


5-1-1999

Establishing the Extraterrestrial: Criminal Jurisdiction and the International Space Station

Stacy J. Ratner

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Air and Space Law Commons](#), [Criminal Procedure Commons](#), and the [International Law Commons](#)

Recommended Citation

Stacy J. Ratner, *Establishing the Extraterrestrial: Criminal Jurisdiction and the International Space Station*, 22 B.C. Int'l & Comp. L. Rev. 323 (1999), <http://lawdigitalcommons.bc.edu/iclr/vol22/iss2/5>

This Note is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

Establishing the Extraterrestrial: Criminal Jurisdiction and the International Space Station

A space station will permit quantum leaps in our research. . . . We want our friends to help us meet these challenges and share in their benefits. . . . [We] will invite other countries to participate so we can strengthen peace, build prosperity, and expand freedom for all who share our goals.¹

With these words, American President Ronald Reagan launched the idea of an international space station (ISS) in 1984.² More than a decade of development later, representatives from fifteen of the participating partner countries gathered in Washington to sign final agreements for the ISS's development and implementation.³ The new 1998 Intergovernmental Agreement on Space Station Cooperation (1998 Agreement) builds on the 1988 Intergovernmental Agreement (1988 Agreement) to establish an official legal structure for what National Aeronautics and Space Administration (NASA) head Daniel Goldin has called the world's first "city in space."⁴ Like any other city, the ISS presents myriad legal problems and questions, not the least of which is where jurisdiction lies for criminal acts committed aboard its eleven modules.⁵ In keeping with the extraordinary emphasis placed on mutual cooperation and prosperity, both the 1988 and 1998 Agreements contained provisions cross-waiving liability among the partner countries for damage to persons, property, and revenue, and stated that these provisions were to be broadly construed.⁶ Previous treaties gov-

¹ Ronald Reagan, State of the Union Address, 20 Weekly Comp. Pres. Doc. 87, Jan. 25, 1984, available in LEXIS, EXEC Library, PRESDC File [hereinafter Reagan].

² See *id.*

³ See Toni Marshall, *15 Sign Pact For Space Station*, WASH. TIMES, Jan. 30, 1998, at A15. The United States, Canada, Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom, Japan, Russia, and Brazil are the official partner countries of the ISS project. See *International Space Station Partners* (visited Feb. 7, 1998) <<http://station.nasa.gov/partners/index.html>>.

⁴ See Marshall, *supra* note 3, at A15.

⁵ See Karl-Heinz Böckstiegel, *Legal Aspects of Space Stations*, 27 COLLOQUIUM ON THE LAW OF OUTER SPACE 228, 228 (1984).

⁶ See Agreement Among the Government of the United States of America, Governments of

erning jurisdiction in outer space have been founded on traditionally recognized bases of international jurisdiction.⁷ But while the criminal jurisdiction provisions in the 1988 Agreement's Article 22 followed this tradition in part, they also represented a disturbing innovation by assigning additional broad-based jurisdiction to the United States (U.S.) that was not shared by any partner countries.⁸ The 1998 Agreement's Article 22 substantially revises the provisions for criminal jurisdiction aboard the ISS, representing a return to a more customary understanding of international criminal jurisdiction.⁹

The relative brevity of Article 22 in both the 1988 and 1998 Agreements, as well as the lack of any concomitant language on civil jurisdiction, indicate the partner countries' mutual feeling that the ISS crew will successfully work together in this spirit of cooperation and that detailed provisions for judicial recourse are unnecessary.¹⁰ It is tempting to think that such optimism is justified, and that the ISS Agreements truly represent international relations breakthroughs whose criminal jurisdiction provisions will never be brought into practice. However, it may be folly to imagine that if the ISS succeeds, and thus forms a prototype for living cities in outer space, the criminal jurisdiction provisions it has adopted via the 1988 and 1998 Agreements will be entirely satisfactory.

This Note will begin in Part I by explaining the history, goals, and missions of the ISS, including the involvement of each partner country and the philosophical principles characterizing the project as a whole. Part II briefly sets out five traditional bases of international jurisdiction and explains their relevance to modern international law. Part III examines the criminal jurisdiction provisions of the 1988 Agreement's

Member States of the European Space Agency, the Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station, *available in* 1992 WL 466295, art. 16 [hereinafter 1988 Agreement]; Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, The Government of Japan, the Government of the Russian Federation, and the Government of the United States of America on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station, art. 16 (visited Feb. 10, 1998) <<ftp://ftp.hq.nasa.gov/pub/pao/reports/IGA.html>> [hereinafter 1998 Agreement].

⁷ See ANDREW J. YOUNG, *LAW AND POLICY IN THE SPACE STATIONS' ERA* 152-53 (1989).

⁸ See 1988 Agreement, *supra* note 6, art. 22.

⁹ See 1998 Agreement, *supra* note 6, art. 22.

¹⁰ See *id.*; 1988 Agreement, *supra* note 6, art. 22. At least one commentator has argued that the failure to consider civil tort jurisdiction is a "major omission" in the Agreements, and one that is "obviously unacceptable." Hamilton DeSaussure, *Tort Jurisdiction Over The New International Space Station*, 32 *COLLOQUIUM ON THE LAW OF OUTER SPACE* 305 (1989).

Article 22 and explores the ways in which they diverged sharply from accepted views of international jurisdiction by assigning the U.S. a disproportionate amount of authority. Part IV examines the revised criminal jurisdiction provisions of the 1998 Agreement, noting how they conform much more closely to accepted bases of international jurisdiction and contrasting them with their counterparts in the 1988 Agreement. Part V argues that although the 1998 Agreement represents a significant improvement over the 1988 Agreement, it is still not a satisfactory answer to the ongoing question of criminal jurisdiction in outer space. Finally, Part VI concludes that the best long-term solution to the problem of criminal jurisdiction in outer space may be an international space agency with the legal power to build from, improve, and adjudicate the jurisdictional provisions of Article 22, building on the goals and spirit behind the ISS project to ensure that continued colonization of space can be legally efficient.

I. STRUCTURES, FUNCTIONS, CREATORS, AND PHILOSOPHY OF THE ISS

Since its original conception in 1984, the ISS project has evolved to become the largest and most complex cooperative science and engineering program ever attempted.¹¹ It will be the first permanently occupied outpost in space, manned by a rotating international crew who will conduct commercial and technological research in the major areas of microgravity, life sciences, space sciences, and earth science.¹² When complete, the ISS will consist of eleven pressurized modules, or elements: seven will be devoted to research facilities, three will serve as crew habitats, and one will provide propulsion, navigation, and altitude control.¹³ The official partner countries of the ISS project have each designated a national agency to implement coordination with the other partner countries.¹⁴ These agencies are:

- The United States: NASA,
- Canada: Canadian Space Agency,

¹¹ See *15 Countries Sign Agreements On International Space Station*, XINHUA ENGLISH NEWSWIRE, Jan. 29, 1998, available in 1998 WL 2786604.

¹² See *European Ministers and Officials to Sign Space Station Agreements in Washington*, M2 PRESSWIRE, Jan. 29, 1998, available in 1998 WL 5047757; *The International Space Station* (visited Feb. 1, 1998) <<http://www.nas.edu/cets/aseb/coss7.html>>.

¹³ See *The International Space Station*, *supra* note 12.

¹⁴ See *International Space Station Partners*, *supra* note 3.

—Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom: European Space Agency (ESA),

—Japan: National Space Development Agency of Japan,

—Russia: Russian Space Agency (RSA),

—Brazil: Brazilian Space Agency.¹⁵

The contributions made by each partner country to the development of the ISS as a whole are crucial to understanding the problems posed by the jurisdiction provisions in Article 22.¹⁶ Although the U.S. can be credited with the initial idea of the ISS, has provided a good deal of the necessary funding for the project, and has been a driving force for continued ISS progress, it will only provide two elements: the U.S. Laboratory Module, which was successfully launched in December, 1998, and the U.S. Habitation Module, slated to be connected in 2002.¹⁷ The bulk of ISS elements will come from Russia, whose contributions (and launch dates) include the Russian Service Module (successfully attached in space in December, 1998), the Russian Functional Cargo Block (1999), two Soyuz-TM vehicles for crew rotation and trips between the ISS and Earth (1999), three Russian Research Modules (2002), the Russian Life Support Module (2002), and the Russian Progress-M vehicle (2002).¹⁸ Japan's supplied Japanese Experiment Module will be sent up in 2000.¹⁹ The European countries' contribution, the Columbus Orbital Facility research module, is scheduled to become part of the ISS in 2001.²⁰ Each country will register the modules it provides in accordance with the 1976 Convention on Registration of Objects Launched into Outer Space.²¹ By the year 2004, all 460 tons of structures, equipment, modules, and supplies required to complete the ISS will be in orbit around the Earth.²²

Like the modules comprising its physical structure, the ISS's crew will be multinational and multifunctional.²³ The entire station will be

¹⁵ See *id.*

¹⁶ See 1988 Agreement, *supra* note 6, art. 22; 1998 Agreement, *supra* note 6, art. 22.

¹⁷ See *The International Space Station*, *supra* note 12; *Shuttle Returns From First Space Station Assembly Mission*, (visited Jan. 28, 1999) <<http://www.cnn.com/TECH/space/981215/shuttle.landing>>.

¹⁸ See 1988 Agreement, *supra* note 6, art. 22; 1998 Agreement, *supra* note 6, art. 22.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See 1998 Agreement, *supra* note 6, art. 5.

²² See *A Whole New Era in Space Flight* (visited Jan. 27, 1999) <<http://station.nasa.gov/station/index.html>>.

²³ See *id.* art. 11.

roughly the size of a football field, but the areas devoted to living and working will make up only a small fraction of this space, therefore, each of the seven crew members aboard at any given time must work closely with his or her foreign counterparts.²⁴ Research astronauts on the ISS are chosen in accordance with Memoranda of Understanding (MOUs) between the partner countries and must conform with the ISS's Code of Conduct while aboard.²⁵ The notion of such a Code of Conduct, which is to be developed by all partner countries through the MOUs, underscores the goals of the ISS project as a whole by formally emphasizing the importance of peaceful cooperation.²⁶ Indeed, some commentators have noted that the significance of the science to be done aboard the ISS is in some ways secondary to its more altruistic purposes and the evolving international values it represents.²⁷

The foreign policy goals of the ISS project, as articulated by President Reagan in 1984, are appropriately lofty for an enterprise of such scope and creativity: strengthening peace, building prosperity, and expanding freedom for all partner countries involved.²⁸ Similarly grand ideals have continued to find expression in the speeches and publications of the partner countries.²⁹ NASA, via its official ISS web site,

²⁴ See Michael Braukus & Susan Povenmire, *Space Station Agreements To Be Signed In Washington* (visited Feb. 7, 1998) <<http://station.nasa.gov/news/pressrel/98-017.txt>>; *The International Space Station*, *supra* note 12.

²⁵ See 1988 Agreement, *supra* note 6, art. 11.

²⁶ See *id.* The Code of Conduct has not yet been formalized, though several MOU's between the partner countries are currently in force and cover issues of crew behavior and treatment. See, e.g., Memorandum of Understanding Between the National Aeronautics and Space Administration of the United States of America and the Russian Space Agency Concerning Cooperation on the Civil International Space Station, art. 11 (visited Feb. 10, 1998) <ftp://ftp.hq.nasa.gov/pub/pao/reports/nasa_russian.html>; Memorandum of Understanding Between the National Aeronautics and Space Administration of the United States of America and the European Space Agency Concerning Cooperation on the Civil International Space Station, art. 11 (visited Feb. 10, 1998) <ftp://ftp.hq.nasa.gov/pub/pao/reports/nasa_esa.html>; Memorandum of Understanding Between the National Aeronautics and Space Administration of the United States of America and the Canadian Space Agency Concerning Cooperation on the Civil International Space Station, art. 11 (visited Feb. 10, 1998) <ftp://ftp.hq.nasa.gov/pub/pao/reports/nasa_csa.html>.

²⁷ See Eric B. Schoch, *The Next Step In Space*, INDIANAPOLIS STAR, Feb. 1, 1998, at D1; Tony Reichhardt, *Science Struggles To Gain Respect On The Space Station*, NATURE, Feb. 17, 1998, at 732.

²⁸ See Reagan, *supra* note 1.

²⁹ See *International Space Station Fact Book, A New Era Of Peaceful Cooperation* (visited Feb. 7, 1998) <<http://station.nasa.gov/reference/factbook/coop.html>>; Patrick Worsnip, *Space Station Accord Marks New Era*, GLASGOW HERALD, Jan. 31, 1998, at 13; *Remarks Made At Signing Session Of The International Space Station Partners Agreement* (visited Feb. 7, 1998) <http://www.state.gov/www/global/oes/space/980129_space_agreement.html> [hereinafter *Remarks at Signing*].

claims that the ISS "serves as a symbol of the power of nations to work together" and "offers a test case for building mutual trust and shared goals."³⁰ Minister Ronald Duhamel of Canada called it "the celebration of cooperation among nations for the benefit of humankind," and Belgium's Yan Yieff, Chairman of the ESA's Ministerial Level Council, noted that "the cooperation on the international space station will enhance the scientific, technological and economic development of all the partners involved" in addition to strengthening "the close ties existing not only among the governments, but also between the peoples of Europe, North America, Russia and Japan."³¹

II. TRADITIONAL BASES OF CRIMINAL JURISDICTION IN INTERNATIONAL LAW

A precise definition of jurisdiction in the international context is extremely difficult to formulate.³² Broadly speaking, the interests of sovereign nations in obtaining and maintaining jurisdiction over their nationals, their territory, and acts that affect their broader welfare have been widely recognized as bases for traditional criminal jurisdiction in international law.³³ In order to serve these interests without impinging on any nation's sovereignty, the world community has generally adopted four theories of international criminal jurisdiction: subjective/objective territoriality, nationality theory, the protective principle, and the doctrine of universal interest.³⁴

Territorial principles of jurisdiction are rooted in the notion that sovereign countries are defined in large part by the territory that comprises them, the basis of sovereignty itself.³⁵ Jurisdiction based on subjective territoriality is accorded to a sovereign nation over any criminal offense committed in its territory.³⁶ The rationale for this type of jurisdiction is perhaps the easiest to recognize: nations have a primary interest in maintaining internal peace and security, and thus they rightfully possess jurisdiction over every person and every act within

³⁰ *International Space Station Fact Book, A New Era Of Peaceful Cooperation*, *supra* note 29.

³¹ *Remarks at Signing*, *supra* note 29.

³² See E. Kamenetskaya, *Large Space Stations: Some Problems of Jurisdiction*, 27 *COLLOQUIUM ON THE LAW OF OUTER SPACE* 254, 254 (1984).

³³ See COVEY T. OLIVER ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 133-35 (4th ed. 1995).

³⁴ See *id.* at 132.

³⁵ See YOUNG, *supra* note 7, at 152.

³⁶ See OLIVER ET AL., *supra* note 33, at 135.

their borders.³⁷ This interest is sufficiently strong that a nation may obtain jurisdiction even if only one element of an offense constituting a crime takes place within its territory.³⁸ Virtually every country utilizes this principle.³⁹ Objective territoriality seeks to protect the same interests as subjective territoriality, but its reach is slightly broader: a nation may exercise jurisdiction over conduct outside its territory that causes an effect therein.⁴⁰

Under the nationality theory, a sovereign nation has jurisdiction over the activities of its nationals regardless of their location.⁴¹ This basis of jurisdiction is founded both in the notion that the nationals of a country owe it allegiance even when they are outside its boundaries and in the concept that a sovereign nation must exercise responsibility for the acts of its citizens in the world as a whole.⁴² It derives from the old Roman notion that "one's law travels with him," and is particularly important to civil law jurisdictions, where the honor of the country is perceived to be at stake when nationals commit offenses abroad.⁴³ A sovereign nation may extend this basis by ascribing nationality to corporations, vessels, and aircraft; they then become subject to its jurisdiction precisely as individuals would.⁴⁴ Additionally, some sovereign nations have tried to obtain jurisdiction based on the nationality of the crime victim.⁴⁵ This is known as the passive personality principle.⁴⁶ Although the principle makes sense intuitively—a sovereign nation clearly has an interest in protecting its nationals, and in ensuring that perpetrators of crimes against them are brought to justice—it has not been universally accepted, and many nations including the U.S. have tended to reject it as a basis for jurisdiction.⁴⁷

The third main basis of international jurisdiction is the protective principle.⁴⁸ This principle is something of an exception to territoriality theories: it provides jurisdiction over offenses committed wholly out-

³⁷ See GLENN H. REYNOLDS & ROBERT P. MERGES, *OUTER SPACE: PROBLEMS OF LAW AND POLICY* 248 (1989).

³⁸ See OLIVER ET AL., *supra* note 33, at 137.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See YOUNG, *supra* note 7, at 152.

⁴² See *id.*

⁴³ OLIVER ET AL, *supra* note 33, at 165.

⁴⁴ See *id.* at 166.

⁴⁵ See YOUNG, *supra* note 7, at 152.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See OLIVER ET AL., *supra* note 33, at 171.

side the sovereign nation's territory, but only applies to offenses that cause or threaten to cause adverse effects on the country's security, integrity, or sovereignty.⁴⁹ Some commentators have criticized the protective principle for being overbroad because it allows jurisdiction over conduct that merely poses a potential threat to interests of the nation in question.⁵⁰ However, the fact that its applicability is limited to recognized and limited interests (the security or integrity of the nation) may help to reduce the danger of overreaching.⁵¹

Universal interest, the final basis of international criminal jurisdiction, is distinct from the others in that the sovereign nation exercising it need not have a direct connection to the criminal conduct being tried.⁵² This type of jurisdiction applies only to certain crimes that have been condemned by the domestic laws of virtually all civilized nations and that are violative of international laws: piracy, hijacking, genocide, slave trading, apartheid, and war crimes.⁵³ Such offenses trigger an obligation either to prosecute or to extradite the accused.⁵⁴ The basic notion underlying universal interest jurisdiction is that crimes of this nature are sufficiently serious that all nations have an equal interest in prosecuting them, and so any convenient forum may be utilized for that purpose.⁵⁵

III. ARTICLE 22 OF THE 1988 AGREEMENT—GOING TOO FAR

Like the high seas, to which it is perhaps the closest jurisdictional analogue, outer space is not considered to be under the exclusive control of any earthly nation.⁵⁶ However, like ships at sea, objects launched into space can be registered by their creating nations in

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See REYNOLDS & MERGES, *supra* note 37, at 248–49.

⁵³ See OLIVER ET AL., *supra* note 33, at 177–78.

⁵⁴ See *id.* at 177.

⁵⁵ See *id.* Interesting cases of universal interest jurisdiction include those dealing with World War II genocide crimes and the Nuremberg principles. In *Attorney General of Israel v. Eichmann*, for example, the Israel Supreme Court found that it had jurisdiction over an accused war criminal because of the nature of his involvement with the Nazi regime even though the state of Israel was not in existence when the alleged crimes were committed. 36 Int'l L.Rep. 277 (Israel S. Ct. 1968).

⁵⁶ See Hamilton DeSaussure & Melissa S. Ulrich, *Transition of Control and Jurisdiction Over Space Settlements*, 34 COLLOQUIUM ON THE LAW OF OUTER SPACE 56, 56 (1991); Ty S. Twibell, *Space Law: Legal Restraints on Commercialization and Development of Outer Space*, 65 UMKC L. REV. 589, 594 (1997).

accordance with the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space; these nations then retain jurisdiction over the registered spacecraft.⁵⁷ Since the ISS is constructed of elements registered in several different partner countries, the 1988 Agreement provided that registration need not be the sole or even chief means of establishing jurisdiction over any element.⁵⁸ Instead, the Agreement focused on the origin of each element and the nationality of the personnel to determine which partner country had jurisdiction over an offense committed aboard the ISS.⁵⁹

This approach was solidly rooted in the traditional jurisdictional bases of territoriality and nationality, and therefore made sense as an initial attempt to address criminal jurisdiction in outer space.⁶⁰ However, the 1988 Agreement went further, creating a wholly new jurisdictional right for the U.S. alone.⁶¹ This provision was unfounded in any standard of international jurisdiction, and represented a dangerous precedent for partisan interests on the ostensibly shared ISS.⁶²

Under the 1988 Agreement, signatory partner countries were granted criminal jurisdiction over "the flight elements they respectively provide" and "over personnel in or on any flight element who are their respective nationals."⁶³ It is easy to understand these provisions in light of customary jurisdictional bases. Giving partner countries criminal jurisdiction over the elements they built and provided to the ISS was the functional equivalent of permitting them to exercise jurisdiction over their own territory.⁶⁴ Hence, this provision was easily analogized to the earthbound doctrine of subjective territoriality.⁶⁵

Additional support for these grants came from the nationality theory of international jurisdiction.⁶⁶ A partner country maintains its interest in the activities of its nationals regardless of their location; though traditional theorists may not have had outer space specifically in mind, it is clear that a nation retains concern for its citizens even if they have left the planet.⁶⁷ Thus, the grant of jurisdiction over personnel who

⁵⁷ See YOUNG, *supra* note 7, at 153.

⁵⁸ See 1988 Agreement, *supra* note 6, art. 22.

⁵⁹ See *id.*

⁶⁰ See OLIVER ET AL., *supra* note 33, at 135, 165-66.

⁶¹ See 1988 Agreement, *supra* note 6, art. 22.

⁶² See *id.*

⁶³ *Id.* § 1.

⁶⁴ See OLIVER ET AL., *supra* note 33, at 137.

⁶⁵ See *id.*

⁶⁶ See *id.* at 165.

⁶⁷ See *id.*

were nationals anywhere aboard the ISS made good sense.⁶⁸ Similarly, a partner country could ascribe its nationality to the ISS elements it owned and provided.⁶⁹ Those modules would then be subject to the ascribing country's jurisdiction just as ships or aircraft of ascribed nationality would be, and thus a basis for criminal jurisdiction in a location not owned by any sovereign nation would be satisfactorily established.⁷⁰

The basic criminal jurisdiction provision of the 1988 Agreement, therefore, was solidly founded on customary territorial and national bases for international jurisdiction.⁷¹ Such principles were familiar to all the signatory partner countries, each of which was large and sophisticated enough to be familiar with the complexities of international jurisdiction issues.⁷² Given the eminent sensibility of this first provision, the second—which essentially gave an extra grant of jurisdiction to the U.S. even if no threat to U.S. security interests existed—is difficult to understand or defend from any traditional perspective.⁷³ The pertinent text of the Agreement gave the U.S. an exclusive right to “exercise criminal jurisdiction over misconduct committed by a non-U.S. national in or on a non-U.S. element of the manned base or attaching to the manned base which endangers the safety of the manned base of the crew members thereon” as long as it first consulted with the miscreant's national partner country and obtained either concurrence of that partner state in continuing prosecution or else failed to receive assurances that the partner state intended to prosecute on its own behalf.⁷⁴

The blanket grant to the U.S. of jurisdictional power over non-U.S. nationals and the acts they might commit aboard non-U.S. modules did not fit with nationality or territorial theories of jurisdiction; in fact, it could be read as flatly contradicting them.⁷⁵ If the clause had limited extra U.S. jurisdiction to those cases where the victim of the offense was a U.S. national, it might have been rationalized as an application of the passive personality principle.⁷⁶ However, the U.S. has tended to

⁶⁸ See *id.*

⁶⁹ See 1988 Agreement, *supra* note 6, art. 6.

⁷⁰ See OLIVER ET AL., *supra* note 33, at 166.

⁷¹ See *id.* at 137, 165–66; 1988 Agreement, *supra* note 6, art. 22.

⁷² See OLIVER ET AL., *supra* note 33, at 166.

⁷³ See 1988 Agreement, *supra* note 6, art. 22.

⁷⁴ See *id.*

⁷⁵ See OLIVER ET AL., *supra* note 33, at 137, 165–66.

⁷⁶ See *id.* at 168.

reject this basis of international jurisdiction, and in any case the language did not contain such a limitation.⁷⁷ Nor was the additional jurisdiction given to the U.S. under Article 22 explicable in terms of the protective principle or universal interest.⁷⁸ Nothing in Article 22 limited the U.S.'s extra jurisdiction to offenses that directly threatened American security, integrity, or sovereignty, so no direct invocation of the protective principle existed.⁷⁹ The U.S. was simply to have additional criminal jurisdiction over any offense committed by anyone anywhere aboard the ISS—this would include hijacking and piracy, both of which fall under universal interest, but it was not limited to such offenses and therefore could not be read as resting on this base.⁸⁰

Since it was without roots in any customary base of international criminal jurisdiction, the additional blanket grant given to the U.S. by Article 22 represented a disturbing and dangerous departure from tradition, while simultaneously giving broad unilateral discretion to the U.S. as to whether it would become involved with any ISS criminal offenses that interested it.⁸¹ Some comfort might have been taken from the clause indicating that the U.S. must consult with the partner country in question before proceeding with prosecution.⁸² But this reading was not persuasive in light of the next clause, which gave unprecedented jurisdiction back to the U.S. if it "failed to receive assurances" that the partner state would undertake prosecution itself.⁸³ There was no indication of what might constitute such "assurances," and it is significant that the language turned on the U.S.'s failure to "receive" them rather than on the partner country's failure to "provide" them.⁸⁴ This wording presumptively left the central question of whether assurance was provided to the discretion of the U.S.⁸⁵ Even if a partner country gave what it considered to be more than adequate assurance that it would prosecute its accused national, the U.S. remained in an

⁷⁷ See *id.*; 1988 Agreement, *supra* note 6, art. 22.

⁷⁸ See 1988 Agreement, *supra* note 6, art. 22; OLIVER ET AL., *supra* note 33, at 171, 177.

⁷⁹ See 1988 Agreement, *supra* note 6, art. 22.

⁸⁰ See 1988 Agreement, *supra* note 6, art. 22; OLIVER ET AL., *supra* note 33, at 178. The same argument would theoretically apply to the universal interest crimes of apartheid, genocide, and slave trading, but it would be virtually impossible for such offenses to be committed aboard the ISS in the first place. See 1988 Agreement, *supra* note 6, art. 22; OLIVER ET AL., *supra* note 33, at 178.

⁸¹ See 1988 Agreement, *supra* note 6, art. 22.

⁸² See *id.*

⁸³ *Id.* art. 22, § 2(b)(2).

⁸⁴ *Id.*

⁸⁵ See *id.*

Agreement-supported position to claim it had not received proper assurance, and could confidently continue any attempts to exercise its own jurisdiction.⁸⁶ There was (and still is) no intergovernmental agency with the power to resolve conflicts over questions raised by the Agreement or over events occurring aboard the ISS itself.⁸⁷ Hence, the U.S. was assigned and retained ultimate additional criminal jurisdiction with no traditional basis, and faced no outside intervention if it chose to exercise its exclusive power.⁸⁸

IV. ARTICLE 22 OF THE 1998 AGREEMENT: REVISING TOWARDS REASONABLENESS

Over the decade between the 1988 and 1998 Agreements, the ISS project as a whole underwent significant diplomatic developments.⁸⁹ Critical among these was the addition of Russia to the list of participating partner countries.⁹⁰ Due to its ongoing experience with the space station Mir, the RSA has been able to lend a huge amount of expertise to the ISS project.⁹¹ It is safe to assume that without the RSA's assistance, the ISS would be nowhere near meeting its proposed schedule, and that its technological capabilities as well as its functionality would be at significantly lower levels.⁹² By agreeing to cooperate with Russia on the ISS, the U.S. unquestionably expanded the possibilities of the project and achieved a breakthrough in U.S.-Russian relations following the end of the Cold War; as Russian Ambassador Yuli Vorontsov stated:

Way back in the past will stay the times of rivalry and jockeying for all kind of the first places in space. Russia is investing in the project her achievements and unique experience of man's space flights and laboratories. We hope that they will act as guarantors of a successful construction of the international space station.⁹³

⁸⁶ See *id.*

⁸⁷ See CARL Q. CHRISTOL, *SPACE LAW: PAST, PRESENT, AND FUTURE* 200 (1991).

⁸⁸ See 1988 Agreement, *supra* note 6, art. 22.

⁸⁹ See *Remarks at Signing*, *supra* note 29.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

However, once Russia became involved, the U.S. ceased to be the clearly dominant partner in terms of expertise and equipment provided.⁹⁴ The 1998 Agreement reflects this changed power structure: in the completely revised Article 22, the extra jurisdiction granted to the U.S. was excised and replaced with much more precise and egalitarian language based on recognized principles of international criminal jurisdiction.⁹⁵

Under the 1998 Agreement, partner countries retain the right of jurisdiction over their nationals anywhere aboard the ISS.⁹⁶ As in the 1988 Agreement, this provision is a clear expression of traditional nationality jurisdiction.⁹⁷ However, the 1998 Agreement no longer grants partner countries jurisdiction over the elements they provide to the ISS.⁹⁸ This revision may reflect the spirit of international cooperation so much alluded to by the partner countries' diplomats: if the ISS is really a cooperative venture, and the crew is to move freely about the station and use all parts of it to conduct multinational experiments, it makes little sense to differentiate the sponsorship of each element merely for the purposes of criminal jurisdiction.⁹⁹

In addition to standard nationality theory, the 1998 Agreement's Article 22 depends heavily on the doctrine of passive personality for establishing criminal jurisdiction.¹⁰⁰ According to the new language, a partner country may, under certain circumstances, exercise criminal jurisdiction over an offense committed aboard the ISS that "affects the life or safety of" one of its nationals, regardless of the perpetrator's nationality.¹⁰¹ Passive personality, though not usually accepted as a jurisdictional basis by the U.S., has experienced a resurgence of popularity in Europe since the mid-20th century.¹⁰² Those defending it as a basis for international criminal jurisdiction argue that since the essential object of criminal law is to protect the public interest, the victim's national law and justice system provide the best appreciation of precisely what protection should be afforded.¹⁰³ This argument militates

⁹⁴ See *The International Space Station*, *supra* note 12.

⁹⁵ See 1998 Agreement, *supra* note 6, art. 22.

⁹⁶ See *id.*

⁹⁷ See OLIVER ET AL., *supra* note 33, at 165.

⁹⁸ Compare 1998 Agreement, *supra* note 6, art. 22, with 1988 Agreement, *supra* note 6, art. 22.

⁹⁹ See *Remarks at Signing*, *supra* note 29.

¹⁰⁰ See 1998 Agreement, *supra* note 6, art. 22.

¹⁰¹ *Id.*

¹⁰² See OLIVER ET AL., *supra* note 33, at 168.

¹⁰³ See *id.*

strongly against the type of blanket jurisdiction granted to the U.S. by the 1988 Agreement, and its appeal is clear: a country whose national has been the victim of a given criminal offense has a strong interest in the case, whereas the U.S., who (under the 1988 Agreement) could have chosen to become involved in any offense committed, might well lack any connection to that offense in terms of nationals and property.¹⁰⁴

Because it provides for jurisdiction based on both nationality and passive personality, the 1998 Agreement contains (as it must) clauses describing how jurisdictional conflicts of interest are to be settled.¹⁰⁵ According to the new Article 22, the partner country of the alleged perpetrator must consult with the partner country of the alleged victim at the latter's request to discuss their respective prosecutorial interests.¹⁰⁶ Following such a consultation, the victim's nation may choose to exercise jurisdiction if the alleged perpetrator's nation concurs in that exercise or fails, within 90 days, to "provide assurances that it will submit the case to its competent authorities for purposes of prosecution."¹⁰⁷

There are two major shifts in this provision that differ from the 1988 Agreement and that are worth noting.¹⁰⁸ The first is the requirement that the two partner countries involved in the dispute consult with one another, a precondition that was noticeably absent from the 1988 Agreement's grant of extra jurisdiction to the U.S.¹⁰⁹ This change is consonant with the new spirit of international trust and cooperation concerning the ISS project as a whole, and is further codified later in Article 22 with the provision that each partner state shall, "subject to its national laws and regulations, afford the other [p]artners assistance in connection with alleged misconduct on orbit."¹¹⁰

The second important change in the 1998 Agreement's language is the shift from the U.S.'s failure to "receive" assurances of prosecution (1988) to the concerned partner country's failure to "provide" them

¹⁰⁴ See 1988 Agreement, *supra* note 6, art. 22.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* § 2.

¹⁰⁷ *Id.* § 2(2).

¹⁰⁸ See *id.*, art. 22; 1998 Agreement, *supra* note 6, art. 22.

¹⁰⁹ See 1998 Agreement, *supra* note 6, art. 22; 1988 Agreement, *supra* note 6, art. 22.

¹¹⁰ 1998 Agreement, *supra* note 6, art. 22, § 4; see generally *Remarks at Signing*, *supra* note 29. This provision manages to strike a nice balance between guaranteeing bilateral communication and respecting each partner country's particular laws and regulations. See 1998 Agreement, *supra* note 6, art. 22, § 4.

(1998), in cases where the partner country exercising jurisdiction is not that of the perpetrator.¹¹¹ Balancing the requirement on the side of the receiver has several negative implications.¹¹² Under the 1988 Agreement, the U.S. could invoke its jurisdiction merely by claiming it had not received any assurances that the partner country involved intended to prosecute; no evidence could really be required, as it would be impossible to prove that something was never received.¹¹³ However, the nation of an alleged perpetrator might well be able to show that it provided assurances to the victim's partner country via some kind of physical proof: copies of memos sent, recordings of conversations held, and so forth.¹¹⁴ Shifting the burden from receiver to provider therefore continues the move towards fairness and equality that marks the 1998 Agreement's Article 22.¹¹⁵

Also new in the 1998 Agreement, and reflective of more thoughtful draftsmanship, is a provision concerning extradition.¹¹⁶ Generally, an obligation to prosecute or extradite is triggered when the crime in question is one that would come under the jurisdictional nexus of universal interest.¹¹⁷ However, the new Article 22 provides for extradition of an alleged perpetrator without limiting its coverage to hijacking, piracy, or any of the other universal interest crimes.¹¹⁸ Furthermore, the language of the 1998 Agreement makes it possible for extradition to occur even in situations where the requesting and requested country have no separate extradition treaty; under such circumstances, the countries involved may "consider this Agreement as the legal basis for extradition in respect of the alleged misconduct on orbit."¹¹⁹ This provision is an interesting extension of the universal interest doctrine and makes sense in the context of outer space. Moreover, it indicates a willingness by the partner countries to let new space treaties override traditional arrangements; agreeing that the fledgling 1998 Agreement may be used in place of customary extradition treaties, which were formerly necessary in many of the partner countries

¹¹¹ See 1998 Agreement, *supra* note 6, art. 22; 1988 Agreement, *supra* note 6, art. 22.

¹¹² See *supra* part II.

¹¹³ See 1988 Agreement, *supra* note 6, art. 22.

¹¹⁴ See 1998 Agreement, *supra* note 6, art. 22.

¹¹⁵ See *id.*

¹¹⁶ See *id.* § 3.

¹¹⁷ See OLIVER ET AL., *supra* note 33, at 177.

¹¹⁸ See 1998 Agreement, *supra* note 6, art. 22, § 3.

¹¹⁹ *Id.*

(including the U.S.), demonstrates a deep commitment to mutual cooperation and genuine desire to make the ISS project successful.¹²⁰

Taken as a whole, the newly revised version of Article 22 appears to reflect a significant shift in U.S. attitude towards the ISS project.¹²¹ Compromises such as forfeiting its extra grant of criminal jurisdiction, permitting the use of the passive personality principle as a base for international jurisdiction, and agreeing to substitute the 1998 Agreement for extradition treaties in cases where none exist may indicate the U.S.'s willingness to negotiate previously key aspects of its foreign policy in order to further the interests of the ISS.¹²² The Clinton administration (1992–2000), reaffirming its commitment to the ISS, released a comprehensive new National Space Policy in 1996 designed to “ensure America’s role as the world’s space leader.”¹²³ The 1998 Agreement demonstrates a new American understanding: in order to be one of the leaders in space exploration, the U.S. will have to work closely with other giants like Russia and the ESA, yielding its attitude of superiority and perks like unlimited extra jurisdiction in the process.¹²⁴

V. THE LIMITATIONS OF LANGUAGE: ACHIEVEMENTS AND SHORTCOMINGS OF THE 1988 AND 1998 AGREEMENTS

Although the ISS is currently the world’s most developed space colonization project, it is by no means the end of the quest for extra-terrestrial outposts.¹²⁵ Plans to establish manned colonies on the moon and Mars have been in development for many years, reflecting a perception that human expansion into space will foster long-term growth and wealth creation as well as global security.¹²⁶ With such growth will come a host of legal, administrative, and political problems. While criminal jurisdiction may not be the first or most pressing of these

¹²⁰ See OLIVER ET AL., *supra* note 33, at 217.

¹²¹ See 1998 Agreement, *supra* note 6, art. 22.

¹²² See *id.*

¹²³ *President Issues New National Space Policy*, available in 1996 WL 533618, *1 (White House), Sept. 20, 1996. Some scholars argue that the U.S.'s self-perceived preeminence in space ventures is largely fictional: Russia's Mir program is perhaps the best-known space experiment, and the majority of commercial contracts in outer space are awarded to the ESA and some Third World countries. See Twibell, *supra* note 56, at 591.

¹²⁴ See 1998 Agreement, *supra* note 6, art. 22; *Remarks at Signing*, *supra* note 29.

¹²⁵ See *Space Age Associates Events Preview Page* (visited Mar. 1, 1998) <<http://www.astronist.demon.co.uk/saa20.html>>.

¹²⁶ See *id.*

issues, it has nevertheless attracted the attention of many space law scholars and been the focus of several colloquia.¹²⁷ Article 22 of the 1988 and 1998 Agreements therefore bears close scrutiny as a possible prototype for future criminal jurisdiction provisions in outer space, which will have to be based on similar international principles if they are to provide satisfactory guidance in this yet-uncharted field.¹²⁸ However, the gaping holes in the 1988 and 1998 Agreements indicate that international treaties cannot, in and of themselves, serve as the basis for criminal jurisdiction in outer space as the human presence there increases.¹²⁹ No single nation can or should be given the type of authority granted to the U.S. by the 1988 Agreement—and yet there is a need for a centralized authoritative body with the power to address the issues raised by space exploration and conquest.¹³⁰ Such an agency, working from the principles informing the 1988 and 1998 Agreements, seems the best way to ensure that criminal jurisdiction over all future space settlements and outposts is assigned in an equitable fashion.¹³¹

Although some provisions of the 1988 Agreement's Article 22 were rooted in traditional theories of territoriality and nationality, the extra criminal jurisdiction granted by it to the U.S. was not based on any customary ground and would arguably have been catastrophic as a prototype for future treaties.¹³² Future space stations and eventual settlements on the moon and Mars are almost certain to be international projects, developed and implemented by several partner countries acting in cooperation; the U.S. is not the most advanced of the spacefaring nations, and will need to work closely with the RSA and ESA (at the very least) to build on the knowledge gained during the ISS experiment.¹³³ Granting the U.S. the type of blanket jurisdiction described in Article 22 of the 1988 Agreement would have created great confusion, particularly given the significant differences in criminal procedure between the common law American system and the civil law

¹²⁷ See, e.g., DeSaussure & Ulrich, *supra* note 56, at 55–58; Charles Chukwuma Okolie, *International Law Principles of Jurisdiction in Regard to Settlements of Humankind on the Moon and Mars*, 34 COLLOQUIUM ON THE LAW OF OUTER SPACE 64–69 (1991); Jan Ondrej, *Problems of Jurisdiction in Connection with Settlements on the Moon and Mars*, 34 COLLOQUIUM ON THE LAW OF OUTER SPACE 71–73 (1991).

¹²⁸ See Okolie, *supra* note 127, at 65.

¹²⁹ See 1988 Agreement, *supra* note 6, art. 22; 1998 Agreement, *supra* note 6, art. 22.

¹³⁰ See CHRISTOL, *supra* note 87, at 200; DeSaussure & Ulrich, *supra* note 56, at 57.

¹³¹ See CHRISTOL, *supra* note 87, at 200; DeSaussure & Ulrich, *supra* note 56, at 57.

¹³² See 1988 Agreement, *supra* note 6, art. 22.

¹³³ See Knut Focke, *International Cooperation in Space: Legal Aspects for the Future*, 33 COLLOQUIUM ON THE LAW OF OUTER SPACE 192, 193 (1990); Twibell, *supra* note 56, at 591.

systems of most partner countries.¹³⁴ It would also have created a serious imbalance of power between the U.S. and other partner countries, thus going against the unique cooperative spirit established by the ISS participants and giving the U.S. a negative, power-grabbing image.¹³⁵ Clearly, revisions needed to be made—and, as major powers like Russia became part of the ISS project, they were.¹³⁶

Article 22 of the 1998 Agreement represents a vast improvement on its 1988 predecessor.¹³⁷ In the 1998 version, criminal jurisdiction provisions are solidly based on customary principles of nationality and the protective principle, the matter of extradition is addressed, and the spirit of mutual cooperation and open discussion is codified for the first time.¹³⁸ The 1998 Agreement's Article 22 also contains language acknowledging the need for further development in the areas of misconduct and order maintenance aboard the ISS.¹³⁹ A separate Code of Conduct, described elsewhere in the Agreement, is to be authored and signed by the partner countries to govern the behavior of ISS crew members.¹⁴⁰ Such an admission that more agreements will be needed demonstrates a continuing commitment to cooperation by the ISS partner countries, but it also reflects the ongoing question of whether any treaty, even one as carefully drafted and important as the 1998 ISS Agreement, can be anything more than an initial framework for creating and maintaining codes of criminal jurisdiction over outer space activities.¹⁴¹ Language like that of the 1988 and 1998 Agreements is too

¹³⁴ For a general overview of the differences in criminal procedure between civil and common law countries, see RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 473–80 (5th ed. 1988).

¹³⁵ See *Remarks at Signing*, *supra* note 29.

¹³⁶ See 1998 Agreement, *supra* note 6, art. 22; 1988 Agreement, *supra* note 6, art. 22; *Remarks at Signing*, *supra* note 29.

¹³⁷ See 1998 Agreement, *supra* note 6, art. 22; 1988 Agreement, *supra* note 6, art. 22; *Remarks at Signing*, *supra* note 29.

¹³⁸ See 1998 Agreement, *supra* note 6, art. 22.

¹³⁹ See *id.* § 5.

¹⁴⁰ See 1998 Agreement, *supra* note 6, art. 11.

¹⁴¹ See 1998 Agreement, *supra* note 6, art. 22, § 5; Focke, *supra* note 133, at 193–94. It could be argued that criminal jurisdiction over the ISS is not really a matter of concern because of the small likelihood that any of the ISS's carefully handpicked crew members, who are admitted to the program only after rigorous training and who are fully aware that they represent their nation under the scrutiny of the world, would commit a criminal offense while aboard. But while this argument may be convincing in its immediate application, it ignores the logical continuation of the ISS: future space stations, which will be more complex and require more crew members, and eventual civilian settlements on the moon and Mars. See *Space Age Associates Events Preview Page*, *supra* note 125.

vague and general to be of real assistance with problems arising in the inevitable context of future space colonization.¹⁴²

VI. CONTINUING PROGRESS AND THE LEGAL FUTURE: A NEW INTERNATIONAL SPACE ORGANIZATION AND CRIMINAL JURISDICTION

Since static language and treaties cannot be easily modified or used as the basis for adjudication, some commentators have argued for the establishment of an international agency exclusively dedicated to addressing and resolving the issues connected with space stations and planetary settlements.¹⁴³ "In order to serve the needs of the space age," one commentator has written, "an [international space] organization undoubtedly must possess the power to formulate legal principles, standards and rules. It also must be endowed with the power to manage or supervise, on behalf of the international community, a number of practical events and activities."¹⁴⁴ Creating such an organization and giving it these powers is the essential first step towards establishing a concrete and satisfactory system for criminal jurisdiction over outer space.¹⁴⁵ Armed with the legal authority to adjudicate, legislate, and supervise, an international space agency would do well to begin with the language of the 1988 and 1998 Agreements on criminal jurisdiction, retaining the provisions and principles that are valid and drafting new language as needed.¹⁴⁶

One of the flaws in both versions of Article 22 is the absence of any language specifying who is to serve as arbiter in the event that two partner countries entitled to exercise jurisdiction both wish to do so.¹⁴⁷ An international space agency would be the obvious choice for such arbitration.¹⁴⁸ Language as overbroad as that in the 1988 Agreement must be avoided: no one country should be entitled to extra jurisdiction such as was given to the U.S. under that Article 22, because such special grants go against the spirit of international cooperation that informs the ISS project.¹⁴⁹ In formulating new guidelines for the exer-

¹⁴² See 1988 Agreement, *supra* note 6, art. 22; 1998 Agreement, *supra* note 6, art. 22.

¹⁴³ See CHRISTOL, *supra* note 87, at 200; REYNOLDS & MERGES, *supra* note 37, at 254; DeSaussure & Ulrich, *supra* note 56, at 57.

¹⁴⁴ CHRISTOL, *supra* note 87, at 201.

¹⁴⁵ See *id.*

¹⁴⁶ See 1998 Agreement, *supra* note 6, art. 22; 1988 Agreement, *supra* note 6, art. 22.

¹⁴⁷ See 1998 Agreement, *supra* note 6, art. 22; 1988 Agreement, *supra* note 6, art. 22.

¹⁴⁸ See CHRISTOL, *supra* note 87, at 201.

¹⁴⁹ See 1988 Agreement, *supra* note 6, art. 22; *Remarks at Signing*, *supra* note 29.

cise of criminal jurisdiction, the proposed international space agency should rely on more traditional principles, like those embraced by other portions of the 1988 and 1998 Agreements.¹⁵⁰

Territoriality and nationality are among the oldest bases for criminal jurisdiction, and the most intuitive.¹⁵¹ Since previous international treaties prevent any country from claiming the moon or other planets as their territory, the international agency entrusted with developing laws of criminal jurisdiction in outer space would be well-advised not to utilize territoriality as a basis for new legislation.¹⁵² The change from the 1988 Agreement, which allowed for jurisdiction based on territoriality over provided elements, and the 1998 Agreement, which did not, may indicate that drafters came to see the eventual problems in its application.¹⁵³ Nationality theory, however, poses no such problems, at least not in the foreseeable future.¹⁵⁴ Astronauts sent into outer space as part of future experimental missions will presumably retain the nationality of their earth country, as the crew members of the ISS do.¹⁵⁵ Until such time as the human presence in outer space includes persons actually born there, nationality could continue to be one satisfactory basis for criminal jurisdiction, just as it has been in the equally non-territorial area of the high seas.¹⁵⁶

The second basis for criminal jurisdiction in outer space that an international space agency should adopt is the passive personality principle, so that a nation may exercise jurisdiction over offenses in which one of its nationals was the victim.¹⁵⁷ The fact that jurisdiction based on this principle is part of the 1998 Agreement's Article 22 indicates that even countries like the U.S., which have historically rejected this doctrine, are beginning to see its advantages.¹⁵⁸ It is true that extending jurisdiction to the countries of both the alleged perpetrator and the victim could lead to a multiplicity of valid jurisdictional choices for any given offense, but an international space agency would have the power and the resources to decide just such questions and

¹⁵⁰ See 1988 Agreement, *supra* note 6, art. 22; 1998 Agreement, *supra* note 6, art. 22; *Remarks at Signing*, *supra* note 29.

¹⁵¹ See OLIVER ET AL., *supra* note 33, at 135, 165.

¹⁵² See Twibell, *supra* note 56, at 593.

¹⁵³ See 1988 Agreement, *supra* note 6, art. 22; 1998 Agreement, *supra* note 6, art. 22.

¹⁵⁴ See OLIVER ET AL., *supra* note 33, at 165.

¹⁵⁵ See 1988 Agreement, *supra* note 6, art. 22.

¹⁵⁶ See OLIVER ET AL., *supra* note 33, at 165.

¹⁵⁷ See YOUNG, *supra* note 7, at 152.

¹⁵⁸ See OLIVER ET AL., *supra* note 33, at 168.

could determine the proper forum; as things currently stand, both countries have the right to exercise jurisdiction, but there is no final arbiter to determine which will ultimately get to do so.¹⁵⁹

The nationality and passive personality bases of jurisdiction will probably be sufficient for projects like the ISS, especially if an international agency is established to resolve conflicts and update the provisions, but that agency will also have to create legislation for larger outer space activities like bigger space stations or manned settlements.¹⁶⁰ When the time for such legislation arrives, criminal jurisdiction based on the protective principle and universal interest could be added.¹⁶¹ The highly technological nature of huge space station projects means that their crews are, theoretically, in a unique position to divulge information that might endanger a country's national security, integrity, or sovereignty. Enabling an earthly nation to exercise jurisdiction over conduct committed wholly in space that threatens these vital interests is therefore sensible.¹⁶² Similarly, every nation should be granted jurisdiction based on universal interest for the heinous crimes in that category that take place in space or on other planets.¹⁶³ Clearly, the offenders will have to be extradited from outer space in order to stand trial in whatever terrestrial nation the proposed international agency deems appropriate, or possibly even in an international court; the agency will therefore need to draft extradition provisions as well, which could easily be done by following the lead of the 1998 Agreement's Article 22.¹⁶⁴

Taken together, the 1988 and 1998 Agreements' Articles 22 demonstrate a growing willingness on the part of the ISS partner countries to compromise particular national principles in order to further the cooperative goals that the project represents.¹⁶⁵ This willingness must be perpetuated to ensure continued cooperation among the world's nations as outer space exploration becomes more advanced and more nations become involved.¹⁶⁶ The important research being done on the

¹⁵⁹ See 1998 Agreement, *supra* note 6, art. 22; CHRISTOL, *supra* note 87, at 201.

¹⁶⁰ See CHRISTOL, *supra* note 87, at 201.

¹⁶¹ See OLIVER ET AL., *supra* note 33, at 177-78.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See 1998 Agreement, *supra* note 6, art. 22.

¹⁶⁵ See *id.*; 1988 Agreement, *supra* note 6, art. 22; *Remarks at Signing*, *supra* note 29.

¹⁶⁶ See Twibell, *supra* note 56, at 591. Many Third World countries, although not part of the current ISS project, possess significant space technology and will undoubtedly become players in the near future. See *id.*

ISS in the fields of microgravity, life sciences, space sciences, and earth sciences, as well as the enormous economic and humanitarian rewards that could be reaped through space industrialization and commercialization, indicate the great advantages of continued progress in the area of space exploration.¹⁶⁷ It is therefore imperative that a workable system of criminal jurisdiction over the ISS, future space stations like it, and eventual manned settlements on the Moon and other planets be developed now, before the first criminal offense is committed in outer space and the need for such a system becomes imminent.¹⁶⁸ An international space agency is a promising solution to the problem of drafting and implementing such legislation because it will not owe particular allegiance to any sovereign nation, and because it will thus be able to create a unitary law for space inhabitants while preventing the conflict of legal regimes on Earth.¹⁶⁹ Such an agency should begin with the solid foundation of Article 22, incorporating into its eventual criminal jurisdiction provisions the bases of nationality and passive personality represented by the 1988 and 1998 Agreements as well as the protective principle and the doctrine of universal interest.¹⁷⁰

It was in a State of the Union address that President Reagan first announced the idea of an international space station, describing it as a project that would “strengthen peace, build prosperity, and expand freedom.”¹⁷¹ Nearly fifteen years later, after major progress on the project and the addition of Russia to its partner countries, President Clinton’s State of the Union address made reference to the fact that the ISS will allow the partner countries to “set sail on an uncharted sea of limitless mystery and unlimited potential.”¹⁷² The unprecedented goodwill and optimism engendered by the ISS in diplomats and scientists worldwide speaks to the potential of such projects, and the fundamental importance of being legally prepared in advance for the technological breakthroughs that are sure to follow in their wake.¹⁷³

¹⁶⁷ See *id.* at 590–91; *The International Space Station*, *supra* note 12.

¹⁶⁸ See DeSaussure & Ulrich, *supra* note 56, at 57.

¹⁶⁹ See *id.*

¹⁷⁰ See 1998 Agreement, *supra* note 6, art. 22.

¹⁷¹ Reagan, *supra* note 1.

¹⁷² William Clinton, State of the Union Address, M2 PRESSWIRE, Jan. 28, 1998, *available in* LEXIS, News Library, 90 Days File.

¹⁷³ See *Remarks at Signing*, *supra* note 29.

CONCLUSION

The ISS project, now nearing realization after more than a decade of development, represents one of the most challenging scientific ventures ever undertaken. The fifteen partner countries involved have recognized and furthered a unique spirit of cooperation and diplomacy throughout the project's progress, beginning with the 1988 Agreement and culminating recently with the revised 1998 Agreement. As the ISS has continued developing, the contributions and role of the partner countries have shifted somewhat, particularly with the addition of Russia to the list of participants. As a result, the criminal jurisdiction provisions of the Agreement have changed: the U.S. has ceded the special grant of jurisdiction it enjoyed under the 1988 Agreement, and the new Article 22 rests squarely on the traditional bases of nationality and passive personality. This solid foundation in recognized principles of international jurisdiction may indicate a willingness to compromise on the part of all partner countries, and also the depth of commitment to the project as a whole. But no treaty language, no matter how egalitarian and carefully drafted, can be sufficient to address the problems that will inevitably arise when the first criminal offense occurs in outer space. Continued colonization and exploration of the extraterrestrial is a given. Articles 22 of the 1988 and 1998 Agreements show what can be accomplished by nations sincerely bent on attaining cooperation and establishing a workable system for all aspects of future space exploration and colonization, including criminal jurisdiction. It is therefore imperative to take the next step on Earth before astronauts take the next steps in space, and establish an international supervisory space agency with the legal knowledge and power to build on prior jurisdictional accomplishments and write the basic code for the centuries ahead.

Stacy J. Ratner