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INTERNATIONAL REVIEW

FROM WARSAW TO THE FRENCH COUR DE CASSATION: ARTICLE 25 OF THE WARSAW CONVENTION

BY JULIAN G. VERPLAETSE

THE WARSAW CONVENTION enacted in 1929, establishes a presumption of liability on the part of the air carrier for death, wounding or any other bodily injury suffered by passengers in Article 17 or in the event of the destruction or loss of or damage to any registered luggage or goods as per Article 18. As a counterpoise to the assumption of liability, the Convention provides for certain limits thereto; the most important being in Article 22 (4) that the liability of the carrier for each passenger shall be limited to 125,000 Poincare francs or approximately \$8,300. Certain exemptions from liability are provided in favor of the carrier in Articles 20 (1), (2), 21, and 26. But on the other hand, passengers will be, in certain cases, freed from any exemption or limit foreseen in favor of the carrier. Article 25 is a topical case and brings us to the subject of this paper.

The translation of Article 25 of the French text of the Warsaw Convention, as consented to by the United States Senate on 15 June 1934, reads as follows:

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by any such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.¹

This is a knotty text, which could offer an excellent topic for scholastic meditations on the interplay between conventional international law and domestic law and on the pervasive stress between uniform law and conflict of laws. This provision is one of four in the Convention² which refer to the *lex fori*. The default (*faute*) is to be calibrated by the law of the court seized of the case. The drafters, under the influence of Professor Ripert, thought that they would avoid thereby any *non liquet* derived

¹ The authentic text of the Warsaw Convention is in the French language in Article 36. Since the binding international instrument is the single copy of that text it is appropriate to give, alongside, the French original: (1) "Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol. (2) Ce droit lui sera également refusé si le dommage a été causé dans les mêmes conditions par un de ses préposés agissant dans l'exercice de ses fonctions."

² The others are Warsaw Convention, arts. 21, 28 (2), 29 (1926).

from unknown or uncertain institutes. The happy result did not follow. Indeed, the mischief was at the bottom of the provision. Anglo-American law, which was going to be of paramount importance in air matters, does not know the French concept of "dol" nor, by and large, the concept of "faute lourde" which acted as an equivalent of or a substitute for "dol." The translation of "dol" as "wilful misconduct" was a misnomer. To cap it all, the civil lawyers were not agreed among themselves on the innermost structure of the provision. Three main trends could be distinguished:

1) In dominant practice it was thought that the text provided two causes of action in favor of the passenger or shipper: "dol" and "faute équivalente au dol." The drafters, wrongfully, thought that they were in agreement on "dol" as "wilful misconduct." Being unable to agree on a common definition of gross negligence, they referred to the definitions of the *lex fori*.

2) Another theory maintained that there was only one cause: "Dol" in civil law countries, and gross negligence in those countries that do not know the concept of "dol." It would seem that this was, indeed, what the drafters had in mind and the intent of the Convention should prevail over the faulty drafting.

3) Some wanted to reconcile text and intent through a common underlying concept: The Roman law rule: *culpa lata dolo equiparatur* (gross negligence is held to be equivalent to intentional wrong). They even went so far as to obfuscate the reference to the *lex fori* by suggesting that it could never endanger the purpose of the Convention, which was unification of the law.

The contradictions, discrepancies and uncertainties of interpretation, even in civil law countries, where the rule *culpa lata dolo equiparatur* is affirmed here and denied there, led to the attempt at The Hague, in 1955, where the limits were doubled, to find an accurate definition of the basic purpose of Article 25. The original Warsaw draft was discarded and replaced by the following formula:

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with the intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.³

This formula endorsed American practice as evidenced by the decisions of the courts.⁴ It purported to bring final unity and to end the chaos of

³ The Hague Protocol, 1955 is drafted in three versions, each of which is authentic. But, after an eloquent appeal of Me Garnault, it was decided that the French version shall prevail in case of any inconsistency. The French version reads: "Les limites de responsabilité prévues à l'art. 22 ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du transporteur ou de ses préposés fait, soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés, la preuve soit également apportée que ceux-ci ont agi dans l'exercice de leurs fonctions."

⁴ See the extracts in VERPLAETSE: INTERNATIONAL LAW IN VERTICAL SPACE 327 *et seq.* (1960). The formula is a condensed statement of the very terms used in those decisions. See, e.g., Pekelis

conceptualism which had foiled the intent of the Warsaw Convention. It purported to be a universal, simple and magic definition of unwonted negligence.

The Montreal Agreement, enacted in 1966, although allegedly operating under the special contract provision of Article 22(1) of the Warsaw Convention, is, in fact, an amendment of the Convention reached through the heretical procedure of a so-called private agreement between private carriers.⁵ It raises the liability limit to \$75,000 and waives the carrier's defenses leading to exemption from liability under Article 20(1).⁶

France is one of the countries which, having ratified the Warsaw Convention, accepted the Warsaw scheme also as domestic law. The latter was performed by the Statute of 2 March 1957. France, likewise, ratified the Hague Protocol by a Decree of 31 December 1959. The Hague Protocol entered into force on 1 August 1963, yet, the French Statutes had already taken into account the formula of the Hague Protocol on gross negligence provided in its Article 42:

Pour l'application de l'Article 25 de la dite Convention (la Convention de Varsovie du 12 octobre 1929), la faute considérée comme équivalente au dol est la faute inexcusable. Est inexcusable la faute délibérée qui implique la conscience de la probabilité du dommage et son acceptation téméraire sans raison valable.⁷

The text calls for several observations:

1. It is similar to but still different from the text of the Hague Protocol.⁸
2. It applies only to the Warsaw Convention.
3. Unlike the Hague Protocol text, it does not cover the concept of "dol."
4. It only defines *lege fori*, conformably the Warsaw Convention, the default equivalent to willful misconduct.
5. It does not refer to the Hague Protocol which, legally, would apply on a different level. The Protocol text prevails in any case where it is applicable, in accordance with Article 55 of the French Constitution which gives supremacy to treaties over statutes.⁹

v. *Transcontinental and Western Airlines, Inc.*, 187 F.2d 122 (2d Cir.); *cert. denied*, 341 U.S. 951 (1951).

⁵ Reference is to the private agreement of 13 May 1966, between 11 United States and 17 foreign air carriers.

⁶ The agreement works within the limits of the Warsaw Convention but only when the air travel starts or ends or has a stopping place in the U.S.A. Not all air carriers are parties to the agreement and some of the parties did not waive art. 20(1).

⁷ Translation: "For the application of art. 25 of said Convention, the fault considered as equivalent to 'dol' is the unwarrantable fault, which implies the consciousness of the probability of damage and its reckless acceptance without good reason."

⁸ The formula, although it reminds one of the Hague spirit, is in fact taken over entirely from a chronicle by Dean Chauveau in *Dalloz* 1955, 81. If the formula is similar to the Hague text, the latter is not adopted as the French law. On that point the Hague Protocol is implicitly rejected or, at least, explicitly dubbed and the French Law sticks to its own interpretation of art. 25 of the Warsaw Convention. It also recalls the formula contrived by the Cour de Cassation in matters of Workmen's Compensation. (Cass. Chambres Réunies 15 July 1941, J.C.P. 1941. II. 1705, note Mihura, *Dalloz Jur.*, 1941, II, note Rouast), although advocate General Lindon has shown that, here again, differences exist.

⁹ The legal situation is thus as follows: a) In relation with Warsaw countries, France applies the Warsaw text but has laid down by the 1957 Statute its own definition of gross negligence. b) With respect to Hague countries, France is bound by the Hague text, which inspired the Statute,

6. It may be supposed, however, that the French courts will be strongly influenced by the phrasing of their own statute and this is what actually happened.

One outstanding point is that the French courts may interpret the term "conscience" (knowledge), which appears in the Hague Protocol as well as in the French statute, in a manner which does not correspond to the meaning of the Hague Protocol as accepted by other countries. In this prospect, the ill-fated trial at the ill-starred Conference of the Hague, in 1955, would not lead to uniformity, which remains as conspicuously absent as in the Warsaw Convention.

In a 1967 decision in the case of *Emery et al v. Sabena*, the French Cour de Cassation held that behavior must be interpreted objectively and not subjectively.¹⁰ The decision of the French Cour de Cassation on 24 June 1968, in *Air France v. Dame Namadou Diop*, considering the Hague Protocol (although it was a Warsaw case) also affirmed an objective criterion implying that "conscience" (knowledge) means that which should be and not that which actually existed: "Qu'il ne pouvait pas ne pas avoir conscience des risques probables auxquels il s'exposait et exposait les occupants de l'aeronef."¹¹ The interpretation of the Court is that the pilot *should have had* knowledge and not that he *actually had*, borrowing wording akin to that used in workmen's compensation matters.¹²

It is a mystery why the French legislator, allegedly intent on borrowing the Warsaw-Hague scheme, did not take over *ipsis verbis* the definition given by the Hague Protocol to Article 25 of the Warsaw Convention. Although the terms are similar in both legal instruments, the Hague Protocol and the 1957 Statute, differences exist and are bound to develop further in the interpretation of the international agreement. The term

1957, but is not identical to it. c) With regard to countries which are neither members of Warsaw nor of the Hague, the French Statute, 1957, applies, which allegedly purported to take over the Warsaw-Hague scheme, but apparently did not achieve this result.

¹⁰ Accident litigated: Viterbe, 13 February 1955. In that case, the pilot had drifted 60 km. from the beam but the court of appeals had held that he was not aware of the drift and, hence, that his fault was not "une faute délibérée," one which implied "la conscience de la probabilité du dommage et son acceptation volontaire sans raison valable." The Cour de Cassation, however, maintained that the crew knew the importance of the atmospheric perturbations as well as of the mountainous region, that they did not use the full set of radio means at their disposal which would have allowed them to correct the navigation, and that the subjective interpretation of these errors by the court of appeals was not a correct deduction of law.

¹¹ Translation: "that he could not, not have had consciousness of the probable risks to which he exposed himself and exposed the occupants of the airplane."

¹² Accident litigated: Cape Verde, 29 August 1960. The Cour de Cassation, approving the court of appeals, lumps together Warsaw, The Hague and the French Statute (1957) and qualifies the act or omission required as one "fait téméairement, avec conscience qu'un dommage en résultera probablement, et non pas d'une faute commise avec la conscience d'un risque." It discovered such circumstances when it found that the pilot landed, although he knew that heavy rains and storms had just visited the landing area and prevented contact with the radio tower, that he had enough fuel for two hours, that he came below the minimum height several times in his search for the landing strip, that he did not use instruments and was known for his temerarious behavior. Compare: German case law, which is definitely restrictive, sticks to the traditional interpretation of art. 25 of the Warsaw Convention and to the combined effect of objective and subjective elements in the concept of gross negligence (grobe Fahrlässigkeit): B.G.H. July 11, 1967, in 17 Z L R W 1968, 85. Compare: Belgian case law, which seems to cling to a purely subjective interpretation of art. 25 Warsaw Convention: Delaby c. Sotramat, Appeal Brussels January 12, 1965, R. G. A. E. 1969, 66, note Nys ("on conçoit mal qu'il ait voulu, sans nécessité"; "il n'est pas établi qu'il l'ait fait intentionnellement"; "qu'il n'est pas exclu que son comportement peut s'expliquer . . .").

knowledge ("conscience") is one of them. In the Hague Protocol "avec conscience qu'un dommage en résultera probablement" reeks of subjective conditioning, *i.e.*, that the defendant must have had *effective consciousness and knowledge* of the damage which would have probably resulted. If he does not have the "conscience," if he merely *should have had* it, the exoneration or exemption from limits of Article 25 does not apply. With the text of the 1957 Statute, this position is not so clear and French case law today clings to a broad interpretation; the meaning given to "conscience" being: *Should have had* consciousness. This interpretation is against the text of the 1957 Statute, which speaks of "la conscience de la probabilité du dommage et son acceptation térméraire, sans raisons valables." One cannot accept the probability of a damage of which one *should be* aware, only of a damage of which one *is* aware. A further difference of case law from the text both of the Protocol and the Statute appears in the decision of the Cour de Cassation of 24 June 1968, where it is held "qu'il ne pouvait pas ne pas avoir conscience des risques probables," whereas the Protocol, as well as the Statute, speaks not of consciousness of the risks, but of consciousness of the likelihood of damage.

Perhaps, if one may sound, with some over-simplification, the rock bottom of the new line of argument of the Cour de Cassation, one might state it as a reversal of the terms of evidence. Alongside the presumption of fault,¹³ the Cour de Cassation introduces a qualified presumption of gross default (*dol*, *faute équivalente au dol*, *faute inexcusable*). Grosso modo, up till now, any such default required the proof by plaintiff of the intent or awareness to cause the damage. This was a rather absurd proposition since no one could suppose that the carrier or his agents would willfully inflict or risk self-destruction. Under the new concept of the Cour de Cassation, close to *res ipsa loquitur*, it is assumed that certain circumstances imply gross default, irrespective of a subjective intent of defendant. Instead of elaborating on the material element of the 1957 Statute: *la faute délibérée qui implique la conscience de la probabilité du dommage*, the Cour de Cassation found the *preuve implicite* de la conscience qu'il en avait.¹⁴ The implicitness is shifted from substance to proof.

The trend involves several elements: The way back from *culpa in concreto* to the standard of reasonable care of the bonus paterfamilias, from *onus probandi* on the victim to a presumption in his favor along objective criteria, and from automatic compensation tempered by upper limits of liability to the traditional negligence system tempered by exclusive lower limits of fault.

The *ratio arguendi* of the French courts must be investigated in the light of the general economy of the international system of liability for damages caused in the course of carriage by air. Since carriage by air is international by its very essence, it is advisable to avoid, by means of a uniform law settled through international convention, the many conflicts of laws to which it would be heir. This was one of the purposes of the

¹³ Warsaw Convention, arts. 17, 18 (1929).

¹⁴ Translation: "The implicit proof of the consciousness which he had."

Warsaw Convention: That uniform law must be based on a realistic appraisal and weighing of all the interests involved. The customer has an interest in obtaining, through a smooth and speedy procedure, compensation for damage caused. This could hardly be expected if he had to struggle through the jungle of evidence of fault in accidents which, at that time, quite often, left neither survivors nor the slightest clue of proof. The carrier, however, could hardly cope with absolute liability at this pioneering stage, since it was fraught with the odds of high investments and engaged in heavy risks. The insurer had to limit his share of burden, and the insurance market was not in a position to face unlimited claims in a business which, at that time, was sometimes regarded as too dangerous to be insured.

Hence, a compromise was devised. A presumption of liability of the carriers became the pivot of the device. But the amount of damage to be paid was limited by an upper ceiling. This limit, traditional in cases of presumption of fault and in those of absolute liability, worked, however, under a system of higher appeal to fault which is the substratum of the legal Warsaw structure. It could be discarded by the carrier, if he proved the utmost care under Article 20, as well as by the customer if he proved willful misconduct or gross negligence of the carrier. In the latter case the client could recover to the full extent on the basis of fault.

After World War II a change in the basic elements of that system upset its balance. Air carriage was no more than ultrahazardous business. Air insurance had the benefits of enhanced safety and the experience of its bearings. The cost of living and the value of human life in some parts of the world had soared beyond the gold content of the Poincare franc.¹⁵

In order to reestablish the equilibrium, an international conference was convened, after years of preparations and tentative drafts, at the Hague in 1955. A looker-on, as the present writer was at The Hague, could not help being strongly convinced of the uselessness of the meetings. In order to do justice, the reestablishment of equilibrium was sought at the hinge of the limit of liability. The promoter for the increase of the limit was the United States. It was quite evident that most delegations were against a substantial increase. It was equally obvious that the United States delegation was completely dissatisfied with the compromise result of doubling the limits and an additional fringe of litigation costs. The question of liability being the kernel of the revisory proceedings and the conference having failed on that point, it was only a small step to conclude the failure of the Hague Protocol.

But there were other and perhaps more serious reasons which forecast

¹⁵ Warsaw Convention, art. 22(4) (1929). The trend back to full compensation appears in all accident cases all over the world. Recently a man injured in a motor accident was awarded £ 74,500 by the Q. B. D. (*The Times*, April 22, 1969). It is easy to see that aviation accidents could not stay behind: See also, Eike von Hippel: *Schadenausgleich bei Verkehrsunfällen. Haftungsersatzung durch Versicherungsschutz. Eine rechtsvergleichende Untersuchung* (Berlin 1968); Ehrenzweig *Full Aid Insurance for the Traffic Victim—A Voluntary Compensation Plan*, 43 CALIF. L. REV. 1 *et seq.*; Ehrenzweig, *Negligence without Fault—Trends towards an Enterprise Liability for Insurable Loss* (1951), reprinted in 54 CALIF. C. REP. 1422 (1966). The *iuscicendi* of Lisi, now confirmed by Bayles (N.Y.S.D. 1968), springs from the same general trend.

its doom. Indeed, the whole idea and technique of amendment of the Warsaw text by a Protocol had inherent and implemental hitches which made it pretty unworkable from the viewpoint of international law.¹⁶ Small wonder, therefore, that the problems remained unsettled. The crux was still the limit of liability. The United States denounced the Warsaw Convention, but dropped their denunciation when more adequate compensation was secured in Montreal in 1966. Although official opinion would not have it, the Montreal agreement meant the disruption of the Warsaw Convention. The Panel of Experts of ICAO had been discussing a new Convention. Those discussions have not yet produced a result.

In the meantime, unobtrusively, the French Cour de Cassation is trying to revise its practice of Article 25 and perhaps attempting to save the Warsaw Convention, which is considered as a masterpiece of French legal thinking.¹⁷ Well aware that the original practice does not keep pace with the elements of balance in our age, it does, nonetheless, not want to dismantle the juridical basis altogether. Instead of uprooting the basic rules of fault and normal presumption within normal limits, it uses Article 25 in order to reach more adequate compensation. This article had hitherto been interpreted in a restrictive way. In accepting a more liberal interpretation of "dol" and "fault equivalent to dol", the French Cour de Cassation is pursuing, by other means, a similar end of adjusted compensation.

Whether this rear guard action will suffice to maintain the structure of the Warsaw Convention is highly dubious. The escape valve would yield only a trickle. Litigation would become the normal case, whereas the purpose of the Convention and increase of traffic require settlement of most claims out of court.

If anything can be learned from the recent interpretation of the international texts by the Courts, it would be to admit the failure of the Hague Protocol and of all efforts to establish total uniformity and complete harmony. The Hague Protocol may have succeeded in the non-negligible and still insufficient simplification of documents of carriage. But this could be achieved also through IATA. It definitely failed on the crucial issues of limits of liability and uniformity of the concepts embodied in Article 25. Even if its definition were accepted by all signatories of the Warsaw Convention, as well as an adopted rule of international law as in the domestic concept, it is unlikely that full uniformity would follow, unless through the creation of an International Court of Air Law, which is, in our still very disorganized international organization, as far away from reality as the older dreams of an International Prize Court.

One may be tempted to call upon comparative law in order to find a

¹⁶ Verplaetse, *The Hague Protocol, 1955*, [1956] BUS. L. REV. at 101.

¹⁷ Advocate General Lindon, answering to the argument of claimant that the New York Courts had granted compensation beyond the limit in a case originating from the same accident, *Viterbe*, and that it might be advisable to adjust compensation due to the same accident independently of the domicile of the victim, said: "s'il est vrai qu'une certaine unité est souhaitable. . . on ne voit pas pourquoi ce serait aux juridictions françaises de s'aligner sur les juridictions américaines." Translation: "If it is true that a certain unity is desirable. . . one does not see why the French Courts should line up with the American Courts."

common denominator of different legal systems. The latchkey would not serve our purpose very well. The endeavor to reach a common legal concept in worldwide compass is anything but practical jurisprudence. Even in such a circle of relatives like the European community, which is, in part, tied by supranational organization, supranational law finds it very hard to break through. The International Court of Justice, bound by its Article 38(1)(c) to apply the general principles of law, has done so to a limited extent, but it would seem that it arrived at those principles not by comparative research but rather by a claim of self-evidence supported, sometimes, by an appeal to history, mainly to Roman law.

Therefore, if the Warsaw Convention is to be succeeded by another international agreement on international carriage by air, instead of being kept limping by the patchwork of Montreal and Paris, it seems likely that some references to domestic law will remain regrettably unavoidable. Whether Article 25 should be one of them, or should disappear altogether in a system of high-graded absolute liability, is a moot point. The present writer deems that, *hic et nunc*, gross misbehavior will require separate treatment. Deeply rooted in human nature is a hurdle between conceivable failure and unbelievable neglect. No one would like to take the stead of God and put the hurdle at one spot *sub specie aeternitatis*. But removing the hurdle altogether would amount to a denial of human nature.

To be sure, those references to the *lex fori* should be kept to a minimum. No one would approve of that court, which, in a non-Warsaw case, called upon a very old municipal statute, drafted for the needs of carriage by rail and now itself well-nigh obsolete, in order to apply its technicalities to air travel. In such a case internationalism is sound, and the better way to find adequate analogy would be an inquest into international agreements and practice which cover the largest part of air traffic. But when it comes to the general structures of liability, which involve antagonistic economic interests, divergent social pattern and dissimilar ethical concepts, world law without some help of the *lex fori*, is, as of today, a fanciful anticipation. The new talk of laws of immediate application, rekindling that old story of the advent of uniform law, has still to wait a more elaborate organization of international society in the executive, legislative and judicial branches.

THE MOON, SPACEPORTS AND LAW

BY CAMERON KINGSLEY WEHRINGER†

WITH MAN on the moon and "One Small Step for a Man, One Giant Leap for Mankind," the next steps are two-fold. Man will push forward to other celestial bodies, and he will consolidate his advances to date. Consolidation can take two forms. Bases can be placed on the moon and expanded in size and service so that men can live on the moon for extended periods of time. To help reach moon bases, thought has been given to manned orbiting laboratories.¹ What is said concerning moon bases will apply to bases on Mars, Venus, or wherever the ingenuity of man's scientific accomplishments take him.

The daily, weekly, and monthly news reports on whether or not a particular project is to proceed are without importance; the projects will go forth at some time by some State. At such time the legal questions will come to the forefront. In speaking of the law to be applied, it must be assumed that there is no other legal system in conflict with that of man, and that a legal vacuum exists which man has the right to enter. As to the moon and those planets as now known to us, there seems no question but that there is a legal vacuum available to earth-centered law. Concerning the means of travel and man-made earth [or moon] circling objects such as orbiting laboratories or spaceports, earth-law obviously will apply.

Ownership of a moon base is a key problem as to the moon. Ownership implies exclusivity as to an area and the law enforced in that area. There are four legal views which are prevalent. First, is the law as presented by the Treaty² now in force; second, is the historical view of ownership and its acquisition; third, is the "ancient" concept of the moon and its relation to earth; and fourth, is the likely legal development.

I. THE MOON

A. *The Treaty*

"Resounding statements and noble words and intentions are not good enough to create a law *which will be respected*. As Machiavelli would have said, justice is perhaps the weakest of the international moral forces; inter-

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¹ Cheng, *The 1967 Space Treaty*, 95 JOUR. DU DROIT INT. 532, 604 (1968). This Article was printed with English and French versions. The English language side is cited.

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. (Hereinafter Treaty on Outer Space). Signed by the President of the United States and representatives of more than 60 States at the White House on January 27, 1967; Senate recommended ratification by a 88-0 vote on April 26, 1967. Instruments of ratification filed on October 10, 1967 by the United States, the United Kingdom and the U.S.S.R. among other States. Jan. 27, 1967, art. II, T.I.A.S. No. 6347, Annexed to U.N. Doc. A/C.1/L. 396 (1966).

national love does not exist and the two strongest forces are fear and greed. Therefore, an international law based purely on the abstract judicial concepts is no law at all. Space makes no exception, and the international law of space, to come into existence, will have to be protected by the force of fear (enforcement) and by the force of greed (mutual interest)."³

The "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies" [hereinafter Treaty] has been the subject of several articles.⁴ It has its shortcomings.⁵ Perhaps one of its greatest weaknesses is the one-year withdrawal permission.⁶ With foreseeable technological advancement, a base can be equipped and staffed. However, after evaluating it as a sovereign outpost with military potential or actuality, a withdrawal from the Treaty could be made.

In the interim "all stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States' Parties to the Treaty on the basis of reciprocity."⁷ Reciprocity means that "which common sense would dictate." In the extreme, reciprocity can mean that no other State can view or inspect, but nevertheless the Treaty requirement has been met. Denial of viewing or inspecting leaves a refused State in a quandary. There are no enforcement procedures,⁸ and recourse to "such other remedies as it would have under international law"⁹ is a polite way of noting that nothing is to be done beyond diplomatic preening.

The bases, in reality, can be readied and used for military purposes. Although the Treaty states: "The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden,"¹⁰ its blanket prohibition is demolished by the next two sentences. "The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited."¹¹ It is obvious that trucks for peace can be switched to the transport of war material. Moon equipment for "scientific research" can be a "facility necessary for peaceful exploration of the moon." The fact that moon equipment can be converted, quickly or slowly, to war

³ Fiorio, *Space Claims—A Matter of Common Sense*, 57 AM. SOC. INT'L L. 186, 188 (1963).

⁴ Wehringer, *The Treaty on Outer Space*, 54 A.B.A.J. 586 (1968); Finch, *Outer Space for 'Peaceful Purposes'*, 54 A.B.A.J. 365 (1968); Menter, *The Developing Law for Outer Space*, 53 A.B.A.J. 703 (1967); Cheng, *supra* note 1.

⁵ Wehringer, *supra* note 4; McMahon, *Legal Aspects of Outer Space: Recent Developments*, 41 BRIT. U.B. INT'L L. at 417, 420 (1965-66).

⁶ Treaty on Outer Space, art. XVI, T.I.A.S. No. 6347: Any State Party to the Treaty may give notice of its withdrawal from the Treaty one year after its entry into force by written notification to the Repository Governments. Such withdrawal shall take effect one year from the date of receipt of this notification.

⁷ Treaty on Outer Space, art. XII, T.I.A.S. No. 6347.

^{7a} Then Ambassador to the United Nations Goldberg, Press Release No. 5034 (Dec. 17, 1966).

⁸ Wehringer, *supra* note 4, at 588; McMahon, *supra* note 5, at 420.

⁹ Then Ambassador to the United Nations Goldberg stated the "basis of reciprocity" means that "which common sense would dictate." Press Release No. 5034 (Dec. 17, 1966).

¹⁰ Treaty on Outer Space, art. IV, T.I.A.S. No. 6347.

¹¹ *Id.*

uses, defensive or aggressive, is not in the Treaty view and is not a Treaty violation. If a question is raised, the Treaty has no interpretative procedures for ambiguities, nor for dispute settlement.¹² The State that has established the base, of course, may withdraw from the Treaty, if to that State's advantage. Alternatively, it may simply ignore the Treaty. As one space law leader noted "treaties can be and have been broken." A properly drawn treaty "would state unequivocally the rights and obligations of the parties."¹³ However, this Treaty places quicksand around some important aspects. The issue as to moon use and occupancy is not resolved by the Treaty. Steps forward have been taken, but these steps are not the "giant leap for mankind"¹⁴ that technology has advanced.

B. Militarism Equals Peace Equals War

Words mean what the speaker and listener want them to mean. Sentences have a way of compounding the difference in meaning. In the moon question this is clear. If military personnel are on the moon building a nuclear power plant, would this be warlike as distinguished from peaceful, or aggressive (offensive) as contrasted to defensive? The Treaty speaks of "peaceful."¹⁵ It is argued this word "peaceful" does not mean "non-military," but it does mean not "aggressive."¹⁶ In two other treaties there was made a distinction between "peaceful uses" and "military purpose."¹⁷ However, because of the confusion between use of military personnel for scientific research¹⁸ and the lack of interpretative means,¹⁹ the most that can be said is that "peaceful" means "non-aggressive." This is reenforced by the statement that "[i]ts usual meaning in international law and in the context of the Charter of the United Nations is non-aggressive. In the absence of any specific agreement to the contrary, 'peaceful' in the context of outer space must be taken in its ordinary meaning in international law and be understood as non-aggressive."²⁰

Non-aggressive preventive warfare, by this argument, is legal. The right of self-defense cannot be denied.

The real problem is therefore not legal. The question is rather one of scientific progress, military strategy, and national policy. If a State determines that the conditions are present which justify action, and if effective means are available, action can be taken in self-defense on land, at sea, in the air—or in outer space.²¹

¹² *Supra* note 5.

¹³ Cooper, *Who Will Own the Moon? The Need for an Answer* (1965-66), reprinted in *EXPLORATIONS IN AEROSPACE LAW* 341, 353 (Ed. Vlasic 1968).

¹⁴ Neil A. Armstrong, "That's one small step for a man, one giant leap for mankind," *N.Y. Times*, July 21, 1969, at 1.

¹⁵ Treaty on Outer Space, art. IV, T.I.A.S. No. 6347.

¹⁶ Finch, *supra* note 4, at 367.

¹⁷ Statute of the International Atomic Energy Agency and the Antarctic Treaty. Brownlie, *The Maintenance of International Peace and Security in Outer Space*, 40 *BRIT. Y.B. INT'L L.* 1, 13 (1964).

¹⁸ Treaty on Outer Space, art. IV, T.I.A.S. No. 6347.

¹⁹ McMahon, *supra* note 5.

²⁰ McMahon, *Legal Aspects of Outer Space*, 38 *BRIT. Y.B. INT'L L.* 339, 360 (1962).

²¹ Cooper, *Self-Defense in Outer Space and the U.N.* (1962), reprinted in *EXPLORATIONS IN AEROSPACE LAW* 412, 422 (Ed. Vlasic 1968).

The following might be included, "as well as on, and from, the moon." This may mean military personnel on a moon base will not only deny inspection by another State, but will seek to fortify its base for defensive means. The Treaty, in speaking of the non-installation of nuclear or mass destruction weapons, prohibits installation on celestial bodies, but the word "moon" is omitted.²² As need arises to make issue of the omission, the opportunity to do so will be seized. Each State has the right "to protect itself by preventing a condition of affairs in which it will be too late to protect itself."²³ Under the Treaty, if it is deemed all final in the legal area concerned, the law of the launching state is applicable. Therefore, if one State should destroy another's base, its law (the law of the destroyer) would govern. "It's not a tenable notion, it seems to me, to have the law of the launching state governing on the moon."²⁴

C. An Historical View

As noted in the opening of this essay, the forces of fear (enforcement) and greed (mutual interest)²⁵ are applicable to moon exploration. Without these forces operating in the past, territorial advance under a shadow of law would have been slow. The donations of a Pope, or the resolutions of a United Nations, were mere resounding statements that have little merit in solving dilemmas, though they may not have been without some effect in the total picture.

Pope Alexander VI, in 1493, sought to divide the New World between Portugal and Spain.²⁶ Grotius wrote in 1604 as to this diversion that "anyone who chooses to make a thorough examination of the question of law, whether divine or human, weighing the matter independently of his personal interests, will readily discern that a donation of this kind, concerning as it does the property of others, is without legal effect."²⁷ So also would be a United Nations resolution.²⁸ The United Nations, after passing several resolutions on this topic²⁹ did recognize its power limitations and proposed

²² McMahon, *supra* note 5, at 420; Treaty on Outer Space, art. IV, T.I.A.S. No. 6347.

²³ Root, 1914 Proceedings, AM. SOC. INT'L L. 12, AM. J. INT'L L. 432.

²⁴ Alexander, BUSINESS WEEK, July 19, 1969, at 104.

²⁵ *Supra* note 3.

²⁶ 1 KEITH, *Wheaton's Elements of International Law* 339 (6th ed. 1929).

²⁷ Schrader, *National Sovereignty in Space* (July 4, 1962), MILITARY L. REV. 41, 54.

²⁸ France opines the resolution as to outer space made by the U.N. in 1963 (resolution No. 1962 (XVIII)) was "no more than a 'declaration of intention.' Certainly a declaration of intention, valid when made, could be repudiated on later occasion if political conditions changed." Cooper, *supra* note 13, at 352.

²⁹ The Treaty on Outer Space brings attention to certain resolutions by stating in the preamble that:

Recalling resolution 1962 (XVIII), entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space," which was adopted unanimously by the United Nations General Assembly on 13 December 1963.

Recalling resolution 1884 (XVIII), calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies, which was adopted unanimously by the United Nations General Assembly on 17 October 1963,

Taking account of United Nations General Assembly resolution 110 (II) of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression, and considering that the aforementioned resolution is applicable to outer space

a solution to the outer space problem. This solution became the Treaty, which has its force in law.³⁰

However, beyond the attempt to declare a State will have ownership, or cannot have ownership, is the factual pattern found in history. There is the method of occupation. This was symbolic or actual. Discovery was a historical means³¹ of at least reserving an option to make a title claim. Discovery meant an inchoate title,³² giving the discoverer time for "effectively occupying the discovered territory."³³ This discovery—inchoate title concept—would be inappropriate for the moon, known to man for ages, but outside his physical grasp until 1969.

In the past symbolic possession sometimes was sufficient.³⁴ There is authority that symbolic possession was sufficient in areas not requiring supplementation by other acts such as "effective occupation."³⁵ In passing, it is noted that symbolic possession was a ceremony that varied with the claimant State.

The French and Portuguese would erect crosses or monuments bearing the royal arms. The Spanish and English used more elaborate ceremonials, usually a whole ritual, to denote the formal taking of possession. For example, the English sometimes used a "turf and twig" ceremony, taking from the land a clod of earth and twig as tokens of acquiring ownership. The Russians also employed symbolic acts, such as burying copper-plates bearing their coat-of-arms in the Aleutian Islands and the Alaskan coast.³⁶

On the moon, the Russians did shoot, or plant, a small sphere containing a Soviet ensign and the Russian words for "U.S.S.R. September 1959."³⁷ The Soviet Union denied territorial claims.³⁸ Its view is that the moon belongs to "all humanity."³⁹ The United States has denied territorial ambition.⁴⁰ No other State presently is moon-bound. Nevertheless, one day it is likely that the two powers "will assert conflicting claims on the moon."⁴¹ A very pragmatic reason for the present posture looms—ability to enforce a claim is lacking. The making of an empty claim would bring back only an echo of mockery.

Thus, historically and with a comment as to the present, symbolic pos-

³⁰ U.S. CONST. art. VI, § 2.

³¹ Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448 (1935).

³² 1 Keith, *supra* note 26, at 339.

³³ 1 LAUTERPACHT, OPPENHEIM'S, INTERNATIONAL LAW 558, 562 (8th ed. 1955).

³⁴ Finch, *Territorial Claims to Celestial Bodies* (1959), reprinted S. Doc. No. 26, 87th Cong., 1st Sess. 626, 629 (1961).

³⁵ *Id.* Jacobini, *Effective Control as Related to the Extension of Sovereignty in Space*, 7 J. OF PUB. L. 97, 110 (1958).

³⁶ Finch, *supra* note 34, at 629.

³⁷ Finch, *supra* note 34, at 626. See, Fenwick, *How High is the Sky?*, 52 AM. J. INT'L L. 96, 99 (1958).

³⁸ *Id.*

³⁹ Yeager, *The Moon—Can Earth Claim It?* (1960), reprinted S. Doc. No. 26, 87th Cong., 1st Sess. 757, 761 (1961).

⁴⁰ Statement by President Eisenhower, September 22, 1960. Cooper, *Fundamental Questions of Outer Space Law* (1960), reprinted, S. Doc. No. 26, 87th Cong., 1st Sess. 764, 764 (1961). The view was adopted by President Kennedy and the Soviet Union's Premier Krushchev in March 1962. HALEY, SPACE LAW AND GOVERNMENT 12-13 (1963).

⁴¹ Quigg, *Open Skies and Open Space*, 37 FOREIGN AFFAIRS 95-106 (1958), reprinted S. Doc. No. 26, 87th Cong., 1st Sess. 463, 468 (1961).

session was and is inadequate. Occupation became essential. "Occupation, as proven by the 19th century events, was the only certain way of showing national claims."⁴² The area occupied must be a geographical unit, a "naturally rounded-off region."⁴³ On the moon, perhaps a "sea," an area formally identified in the past would be sufficient.

D. "Ancient" Concepts

A line of thought had prevailed dependent on acceptance of the moon as a satellite of the earth. It is subject to earth's natural controls, and "to that extent [is] a natural possession of Earth as an entirety." This can lead to a legal principle, namely, "any object, satellite, spaceship, space station and so forth, by natural law, is within Earth's control if it is within its sphere of influence or force of attraction."⁴⁴

There was authority contending that the moon is "not a satellite of Earth at all but another small planet . . ." The argument was raised that it does not have the characteristics of a normal satellite of a planet. A "true" satellite, according to astronomers it was alleged, is created along with the parent planet as part of its system. "Captured" or "adopted" satellites were probably asteroids, and were captured by the planet and caught up in a permanent orbit.⁴⁵ For various reasons the claim was heard that the "Earth-Moon combination is actually a double planet, the only example in the Solar system."⁴⁶

This argument continued that while a continent has "a sort of *natural* jurisdiction over her adjoining islands,"⁴⁷ the moon is not as is an island. Without seas, in the sense that seas are known on earth and not as named on the moon,⁴⁸ the "hinterland principle" used in claiming the Western Hemisphere years ago by the European powers is not applicable. The analogy used is the proximity of the United States and the Soviet Union at the Bering Sea.⁴⁹ The proximity of one area or State to the other does not mean a valid claim to the other exists.

Of those who would permit a claim of sovereignty to the moon, one authority thought "that only those states 'over' which a body passes would have a basis for claiming sovereignty."⁵⁰ This would exclude a claim by

⁴² Finch, *supra* note 34, at 631. McDUGAL, LASSWELL & VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 834 (1963).

⁴³ Finch, *supra* note 34, at 630.

⁴⁴ Tamm, *A Concept for a Law of Space* (1960), reprinted S. Doc. No. 26, 87th Cong., 1st Sess. 674 (1961).

⁴⁵ Yeager, *supra* note 39, at 758.

⁴⁶ Yeager, *supra* note 39, at 759. "It is not the same thing to assume jurisdiction over a satellite such as our man made satellites or a true natural satellite as it would be to assert jurisdiction over another planet. A mother country may have, as international law recognizes, a sort of *natural* jurisdiction over her adjoining islands—but not of another continent no matter what the proximity. The fact that the Moon is relatively close to us means nothing more (jurisdictionally) than the fact that the Soviet Union and the United States face each other at a distance of a few miles across the Bering Sea." *Id.* at 758.

⁴⁷ On the other hand, were the seemingly unlikely event occur for higher beings to exist on another planet, and they were to lay claim to the Moon, Earth's international or space law[s] would find in the proximity of Moon and Earth, a "natural" claim by Earth as a planet to a [its] moon.

⁴⁸ Finch, *supra* note 34, at 626. For example the Sea of Serenity and the Sea of Tranquility.

⁴⁹ *Supra* note 46.

⁵⁰ AMERICAN BAR FOUNDATION, *The Law of Outer Space* (1961). REPORT TO NASA (1960), reprinted in S. Doc. No. 26, 87th Cong., 1st Sess. 779, 779 (1961).

some States to the the moon, creating a new principle, without previous foundation. Other possibilities have been discussed. The moon could be divided among the States willing and able to "explore and or colonize their share."⁵¹

A thought now considered nonsense was to "recognize claims to wide corridors made as space ships orbit the moon." Besides the disputes created "where the corridors overlap,"⁵² the symbolism for annexation would be carried to an extreme measure. This would be "illogical both in theory and practice."⁵³

Another view, which finds its acceptance by the Treaty, is that concept of the moon as "incapable of appropriation in whole or in part."⁵⁴ A view that seems out-of-touch with reality in light of technological advances was that "the Moon, being an Earth satellite, is constantly under the different right of sovereignty of some States on the Earth owing to the fact of the rotation of the Moon around the Earth. Therefore, it is by the astronomical realities impossible to find a logical system of individual Earth State sovereignty."⁵⁵ This would arise if the sovereignty of a State extended without limit, or with a limit beyond the orbit of the moon.

A not unexpected concept of early years was that the moon could be placed "under the control of the United Nations." It would be held "in trust" for the entire earth. "This, of course, means that the United Nations would also develop laws, rules and regulations to govern activities on the moon."⁵⁶ Title would be in the United Nations.⁵⁷ This would have avoided the application to the rules of discovery and occupation⁵⁸ that the Treaty seemingly has erased for the moment. Even then, it was contended that a claim by the United Nations "would probably succeed only in seeming presumptuous or a little ridiculous." The better way, it was countered, might be to conduct exploration of the moon through United Nations auspices.⁵⁹ This might implant the notion in the public mind that the moon was under United Nations trusteeship.⁶⁰ These thoughts had earnest support. Only the concept of the moon being incapable of appropriation has as yet had no support.

E. A Likely Development

Completing the full picture, including the Treaty, the legal situation is that the moon is presently without a particular State either able or seeking to claim its sphere or parts thereof, and there is a renunciation of claims

⁵¹ Schrader, *supra* note 27, at 54.

⁵² Schrader, *supra* note 27, at 66.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Smirnoff, *Legal Status of Celestial Bodies*, 28 J. AIR L. & COM. 385, 393 (1961).

⁵⁶ Schrader, *supra* note 27, at 66.

⁵⁷ Jenks, *International Law and Activities in Space* (1956), reprinted in S. Doc. No. 26, 87th Cong., 1st Sess. 33, 42. Address by Sir Leslie K. Munro, former President of the United Nations General Assembly to the American Assembly, Harriman, N.Y., Oct. 22, 1961.

⁵⁸ Jenks, *supra* note 57, at 42.

⁵⁹ Yeager, *supra* note 39, at 762.

⁶⁰ "No moon, no planet, shall ever fly a single nation's flag," U.N. Doc. A/AC.105/PV.2, Committee on the Peaceful Uses of Outer Space, May 3, 1962, at 13-15.

both by political and legal means. But, with time will come the establishment at various places, perhaps even at a "naturally rounded-off region,"⁶¹ of a base or bases by a State. Such a base will be maintained as necessary for survival. "Great military leaders have said that the nation which controls the moon will also control the earth."⁶² This is akin to the heartland theory that prevailed in World War II.⁶³

The establishment and use of a base will not be "appropriation." "What constitutes appropriation is a very tacky question."⁶⁴ The Treaty states: "Outer space including the moon . . . is not subject to national appropriation . . . by means of use or occupation, or by other means."⁶⁵ Without even considering a territorial annexation, appropriation logically includes a taking, a taking away. However, a few samples of rock for scientific study will not become a topic for legal argument, but the later discovery of, and means of exploiting, mineral wealth will bring up the question and claim of appropriation.⁶⁶ "There is nevertheless always the possibility of exclusionary acts without a formal claim to sovereignty, if some areas prove especially rich or suitable for military activities or populations."⁶⁷

In Russian literature there is the suggestion "that, in time, chemical means would be found of turning lunar rocks into gases and gradually creating something that would do as an atmosphere. Once an atmosphere has been created, hydrogen and oxygen extracted from minerals could be made to produce water."⁶⁸ Would use of these rocks and the resulting cycle be an appropriation? One view is that "The term 'appropriation' is used most frequently to denote the taking of property for one's own or exclusive use with a sense of permanence."⁶⁹ This means "a temporary occupation of a landing site or other area, just like the temporary or non-exclusive use of property, would not constitute appropriation. By the same token, any use involving consumption or taking with intention of keeping for one's own exclusive use would amount to appropriation."⁷⁰

A resolution of the matter is not immediately at hand. Only problems can be foreseen. "To the extent to which outer space and celestial bodies constitute *res extra commercium*, by analogy with the rules underlying the freedom of the high seas, the appropriation of the natural resources thereof merely forms a part of the freedom of exploration, and use, and is not prohibited."⁷¹ But . . . the semi-permanent occupation of parts of

⁶¹ *Supra* note 43.

⁶² Haley, *Survey of Legal Opinion on Extraterrestrial Jurisdiction* (1960), reprinted S. Doc. No. 26, 87th Cong., 1st Sess. 719, 732 (1961). McDUGAL, LASSWELL AND VLASIC, *supra* note 42, at 379.

⁶³ A Swede, Kjellen, invented the term "Geopolitik." Mackinder of England expounded the heartland theory in a book, and a World War II German general, Haushofer, seized upon the thought that the Balkans were the key to world domination.

⁶⁴ Alexander, *supra* note 24.

⁶⁵ Treaty on Outer Space, art. II, T.I.A.S. No. 6347.

⁶⁶ Alexander, *supra* note 24.

⁶⁷ Taubenfeld, *The Status of Competing Claims to Use Outer Space: An American Point of View*, 57 AM. SOC. INT'L L. 173, 182 (1963).

⁶⁸ Lord Russell, *Let's Stay Off the Moon*, The Wall Street Journal, July 16, 1969.

⁶⁹ Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 FORDHAM L. REV. 349, 352 (1969).

⁷⁰ *Id.*

⁷¹ Cheng, *supra* note 1, at 574.

outer space and especially celestial bodies for purposes of exploitation will pose problems which require further study and, if the example of the continental shelf is any guide, also further regulation."⁷²

Thus in time the barrier to land claiming—an annexation—will fall. With increased size and permanency of a base, and with the taking of mineral wealth, when found and if feasible, the area or areas involved will become in effect the territory of the State that controls the area. Unless, or until abandoned, it will be land of a particular State. To what extent the base, its "town," will mean a claim to a "naturally rounded-off region" will be determined by such matters as seeming geographic continuity and the necessities of exclusionary control. To make a claim absolute, the recognition of other States is required. Should an area be in dispute, the claimant that best shows sovereignty and is recognized as such will prevail.⁷³ The recognition needed will be from others claiming or capable of making claims.⁷⁴ It is possible, but probability cannot be assessed, that a claim could be resolved by war, until which time the claim would be unrecognized. "War is and will always be the first origin and the ultimate ratio. Sovereignty means power and ultimately military and technical power, whatever may be the means and ways . . ."⁷⁵

A stalemate or stand-off is possible. "By 1990 we will have several research stations on the moon, probably owned by various nations. There will be a degree of co-operation on the moon, just like we have in Antarctica today."⁷⁶

Until bases are on the moon, legal questions are theoretical exercises. Upon bases appearing, these questions become "real" vital issues. At such time, assuming the Treaty has not disappeared into historical limbo, nor been renounced with use of the one-year withdrawal provision,⁷⁷ then the States asserting claims to bases, or even to areas on which different States' bases are located, will find alternatives. Among these are:

- (1) War to resolve the claims; particularly if moon control means earth control.⁷⁸
- (2) Diplomatic maneuvering without result, but with emotional needs of the States satisfied.
- (3) Settlement by the immediate base claimants.
- (4) Diplomatic recognition of the conflicting claims by those capable of action; capable meaning then and in the near future having active potential. Those not being capable being ignored in fact although some theoretical considerations of their views may be given.
- (5) A stand-off, with a "new principle" proclaimed, either within

⁷² Cheng, *supra* note 1, at 576.

⁷³ Cheng, *Problems of Space Law* (1960), reprinted S. Doc. No. 26, 87th Cong., 1st Sess., 666, 668 (1961).

⁷⁴ "When England, France and Spain were dividing the new world they certainly didn't consult the various principalities of Germany or Italy," Schrader, *supra* note 27, at 70.

⁷⁵ VERPLAETSE, *INTERNATIONAL LAW IN VERTICAL SPACE* 162 (1960).

⁷⁶ von Braun, *U.S. NEWS & WORLD REPORT*, June 1, 1964 at 57.

⁷⁷ Antarctica "is incapable of 'occupation' in the sense of an establishment capable of maintaining itself by resources drawn from the local area." Fenwick, *supra* note 37, at 99. Treaty on Outer Space, art. XVI, T.I.A.S. No. 6347.

⁷⁸ *Supra* note 60, 63 (the heartland theory).

the Treaty words or by formal amendment, this being a "pseudo" or "semi-permanent" territorial right to the base area.

(6) Some base strength modification as to its potential war use, be this aggressive or defensive in nature.

(7) With time passage, legal acceptance would follow as to base ownership ("appropriation") as and if this becomes important. The importance of legal ownership ("appropriation") might increase as more than one State acquires a base within which are its "scientific" endeavors⁷⁹ created in its pursuit of "peaceful purposes."

(8) If a lessening of military potential is not obtained, any standoff may mean the Treaty limitations as to aggressive military purposes are disregarded upon the rationale, spoken or unspoken, that between the claimants a stalemate of power will result.

In summary, the Treaty has given the world resounding words, a seeming solution; and presently the fear of greed (mutual interest) is its implementation. The force of fear (enforcement) is not in the moon picture at this time. When it arises, the historical means of territorial annexation—that of physical occupancy as modified by environmental conditions of the moon—will take precedence over the Treaty language (though it may be given token obedience with distinguishing interpretation) as the States' needs require.

II. SPACEPORTS

The program to place into orbit spaceports⁸⁰ or manned orbiting laboratories⁸¹ may or may not be followed through. Although the factor of cost is of concern, the matter of need will be predominant in any decision. If to reach the moon on either a more regular schedule, or for defensive or offensive purposes⁸² means a continuation of the present technology of large rockets to break through the earth's gravitational pull, then additional consideration to spaceports is logically in view.⁸³ If the spaceports are not needed because of technological advances, then as the sea-islands of years ago, the reason for consideration failing, the dismissal of the conception must follow.

A. *The Treaty*

The Treaty applies to orbiting objects. This includes spaceports. There are significant differences between the Treaty concern as to the moon and bases thereon, and as to spaceports. The Treaty states that "outer space, including the moon . . . is not subject to national appropriation," but it avoids seeking internationalization of spaceports.⁸⁴ It provides for the use

⁷⁹ Treaty on Outer Space, art. III, IV and XII, T.I.A.S. No. 6347.

⁸⁰ Wehringer, *Spaceports—Waystations of Space*, 40 TEXAS L. REV. 371 (1962).

⁸¹ Cheng, *supra* note 1, at 604. He quotes a \$1,500,000,000 price as of its announcement on August 25, 1965. The program is shelved; at least for the time being.

⁸² The spaceports initially would be for earth-moon navigation. Later, use in interplanetary travels will be made. See, McDougal, Lasswell and Vlasic, *supra* note 42, at 760.

⁸³ Verplaetse, *supra* note 75, at 491. He wrote that bombs would remain suspended in the orbit of the space platform. Later he alleges that "Psychological warfare could be carried out more effectively from space stations, since it is thought that it would be impossible to jam those waves.

⁸⁴ Treaty on Outer Space, art. II, T.I.A.S. No. 6347.

of the moon for "peaceful purposes." It allows military personnel to be used for "scientific research or . . . other peaceful purposes." This detailing as to "peaceful," "scientific research" and "military personnel" does not apply as to spaceports. The only prohibition appearing here as to spaceport use concerns "nuclear weapons or other kinds of weapons of mass destruction."⁸⁵ By lack of statement, a military spaceport manned by military personnel for military use is not prohibited. Only mass destruction weapons are in violation of the Treaty. Missiles capable of destruction of military targets, or anti-missiles, are not prohibited.

The Treaty provides that the launching of an object into space carries with it "jurisdiction and control over such object, and over any personnel thereof."⁸⁶ The launching of an object that is joined together in space with other launched objects to become a spaceport comes within this definition. The spaceport would be a State controlled object. "[A] state should retain jurisdiction and control over personnel while on board a space station or celestial entity"⁸⁷ The Treaty confirms this as to spaceport personnel. Jurisdiction implies an exclusivity; an exclusion of others. If a spaceport may be military in design and purpose, such jurisdictional exclusivity would fall within the Treaty as approved.

Further liberality as to spaceports appears. The observation of a launching of an object into space is a privilege "determined by agreement," which means an agreement to agree. Parties need not agree, nor is there any provision for what is to be done when the parties do not agree; there is a void. Spaceport launchings, perhaps designed for a State's military advantage, need not be open to close-hand observation by other States.⁸⁸ This possibility for secrecy should be contrasted to the Treaty statement as to the inspection of "stations, installations, equipment and space vehicles *on* the moon[Emphasis added]."⁸⁹ No spaceport inspection, even on the weak "basis of reciprocity" is required.⁹⁰

A general requirement appears in the Treaty that all "activities" are to be conducted "with due regard to the corresponding interests of all other States Parties to the Treaty." (Note that the interest of non-Treaty States need not receive consideration.) The only recourse if "due regard" is not had is to "request consultation."⁹¹ This is a promise to talk.

The Treaty, as it reads, does not give assurance that spaceports will not be built solely for military advantage. In a sense, this is a just recognition of facts. A spaceport, in and of itself, even when designed and used for "scientific endeavors," adds to a State's knowledge. Any knowledge in space, particularly today, can have military applications, so the building and using of any spaceport is a gain. What the Treaty does though is to add an advantage of peaceful posturing as neither inspection nor peaceful

⁸⁵ *Supra* note 22.

⁸⁶ Treaty on Outer Space, art. VIII, T.I.A.S. No. 6347.

⁸⁷ Christol, *Space Stations: A Lawyer's Point of View*, 4 INDIAN J. INT'L L. 488, 494 (1964).

⁸⁸ Enforcement of an agreement to agree is in any law field impossible. Treaty on Outer Space, art. X, T.I.A.S. No. 6347.

⁸⁹ Treaty on Outer Space, art. XII, T.I.A.S. No. 6347.

⁹⁰ *Id.*

⁹¹ Treaty on Outer Space, art. IX, T.I.A.S. No. 6347.

use is stressed or required. This permits Treaty adherence and protestation of peaceful views without foregoing the increasing of State military strength through military outposts in space.

B. *An Historical View*

The manned orbiting laboratory, or spaceport, is "more analogous to ships on the high seas, or Texas Towers, or lightships, than to natural celestial bodies"⁹² In seeking the historical bases of law, prior to the Treaty, the law search is to maritime law, not the law of the air.⁹³ That this search goes to the sea can be said to be a reason for asserting that space will create its own law. The rules viewed are those applicable to "seadromes" or "*aéroport de haute mer*." The International Committee on Aviation, called usually by its French title, the *Comité juridique international de l'aviation*, has considered the seadromes. It did not accept what is called the "island" or "île" theory as to these man-made vehicles. The island theory gives weight to legal arguments permitting coastal waters and the like to surround the artificial outpost, the seadrome. This has its significance as, by analogy, the spaceport would not be considered a part of the State's land territory in outer space.⁹⁴ It would be subject, however, to "normal sovereign control."⁹⁵ Of course, international ownership has been suggested, but the suggestion bears weight only in discussion, not in fact.⁹⁶

There has been a comparison made between a seadrome and a cable, which extending the analogy means between a spaceport and a cable, although there is good authority for denying the comparison as apt.⁹⁷ The view of comparison is that a cable, when used for other than a peaceful purpose can be cut and "indeed taken possession of."⁹⁸ In other words, in line with this theory, a spaceport while peaceful in purpose is not to be disturbed; however, when used for non-peaceful purposes the analogy follows that it may be destroyed ("cut") and in the alternative, captured. The analogy is tripartite: "What has been done under the water may be done above the water."⁹⁹ And in turn, *arguendo*, it may be done in space.

The definition of a seadrome may be reviewed for its similarity to a spaceport, or orbiting laboratory. A seadrome "is an anchored float or dock, a landing platform analogous to an airfield, on the high seas, whose chief purpose will be to facilitate the landing, servicing and taking-off of aircraft on the high seas. It may be likened to a floating structure permanently moored, which though capable of being moved, is built, designed and intended to be comparatively permanent."¹⁰⁰

⁹² AMERICAN BAR FOUNDATION, *supra* note 50, at 801.

⁹³ Meyer, *Legal Problems of Flight into the Outer Space* (1952), reprinted S. Doc. No. 26, 87th Cong., 1st Sess., 8, 15 (1961).

⁹⁴ Sandiford, *Legal Questions Concerning Aerodromes on the Open Sea, Usually Referred to as Floating Islands*, 5 AIR L. REV. 11, 17 (1934). Heinrich, *Air Law and Space*, 5 ST. LOUIS U. L.J. 11, 52-53 (1958), reprinted S. Doc. No. 26, 87th Cong., 1st Sess., 271, 311 (1961).

⁹⁵ Jacobini, *supra* note 35, at 113.

⁹⁶ Horsford, *Principles of International Law in Spaceflight*, 5 ST. LOUIS U. L.J. 70, 74 (1958).

⁹⁷ *Supra*, note 75, at 90. Verplaetse writes that generally this comparison is denied.

⁹⁸ Scott, *The International Seadrome*, 5 AIR L. REV. 20, 24 (1934).

⁹⁹ *Id.*

¹⁰⁰ FIXEL, *THE LAW OF AVIATION* § 205 (3d ed. 1948).

The spaceport is not moored, but it is "permanently" orbited. There is a permanence about the spaceport that obstructs flight. The similarity of the seadrome in closing off a portion of the high seas is in point.

The 'Freedom of the Sea' does not contradict actual occupation of part of the sea not for the purpose of exercising dominion, but as a means of asserting the right of use permitted to everyone. No one had ever questioned this right in the case of ships which make exclusive use of the space they cover while sailing, and which space is, of course, blocked off to others. For this reason fixed installations had been permitted in the open sea, such as anchored buoys and light-ships, indispensable to the safety of shipping.¹⁰¹

Two points may be noted. By analogy, a small spaceport "indispensable to the safety of [outer space] shipping" would be acceptable without diminishing the concept of "free flight."¹⁰² A larger spaceport, such as a "light [radio-beam guidance] ship" also would be acceptable. What would then follow is a question concerning a spaceport large enough for space vehicles to use between earth and moon or other celestial bodies. This also should be acceptable by analogy. The occupancy of outer space is akin then to the "anchored [space] buoys" in a larger size, and also in a much larger total area, and should fall within the reasoning applicable to seadromes.¹⁰³

Projecting the seadrome [*aéroport de haute mer*] theory, the "island theory," once considered for seadromes and rejected, is rejected as to spaceports.¹⁰⁴ Had seadromes been treated as an island, the argument would follow that so should spaceports. In both cases, the "island" theory means that there exists a clear right to arm the artificial body. Fortification would be followed by a claim to a coastal zone around the seadrome, and by extension, some space area of State domination around the spaceport.¹⁰⁵ This, in effect, extends the flag.¹⁰⁶ Arguing against the extension of a State's dominion in this matter, one authority wrote:

No artificial island, no matter how firmly it was anchored, could permanently cover the same part of the sea; wind and currents would always change its location to some extent. The seadrome could have no coastal waters, nor could the superjacent airspace and the subjacent water belong to the sovereign territory of the seadrome, for it seems unjustified to permit such far-reaching inroads into the freedom of the sea and the airspace. . . . The only difference, in fact, between ships and seadromes is their outward shape; and this could not be a suitable reason to treat the two differently in law.¹⁰⁷

The same thinking is applicable to a spaceport. If orbiting, many different areas would be passed over rapidly. This would permit indeed "far-reaching inroads" into space and the right of free travel. Ordinary syn-

¹⁰¹ Heinrich, *supra* note 94, at 52.

¹⁰² This, of course, ignores the possibility there may be a claim to sovereignty in the space area where the spaceport is located.

¹⁰³ FIXEL, *supra* note 100, at 207.

¹⁰⁴ *Supra* note 15, at 90. Verplaetse argues that a seadrome is subject to the rules governing islands.

¹⁰⁵ Jacobini, *supra* note 35, at 113.

¹⁰⁶ Heinrich, *supra* note 94, at 54. Fixel would permit fortification by "those who operate and control a seadrome . . ." *supra* note 100, at 207.

¹⁰⁷ Heinrich, *supra* note 94, at 56.

chronous positioning might be subject to shifts, and therefore, objected to as were "anchored" seadromes. The only logical possibility for considering the right for a State to extend its dominion to the spaceport and some surrounding area in a manner of territorial sea, superjacent airspace and subjacent water claiming, is if the seaport were "anchored" (orbiting synchronously with the earth's rotation) in an outer space area in which the State can claim legal rights to its sway of sovereignty.¹⁰⁸ However, if the spaceport were "anchored" in a space area where sovereign claims were recognized, there would be no need for the "island" theory. The "island" theory, rejected as to seadromes, is rejected as to spaceports. It is not needed. As there only is a "difference . . . between ships and seadromes [in] their outward shape, and this could not be a suitable reason to treat the two differently in law,"¹⁰⁹ the same rationale applies as to spaceports. The shape is different, but that is all.

C. A Likely Development

Perhaps spaceports will not be built. The original reason for the talk of building seadromes was due to the limited flight capability of airplanes. Airplanes were to fly to the seadrome anchored in the sea, land, refuel, and continue across the sea to land. A cited reason for spaceports is to permit launching without the immense rocketry needed to escape the earth's gravitational pull. Technological advances cannot be foretold, but it does not seem beyond the realm of possibility, as well as probability, that this flight from gravitational pull can be resolved without recourse to way-stations in orbit. At the present writing though, spaceports are contemplated. A nine-man space station orbiting the earth is contemplated by the United States as part of the Apollo Applications Program. It will be ready in 1972. By 1980 a mammoth space station "comfortably housing 100 men" is possible.¹¹⁰ In the 1975-76 time-period may come moon orbiting spaceports.¹¹¹

Fortification for defensive means can follow. The distinction between what is aggressive and what is defensive might be argued, but only because inter-State relations demand the distinction be made. However, discuss as the States may, where military advantage or the right of self-preservation is the motivating force, the greater need will follow.

In all discussions known to the writer of the Treaty, emphasis has been placed on the legal questions as to the moon. The spaceport question in terms of the Treaty has been ignored. The Treaty as drawn permits the seizing of a military advantage by military purpose spaceports. The Treaty can continue, and is likely to continue subject to the moon base discussion earlier in this essay. The Treaty can be existent and need not be bent in meaning; a State need not withdraw from the Treaty's cover-

¹⁰⁸ Jacobini, *supra* note 35.

¹⁰⁹ Heinrich, *supra* note 94, at 56.

¹¹⁰ *Apollo's Moon Mission: Here Are the Results*, U.S. NEWS & WORLD REPORT, Aug. 4, 1969, at 24.

¹¹¹ Interview with Mueller, head of manned space program of NASA, *The Goals of Future Explorers*, U.S. NEWS & WORLD REPORT, Aug. 4, 1969, at 30, 31.

ing umbrella; and still the need of State security (aggressive or defensive) can be met. Sovereignty over spaceports and its personnel is not in question. This will continue.

As first noted¹¹² there are two reasons for adhering to law: The force of fear (enforcement) and the force of greed (mutual interest). Practical considerations of diplomacy and war will be determinative and on these our fates lie, and law in space as on earth will be made.

¹¹² Fiorio, *supra* note 3.