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Book Review: The Illegal Diversion of Aircraft and International Law

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Book Review

THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW. By Edward McWhinney. Leyden, The Netherlands: Sijthoff; Oceana Publications, Dobbs Ferry, N. Y., 1975. Pp. 123. DFI. 20.00.

In this slim volume of lectures Professor McWhinney informatively analyzes the comparative limitations of international law-making as a means of solving the international "air piracy" problem. In doing so, he offers broader lessons applicable to more current problems, such as terrorism generally, and to as yet unperceived phenomena of the future.

The author starts with the "polycentricity" of hijacking, noting that the perpetrators encompass a wide range—political and religious refugees, a "lunatic fringe," "sky bandits" for profit, and politically motivated terrorists. In short, the symptoms are universal but the causes manifold. This diversity in the origins of the problem is matched, the author then points out, by a corresponding difference of perspectives within the "special legal community" affected by hijacking in all its forms. Thus, major airline countries may be especially concerned with the security of their investment in routes and equipment, pilots may be preoccupied with physical safety, and non-aviation countries may sympathize with such political expression as is involved, with the dazed passengers being somewhat neglected. Even individual angles of vision vary, depending on the facts: Both the United States and the Soviet Union react differently to the case of a fleeing Soviet Jew and that of a Palestinian guerrilla. Of necessity this disparity among both causes and concerns is reflected, with untidy results, in the international organizations reacting to the problem, whether private, such as IATA and IFALPA, or public, such as ICAO and the United Nations itself.

It is small wonder, the author suggests, that the world community has been only modestly successful in attempting to solve the multifaceted problem of "illegal diversion" by adoption of broad international agreements. A major part of the book is devoted to

tracing the development of the Tokyo, Hague, and Montreal Conventions and the subsequent, ultimately unsuccessful efforts towards a Sanctions Convention which would "put teeth" in that triad. As a compilation of the historical record alone, this portion of Chapter 3 is quite useful. The author next turns to a favorable analysis of the bilateral approach to international lawmaking, focusing on the United States-Cuban accord of February 15, 1973, and then sifts discriminatingly through the relative merits of informal arrangements, initiatives by pilot and carrier groups, individual law suits, and national actions, including administration of air transport agreements, penal law, pre-flight searches and use of "sky marshals."

The predictable bias resulting from the author's analysis is foreshadowed in the characteristically professorial title of the final chapter: "The Balance-Sheet of International Legal Problem-Solving In Regard To Aerial Hijacking: Holistic Or Global Solutions Versus Pragmatic, Empirical, Problem-Oriented Methods." Beneath the political gaudiness inherent in our apparent failures to achieve forceful global solutions the problem has been substantially solved by a combination of less ambitious means, not the least of which has been the United States requirements, since early 1973, of total passenger screening. Professor McWhinney particularly suggests that specialized organizations such as ICAO "limit themselves to their own 'special competence'" and avoid "more generally political aspects" of problems such as hijacking.

It is possible, while concurring in the author's basic analysis, to disagree with his ultimate conclusions. As Professor McWhinney himself implies, the real reason hijacking has diminished as a world problem is that most nations have arrived at an unspoken consensus that it is bad to hijack for individualized or selfish reasons, *e.g.*, due to mental illness or for profit, but that hijacking motivated by broader political considerations, *e.g.*, religious persecution or dramatization of political grievances, is at least tolerable if accomplished with no loss of life or serious injury among crew and passengers. If the broad international lawmaking efforts of ICAO have not themselves borne the final fruit, have they not by their very being—noisome, prolonged and evident—increased sensitivity to the problem and thus helped fashion the consensus? There is no reason to believe that the elements contributing to a solution of the hijack-

ing problem have been any less multifarious than its causes and impact. Indeed, on the theory that form is, after all, substance, there is much to be said for the proposition that the "failures" of ICAO helped ensure the ultimate success of more prosaic methods.

All in all, Professor McWhinney's book, apart from being a handy narrative of its subject, provides a fairly readable, self-contained study of international lawmaking in an increasingly political world. As such, it should be a useful text for wider debates in legal philosophy.

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