

Book Reviews

Explorations in Aerospace Law (Selected Essays by John Cobb Cooper), Ivan A. Vlastic, ed. McGill University Press, Montreal: 1968. Pp. xx, 480 (\$7.50).

This review of John Cobb Cooper's selected essays has long been overdue, but unforeseen circumstances prevented me from writing it earlier. I therefore owe a special apology to the readers of this *Journal* and in particular to its editors — the more so in that the volume under review is one of great value: one which every specialist in air or space law should keep as a reference book of lasting importance. Conceived as a volume crowning the work of John Cobb Cooper, it has become a posthumous tribute to him.

It is particularly the personality of the author which makes this volume almost unique in the literature of these subjects, for hardly anyone else had so close an association with them in both theory and practice. For over 30 years John Cobb Cooper was active at international conferences, in posts with national and international organizations, with one of the world's leading airways and, finally, in the world of learning. He had a most intimate knowledge of large and small problems — all the intricacies of aerial navigation. Long before space exploration had become a reality, he turned his interest to this new domain. He then shared his experience and knowledge with students of the Institute of International Air Law at McGill University, of which he was the first Director (and with which I had the pleasure of being associated).

Throughout these years he was a prodigious writer of books and articles. His writings as Professor Vlastic (editor of the volume) rightly points out, cover "almost every aspect of aeronautical and space activities that can be subject to legal regulation".¹ Small wonder that in the evening of his life he was looked upon as a grand old man of air and space law.

We are therefore very fortunate to have this collection of essays. We owe a special debt to their distinguished author for prefacing them with small notes ("Author's Notes") which, by explaining the circumstances in which they were written, constitute a useful guide

¹ *Explorations in Aerospace Law* (Selected Essays by John Cobb Cooper), Ivan A. Vlastic, ed., (McGill University Press, Montreal: 1968), at p. xi. Hereinafter cited as *Explorations in Aerospace Law*.

to understanding them and place his views in proper perspective. Although the collection includes only one-third of the articles written by him, it covers 451 pages and is an important part of the rich heritage he has left us.

Throughout these pages one is able to follow Professor Cooper's interests in the key issues of air-law in historical perspective, from its early beginnings when the first rules for air navigation were being shaped to the important decisions taken at Chicago in 1944. Twenty years later he looked back at the Chicago Convention — its achievements and shortcomings — and tried to visualize its further development. Then we have his studies on the legal aspects of the use and exploration of outer space: his searching mind dealt with the growing number of problems facing states in the Space Age.

In all of these studies there is an harmonious blend of theory and practice. By looking backwards, Professor Cooper senses the meaning of a rule for the law of today and the need for its development tomorrow. In fact, he was one of the rare specialists in his field always several steps ahead of his contemporaries, not only in mere speculation, but relying on strong practical considerations. But, what is particularly striking, Professor Cooper never hesitated to change his views or to revise his previous conceptions if he thought that a new approach was necessary. Thus he went on reviewing his own work, freely admitting (what a rare virtue!) when he felt that he had committed an error. This indeed adds a new dimension to his contribution, for it not only testifies to his high intellectual honesty but challenges the reader to adopt the same frankness of outlook.

Of particular interest are his studies on the question of sovereignty in air-space. He goes back to the well-known maxim, *cujus est solum*, in international law. The essay, "Roman Law and the Maxim 'Cujus est solum' in International Law",² written in 1952, is the result of a very searching historical analysis which traces the origins of claims to air-space made centuries before man was able to fly. Reflection on the distinction between *coelum* and *aer*, on the Digest, Justinian Code, the glosses of Accursius, the XVth and XVIth century editions of the Code, the XVIIth century dissertation of Jean-Etienne Danck, *De jure principis aereo* (to which Nys referred earlier), and finally on the respective rules of common law and civil codes of many states, including decisions of the United States courts — all makes most interesting reading. It leads him to the conclusion "that States claimed, held, and in fact exercised sovereignty in the airspace above their national territories long prior to the age of

² *Ibid.*, at p. 54.

flight" and that its "recognition" by modern air-law "was well founded in law and history".³ As if to confirm this finding he goes on (in another essay⁴) to review the proceedings of the International Air Navigation Conference, held in Paris in 1910 — that Conference which adjourned, never reconvened, and which he rightly qualifies as "technically a diplomatic failure".⁵ Yet the course it followed and the positions of its principal participants lead him to the conclusion that, after all, this Conference "evidenced tacit but actual agreement . . . that each State had full sovereignty in flight-space over its national lands and waters as part of its territory . . .".⁶ Thus it laid the foundations for the Paris Convention of 1919. It is here that he frankly admits what he considers as his own error, committed five years earlier, in his major study, *The Right to Fly*.⁷ There he had suggested: "had a vote been taken [at the Conference of 1910], a convention might then have been adopted . . . recognizing as the long-established Law of Nations that 'the air is free'".⁸ Now he confesses: "Several years of intense research . . . convinced me that the conclusions which I reached . . . are unsound."⁹

The developments in the years 1910 to the outbreak of World War I, which he analyses in another essay¹⁰ (written in 1954), are used as a further illustration of "State sovereignty in space" being recognized. Notes of governments, legislative acts, such as the *British Aerial Navigation Act of 1911*, the French Presidential Decree of the same year, several Decrees and Orders of German States, lead him to conclude that the principle of sovereignty in the air was accepted and that: "No European or other State protested these unilateral acts."¹¹

Another essay,¹² although written earlier in 1951, constitutes a continuation of the same theme. It dwells upon the role of the United States delegation at the Paris Conference of 1919. By comparing the three drafts submitted to the Conference (the British, French and United States) and following up the discussion on them, he illustrates how the United States position turned the scales in

³ *Ibid.*, at p. 102.

⁴ "The Evolution of the Modern Principle of State Sovereignty in Airspace", *ibid.*, at p. 103.

⁵ *Ibid.*, at p. 105.

⁶ *Ibid.*, at p. 123.

⁷ Henry Holt & Co., New York: 1947.

⁸ *Ibid.*, at p. 33.

⁹ *Explorations in Aerospace Law*, at p. 124.

¹⁰ "State Sovereignty in Space: Developments 1910 to 1914", *ibid.*, at p. 125.

¹¹ *Ibid.*, at p. 133.

¹² "United States Participation in Drafting Paris Convention", *ibid.*, at p. 137.

favour of the French proposal, thus limiting the rights of foreign aircraft and excluding what has now become the third, fourth and fifth freedoms of the air.

An essay on "Air Transport and World Organization",¹³ again written much earlier (in 1946), leads us into the wider field of air-law and the problems which it faced on the establishment of ICAO, when "[a]ir transport has become an inseparable part of the complicated fabric of world transport".¹⁴ He dwells on the differences between sea and air transport, and lays special stress on the political aspects of air power: "Though its uses are various, both military and civil, it is basically indivisible".¹⁵ While realizing the implications of the right of states to develop their air power, he sees the solution in a world organization, vested with "sufficient international control", which, however, should not unduly affect "[t]he needs of the public for adequate transportation", for, "[w]orld commerce must never be unduly retarded":¹⁶ a plea reminiscent of Richard Cobden. Comparing this objective with the decisions taken at the Chicago Conference, he finds that, while adequate provisions for "the unification of technical and safety procedure" were established, "[i]n the economic and political fields the need for international organization remains unsatisfied".¹⁷ Hence his regrets concerning the weaknesses and limitations of the Transit and Transport Agreements and the difficulties encountered in respect to them.

He carries his reflections further by evaluating the well-known Bernuda Plan and Agreement (11 February 1946) in which he saw a "possible compromise pattern for future general international control".¹⁸ He was convinced that these problems could be solved by a co-ordinated effort of the United Nations (in particular its Economic and Social Council and Security Council) and ICAO: "Aviation is a dynamic force. World air transport is its most important instrumentality in time of peace. Such a dynamic force cannot long await the final decision of political discussions."¹⁹ This is indeed the vision which he carried throughout his life and which is so forcefully reflected in his writings. The goal leaves little room for doubt, but he seems to have underestimated the preoccupation

¹³ *Ibid.*, at p. 356.

¹⁴ *Ibid.*, at p. 363.

¹⁵ *Ibid.*, at p. 369.

¹⁶ *Ibid.*, at pp. 371-72.

¹⁷ *Ibid.*, at pp. 372-73.

¹⁸ *Ibid.*, at p. 376.

¹⁹ *Ibid.*, at p. 380.

of many states with their national interests, a factor which remained a serious element in the development of legal provisions on the subject.

He was disappointed with the limited progress made in 1944 and the years which followed. Thus, in late 1946 (in another article²⁰), he returns to the theme of the Bermuda Plan and Agreement. He discusses the arrangements concerning routes, privileges, rates, frequencies and capacity of services. Notwithstanding its limitations, he reaffirms the view that the Bermuda Plan "could easily become the basis of a general international air transport convention".²¹

Professor Cooper's deep commitment to the cause of furthering air transport makes him return to the question of internationalization of air transport (three years later in 1949).²² He traces the discussion on the subject to the days of the League of Nations (in the Air Transport Co-operation Committee of 1930-1932), pointing to the close relationship to the debates on disarmament (1933). There follows the adoption of the *Civil Aeronautics Act* of 1938, by which the United States committed itself to air transport on a competitive basis. He describes the confrontation of views which manifested itself on the eve of the Chicago Conference between those advocating "an International Air Transport Authority" (Australia and New Zealand) and those desiring the continuation of the competitive system. It was reflected at the Conference itself, at the interim assembly of PICAQ and the first assembly of ICAO. The purpose of this essay, in his own words, was "to state the existence and history of the disagreement between major powers as to whether internationalization should or should not be accepted as a basis for future organization and operation of world air trunk services".²³ His own views leave little room for doubt.

In "A Study on the Legal Status of Aircraft" (1949),²⁴ he gives a profound historical analysis of the status of vessels, railways, automobiles and aircraft — a detailed picture of how there evolved "that quality of legal quasi-personality in public international law known as 'nationality'".²⁵ He makes a series of recommendations, aimed at the improvement of law on the subject.

²⁰ "The Bermuda Plan: World Pattern for Air Transport", *ibid.*, at p. 381.

²¹ *Ibid.*, at p. 393.

²² "Internationalization of Air Transport", *ibid.*, at p. 395.

²³ *Ibid.*, at p. 411.

²⁴ *Ibid.*, at p. 204.

²⁵ *Ibid.*, at p. 241.

These studies on air navigation conclude with an essay written in 1965,²⁶ in which he reviews the achievements of ICAO in the light of an experience of 20 years. He singles out major fields of particular importance: for example, he states that the "Convention has served as a useful and powerful vehicle for the restatement of principles of internal law".²⁷ (Among the latter, he mentions air-space sovereignty freedom of flight over the high seas, nationality of aircraft as transport instrumentalities and special limitations on "state" aircraft.) Turning to a brief evaluation of the general nature of ICAO, he again admits that the solutions adopted were a compromise. Yet ICAO "was given strong technical powers together with economic functions applicable generally within the advisory and research fields".²⁸ One cannot but fully subscribe to his conclusion "that the decisions made at Chicago were sound".²⁹ One must also agree with his discussion concerning the relationship between the text of the Convention and its Annexes, the special status of the latter permitting their amendment by a simplified process. This, no doubt, led to the establishment in practice of regulations of the greatest possible uniformity.

Of particular interest are his comments on the ambiguities in the Convention.³⁰ They concern the well-known Articles 5 and 6 (scheduled and non-scheduled flights), Article 15 (on airport or similar charges), and Article 77 (joint transport organizations). The last of these raises the important question of registration and nationality of aircraft, in case international organizations should operate in this field. Further developments and decisions taken by the ICAO Council on particular issues did not resolve the questions raised by Professor Cooper.³¹ In the years that followed the writing of this essay, Professor Cooper would have derived comfort from the considerable expansion of the activities of an ICAO whose membership has grown from 108 to 127 and from the fact that many of the problems raised by him continue to be discussed both within and without the Organization. The solution of some of them has become very urgent, and there are frequent calls for a reassessment of the work of the Chicago Conference.

²⁶ "The Chicago Convention — After Twenty Years", *ibid.*, at p. 439.

²⁷ *Ibid.*, at p. 441.

²⁸ *Ibid.*, at p. 444.

²⁹ *Ibid.*

³⁰ *Ibid.*, at pp. 446 *et seq.*

³¹ *Cf.* the same question raised in regard to the law of the sea by J.P.A. François, "Report on the Rights of International Organizations to Sail Vessels under their Flags", *Yearbook of the International Law Commission*, (1956), vol. II, at pp. 102 *et seq.*

The final question posed by Professor Cooper in this essay is a very pertinent one: "Can the Convention continue to function successfully in the light of present and future outer-space developments?" On a note of skepticism, he concludes that: "Whether the Chicago Convention can meet this test is most doubtful."³²

Although this essay is the last in the collection, it could equally well constitute an opening or explanation for his many stimulating studies on the law of outer space — a subject which he was one of the first to discuss.

One of the most interesting questions which engrossed him for several years was the need to establish a frontier between air and outer space. Writing on "High Altitude Flight and National Sovereignty" (1951),³³ he tried to define the inner frontier of outer space (or the frontier of state territory upwards). He called for some reasonable rules, and rightly pointed out: "Any theoretical possibility of a State controlling far distant regions in space is absolutely out of the question."³⁴ His was a preliminary suggestion and he had the merit of being one of the first to pose the question concerning the status of outer space. This was to be resolved 12 years later in the Declaration of Legal Principles on the Exploration and Use of Outer Space of 1963 and the Space Treaty of 1967. With the tenacity so characteristic of him, he went on to analyse the "Legal Problems of Upper Space" (1956):³⁵ the need for the establishment of the upper limit of national air-space, for a right of transit in air for non-military aircraft and for considering the issue of the "nationality" of rockets and satellites. A year later (1957), in a paper written two weeks after the launching of the first sputnik,³⁶ he called for consideration of exact data concerning the contiguous zone in the light of scientific information and urged the conclusion of a treaty on the subject under the auspices of the United Nations.

Disagreeing with the first report published by the United Nations *ad hoc* Committee on the Peaceful Uses of Outer Space, which found that the determination of a frontier did not require "priority consideration at this moment", he reiterated his proposal for a frontier, but now based on different criteria, with a right of transit accepted within an "intervening area".³⁷ He pursued his claim for outer space to be declared "a common highway for all" and again for every

³² *Explorations in Aerospace Law*, at p. 451.

³³ *Ibid.*, at p. 356.

³⁴ *Ibid.*, at p. 264.

³⁵ *Ibid.*, at p. 268.

³⁶ "The Russian Satellite — Legal and Political Problems", *ibid.*, at p. 279.

³⁷ *Ibid.*, at p. 291.

instrumentality to have a determined status of nationality. In 1964, in the address to the National Convention of the Federal Bar Association, he offered a new solution for the frontier problem.

In another article,³⁸ he repeated this proposal, while offering greater specification on the status of the contiguous zone where a state "could exercise the same preventive and protective jurisdiction against foreign flight instrumentalities as it has in its airspace zone except that rights of passage would be permitted for non-military flight instrumentalities when ascending toward or descending from outer space above".³⁹ The frontier question remained in abeyance until 1967. Only after the conclusion of the Space Treaty was it again placed on the agenda of the United Nations, and ever since it has been under consideration by both the Legal and the Scientific and Technical Sub-Committees of the United Nations Committee on the Peaceful Uses of Outer Space. The General Assembly having recommended "the study of questions relative to the definition of outer space",⁴⁰ official proposals have been submitted, while many suggestions have come from writers on the subject. The difficulties involved are, of course, obvious. Here I would own to having myself been one of those who suggested that there were no cogent reasons for states to proceed with the delimitation of the frontiers between airspace and outer space. Yet I now feel that we are approaching the day when Professor Cooper's views may be accepted. Even if his concrete proposals are not fully adopted, he will be remembered as one of the first to place the issue before the law-makers and one who spared no effort to find a proper solution for it. Nor can one forget his perseverance to resolve other questions, *inter alia* his suggestion, made in 1964, for the conclusion of a treaty which would recognize the principle of the non-appropriation of celestial bodies.⁴¹

He also took a great interest in the status of spacecraft, and pleaded for the extension to them of the concept of nationality applied to aircraft.⁴² However, the solution which found its way into the Declaration of Legal Principles of 1963 and the Space Treaty of

³⁸ "Contiguous Zones in Aerospace — Preventive and Protective Jurisdiction", *ibid.*, at p. 316.

³⁹ *Ibid.*, at p. 325.

⁴⁰ Res. 2222 (XXI), 19 December 1966.

⁴¹ See: "Who Will Own the Moon? The Need for an Answer" (1965-66), *Explorations in Aerospace Law*, at pp. 339 *et seq.* It should be noted that the principle of non-appropriation of celestial bodies did, in fact, materialize on 27 January 1967.

⁴² See: "Basic Problems of Aircraft Nationality", Author's Supplemental Note (1966) to "A Study on the Legal Status of Aircraft", *ibid.*, at p. 251.

1967 was based neither on the sea-law concept of the "State of the flag" nor on air-law's "nationality", but on "jurisdiction".

In the context of nationality he also raised the question of the registration of spacecraft (as he did that of aircraft), in case they are launched by an international organization.⁴³ This problem, indeed, was not resolved by the provisions of paragraph 7 of the Declaration of Legal Principles, nor by Article VIII of the Space Treaty. However, the need to deal with registration in all its aspects has been growing; the matter was placed on the Agenda of the Legal Sub-Committee of UNCPUOS and France submitted a Draft Convention concerning the Registration of Objects Launched into Space for the Exploration and Use of Outer Space (1968). Of special interest are Articles 1 and 2(c) and (e).

These are some illustrations of how Professor Cooper's timely suggestions had to be taken up by the law-makers for outer space, for they concerned issues without whose solution law could not progress.

The range of Professor Cooper's interests was wide. They led him to reflect, *inter alia*, on such problems as "Airspace Rights over the Arctic" (1949)⁴⁴ and claims of various governments relying on the "sector theory"; on the legal status of flights above the high seas and territorial waters (1959);⁴⁵ on "Self-Defense in Outer Space and the United Nations", in the context of Article 2, paragraph 4, and 51 of the Charter (1962);⁴⁶ on "Liability for Space Damage" (1965)⁴⁷ in which essay he deals with possible conflicts of jurisdiction between the rules of outer space and air law; on "State Sovereignty Versus Federal Sovereignty of Navigable Space" (1948),⁴⁸ a survey of conflicts of law between state and federal sovereignty in the United States. His vision of man's future activities in outer space prompted considerations on "The Manned Orbiting Laboratory" (1965),⁴⁹ and in this context on the "peaceful" and "military" uses of outer space.

Throughout these pages, in particular in "Air-Law — A Field for International Thinking" (a lecture delivered in 1951)⁵⁰ and

⁴³ *Ibid.*, at p. 254.

⁴⁴ *Ibid.*, at p. 171.

⁴⁵ "Space Above the Seas", *ibid.*, at p. 194.

⁴⁶ *Ibid.*, at p. 412.

⁴⁷ "Liability for Space Damage — The United Nations — The Rome Convention", *ibid.*, at p. 432.

⁴⁸ *Ibid.*, at p. 156.

⁴⁹ "The Manned Orbiting Laboratory: A Major Legal and Political Decision", *ibid.*, at p. 423.

⁵⁰ *Ibid.*, at p. 2.

"Aerospace Law — Subject-Matter and Terminology" (1963),⁵¹ the reader is bound to be impressed with Professor Cooper's growing conviction that the two branches of law will finally merge into one régime, governing all man-made instruments located above the surface of the earth. He visualized "a single branch of the law", which "should include all rules applicable to flight no matter at what height".⁵² This is indeed his valedictory.

Several of these essays cover similar ground; and they revert to the same basic issues. This is frequently the case with collections, but at least it has the advantage of maintaining the integrity of the treatment of each stage and aspect.

Some of them, as their titles may indicate, constitute a balance-sheet of the law as it stood at the time they were written, others presented mere inklings of rules to come, while others again have been overtaken by events. Yet none of this diminishes their value, for they are important signposts on the road to understanding of the issues and their evolution. Thus they make indispensable reading for every student of the many chapters of air and outer space law. They enshrine the thoughts and pre-occupations of a man deeply concerned with the development of law and its progress.

Gratitude is due to those who made this publication possible, especially Professor I. A. Vlasic⁵³ for his work as editor, an exacting task which he has carried out with great care. On the arrangement of the essays, I would say that it might perhaps have been wiser to divide and arrange some of them in a more systematic manner, so as to follow more closely Professor Cooper's thinking and the development of his various concepts. This, however, does not diminish our debt to the editor, who, moreover, introduces the collection with a very useful Foreword. To Professor Maxwell Cohen⁵⁴ we owe particular thanks for sponsoring the publication, and also for his so gracefully written tribute to John Cobb Cooper. A special word of praise, finally, to the McGill University Press for the presentation and print, which makes the volume an adornment of the bookshelf.

Manfred Lachs *

⁵¹ *Ibid.*, at p. 43. Cf. also an essay mentioned earlier: "The Chicago Convention — After Twenty Years" (1965), at pp. 449-51.

⁵² Professor Cooper uses the term "Aerospace Law": *ibid.*, at p. 44.

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Historical Introduction to the Study of Roman Law by the late H.F. Jolowicz and Barry Nicholas, Third edition 1972, Cambridge: Cambridge University Press, Pp. xxvi, 528. (\$49.50).

Except in South Africa, where it continues to be part of the living law, Roman law has ceased to be a compulsory teaching subject in most, if not all, universities in England and those countries which once formed part of the old British Empire. Even at Oxford and Cambridge, for centuries centers of study of the Roman law, it is no longer prescribed for law students. But though its study is no longer of concern to the large mass of law students, it has lost none of its importance as a jurisprudential subject, and it must be a matter of great satisfaction to all who are interested in law as a science to see that the younger generation of romanists in England and Scotland are carrying on where the older one left off. This is attested by the third edition of W.W. Buckland's *Text of Roman Law*, which was published, thoroughly revised by Professor Peter Stein of Cambridge, in 1963, and now by H.F. Jolowicz's *Historical Introduction*, which has just appeared in the third edition, revised and brought up to date by Professor Barry Nicholas of Brasenose College, Oxford, well-known author of *An Introduction to Roman Law*.

Since 1952, the publication date of the second edition of the *Historical Introduction* (last reprinted, with corrections, in 1967), which was still the sole work of Professor Jolowicz, a mass of literature on Roman law has been published, including, to mention only a few of the more important works, M. Kaser's *Römisches Privatrecht*, and *Römisches Zivilprozessrecht*, A. Watson's *Law of Obligations, Law of Persons, Law of Property and Law of Succession*, D. Daube's *Forms of Roman Legislation*, and F. Wieacker's *Textstufen*. A comparison of the second and third editions of the *Historical Introduction* shows how conscientiously Professor Nicholas has performed his task. Several parts of the book, such as the exposition of the origins of the formulary system (second edition pp. 226-233, third edition pp. 218-225) and the chapter on "Criminal Law in the Republic" (second edition pp. 321-331, third edition pp. 305-320) have been practically rewritten. The list of abbreviations, an indication of the range of the literature consulted, has grown from four and a half to twelve pages.

It is remarkable how well the numerous changes that had to be made have been blended into the original text. There is no

impression of patch work, no sensation of bumps or jars, and the felicitous style and format which made the original work such a pleasure to read have been fully preserved. In *Jolowicz-Nicholas*, one of the classic English works on Roman law will live on.

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