

John Cobb Cooper: At the Frontiers of International Law

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Abstract

This paper examines the development and formalization of air and space law as a subfield of international law by focusing on the contributions of John Cobb Cooper, founder of the Institute of Air and Space Law at McGill University and a pioneer in air and space law. John Cobb Cooper's experiences and vision greatly influenced the direction of air and space law, both in terms of shaping the substantive law and its supporting institutions. By reflecting on John Cobb Cooper's work, I discuss the process of creating a subfield and the interactions between the specific subfield of air and space law and the wider body of international law. The rapid technological developments that made air space and outer space accessible to humans necessitated order. The legal community responded with treaties, organizations, and a body of legal principles, reflecting an international cooperation that was dictated, in large part, by the common nature of air space and outer space.

Introduction

The personal papers and books of John Cobb Cooper's are affixed with small bookplates, bearing his name and an image of Pegasus against a starry sky. Pegasus, the winged horse of Greek mythology ridden by Bellerophon, represented the ancient human desire to fly through the air. Millenia later, the desire was realized by aircraft, modern-day Pegasusses, flying through space and eventually outer space.

John Cobb Cooper is central to the history of the development of air and space law. He was involved in the drafting of major international air law conventions, a pioneer in the field of space law, and the founder of the Institute of Air and Space Law (the "Institute") at McGill University. Although he was an American, he advocated cooperation and an international approach to air and space law. He was a visionary in his proposals to develop a legal regime of transport in air space and outer space.

This paper will examine how and why air and space law emerged as a subfield of international law and Cooper's role in its emergence and influencing the direction in which it developed. Part I details Cooper's personal and profession experiences to situate him in the air and space law community. Then, I will describe the process of creating a subfield in international law, followed by a discussion of the substantive law of air and space as developed by John Cobb Cooper. Cooper's major achievement was the founding of the Institute and, in turn, the Institute's existence is one of the hallmarks of air and space law as a distinct subfield. Part IV of the paper describes the founding of the Institute, Cooper's vision for it, and the reality. Finally, I will conclude with an assessment of John Cobb Cooper's contribution to international air and space law and general international law.

The subfield of air and space law stands in a particular relationship to general international law. For example, the almost invisible success of air law, as evidenced by the relatively smooth operation of international civil aviation, exemplifies an effective international legal system. Space law, with its emphasis on common property and a coherent regime for outer space, reflects a utopian vision of international law's ability to facilitate cooperation among states. The specialization of international law into a subfield does not mark a severance from the larger body of international law. Rather, I will show that John Cobb Cooper's continued engagement with basic concepts of international law demonstrates a subfield's potential to serve as a laboratory for creating new law while reconceiving existing principles.

I. John Cobb Cooper: The Man

John Cobb Cooper was born on September 18, 1887, but his interest in and expertise in air and space law made him a visionary of the twentieth century. Cooper obtained a Bachelor of Arts from Princeton University in 1909. He was one of the last of a generation of American lawyers to have studied law at a private law firm for two years rather than studying it as an academic subject. He was admitted to practice law in 1911 and practiced privately in Jacksonville, Florida for twenty-one years, interrupted for two years by naval service during World War I. It is somewhat surprising to consider that this prolific writer of academic papers on air and space law and promoter of air law as an academic field of study and research did not have any formal legal training himself. However, I argue that his understanding of the practicalities of flight, such as speeds, altitudes, and flight routes, together with his experience in American aviation policy, in the airline industry, and as a diplomat at the international level enabled John Cobb Cooper to envision the possibilities and essential elements of air and space

law. In conceiving his vision for air law, Cooper was motivated by the commercial and cross-cultural possibilities of air transport. On the other hand, the development of outer space, driven as it was by political ideology and U.S.-Russian state relations, encouraged Cooper to focus on the public international law aspects, where he continued his theme of international cooperation from international air law to the regime in outer space.

In the 1930s, Cooper became involved in air law at the international level. He was appointed by the State Department in 1932 as one of the first American members on the International Technical Committee of Aerial Legal Experts, and from 1932-35, he chaired the American Bar Association's Committee on Aeronautical Law.

Cooper participated in the major air law conferences of his time. In 1933, he chaired the American delegation to the Third International Conference on Private Air Law, which produced the *Convention on Liability for Damages to Third Parties on the Surface*. He attended the Inter-American Aviation Conference in 1937 as an observer for the U.S. Appointed as a legal adviser to the U.S. delegation to the 1944 Chicago Conference on International Civil Aviation, Cooper chaired one of the drafting committees. As an observer for IATA, Cooper attended and participated in the Geneva Conference of 1948 which produced the *Convention Rights in Aircraft*, the Rome Conference of 1952 which produced the *Convention on Damage Caused to Third Persons on the Surface*, and the Hague Conference in 1955 which produced the *Protocol for the Warsaw Convention*. Cooper's participation in international conferences was significant because the resulting conventions became the sources of international air law.

Air law is also shaped by its international organizations, primarily the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA), an inter-airline cooperative effort. ICAO was created at the Chicago Convention. The Articles of IATA

were adopted at the International Air Transport Conference, Havana, 1945, for which Cooper served as the chairman of the organizing committee and vice-president of the conference. His continued involvement with IATA included serving as a member of its first Executive Committee in 1945 and subsequently as legal advisor until 1964.

Cooper moved to Princeton, New Jersey in 1934 when he assumed the vice presidency of Pan-American Airways, which was the largest international air carrier at that time. In this capacity, Cooper negotiated route agreements, including the first trans-Atlantic and trans-Pacific scheduled air services.¹ Pan-Am negotiated trade routes directly with governments by obtaining franchises and landing rights from each country, advancing from Mexico to Central America, the Caribbean, and South America.² He retired as Vice-President in 1945 and served on its Board of Directors from 1944-46.

Cooper's industry and policy experience was helpful in terms of the additional perspectives he brought to the academic study of air law, but academia requires a degree of impartiality in terms of the ability to make independent, objective criticisms. Particularly in a field such as air and space law, dominated as it was by the American and Soviet superpowers, there was a danger that the development of a legal regime along the lines of a particular ideology would undercut its legitimacy as law and transform it into a quasi-political regime instead. John Jackson, the creator of the subfield of international trade law, recognized this danger and tried to avoid identification with any particular issue or policy dispute, which was all the more important given his background working at the United States Trade Representative's office.³

¹ Ivan A. Vlasic, "Foreword" in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) at x.

² John Cobb Cooper, *The Right to Fly* (New York: Henry Holt and Company, 1947) at 145.

³ David Kennedy, "The International Style in Postwar Law and Policy: John Jackson and the Field of International Law" (1994-95) 10 *Am. U. J. Int. L.* 671 at 673.

Cooper entered academia upon his election to the Institute for Advanced Study at Princeton in 1946 for a five-year term to engage in research in international air law under a grant from the Rockefeller Foundation. In 1947, Cooper established his academic credentials by publishing his seminal book, *The Right to Fly*, where he examined the interdependent factors that determine the air policies of states and, by extension, international air law. Perhaps a desire to assert his academic independence led Cooper to explicitly disassociate himself, in the “Acknowledgements” section, from Pan Am and the Institute of Advanced Study. Cooper’s thesis in *The Right to Fly* was that military and civilian uses of air power, defined as “the ability of a nation to fly”, cannot be separated. A full discussion of air power, its elements, development, and manifestations was necessary so as not to repeat the mistake made at Versailles with respect to ignoring, and by default, sanctioning, Germany’s development of air power in the civilian context.⁴ Several chapters of *The Right to Fly* were adapted from previously published articles. Along the same line examining the elements of air power, Cooper published *The Fundamentals of Air Power* in the following year.⁵

Cooper was never purely an academic. As I have mentioned above, he participated in international air law conferences throughout his tenure at Princeton and McGill. On the policy side, he served as an aviation advisor to President Franklin D. Roosevelt and as a consultant on President Truman’s Air Policy Commission (1947) and Airport Commission (1952).

II. Subfields in international law

Creation of a subfield

⁴ *Supra* note 2 at 4.

⁵ John Cobb Cooper, *The Fundamentals of Air Power* (Washington, D.C.: Library of Congress, 1948).

The adjustment of state relations after World War II marked a significant step forward for the development of international law. New states were created as a result of decolonization and the United Nations was established as a permanent forum for international cooperation. One notable feature of international law in this period was the outgrowth of specialized subfields, such as human rights law, trade law, and air law. In the United States, the development of subfields was attributed to a reaction against the popular American perception that public international law was irrelevant to the conduct of U.S. foreign policy.⁶ The subject matter of these specialized subfields had always existed in some form as part of the corpus of international law, but the specialization into a subfield marks, I argue, the distinction of the subject matter as having unique characteristics, apart from general international law, that merit special consideration. While analogies may be drawn from existing concepts in international law, subfields also presented an opportunity to create new legal principles or reformulate existing principles to be applied in a new context. As I will elaborate further in Part III, although Cooper concluded that “the legal status of outer space and the high seas differs very little, if at all”,⁷ he still urged discussion about unsettled issues in air and space law with a view towards developing a distinctive legal regime. Perhaps the growing body of international law and its attendant complexity spawned specialization. Certainly, the advantages of subfields to general international law were noted:

supplementing treatises on, and teaching in, the general principles of international law.

Such specialization will not only result in providing more adequate knowledge in the

⁶ *Supra* note 3 at 674.

⁷ John Cobb Cooper, “The Manned Orbiting Laboratory: A Major Legal and Political Decision” (1965) 51 *American Bar Association Journal* reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 423 at 429.

narrower fields, but is likely to enrich insight into the nature, functions and principles of the law of nations as such...⁸

While it sets itself apart, a subfield still shares many of the characteristics of general international law, such as its sources and fundamental principles. In this paper, I will examine the extent and nature of interaction between a particular subfield, air and space law, and its practitioners, who may or may not also be general public international lawyers, and the larger legal community.

David Kennedy has written a useful article describing the beginnings of international trade law, its “invention” being attributed to John Jackson.⁹ It would be an exaggeration to attribute the invention of air and space law to John Cobb Cooper and such a characterization would probably have been denied by Cooper himself, given his articles tracing air law back to Roman times and his acknowledgment of the work of early air law jurists such as Paul Fauchille. Nevertheless, Kennedy’s article is a useful guide for identifying the elements of a subfield in international law. Using these elements as measurements, I conclude that Cooper’s efforts were significant for formalizing air and space law as an academic endeavour and situating it in the wider field of international law.

The current director of the Institute, Paul Stephen Dempsey, on the fiftieth anniversary of the Institute’s founding, described Cooper’s vision: “air transportation would shrink the planet, bringing diverse cultures and economies closer together, and that a regime of law was essential to its success”.¹⁰ In his time, this would have been a visionary idea, given that commercial air transportation was only in its early stages. This view of air transportation and, more particularly, the role of law in the context of air transportation, foreshadows the current catchword of

⁸ Georg Schwarzenberger, “The Provenance and Standards of International Economic Law” (1948) 2 Int’l. L.Q. 402 at 405.

⁹ *Supra* note 3 at 671.

“globalization”, in terms of opening access to foreign markets and facilitating long-distance travel for the public. At first glance, it may seem that Cooper was purely optimistic about the possibilities of air transportation. However, the way in which he framed the elements of the subfield demonstrate that he recognized the problems and potential conflicts which accompany globalization. The extent to which law can mitigate or resolve these conflicts while maximizing the benefits that accrue from increased interactions among cultures and economies, therefore, will determine the success of air transportation.

Institutionalization was a key part of Jackson’s strategy for promoting international trade law as a subfield. In his case, he wrote a casebook specifically for the subject, taught students, and participated in pedagogical conferences for American law professors.¹¹ Institutionalization, literally in the form of an institute, is a vital step for developing a subfield. An institute can archive or consolidate the existing knowledge in the field as well as propagate or create new knowledge, whether in the form of research or training. It is a place for receiving students, either shaping them according to a particular school of thought or sending the students out to become ambassadors of the institute and of the subfield to the outside community. The capacity of an institute to support original research projects enables it to play a role in shaping the substantive law of the subfield, or at the very least, to influence the priorities of the subfield. Cooper’s major contribution to the development of air and space law as a subfield was his founding and vision for the Institute of Air and Space Law at McGill, a topic that I will explore in greater detail in Part IV.

The structure of international law may also be discerned by examining the organization of general treatises on international law, which were used by jurists and as teaching materials. In

¹⁰ Paul Stephen Dempsey, “The Road Ahead: McGill University’s Institute of Air & Space Law” (2002) *Annals of Air and Space Law* 305 at 306.

particular, a comparison can be drawn between the treatment of maritime law and air and space law. The law of the sea, a subfield of international law, has a unique place in the history of international law as also being the first example of true international law. World War I and the *1919 Paris Convention*, setting forth principles of air law, marked the distinction of air law as a specialization within international law. Before this, for example, a 1911 international law book addressed property rights over land, water, and miscellaneous objects, but not over air.¹²

Similarly, the rights and duties incident to jurisdiction were enumerated with respect to ships at sea, but not to aircraft, and the rights and duties of states in wartime related only to terrestrial and maritime and not aerial aspects. The “elevation” of air law to its own subfield can be seen most clearly in comparing its treatment by the fifth and sixth editions of *Wheaton’s Elements of International Law*.¹³ The key differences are the inclusion, in the sixth edition, of “The Aerial Domain” in the section on property rights, in addition to existing sections on maritime territorial jurisdiction, and the addition of a chapter on “Air Warfare” alongside chapters on land and maritime warfare. In the sixth edition, radio-telegraphy and radio-telephony issues are classified as elements of “the aerial domain”,¹⁴ although John Cobb Cooper makes it clear in his definition of air law that air law excludes telecommunications issues.¹⁵ By 1928, there was some indication that air law was recognized as a topic in its own right, for example, a specific section on jurisdiction over the air can be found in *The Law of Nations*, but it had not reached maturity

¹¹ *Supra* note 3 at 673.

¹² F.E. Smith, *International Law*, revised and enlarged by J. Wylie, 4th ed. (London: J.M. Dent & Sons Ltd., 1911).

¹³ Coleman Phillipson, *Wheaton’s Elements of International Law*, 5th ed. (London: Stevens and Sons, Ltd., 1916); A. Berriedale Keith, *Wheaton’s Elements of International Law*, 6th ed., 2 vols. (London: Stevens and Sons, Ltd., 1929).

¹⁴ Keith, *ibid.* at 414. Other early writers also included wireless telegraphy as an air law issue, see e.g. James L. Brierly, *The Law of Nations* (Oxford: Clarendon Press, 1928) at 120.

¹⁵ John Cobb Cooper, “Aerospace Law – Subject Matter and Terminology” (1963) 29 *Journal of Air Law and Commerce* reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968)43 at 44.

comparable to the law of the sea.¹⁶ Brierly devoted Part V to “Jurisdiction of States on the High Seas” and a section of “Part III: The Territory of States” to territorial waters. Even in more modern tracts, the status of air law within the international law is not as clear as the law of the sea or humanitarian law, for example. The third edition of Ian Brownlie’s *Principles of Public International Law* dedicates whole parts to “The Law of the Sea” and “The Protection of Individuals and Groups”. Air law topics, in contrast, are scattered throughout according to general international law principles, that is, outer space is a chapter in “Part V: Common Amenities and Co-operation in the Use of Resources” and space vehicles are subsumed under “Rules of Attribution.”¹⁷

The development of air and space law as a subfield of international law resulted from a conscious creation of elements of a subfield, such as the founding of the Institute of Air and Space Law, and as a natural outgrowth of international law, as marked by its growing recognition as a distinct field in textbooks. The two processes inevitably interact with each other. As a subfield emerges, it attracts the attention of jurists who then make a conscious effort to develop and promote the subfield. At the same time, the presence of identifying elements of a subfield elevates the subfield to a “serious” field of study, in the sense that it merits special attention. While the former process can be controlled, that is, individual actors like Cooper can choose to involve themselves in the development of the subfield, the latter process of emergence is organic, culminating in recognition by the larger legal community. My discussion below on the origins and development of air and space law will highlight the latter process by contrasting the different responses to air and space law, depending on the time periods and circumstances. Initial efforts at elaboration in both fields did not spark the legal community’s interest

¹⁶ James L. Brierly, *The Law of Nations* (Oxford: Clarendon Press, 1928).

¹⁷ Ian Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979).

immediately, but scientific and political developments created a climate that was conducive to the development of an air and space law regime.

III. Air and Space Law

At its most basic, creation of a subfield requires a definition of the subfield. One of Cooper's most important contributions to the development of air and space law was his ability to identify and describe the elements of air and space law, as evidenced by his writings and his curriculum for the Institute. An assessment of Cooper's contributions would not be complete without a look at his position on substantive topics in air and space law. I will set out John Cobb Cooper's main ideas in air and space law and juxtapose them against the state of the law at the time and the response of the legal community to his ideas.

The Beginnings of Air Law

According to Cooper, the first time when air law was considered a distinct subject matter was in the 1867 dissertation of Jean-Etienne Danck, titled *De iure principis aereo*, at the University of Frankfurt.¹⁸ Early air law applied in the beginning to airships and planes that required gaseous air for lift. At the beginning of the twentieth century, Professor Ernst Nys of the University of Brussels wrote about *droit aérien*.¹⁹ As well, the 1901 treatise by Paul Fauchille, "Le Domaine aérien et le régime juridique des aérostats" discussed the legal quasi-personality of aircraft in public international law where aircraft nationality was a necessary

¹⁸ John Cobb Cooper, "Roman Law and the Maxim 'Cuius est solum' in International Air Law" (1952) 1 Institute of International Air Law, McGill University reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 54 at 81.

¹⁹ John Cobb Cooper, "Air law – A Field for International Thinking" (1951) U.N. Transport and Communications Review reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 2 at 6 referring to Ernst Nys, "Droit et aérostats" *Revue de droit international et de législation comparée*, vol. 34, 1902.

precondition for determining which aircraft could enter the air space above a state's subjacent territory.²⁰

The first issue to arise in air law was the status of the air space above a state's territory. The two most popular theories were expounded at the 1906 meeting of the Institute of International Law. Paul Fauchille advocated freedom of the air, subject only to a state's right to self-preservation. John Westlake was a proponent of the extension of the subjacent state's sovereignty over the air space, but allowed for "inoffensive passage of aerial machines and of wireless telegraphy."²¹ The adoption of the latter view was reflected in the consensus from the 1910 Paris Conference, several pieces of national legislation following the 1910 Paris Conference, and in the provisions of the *1919 Paris Convention*.²² The competing interests of state sovereignty and the common use of air space would remain a theme throughout air and space law.

The capacity to fly increased as a result of aviation experiences during World War I, eventually leading to commercial aviation. In Europe, international routes developed quickly, whereas air transport in the United States started as a means of connecting domestic cities before expanding internationally. By 1939, the major international air routes were in operation.²³ One of the first specialized air law organizations, the International Air Commission, under the auspices of the League of Nations, was founded after the 1919 Paris Conference. It was

²⁰ John Cobb Cooper, "A Study on the Legal Status of Aircraft" reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 205 at 215.

²¹ Keith, *supra* note 13 at 414.

²² John Cobb Cooper, "State Sovereignty in Space: Developments 1910 to 1914" reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 125.

²³ *Supra* note 2 at 152.

responsible for amendments to the *1919 Paris Convention* and dealt with aircraft registration and other technical matters.²⁴

During World War II, private flying was brought to a halt, although air transport flourished as the means for long-distance travel.²⁵ The truly global extent of air transport highlighted the need for an international regime to order air transport if it were to continue during peacetime. One of the foundational documents for modern air law is the *1944 Chicago Convention*. Its provisions include restatements of customary international law, such as sovereignty over air space, freedom of flight over the high seas, aircraft nationality, and limitations on the flight of state aircraft over the territory of another state.²⁶

Unified Field

Cooper envisioned air and space law as a unified body of law containing all the rules for flight instrumentalities “in all space above and beyond the surface of the earth.”²⁷ Throughout this paper, I will refer to “air space” and “outer space”. Cooper defined “air space” as the area where air was present in sufficient quantities to support the flight of aircraft.²⁸ This area within a portion of Earth’s atmosphere.²⁹ Unless otherwise indicated, my references to “air space” are to the space subjacent to the terrestrial area of a state and in which the subjacent state exercises its

²⁴ Keith, *supra* note 13 at 416.

²⁵ *Supra* note 2 at 158.

²⁶ John Cobb Cooper, “The Chicago Convention – After Twenty Years” (1965) 19 *University of Miami Law Review* reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlastic (Montreal: McGill University Press, 1968) 439 at 441.

²⁷ *Supra* note 19 at 3.

²⁸ John Cobb Cooper, “High Altitude Flight and National Sovereignty” reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlastic (Montreal: McGill University Press, 1968) 256 at 257.

²⁹ The scientific community divides the atmosphere according to the constitution of gases at each level. The troposphere is immediately adjacent to land, followed by the stratosphere, the ionosphere, and the exosphere. When the two-stage rocket entered the ionosphere, reaching a height of 400 kilometers, in 1949, it was considered to have passed beyond air space.

sovereignty. The status of the nebulous area beyond air space but before outer space will be discussed in the section on “Contiguous Zones.”

As a reflection of a single legal regime that was to govern flight in both air space and outer space, Cooper proposed the term “aerospace law”.³⁰ He believed that such an encompassing term would prevent confusion and account for the inevitable overlap between air law and space law, especially given the uncertainty about the boundaries of outer space and, hence, the applicable legal regime.

Contiguous Zones

While customary international law recognized sovereignty over national air space, air space had an upper boundary beyond which sovereignty could no longer be exercised. Determining the maximum height of sovereignty was made more urgent by the frequency of high altitude rocket flights. Cooper’s article addressing this issue was significant as it was one of the first discussions about the legal implications of launching and orbiting a satellite.³¹

The conceptualization of contiguous zones was premised on defining the boundaries of air space, outer space, and some type of in-between zone. The idea of having three zones was first suggested to Cooper by R.S.S. Allen of London, a colleague of his at the Institute of International Air Law.³² From this initial suggestion, Cooper went on to develop a theory of contiguous zones, a concept with which he would come to be associated. Cooper’s belief in an upper territorial boundary, what he would call “air space”, was reasoned by applying classical principles of public international law. State sovereignty includes the right of a state to protect

³⁰ *Supra* note 15 at 44.

³¹ *Supra* note 28.

itself against the actions of another state. This right can only be exercised where a state has a right to control an area and if damage and loss to that state will occur when other states use that area. Cooper reasoned that beyond Earth's gravitational fields, objects could no longer fall and cause terrestrial injury so no subjacent state could be affected in the way that sovereign rights were intended to protect against.³³ In 1951, Cooper determined the height of sovereignty according to which scientific progress permitted control of the space above.³⁴ Five years later, he proposed the idea of contiguous zones. The upper boundary of national air space would be the maximum altitude of aircraft that operated using aerodynamic lift; the upper boundary of the contiguous zone, where non-military flight instrumentalities were allowed, was three hundred miles above the Earth's surface.³⁵ The following year, Cooper increased the upper boundary of the contiguous zone to six hundred miles to allow states to protect themselves against guided missiles.³⁶

The idea of contiguous zones facilitates the exercise of preventative and protective jurisdiction, which is recognized under customary international law, and represents a compromise between the permissible jurisdiction that can be exercised in air space as compared to outer space. Cooper reasoned that setting the maximum height of air space at twenty five miles would mean that spacecraft and some aircraft not requiring aerodynamic lift could fly into foreign territories without a state's consent because the area would be beyond the jurisdiction of any state. Instead, a contiguous zone, whose boundaries were defined by the maximum altitude of normal airplanes and the minimum altitude of unpowered orbital flight, allowed the subjacent

³² John Cobb Cooper, "Legal Problems of Upper Space" (1956) Proceedings of the Fifth Annual Meeting of the American Society of International Law 85 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlastic (Montreal: McGill University Press, 1968) 268 at 276.

³³ *Supra* note 19 at 8.

³⁴ *Supra* note 28 at 257.

³⁵ *Supra* note 32.

³⁶ John Cobb Cooper, "Flight-space and the Satellites" (1958) 7 *International and Comparative Law Quarterly* 82.

state to exercise the same preventative and protective jurisdiction as in its own air space, while allowing a right of passage for nonmilitary flight instrumentalities that were ascending to or descending from outer space.³⁷ As new scientific knowledge about a satellite's orbit emerged, Cooper modified his proposal by increasing the boundary of the contiguous zone to three hundred miles above the Earth's surface; the rights of the subjacent state in that space remained the same.³⁸

In proposing the lower boundary of outer space, Cooper surveyed scientific data on the minimum altitude of orbiting satellites and the temperature and gaseous composition of different atmospheric levels and beyond. For example, outer space should begin above the area where objects approaching Earth would be destroyed by heat from atmospheric friction, thereby precluding the necessity of preventive jurisdiction.³⁹

Space Law

Although the first academic work on space law was published in 1932 by Vladimir Mandl, it was ignored by his contemporaries.⁴⁰ It was not until space flight became a reality with the rocket tests and plans to launch artificial satellites that the legal community contemplated the possibility of a legal regime for outer space and in this, air lawyers such as John Cobb Cooper were the natural pioneers. The Cold War was the most important impetus for

³⁷ John Cobb Cooper, "Contiguous Zones in Aerospace – Preventive and Protective Jurisdiction" (September-October 1965) 7 *Air Force Judge Advocate General Law Review* 15 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 316 at 325.

³⁸ *Supra* note 32 at 276.

³⁹ John Cobb Cooper, "Fundamental Questions of Outer Space Law" Address delivered at the University of Leiden, October 10, 1960 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 286.

⁴⁰ Gyula Gal, *Space Law*, trans. By I. Móra (Leyden & Dobbs Ferry, N.Y.: A.W. Sijthoff & Oceana Publications, 1969) at 24.

the development of space technology.⁴¹ Scientific developments excited public interest in outer space and compelled the international community to respond. The launch of Sputnik I on October 4, 1957 was a landmark achievement for space exploration. Space law also gained prominence on the legal agenda due to the priority it was given by national governments. In 1955, the United States government announced its support of a series of satellite flights as part of the 1957-1958 International Geophysical Year, directed by committees of international scientists.⁴² Space law was the legal community's contribution to the discourse on the new conditions found in outer space, which were already being addressed by other fields of study, such as medicine and the psychiatric and biological sciences.⁴³ The publication of the World Wide Space Law Bibliography in 1976 by Kuo Lee Li, a law librarian at McGill with expertise in air and space law, was indicative of the legal community's interest at that time of having an inventory of materials related to space law.

The uncharted nature of space in the early 1960s was reflected in its contemporary legal regime or lack thereof. It was fitting that the first conference hosted by the Institute of Air and Space Law in April 1963 was a conference on the law of outer space. As Maxwell Cohen, its director at the time, stated in his introduction, a study of the regime of outer space would provide insight into the law-creating process.⁴⁴ This was made possible by the *tabula rasa* nature of outer space, and, to a lesser degree, in air law where there was not yet a fixed legal regime. Rather, the development of international law in these fields either anticipated or very quickly responded to technological developments, which demanded a legal ordering.

⁴¹ Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Martinus Nijhoff Publishers, 1998) at 177.

⁴² *Supra* note 32 at 273.

⁴³ John Cobb Cooper, "Outer Space and the Law: An Engineering Problem" reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 36 at 38.

From the beginning of space exploration, there was general agreement about the non-appropriation of outer space. Kemal Basler attributed the prominence of the non-appropriation doctrine to the popularity of natural law after World War II, as reflected by “universal ethics based on human dignity and human rights.”⁴⁵ Cooper predicted that the creation of a legal regime for outer space would require a reconsideration of state sovereignty rules.⁴⁶ Like others, he recognized the physical incapability of individual or collective appropriation of any part of outer space.⁴⁷ Oscar Schachter, in 1952, was the first to suggest that outer space be regarded as the common property of all mankind.⁴⁸

When the Russians first made impact with the moon, Prime Minister Khrushchev denied any resulting territorial claims. In the same vein, President Kennedy encouraged an end to the race to the moon and stated his preference for cooperation.⁴⁹ Despite these public statements of cooperation, the United States and the U.S.S.R. continued their respective Cold War space programs. The difference between their “public” and “private” faces may reflect a desire to be seen as conforming to the general international sentiment about the status of outer space or as a political maneuver to prevent other states from entering the space race by publicly declaring that there was no such race. The presumption seems to have been that outer space was a *res communis* and, intertwined with this legal status, was the concept of its common use. UN

⁴⁴ Maxwell Cohen, Preface to *Law and Politics in Space: Proceedings of the First McGill Conference on the Law of Outer Space, 12 and 13 April 1963* (Montreal: McGill University Press, 1964).

⁴⁵ *Supra* note 41 at 167.

⁴⁶ John Cobb Cooper, “The Institute of International Air Law” (1953) 2 *Journal of the Society of Public Teachers* 122 at 122.

⁴⁷ C. Wilfred Jenks, *Space Law* (New York and Washington: Frederick A. Praeger, 1965) at 97. Jenks was a prominent utopian who promoted the universal reach of international law, premised on a world community. Cooper’s belief in international cooperation did not extend to the extreme, but did call for a certain degree of consensus with respect to ordering the legal regime in outer space.

⁴⁸ Oscar Schachter, “Who Owns the Universe?” reprinted in *Space Law – A Symposium, 85th Cong., 2nd Session.*, pp. 8, 17 (1958).

⁴⁹ John Cobb Cooper, “Who Will Own the Moon? The Need for an Answer” (Winter 1965-66) 27 *University: A Princeton Quarterly* 3 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 339 at 345.

Resolution 1962 (XVIII), adopted on December 13, 1963 was a landmark declaration by the international community that outer space would not be subject to national sovereignty and should remain free for the exploration and use by all. From the writings, it is difficult to determine whether the legal status as such was first conceived and the permissible uses flowed therefrom or whether it was because of the intended uses that such a legal status was necessary. Put it in concrete terms, a later director of the Institute spoke of “the common interest of mankind in the peaceful and fruitful exploration of space for all scientific purposes” and, to this end, of a custom of a common right to move freely within outer space and “to engage in every form of peaceful and scientific pursuit.”⁵⁰ The alternative to the peaceful use of outer space for the benefit of all, as posited by President Eisenhower in his address to the United Nations on September 22, 1960, was the development of outer space as “an area of dangerous and sterile competition.”⁵¹

For all the optimism about space law’s potential to foster new forms of international cooperation, jurists were sensitive that it could just as easily become another tool in the arms race.⁵² The form which space law would take, therefore, was not just a theoretical exercise, rather, it had practical ramifications on societies on Earth. Cooper’s concern about the arms race had an additional dimension, namely, that inaction with respect to a legal regime in outer space would lead to a destructive free-for-all by the superpowers.

The call to define the boundary between air space and outer space has been considered Cooper’s most important contribution to space law. He was the most outspoken proponent on prioritizing this as an issue in space law⁵³ at a time when colleagues, such as Eugene Pépin and P.K Roy at ICAO and John A. Johnson at the National Aeronautics and Space Administration in

⁵⁰ *Supra* note 44 at 13.

⁵¹ *Supra* note 39 at 287.

⁵² *Supra* note 44.

⁵³ *Supra* note 43.

the U.S., did not consider it to be very important.⁵⁴ However, his proposed solutions, based on scientific developments, turned out to be premature because they had to be continuously modified.

Cooper's writings on the liability of space vehicles proposed a regime for proof of fault in outer space.⁵⁵ While no proof of fault should be required once there was damage on the surface or in air space resulting from the activities of a space vehicle, some proof of fault should still be required in outer space as between space vehicles. In the context of liability, Cooper demonstrated the need for coordination among international bodies regulating air and space law. There were potential conflicts of jurisdiction between the UN and ICAO in the area of liability for space damage. For example, the *1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, an ICAO document, held the operator of the aircraft liable. In contrast, early drafts of UN documents would have held the launching state responsible. Moreover, some of the flight instrumentalities launched into outer space could derive support from the atmosphere, thereby falling under the kinds of aircraft regulated by the *Rome Convention*.⁵⁶ Bearing in mind Cooper's immediate audience of the space law community, I suggest that Cooper's writings on this subject, anticipating the production of a UN document, were an attempt to influence the final document, in particular, by drawing attention to potential contradictions with the goal achieving legal coherence and consistency in air and space law.

⁵⁴ *Supra* note 47 at 108.

⁵⁵ John Cobb Cooper, "Legal Problems of Spacecraft in Airspace" from *Festschrift für Otto Riese*, Karlsruhe, 1964 465 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968)305 at 306; John Cobb Cooper, "Memorandum of Suggestions for an International Convention on Third Party Damage Caused by Space Vehicles" in *Proceedings of the Third Colloquium on the Law of Outer Space* (Stockholm, 1960).

⁵⁶ John Cobb Cooper, "Liability for Space Damage – The United Nations – The Rome Convention" paper submitted to the Eighth Colloquium of Space Law, Athens, 14-15 September 1965 reprinted in *Explorations in Aerospace*

The Law-Making Process in the Air and Space Field

The rapid evolution of air and space law was not unique to the subfield; a similar pace of development characterized its contemporary subfields, such as the law of the continental shelf, the legal personality of international organizations, and human rights law.⁵⁷ As a result, treaty more than custom plays a more important role as a source of law for international air and space law. This was partly a function of the rapid technological advancements in the field, requiring a concomitant legal response, that militated against the longer development of custom over time.⁵⁸ With respect to space law, American lawyer and air law lecturer Arnold Knauth pointed out the difficulty of finding widespread and continuous state practice in outer space, given the rarity of satellite launches.⁵⁹ The substantive rules of international air and space law are often either embodied in a treaty, or states will use a treaty to delegate their legislative power to an international organization.⁶⁰ Conventions contribute to the development of a unified law of the air by serving as a guide for national laws. Cooper opined that even bilateral agreements, such as the Bermuda Plan between the United Kingdom and the United States, which set out principles for commercial operations and traffic, could govern future arrangements about commercial privileges and routes: “Such an agreement would bring about international commercial uniformity but would leave to the nations concerned the right to determine with what

Law: Selected Essays by John Cobb Cooper, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 432 at 433.

⁵⁷ J.E.S. Fawcett, *International Law and the Uses of Outer Space* (Manchester: Manchester University Press, 1968) at 1.

⁵⁸ *Supra* note 43 at 38.

⁵⁹ *Supra* note 39.

⁶⁰ *Supra* note 43 at 39.

nations and over what routes they might wish to trade.”⁶¹ In a legal vacuum, a treaty addressing a particular issue was preferable to a vague United Nations resolution, in Cooper’s opinion. A treaty stated “unequivocally the rights and obligations of the parties”, thereby avoiding ambiguity in a field where clarity was absent inherently.⁶²

As evinced through his writings, John Cobb Cooper appreciated the history of air law and for him, this historicism was important to understanding air law. First, looking back to the roots of air law was a means of deriving first principles, and while international air law depends less on custom as compared to other fields of international law, an examination of the history of air law does allow one to extract some customary principles. Second, as recognized by Article 32 of the *Vienna Convention on the Law of Treaties*, part of treaty interpretation consists of the *travaux-préparatoires*.⁶³ Cooper’s analysis of the records of the meetings and positions of the parties of the 1910 and 1919 Paris Conferences serve as guides to treaty interpretation. Furthermore, his participation in the air law conferences of his time, especially as a chairman of a drafting committee of the *1944 Chicago Convention* allowed him to speak with some authority about the original intention of the drafters. The development of air law necessitates going beyond the bare language of a treaty, but the intentions of the parties also serve as a guide and limitation to treaty interpretation.

The air and space law regime is characterized by the proliferation of international organizations, which often set the standards for actors. While these organizations facilitated the harmonization of legal rules among different countries, communication between them and the formulation of their mandates were important to avoid overlap and confusion. Cooper took note,

⁶¹ John Cobb Cooper, “The Bermuda Plan: World Pattern for Air Transport” (1946) *Foreign Affairs* reprinted in reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 381 at 393.

⁶² *Supra* note 49 at 353.

for example, of the lack of coordination between ICAO and the United Nations Committee on the Peaceful Uses of Outer Space, which further added to the confusion between the regimes of air space and outer space.⁶⁴

IV. Founding the Institute of Air and Space Law

The Institute of International Air Law, now called the Institute of Air and Space Law was founded at McGill University in 1951. With the establishment of the headquarters of ICAO and IATA in Montreal, the city became a centre for international civil aviation. In addition, Montreal was also the headquarters of the Canadian Space Agency, Air Canada, Pratt & Whitney, and Bombardier. One reason cited for Cooper's decision to found the Institute in Canada was that the "need for international cooperation, across ideological lines, in its progressive development and codification" should be outside the United States.⁶⁵ Despite its Canadian location, the Institute consciously asserted an international perspective. Cooper envisioned the Institute as facilitating international cooperation and playing a role, if not directly, at least, indirectly through its influence, in the progressive development and codification of air and space law. On the twentieth anniversary of the Institute, its director at the time Edward McWhinney believed that the great strength of the Institute was that it was never conceived of or administered as a purely Canadian centre.⁶⁶ In this section, I will describe the structure of the Institute, the meaning and consequent implications of its international character, and the extent to which this may be attributed to John Cobb Cooper.

⁶³ *Vienna Convention on the Law of Treaties*, (1969) 1155 U.N.T.S. 331, Art. 32.

⁶⁴ *Supra* note 15 at 48.

⁶⁵ *The Institute of Air and Space Law, A Brief History and Bibliography, 1951-70*, introduction by Edward McWhinney (Montreal: McGill University, 1970) at 5-6.

⁶⁶ *Ibid.* at 9.

There are differing accounts as to the origination of the idea for the establishment of an institute of air and space law at Montreal, with most accounts attributing it to John Cobb Cooper. One account credits at least the idea of an academic organization to the member states of ICAO.⁶⁷ In any case, given Cooper's involvement in ICAO, it is likely that he would have participated in such discussions. Certainly, Cooper, as its first director, created the Institute's structure and programme of study and ensured its endurance. Cooper discussed the idea of an institute in 1950 with a cross-section of academics and international bureaucrats, including Edward Warner, President of the ICAO Council, Eugene Pépin, Legal Adviser of ICAO, P.K. Roy, at the time, McGill's Principal and Dean of the Faculty of Law and later, Legal Adviser of ICAO, and Sir William Hildred, head of IATA. In 1951, representatives from ICAO, IATA, and McGill convened for a series of conferences about the establishment of an institute, envisioned as a post-graduate teaching institute that would generate original research.⁶⁸

Contemporaries of Cooper viewed the creation of the Institute as a positive contribution to the air law community. For example, Dr. Nicholas Matte, in a retrospective tribute, praised Cooper for having "created a unique avant-garde post-graduate institution."⁶⁹ Indeed, the Institute was unique as the only academic institution in the world offering a full-time graduate programme in air and space law and granting degrees in that field.⁷⁰

Goals: Internationalism and Research

⁶⁷ A.B. Rosevear, "McGill's Institute of Air and Space Law" (1962) 14 *The University of Toronto Law Journal* 257 at 258.

⁶⁸ A.B. Rosevear, "John Cobb Cooper and McGill's Institute of Air and Space Law" (1961-62) 28 *Journal of Air Law and Commerce* 346 at 347.

⁶⁹ Nicholas M. Matte, "50th Anniversary Conference, Speaking Notes" (2002) *Annals of Air and Space Law* 447 at 447.

⁷⁰ Yves-Marie Morissette, "Welcome on Behalf of the University: 40 Years of Teaching and Research at the IASL" (1992) 27 *Annals of Air and Space Law* 1.

In the year of the Institute's founding, John Cobb Cooper wrote an article that introduced the Institute to the Canadian legal community.⁷¹ The Institute had a two-fold purpose: to provide facilities for advanced studies in international air law and to provide an academic organization for fundamental research in the field.⁷² Although courses in air law were already being given at other universities and national air law institutes had been established, the Institute was unique because it was "directed primarily to the international phases of air law."⁷³ From the outset, the Institute consciously styled itself as being international in orientation.

The establishment of a chair of droit aérien at the Université de Montréal by Dr. Nicholas Matte, who would become a Director of the Institute in 1976, was a coincidence.⁷⁴ In the Institute's early years, there was some contact between the Institute and Dr. Matte, at least on the personal level, insofar as Dr. Matte was invited to be a yearly visiting professor to the Institute starting in 1961; Dr. Matte also noted that he had "cooperated with the Institute" since 1951, although the form which this cooperation took was not explained.⁷⁵ Interactions between professors at different universities in the same city may not appear unusual, but in this case, cooperation was more significant because it represented an intellectual exchange between the civil and common law systems and, more specifically, between the francophone and anglophone academic communities of Montreal.

As part of the Faculty of Law, the Institute benefited from the Faculty's strength in comparative law. Although the National Programme at McGill's Faculty of Law, combining the study of civil and common law, would not be introduced until 1968, as early as 1963, members of the legal community recognized McGill's unique situation in a civil law jurisdiction among

⁷¹ John Cobb Cooper, "McGill's Institute of International Air Law" (1951) 29 Canadian Bar Review 515 at 515.

⁷² *Supra* note 46 at 122.

⁷³ *Supra* note 71.

⁷⁴ *Supra* note 69.

common law provinces.⁷⁶ Facility with both legal systems was perceived as an advantage for the air lawyer because all private air law conventions drew upon the experiences of both legal systems. Cooper's own words best describe the rationale for juxtaposing the civil and common law systems in the study of air and space law: "No single theory of law or system of jurisprudence can be accepted as controlling. International air law must eventually become a set of rules that exists irrespective of the background of any particular national system."⁷⁷

As a research institution, the Institute's output could take two forms. One form is creative law, in the sense that it would highlight current or future problems in international air and space law and propose solutions, in the hope of influencing policy. Another form is as a repository for preserving documents, thereby guarding historical memory.

The goal of air law, according to the Institute, was the discovery of the best solutions to legal problems, defining "best" in terms of a safe, efficient, and regular international transport system. The goal of space law is "to ensure that outer space is used only for peaceful purposes and for the benefit of all mankind", which can best be achieved through international cooperation.⁷⁸

Administration and Funding

Cooper persuaded McGill to sponsor the Institute at a time of financial difficulty for the university.⁷⁹ The Institute also relied on private foundations for its initial funding. In its first twenty-five years, the Institute received seed funding from the Rockefeller and Ford Foundations

⁷⁵ *Ibid.*

⁷⁶ Geoffrey N. Pratt, "The Institute of Air and Space Law, McGill University" (1963) 1 *Can. Y.B. Int'l. L.* 298 at 298.

⁷⁷ *Supra* note 71 at 519.

⁷⁸ *Ibid.*

⁷⁹ *Supra* note 65 at 6.

as well as the Carnegie Corporation.⁸⁰ A look at later funding may give rise to some inferences about why initial funding was from private foundations. When Institute Director Maxwell Cohen negotiated an additional grant from the Ford Foundation, one of the Institute's first and biggest financial supporters, in the early 1960s, he did so to avoid seeking money from the Canadian government, thereby creating official ties.⁸¹ Perhaps the Institute sought to be independent financially from any ideological or political forces. Although it was an American foundation, the Ford Foundation's mission aligned with many of the international ideals of the Institute. The founding of the Institute also coincided with the Foundation's self-assessment pursuant to the Gaither Committee report and its renewal of its mission statement, published in 1950, where it "recommended support for activities worldwide that: promise significant contributions to world peace and the establishment of a world order of law and justice."⁸² With respect to the Rockefeller Foundation, Cooper had a prior relationship, having received a grant from them while at the Institute for Advanced Study to research international air law. The grants from the private foundations were small and when the money was spent, McGill assumed the Institute's administrative expenses. From 1954-61, the Institute relied on grants from the Canada Council, the Colomba Plan, and the Commonwealth Scholarship and Fellowship Plan.⁸³ The potpourri of funding sources for the Institute has sometimes been referred to as an example of "international co-operative effort and financing."⁸⁴

As a postgraduate institution, the Institute was under the aegis of the School of Graduate Studies and Research, but its faculty held joint, concurrent appointments as professors at the

⁸⁰ *Supra* note 76.

⁸¹ *Supra* note 65 at 8.

⁸² <http://www.fordfound.org/about/mission2.cfm>.

⁸³ *Supra* note 67 at 258.

⁸⁴ *Supra* note 70 at 2.

Faculty of Law and shared facilities with the Faculty of Law. The Institute literally began in a small room with a chair, occupied by John Cobb Cooper.⁸⁵

Curriculum

The curriculum, which was developed by Cooper, consisted of four required courses: the development of international transport law, public international air law focusing on relevant conventions, bilateral agreements, and aircraft nationality, private international air law focusing on the rights and liabilities of air carriers and relevant treaties, and international air regulation focusing on the implementation of the *Chicago Convention*. Cooper himself taught the courses on the development of international transport law and public international law. Private international law was taught by Dr. J.G. Gazdik, Secretary of the Institute and of the Legal Committee of IATA. International air regulation was taught by Dr. Eugene Pépin in the Institute's first two years and then by P.K. Roy, both of who were directors of ICAO's legal bureau.⁸⁶ It is probably fair to characterize the Institute in its early years as a creature of John Cobb Cooper, and I think it is safe to assume that Cooper was responsible for the choice of Pépin as his successor. Cooper would have wanted to ensure the continuation of his vision for the Institute, especially given that he served as its director for only three years. Cooper's selection of Pépin, who shared a similar background as Cooper with respect to ICAO, was not surprising. The curriculum Cooper created remained the same at least until Rosevear's tenure (1959-1962), with the only addition being a course on the law of outer space.⁸⁷ John Cobb Cooper's creation of the Institute's curriculum is an important evidence of his vision of the field of air law, its elements, and what was important for its study.

⁸⁵ *Ibid.*

⁸⁶ *Supra* note 46.

In addition to the mandatory courses, students at the Institute could take electives in collateral subjects, such as international trade, principles of maritime law, principles of civil law, and international relations, offered by other McGill faculties.⁸⁸ This list of examples cited by Cooper reflect his interdisciplinary approach to air and space law, and reveal the subjects that he thought were important to understanding air and space law. Notably, the international nature of the courses and the course on principles of civil law reflect a holistic approach to the legal systems represented in air and space law. Given his frequent analogies to maritime law in developing principles of air and space law, Cooper's recommendation of maritime law is also not surprising.

The Institute took advantage of its Montreal location by inviting officers of ICAO and IATA to give special lectures. In its first years, distinguished guest lecturers at the Institute included the Director General of IATA, a Canadian member of the Council of ICAO, and a professor of transport from the Harvard School of Business Administration.⁸⁹ Lectures by "practitioners" anticipated that graduates of the Institute would go on to work at these organizations. As well, Cooper may have recognized that understanding the functions and internal problems of these international organizations would encourage a dialogue between the organizations and the Institute.

The research component of the degree was equally as important as the Institute's lectures. Cooper proposed the subject matter for the original research to be undertaken by students in their second year of study. This gave him the opportunity to direct the kind of research being undertaken by the Institute based on his legal interests. As we have already seen, the ability to define the legal questions in a novel field plays an important role in shaping the field itself

⁸⁷ *Supra* note 69 at 349.

⁸⁸ *Supra* note 71 at 517.

according to the elements. In the Institute's first year, Cooper envisioned original research in the fields of: competence and jurisdictional conflicts arising from the prosecution of crimes committed on aircraft flying over non-flag state territory, national airspace rights in the Arctic and Antarctic, noting this subject matter as being of particular interest to Canada, airspace rights over United Nations trusteeship territories, sovereignty over the region beyond airspace.⁹⁰

In Cooper's opinion, the production of original research was an important part of the Institute's role as "contribut[ing] in some measure toward the future development of international air law on a sound academic basis."⁹¹ Grounding the development of law on an academic basis belies Cooper's role as an academic later in life. Cooper himself acknowledged that the creation of air and space law was as much a function of scientific development as it was of politics. By inserting the Institute as an academic institution into this discourse, Cooper allowed the Institute to play a utopian role in envisioning air and space law from a purely juristic perspective, without the trappings of political compromises.

In addition to developing the Institute's curriculum, John Cobb Cooper also contributed to the contents of its library. In 1963, he presented 1,600 books and documents dealing with problems of air and space law to the Institute. The donation represented the major part of his working collection of documents and papers. This was in addition to an earlier donation of books on air and space law from his private library.⁹²

First Students

⁸⁹ *Supra* note 46 at 124.

⁹⁰ *Supra* note 71 at 518.

⁹¹ *Ibid.*

⁹² D.B. Macfarlane, "How High Is Up? Question Even Baffles Space Experts" in *The Montreal Star*, November 9, 1963.

Notwithstanding his interest in the commercial potential of air power, Cooper opened *The Right to Fly* with the statement that “Properly used, [air power] can be the means to better understanding among the peoples of the world.”⁹³ Interestingly, the same could be said of the Institute of Air and Space Law, a meeting point for international air lawyers from all over the world.

The initial success of the Institute and its attraction for its first students can be attributed as much to the challenge of a novel field as to Cooper’s reputation.⁹⁴ He had a very clear idea about his ideal student for the Institute: one who had a working knowledge of English and French and who was already involved in international aviation or who planned on such careers. She or he must also hold a law degree or its equivalent and be admitted to the bar.⁹⁵ The small size of incoming classes was intended to allow for round-table discussions.

To achieve geographic diversity, the Institute categorized its students into regional groupings and tried to maintain a balance among the regions.⁹⁶ Cooper believed that the geographical diversity of students would create an international atmosphere at the Institute and believed that “the interchange of ideas of men and women from various parts of the world is necessary.”⁹⁷ In its first four years, the Institute attracted students from twenty-five different countries.⁹⁸ To the extent that the air law would result in an international set of rules, in the sense of being common and universal, Cooper hoped that interchange of ideas among

⁹³ *Supra* note 2 at 1.

⁹⁴ *Supra* note 65 at 6.

⁹⁵ *Supra* note 46 at 125.

⁹⁶ *Supra* note 65 at 9. The regions were North America, Western Europe, Eastern Europe, Africa, the Middle East, and Latin America.

⁹⁷ *Supra* note 46 at 125.

⁹⁸ “List of Students” (1992) 27 *Annals of Air and Space Law* 421-39..

international students would further this objective.⁹⁹ Implicit in this is the idea that the students would translate their experiences from the Institute into their careers.

The first students of the Institute were self-funded.¹⁰⁰ This had implications in terms of the kind of students attracted to the Institute and may help to explain why most of them were already accomplished in the field of air law. Delegates to international air law conventions were members of the Institute's first classes.¹⁰¹ Study at the Institute may more properly be characterized as a honing of skills rather than as an introduction to air and space law. In fact, the first classes with Cooper were best described as "a cooperative venture."¹⁰² Given that his audience was composed of senior lawyers, civil servants, and government advisers, Cooper recognized the advantages of drawing upon the experienced background of his first students.

The Institute's training of the future shapers of international air and space law was an indirect means of influencing the subfield's development. I do not suggest that Cooper used the Institute as a propaganda tool for a particular kind of air and space law. Rather, Cooper's emphasis on the international aspect of air and space law suggested to his students a particular conception of air and space law as crossing national boundaries with the ultimate goal of international cooperation. To the extent that his students would go on to work in the field, they would carry this philosophy with them as well as their interactions and international experiences from the Institute.

V. Life After the Institute

⁹⁹ *Supra* note 46 at 126.

¹⁰⁰ *Supra* note 65 at 6.

¹⁰¹ *Supra* note 46 at 125.

¹⁰² *Supra* note 65 at 6.

Cooper retired as director of the Institute in 1955, due to old age, but continued as a lecturer until 1958. His three-year directorship set out the future course of the Institute and was remarkable for the imprint he left on the Institute despite his short tenure. McGill appointed him professor emeritus in 1958. By this time, he had returned to Princeton, where he sat on the advisory council of the Woodrow Wilson School of Public and International Affairs until his death in 1967.¹⁰³

Towards the end of his life and paralleling technological advances, Cooper became more involved in the field of space law. He chaired a committee of the International Astronautical Federation that was charged with preparing a statement for possible submission to the UN and ICAO with respect to the extent of air space and resulting jurisdictional problems. He was awarded the first gold medal of the International Institute of Space Law of the International Astronautical Foundation in 1961 and served as its president from 1961-62.

Conclusion

The Private International Law Aspect

Air and space law encompasses public and private international law aspects, and the emphasis of one aspect over the other seems depended as much on the personality and interests of a jurist as on the legal community's concerns at a particular point in time. Early air law, as found in the *1919 Paris Convention*, manifested more public law aspects because of the concern with aviation security. In particular, the immediate impetuses for the 1910 Paris Conference, which Cooper has argued contained the roots for the 1919 conference, were the sporadic

¹⁰³ Ian C. Pilarczyk, *'A Noble Roster': One Hundred and Fifty Years of Law at McGill* (Montreal: McGill University Faculty of Law, 1999) at 37.

landings of German balloons on French territory, thereby posing a security threat to France.¹⁰⁴ By the 1940s, although the security aspects of air law were still important given airborne weapons of mass destruction, the rise of private air transportation for civilian uses enlarged the framework of air and space law to its commercial aspects.

Despite Cooper's vision of a unified law of air and space, the balance between private and public international law between the two fields differed according to their origins and subsequent development. Although the early issues in air law were about security and upholding state sovereignty, private international law came to play an important role in regulating air transport in the commercial context. In contrast, space law was a product of the Cold War military rivalry and so military considerations, as framed by the state, rather than trade and business, shaped the development of space law principles.¹⁰⁵ This dichotomy is reflected to an extent in Cooper's writings where the role of air law is to bring together cultures and promote international commerce. The uncertainty of outer space, on the other hand, called for an international regime to avert "fatal international confusion and perhaps conflict."¹⁰⁶ In contrast, the motivation for air law was to bring together cultures and promote trade.

The private international law perspective of air transport is apparent in Cooper's early writings and shaped his thinking about sovereignty in air space. Although he considered the legal status of aircraft as *sui generis*, he also classified it as one among many instrumentalities of commerce.¹⁰⁷ He viewed air transport as a natural evolution from the shipping origins of world transport, where the right to trade and the freedom from interference in maritime trade routes had

¹⁰⁴ John Cobb Cooper, "The International Air Navigation Conference Paris 1910" (1952) 19 *Journal of Air Law and Commerce* 127 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 104.

¹⁰⁵ *Supra* note 41 at 177.

¹⁰⁶ John Cobb Cooper, "The Russian Satellite – Legal and Political Problems" (1957) 24 *Journal of Air Law and Commerce* 379 reprinted *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 279 at 285

been asserted as early as the time of Grotius. Similarly in Cooper's time, air transport could become and "instrument[s]" of national transport and communication policy" by allowing foreign actors access to local markets.¹⁰⁸ However, Cooper never advocated a free-for-all. The absence of any regulation could lead to subsidy wars and local air services of smaller countries disappearing or being absorbed into larger air services because of their inability to compete in the market.¹⁰⁹ Keeping the best interests of the world economy at the forefront of his proposals, he wanted "unjustified control and regulation...[to] be kept to a minimum" while ensuring that satisfaction of public's need for adequate transportation.¹¹⁰

Contribution to International Law

Today, Canadians often speak of a "brain drain" referring to the departure of skilled workers from Canada to the United States. Among international lawyers, Thomas Franck is an example of a Canadian who left Canada to teach law at New York University. Fifty years ago, Cooper did the opposite by moving to Canada and establishing an institute for air and space law. Cooper had no apparent personal, professional or academic ties to Canada. The establishment of an academic centre away from one's geographical roots has been suggestive of an institute in exile. I argue that this was not the case for John Cobb Cooper and the Institute of Air and Space Law. While at McGill, Cooper continued to maintain ties to the United States, most notably serving on presidential commissions; he also continued to write for American audiences. One might argue that Cooper's desire to distance air law from any

¹⁰⁷ *Supra* note 20 at 249.

¹⁰⁸ John Cobb Cooper, "Air Transport and World Organization" (August 1946) 55 *Yale Law Journal* 119 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 356 at 363 and 366.

¹⁰⁹ *Ibid.* at 371.

¹¹⁰ *Ibid.* at 369.

particular ideology made the founding of the Institute in Canada a choice by default, i.e. Canada's identity in the international community as "not the United States". I would argue, however, that the choice of Canada signals a more positive view of Canada's role in the creation of international law and its status in the international community as a facilitator of international law. It is, perhaps, more than just a coincidence that the Institute was founded at a time when Canada was at the forefront of international law in other respects, as exemplified by John P. Humphrey's participation in the drafting of the Universal Declaration of Human Rights in 1948 and by Lester B. Pearson's creation of the concept of United Nations peacekeeping in 1956. It made sense to locate an Institute that furthered international law in a country that was clearly receptive to and even actively promoting the development of international law. The outward-looking model of Canadian international law at the time, particularly with its philosophy of international cooperation,¹¹¹ was more aligned to Cooper's conception of what air and space law should be and it may have been for this reason that the Institute was located in Canada.

In addition to fleshing out the substantive law of air law, one of Cooper's major contributions was the fact that he raised potential legal issues even before technology made them relevant. Cooper was a visionary in terms of his ability to anticipate. The anticipatory nature of Cooper's legal thinking differs from the traditional legal approach that is reactionary. Usually, the formulation of legal rules is a response to chronic problems and the need to order relations. The challenge of Cooper's type of "anticipatory law" is finding a balance between

¹¹¹ Allan Gotlieb and Charles Dalfen, "National Jurisdiction and International Responsibility: New Canadian Approaches to International Law" in *Selected Papers in International Law: Contributions of the Canadian Council on International Law*, eds. Yves Le Bouthillier, Donald M. McRae, and Donat Pharant (The Hague: Kluwer, 1999) 3.

crystallizing law too soon, with the risk of having to revise it or finding that it is no longer applicable, and waiting too long, at which point conflicts have already arisen.

On a smaller scale, for example, Cooper posited the idea of contiguous zones, with varying degrees of sovereignty, before the first satellite had been launched and before it was necessary to consider questions arising from a satellite passing through multiple jurisdictions.¹¹² On a larger scale, the founding of the Institute anticipated the need for an institution devoted to the study of air and space law from an international perspective. As with all visionary ideas, Cooper's ideas were not always accepted immediately. For years, his writings on the need to define the boundaries of outer space were discounted. It was only in July 1967, a few months before his death, that Cooper's views were acknowledged by the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, which affirmed the need to define outer space.

Cooper explained the reason for his writings on subjects that he anticipated would become issues in air and space law: "to be in position, when the time comes, to aid in reaching an international accord."¹¹³ In this statement, he revealed his view of the role of a lawyer as a creator rather than simply an applier of law, made necessary by air and space law's character as an emerging field of law. Second, the ultimate goal of air and space law was an international accord. As I have already discussed, Cooper believed that the best way to achieve international accord was through international cooperation.

Air and Space Law's Relationship to General International Law

¹¹² *Supra* note 1 at xiii.

¹¹³ *Supra* note 32 at 278.

Cooper's decision to found the Institute outside the United States, thereby preventing it from being associated with any particular ideology, supports my theory of his utopian vision of air and space law. Although this was in the context of air law, it applies even more purely to space law where the unique status of space allowed for a *tabula rasa* legal regime that was not possible in any other place, not even Antarctica or the high seas. With respect to air law, while Cooper acknowledged sovereignty over national airspace, the special character of the space between national airspace and outer space also lent itself to possibilities of reconceiving ideas about jurisdiction and sovereignty. It may be said that Cooper was a utopian reactionary to the Cold War, which manifested itself in the Korean War of the 1950s. Rather than espousing an ideology and using air and space law as a means of furthering that ideology, he reacted against it by proposing international cooperation as an alternative. The possibilities of space law also offered hope beyond the legal arena. Referring to space law, C. Wilfred Jenks wrote that "the future of the law on the matter, in addition to being profoundly influenced by, may also exercise some influence upon, the general course of international politics."¹¹⁴

For Cooper, the development of air and space law was always more than just an intellectual exercise. A legal regime for air and space should further the goals of bringing cultures together, in terms of transportation and market access. The achievement of these goals necessarily "transcend[s] the jurisdictional boundaries of a State and require[s] international regulation, standardization and unification of law."¹¹⁵ Having seen how maritime law facilitated commerce and transport on the high seas, Cooper often invoked Justice Story's characterization of the high seas as "the common highway of all, appropriated to the use of

¹¹⁴ *Supra* note 47 at 384.

¹¹⁵ *Supra* note 70 at 2.

all”¹¹⁶ in the context of the air space over the high seas. The private sector also had an important role to play in contributing to international cooperative efforts. Cooper advocated, for example, the internationalization of air transport services in terms of international ownership and operation. He envisioned this as a way to prevent the misuse of civil aircraft for military purposes, to promote global markets, and to eliminate nationalism.¹¹⁷

The establishment of the rule of law consists of both substantive and procedural rules. The latter has been termed a “functional” approach to law, which looks to sources and procedural rules for establishing a regime of public order.¹¹⁸ Regardless of air and space law’s success in terms of establishing substantive international norms, it is one of the best successful examples of international law from a functional perspective. This is reflected in Cooper’s, and subsequently, the Institute’s interest in treaty-making as a law-creating process as well as the workings of international organizations, which, for the purposes of air and space law, often function as law-creating or at least, norm-creating, bodies.

One of John Cobb Cooper’s successors, Edward McWhinney, noted that Cooper was an air law specialist rather than a generalist public international lawyer as were some of the subsequent directors of the Institute.¹¹⁹ Yet, despite the narrow focus of his subject matter, Cooper’s conception of air and space law encompassed the foundations of public international law and the questions with which he grappled were logical extensions of doctrines that were taken for granted by public international law. The clearest example is the doctrine of state sovereignty, one of the foundations for structuring relations between states. Today, public

¹¹⁶ *The Marianna Flora* (1826), 11 Wheaton (24 U.S.) 1 at 42.

¹¹⁷ John Cobb Cooper, “Internationalization of Air Transport” (1949) 2 *Air Affairs* 546 reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 395 at 397.

¹¹⁸ *Supra* note 3 at 677.

¹¹⁹ *Supra* note 65 at 8.

international law is evolving to recognize the limits of state sovereignty, for example, when it is limited by environmental or human rights concerns. Similarly, Cooper was interested in the limits of sovereignty with respect to the air and the competing interests which limited that sovereignty, both physical/scientific in terms of the inability to exert control over air and the space beyond as well as the desire to limit sovereignty in favour of leaving the region open for research, exploration, and the beneficial uses of human kind.

To the extent that it shared principles with general public international law, air and space law maintained a dialogue with the wider field. For example, the status of air space depends on the nature of the subjacent land, namely, whether a state exercises sovereignty over the surface territory. Thus, the determination of air space rights over the Arctic intersected with the determination of national surface sovereignty rights in the Arctic.¹²⁰

In Part II, I wrote about the relationship between a subfield of international law and general international law. Kennedy characterized Jackson's creation of trade law as a subfield as "less rejecting international law and setting up a parallel discipline, a preferable optic, than describing international law's general displacement and restricted area of continued relevance."¹²¹ I argue that Cooper's development of air and space law as a subfield is even less iconoclastic. To the contrary, Cooper's treatment of air and space law, by going back to the fundamental principles of general international law such as state sovereignty, reduces the basic problems, once faced by international law, which are faced anew in air and space. The questions posed by Cooper are the classical questions of international law: what is the extent of state sovereignty and what are its limits? The new context in which those questions are raised,

¹²⁰ John Cobb Cooper, "Airspace Rights Over the Arctic" in *Encyclopedia Arctica* reprinted in *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper*, ed. by Ivan A. Vlasic (Montreal: McGill University Press, 1968) 171 at 178.

¹²¹ *Supra* note 3 at 680.

however, tests the validity of the old rules based on the feasibility of application and the effects of applying the old rules in the new context. In its creative process as well as its substantive norms, air and space law serves as a window on general international law and its novelty offers an opportunity for general international law to develop in new directions.

At a micro-level, the dynamic between general international law and its subfield of air and space law continues the discursive practice of law. According to Ian Johnstone, “legal discourse...occurs within interpretive communities composed of participants in a particular field or enterprise.”¹²² The interpretive community of a subfield is a subset within the larger community of international law and derives its authority from its expertise in the field. An international organization may form part of an interpretive community. In 1946, Cooper campaigned for an organization that could adjudicate disputes about the legitimate objectives of air power.¹²³ In the field of air law, ICAO fulfilled this role by adopting necessary international standards about technical and safety procedures. Similarly, IATA’s regional rate traffic conferences were a means by which the community stabilized air traffic conditions and prevented rate wars.¹²⁴

While the concept of an interpretive community describes the nature of interpretation rather than a group of people, its members may be classified as either part of the “inner circle”, that is, those who participate in the formulation, negotiation, and implementation of legal norms, or part of the “outer circle”, that is, those active in the field regulated by the legal norms.¹²⁵ The parameters for interpreting a treaty, which is a function of a particular set of circumstances, are set by the community that gave rise to or is responding to those

¹²² Ian Johnstone, “The Power of Interpretive Communities” in *Power and Global Governance*, ed. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005) 185 at 186.

¹²³ *Supra* note 108 at 371.

¹²⁴ *Ibid.* at 377.

circumstances.¹²⁶ Notwithstanding treaty law, the development of customary international law requires some consensus by a community as to the status and content of norms by which members of the community can influence behaviour and by which members can measure their actions and “their own interpretations against anticipated judgment of the community.”¹²⁷ From this perspective, legal subfields are almost inevitable because of the highly specific and specialized nature of the fields. I argue that the larger community of international law cannot be as attuned to the nuances and special circumstances of a given subfield nor should there be such an expectation on the larger community. To the extent that the community of the subfield applies principles of general international law to the subfield and carries out the principles to their logical conclusion, there is no conflict. Conflict may arise, however, when a legal norm in the subfield appears to depart from general international law, but may be explained by special circumstances unique to the subfield. For example, the principle of sovereignty suggests that a subjacent state should be able to exercise jurisdiction over the entire column of air above its territory. Nevertheless, air law limits national sovereignty to the air space immediately above territory, having accommodated technological advances with respect to satellites and rockets and taking into account the importance of fostering civilian air transportation. These are norm-creating decisions made by the air and space law community and accepted by the larger international law community, such that they have been incorporated into the corpus of general public international law. Taking the Institute’s influence as an example of the impact of a subfield on general public international law, the Institute has been

¹²⁵ *Supra* note 122 at 190.

¹²⁶ *Ibid.* at 188-89. See also Stanley Fish, *Doing What Comes Naturally* (Durham: Duke University Press, 1989) at 142.

¹²⁷ *Supra* note 122 at 192-93.

commended as having “a considerable impact on the teaching and research of international law at McGill.”¹²⁸

John Cobb Cooper’s many roles in the field of air and space law throughout his life established his membership in the interpretive community. As a participant at air law conferences and legal advisor to IATA, he was a member of the inner circle, and as an air and space law scholar and vice-president of an airline, he was a member of the outer circle. I believe, however, that his most important role in the interpretive community was as a leader. In Part III, I described Cooper’s substantive contributions to the body of air and space law. By identifying and prioritizing the issues in the field, he shaped the direction of the development of air and space law. Moreover, his founding of the Institute of Air and Space Law was instrumental in the promotion of a distinctive interpretive community within the subfield, one oriented towards international cooperation and international understanding in the field of air and space law.

Earlier, I discussed how the development of a subfield depends upon a conscious effort to create and develop elements of a subfield and upon its emergence, as marked by the interest of the larger legal community. Through his prolific writings, teachings, and most important, the founding of the Institute of Air and Space law, John Cobb Cooper made a conscious contribution to establishing air and space law as a subfield. Although the interest of the larger legal community in the subfield resulted, in part, from the scientific advances and the concomitant public and political interests, the direction in which the subfield developed depended on the receptivity of the legal community to certain ideas. I posit that Cooper was able to establish himself as an authority in the subfield because his ideas about the international potential of air

¹²⁸ Ronald St. John Macdonald, “A Historical Introduction to the Teaching of International Law in Canada” (1974) 12 *Can. Y.B. Int’l. L.* 67 at 80.

and space law and the achievement of this potential through cooperation accorded with the legal community's optimistic outlook on the positive uses of international law in the period after World War II.