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THE CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS FROM THE HUMAN RIGHTS PERSPECTIVE – SELECTED ASPECTS

Abstract

In spite of the Convention on International Liability for Damage Caused by Space Objects being in force for a long time, it has not as yet been analysed from a human rights perspective. While at the beginning of the space age activities in space were associated only with states, the progress on humankind in the conquest of space has significantly changed that. Nowadays, the role of individuals in space operations is growing. The well-established human rights law on Earth also needs to be reflected in regulations concerning outer space. This paper assesses selected aspects of the Convention from the human rights perspective. The analysis encompasses the definition of "damage" along with the possible amount of compensation due to individuals and the different aspects of procedural guarantees available for them. The paper presents two possible routes for obtaining compensation: one through diplomatic channels and another using national channels of launching states. This study offers a *de lege ferenda* proposal to appeal to state parties to introduce internal regulations aimed at avoiding human rights infringements. Domestic law systems may create legal provisions that may fill the

gaps caused by the Convention's limitations, e.g. by introducing an appropriate insurance system for space passengers.

KEYWORDS

Convention on International Liability for Damage Caused by Space Objects, international human rights law, space and human rights

SŁOWA KLUCZOWE

Konwencja o międzynarodowej odpowiedzialności za szkody wyrządzone przez obiekty kosmiczne, międzynarodowe prawo ochrony praw człowieka, kosmos a praw człowieka

1. INTRODUCTION

Despite the Convention on International Liability for Damage Caused by Space Objects (Convention) being in force for a long time, it has not as yet been analysed from a human rights perspective. One probable explanation is that it is not a common practice to merge these two very different fields of international law. Nevertheless, it is perfectly permissible to do so and there are no obstacles from legal and ethical perspectives. The first to point out the intersection of these two fields was Christol.[1] Expanding upon his concept, Freeland and Jakhu highlighted the relationship between space law and human rights law remarking that "(i)t is undisputed that, from a 'legal rules' perspective the international regulation of outer space – past, present and future – is 'embedded' in international law. It is not an esoteric and separate paradigm limited solely to the *lex specialis* of space law with which we are familiar. (…) Notwithstanding the continuing applicability of the fundamental framework of space principles, in such cases, were the need to arise, it will often become necessary to draw upon other areas of international law to resolve a particular dispute".[2] Following Christol's, Jakhu's and Freeland's thinking, several aspects of the Convention might be considered from a human rights perspective.

[1] C. Christol, *Human Rights in Outer Space,* American Institute of Aeronautics and Astronautics (AIAA). Paper No. 68-910-1967; https://doi.org/10.2514/6.1968-910, p. 1.

[2] S. Freeland, R. Jakhu, *The Intersection Between Space Law and International Human Rights Law,* (in:) R. Jakhu, P. Depsey (eds), *Routledge Handbook of Space Law*, New York 2017, p. 228.

In fact, the Convention on International Liability for Damage Caused by Space Objects addresses the topic of life and well-being of individuals much more than it was originally realised. It is worth taking a closer look at the definition of "damage", the possible amount of compensation due to individuals, and the different aspects of procedural guarantees available to them, considering the human rights law perspective.

An analysis of this critical legal instrument involved different methods. In the first part of the article, the historical perspective is presented, before applying the classical method for legal analysis, that is an investigation of the law in force. This first part provides a context for the other aspects of the analysis which follow.

2. HISTORICAL PERSPECTIVE

The historical approach to the existing legal acts is based on an analysis of other events that happened at the time of adoption of the Convention. The Legal subcommittee of COPOUS negotiated the Convention between 1963 and 1972. The agreement on the content of the text was reached in the UN General Assembly in 1971.[3] The resolution adopted by the GA in its very first sentence stated: "Reaffirming the importance of international cooperation (…) and of promoting the law in this new field of human endeavor". This part of the resolution acknowledged that it is in the nature of human beings to acquire new knowledge and experience, as set out in Article 27 of the Universal Declaration of Human Rights, which states that "everyone has the right freely to share in scientific advancement and its benefits".[4]

The Convention was signed at the beginning of March 1972, ahead of an important human rights event in Stockholm: the United Nations Conference on the Human Environment which took place on 5-16 June 1972.[5] The responsibility for environmental protection, which rests with humans, has been introduced in the first principle of the Declaration of the United Nations Conference on the Human Environment: "(M)an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."[6]

[3] UNGA Resolution 2777. Convention on International Liability for Damage Caused by Space Objects. RES 2777 (XXVI).

[4] UNGA, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[5] United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm, https://www.un.org/en/conferences/environment/stockholm1972 (accessed 21.02.2023).

[6] Declaration of the United Nations Conference on the Human Environment, http://www.un-documents.net/unchedec.htm (accessed 21.02.2023).

This same principle of care for environmental protection spelled out during the Stockholm conference, was among the driving forces for the Convention's creation several months earlier. The above-mentioned principle may be seen as an original cause and a first framework to implement responsibility for damage caused by space objects by introducing the concept of absolute liability to pay compensation for damage caused by space objects on the surface of the Earth or to aircraft for a launching State and liability based on fault for damage caused in space. It could be interpreted almost as a coming-of-age moment for the international community. However, it is worth underlining that the way the environment is understood within the Convention excludes the space environment as such[7] and leaves significant doubts about covering environmental damage on the Earth, which is not closely related to the term "harm" used in Article 1.[8] This exclusion, especially nowadays, raises many difficulties, since protecting the space environment has become critical.[9]

In the context of the analysis conducted above, demonstrating the profound relationship between the need for a system of responsibility for space damage and the protection of human rights, one can safely say that 1972 was a special year. An apt metaphor for it is the very popular, even symbolic, first colour photograph of the Earth taken from space in December 1972 by the Apollo 17 crew (called Blue Marble).[10]

3. REMEDY ISSUES

Effective remedy, one of the main concepts of international law, is retained in space law, initially by including grounds for responsibility in Article VII of the Outer Space Treaty[11], followed by the adoption of the Convention on International Liability for Damage Caused by Space Objects. Drawing up of the Convention also goes in line with one of the main principles of human rights, which states that any infringement of human rights needs to be adequately redressed.[12]

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[7] A. Kerrest, L.J. Smith, *Article I of the Convention on International Liability for Damage Caused by Space Objects,* (in:) S. Hobe, B. Schimdt-Tedd, K.-U. Schrogl (eds), *Cologne Commentary on Space Law.* Vol. II, Köln 2013, p. 113.

[8] M. Polkowska, *Prawo kosmiczne w obliczu nowych problemów współczesności*, Warsaw 2011, p. 74.

[9] More in: Y. Zhao, *The 1972 Liability Convention: Time for Revision?,* 'Space Policy' 2004, No. 20, pp. 118-122.

[10] NASA, *Blue Marble - Image of the Earth from Apollo 17*, 30 November 2007, https://www.nasa.gov/content/blue-marble-image-of-the-earth-from-apollo-17 (accessed 21.02.2023).

[11] UNGA, Res. 2222 (XXI), https://www.unoosa.org/pdf/gares/ARES_21_2222E.pdf (accessed 21.02.2023).

[12] D. Harris, M. O'Boyle, E. Bates, C. Buckley, *Law of the European Convention on Human Rights* (2nd edition), New York 2009, p. 562.

The Convention's creators employed the compensation method to satisfy the need for remedies. It must be noted that the Convention goes a step further by introducing the concept of damage that can occur as a result of legal activity. This principle is set out in Article II of the Convention, which specifies that states bear absolute liability to pay compensation for damage caused by space objects on the Earth's surface or to aircraft in flight that occurs through legitimate activity and irrespective of fault. However, an exception to this absolute liability exists, as provided for in Article VI of the Convention.[13] The exception relies on the contribution to the damage caused by the claimant state and does not apply in the event that the space activities are conducted in breach of international law.[14] Article III of the Convention addresses the situation of damage in space employing the principle of liability based on fault.

Whether the damage occurs due to legal or illegal activity in space, the consequence could be very harmful to individuals. The Cosmo 954 accident serves as an example of how serious such damage might be.[15] Such an accident could lead to severe injury to the body or health of an individual, and even death, which is undoubtedly one of the circumstances that requires a remedy.

In human rights law, notions of effective remedy were accurately defined in the UN General Assembly resolution 60/147 – Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[16] The resolution is a non-binding instrument, yet it systematises matters which have already been regulated in various human rights treaties, such as Articles 2(2) and (3) of the International Covenant on Civil and Political Rights (ICCPR)[17], Article 13 of the Convention for the Protection of Human Rights and

[13] Article VI(1): "Subject to the provisions of paragraph 2 of this Article, exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents".

[14] Article VI(2): "No exoneration whatever shall be granted in cases where the damage has resulted from activities conducted by a launching State which are not in conformity with international law including, in particular, the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies."

[15] A. Cohen, *Cosmos 954 and the International Law of Satellite Accidents,* 'Yale Journal of International Law' 1984, Vol. 10, https://openyls.law.yale.edu/handle/20.500.13051/6129 (accessed 21.02.2023).

[16] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147.

[17] "2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be required to give effect to the rights recognized in the present Covenant.

Fundamental Freedoms (ECHR)[18] and Article 47(1) of the Charter of Fundamental Rights of the European Union.[19] The aforementioned resolution clarifies the role of effective remedies. In the context of space such recalling of the institution of effective remedy has two aspects.

One is based purely on human rights principles. It might be described as fulfilment of the effective remedy concept. It may be done internally, as the strict human rights doctrine interprets the provisions of ICCPR and other legal acts, or by bringing this human rights spirit into space, which is done inter alia by introducing procedures for awarding compensation. Such procedures fulfil the definition formulated by Hofmański and Wróbel, who claim that an "effective remedy" should be understood broadly as any legal remedy that makes it possible to deal with a case.[20]

The second is based on granting full effect to human rights law in the form of direct application of legal norms described in human rights treaties. Such an approach can be based on damage to life and/or health of an individual on Earth caused by space objects and obligations introduced by Article 2(2) and (3) ICCPR (as well as Article 13 ECHR for Council of Europe members) to introduce internal procedures to safeguard the duty to compensate the damage. However, the Convention on International Liability for Damage Caused by Space Objects allows for an exception to the regular internal process as the core of the compensation procedures is framed by the Convention.

As described in detail below, the Convention allows individuals to access two possible routes for obtaining compensation: one through diplomatic channels and another using national channels of launching States. Both are analysed below.

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3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

[18] "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[19] "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

[20] P. Hofmański*, Art. 13,* (in:) L. Garlicki (ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności.* Vol. 1, Warsaw 2010, p. 728.

4. DEFINITION OF THE TERM "DAMAGE"

The Convention on International Liability for Damage Caused by Space Objects, when analysed from a human rights perspective, requires an elaboration on the concept which could well be seen as the heart of this treaty, i.e. the definition of the term "damage". The treaty states that "(a) (t)he 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 intergovernmental organizations".[21] The definition of "damage" mirrors the approach adopted in the preamble which places a human being in the centre of the protection regime. It serves as a reflection of the fourth paragraph of the Convention's preamble which states: "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 full and equitable measure of compensation to victims of such damage".

This perspective is also shared by Smith and Kerrest, who write: "The Convention was drafted with a view to achieving a victim-oriented and unlimited system of liability".[22] The definition aims to protect two fundamental values from a human rights perspective, i.e. life and property. It applies not only in cases of death and physical injury but also other health impairments. These different forms of health impairments, such as trauma or shock, naturally need to be demonstrated taking into accordance the legal principles of causality. Causality has to be demonstrated as well when the damage concerns the environment and impacts human life.[23] However, the definition's wording makes its application to environmental damage controversial in certain situations, such as those that concern territories not under state sovereignty, e.g. high seas.[24]

Any loss of or damage to property of persons is also included in the definition. Consequently, all material damage related to State property and individual property is covered.

As Tronchetti, Smith and Kerrest note on the proposal of the Moroccan delegation of June 1971, Article XXI introduces a particular type of "damage that creates a large-scale danger to human life or seriously interferes with the living conditions of the population or the functioning of a vital center".[25] The occurrence

[21] Article 1 of the Convention on International Liability for Damage Caused by Space Objects.

[22] A. Kerrest, L.J. Smith, *Article VI ...*, 2013, *op. cit*., p. 146.

[23] A. Kerrest, L.J. Smith, *Article I...*, 2013, *op. cit*., p. 113.

[24] *Ibid.* and more on environmental damage in L. Viikari, *Environmental Aspects of Space Activities,* (in:) F. von der Dunk, F. Tronchetti (eds), *Handbook of Space Law*, Cheltenham 2015.

[25] F. Tronchetti, L.J. Smith, A. Kerrest, *Article XXI of the Convention on International Liability for Damage Caused by Space Objects,* (in:) S. Hobe, B. Schimdt-Tedd, K.-U. Schrogl (eds), *Cologne Commentary on Space Law.* Vol. II, Köln 2013, p. 200.

of such damage triggers the obligation on the State Parties of the Convention, and especially of the launching states, to examine the possibility of rending assistance. It can be delivered only at the request of states on whose territory such damage occurred. Including this provision in the Convention may be seen as a prioritisation of human life among other values. The introduction of this provision, as Tronchetti, Smith and Kerrest once again note, without any further discussion[26], is a manifestation of an engagement in "a life of dignity and well-being" as stated during the aforementioned United Nations Conference on the Human Environment. Such a premise fits the spirit of human rights; however, a broad scope of the concept of "large-scale danger" can potentially lead to interpretation disputes in this area. Article XXI clarifies that rending such assistance will not influence the right of State Parties to implement other provisions of the Convention, including the right to submit a claim.

What needs to be stressed, from a human rights perspective the definition of the term "damage" does not introduce any limits to the amount of damages or compensation which may be sought under the liability regime. Moreover, Article XII of the Convention establishes the principle of *restitution in integrum* according to which the compensation must be determined in such a way that it "will restore the person (…) on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred". The lack of limits, along with the principle of *restitution in integrum,* also applicable in human rights law, may be seen as one of the greatest advantages of this regulation.[27] In light of this clear advantage, proposals, such as those put forward by Zhao, to introduce limits similar to those set up in the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage, have to be treated very carefully.[28] At this stage the scope of possible types of damages is still somewhat unclear, so such unification could prove to be detrimental to the protection of rights of individuals.

In summary, the definition cited above is designed in a way that can support the implementation of norms of the human rights law dedicated to protecting the right to life and the right to property. Additionally, the introduction of Article 1 of the Convention, which includes the definition of the terms used, is conducive to building legal certainty. Including definitions in treaties is a good practice in general from a human rights perspective. However, it is still not universally used in human rights legal instruments. Nevertheless, a positive trend in this area can

[26] *Ibid.*

[27] A. Buyse, *Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law,* 2008, p. 21, https://web.archive.org/web/20200709023251/https://dspace.library.uu.nl/bitstream/handle/1874/32809/Restitution.pdf?sequence=1 (accessed 21.02.2023).

[28] Y. Zhao, *The 1972 Liability Convention: Time for Revision?*, 'Space Policy' 2004, No. 20, p. 120.

be observed as two UN treaties have recently incorporated provisions that present a list of definitions: the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[29]

5. COMPENSATION PROCEDURES

The Convention on International Liability for Damage Caused by Space Objects attempts to fulfil the concept expressed in the right to an effective remedy by introducing an important procedural safeguard that allows infringements committed to be adequately rectified.

Compensation can be claimed from the launching state as set out in Articles II and III of the Convention.[30] The interests of the injured parties are secured by Article V, which establishes joint and several liabilities of launching states if more than one falls within the definition introduced in Article 1. Article V provides the possibility to seek compensation from any of the launching states, which is a highly favourable solution form a human rights perspective.

The redress, as stipulated in Articles IX and XI of the Convention, could be obtained using two possible ways. One is through diplomatic channels described in Article IX of the Convention and the other is by using national channels of launching states.

The first procedure, regulated in Article IX of the Convention, veers to the path of diplomatic protection, which is rare in human rights law. Nowadays, human rights protection standards lie in the ability to claim rights by using one's national jurisdiction and, in case of not obtaining appropriate remedy, to file a complaint with the international tribunals that deal with human rights infringements. However, the Convention in one of its procedural channels refers to a classic institution of international law that features large *acquis* concerning diplomatic protection.

The diplomatic protection procedure introduced jointly in Articles IX and VIII may be seen as favourable from the perspective of individuals. Article VIII of the Convention provides for a number of potential States which are eligible to file a claim using this channel. The claiming State must be in one of the three defined relationships with the victim: it must be the State where the damage occurs, or it is the State of nationality of the victim or the State of permanent residence of the victim. As Smith and Kerrest confirm, the Convention introduces an order which gives preference to the State of nationality over the State where the

[29] Article 2 of both conventions.

[30] A. Kerrest, C. Thro, *Liability for Damage Caused by Space Activities*, (in:) R. Jakhu, P. Depsey (eds), *Routledge Handbook of Space Law*, New York 2017, p. 60.

damages occurred. Finally, if both aforementioned States fail to bring a claim, the State of residence may do so.[31]

It needs to be pointed out that the design of the Convention allows presenting a compensation claim irrespective of whether the claimant State is a party to the Convention.[32] Not limiting the States allowed to submit a claim to the parties of the Convention deserves credit from a human rights perspective. Such a solution goes a long way in implementing the principle of non-discrimination, as it is understood in human rights law, e.g. in Article 2(1) ICCPR or Article 14 ECHR.

If the State that submits the claim lacks diplomatic relations with launching States, it may request assistance. Other States could offer to act as intermediaries and the Secretary-General of the UN may also be involved in such a capacity, providing both the claimant State and lunching State are UN members.[33]

The procedure established by the Convention has one crucial shortcoming related to the very core of the notion of diplomatic protection. The process of the victim's fall-back on diplomatic protection domestically is left entirely out of the Convention's purview. It is understandable from an international law perspective because it is in the state's exclusive competence. However, it may be considered a disadvantage from a human rights perspective. Therefore, great clarity in the domestic procedures is needed to safeguard legal certainty, which is a significant value in human rights law.[34]

The claim for compensation set out by the Convention needs to be submitted by the deadline established in its Article X. This article limits this time to "one year". The lapse of this deadline may begin at different points in time, as listed in said article: the date of the occurrence of damage or the date of the identification of the launching State to name a few. When applying the human rights perspective, this multipoint construction can be seen as a solution introduced to secure the interests of victims of damage.

Schmalenbach claims that it is a surprisingly short period.[35] However, shortening the entire procedure as much as possible could also be interpreted as a victim-oriented approach and, in such light, appreciated. Keeping the proceedings

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[31] A. Kerrest, L.J. Smith, *Article VIII of the Convention on International Liability for Damage Caused by Space Objects,* (in:) S. Hobe, B. Schimdt-Tedd, K.-U. Schrogl (eds), *Cologne Commentary on Space Law.* Vol. II, Köln 2013, pp. 156-157.

[32] K. Schmalenbach, *Convention on International Liability for Damage Caused by Space Objects,* (in:) P. Gailhofer et al. (eds), *Corporate Liability for Transboundary Environmental Harm*, Springer, Cham 2023, https://doi.org/10.1007/978-3-031-13264-3_11, p. 576.

[33] More about the parties to convention: K. Doo Hwan, *Global Issues Surrounding Outer Space Law and Policy*, Hershey 2021, p. 25.

[34] The diplomatic protection as a way to protect human rights has been contested in legal scholarship, and the assessment of this issue is beyond the scope of this article. More in: P. Kobielski, *Diplomatic Protection in Practice of European Court of Human Rights*, 'Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego' 2015, Vol. XIII, pp. 42-43.

[35] K. Schmalenbach, 2023, *op. cit*., p. 532.

shorter encourages submission of a claim even if the amount of damage is not yet clear. From the point of view of the injured party, such construction may act in favour of the individual in terms of obtaining compensation faster and prevents undue delays in completing the procedure which may arise from an attempt to meticulously ascertain the exact extent of damage.

Moreover, when applying the aforementioned perspective, it is worth comparing the indicated period with ones provided for in human rights treaties and checking it against the concept of "reasonable time" as interpreted in the case-law of the European Court of Human Rights.

The "one-year" rule exists in many procedures for protection of human rights, with such a deadline appearing in Article 3(2)(a) of the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights[36] and in Article 7(h) of the Optional Protocol to the Convention on the Rights of the Child.[37] In both cases, it is counted from the moment domestic remedies are exhausted, which differs from the analysed instruments. Some human rights bodies and courts like the ECtHR, due to their workload, limit this time to an even shorter period. For example, in February 2022, the ECtHR introduced a 4-month deadline to submit a claim.[38]

In addition, the "reasonable time" standard is introduced in Article 6 of the European Convention on Human Rights titled Right to fair trial. This standard is formally applied to the legal proceedings under Article 6 ECHR; however, by extension, it may be applied to the "one-year" rule that exists in the Convention. The European Court of Human Rights states that it is every person's right to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time.[39] As Harris, O'Boyle, Bates and Buckley rightly point out by recalling the H v. France case, the purpose of "reasonable time" underlines the importance of rending justice without delays which might jeopardize its effectiveness and credibility".[40] The criteria established by the ECtHR specify that "reasonable time" must be assessed in the light of the circumstances of the case and in accordance with the following indicators: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the appli-

[36] "The Committee shall declare a communication inadmissible when: (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit".

[37] "The Committee shall declare a communication inadmissible when: (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit".

[38] Article 35(1) ECHR as amended by Protocol 15.

[39] ECtHR judgments: Comingersoll S.A. v. Portugal (Application no. 35382/97), para. 24; Lupeni Greek-Catholic Parish of Lupeni and Others v. Romania (Application no. 76943/11), para. 142.

[40] D. Harris, M O'Boyle, E. Bates, C. Buckley, 2009, ***op. cit.***, p. 278.

cant in the dispute.[41] In light of this test, the "one-year" rule for submitting the claim concerning the space damage seems rational. The aforementioned criteria could serve as a good model for assessing all proceedings under the Convention. However, the assessment can only be done on a case-by-case basis, as too many variables can appear.

The provisions of Article XI of the Convention also expressly exclude exhaustion of domestic remedies as a prerequisite to the submission of the claim based on diplomatic protection. This model is rarely applied in human rights laws, as such a requirement does not usually exist, before nearly any human rights bodies and courts. The lack of an obligation to use domestic remedies makes the system more akin to the one protecting social rights, since the European Committee of Social Rights does not require the exhaustion of domestic remedies either.

The Convention also sets out a solution for an event in which using the diplomatic channel does not bring about a settlement of the claim. Articles XIV to XX of the Convention regulate the establishment and functioning of the Claims Commission, which aims to solve disagreements concerning the claim. The existence of such a possibility commands praise from a human rights perspective, yet, due to limits of this publication, is left out of the in-depth analysis.

Article XI of the Convention also introduces the second route for obtaining compensation based on national law. Section XI(2) excludes the ability to present a claim using the diplomatic protection procedure if one has already been submitted directly by the victim using local remedy instruments, which complies with the *ne bis in idem* rule. The analysed article specifically indicates that the claim should be submitted to "courts or administrative tribunals or agencies of a launching State." Smith and Kerrest[42] and Thro[43] suggest that it can be filed in the jurisdiction chosen by the victim.[44] From a human rights perspective, such a solution would be comfortable as it would keep the victim, as a weaker party in the case, in the most familiar legal environment.[45] Even if the Convention's word-

[41] ECtHR judgement, Bieliński v. Poland (Application no. 48762/19), paras. 42-44.

[42] A. Kerrest, L.J. Smith, *Article XI of the Convention on International Liability for Damage Caused by Space Objects* (in:) S. Hobe, B. Schimdt-Tedd, K.-U. Schrogl (eds), *Cologne Commentary on Space Law.* Vol. II, Köln 2013, p. 168.

[43] A. Kerrest, C. Thro, 2017, *op. cit.*, p. 68.

[44] A. Kerrest, L.J. Smith, *Article XI...,* 2013, *op. cit.*, p. 168.

[45] Such a positive trend in international law is confirmed in air law by introducing Article 33(2) of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), OJ L 194, 18.7.2001, p. 39–49: "In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement."

ing may not expressly support such interpretation, this analysis, which includes the drafting history of the Convention, confirms that such a functional interpretation of this provision is in fact permissible.[46]

Smith and Doldrina share this view.[47] However, they derive such a conclusion from other sources, which has its own reservations. They base their position on Regulation (EC) No. 864/2007 of the European Parliament and of the Council (Rome II), which would mostly, but not exclusively, apply to EU Member States.[48] These authors explain that Article 4 of Rome II points to the law of the country in which the damage occurs, which for most cases would mean the national jurisdiction of the victim. Following the Rome II provision, this more favourable jurisdiction could be relevant only if the damage arises from a tort/delict, as this regulation's main scope of application. The possibility of applying the instrument of Rome II in the circumstances of space damage is also confirmed by the fact that it was not excluded by Article 29 of Rome II.[49] However, it is worth noting that Rome II provisions are not applicable where the damage occurs due to a legal act of launching by a State for which the Convention was chiefly established.

In summary, the possibility to choose between two channels of obtaining compensation is one of the advantages that the Convention offers. However, it must be stressed once again that opening the proceedings in domestic law automatically closes the possibility to submit a claim based on diplomatic protection, as the latter is accessible only if there is no prior submission concerning local remedies.

6. LIMITATIONS

Another common ground between the Convention on International Liability for Damage Caused by Space Objects and human rights law lies in the concept of limitation. The notion of limitation functions and is described in international law of human rights in some detail. The fundamental rule of human rights law is inscribed in a phrase expressed by Alexis de Tocqueville: "(T)he freedom of man ends where the freedom of another begins." In short, each human right features adequate limitation described in the relevant human rights treaties.

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[46] A. Kerrest, L.J Smith, *Article XI...,* 2013, *op. cit.*, p. 168.

[47] L.J. Smith, C. Doldrina, *Jurisdiction and Applicable Law in Cases of Damage from Space in Europe–The Advent of the Most Suitable Choice–Rome II*, 'Acta Astronautica' 2010, Vol. 66, https://doi.org/10.1016/j.actaastro.2009.05.008, p. 242.

[48] *Ibid*.

[49] Notifications under Article 29(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ C 343, 17.12.2010, p. 7.

The Convention's framework includes the abovementioned concept. Article VII of the Convention sets out limitations too. It limits the application of the Convention by leaving out damage caused to the citizens of launching States and citizens of other countries that take part in the space operations.[50] Such limitations are significant for the present research because they directly affect individuals and, as such, they have to be assessed from a human rights law perspective.

The strict limitations exclude the Convention's applicability regarding citizens of the launching State and citizens of other countries engaged in the space activities. This leaves a fundamental question of whether there is a basis for those citizens to obtain compensation.

Two of the most tragic space accidents, the Challenger and Columbia disasters, may serve as a suitable illustration of the problem. Both are excluded from the Convention's scope based on its Article VII. Limited access to the settlement's material and proceedings from the Challenger and Columbia disasters does not allow for in-depth research. In both cases, the settlements were made out of court and, due to the protection of the families' privacy, were disclosed long after the conclusion. Moreover, the disclosure procedure failed to mention the exact compensation amount for families of each victim.[51] However, what is essential from a human rights perspective is that only one settlement, in both disasters, was done without the financial involvement of the US government.[52] Such circumstances may confirm the existence of a government sense of responsibility regarding such disasters, even if there is no clear legal basis in the Convention for bearing such responsibility.

As such, the answer to the above question of where citizens who are excluded from the scope of the Convention should look to obtain compensation is to be found in domestic laws and regulations.

The practical solution to this problem adopted by some states is the introduction of internal space law that covers individuals excluded from the scope of the Convention. Such solutions which may be modelled on Article 6[53] of the French Law No. 2008-518 of 3 June 2008 on space operations.[54] The provision imposes an obligation on the State and public establishments to obtain insurance which

[50] M. Couston, *Droit spatial*, Paris 2014, p. 79.

[51] M. Darsey, *To the Stars, Despite Adversity: Liability for the Columbia Space Shuttle Tragedy*, 'Houston Law Review' 2005, Vol. 5, p. 469.

[52] *Ibid.*

[53] "III – The insurance or financial guarantee must benefit, to the extent of the responsibility that may fall to them because of damage caused by a space object, the following persons:

1° The State and its public establishments;

2° The European Space Agency and its Member States;

3° The operator and the persons who participated in the production of the space object or in the space operation."

[54] Law No. 2008-518 of 3 June 2008 relating to space operations, JORF (Official Journal "Laws and Decrees") No. 0129 of 4 June 2008 (France).

covers compensation in case of accountability of such actors. Moreover, as Kerrest and Thro note that such a norm equalises the protection of national victims with foreigners[55], which is welcome from a human rights perspective.

Smith and Kerrest propose another solution in their publication.[56] These authors point to the European Space Agency's agreements with the Member States which provide insurance on the life and health of astronauts during missions.[57] The proposed solution seems particularly important in the case of the participation of international organisations and, from the perspective of individuals, appears to be rather convenient.

Looking at the Polish internal regulations, it is worth stressing that we are lacking adequate provisions so far. As such, injured parties have to seek remedy through the general norms of civil law. However, in practice it might not be easy to follow the concept presented by Kobielski, who suggests that such claims be based on Article 417 of the Polish Civil Code. The limitation of using this legal basis is similar to that concerning using the Rome II regulation, which means that it can be applied only in the event of an illegal act or omission. In consequence, the question of obtaining compensation in the case of legal activity remains open.[58]

As described above, limitation is a concept that, on the one hand, is well-known in the human rights law and may be worked around. On the other hand, its application in the Convention may lead to exclusions that in turn may lead to human rights infringements. For example, Article VII of the Convention significantly impacts space tourism activity. Most of the representatives of legal scholarship are inclined to believe that passengers of a spacecraft cannot claim compensation on the basis of the Convention on International Liability for Damage Caused by Space Objects.[59] Such limitation, if no alternative is provided at the domestic level, may lead to human rights infringements.

7. CONCLUSIONS AND RECOMMENDATIONS

In conclusion, it is essential to introduce, at all possible levels, the ability for individuals to obtain adequate protection in case of any human rights infringements caused by a space object. Only such an approach would fulfil the principle spelled out in Article 28 of the Universal Declaration of Human Rights, i.e.:

[55] A. Kerrest, C. Thro, 2017, *op. cit*., p. 68.

[56] A. Kerrest, L.J Smith, *Article VIII...,* 2013, *op. cit*., p. 152.

[57] A. Kerrest, L.J Smith, *Article VIII...,* 2013, *op. cit*., p. 152.

[58] P. Kobielski, *Budowa tarczy antyrakietowej w Polsce a demilitaryzacja przestrzeni kosmicznej,* (in:) Z. Galicki, T. Kamiński, K. Myszona-Kostrzewa (eds), *Wykorzystanie przestrzeni kosmicznej – Świat-Europa- Polska,* Warsaw 2010, p. 212.

[59] S. Hobe, *Legal Aspects of Space Tourism*, 'Nebraska Law Review' 2007, Vol. 86(2), https://digitalcommons.unl.edu/nlr/vol86/iss2/6, p. 450.

"(e) eryone is entitled to a social and international order in which the rights and freedoms outlined in this Declaration can be fully realized." The above-conducted analysis confirms the observations made by Potter, who writes that: "the development of outer space together with rapidly changing human rights issues will create enormous challenges to those who participate in the area of space law".[60] This interpretative line was continued by Polkowska, who expressed her position on "the Convention's lack of effectiveness" and "failing to provide proper payments and compensation to victims of space accidents".[61]

However, the presented analysis showed that the Convention on International Liability for Damage Caused by Space Objects was built on a certain human rights foundation. States Parties can still avoid human rights infringements if they apply the solutions that respect the human rights' spirit of this instrument.

As a *de lege ferenda* proposal, one possible approach would be to introduce amendments to the Convention, that would focus more on the human rights perspective.[62] However, from a purely practical standpoint, with full knowledge that State Parties may be hesitant to renegotiate an already accepted piece of international law, it is somewhat more realistic to appeal to State Parties to introduce internal regulations aimed at avoiding human rights infringements. In a domestic law system, legal provisions can be created that may fill the gaps caused by the Convention's limitations, e.g. by introducing an appropriate insurance system for space passengers.[63]

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[60] M.A. Potter, *Human Rights in the Space Age: an International and Legal Political Analysis*, 'The Journal of Law & Technology' 1989, Vol. 4, p. 388.

[61] M. Polkowska, 2014, *op. cit.*, p. 81.

[62] Y. Zhao, *The 1972 Liability Convention: Time for Revision?,* 'Space policy' 2004, No. 20, p. 121.

[63] More on insurance in: C. Gaubert, *Insurance in the Context of Space Activities,* (in:) F. von der Dunk, F. Tronchetti (eds), *Handbook of Space Law*, Cheltenham 2015, pp. 910-947; I. Ryzhenko, O. Halahan, *Types of Liability for Illegal Space Activities,* 'Advanced Space Law' 2019, Vol. 3, https://doi.org/10.29202/asl/2019/3/8.

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