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Criminal Jurisdiction in Outer Space†

As man's penetration of outer space becomes more and more of a commonplace, the opportunities for criminal behavior and the commission of offenses may be expected to increase. One of the early tasks of the law in meeting this challenge is to provide for the timely clarification of applicable jurisdictional rules, the elimination of possible conflicts and the filling of any gaps in the legal framework.

Much like on earth, criminal behavior in outer space, including the moon and other celestial bodies, may range from simple transgressions and violations of public order to the more heinous crimes. These violations may occur in outer space itself, that is in the void, or on board a spacecraft, space laboratory or another space object in outer space, or on such craft on a celestial body or on a celestial body but not aboard such a craft either within a particular facility or without it. In all these situations a number of problems of criminal jurisdiction may arise which will have to be tackled by lawyers if man's activities in space are to take place in an orderly manner and with a minimum of friction.

Principles Of Jurisdiction

Traditionally, the states have claimed and exercised jurisdiction over people who committed offenses by invoking certain principles of criminal competence.¹ The most well-known and widely recognized principle has been the principle of territoriality on the basis of which states have invoked competence to try offenders who commit crimes within their

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†This article is an elaboration of the author's address before the Federal Bar Association's annual convention on September 8, 1971 in New Orleans and will constitute a chapter in a forthcoming book on International Criminal Law.

¹Various principles of criminal jurisdiction and their application are discussed in Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 at 480-591. (Supp. 1935.) See also Christol, *The International Law of Outer Space*, in 55 NAVAL WAR COLLEGE, INTERNATIONAL LAW and Taubenfeld, *The Law Relating to Activities of Man in Space* 201 ff. (1970), LAW STUDIES 1962, 418 ff. (1966); McDUGAL, LASSWELL and VLASIC, LAW AND PUBLIC ORDER IN SPACE 695 ff. (1963).

territory. Offenders in such a case may involve not only nationals, temporary or permanent residents, but also foreigners.

National territory would include national land, territorial waters and air space above such national land and territorial waters. There is no agreement at the present time with respect to the extent of territorial waters since claims to such waters range from three to two-hundred miles or more. Also, there is no agreement regarding the upward extent of air space and the precise demarcation line between air space and outer space.²

Another frequently invoked principle of jurisdiction is the principle of nationality on the basis of which many states claim jurisdictional competence over their nationals who have committed crimes without the territorial jurisdiction of the state. The degree of the invocation of such principle varies to a great extent. Some states invoke it only for serious offenses, while others apply it also to lesser crimes committed by their nationals.

Still another method invoking competence relates to the principle of the injured forum, also referred to—with some variations in connotation—as the “protective” principle and “impact territoriality” principle.³ Under this principle a state may punish an offender who committed a crime without the territorial jurisdiction of the state if the crime adversely affects people or property within the state.

Some states invoke jurisdiction only if national security interests, including not only political but financial, and currency stability interests are involved. Anti-trust statutes have been applied by United States courts to certain events which have taken place abroad by the invocation of the “impact territoriality” principle.⁴

Finally, the principle of universality should be mentioned. By resorting to this principle states have claimed jurisdiction regarding certain offenses which may have been committed by any person anywhere in the world. Piracy is, for instance, a crime which would fall into this category.⁵

While the foregoing principles of criminal jurisdiction have frequently been invoked by states, international practice has not necessarily been limited to them. Ships and aircraft flying the national flag on and above

²For an early, comprehensive exposition of the problems of upward extent of sovereignty, see Gorove, *On the Threshold of Space: Toward a Cosmic Law*, 4 N.Y.L.F. 305 (1958); Gorove, *Toward a Cosmic Law: Problems of the Upper Extent of Sovereignty*, Proc. 1st Colloquium on the Law of Outer Space 1-4 (1958).

³MCDUGAL, LASSWELL AND VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 700 (1963).

⁴*Ibid.*

⁵Jenks states that “acts which would be piracy if committed at sea are piracy if committed in space and are, accordingly, punishable by the law of nations by any State.” JENKS, *SPACE LAW* 293 (1965).

the high seas and also elsewhere have been assimilated to national territory; thus, claims to competence have frequently been advanced by states which sought to apply their criminal laws to offenders on such ships and aircraft.

States have also claimed competence on the basis of such criteria as the state of embarkation or disembarkation and other criteria in relation to crimes committed on board an aircraft over the high seas.⁶ Generally speaking, the variety of jurisdictional claims grows out of the fact that nations have been traditionally free to determine their criminal competence and relatively few limitations seem to have been imposed by international law.

There is no reason to believe that the various principles of criminal jurisdiction will not be invoked in connection with man's antisocial activities in outer space. Many learned writers have pointed out the similarities as well as the differences which may exist with respect to an aircraft over the high seas, or a ship on the high seas, and a spacecraft in outer space. They seem to be reflected in the formulation of certain principles by the United Nations⁷ and in some of the corresponding prescriptions written into the Outer Space Treaty⁸ which have placed the traditional problems associated with criminal jurisdiction into a new perspective.

The key provision embodying the relevant principles and prescriptions is Article VIII of the Outer Space Treaty, which stipulates that a "Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control of such object, and over any personnel thereof, while in outer space or on a celestial body." As we shall see, the foregoing stipulation—like many other provisions of the Treaty—seems to have created almost as many problems as it may have intended to resolve.⁹

⁶For further details and relevant literature, see MCDUGAL, LASSWELL AND VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 701-2 (1963).

⁷See Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space, U.N. Gen. Ass. Res. 1962 (XVIII) of December 13, 1963 (U.N. Doc. A/C.1/L.331 and Corr. 1).

⁸The Treaty on Principles Governing Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (hereinafter referred to as "Outer Space Treaty" or, simply "Treaty") was signed on January 27, 1967, and entered into force October 10, 1967 (T.I.A.S. No. 6347).

⁹For analyses of other articles of the Treaty, see for instance Adams, *The Outer Space Treaty: An Interpretation in Light of the No-Sovereignty Provision*, 9 HARV. INT'L L.J. 140 (1968); Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 FORDHAM L. REV. 344 (1969); Gorove, *Arms Control Provisions in the Outer Space Treaty: A Scrutinizing Reappraisal*, 1 GEORGIA J. OF INT'L & COMP. L. 259 (1971); Gorove, *The International Protection of Astronauts and Space Objects*, 20 DE PAUL L. REV. 175 (1971); Gorove, *Freedom of Exploration and Use in the Outer Space Treaty: A Textual Analysis and Interpretation*, 1 DENVER J. OF INT'L LAW & POLICY 65 (1971); Markov, *The Juridical Meaning of the Term*

Jurisdictional Authority

An initial question with respect to the quoted provision of Article VIII is whether or not the phrase, "shall retain jurisdiction" refers both to civil as well as criminal jurisdiction. It is submitted that it would be extremely difficult, if not impossible, to make out an argument for an affirmative response.

The Outer Space Treaty appears to vest not only jurisdiction and control over a spacecraft and its personnel in a particular state but also imposes international responsibility for all national activities in outer space irrespective of whether such activities are being carried out by governmental agencies, or by nongovernmental entities. The avowed purpose of the Treaty is to assure that national activities are carried out in conformity with the provisions of the Treaty.¹⁰

It is hard to see how a party could comply with the aforementioned stipulations and assume international responsibility unless it is entitled to exercise jurisdiction, especially criminal jurisdiction. Also, the further provision of the Treaty that the activities of non-governmental entities in outer space, including the moon and other celestial bodies, require authorization and continued supervision by the state concerned, would clearly indicate the need for establishing the right to exercise criminal jurisdiction.¹¹ Such invocation of competence and control, however, should not run counter to the prohibition of national appropriation of outer space, including the moon and other celestial bodies, as stipulated by Article II.¹²

While the right to retain criminal jurisdiction and control seems to have been conferred on the state of registry by Article VIII, the question arises whether this means exclusive or concurrent criminal competence.

Traditionally, if a person had been convicted or acquitted or not prosecuted by State X, any such fact alone, in the absence of some international custom or agreement to the contrary, did not prevent State Y from subsequently prosecuting, convicting or acquitting him subject to whatever laws State Y may have had on double jeopardy.

It is somewhat doubtful that Article VIII intended to bring about a definite change in the foregoing situation. For one thing, Article VIII does not use the words "exclusive jurisdiction" but only "jurisdiction." For another, little would seem to be gained by insisting on exclusivity at the

"Peaceful" in the 1967 Space Treaty, Proc. 11th Colloquium on the Law of Outer Space 30 (1969); Meyer, *Interpretation of the Term "Peaceful" in the Light of the Space Treaty*, Proc. 11th Colloquium on the Law of Outer Space 24 (1969).

¹⁰Treaty, Art. VI.

¹¹*Ibid.*

¹²*Cf.* Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 Fordham L. Rev. 344 (1969).

present time. Thus, for instance, if the state of registry for some reason did not prosecute, this fact alone should not necessarily bar prosecution by another state on the basis of invoking some other recognized principle of criminal jurisdiction.

On the other hand, it could also be argued that there would be little reason to confer jurisdictional authority on the state of registry if other states could equally claim competence. Perhaps the answer is that the state of registry should retain its primary jurisdiction and any other state should not be permitted to invoke its criminal competence except secondarily.

Finally, it should be pointed out that it is not clear from Article VIII whether or not the retention by the state of registry of criminal jurisdiction is mandatory. At present, the United States has not yet enacted federal legislation to provide for the prosecution and punishment of civilian persons who commit crimes in outer space. If the exercise of criminal jurisdiction had been interpreted as a mandatory obligation, all parties to the Treaty would have been expected to enact appropriate national legislation as soon as the Treaty entered into force with respect to them. Also, a mandatory obligation for a party would mean that it could not agree in any given case on some other principle of jurisdiction, except with the consent of all the other parties to the Treaty.

Crimes Committed in a Spacecraft in Outer Space or in a Spacecraft (Facility) on the Moon and Other Celestial Bodies

Generally speaking, a parallel may be drawn between crimes committed on board an aircraft flying over the high seas or a ship on the high seas, and crimes perpetrated within the confines of a spacecraft. In the former instances jurisdiction has been claimed and exercised by the state of registry or flag even though occasionally, as has been intimated previously, also other states have claimed criminal competence.¹³ In the latter situation Article VIII of the Outer Space Treaty is now controlling, which entitles the party on whose registry an object launched into outer space is carried to retain jurisdiction over such object and any personnel thereof.

Registration

The first question that comes to mind is whether a national or international registration is required. In response to this question, it may be noted that Article VIII speaks of a state party on "whose" registry an object is launched, thereby implying that a state registry and not an international registry is meant. Also, it may be observed that, at the present

¹³See text preceding note 6 above.

time, there is no compulsory international registering authority even though states have filed with the Secretary General of the United Nations information pertaining to many objects which they had launched into outer space.¹⁴

It may be pointed out that the mere fact of registration should not necessarily entitle the registering state to jurisdiction and control unless there are additional criteria present, such as prior exercise of jurisdiction and control by the state of registry over the particular space mission. This becomes apparent from Article VIII which uses the phrase, "shall retain" jurisdiction, thereby implying that prior jurisdiction and control was exercised by the state of registry. Otherwise, it could happen that any state could claim jurisdiction and control by the mere fact of including a space object in its national registry.

If the particular state on whose spacecraft the crime is committed is not a party to the Treaty, it would seem that the principle embodied in Article VIII may still be invoked to support a claim to criminal competence. At the same time, it appears that a nonparty would be in no position to object to the retention of primary criminal jurisdiction by the party of registry.

No doubt a non-party could always use the argument that it had not ratified the Treaty and, for that reason, it should not be bound by its stipulations. However, if the Treaty is an expression of the consensus of a great majority of states, large and small, in the world community, its provisions are likely to carry great weight in the determination of law.

There are at least three other pertinent problems which may be touched upon. They relate to international registration, no registration, and multiple registration.

In the first case, if the state party has not registered the object in its national registry, but only in the international registry if such is established, it would appear that the latter fact alone should not deprive that party from retaining jurisdiction over the object's personnel. On the other hand, if an international organization has registered the object in an international registry, it is doubtful that the organization could exercise criminal jurisdiction.

While Article VI states that when activities are carried on in outer space by an international organization, responsibility for compliance with the Treaty must be borne both by the international organization and by the parties to the Treaty participating in such organization, Article VIII speaks of jurisdiction only with respect to a state party on whose registry the

¹⁴For a brief review of U.S. and Soviet practices with respect to filing information with the Secretary General of the United Nations, see Sheldon & DeVoe, *United Nations Registry of Space Vehicles*, Proc. 13th Colloquium on the Law of Outer Space 127 (1971).

object is carried. Thus even though the international organization would be clearly responsible for its activities, without some additional international agreement, it would be in no position to claim criminal competence.

A more likely result under the circumstance, would be that states participating in the international organization would invoke traditional principles of jurisdiction. Also, in case of an international endeavor, if the spacecraft is registered in the national registry of a participating state which is also in charge of the technical control over the space mission, that state could claim primary criminal jurisdiction over the object's personnel.

In the second situation, if a party has not registered an object, it would seem again that this fact alone should not deprive that party from exercising jurisdiction. In such a case, other relevant criteria, such as, for instance, the state exercising ground control over the particular mission, the launching state, or the state entitled to ownership of the object should be carefully considered. Finally, in the third case, if several states have registered different objects which constitute component parts of the same spacecraft, it would appear that the state on whose registry such spacecraft is carried should retain jurisdiction.

Last but not least, it may also be noted that Article VIII gives no further clue as to the type of data which are to be included in the registry or the time, manner and validity of registration or any other relevant matter. These particulars at the present time seem to be left within the discretion of each state.

Personnel

Article VIII speaks, *inter alia*, of jurisdiction over the personnel of the space object. This raises the question of who is to be included in this category. Are passengers or stowaways in a spacecraft, if such ever be the case, to be regarded as personnel? It would seem not.¹⁵ By ordinary interpretation the term personnel refers to the crew, and not to the passengers, and even less to stowaways or other unauthorized travelers.

The fact that passengers, visitors and unauthorized people are not to be regarded personnel, does not necessarily mean that the state of registry would not be entitled to exercise jurisdiction over them, while in its registered spacecraft in outer space, or in such a craft on the moon or another celestial body.

More of a problem may arise in connection with crimes committed during visits by personnel of another spacecraft. In such cases, there may

¹⁵Gorove, *Legal Problems of the Rescue and Return of Astronauts*, 3 INT'L LAW. 898 at 899 (1969).

be insistence on the literal interpretation of Article VIII, to the effect that the jurisdictional authority of the state of registry over the personnel of its registered spacecraft, should continue even if such personnel is within the confines of a foreign spacecraft.¹⁶

While the wording of Article VIII seems to lend itself to such interpretation, that is the personnel of the spacecraft ("object") would remain the personnel "thereof" outside of the confines of the craft, it is by no means clear that such result was intended. The problem is particularly bothersome where the foreign spacecraft personnel are also nationals of the foreign power. In such case, the foreign state could also invoke Article VI, under the terms of which parties are required to exercise continued supervision and control over national activities of nongovernmental entities, and such would presumably cover the activities of all nationals, including individuals.

Against this admittedly quite persuasive logic, must be set the argument that the suggested solution would run counter to previous international practice, with respect to crimes committed on board ships and aircraft on or over the high seas. While analogy should not necessarily be resorted to in resolving a problem of criminal jurisdiction in outer space, further support for such position may be found in both Article VIII and Article XII of the Treaty.

Article VIII entitles the state of registry to jurisdiction first of all over the registered object. It is hard to see how any interference with the proper operation of such object, or with its personnel and passengers, would have to be tolerated by the state of registry. Also, it is hard to visualize how the state of registry—without some additional understanding or agreement—would be willing to surrender foreign personnel and other visitors to the foreign state for what would appear to be trial and punishment, by waiving its primary jurisdiction.

Furthermore, under Article XII the parties appear to exercise some measure of control with respect to space vehicles as well as all stations, installations and equipment on the moon and other celestial bodies. This is intimated by the stipulation that the right of visit by foreign representatives is based on reciprocity, and that reasonable advance notice of a proposed visit is required, so that appropriate consultation may be held and maximum precautions taken, to assure safety and avoid interference with normal operations in the facility to be visited.¹⁷ Thus, from the tenor of this

¹⁶Cf. JENKS, *SPACE LAW* 294 (1965).

¹⁷The full text of Article XII of the Treaty reads as follows: "All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such represen-

stipulation one gets the feeling that the state would be expected to exercise some degree of control as well as jurisdiction with respect to crimes taking place within the confines of a spacecraft. Admittedly this contention is not as strong in connection with a facility other than a spacecraft.

**Crimes Committed in Outer Space or on a
Celestial Body Not Within a Spacecraft, or Facility**

One problem which may arise with respect to the interpretation of Article VIII, involves the question whether or not criminal jurisdiction by the state of registry, should be exercised only with respect to events occurring on board a spacecraft, or also with respect to activities which take place in outer space or on a celestial body, but not on board a spacecraft or facility. Article VIII of the Treaty says only that the party shall retain jurisdiction over an object, and over any personnel thereof, while in outer space or on a celestial body.

The wording of this sentence is not clear with respect to the personnel, whether or not it must be within the object in outer space or on a celestial body. The question here again is whether or not the "personnel" of the object (if "thereof" refers to the object), remains its personnel outside of the confines of that object. The answer here is not necessarily the same as in the case where the personnel of the spacecraft of one state of registry commit crimes on board the registered spacecraft of another state.¹⁸

From a reading of Article VI, it could be argued that since a party is required to exercise continued supervision and control over national activities in outer space, including those carried out by governmental or non-governmental entities and so also individuals, such control would relate to such activities irrespective of whether or not they take place within the confines of a spacecraft or facility or outside it.

Furthermore, if one interprets Article VIII to mean that the state's criminal jurisdiction would continually extend to any personnel of the spacecraft, even though the personnel is outside the spacecraft or facility in outer space or on a celestial body, then all personnel, irrespective of their nationality, would remain subject to the jurisdiction of the state of registry.

The situation would appear to be slightly more complicated in case of passengers and other people not falling into the category of personnel. While there may be valid reasons for invoking a principle other than that of the state of registry, it would appear that the latter should not be denied

tatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

¹⁸*Cf.* text preceding notes 16 and 17 above.

jurisdiction over crimes committed in outer space by persons who were carried by its registered spacecraft irrespective of whether or not they belong to the category of personnel.

For one thing, the state of registry, which exercised control of the particular mission from the outset, would seem to be the most logical party to do so, at least in relation to acts which affect its spacecraft and its passengers. For another, in many cases the state of registry may be, by necessity, the only state that would be in a position, at least initially, to exercise jurisdiction. For example, non-personnel people may include nationals of states which are not space powers and which, for that reason, could not exercise initial jurisdiction anyway.

However, if the criminal acts affect a foreign spacecraft or its passengers, it is more likely that the foreign state of registry will claim primary jurisdiction. Such solution would be in line with the Restatement of the Foreign Relations Law of the United States, according to which a state has jurisdiction to prescribe rules of law "attaching legal consequences to conduct outside its territory that threatens its security as a state, "provided" the conduct is generally recognized as a crime under the laws of states that have reasonably developed legal systems.¹⁹

Of course, it is realized that this solution would run counter the literal interpretation of Article VIII and would pose a further problem with respect to distressed astronauts whose safe and prompt return to the representatives of the launching authority may perhaps be insisted upon irrespective of their criminal behavior prior to their distress.²⁰

Conclusion

The preceding analysis of problems of criminal jurisdiction in outer space reveals a need for clarification of applicable rules and filling of gaps in the legal framework.

To be sure, the provisions of the Outer Space Treaty constitute a significant landmark in the development of space law, but further national and international action, involving domestic legislation and treaty law, will be needed to avoid lawlessness and chaotic conditions. The purpose of this

¹⁹American Law Institute, *RESTATEMENT OF THE LAW (Second): Foreign Relations Law of the United States* § 33, 92 (1965); but cf. JENKS, *SPACE LAW* 294 (1965).

²⁰Cf. Dembling and Arons, *The Treaty on Rescue and Return of Astronauts and Space Objects*, 9 WM. & MARY L. REV. 630 at 652 (1968); Haley, *Space Salvage—Artifacts and Personnel in Space and on Terrestrial Jurisdictions*, Proc. 8th Colloquium on the Law of Outer Space, 119 at 121-2 (1966).

study has been to focus on some of the controversial problems and suggest some alternatives without offering any iron-clad solutions. This is in line with the basic characteristic of the subject matter, namely that space law is a new and very much developing area of the law.