Injury to Rights of Personality Caused by Satellite Programme Contents

Prospects of Relief under the Law of Outer Space

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The use of satellites to broadcast television across national frontiers came into its own in the early 1980s, prior to which technical constraints had relegated television to being an almost entirely domestic medium. The transborder dimension of satellite television is such that a person resident in a receiving state may allege damage to a right of the personality on the basis of a broadcast originating in another state. Such claims may, for example, be based on injury to the plaintiff's reputation, unauthorized use of his/her image or an intrusion of his/her privacy.[1]

Since broadcasting by satellite involves a use of outer space, the question arises as to whether the norms of international space law[2] extend to the damage-causing programme contents of such broadcasting. Generally speaking, international space law embraces the principle that a state conducting outer space activities is internationally accountable for damage caused by such activities. The present

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1 See generally, P. *Bourel, Du Rattachement de Quelques Délits Spéciaux en Droit International Privé*, 214 Académie de Droit International, Recueil des Cours 251, 302 *et seq*.(1989-II); P.-D. Ollier and J.P. Le Gall, *Various Damages*, Vol. XI, Ch. 10, p. 63 *et seq.*; and S. Strömholm, *Right of Privacy and Rights of the Personality*, Norstedt, Stockholm, 1967.

2 International space law may be defined as that body of public international law which governs humankind's activities in outer space and presently encompasses no less than five space treaties spanning topics as diverse as state responsibility, lunar exploration and astronaut rescue. The five treaties are: *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, concluded London, Moscow, Washington 7 Jan. 1967, entry into force 10 Oct. 1967, 610 *UNTS* 205; *Convention on International Liability for Damage Caused by Space Objects*, concluded London, Moscow, Washington 29 Mar. 1972, entry into force 15 Sept. 1976, 961 *UNTS* 187; *Convention on Registration of Objects Launched into Outer Space*, concluded New York, 12 Nov. 1974, entry into force 15 Sept. 1976, 14 *ILM* 43; *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, concluded New York, 5 Dec. 1979, entry into force 11 July 1984, 18 *ILM* 1434; *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, concluded London, Moscow, Washington, 22 Apr. 1968, entry into force 3 Dec. 1968, 672 *UNTS* 119.

article will examine whether various instruments of space law, including provisions on state responsibility and liability, may be said to provide relief to persons claiming that satellite broadcasts have caused injury to their rights of the personality.

A The Outer Space Treaty

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (hereinafter referred to as the "Outer Space Treaty") is the first, and most general, international instrument to govern inter-state relations in outer space. Generally speaking, the Treaty seeks to ensure the anticipated benefits of outer space exploration and use[3] while at the same time addressing potential dangers, including non-peaceful and environmentally harmful uses.[4] This section will focus on the Treaty's principle of outer space freedom and its provisions addressing state accountability for the injurious consequences of outer space activities.

The Treaty's principle of freedom is set forth in the first paragraph of Article I, as follows:

> Outer space... *shall be free for exploration and use by all States* without discrimination of any kind, on a basis of equality and *in accordance with international law*, and there shall be free access to all areas of celestial bodies.[5]

The foregoing principle had actually gained international recognition as early as 1958, following the International Geophysical Year (IGY) in which the Soviet Union and the United States had each launched satellites into earth orbit.[6] Today, there should be no doubt that the freedom of outer space encompasses the right of states to place communications satellites into orbit and to use them there.[7] This

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3 This intention is reflected in the preamble to the Treaty as follows:
Inspired by the great prospects opening up before mankind as a result of man's entry into outer space,
Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes...

4 See Arts. IV and IX, respectively.

5 Emphasis added. Freedom of *scientific investigation* in outer space is acknowledged in the third paragraph of the same Article.

6 Austria stated in the First Committee of the United Nations General Assembly that "space beyond the earth's atmosphere was *res communis omnium* which all States may use freely and without interference, ... the ultimate goal should be the free use of outer space under international control." U.N. Document A/C.1/SR.990, p. 224, para. 12 (1958). Quoted in D.I. Fisher, *Prior Consent to International Direct Satellite Broadcasting*, p. 67, Nijhoff, Dordrecht/Boston/London, 1990. In referring to the IGY flights, the *Ad Hoc* Committee on the Peaceful Uses of Outer Space cited general recognition of the principle that "outer space is, on conditions of equality, freely available for exploration and use by all in accordance with existing or future international law or agreements." See *Report of the Ad Hoc Committee on the Peaceful Uses of Outer Space*, U.N. Document A/4141, p. 60, para. 133 (14 July 1959). Quoted in Fisher, ibid., p. 70.

7 Cf. S. Courteix, *Aspects juridiques internationaux de la diffusion par satellite d'émissions de télévision*, 16 Droit et pratique du commerce international 550, 566 (1990); and L. Frieden,

freedom must, of course, as set forth in the above-quoted paragraph of Article I, be exercised *in accordance with international law*.[8] Thus, for example, the use of satellite orbital slots and broadcasting frequencies must comply with international telecommunications law.[9] Likewise, satellite broadcasts may not contain harmful propaganda or violate human rights.[10]

Although the above-quoted principle refers only to *states* as the beneficiaries of this freedom, the Treaty does not seek to exclude private entities and international organizations from engaging in space exploration and use.[11] This conclusion is corroborated by the now sizable scale on which private entities and international organizations engage in outer space activities.

Article II provides that "[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." This exclusion of territorial sovereignty, the traditional basis of the exercise of state jurisdiction,[12] thus renders invalid any claim which a state may have that its national laws are applicable in outer space as such. This provision is not however concerned with other (non-territorial) bases of jurisdiction applicable to space objects and personnel, to be discussed, *infra*, in connection with Article VIII.

Almost as a corollary to the Treaty's principle of outer space freedom, Article VI establishes that state parties bear "international responsibility" for "*national activities* in outer space,"[13] whether carried out by their governmental or non-governmental entities, and obliges the parties to ensure that such activities conform with the Treaty. Furthermore, the outer space activities of non-governmental (i.e., private) entities require "authorization and continuing supervision" by the "appropriate State Party." The duty of a state party to subject the space activities of private entities to "authorization and supervision" may in effect make the

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Newsgathering by Satellites: A New Challenge to International and National Law at the Dawn of the Twenty-First Century, 25 Stanford Journal of International Law 103, 110-111 (1988), in the context of newsgathering by satellite. The same author states that "[t]he unhampered operations of all varieties of civilian satellites and the repeated affirmations of the lawful use of outer space by all nations for peaceful purposes indicate the existence of a rule of customary international law which allows all peaceful space activities." *Ibid*., p. 116.

8 For a comprehensive enumeration of limitations on this freedom contained in the Treaty, see S. Gorove, *Studies in Space Law: Its Challenges and Prospects*, p. 56, Sijthoff-Leyden, 1977.

9 Cf. *Convention of the International Telecommunication Union*, concluded Geneva, Dec. 1992, entry into force 1 July 1994.

10 The Treaty's eighth preambular paragraph refers specifically to the applicability of General Assembly Resolution 110 (II), *Official Records of the General Assembly*, U.N. Document A/519 (1947), prohibiting propaganda, to outer space.

11 Cf. Gorove, *supra*, n. 8, p. 50.

12 "This principle may be regarded as the `antithesis' of the principle of absolute and exclusive sovereignty, and its corollary the principle of national appropriation accepted in general international law." I.A. Csabafi, *The Concept of State Jurisdiction in International Space Law*, p. 116, Nijhoff, The Hague, 1971. And see B. Cheng, *The Commercial Development of Space: The Need for New Treaties*, 19 Journal of Space Law 17, 41 (1991): "there is no territorial sovereignty or territorial jurisdiction in outer space."

13 Emphasis added. The reference to "*international* responsibility" excludes the possibility of proceedings being brought by a national against his/her own state. S. Gorove, *Liability in Space Law: An Overview*, 8 *Annals of Air & Space Law* 373, 378 (1983).

permissibility of the activity in question, e.g., satellite uses, a function of an individual state's domestic law.[14] When outer space activities are conducted by an international organization, responsibility for *treaty compliance* is borne jointly by that organization and by (Outer Space Treaty) parties participating in such organization.[15]

It appears that Article VI is mainly oriented to the situation in which outer space activities are carried out by the private or public entities of a *single* state party.[16] The only exception provided for is where such activities are conducted by an international organization; as we have seen, responsibility for compliance with the Outer Space Treaty is in such cases shared by the organization itself and by the states participating in it. On the other hand, no indication is given of how responsibility for compliance is to be determined in cases where outer space activities are conducted by the entities of *more than one* state party outside the framework of any international organization. This is true, not least, with respect to state responsibility for the activities of multinational private parties.[17] A similar problem may arise when one state is the site of the space launch, whereas another state has procured the launch: Is the "appropriate State Party" the launching or the procuring state?[18]

But even leaving aside problems of which of potentially several state parties bear(s) responsibility under Article VI, there is some question as to the very scope of the phrase "activities in outer space."[19] Actually, the Outer Space Treaty is the

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14 Cf. Frieden, *supra*, n. 7, p. 116. Since the ratification of the Treaty, only two Western European countries, i.e., Sweden and the United Kingdom, have adopted national space legislation. M. Bourély, *Quelques réflexions au sujet des législations spatiales nationales*, 16 Annals of Air & Space Law 245, 246, n. 3 and p. 261 *et seq*. There is however no explicit requirement in Article VI that state parties enact implementing legislation. P. Dann, *The Future Role of Municipal Law in Regulating Space-Related Activities*, in Zwaan (ed.), Space Law: Views of the Future, p. 129, Kluwer Law & Taxation, Deventer/Antwerp/London, 1988. One commentator interprets the "authorization and continued supervision" clause as creating a "need for establishing the right to exercise criminal jurisdiction" over national space activities. S. Gorove, *Criminal Jurisdiction in Outer Space* 6 The International Lawyer 313, 316 (1972).

15 The relevant portions of this provision read as follows:
States Parties ... shall bear international responsibility for national activities in outer space … whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space … shall require authorization and continuing supervision by the appropriate State Party … When activities are carried on in outer space … 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.

16 On the other hand, there is some doubt as to whether this provision represents a norm of customary international law, and thus binding on states not parties to the Convention. See Cheng, *supra*, n. 12, p. 21.

17 L.J. Eisenstein, *Choice of Law Regarding Private Activities in Outer Space: A Suggested Approach*, 16 California Western International Law Journal 282, 290 (1986).

18 Cf. Gorove, *supra*, n. 13, pp. 377-378 (*passim*).

19 Cheng underscores the need for international agreement on this and other terms used in Article VI, including "the appropriate state." Cheng, *supra*, n. 12, p. 36. In the satellite context, M. Bourély raises the question whether Art. VI includes the transmission and

only one of the various space conventions which governs space *activities* and not (merely) space *objects*.[20] But even assuming that satellite broadcasting is an "activity in outer space" within the meaning of Article VI, it is at best an open question whether state responsibility extends to the legal consequences of the *contents* of space broadcasting.[21] We may note that when this question was addressed in the United Nations in other space law contexts, the states of Western Europe (and other Western states) have consistently and emphatically opposed the imposition of any such responsibility.[22] Against that background, it can be concluded that a sizable number of states (including many of the so-called space nations) did not intend Article VI to encompass state responsibility in this regard.

Article VII sets forth the principle that each state party who launches or procures the launching of a space object and each such party from whose territory or facility an object is launched, will be *internationally liable* for damage caused by the object to another state party or to the latter's natural or legal persons.[23] Whereas Article VI established state responsibility for national outer space *activities*, Article VII is restricted to questions of liability for damage caused by *space objects or their component parts*.[24] If Article VII had been intended to include damage caused

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reception of space radio signals. Bourély, *supra*, n. 14, p. 252. One commentator notes that: "There may be even some question as to whether it is an activity in outer space when you are doing something here on earth. But the utilization of outer space by the use of a broadcast satellite is ... a use of outer space." *Regional Conference on `Direct Broadcast Satellites and Space Law*, November 1, 1974, University of Mississippi Law Center" 3 Journal of Space Law 107, 118 (1975).

20 Frieden, *supra*, n. 7, p. 110.

21 In the particular context of direct broadcasting satellites, Cheng queries: "Does the responsibility assumed by States under Article VI extend to the content of broadcasts made by private concerns under their jurisdiction, at least to the same extent as if the broadcasts were made by the States themselves, or are States merely obliged to ensure that the broadcasting activity is carried out in accordance with international law and pertinent international agreements? Also does it extend to, for instance, private claims for breach of copyrights and neighbouring rights?" Cheng, *supra*, n. 12, p. 40.

22 See, e.g., *Television by Satellite and Cable*, Council of Europe, Steering Committee on the Mass Media (CDMM), Committee of Legal Experts in the Media Field (MM-JU), Council of Europe Doc. no. MM-JU (84) 2 (2nd revision) (Restricted) (1984), p. 20: state responsibility for satellite programmes would be "totally contrary to the Western concept of the independence of these media." Inclusion in U.N. General Assembly resolution 32/95 (1982), containing principles to govern international direct broadcasting satellites (DBS), did not receive the votes of Western European and other countries in part because of its inclusion of a provision that would impose responsibility on governments for the programme contents of DBS broadcasts. Domestic views on freedom of expression were at the core of their opposition. Cf. Fisher, *supra*, n. 6, p. 46.

23 The relevant portion of Article VII reads as follows: "Each State Party to the Treaty that launches or procures the launching of an object into outer space ... 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…"

24 Christol notes that Art. VII "looked to physical harm of the kind that would result from collisions with space objects or aircraft, or from impacts on individuals or their property on the earth. It focused on nonelectronic and physical injury... ." C.Q. *Christol International Liability for Damage Caused by Space Objects*, 74 American Journal of International Law 346, 355 (1980).

by the actual uses of such objects, one would expect to find wording to that effect (compare the reference to "activities" in Article VI). Given the absence of such wording, it appears likely that Article VII refers to damage caused by space hardware as such, whereas liability for the *activities* of such objects, e.g., for satellite broadcasts themselves, is excluded.[25] Neither Article VI nor VII establishes any procedure for claims settlement.[26]

Under Article VIII of the Outer Space Treaty, a state party carrying a space object on its registry retains "jurisdiction and control" over such object and over any personnel thereof "while in outer space...." Despite the reference to a state party's *registry*, the Treaty itself contains no duty to establish such a registry; such a duty is however imposed on "launching states" by the Convention on Registration of Objects Launched into Outer Space.[27] But can the phrase "jurisdiction and control" be taken to mean that the law of the registry state applies to the *private law consequences* of the activities of a state's space objects and personnel? Firstly, it may be recalled that under Article VIII, "jurisdiction and control" is retained over the space object "*while* in outer space." The latter phrase apparently indicates that a registry state is entitled to apply its laws to *command and control* aspects of space objects and their personnel during the actual space mission, thus excluding questions of which state's laws apply to claims arising from the operation of such objects.[28]

Under both Articles VI and VII, international responsibility/liability "is only on the international plane. The State cannot transfer its responsibilities to the private enterprise on that level, but it can on the national level." B.A. Hurwitz, *State Liability for Outer Space Activities*, p. 48, Nijhoff, Dordrecht/Boston/London, 1992. And see H. Shin, *Multinational Space Stations and Choice of Law*, 78 California Law Review 1375, 1386 (1990). That private persons are not generally bound by international treaties follows also from general principles of international law. Cf. K. Henaku, *Private Enterprises in Space Related Activities: Questions of Responsibility and Liability*, 3 Leiden Journal of International Law 45, 49 (1990).

25 See also Section B, *infra*, for a discussion of the applicability of the "Liability Convention" to the same question.

26 See Gorove, *supra*, n. 13, p. 376.

27 Cited in full, *supra*, n. 2. The duty to register is set forth in Art. II (1) of the Registration Convention as follows:

When a space object is launched into earth orbit or beyond, the launching State shall register the space object by means of an entry into an appropriate registry *which it shall maintain*. [Emphasis added.]

Where there are two or more launching states for the same space object, such states shall jointly determine on which of their respective registries the object shall be carried. Such a determination is however without prejudice to any agreement between these states regarding jurisdiction and control over the object in question and any personnel thereof. (Art. II [2]).

It may however be noted that to date only 37 states are parties to the Convention.

28 Cf. H. DeSaussure & P.P.C. Haanappel, A *Unified Multinational Approach to the Application of Tort and Contract Principles to Outer Space*, 6 Syracuse Journal of International Law and Commerce 1, 4 (1978), noting that "the limiting words `while in outer space or on a celestial body' make it clear that this treaty jurisdiction refers to command and disciplinary jurisdiction for the duration of the space voyage, not to adjudicative and enforcement jurisdiction which must attach to claims lodged back on earth."

And see e.g., H. DeSaussure, *An Integrated Legal System for Space*, 6 Journal of Space Law 179, 182 (1978), concluding that Article VIII applies to the prescriptive jurisdiction of the registry state while the space objects and personnel are actually in outer space; and

We thus find that the Outer Space Treaty establishes a principle of freedom of outer space. Although containing provisions on state accountability and on "jurisdiction and control," these provisions do not address the private law consequences of damage by satellite broadcasts nor do they, in default thereof, indicate criteria for determining the applicable national law.

B The Liability Convention

The 1972 Convention on International Liability for Damage Caused by Space Objects (hereinafter referred to as the "Liability Convention")[29] provides greater specifics on the subject of liability than do the corresponding provisions of the Outer Space Treaty.[30] What is more, unlike the Outer Space Treaty, the Liability Convention establishes a claims settlement procedure.[31] Despite this advantage of specificity, the scope of the Liability Convention appears limited to cases involving damage caused by space objects themselves, whereas other damage incidental to the use of such objects appears to fall outside its scope. Thus, a television satellite crashing to the surface of the Earth would be a likely candidate for application of the Liability Convention, whereas damage to reputational interests caused by a broadcast from the same satellite would not.

The foregoing conclusion is to some extent supported by a textual analysis of the Liability Convention. Firstly, a reading of its very title reveals the Convention's

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Eisenstein, *supra*, n. 17, p. 291: "These problems, regarding what is `jurisdiction and control,' and whether it applies on earth or merely in space, make the treaty nondispositive for choice of law purposes." And, in the space station context: Under Art. VIII, "national law rules will have full force *on board* earth orbital stations with crews of mixed nationalities." (Emphasis added.) J. Klucka, *The Role of Private International Law in the Regulation of Outer Space*, 39 International & Comparative Law Quarterly 918, 921 (1990). "[U]nless a registry state allows [a Multinational Space Station (MSS)] to establish its own court system or gives an MSS commander the authority to make legally binding judgments of liability, the Outer Space Treaty's jurisdictional provision cannot form the basis for a choice of law regime." Shin, *supra*, n. 24, p. 1389.

The question of whether a registry state's national laws are *at all* applicable in the outer space context may however be a matter of that state's own view of the matter: Referring to Arts. II and VIII, Dann, *supra*, n. 14, p. 130, submits that "[t]hese provisions only define the extent of permitted jurisdiction. It does not follow that the existing municipal law of a particular State will necessarily apply to the activities of nationals of that State in outer space, or to activities on board a space object carried on the registry of that State." And see A. Vahrenwald, *Intellectual Property on the Space Station 'Freedom'*, 9 European Intellectual Property Review 318, 318 (1993): "If a space object is launched, the registering state will retain jurisdiction and control over it, and the question of whether in such a case this state's intellectual property law will be applicable on the space object depends on the national law." According to Henaku, *supra*, n. 24, p. 54, the retention of jurisdiction and control implies an obligation on the state in question to have domestic laws in such diverse areas as property rights, civil rights and criminal law.

29 Cited in full, *supra*, n. 2.

30 S. Eigenbrodt, *Out to Launch: Private Remedies for Outer Space Claims*, 55 Journal of Air Law & Commerce 185, 193 (1989). Arts. VI and VII "only establish general legal principles. They provide no solutions to concrete problems... ." Hurwitz, *supra*, n. 24, p. 9.

31 Cf. B.E. Showalter, *In Space, Nobody Can Hear You Scream `Tort!'*, 58 Journal of Air Law and Commerce 795, 810 (1993).

concern with "Damage Caused by Space *Objects*."[32] The same applies to the drafters' stated purpose in the preamble of compensating "damage caused by space *objects*."[33] One would perhaps expect the drafters to have instead referred to "damage caused by space *activities*" (or other words to that effect) if their intention had been to extend liability to damage caused by the services performed by such objects. Moreover, an (exclusive) concern with damage caused by space hardware appears to be reflected in the very definition of "space object" provided in Article I(d): "The term 'space object' includes component parts of a space object as well as its launch vehicle and parts thereof."

The definition of "damage" in Article I(a) reveals the types of interests for which compensation can be recovered under the Convention: "The term 'damage' means loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international inter-governmental organizations."[34] The foregoing categories of damage contained in this definition are of a material nature and can scarcely have other than physical causes and effects; the only possible exception is "impairment of health," which arguably includes damage to the psychological "health" of the victim, for example, a person's mental anguish upon witnessing a space vehicle crash.[35] But whatever the nature of the damage to persons for which compensation may be claimed, whether bodily or psychological, nothing in the definition of "damage" detracts from the impression that the space object itself must be the cause.[36] Thus, it appears that the Liability Convention applies to damage caused by space objects themselves but not to non-physical causes, such as satellite programme contents,[37] or to non-physical effects, such as injury to reputation.

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32 Emphasis added.

33 Emphasis added.

34 Art. I (a). Actually, the damage provision bears a striking resemblance to a corresponding provision of the Convention on Third Party Liability in the Field of Nuclear Energy (concluded Paris, 29 July 1960, entry into force 1 Apr. 1968, 55 *AJIL* 1082 (1961)), which lends added support to the conclusion that the Liability Convention's compensation regime is premised on physical causes.

35 Foster states, in interpreting the term "damage": "From the broad terminology used in this definition it is clear that all injuries to persons are covered whether or not they are accompanied by objective or substantially harmful physical or psychopathological consequences provided they at least result in an `impairment of health.'" W.F. Foster, *The Convention on International Liability for Damage Caused by Space Objects*, *10 Canadian Yearbook of International Law* 137, 155 (1972). According to Christol, *supra*, n. 24, p. 359, "a claimant would be required to show that the harm flowed directly or immediately from, and as the probable or natural result of, the malfunctioning of the space object." See also S. Gorove, *The Growth of Domestic Space Law: A U.S. Example*, 18 Journal of Space Law 99, 109 (1990), concluding that the Convention does not cover indirect or consequential damages and the same author, *supra*, n. 13, pp. 374-5.

36 Cf. Hurwitz, *supra*, n. 24, pp. 13-17 (*passim*) (although that author makes reference to "space activities" and not "space objects" *ibid*., p. 14).

37 Cf. I.H. Ph. Diederiks-Verschoor, *Similarities with and Differences between Air and Space Law Primarily in the Field of Private International Law*, 172 Hague Recueil 317, 373 (1981-III). And see "Regional Conference...", *supra*, n. 19, p. 113 (damage caused by direct broadcast satellite (DBS) transmissions). Hurwitz, *supra*, n. 24, p. 18, cites a unanimous opinion among publicists to the effect that private law aspects of DBS, i.e., financial damage to copyright owners, etc., caused by such satellite broadcasts "are not covered by the

Moreover, the very nature of the legal consequences prescribed for "damage", as defined above, militate against such a conclusion. These legal consequences are set forth in Article II: "A launching State shall be *absolutely liable* to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight."[38] This rule of absolute liability further strengthens the impression that the Liability Convention is concerned with primarily (if not exclusively) physical risks of harm caused by space activities:

> The objectives of the Convention would largely have been defeated if the claimant state were required to produce evidence of fault, for not only would the necessary evidence be complex and technical but also such evidence, where it existed, might well be known only to the launching state and be impossible to obtain.[39]

Whereas the imposition of liability without fault may be understandable in risk-filled areas of high technology,[40] not least given the otherwise unreasonable onus of proof that would, as alluded to in the above quotation, be placed on the victim, there does not appear to be any reason to impose such liability in cases of television programmes transmitted by satellite. Evidence of the contents of the complained-of programme is not to be found in outer space but somewhere on Earth. Nor will the nature of the programme contents require the type of technical proof which might be inaccessible to the claimant in a physical accident case. The considerations

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Liability Convention." And see *Television by Satellite and Cable*, *supra*, n. 22, p. 20; and C. Patermann, *Applicable Law in Cases of Tort Damages Caused by Direct Broadcast Satellites*, 3 Journal of Space Law 47, 52 (1975).

Nor does the Convention apply to damage caused by spacefaring personnel (DeSaussure, *supra*, n. 28, p. 188) or by other persons or property on board the space object (Foster, *supra*, n. 35, p. 158).

38 Emphasis added. A "launching state" is, for purposes of the Convention: "i) A State which launches or procures the launching of a space object;" and "ii) A State from whose territory or facility a space object is launched." (Art. 1(c)). For purposes of this provision, as with all other operative provisions of the Convention, the reference to "States" includes international intergovernmental organizations conducting outer space activities as stipulated in Art. XXII.

39 Foster, *supra*, n. 35, pp. 150-151. And, in the context of falling space objects causing damage on Earth: "Here it seems best to follow the guidance of the Liability Convention and use a rule of strict liability for damage... . This is especially justified by the fact that such torts are unusual, and unusually dangerous. In addition, the parties injured by objects hitting the earth have, in contrast to those who originally launched the objects, assumed none of the risks of space activity voluntarily." Eisenstein, *supra*, n. 17, p. 310. Indeed, the very history of the Convention process in the U.N. indicates that the main, if not exclusive, concern was with falling space objects. Cf. G. Gyula, *Space Law*, p. 228, Oceana, Dobbs Ferry, New York, 1969. (Liability based on *fault* is stipulated in Art. III with respect to damage caused to another launching state's space object or persons or property on board other than on the surface of the Earth; exoneration from absolute liability is available pursuant to the conditions stipulated in Art. VI).

40 Regarding other hazardous activities for which absolute liability is imposed, see e.g., Convention Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface, concluded Rome, 7 Oct. 1952, entry into force 4 Feb. 1958, 310 *UNTS* 181; Convention on Third Party Liability in the Field of Nuclear Energy, concluded Paris, 29 July 1960, entry into force 1 Apr. 1968, 55 *AJIL* 1082 (1961); and International Convention on Civil Liability for Nuclear Damage, concluded Vienna, 21 May 1963, entry into force 12 Nov. 1977, 2 *ILM* 727.

underlying a rule of absolute liability are therefore lacking in the context of liability for the contents of satellite broadcasts.

What is more, even with respect to claims that more clearly fall within the scope of the Liability Convention, it may be of limited practical value for victims seeking compensation.

Firstly, there is some question as to whether liability for the space activities of private entities is at all imputable to a state. Some authors answer this question in the affirmative,[41] others conclude the opposite.[42] A literal reading of the Liability Convention appears to support the latter conclusion, which, as indicated above, imposes liability on "launching states" without any reference to vicarious liability for the private entities of such states. Thus, even if the Liability Convention were found to apply to damage caused by satellite television programmes, it may be of limited value where the programmes have been transmitted by private entities, who may be involved in everything from the launching of television satellites to the broadcast of the programmes themselves.

Secondly, the Liability Convention is inapplicable to claims by nationals of the launching state (or of the state procuring the launch) or by foreign nationals participating in the launch.[43] Such claimants will have to resort to domestic remedies, just as they would without the existence of the Convention.[44] The suit could in such cases be against the launching state or against private parties.[45] Needless to say, domestic law will include the choice of law rules of the forum.[46]

Thirdly, although the Liability Convention gives the "victim" of space damage the option of presenting a claim through diplomatic channels under Article IX,[47] individuals have no standing to bring claims against foreign governments; instead,

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41 "For this reason, the United States traditionally compels private commercial enterprises to indemnify the government from potential third-party claims. As an example, a typical NASA launch agreement requires a user to obtain a certain level of third-party liability insurance." Showalter, *supra*, n. 31, p. 807. Cf. L.P. Wilkins, *Substantive Bases for Recovery for Injuries Sustained by Private Individuals as a Result of Fallen Space Objects*, 6 *Journal of Space Law* 161, 166 (1978) and Gorove, *supra*, n. 13, p. 378. And see L.S. Kaplan, *Space-Specific Remedies for Torts in Outer Space: What Path Will U.S. Law Follow?*, 22 The International Lawyer 1145, 1148 (1988).

42 Foster concludes in this context that the scope of the Liability Convention is narrower than that of the Outer Space Treaty (Art. 6), since the former does not impute liability to states for the acts of their private entities. Foster, *supra*, n. 35, p. 184.

43 Art. VII. Cf. G.J. Mossinghoff, *Managing Tort Liability Risks in the Era of the Space Shuttle*, 7 Journal of Space Law 121, 122-123 (1979).

44 Such remedies "may very well be State oriented and not victim oriented." Hurwitz, *supra*, n. 24, p. 79.

45 Cf. *ibid*., p. 48.

46 According to Dann, *supra*, n. 14, p. 126, in cases of damage under the Liability Convention, the injured party may be able to sue in tort, "although such a claim may raise formidable problems of jurisdiction and applicable law." And see Hurwitz, *supra*, n. 24, p. 47: "This situation will lead to not a little confusion and injustice as plaintiffs suffering identical or similar damage might receive substantially different amounts of compensation."

47 This provision reflects a traditional remedy offered by international law but deviates therefrom by, *inter alia*, "eliminating the classical requirement of exhaustion of all domestic remedies." I.H. Ph. Diederiks-Verschoor, *Space Law as it Effects Domestic Law*, 7 Journal of Space Law 39, 44 (1979).

they must rely on their governments to pursue relief.[48] Where this does not lead to a settlement within one year, a Claims Commission shall be established at the request of either state party under Article XIV. The Claims Commission shall consist of three members chosen by the state parties as set forth in Article XV. If the state parties so agree, the Commission Award will be binding; otherwise, it will merely be recommendatory under Article XIX.[49]

Regardless of the procedure followed, Article XII provides that the compensation due is to be determined in accordance with "international law, and the principles of justice and equity." No *a priori* application of any particular national legal system was thus accepted.[50] It may however be problematic to define tort law in accordance with this standard of "international law," etc.[51] Foster views "principles of justice and equity" as a residual source to "international law."[52] Such uncertainty with respect to the applicable law could deter claimants from pursuing claims under the Liability Convention and instead cause them to seek redress in domestic courts where the applicable tort norms will be more predictable. Actually, payment of compensation under the Convention has only occurred once.[53] As one author ruefully exclaims "[a]dequate, prompt, and full relief for harms caused by activity in space will frequently lie outside the Liability Convention."[54]

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48 According to Eigenbrodt, *supra*, n. 30, p. 196: "The first obstacle facing a private person desiring to make a claim is the Liability Convention's refusal to allow individual claimants; a State must bring a claim for an individual against another State. The question of whether a State will bring the claim at all is one solely of municipal law; international law has no jurisdiction over the decision."

49 Foster, *supra*, n. 35, p. 175, criticizes the Convention for its failure to provide an effective dispute settlement procedure: "[T]he Convention cannot be said to lay down an effective procedure under which disputed claims are definitely settled - at best it assures a claimant state a reasonable prospect of the payment of compensation. In this respect the Liability Convention is seriously defective and its value may be questioned."

50 Cf. C. Patermann, *The Question of the Law Applicable in Cases of Damage Caused by Direct Satellite Broadcasts*, 16 Colloquium on the Law of Outer Space 75, 79 (1973). Foster notes that this provision was arrived at after some difficulty. Foster, *supra*, n. 35, p. 171. None of the many state proposals on applicable law gained general acceptance. See Foster (*ibid*) pp. 171-172, n. 109. According to Christol, "the applicable law will conform to a world standard rather than to diverse national outlooks." Christol, *supra*, n. 24, p. 370.

51 Eisenstein, *supra*, n. 17, p. 289. But see B. Cheng, *International Liability for Damage Caused by Space Objects*, Ch. III, in Jasentuliyana & Lee (eds.), *Manual of Space Law*, Vol. 1., p. 126, Oceana, Dobbs Ferry, New York, 1979.

52 "In the event that international law should prove deficient or uncertain, recourse may be had to the 'principles of justice and equity', which will normally consist of rules of general application in the municipal legal systems of the world, to fill the gaps and cure the ambiguities." Foster, *supra*, n. 35, p. 172.

53 "Actual recovery under the provisions of the Liability Convention for third-party claims is very rare. From the launch of Sputnik in 1957 to 1984, the space nations have placed over 17,000 objects into Earth orbit.... The Soviet Cosmos 954 satellite crash in Canada, however, is the only incident involving liability payments for damage to persons or property caused by a falling space object." Showalter, *supra*, n. 31, p. 811. According to Eigenbrodt, *supra*, n. 30, p. 202: "no individuals suffered damage as a result of the Cosmos incident. To that extent, the whole exercise lacked the personal element of individual damages." And see Hurwitz, *supra*, n. 24, p. 121.

54 DeSaussure, *supra*, n. 28, p. 188. And see Eigenbrodt, *supra*, n. 30, p. 196: "the fact remains that damages will be determined on a case by case basis, thus possibly undermining any

Concluding Remarks

The present examination of the Outer Space Treaty reveals that it accords a significant degree of freedom to pursue activities in outer space. This freedom is enjoyed both by states and by private entities. Although this freedom may be qualified by the state responsibility provision of Article VI, there is some question of how such responsibility is to be established when the private and/or governmental entities of more than one state party are jointly engaged in outer space activities. Moreover, it is doubtful whether states parties have actually undertaken responsibility under Article VI for the contents of satellite broadcasts. Although Article VII specifically contains a principle on liability, such liability is limited to damage caused by space objects themselves and not to the services provided by such objects. In any case, neither that Article nor Article VI, on state responsibility, provides for any procedure of claims settlement and is, not least for that reason, unlikely to divert a private party from resort to traditional, domestic remedies. Nor does Article VII, which declares that state parties retain "jurisdiction and control" over their registered space objects and their personnel, appear to clarify the situation with respect to which state's law applies to the legal consequences of a particular space damage claim.

Although the Liability Convention is more specific than the Outer Space Treaty in the field of space liability, the Convention's scope appears limited to claims based on damage caused by space object hardware. Even with respect to such claims, the Convention may be of limited value to a claimant since, *inter alia*, where a *private* entity causes the damage, liability will not likely be imputable to a state party and, even if a claim *were* lodged with the Claims Commission, its award would only be binding if the state party had so agreed. This fact in combination with the somewhat nebulous reference to "international law, and the principles of justice and equity" may cause the individual claimant to pursue (presumably more predictable) domestic remedies instead of those provided in the Liability Convention.

Thus, in summary, international space law acknowledges freedom to pursue activities in outer space, including satellite broadcasting, but with the possible exception of damage caused by space objects themselves, it evidently provides no redress to private claimants. Persons seeking relief for alleged injuries to rights of the personality are thus to resort to traditional, national modes of pursuing relief, including the choice of law rules of the forum country.

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consistency in damage claims. This case-by-case approach may increase the attractiveness of municipal law as the avenue of recovery in a country such as the United States that typically has high damage awards." And see Eisenstein, *supra*, n. 17, p. 293, concluding that the Liability Convention "probably is of no relevance... for suits involving private parties."