The Federal Bomb Hoax Hybrid: Civil Penalty for Criminal Wrong

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THE FEDERAL BOMB HOAX HYBRID: CIVIL PENALTY FOR CRIMINAL WRONG

By JOSEPH C. LYNCH†

I. Introduction

THE MID-AIR sabotage-explosion in 1956 of an airliner traveling in interstate commerce, resulting in the death of forty-five passengers near Longmont, Colorado, focused congressional attention upon the absence of federal legislation which would level criminal sanctions on the destruction or attempted destruction of an aircraft over the territory of the United States. Proposed enactments intended to fill this void were introduced in both the Senate and House of Representatives. The House Report stated that the only statutes then pertinent to crimes committed on board aircraft were intended to furnish sanction for contravention of Civil Aeronautics Board regulations and were not designed to encompass "more serious crimes such as murder and sabotage . . . ." The Report acknowledged that murder and other crimes were covered by state laws but pointed out that the speed and mobility of aircraft could present grave jurisdictional problems and other obstacles. The report stated, "Airline operations in the United States are peculiarly interstate in nature, and, as such, the federal government owes an obligation to the people of the country to protect the commerce moving aboard interstate and overseas flights with every means at its disposal."

Accordingly, on 14 July 1956, Congress passed an act making it a

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The opinions expressed in this article are the personal views of the author and do not necessarily reflect the official position of the United States Department of Justice.

1 For a general discussion concerning federal jurisdiction over crimes committed aboard aircraft see: Brown, Jurisdiction of United States Courts over Crimes in Aircraft, 15 STAN. L. REV. 45 (1962).

2 H. R. REP. No. 1895, 84th Cong., 2nd Sess. 3-4 (1956).

§ 32. Destruction of aircraft or aircraft facilities

Whoever willfully sets fire to, damages, destroys, disables, or wrecks any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce; or

Whoever willfully sets fire to, damages, destroys, disables, or wrecks any aircraft engine, propeller, appliance, or spare part with intent to damage, destroy, disable, or wreck any such aircraft; or

Whoever, with like intent, willfully sets fire to, damages, destroys, disables, or wrecks, or places or causes to be placed any destructive substance in, upon, or in proximity to any shop, supply, structure, station, depot, terminal, hangar, ramp, landing area, air-navigation facility or other facility, warehouse, property, machine, or apparatus used or intended to be used in connection with the operation, loading, or unloading of any such aircraft or making any aircraft ready for flight, or otherwise makes or
federal crime to wilfully damage or destroy aircraft used, operated, or employed in interstate, overseas, or foreign air commerce or to attempt to damage or destroy such aircraft. Concomitantly, and responsive to public apprehension about this subject, it enacted the "Bomb Hoax" or "False Tip" Statute, making it a federal crime to wilfully impart or convey information, known to be false, concerning attempts or alleged attempts to do any act prohibited by Title 18, USC Section 32.

Both the language and penalty provision of Section 35 raised distinct problems from a prosecutive viewpoint. Although it could be argued that the law was to have prohibited only a voluntary and conscious divulgence of the proscribed information; thus intended to punish fictitious and even "pranksterish" remarks, it became very difficult to convict without a showing of malicious intent. The word "wilfully" and the fact that convictions visited a criminal penalty upon all offenders caused juries to limit the statute's application to deliberate and intentional disturbances of an almost premeditated nature. However, the act was designed, in the interests of the traveling public's safety and peace of mind, to encompass those false reports of a covertly jesting nature which likewise precipitated certain emergency procedures and were by far the more common occurrence. Because of this difficulty, Section 35 was amended in 1961.

The 1961 modification set up a dichotomy in aid of prosecution. Those incidents involving nonmalicious false bomb reports were continued as misdemeanors. However, where the false information was conveyed wil-

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For a good analysis of this law, see Note, 30 J. Air L. & Com. 390 (1964).

6 Act of 14 July 1956, § 35, 70 Stat. 540:
§ 35. Imparting or conveying false information
Whoever willfully imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be fined not more than $1,000, or imprisoned not more than one year, or both.

7 The Committee on Interstate and Foreign Commerce of the House of Representatives amended the proposed Section 35 to cover fictitious, as well as false, reports that attempts to destroy or damage an aircraft were being made or contemplated. See H.R. REP. 435, 87th Cong., 1st Sess. 3 (1961).

§ 35. Imparting or conveying false information.
(a) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever willfully and maliciously or with reckless disregard for the safety of human life, imparts or conveys, or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or an alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be fined not more than $1,000 or imprisoned not more than five years or both.
fully and maliciously or with a reckless disregard for human life, the act was raised to the level of a felony. In a letter to the Speaker of the House of Representatives, Attorney General Kennedy explained that the amendment’s purpose was to clarify the statute and deter false bomb reports by pranksters which disturb the orderly operations of aircraft and other common carriers. Thus, Section 35, as amended, encompassed both false reports made with a specific intent to harm the carrier by disrupting air traffic as well as those made in jest, which, while lacking such singular intent, worked the same result.

Following the amendment, false reports concerning the destruction of passenger aircraft continued to interrupt orderly airline operations and created confusion, fear, and danger to the security of passengers and personnel. However, as before, most of those occurrences involved remarks which were made in jest by respected and otherwise responsible persons who gave no thought to the serious consequences which might flow from their statements. Because of the good character of the offenders and the nature of their offense, juries continued to be extremely reluctant to return guilty verdicts and create criminal records for these persons.

Accordingly, on 23 March 1965, the Attorney General again wrote to the Speaker of the House of Representatives and the Vice President recommending that the misdemeanor provision of the “Bomb Hoax” Law be replaced by a new subsection (a), which would prescribe a maximum civil penalty of $1,000 for nonfelonious violations of the statute. It was believed that the new civil penalties would be more effective than their criminal predecessors in punishing pranksters and jesters for their disruptive conduct, and their punishment would serve as a deterrent to others. The amendment became law on 7 July 1965, repealing the former subsection (a) of Section 35 and replacing it with the following new paragraph:

Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this Chapter or Chapter 97 or Chapter 111 of this Title shall be subject to a civil penalty of not more than $1,000 which shall be recoverable in a civil action brought in the name of the United States.

Subsection (b) of Section 35, which prescribes the felony penalties of the act, was not affected by the amendment. Also untouched was the false report provision contained in the 1961 amendments to the Federal Aviation Act of 1958.
The fundamental considerations governing potential misdemeanor prosecutions under the old law would also seem generally applicable to actions commenced under the new law because the amendment does not change the language of the prohibition contained in the earlier statute. As before, willfulness need not be shown, and the penalty is recoverable even if the false report was the result of an attempt at humor or prompted by annoyance or fatigue.¹⁰

Furthermore, the statutory test of whether the “information” has been imparted continues to be the impression created in the minds of those who hear the remark and observe the person making it. These impressions should be tested by what reasonable persons would conclude from the words actually spoken and from the conduct and demeanor of the speaker. In general, words amounting to an inquiry, conjecture, or speculation do not constitute an affirmative imparting of information and therefore, do not bring the speaker within the proscription of the enactment. Similarly, an inherently unbelievable statement would not amount to an attempt to seriously convey an impression of danger. However, where the language involved amounts to a plain, straightforward announcement of the presence of explosive material and the speaker’s conduct is consistent with his words, then, even if the speaker follows his false report with an immediate disclaimer of malevolent intent, he has aroused suspicion or doubt which, in the interests of the traveling public’s safety, cannot be ignored.

The legislative history of the 1965 amendment demonstrates intent on the part of Congress to facilitate the punishment of jokesters who had previously escaped misdemeanor convictions solely because of the distaste which jurors have had for attaching criminal consequences to what was merely pranksterish conduct.¹¹ Under the amended statute a prankster is appropriately amenable to civil suit regardless of his purpose in conveying the alarming information. The sharp disparity between the civil penalty and the felony provision, as well as the legislative history of the amendment, should enable the plaintiff to convince the judge and jury that the public interest in the safety of air travel requires that this new, non-criminal penalty be imposed as a deterrent in all but extraordinary cases.

The synoptic view presented above coupled with the absence of case law in this area presents the deceptive picture of a landscape uncluttered with pitfalls. However, although certain problems inherent in the statute

¹⁰ See United States v. Sullivan, 329 F.2d 755 (2d Cir. 1964), cert. denied, 377 U.S. 1005 (1964); United States v. Rutherford, 332 F.2d 444 (2d Cir. 1964); United States v. Allen, 317 F.2d 777 (2d Cir. 1963) for successful misdemeanor prosecutions where destructive intent was neither alleged nor proven.

¹¹ The purpose of H.R. 6848 is to reduce the existing penalty against pranksters and jokesters who falsely report the presence of bombs, and the like, aboard aircraft, motor vehicles, railroads, or vessels, but who do so without malice or evil purpose .... The Justice Department reports it is having difficulty in obtaining misdemeanor convictions against persons of good reputation and standing in their communities whose offense consists more of bad judgment than intentional anti-social behavior, because juries are reluctant to stigmatize such persons as criminal .... The Department now believes that a civil penalty will be equally appropriate and more effective .... The committee finds merit in H.R. 6848 and recommends its enactment without amendment.

find resolution in its legislative history, many difficulties of considerable complexity are presented by the civil penalty amendment. Consider, for example, how service may be affected upon the "departed defendant." Can a defendant avoid litigating the action in the jurisdiction where he purportedly perpetrated the hoax? What intent need be alleged and proven? Does the federal statute apply to exclusively intrastate flights? What defenses may be effectively asserted? This article will explore in detail some of the more intricate areas of concern in an attempt to present the profession with a broader understanding of this new and commercially important act. The sections that follow will consider (1.) Process, (2.) Venue, (3.) Pleadings, (4.) Intrastate Application, (5.) Intent, and (6.) Defenses.

II. Process

The process problem can best be introduced by a hypothetical illustration. A passenger boarding a plane at Kansas City, Missouri, subsequent to the amendment of the statute, comments to the hostess that the little black bag he's carrying contains a bomb. He and the package, as well as all other passengers and their luggage, are immediately removed from the aircraft. After an inspection reveals that the parcel does not contain explosive apparatus, the passenger apologizes, saying he made the statement only as a joke, and promises not to do it again. He later returns to his residence in Denver, Colorado.

The Government, as plaintiff in a civil case, is often, as in the example given, initially faced with the problem of acquiring jurisdiction over a defendant who perpetrates the hoax in one jurisdiction and presently resides in another. For his part, the defendant has a real interest in avoiding such jurisdiction or, failing that, in having the action litigated where he resides rather than where the alleged false statement was made.

Congress has provided that the proceeding for the recovery of a pecuniary fine, penalty, or forfeiture may be prosecuted either in the district where it occurred or in the district where the defendant is found.\footnote{18 U.S.C. § 1395(a) (1964).} The Federal Rules of Civil Procedure also provide that process may be served upon a defendant personally, may be left with an appropriate party residing at his dwelling place,\footnote{FED. R. CIV. P. 4(d)(1) and 4(f).} or served upon an agent authorized by appointment or by law to receive service of process.\footnote{20 FED. R. CIV. P. 4(d)(1).} Alternatively, jurisdiction may be gained over a defendant by service in the manner generally prescribed by the state in which the action is to be commenced.\footnote{21 FED. R. CIV. P. 4(d)(7).}

The problem of the departed defendant is dealt with by subsection (e)
of Rule 4 of the Federal Rules of Civil Procedure which in two instances allows the Government to proceed in the district of the offense even though the defendant resides in another state and provides that the appropriate extraterritorial jurisdiction may be obtained by compliance with "a statute of the United States or an order of Court thereunder" or a statute or rule of Court of the state in which the district court is held. Thus it would appear that if the state in which the false information is conveyed has an appropriate long arm statute, the civil procedure of that state can be utilized to obtain federal jurisdiction over the person, and he can be sued where the act was committed even though he is outside the boundaries of both the state and the federal district in which the civil action is brought.

Unfortunately, even if this approach is arguably applicable, the civil procedure of the states is far from uniform. For example, in the illustration given above, the state of Missouri, in which the false information was imparted, has no such regulation.

Again, with reference to Rule 4(e), it might be argued that the "statute of the United States" may implicitly provide for extraterritorial service and that 18 U.S.C. 1395(a) does just that. The contention is, however, of doubtful validity in view of the fact that Section 1395(a) is embodied in a section exclusively concerned with venue provisions. The Supreme Court has stated that "apart from specific exception created by Congress the jurisdiction of the district court is territorial." The only cases allowing such statutory extraterritorial service rely upon explicit provisions embodied in particular statutes for their authority.

22 FED. R. CIV. P. 4(e) provides that:

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of, or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule [Emphasis added.].

23 FED. R. CIV. P. 4(e) further directs:

Whenever a statute or Rule of court of the state in which the district court is held provides for service of a summons or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule [Emphasis added.].

4 See VERNON'S ANN. MO. STAT. §§ 506, 110-360, 350; § 302 C. P., L. R. McKinney's CONSOL. L. of N.Y. (1963); SMITH-HURD ILL. REV. STAT. C. 110 § 17 (1959); Md. ANN. CODE ART. 23 § 92 (1957); W. VA. CODE ANN. § 3083 (1957); VT. REV. STAT. § 1562 (1947); N. C. GEN. STAT. § 55-145 (1957). Virginia and Tennessee are among the States which have in recent years adopted statutes conferring personal jurisdiction over nonresidents who commit torts within the state. However, even if a bomb hoax may be viewed as a tort, it is doubtful that all of these varying state process provisions would apply. For instance, in the usual bomb hoax situation where only one airline employee hears the remark and none of the passengers are disturbed there would probably not be the harm or injury requisite to bring the Virginia "long arm" statute into effect.


III. Venue

From a juxtaposition of 28 U.S.C. 1404(a) and 28 U.S.C. 1395(a), the proposition might be advanced that if it be deemed desirable to sue defendant in the district which he committed the offense but summons cannot be served upon him therein, Service may be made and action commenced in the district where he resides and then, given proper circumstances, venue may be transferred under Section 1404(a) to the district where the proscribed information was imparted. However, Section 1404(a) is an all encompassing provision and is not limited in any way by the special venue provision if Section 1395(a). The difficulty with relying on a forum non conveniens theory to transfer jurisdiction to the district in which the cause of action accrued is that, as a practical matter, the United States Government is particularly capable of prosecuting suits in any district. Moreover, the Supreme Court has ruled that an action begun where the defendant resides may not be removed to the district where the hoax was perpetrated if defendant was not subject to service in that jurisdiction when the suit was initiated. In actuality it will be the defendant who will be able to rely upon forum non conveniens as a basis for removal under Section 1404(a) because of the hardships involved in defending himself in suits brought under the “Bomb Hoax” Statute.

IV. Initial Pleadings

The complaint should analytically describe the offense, and in plain, concise statements set forth the date and place of the bomb hoax. It should specify the name of the person to whom the proscribed intelligence was communicated, the airline by which this individual was employed, and the name of the company operating the aircraft involved.

Since federal jurisdiction under 18 U.S.C. 35(a) is based upon the fact that the civil aircraft involved was "used, operated, or employed in interstate, overseas or foreign air commerce," the pleading must specify that the aircraft which was the object of the bomb hoax was a civil aircraft then being used, operated, and employed in interstate [overseas] [foreign] air commerce. Because the defendant must know what he says is untrue before there is a violation of Section 35(a), the complaint must set forth that defendant knew the information so imparted and conveyed was false. Finally, this pleading must request judgment for an appropriate amount, usually the $1,000 maximum provided for in Section 35(a), together with costs of the action and such further relief as may be proper.

The answer may, of course, attack any essential element which must be alleged in the complaint. Thus, it may address itself to any omission or improper allegation of subject-matter jurisdiction, personal service or interstate air commerce. Defendant may also wish to argue that though

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30 In view of the liberal amendment of pleadings in federal courts, defendant may wish to withhold presentation of these defenses until completion of plaintiff's case and then move for directed verdict.
the craft was engaged in multi-state flight, it was not a plane covered by
the statute, i.e., it was an aircraft used for personal or private purposes.31
The answer may also set up any number of defenses which will be con-
sidered in the latter portion of this article.

V. INTRASTATE JURISDICTION

Since federal jurisdiction under Section 35 (a) is based upon the fact
that the civil aircraft involved was "used, operated, or employed in inter-
state, overseas, or foreign air commerce,"32 there is serious question whether
the statute encompasses a bomb hoax made aboard an intrastate flight.
Although the problem has not been conclusively adjudicated, it would
seem that, under the present view of the interstate commerce clause, juris-
diction could be constitutionally asserted.33

The legislative history of Section 32 indicates that Congress intended
a broad jurisdictional construction rather than a restrictive interpretation.
The enactment was passed on the heels of the Colorado air-sabotage dis-
aster which took 44 lives, and the record leaves no doubt that Congress
was interested in extending federal protection to as much air traffic as was
constitutionally possible.34 Congress viewed all commercial air line opera-
tions as inherently interstate and was anxious to protect any commerce
moving aboard such flights.35

The case of C.A.B. v. Friedkin Aeronautics,36 suggests a feasible juris-
dictional approach to Section 35 (a). In that case a civil suit for an in-
junction turned on the issue of whether or not the carriers were involved
in "interstate air transportation" as defined in Section 1301 (21) (a) of
the Civil Aeronautics Act of 1938.37 The trial court deemed conclusive
the fact that the carriers never left the State of California, but the court
of appeals held that single fact not to be dispositive.38 While the Friedkin
case does not exactly parallel the situation where an interstate airline
operates a shuttle service between given cities in a particular state, it does
indicate that many factors must be considered, aside from the fact that
the flight is intrastate.

The carriage of cargo destined to cross state boundaries should also be
considered in determining the character of the flight. In the case of Berk-

31 Details of the occurrence, such as location, airline and persons who heard the remark would be
matter for a bill of particulars.
32 The term "interstate air commerce" is referenced by 18 U.S.C. § 31 to 49 U.S.C. § 1301 (20)
(1964) which defines the term. For a criticism of the "air commerce" basis for jurisdiction, See
generally, Mendelsohn, In-Flight Crime: The International and Domestic Picture Under the Tokyo
33 See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v.
McClung, 379 U.S. 294 (1964); Wickert v. Filburn, 317 U.S. 111 (1942). In view
of decisions of this caliber, it is difficult to conceive of any activity, however local, which Congress could not
regulate.
34 102 Cong. Rec., Pt. 6, 7631, 7634 (1956).
35 Id.
36 246 F.2d 173 (9th Cir. 1957).
37 49 U.S.C. § 1301 (21) (a) (1964) employs the same geographic test as 49 U.S.C. § 1301 (20)
(1964).
38 246 F.2d 173 (9th Cir. 1957). See, e.g., United States v. Capitol Transit Co., 321 U.S. 317,
Dower v. United Air Lines, 329 F.2d 684 (9th Cir. 1964).
man v. Trans World Airlines, Inc.," a passenger was on the St. Louis, Missouri, to Kansas City, Missouri, leg of a flight from New York to Portland, Oregon. The court held that the baggage liability filed with the CAB by TWA was applicable, even though the flight on which the baggage was lost was intrastate. The court stressed the final destination of the passenger and the scope and language of the Federal Aviation Act in reaching its decision.

In considering how far federal jurisdiction extends, it must be borne in mind that congressional regulation of almost all other aspects of air commerce is pervasive and exclusive, and by enactment of the 1938 Aeronautics Act, Congress adopted a sweeping design for the regulation of air traffic in navigable air space: a fact recognized by the Supreme Court.

In light of this extensive congressional direction, it is facetious to contend that Congress could control an interstate but not an intrastate flight though the very presence of the latter in adjacent airspace endangers the former. Obviously the very existence of such propinquity with its attendant aeronautical hazards constitutes a "substantial effect" upon interstate commerce, thus mandating congressional supervision.

318 U.S.C. § 32 (1956) was specifically announced by Congress to be modeled after the Train Wreck Act, 18 U.S.C. 1922. The destination of the cargo has provided the basis for federal jurisdiction under the Train Wreck Act.
32Justice Black's dissent in Griggs v. Allegheny County, 369 U.S. 84, 91-93 (1962) drew this conclusion:
Congress has over the years adopted a comprehensive plan for national and international air commerce, regulating in minute detail virtually every aspect of air transit—from construction and planning of ground facilities to safety and methods of flight operations. As part of this overall scheme of development, Congress in 1938 declared that the United States has "complete and exclusive national sovereignty in the air space above the United States" and that every citizen has "a public right of freedom of transit in air commerce through the navigable air space of the United States." Although in [United States v. Causby] the Court held that under the then existing laws and regulations the airspace used in landing and takeoff was not part of the "navigable airspace" as to which all have a right of free transit, Congress has since, in 1978, enacted a new law, as part of a regulatory scheme even more comprehensive than those before it, making it clear that the "airspace needed to insure safety in takeoff and landing of aircraft . . . is navigable airspace." Thus Congress has not only appropriated the airspace necessary for planes to fly at high altitudes throughout the country but has also provided the low altitude airspace essential for those same planes to approach and take off from airports. These airspaces are so much under the control of the Federal Government that every takeoff and every landing at airports such as the Greater Pittsburgh Airport is made under the direct signal and supervisory control of some federal agent [Citations omitted.].

See also, Northwest Airlines v. Minnesota, 322 U.S. 292 (1944).

Also, since congressional regulation is so persuasive, it is doubtful that a state could constitutionally legislate on this matter. See, e.g., Southern Pac. v. Arizona, 325 U.S. 761 (1944); Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955).

For the meaning and comprehensive scope of this phrase see, Katzenbach v. McClung, 379 U.S. 294, 300-306 (1964); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); United States v. Darby, 312 U.S. 100 (1940); Weiss v. United States, 308 U.S. 521 (1940); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Congressional control over intrastate flights may arguably be supported upon three theories:

(a) The intrastate flights may be found to be a part of interstate commerce. See, e.g., United States v. Capitol Transit Co., 325 U.S. 357, 363 (1945).

(b) The intrastate flights may be found to "substantially affect" interstate commerce. For a recent exposition of what "substantial effect" is see, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

(c) Finally such regulation may be deemed an appropriate means to the attainment of a legitimate end—i.e., protecting and regulating interstate commerce. See United States v. Wrightwood Dairy, 313 U.S. 110 (1942).
Based on the "safety theory," federal regulations governing the operation of aircraft have been upheld as applied to wholly intrastate activities. Thus, federal requirements of pilot certification, certification of air worthiness, and the maintenance of minimum safe altitudes have been held applicable to intrastate flight.43

Again, analogy may be made to the constitutional basis for congressional control over craft operating upon navigable rivers which, by themselves or their connection with other waters, form a continuous channel for commerce among the states.44 Since there is no section of the navigable atmosphere of the United States which is not a part of "a continuous channel of commerce among the states and with foreign countries,"45 Congress should also be able to control this form of "commerce."

"The Bomb Hoax" legislation is not limited to the flights of commercial airlines. It also extends to the interstate flights of private corporations for business and commercial purposes.46 However, interstate operation of the aircraft itself, not mere interstate contacts of the corporation, is essential for protection under the statute. Therefore, a company plane of the Standard Oil Corporation, transporting executives from one part of Oklahoma to another, would not be covered under the statute, whereas a crop-sprayer operating throughout several states would be covered. Aircraft used for personal or private purposes are not covered by the statute.47

VI. INTENT

The complaint in a civil "bomb hoax" action must allege that the defendant imparted or conveyed, or caused to be imparted or conveyed, information known to be false concerning an attempt to do a criminal act prohibited by Section 32. Under Section 32, it is a crime to place a destructive substance upon or in proximity to an aircraft only if one's purpose is to damage or destroy such aircraft.48

The question arises, therefore, whether a complaint alleging violation of Section 35(a) need charge that the proscribed information was imparted with design to damage or destroy such aircraft. The theory, intention, and policy of the 1965 amendment was clearly to obviate the necessity for

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46 The House Report to H.R. 319 (1956) (which ultimately became 18 U.S.C. § 32 (1958)) defined "aircraft" to mean "any contrivance contemplated within the definition of aircraft set forth in . . . [49 U.S.C. § 1301(14) (1964)] used for commercial purposes in the transportation of persons or property and viewed "commercial purposes" as including:
47 [the] carriage of persons or property by airlines, scheduled as well as nonscheduled, charter flights, and flights by company or other planes in connection with any business or other undertaking intended for profit. It does not include aircraft used for personal or private purposes. H.R. Rep. No. 1895, 84th Cong., 2d Sess. 4 (1956) [Emphasis added.].
alleging and proving such contemplation. However, conversion of the offense from misdemeanor to civil penalty, with no change in the wording of the statute, leaves for judicial resolution the question of the precise nature of the intent which must be alleged.

An examination of the cases decided under the criminal statute seems to lead to the conclusion that the courts will allow civil recovery on mere assertion of communication of the proscribed intelligence so long as a reasonable person would properly infer destructive intent.

Under previous “Bomb Hoax” Statutes, the problem was complicated by the fact that, though linked in theory with aircraft sabotage and criminal punishment, the prohibited statement was often made merely as a prank and was by no means necessarily connected with attempted destruction of the craft. Thus, while one court held that malicious design must be alleged in the indictment, another deemed it sufficient to charge that the defendant committed the act knowingly but without malice.

The most influential case on this point is United States v. Allen. In that case defendant, handing luggage to a friend at Bradley Field, Windsor Locks, Connecticut, asked “is that the bag with the bomb in it?” A search revealed no explosive, and the companion proceeded on his flight. A nearby attendant, though alarmed by the question, soon decided the remark was made in jest. At the trial defendant contended the misdemeanor information filed against him was defective for failure to include an allegation that the false report was made with intent to destroy the plane. The court held such assertion unnecessary, for fictitious as well as false reports are intended to be covered. The Allen case also established that the prosecution need not prove defendant’s express statement of intent to damage or destroy the aircraft: it is sufficient if the person to whom the remark was made could have reasonably understood that such was defendant’s intention.

In conformity with the Allen decision, the most recent cases have held that a misdemeanor information charging violation of Section 35 (a) need not specifically allege a threat to destroy the plane; sufficient proof has

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51 For a good analysis of these decisions see Note, 30 J. Air L. & Com. 390 (1964).
52 Act of 3 Oct. 1961, Pub. L. No. 87-138, § 35, 75 Stat. 751. The first prosecution under the original version of section 35, Smith v. United States, 283 F.2d 16 (6th Cir. 1960), cert. denied, 365 U.S. 847 (1961), involved defendant’s phone call informing a federal agency that there was a bomb on an outgoing plane. His indictment, following the language of section 35, charged him with conveying the information “with intent to damage, destroy, disable, and wreck such aircraft.”
53 Carlson v. United States, 196 F. Supp. 677 (E.D. Pa. 1961). Defendant informed a ticket agent he had a bomb in his luggage. Search revealed a can of aerosol spray labeled “Bug Bomb.” The court decided that it was sufficient if the prohibited intelligence were imparted knowingly but without actual intent to damage the airplane and that in a violation of section 35 “proof of intent to violate Section 32 [is] unnecessary.”
54 317 F.2d 777 (2d Cir. 1963).
55 Id.
57 ’While ‘willfully’ [as used in Title 18, Section 31 (a)] is a word of many meanings, we think Congress in this misdemeanor statute must be taken to have used the word in the more usual sense of knowingly, intentionally, voluntarily.’
58 Id.
59 Id. See, e.g., United States v. Carlson, supra note 53.
been adduced where the prosecutor establishes defendant’s making a remark which, reasonably construed, evinces an intent to damage the aircraft. This is properly so and should hold true for civil actions commenced under the amended statute, because, as defendant knows his statement to be false, it is impossible for him to have an actual intent to destroy or damage the craft.

VII. DEFENSES

When presented with process and complaint in a civil penalty “bomb hoax” action, a defendant has several alternatives of defense. His best initial move is an attempt to have the statute declared criminal in nature. If successful in this venture, the defendant achieves a two pronged victory. First, he increases the Government’s burden from “preponderance of evidence” to “proof beyond a reasonable doubt” and wins for himself all the safeguards of a criminal trial: confrontation, compulsory process for obtaining witnesses, notice, and assistance of counsel among others. Second, if defendant can convey to the jury that though the penalty be merely pecuniary, its imposition has criminal implications, the jury may be reluctant to impose such sanction where defendant is of good repute and his actions of a minor character.

One of the clearest indications that Section 35(a) may be penal in nature is that it operates to promote the traditional aims of punishment—retribution and deterrence. For imposition of the penalty there must be the commission of an act, which, until the 1965 amendment, had been regarded as a crime. Indeed, the Attorney General, in his letter to Congress asking for the civil penalty, did not request the amendment because the conduct was no longer viewed as criminal, but precisely because juries were not inflicting criminal retribution for the proscribed conduct, thus vitiating the deterrent effect of the misdemeanor statute. Certainly, exaction of the $1,000 is not motivated by fiscal necessity but is rather exemplary of prohibitory intent.

This statute provides for a “civil penalty” recoverable in a “civil action.” “How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!” The very wording of the enactment is, except for the provision fixing penalty, exactly the same as that of the prior misdemeanor provision, and the statute is located, as was its misdemeanor predecessor, in the criminal portion of the United States Code. “[E]ven
a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute.\(^{66}\)

In *Trop v. Dulles*,\(^{70}\) Chief Justice Warren, when adjudging penal a provision that a deserter in time of war shall lose his citizenship,\(^{8}\) stated that:

in deciding whether or not a law is penal, this Court has generally based its determination upon the purposes of the statute. If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrong-doer, to deter others, etc.—it has been considered penal. But a statute has been considered non-penal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.\(^{68}\)

Here, it may be argued, the reason for imposing a $1,000 civil penalty upon the defendant is simply to punish him. *There is no other legitimate function* that the statute could serve; no "alternative purpose to which it may rationally be connected is assignable. . . ."\(^{76}\) "Here the purpose is punishment, and therefore the statute is a penal law."\(^{71}\)

Moreover, what little history the treatment of this conduct has is clearly punitive. From origin of proscription in 1956 until the 1965 amendment, dissemination of false information concerning destruction of aircraft was punishable as a misdemeanor.\(^{72}\) Civil penalty modification came only when juries failed to return misdemeanor convictions. Today, the same conduct in aggravated form is dealt with as a felony.\(^{73}\) This behavior has always been viewed as criminal malfeasance.

However, notwithstanding the foregoing, Section 35 (a) may be viewed as truly civil in character. It involves neither restraint\(^{74}\) nor disability in the accepted sense of the word;\(^{75}\) the enactment visits upon a defendant no prohibition from avocation,\(^{76}\) office,\(^{77}\) or employment,\(^{78}\) no stripping of citizenship,\(^{79}\) franchise,\(^{80}\) or professional license.\(^{81}\) Indeed, the prohibited conduct may be viewed as not criminal at all but rather as a prima facie tort upon the serenity and order of citizens, actionable by their government. This construction of the statute finds support in the fact that although the amount of a criminal fine is imposed according to the discretion of a sentencing judge following conviction, the sum of the civil

\(^{66}\) 356 U.S. at 95.

\(^{67}\) 356 U.S. 86 (1957).


\(^{73}\) 72 Stat. 751.


\(^{76}\) Id.

\(^{77}\) Ex *Parle* Garland, 71 U.S. 333, 337 (1886).

\(^{78}\) Cummings v. Missouri, 71 U.S. 277, 320-21 (1866).

\(^{79}\) United States v. Lovett, 328 U.S. 303, 316 (1945); Ex *Parle* Garland, 71 U.S. 333, 337 (1886).


\(^{81}\) Id.
penalty under the "Bomb Hoax" Statute would be determined by a jury and awarded at the time of its decision.

Moreover, as the analysis of intent shows, the statute may be enforced without a finding of scienter. Criminal statutes usually require an intent to do wrong, be it of general or specific nature; civil redress generally demands only that the plaintiff has been damaged, regardless of his neighbor's clean heart. The statute before us, like the doctrine of negligence, is founded on unintended injury.

One of the latest cases to decide the penal nature of a statute, Kennedy v. Mendoza-Martinez,82 may be read as modifying Trop v. Dulles, to the extent that the traditional factors affecting a determination of penal character of a statute are only relevant "absent conclusive evidence of congressional intent. . . ."83 If Congress ever decided any statute should be civil, this is it. The draft legislation was introduced for the specific purpose of modifying the previous misdemeanor sanction to allow a civil penalty which juries would be less reluctant to impose since the defendant would not be stigmatized with a criminal record.84 The Attorney General wrote to the Speaker of the House specifically requesting him to provide civil remedy in this area.85

The House and Senate Reports on the bill state that, "The purpose of H.R. 6848 is to . . . substitute [for the prior misdemeanor sanction] a civil penalty of not more than $1,000 to be recovered in a civil action brought in the name of the United States."86 Both reports further state that "civil penalty statutes are not unknown to the law" and indicate several examples of such enactments in a positive assertion that this law is to be civil in nature.87 The reports conclude by quoting the Attorney General's letter to Congress, thus illustrating their adoption of his impetus for this legislation—to meet the prohibited activity with civil response.88

Conduct is deemed morally acceptable or reprehensible according to contemporary societal norms. Today, juries refuse to treat false reports, usually resulting from annoyance, fatigue, or attempted humor, as illegal conduct. Thus, there is implicit in this legislation a congressional finding that the behavior it covers is simply not criminal. This determination renders obvious the "alternative purpose to which it [the statute] . . . may rationally be connected"89 i.e., not punishment but provision for the orderly operation of flights in conjunction with other federal aircraft

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84. In Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1962) it was stated: "Absent conclusive evidence of congressional intent as to the penal nature of a statute, these [traditional] factors must be considered in relation to the statute on its face" [Emphasis added.].
85. Support for this reading may be found in the opinion of Mr. Justice White dissenting in United States v. Brown, 381 U.S. 437, 476 (1965).
86. See H.R. REP. No. 263, supra note 11.
87. Id. at 1.
89. Id. at 2.
90. Id. at 3-4.
regulations. Section 31, referring as it does to the definitions and jurisdictional basis of the Civil Aeronautics Act of 193891 (where Congress originally intended to place this statute), supports this interpretation of a logical connection and common purpose between the two enactments. The civil penalty is not "excessive in relation to the alternative purpose assigned." Though Section 35(a) would seem to be an obviously good example of a civil penalty, defendant loses nothing and, if successful, gains much by urging that it be viewed as punitive.

Further lines of defense depend upon the facts of the occurrence. It may be urged that the statement was inherently unbelievable; thus there was no "impacting or conveying" of information as judged by reasonable standards.92 The wording of the "remark" can afford another buttress of defense. If it amounts to inquiry, conjecture or speculation, then again there is no "impacting or conveyance" of information, and the statute has not been violated.93 This type of defense frequently arises out of a situation in which there are only two witnesses to the remark: the person who made it and the one who heard it. Defendant may deny making the statement, contending that his words were misunderstood, or maintain that he was merely speculating about a possibility. Because we are here dealing with the inference drawn by one fallible human being from the language, manner, and conduct of another, any of these assertions may be true. As many of these situations occur in crowded airport terminals where attention is easily distracted, mistakes can often be made.

Again, the deportment of the speaker may be so inconsistent with his words as to preclude his being taken seriously. Many of these statements are bantering comments made in jesting fashion during jocular conversation with a friend or pretty stewardess rather than attempts to impart false information in violation of the "bomb hoax" enactment. Here again,
word-against-word conflict concerning demeanor may render it doubtful that plaintiff can show by a preponderance of the evidence that there was an actual imparting or conveying of proscribed information when judged by an objective standard.

It is, of course, frivolous to assert that Section 35(a) is unconstitutional as an unreasonable abridgement of the freedom of speech. As Justice Holmes remarked, no one has the right to falsely cry "fire" in a crowded theatre. Nor is this law unconstitutionally vague or an excessive exercise of congressional power.

The fact that the defendant may have immediately followed his remark with a disclaimer does not constitute an effective defense. Once there has been a clear imparting of information concerning the destruction of aircraft, the interests of security in air commerce demand that it not be overlooked.

If no valid defense can be found, it may be urged that exceptional circumstances make the civil penalty useless in a particular instance. For example, if the defendant was deranged at the time of his actions or muttered his words through the mists of a drunken stupor, and he is presently undergoing treatment in a mental institution or rehabilitation in an alcoholic clinic, little would be achieved by visiting further retribution upon him.

If there are no valid defenses or exceptional circumstances, it may at least be possible to plead in mitigation, depending upon the facts of the case, that: the remark led to no delay in departure of flight, only one person heard it, the other passengers and airline personnel were unaware of it, or similar factors modifying the seriousness of the incident.

If nothing else can be done, the defendant might consider negotiating a settlement. Lack of express statutory authority renders it dubious that the United States can compromise liability in a "bomb hoax" civil penalty case without the entry of a judgment. Accordingly, where defendant can convince a United States Attorney that the $1,000 maximum penalty is not an appropriate assessment in his case and the exaction of lesser amount will satisfy any possible deterrent purpose behind the act, an agreement should be finalized by a consent judgment of the court after filing of the complaint.

VIII. CONCLUSION

The federal civil penalty "Bomb Hoax" Statute, like any other hybrid, has problems peculiar to itself. It is anomalously civil, since it is directed toward deterrence rather than redress of injury. The enactment is insufficiently published since it is obscurely located in the criminal rather

91 Schenck v. United States, 249 U.S. 47, 52 (1918).
92 United States v. Allen, 317 F.2d 777 (1st Cir. 1963).
93 There is no specific statutory authority permitting the United States to solicit or accept payment from defendant in a "bomb hoax" action in the absence of a complaint and the very nature of civil penalties weighs heavily against the possibility. See, e.g., Missouri K. & T. Ry. v. United States, 231 U.S. 112, 119 (1913) (penalty as "deterrent not compensation"). However, it can be argued that, if this precedent be found controlling, the statute is really a criminal sanction as discussed supra.
than the civil portion of the code. In addition, notice of this law is not given at the airport itself—on signs, on the backs of airline tickets, or on the safety instruction cards. Absent such notice, passengers, when joking with friends or stewardesses, expect their extemporaneous, jesting references to destruction to be taken in the casual, social context in which they are uttered. Evidently conscience does not warn the speakers of the serious nature of their impulsive conversational gambits. Thus travelers are punished under an obscure and little known statute for conduct they did not consider wrong.

Notwithstanding its occasional harsh impact, there is much justification for the imposition of the civil penalty. Certainly, had the passenger paused to reflect, he should have been deterred from making his comment by a realization of the serious consequences which might flow from such a remark. Accordingly, it is appropriate to punish him for injury resulting from his thoughtlessness.

Moreover, there is room within the “civil penalty” concept to tailor the amount of the penalty to the extent of the injury caused. In many instances “bomb hoax” statements are investigated quietly and efficiently by airline personnel and occasion very little disruption. Therefore, although Section 35 (a) makes no mention of a requisite showing of injury for recovery of “a civil penalty of not more than $1,000,” the jury as in any civil action, should be properly instructed in damage theory so that a judgment commensurate with the injury caused by the remark will be imposed.

Of course, the results of an unthinking “bomb hoax” statement, especially one expressed in the air, can be disastrous: giving rise to aborted flights, broken traffic patterns, and the danger of collision and grave personal injury. Conduct causing such serious harm is appropriately amenable to stringent sanction. Although the proper action for such activity would seem to be the imposition of criminal punishment, deterrence might better be effected by making the “civil penalty” more truly civil in application; that is, by amending or construing the legislation to provide private causes of action for passengers and airline companies. Under such an approach, it is probable that in most instances neither the airlines nor the passengers would sue: the former because it would be both bad press and bad public relations, the latter because requisite injury would generally be lacking. But those persons sustaining substantial personal or economic injuries would be provided a vehicle for compensation, and the publicity generated by their lawsuits would hopefully restrain others from perpetrating similar pranks. Thus, civil retribution could effectively operate to deter criminal wrong.

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100 The publication problem is indeed a complex one. At first blush, increased publication of the “bomb hoax” law at airports would seem invariably to deter passengers from making such remarks. But, airline officials might well be hesitant to adopt such a notification procedure precisely because its consequences cannot be anticipated with a sufficiently high degree of certainty: the “solution” might, in other words, prove ineffective and might in fact lead to an increased incidence of truly disruptive bomb scares—particularly of the anonymous phone call variety—by focusing attention upon the bomb threat area.
THE EVOLUTION OF THE OUTER SPACE TREATY†
By PAUL G. DEMBLING†† AND DANIEL M. ARONST†††

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V. CONCLUSION

I. INTRODUCTION

AN ANNOUNCEMENT was made on 8 December 1966, that agreement had been achieved among the members of the twenty-eight nation United Nations Outer Space Committee on the text of a treaty establishing principles governing the activities of states in the exploration and

† This article contains some material concerning the Treaty which appeared previously in the Journal, prior to the United States' ratification. Added to this are the developments which have occurred since United States' ratification.
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The opinions expressed in this article are solely those of the writers and are not intended to represent the views of any agency or organization with which they may be connected.
use of outer space, the moon, and other celestial bodies. Approval of the Treaty was recommended unanimously by the Political Committee of the General Assembly on 17 December 1966. Two days later, the Treaty was endorsed by a unanimous vote of the General Assembly. Regardless of the total number of States which may sign and ratify the Treaty, a remarkable endeavor of great significance to international law and politics has reached fruition. Nations often in conflict with one another and adhering to widely divergent political philosophies have agreed on the first Treaty of general applicability governing activity in outer space.

The principles set forth in the Treaty had been advanced previously in the form of General Assembly resolutions, analogous international agreements, domestic legislation, statements by government officials, articles by scholars in the field and other expressions of views. However, agreement on the Treaty was primarily the product of the labors of the twenty-eight member Legal Subcommittee of the United Nations General Assembly's Committee on the Peaceful Uses of Outer Space during the Subcommittee's Fifth Session held in Geneva from 12 July to 4 August 1966, and in New York from 12 to 16 September 1966. The few issues requiring resolution subsequent to the conclusion of the Fifth Session were the subject of various bilateral negotiations and other discussions held during the Twenty-First Session of the General Assembly. Agreement was obtained on those issues shortly before the 8 December announcement that agreement on the Treaty as a whole had been reached.

This paper will first consider briefly the expressions of views, international agreements and other events prior to the Fifth Session, which are pertinent to the establishment of principles governing exploration and use of outer space and celestial bodies. The critical events immediately prior to the Fifth Session will be summarized. Considerable attention will then be devoted to the two draft treaties introduced at the outset of the Fifth Session, and the discussions and amendments of those drafts which culminated in the agreed upon text which was announced, in final form, on 8 December 1966.

II. PRIOR CONSIDERATION OF OUTER SPACE AND CELESTIAL BODIES

A. Principles Applicable To Celestial Bodies

Although the scope of the Treaty as eventually agreed upon includes both outer space and celestial bodies, an important aspect of the deliberations leading to agreement on the Treaty is the extent to which the nations

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4 As of this writing, 79 States have signed the Treaty and 5 States have deposited instruments of ratification.
and individuals involved were concerned, for the first time, with the formulation of realistic principles which might govern activity on celestial bodies in addition to, but as distinct from, outer space. This consideration of celestial bodies was based upon a body of thought and action that preceded the Fifth Session of the Legal Subcommittee. Even prior to 1960, a considerable amount of commentary existed on the question of "whether it is possible for a terrestrial nation-state to acquire sovereignty over all or part of a natural celestial body, and what would be required under existing law to make such a claim legally valid." Analogies were drawn to the manner in which nations had previously sought to exert legal claims to sovereignty over portions of the earth's surface, e.g., through discovery, occupation, annexation and contiguity. Considerable discussion arose over the legal effect of the reported striking of the moon by an early Soviet satellite carrying the Soviet flag. However, the Soviet Union did not seek to exert any claim of sovereignty based upon this occurrence.

Although writers regarded the legal principles derived from exploration of the earth's surface as potentially applicable to exploration of celestial bodies, they did not consider such applicability to be desirable. The suggestion was made that "both public and private groups . . . work towards formulating standards and procedures that will guarantee access by all to these resources on equitable terms and prevent interference by one State with the scientific programs of another." As early as 1959, the American Bar Association passed a resolution declaring "that in the common interest of mankind . . . celestial bodies should not be subject to exclusive appropriation." A similar concern was evidenced at the official level. The United Nations Ad Hoc Committee on the Peaceful Uses of Outer Space, created by the General Assembly in 1959, took the position in its report that "serious problems could arise if States claimed, on one ground or another, exclusive rights over all or part of a celestial body," and suggested that "some form of international administration over celestial bodies might be adopted." In an address before the General Assembly in September 1960, President Eisenhower proposed that:

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6 A portion of the material in Sections II and III of this paper also appears in Dembling and Arons, The United Nations Celestial Bodies Convention, 32 J. AIR L. & COM. 535 (1966).
11 Lipson and Katzenbach, id.
1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.
2. We agree that the nations of the world shall not engage in warlike activities on these bodies.
3. We agree, subject to verification, that no nation will put into orbit or station in outer space weapons of mass destruction. All launchings of spacecraft shall be verified by the United Nations.\textsuperscript{12}

However, as the Ad Hoc Committee had previously concluded:

While scientific programmes envisaged relatively early exploration of celestial bodies, human settlement and extensive exploitation of resources were not likely in the near future. For this reason, the Committee believed that problems relating to the settlement and exploitation of celestial bodies did not require priority treatment.\textsuperscript{14}

Thus, since the formation of the present Committee on the Peaceful Uses of Outer Space in 1960, attention has been directed primarily to problems associated with the launching of spacecraft, their revolving in earth orbit, and their return to earth. The proceedings of the Fifth Session of the Legal Subcommittee, however, reveal a greatly increased concern with the need to provide legal principles governing the exploration and use of the moon and other celestial bodies, in addition to outer space.

Agreement on the principle of freedom of exploration of celestial bodies is not devoid of analogous legal precedent. As the Ad Hoc Committee on the Peaceful Uses of Outer Space noted in its report (in 1959), during the International Geophysical Year, 1957-58, and subsequently,

countries throughout the world proceeded on the premise of the permissibility of the launching and flight of the space vehicles which were launched, regardless of the territory they 'passed over' during the course of their flight through outer space. The committee . . . believes that, with this practice, there may have been initiated the recognition or establishment of a generally accepted rule to the effect that, in principle, outer space is, on conditions of equality, freely available for exploration and use by all in accordance with existing or future international law and agreements.\textsuperscript{14}

If one includes principles applicable to the exploration of celestial bodies under those pertaining to the exploration of outer space generally, the practice developed during the International Geophysical Year and further developed by subsequent space flights would support the view that, as a principle of customary international law, anything outside the earth's atmosphere, except an item launched from earth, is not subject to claim of national sovereignty.

B. Analogies To Other Treaties

An obvious precedent for an international convention governing activities in outer space and on celestial bodies is the Treaty concerning Antar-
tica. Indeed, the draft conventions tabled by the United States and the
Soviet Union at the Fifth Session of the Legal Subcommittee, contain
provisions quite obviously based upon analogous provisions in that Treaty.
Article I provides that Antarctica shall be used only for peaceful pur-
poses. Article II provides for freedom of scientific investigation in Ant-
arctica and cooperation in that regard. Article III provides for exchange
of scientific information and personnel. Article IV, paragraph 2, pro-
hibits nations from making additional claims of sovereignty, although it
does not require renunciation of existing claims.

Another treaty which affords some precedent to agreement on the use
of outer space and celestial bodies for peaceful purposes is the Nuclear
Test Ban Treaty. Article I provides, in part, as follows:

1. Each of the Parties to this Treaty undertakes to prohibit, to prevent,
and not to carry out any nuclear weapon test explosion, or any other nuclear
explosion, at any place under its jurisdiction or control:
   (a) in the atmosphere, beyond its limits, including outer space; or under-
water, including territorial waters or high seas; or
   (b) in any other environment if such explosion causes radioactive debris
to be present outside the territorial limits of the State under whose jurisdic-
tion or control such explosion is conducted. .....

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9 The Antarctic Treaty signed at Washington on 1 Dec. 1959, by the seven Antarctic sector
States (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) and
Belgium, Japan, Union of South Africa, the Soviet Union, and the United States. The history of
the multiple claims to various portions of Antarctica, as well as the assertions of national interests
is fully considered in P. Jessup & H. Taubenfeld, CONTROLS FOR OUTER SPACE AND THE ANT-
ARCTIC ANALOGY (1959). See also Lissitzyn, The American Position on Outer Space and Antarctica,

10 Article I provides:
1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any
measures of a military nature, such as the establishment of military bases and fortifications, the
carrying out of military maneuvers, as well as the testing of any type of weapons.
2. The present Treaty shall not prevent the use of military personnel or equipment for scien-
tific research or any other peaceful purpose.

11 Article II provides:
Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied
during the International Geophysical Year, shall continue, subject to the provisions of the present
Treaty.

12 Article III provides:
1. In order to promote international cooperation in scientific investigation in Antarctica, as
provided for in Article II of the present Treaty, the contracting parties agree that, to the greatest
extent feasible and practicable:
   (a) information regarding plans for scientific programs in Antarctica shall be exchanged
to permit maximum economy and efficiency of operations.
   (b) scientific personnel shall be exchanged in Antarctica between expeditions and stations.
   (c) scientific observations and results from Antarctica shall be exchanged and made freely
available.
2. In implementing this Article, every encouragement shall be given to the establishment of
cooperative working relations with those Specialized Agencies of the United Nations and other
international organizations having a scientific or technical interest in Antarctica.

13 Article IV, Paragraph 2, provides:
No acts or activities taking place while the present Treaty is in force shall constitute a basis
for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica or create any
rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial
sovereignty shall be asserted while the present Treaty is in force.

14 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water,

15 Article I, Paragraph 2, provides:
Each of the parties to this Treaty undertakes furthermore to refrain from causing, encouraging,
or in any way participating in, the carrying out of any nuclear weapon test explosion, or any other
nuclear explosion, anywhere which would not take place in any of the environments described, or
has the effect referred to, in paragraph 1 of this Article.
Whether one regards the moon and other celestial bodies as included in "outer space," as referred to in subparagraph (a), or "in any other environment," as referred to in subparagraph (b), nuclear explosions are effectively prohibited from being carried out on celestial bodies. Thus, the negotiation and drafting of principles providing for the peaceful exploration and use of outer space and celestial bodies proceeded from the standpoint that an activity of immense military significance had already been banned.

C. Prior Activity In The United Nations

Although the Fifth Session of the Legal Subcommittee provided the first opportunity for intensive examination, in the United Nations, of principles governing the exploration and use of outer space and celestial bodies, it was not the first time that the U.N. had ever considered this matter. At the first meeting of the present Committee on the Peaceful Uses of Outer Space in November-December 1961, the nations represented agreed on a draft resolution, originally proposed by the United States, which, as adopted by the General Assembly on 20 December 1961, commended to States for their guidance in the exploration and use of outer space the following principles:

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

Proposed elaborations of, and additions to, the principles stated in Resolution 1721 were further discussed during the First and Second Sessions of the Legal Subcommittee in 1962 and 1963. This discussion of "basic principles," together with discussions of draft conventions and resolutions covering assistance to, and return of, astronauts and space vehicles, and of liability for damages caused by space vehicles, led to the unanimous adoption by the General Assembly, on 13 December 1963, of Resolution 1962 (XVIII) entitled Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. Repeating

23 G. A. Res. 1721 (XVI). On the United States position, Ambassador Adlai E. Stevenson made the following statement in General Assembly Committee I (Political and Security) on 4 Dec. 1961:
Freedom of space and celestial bodies, like freedom of the seas, will serve the interest of all nations.
Outer space and celestial bodies are free for exploration and use by all states in conformity with international law and are not subject to national appropriation by claim of sovereignty or otherwise.
See also address by Harlan Cleveland, Assistant Secretary of State for International Organization Affairs, 22 Oct. 1961, St. Louis University, reproduced in 45 DEP'T STATE BULL. 796, 800 (1961).
what had already been covered in Resolution 1721, the Declaration, in paragraphs 2 and 3, provides:

Outer space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law.

Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Although the Declaration, like other General Assembly resolutions, does not having the contractually binding characteristics of a treaty, the Declaration does reflect a certain international understanding of the principles which ought to govern the exploration and use of outer space and celestial bodies and, therefore, provides evidence of the customary international law in that regard. Thus, over two and one-half years prior to the Fifth Session, a general consensus had been obtained among the nations involved in space exploration that outer space and celestial bodies should be governed by the principles of international law and free for peaceful exploration and use without being subject to claims of national sovereignty.

During its previous four sessions, particularly the Third and Fourth Sessions in 1964 and 1965, the Legal Subcommittee had been primarily concerned with the relatively narrow subjects of assistance to and return of astronauts and space objects and liability for damages caused by space vehicles. By the close of the Fourth Session in October 1965, agreement had been virtually achieved on a draft convention covering the former subject, and considerable progress had been made on the latter. However, the activities of the Legal Subcommittee were not limited to these two subjects. Under the mandate governing its activities during the Fifth Session, the Subcommittee was not only “urged” by the General Assembly to prepare draft international agreements on “assistance and return” and “liability” but also “to give consideration to incorporating in international agreement form, in the future as appropriate, legal principles governing the activities of States in the exploration and use of outer space.”

The consideration by the Legal Subcommittee of the draft conventions on exploration and use of outer space and celestial bodies came within this last part of its mandate.

III. EVENTS GIVING RISE TO FIFTH SESSION

That a sense of urgency had developed concerning the need for an international agreement on the exploration of the moon and other celestial bodies was made clear in a statement by President Lyndon B. Johnson on 7 May 1966. He emphasized the need to “take action now . . . to insure that explorations of the moon and other celestial bodies will be for peaceful purposes only” and “to be sure that our astronauts and those of other nations can freely conduct scientific investigations of the moon.” The President suggested a treaty containing the following elements:

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87 See Dembling and Arons, supra note 25 at 349, 371.
89 For full text, see 14 DEP'T STATE BULL. 900 (1966).
1. The moon and other celestial bodies should be free for exploration and use by all countries. No country should be permitted to advance a claim of sovereignty.

2. There should be freedom of scientific investigation, and all countries should cooperate in scientific activities relating to celestial bodies.

3. Studies should be made to avoid harmful contamination.

4. Astronauts of one country should give any necessary help to astronauts of another country.

5. No country should be permitted to station weapons of mass destruction on a celestial body. Weapons tests and military maneuvers should be forbidden.

Two days after the president made his statement, United States Ambassador to the United Nations Arthur J. Goldberg addressed a letter to Dr. Kurt Waldheim of Austria, the Chairman of the Committee on the Peaceful Uses of Outer Space, requesting an early convening of the Legal Subcommittee to consider the treaty proposed by President Johnson.

On 30 May 1966, Soviet Ambassador Fedorenko transmitted to the Secretary-General of the United Nations a letter from Mr. A. A. Gromyko, Minister for Foreign Affairs of the U.S.S.R., requesting the inclusion of an item on the agenda for the 21st Session of the General Assembly entitled "Conclusion of an International Agreement on Legal Principles Governing the Activities of States in the Exploration and Conquest of the Moon and Other Celestial Bodies." In his letter, Mr. Gromyko suggested that such an international agreement be based on four principles, which appeared to be quite similar to the principles stated by President Johnson.

On 16 June Ambassador Goldberg addressed a letter to the Chairman of the Committee on the Peaceful Uses of Outer Space tabling the United States' proposed draft "Treaty Governing the Exploration of the Moon and Other Celestial Bodies." On the same day, Mr. Platon Morozov, Acting Permanent Representative of the U.S.S.R., transmitted to the Secretary-General, for inclusion in the agenda of the Twenty-First Session,
the Soviet proposed draft "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, the Moon and Other Celestial Bodies." Up to this point, the Soviet Union had desired that consideration of these proposals await the start of the Twenty-First Session of the General Assembly. However, in diplomatic discussions on 17 June, the Soviets reversed their position and even suggested that the Legal Subcommittee convene prior to 12 July, the date proposed by the United States. During the following week, agreement was reached that 12 July would be the date on which formal consideration would commence and that the meeting would be held at Geneva, the date being the preference of the United States, and the place being the preference of the Soviet Union.

IV. THE FIFTH SESSION OF THE LEGAL SUBCOMMITTEE

A. General Scope And Purpose Of The Treaty

During the first few days of the Geneva portion of the Fifth Session, the various delegations discussed the urgent need for the Treaty, whether its scope should be limited to activities on celestial bodies or should include outer space as well, and whether its provisions should state general principles or should provide specific rules for the conduct of activity in outer space and on celestial bodies. There was a belief that a treaty regulating the conduct of States on celestial bodies should be agreed upon as soon as possible. It was apparent that the delegations regarded the prospect of manned lunar landings by both the United States and the Soviet Union as necessitating regulation before such landings. As one delegate stated, "prompt action was essential, not only because the legal aspects of the problem might hamper scientific and technical progress, but also because such progress would depend on the correct solution of the legal problem." While celestial bodies are as yet practically untouched by man, there was a particular desire to prohibit the use of celestial bodies, if not outer space as well, for military purposes. As "the arms race and the conflicts which took place on earth were bound to affect space . . . every effort should therefore be made to limit the arms race wherever possible." In this regard, there was also general agreement that a critical need existed to include a provision banning nuclear weapons and other weapons of mass destruction from outer space.

37 All twenty-eight members of the Legal Subcommittee were present. They are: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chad, Czechoslovakia, France, Hungary, India, Iran, Italy, Japan, Lebanon, Mexico, Mongolia, Morocco, Poland, Rumania, Sierra Leone, Sweden, United Arab Republic, U.S.S.R., United Kingdom, and the United States.
38 Statement of the Mongolian delegate in U.N. Doc. A/AC.101/C.2/SR. 62 at 9. The discussions which took place at the formal meetings were summarized and published in the form of Summary Reports [hereinafter cited as SUM. REP.].
39 The moon has been struck by man made objects.
40 Statement of the Polish delegate in SUM. REP. 62 at 7.
41 See statement of the Czech delegate in SUM. REP. 58 at 7.
The belief that agreement must be reached as soon as possible affected the matter of whether the agreement should be limited to a statement of general principles or whether it should establish more specific regulation of space activity. As noted above, previous sessions of the Legal Subcommittee had devoted considerable attention to the detailed draft treaties on assistance to and return of astronauts and space vehicles and liability for damages caused by space vehicles. Various delegations expressed a desire that the Subcommittee continue its work on these drafts during the Fifth Session, and were not satisfied with the inclusion of general provisions on those subjects as items in a treaty as broad as those suggested by the United States and the Soviet drafts. However, the Subcommittee was interested in obtaining "maximum results in a minimum time" and believed it "should limit itself strictly to settling essential and urgent issues."

Most of the delegations felt that the principles set forth in the United States and Soviet drafts were "a starting point and would be applied in practice later—in particular in the field of liability and the return of astronauts. It was therefore essential to define and codify now the largest number of points of agreement . . ." As stated by Mr. Platon Morozov, the head of the Soviet delegation to the Fifth Session, and later agreed to by the members of the Subcommittee, the inclusion in the Treaty of two broadly phrased articles on assistance and return and liability respectively "was not intended to prejudice the efforts already being made in the Subcommittee to conclude a special agreement on those matters."

A further matter to which considerable discussion was devoted during the general debate was whether the Treaty should establish rules governing activity on celestial bodies or should include all of outer space as well. The most obvious difference between the Soviet and United States drafts was that the Soviet draft would have applied to celestial bodies and outer space while the United States draft would have applied only to celestial bodies. As expected, the delegate from the Soviet Union and the representatives from Communist bloc countries of Eastern Europe advocated the Soviet version. In addition, however, several delegations from non-aligned and pro-Western nations supported the Soviet position on this matter. Cogent arguments were advanced to the effect that the implementation of several of the proposed treaty articles would be extremely difficult, if not impossible, should the scope of the Treaty be limited to activities on celestial bodies to the exclusion of outer space.

In view of the various statements made concerning the scope of the treaty, it is important to consider the points raised by different delegations.

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Footnotes:
41 Statement by the Belgian delegate in Sum. Rep. 61 at 7.
42 Statement by the Canadian delegate in Sum. Rep. 58 at 10.
44 See statements by the Soviet delegate, Sum. Rep. 62 at 11; the Rumanian delegate, Sum. Rep. 61 at 1; the Bulgarian delegate, Sum. Rep. 61 at 2; and the Hungarian delegate, Sum. Rep. 59 at 3.
treaty, the United States delegation recognized that a consensus had been reached on the broad proposition that "the Treaty should not be limited to celestial bodies alone but should include outer space along the lines of the U.S.S.R. draft" and agreed to work towards the conclusion of such a treaty. In return, the Soviet delegate stated that his delegation was prepared "to consider the possibility of including, in the draft treaty to be prepared by the Subcommittee, provision which did not appear in the Soviet text, including certain points from the United States' draft." The Soviet delegate was referring particularly to the provisions in the United States draft that provided for reporting of scientific information and free access to all areas of celestial bodies. As a comparison of the Soviet and United States drafts readily indicates, there were not many substantive points of difference between the Soviet and United States positions on the matters sought to be covered.

Thus, even before the Subcommittee began its article by article analysis of the respective drafts, a reasonable amount of agreement existed between the two major space powers, and among all the members of the Subcommittee, on the general scope and purpose of the Treaty. The remainder of the discussions during the Fifth Session concerned specific matters to be covered in the Treaty.

B. Outer Space, Including The Moon And Other Celestial Bodies Shall Be Free For Exploration And Use For The Benefit Of All, Shall Not Be Subject To Claims Of Sovereignty, And Shall Be Governed In Accordance With International Law.

The Preamble and Articles I, II and III of the Treaty state broad principles which, from the outset of discussion, were generally acceptable to the members of the Subcommittee and provoked little disagreement as to wording. The texts of these provisions were taken almost entirely from the Preamble and Articles I, II and III of the Soviet draft. The same general principles appeared in Articles 1, 2, 3 and 6 of the United States draft, but were stated differently. The first three articles of the Treaty, as eventually approved, are, in large part, a codification of paragraphs 1 through 4 of the Declaration of Legal Principles, and are analogous to certain principles set forth in the Antarctic Treaty. Thus agreement on the text of these provisions without much debate was not surprising.

Despite general agreement on the principles stated in these provisions, a few differences of opinion were voiced during the Geneva portion of the Session prior to agreement on a final text. Article I, Paragraph 2, of the Treaty provides that the benefits of the exploration and use of outer space, including the moon and other celestial bodies, shall accrue to all countries "irrespective of their degree of economic or scientific development." The implied reference to the developing countries appeared initially in the Preamble to the Soviet draft. However, the delegations from those

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countries took the position that such language should be included as a part of the binding treaty commitment, and it was ultimately agreed that such language should be included in the Treaty.

A related concept appears in the second paragraph of Article I which provides, in part, for exploration and use of outer space and celestial bodies “without discrimination of any kind” and “on a basis of equality.” The United States delegate suggested that the phrase “without discrimination of any kind” appeared redundant. He argued that the expression “on the basis of equality,” derived from Paragraph 2 of the Declaration of Legal Principles, adequately covered the subject, and the addition of “without discrimination of any kind” in the Soviet draft was not necessary. However, supporters of the Soviet draft insisted that this explicit nondiscrimination language corresponds to a most favored nation clause which is necessary to assure cooperation among nations in space exploration. While the words “on a basis of equality” may convey the same thought, it was argued that the main consideration was not de facto equality, but rather the absence of discrimination between States. In view of the arguments made in favor of specific inclusion of this nondiscrimination language, the United States delegate withdrew his objection, and later fully endorsed the agreed upon language of Article I in stating that this provision, together with others, “make[s] clear the intent of the Treaty that outer space and celestial bodies are open not just to the big powers or the first arrivals but shall be available to all, both now and in the future. This principle is a strong safeguard for the interests of those states which have, at the present time, little or no active space program of their own.”

Article VI of the United States draft and Article I of the Soviet draft provided for free access to all areas (in the case of the former) or all regions (in the case of the latter) of celestial bodies. The last phrase of the second paragraph of Article I of the Treaty provides that “there shall be free access to all areas of celestial bodies.” It might appear, from a comparison of this phrase with the comparable provision in the United States draft, that the United States version had proved acceptable to the Subcommittee. However, this provision must be read in the light of

50 See statements by the Czech delegate, SUM. REP. 64 at 4; the United Arab Republic delegate, SUM. REP. 67 at 7; the Indian delegate, SUM. REP. 65 at 8; the Brazilian delegate, SUM. REP. 63 at 9; and the Hungarian delegate, SUM. REP. 71 at 22.
51 Statements of the Hungarian delegate, SUM. REP. 64 at 3; and the Rumanian delegate, SUM. REP. 61 at 7.
52 Statement by Ambassador Arthur J. Goldberg before General Assembly Committee I (Political and Security), 17 Dec. 1966, reprinted in 56 DEP'T STATE BULL. 78, 81 (1967). During the hearings held by the Senate Foreign Relations Committee prior to Senate approval of the Treaty, Senators J. William Fulbright and Albert Gore questioned Ambassador Goldberg on the possibility that Article I would require the United States to make its communications satellites, including those for defense communications, available for the benefit of all countries. Ambassador Goldberg replied, in effect, that Article I is a statement of general goals, and that separate international agreements would be required to cover the use of particular satellites. Hearings on Executive D, Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess., “Treaty on Outer Space,” at 31-37, 7 & 13 March and 12 April (1967). [hereinafter referred to as Senate Hearings]. Based on this explanation, the Committee stated in its Report that nothing in Article I, paragraph 1, of the Treaty diminishes or alters the right of the United States to determine how it shares the benefits and results of its space activities.” “Treaty on Outer Space,” S. Exec. Doc. No. 8, 90th Cong., 1st Sess. 4 (1967).
Article XII, which provides that “All stations, installations, equipment and space vehicles shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity.” The “free access” provision of Article I should therefore be read to mean that there shall be free access at all times to all areas of outer space and celestial bodies, except as provided in Article XII. The deliberations leading to Article XII, including possible meanings of “reciprocity,” will be discussed infra.

Article I, Paragraph 1, of the Treaty, as well as other provisions, applies to the “use” of outer space and celestial bodies as well as to the “exploration” thereof. Although there was some difference of opinion over the meaning of the word “use,” as distinguished from “exploration,” it appeared that most of the delegations agreed with the French delegate that “use” means exploitation. The French delegate cited existing “uses” of outer space for meteorological research and telecommunications, and potential use of the moon, e.g., for the extraction of minerals. Since the analogous provisions of the Declaration of Legal Principles apply to “use” as well as to “exploration,” there was no disagreement that the scope of the Treaty should include “use” of outer space and celestial bodies, even though potential uses of outer space and celestial bodies can be foreseen only to a limited extent at present.

The text of Article II, which prohibits national appropriation of outer space and celestial bodies, provoked only a few minutes of debate. The wording of the second sentence of Article 1 of the United States draft and the wording of Article II of the Soviet draft are almost identical. Agreement was reached on the final text when the Soviet delegate concurred in a suggestion by the United States delegate that the words “and celestial bodies” in the Soviet draft be replaced by the words “including the moon and other celestial bodies” and another minor drafting change. Although there was some later criticism of the use of the word “appropriation” for possible vagueness, the Soviet delegate had indicated, at a prior stage of the discussions, that the term referred to the ban on assertion of national claims by way of any human activity in outer space or on the moon or other celestial bodies. As explained by Ambassador Goldberg to the Political Committee of the General Assembly, Article II, by banning national appropriation of outer space and celestial bodies, reinforces the free access language in Article I. If an individual nation cannot claim sovereignty to any particular area of outer space or of a celestial body, it cannot deny access to that area. However, as stated above, there may be a limitation on “free access” imposed by Article XII depending on the meaning that one attaches to the use of the term “reciprocity” in Article XII.

Article III, by making international law, including the Charter of the

54 SUM. REP. 63 at 8. See also SUM. REP. 69 at 5.
55 SUM. REP. 64 at 10.
56 Statements of the Austrian delegate in SUM. REP. 71 at 10, and the Australian delegate in SUM. REP. 71 at 15.
57 SUM. REP. 63 at 10.
58 Statement by Ambassador Goldberg, supra note 53, at 80.
United Nations, applicable to outer space and celestial bodies, further reinforces Article I. Indeed, there is considerable overlap between Article III and the second paragraph of Article I which assures the availability of outer space and celestial bodies "for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law . . . ." Except for minor drafting changes, Article III was taken verbatim from Article III of the Soviet draft, which is merely a restatement of Paragraph 4 of the Declaration of Legal Principles. Although Article I of the United States draft also contained a reference to the applicability of international law, formal discussion in the Subcommittee of the substance of Article III ended momentarily after it began, when the United States delegate stated that the Soviet text was acceptable to his delegation.  

There could hardly be any dispute over the theoretical application of international law to outer space and celestial bodies in view of the relative absence of specific rules of law in this area. However, Article III is important in itself if viewed in the light of the consensus reached earlier, that this Treaty is intended to establish basic principles applicable to conduct in outer space and on celestial bodies. By virtue of Article III, as Ambassador Goldberg later stated before the Political Committee, "As man steps into the void of outer space, he will depend for his survival not only on his amazing technology but also on this other gift which is no less precious: the rule of law among nations." One may wonder what are the principles of international law applicable to outer space and celestial bodies, aside from those that might be derived from the United Nations Charter. Although various analogies may be suggested (e.g., rules governing freedom of the seas), the principal thrust of Article III is to establish the applicability of rules of law to activity in outer space and on celestial bodies, as distinct from each nation unto itself. The text of Article III, along with the texts of Articles I and II, was accepted by the Working Group of the Legal Subcommittee on 29 July 1966.  

C. No Weapons Of Mass Destruction Shall Be Placed In Orbit Or On Celestial Bodies, Or Stationed In Outer Space In Any Other Manner; Celestial Bodies Shall Be Used Exclusively For Peaceful Purposes

Article IV of the Treaty constitutes, as President Johnson stated, "the most important arms control development since the 1963 treaty banning nuclear testing in the atmosphere, in space and under water." Ambassador Goldberg explained to the Political Committee of the General Assembly that:

This article restricts military activities in two ways:

First, it contains an undertaking not to place in orbit around the earth,
install on the moon or any other celestial body, or otherwise station in outer
space, nuclear or any other weapon of mass destruction.

Second, it limits the use of the moon and other celestial bodies exclusively
to peaceful purposes and expressly prohibits their use for establishing mili-
tary bases, installations or fortifications, testing weapons of any kind, or
conducting military maneuvers.65

Article IV is taken from Articles 8 and 9 of the United States draft. Both the United States and Soviet drafts reflect principles previously agreed
upon in the Nuclear Test Ban Treaty, and United Nations Resolution
1884 (XVIII), adopted by the General Assembly by acclamation on 17
October 1963.64 In addition, the last sentence of Article 9 of the United
States draft, which provided for the use of military personnel, facilities,
or equipment for peaceful purposes, is quite similar to Article I, Para-
graph 2, of the Antarctic Treaty.66 Ambassador Goldberg explained to
the Legal Subcommittee that:

As in the exploration of the Antarctic, man could not have penetrated
outer space and survived in that hostile environment unless he had been
able to draw upon the benefits of all research, civilian or military, involving
both personnel and equipment. For any country engaging in space activity,
military personnel, facilities and equipment played an indispensable role and
would continue to be an essential part of future space programs.66

Except for two differences of opinion, to be discussed below, agreement on
the final text of Article IV was reached towards the conclusion of the
Geneva portion of the Session on the basis of acceptance by the United
States delegation of the language of the first sentence of Article IV of
the Soviet draft, and acceptance by the Soviet delegation of the United
States desire to include provision for the use of military personnel for
peaceful purposes.67

It is noteworthy that the prohibition contained in the first paragraph of
Article IV applies to both outer space and celestial bodies, while the pro-
hibition contained in the second paragraph of the article applies to celestial
bodies only. Several of the delegations questioned the propriety of exclud-
ing outer space from the coverage of the second paragraph, the implica-
tion being that outer space may be used for nonpeaceful purposes.68 However,
it is a well-known fact that both the United States and the Soviet
Union have already launched satellites into outer space for military pur-
poses, and examination of a ban on such satellites would have raised con-
troversial issues presently within the purview of disarmament negotiations.

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65 Statement by Ambassador Goldberg, supra note 53, at 80.
64 G. A. Res. 1884 (XVIII) “2. Solemnly calls upon all States: (a) To refrain from placing
in orbit around the earth any objects carrying nuclear weapons or any other weapons of mass
destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space
in any other manner. (b) To refrain from causing, encouraging, or in any way participating in
the conduct of the foregoing activities.’’
66 Article I, paragraph 2, of the Antarctic Treaty is quoted, supra note 17.
67 SUM. REP. 65 at 9.
68 Working Group/L.4, accepted by the Working Group on 29 July 1966, in Report of the
Legal Subcommittee, Annex II at 5.
69 See statements by the Indian delegate, SUM. REP. 66 at 6; the Iranian delegate, SUM. REP.
66 at 7; the Austrian delegate, SUM. REP. 71 at 10; the Japanese delegate, SUM. REP. 71 at 12;
the Brazilian delegate, SUM. REP. 71 at 17; and the Mexican delegate, SUM. REP. 71 at 19.
The text of Article IV as agreed upon was conceded to be the most practical solution from the standpoint of expeditious conclusion of a treaty on outer space. As the Soviet delegate stated, "A number of questions would, of course, remain to be dealt with after the elaboration of the Treaty, particularly the use of outer space for exclusively peaceful purposes.” In the interim, one might conclude that any military use of outer space must be restricted to nonaggressive purposes in view of Article III, which makes applicable international law including the Charter of the United Nations.

At the conclusion of the Geneva portion of the Session, two matters had not been resolved with respect to Article IV. The United States had previously revised and consolidated Articles 8 and 9 of its draft and tabled a single, two-paragraph article quite similar to Article IV of the Soviet draft. The second paragraph of the revised United States article read as follows:

The moon and other celestial bodies shall be used exclusively for peaceful purposes. The establishment of military bases and fortifications, the testing of any type of weapons, and the conduct of military maneuvers shall be forbidden. The present Treaty does not prohibit the use of any types of personnel or equipment for scientific research or any other peaceful purpose.79

The Soviet Union desired, however, to include the word “installations” between “military bases” and “fortifications,” and to ban the use of “military equipment” on celestial bodies.

Concerning the use of the term “installations,” the Soviet delegate did not articulate any reason for his delegation’s insistence on the inclusion of that word, except for the possibility that the words “bases” and “fortifications,” in Russian translation, do not adequately describe all of the possible structures that might be erected for military use on celestial bodies. 80 The United States delegate argued that the term “installation” is too vague,81 possibly viewing “bases” and “fortifications” as terms containing use of a facility for military purposes, while “installations” might be construed to apply to a facility used for peaceful purposes but constructed or inhabited by military personnel.

A more important point of disagreement was whether military equipment may be used on celestial bodies. Notwithstanding the analogy in Article I, Paragraph 2, of the Antarctic Treaty, the Soviet delegate argued that “if the use of military equipment in outer space was allowed, the essence of the treaty would be distorted and a loophole would be created for evading one of its most fundamental provisions.”82 The United States

79 SUM. REP. 66 at 6.
81 SUM. REP. 65 at 10. See also a statement by the Czech delegate in SUM. REP. 66 at 3.
82 SUM. REP. 70 at 6.
83 SUM. REP. 65 at 11. The Soviet position was supported by the other delegations from Communist states, e.g., Bulgaria, whose delegate stated that “The inclusion of a provision prohibiting the use of military equipment on celestial bodies would afford a firm guarantee of the use of those bodies for peaceful purposes only, and might be the means of averting future disaster.” SUM. REP. 71 at 21. Also see statement by the Hungarian delegate, SUM. REP. 71 at 21.
position was that “Equipment used in outer space had, in many cases, been
developed through military research; that was the case, in particular, with
respect to the rockets carrying astronauts; that could not, however, be said
to constitute a violation of the principle of the peaceful uses of outer
space.” The British delegate added that “The fact that a piece of equip-
ment owed its origin to military development should not preclude its use
for peaceful purposes foreseen by the Treaty and apparent to all as peace-
ful purposes.”

As a reading of the second paragraph of Article IV indicates, the United
States and its supporters eventually agreed to accept the use of the term
“installations,” while the Soviet Union and its supporters agreed to the
inclusion of a provision which would not ban the use of military equip-
ment on celestial bodies. Emphasis on the purpose for which a piece of
military equipment is to be used on a celestial body, as stressed by the
United States delegate, is reflected in the last sentence of Article IV. Thus,
aside from the first paragraph of Article IV, the placement of a weapon
or other item of military equipment of any description on a celestial
body would appear to be prohibited unless it can be demonstrated that the
item of military equipment will be devoted solely to the peaceful explora-
tion or use of the celestial body. Agreement on the final text of Article
IV was not reached until after the close of the New York portion of the
Session in the course of compromising the few outstanding differences
which stood at that time as a barrier to announcement of the agreement
on the treaty.

D. Assistance And Return Of Astronauts And Space Vehicles; Notification
Of Dangerous Phenomena In Outer Space Or On Celestial Bodies.

Article V of the Treaty contains two distinct though related principles.
The first two paragraphs set forth the principle of assistance to and return
of astronauts, a subject which had been discussed in considerable detail
during previous sessions of the Legal Subcommittee. The text of the first
two paragraphs of the Article was taken almost verbatim from Article IX
of the Soviet draft which restated Paragraph 9 of the Declaration of Legal
Principles. Although the principles of assistance and return are contained
in Article 5 of the United States draft, the United States delegate acceded
to the Soviet version subject to minor drafting changes. The third para-
graph of Article V is derived from a proposal made by the United States
during the Geneva portion of the Session as follows:

A State conducting activities in outer space, including the moon and other
celestial bodies, shall promptly notify the Secretary-General of the United
Nations of any information relating to the physical safety of astronauts.

In the Working Group, this proposal was revised to require notification

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73 Sum. Rep. 71 at 5.
76 For commentary on the Legal Subcommittee’s work on assistance and return, see Dembling
and Arons, supra note 25.
77 Sum. Rep. 66 at 8.
78 Id.
of either the other parties to the Treaty or the Secretary-General. It is noteworthy that the third paragraph of Article V constitutes a mandatory reporting obligation which the Soviet Union accepted. As discussed in connection with Article XI, the Soviet delegation rigorously adhered to its position that the reporting of activities in outer space and on celestial bodies generally should be only on a voluntary basis. As a result of the Soviet view, Article XI is ambiguous, as distinguished from the comparatively unequivocal obligation imposed on parties to the Treaty by the third paragraph of Article V.

The principles of assistance to astronauts in distress and their return to the launching State or other State of registry were already accepted by the members of the Legal Subcommittee as constituting humanitarian obligations. Thus, there was little discussion beyond that noted above, and the text of Article IV was accepted by the Working Group shortly before the close of the Geneva portion of the Session. As mentioned above, however, several delegations had expressed the desire that the Subcommittee continue progress towards the conclusion of detailed treaties on assistance and return liability, and that the Treaty under discussion should not prejudice the efforts undertaken with respect to those other treaties. Thus, in connection with Article V, the Indian and Australian delegates proposed the inclusion of another paragraph which would have specifically provided that the provisions of Article V are adopted without prejudice to the provisions of any subsequent treaty applicable to the matter of assistance and return of astronauts. This proposal was adopted in the form of a paragraph included in the General Assembly Resolution which commended the Treaty, adopted on 19 December 1966.

Paragraph 4(a) of the Resolution constituted a request by the General Assembly that the Committee on the Peaceful Uses of Outer Space continue its work on the elaboration of agreements on assistance to and return of astronauts and space vehicles, and on liability for damages caused by the launching of objects into outer space.

E. Parties Shall Bear International Responsibility For National Activities In Outer Space.

Article VI of the Treaty assures that the parties cannot escape their international obligations under the treaty by virtue of the fact that activity in outer space or on celestial bodies is conducted through the medium of nongovernmental entities or international organizations. Perhaps the most important of the three sentences from the standpoint of domestic concern is the second, which states that the activities of nongovernmental entities in outer space and on celestial bodies shall require authorization and continuing supervision by the State concerned. The obvious example of activity covered by the second sentence is that of the Communications Satellite Corporation, a nongovernmental entity whose activities are

80 SUM. REP. 66 at 10.
authorized and regulated by United States federal agencies pursuant to federal statutes and regulations. However, while no one would doubt the need for governmental control over space activity at its present stage, the second sentence of Article VI would prohibit, as a matter of treaty obligation, strictly private, unregulated activity in outer space or on celestial bodies even at a time when such private activity becomes most common-place. Although the terms "authorization" and "continuing supervision" are open to different interpretations, it would appear that Article VI requires a certain minimum of licensing and enforced adherence to government-imposed regulations.

Article VI was taken almost verbatim from Article VI of the Soviet draft, which was in turn based on Paragraph 5 of the Declaration of Legal Principles. The United States draft contained no comparable provision but the United States delegate readily acceded to the Soviet version subject to changing the term "nongovernmental bodies corporate" to "nongovernmental entities," the word "corporate" not being adequately descriptive. When the Soviet delegate accepted this minor change, debate ended on the first two sentences of Article VI. A more difficult question was posed by the third sentence, which purports to make international organizations responsible for compliance with the Treaty with respect to activities conducted in outer space or on celestial bodies by these organizations. Although Paragraph 5 of the Declaration of Legal Principles contains a similar provision, it is not necessary for the purposes of a General Assembly resolution to provide a mechanism for creating contractually binding obligations between various states or groups of states. However, the restatement of Paragraph 5 of the Declaration as a treaty provision raised such questions as: whether international organizations should be permitted to become parties to the Treaty, whether they should be permitted to incur treaty obligations as entities independent of their member states which are parties to the Treaty, whether members of an international organization which are not parties to the Treaty could become indirectly bound to the Treaty obligations by virtue of their membership in an organization which has become a party to the Treaty, and other questions of like import. The debate which developed out of consideration of the last sentence of Article VI led to the adoption of Article XIII, which specifically provides for the treatment of international intergovernmental organizations under the Treaty. However, the last sentence of Article VI was retained even though it contained no provision for international organizations to become parties to the Treaty. The Soviet delegation was categorically opposed to any provision which would exempt international organizations from responsibility for their activities in outer space and yet was unwilling to accept a provision which would place such organizations on an equal footing with the States Parties to the Treaty.

82 SUM. REP. 66 at 12.  
83 Presumably, activity by international nongovernmental organizations will be subject to the first two sentences of Article VI providing for responsibility, authorization and supervision by the states concerned.  
84 SUM. REP. 70 at 3.
Since the Soviet delegation refused to consider any modifications to the last sentence of Article VI, the gap in coverage remained but was resolved in part by Article XIII. Article VI together with Article XIII appear to require States which are parties to the Treaty, when they conduct activities through an international organization, to use their best efforts to secure compliance by the international organization with the obligations set forth in the Treaty. Such compliance could be readily obtained if the organization is comprised entirely of parties to the Treaty, or such parties at least hold the balance of power in the organization. However, if States Parties to the Treaty do not have sufficient power to determine the conduct of the international organization in question, Articles VI and XIII might be construed to require such parties to disassociate themselves from activity of the organization which is violative of the Treaty, or to resign entirely from the organization.

When it appeared to the various delegations during the Geneva portion of the Session that there was little possibility of obtaining agreement on any modifications to the last sentence of Article VI, this Article was accepted in the form in which it appears in the Treaty. Resolution of the status of international organizations was a subject of further discussions during the New York portion of the Session and thereafter.

F. Parties To The Treaty That Launch Or Procure The Launching Of Objects Into Outer Space Shall Be Liable For Damages.

Article VII concerning liability was also taken almost verbatim from an article of the Soviet draft, in this case Article VII. The Soviet draft was based on Paragraph 8 of the Declaration of Legal Principles. Although the United States draft contained no similar provision, the United States delegate readily agreed to the inclusion of Article VII of the Soviet draft, subject to minor drafting changes. The United States delegate, along with others, recognized that the Legal Subcommittee was in the process of drafting a detailed treaty on liability, but no objection was raised to the mere inclusion of an article stating the general principle in the present Treaty on outer space and celestial bodies. As the French delegate stated:

The questions of liability and assistance were extremely complicated, and if any reference to them was included in the treaty under discussion, it should be very brief and simple and should merely establish the principle concerned. Any additional details might deal too rapidly with problems which had not yet been settled.

On this basis, agreement was reached shortly before the close of the Geneva portion of the Session on the inclusion of Article VII of the Soviet draft with minor modifications.

The subject of international liability for damage caused by space vehicles is indeed one involving a multitude of problems, discussed elsewhere by

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the authors in connection with the work of the Legal Subcommittee on the draft conventions on liability. Since Article VII of the Treaty is essentially a repetition of Paragraph 8 of the Declaration of Legal Principles, these problems were hardly touched upon during the Fifth Session in the course of discussion on liability. However, the Indian delegate questioned the meaning of the word "internationally," as used to modify "liable," and stated that the article would only be acceptable if "internationally" meant "absolutely." But other delegations noted that the concept of "absolute liability" was still being refined in discussions of the detailed draft treaties on liability and doubted the feasibility of embodying the concept of absolute liability in the text of Article VII. As the Australian delegate noted, "At earlier sessions the Subcommittee had found that absolute liability was necessarily subject to limitations and qualifications if justice was to be achieved." A number of delegations supported the view of the Indian delegate that the word "internationally" as used in Article VII is ambiguous if it does not mean "absolutely." For this reason, several delegations proposed to include a sentence, in Article VII, or elsewhere in the Treaty, making express reference to the conclusion of a detailed treaty on liability, in the same manner as suggested in connection with Article V, on assistance and return, discussed above. In rebuttal, the Lebanese delegate raised doubts that it is legally possible to refer in a treaty to an agreement which had not yet been concluded. The argument was ended when the United States delegate concurred in the Lebanese delegate's view, stating that the force of Article VII might be weakened if a specific reference to an agreement not yet negotiated were included in the present Treaty. The Soviet delegate then added his opinion that a special statement referring to the agreements to be concluded on liability would not be necessary. As noted above in connection with the discussion of Article V on assistance and return, Paragraph 4(a) of the General Assembly Resolution commending the Treaty requests the Legal Subcommittee to continue its work on the elaboration of agreements on liability and assistance and return. It was hoped that this paragraph of the Resolution would alleviate the fears of some of the delegations that Articles V and VII would prejudice the work of the Legal Subcommittee on the other treaties.

G. Jurisdiction And Control Over Personnel And Objects Are Not Affected By Their Presence In Outer Space Or On Celestial Bodies.

Article VIII of the Treaty consists of three sentences, two of which state general rules concerning control and ownership of personnel and objects while in outer space and on celestial bodies. The third sentence

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80 Dembling and Arons, supra note 21.
84 Sum. Rep. 67 at 11.
85 Id. at 12.
imposes an obligation upon parties to the Treaty to return found objects to the party to the Treaty on whose registry they are carried. The State of registry is required to furnish identifying data if so requested. The third sentence, in providing for the return of space objects, can be regarded as a companion provision to Article V which provides for the assistance and return of astronauts. The return of space vehicles to the State of registry has been considered by the Legal Subcommittee in previous sessions as a part of a treaty that, if adopted, would regulate the assistance and return of astronauts.96

Article VIII was taken from Article V of the Soviet draft which virtually repeated Paragraph 7 of the Declaration of Legal Principles. Article 7 of the United States draft was a similar provision but was concerned with control of persons and ownership of objects only on celestial bodies. Also, the United States version did not contain a provision for the return of objects. However, the United States delegate readily acceded to the Soviet version, applicable to both outer space and celestial bodies, subject to a few minor drafting changes. The most noticeable change was the substitution of the word "landed" for "delivered to" in the second sentence.97 Agreement on the final text of Article VIII was reached one week before the close of the Geneva portion of the Session, prior to agreement on the final text of any other article.98

H. Parties To The Treaty Shall Avoid Harmful Contamination Of Outer Space, Celestial Bodies, And The Environment Of Earth, And Shall Consult With Other Parties Regarding Potentially Harmful Experiments.

As stated by a leading proponent of the Treaty as an instrument of international cooperation, Article IX is "a provision which is designed to protect outer space and the celestial bodies from contamination and pollution and to protect the legitimate programmes of States from undue interference."99

Article IX was taken from Article VIII of the Soviet draft and Article 10 of the United States draft. The Soviet version was in turn a reiteration of Paragraph 6 of the Declaration of Legal Principles. Article IX of the Treaty closely follows the text of the Soviet version. However, the Soviet Union agreed to add specific language making the provision applicable to celestial bodies in addition to outer space, and agreed to add the provision of the United States draft prohibiting parties to the Treaty from conducting experiments which might cause adverse changes in the environment of earth.100

The first sentence of Article IX restates the principle of international

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96 Dembling and Arons, supra note 25, at 338.
99 International Cooperation from the U.N. Viewpoint, at 4; Speech by Dr. Kurt Waldheim before the 13th Annual Meeting of the American Astronautical Society, Dallas, Texas (1967). Dr. Waldheim is the Chairman of the Committee on the Peaceful Uses of Outer Space.
100 Sum. Rep. 68 at 3, 4.
cooperation in the exploration and use of outer space and celestial bodies for the benefit of all mankind enunciated in the Preamble and Articles I and III of the Treaty. However, Article IX lays stress upon a particular element of such international cooperation which is, as stated by the Canadian delegate, "that States should conduct their activities in outer space with due regard for the corresponding interests of other States." The remaining sentences in Article IX implement this principle of "due regard" for the interests of other States.

The second sentence combines the second sentence of Article VIII of the Soviet draft and Article 10 of the United States draft. By virtue of this provision, parties to the Treaty must conduct their activities in such a manner so as to avoid the harmful contamination of outer space or celestial bodies and adverse changes in the environment of earth. The third and fourth sentences establish the procedure of international consultations as the method of enforcing the obligations stated in the first two sentences. The third sentence imposes a mandatory obligation upon a party planning a potentially harmful experiment to consult with other parties. Most significantly, the fourth sentence provides each party with the right to request consultations concerning a potentially harmful activity or experiment planned by another State in outer space or on a celestial body.

The Japanese delegation proposed to add language which would have required parties planning potentially harmful experiments to report such planned experiments to the Secretary-General of the United Nations before undertaking them. The Soviet delegate, however, disapproved of this suggestion, stating that the essential information would be communicated more quickly to the other parties to the Treaty if the Secretary-General were not utilized as an intermediary. In addition, and more important, he regarded the Japanese suggestion to be in conflict with the position of the Soviet Union that the Secretary-General not play a role in the application of the Treaty by States. Although the Soviet delegate, after much debate, agreed to Article XI, which provides for the reporting of activities in outer space and celestial bodies to the Secretary-General, he drew a sharp distinction between the mandatory consultations in advance of the event, under Article IX, and what he regarded as voluntary reporting after the event, under Article XI. The Soviet view of the proposed Japanese amendment to Article IX is consistent with the acceptance by the Soviet delegation of the third paragraph of Article V. That paragraph requires the reporting of phenomena considered hazardous to astronauts either to the other parties to the Treaty or the Secretary-General. In view of the unequivocal refusal of the Soviet delegation to accept any provision requiring mandatory reporting to the Secretary-General, the Japanese proposal was dropped and agreement was reached

101 Id. at 10.
102 Id. at 5-6.
103 Id. at 7-8.
104 Id. at 8. The Soviet delegate was supported by the Bulgarian delegate, Id. at 8.
on the text of Article IX, including the mandatory provisions for consultations of potentially harmful experiments, shortly before the close of the Geneva portion of the Session.\[105\]

I. Parties To The Treaty Shall Consider Requests By Other Parties To Be Afforded An Opportunity To Observe The Flight Of Space Objects Launched By Those States; The Nature Of The Opportunity Afforded Shall Be Determined By Agreement Between The Parties Concerned

Article X of the Treaty pertains principally to the establishment and use of tracking facilities by parties to the Treaty on the territory of other parties. Although there is little in the available published material reflecting discussions on this matter, protracted disagreement among delegations, particularly between the United States and Soviet delegations, proved to be a major stumbling block to agreement on the Treaty as a whole. Ambassador Goldberg stated to the Senate Foreign Relations Committee, "This is a provision that gave us a great deal of trouble. It required long negotiation to come out as it did."\[106\]

The genesis of the provision is in the second sentence of Article I of the Soviet draft which provided that "The parties to the Treaty undertake to accord equal conditions to States engaged in the exploration of outer space." No comparable provision appeared in the United States draft. Essentially, the Soviet Union was seeking the inclusion of a most-favored nation clause with respect to the availability of tracking facilities. Mr. Morozov, the head of the Soviet delegation, explained that this sentence in the Soviet draft "meant that if State A permitted State B to build a tracking station on its territory, State C, which was pursuing the same peaceful aims in space, should be given the opportunity to build a similar station on A's territory. The provision, of course, would not affect the similar right of State A to refuse to grant such privileges to either State B or State C."\[107\] Although the Soviet position received some adverse comment during the Geneva portion of the Session,\[108\] there appears to have been little thought that the Soviet delegation would insist on such a provision to the point of jeopardizing agreement on other provisions. However, towards the close of the Geneva portion of the Session, the Soviet delegation introduced a working paper which sought to clarify the meaning of the second sentence of Article I of its draft, and made clear Soviet insistence for a mandatory most-favored nation provision on the availability of tracking facilities.\[109\]

When the New York portion of the Session opened, the United States delegation and its supporters strongly opposed the Soviet proposal. Indeed,

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\[106\] Senate Hearings, supra note 53, at 43.

\[107\] SUM. REP. 63 at 6.

\[108\] See statements by the Brazilian delegate, SUM. REP. 63 at 9; the United Kingdom delegate, SUM. REP. 63 at 9; and the United States delegate, SUM. REP. 63 at 10.

it appeared that success or failure of the negotiations would depend on whether an accommodation could be reached on the availability of tracking facilities to parties to the Treaty. Ambassador Goldberg stated that "The United States could not understand why the Soviet Union now regarded the tracking facilities proposal as the key point of the whole Treaty. The question of arms control, and the need to translate into treaty form the elements of the Declaration of Legal Principles were of far greater importance."

The United States delegate explained that his delegation could not accept the Soviet proposal since it appeared to be for the benefit of the space powers alone, for it would give a space power the right to require of a non-space power equivalent facilities in regard to the tracking of space objects if the non-space power had previously granted facilities of that kind to another State. Thus the State would be bound to accord tracking facilities without reference to any bilateral negotiations . . . Under the Soviet proposal, if State A had granted tracking facilities to State B, A must grant equal facilities to State C, apparently regardless of any terms or mutual consideration which formed the basis of the agreement between A and B. Furthermore, the number of space powers was growing constantly; thus, the Soviet proposal would place an unknown and indefinitely enlarging obligation on non-space powers. The effect would be to discourage accession to a treaty which contained agreed elements of the highest importance. Moreover, the proposal put a premium on non-cooperation. The Soviet text did not require State A to offer tracking facilities to State B. Only if State A had extended such facilities to a third party was it obliged to make the same facilities available to State B. Besides, a country having tracking facilities and using them exclusively for its own space programs would have no obligation at all towards other countries. In that way, a State that did not cooperate with others was placed in the strongest position to demand that States wishing to cooperate must extend every possible assistance to it. Finally, the installation of tracking facilities in the territory of a host country raised many technical and political questions which could only be dealt with bilaterally.\footnote{SuM. REP. 73 at 4.}

The United States was supported in opposition to the Soviet proposal by Australia, Austria, Belgium, Brazil, Canada, France, Italy, Japan, Lebanon, Mexico, Sweden, and the United Kingdom.\footnote{Id. at 4-5.}

Notwithstanding the strenuous objections of the United States and its supporters, the Soviet Union tabled a revised working paper which reiterated its earlier position, but stated in a second paragraph that any expenses incurred by a party to the Treaty in rendering assistance to another party for the purpose of observing the flight of space objects would be reimbursed by the party receiving the assistance.\footnote{See statements by the United Kingdom delegate, SuM. REP. 71 at 5; the Austrian delegate, SuM. REP. 71 at 11; the Japanese delegate, SuM. REP. 71 at 13; the Australian delegate, SuM. REP. 71 at 15; the Brazilian delegate, SuM. REP. 71 at 17-18.}

The Hungarian and Bulgarian delegations supported the Soviet working paper.\footnote{Working Paper No. 29, 13 Sept. 1966, in Report of the Legal Subcommittee, Annex IV at 2.} From a state-
ment by the Soviet delegate, it was apparent that the Soviet Union wished to use the Treaty as a vehicle to place itself in a more equal position vis-à-vis the United States in the acquisition of a world-wide tracking network. The effect of the most-favored nation provision regarding the use of tracking facilities would be to require any party to the Treaty, which permitted its territory to be used for tracking facilities by the United States or France, for example, to afford the Soviet Union the same right.

The New York portion of the Fifth Session adjourned without an accommodation on the use of tracking facilities and, for a time, it appeared that agreement on the Treaty as a whole would be postponed indefinitely. However, extensive bilateral negotiations continued to be held between the United States, the Soviet Union, and other States, particularly those which have already granted tracking facilities to the United States. Agreement was reached on the text of Article X shortly before the entire Treaty was approved by the General Assembly. Although the most-favored nation principle sponsored by the Soviet Union was included in the Treaty, the disagreement was resolved essentially in favor of the United States' position. Parties to the Treaty which afford tracking facilities to other parties are only obligated to "consider on a basis of equality any requests by other States Parties to the Treaty to be afforded an opportunity to observe the flight of space objects launched by those States." However, as Ambassador Goldberg stated before the General Assembly's Political Committee:

It is quite clear from the text of the Article . . . that there must be agreement between the parties concerned for the establishment of a tracking facility. The Article as thus revised recognizes that the elements of mutual benefit and acceptability are natural and necessary parts of the decision whether to enter into an agreement concerning such a facility, and it properly incorporated the principle that such State which is asked to cooperate has the right to consider its legitimate interests in reaching its decision.

Since this interpretation remained unchallenged, it appears that the Soviet Union essentially acceded to the United States position.

J. Parties To The Treaty Shall Agree To Inform The Secretary-General Of The United Nations As Well As The Public And The International Scientific Community, To The Greatest Extent Feasible And Practicable, Of The Nature, Conduct, Locations And Results Of Such Activities.

Article XI of the Treaty, a provision for reporting of activities in outer space and on celestial bodies, originated with Article 4 of the United States draft. The United States initially took the position that parties to the Treaty should be under a mandatory obligation to "promptly provide the Secretary-General of the United Nations with a descriptive report of the

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115 Sum. Rep. 73 at 6-7.
116 See Ambassador Goldberg's statement in Senate Hearings, supra note 53, at 154-55.
117 Statement by Ambassador Goldberg, supra note 33, at 82.
of ratification and deposit of instruments of ratification and accession. Paragraph 3 provides that the Treaty shall enter into force upon the deposit of instruments of ratification by five governments including the depositary governments. According to paragraph 4, ratification or accession by a State subsequent to the entry into force of the Treaty shall be effective with the deposit of the instrument of ratification or accession. Paragraph 5 requires the depositary governments to notify all signatory and acceding States of the dates of signatures, deposits of instruments of ratification, etc. Paragraph 6 provides that the Treaty shall be registered pursuant to Article 102 of the Charter of the United Nations.

Article XV permits any State Party to the Treaty to propose amendments. For an amendment to be binding upon a party, that State must accept the amendment and, in any event, an amendment does not enter into force until it has been accepted by a majority of the States Parties to the Treaty.

Article XVI provides that any party may withdraw from the Treaty by giving written notice thereof, to the depositary governments, the withdrawal to take effect one year from the date of receipt of the notification. However, since no notice may be given until at least one year has elapsed after the Treaty has entered into force, no withdrawal can take place until at least two years from the date the Treaty entered into force.

Article XVII specifies that the Chinese, English, French, Russian, and Spanish texts of the Treaty are equally authentic, and that the texts shall be deposited in the archives of the depositary governments, which shall then transmit certified copies to the signatory and acceding States.

V. Conclusion.

As stated at the outset of this paper, the Treaty was approved by the United Nations General Assembly by acclamation on 19 December 1966. The Treaty was opened for signature in Washington, London and Moscow on 27 January 1967. Sixty nations signed the Treaty on that date including the United States, the Soviet Union and the United Kingdom. Advice and consent to ratification of the Treaty was given without a negative vote by the United States Senate on 25 April 1967. The Treaty was approved by the Presidium of the Supreme Soviet of the Soviet Union on May 18 of the same year.

With the Treaty having been signed and ratified by the two major space powers, as well as many other nations, the activities of human beings in outer space and on celestial bodies have been subjected to a regime of law. It is true, as President Johnson stated in transmitting the Treaty to the

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171 Article 102 provides "1. Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

"2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement with any organ of the United Nations."

172 As of this writing, instruments of ratification have not yet been deposited by the United States and the U.S.S.R.
In establishing these principles in treaty form, the parties are now contractually obligated to carry out their activities in outer space and on celestial bodies in accordance with accepted norms and goals validated in a legal form significantly more binding upon the parties than the United Nations resolutions and utterances of individual nations that preceded the Treaty. As President Johnson stated in his message to the Senate, “The future leaves no option. Responsible men push forward in the exploration of space, near and far. Their voyages must be made in peace for purposes of peace on earth. This Treaty is a step—a first step, but a long step—toward assuring the peace essential for the longer journey.”
that the parties to the Treaty, "to the extent feasible and practicable, will promptly submit reports to the other Parties to the Treaty, The Secretary-General of the United Nations, and to the international scientific community." (Emphasis added.) The U.A.R. revised its proposal to accord with the United States revision. The phrase "to the extent feasible and practicable" is identical to that used in the analogous reporting provision in the Antarctic Treaty, and the text finally agreed upon for Article XI of the Outer Space Treaty closely parallels the language of Article III of the Antarctic Treaty.

With the introduction of the revision of Article 4 of the United States draft, little difference remained between the United States and Soviet positions. As the Italian delegate added, "[W]ith a little goodwill the Sub-committee should be able to reach early agreement" on a reporting provision. However, the Soviet Union and its supporters conditioned final agreement on this and other provisions upon a resolution of the dispute over the availability of tracking facilities. Thus, agreement on the final text of Article XI was not achieved until the parties finally agreed upon the substance of Article X.

K. Stations, Installations, And Space Vehicles On The Moon And Other Celestial Bodies Shall Be Open To Representatives Of Parties On A Basis Of Reciprocity. Representatives Shall Give Reasonable Advance Notice In Order That Consultations May Be Held, Safety Precautions Taken And Interference With Operations Avoided.

Article XII of the Treaty is another provision which reflects a compromise of United States and Soviet positions. Article 6 of the United States draft initially provided that

All areas of celestial bodies, including all stations, installations, equipment and space vehicles on celestial bodies, shall be open at all times to representatives of other States conducting activities on celestial bodies.

The Soviet draft did not contain a comparable provision although one might regard the second paragraph of Article I of the Soviet draft as overlapping Article 6 of the United States draft, at least to the extent that the Soviet version provided that "there shall be free access to all regions of celestial bodies." As discussed in connection with Article I of the

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130 Article XI of the Outer Space Treaty begins: "In order to promote international cooperation in the peaceful exploration of outer space . . . ." Article III of the Antarctic Treaty begins "In order to promote international cooperation in scientific investigation in Antarctica . . . ."
131 SUM. REP. 73 at 7.
132 See statement of the Bulgarian delegate, SUM. REP. 73 at 12.
133 Article 6 of the United States draft was based on Article VII, Paragraph 3, of the Antarctic Treaty which provides:

"All areas of Antarctica, including all stations, installations, and equipment within those areas and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica shall be open at all times to inspection by any observers designated [by the Contracting Parties]."
Treaty, the Soviet Article I related more to the broad principle of freedom of scientific investigation on celestial bodies which was eventually covered by Article I of the Treaty. As the Soviet delegate explained, the geographical idea of "areas of celestial bodies" was on a somewhat different plane from "stations, installations, equipment and space vehicles."

At the outset of the Geneva portion of the Session, the Soviet delegation accepted Article 6 of the United States draft subject to deletion of the words "all areas of celestial bodies, including," the deletion of "at all times," and the addition of the phrase: "on the basis of reciprocity under the conditions that the time of the visit is to be agreed between the parties concerned." In a revision of Article 6 of its draft, the United States delegation accepted the Soviet suggestion that the initial phrase be deleted, but did not agree to the other proposed amendments. Ambassador Goldberg stated that "The deletion of the words 'at all times' and the addition of a requirement that the time of visits would have to be agreed upon would frustrate the right of access." He added that no difficulties had been experienced in carrying out the purposes of Article VII, Paragraph 3, of the Antarctic Treaty, on which Article 6 of the United States draft was based. The Soviet delegate responded that the Soviet Union fully accepted the principle of open access stated in Paragraph 6 of the United States draft, and the proposed Soviet amendments were merely drafting changes to clarify the intent of the parties.

Notwithstanding the Soviet delegate's statement to the effect that the Soviet amendments were merely drafting changes, there remained an important substantive difference between the United States and Soviet views on the right of access to stations, etc., on celestial bodies. The United States was seeking a treaty provision providing for an unlimited right of access. The Soviet Union, while accepting the principle of open access, was seeking to impose conditions upon the ability of individual nations to exercise that right.

With respect to the Soviet suggestion that the phrase "at all times" be deleted, the Soviet delegate explained that his delegation did not consider that a right of access to stations, etc., should be so absolute as to permit access to the point of endangering the lives of astronauts or interfering with the normal operations. This idea caught favor with certain delegations who ordinarily supported the United States position on other matters. The Japanese delegation proposed an amendment to Article 6 of the United States draft that retained the phrase "at all times," but also added a sen-

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234 SUM. REP. 63 at 4.
235 Id. at 4-5. The Soviet amendments were later included as paragraph 4 of an amended Article I of the Soviet draft. Working Paper No. 23/Corr. 1., 29 July 1966, in Report of the Legal Subcommittee, ANNEX III at 12.
237 SUM. REP. 63 at 6.
238 Id.
239 As a matter of minor significance, the Indian delegate suggested that a reference to "outer space" be included in Article 6 of the United States draft on the supposition that platforms will be constructed in space. SUM. REP. 64 at 7. It appears, however, that this suggestion was not taken seriously by other delegations.
240 SUM. REP. 64 at 9, 10.
tence providing that “representatives shall take maximum precaution not to interfere with the normal operation of activities therein.” The Italian delegation also proposed an amendment to Article 6 which would have deleted the phrase “at all times” and conditioned the right to “free, immediate access” to stations, etc., “on the understanding that the time of the visit should not imperil the lives of the personnel and the functioning of the installations involved.”

Although there was general agreement that Article 6 of the United States draft should be modified to permit denial of access to a prospective visitor if the visit would be untimely, the Soviet suggestion that the right of access should be on a basis of “reciprocity” provoked considerable discussion. A refusal to permit a visitor to enter a station for reasons of untimeliness need not necessarily be regarded as a refusal to permit entry under any circumstances. The suggested inclusion of the “reciprocity” language, however, suggested to several delegations that if a particular nation, which controls a station on a celestial body, has no desire to inspect the stations, installations, etc., of other nations, it is under no obligation to permit visitors from other stations to enter its own stations, unless bilateral agreements provide otherwise. Moreover, there was a fear on the part of nations having only very small space programs, or no space program at all, that conditions of reciprocity would only benefit the space powers. States having no station, installation, etc., on a celestial body would not be entitled to visit a station controlled by another State. Or, would “reciprocity” be so narrowly construed as to mean that if State A has one station and State B has five stations on a celestial body, State A could be barred from visiting four of the five stations controlled by State B? The confusion was compounded by the failure of the Soviet delegation to provide an adequate definition of “reciprocity” after having gone on record as being in favor of “open access.”

After much discussion over the meaning of reciprocity, the United States delegate restated his nation’s position as follows:

Access should not be conditional, and the notion of prior agreement implied a sort of veto on it. Representatives of a State Party to the Treaty conducting activities on celestial bodies should have the right of access to the stations, installations, equipment and space vehicles of another State party on a celestial body, regardless of whether the second State had ever claimed or exercised a right of access itself; however, if the first State had denied access to representatives of the second State then the latter was not required on the principle of reciprocity to grant access to representatives of the first State. That was a well-established principle of law, and that was why the United States delegation thought that no mention of reciprocity was needed. The United States was however prepared to include in its text ‘on the basis

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143 See statements by the Australian delegate, Sum. Rep. 63 at 8; the Mexican delegate, Sum. Rep. 63 at 8; the United Kingdom delegate, Sum. Rep. 63 at 9.
144 See statements by the Italian delegate, Sum. Rep. 64 at 5; and the Canadian delegate, Sum. Rep. 64 at 7.
of reciprocity,' if the above-mentioned interpretation was universally shared and if the other provisions in the article were consistent with the idea of reciprocity.\textsuperscript{148}

Thus, by the end of the Geneva portion of the Session, the United States had acceded to including "reciprocity" language in the treaty provision covering access to stations, etc., subject to certain interpretive caveats.\textsuperscript{149}

By the opening of the New York portion of the Session, the only remaining issue with respect to Article 6 of the United States draft involved the desire of many of the Subcommittee members to include limitations on the right of access in consideration of safety precautions and non-interference with ordinary operations of stations, installations, etc. The issue was whether to condition the right of access upon prior agreement as to timeliness, or whether the right of access should be unqualified, but some language included to require that prospective visitors consider such factors as the safety of astronauts before insisting upon a right of entry. The United Kingdom and Mexico favored the latter approach,\textsuperscript{147} which was also the view of the Japanese delegation in its proposed amendment to Article 6 of the Soviet draft.\textsuperscript{148} Hungary and Bulgaria, in support of the Soviet position, would not accept the "at all times" language of Article 6 of the United States draft.\textsuperscript{149} The issue was resolved when the United States introduced a revised version of Article 6 which omitted the phrase "at all times," and added the language that was eventually adopted as the second sentence of Article XII of the Treaty.\textsuperscript{150} Agreement was rapidly achieved on the text of the United States version.\textsuperscript{151} But since the Soviet delegation and its supporters refused to agree to any formal adoption of additional treaty supporters refused to agree to any formal adoption of additional treaty articles until agreement had been attained on the matter of availability of

\textsuperscript{148} \textit{SUM. REP.} 70 at 6-7.

\textsuperscript{149} Ambassador Goldberg has made clear in subsequent statements that the agreement of the United States to include the phrase "on the basis of reciprocity" in Article XII is based upon the understanding apparently reached that the right of access by one state is not conditioned upon whether a second state wishes to exercise its right of access. See Ambassador Goldberg's statement, \textit{supra} note 53, at 80; and his statement before the Senate Foreign Relations Committee in \textit{Senate Hearings, supra} note 53, at 152.

\textsuperscript{147} \textit{SUM. REP.} 71 at 4, 20.

\textsuperscript{148} See \textit{SUM. REP.} 71 at 12.

\textsuperscript{149} Id. at 21, 23.


As Ambassador Goldberg later stated before the Senate Foreign Relations Committee:

On reflection it seemed clear that the inspection provisions of the Antarctic Treaty from which our access language was drawn were not in all respects appropriate for the Outer Space Treaty. This was especially true in view of the far greater difficulties and hazards of lunar exploration in contrast to Antarctic exploration—the extreme importance of unimpaired oxygen supply, the need for careful conservation of life-supporting systems, and the difficulty of surface travel. We would not want to receive a visit from the Soviets or any other party if that visit would jeopardize the lives of our astronauts. We also bore in mind the practical fact that for the foreseeable future it would be immensely difficult to engage in forbidden activities on the moon without detection. \textit{Senate Hearings, supra} note 53, at 153.

\textsuperscript{151} Consistent with Ambassador Goldberg's statements regarding the United States agreement to include the phrase "on the basis of reciprocity" in Article XII, he has also stated that the United States' agreement to include the second sentence of Article XII is predicated on the understanding that the requirement for reasonable advance notice of a projected visit, in order that appropriate consultations be held and precautions taken, is not to be taken as a right in the state whose facility is being visited to veto the visit. See Ambassador Goldberg's statement, \textit{supra} note 53, at 81; and his statement before the Senate Foreign Relations Committee, \textit{Senate Hearings, supra} note 53, at 153.
tracking facilities, final agreement by the Subcommittee on the text of Article XII was reached at about the same time as agreement was obtained on Article X of the Treaty.

L. The Provisions Of The Treaty Shall Apply To Parties Whether Acting Singly, Jointly With Other States, Or Within The Framework Of International Inter-Governmental Organizations. Practical Questions Shall Be Resolved By Parties Either With The Appropriate International Organization Or With One Or More States Members Of That International Organization, Which Are Parties To This Treaty.

The first twelve articles of the Outer Space Treaty more or less pre-scribe general rules governing the conduct of parties to the Treaty. Article XIII does not provide any additional rules governing such conduct, but rather seeks to establish the applicability of the substantive principles to actions by the parties whether taken singly, jointly, or within the framework of international organizations. To a degree, the relationship of international organizations to the Treaty is covered by the third sentence of Article VI, which was taken from Article VI of the Soviet draft, which, in turn, is a reflection of Paragraph 5 of the Declaration of Legal Principles. The third sentence of Article VI provides that when activities are undertaken in outer space or on celestial bodies by an international organization, responsibility for compliance with the Treaty shall be borne by both the international organization and the participants in the organization who are also parties to the Treaty. While this provision was considered adequate as an expression of principles included in a General Assembly Resolution, several delegations regarded it inadequate as a contractually binding document establishing rights and duties among the parties.

The delegations dissatisfied with Article VI of the Soviet draft represented nations whose space activity is presently being carried out within the framework of international organizations, such as the European Space Research Organization, or nations involved with other States in joint activity. Those nations, particularly the United Kingdom, France, Belgium, Sweden, and Australia, believed that the Soviet version left unclear the status of an international organization vis-à-vis States Parties to the Treaty and also appeared to deny the benefits of the Treaty to international organizations while requiring them to assume the burdens. In response to the suggestion that international organizations as separate entities be permitted to become parties to the Treaty, the Soviet delegation insisted that under international law only a State may become a party to a treaty, and that its proposal merely imposed the provisions of the Treaty on the States Parties to it even when acting within the framework of an international organization.

The British delegate, relying on an opinion by the International Court

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153 See statement by the Bulgarian delegate, SUM. REP. 73 at 12.
154 See the statement by the United Kingdom delegate, SUM. REP. 66 at 13.
155 SUM. REP. 67 at 3.
of Justice, argued that since an international organization as an entity may assume rights and duties under international law, it might be possible for the purposes of the Treaty to regard the organization as the sum of its members. With that in mind, he introduced a proposed new article which would establish a procedure whereby an international organization might legally subject itself to the provisions of the Treaty without becoming a party to it. Under the British proposal, an international organization conducting activities in outer space or on celestial bodies would file a declaration with a depositary authority that it accepts and undertakes to comply with all of the provisions of the Treaty except the articles concerning signature, ratification and accession by parties. States which are parties to the Treaty would be obligated to use their best efforts to "ensure" that such a declaration is filed by international organizations of which they are members and which conduct space activities. Prior to the time that a declaration is filed, parties to the Treaty that are members of the organization would take steps to assure that the organization complies with the "principles" of the Treaty.

Although the United Kingdom proposal received significant support, notably from Belgium, France, Australia, and Sweden, the United States did not intervene actively in favor of it during the debates notwithstanding strenuous objections by the Soviet Union and its supporters. The Soviet delegate rejected the British proposal out of hand as an attempt to endow international organizations with the same status as States Parties to the Treaty. Moreover, the Soviet delegate viewed the British proposal as a vehicle to permit parties to escape their obligations under the Treaty by conducting their activities in outer space through the framework of an international organization prior to the time that the organization files a declaration with a depositary authority. The Italian delegate envisioned the same loophole and also questioned the method by which a State not a party to the Treaty but belonging to an international organization which was a party, could be compelled to abide by the provisions of the Treaty. The Indian delegate had difficulty in understanding how States Parties to the Treaty would "ensure" that any international organization to which they belonged would make the necessary declarations, particularly where the States Parties to the Treaty are minority members of the organization. And while the Soviet delegation regarded the British proposal as tantamount to making international organizations parties to the Treaty, the Austrian delegation took the converse position that such organizations would not be parties, but as non-parties they could not be required to fulfill their obligations under the Treaty.

156 The United Kingdom delegate relied on the Reparations Case, [1949] I.C.J. 174 stating that the United Nations, as an entity, may be considered liable in connection with reparations for damages suffered in the service of the United Nations. This advisory opinion by the Court is reprinted in 43 Am. J. Int'l L. 589 (1949).
158 The British delegate's explanation of his delegation's proposal appears in Sum. Rep. 67 at 5.
160 Id. at 7.
161 Id. at 8.
In view of the opposition, the United Kingdom delegation agreed to the inclusion of the third sentence of Article VI of the Soviet draft subject to the outcome of further discussion on the merits of the British proposal. Considerable sentiment in favor of including a separate article on international organizations was voiced by Sweden, France, Belgium, Australia, and Iran. The comments made were to the effect that there ought to be a way by which international organizations could assume rights and responsibilities under the Treaty without becoming parties, and that the practical problems involved in the relationships between States Parties to the Treaty and the international organizations of which they are members should be viewed as internal matters within the organizations.

Article XIII is the result of these discussions. It does not provide a mechanism whereby international organizations can become, for all practical purposes, parties to the Treaty. But it does provide that the provisions of the Treaty shall apply to space activities carried out by parties to the Treaty within the framework of international intergovernmental organizations. The matter of how they will be made to apply in individual situations is an internal matter to be resolved between the States Parties to the Treaty and the international organizations of which they are members.

M. Miscellaneous Matters.

A word should be said here about settlement of disputes. The Treaty does not include a provision for recourse to a court, arbitral tribunal, or some other procedure for resolution of disputes arising between parties to the Treaty over matters covered therein. However, both the United States and Soviet drafts contained proposed articles on settlement of disputes. Article 11 of the United States draft provided for recourse to the International Court of justice for a decision. Article X of the Soviet draft provided merely that “the States Parties concerned shall immediately consult together with a view to their settlement.” Previous sessions of the Legal Subcommittee on the draft assistance and return and liability conventions had revealed an inability on the part of the United States and Soviet delegations to compromise their differences on this matter. In the interest of expediting agreement on the Treaty as a whole, neither the United States nor the Soviet delegations pressed for inclusion of a specific provision covering resolution of disputes, and little time during the debates was devoted to it. In the absence of a provision on this subject, disputes between parties over applications or interpretations of provisions of the Treaty may be resolved in accordance with any method agreed upon by the parties, subject, of course, to any limitations imposed by other applicable international agreements binding upon the parties to the dispute.

163 *Sum. Rep.* 71 at 5-6.
165 With respect to international nongovernmental organizations, see note 83 *supra*.
166 See Dembling and Arons, *supra* note 25, at 356.
The only remaining provision which involved controversy is contained in the first sentence of the first paragraph of Article XIV. That sentence provides that the Treaty shall be open to all States for signature. This was the position advocated by the Soviet Union in its draft. The United States, in Article 12 of its draft, proposed that the Treaty

be open for signature by States Members of the United Nations or of any of the specialized agencies or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party.

The United States formulation would have probably excluded certain non-United Nations members from being permitted to become parties to the Treaty, notably Communist China and East Germany.

The United States delegate, supported by the United Kingdom, explained that the formulation advocated by the United States was consistent with that used in other United Nations treaties and resolutions. However, as explained by the Rumanian delegate in support of the Soviet position, none of the other Treaty provisions purported to discriminate between nations; and many of the provisions appealed to all States to participate in regulating the activities of States in outer space and on celestial bodies in the interest of all mankind. The United States agreed to the Soviet formulation "because of exceptional circumstances favoring a very broad geographical coverage for the Space Treaty," but subject to the understanding that accession to the Treaty by a regime or entity not recognized by the United States does not, without more, amount to recognition of that regime or entity by the United States.

Little need to be said about the remaining provisions of the Treaty. There was some debate over what agency would constitute the depositary authority. Article 13 of the United States draft provided that instruments of ratification, approval or accession shall be deposited with the Secretary-General of the United Nations. The Soviet draft, in Article XI, provided for such instruments to be deposited with governments to be designated. The Soviet delegate explained that his delegation's position on this matter was consistent with its position on the issue of whether "all States" or only those permitted by the United Nations should be permitted to sign the Treaty. He argued that if the Secretary-General were to become the depositary for the Treaty, the Secretary-General would have to ask the General Assembly which States could be parties to it, thereby contradicting the "all States" principle set forth in the first paragraph of Article XI of the Soviet draft. This argument appears to have been persuasive since paragraph 2, as well as paragraph 1, of Article XIV, reflects the Soviet position. The governments designated as the depositary authorities are the Soviet Union, the United Kingdom and the United States.

The remainder of Article XIV concerns the mechanics and legal effect

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169 Statement by Ambassador Goldberg, supra note 53, at 82.
nature, conduct and locations” of activities on celestial bodies and “make the findings of such activities freely available to the public and the international scientific community.” The Soviet Union had no comparable provision in its draft. But shortly after the Geneva portion of the Session opened, the Soviet delegation readily acceded to the United States view, at least to the extent that there should be some provision in the Treaty for reporting and disseminating information. However, the Soviet proposal was that the reporting of activities on celestial bodies should be a voluntary matter on the part of the States concerned:

A State conducting activities on celestial bodies will, on a voluntary basis, inform the Secretary-General of the United Nations and also the public and the international scientific community of the nature, conduct and locations of such activities.118

The Soviet delegation relied on the precedent established by General Assembly Resolution 1721 (XVI), 1961, which, inter alia, provided for the exchange of information relating to space activities on a voluntary basis.119 But, as the Canadian delegate suggested, although Resolution 1721 (XVI) established a precedent with respect to the principle of reporting, it did not create a treaty obligation, and therefore did not preclude the establishment of a mandatory requirement for the dissemination of scientific and technical information to the entire world.120

As expected, debate during the Geneva portion of the Session took the form of argument over whether reporting of activities in outer space and on celestial bodies should be mandatory or voluntary. In supporting the United States position, the Australian delegate argued that obligatory reporting of activities on celestial bodies is a “logical corollary to provisions already agreed upon in substance which called for freedom of scientific investigation in outer space and on celestial bodies, and for international cooperation in such investigation. If cooperation among nations were to be sought, full exchange of information would be necessary as a matter of treaty obligation.”121 Indeed, the United States and its supporters were seeking to embody in treaty form a principle that had already become a hallmark of the United States space program: a requirement that there be full dissemination of scientific and technical information for peaceful purposes.122

119 Statement of the Soviet delegate, SUM. REP. 64 at 12.
120 SUM. REP. 65 at 4.
121 SUM. REP. 65 at 7. The Italian delegate made essentially the same argument, SUM. REP. 70 at 9.
122 National Aeronautics and Space Act of 1958, § 102(c), as amended, 42 U.S.C. 2451(c) provides that:

The aeronautical and space activities of the United States shall be conducted so as to contribute materially to one or more of the following objectives:

(1) The expansion of human knowledge of phenomena in the atmosphere and space;
(7) Cooperation by the United States with other nations and groups of nations in work done pursuant to this Act and in the peaceful application of the results thereof.

Section 203(a)(3) of the same Act, 42 U.S.C. 2473(a)(3), requires the National Aeronautics and Space Administration to “...provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof.”
The Soviet Union continued to oppose any provision for mandatory reporting, however, and efforts at compromise were thus generated. Towards the close of the Geneva portion of the Session, the United Arab Republic [U.A.R.] submitted a working paper which essentially retained the Soviet proposal for voluntary reporting in the first paragraph, but added a second paragraph providing that “All information shall be promptly submitted, preferably in advance or at the carrying out of these activities or immediately after.” A third paragraph provided that

The United Nations should be prepared to disseminate these [sic] information immediately and effectively after receiving the said information which has to be ample and in detail for the benefit of the general public and the international scientific community.125

Although one might seek to interpret the second paragraph of the U.A.R. proposal as a mandatory reporting provision, a fair reading of the first two paragraphs together would seem to indicate that the U.A.R. was suggesting that the parties to the Treaty would agree to report voluntarily on their activities, but if a party chooses to report on a particular activity, it must do so promptly. At least the Soviet Union appears to have regarded the U.A.R. draft as preserving reporting only on a voluntary basis, for the Soviet delegation accepted the U.A.R. draft.124 However, the United States delegation agreed to the U.A.R. draft only to the extent that it provided that “The United Nations should undertake to ensure the dissemination of information as soon as it was received.”126 The agreement thus reached resulted, with changes in wording, in the last sentence of Article XI of the Treaty: “On receiving the said information the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.”128

At the outset of the New York portion of the Session, agreement had still not been achieved on a general reporting provision.127 In order to meet the objections raised by the Soviet Union, the United States proposed a revised version of its Article 4 which did not obligate the parties to report on their activities in outer space and on celestial bodies without exception.128 The key language of the new United States proposal was

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124 SUM. REP. 70 at 3.
125 Id. at 5.
126 One might question the legality of the last sentence of Article X as an attempt by states which are parties to a multilateral treaty to impose an obligation on an international organization which is not a party. However, the United Nations had already undertaken certain activities in the exchange of information relating to outer space matters pursuant to prior General Assembly resolutions such as 1721 (XVI), 20 December 1966, and 2130 (XX), 21 December 1965. And, it might be argued that in endorsing the Outer Space Treaty by resolution on 19 December 1966, the General Assembly was impliedly undertaking to carry out any obligations sought to be imposed upon it consistent with its prior resolutions. As a practical matter, the Secretary-General would hardly decline to abide by the intent of the last sentence of Article XI.
127 It should be noted, in this connection, that agreement had already been achieved on mandatory reporting provisions with respect to two specific subject matters. Pursuant to Article V, phenomena discovered in outer space or on celestial bodies which might endanger the life or health of astronauts must be reported to the other parties to the Treaty or to the Secretary-General. The duty of parties, which plan potentially harmful experiments, to consult with other parties, pursuant to Article IX, implies the duty to report on those experiments.
THE HUNGARIAN AIR CODE

BY IMRE CSABAFT†

I. Introduction

UNTIL RECENTLY Hungarian air law was not codified. In 1964 two basic statutes were promulgated in Hungary codifying the law of civil aviation. Law-Decree No. 26 of 1964 of the Presidential Council on Civil Aviation was followed by Order No. 17/1964 (XI. 10.) of the Council of Ministers enforcing the former. Subsequently, in 1965, the Council of Ministers issued Order No. 22/1965 (XI. 14.) regulating the conditions of carriage by air. Prior to these enactments most of the statutes were published in departmental gazettes, and therefore, were not available outside the country for legal research.

The increasing capacity of the Hungarian air transport industry made a tabula rasa imperative. Following suit with the Soviet and other East European codifications, the Hungarian Air Code has updated and rewritten the law of domestic and international air transport. This article will deal with the constitutional basis and the application of the Code to air traffic, both foreign and domestic. The analysis of conditions of carriage by air cannot be included in this article due to lack of available space.

The objectives of air transport are stated in the Preamble of the Law-Decree No. 26 of 1964 (hereinafter referred to as LD). Accordingly, the prime objective of Hungarian civil aviation is to satisfy the needs of national economy. This is achieved by the exercise of "uniform state control" over civil aviation. MALEV (Magyar Légiközlekedési Vállalat), the Hungarian Airlines, is a national company fully owned by the government. It is the sole public air carrier.

II. The Constitutional Basis of the Code

The Air Code is one of the products of a general process of codification which has been taking place in Hungary. The codifiers' aim was to strengthen the monopoly of the "Socialist" state and at the same time to

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1 The two statutory instruments discussed in this article will be referred to as the Code.


3 For history of Hungarian air transport see, Davies, A HISTORY OF THE WORLD'S AIRLINES 27, 37, 64, 66, 69, 116, 121, 122 (1964). For history of East European airlines see, Davies, id. at 294-99.

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ensure by legal means a more efficient execution of state plans in the field of air transport. The application of the Air Code conforms to the pattern established by the "Socialist" politico-legal superstructure with which the student of air law may not necessarily be familiar. In order that the provisions of the Code may be read in their proper context, its constitutional basis is briefly described as follows.

The theoretical basis of the state structure is the principle of unity of the legislative and executive branches. The structure of the Hungarian state is composed of the following constitutive elements: (1) the organs of state power, (2) the organs of state administration, (3) the judiciary, (4) the system of state prosecution, (5) and the social organizations. Parliament is the supreme organ of state power; its jurisdiction is theoretically unrestricted, though it may delegate some of its powers to other organs. The Presidential Council of the People's Republic is the substituting body of the Parliament. The Presidential Council holds inter alia the power to conclude and ratify international treaties. In general, the basic principle of Hungarian state structure is the priority of the representative organs of state power over the organs of state administration. The function of the organs of state administration is four-fold, namely: executive-dispositive-organizing-controlling.

The Council of Ministers is the "central administrative organ with general jurisdiction." The main feature of the centralized state structure is the subordination of the organs of state administration to the organs of state power and the hierarchical subordination and superordination of the organs of state administration themselves. The Council of Ministers stands at the peak of state administration. It directs the activities of ministries and other subordinate organs, and assures the enforcement of law, the realization of the objectives of economic plans, etc. The Council of Ministers may revoke the jurisdiction of any organ of state administration, thus inter alia that of the Ministry of Transport and Post in respect of matters of civil aviation.

The Ministry of Transport and Post is the central special administrative organ of civil aviation. There is no separate ministry for civil aviation in Hungary. The Minister of Transport and Post holds the totality of powers conferred upon the Ministry by statutes. The Minister acts in his administrative capacity by delegating certain elements of his jurisdiction to the high officials of the Ministry. The Minister is, however, not bound by his own orders, because he may at any time revoke, terminate, or restrict the jurisdiction so conferred by him upon his delegates. Within the Ministry of Transport and Post, there is, as a separate department, the Civil Aviation Authority (hereinafter CAA), which approximately combines the functions exercised by the CAB and FAA in the United States.

The CAA is responsible for the administration of civil air transport and navigation. It is headed by a deputy-minister who is responsible for the administration of the whole branch of civil aviation. The CAA is the intermediary between the Minister of Transport and Posts and the sub-
ordinate organs, e.g., MALEV. Actually, the head of CAA exercises the powers of the Minister by way of delegation. In matters of decisive importance, the right of decision is reserved for the deputy-minister. The Ministry of Transport and Post may initiate negotiation about bilateral agreements. The CAA is concerned with major policy questions of MALEV. In addition, the Ministry of Transport and Post may exercise its administrative functions through such normative and concrete measures as planning, pricing, financing, collection of information necessary for decision making, provision of material resources, specifications, and standards.

### III. The Sources of Hungarian Air Law

The Constitution (Act XX of 1949) determines the social and economic order of the country. Paragraph 1 of Section 4 provides that the bulk of means of production shall constitute state property, including *inter alia*, "transport vehicles—railway, roads, water transport and air routes." Theoretically, there is no legal obstacle restricting the private ownership of aircraft by citizens. Paragraph 1 of Section 8 of the Constitution recognizes and protects "property acquired by labour."

Besides relevant provisions of the Constitution and the three statutes set out in the introduction, the Civil and Penal Codes, statutes relating to labour law, social security and insurance, and the multi-and bilateral international agreements constitute an important part of the body of Hungarian air law.

Hungary is party to the Warsaw Convention as modified by the Hague Protocol of 1955. Hungary is also party to the Rome Convention of 1933 on the Precautionary Arrest of Aircraft. Besides the Hungarian-Italian and Hungarian-Swiss air services agreements, Hungary is party to twenty-eight intergovernmental bilateral agreements as of early 1966. It is important to note here that, according to Hungarian law, an international agreement does not become law of the land by ratification alone. Therefore, an international agreement is still not a source of Hungarian air law unless it is accepted and made public in the form of a municipal statute.

At the present time, Hungary is neither a member of ICAO or IATA, nor is she a party to the Chicago Convention of 1944. However, Hungary conforms to most of the standards developed by ICAO, and the conditions of carriage of MALEV are in full accord with those adopted by IATA.

### IV. The Code

The Law-Decree of the Presidential Council on Civil Aviation consists of eight chapters and thirty-one articles. The Enforcing Order (hereinafter EO) contains forty-four articles.

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8 See Chapters XXX and XXXI (Sections 345-60) of Act IV of 1959 on the Civil Code (Budapest: Corvina Press 1960).
10 See Article 28.
11 For details see Order 22/1965. (XI.14.) on the Conditions of Carriage by Air.
A. The Scope Of The Law-Decree

Article 1(1) determines the territorial scope of Hungarian air law. It adopts double criteria, namely, that of the territorial airspace of the country and that of Hungarian civil aircraft during flights outside such airspace. Article 1(2) recognizes the priority of international law over municipal law in the event an international agreement duly approved by the Council of Ministers is applicable. The ratio legis apparently may be found in the characteristically international nature of civil aviation. It appears that Hungary has accepted the method of unifying private international law by way of extending the provisions of international air law treaties to domestic legal relations.8

As a general rule, the provisions of the LD do not apply to special and occasional military flights even if civil aircraft and civil flight crews participated in the carrying out of such flights. Article 2(1) of the LD gives an enumeration of the kinds of activities falling within the scope of civil aviation, i.e., transport of passengers, baggage, etc.; ground control of navigation; pilot training; manufacture of civil aircraft, etc. These activities all come within the area over which the Minister of Transport and Post may exercise jurisdiction including technical supervisory powers.

B. Sovereignty Over Hungarian Airspace

Unlike most of the air law codes of other countries, including the codes of the Soviet Union and the socialist countries of Eastern Europe, the Hungarian LD does not declare that Hungary exercises absolute and exclusive sovereignty over its national airspace. The Constitution does not define the concept of territorial sovereignty either. From the aspect of positive law, therefore, the exercise of sovereignty in Hungarian state territory including national airspace rests on international conventions which have become part of the law of the land.

Every aircraft, whether national or foreign, flying in Hungarian airspace, is subject to the rule of Hungarian law. Hungarian law, however, follows aircraft registered in Hungary abroad as well. The nature of jurisdiction in this case may be best characterized by adopting the apt terminology of Dr. Bin Cheng—as being "jurisdiction." The Hungarian government has no "jurisdiction" over Hungarian aircraft while it is in the territory of a third state.

C. Jurisdictions

The Minister of Transport and Post determines the rules concerning the exercise of supervisory powers over aviation activities (EO Article 1(1)). In exercising his technical supervisory powers, he must act in consultation with the competent ministers (heads of administrative organs having national jurisdiction, e.g., ministries) regarding basic questions of aviation, as well as the formulation of principles and rules (EO Article 2(1)). In

8 For methods of unification of private international law see, G. CHESHIRE, PRIVATE INTERNATIONAL LAW 10-11 (1965).
particular, the Minister of Transport and Post shall act in agreement with the Minister of Defense in matters concerning the determination of development plans of organs responsible for the performance of aviation tasks (EO Article 1(3)) and the elimination of interference between civil and military aviation (EO Article 2(2)).

D. Registration Of Aircraft

Every aircraft and parachute owned by citizens or legal persons having a Hungarian domicile are subject to mandatory registration. The CAA determines the conditions and cancellations of registration, including the entering into, or striking from, the register of a third State (EO Article 4(2)). The legal effect of entering an aircraft into the Hungarian register is that all prior entries in respect to such aircraft in the register of a third state become null and void. On the other hand, Hungarian law does not recognize the validity of the registration of an Hungarian aircraft in a third State until such aircraft has been struck from the Hungarian register. The CAA is responsible for the administration of this provision.

E. Design, Production, Import And Export Of Aircraft

The Minister of Transport and Post exercises wide technical supervisory powers concerning the design, production, import, and export of aircraft and parachutes. Plants for the repair and production of aircraft and parachutes, the design specifications, and tasks of plants, may be established or determined only in consultation with the Minister of Transport and Post. Most of these powers are exercised through the CAA. For example, the CAA licenses the overhaul, production, import and export of aircraft and parachutes; determines the construction specifications of aircraft; authorizes the production and importation of aircraft subject to requirements of airworthiness; and may also limit the number of types.

F. Conditions Of Operation Of Aircraft

Article 6(1) of the LD states, "No aircraft shall be operated without a proper license issued by the Civil Aviation Authority." The CAA may revoke the license if, according to its judgment, the operator does not comply with the terms set out in the license (EO Article 9).

Article 7 of the LD and Article 10 of the EO deal with questions of airworthiness. The CAA grants the airworthiness certificate which certifies the fitness of the aircraft, both in respect to the safety of air navigation and the designated task.

G. Airports, Ground Establishments, And Safety Zones

The Law-Decree and the Enforcing Order both give an exemplary and functional definition of airports. An airport may be public or nonpublic, and further, a public airport may be either international or domestic. The term airport as used by the Code includes aerodromes, waterdromes and heliports. Their purpose is determined as being to serve departure and re-
ception of aircraft. The CAA exercises wide powers concerning the establishment, maintenance, and closing of airports.

Article 11 of the LD provides for the applicable rules concerning the acquisition of land, toleration of preparatory work, and the assessment of and the compensation for damage. The owner of the land does not have an absolute title to claim compensation. Compensation is due only if the installation substantially interferes with the regular use of the land. The amount of damages must be proportionate to the degree of interference.

The Law-Decree, Article 13 (1), provides for the establishment of safety zones above airports and other ground establishments. The CAA is responsible for the establishment of safety zones. Local authorities also have power within their territorial competence to impose "restrictions in respect to building and implantation within flight safety zones."

H. Personnel Employed In Civil Aviation And Related Problems

Chapter IV (Articles 14-19 of the Law-Decree and Articles 19-23 of the Enforcing Order) contains provisions concerning the flight crew, the aircraft commander, parachutists, ground personnel, and professional training. Chapter IV also contains detailed provisions concerning professional training, the design of uniforms to be worn by employees of the public air carrier (MALEV), and other branches of aviation.

I. Conditions Of Flight

No aircraft may fly in Hungarian airspace unless the national identification and registration marks have been displayed thereon. In addition to a certificate of airworthiness, a public transport aircraft must carry on board radio license, log book, and documents relating to persons, baggage, cargo, mail; etc.

It appears from Article 29 of the EO that the Minister of Defense has the powers to establish prohibited zones. In this respect, there is no *expressis verbis* reference to international agreements. The Minister of Defense may permanently or temporarily restrict flights over prohibited areas. The frontiers of such zones are determined by the Minister of Defense. In matters concerning the duration of prohibition and other restrictions of flight, he must act jointly with the Minister of Transport and Post. As a general rule, prohibited areas may be established only over certain regions of the country. However, such restrictions or prohibitions may occasionally be extended to the entire national airspace. It is the responsibility of the CAA to issue notification about the prohibited zones and flight restrictions. (LD Article 24 and EO Article 38 (1), (2))

The Code provides for mandatory investigation into the causes and circumstances of damage caused to aircraft and persons while the aircraft is in operation. The investigation of aerial accidents falls into the jurisdiction of the CAA. It may delegate its powers to one of its subordinate organs. In case a foreign aircraft suffers an accident in Hungarian territory, the civil aviation authority of the State of registration of such
aircraft may be invited, subject to the permission of the Minister of Transport and Post, to participate in the accident investigation.

**J. General Rules Of Carriage By Air**

The Law-Decree lays down only a few general rules, leaving it to the Council of Ministers to establish the detailed rules of carriage by air. Regular transportation by air of passengers, baggage, and mail for remuneration may be undertaken only by the state public air carrier. International air transportation or international carriage by air may be undertaken both by domestic and foreign carriers.

**K. Rules Of Liability**

Articles 28 to 30 of the LD contain provisions regarding liability. Liability is attached to the operator of aircraft and other flying contrivances. The operator's liability is governed by one of two systems of liability, depending whether the operator in such capacity is liable toward his employees or toward third persons. In the former case, the provisions of the Labor Code are applicable. The operator's liability toward third persons, e.g., passengers and persons suffering damage on the surface, is governed by the provisions of the Civil Code concerning liability for damage caused by the operator of dangerous works.

Article 29 of the LD determines the air carrier's liability. The air carrier may exculpate himself from liability for the death, wounding or any other bodily injury or delay of a passenger, and the destruction, loss or damage to or delay in the carriage of baggage and goods in the possession of the passenger by proving either that (a) he has taken all necessary measures to avoid the damage or (b) that it was impossible for him to take such measures. Under the power granted by Article 30 of the LD, the Council of Ministers limited the amount of damages payable by the air carrier by accepting the limits imposed by the Warsaw Convention of 1929 as modified by the Hague Protocol of 1955. Thus, in the event the carrier is not relieved of liability for the above mentioned kinds of damage, he will be liable up to the limit of 390,000 forints.

The carrier's liability for the destruction, loss, damage, or delay in the carriage of cargo and mail is governed by the provisions of the Civil Code concerning "Responsibility of the Carrier and of the Consignor." The carrier's liability—similarly as above—is limited to 7,800 forints in respect to baggage in the possession of the passenger and to 390 forints per kilogram of cargo and handbaggage. In this manner, there is no difference as to the limits of the carrier's liability in domestic or international carriage. The treatment is uniform, no matter whether the concrete case of compensation falls within the scope of the Warsaw Convention of 1929 or municipal law.

It should be noted that the provisions of the Civil Code cannot conflict with the provisions of international agreements. Thus, liability for damage accruing from international carriage by air—as determined by Article 1
of the Warsaw Convention as modified by the Hague Protocol—is not governed by municipal law, but by the Warsaw Convention.

If the damage was caused by the party claiming compensation, the carrier is relieved of liability. Apportionment of damages takes place in case of contributory negligence. Liability for collision between aircraft is based on the principle of fault between the parties inter se. In such cases, the carrier proving that “he has been acting in such a manner as might, as a rule, reasonably be expected in the situation” can successfully claim compensation from the other party. In case the degree of fault cannot be ascertained, the principle of casus nocet domino applies, i.e., each party bears his own damage.

Compensation for death or bodily injury is awarded only where the damage is accompanied by material damage (financial loss). In case the party is covered by social insurance, compensation is payable only to the extent that the financial loss exceeds the insurance benefits.

V. Conclusion

Having examined the provisions of the new Hungarian air law code, it seems prudent to state that they reflect in legal terms the development Hungarian civil aviation has achieved so far and provide a legal framework that assures an effective participation in the international air transportation business. Foreign and domestic interests are properly protected mostly by conforming—in certain respects—the provisions of municipal law to international agreements on civil aviation.

It is not to be forgotten, that the free development of Hungarian air transport depends on much more than the mere enactment of a new Air Code. The search for and satisfaction of national interests, the major attributes of independence and national sovereignty, are still far from political reality in Hungary. This in itself circumscribes the limits within which Hungarian air transport may and must operate. It is hoped, however, that the scope of application of the Air Code will expand in the future due to the incentives which may derive from the profit-oriented new economic mechanism to become effective in 1968.