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PEACEFUL RESOLUTION OF OUTER SPACE CONFLICTS THROUGH THE INTERNATIONAL COURT OF JUSTICE: "THE LINE OF LEAST RESISTANCE"

GEORGE PAUL SLOUP*

INTRODUCTION

SIMON NEWCOMB, the great American astronomer, wrote these words at the beginning of the present century:

The demonstration that no possible combination of known substances, known forms of machinery and known forms of force, can be united in a practical machine by which man shall fly long distances through the air, seems to the writer as complete as it is possible for the demonstration of any physical fact to be.¹

Newcomb was not alone in his scolding of those whose imaginations allowed them to foresee such things as men flying through the atmosphere in heavier than air machines or going to the moon. During the first few decades of the twentieth century other learned and respected scientists contributed to the derision of anyone suggesting that such events would eventually come to pass, or that such events would be of any practical use even if they could be accomplished.² It is not difficult to imagine what horrors of social and professional ostracism at the time would probably have befallen a law professor or practicing attorney who, instead of devoting his time and energies to such avant-garde subjects as the *Uniform Stock Transfer Act*, had decided to devote all or part of his talents to the study of the possible legal implications of airship operation.³

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1. CLARKE, PROFILES OF THE FUTURE 2 (1958).

2. *Id.* at 3-11.

3. For some interesting early articles on air law see Moore, *Aerial Navigation*, 4 LAW NOTES (N.Y.) 87 (1900); *Air-ships-a legal problem*, 51 SOL. J. 771 (1907); *A closed chapter in aeritime law*, 19 GREEN BAG 708 (1907); Baldwin, *Law of the Air Ship*, 4 AM. J. INT'L L. 95 (1910); Kuhn, *The Beginnings of an Aerial Law*, 4 AM. J. INT'L L. 109 (1910).

The pattern of history linking once absurd ideas with technological reality has become all too clear during the present century: the imaginations of a few individuals conjure up an abstract idea, impossible at the time of realization; then comes science and its ever present though subordinate companion, technology, and through the human processes of discovery, invention, and innovation the once-impossible idea becomes everyday reality. Along with and sometimes before the benefits of the new reality come problems which threaten in whole or in part the values and very existence of human beings and their society. The solution of these problems becomes very difficult because little or no thought was given to them in advance. Often the laggard in such situations is the law—the tool society employs for the orderly solution of its problems. The law, often caring little about the activities of scientists, becomes stifled by the newly presented accomplishments of engineers and technicians.

The moon, always a subject of great interest to astronomers, now enjoys a wider scope of attention from men in diverse occupations and with even more diverse interests. It can be conceived of as a base from which to either launch missiles with thermonuclear warheads to Earth or, by intimidation with such missiles, control Earth, or it can become the scene for international mining and manufacturing operations, the output of which will greatly benefit all peoples on Earth.

That outer space, the newest of man's environments, will become increasingly important as an arena of human activity and interaction seems at this point, only fourteen years after the launching and placing into orbit of Earth's first satellite, to be nearly immune from contradiction. *Homo sapiens* is basically an exploratory species and can be expected to advance as far into any newly-found environment as he is physically and psychologically able.⁴ The efforts of humans on Earth to explore and utilize outer space which formally began on October 4, 1957, with the launching of Sputnik I, will continue to become of greater importance either directly or indirectly not only to the two giant industrial leaders of the space club, the United States and the Soviet Union, but to all other nations on Earth as well. The American space program, although listing

4. Wiley, *Space: A Barrier to the Species*, NATURAL HISTORY, Jan. 1970, at 70.

slightly due to the recent near-tragedy of Apollo 13 and the pre-Apollo 13 decision to reduce NASA's (National Aviation and Space Administration) budget to the lowest it has been since 1962, will, nevertheless, remain healthy.⁵ Recently the President outlined six major areas of concern for the United States space program for the 1970's:

1. The Skylab program, formerly the Apollo Applications Program, which will involve the launching of manned orbiting space stations into Earth orbit;
2. The development of a space-shuttle system, utilizing either a reusable or a one-time booster, which will greatly cut the amount of money currently needed to place a craft into orbit;
3. A second generation Skylab or space station system;
4. Unmanned planetary probes of all or most of the planets in our solar system;
5. Science-applications space flights, involving unmanned satellites, to explore such fields as communications, meteorology, and earth resources;
6. More lunar landings.⁶

This will insure that the United States space program will not atrophy, despite certain necessary budget cuts in view of pressing domestic needs at home.

The Soviet space program, being veiled in the characteristic secrecy of most of the activities of the other leader of the space club, is a subject open to speculation. It is a certainty, however, that the efforts of the Soviet Union will at least equal and possibly surpass those of its rival across the Pacific. The Soviets will no doubt concentrate heavily upon the development and installation of a system of manned space stations in permanent Earth orbit, with manned lunar landings occupying a subordinate role.⁷ In addition to this the Soviet Union, like the United States, will continue to investigate the military potentials of space as they relate to national security. Of particular interest are the applications of unmanned satellites to mili-

5. NASA's total budget for fiscal 1972 (as of this writing neither authorized nor approved) is \$3.2 billion, down considerably from the 1965 figure of \$5.1 billion. *Christian Science Monitor*, April 12, 1971, at 9, col. 4.

6. *Christian Science Monitor*, April 4, 1970, at 5, col. 1. Although there were seven more lunar landings planned after Apollo 12, the idea of cancelling the last two missions, Apollos 18 and 19, and using the Saturn 5 components for the second Skylab series of launchings was advanced before the near-tragedy of Apollo 13 occurred. *Christian Science Monitor*, April 10, 1970, at 5, col. 4 and Sept. 9, 1970, at 3, col. 2.

7. *Christian Science Monitor*, Feb. 27, 1970, at 3, col. 1; June 4, 1970, at 10, col. 1; and Dec. 23, 1970, at 9, col. 1.

tary communications and reconnaissance or "spy" functions.⁸ The close relation between aerospace technology and national security became all too clear when the first V-1 and V-2 rockets were launched against London by Nazi Germany in World War II.

The efforts of other countries to explore and utilize the new domain of outer space will for some time be closely-allied with either the United States or the Soviet Union due to the need for a large and complex industrial base necessary to launch even a small unmanned satellite into orbit. The United States has extensive space ties with over seventy countries, and almost two hundred sixty agreements have been entered into between NASA and other countries for international space projects.⁹ Attempts to establish a close working relationship with the Soviet Union, however, have been unsuccessful for the past ten years.¹⁰

Beyond what are listed above as the main areas of focus for both the United States and Soviet space efforts in the 1970's it is possible to envision for the 1980's, and 1990's such developments as: the ROMBUS (reusable orbital module-booster and utility shuttle, which is in more common terms an intercontinental ballistic missile which would be used to carry passengers and freight across the world from continent to continent in less than one hour); large space stations with capacities for several hundred individuals; permanent scientific colonies on the moon and, perhaps later, Mars; manned exploration of Mars, Venus, Mercury, and perhaps the outer planets; unmanned interstellar probes; and such future mundane activities as mining and manufacturing both on the moon and other celestial bodies.¹¹

8. The "satellite destroyer" which the Soviet Union has allegedly tested in Earth orbit (*see* Christian Science Monitor, Nov. 9, 1970, at 3, col. 2) has a potential application to the area of national security activities. Such a device could be used to destroy spy satellites of other states which are spying on the Soviet Union or its allies. The Soviet Union has in the past taken the position that although a state may not exercise or claim sovereignty over any part of outer space, a state may legally defend itself against spy activities which take place in outer space. This could include the destruction of spy satellites. McDUGAL, LASSWELL & VLASIC, LAW AND PUBLIC ORDER IN SPACE 311-20 (1964).

9. Christian Science Monitor, April 9, 1970, at 7, col. 1.

10. *Id.*

11. *See, e.g.,* BONO & GATLAND, FRONTIERS OF SPACE (1969); CLARKE, PROFILES OF THE FUTURE (1958); CLARKE, THE PROMISE OF SPACE (1968).

THE LAW OF OUTER SPACE AT PRESENT

Enter the law. Man makes it—breaks it—and endeavors to apply it, to all of his affairs. Except for periodic spasms of anarchy, war (governmental anarchy with rules), intrastate riots and other assorted disruptions, human beings are generally obedient to whatever law applies to them at the moment. Order is desired in human society; it is in fact necessary to human society, for no society can exist for long which permits unrestrained violence among its members.

As Earth people move into outer space, they will bring concepts of order and, it is hoped, justice with them. To implement order and justice (the first being a necessary corollary to the second, but not *vice-versa*) the law will be used.

Today the law of outer space is pre-embryonic; it is a zygote. It is the union of an egg and a sperm. The egg is the rapidly appearing achievements of science and technology, and the sperm is the idea that rules must be devised to insure that these achievements will not result in the extinction of man and his home planet as the result of a massive nuclear holocaust, brought about by man's inability to live within the technology he has created (the Battle of the Sea of Tranquility?).

It was not long after the smoke had cleared from Sputnik's launching pad and the small metal ball began to beep its way into history that legal eyes of various types began to focus upon the concept of law in outer space. Actually, legal articles began to appear in American publications as early as late 1956 and in foreign legal publications around 1958. Since then the number of articles in legal publications has increased greatly. Books on space law have also appeared in greater numbers as space achievements have become more and more dramatic.¹²

12. Some of the books which have appeared on the subject of space law are JESSUP & TAUBENFELD, *CONTROLS FOR OUTER SPACE* (1959); LIPSON & KATZENBACH, *THE LAW OF OUTER SPACE* (1961); VAZQUEZ, *INTRODUCCION AL DERECHO INTERNACIONAL COSMICO* (1961); McDUGAL, LASSWELL & VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); HALEY, *SPACE LAW AND GOVERNMENT* (1963); TAUBENFELD, *SPACE AND SOCIETY* (1964); JENKS, *SPACE LAW* (1965); LEVY, *SPACE: ITS IMPACT ON MAN AND SOCIETY* (1965); CHRISTOL, *THE INTERNATIONAL LAW OF OUTER SPACE* (1966); COOPER, *EXPLORATIONS IN AEROSPACE LAW* (1968); FAWCETT, *INTERNATIONAL LAW AND THE USES OF OUTER SPACE* (1968); McWHINNEY & BRADLEY, *NEW FRONTIERS IN SPACE LAW* (1969); MATTE, *AEROSPACE LAW* (1969); LAY & TAUBENFELD, *THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE* (1970); and WHITE, *DECISION-MAKING FOR SPACE* (1970).

The United Nations began to give serious thought to the question of outer space and its relation to the activities of men and states on Earth with the passing, on December 13, 1958, of Resolution 1348 (XIII), setting up the Ad Hoc Committee on the Peaceful Uses of Outer Space (COPUOS). The following year COPUOS was established to study and review the peaceful uses to which the new domain could be put and to study any legal problems that might arise from the exploration of outer space.¹³ The next step the United Nations took was to recommend some basic principles for nations to follow in their exploration and use of outer space. Resolution 1721(XVI), passed by unanimous vote of the General Assembly, stated that

- (a) International law, including the Charter of the United Nations, applies to outer space and celestial bodies;
- (b) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation.¹⁴

Included in this resolution was the provision requesting states launching objects into orbit or beyond to register the launchings with COPUOS, through the Secretary General of the United Nations. The following year another resolution, less important than 1721, was passed defining the first activities of COPUOS and elaborating principles stated in 1721.¹⁵ In 1963 another resolution was, like 1721, passed unanimously.¹⁶ It was of great importance because it stated many principles which were later to be used in the *1967 Space Treaty*.¹⁷

Thus, by 1963 there was a growing number of publicists writing on the subject of outer space, either prescriptively or descriptively as well as a number of resolutions of the General Assembly setting forth basic principles to govern the activities and interactions of men and states in outer space. The writings of publicists are considered a secondary source of international law.¹⁸ They are of great importance in pointing out deficiencies in present legal concepts and rec-

13. G.A. Res. 1472, — U.N. GAOR Supp. 14, at —, U.N. Doc. A/— (1959).

14. G.A. Res. 1721, — U.N. GAOR Supp. 16, at —, U.N. Doc. A/— (1961).

15. G.A. Res. 1802, — U.N. GAOR Supp. 17, at —, U.N. Doc. A/— (1962).

16. G.A. Res. 1962, — U.N. GAOR Supp. 18, at —, U.N. Doc. A/— (1963).

17. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the moon and Other celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347.

18. I.C.J. STAT. art. 38, para. (1)(d).

ommending improvements, but they do not actually establish rules of law. Resolutions of the United Nations General Assembly, likewise, do not establish rules of law. Although it has been stated by some that certain types of resolutions may have binding force,¹⁹ it can generally be said that resolutions are only expressions by States that indicate a consensus of opinion on a particular matter.²⁰ In this way they may help to clear the way for later agreements and treaties on issues.²¹

The need for some binding statement of the law of outer space, at least certain basic principles relating to the establishment of minimum public order,²² was apparent, therefore, in the early 1960's. As the prevention of that third world war, which Einstein said would precede the war fought with stones,²³ was then and is still the most important aspect of international law in general, and aerospace law in particular. Due to the direct relationship between aerospace technology and the equipping of the world's arsenals, it was appropriate that one of the first treaties establishing legal norms for man's conduct in outer space was the *1963 Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water*.²⁴ The Treaty in Article I contains the same proscription as in the title: nuclear weapons cannot be tested in outer space, as well as in the other specified parts of man's expanding environment. The Treaty, of

19. See, e.g., Statements of Adlai Stevenson and the representative of the Soviet Union to the General Assembly regarding the binding force of Resolution 1962 (XVIII) in Simsarian, *Outer Space Cooperation in the United Nations in 1963*, 58 AM. J. INT'L L. 717, 720-21 (1964); and Bin Cheng, *infra* note 174.

20. The I.C.J. STAT. art. 38, makes no mention of resolutions as sources of international law.

21. Vlasic, discussing the inadequacy of Resolutions 1721 and 1962, stated: "As long as space activities do not include landing manned spacecraft upon celestial bodies these principles will most likely be adequate. One is, however, less certain as to their adequacies to prevent controversies once such a landing is made and permanent stations established." VLASIC, *Law and Public Order In Space: A Balance Sheet*, WORLD PEACE THROUGH LAW—THE WASHINGTON WORLD CONFERENCE 164, 167 (1967).

22. Minimum public order means that the illegal use of coercion and violence by states is minimized and, eventually, eliminated by proper preventative measures taken by the world community. See McDUGAL, LASSWELL & VLASIC *supra* note 8, at 102; and VLASIC, *supra* note 21, at 170. The use of the term has been criticized, however; see Cepelka and Gilmore, *The Application of General International Law in Outer Space*, 36 J. AIR L. & COM. 30, 49 n.84 (1970).

23. See quotation in SCOTT, *POLITICAL WARFARE* 236 (1955).

24. Done Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

course, is binding only upon those States who are parties to it²⁵ (which at this time numbers over one hundred). Notable exceptions to the parties to the Treaty are France, the world's number three space power and a member of increasing importance in the atomic energy club, and Communist China, the newest space power and an avid dabbler in the various uses of fission and, before too long, fusion power. Both France and Communist China have continued to conduct atmospheric nuclear tests, which are forbidden to those States who are parties to the Treaty. Underground nuclear tests, which are not proscribed by the Treaty, have continued to be performed by certain States, not the least noticeable of which is the United States.

Another major development in 1963 was the occurrence in Geneva, Switzerland, of the Extraordinary Administrative Radio Conference on Space Communications,²⁶ attended by some seventy member States of the International Telecommunication Union (ITU). The purpose of this conference was to bring some order and regulation to the area of the use of the radio frequency spectrum, a finite natural resource due to the fact that there is not an unlimited number of frequencies to be assigned. Allocations of some fifteen per cent of the entire radio frequency spectrum were made for communications satellites, space telecommand, telemetry, tracking, meteorological and navigational satellites, space research, radio astronomy, and satellite identification. Also agreed upon were technical standards and criteria for shared use of certain bands between space activities and terrestrial communications. The registry of assigned frequencies and the recording of harmful interferences are kept by the International Frequency Registration Board, which is an organ of the ITU. The Board, however, has no power to enforce the regulations in case of a violation. Another limitation of the Conference is that member states reserve the right to limit their adherences to the allocations in order to protect their "national interests."²⁷

In the year following the Conference another major step was taken

25. *But see* VLASIC, *supra* note 21, at 172.

26. *Done* Nov. 8, 1963, 15 U.S.T. 887, T.I.A.S. No. 5603. The 1963 Conference was a partial revision of the Radio Regulations, Geneva, *signed* on Dec. 21, 1959, 12 U.S.T. 2377, T.I.A.S. No. 4893.

27. VLASIC, *supra* note 21, at 174.

in the area of telecommunications—the area of space law which has so far been regulated most. *The International Telecommunications Satellite Consortium* (INTELSAT), which was in the works for several years previous to 1964 and to which over seventy States are currently parties, established interim arrangements for the first global commercial satellite system.²⁸ Also signed in 1964 along with the main INTELSAT agreement was a Special Agreement,²⁹ the former setting up the framework and policy of INTELSAT, the latter being more directed to the management and functioning of the organization. Since the launching of its first satellite, Early Bird, in April 1965, INTELSAT has launched three series of satellites into positions in orbit around Earth. At the present the satellites which are used to relay television broadcasts from one country to another require ground stations to receive the broadcasts, but plans have been made for the launching in either 1972 or 1973 of the INTELSAT IV series, which will consist of satellites able to receive television broadcasts from one country and transmit them directly to individual television sets in other countries without the need of intervening ground receiving stations. This system will first be tested by the United States for educational purposes in India.³⁰

28. An agreement establishing interim arrangements for a global commercial communications satellite system [hereinafter INTELSAT Agreement], done Aug. 20, 1964, 15 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26. The agreement expired in 1970, but as of this writing there has been no final decision on a new agreement. Negotiations are currently underway in Washington, however. See Ablard, *The International Telecommunications Satellite Consortium Conference—Where Do We Go From Here?* 12 AFJAG L. REV. 231 (1970). The Soviet Union and its satellite states are not members on INTELSAT, but they have submitted to the United Nations tentative plans for their own such system. See Doyle, *Analysis of the Socialist States' Proposal for Intersputnik: An International Communication Satellite System*, 15 VILL. L. REV. 83 (1969).

29. Special Agreement, done Aug. 20, 1964, 15 U.S.T. 1745, T.I.A.S. No. 5646, 514 U.N.T.S. 48. On June 4, 1965, the INTELSAT Supplementary Agreement on Arbitration was opened for signature, the text to which can be found at 4 INT'L LEGAL MATERIALS 735 (1965). The Arbitration Agreement is discussed here in detail in *infra* text accompanying note 199.

30. The text of the agreement between India and the United States concerning this project can be found at 8 INT'L LEGAL MATERIALS 1281 (1969). Another INTELSAT project involves the linking up by June 1971 of Pakistan with the global network of communication satellites, and of East and West Pakistan, currently separated by more than 1,000 miles of Indian territory, with each other. To accomplish this, an INTELSAT Series 3 Communication Satellite will be placed in synchronous orbit over the Indian Ocean, and two earth ground stations will be built, one in East and one in West Pakistan respectively. Christian Science Monitor, Jan. 31, 1970, at 11, col. 1.

The business manager of INTELSAT is, by agreement of the member States, the Communications Satellite Corporation (COMSAT),³¹ created by the 1962 *Communications Satellite Act*³² to establish together and in cooperation with other States a global communications satellite system.³³ COMSAT is also, of course, the United States representative to INTELSAT.

The developments discussed above all relate to two important and distinct areas of the law of outer space—minimum public order and telecommunications. Until 1967 there was no agreement or treaty entered into on a world-wide basis designed to state legal principles of a more general nature applicable to outer space. Then in that year the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*³⁴ (1967 Space Treaty) was opened for signature in Washington, London, and Moscow.³⁵ Contrary to the opinions of some, this treaty is not by any means a cosmic Code of Hammurabi. It is simply a multilateral treaty, binding only on those states who are parties to it, which attempts to establish certain basic principles for the conduct of human activities in the new realm of outer space, rather than attempting to formulate precise substantive and procedural rules of law. The 1967 *Space Treaty* is the product of compromise and is in some areas vague and indefinite.

Among the most important sections of the treaty are Articles II and IV. Article II states that "outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty by means of use or occupation, or by any other means." The rule, however, that no State may claim any part of outer space or any natural celestial body as part of its own territory was generally regarded as an accepted legal principle by writers and statesmen for some time before this treaty.³⁶ This Article, however, does not solve the problem of the appropriation of natural resources

31. INTELSAT Agreement, art. VIII, done Aug. 20, 1964, 15 U.S.T. 1705, T.I.A.S. No. 5646.

32. 76 Stat. 419, 47 U.S.C. 701 *et seq.* Aug. 31, 1962.

33. See 47 U.S.C. 701(a).

34. Done Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347.

35. The 1967 Space Treaty was opened for signature in the three capitals in order to insure that a maximum number of states would sign the treaty.

36. See sources cited *infra* note 175 and accompanying text.

found in outer space or on celestial bodies, which is one of the main problems for the near future in space law.³⁷ The analogous Earth situation is obvious: the high seas, like outer space, is not subject to claim of sovereignty or ownership itself, but fish, minerals, and other resources may be taken from the high seas and claimed as the property of the takers.

Article IV of the treaty states: "Parties to the Treaty undertake not to place into orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." This is a most significant provision as it forbids devices of destruction and devastation from Earth orbit, celestial bodies, and other parts of outer space. Unfortunately ICBM's, IRBM's, SLBM's, ABM's, FOBS's (the Soviet fractional orbital bombardment system), and MIRV's, (the United States multiple independently targeted re-entry vehicle) do not go into orbit around the Earth when used as intended. They are all sub-orbital weapons and are excluded from the Article IV proscription.

Other important parts of the 1967 Space Treaty state that, 1) States shall conduct activities in outer space in accordance with international law (Articles I and III); 2) there shall be free access to outer space for all states on a basis of equality (Article I); 3) astronauts shall be given all possible assistance in case of accident, distress, or emergency (Article V); 4) States shall bear international responsibility for governmental and non-governmental activities carried on under their supervision and shall also be responsible for the activities of international organizations of which they are a part (Article VI); 5) States shall be responsible for damage or injury caused by the launching or attempted launching into outer space of objects (Article VII); 6) States shall retain jurisdiction over objects and personnel they launch into outer space (Article VIII); and 7) states shall act in accordance with certain specified principles of cooperation, mutual assistance, due care, diligence, and non-interference in their exploration and use of outer space (Articles IX, X, XI, XII).

As already mentioned, the *Treaty* is not by any means the last

37. For a discussion for possible problems relating to Article II of the 1967 *Space Treaty* see Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 *FORDHAM L. REV.* 349 (1969).

word on space law. It is only an attempt at a beginning, a beginning which will by necessity see many elaborations, modifications, and even complete changes in the principles set forth in it as man comes closer to a rough approximation of his relationship to the universe as a whole.

Meanwhile, further elaboration has already been accomplished regarding certain parts of the 1967 *Space Treaty*. In 1968 the *Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space*³⁸ (1968 *Astronaut Agreement*) was concluded, elaborating upon Articles V (astronaut rescue) and VIII (retention of jurisdiction over objects and personnel) of the 1967 *Space Treaty*. Although definitely an improvement in the definition of the legal rights and duties of states in regard to the above areas, the 1968 *Astronaut Agreement* does not entirely clear up the area, leaving perhaps the necessity of more thoughtful development.³⁹ Nevertheless, it is a step in the right direction.

Another important treaty concluded in 1968 was the *Treaty on the Non-Proliferation of Nuclear Weapons*,⁴⁰ designed to halt the spread of nuclear weapons by preventing nuclear powers from giving such weapons to non-nuclear states, and by preventing non-nuclear states from developing their own nuclear weapons, either by themselves or with assistance from nuclear states. Notably absent from the list of signatory states, are of course, France and Communist China. Although outer space is not expressly mentioned in the treaty, the extent of the Treaty into this area is indicated by its reference to the 1963 *Test-Ban Treaty*.

In addition to the above-mentioned treaties, the United States has entered into a large number of agreements, mostly bilateral, with other states concerning technical matters, such as tracking stations

38. Done April 22, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599.

39. See generally Gorove, *Legal Problems of the Rescue and Return of Astronauts* 3 INT'L LAWYER 898 (1969); and Riccio, *Another Step for Mankind—The Agreement on the Rescue of Astronauts and the Return of Objects Launched into Outer Space*, 12 AFJAG L. REV. 142 (1970). The Soviet Union agreed recently to join the United States and ten other nations in discussing an international space rescue system. *Christian Science Monitor*, Oct. 10, 1970, at 2, col. 1. See also editorial "Cooperation In Space Rescues," *Id.* at 14, col. 1.

40. Opened for signature on July 1, 1968, [1968] — U.S.T. —, T.I.A.S. No. —. The text of the treaty can be found at 7 INT'L LEGAL MATERIALS 811 (1968).

and scientific projects.⁴¹ The Soviet Union has also entered into a number of such agreements. Even more important to the future course of Earth-space activities, however, are those treaties creating regional intergovernmental organizations for the purpose of exploring and utilizing outer space. Two such treaties, both signed in 1962, were the *Convention for the Development and Construction of Space Vehicle Launchers*,⁴² which created the European Launcher and Development Organization (ELDO), and the *Convention for the Establishment of a European Space Research Organization* (ESRO).⁴³ ELDO, a politically and economically-oriented organization, was composed of West Germany, the United Kingdom, France, Italy, Belgium, the Netherlands, and Australia. The member states of ELDO have decided to dissolve the organization, presumably to lay the groundwork for the creation of a new and more improved organization.⁴⁴ ESRO, a scientifically-oriented organization composed of West Germany, the United Kingdom, France, Italy, Sweden, Belgium, the Netherlands, Switzerland, Spain, and Denmark, approaches the end of its initial eight year authorization this year. France and Denmark have served notice of intent to withdraw from the organization, apparently to force the other states in ESRO to thoroughly rethink the whole cooperative effort.⁴⁵ This is the formal procedure of protest, provided for in the ESRO charter, and may eventually lead to a new and improved European space organization, with the areas of rocket development (which was ELDO's function) and research applications being integrated.⁴⁶

CLASSIFICATION OF DISPUTES WHICH WILL ARISE IN OUTER SPACE

The Earth law now applicable to outer space, insofar as human beings are concerned, is, as stated earlier, in a pre-embryonic stage. It must and will develop as the activities of man in outer space become more complex, more significant to everyday life, and more extended throughout our solar system and, eventually, beyond. More

41. Christian Science Monitor, *supra* note 9.

42. Done on March 29, 1962, 507 U.N.T.S. 177 *et seq.*

43. Signed on June 14, 1962, 528 U.N.T.S. 33 *et seq.*

44. See Christian Science Monitor, February 13, 1971, at 11, col. 3.

45. *Id.*

46. *Id.*

treaties, especially multilateral treaties, will be needed to define, with clarity and precision, the rights and duties of those who participate in outer space activities *i.e.*, liability for personal injury and property damage, appropriation and use of natural resources found in outer space and on celestial bodies, jurisdiction over crimes-torts, use of national airspace for purposes of innocent passage by space shuttle-craft returning from outer space, and many other problem areas not even capable of being defined at this time. International cooperation, which now ranges from passive non-interference to accommodation to active bilateral and multilateral participation in joint efforts,⁴⁷ must increase so that man's skills and resources are not wasted on a duplication of efforts and needless dispute.

Nevertheless, there will be conflicts of interest. The individuals who have gone into space thus far, have been skilled test pilots, generally with military backgrounds. The craft they have piloted have been of the nationalities of their single states. Their missions have been basically of experimentation and exploration.⁴⁸ Although these

47. Passive non-interference refers to the efforts of states to stay away from, or at least not interfere with, the spacecraft recovery operations and various missile tests conducted on the high seas by other states. In doing so, states have at least impliedly said that although the high seas are free for use by all states and are not subject to the exclusive use and possession by any one state or group of states, a state or group of states acting jointly in recovery or test operations may be allowed or accorded a limited license by other states to use exclusively and temporarily, a part of the high seas for such operations, as long as the operations are not in some way violative of international law (as a nuclear test over the high seas would be if conducted by a state party to the 1963 Test Ban Treaty).

Accommodation includes such activities as the giving by one state to another state of information vital to the safe conduct of the latter state's space activities. An example of this occurred during the mission of Apollo 11 when U.S. Astronaut Frank Borman requested and received from the Soviet Union the coordinates of the lunar orbit of Luna 15, which was feared by some United States space officials as posing a threat to the Apollo 11 mission. Principles of non-interference and accommodation have similarly been included in the *1967 Space Treaty*, Articles IX, X, XI, XII.

The highest level of international cooperation in outer space, of course, is active bilateral and multilateral participation in joint efforts, as illustrated by the many treaties and other international agreements in existence dealing with some aspect of the exploration and use of outer space. See Robinson, *NASA's Bilateral and Multilateral Agreements—A Comprehensive Program for International Cooperation in Space Research*, 36 J. AIR L. & COM. 729 (1970).

48. It must be realized that most space missions, whether manned or unmanned, have some degree of political importance. Thus, Explorer 1, while making scientific history by discovering the Van Allen Radiation Belt around Earth, had great political importance due to the fact that it was America's first successfully-launched unmanned satellite. While manned flights have been concerned mainly with experi-

circumstances will continue, they will not in the future be dominant, for there will go into outer space a progression of individuals of increasingly diverse backgrounds and occupations. There will be spacecraft launched by international organizations, either of world-wide scope, such as INTELSAT, or regional scope, such as ELDO and ESRO. These spacecraft will be both manned and unmanned, and their missions will be not only of an exploratory nature, but commercial as well. One does not need the foresight and imagination of a da Vinci or a Verne to realize that, despite an expanding body of law applicable to outer space, there will be conflicting claims and differences of opinion as to matters of common interest and concern. For purposes of clarification and orientation the following classification of potential areas of space and space-related disputes can be made at the present time:

By Subject Matter

1. Liability for personal injury and property damage caused by space activities;
2. Appropriation and use of natural resources found in outer space and on natural celestial bodies;
3. Appropriation and use of outer space *qua* space (*i.e.*, the use of the surfaces of natural celestial bodies and parts of outer space itself for laboratories, factories, etc. Analogous situations on Earth include floating canneries, whaling factory ships, and oil-drilling facilities located on the high seas.);
4. Problems related to the legal dichotomy between national airspace and outer space:
 - a) Whether there should be established a definite point at which national airspace (subject to the sovereignty of the subjacent state) ends, and outer space (free for use by all states and not subject to any sovereign claims) begins;
 - b) The location of such of such a point if there should be one;
 - c) The alternative to such a point if there should not be one;
 - d) Whether the concept of innocent passage should be adopted by multilateral treaty for space shuttlecraft which may, by necessity, need to pass through foreign national airspace;
5. Jurisdictional conflicts between states which claim jurisdiction over an individual, unincorporated association, or corporation for acts, such as crimes and torts, detrimental to the states involved;
6. Problems related to the maintenance of peace and security in outer space;
7. Pollution, interference with telecommunications, invasions of privacy, and other such problems brought about by rapidly advancing science and technology which are caused very often by governmental as opposed to individual activities;
8. Problems not even capable of being defined at this time.

mentation and exploration, unmanned spacecraft have conducted many activities related to national security (spying) and commercial enterprise (communications and meteorology).

By Parties

1. States;
2. International organizations, whether or not connected with the United Nations;
3. Corporations and unincorporated associations;
4. Individuals;
5. And possibly, to make this list all-inclusive, forms of extra-terrestrial sentient life which come into contact with humans from Earth.

It is the thesis of this discussion that some means of resolving these disputes *must* be available to the parties involved when other peaceful methods of resolution fail, *i.e.*, either the International Court of Justice or some other world tribunal. The need for the prevention of a Hobbesian-type anarchy, such as the American "Old West" or the seventeenth and eighteenth century Caribbean, in outer space was well-recognized by McDougal and Associates:

We see no advantage in allowing frontier conditions of initial disorder to establish a tradition of lawlessness in the world of space. It is much too dangerous. We conclude that from the beginning ample provision needs to be made for public officials to take responsibility for invoking norms of public order in connection with exploration and settlement.⁴⁹

SOVEREIGNTY, SPACE POLICE, AND COURT DECISIONS

Before proceeding to a discussion of the general rule of municipal court jurisdiction over cases having some international aspect, such as a foreign national within the jurisdiction of the municipal court or an act committed by a national beyond the territorial boundaries of his home state, and of the exceptions to the general rule, namely, those situations in which international tribunals (and most particularly the International Court of Justice) have jurisdiction over such cases, it will be necessary to briefly discuss the limited nature of international courts. It is a well-established principle, of course, that each of the Nation-States (hereinafter referred to as States) is a sovereign entity under international law. It is because of this principle that the decisions of an international court, as will be seen in more detail later with respect to the International Court of Justice, are binding only upon those States which have submitted the dispute in which they are involved to the court.⁵⁰ The International Court of Justice, created by the Charter of the United Nations, a multilateral treaty, is

49. MCDUGAL, LASSWELL & VLASIC, *supra* note 8, at 1066-67.

50. I.C.J. STAT. art. 59.

a legally created institution under international law. When it gives a decision on a particular case before it that decision is binding upon those states (or certain international organizations as will be seen later) which have submitted the dispute to it, as long as the court had jurisdiction over the parties and subject matter of the case. In this respect the decisions of the court are similar to the decisions of a municipal court. Enforcement of the court's decisions, however, is not available as it is with municipal court decisions because of the fact that there does not exist on the international level any executive or administrative agency analogous to a local police force, national police force, or military force, as there is on the municipal level. Although it is possible to employ various persuasive means to enforce the decisions of the International Court of Justice, such as embargo, public opinion, or threat of non-reciprocity, the fact remains that there is no international police force available to enforce the decisions of the court upon those states which agreed to be bound by them. Nevertheless, the decisions remain legally valid and binding. Furthermore, the concept of a world police force, or more particularly for the purposes of this discussion, an international space police force, is not possible within the framework of the existing international reality of the planet Earth. Hans Kelsen sums it up well:

An international police force would be a radical restriction, if not the total destruction, of the sovereignty of the States. Such a police force is the essential element of a World State, and the idea of a World State is, at least for the present generation, a utopian scheme.⁵¹

Kelsen was writing during the middle of a "hot" war, but his statement seems equally valid for the current "cold" war. Although there may be minute indications that the cold war is beginning to thaw,⁵² it is safe to assert at this point that a world police force, operating with the blessings and assistance of all of the states of the world (and perhaps with an outer space branch), is still far beyond the horizon of existing international relations. Also, a world police force would probably have to be under the control of a world executive body, perhaps under some scheme of world federalism. Kelsen's words are equally appropriate in regard to this:

51. Kelsen, *Compulsory Adjudication of International Disputes*, 37 AM. J. INT'L L. 397, 399 (1943).

52. Christian Science Monitor, March 1, 1971, at 1, col. 2.

The organization of a centralized executive power, the most difficult of all the problems of world organization, cannot be the first, it can only be one of the last steps; a step which in any case cannot successfully be undertaken before the international court has been established, and has, by its impartial activities, gained the confidence of the governments.⁵³

Kelsen was writing after the Permanent Court of International Justice had become inactive in 1939 and before the present International Court of Justice was established in 1945. If "natural legal evolution tends first toward an international judiciary, and not toward international government or legislation,"⁵⁴ then to focus attention upon the potential role of the International Court of Justice as an arbitrator and adjudicator of international disputes in outer space as well as on Earth would be a logical step toward the establishment of minimum public order—problem one in both international and aerospace law, the latter being a subdivision of the former. This is not to say, however, that concepts such as an international space police force and legislative and executive bodies will never become workable. Quite to the contrary, such bodies will indeed eventually have to achieve the status of institutionalized reality if the planet Earth is to achieve some type of permanent order so that justice and peace can be secured for its inhabitants. The object of this paper is to provide for some type of interim measures to achieve the above goals for the time period between the present reality and the more idealistic scheme mentioned above.

THE PROBLEM OF SOVEREIGN IMMUNITY AND MUNICIPAL COURT JURISDICTION

Since the submission of disputes by states to international courts, and particularly to the International Court of Justice, for either advisory or adjudicatory proceedings is the exception and not the rule in international law today; and since it is also a recognized principle that in criminal and other important matters municipal court jurisdiction applies in the absence of an express principle of international law,⁵⁵ it is essential that an examination of the general nature of the jurisdiction of municipal courts in regard to criminal and other important matters be conducted at this point.

53. *Supra* note 51, at 399.

54. *Supra* note 51, at 400.

55. *See* Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9.

Although the concept of territory, as will later become evident, is decreasing in importance as a basis for jurisdiction in international law today, it is still helpful to structure an inquiry into the nature of municipal court jurisdiction in terms of cases arising both within and without a state's territorial boundaries.

The question of when states can assert jurisdiction within their territorial boundaries is basically an easy one. The general rule is that each nation-state, being a sovereign entity under international law, has exclusive jurisdiction within its territorial boundaries over all persons, whether nationals or foreigners, and all things, whether tangible or intangible.⁵⁶ The word exclusive, however, does not mean absolute, as states themselves impose certain limitations, often upon a basis of reciprocity, upon their jurisdiction within their territorial boundaries.

One of these limitations is the so-called "act of state" doctrine, which forbids the courts of one State from questioning the legal validity of the acts of the government of another State done within the latter State's territory. The doctrine has been applied both in cases where the foreign government's act of State has allegedly violated its own municipal law,⁵⁷ or where it has allegedly violated international law,⁵⁸ although exceptions have been made to the latter application of the doctrine.⁵⁹

56. I OPPENHEIM, INTERNATIONAL LAW 325 (8th ed. Lauterpacht 1955) [hereinafter cited as OPPENHEIM]; BRIERLY, THE LAW OF NATIONS 222, 299 (6th ed. 1963).

57. "It should make no difference whether the foreign act (of state) is, under (the foreign state's) local law, partially or wholly, technically or fundamentally, illegal. . . . So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws." *Banco de Espana v. Federal Reserve Bank of New York* 114 F.2d 438, 444 (2nd Cir. 1940).

58. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), where the Court held that it would not examine the validity of the taking of property within United States territory by an expropriation decree of the Cuban government in the absence of a treaty or other unambiguous agreement regarding controlling legal principles of the case, even if the Cuban decree allegedly violated customary international law. *Id.* at 428.

59. The effect of the *Sabbatino* decision was lessened, if not eliminated completely, by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. 2370(e)(2), as amended, 79 Stat. 658-659 (Sept. 6, 1965), the constitutionality of which has been upheld. *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd* 383 F.2d 166 (2nd Cir. 1967), *cert. denied* 390 U.S. 956 (1968). In the amendment Congress had declared that courts of the United States should not refrain, on the basis of the act of state doctrine, from determining

Another limitation is the doctrine of sovereign immunity. It is, of course, a well-known fact that a State may not be sued in the courts of another State unless the former has consented to be sued.⁶⁰ Certain persons and objects are also granted immunity from the jurisdiction of foreign states in whose territorial boundaries they happen to be. Often such persons and objects are said to have acquired the status of "extra-territoriality," although this term is a fiction since the person or object is in fact physically within the foreign State. The use of the "extra-territoriality" concept has drawn criticism from both publicists and courts.⁶¹ A preferable way to explain such exceptions to State internal jurisdiction is to say that the person or object has acquired some degree of sovereign immunity from the jurisdiction of the foreign state. In some instances the act of State doctrine will apply along with the sovereign immunity concept.

In regard to persons the most obvious type of immunity is that which a sovereign or head of State has when visiting a foreign State. A monarch or other head of State has complete immunity from all prosecution, both civil and criminal, in such an instance.⁶² Diplomatic and consular agents are accorded a varying range of immunities while in foreign countries depending upon their rank,⁶³ although consular personnel have less immunity, usually, than do diplomatic personnel. For non-official acts consular agents are usually subject to the jurisdiction of the foreign state. Military personnel of one State in the territory of another State have never enjoyed the traditional immunity which diplomatic officials have enjoyed, although there have been views to the effect that they should be immune from local jurisdiction.⁶⁴ The general rule is that they are at least subject to local criminal jurisdiction.⁶⁵ Usually, the problem of military personnel

the merits in cases involving a confiscation after January 1, 1959 by an act of a foreign state in violation of the principles of international law, including the principles of compensation.

60. BRIERLY, *supra* note 56, at 243.

61. BRIERLY, *supra* note 56, at 222.

62. OPPENHEIM, *supra* note 56, at 759, 763. See also the classic case of *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149.

63. See OPPENHEIM, *supra* note 56, at 783-813 (for diplomatic agents) and at 840-43 (for consular agents).

64. OPPENHEIM, *supra* note 56, at 847.

65. OPPENHEIM, *supra* note 56, at 848-49. See also the account of the *McLeod* case (25 Wend. 483) in OPPENHEIM, *supra* note 56, at 850.

being in a foreign country with the consent of the foreign government is handled by special agreements called "status of forces" agreements. In special cases, even immunity acquired in such a manner may be waived, as it was in the widely publicized case of *Wilson v. Girard*.⁶⁶

Agents and personnel of international organizations, such as the United Nations, have also been accorded immunity by special agreement. Article 105 of the *United Nations Charter* states that "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." Also the United Nations itself shall have such privileges and immunities in the territory of each of the member States "as are necessary for the fulfillment of its purposes."⁶⁷ Members of the International Court of Justice are granted diplomatic privileges and immunities when engaged in the business of the court,⁶⁸ and the agents, counsel, and advocates of parties before the court are also granted the same when "necessary to the independent exercise of their duties."⁶⁹

Governmental property, consensually within the territory of a foreign state, has traditionally been held to be beyond the jurisdiction of the foreign state. Perhaps the most famous case illustrating this point is *The Schooner Exchange v. MacFaddon*,⁷⁰ where immunity was granted to a French naval vessel in the port of Philadelphia on a friendly visit. The vessel originally had been seized by the forces of Napoleon, Emperor of France, while it was sailing toward the port of San Sebastian in Spain during a blockade of England by French naval forces, and it was subsequently transformed into a French naval vessel. The former American owners tried to regain ownership of the vessel while it was in American waters, but since it had become a governmental vessel of France, their suit was dismissed for lack of jurisdiction.

66. 354 U.S. 524 (1957).

67. U.N. CHARTER art. 105, para. 1.

68. I.C.J. STAT. art. 19. See also art. 32, para. 8 for tax exemption for court members.

69. I.C.J. STAT. art. 42, para. 3.

70. 11 U.S. (7 Cranch) 116 (1812).

Property of a foreign state on dry land is subject, generally, to the same immunity. In *Vavasseur v. Krupp*⁷¹ an action was brought by one Josiab Vavasseur against Friedrich Krupp, the famous armament manufacturer, and his agent in England for an injunction against the shipping of a quantity of shells and other projectiles out of England. The armaments were at that time the property of the government of Japan and were bound for Japan. Plaintiff claimed damages for patent infringement by Krupp. The English court denied the injunction on the basis that it could not deprive a foreign sovereign of his public property or deny him the right to remove his property from British jurisdiction. Lord Justice Cotton stated the law in regard to property owned by a foreign sovereign:

This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially what we call the public property of the state of which he is sovereign, as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country who has property there, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign.⁷²

Although the immunity of warships under the *Exchange* principle has never been seriously questioned, a problem did arise with respect to vessels, owned and operated by foreign governments and therefore ostensibly under the doctrine of absolute immunity, which were involved in commercial activities within the territorial boundaries of other States. The concept of absolute immunity was applied to an Italian vessel, owned and operated by the Italian government and docked in New York harbor on a commercial visit, in *Berizzi Bros. Co. v. S.S. Pesaro*.⁷³ Later cases, however, have denied absolute immunity to ships of foreign governments engaged in commercial ventures. Thus, in *Republic of Mexico v. Hoffman*,⁷⁴ a vessel owned by Mexico but in the "possession, operation, and control" of a private Mexican corporation was denied immunity from suit by the owner of an American vessel which had been damaged by the Mexican vessel in an accident in Mexican waters.⁷⁵

71. 9 Ch. Div. 351 (1878).

72. *Id.* at 360.

73. 271 U.S. 562 (1926).

74. 324 U.S. 30 (1945).

75. *Id.* at 32, 33. An earlier case, also involving a Mexican vessel, was *The*

Corporations, whether wholly or partly owned by a foreign state, have generally been denied immunity unless the corporation and the government were so close as to be viewed as an entity. The general test in such cases is whether the corporation is either an arm of the government or so close as to be viewed as one entity. The general test is for private gain or for the gain of the State. Thus, a bank created by the law of the State of Argentina was denied immunity from the jurisdiction of New York courts because, although the bank was an instrumentality of the State of Argentina, the activities of the bank upon which the suit was based were of a private nature.⁷⁶ Where there is little difference or no difference at all between the corporate body and the governmental body it serves, both American and English courts have ruled that immunity will be granted to the corporation or business entity under the sovereign immunity doctrine.⁷⁷

Of greater importance to the establishment of at least minimum public order both on Earth and in outer space than the question of when a State can or cannot assert jurisdiction over persons or objects within its territory is the question of when a State may assert jurisdiction over persons and objects located *outside* of its territory, either in a foreign State or in an area not subject to claims of sovereignty by any State, such as on the high seas or in outer space. With regard to those situations where a state will desire to assert jurisdiction beyond its territorial boundaries due to the impact of the event upon the

Uxmal, 40 F. Supp. 258 (D. Mass. 1941). The Court ruled that in order for a foreign merchant vessel to acquire sovereign immunity it must not only be owned by the foreign government, but it also must be possessed and operated by the government for some national purpose.

76. *Mirabella v. Banco Industrial de la República Argentina*, 237 N.Y.S.2d 499 (1963).

77. *See, e.g., Mason v. Intercolonial Railway of Canada*, 83 N.E. 876 (Mass. 1908), in which a suit brought against a Canadian railway was dismissed for lack of jurisdiction because the court found that the railway was the property of the King of England, not a corporation, and operated through the government of Canada for the public purposes of Canada; *Dunlap v. Banco Central del Ecuador*, 41 N.Y.S.2d 650 (1943), where the court said that the question of whether an Ecuadorian corporation was entitled to sovereign immunity depended in turn upon how closely it was related to the Ecuadorian government and whether the acts were public or private acts; and an English case, *Baccus S.R.I. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438, involving an Italian corporation suing a Spanish corporation which was carrying on business in Spain. Both parties had agreed contractually to submit the dispute to the London courts. It was held that the Spanish corporation, being a department of the state of Spain, was entitled to sovereign immunity even though it was a corporate body and a separate legal entity.

State's important interests, the following dichotomy can be made: 1.) events which either are not disruptive or cannot reasonably be expected to be disruptive of peaceful relations between states; and 2.) events which either are disruptive or can within reason be expected to be disruptive of peaceful relations between states.

In order to classify an activity or interaction under the above scheme, whether the activity involves individuals, groups of individuals in either corporate or non-corporate associations, States themselves, or regional or worldwide international organizations, it is necessary to look at the effects of the activity upon the goals and values of the states which desire to assert jurisdiction over the event. Among the most important values or goals any State has are those regarding its defense and national security, economic stability, welfare of its nationals and their property, and prestige. Any event occurring outside of the territory of a State which threatens or acts in derogation of any of the above interests will be cause for the State to find *some means* of asserting jurisdiction over the event and thereby having the matter handled by *its* municipal courts. Disputes arising from interactions such as contracts, marriages, births, deaths by natural causes, divorces, will contests, *inter vivos* gifts and the like are not, as a general rule, a substantial threat to the above-mentioned interests of States. While States are interested in the protection of the interests of their nationals in regard to these events, there is not much danger that two or more states will go to war or even resort to less hostile methods such as blockade in the event of a conflict over who shall resolve the matter in whose municipal courts. While the conflict of laws rules regarding such matters are far from settled, there is no need to worry that disputes based upon such matters will be disruptive of world peace or the establishment of a more stable international situation. It is for this reason that these events and the jurisdictional problems they present will not be discussed in the remainder of this paper.

Events which belong to the second classification and which are, therefore, of much greater interest to any State include crimes and torts which, although committed outside the borders of a State, may threaten any one of its important interests, acts committed by other States which, although not traditionally classifiable as either crimes or torts, due to the fact that they were committed by other States,

affect various interests of many States, and treaty disputes. While some of these events are subject to the jurisdiction of municipal courts, as will be seen, others, such as treaty disputes, can only be handled by an international court.

Crimes committed outside of the territorial boundaries of a State which affect that State in some way will almost always cause that State to seek some means of legally asserting jurisdiction over the individuals involved. Of special interest, of course, are crimes which affect a State's security, such as treason, and economic stability, such as counterfeiting and fraud.

The basic rule for international criminal jurisdiction is that no State will apply the criminal laws and sanctions of another State.⁷⁸ Punishment for criminal acts has never been considered by either common or civil law as "transitory" or "extra-territorial." Each state punishes only acts criminal by its own law; there is never any choice of law problem as such—though it is entirely possible for the same acts to constitute a crime by the law of more than a single state.⁷⁹

When the offence is committed by either a national or an alien outside of the territorial boundaries of a State, but which violates the law of that State, a number of theories or principles exist which the State may use in order to legally assert jurisdiction over the suspect. International law shows no uniformity in practice.

The *territorial principle*, followed by the United States, Great Britain, and a number of other States, holds that a State may not exercise jurisdiction over either a national or an alien for a criminal act committed outside of the State's territorial boundaries. This principle, when applied to crimes committed by nationals, is illustrated by the classic case of the *American Banana Co. v. United Fruit Co.*,⁸⁰ in which the United States Supreme Court refused to enforce the provisions of the Sherman Anti-Trust Act against the United Fruit Com-

78. OPPENHEIM, *supra* note 56, at 328.

79. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1140 (footnote omitted) (1956). On jurisdiction in general see also George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609 (1966); Sarkar, *The Proper Law of Crime in International Law*, 11 INT'L & COMP. L. Q. 446 (1962); Taubenfeld, *States and Offenses Committed Beyond Their Border*, 16 N.Y.L. FOR. 592 (1970); Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L. Q. 295 (1959).

80. 213 U.S. 347 (1909).

pany for activities undertaken by the latter in Panama and Costa Rica, where the alleged acts were not in violation of local law. Since that case was decided, however, exceptions to the territorial principle have evolved, allowing United States courts to assert jurisdiction over nationals of the United States who have committed offenses, defined as such under the law of the United States, outside of the United States. These cases for all practical purposes overrule the holding in *American Banana* and usually involve crimes harmful to the economic⁸¹ or national security⁸² interests of the United States. In these cases the United States nationals were arrested and tried whether they returned voluntarily or involuntarily to the United States. Other United States cases have also shown that the territorial principle of jurisdiction as applied to United States nationals has been greatly weakened.⁸³ The most important fact to recognize about the territorial principle is not that it allows a State to exercise juris-

81. See, e.g., *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927), in which defendant American corporations were enjoined by a federal court from conducting in Yucatan various activities designed to control the exportation of sisal from Mexico to the United States and monopolize the market both inside and outside the United States in violation of provisions of the Sherman Anti-Trust Act; and *Steel v. Bulova Watch Co.*, 344 U.S. 280 (1952), in which a federal district court in Texas was held to have jurisdiction over a suit by an American watch company to enjoin a United States citizen from using the company's trade mark, registered under United States law, in Mexico on watches made in Mexico. The Court, quoting from *Skirotes v. Florida*, 313 U.S. 69, 73 (1941), stated the principle: "The United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government."

82. See, e.g., *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), cert. denied 336 U.S. 918 (1949), where the court held that a United States national who had acted as a propagandist and radio announcer for Germany during World War II, and who had been arrested in Germany by United States troops could be tried for treason in the United States because he still owed allegiance to the United States while he was in Germany; and *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950), where the defendant, also a United States citizen who had broadcast propaganda for Nazi Germany, and who was later arrested by United States forces in Germany, was convicted of treason by a federal court, being held to have been under the same duty of allegiance to the United States while residing in a foreign country with which the United States was at war.

83. In *Blackmer v. United States*, 284 U.S. 421 (1932), the defendant, a United States citizen, was convicted upon his return to the United States for contempt of a United States court for failure to obey a subpoena of the court directing him to return home from France to act as a witness for the United States government in a criminal trial. In *Sachs v. Government of the Canal Zone*, 176 F.2d 292 (5th Cir.

diction over most persons or objects within its boundaries, which all States do, but that it *limits* the State to those exceptions, such as discussed above, allowed by the municipal law of the State itself.

All of the exceptions to the territorial principle as it applies to the nationals of a State can also fall within the *active personality* or *nationality principle* of jurisdiction.⁸⁴ This theory allows a State to assert jurisdiction over a national who commits or participates in the commission of an offense beyond its territorial boundaries. The *Restatement (Second) Foreign Relations Law of the United States* recognizes this principle in Section 30(1): "A state has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs."⁸⁵ This basis of jurisdiction, used most with serious crimes such as treason or homicide but which can be used for any conduct defined as criminal by the State of nationality of the individual, allows a State competence to assert jurisdiction over a much broader area of potential cases than any of the exceptions to the territorial principle. When used with the latter it greatly enlarges the scope of a State's jurisdiction.

As to the application of the territorial principle to aliens who have committed crimes outside of a State which wants to assert jurisdiction over them, the Anglo-American view is illustrated by the case of *United States v. Baker*,⁸⁶ which held that the United States had no jurisdiction to try an alien for crimes in violation of United States law which were committed outside of the boundaries of the United States. The act in question was the falsifying of a material fact in a matter within the jurisdiction of the Immigration and Naturalization Service.⁸⁷

1949), a United States citizen was tried and convicted for a criminal libel which he had composed in the Republic of Panama, a sovereign state, for publication and circulation in the Canal Zone.

84. See, e.g., *Skirotes v. Florida*, 313 U.S. 69, 73 (1941).

85. See *Harvard Draft Convention on Jurisdiction with Respect to Crime*, art. 5, 29 AM. J. INT'L L. 439, 440 (1935 Supp.).

86. 136 F. Supp. 546 (S.D.N.Y. 1955).

87. The court in *Baker* distinguished the earlier case of *United States ex. rel. Mayka v. Palmer*, 67 F.2d 146 (7th Cir. 1933), in which an alien was ordered deported for having made false statements under oath to an American Consul abroad when applying for a passport: "But deporting an alien for perjury is far different from indicting and trying him for a crime committed abroad." 136 F. Supp. 546, 548 (S.D.N.Y. 1955).

Just as with crimes committed by nationals, however, the territorial principle can be subject to modifications which will allow a State to assert jurisdiction over aliens who have engaged in certain special acts which were violations of the law of the State even though they occurred outside of the State. A well-known but highly unusual example is the case of William Joyce, better known to Allied servicemen in the European theater of World War Two as "Lord Haw-Haw," a propagandist radio announcer for Nazi Germany.⁸⁸ Joyce was a national of the United States and, therefore, an alien to British courts. He did, however, have a British passport from July, 1933, to July 1, 1940, having stated on the passport application that he was a British subject by birth. Between some date in 1939, when he left England, and July 1, 1940, when his passport expired, Joyce began to broadcast on behalf of Germany. It was on the basis of this period of time that the British courts found that Joyce had owed a duty of allegiance to the British Crown, and having violated that duty by making broadcasts on behalf of England's enemy, Joyce was found guilty of treason and subsequently hanged. The possession and use of even this illegal passport had given him certain rights under British law and imposed upon him a corresponding duty of allegiance.⁸⁹

A more general means or exception utilized by the United States, Great Britain, and other States which follow the territorial principle in order to elude the restrictive nature of this theory and extend their jurisdiction to aliens acting outside of the boundaries of the States in question is the *subjective-objective territorial principle*. Here the alien, although acting outside of the boundaries of a State, is considered as having committed a crime *within* the territory of the State which desires to assert jurisdiction over him. An obvious example of this would be the situation of a Canadian national standing in Canada who shoots a rifle at and kills a man standing across the border in the United States. The crime, homicide, is considered as having occurred in the United States, although the person responsible

88. *Joyce v. Director of Public Prosecutions*, 62 T.L.R. 208 (1946); A.C. 347.

89. Brierly refers to this as a "constructive" allegiance. BRIERLY, *supra* note 56, at 299. The American Law Institute's *RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES* states that it "expresses no opinion" upon the propriety or validity of such a theory. *Id.* at 88-89.

for firing the rifle was physically in Canada at the time of the firing. The jurisdiction in Canada would be called subjective, and the jurisdiction of the United States would be called objective.⁹⁰

Included under the territorial principle is the concept known as the law of the flag or "floating" territorial principle. Any vessel or aircraft operating under the flag of a particular state is considered to be part of that state for jurisdictional purposes and any act or event occurring on board the vessel or aircraft is thereby within the jurisdiction of the flag State. This principle has been extended to spacecraft by Article VIII of the 1967 *Space Treaty*: "A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body." The territorial principle is not, of course, followed by all states. Those which reject the concept of territory as a basis of jurisdiction over events of a criminal or other important nature are free to choose from a number of other theories, all of which are based upon factors other than the location of the occurrence.

90. See, e.g., *Rex v. Godfrey*, [1923] 1 K.B. 24, where an English court ordered a man in England to be extradited to Switzerland to stand trial for having procured his partner who was in Switzerland to obtain goods in Switzerland by false pretenses. The man who was in England had never been in Switzerland, but the effects of his crime were felt there. The jurisdiction of the British court was subjective while that of the Swiss court was objective. In *Ford v. United States*, 273 U.S. 593 (1927), the defendants, British subjects who had been in a British ship on the high seas about 25 miles west of San Francisco at the time of its seizure by United States authorities, were convicted of conspiracy to violate the United States liquor laws pursuant to a treaty between the United States and England, authorizing the United States to seize any British vessels and persons on such vessels suspected of such violations. See also *Charron v. United States*, 412 F.2d 657 (9th Cir. 1969). The subjective-objective territorial principle is recognized by the RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18: "Jurisdiction to Prescribe with Respect to Effect within Territory."

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory if either—

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies;

(ii) the effect within the territory is substantial;

(iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and

(iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."

One such theory allows a State to claim jurisdiction over a crime in which the victim was a national of the State in question. This is called the *passive personality principle* and is followed by some European states and Turkey. The classic case demonstrating this theory, and one of the most famous cases in international law, is the *Steamship Lotus*,⁹¹ heard before the Permanent Court of International Justice in 1927. In the *Lotus* case a French officer was tried and convicted of manslaughter by a Turkish court for having caused the deaths of eight Turkish nationals in a collision on the high seas between the French ship on which he was watch officer at the time of the collision and a Turkish vessel, on which were the Turkish nationals. The officer was arrested after he had put ashore in Constantinople. France and Turkey agreed to submit the case to the Permanent Court, the former claiming that Turkey had no jurisdiction to try the officer, the latter claiming that to do so was not in violation of international law.⁹² The court held that no rule of international law prevented Turkey from asserting jurisdiction over the defendant since the effects of the offense were produced on the Turkish vessel, which was considered under international law to be part of Turkish territory.⁹³ The *passive personality principle* has been repudiated by the *Geneva Convention of 1958 on the High Seas*,⁹⁴ which states in Article 11:

In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

91. [1927] P.C.I.J., ser. A, No. 10.

92. Turkey claimed jurisdiction at least in part under article 6 of the then new Penal Code of Turkey, which provided that any foreigner who committed an offense abroad to the prejudice of Turkey or of a Turkish subject would be punished in accordance with the Turkish Penal Code, provided that the minimum penalty under Turkish law for the offense was one year's imprisonment and also that the accused was arrested in Turkey. Hudson, *The Sixth Year of the Permanent Court of International Justice*, 22 AM. J. INT'L L. 1, 10 (1928).

93. The decision in the *Lotus* case can be interpreted as a recognition by the majority of the Permanent Court of either the objective territorial principle (BRIERLY, *supra* note 56, at 303) or what has been referred to as the impact territorial principle (McDOUGAL, LASSWELL & VLASIC, *supra* note 8, at 699). (The impact territorial principle is discussed here *infra* note 98). The passive personality principle, however, was the theory behind at least part of article 6 of the Turkish Penal Code.

94. Convention on the High Seas [hereinafter referred to as the High Seas

While the treaty therefore limits the possible basis of jurisdiction to either the law of the flag or active personality theories, it only applies to collisions at sea and similar incidents and does not prevent the use of the *passive personality principle* for other types of cases. The principle, therefore, must continue to be considered as a possible basis of a jurisdictional claim by a State over an alien who has been accused by the State of committing a criminal act, as defined by the State's own laws, against one of its nationals outside of its territorial boundaries.⁹⁵

Another theory of jurisdiction which may be used where an act committed outside of a State is of such importance to the interests of the State that it desires to assert jurisdiction over the event is the *protective or protected interest principle*. It is stated in one possible form by Section 33 of the *Restatement (Second) Foreign Relations Law of the United States*:

(1) A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

(2) Conduct referred to in Subsection (1) includes in particular the counterfeiting of the state's seals and currency, and the falsification of its official documents.

This principle can be considered as a much broader application of the *passive personality principle*, going beyond the protection of nationals to include the protection of national-state interests,⁹⁶ and it has been used by United States courts a number of times.⁹⁷ While

Treaty], done at Geneva April 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

95. The RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES repudiates the use of the passive personality principle in § 18(2): "A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." The *Harvard Draft Convention on Jurisdiction with Respect to Crime*, while listing in the Introductory Comment the passive personality principle as being one of the five general principles of penal jurisdiction in use throughout the world by states, does not include it in the text of the Draft Convention itself: "The (passive personality principle) . . . is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles." 29 AM. J. INT'L L. 435, 445 (Supp. 1935).

96. STEIN & HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA 684 (1963).

97. See, e.g., *United States v. Archer*, 51 F. Supp. 708 (S.D. Cal. 1943), where the issue arose whether an alien who had falsely sworn before a vice consul of the

the protective principle and some of the various exceptions to the territorial principle seem to arrive at the same results when each is applied to specific cases, it should be appreciated that the protective principle will allow a State a greater latitude of jurisdiction with less legal maneuvering than the territorial theory exceptions. Such a theory may have distinct advantages in the Space Age, when science and technology pose new challenges to traditional concepts of territoriality.

The United States, although it has used the protective theory in certain cases, still adheres to the territorial and active personality theories in most other cases.⁹⁸ Other States may rely upon various other

United States at an American Consulate in Mexico could be prosecuted in the United States under a statute making such false swearing a crime. The court answered the question in the affirmative, stating that "any person who takes a false oath before a consul commits an offense, *not against the country where the consul is, but against the sovereignty of the United States*" (court's emphasis). *Id.* at 711. Although the court supported its decision, in part, by alluding to the fact that the United States Consulate was considered as American territory (and therefore invoking the territorial principle), a fiction which has come under criticism (*see, e.g., BRIERLY, supra* note 56, at 222), the decision could have been supported entirely by the protective principle. In a similar case, *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), defendants had made false statements to United States officials outside of United States territory in order to obtain status as non-quota immigrants. The court stated that "Congress may (from the body of international law) pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by (its) legislation." *Id.* at 491. The fact that Congress had generally adhered to the territorial principle did not prevent it from adopting the protective principle where it saw fit to do so. In a third case, *Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961), the defendants had conspired to enter the United States illegally as immigrants with preferred status based upon "sham" marriages to American citizens. Again relying upon the protective principle, the court cited the *Rodriguez* case and stated that "the powers of the government and the Congress in regard to *sovereignty* (court's emphasis) are broader than the powers possessed in relation to internal matters." *Id.* at 549. A very recent case utilized the protective principle to apply certain provisions of the Securities Exchange Act to transactions taking place outside the United States which are detrimental to the interests of American investors, if the transactions involve stock registered and listed on a national (United States) securities exchange. *Shoenbaum v. Firstbrook*, 405 F.2d 200 (2nd Cir. 1968).

98. The United States has also used what has been referred to as the impact territoriality principle. *MCDUGAL, LASSWELL & VLASIC, supra* note 8, at 700. This theory, which may be included among certain of the exceptions to the territorial principle or under § 18 RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 90, and which is nearly identical to the protective principle, allows a state to claim jurisdiction over alien persons or corporations who have committed offenses outside of the state's territorial boundaries if the offense produces a substantial impact upon the state's territorial community. The United States has used this principle in certain anti-trust cases, such as *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), in which the defendant

combinations of the theories outlined above. Not all States recognize all theories of jurisdiction, and many writers on international law question the validity of some of the principles.⁹⁹ All States and writers do, however, agree that there exist certain types of offenses which due to their very nature constitute a threat to all men and States everywhere and for that reason are subject to the jurisdictional claims of any and all States at any time under what is usually referred to as the *universality principle* of jurisdiction.

This last and most special of jurisdictional theories applies exclusively to crimes and offenses considered as being not only against the interests of one or a few States, but against the interests of all States and the individuals who belong to them. Although the Nuremberg Trials are probably the most dramatic example of the application of the *universality principle*, the principle was in use long before that for crimes such as piracy.

One of the oldest of offenses, piracy, was regarded as detrimental

Canadian corporation was charged with certain violations of the Sherman Anti-Trust Act relating to attempts to restrain and monopolize interstate and foreign commerce of the United States. In regard to those acts committed by defendant outside of the United States territorial jurisdiction Judge Learned Hand said: "Did either the agreement of 1931 or that of 1936 violate sec. 1 of the Act? The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this act, without regard to the limitations customarily observed by nations upon the exercise of their powers. . . . We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. . . . On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize. . . . Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them." *Id.* at 443, 444.

This so-called "Rule of the Alcoa Case" has been criticized as not being part of international law. STEIN & HAY, *supra* note 96, at 684.

99. Brierly, for example, expresses disapproval of the passive personality principle. BRIERLY, *supra* note 56, at 302. See also Fitzgerald, *The Territorial Principle in Penal Law: An Attempted Justification* 1 GA. J. INT'L & COMP. L. 29, 43 (1970).

to all men everywhere—"(*P*)*irata est hostis humani generis.*"¹⁰⁰ It was early established that pirates could be pursued, captured, tried, and punished by any state able to do so, whether or not the pirate sailed ostensibly under the flag of some State.¹⁰¹ The act of piracy caused the individuals and their vessel to lose *ipso facto* the protection of their State flag and national character. The capturing State could then try the pirate under its own municipal law.¹⁰²

Slave trading, although not originally proscribed by customary international law, has, through the acceptance by most States of a number of treaties entered into by various States in the nineteenth and early twentieth centuries, become almost universally condemned by States everywhere.¹⁰³

Individuals, although not subjects of international law, have, therefore, been made subject to certain international duties, the violation of which will make the offender individually subject to punishment under international law, although it is a state or group of states which will usually render the punishment as there is, as stated earlier, no world executive body to administer the punishment. Perhaps the best example of this occurred after World War II when the victorious allied States sought a basis of jurisdiction in order to try those Nazi officials who had participated in acts of genocide and inhumanity committed upon the Jewish and other peoples found within Nazi occupied territory. The allies had only to look to the *universality principle* of jurisdiction as it had been used for piracy and some war crimes in the past.¹⁰⁴ The charter annexed to the *Agreement of August 8, 1945, for Prosecution and Punishment of the Major War Criminals of the European Axis*, which set up the

100. *Harvard Draft Convention on Jurisdiction with Respect to Crime* (Comment to Article 9), 29 AM. J. INT'L L. 435, 566 (Supp. 1935), quoting Coke, C.J. in *King v. Marsh*, 3 Bulstr. 27, 81 Eng. Rep. 23 (1615).

101. OPPENHEIM, *supra* note 56, at 330.

102. *Id.* at 616. See also High Seas Treaty, art. 14-22.

103. OPPENHEIM, *supra* note 56, at 733-35. See also High Seas Treaty, art. 13, 22(1)(b).

104. See OPPENHEIM, *supra* note 56, at 850 n.1, for an example from World War I. See also WILKES, *Courts of International Criminal Jurisdiction*, WORLD PEACE THROUGH LAW—THE WASHINGTON WORLD CONFERENCE 792, 799-800 (1967), for an interesting chronology of international criminal tribunals and the Draft Statute for an International Criminal Court, from the Report of the 1953 Committee on International Criminal Jurisdiction, General Assembly Official Records, IX, Supp. 12 (A/2645) 23-26 (1954); and Klein and Wilkes, *United Nations Draft Statutes for*

Nuremberg International Tribunal, merely applied the concept of individual responsibility, long established for acts such as piracy, to the war crimes and "crimes against humanity" (genocide, human experiments, etc.) which the Nazi officials were charged with having committed.¹⁰⁵ The words of the Tribunal are quite clear on this basic principle underlying the Nuremberg Trials:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹⁰⁶

The *universality principle*, although the least used of the previously discussed basis of jurisdiction, is no doubt the most important from a world-wide view.¹⁰⁷ The recent plague of air piracy, having grown steadily over the past decade, illustrates one area where the *universality principle* can be applied with great effectiveness.¹⁰⁸ The possibility of such crimes infecting the space arena during the next thirty years presents an ominous specter when one considers that in

an International Criminal Court; An American Evaluation, prepared on behalf of the American National Section of the International Association of Penal Law, at the Comparative Criminal Law Project and the Institute of Judicial Administration, New York University. Both documents may be found in MUELLER and WISE, *INTERNATIONAL CRIMINAL LAW*, 513, 526 (1965).

105. OPPENHEIM, *supra* note 56, at 341.

106. *Id.* at 342.

107. WILKES, *supra* note 104, at 798.

108. Although extradition of air pirates has often been suggested as an appropriate solution to international air piracy, it does have its limitations, one of the most serious of which is the situation in which the air pirates ask for political asylum in the state where the aircraft lands. States generally do not want to deny political asylum to individuals who qualify for it, especially if the individuals are fleeing from a state hostile or unfriendly to the asylum state. Nevertheless, air pirates must be punished by some governmental entity if international air commerce is to remain healthy. In such cases where the state holding the air pirates desires to grant them political asylum, it can itself try the individuals by invoking the universality principle. *Aut dedere aut punire*. See Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation*, as found in *AKTUELLE PROBLEME DES INTERNATIONAL-STRAFRECHTS*, 10-18 (Oehler and Potz ed. 1970). This was done recently by West Germany in the case of eight young Czech nationals who had forced a Czech airliner to land in West Germany. The Czechs were granted asylum by West Germany but were then tried, found guilty, and sentenced to jail terms for the acts they had committed. In this way two oft times incompatible masters were served: national political interests (the granting of asylum to people flee-

the not-too-distant future there will be regularly scheduled commercial spaceflights from the Earth to orbiting space stations, the Moon, and, eventually, beyond. Oppenheim also recognized the potential importance of the *universality principle* to the Space Age: "The increasing complexities of modern international relations, in particular having regard to the unlimited potentialities of scientific weapons of destruction, may call for far-reaching extensions of individual responsibility expressly declared by International law."¹⁰⁹

As the preceding discussion indicates, the area of State criminal jurisdiction over individuals acting outside of the boundaries of the State in question can be quite involved.¹¹⁰ As men and women from the planet Earth move into outer space and establish space stations and bases both in orbit around and on celestial bodies the questions of which State may assert jurisdiction over individuals who have been accused of crimes in outer space will only become more complex. Tortious acts which occur in outer space will also be of great interest to States, even though torts by their very nature are less important to the interests of States than are crimes. Crimes are acts so detrimental to the best interests of States that the States themselves will, through their governmental arms, prosecute the wrongdoers, while torts are generally more detrimental to the best interests of only one or a relatively small group of a State's nationals so that the State will

ing from the Iron Curtain) and international law (the punishing of air pirates). See *Christian Science Monitor*, Sept. 21, 1970, at 10, col. 1. For a discussion of the political offense exception to extradition, see Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969).

On December 16, 1970, the member states of the International Civil Aviation Organization completed the Convention for the Suppression of Unlawful Seizure of Aircraft. As of January 21, 1971, 51 states had become signatories to the Convention, which is reprinted in 10 INT'L LEGAL MATERIALS 133 (1971). Article 7 of the Convention affirms the principle of *aut dedere aut punire*.

109. OPPENHEIM, *supra* note 56, at 342.

110. One of the most unusual cases in the history of international criminal jurisdiction is the Eichmann case. Due to the facts that: Eichmann's crimes were all committed outside of Israel; Israel was not even in existence as an independent and sovereign state at the time; and none of the six million or so victims could therefore have been Israeli nationals at the time the crimes were committed, none of the recognized principles of jurisdiction discussed above, with the exception of the universality principle, can be precisely applied to the situation. Note, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961). However, the protective (protected interest) principle would seem to be closest to fitting the circumstances. See Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 9 (1968).

not prosecute the wrongdoer itself but will only afford a means by which its nationals may prosecute the wrongdoer under State law. Nevertheless, nations have an interest in seeing that their nationals who have been the victims of serious tortious conduct committed outside of their territorial boundaries will be able to secure some remedy against the wrongdoers. In addition to this there are many acts which are actually on the borderline between torts and crimes and may be defined as either. In such instances there is what may be referred to as a "merging" of the tort and criminal concepts. In the *Lotus* case, for example, the French Lieutenant, Demons, was charged with what most common law systems would refer to as involuntary manslaughter, a crime involving a high degree of negligence.¹¹¹ It is possible that another State may have defined such conduct as only tortious and not criminal, but even if that were the case the State in all probability would still have asserted jurisdiction over Demons in order that he might be subjected to civil liability for the death of the State's nationals. Tortious acts of such significance may be subject to any of the theories used for criminal acts, giving rise to jurisdictional conflicts between States. A simplified example of such can be demonstrated by the following hypothetical, but entirely possible, situation:

111. The decision of the Permanent Court did not mention the specific section or sections of the TURKISH CRIMINAL CODE (effective July 1, 1926) with which Demons was charged with having violated, but either of the following sections may have been applicable:

§ 383 Whoever causes a fire, explosion, ship-wreck, sea accident or any destruction or calamity comprising a public danger, as a result of imprudence, carelessness, inexperience in one's profession or trade, or disobedience to regulations, orders or rules, shall be imprisoned for not more than thirty months and a heavy fine of not more than 100 liras shall be imposed.

The punishment shall be imprisonment for six months to five years and a heavy fine of 50 to 150 liras in case the above-mentioned offense has resulted in danger to a person's life, and heavy imprisonment for not more than five years and by a heavy fine 100 to 500 liras in case the same offense has resulted in a person's death.

§ 455 Whoever causes the death of a person through negligence or carelessness or inexperience in his profession or trade or inobedience to regulations, orders or instructions, shall be punished by imprisonment for two to five years and by a heavy fine of 250 to 2,500 liras.

Where his act has caused more than one person's death, or one person's death and one or more person's injury and if this injury has been in the degree specified in the second paragraph of Article 456, he shall be punished by imprisonment for four to ten years and by heavy fine of not less than 1,000 liras.

See *The American Series of Foreign Penal Codes, The Turkish Criminal Code*, 9 NEW YORK UNIVERSITY, SCHOOL OF LAW, COMPARATIVE CRIMINAL LAW PROJECT, 145-46 (1965).

A space station of United States registry and operating entirely under the United States flag is orbiting Earth in the late 1980's. The station is used for purposes of telecommunication, navigation, weather forecasting, and research in the fields of astronomy, communications, and medicine. Although the daily operations of the station are carried on exclusively by United States nationals, the research is conducted by scientists and engineers from many states. A space shuttlecraft owned by the Soviet Union and operated under the Soviet flag is approaching the station for rendezvous and docking, after having first received permission to do so from the station's commander. Due to either an error by the Soviet crew or a malfunction in the shuttlecraft's guidance equipment, which was actually made in East Germany, the passenger section of the shuttlecraft collides with the research section of the station, in which a number of scientists are working at the time.

None of the American crew members are killed or seriously injured, but several scientists who are nationals of Ghana, Brazil, and Canada are killed, along with some Canadian and Japanese governmental officials who were visiting the station at the time. Great damage was done to the research section of the station, and scientific equipment belonging to Canada, Japan, and a space research organization composed of Ghana and a number of other African states is completely destroyed. The research projects are set back over a year in most cases.

On the Soviet shuttlecraft none of the Soviet crew members are killed or seriously injured, but passengers who are nationals of Poland, France, and Pakistan are injured in various degrees, and one Yugoslavian governmental official is killed.

After the collision the Soviet shuttlecraft, although badly damaged in the passenger section, remains operative and is able to travel several hundred miles through space to rendezvous and dock, safely, with a research space station owned and operated by the European Space Research Organization. Docking with the damaged American space station was deemed impossible by the station's commander after the collision. After having docked at the ESRO station the Soviet crew and the passengers of the Soviet ship transfer from the ship to the station to receive medical care and await the arrival of a shuttlecraft from Earth. The commander of the ESRO station informs the Soviet crew that they are under what the commander refers to as "protective custody."

Based upon the above facts the following jurisdictional claims could be made over the pilot and crew members responsible, or allegedly responsible, for the collision:

1. The United States claims jurisdiction on the basis of the *protected interest principle*, since the damage to the station, which was under the United States flag, could be detrimental to important United States economic, prestige, and, perhaps, national security interests. Similarly, Canada, Japan, and the African states belonging to the African space research organization, all of whom lost important and valuable scientific research equipment in the collision, could utilize the *protected interest principle* under the same rationale. Alternatively, the United States might be able to claim jurisdiction on the basis of the *subjective-objective territorial theory* since the act or acts of the Soviet pilot and/or crew which allegedly caused the collision, although done on the Soviet shuttlecraft, produced effects on board the United States space station and even in the United States itself.

2. Ghana, Brazil, Canada, Japan and Yugoslavia, all of whose nationals were killed in the collision, could claim jurisdiction under the *passive personality theory*,

as could Poland, France and Pakistan, whose nationals were injured. All of these states might also utilize the *protected interest principle* since the death or injury of scientists or governmental officials could be considered as detrimental to a state's important national interests.

3. The Soviet Union, of course, would have no problem in claiming jurisdiction over the pilot and crew of the shuttlecraft since a state may prescribe and apply rules of conduct to its nationals whenever they may be under the *active personality theory*. If American crewmen of the United States space station were suspected of being responsible for the collision they could similarly be subject to the jurisdiction of United States courts.

4. Each state involved in the research projects could utilize the *protected interest principle* since the successful completion of the projects might be considered of great importance to each state's national interests.

In addition to the Soviet pilot and crew being held responsible for the accident, the Soviet Union itself might be charged with liability. Also, since East Germany was the builder of the guidance equipment of the shuttlecraft, it too might incur responsibility for the disaster if the guidance equipment, and not the Soviet pilot or crew, were the cause of the accident.

Although this example is intended to demonstrate how possible jurisdictional disputes could arise in outer space in regard to tortious or criminal conduct, it does open the door to other questions involving both substantive and procedural issues related to the question of liability. Some of these issues are the following: 1) What theory of liability should be used? (*e.g.*, absolute liability, negligence, etc.); 2) How should liability be apportioned if more than one state or international organization were found to be responsible, and, if an international organization was involved, how should liability be apportioned among the states' members of that organization? 3) Should there be a maximum limit on damages? 4) What court should hear and decide the case?¹¹² It is the last of these issues, namely, what court should be the proper forum for such cases, that comprises the main focus for this article. It is not difficult to see that there is no simple and direct answer to this question when there is a factual situation as involved as the one described above.

SITUATIONS IN WHICH MUNICIPAL COURT JURISDICTION IS INADEQUATE

Potentially more important than either tortious or criminal conduct committed by individuals is that conduct which is under-

112. For a more thorough examination of the various aspects of the question of

taken by States themselves, usually through their official agencies, which threatens the interests of other States. These "national" torts or crimes can be very harmful to the maintenance of peaceful relations between States. Examples include boundary disputes, fishing rights disputes, pollution and other similar matters. Modern scientific and technological developments can be used by governments either intentionally or unintentionally to interfere with such things as privacy or telecommunications. Large numbers of nationals of other States and the official activities of other States may be affected by such acts. In such cases the courts of the States being harmed by the activities will often not be able to get jurisdiction over the responsible individuals due to the fact that the objectionable activities may be entirely carried out within the offending State. If the States involved in such disputes cannot resolve the matter by diplomacy, the matter should be submitted to an international court for either an advisory or an adjudicatory proceeding.

An example of just such an occurrence arising out of an activity brought about by modern technology was the *Trail Smelter Arbitration* case.¹¹³ The dispute arose between the United States and Canada and involved a lead and zinc smelter operated by a Canadian corporation in British Columbia under authorization from Canadian officials. The smelter emitted great quantities of sulphur dioxide fumes into the atmosphere causing damage to property on the American side of the border in the state of Washington. Both sides agreed to set up a special tribunal to resolve the matter. The tribunal found that Canada was responsible for the damage to United States property and ordered indemnification paid to the United States as well as steps taken by Canadian officials to reduce the amount of pollution.

The Space Age will bring an acceleration of the number and kinds of such national or governmental offenses. Pollution, only recently having been given the attention it deserves as a serious problem on Earth, may present some rather unique problems in outer space as a

liability for space activities see Dembling, *A Liability Treaty for Outer Space Activities*, 19 AM. U.L. REV. 33 (1969), and Nanda, *Liability for Space Activities*, 41 COLO. L. REV. 509 (1969).

113. *Trail Smelter Arbitration* (United States v. Canada), Decision of Mar. 11, 1941, U.S. DEPT. OF STATE, 8 ARB. SER. (1941); 35 AM. J. INT'L L. 684 (1941).

result of either intentional or unintentional activities by States. Privacy of States and their nationals may be seriously threatened by spy satellites. Interference with telecommunications may present unusual but serious problems, and liability and natural resource disputes loom on the horizon. In addition to these areas, disputes between States in regard to treaty interpretation and jurisdictional claims, the latter being illustrated by the *Lotus* case and the hypothetical example above, will provide situations in which municipal courts either cannot or should not assert jurisdiction, due to their inherent bias toward their own State. It is in such cases that an international court will prove to be the most reliable way to peacefully decide the dispute. Before examining the present ability of the International Court of Justice to handle any space or space-related disputes which may arise in the near future and presenting proposals to make the court more effective as a tool of world peace both on Earth and in outer space, it will be necessary to explore the current nature and operation of the court.

THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice, located at the Hague, Netherlands, was created in 1945 by the *United Nations Charter*, which is a multilateral convention to which 127 States are parties at the present time. Unlike its predecessor, the Permanent Court of International Justice, which was in existence from 1920 to 1946 and was active between 1922 and 1939, the present court is an integral part of the organization which created it. Article 92 of the *United Nations Charter* states: "The International Court of Justice shall be the principle judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter." And Article 1 of the *Statute of the International Court of Justice* (hereinafter termed the Statute) states: "The International Court of Justice established by the Charter of the United Nations as the principle judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute."

The court consists of fifteen judges, no two of whom may be na-

tionals of the same State.¹¹⁴ A quorum for the court consists of nine judges.¹¹⁵ The judges are elected by the General Assembly and the Security Council from names nominated by national groups.¹¹⁶ To be elected to the court the judges must "possess the qualifications required in their respective countries for appointment to the highest judicial offices, or (be) juris-consults of recognized competence in international law."¹¹⁷ The term of election is generally nine years.¹¹⁸ No judge "may exercise any political or administrative function, or engage in any other occupation of a professional nature,"¹¹⁹ nor may any judge act as agent, counsel, or advocate in any case.¹²⁰ When engaged in the business of the court, the judges are accorded diplomatic privileges and immunities.¹²¹ They are paid salaries which are determined by the General Assembly¹²² and which along with various allowances and compensation allowed by the *Statute* are free from all taxation.¹²³ Although seated at the Hague, the court may sit and exercise its functions wherever it considers it to be desirable.¹²⁴ The court makes its own rules of procedure¹²⁵ and may propose amendments to its *Statute* to the General Assembly,¹²⁶ although any amendments to such, as to the *United Nations Charter* of which the *Statute* is a part, must be passed by the General Assembly itself.¹²⁷ In order to decide a case a simple majority is needed, with the President of the court casting the last vote in case of a tie.¹²⁸ As nine judges constitute a quorum, a minimum of five judges therefore is necessary to decide a case.

Article 59 of the *Statute* states that a decision of the court has no

114. I.C.J. STAT. art. 3.

115. *Id.* at art. 25, para. 3.

116. *Id.* at art. 4.

117. *Id.* at art. 2.

118. *Id.* at art. 13, para. 1.

119. *Id.* at art. 16, para. 1.

120. *Id.* at art. 17, para. 1.

121. *Id.* at art. 19.

122. *Id.* at art. 32.

123. *Id.* at art. 32, para. 8.

124. *Id.* at art. 22, para. 1.

125. *Id.* at art. 30.

126. *Id.* at art. 70.

127. *Id.* at art. 69.

128. *Id.* at art. 55.

binding force except between the parties and in respect of the particular case. Except for the situation where an advisory opinion is asked by a competent international organization,¹²⁹ *only States* may be parties in cases before the court.¹³⁰ This does not confer jurisdiction upon the court in regard to any particular dispute but only opens the court to those states which wish to submit cases to it.¹³¹ When a State has submitted a case to the court it has the right to have a judge of its own nationality on the case, if it does not have a judge of its nationality on the court already.¹³²

States which are members of the United Nations are *ipso facto* parties to the *Statute*¹³³ and are therefore free to bring a case before the court at any time. States which are not members of the United Nations may become parties to the *Statute* on conditions which are determined in each case by the General Assembly upon the recommendation of the Security Council.¹³⁴ This is further elaborated by Article 35(2) of the *Statute*: "The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such provisions place the parties in a position of inequality before the Court."¹³⁵

States which are not United Nations members must contribute an amount toward the expenses of the court, unless, the state is already bearing a share of such costs.¹³⁶ As of January 1, 1971, 48 States had accepted the jurisdiction of the court under Article 36(2) of the *Statute*,¹³⁷ with notable exceptions being the Soviet Union and her satellite states. All but four of the States which have accepted the

129. See *infra* note 157.

130. I.C.J. STAT. art. 34, para. 1.

131. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPETENCE DE LA COMPETENCE 89, 90 (1965).

132. I.C.J. STAT. art. 31.

133. U.N. CHARTER art. 93, para. 1; and I.C.J. STAT. art. 35, para. 1.

134. U.N. CHARTER art. 93, para. 2.

135. States not members of the United Nations which have become parties to the Statute of the International Court of Justice pursuant to resolutions adopted by the General Assembly are Liechtenstein, San Marino, and Switzerland. U.S. Dept. of State, TREATIES IN FORCE 316 (Jan. 1, 1971).

136. I.C.J. STAT. art. 35, para. 3.

137. U.S. Dept. of State, TREATIES IN FORCE 317 (Jan. 1, 1971).

court's jurisdiction, however, have attached conditions to their acceptance.¹³⁸

In order to bring a case before the court a State must rely upon one of two things: 1) A special agreement between itself and the other State or States involved in the dispute; or 2) a unilateral application for the Court to assert jurisdiction over the case. This in turn relies upon either: (a) A prior jurisdictional instrument by which the other party or parties to the dispute have submitted such cases to the Court's jurisdiction; or (b) is merely an invitation, in the absence of the above, to the other party or parties to accept the jurisdiction of the Court in this particular case.¹³⁹

Article 40(1) of the *Statute* sets forth both of these methods: "Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar (of the Court). In either case the subject of the dispute and the parties shall be indicated." After a case is submitted to the court the next step, and the most important one in the whole process from initial submission of the case to final disposition of the merits, if the case goes that far, is the determination by the court of whether it has substantive jurisdiction over the case.

COMPETENCE DE LA COMPETENCE

The power of the court to decide initially and exclusively whether it has substantive jurisdiction over a case is called *competence de la competence*. It is without a doubt the most important single power conferred upon the court¹⁴⁰ and is based upon Article 36(6) of the *Statute*: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court." This power, the exercise of which is the first function the court undertakes in both advisory and contentious cases, involves a wide discretion on the part of the court but is neither absolute nor arbitrary.¹⁴¹ It is limited, in fact, to the extent to which the parties to the dispute have submitted the dispute to the court's jurisdiction, since the court

138. The four states are Haiti, Nicaragua, Paraguay, and Uruguay. *Id.*

139. *Supra* note 131, at 84, 85.

140. *Supra* note 131, at 271.

141. *Supra* note 131, at 187.

founds its jurisdiction solely on the consent of the parties. However, the court is not, in the matter of deciding whether the parties have consented to its jurisdiction, as subject to the mere whims of the parties as would seem to be the case upon superficial examination. The court interprets the jurisdictional instruments and the conduct of the parties and determines for itself whether the parties consented.¹⁴² The jurisdictional instruments may be treaties or other documents by which a State accepts the court's jurisdiction over either one specific case or any number of cases to which it either is currently or might in the future be a party. The court will use them to determine either if it has substantive jurisdiction over a case, or in the event that it already has such, whether that substantive jurisdiction will be subsequently affected by the instrument.¹⁴³ The conduct referred to above is often called the jurisdictional facts of the case and may be used in the same manner as the jurisdictional instruments.¹⁴⁴ It is from the jurisdictional facts and instruments that the court determines whether substantive jurisdiction has been conferred on it by the parties to the dispute.

The International Court of Justice is the only organ of the United Nations entitled by *explicit* provision to determine its own jurisdiction.¹⁴⁵ If the court decides that it does, the case proceeds to the merits. If it decides that it does not, then the case will usually be dismissed unless the parties remedy the defect themselves. In all cases, however, regardless of whether or not the court finds that it has substantive jurisdiction over a matter, the court will exercise the power conferred on it in Article 36(6) of the *Statute*.¹⁴⁶

The court's *competence de la competence* is not immune from challenge, however, as some mutual declarations of acceptance,¹⁴⁷ which are one way in which a state may accept the jurisdiction of the court for disputes which may arise in the future, contain clauses which declare that the State will decide for itself whether the court

142. *Supra* note 131, at 205.

143. *Supra* note 131, at 106.

144. *Supra* note 131, at 106.

145. *Supra* note 131, at 38 n.1. According to Shihata, no international court with continued jurisdiction has been established without this power. *Supra* note 131, at 30.

146. *Supra* note 131, at 300.

147. I.C.J. STAT. art. 36, para. 2.

has jurisdiction over a case ostensibly covered by the declaration of acceptance.¹⁴⁸ An example of such a reservation is found in the August 14, 1946 declaration of the United States by which it submitted to the jurisdiction of the International Court of Justice:

All legal disputes hereafter arising concerning:

- a) the interpretation of a treaty;
- b) any question of international law;
- c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- d) the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to . . .

- b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America* (emphasis supplied); . . .¹⁴⁹

The eight words "as determined by the United States of America" are the well-known Connally Amendment. It purports to declare that the United States will determine which disputes, to which it is a party, may be decided by the International Court of Justice. As Article 36(6) gives the court this power, the Connally Amendment is a challenge to the *competence de la competence* of the court, since there can be no concurrent jurisdiction between the United States or any other State and the court in the matter of the determination of the court's substantive jurisdiction.

The Connally Amendment and other such reservations to the court's power under Article 36(6) of the *Statute* have been much criticized.¹⁵⁰ That all states with such reservations should repudiate them is supported by the following argument of Hans Kelsen:

The opinion of a party that the law which the tribunal has to apply to the conflict is unsatisfactory cannot be a legitimate reason for excluding the conflict from judicial decision or arbitration, and that means from the application of existing (international) law. For such an opinion is based on a subjective value judgment of the interested party. And even if there were a more or less objective criterion for determining the alleged insufficiency of the law, which there is not, such insufficiency could never justify the non-application of the law.¹⁵¹

148. States with such clauses are the United States, Liberia, Mexico, and Sudan (South Africa, which had such a clause, is no longer a member of the *Statute*). *Supra* note 131, at 274-75.

149. Declaration on the Part of the United States of America, *done* Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9.

150. GRIEVES, *SUPRANATIONALISM AND INTERNATIONAL ADJUDICATION* 97 (1969).

151. Kelsen, *supra* note 51, at 404.

Although writing before the Connally Amendment was implemented through the declaration of August 14, 1946, Kelsen, referring generally to the reluctance of States to submit international matters to international courts, points out one of the objections to the Connally Amendment and other such reservations found in mutual declarations of acceptance, namely, the political and social bias of states in disputes to which they are parties and the resulting inability of the states to make a fair and rational judgment on the issues. Kelsen states another objection:

There are no questions which, by their very nature, are "solely within the domestic jurisdiction" of a State. That a dispute between States arises out of a matter which "by international law is solely within the domestic jurisdiction" of one of the parties means nothing else but that international law does not obligate that party to behave in the way claimed by the other party and consequently that the former has, according to international law, a right to repudiate the claim of the latter.¹⁵²

In this way international law is applied to the case. The Court by exercising *competence de la competence* based upon Article 36(6) of the *Statute* decides this initial and most important question.

To those who would argue that the abolishment of reservations to the court's jurisdiction such as the Connally Amendment from their declarations of acceptance would leave the court free to meddle in the genuinely domestic affairs of a State, it must be pointed out that the exercise of the court's power under Article 36(6) of the

152. Kelsen, *supra* note 51, at 405. A third objection to such reservations to mutual declarations of acceptance is their "boomerang" nature, allowing other states to defeat the jurisdiction of the International Court of Justice by invoking the complaining state's reservation. See, e.g., Case of Certain Norwegian Loans (France v. Norway), [1957] I.C.J. REP. 9, at 22, in which France sued Norway over the latter's refusal to pay certain bonds in gold. Norway invoked France's reservation, which was very similar to the Connally Amendment, against France and defeated the court's jurisdiction by claiming that the matter was within the domestic jurisdiction of France. Similarly, when the United States sought to have a case adjudicated in the International Court of Justice involving the death of six American nationals resulting from the shooting down by Bulgarian military aircraft of the Israeli (El Al) civil airliner in which they were on after the airliner had allegedly been driven off its course by strong winds and innocently put over Bulgarian territory, Bulgaria invoked the Connally Amendment and caused the United States to withdraw the case. Aerial Incident of 27 July, 1955, [1959] I.C.J. REP. 127. See also Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357 (1962). Such potential future use of the Connally Amendment has caused one author to state that "(w)hat the United States has done then, in effect, as to arm every country in the world with the provisions of the Connally Amendment. This can only hurt the United States, as a country highly likely to go to court seeking redress of grievances." GRIEVES, *supra* note 150, at 100.

Statute is a most delicate task.¹⁵³ Since the court's decisions are not backed by any particular sovereign state or by any supernational administrative agency, such as a world police force, and since the jurisdiction of the court is based in the first instance upon the consent of the State's parties to the particular dispute before the court, the court will not risk the disapproval which would result from all or most of the States of the world if the court decided that it had substantive jurisdiction over a matter which was clearly one of the domestic concern of a State. The proper exercise of the court's power to determine its own jurisdiction in such a case would result in the court's dismissal of the case on the basis that it was a domestic matter and therefore not within the court's substantive jurisdiction. Also the court would not risk the embarrassment and resulting diminution of whatever respect the States do have for it by deciding such a case on the merits and then having its decision ignored by the State in question. Although the court's decisions are legally binding upon the States which have accepted its jurisdiction, only by earning the respect and confidence of the states as to its fairness and competence, the latter of which includes the concept of judicial restraint, will the court develop into a body of considerable effect in the maintenance of world peace and public order. Unlike the United States Supreme Court, which some writers assert has been too active in certain areas,¹⁵⁴ the International Court of Justice has a rather bare docket at the present time.¹⁵⁵

SUBSTANTIVE JURISDICTION

The various bases of substantive jurisdiction are found in the *Statute* of the court. There are two main classifications: advisory and contentious jurisdiction.

The advisory jurisdiction of the court is based upon Article 65(1) of the *Statute*: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such

153. *Supra* note 131, at 304.

154. See, e.g., Burns, *Mapp v. Ohio: An All American Mistake*, 19 DE PAUL L. REV. 80 (1969).

155. The last decision handed down by the Court was the Barcelona Traction Case (Belgium v. Spain) of Feb. 5, 1970. The text of the decision can be found in 9 INT'L LEGAL MATERIALS 227 (1970).

a request.” Also relevant is Article 68 of the *Statute*: “In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.”

Generally the court should not refuse to give an advisory opinion,¹⁵⁶ but under the power it has in Article 36(6) it may do so. Although only States may be parties in contentious cases, the *United Nations Charter* authorizes the General Assembly and the Security Council to request advisory opinions, for example: Article 96(1) of the *Charter* provides “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

Also, the General Assembly may, under Article 96(2) of the *Charter*, itself authorize certain agencies to request advisory opinions: “Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”¹⁵⁷

Use of the court’s advisory jurisdiction by agencies which have been so authorized and which are concerned with activities either in or related to outer space may be well-advised where there are potential disputes which either cannot or should not be handled in municipal courts of the states involved. Corporations and international organizations which are not connected with the United Nations but

156. The foundation that a presumption exists to the effect that a request for an advisory opinion should not in principle be refused was well established in the *Peace Treaties Case*, I.C.J. REP. 65, 71 (1950). SHIHATA, *supra* note 131, at 123.

157. Organizations which have been authorized under this provision to ask the court for advisory opinions are the Economic and Social Council, Trusteeship Council, Interim Committee of the General Assembly, International Labor Organization, Food and Agricultural Organization, Educational, Scientific, and Cultural Organization, International Civil Aviation Organization, International Monetary Fund, International Bank for Reconstruction and Development, World Health Organization, International Telecommunication Union, World Meteorological Organization, Intergovernmental Maritime Consultative Organization, International Atomic Energy Agency, and the Committee on Applications for Review of Administrative Tribunal Judgments. HARVEY, *Work Paper Summary on Existing and Proposed International Courts*, WORLD PEACE THROUGH LAW—THE WASHINGTON WORLD CONFERENCE 119, 123 (1967). The following organizations of the above either are or should be, due to the nature of their activities, closely involved with the exploration and use of outer space: I.T.U., W.M.O., I.A.E.A., and the I.C.A.O.

which engage in activities related directly to outer space should be permitted to ask the court for advisory opinions, also.¹⁵⁸

The jurisdiction of the court over contentious cases can, as stated earlier, be invoked only by states. In examining the types of contentious jurisdiction the court may have, probably the best breakdown and classification is provided by Shihata's study.¹⁵⁹ Shihata describes two main types: original (or primary), and incidental. Original jurisdiction is based upon the consent of the parties involved in the dispute. It can be conferred in relation to one specific case (*ad hoc*), or it can be conferred in relation to cases arising in the future, in which instance there may be time or subject matter limitations imposed by the states in question.

There are two and possibly three methods of invoking the court's original jurisdiction for one specific case. The first method is for the states involved in the dispute to enter into a prior agreement by which they submit the case to the court. Such a prior agreement is called a *compromis* and is based upon part of Article 36(1) of the *Statute*: "The jurisdiction of the Court comprises all cases which the parties refer to it" The second method is through the principle of *forum prorogatum*, under which the court may not have jurisdiction at the start of the proceedings but acquires it during the initial proceedings.¹⁶⁰ A third possible method is the conferring of jurisdiction on the court by a resolution of the Security Council requesting the parties to refer the case to the court. Whether this method can validly confer jurisdiction on the court against the wishes of the party or parties is in dispute,¹⁶¹ but if the Security Council has this power it would be based upon the following provisions: Article

158. *But see*, I.C.J. STAT., art. 34, para. 2 which provides that: "(t)he Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative." Use of this article is one possible example of what has been referred to as the recommendatory function. *See* McDUGAL, LASSWELL & VLASIC, *supra* note 8, at 122-24.

159. *See supra* note 131, at 125-80.

160. For a detailed discussion of the principle of *forum prorogatum* *see supra* note 131, at 128-35; and 1 ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 344-63 (1965).

161. *See supra* note 131, at 135-39. It should be remembered that in order for a state to be subject to the jurisdiction of the court, the state must have consented to be bound by the court's decision either prior to or during the proceedings. It is for this reason that the term "compulsory" jurisdiction is imprecise.

36(3) of the *Charter* states that "[i]n making recommendations under this article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." And Article 36(1) of the *Statute* provides: "The jurisdiction of the Court comprises . . . all matters specifically provided for in the Charter of the United Nations. . . ."¹⁶²

Original jurisdiction conferred in relation to cases arising in the future can be based upon either a treaty or mutual declaration of acceptance. Jurisdiction based on treaties is provided for in Article 36(1) of the *Statute*: "The jurisdiction of the Court comprises . . . all matters provided for . . . in treaties and conventions in force."

If a treaty which is currently in force and which was entered into during the period of the Permanent Court of International Justice refers matters to that court or to a tribunal which was to have been created by the League of Nations, the matter will now be referred to the present court if the treaty is between states who are parties to the present Statute of the court.¹⁶³ Mutual declarations of acceptance, of which the United States declaration discussed earlier is one example,¹⁶⁴ are based upon Article 36(2) of the *Statute*, often called the "Optional Clause":

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

Article 36(3) states that "the declarations . . . may be made unconditionally or on condition of reciprocity on the part of . . . (other) States, or for a certain time." Many states have accepted the jurisdiction of the court under the "Optional Clause," but all but

162. *Supra* note 131, at 135.

163. I.C.J. STAT. art. 37.

164. Declaration on the Part of the United States of America, done Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9.

four have attached various conditions to their acceptance.¹⁶⁵ As with treaties under Article 37 of the *Statute*, declarations made under the *Statute of the Permanent Court* and which are still in force shall be considered between the parties to be acceptances of the jurisdiction of the present court for the period which they still have to run and subject to all terms contained in the declaration, provided that the States involved in the dispute are members of the United Nations.¹⁶⁶

The second main type of contentious jurisdiction is incidental jurisdiction, which is not based upon the consent of the parties but upon the *Statute* or Rules of court or the fact that the court already has primary or original jurisdiction over the case. Incidental jurisdiction may be exercised either before or apart from the court's determination that it has substantive jurisdiction, or after the court's determination as to such. In the former category there are two sub-classifications. The first is jurisdiction to indicate interim measures of protection, which is similar in function to the power of a municipal court in common law systems to decree a temporary restraining order or a preliminary injunction, *i.e.*, Article 41(1) of the *Statute* provides: "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."¹⁶⁷

The second type is jurisdiction to allow third-party intervention. This is based upon Article 62 of the *Statute*: "(1) Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. (2) It shall be for the Court to decide upon this request."

Article 63 of the *Statute* provides that notice is to be given to States which are parties to a treaty which is the subject of a dispute before the court when those States are not involved at that time in the dispute. Each State so notified has the right to intervene in the case

165. See *supra* notes 137, 138 and accompanying text.

166. I.C.J. STAT. art. 36, para. 5.

167. See also RULES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, art. 61.

as under Article 62, but if it does so intervene it will be bound by the court's decision as to the interpretation of the treaty.¹⁶⁸

In the latter category, where the court must first have made a determination that it has substantive jurisdiction over a case, there is then jurisdiction to interpret or revise a judgment and jurisdiction to decide on counterclaims. Jurisdiction to interpret or revise a judgment is given in Articles 60 and 61 of the *Statute*:

The (Court's) judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon request of any party. [and]

(1) An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

(2) The proceedings for a revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

And the basis for hearing counterclaims is found in Article 63 of the Rules of Court as follows:

When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject-matter of the application and that it comes within the jurisdiction of the Court. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.

The purpose of the incidental contentious jurisdiction of the court is to provide the court with certain incidents of jurisdiction enabling it to provide all parties involved with the fairest possible treatment.

No attempt has been made in the foregoing examination of the court's substantive jurisdiction to analyze critically the articles of the court's *Statute* and Rules upon which it is based and to point out weaknesses, ambiguities, etc. The sole purpose has been to present the more important aspects of the court in order that a basis may be established for understanding the court and its potential as a means for the resolution of disputes arising in the opening realm of outer space. The fact that the court has such incidents of jurisdiction

168. Further elaboration of the intervention procedure is provided by *Id.* art. 64, 65, and 66.

available to it is to its credit. Any deficiencies can always be corrected by amendment of the *Statute* or Rules of the court.

SOURCES OF INTERNATIONAL LAW FOR THE COURT TO APPLY
IN SPACE CASES

After the court has found that it has original substantive jurisdiction over a case it will hear the arguments of the parties and examine the evidence relating to the merits of the case.¹⁶⁹ It will then render a decision based upon its findings. The sources of the law which the court is to apply to a case are enumerated in Article 38(1) of the *Statute*:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹⁷⁰

Treaties are agreements between two or more States. They may or may not create rules of international law. Non-lawmaking treaties merely provide for assistance and cooperation between States relating to various areas of common interest. Most of the bilateral treaties which the United States has entered into with other States providing for satellite tracking stations fall into this category. Lawmaking treaties create rules of international law binding upon the States parties to the treaties. Such treaties may clarify what is considered by the States to be a present rule of international law, create a new rule or rules for governing the future activities of States, such as was done in the 1967 and 1968 *Space Treaties*, or create a new international institution, such as the International Court of Justice, or organization, such as INTELSAT, in which case the rules for the operation of the new institution or organization are specified in the same or a subse-

169. A challenge made by one of the parties to the substantive jurisdiction of the court is called a preliminary objection, which the court will have to decide before it can hear the merits of the case, unless the merits are tied to the preliminary objection, in which case both will be heard. See *Id.* art. 62.

170. I.C.J. STAT. art. 59 reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

quent and related treaty. All of these types of lawmaking treaties are binding, of course, only upon the States parties to the treaties, although a rule created by a treaty may become so widely adopted and followed by such a large number of States not parties to the original treaty that the rule will become part of international custom. Treaties may, as discussed earlier, also be used as bases of jurisdiction for the International Court of Justice as provided in Article 36(1) of the *Statute*.

International custom is the second source of law the court could apply, if relevant, to a case before it. To be considered as custom a rule need not be recognized and followed by all States, but only by most States. To put it differently, the test of international custom is whether the rule in question has general recognition by States.¹⁷¹ Although no one State can create by unilateral action a rule of customary international law, a State may promulgate a rule, not binding at the time outside of its own territory or upon aliens, which eventually becomes accepted and followed by the majority of States as a customary rule of international law.¹⁷² Customary rules of law may be put into treaty form, as was done with respect to certain rules relating to the high seas.¹⁷³

Not very much international custom has developed with regard to the activities of states and individuals in outer space due to the fact that time and repeated practice are usually very important elements in the development of customary international law.¹⁷⁴ It is generally believed, however, by most publicists that customary international law has developed during the fourteen or so years since Sputnik with regard to State claims of sovereignty in outer space.¹⁷⁵ Since the first satellite was sent up in 1957 there have been no complaints from any States that orbiting space vehicles have violated their territorial airspace. Statements and actions by leaders of States have supported this view so that it is now possible to say that however far

171. See BRIERLY, *supra* note 56, at 61.

172. See, e.g., *The Scotia*, 81 U.S. (14 Wall.) 170 (1872).

173. See BRIERLY, *supra* note 56, at 309.

174. But see Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965), for a discussion of the concept of "instant" custom.

175. See McDUGAL, LASSWELL & VLASIC, *supra* note 8, at 217 and ch. 3 generally; BRIERLY, *supra* note 56, at 220; and *supra* note 37, at 351.

up territorial sovereignty extends into the airspace *superjacent* to a State, a question which has not yet been decided, it ends somewhere before the height of the lowest possible perigee of manned or unmanned spacecraft in durable Earth orbit.¹⁷⁶ It must be pointed out, however, that, although States do not consider that space vehicles orbiting Earth encroach upon their territorial sovereignty, some States, most notably the Soviet Union, regard spy satellites as detrimental to their national security interests and have made statements in the past to the effect that such spy satellites, even while beyond the territorial jurisdiction of States, are subject to being shot down by the State upon which they are spying.¹⁷⁷

No other customary international law may be said to have developed in outer space, although arguments have been advanced otherwise.¹⁷⁸ It has also been argued that maritime custom may be applied to outer space through the simple analogy, that neither environment is subject to national claims of sovereignty. Professor Matte points out the opposition to using such an analogy:

Air law and space law differ essentially from maritime law. They regulate methods of locomotion dissimilar in their very technique, in their respective speed and their object. Navigation through air and space experiences fast and constant progress which is no longer a feature of sea transportation. To set down premature legal rules too strict and too rigid, could contribute to retarding the very evolution of the science of aeronautics, astronautics, and several other connected sciences (telecommunications, chemistry, etc.). . . . Therefore, it is indispensable to reject easy analogies, such as that between the status of the sea or even of the Antarctic, etc.¹⁷⁹

176. The height of the lowest possible perigee of manned or unmanned spacecraft in durable Earth orbit is generally believed to be around 68-70 miles. Below that altitude the density of the atmosphere increases causing a spacecraft to burn up as a result of the heat generated from the friction between the spacecraft and the air molecules. The exact demarcation line between airspace, which is subject to national sovereignty, and outer space, which is not, has not yet been determined. See Vosburgh, *Where Does Outer Space Begin?*, 56 AM. B. ASS'N J. 134 (Feb. 1970).

177. See *supra* note 8.

178. See, e.g., Vlasic's statement on the 1963 Test Ban Treaty: "Even though this treaty cannot technically bind the non-signatories, its well-nigh universal acceptance may before too long give it the force of international custom, thus making conduct contrary to its stipulations a violation of international law." VLASIC, *supra* note 21, at 172.

179. MATTE, *supra* note 12, at 44-45 (footnote omitted). The Antarctic Treaty, while allowing the states parties to it to retain the territorial claims they had at the time the treaty was entered into, allows no further territorial claims to be made. See art. IV, Antarctic Treaty, done Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

In addition to differing from methods of transportation on the high seas, travel in outer space is also quite different from flight in the atmosphere due to the much increased speeds, the longer duration of the voyages, and the lack of the dominant presence of the Earth's gravity.

The third source of international law the court can apply to a case is the "general principles of law recognized by civilized nations." This rather broad and flexible phrase is useful in that it allows the court to use various principles of law of proven usefulness in the rendering of just decisions. Such principles include *res judicata*, estoppel, good faith, and so on.¹⁸⁰ The disposition on the part of the framers of the *United Nations Charter* to make the court responsive to ideas and principles from all the major legal systems of this planet can be seen in Article 9 of the *Statute* which states that the court as a whole should represent the "main forms of civilization and . . . the principle legal systems of the world"

A problem with this third source of international law, however, is that the word "civilized" is a highly subjective term. Definitions of the word will vary with one's social values, political allegiances, and the like. Traditionally, "civilized" nations, as the term has been used in international law, have been those whose values, ideologies, social institutions, and the like have been Western European in nature. This, of course, includes the United States, Canada, Australia, etc. International law today is still largely governed by concepts followed and developed by the Western European maritime nations during the sixteenth, seventeenth, and eighteenth centuries to guide them in their conquest and exploitation of almost all of the Western and much of the Eastern Hemispheres. Probably the most important of these concepts, and the one from which many subordinate concepts originated, is the consensual, rather than the compulsory nature of international law.

This same objection to the biased nature of general principles of international law may be applied to customary international law: "Customary international law is largely the product of value structures and state practices in an historic community of which the new,

180. BRIERLY, *supra* note 56, at 63. The Court may also decide a case *ex aequo et bono* if the parties agree to such a determination. I.C.J. STAT. art. 38, para. 2.

underdeveloped nations and the socialist states of the East were not a part."¹⁸¹

It is evident that if international law is to become a more effective instrument for the achievement and maintenance of world peace it will have to be more attentive to the voices and needs of those newer and less developed countries in Central and South America, Africa, and Asia which have not traditionally been a part of the development of international law.

Despite this, however, it will be useful for the court to apply relevant general principles of law to a case if to do so will enable the court to reach a just decision. Matte, while arguing for the creation of a new species of law applicable to outer space, recognizes the need to rely upon some principles which are already developed:

Therefore, (the aerospace-maritime) analogy should be refused and a basic principle asserted: that the legal status of the air and space must derive from a new branch of the law which cannot be copied from any other law, while it must conform to certain principles of international law.¹⁸²

The last two sources of international law are judicial decisions and the writings of qualified publicists of international law. Judicial decisions may be of the International Court of Justice, the Permanent Court of International Justice, other international tribunals, and municipal courts, although the first two are generally accorded more weight.¹⁸³ Although precedent is not binding in international law as it is in common law or Anglo-Saxon legal systems, it will naturally be used in international law as an aid to reading a decision in a case. The importance of judicial decisions in international law was expressed by Chief Justice Marshall of the United States Supreme Court:

The law of nations is the great source from which we derive those rules . . . which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received not as authority, but with respect. The decisions of the Courts of every country

181. HARVEY, *supra* note 157, at 121.

182. MATTE, *supra* note 12, at 54.

183. BRIERLY, *supra* note 56, at 64-65.

show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.¹⁸⁴

There have not as yet been any cases on outer space.¹⁸⁵ This is no doubt due to the fact that activities in outer space have been conducted for only about fourteen years and have been relatively speaking, of a limited nature. Although the international cooperation between the two space giants has left much to be desired, there have been no disputes (other than academic ones) between them. This is probably due to the disposition of each to stay out of the other's way. Nevertheless, as pointed out earlier, as activities become more complex and as more States participate, either directly or indirectly, in the exploration and use of outer space, there will be disputes needing advisement or adjudication by an international court controlled by no States or special interest groups and fair to all.

Sophisticated and near-perfect as space gadgetry becomes, human beings will be ultimately behind their operation for some time to come, and where there are human beings there will be conflicts of interest. Such conflicts, in view of man's increasing ability to destroy life as he knows it, will demand peaceful settlement.

The other subsidiary source of international law, the writings of publicists, is less consequential than judicial decisions as a general rule, but they serve as a good method of determining what the law is or how it can be interpreted. Mr. Justice Gray, writing three years before the Wright Brothers made history at Kitty Hawk, stated a truism for international law in the Space Age:

International law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research,

184. *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 197 (1815).

185. There have been court decisions, however, establishing precedent potentially applicable to the law of outer space. An example is the recent decision of *Burdell v. Canadian Pacific Airlines*, 10 Avi. 18,151 (1968), which declared, among other things, that the provisions of the 1929 Warsaw Convention (49 Stat. 3000 (1934), T.S. No. 876), limiting the liability of air carriers were unconstitutional. Although a trial court decision and although the case was ultimately settled without trial, *Burdell* is an indication of the dislike of American municipal courts for limited liability and is thus a relevant concern for the future framers of a space liability convention, which may contain a provision limiting damages to be awarded for personal injury or property damage.

and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is¹⁸⁶

In addition to describing "what the law really is," the writings of publicists can be of great value as a source of new ideas which may eventually be adopted by custom, court decision, or convention. In this newest and most unexplored of man's adopted environments, where Earthly precedent will many times prove to be of little or no value due to unexpected situations and circumstances, the ideas of qualified and wide-visioned publicists will be of great importance in shaping international rules and policy.

These, then, are the sources of the law of outer space which the International Court of Justice, other international tribunals, or municipal courts can apply in the adjudication of a dispute arising in outer space or on Earth but directly relating to outer space. The municipal law of a State may, where relevant, also be applied. An example of municipal law which could be used in a case involving outer space is the Communications Satellite Act of 1962. The resolutions of the United Nations, although not generally regarded as creating rules of international law by themselves, may be reasonably relied upon as definitive statements of international law if they are tied to a traditional (Article 38) source of international law. This may be done in one of several ways: the resolution may "interpret the United Nations Charter or other treaty, accelerate the development and clarify the scope of a customary rule, or identify and authenticate a 'general principle of law recognized by civilized nations.'"¹⁸⁷

Once a case has been decided the decision is binding on the parties to the case and only in respect of that particular case.¹⁸⁸ Also bound, in the case of the interpretation of a treaty provision, are those States who have intervened in the case under Article 62 of the *Statute*. Each State which is a member of the United Nations is under a duty to comply with any decision of the court in any case to which

186. *The Paquete Habana*; *The Lola*, 175 U.S. 677, 700 (1900), citing *Hilton v. Guyot*, 159 U.S. 113 (1895).

187. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 452 (July 1969).

188. I.C.J. STAT. art. 59.

it is a party.¹⁸⁹ This duty, of course, is based upon the court's finding that the State first consented to the court's jurisdiction over the case, although the State may have contested this in a preliminary objection proceeding. If a party to a case fails to abide by the court's decision, the other party or parties may bring the matter before the Security Council, "which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."¹⁹⁰

The means by which the Security Council or other organs of the United Nations, or the winning States themselves may resort to in order to compel the obedience to a court decision by a reluctant State are beyond the scope of this discussion. Briefly, they are spread over a spectrum which on one end includes such peaceful measures such as United Nations censorship, condemnation or embargo by other States, and similar things, to measures short of war but more hostile, such as blockade, on the other. The ultimate measure, of course, is war, but to go to war in order to enforce a decision of the court seems to defeat the real purpose of the court—the establishment and subsequent maintenance of minimum public order on the planet Earth. War is Earth's most important problem (although pollution and overpopulation rank closely behind it). Kelsen, during what has, so far, been the worst war in the twentieth century, stated this fact: "Hence the elimination of war is our paramount problem. It is a problem of international policy, and the most important means of international policy is international law."¹⁹¹ The rejection of war as a means of settling disputes and the implementation of a greater reliance upon the court or other international tribunal to resolve those cases which for various reasons either cannot or should not be handled by municipal courts remains as *number one objective* in international law today.

Considerable discussion was given earlier to the non-existence of a world police force and the fact that this does not impair the legally-binding character of the court's judgments. The fact that the States have endeavored to set up international courts such as the Permanent Court and the present court shows some degree of recognition that

189. U.N. CHARTER art. 94, para. 1.

190. U.N. CHARTER art. 94, para. 2.

191. Kelsen, *supra* note 51, at 398.

our world is a highly interdependent one, due largely to the advances of science and technology in such areas as transportation and communications in the current century. This interdependency will only increase, for the day of large and isolated societies such as the Inca Empire and pre-twentieth century China are over forever. Human behavior tends toward organization, for as Brierly states, "(t)he ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he is to live."¹⁹²

It is the premise of this paper that the Connally Amendment and all other such adherences by all States which hold to the purely consensual conception of international law will eventually have to give way to a more ordered and peaceful political reality on Earth. In such a reality the concept of an international court has a definite and necessary place.

Before moving to the question of what the International Court of Justice can do today in regard to space disputes, it is essential to point out that resort to the court will in many cases be only a last, and not a first step to the peaceful resolution of problems between states and other international parties. There are other means of peacefully solving international disputes, and to ignore them would be myopic:

A focus on judicial institutions, though defensible for purposes of study, invites distortion of perspective on the status and function of law in the international community. . . . It takes no explicit account of the function of international law in ordering conduct so as to avoid disputes or in setting operative norms for the resolution of conflict through diplomacy, mediation or conciliation. Nor does it encompass more flexible quasi-adjudicative techniques for settling disputes through arbitral tribunals or mixed claims commissions.¹⁹³

The *United Nations Charter* as well recognizes the importance of both judicial and non-judicial means of settling disputes:

(1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

192. BRIERLY, *supra* note 56, at 56.

193. HARVEY, *supra* note 157, at 119.

(2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means. (Article 33).

The most important result in a dispute situation is that the dispute, which may be of such importance to the parties that each of them would risk hostile interaction with the other rather than forego the protection of its interest in the matters at issue, be settled in a manner which is neither disruptive of world peace nor endangering of any future opportunities to achieve a more substantial peace, and which, at the same time, is fair to the interests of all involved parties. The purpose of this article is not to propose international judicial machinery as the *only* means of settling disputes in outer space, but as one which should be resorted to after other means have failed and before and instead of the initiation of less peaceful means. Nations, just as the individuals who populate them, will not always be able to "settle" a case *before* trial.

THE PRESENT STATUS OF THE COURT IN RELATION TO DISPUTES IN OUTER SPACE

At present, very little has been done to provide for the settlement of disputes between States and/or international organizations concerning events either in or directly related to outer space and where municipal courts cannot or should not exercise jurisdiction. Treaties, one of the sources of international law, can, as stated earlier, also be used to confer jurisdiction on either the International Court of Justice or another designated tribunal. It is illustrative, although unfortunately so, of the inability of States to work together to create an international reality where resort to the court or another competent international tribunal to settle disputes which have not been settled by other peaceful means is the general rule and not the exception, as is the case today, that three of the most important treaties currently in force concerning outer space do not contain any provisions for the settlement of disputes about their interpretation or application, either by judicial or non-judicial methods. The 1963 *Test Ban Treaty*, the 1967 *Space Treaty*, and the 1968 *Astronaut Agreement* do not, in fact, even mention the word dispute or an appropriate synonym anywhere in their provisions.¹⁹⁴ The 1968 *Non-Prolifer-*

194. The United States had submitted a draft proposal providing recourse to the International Court of Justice in the event of a dispute as to application or inter-

ation Treaty also contains no reference to the settlement of disputes arising in regard to its provisions.

Two treaties which do not relate directly to outer space, but which because of their subject matter provide somewhat appropriate points of discussion at this point, do contain dispute provisions:

Article XVII of the *International Atomic Energy Agency Statute* states:

A. Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

B. The General Conference and the Board of Governors are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities.¹⁹⁵

The *Antarctic Treaty* provides in Article XI(1) that when two or more of the States parties to the treaty disagree as to the interpretation or application of the treaty, they "shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice." This language is nearly identical with that of Article 33(1) of the *United Nations Charter*, having left out only "resort to regional agencies or arrangements." Paragraph (2) provides that if such a dispute is not resolved by such

pretation of the provisions of the 1967 Space Treaty, but little effort was made by either the United States or the Soviet Union to work out an acceptable provision on dispute settlement due to past differences of opinion and the desire to expedite agreement on the Space Treaty as a whole. See Dembling & Arons, *The Evolution of the Outer Space Treaty*, 33 J. AIR L. & COM. 419, 453 (1967).

The closest the 1967 Space Treaty comes to providing for the peaceful resolution of disputes as to the application or interpretation of its provisions is in art. XIII, where the second paragraph states that "(a)ny practical questions arising in connection with activities carried on by international inter-governmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to the Treaty."

195. The purpose of the International Atomic Energy Agency is stated in art. II of the I.A.E.A. Statute, done Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3: "The (International Atomic Energy) Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose."

means as in paragraph (1), the dispute shall be referred to the International Court of Justice. If the parties fail, however, to reach an agreement (*compromis*) on referring the case to the court, they shall not be absolved "from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 of this Article."¹⁹⁶

The two regional multilateral space organizations in Europe also provided some express means for the settlement of disputes arising among their member States. Article XVI of the *ESRO Convention* provides: "Any dispute concerning the interpretation or application of this Convention, which is not settled by the good offices of the Council, shall be submitted to the International Court of Justice, unless the Member States concerned agree on some other mode of settlement." The *ELDO Convention* provision is more elaborate:

In the event of any dispute between two or more States, Members of the Organisation or former Members, or between one or more of them and the Organisation, concerning the interpretation or the application of this Convention, not being settled by the good offices of the Council, an Arbitral Tribunal shall be set up at the request of one of the parties, unless the parties agree on some other mode of peaceful settlement. (Article 22(1)).

Paragraph (2) relates to the nationality composition of the Arbitral Tribunal. If the States-parties to the dispute cannot agree as to who shall be on the Tribunal, the President of the Court of Justice of the European Communities shall make the appointments at the request of any one of the parties.¹⁹⁷ Paragraph (3) states that the decision of the Tribunal shall be binding on the parties to the dispute. Since *ELDO* existed partly to make vehicle launchers for *ESRO* and since the two organizations differed in purpose and membership, it should be realized that if any dispute had arisen involving States members of both organizations and concerning both organizations it would have posed a jurisdictional problem due to the different means provided for the settlement of disputes.¹⁹⁸

196. Antarctic Treaty, art. XI, para. 2.

197. The Court of Justice of the European Communities is one of the "common institutions" of the three European Communities: the European Atomic Energy Community (EURATOM), the European Coal and Steel Community (ECSC), and the European Economic Community (EEC). The court derives its jurisdiction from the three treaties which created these communities. Stein & Hay, *supra* note 96, at 133.

198. See generally Washburn, *The Future of ELDO and ESRO in the Light of*

Since the most elaborate area of space law today is that involving telecommunications, it is not surprising to find that the most elaborate procedure for dispute settlement is also found in that area. Article 14 of the INTELSAT *Special Agreement* of August 20, 1964 provides:

Arrangements shall be made whereby all legal disputes arising in connection . . . with the rights and obligations of signatories can, if not otherwise settled, be submitted to the decision of an impartial tribunal, to be established in accordance with such arrangements, which would decide such questions in accordance with general principles of law. . . .

Pursuant to this the INTELSAT *Supplementary Agreement on Arbitration*¹⁹⁹ was opened for signature on June 4, 1965, binding on all those states who were or would become parties to the *Special Agreement*. Under the *Supplementary Agreement on Arbitration* procedures were established whereby a panel of individual legal experts, representing the principle legal systems among the signatories, would be appointed from which the presidents of the arbitral tribunals were to be selected if a dispute arose.²⁰⁰ The tribunals were to each consist of the president and two other members, the latter two being chosen by the petitioner and the respondent states respectively.²⁰¹

Article 2(a) of the *Supplementary Agreement* defines the jurisdiction of a tribunal created under the *Supplementary Agreement*. Such a tribunal is competent to decide any legal dispute as to "whether an action or a failure to act by the (Interim Communications Satellite) Committee or by any signatory or signatories is authorized by or is in compliance with the (INTELSAT) *Agreement* and the *Special Agreement*." Paragraph (b) further defines the jurisdiction of the tribunal by giving it competence to decide any legal dispute involving "any other agreement relating to the arrangements established by the *Agreement* and the *Special Agreement* where the signatories which are parties to that other agreement have agreed to confer such a competence." In such a case the tribunal must abide

Current Negotiations of Definitive Arrangements for Intelsat, 4 INT'L LAWYER 288 (1970).

199. The text of the *Supplementary Agreement* can be found in 4 INT'L LEGAL MATERIALS 735 (1965).

200. *Supplementary Agreement on Arbitration*, art. 3 *opened for signature* June 4, 1965, — Stat. —, T.I.A.S. No. —.

201. *Id.* articles 4(d), 4(a)(v), and 4(b).

by the other agreement in deciding the case. And paragraph (c) defines standing in such arbitration proceedings and limits it to signatories and the Interim Communications Satellite Committee.

An arbitral tribunal created under this *Supplementary Agreement* has the competence to decide whether it has jurisdiction over a matter submitted to it under the provisions of the *Supplementary Agreement*. Article 5(f) provides: "At any time during the proceedings, the tribunal may terminate the proceedings if it decides the dispute is beyond its jurisdiction as defined in Article 2 of this *Supplementary Agreement*." Also Article 5(e) provides that "[t]he tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute provided the counterclaims are within its jurisdiction as defined in Article 2 of this *Supplementary Agreement*." And later in Article 6(a): "If one side fails to present its case, the other side may call upon the tribunal to accept its case and to give a decision in its favor. Before doing so, the tribunal shall satisfy itself that it has jurisdiction and that the case is well founded in fact and law." These sections leave no doubt that an arbitral tribunal created to resolve disputes between members of INTELSAT has the competence to decide whether it has jurisdiction over the dispute, and that the States involved do not determine this fact for themselves, as the Connally Amendment purports to state that the United States decides for itself whether the International Court of Justice has jurisdiction over a dispute to which the United States is a party.

Finally, with respect to the *Supplementary Agreement on Arbitration*, a tribunal has an advisory function with respect to each case. "During the course of its consideration of the case, the tribunal shall have power, pending the final decision, to make recommendations to the parties with a view to the protection of their respective rights." (Article 10). This differs from the advisory power of the International Court of Justice, however, in that the tribunal will exercise the power described in Article 10 as part of its determination of a contentious case, whereas the International Court of Justice can exercise its advisory power separately and apart from a contentious case, so long as it has jurisdiction over the case.

If the parties reach an agreement during the proceedings of the tribunal, the agreement shall be recorded in the form of a decision

of the tribunal given by the consent of the parties.²⁰² The decision is binding on all States parties to the dispute, as is the case with the International Court of Justice, unless the tribunal has declared a decision of the Committee null and void because it was not in compliance with the *Agreement* or the *Special Agreement*, in which case the decision of the tribunal is binding on *all States parties to the INTELSAT Agreement*.²⁰³ This latter power, of course, goes far beyond any power the International Court of Justice has, as the court can bind by its decisions only those states which are parties to the case before it, and not United Nation members as a whole.

These then are the instances in which the principle treaties currently in force dealing with the subject of outer space, either totally or partially, have provided for the settlement of disputes concerning the application or interpretation of their provisions. In addition to the above, States may submit disputes on outer space to the International Court of Justice on an *ad hoc* basis by *compromis*, as described earlier, or the court may find on the application of one of the parties to the dispute that the other party or parties have submitted such cases to it under a prior mutual declaration of acceptance made under the "Optional Clause." Neither of these methods, however, is assured of much success in insuring that the court will have jurisdiction over future space disputes, as the former method suffers from the general reluctance of states to refer cases to the court, and the latter method has been diluted in effectiveness by reservations such as the Connally Amendment, although such reservations to the court's jurisdiction can be argued as being invalid.²⁰⁴

202. *Id.* art. 11(b).

203. *Id.* art. 11(c).

204. Shihata lists four theories on the effect of reservation clauses:

1. The clause is null and void in itself and, since it cannot be separated from the instrument containing it, nullifies the instrument as a whole;

2. The clause is void while the rest of the instrument remains valid. Under this view the International Court of Justice can have jurisdiction over the case;

3. The reservation is valid, but the Court still retains its *competence de la competence* (jurisdiction to decide if it has substantive jurisdiction.) The Court will interpret the reservation in *good faith* according to one of the following criteria in *each* particular case:

A. (objective) the invocation of the reservation will be in *good faith* only if the court finds that the question involved falls within the domestic jurisdiction of the reserving party according to international law;

B. (subjective) the invocation of the reservation will be in *good faith* only if the question has been traditionally considered by the reserving state as a matter

The present international political and legal reality offers little hope, therefore, that the International Court of Justice or another international tribunal will be largely instrumental in the orderly development of the outer space environment. This is unfortunate and must be corrected, as scientific and technological developments along with increased interaction among States and their peoples will give rise to problems best resolved, if non-judicial means of settlement fail, in an appropriate international court. One such problem which will no doubt be typical of future problems both on Earth and in outer space is the recent series of claims by Canada to jurisdiction over the Northwest Passage.

Newly-discovered oil fields in Alaska and the probability of super-tankers such as the *Manhattan* making regular runs to the oil fields via the Arctic Ocean along the shores of Canada's Northwest Territories have caused concern among Canadians that the delicate ecological system of the Arctic areas may be irreparably harmed due to pollution from the tankers, especially if a tanker has an accident which would cause the release of huge quantities of oil into the Arctic environment. Since oil does not break up or evaporate in the Arctic and may lie in an almost solid state on the ice or tundra for generations, the Canadians have good reason to become alarmed. Due to the fact that there exists no international law to give coastal states adequate protection against pollution, Canada has taken three steps, best described as interim measures, to protect the Arctic environment against pollution from tankers operating along the Canadian coast but more than three miles off the coast and therefore on the high seas: (1) Canada has extended its claim to territorial waters from the present three-mile limit to a twelve-mile limit beyond its coasts; (2) it has assumed the right to enforce safety regulations on all shipping within 100 miles from its coast; and (3) it has notified the United Nations that it no longer recognizes the jurisdiction of the International Court of Justice in disputes over pollution control and damage off its coastline.²⁰⁵

within its domestic jurisdiction;

4. The acceptance of jurisdiction by the Court is in *all* cases subject to the reservation. *Supra* note 131, at 284-94.

205. *Christian Science Monitor*, April 16, 1970, at 3, col. 1. The text of the Canadian legislation implementing these three steps can be found in 9 INT'L LEGAL MATERIALS 543, 553, 598 (1970).

Official American reaction, of course, rejects the Canadian claim to enforce safety regulations for a hundred miles beyond its coast, and while it is highly unlikely that both nations would engage in any type of hostility over such a dispute, this is precisely the type of matter which will occur with increasing regularity not only on Earth but in outer space as man's technology allows him to use and exploit increasingly larger portions of the universe in which he lives. The legal and jurisdictional vacuum created by onrushing science and technology constitutes potential work for the International Court of Justice. The States must somehow overcome their restrictive adherences to what they erroneously consider national and "domestic" problems: such problems are truly international in scope and effect.

Canada has stated that it is ready and willing to begin not only bilateral, but worldwide negotiations on an international law curbing pollution of all seas.²⁰⁶ Such a worldwide convention, however, would take time to organize and even more time to establish a meaningful and effective set of regulations. In the meantime the Canadian-American situation may not wait, and, in absence of a non-judicial settlement, submission of the dispute to the International Court of Justice for a determination of the rights and duties under international law of both parties would be a mature and realistic way of settling the matter:

(T)he World Court sits with hardly any business. Meanwhile the world is full of jealousies, rivalries, and wars. It is like a frontier community where men take justice into their own hands because the rule of law is powerless. A frank appeal now by the US to put the Arctic claims matter to the World Court for arbitration without appeal would be a token not merely of goodwill to a splendid neighbor, but it would be a gesture of decency for civilization, at a time when nobody knows for sure whether it can survive.²⁰⁷

The future activities of humans to explore and exploit outer space will undoubtedly bring an increase in the number of such important international legal problems.

206. Christian Science Monitor, April 27, 1970, at 11, col. 4. Statements by both governments concerning the whole Arctic question can be found in 9 INT'L LEGAL MATERIALS 600, 605, 607 (1970).

207. Editorial by Richard L. Strout, Christian Science Monitor, April 24, 1970, at 20, col. 3. The whole problem of the Canadian claims as well as those aspects which relate to the International Court of Justice are discussed in Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1 (1970).

As the present situation will no doubt be inadequate for the resolution of these problems, it is essential that some changes and amendments be made to the current status of the International Court of Justice. Such changes and amendments must of necessity begin with the proposal of new ideas. Any proposals, however, relating to the improvement of both international law in general and the International Court of Justice in particular and with an eye toward the evolution of a more rational world reality, where the minimization of the use of force is both an accepted and practiced goal, are subject to either of two main criticisms, usually from two widely differing schools of international political thought: (1) The first criticizes the proposals as being too much attached to present world political reality and dedicated to concepts of arguable value (such as the Connally Amendment) to the solution of present and future problems to be of any constructive use; or (2) the second criticizes the proposals as being too idealistic and far-removed from present international reality to be of any constructive use.

While both of these points of view contain some validity, it should be obvious to the serious student and scholar of international law that the only truly non-constructive attitude is a rigid adherence to either viewpoint. The proposals to follow are intended only as starting points for further discussion, deliberation, and research, and not as conclusive answers to the many vague and undefined problems to be brought about by human activities in outer space.

PROPOSALS

The following pattern should be established:

(A) All disputes arising either in outer space or on Earth (including within the Earth's atmosphere) which directly relate to outer space and which involve questions of international law lie within the compulsory jurisdiction of the International Court of Justice, except as otherwise modified in (B) and (E) below.

The establishment of this general rule would, of course, be the reverse of the present situation, where the jurisdiction of the court is only the limited exception to the general rule of State jurisdiction. It would be a radical departure from the status quo of international law today.

It is possible to envision such an arrangement, as well as that proposed in (E) below, as being established under a form of trusteeship agreement. It is not at all advisable, however, to rely upon the traditional form of trusteeship arrangement that has evolved in the United Nations.²⁰⁸ If, however, a modified concept of the trusteeship system is adopted, so that the emphasis is not upon assisting former colonies and present underdeveloped nations to achieve independence,²⁰⁹ but to peacefully resolve disputes between states which have not been resolved by other peaceful means, then the trusteeship concept can serve a new and useful purpose in outer space. The trusteeship would, of course, be administered by either the United Nations or a new international organization. (See Proposal [E] below).

(B) Disputes which concern matters exclusively within the domestic jurisdiction of a single state according to international law do not lie within the compulsory jurisdiction of the International Court of Justice. Such matters will be handled exclusively by the municipal courts or other institutions of the state in question.

It can reasonably be expected that for some time many spacecraft will have the nationality of a single State, namely, the State on whose registry the spacecraft is carried, and that such spacecraft will remain subject to the jurisdiction and control of that State, as is currently provided in Article VIII of the 1967 *Space Treaty*. Spacecraft will thus be considered extensions of the territorial jurisdiction of the state of registry. Many of the situations occurring on board spacecraft and requiring some type of judicial resolution will be subject to the jurisdiction of either the state of registry or other States having some connection with the event and will not be subject to the jurisdiction of the International Court of Justice.²¹⁰ This would not, of

208. The United Nations trusteeship system (see U.N. CHARTER art. 75-91) is, in part, an extension of the mandate system established by art. 22 of the League of Nations Covenant, which itself was mainly intended as a solution to the problem of the disposition of former enemy (Axis) colonies from World War I. Although trusteeships have greater flexibility and broader scope, their traditional use on Earth leaves little which can be applied directly to the objective of establishing compulsory jurisdiction of the International Court of Justice in outer space.

209. The major objectives of the trusteeship system were to promote the political, economic, social, and educational well-being of the non-self-governing territories and to encourage their development toward self-government or independence. See Malecela, *The United Nations and the Decolonization of Non-Self-Governing Territories*, UN MONTHLY CHRONICLE, Vol. IV, No. 8, 84-85 (1967).

210. Possible examples are disputes arising from contracts, marriages, births,

course, conflict with the now accepted customary rule of international law prohibiting sovereign claims over any part of outer space or over natural celestial bodies.²¹¹

(C) If a dispute arises between two or more States as to whether a matter is exclusively within the domestic jurisdiction of any one of the States involved in the dispute, the International Court of Justice will decide whether the matter is exclusively within the domestic jurisdiction of any one of the States.

One example of such a situation would be where States *A*, *B*, and *C* disagree as to whether a crime which was committed on board a spacecraft carried on State *A*'s registry, which involved nationals of State *B*, and which produced effects in State *C* was exclusively within the domestic jurisdiction of any one of the States. Each State would have a valid claim to jurisdiction over the matter based upon one or more of the theories of international criminal jurisdiction discussed earlier (assuming that the act was defined as a crime in all three states). The question of whether any one of the States is entitled to have exclusive jurisdiction over the matter and the individuals involved because the matter is exclusively within the State's domestic jurisdiction is one of international law for the International Court of Justice to decide.²¹²

(D) If the International Court of Justice finds that the matter is not exclusively within the domestic jurisdiction of any one of the States involved in the dispute, it will then have compulsory jurisdiction over the matter itself.

(E) An international agency or organization should be created which would be given primary jurisdiction over certain matters which by their very nature demand summary measures. Appeal of the decisions of the agency could then be had to the International Court of

deaths by natural causes, divorces, will contests, *inter vivos* gifts and other such interactions which either are not disruptive or cannot reasonably be expected to be disruptive of peaceful relations between states.

211. *But see* MATTE, *supra* note 12, at 311-12, who suggests that the two principles are inconsistent.

212. States could, of course, provide through treaty that certain theories of jurisdiction could not be used. An example of the use of such a device can be found in art. 11 of the 1958 High Seas Treaty, which allows only the territorial and active personality principles to be used in collisions and other specified situations. *See supra* note 94 and accompanying text.

Justice for review, with the agency's decision remaining intact and binding until final decision by the court. In all other disputes not expressly within the primary jurisdiction of the designated agency the International Court of Justice would have compulsory jurisdiction as stated in Proposal (A).

Although it would be desirable to put all space activities under the jurisdiction and control of an international space organization which would coordinate and direct the efforts and activities of men and states in outer space, with various agencies directing specific areas of concern, and thereby prevent the waste of human and other resources in unnecessary and duplicate efforts by rival states as is currently the case, the existing international reality precludes such a scheme, at least for the foreseeable future. What can be done presently, however, is to give a designated international agency or organization jurisdiction to regulate, at least a particular area in need, in order that States and international organizations, such as *ELDO* and *ESRO*, which are involved in space activities do not interfere with and disrupt each other's efforts. As telecommunications is the area of space science and technology of most practical and beneficial use at the present time, and since it is essential to all other areas of space activity, it would be most logical to begin there.

For example, the International Frequency Registration Board, the organ of the International Telecommunication Union which keeps the registry of assigned frequencies and records harmful interferences, currently has no power to enforce the regulations in case of a violation. It should be given power by multilateral international agreement so that it will be able to prevent or remedy any harmful interferences.²¹³ This power would be similar in result to the in-

213. The ideas that the ITU should be given sufficient power to remedy harmful radio interference, and that an international court would be too slow in acting to initially handle such a matter have been advanced before: "At a time when man is reaching the moon, the dangers caused by harmful (radio) interference may be more destructive than previously, because of the increased importance of telecommunications during interplanetary journeys. The need to arrive at a new method of international control of wave lengths, by an organization able to make speedy decisions, is urgent: as, any tribunal or international court would be obsolete and superfluous on account of the rapid decisions which must be taken in similar circumstances, particularly as the limited number of frequency bands obliges humanity to choose the best means of using them peacefully and in the general interest." MATTE, *supra* note 12, at 120.

Vlasic suggests "strengthening the ITU's decision-making authority and . . . ex-

junctive power of common law municipal courts. After the activities causing the interference have ceased due to the IFRB's summary order, the whole matter could be reviewed by the International Court of Justice.

As other areas of outer space activity become more important they too could, with the agreement of the States involved, be put under the jurisdiction and direction of an international organization or agency. Mining and manufacturing operations on the moon, not currently feasible economically, may one day be conducted under such a scheme. Appeal of the decisions of any regulatory agency, of course, would be available to the International Court of Justice or another international judicial body.²¹⁴ Eventually, it is hoped, all activities of men and States of the planet Earth will be directed by an "Earth Space Organization" for the benefit of all humans, with particular areas (telecommunications, weather forecasting, mining and manufacturing, etc.) probably being administered by different agencies within the organization.²¹⁵

Next the Connally Amendment and all other reservations to mutual declarations of acceptance of the court's jurisdiction should be repealed by the States which enacted them.

Although any multilateral treaty by which States agree to submit all or certain types of disputes to the International Court of Justice would not be affected by Connally-type reservations, due to the fact that such reservations refer only to acceptances of the court's juris-

tending the powers of the IFRB to include the enforcement of the frequency assignments." VLASIC, *supra* note 21, at 175. See also Glazer, *The Law-Making Treaties of the International Telecommunication Union Through Time and Space*, 60 MICH. L. REV. 269, 309-15 (1962).

214. One of the functions of the Court of Justice of the European Communities (see *supra* note 215) is to review the administrative acts of the various institutions of the Communities. STEIN & HAY, *supra* note 96, at 133, 134.

215. It is impossible at the present time to predict with any degree of accuracy the precise form that such an "Earth Space Organization" should take, due to the fact that so little is known about the space environment and even less about how human activities and interactions will be affected by it. It can reasonably be suggested, however, that one study the proposals relating to the control of the international seabed area in order to derive some idea about how the questions of resources, etc. be best handled in outer space. The seabed (that area of the ocean floor beyond territorial boundaries) is in many ways analogous to planetary surfaces and perhaps even space itself. See text of the United States Draft of the United Nations Convention on the International Seabed Area. 9 INT'L LEGAL MATERIALS 1046 (1970).

diction made under Article 36(2) of the *Statute* (whereas a treaty provision which invokes the court's jurisdiction would be made under Article 36(1) of the *Statute*),²¹⁶ the existence of such reservations could interfere with the submission to the court of an outer space dispute not falling under any then-existing treaty provision.²¹⁷ Also, since the legal validity²¹⁸ and certainly the wisdom of such reservations can be questioned, it can certainly be argued that the mere existence of them constitutes bad faith on the part of those States having them with respect to the creation of a more rational world reality. The revocation of such reservations can be done through the use of a multilateral treaty to insure a unified and reciprocal effort.

Thirdly, an international panel of experts on scientific and technological matters relating to outer space should be created to assist the International Court of Justice or any other international judicial or regulatory administrative body.

This panel, which could be created presently under the existing *United Nations Charter* (at least in relation to the Court) pursuant to Article 50 of the *Statute*,²¹⁹ would be available to advise the court on such questions of fact requiring expert knowledge which are necessary to the decision of a case (*e.g.*, How much radiation can a person of a given physical type and condition safely stand?).²²⁰

Fourth, individuals, corporations, and those international organizations not presently able to invoke the court's jurisdiction should be given standing to invoke either or both the advisory and contentious jurisdiction of the court.

Appropriate limitations, of course, could be specified where deemed necessary. For example, individuals might be given stand-

216. See U.S. Dept. of State, Memorandum Regarding Article XIII of the International Convention for the Prevention of Pollution of the Sea by Oil, May 23, 1960 (*reprinted in* FRIEDMANN, LISSITZYN & PUGH, *CASES AND MATERIALS ON INTERNATIONAL LAW* 289-90 (1969).)

217. See cases cited, *supra* note 152.

218. See *supra* note 204.

219. I.C.J. STAT. art. 50 states: "The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion."

220. The INTELSAT Supplementary Agreement on Arbitration art. 8 provides the following: "Either at the request of a party, or upon its own initiative, the tribunal may appoint such experts as it deems necessary to assist it."

ing only in cases to which they are parties, except in cases involving human rights, disarmament and arms limitation pursuant to treaties in force at the time, and in other cases where the issues involved concern the whole world community. The most important point at the present time is that the International Court of Justice be made available to more potential parties than just States and selected international organizations.²²¹ The transition of individuals, corporations, and those international organizations not currently able to invoke the court's jurisdiction from the status of objects of international law to subjects of international law can only be considered as consistent with the increasingly interdependent character of all elements of human society on the planet Earth.²²²

The next two proposals are measures which can be adopted at the present time and do not involve any changes in the present structure of international law in general and the *United Nations Charter* in particular. For this reason they are to be considered only as compromise efforts between the existing international legal reality and the advanced scheme proposed above.

Initially the *1967 Space Treaty*, the *1968 Astronaut Agreement*, and any other treaties concerning outer space by which states would agree in advance to submit disputes arising out of the interpretation or application of the treaties' provisions to the International Court of Justice, unless the states involved in the dispute agree that another peaceful form of settlement should be adopted.

An example of such a document is the *Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes*, which was adopted by the United Nations Conference on the Law of the Sea.²²³ The *Protocol* provides in Article I that "(d)isputes arising out of the interpretation or application of any *Convention on the Law of the Sea* shall lie within the compulsory jurisdiction of the International Court of Justice, and may accordingly be brought before the court

221. See list of such organizations, *supra* note 157.

222. It has been held by the International Court of Justice that the United Nations itself is a subject of international law and is capable of possessing international rights and duties and maintaining those rights by bringing international claims. *Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. REP. 174, 179.

223. Done at Geneva April 29, 1958; entered into force September 30, 1962, 450 U.N.T.S. 169. The Protocol is not in force for the United States.

by an application made by any party to the dispute being a Party to this Protocol."

In addition the use of Articles 26-29 of the current *Statute of the International Court of Justice*, which provide special methods of using the court to decide cases before it, should be considered for possible application to space disputes.²²⁴ For example Article 26(1) of the *Statute* allows the court to "from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with *particular categories* (emphasis supplied) of cases; for example, labor cases and cases relating to transit and communications."

Under Article 26(1) the court can create a special chamber to hear cases involving all disputes arising in outer space which the parties refer to it, or only disputes relating to particular areas, such as liability for space accidents or pollution. Since this proposal is based upon the current status of the court (and is therefore not to be considered in relation to or as a preferable alternative to the proposals above) the court would have to make a finding that the parties have consented to its jurisdiction for the case in question. In this respect all of the jurisdictional limitations of the court would apply. If the court found that the parties did consent, however, the decision would be binding upon them. Also, under section (3) of Article 26, the parties must request that the case be heard by the special chambers.

Article 29 of the *Statute* provides that the court "shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by *summary procedure* (emphasis supplied). In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit." Use of this Article might be recommended in areas where a relatively quick decision is needed, as, for example, in disputes involving radio interference. Again, this proposal is based upon the current status of the court and is not to be considered in relation to or as a preferable alternative to proposals above.

Article 27 of the *Statute* simply provides that "(a) judgment given by any of the chambers provided for in Articles 26 and 29 shall be

224. See Harvey, *supra* note 157, at 122.

considered as rendered by the court," and it needs no further explanation or comment.

As to venue Article 28 of the *Statute* provides that "[t]he chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague." This Article, as well as Article 22(1),²²⁵ may have particular importance to the question of the proper forum for cases involving liability disputes.²²⁶ Generally, the best place to hear a case involving an accident is the situs, or nearby the situs, as that is where most or all of the evidence, witnesses, and parties are to be found. As it is rather absurd to believe that most or all of the incidents occurring in the future which involve injury to persons and damage to property on Earth caused by space activities will occur at or near to The Hague, it is not at all far-fetched to suggest that the members of the court participating either in the full court or in a special chamber created pursuant to Article 26 or 29 be transported to the situs of the accident, rather than the witnesses, parties, and movable evidence be taken to The Hague, in a case over which the court has jurisdiction. This is true whether the present status of the court is considered, or whether an improved status, such as that outlined previously is considered. If the language of Articles 22(1) and 28 be interpreted quite literally, furthermore, it is even possible to envision a time when the members of the court or another international judicial body will transport to an orbiting space station or possibly a base or colony located on the moon or some other natural celestial body to hear a case involving an accident or other event which occurred there, provided that the members of the court are physically able to make such a trip and that the facilities of the space station or other outer space location are adequate to support them for the duration of the litigation. The rationale for such a procedure would be the same as that discussed above in relation to moving the members of the court from the Hague to another location on Earth, namely, economic savings and nearness to the situs of the accident or other event.

225. Article 22(1): The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

226. See LAY & TAUBENFELD, *supra* note 12, at 160, for a discussion of factors to consider in choosing a forum for liability cases.

CONCLUSION

The main purpose of this discussion has been to examine the possibility of using the International Court of Justice to resolve disputes involving questions of international law which arise in relation to outer space activities where other peaceful means of settling disputes have failed. The choice of the court as a basis of discussion was spawned by the fact that the court is in existence and is ready for service even without the rather sweeping proposals discussed above, although it must be again emphasized that the present court, if used to resolve space cases, can only be regarded as an interim measure until a more improved system of international adjudication is institutionalized and accepted by the States and international organizations which may be parties before it. Although it is possible to conceive of the creation of a new and special international court to handle space disputes,²²⁷ it has not been necessary to discuss that possibility separately as both the creation and operation of such a new court would pose the same basic problems the present International Court of Justice faces in today's international political reality. To discuss the nature and limitations of the present court and to suggest improvements to it so that it will operate more effectively in the future with respect to disputes in outer space is, in effect, to discuss the same basic issues which would be involved in the creation of a new international court outside of and separate from the present International Court of Justice.

To those who would argue that it is merely an academic exercise to discuss the International Court of Justice or any other international court as an instrument by which an improved world reality can be hewn, due to the fact that there are currently so many limitations upon international courts, an answer may be provided by the following words of Hans Kelsen:

[I]n the field of international relations the majority principle is not applied with one exception. The exception is extremely significant, however. It is the procedure of international courts. Here, and here alone, is the majority principle generally accepted. Submission to the majority vote of an international court is not

227. U.N. CHARTER art. 95 provides the following: "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

considered incompatible with the sovereignty of the State. This is one of the reasons why it is advisable to make a court, and not a government, the main instrument of international reform. It is the line of least resistance.²²⁸

228. Kelsen, *supra* note 51, at 399. In agreement with Kelsen is Paul C. Szasz, a European oriented scientist-lawyer: "Lawyers, in considering the possibility of preserving peace through law, naturally often focus their thinking on international judicial organs. . . . In a sense, the creation of effective judicial organs to settle international disputes is simpler than the establishment of legislative or executive ones. Even states that are most reluctant to restrict their nominally uncontrolled right to determine their international obligations or to participate in the creation of any international force greater than their own, may be willing to yield to some extent to judicial organs whose impact is necessarily restricted to the particular cases under consideration." Szasz, *How to Develop World Peace Through Law*, 52 AM. B. ASS'N J. 851, 855 (1966).