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INTRODUCTION TO A SYMPOSIUM ON ISSUES IN AERO-SPACE LAW

M. C. BASSIOUNI*

THE AGE of outer space has become a reality thrust upon us, limitless, and exhilarating. But the glory and excitement generated by the first orbitings and moon landings are rapidly fading away. Instead, we find ourselves confronted with the consequences of what Astronaut Armstrong, the first man to walk on the moon, called "a great leap for mankind." Prescinding from the very significant issue of priority of space ventures over domestic needs, we must consider that our ecological environment extends beyond this planet. The exploration of outer space and other planets will certainly bring about a number of foreseen and unforeseen problems. As an example, consider that among other things, space debris, orbiting satellites and a host of that which only science fiction can predict, may become the refuse belt of the earth. Already over five thousand objects are traced by NORAD, and by 1980 some twenty thousand orbiting objects and debris will surround the globe. Who, then, owns space and its celestial bodies? How will we resolve conflicts in space?

The space age unfortunately has not been inaugurated after all problems of conventional air transportation have been resolved. The short shrift treatment given some of these problems which developed over the years since commercial aviation became a fact of life, allowed them to accumulate unresolved. Civil and military flights have increased so rapidly in the last twenty years that issues of safety, traffic regulation, and accidents in all forms have become the order of the day almost everywhere in the world. Noise, vibration and other forms of nuisance arising out of this new way of life brought our

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mechanized civilization to what Professor Reich may well call another level of "consciousness."

The jet age came with all its time saving convenience, but also with all its unsettled and unsettling consequences. The hidden cost of that now indispensable fact of life ranges from air traffic control problems to such extravaganzas as the development of supersonic aircrafts, not to overlook the almost routine "hijacking."

This special double issue, volumes 20-2 and 20-3, is dedicated to some of these problems; each article will be briefly introduced in the order of its presentation. Many of the problems discussed in this symposium deal with international law and relations, and it is opportune to remark on their overall significance.

The advancement of world peace through the rule of law can be attained only when people as individuals have reached a level of personal commitment to a common morality that can be adduced as mankind's common denominator. Only then will governments cease to engage in the old world self-serving game of *Realpolitik*. The weakness of international law is attributed to its lack of enforcement capabilities and its reliance on wilful cooperation or voluntary compliance. It is significant however to note that Law does not derive its existence or validity from its coercive potential, but rather that it is enforced because it is Law. Coercion is law's last resort, not its *raison d'être*. The power of moral suasion must never be underestimated because repression is more expedient. There are, according to some estimates, over one million members of the legal profession throughout the world, and most world leaders are trained in the law. The significance of this fact is that seldom, if ever, does any governmental decision-making process anywhere in the world function without taking law into account and without being affected or influenced by legally trained individuals. Thus, through them the world can move in the direction of peace under law. Certainly legal education finds its greatest challenge in exposing those who seek to learn this discipline to the knowledge and realization that no other profession has the same opportunity and obligation to assert its moral leadership in national and world affairs.

If international cooperation and world wide wilful compliance with world community proscriptions existed, no need for coercion

would arise, but if it did, the world community would not find it as impossible as it is today, to muster agreement on the imposition of its collective will. In either case it will depend on whether the peoples of the world by their commitment to the rule of law can exert sufficient moral pressure upon their governments and others to compel their adherence to the rule of law.

In that context efforts at all levels must be enlisted to bolster this new moral force. To that extent the distinguished authors who addressed themselves in this symposium to this point have added their contribution, as has this institution through this forum, to the slow but inexorable process of mankind's quest for peace under law.

PIRACY: AIR AND SEA (*Jacob Sundberg*)

The depth and breadth of Professor Sundberg's article is such that it deserves the highest recognition, but along with it he must endure the criticism that such a major undertaking is bound to attract. It is, therefore, in this spirit that these remarks are made.

"Law" as the embodiment of social values and criminal sanctions imposed for the commission of certain acts, merely reflects the degree of social opprobrium attached to them. Historically, international law grew out of the need to avoid wars among European nations. Modern developments in international law, however, reflect a much broader concept—one less likely to encompass only Western European interests. The history of international law is a complex mixture of idealism, pragmatism and opportunism. When piracy on the high seas was considered a crime by Hugo Grotius in the 1600's, he was acting as the legal adviser to the Dutch West Indies Company. His concern for the freedom of the seas was motivated in large part by his desire to insure the unhindered commerce of the Western colonial powers. Contemporary attempts at making the unlawful seizure of aircraft a crime have a different rationale.

The Tokyo Convention of 1963 indicates priority of the commercial aspects of air transportation over other considerations, while the 1970 Hague Convention emphasizes its greater concern for the criminality of the act and punishment of its perpetrator. The unlawful seizure of aircraft, all too often incorrectly referred to as "hijacking" (a term developed in the United States during the prohibition era),

is deemed by many distinguished publicists to be an international crime, because the act contravenes the social values of the world community. The late Professor Donnedieu de Vabres, (who was France's judge on the International Military Tribunal at Nuremberg and one of the world authorities on international criminal law) believed that an act could become an international crime only if it so offends the common morality of mankind that it would be universally condemnable. Even though he had formulated this idea in the early 1920's, its similarity to the definition of "general principles of international law recognized by civilized nations" is striking. Such "general principles" are one of the sources of international law (Art. 38 of the Statute of the International Court of Justice) and are, therefore, binding upon the member-states of the world community. Is unlawful seizure of aircraft the same as piracy on the high seas and, therefore, by analogy also an international crime, or is it a different type of offense equally deserving of being considered an international crime, but for other reasons? Have such acts risen in the common morality of mankind to the level of universal condemnation likely to merit recognition as an international crime? Have the member-states of the world community recognized, with some degree of uniformity such acts as reprehensible and, therefore, likely to warrant the conclusion that their condemnation is a generally accepted principle of international law? It certainly cannot be said that the condemnation of such acts are part of customary international law. Nation-states have not customarily evidenced through their consistent practice that air piracy is a crime by prosecuting the perpetrators of such acts under their municipal laws or under international law. Professor Sundberg surveys the history of piracy on the high seas and seeks to show that the unlawful seizure of aircraft is but the same crime accomplished by other means. He makes an analysis of this analogy, but the difficulty with it lies in the attempt to establish a relationship between the two types of conduct and their levels of reprehensibility. The 1958 Geneva Convention on the law of the Sea analogizes the two types of "piracy" and labels both as the crime of "piracy". The contemporary standards of the common morality of mankind are, however, taken for granted by the author without regard to the opinions of some publicists who still refute the notion that air piracy is a crime, *iure jus gentium*. The case for air piracy

as an international crime still needs to be made by more publicists like Professor Sundberg so that it can gain wider recognition in legal doctrine to be manifested by the "writings of the most highly qualified publicists" (which is another source of international law).

The unlawful seizure of aircraft must be established as an international crime and be so recognized by the world community because it constitutes a threat not only to commercial interests common to most countries of the world, but also because it represents a real danger to mankind. This is demonstrated by the number of people whose lives are likely to be endangered by such acts regardless of their nationality or status.

Professor Sundberg uses as examples the PFLP (Popular Front for the Liberation of Palestine) cases and tries to retrace the roots of these acts. He sees a basis for these actions by the PFLP in medieval Islamic law and practice; this conclusion is, in the opinion of this writer, unfounded. The rationale for actions by Palestinian commando organizations is in no way based on the *Qu'ran*, the prime source of Islamic Law, but rather is predicated upon their claims against the state of Israel. To analogize their conduct to *Jihad* (holy war) is unjustified, since the conflict between the Palestinian people and Israel and the conflict between other Arab states and the State of Israel are predicated on grounds other than religious.

The author refers to the relationship between war prizes and piracy on the sea and in the air, but gives little detail on the international law aspect of war prizes, particularly when he refers to Israeli aircraft seized by the PFLP. Reference to medieval practices in that part of the world is not relevant to the contemporary context, but it is of course difficult to avoid the controversial topic of the Arab-Israeli conflict. In connection with the examples of unlawful seizure of aircraft cited by the author, the historical references he makes to "private warfare" concepts and practices of the middle ages cast little light on the actual issues of *our* times. "Wars of liberation" are being waged in many parts of the world; therefore, the question deserves treatment in the context in which it is seen by the people claiming it. If unlawful seizures of aircraft are committed by either mentally or psychologically disturbed persons or by those with political motivations, then both categories must be discussed from the aspect of deterrence and enforcement. Professor Sundberg aptly re-

lies on the maxim *aut dedere aut punire*, which imposes a duty on nation-states to combat criminality, so as to preserve minimum world order. He refers to this proposition, which is gaining wider recognition, even though in the years since it was first enunciated by Hugo Grotius in the seventeenth century it became the object of an almost total eclipse. Its acceptance would be tantamount to a rejection of the "political offense exception" to extradition and would require either the rendition of the offender to the requesting state seeking his extradition or, alternatively, his prosecution in the state of refuge. To this extent the concept has become the position of the 1970 Hague Convention on unlawful seizure of aircraft. As the author refers to it, the 10th International Penal Law Congress held in Rome in 1969 endorsed this position with respect to extradition. The alternative to the return of the offender to the requesting state or his prosecution in the landing state is the prosecution of the offender by an international criminal court, as this writer proposed at the international colloquium on extradition held in the Max-Planck Institute in Friburg, i. br., in 1968 and also presented to the International Pre-Congress on International Criminal Law held in Syracuse, Italy in 1969. The proposals made there were in part adopted by the 10th International Penal Law Congress as its resolutions mentioned by the author attest thereto. Another position which this writer advocated at these international conferences was the formulation of a universal convention on extradition. An analogy can be drawn between this idea and the 1970 Hague Convention, which is a multilateral convention, signed then by over fifty nation-states (but not yet ratified).

Professor Sundberg limited his discussion of the problems of the "political offense exception" to extradition to a minimum, although it would have merited more attention, but here again, any author must draw some arbitrary cut-off line on the extent of his coverage.

The greatest difficulty remains in the application of sanctions against violations of the Tokyo and Hague Conventions. Certainly once it is recognized that a given type of conduct is punishable, the question of what substantive law is applicable must be answered. The Tokyo and Hague Conventions satisfy in part the requirement of *nulla poene sine legge*, but will they satisfy that of *nullum crimen sine poena*? The answer is negative; therefore, the United

States and Canada jointly proposed a sanctions convention which is intended to fill this loophole. The joint proposal was made after the Sundberg article had been completed and is, therefore, attached as an appendix thereto at this writer's suggestion.

Professor Sundberg's well-documented article embraces many of the problems of unlawful seizure of aircraft (which he refers to as "air piracy"). He outlines these problems with a wealth of references to the historical antecedent of piracy on the high seas, and he deserves great recognition for his scholarship and efforts to bring about a better understanding of a difficult problem confronting the world community.

PROBLEMS REGARDING AVIATION LITIGATION (*John Kennelly*)

This article is but another of the many publications of this distinguished trial lawyer. The author introduces the reader to what a colleague, Professor Rosenfield, refers to as "the international numbers game." Considering applicable international treaties on limitation of personal injury liability arising out of aircraft accidents, this able plaintiff's counsel makes a case against limitation of liability for wrongful death. He then considers the nature of a cause of action against an airline and details its requirements. The article makes a case against treaties limiting liability of carriers whom the author represents as the beneficiaries of discriminatory treaties applicable in American courts in violation of the Constitution.

There are, of course, very few hints offered to the defense, and in fact, defenses available to the carriers are frequently taken to task. The author labels carriage contracts as contracts of adhesion, in which the fine print disclaimers and notices of limited liability are traps for the unwary and choiceless passenger. The case study he makes is thorough, even if partisan, but is of interest to both the practitioner and student.

The author shows with incisiveness how courts have used conflict of laws theories to avoid what he calls "conflicts in the law," and thereby soften the harshness of limited liability in wrongful death actions. He fails, however, to examine sufficiently the Guatemala Protocol of February, 1971, which supersedes the Warsaw Conven-

tion and the other agreements upon which the author relies for his conclusions. The reader should be mindful of the fact that the Guatemala Protocol sets a ceiling of \$100,000 recovery per death, but allows each signatory state to increase the amount of the passenger's coverage for death beyond the limit set forth. This supplemental coverage to be underwritten with commercial insurers should remove most of the author's objections, except for the fact that its cost, even though minimal will be passed on to the passenger in that it will be reflected in the price of his ticket. Because of this optional increase clause, there will be, of course, some disparity among nations and carriers. The problems of administering several liability ceilings funded by various insurance programs in diverse countries and applicable differently to passengers depending upon their nationality is likely to be cumbersome, but its major advantage is obvious. Because of the importance of this new treaty, it appears after the article of Attorney John Kennelly at the suggestion of this writer; with it is a letter from Mr. Jared Carter, Assistant Legal Advisor for Economic Affairs, Department of State who offers his valuable comments on the Protocol's importance.

Attorney Kennelly's research and thought provoking arguments would have been of great value to the practitioner and student if much of it did not bear great resemblance to what he presented in his books also cited in the article. The author makes, however, a most convincing case against arbitrary limitation of liability by treaty, even though this argument may have lost some of its significance since the Guatemala Protocol.

INTERNATIONAL LAW—CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT OR, MORE SIMPLY, THE TOKYO CONVENTION (*Robert Klimek*)

No study of unlawful seizure of aircraft can avoid a discussion of the Tokyo Convention. This Convention, although signed in 1963, became effective in 1969 with the deposition of the 12th instrument of ratification, which in this case was the United States. The Convention was no sooner in force than it was to a large extent obsolete. The 1970 Hague Convention, which superseded it, shifted the Commercial interest emphasis that Tokyo displayed to a more enforcement control orientation.

The Tokyo Convention was a milestone upon which the Hague Convention was built, but the concern of the world community is turning to sanctions and the necessary steps and machinery for this implementation. Mr. Klimek's article-by-article study of the Tokyo Convention is done carefully and thoughtfully. His research into the law and practice of extradition, although limited, is indispensable to an appreciation of the Convention. There have been many studies of the "political offense" and its relationship to "hijacking," and the author wisely limits himself to referring the reader thereto and consequently avoids the ungrateful task of attempting to tackle this controversial topic.

The appendices are worthy of careful consideration by the reader, even though the information on "hijackings" was not gathered by Mr. Klimek. The Klimek article should ideally be read before Professor Sundberg's article in order to develop a better feel for the chronology of international efforts to deter and combat the crime of unlawful seizure of aircraft.

AIR LAW—THE MEMORY LINGERS ON: *Ad Coelum* IN THE 1970's
—SOME NEW APPROACHES (*Terrence Benshoof*)

Aircraft have to take off and land, and one direct result of that process is noise and vibration. The increase in air traffic is intensifying these troublesome aspects of the winged society. Considering that Chicago's O'Hare Airport, which is located in a populated area, handles over 600,000 landings and takeoffs per year and that over 60 metropolitan airports in the States will, by 1980, handle on the average some 400,000 flights per year, the problem is staggering.

The author discusses the doctrine of *ad coelum* which originated with Blackstone as a property law concept in Anglo-Saxon law and, in the opinion of Mr. Benshoof, is still valid. This assertion is, however, questionable. He examines the doctrine's relationship to the overflight doctrine with respect to noise and vibration damages under federal and state law. His approach is to balance the interests involved in an equitable fashion, weighing the public interest and the right of the owner of the premises which are damaged by overhead flights. He outlines these problems on the basis of a case law study presented with a view toward determining the legal basis

of a right to recovery and the right to injunctive protection from such damages.

Perhaps no property owner can claim ownership of the air above his property *ad coelum*, but to the extent that he is entitled to be free from noise and vibration damage, the author feels that the doctrine survives and to that extent he will find little quarrel from anyone. However, the problem of sonic booms and supersonic flights should have received more attention, since the application and implications of the author's theory extend thereto. The dimension of "noise pollution" and its psychological effect on people's behavioral patterns are a matter of contemporary interest and social significance which should be considered in any study relating to noise, vibration, airport location, developing technique in noise control, and direction of flight patterns. But unlike civil actions for property damage, this related question of ecology goes to the very quality of life in a highly mechanized society, and, therefore, is of extreme importance to the entire community.

SOME COMMENTS ON A TRUE STEP TOWARD INTERNATIONAL CO-OPERATION IN SPACE: THE TREATY OF JANUARY 27, 1967. (*Aldo Armando Cocca*)

As the title of this article indicates, it is a commentary upon a treaty, namely: Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. Professor Cocca whose many activities and participation in international conferences on this subject including his country's representation on the subject at the United Nations, briefly covers the antecedents of this landmark Treaty. He does so not because he seeks to give it short shrift treatment, but because he elected to use the Treaty merely as a vehicle to indicate the emergence and development of a *jus humanitatis*, a law of mankind. This very laudable approach is intended to erode at the doubts of the skeptical and reinforce the hopeful that international cooperation can be attained even in a politically divided world.

Who owns space; what can any one nation do in that environment; who owns the moon and other celestial bodies; and what can be done on these bodies? These are some of the questions the

Treaty seeks to answer. What the Treaty says, however, is to some extent less significant than why it says it. Professor Cocca highlights this point as he emphasizes the Treaty's two premises: that it is framed in the spirit of a *jus humanitatis* and establishes the principle that space and celestial bodies are *res communis humanitatis*, the common ownership of mankind. The same notion is at the base of the latest positions on the law of the sea, the exploitation of its resources, the sea bed and beneath it. Arguing for a new conference on the Law of the Sea, Ambassador Parto of Malta urged the United Nations to consider the natural resources of the Sea as "the natural heritage of mankind" (A conference on the Law of the Sea will be held in Geneva in 1973). And so international law advances with the developing needs of mankind, slowly and seriously hampered by the ideological divisions that rake the world with animosity and divisiveness.

Professor Cocca's treatment of some of the Treaty provisions are intended to reveal more the spirit of the agreement than its specifics. Like Professor Gorove and Attorney Sloup whose articles follow, this author also emphasizes the role of international law in prevention and resolution of conflicts. Unlike Mr. Sloup who offers specific creative suggestions or Professor Gorove who discusses sources of conflicts and rules of resolution, this author concentrated on what can be called the philosophy of international cooperation manifested by this Treaty. All three articles have one most important common value-oriented goal, namely: to preserve minimum world order, and their most able presentations are most likely to advance the understanding of the Rule of Law.

INTERNATIONAL PROTECTION OF ASTRONAUTS AND SPACE OBJECTS
—NATIONAL AND INTERNATIONAL THEORIES OF JURISDICTION
(*Stephen Gorove*)

When astronauts are in space or on their way to and from space, they are likely to be endangered, to stray from their intended course; they may enter another state's airspace, or land fortuously on its territory. Objects, be they spaceships, their boosters or parts thereof, are also likely to fall unintentionally onto a state's territory. The subject matter of these problem areas has been covered in two interna-

tional landmark documents which are analyzed by the author with great thoroughness. This detailed study of outer space legislation is applied to a selection of hypothetical, though foreseeable, problems.

Professor Gorove is no stranger to the law of outer space as indicated by references to his other works. The interesting treatment given this question lies also in the approach taken to these problems as they may realistically occur. Rather than examining all the legal ramifications of these questions, he focuses first on definitions of terms, their significance and application. He then examines the problem of jurisdiction. The applicable law and proper forum are indeed the beginning of all juridical inquiries. Professor Gorove guides the reader into a new field of law, with precision of terms and clarity of thought that makes this difficult area seem almost simple. It is hard to say whether this thorough study overlooked any potential application of astronaut protection and space objects; time and experience will no doubt reveal many additional problems.

PEACEFUL RESOLUTION OF OUTER-SPACE CONFLICTS THROUGH THE INTERNATIONAL COURT OF JUSTICE: THE LINE OF LEAST RESISTANCE. (*George P. Sloup*)

It may seem an overreach by anyone to attempt to cover all or even a portion of the problems of outer space and to propose a realistic solution thereto. Professors McDougal and Vlasic were the early pioneers of this field and inspired Mr. Sloup by their work. He sought to focus his efforts, in the best tradition of a generalist, on the catalogue of known and foreseeable problems of space, proffering a realistic and feasible solution thereto. A basic assumption of this study is that technology placed man on the moon and objects in space, but law has yet to catch up with these developments. The number of people and objects in space is ever-increasing and their movement to and fro has become an everyday occurrence. That is why problems will arise between states involved in space activities. Mr. Sloup catalogs these problems and their potential for international conflict in a very informative manner, then proceeds to seek a process for channelling anticipated conflicts into a model for peaceful resolution. A logical assumption made is that major conflicts will arise essentially because of the lack of an international forum

likely to resolve smaller practical problems. Outlining in survey form various theories of national and international jurisdiction, he concludes that under existing legal doctrine and in view of the nature of the conflicts likely to develop, only a true international forum is presently capable of effectively coping with such a situation. He offers the forum of the International Court of Justice as an existing structure already accepted by the member-states of the world community. Mr. Sloup relies on this existing structure, rather than proposing another forum, on the premise that nation-states will, as Professor Hans Kelsen put it, "follow the path of least resistance", and accept a broadened jurisdiction of the I.C.J. to encompass conflicts in space. To achieve this end, he relies on the book of Professor Shihata, which explores the International Court of Justice's "competence of the competence." Mr. Sloup analogizing Shihata's most thorough thesis, shows how the Court has the power to determine its own competence and, therefore, can evolve into becoming that proper forum he envisages. This, however, is seen as an interim stage to be utilized until such time as a new more specialized forum could be developed to respond to the needs of the ensuing decades of space voyagers.

The wealth of information and reference presented in this article will not escape the reader and will delight the researcher for its appropriateness and selectivity.

A DOCUMENTATION OF THE PROFESSIONAL AIR TRAFFIC CONTROLLER'S ORGANIZATION—FEDERAL AVIATION ADMINISTRATION LABOR DISPUTE OF 1970—AN ILLUSTRATION OF THE NEED FOR A CHANGE IN PUBLIC EMPLOYEE LABOR DISPUTE SETTLEMENT TECHNIQUES (*James Calabrese*)

This article is a realistic, well-documented evaluation of public employees, labor dispute settlement and developing techniques and methods needed in this area. Mr. Calabrese suggests new methods for settlement of employee disputes in three areas and gives this specialized subject the benefit of an informed study which the reader will, no doubt, acknowledge.

The vital importance of maintaining the unhindered flow of air traffic requires a special apparatus to handle disputes, which are

likely to be economically and socially crippling. The problem, as outlined is very real and the solutions proposed quite needed. Strikes and slow-downs among air traffic controllers in 1970 showed the extent of society's reliance on air traffic. Labor negotiation devices were discussed by the author, who then makes an evaluation of such techniques and offers some insight into their effectiveness, all of which is deserving of the reader's careful consideration.

CERTIFICATION PROCEDURES—AIRCRAFT AND PILOT: THE ROLES OF THE FEDERAL AVIATION ADMINISTRATION AND THE NATIONAL TRANSPORTATION SAFETY BOARD (*Daniel Wanat*)

The author reviews the certification process and procedures under the Federal Aviation Act and various FAA regulations and the NTSB. He surveys aircraft and pilot certification regulations and procedures set by FAA and NTSB, showing their technological effectiveness.

He is very praise-worthy of the efficiency and security consciousness of these agencies which, as he reveals, has successfully reduced flight accidents. Mr. Wanat examines the safety record of the airline industry (aircraft and pilots), as well as contemporary standards set by these public agencies, foreseeing that FAA and NTSB will more than likely meet future needs as an effective watchdog of public safety. The appraisal made of these agencies is justified and documented; even so it is refreshing to read these days about a governmental agency deserving of praise. That there is, however, room for improvement within these agencies at least to increase their administrative efficiency is beyond question; however, this observation is not meant to detract from the quality of this fine article.