

Direct International Responsibility of Non-Governmental Entities in The Utilization of Outer Space

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Abstract:

Article VI of the Space Treaty of 1967 defines non-governmental entities as legal concept. However, their responsibility in space activities is not defined comprehensively. The Treaty provides that the activity of non-governmental entities shall require authorization and continuing supervision from the appropriate state party to the Treaty. It suggests that non-governmental entities essentially are not the parties with direct international responsibility for their space activities. In other words, they have indirect international responsibility. On the other hand, commercialization and privatization of outer space have taken place intensively in the last two decades. It designs non-governmental entities as main actors in the exploration of outer space. The fact that non-governmental entities only have indirect international responsibility may lead to create difficult and complicated mechanisms, especially if the non-governmental entities are Multinational Corporations (MNCs). This study uses normative legal research, which is based primarily on the secondary data from library research relate to the responsibility of non-governmental entities for their activities in outer space. This study concluded that non-governmental entities should bear direct international responsibility following the current development in international law, of which, non-state legal subjects such as individual have a direct international responsibility for violations of international law they have committed.

Keywords: direct international responsibility, non-governmental entities, outer space

Tanggung Jawab Internasional Langsung bagi Entitas Non-Pemerintah dalam Pemanfaatan Ruang Angkasa

Abstrak:

Entitas non-pemerintah sebagaimana diatur dalam Pasal VI the Outer Space Treaty 1967 (the OST) adalah suatu konsep hukum yang belum memiliki pengertian yang jelas, terutama yang berkaitan dengan tanggung jawabnya dalam kegiatan keruangkangkasaan. Menurut the OST, kegiatan keruangkangkasaan yang dilakukan oleh entitas non-pemerintah memerlukan otorisasi dan supervisi berkelanjutan dari negara peserta the OST. Hal ini menunjukkan bahwa entitas non-pemerintah pada dasarnya bukan pihak dalam the OST yang memiliki tanggung jawab internasional langsung untuk kegiatan keruangkangkasaan yang dilakukannya. Dengan kata lain, tanggung jawab entitas non-pemerintah dalam

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kegiatan keruangkangkasaan bersifat tidak langsung (indirect responsibility). Sementara itu, komersialisasi dan privatisasi ruang angkasa yang terjadi secara intensif dalam dua dekade terakhir telah menjadikan entitas non-pemerintah sebagai aktor utama dalam pemanfaatan ruang angkasa. Dengan demikian, penerapan indirect responsibility kepada entitas non-pemerintah akan menimbulkan permasalahan dalam mekanisme penerapannya, terutama ketika entitas non-pemerintah adalah sebuah Perusahaan Multinasional (MNC). Penelitian ini menggunakan metode penelitian hukum normatif yang mendasarkan kepada data sekunder mengenai tanggung jawab entitas non-pemerintah dalam kegiatan keruangkangkasaan. Data yang diperoleh kemudian dianalisis secara kualitatif. Penelitian ini menyimpulkan bahwa entitas non-pemerintah dapat bertanggung jawab secara langsung sesuai dengan perkembangan hukum internasional saat ini dimana subyek hukum bukan negara seperti individu memiliki tanggung jawab internasional langsung terhadap pelanggaran hukum internasional yang dilakukannya.

Kata kunci: *entitas non-pemerintah, ruang angkasa, tanggung jawab internasional langsung*

A. Introduction

Commercialization and privatization of outer space have taken place intensively in the last two decades. The phenomenon has placed non-governmental entities as main actors in the exploration of outer space. The outer space law does not explicitly mention the term ‘commercialization’ but it does not mean that the exploration of outer space is not allowed for commercial purposes. The Outer Space Treaty assigns that “non-governmental entities” shall bear international responsibility for their outer space activities.¹ This provision implies that privatization and commercialization of outer space is legally acceptable.

Unlike other areas of legal instruments, law of outer space has been set up to respond the rapid development of outer space technology.² Only a few states have developed related technology excellently. Thus, most states entering international treaties governing outer space activities have neither program nor national space legislation. Notably, the *Corpus Juris Spatialis* consists of five international treaties governing outer space activities.³ They are (1) *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 1967 (the Outer Space Treaty); (2) *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, 1968 (the Rescue Agreement); (3) *Convention on International Liability for Damage Caused by Space Objects*, 1972 (the Liability Convention); (4) *Convention on Registration of Objects Launched into Outer Space*, 1975 (the Registration Convention); and (5) *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 1979 (the Moon Treaty). The agreements

¹ See Article VI of the Outer Space Treaty 1967.

² Francis Lyall and Paul B Larsen, *Space Law A Treatise*, England: Ashgate Publishing Company, 2009, p. 39.

³ See *United Nations Treaties and Principles on Outer Space*, New York: United Nations, 2002.

have designated state as main actor in the utilization and exploration of outer space; and that each state shall bear international responsibility for national activities in outer space.

The involvement of non-governmental entities in the outer space activities has created some legal problems because the term 'non-governmental entities' as stipulated in Article VI of the Outer Space Treaty (OST) is a term that is not well-defined. It also does not cover responsibility in outer space activities. Article VI of the OST states as follows.

"States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, 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, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization."

The provision stipulates that each state party to the OST is internationally responsible for national activities in outer space, whether the activities conducted by governmental agencies or by non-governmental entities. States parties to the OST also must ensure that their outer space activities are carried out in conformity with the provisions set forth in the Treaty. Furthermore, non-governmental entities activities in outer space require authorization and continuing supervision by appropriate state party to the OST. This suggests that non-governmental entities essentially are not the parties to the treaty who bear international responsibility for space activities. In other words, non-governmental entities only bear indirect international responsibility.

The fact that non-governmental entities only have indirect international responsibility may lead to create difficult and complicated mechanisms, especially if the non-governmental entities are Multinational Corporations (MNCs). This study argues that non-governmental entities should bear direct responsibility following current development in international law.

B. Non-State Actors in International Law

The classical international law claims that state is the only subject of international law.⁴ Oppenheim states that⁵ “*Since the law of Nations is a law of between states only and exclusively, States only and exclusively are subjects of the Law of Nations.*”

Since the notion is premised on state-based system, other entities are considered as subsidiary subjects of international law. Piotrowicz asserts that by way of state other international legal personality is formed⁶. Broms identifies several requirements so that an entity could be defined as subject of international as follows.⁷

1. The entity has capability to participate in the creation, development, and enforcement of international law;
2. The entity has capability to bring international claims;
3. The entity has direct international rights and responsibilities.

Based on the requirements, Broms identifies subjects of international law consisting of state and special entities. They are, among others, ICRC, belligerents, international organization, and individuals.⁸ However, the requirements can be applied only to states or entities representing them. This in turn may lead to difficulties if other entities are, or by some reasons should be, the subject of international law.

Today, majority of international law scholars has abandoned this traditional view. The notion of legal personality is a relative phenomenon that depends on circumstances.⁹ It can change due to needs of community.¹⁰ For example, International organizations and individuals are two non-state actors in international law, which have widely been recognized by the international community. The main reason behind the recognition international organization as the subject of international law is that to make this entity able to exercise and enjoy its function and rights. Thus, it has capacity to maintain rights by bringing international claims.

⁴ Mark W. Janis and John E. Noyes, *International Law Cases and Commentary*, 3rd Edition, United States of America: Thomson, 2006, p. 364.

⁵ Oppenheim as cited by Robert McCorquodale, “The Individual and the International Legal System”, in Andrea Bianchi (Ed), *Non-State Actors and International Law*, United States of America: Ashgate Publishing Company, 2009, p. 122.

⁶ Ryszard Piotrowicz, “The Structure of the International Legal System”, in Sam Blay, Ryszard Piotrowicz, Martin Tsamenyi (Eds), *Public International Law: An Australian Perspective*, Second Edition, Oxford, Oxford University Press, 2005, p. 37.

⁷ Bengt Broms, “Subject: Entitlement in the International Legal System”, in Ronald St. J. Macdonald, Douglas M. Johnston, *The Structure and Process of International Law: Essay in Legal Philosophy*, United Kingdom: Brill Archive, 1991, p. 1.

⁸ *Ibid.*

⁹ M. N. Shaw, *International Law*, United Kingdom: Cambridge University Press, 1997, p. 138.

¹⁰ Mark W. Janis, John E Noyes, *op.cit.*, p. 475.

The International Court of Justice in its judgment on the reparation of injuries case stated as follows.¹¹

“...in the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane...Accordingly, the Court has come to the conclusion that the organization is an international person. ...What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims...”

The recognition of individual as a subject of international law has been performed since the beginning of the 20th Century. The Versailles peace treaty ended the World War I involving Germany, the United Kingdom, and France. This agreement allows individuals to bring international claims to the International Arbitration Court.¹² Similar provisions are also found in other international treaties such as the 1922 Upper Silesia Treaty.¹³ The Tokyo and Nuremberg Tribunal that prosecuted the World War II criminals individually had been a very important development and confirmed the position of individuals in international law. Individuals are not responsible internationally. The 1998 Rome Statute reaffirms this position by employing the principle of no impunity to individuals who commit international criminals. Further development is occurred in the European Union. Many international law scholars consider this region as the most advanced region in terms of recognition of the individuals as the subject of international law, in particular with regard to the protection of human rights.

All in all, international responsibility of individuals contains same characteristics with the international responsibility of states or international organizations. It refers to any actions that may breach or violate international obligations.¹⁴ Bonafè states¹⁵ as follows.

“Aggravated state responsibility and individual criminal liability have a common origin. They both stem from the serious breach of obligations owed to the international community as a whole. Thus, the starting point of the international legal order provides for two sets of consequences (with respect to states and individuals) when the same

¹¹ Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), *ICJ Report 1949*, p. 1746.

¹² Mochtar Kusumaatmadja and Eddy R. Agoes, *Pengantar Hukum Internasional*, Bandung: Alumni, 2003, p. 104.

¹³ *Ibid.*

¹⁴ James Crawford, Alain Pellet, and Simon Olleson, *The Law of International Responsibility*, Oxford: Oxford University Press, 2010, p. 8.

¹⁵ Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes*, Leiden: Martinus Nijhoff Publishers, 2009, p. 23.

type of international obligations is not complied with. In other words, the relationship between state and individual responsibility for international crimes is characterized by a certain unity as far as primary norms are concerned."

However, apart from this general character, individual responsibility has a particular character as follows.¹⁶

1. In particular, it has a criminal element.
2. It could be applied by an ad hoc international court in the form of an international tribunals.
3. Individual responsibility occurs only when an international criminal court has been established to prosecute such individual violations, provided either by a treaty or by a United Nations Security Council resolution.

To summarize, international organizations and individuals are the most possible non-state actors in international law compared to other entities such as Multinational Corporations (MNCs) as it is still considered the potential candidate of the subject of international law. More important, international organizations and individuals are directly responsible for breach of international law without having to associate it with the responsibility of state. That is a very important development of the responsibility of non-state actors shifting from indirect to direct responsibility. In addition, it can be considered as an appropriate model for the outer space law that still imposes indirect responsibility of non-governmental entities activities in outer space.

C. State Responsibility in International Law and the Outer Space Law

1. State Responsibility in International Law

International law distinguishes direct and indirect state responsibilities. Direct state responsibility refers to the responsibility of state for the actions. Thus, state officials' actions in their capacity as state representatives are not considered individual actions. Consequently, they cannot be responsible individually for their actions. Indirect state responsibility refers to state's responsibility to protect other states and citizens from any actions of anyone who is within state's jurisdiction, especially if the actions cannot be accused to the offender and violate the rights of other state and the rights of citizens of other states.¹⁷ In principle, although actions carried out by an individual occurs in a state's territory, the state is not directly responsible for the damage to other state or citizens of other state, regardless of whether the individual is their citizen or not and notwithstanding with the amount of individuals. The actions cannot be accused to state. However, state has an obligation to use due diligence process in the application of international standards

¹⁶ James Crawford, Alain Pellet, and Simon Olleson, *loc. cit.*

¹⁷ Bin Cheng, "Article VI of the 1967 Space Treaty Revisited: International Responsibility, National Activities, and the Appropriate State", *Journal of Space Law*, Vol. 26, Number 1&2, 1998, p.11.

to prevent, to resist, and to cease any violations to the rights of states, including the rights of its citizens, carried out within its jurisdiction, and done by anyone who acts in the capacity as state officials.¹⁸

The International Law Commission (ILC) has contributed to the establishment of the law of state responsibility. The ILC has discussed and codified the concept of state responsibility in international law since 1956.¹⁹ The first draft of the law of state responsibility, known as the Draft Articles on the Responsibility of States (hereinafter referred to as the ARSIWA/Articles of Responsibility of State for Internationally Wrongful Acts), were discussed the general provisions on state responsibility. It consists of three main parts. The final draft was adopted by the ILC on August 9, 2001. The UN General Assembly approved the draft at the 56th session.²⁰ The ARSIWA is actually a codification of the basic provisions of state responsibility for internationally wrongful acts and of the progressive development of the provisions. The basic principle of state responsibility set out in Article 1 of the ARSIWA, as follows.²¹

“Every internationally wrongful act of a State entails the responsibility of that State”.

According to this article, every internationally wrongful act of a state would lead to international responsibility of the State concerned. An internationally wrongful act of a state can be in the form of one or more acts or violations or a combination among them. There is an internationally wrongful act if two elements are fulfilled. First, the unlawful acts are attributable to the State under international law; and second, such acts constitute a breach of international obligations. Article 2 of the ARSIWA reads as follows.²²

“There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- a. Is attributable to the State under international law; and*
- b. Constitutes a breach of an international obligation of the State.”*

The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have applied the principle of the ARSIWA in a number of cases. In the case of Phosphates, in Morocco, the ICJ determined that once a state is undertaking an internationally wrongful act to another state, there is a problem of international responsibility between the two states.²³ Other cases, such as the Corfu Channel

¹⁸ *Ibid.*, p. 12.

¹⁹ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, UK: Cambridge University Press, 2002, p.1.

²⁰ See 1996 ILC Draft Articles on State Responsibility; Rene Provost (Ed.), *State Responsibility in International Law*, England: Dartmouth Publishing Company, 2002, p. 531.

²¹ *Ibid.*, Article 1.

²² *Ibid.*, Article 2.

²³ For more detail see the case of Phosphates in Morocco, Preliminary objections, 1938, P.C.I.J., Series A/B, no.74.

case²⁴ and the Military and Paramilitary²⁵ Activities case, is also involved the principles. In the case of the Rainbow Warrior, the arbitral tribunal also emphasized that any breach of obligations by a state, regardless of the reasons, gives rise to state responsibility.²⁶

The elements that are attributable to state is derived from the fact that state is an organized entity and is a legal subject that has full authority to act under international law. According to some legal systems, state organ consists of several distinct legal personalities. Each legal personality has unique rights and obligations. Therefore, they can be prosecuted and responsible independently. However, in the discourse of state responsibility under international law, legal personality of state has different positions. It was accepted that states cannot do actions by themselves. An 'act of state' would involve violations or omissions committed by individuals or groups of people as the legal subject of a state. States can only act through agents or representatives. In determining state's responsibility, the actions done by any parties on behalf of a state are 'the state actions'.²⁷ Further, actions that are being attributable to state can be either a violation or omission. For example, in the case of the Corfu Corfu Channel case, the ICJ determined that the Albanian state knew or considered to know the existence of mines in its territorial waters; and that the Albanians did not warn others on its existence. The fact is enough to place international responsibility to Albania.²⁸

The second element for the internationally wrongful act is a breach of an international obligation. The term breach of international obligation by the state covers any obligations resulted from an agreement (treaty obligations) or not resulted from an agreement (non-treaty obligations). The decision of the ICJ in the case of the Factory at Chorzow used the term 'breach of an engagement'. The ICJ then refers this term clearly in the case of the *Reparation for Injuries*. The Arbitration Tribunal in the case of the *Rainbow Warrior Affair* used the term 'any violation by a state of any obligation'. According to Crawford, all of these terms have the same meaning as 'breach of an international obligation' used in the articles of State Responsibility.²⁹ Thus, there is no exception to the fulfillment of these two essential elements for an internationally wrongful act. The question is whether these elements are sufficient as a condition of an internationally wrongful act.

The second element is also referred to a breach of an international obligation, not a breach of a rule or a norm of international law. This means that the existence of such element does not refer to the issue of the existence of a rule, but it refers

²⁴ Corfu Channel Case, Merits, ICJ Reports 1949.

²⁵ Nicaragua v. United States of America), Merits, ICJ Reports, 1986.

²⁶ Rainbow Warrior, New Zealand/France, 1990.

²⁷ James Crawford, *op.cit.*, p. 82.

²⁸ Corfu Channel Case, *loc.cit.*

²⁹ James Crawford, *op.cit.*, p. 83.

to the problem of the rule enforcement. The term 'obligation' is generally used in the decisions and processes of international justice, as well as in the literature. The term covers various possibilities. However, the term 'obligation' set out in Article 2 of the ARSIWA is limited to 'obligation under international law'. Further, it is clarified by Article 3 as follows.³⁰

"The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

2. State Responsibility in Outer Space Law

The origin of international responsibility in the Law of Outer Space can be found in the 1962 United Nations General Assembly Resolutions on the principles governing the activities of states in the outer space exploration and exploitation. Based on the fifth and the eighth principles of the Declaration, state's activities in the exploration and use of outer space³¹, the OST reiterates the two principles in Article VI and Article VII as follows.³²

Article VI:

"States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, 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, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization."

Article VII:

"Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its

³⁰ Article 3 of the ARSIWA.

³¹ The United Nations General Assembly Resolution 1962 (XVIII) of 13 December 1963 on Principles Governing the Activities of States in the Exploration and Use of Outer Space.

³² Articles VI and VII the OST.

component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.”

The substance of the provisions set out in both articles is exactly similar to the fifth and eighth principles of the Declaration. Based on Article VI of the OST, the state parties to the OST internationally considered responsible to fulfill the following obligations.³³

1. The undertaken outer space activities shall be in accordance with the provisions contained in the OST.
2. Ensure that outer space activities carried out by non-governmental entities in accordance with the provisions of the OST, particularly the provisions regarding the authorization and continuous supervision requirements.
3. Define ‘the appropriate state’ that shall authorize and supervise continuously to the outer space activities carried out by non-governmental entities.
4. Assume the direct international responsibility to the outer space activities carried out by non-governmental entities.

Referring to Article VI and Article VII of the OST, international responsibility in outer space activities directly refers to states. This is consistent with the general principle of international law that a state can only act through agents and representatives.³⁴ However, deviating from the general doctrine of state responsibility, based on the Article VI of the OST, states are responsible for the public activities carried out by non-governmental entities. Substantially, this can be a disruption to the law and justice when an innocent state should be responsible for damages caused by the launch of space objects in international territory by national or multinational corporations act on behalf of the state to deceive the law.³⁵

Actually, Article VI and Article VII of the OST impose a strict liability regime to a launcher-state. The OST prohibits any outer space activities conducted by non-governmental entities unless being authorized and supervised continuously by state. Thus, the state parties to the OST must read the provision set out in Article II as follows: when a non-governmental entity carries out outer-space activities, state must have given the authorization to conduct the activities will take responsibility for damages caused by the activities. Despite the fact that it is not mandatory, each state party to the OST needs to make its national legislation governing the outer space activities.

The issue of authorization for the activities of non-governmental entities in outer space has been discussed since the drafting process of Article VI of the OST. There were disagreements between two space power states: The United States and

³³ Bin Cheng, *op.cit.*, pp. 13-14.

³⁴ Oppenheim, *International Law*, Jennings & Watts, Longman, 9th ed, 1996, as cited by Abhisek Dubey, “OST, Liability Principles and Launch from International Domain: Resolving A New Twist in the Tail”, *Proceedings of the Fiftieth Colloquium on the Law of Outer Space*, International Institute of Space Law, 2007, p. 148.

³⁵ *Ibid.*

the Soviet Union, during 1950s to 1960s. The United States did not agree to the Soviet Union's proposal that the outer space activities can only be carried exclusively by states.³⁶ The provision set out in the fifth principle of the Declaration and in the Article VI of the OST is a compromise provision between both parties. Finally, the provision regulates that non-governmental entities can legally perform outer space activities. However, it should be subject to the provisions that regulate the international state responsibility. In other words, such activity is private but the responsibility is public.³⁷

D. The Implementation of Direct International Responsibility for Non-Governmental Entities' Outer Space Activities

The outer space activities have been developed consistent with the rapid development of space technology. The involvement of non-governmental entities in outer space activities is being increased. Nowadays, non-governmental entities' outer-space activities have made outer space as a business field. Despite the fact that the legal concept of non-governmental entities' involvement is unclear, the outer space activities of private companies within the jurisdiction of a state or a multinational corporation (MNCs) currently own, control, or regulate business operations either alone or in cooperation with other economic entities in two or more states. The private companies are informally recognized as non-governmental entities. The number of private companies engaged in the outer space activities is extensively increasing in the United States and Europe.³⁸ As explained earlier, the involvement of non-governmental entities caused difficulties in the determination of the responsible party for any damages, particularly when the non-governmental entity is an MNC.

Based on the previous discussions and the concept of state responsibility in the outer space law, each state party to the OST is internationally responsible for

³⁶ Stephan Hobe (Eds), *Cologne Commentary on Space Law*, Netherlands: Carl Heymanns Verlag, 2009, p. 105.

³⁷ Frans G Von der Dunk, *National Space Legislation in Europe*, Netherlands: Martinus Nijhoff Publishers, 2011, p. 6.

³⁸ Space Entrepreneurs can be classified into several categories as follows:

- Entrepreneur of High Net Worth Individuals (EHNWI) incorporated in the club 'Super Angels' is a company that financially is owned by individual and apart from the international financial market. Some of the companies that fall under this category, include: *Blue Origin* (Jeff Bezos), *Bigelow Aerospace* (Robert Bigelow), *Virgin Galactic* (Richard Branson).
- Core and Tourism Entrepreneur is a company that have direct access to global financial market to fund the company. Business activities are concentrated on activities that have a very high risk and space tourism along with its infrastructure. Such companies are: *Rocketplane Kitler* (George French), *XCOR Aerospace* (Jeff Greason), dan *Orbital Outfitters* (Rick Tumlinson).
- Utilization Plus Entrepreneur is a company does not play on external financial resources to fund the company. The company concentrates on the market of technological applications that have medium and low risk level such as the application of information technology. Some companies included in this category are: *RapidEye* (Manfred Kruschke dan Wolfgang Biedermann) dan *Septentrio* (Peter Grogard).

For more detail see Joerg Kreisel dan Burton H Lee, "Space Entrepreneurship – Status and Prospects", European Space Policy Institute, *Yearbook on Space Policy 2006/2007*, Springer Wien, Austria, 2008, pp. 259-260.

national activities in outer space, whether these activities carried on by government agencies or by non-governmental entities. It is necessary to authorize and supervise continuously by the appropriate state party to the OST towards the outer space activities carried on by a non-governmental entity. This shows that non-governmental entities are not party to the treaty that have international responsibility for the outer space activities. In other words, non-governmental entities have indirect international responsibility.

The legal basis, which supports the concept of state responsibility in the law of outer space, is Article 31 of the 1969 Vienna Convention.³⁹ The article regulates that responsibility may not be imposed on non-governmental entities that are not parties of an international treaty (*pacta sunt servanda*). However, the application of indirect international responsibility to the outer space activities carried on by non-governmental entities practically creates difficulties and complicated mechanisms, especially when the non-governmental entity carried on the outer space activities within territory of a state that is not a party to the OST, or when the non-governmental entity is a multinational Corporation (MNC). Therefore, the implementation of direct international responsibility to the outer space activities carried on by non-governmental entities will be very helpful in the prosecution of their responsibility. In connection with the internationally wrongful act, Article VI of the OST can be interpreted as an obligation of state to implement international obligations: authorization and continual supervision. Thus, if a state has implemented the obligations correctly and effectively, then the state should not be responsible for the activities carried on by non-governmental entities in the state's territory or jurisdiction.⁴⁰

The assignation of non-governmental entities, including MNCs, as the subjects of international law should not mean that non-governmental entities has similar rights and obligations of other subjects of international law. Shaw and Harris claim that different subject of law have different legal capacities, rights, and obligations.⁴¹ Some prominent law scholars consider individuals as limited subjects of international law. Hence, it can be said that non-governmental entities can be referred to as a limited subject of international law with restricted rights and obligations. The requirements for a 'subject' of the international law to be considered having direct rights and responsibilities under that system, bring international claims, and able to participate in the creation, development, and enforcement of international law,⁴² should not be applied to non-governmental entities. Then, to expand the subject of international law, such criteria that have limited application should be changed. Furthermore, as stated by Janis and Noyes

³⁹ Article 31 Vienna Convention on the Law of Treaty of 1969.

⁴⁰ Frans G. Von der Dunk, *op. cit.*, p. 81.

⁴¹ Malcolm N. Shaw, *op. cit.*, p. 138. See also D. J. Harris, *loc. cit.*

⁴² Bengt Broms, *loc. cit.*

that the recognition of a legal subject can be done as there is a need of the society.⁴³ This is also confirmed by McCorquodale,⁴⁴

“..... while the State is the primary subject of the international legal system, the subjects of that system can change and expand depending on the ‘need of the international community’ and ‘the requirements of international life.’”

To accelerate the mechanism of responsibility for damages caused by the outer space activities, the community is very concerned to provide non-governmental entities the status as subjects of international law. In this context, the community referred to the international community including states, international organizations, and even individuals.

Modern international law has already considered a variant of non-state subjects of international law. It recognizes individuals as subjects of international law, to be precise limited subjects of international law.⁴⁵ Sumaryo groups them into non-state entities,⁴⁶ and *Brownlie* classifies them into *special types of personality*.⁴⁷ In fact, individual as subject of international law had been recognized in the 1919 Versailles Peace Treaty that ended the World War I among Germany, Britain, and France. The treaty allows individuals to file a lawsuits to the International Court of Arbitration.⁴⁸ The similar provisions also exist in several other international treaties such as the 1922 Upper Silesia Treaty.⁴⁹

The important moment in the development of this concept is the prosecution of war criminals in several international courts that began with the establishment of an ad hoc tribunal to the formation of a permanent court, namely the International Criminal Court that was established under the Rome Statute. As a subject of international law, individuals can no longer protect themselves in their capacity as state representation under the impunity principle. Further developments have taken place in Europe with the establishment of regional organizations, the European Union and the European Council, which are considered by many international experts as the most advanced regional regions in terms of individual recognition as subjects of international law, especially related to the protection of human rights.

⁴³ Mark W. Janis and John E. Noyes, *loc.cit.*

⁴⁴ Robert McCorquodale, “The Individual and the Intrnational Legal System” in Andrea Bianchi (Ed), *Non-State Actors and International Law*, USA: Ashgate Publishing Company, 2009, p. 309.

⁴⁵ Mochtar Kusumaatmadja, Ety R. Agoes, *Pengantar Hukum Internasional*, Bandung: Alumni, 2003, p. 103.

⁴⁶ Sumaryo Suryokusumo, *Pengantar Hukum Organisasi Internasional*, Jakarta: PT Tata Nusa, 2007, p. 46.

⁴⁷ Ian Brownlie, *Principles of Public International Law*, Seventh Edition, Oxford: Oxford University Press, 2008, p. 65.

⁴⁸ Mochtar Kusumaatmadja and Ety R. Agoes, *op.cit.*, p. 104.

⁴⁹ *Ibid.*

As mentioned earlier, in general, international responsibilities of individuals are similar with state's or international organizations' international responsibilities.⁵⁰ As subject of international law, individual has rights and obligations. Although it is a limited subject of law, the recognition of individual has ended the state-centric of international law that put state as sole subject of international law. The recognition of individual as subject of international law can be seen in the following cases.

1. Respublica v. The Longchamps Case (US Supreme Court, October 1784)

Charles Julian De Longchamps (Chavelier De Longchamps) was accused of verbally attacking the French Consul General to the United States, Francis Barbe Marbois on May 17, 1784. Two days later, De Longchamps was suspected of carrying out acts of violence against the consul publicly. De Longchamps was later convicted for physically harming De Marbois. The American domestic court, the Court of Oyer and Terminer was then asked to consider whether De Longchamps should be extradited to France or be sentenced in Pennsylvania. The court presided over by Chief Justice M'Kean stated that De Longchamps could not legally be deported or imprisoned because De Longchamps had violated the laws of the nations (read: international law). He is considered violating international law because of his position as a public minister (a diplomat). The following is the court stipulation.⁵¹

"The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and wellbeing of the nation; he is the guilty of a crime against the whole world."

The act of violence against a diplomat is considered not only insulting the sovereignty of state but also disturbing the general security and welfare of the nations. Therefore, De Longchamps is considered guilty of committing crimes against the whole world (read: international community). The court then sentenced De Longchamps to two years in prison, fined him of 100 *French Crowns*, and added an additional seven years' good bail. Some constitutional law experts are of the opinion that this case is the driving force for the inclusion of the Law of Nations in the United States constitution.

2. The Paquete Habana Case (US Supreme Court, 8 January 1900)

In this case, the US armed forces captured two Cuban fishing vessels with Spanish flag on the first day of the start of the US-Spanish war. The US Federal Court designated the two fishing vessels as spoils of war. The master of the ship along with the crew and ship owner appealed to the Supreme Court of the United States. They made a rebuttal before the Supreme Court and said that the boat used to

⁵⁰ James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford: Oxford University Press, 2010, p. 8

⁵¹ Library of Congress, "U.S. Reports: Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784)", <https://www.loc.gov/item/usrep001111/> downloaded on 14th of April 2019.

catch fish peacefully so it was not spoils of war based on the provisions in international law as the two ships regularly entered and exited across Cuban waters to catch fish. They sailed under the flag of the Spanish state. The ship's owner and skipper are Spanish nationals who were born in Cuba and lives in the city of Havana. Two-thirds of the fish catch is usually given to the ship's captain and crew and one-third of the portion is given to the ship's owner. This fishing activity has become a routine activity carried out by the two ships until the two ships are surrounded and stopped by the US troops. Under siege, the two fishing vessels were completely unaware of any war or blockade. The two ships also did not have weapons or ammunition and did not try to avoid the siege after knowing of their whereabouts or putting up resistance at the time of capture.

This case questions the customary law enforcement, which prohibits the capture of fishing vessels. Until now, the states of the world recognize and declare this recognition both in agreements and other general agreements that unarmed fishing vessels, including cargo and crew, used to carry out fishing, should not be captured and made spoils of war. This provision has become an established principle in international law.⁵² The following is the stipulation of the Supreme Court.⁵³

"By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war."

The Supreme Court then concludes as follows.

- a. The practice of states that exclude fishing vessels (used for fishing) as spoils of war has become customary international law.
- b. Customary international law can influence decisions in some cases resolved by the US courts.
- c. International law is part of the national law of the US, so that international law can be established and implemented by the US courts in accordance with the courts' jurisdiction.⁵⁴

⁵² Recognition of the *Traditional Fishing Rights Principle* has developed into the customary law of nations in the 19th century. Countries with the system of *Common Law* at the time determined that rules originating from recognized international legal sources would only be binding if they were incorporated into their national law through laws, court decisions, or customs that were carried down hereditary. For details see Michael Lobban, "Custom, common law reasoning and the law of nations in the nineteenth century" in Amanda Perreau-Saussine (Eds), *The Nature of Customary Law*, New York: Cambridge University Press, 2007, p.256-257.

⁵³ *The Paquete Habana*, 175 US 677 (1900), <http://www.lawschoolcasebriefs.net/2012/01/paquete-habana-case-brief.html>, downloaded on 14th April 2019.

⁵⁴ *Ibid.*; Learn the Supreme Court stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of Appropriate jurisdiction, as often as questions of right Depending Duly upon it are presented for their determination ".

Thus, individuals have the right to rely on provisions derived from international legal sources to be determined and carried out by domestic courts in their respective states.

3. The International Military Tribunal at Nuremberg (Judgment of 1 October 1946)

The International Military Tribunal (the IMT) after the World War II has decided that individuals can be held liable according to international law. The IMT⁵⁵ expressly stipulates that individuals must comply with international provisions when committing crimes against peace, war crimes, or crimes against humanity. Article 6 of the Charter stipulates the three forms of crime, which become the jurisdiction of the IMT to hold individuals and those who participate in the formulation or execution of a plan or conspiracy to commit these crimes.⁵⁶

"... The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:*
- (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity:*
- (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated .*

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the for crimes are responsible for all acts performed by any persons in execution of such plans."

⁵⁵ The full name of this charter is The Charter of the International Military Tribunal at Nuremberg (hereinafter referred to as *the Charter*)

⁵⁶ See Article 6 of the Charter.

Thousands of individuals have faced trials in Nuremberg and hundreds among them have been convicted.⁵⁷ Therefore, the Nuremberg Tribunal clearly and firmly has reaffirmed that the provisions of international law can be applied to individuals. The Nuremberg Tribunal stipulates that the provisions of international law can be implemented only to prosecuting individuals who commit crimes as mentioned above.⁵⁸

In its development, the court in Nuremberg also had an enormous influence on the birth of other elements of modern international law –for instance, the 1950 The European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Convention stipulates that each state party to the convention must guarantee certain rights and freedoms for everyone in state's jurisdiction. These particular rights and freedoms include, among others, the right to life, freedom from torture, barbaric and degrading, slavery, and the right to freedom and security of a person.⁵⁹ The European Convention did not only formulate substantial international rights but it also established institutions as a tool to implement these rights. They are, among others, the European Commission of Human Rights and the European Court of Human Rights. In practice, the European Court of Human Rights manages more cases of human rights violations involving individuals as parties.⁶⁰ This fact has made the human rights enforcement system in Europe being an important aspect of international law as it has strengthened the recognition that state is not the only subject of international law.

E. Conclusion

The implementation of indirect international responsibility of non-governmental entities for their outer space activities may create complicated mechanism in both international and national law. The unsettled legal position of non-governmental entities in the outer space law may lead to the ineffective international law enforcement, considering that it always has to include state in the mechanism. Since international law is the main source of space law, the adoption of the concept of responsibility of non-state actors in international law may be feasible. The similar concept may be implemented to non-governmental entities for outer space activities. It is a rational choice and a necessity for the space law to respond the escalating development of privatization and commercialization of outer space.

⁵⁷ See Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (22nd August 1946 to 1st October 1946).

⁵⁸ The Tribunal *Nuremberg* stipulates as follows: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes as can the provisions of international law be enforced". See M. W. Janis, "Individuals as Subjects of International Law", *Cornell International Law Journal*, Vol. 17, Issue 1, 1984, p. 66.

⁵⁹ Specific rights and freedoms guaranteed by the convention, see Article 1 - 12 of The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

⁶⁰ Until September 30, 1981 the *European Commission of Human Rights* only received case requests from 13 countries, whereas applications from individuals amounted to 9560 requests. See MW Janis, *op.cit.*, p. 68.

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