on State Responsibility, maintain] a strict

distinction between this … and the task of defining the rules that place obligations on States, the violation of which may generate responsibility"[xx].

International laws act as the primary rules that are required to be followed by the state, imposing a obligation on the state to carry out the same. The nexus between the state responsibility and state liability arises regarding the distinction between acts, which are actions or omissions encompassing the element of breach, and activities, where the former emerge as a consequence of the latter and could result in wrongful conduct, despite the activity itself not being wrongful or prohibited[xxi]

There exists a twin operation regime between the state responsibility and state liability, both are contemporary to one another. The state will be held responsible only when the wrongful act has been committed. The wrongful act need to have an element of causation to bring it under the scope of 'fault' of Article III of Liability Convention, 1972. To determine causation, the need of due diligence becomes extremely essential. The articulation or content of the primary rule establishing a due diligence obligation will determine the 'relevance of fault [or the obligation's] relative strictness' or its fault standard[xxii]

CONCLUSION

The Convention and Treaty with respect to Liability have been unclear and ambiguous in determining the extent of the same. The lack of clarity in Article III of the Liability Convention forces one to interpret it in terms of the existing international customs and standards. The international customary laws play a vital role in interpretation of liability.

The current stance of the Liability Convention is weak and arguably, the principal primary rule that contains a fault standard is due diligence[xxiii].

Inclusion of soft law for determining 'fault' is required to be changed as it creates confusion and makes the burden of international laws higher. The space forum being an underdeveloped field is required to determine various fault standards rather than being dependent on the soft laws.

ENDNOTES

[i] Convention on International Liability for Damage Caused by Space Objects (Liability Convention) 1972, 961 UNTS 187.

[ii] Shenyan Chen, The Space Debris Problem, Vol. 35, No. 4, Asian Perspective, 537-558 (2011).

[iii] Supra 1.

[iv] Vienna Convention on the law of treaties (1969)

[v] Bedjaoui, *Responsibility for States: Fault and Strict Liability*, R. Bernhardt *et al.* (eds), Encyclopedia of Public International Law (1987), vol. 10, at 361.

[vi] Joel A Dennerley, *State Liability for Space Object Collisions: The Proper Interpretation of 'Fault' for the Purposes of International Space Law*, European Journal of International Law, Volume 29, Issue 1, February 2018, Pages 281–301.

[vii] U.S.S.R v. Canada (Cosmos 954).

[viii] United States v. Canada (Trial Smelter case)

[ix] Albania v. United Kingdom (Corfu Channel case)

[x] Bryce Space and Technology, Satellite Industry Association, State of the Satellite Industry Report, June 2017, at 8.

[xi] Supra 1, Preamble.

[xii] Supra 6.

[xiii] Vienna Convention on the Law of Treaties (VCLT)

[xiv] Supra 6.

[xv] Supra 7.

[xvi] Hungary v. Slovakia (Gabjikovo Nagymaros project case)

[xvii] Supra 8.

[xviii] Supra 9

[xix] Belgium v. Spain (Barcelona traction case)

[xx] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), UN Doc. A/RES/56/83, 28 January 2002.

[xxi] 'Chapter V: Liability and Responsibility: Duality of Regimes', 2(1) *ILC Yearbook* (2000) 121, at 121, para. 27

[xxii] I. Brownlie, *System of the Law of Nations: State Responsibility*, part 1 (1983), at 44.

[xxiii] Supra 6.