Responsibility and Liability of the EU under International Air and Space Law

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RESPONSIBILITY AND LIABILITY OF THE EU UNDER INTERNATIONAL AIR AND SPACE LAW

1. *The involvement of the EU with space activities*

Since the 1990s, the EU has established and implemented European space programmes, including the Galileo and Copernicus programmes. The Galileo programme is carried out under EU Regulation 1285/2013 which was adopted pursuant to art. 172 of the Treaty on the Functioning of the European Union (TFEU). The first four satellites were launched in 2011 and 2012 on behalf ESA from the European spaceport in Kourou, French Guyana. Other satellites are being launched on behalf of the Union using the same facilities.

The Copernicus programme has been drawn up under EU Regulation 377/2014[1]. Fifteen observation missions will be launched into outer space to provide information in the fields of environment and security. The first satellite was launched in April 2014 on behalf of ESA. The second was launched from the same location in June 2015, and the third was launched from Plesetsk, Russia in February 2016.

The next sections will identify the development of international space law, and discuss the concepts of responsibility and liability of, in particular, international organisations under international law. Special attention will be paid to the position of international organisations, and the EU, under international space law, and other branches of international law, especially in terms of responsibility and liability. The last section

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[1] It was adopted pursuant to art. 189 of the TFEU.

contains conclusions.

2. *Responsibility and liability of international organisations under general International Law*

International organisations can be held responsible for their acts and liable for the damage caused by these acts under international law. This section will explain the state of international law by discussing cases in which such organisations can be held responsible and liable.

Under the draft Articles of the International Law Commission (ILC) on the *Responsibility of International Organizations* (ILC Draft Articles)[2], such organisations can be held responsible for an «internationally wrongful act» if that act is attributable to that organisation under international law, and constitutes a breach of an international obligation of that organization[3]. An international organisation breaches an international obligation when an act of that organisation «is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned»[4]. In such instances, the responsible international organisation is liable for the consequences of that act and must make full reparation for the injury including any damage, whether material or moral, caused by its internationally wrongful act[5]. Under the ILC Draft Articles a Member State may be held responsible for the wrongful act of an international organisation.

Thus, from an institutional and operational perspective the State(s) must be closely involved with the act carried out by the international organization[6]. The analogy between States and international organisations is also reflected in the Draft art. 4 pursuant to which an act of an organ, or official, of an international organisation shall be considered an act of the organisation under international law, «whatever position the organ, official or person holds in the structure of the organisation.» This article can be seen as a corollary of the provision that an organisation cannot justify its non-compliance with international rules by referring to its internal rules[7] – and, hence, neither rules pertaining to its internal structures or division of competencies among institutions forming the international organisation.

Because the EU meets the conditions of an international organisation under the ILC Draft Articles, it is bound by international law, consequent upon which it cannot defend itself by referring to internal rules justifying its conduct or to its institutions on whose

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[2] Defined as «an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality»; *see*, art. 2, lett. (a), at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf.

[3] See, art. 3 in conjunction with art. 4.

[4] See, art. 10.

[5] See, art. 31.

[6] See, arts. 5, 25, 26, 27 and 29.

[7] See, art. 27 of the Vienna Convention on the Law of Treaties (1969): art. 27 Internal law and observance of treaties: «A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46». As to art. 46 which may impact the position of the EU as to which see the discussion in section 4.3 regarding the EU's position in the UNCLOS convention: 1. «A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.»

behalf it acts. Thus, it cannot be excluded that damage caused by satellites owned by the EU constitutes a breach of an international obligation, but this conclusion must be underpinned by the facts of the case and the governing regime which is the specific regime of international space law which will be further discussed in the next section.

3. *Space law as a new chapter of International Law*

3.1. *The coming into being of International space law*

The law governing outer space has been established by the global community assembled in the United Nations. The beginning of this law making process on the use and exploration of outer space started with the Declaration of Legal Principles in 1963 in which UN States, «inspired by the great prospects opening up before mankind as a result of man's entry into outer spaces», solemnly confirmed nine principles which formed the principal provisions and objectives of the documents on outer space law to which reference is made below[8].

The Member States of the United Nations declared in univocal terms that their governments would respect the principles laid down in this Declaration. The said Principles formed the basis of the provisions laid down in the outer space treaties which will be referred to below while the Declaration should be viewed within the framework of a wider phenomenon reflecting a trend toward dispensing with traditional forms of more formal decision making in international relations[9]. After this first stage in the development of space law, a new stage of law-making was reached that finally would constitute the *Corpus Iuris Spatialis* consisting of five international space law conventions as to which see below.

3.2. *The* Corpus Iuris Spatialis

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies of 1967, hereinafter referred to as the Outer Space Treaty or OST, was designed as a basic international law instrument in this field. However, it appeared that specific questions had to be elaborated by other instruments of international law.

Hence, the Agreement on the Rescue of Astronauts, Return of Astronauts and Return of Objects launched into Outer Space (Rescue Agreement) was drawn up in 1968, and entered into force in the same year, and the Convention on International Liability for Damage Caused by Space Objects in 1972, also referred to as the "Liability Convention", which entered into force in 1973. Although at that time outer space was being explored and used by a limited number of States, non-active States also participated in the creation of these instruments of international space law.

In 1975 the Convention on Registration of Objects Launched into Outer Space (Registration Convention) was concluded which entered into force in 1976. This was followed by the creation of the Agreement Governing the Activities of States on the Moon

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[8] *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, Resolution 1962 (XVIII) adopted at the 1280th plenary meeting of the General Assembly of the UN, of 13 December 1963, available at: http://www.oosa.unvienna.org/oosa/SpaceLaw/gares/html/gares_18_1962.html.

[9] See, M. LACHS, *The Law of Outer Space: An experience in Contemporary Law-Making*, Leiden, 2010.

and Other Celestial Bodies (Moon Agreement), which was adopted by the UN General Assembly in December 1979 and entered into force in July 1984. Only thirteen States have ratified it, whilst the big space powers Russia, US, UK, France and China have not.

In light of lack of space, and in order to keep the focus on the principal questions which are asked in this essay, the next sections will deal with the main provisions of the Outer Space Treaty (1967) and the Liability Convention (1972) respectively. The other treaties, international agreements, declarations and principles mentioned above will not be further addressed.

3.3. *The Outer Space Treaty (OST) (1967)*

The Outer Space Treaty forms the cornerstone of international space law as it contains basic principles. They constitute the environment within which responsibility and liability provisions must be interpreted and implemented.

The exploration and use of outer space including the moon and other celestial bodies should be carried out «for the benefit and in the interest of all countries and shall be the province of all mankind», whereas outer space, including the moon and other celestial bodies, should be free for exploration and use by all States[10].

Importantly, outer space may not be made subject to national appropriation by claims of sovereignty, by means of use or occupation, or by any other means[11]. States parties to the OST must carry out these activities 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[12]. The explicit recognition of international law and the promotion of international cooperation[13] are considered to be vital for the establishment of a genuine international legal regime for the use of outer space for the benefit of all mankind. However, the extension of international law to outer space should be seen as a first step forming the basis for the establishment of specific rules which already have or will become necessary in the future[14].

Under the OST, States are internationally liable for the activities carried out in outer space[15]. That liability is attached to the launching State as to which see the next section.

Hundred and three States, including twenty seven EU States, that is, all of them except for Latvia, are a party to it. International organisations, hence, including the EU, cannot become a party to it, and cannot make a Declaration of Acceptance pursuant to which they can be bound by provisions of this convention. This is different for the 'Convention on international liability for damage caused by space objects' of 1972, henceforth referred to as the Liability Convention as to which see, again, the next section.

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[10] See, art. I.
[11] See, art. II.
[12] See, art. III.
[13] See, art. IX.
[14] See, M. LACHS, *The new horizon of international law*, in T.L. MASSON, S. HOBE (eds), *The Law of Outer Space*, Leiden, 2010, p. 11 ss.
[15] See, art. VII: «Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State 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 by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies».

3.4. *The Liability Convention (1972)*

The Liability Convention elaborates the principles drawn up in art. VII of the Outer Space Treaty. If a State or an international organisation has suffered damage, it can address a claim to the "launching State" for compensation. As States are the principal actors under space law, individuals cannot claim on a personal title but the State of their nationality or residence must do so via diplomatic channels.

The Liability Convention is based on an "absolute liability" regime for damage caused by the space object launched by a State on the surface of the earth or to aircraft flight, and on "fault liability" for damage sustained in orbit. Absolute liability differs from risk or strict liability, which arises when the said causal link between the State or person who produces the damage and the injured person is established[16]. Under the concept of absolute liability, liability arises as soon as the conditions of the treaty, in this case the Liability Convention, have been fulfilled. If there are several "launching States", they are jointly and severally liable.

In short, the Liability Convention (1969) introduces definitions for damage caused by space activities and identifies those "launching States" that could be absolutely liable for such damage and the mechanisms for such claims. This convention also provides for procedures for the settlement of claims for damages. Again, these provisions have not been tested in practice.

The Liability Convention has never been invoked in a court case, and hence its provisions have never tested in judicial proceedings, which is not uncommon in space law.

Under the Liability Convention, international organisations complying with the provisions of this convention can make a "Declaration of Acceptance" in which case they are bound by specified provisions of this convention, pursuant to the procedures mentioned there[17].

Ninety two States are a party to this convention. These include the major space powers such as the USA, Russia, China, India, Japan, France, the UK, Canada and Germany who have also ratified the Outer Space Treaty (1969). As far as the 28 Member

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[16] See, B. CHENG, *A Reply to Charges of Having Inter Alia Misused the Term Absolute Liability in Relation to the 1966 Montreal Inter-Carrier Agreement in my Plea for an Integrated System of Aviation Liability*, in *Ann. Air Space Law*, 1981, p. 7 ss.

[17] See, art. XXII: «In this Convention, with the exception of Articles XXIV to XXVII, references to States shall be deemed to apply to any international intergovernmental organisation which conducts space activities if the organisation declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organisation are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. States members of any such organisation which are States Parties to this Convention shall take all appropriate steps to ensure that the organisation makes a declaration in accordance with the preceding paragraph. If an international intergovernmental organisation is liable for damage by virtue of the provisions of this Convention, that organisation and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that: any claim for compensation in respect of such damage shall be first presented to the organisation; only where the organisation 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. Any claim, pursuant to the provisions of this Convention, for compensation in respect of damage caused to an organisation which has made a declaration in accordance with paragraph 1 of this Article shall be presented by a State member of the organisation which is a State Party to this Convention».

States of the EU are concerned, Latvia is the only EU Member State that has not ratified or signed any of the treaties[18].

Three international, that is, European intergovernmental organisations, to wit EUMETSAT, EUTELSAT-IGO and the European Space Agency (ESA), have signed Declarations of Acceptance of the rights and obligations under the above space law treaties, including the above Liability Convention, except for those laid down in the Outer Space Treaty, which does not permit it, as to which see below[19]. The EU has not, or not yet, signed such a Declaration.

4. *The participation of the EU to international conventions*

4.1. *The* status *of the EU in the UN*

The *status* of the EU has been upgraded under the General Assembly (GA) Resolution A/65/L.64/Rev.1 of 3 May 2011. Under it, the Union's senior representatives such as the President and the EU's first High Representative of the Union for Foreign Affairs and Security policy are entitled to present statements on behalf of the Union, and shall be invited to participate in the general debate of the GA, and permitted to have communication channels with the various UN bodies. The above resolution indicates that the EU's status under general international law has been enhanced, at least formally.

4.2. *The* status *of the EU in the Food and Agricultural Organisation (FAO)*

The EU became a Member of the FAO as early as 1991, the first UN organisation admitting the – then – EC as such. Under art. II of the FAO Constitution, «any regional economic integration organization» (REIO) meeting the criteria of the Constitution can be admitted as a Member. Those criteria pertain to the following:

- The REIO must be constituted by sovereign States;
- A majority of which must be FAO Members;
- To which the Member States «have transferred competences over a range of matters within the purview of the organization, including the authority to make decisions binding on its Member States in respect of those matters», while specifying which matters are covered by the competence of the REIO;
- The REIO may «exercise … a number of votes equal to the number of Member States which are entitled to vote in a meeting on matters within its competence»;
- Submission of a Declaration «made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission» upon an application made to the Director General of the FAO who must transmit it to the Member States for decision[20].

Ever since, the EU has actively contributed to the work of the FAO as evidenced by

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[18] See, Strategy & Presentation about a *Study on the Regulatory Framework Conditions for the Economic Development of Space Products and Services Addressing "Space Law" Issues such as Authorisation, Registration, Liability and the Obligation of Insurance of Space Activities* (2015).

[19] Source: www.unoosa.org/pdf/limited/c2/AC105_C2_2015_CRP08E.pdf.

[20] See, Article II in conjunction with Rule XIX on Admission of Additional Member Nations and Associate Members.

agreements on cooperation which have been concluded between the two organizations[21]. Practice shows that this framework for membership and cooperation functions well[22].

4.3. *The UN Conference on the Law of the Sea (UNCLOS) (1982)*

UNCLOS entered into force on 16 November 1994 and has – per today – 168 parties, including the European Union and all of its Member States, and Palestine. It is often referred to as the "Constitution of the Oceans".

The – then – EEC had successfully negotiated its status as a Contracting Party UNCLOS. The Union was entitled to sign this convention, which is subject to ratification or accession by States and «formal confirmation or of accession» by international organisations in accordance with Annex IX. An international organisation is defined as «An intergovernmental organization constituted by States to which its Member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters»[23].

The language used in these provisions refer to the EU's exclusive and shared competencies over the matters governed by UNCLOS (1982) which is a matter of EU law rather than international law. However, the division of powers between the EU and its Member States has implications for relations with third States and, with that, international law. Again, it is sufficient that, again, an unqualified majority of the international organization's Member States have ratified or acceded to the Convention, which is similar to the provisions of the space law treaties referred to above.

Other provisions of Annex IX regulate the transfer of powers from the Member States to the international organisations and the implications thereof for the responsibility for matters governed by the Convention. The international organisation is obliged to continuously inform the other States of its exclusive or shared competencies whereas the international organisation and its Member States are liable for failure to comply with this obligation. Thus, the EU made these Declarations explaining the fields of exclusive competencies and shared competencies. Since its first Declaration made in 1998[24], this list has not been amended.

While UNCLOS proceeds from the competency of either the EU or its Member States on the basis of the information they have provided to other parties, uncertainty about this division of competencies may result in joint responsibility for infringement of the UNCLOS in relation to third Parties. In its Decision of 2 April of 2015, the International Tribunal for the Law of the Sea has confirmed that third States may request an international organization or its Member States which are parties to the Convention, for questions regarding the division of competencies. Failure to do so may result in joint and several liabilities of the international organisation and the Member States[25].

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[21] See, European Commission, *Strategic Partnership between the Commission of the European Communities and the Food and Agriculture Organisation in the Field of Development and Humanitarian Affairs*, available at: http://eeas.europa.eu/delegations/rome/documents/eu_united_nations/fao_ec_working_doc_final_en.pdf.

[22] See, http://www.eeas.europa.eu/delegations/rome/eu_united_nations/work_with_fao/ec_status_fao/index_en.htm.

[23] See, art. 1 of Annex IX.

[24] See, Council Decision 98/392, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1998.179.01.0001.01.ENG.

[25] See, *Request for an Advisory Opinion Submitted by the Sub Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, available at: https://www.itlos.org/ fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf. See, also, E. PAASIVIRTA, *The European Union and the United Nations Convention on the Law of the Sea*, in *Fordh. Int. Law Jour.*, 2015, p. 1047 ss.

Practically all of the provisions of UNCLOS (1992) apply to international organisations in case the conditions on transfer of competencies are met. These include rules on State responsibility for the protection of the marine environment, State liability for damages caused by unlawful seizure of vessels and unlawful enforcement measure imposed on such vessels. Importantly, liability relates to "acts of States" such as unlawful enforcement and unlawful seizure of craft, that is, ships, and not to the operation of those craft, as is the case under the Convention on *International Liability for Damage Caused by Space Objects* (1971) which is discussed in the next section.

It is also stated that «The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of further rules regarding responsibility and liability under international law».

So far, there is no case law explaining this provision.

Again, special rules regulate ratification and denouncement of this Convention and dispute settlement in case of accession by international organisations.

The EU is not a Member of the International Maritime Organisation (IMO) and it is not expected that it will be admitted as such in the near future.

4.4. *The* status *of the EU under aviation law*

Where UNCLOS is referred to as the "Constitution of the Oceans", the Chicago Convention on international civil aviation of 1944 can be termed as the constitution of international civil aviation. States are the predominant actors under international air law when it comes to responsibility, that is, for safety, security and environmental protection. Liability is a different matter as to which see below.

International organisations cannot become a party to the Chicago Convention, and this is not likely to change. Hence, the question of submission of a Declaration does not arise as only States can become a party to the International Civil Aviation Organization (ICAO) which was set up by the Chicago Convention. At present, 192 States including all of its 28 Member States are a party to this convention which are and must be UN Members[26].

The EU has an *ad hoc* observer *status* in various bodies of ICAO, whereas it has concluded a Memorandum of Understanding with ICAO on aviation security.

State liability for damage arising out of "acts of State" is not confirmed in the same fashion as in UNLOS (1982) but may, in very exceptional cases, be based on national law. Otherwise, States may rely on sovereign immunity in case of accidents caused by aircraft which fall under their responsibility or supervision. The operators of the air transport service, that is, airlines, are liable for damage when an accident occurs as evidenced by the Warsaw Convention of 1929 as variously amended[27] and the Montreal Convention of 1999[28]. This is different under space law which proceeds from "reversed immunity" as to which see section 5 below.

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[26] See, Articles 92 and 93 of this convention which is available at http://www.icao.int/publications/Documents/7300_orig.pdf.

[27] See, *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (1929).

[28] See, *Convention for the Unification of Certain Rules for International Carriage by Air* (1999).

5. *Conclusions*

While States are the principal actors and the bearers of rights and duties under international space law, other actors, including international organisations and private corporations, are increasingly active in outer space. International space law only marginally addresses the above development, and does not sufficiently take it into account despite its practical relevance.

The position of the EU, operating satellites as indicated in the first section, is not clearly defined in light of the provisions of, to begin with, the Outer Space Treaty and the Liability Convention, as the EU has not or at least not yet made a Declaration of Acceptance under the latter convention, explaining its responsibilities and liabilities in this regard.

Consequently, international agreements between launching States and licenses granted to private corporations under national space law are filling gaps in order to regulate in the first place the liability for the damages occasioned by space activities if they are carried out by more than one State, in cooperation with private corporations.

Lessons may also be learned from other branches of law, for instance, international air law which departs from an opposite direction, that is, it imposes liability on the operators of the craft. As noted above, this is different for the operators of the craft undertaking activities in outer space, that is, satellites, where liability is attached to the State launching them. Thus, as compared with air law, and other branches of law, space law is exceptionally founded on what could be termed as "reversed immunity".

Indeed, airlines may also be closely linked to States in which they are incorporated, to be compared with the "launching State", under international space law. However, States have preferred to set up a liability regime pursuant to which airlines, and not the States, are liable for the damages they caused to passengers and cargo. As variously said, international space law does not make the operators, but the States which launched, or procured the launching, liable for the damages they produced.

Moreover, the participation of international organisations in space programs has added another complication to the attribution of shared liability among the international organisation(s) and the participating States[29], as illustrated by the Galileo programme of the EU. It seems to us that the complexity, the global nature and the high costs involved with the safe and efficient performance of space activities calls for more legal clarity in particular on the sharing of liability between the parties involved.

It would be advisable to harmonise national space acts between States involved in space activities. In this respect the European Union might instigate its Member States to start harmonisation which is the more compelling since the Treaty on the Functioning of the EU confirms competence of the EU for space activities[30].

ABSTRACT: *Responsibility and Liability of the EU under International Air and Space Law*

The development of the global society and the international legal order has been articulated in the context of the exploration and use of outer space by mankind. Multiple

[29] See, P.M.J. MENDES DE LEON, H.L. VAN TRAA, *International Space Law*, in A. NOLLKAEMPER, I. PLAKOKEFALOS (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge, 2017, p. 453 ss.
[30] See, art. 189 TFEU.

actors including States, international organisations and private entities operate interactively possibly resulting into injurious consequences such as environmental damages, including the production of space debris, and the malfunctioning of signals transmitted via satellites. Such operations are carried out by governmental and non-governmental actors, and international organisations, including, the EU, and may be governed by special responsibility and liability regimes which will be briefly discussed in the next sections.

This essay discusses principal aspects of international space law in terms of responsibility and liability, with special reference to the position of intergovernmental organisations under various branches of international law, while referring to the role of the EU in respect of the use and management of satellites. It draws parallels and marks differences between these fields of law, while noting that both are part of international law.

It will be concluded that the position of the EU, as the owner of satellites, could be legally more articulated under international space law even if the tools which space law provides for this purpose are limited. Hence, lessons should be learned from those other branches of international law whereas national regulations including licensing conditions and contracts between the concerned undertakings can play a supplementary role.