"R I G H T O F I N N O C E N T P A S S A G E"

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Autumn Term 1956

"RIGHT OF INNOCENT PASSAGE"

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INTRODUCTION

A B.B.C. musical critic, reviewing an interpretation of an Elgar symphony, stated that "with Elgar, one travelled". He was pleasantly rebuked by a colleague who reminded him that people nowadays did not want to travel; they wanted simply to "get there". Fifty-three years after the Wright Brothers demonstrated at Kitty Hawk that it was possible to fly heavier-than-air machines, the jet age is making its full impact upon us. Plans are vigorously afoot to transport the travelling public from one side of the Atlantic to the other in super-swift aircraft, capable of carrying 100/120 passengers, at the approximate cost of $375 return fare.

From the type of plane which progressed majestically along its way, we have now reached the type which is propelled with such force that scarcely, by its noise, has it claimed our attention than it is gone, and without our possibly ever having seen it.

In certain continents, the present generation has witnessed fantastic things taking place in the airspace and unfortunately, in many cases, has felt the full force of the consequences upon their physical person.

As a mode of civil transportation, however, the aeroplane is now one of the most accepted media. Passengers arrive at the airport, see the plane, get in and think very little more about it. But that is only the beginning of the story. What of the conditions under which the planes fly, and more particularly, under which flight has developed.

The story is a peculiar one.

Addressing the University of Leiden in 1938, Dr. Goedhuis deplored the conditions under which civil aviation had had to develop. Among other things, he said: "One may start from two different concepts. According to the first, aviation is a mode of transport of which only the medium is new, whilst the juridical relationships which ensue from the utilization of this medium carry nothing novel in them. At the most, certain adjustments of Common Law to this new mode of transport might be required.

"According to the second opinion - which is the one I share - aviation alters the entire character of human society to such an extent that the rules by which it is to be governed will have to be constructed on an independent basis."[1)]

Further, he said: "The reason why the principle of traffic has been and still is being jettisoned lies in fear, fear of competition, fear of political penetration, fear of the agressive potentiality of the aircraft.

"In aviation, such a universal conception that each state stands more to gain than to lose by freedom of passage for aircraft is at present still lacking. The absence of such a universal conception is a result of the failure to appreciate the true nature of aviation, and this in its turn results from the difficulty of appreciating the true nature of aviation in the early state in which it still finds itself."[2)] That was in 1938.

When the same spokesman had occasion to address a similar audience in 1947, he deplored still further what was taking place and, with additions, he underscored every word that he said in 1938.

As the matter stands, there is "no right of innocent passage" in the airspace "pleno jure gentium". There is no comparable right in the airspace for passage of foreign civilian planes that there is in the coastal or territorial waters of a State for the passage of foreign civilian ships. In the airspace, there is a "privilege" and it is there as a result of conference, long and tedious, of States' representatives entrenching themselves squarely behind the national sovereignty in the airspace theory and conceding the privilege of passage, under certain conditions, to other contracting States.

In the following pages, it is proposed to trace the "right" in the sea and the other "privilege" in the airspace.

Starting in the Roman period, when most of the known world around the Mediterranean was under Roman jurisdiction, passage of any kind was naturally subject to Roman law. After the Roman hey day was over, we see the nuclei of the present European States beginning to form. We later see not only Spanish and Portuguese discoverers setting out upon their conquests to East and to West but we see evolving legal thought in relation thereto, first under the Spanish theological school; it seems to synchronize well with the intrepid expeditions by sea to other continents. We see the clash of interests between the English and the Spanish and Portuguese; and we see the clash of interests between the Dutch and the Spanish and Portuguese; and we see the clash

of interests between the English and the Dutch themselves. In true Elizabethan fashion, we find the monarch who gave her name to the Age, with all its implications, in 1580 declaring to the Spanish Ambassador, Mendoza, that: "her subjects would continue to navigate that vast ocean since the use of the sea and air is common to all." What Professor A. D. Gibb, in his "Scotland Resurgent", describes as "the swashbuckling days of the English" had begun.

The various law schools throughout Europe all produced their academicians. Practically all their discussions were in Latin; Vattel, Swiss diplomat and legal scholar, of the later 18th Century was one of the first to write in French.

We find exposés, on the one hand, on "mare liberum" and, on the other hand, on "mare clausum"; the first, written by a clever counsel in support of his royal brief, and the second, written by a less attractive writer, but again by command of his sovereign. The latter writer was vainly endeavouring to stretch the extent of his sovereign's jurisdiction to the coast of France. "The Sea of England" foorsooth. However, despite the fact that the English navy could undoubtedly have made good the claim, England rather wisely abandoned the theory, took the longer term view and finally opted for the theory of the Freedom of the Seas.

History interestingly shows us how divergent were the views and legal principles of the Scots before the Union. Precluded during centuries of strife with her neighbour in the South from attending the Universities of Oxford and Cambridge, the Scottish legal "lions" sought inspiration in the Continental schools, Leiden, Paris and Bologna

apparently holding considerable attraction for them. There is, as yet, not too much in print on the subject. The late Lord Cooper, President of the Court of Session, had accumulated more information about the subject than had any other person.

Towards the end of the 18th Century, at the time when Vattel was expounding his views on the rights of transit and commerce, the Montgolfier Brothers in France were working hard and it will be recalled that in 1783 they eventually constructed the hot air balloon which enabled J. F. Pilatre de Rosier and d'Arlande to become history's first men to fly.[3] Two years later, in 1785, Blanchard crossed the English Channel by balloon. Thereafter, there appears to have been a kind of lull but in 1870, with the outbreak of the Franco/Prussian War, and the siege of Paris, the subject of aviation violently flared up again. Among the escapees by balloon from the besieged City was an Englishman by the name of Worth. The balloon in which he was travelling was intercepted by the German Army over the German lines and Mr. Worth was considered to have in his possession rather incriminating documents. Bismarks first order, later withdrawn, was "Shoot the man as a spy."

The legal furore on the question of freedom in the airspace as opposed to sovereignty of the subjacent State, which Bismark's first order released, was certainly off to a most auspicious start; it only tended to subside with the outbreak of the First World War in 1914, by which time various Governments had already passed legislation declaring their sovereignty in the airspace above their land territory and territorial waters. The period between 1900 and 1914 was the period during

which the French jurist, Fauchille, flourished in one conference after another, in one journal after another, and in which he propounded his theory "l'air est libre" and later "la circulation aérienne est libre". With the Convention Relating to the Regulation of Aerial Navigation of 1919 a well signed and ratified document, the controversy tended to be considered as classé.

During the early part of the "paper" discussion on the above subject, sovereignty versus freedom, other practical demonstrations continued to take place in the airspace - by the Tissandier Brothers in 1882, by Renard and Krebs in 1884; by Ader in 1897 and finally in 1903, the Wright Brothers conclusively demonstrated at Kitty Hawk that flight in heavier-than-air machines was possible. In 1909, Bleriot crossed the English Channel.

While it is pleasant and thought provoking to accompany academicians along their various and devious lines of argument, nevertheless it seems absolutely essential to look squarely at the subject from the point of view of States' action in the matter. What did they do? The right of commerce became inextricably mixed with the right of passage. Accordingly, beginning with the first abortive International Air Navigation Conference in Paris in 1910, let us work our way in some detail through the various international discussions which have, so far, shaped the pattern - the Convention Relating to the Regulation of Aerial Navigation (Paris 1919); the Ibero/American Convention (Madrid 1926); the Pan-American Convention (Havana 1928); the Extraordinary ICAN (International Commission for Air Navigation) Meeting in Paris in

1929; the International Civil Aviation Convention (Chicago 1944); the Bermuda Conference in 1946; the Geneva Conference, convened by ICAO, in 1947; the two Conferences, convened by ICAO, at the request of the Council of Europe, in the years 1954 and 1955.

Attention is especially called to the number of opportunities which have arisen for States to declare themselves in favour of the "right of innocent passage" in the airspace. One after the other, however, the opportunities have been discarded. During the 1910 Conference relating to the regulation of international aerial navigation in Paris when Germany, then leading the world boldly in aviation activities and material, was endeavouring to obtain equal treatment for foreign planes in the sovereign airspace territory of the other contracting States, the British brought a halt to the Conference. She, and other States present, were not prepared to commit themselves to such a programme. The two most important articles, Articles 19 and 20, were never written.

Later in 1919, during the meetings of the Aeronautical Commission of the Peace Conference, composed of representatives of the Allied Powers, we see a more expansive attitude being adopted by the British, for example. While desiring sovereignty in the airspace for the subjacent State, she is clamouring for what has become known as fifth freedom commercial rights. But President Wilson in the Peace Conference, having decided that Germany must be allowed a commercial fleet of planes, Articles 1/5 and 15 of the Convention Relating to International Aerial Navigation were accepted and the later interpretation

of these articles by contracting States removed all doubt about there being any question of the "right of innocent passage" in the airspace.

Article 1 of the 1919 Convention stated that: "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory." That was a bold political decision; it was nothing if not expedient to those lawyers asked to draw up a Draft Convention under the existing circumstances. What did the delegates mean by "complete and exclusive" sovereignty, asks one writer. "Did the authors of the article want to indicate that the power of the State over the air was an unrestricted power? Was that the reason why the words 'complete and exclusive' were added to the term 'sovereignty'? Or were they simply meant to convey that only the subjacent State is entitled, to the exclusion of all others, to exercise legal power?" 4)

The Ibero-American Conference of 1926, which was considered to have supplied a corrective to the text of Article 5 of the 1919 Convention and which the participating States were otherwise adopting, amounted to little; the 1926 Convention was ratified by few States and was, within a short period of time, a matter of historical note only. Article 5 of the Ibero-American Convention purported to give contracting States complete freedom to permit or deny navigation in the airspace above their territory to aircraft not possessing the nationality of contracting States.

The Pan-American Conference in 1928 was based on the 1919 Convention, although the disposition of its articles is different. Of

the 1928 Convention, Mr. Latchford says: "Since the Habana convention does not state specifically that the operations of a scheduled air line of any contracting state over the territory of another contracting state shall be subject to the prior authorization of the latter state, Article IV providing for innocent passage considered in connection with Article XXI might, if the two articles were given a literal interpretation, be interpreted to mean that each contracting state undertook to grant blanket authorization for scheduled international airlines of other contracting states to operate in transit through its territory or to have commercial entry into such territory. In practice, however, none of the countries parties to the Habana convention interpreted the convention as giving any blanket right of transit or of commercial entry into its territory."[5] So yet another opportunity to establish a "right of innocent passage" was lost.

In 1929, when the CINA (Commission internationale de navigation aerienne) undertook the arrangements for a Diplomatic Conference in Paris in order that States, which had been neutral or ex-enemy during the War, might be given an opportunity to vent their grievances against the Convention Relating to the Regulation of Aerial Navigation (1919), we see Sir Sefton Brancker, chief British delegate, making a plea for more freedom during the famous discussion of Article 15 of that Convention. We hear him suggesting that States ought to be "reasonable". He knew what he was talking about. When Imperial Airways in 1928, and 1929, had wanted to develop respectively lines over the Belgian Congo and to India, first Belgium, and then Persia, said: "No, you shall not cross over our air territory without prior permission." The British were interpreting

Article 2 to mean: transit rights without prior permission, "right of innocent passage"; the other two contracting States were not so interpreting Article 2. Sir Sefton's recommendation, put to the vote, resulted in 27 votes to four votes against it, i.e. the answer was "absolute unlimited sovereignty" for the subjacent State. Here was another opportunity which was not taken.

The proceedings during the International Civil Aviation Conference at Chicago in 1944 have to be read to be believed.

A great deal of nonsense seems to have been talked about American freedom during the Chicago Conference with which neither their Constitution nor their Civil Aeronautics Act of 1938 seemed to square. We have occasion to quote later Mr. Stannard who stated: "It has sometimes been alleged by the American press that the United States stood for the freedom of the air. Nobody at Chicago stood for the freedom of the air. It was agreed that each nation was sovereign over its own air, and that its sovereignty covered cabotage, i.e. the right to reserve to its own national services traffic between points on its own territory. If Great Britain and the United States had mutually conceded the five freedoms, not a single British plane would have been entitled to fly between New York and Chicago and not a single American plane between London and Belfast except as a consequence of special agreement between the two Governments."6)

At the end of World War II, the U.S.A. was in possession of practically everything that could fly commercially. Naturally they wanted freedom to fly that material; they may even have estimated that

reciprocal rights would not require to be given for some time. However, there was talk of planes on loan for States willing to grant them commercial rights.

Articles 5 and 6 are the jewels in the crown of the Convention on International Civil Aviation 1944. Article 6 states very plainly, with regard to scheduled international services, what will not be done. It states: "Scheduled air services: No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." Article 5 appears to accord rights to other than scheduled services but what is given with one hand, is withdrawn with the other. Paragraph 2, as it has been interpreted by some countries, can entirely negative paragraph 1.

Australia/New Zealand went the length of stating that international trunk routes should be operated by internationally owned aircraft. Canada tabled a Draft Convention, and the United Kingdom a plan, which sought to create an international agency with real administrative and economic power, a body which would allocate rights and frequencies and fix tariffs. This was anathema to the U.S.A. which had all the planes ready to fly, and the kind of Constitution with which it was not easy to compromise. The Commonwealth group were not prepared to surrender their commercial rights unless an international organization vested with real power was created to control the situation and this, the U.S.A. could not accept.

By 1946, whatever the U.S.A. had been propounding at the Chicago Conference was no longer in vogue and yet another change took place. In an article, already referred to by Dr. Goedhuis, 7) the author seeks to draw an analogy between the course pursued over the centuries by the British in relation to the sea and the Americans, now operating more than half the world's entire civil air transport, in the airspace. The writer appears to be able to finish his article quite optimistically so far as his subject is concerned.

Perhaps one of the brightest and most rational interludes has been during the Bermuda Conference in 1946 between the U.S. and the U.K. when these two States, with such diametrically opposed philosophies at Chicago, were able to strike a compromise. Why did "Bermuda" succeed? Because high powered officials on either side of the Atlantic had given instructions that it must succeed and, in the absence of a multilateral agreement, this bilateral agreement set the pattern in agreements between States on which civil aviation, since the last war, has had to operate.

It is depressing to relate but, of the various attempts by the International Civil Aviation Organization, at Assembly meetings, and at the special Conference convened at Geneva in 1947, little progress has been made towards a multilateral agreement which would free the air by international convention. Of the two regional European conferences, convened by ICAO at the request of the Council of Europe in Strasbourg, the first in 1954 seemed to show more hopeful results than those produced in 1955.

We should like in the course of this paper to substantiate the above remarks and to show clearly that, as the position stands, there is in the airspace no comparable "right of innocent passage" with that which exists in the territorial waters.

INTRODUCTION

Footnotes

1. Dr. D. Goedhuis. Air Law in the Making. Address to the University of Leiden, 1938, on accepting Lectureship in Air Law. (M. Nijhoff, The Hague)

2. Ibid. (See also by same author "Idea and Interest in International Aviation". Address to the University of Leiden, 1947, on accepting Professorship in Air Law. M. Nijhoff, The Hague)

3. A. Roper. La Convention aerienne internationale. Portant Reglementation de la Navigation Aerienne. P.8.

4. Dr. D. Goedhuis. The Air Sovereignty Concept and U.S. Influence on Its Future Development. Journal of Air Law and Commerce, Vol.22, Spring, 1955, No.2, pp.209-221.

5. Stephen Latchford. Comparison of the Chicago Convention with the Paris and Habana Conventions. Dept. of State Bulletin, Vol. XII, No.298, March 11, 1945, p.412.

6. Harold Stannard. Civil Aviation: An Historical Survey. 21 International Affairs, Oct. 1945, pp.497-511.

PART I: RIGHT OF INNOCENT PASSAGE IN RELATION TO THE TERRITORIAL WATERS

C H A P T E R I

HISTORICAL

A) EARLY LAW AND THE THEORIES CANVASSED BY JURISTS DURING THE PERIOD OF THE ROMAN EMPIRE AND THE MIDDLE AGES

Roman Empire:

On examination, we find quite naturally that, during the period of the Roman Empire, and particularly up till the collapse in the West during the 6th Century, A.D., juridical conceptions of the rights and duties of States embodied in the sea which washed their coasts were otherwise than our own. The Roman jurists, whose Empire contained at the time all the seas of the civilized world, imposed certain obligations and offered corresponding protection. But this was not international law as we know the term at the present time. The sea, like the air, was free for the use of all and not simply restricted to Roman citizens only. The sea was juris gentium; to quote Celsus, "Maris communem usum omnibus hominibus".[1] The Roman jurists, in fact, were more particularly concerned with private rights.

Rome had had, none the less, a long association with sea law.

Coleman Phillipson[2] calls attention to several treaties agreed to between Rome and Carthage, the first being in 509/508 B.C., very soon after the expulsion of the Kings, and under the Consulship of Junius Brutus and M. Horatius. The salient point in this treaty contains a restriction by the Carthaginians on the Roman sphere of navigation in the Mediterranean; to mitigate this blow, there was provision for securing due

performance of commercial contracts, the establishment of some form of international jurisdiction and the Romans were accorded access to the Carthaginian province of Sicily and to the enjoyment of full rights therein.

The first condition of this treaty was that "neither the Romans nor their allies are to sail beyond the Fair Promontory, unless driven by stress of weather or the fear of enemies. If anyone of them be driven ashore, he shall not buy or take aught for himself save what is needful for the repair of his ship and the service of the gods, and he shall depart within five days. Second, men landing for traffic shall strike no bargain save in the presence of a herald or town clerk. Whatever is sold in the presence of these, let the price be secured to the seller on the credit of the State, that is to say, if such a sale be in Libya or Sardinia."[3)]

And the conclusion of the fourth condition reads: ".... they (the Romans) shall build no fortress in Latium; and if they enter the district under arms, they shall not stay the night therein."[4)]

In the second Treaty 306 B.C., the third condition is contained in the following words: "In Sardinia and Libya no Roman shall traffic or found a State; he shall do no more than take in provisions and refit his ship. If a storm drive him upon these coasts, he shall depart within five days."[5)]

And the second condition of the third treaty, dated 279 B.C., reads: "If one or other stand in need of help, the Carthaginians shall supply the ships, whether for transport or war; but each people shall supply the pay for its own men employed on both"; and the third condition,

"the Carthaginians shall also give aid by sea to the Romans if need be; but no one shall compel the crews to disembark against their will."[6)]

These treaties show restrictions but there was little distinction made between the coastal sea and the portions further out. In fact, to this lack of interest generally in the various parts of the sea by the Romans, Gidel attributes the slow development of territorial waters in the Mediterranean.[7)]

Accordingly, the difficulty of applying later the Roman texts to situations, for which in any case they were basically unsuitable, and never intended, explains the use and introduction of the Canon Law texts at the time when the centrally controlled Roman Empire was breaking up and being replaced by a number of political divisions.

Raestad,[8)] citing the 16th Book of Decretals which contains a chapter on the procedure to be followed in Papal Elections, calls the reader's attention to the gloss contained therein. Being a rule of the Roman Church that, on the death of the Pope, the Cardinals should immediately meet at the place of the demise and thereupon proceed to the election of a new Pope, the hypothetical question arose as to what the correct modus operandi should be in the event of the deceased having passed away on the sea. It was in order to overcome this canonical difficulty that the jurisdiction of the districtus of the coastal state was extended to the sea. Another Digest commentator, Perusio,[9)] under the title of Delicts Committed on the Sea, states that contracts concluded on the sea fall under the jurisdiction of the nearest coastal state.

The republics generally, and the cities of Venice and Genoa particularly, extended their jurisdiction on the sea to 100 miles and this delimitation was later confirmed enthusiastically by Bartolus (1314-57). He raised two questions: 1) Has the coastal state jurisdiction over the coastal sea? 2) And if so, to what extent?

Middle Ages:

According to Raestad[10] and Gidel,[11] Bartolus dealt with the first question satisfactorily but he failed to use all the arguments that he might have when dealing with the second question. He got side-tracked by discussing the juridical position of islands situated at some distance from the coast. He concluded that those islands which were within 100 miles of the coast, or two days' sailing distance, fell within the jurisdiction of the coastal province and that those beyond the 100 miles fell within the jurisdiction of the Emperor. The theory, in practice, fell down for the very good reason that the Emperor, in order to make it effective, would have required to have at his disposal the appropriate fleet - an advantage which he did not apparently always possess.

Raestad criticises Bartolus for not making more use of the Roman texts in support of his argument, for example, the zone of jurisdiction for the urban prefect stretched to 100 miles from the City of Rome. When members of the clergy fell from grace, they were banished and obliged to live at a distance of not less than 100 miles from the city whose peace they had disturbed. For the Roman jurist, a place outwith the 100 miles' distance from Rome was considered to be a safe distance away.

So far as Bartolus was concerned, says Gidel,[12] he was discussing a repressive jurisdiction on the coastal waters of states; and mainly associated with piracy, probably rampant in the Mediterranean at the time, and of which coastal states and their ships were victims.

Thereafter, Baldus de Ubaldis took up the work of his master, Bartolus, and tried to define the nature of the jurisdiction exercised by a state in its coastal waters. Dividing his subject into three parts: ownership, usage and jurisdiction, Baldus stated with regard to the jurisdiction that the coastal state had the duty of protection. The onus on the coastal state was heavy, i.e. it had the duty of clearing the sea of pirates, but it had the corresponding right to judge the acts of violence committed by them within the limits of the coastal jurisdiction which Baldus himself set at 60 miles. The use of the sea was common to all. Such were the correlative rights and duties of states in the Mediterranean during the 13th and 14th Centuries.

In the Middle Ages there was apparently more justification for the position to develop quicker in the Northern Seas. In addition to the pirates, and later the privateers, the sea itself was economically richer. While the method of delimiting the extent of water in which the coastal state was interested, known as "the middle line" theory, went out of vogue in Norway, it was still being recognized in England in Elizabeth's reign by jurists in that country, as well as in Holland. By that time, Norway, like Scotland, (and later the practice found its way down to the Mediterranean) adopted the extent of vision, but of course the extent of vision might vary from person to person and from one location to another. Notions about the territorial seas quite definitely during this period seem to have

been fluid but, nevertheless, as Gidel says, the idea of a territorial sea had quite definitely got established among the maritime powers by the 13th Century.[13)]

Economically, states such as England, France, Germany and Denmark considered that fishing should be free to all in the belt of water next their coasts and in fact they allowed this. On the contrary, Norway and Scotland, to whom fishing was economically the mainstay of their very existence, took up a different attitude and excluded foreigners from fishing therein.

B) DEVELOPMENT OF THE TERRITORIAL WATERS AND THE THEORIES CANVASSED BY JURISTS DURING THE PERIOD 13TH TO 18TH CENTURIES

Spanish School:

With the advent of the writing of Franciscus a Vitoria, born at Vitoria in Spain in 1480, we enter into a period when a veritable galaxy of legal literature concerning international law generally was produced. The whole position regarding the sea was given due and adequate consideration.

Though basically a theologian, Vitoria was well qualified to expound on the legal status of the sea. After a studious and brilliant youth spent in Spain, Vitoria had repaired to Paris to the Dominican College of St. Jacques where, for 19 years, he pursued his studies. Three years after his return to Spain, in 1526, he was elected by open competition to the Chair of Theology in the University at Salamanca, a position

which he held until his death in 1546. Not only was he a brilliant lecturer but he wrote a series of "Relectiones Theologicae"; the first edition was published in Lyons in 1557, the fifth and sixth subjects treated being entitled respectively "de Indis" and "de jure belli".

Vitoria was a courageous writer; he defied his Pope and Emperor (Charles V) and, as Coleman Phillipson[14] reminds us when writing of this illustrious man, this was the age not only of great discoveries but it was also the age of the Reformation, of the Inquisition and the strong arm was the law.

Vitoria reproached both his own country and Portugal, which were attempting to partition practically the whole of the known world, including the seas, between them, and resting their case on Papal bulls issued in their favour.[15]

In order to understand Vitoria's arguments, it is necessary to realize that he is thinking in terms of the known world as a whole, as a society of states, and of the interdependence of those states.[16] Originally, all things had been held in common and the fact that certain parts of the world were breaking up into political units did not mean to say that they were withdrawing from the former position, that is as part of the society of states. On the contrary, "ius communicationis" is fundamental; it postulates the right of immigration, and the duty of states, to admit strangers, subject, of course, to the reservation "sine iniuria aut damno". "Nolle accipere hospites et peregrinos est de se malum." Accordingly inhabitants of foreign countries possess the right to settle - with reasonable limitations, it may be - in the territory of another state,

and eventually to acquire its nationality, and children born of domiciled aliens acquire the rights of citizenship in the place of their birth. No one can be outside the international community; but the international community comprises only States; therefore no one can be outside some State or other, that is, every person must belong to a State. It is to be noted that for Vitoria this international community is not confined to the Christian circle; his view is much more generous and much more comprehensive than that current in his day.

Vitoria accordingly refuses to recognize a position whereby Spain, basing her case on the Papal Bull of May 14th, 1493,[17] was endeavouring to prevent the Dutch from navigating to, or trading with, the Indians. Stout churchman that Vitoria was, he considered that the Pope should confine his attention to things purely spiritual, leaving to secular authorities political questions which came up for settlement. It was quite ridiculous for the Pope to stand as arbitrator between secular princes or to take upon himself the responsibility of parcelling out large parts of the known world, including the seas. There was one sphere in which he was competent to act and that was the purely spiritual domain.

Phillipson says: "It follows, from the above considerations, and especially from the principle of State independence, that the claims of world dominion made by the Emperor or by the Pope were not justifiable." In regard to the latter, Vitoria's view is opposed to that of a long line of jurisconsults and theologians, such as Hostiensis, Sylvester, Bartolus and his school, St. Thomas Aquinas, Herveus, and many others. Vitoria repudiates the pretensions of the Papacy to be 'orbis dominus' in things temporal. He points out that the very founder of Christianity was not the

temporal sovereign of the whole world; and the Vicar is assuredly not greater than his Lord. He denies that the Pope possesses a legitimate title to exercise a temporal jurisdiction over civil sovereigns in any matters not essentially involved in the 'finis spiritualis'. ('Papa habet potestatem temporalem in ordine ad spiritualia.') -- The Pope's dominium is limited to matters spiritual, and even then, as regards independent princes, within certain bounds.[18] Vitoria's doctrines are of a remarkably progressive character; in many respects they are far in advance of the best practice and prevailing conceptions of the time.

Phillipson is correct for not only was Jean Bodin in France still propounding the former Italian theory of the 100 miles, but so also was Gentilis in England in the 16th Century, and even some of the German writers were propounding this theory in the 17th Century.

Vitoria, at the end of the 15th and the beginning of the 16th Century, was therefore one of the first writers to deal with the rights of transit and commerce. Vitoria recognized both rights but thinking basically as he did in terms of the interdependence of States, it was left to Albericus Gentilis to start the discussion on the development of the two rights separately. The problems are still with us in all their full force. Nations appear to accord the right of transit more readily than the right of commerce; the moment discussion starts regarding rights of commerce, national feelings run high. Protection is demanded and governments accord it most enthusiastically. Trade barriers and tariffs are erected and must be squarely faced by the foreigner trying to do business within a State which is not his own.

Vitoria's work was carried on by his pupil, de Castro, and by Vasquez in Spain. Grotius later was inspired by it. However, it may be added that very little of Vitoria's theoretical thinking was ever accepted by nations in their relations inter se. Today, all that remains of Vitoria's thesis are the rules of law which prevail on the high seas.

The Father of the Law of Nations:

No discussion of our subject is possible without mention of Grotius, this lion of legal writers which Holland produced in the 17th Century, and who is frequently referred to as the Father of the Law of Nations.

Raestad[19)] reminds us that, a month after the publication of Grotius' "Mare Liberum", the Spanish government recognized that the Dutch, by the treaty of April 9th, 1609, had the right to navigate the Indian Ocean. In other words, the object which the Director of the East India Company had in mind, in publishing this work of Grotius, had already been achieved before the contents of the book began to influence public opinion in Europe. To begin with, the "Mare Liberum" only attracted but scant attention and it was not until the new dispute broke out between the Dutch and Great Britain that the book really became well known. Reprinted in 1618, this book had such a reception and repercussion that it can only be compared with the major work of Grotius, "de jure belli et pacis" of 1625.

Raestad says that there was no great novelty really in the contents of the book; the Spanish writer Ferdinandus Vasquis (or Vasquez), referred to by Grotius, and in fact for that matter the English plenipotentiaries at Bremen in 1602, had said in substance practically the same thing;

undoubtedly it was the presentation of the ideas of the book which caught the public appeal. Gone were the laborious efforts of former writers to try and force the emerging jurisprudence into the old Roman framework. With perfect command, the author arranges his argument, the salient points interlocking as they proceed. The work is a very able lawyer's brief.

The "Mare Liberum", as is generally well known, was directed against the restrictions imposed by the Spanish and Portuguese on the free navigation of the high seas. Grotius is careful to call his reader's attention to the fact that he is indeed speaking about the high seas and not about the enclosed waters of a state, or that part of the sea within the extent of vision from the land. Regarding the extent of these waters, he takes care to point out that the enclosed parts (diverticula maris) belong in full ownership to the riparian state.[20] From time to time, he discusses the extent of these waters but modifies his ideas from one work to another.

Raestad[21] says that, in order to judge accurately the statements made by Grotius, it is absolutely essential to understand that Grotius never in his literary works, despite what has been said, reversed his first opinion; namely, that navigation and fishing are free even in the coastal waters. A number of writers have accused him in "de jure Belli et Pacis"[22] of denying this right but Raestad insists that Grotius was therein discussing the question of fresh water fish. Writing his "Defensio", Grotius goes out of his way to show that the liberty of fishing flows naturally from Roman Law principles and he there repeats once more that the sea, including its use and the right of fishing, is free to all.[23] But in his "Defensio", he states that there is considerable difference between ownership

of the sea and the control of it, or more specifically, jurisdiction.[24] In agreement with the Italian school on this question, Grotius considers that a state must be owner of the sea if it wishes to be able to prohibit foreigners from the navigation and fishing. Without that, then the State has only jurisdiction and he means by that, criminal jurisdiction; here is an extremely important aspect of his thoughts: according to Grotius, the laws which are to be imposed on, or put into vigour in, this part of the sea must conform to the law of nations. Otherwise they will be inoperative, and moreover, Grotius only accords to the coastal state the criminal jurisdiction over foreigners, provided their respective states have previously agreed to this arrangement, expressly or tacitly; failing such an agreement, the jurisdiction of the coastal state is limited, according to him, to the nationals of the coastal state.[25]

In his book "de jure Belli et Pacis",[26] he distinguishes between two kinds of maritime control, one deriving from persons and the second from territory. (We shall see that both theories were picked up later by other writers.)

In the first category, he compares the army general, continuing to exercise his normal jurisdiction when he is in the field with his army (referred to as "his territory"), with the admiral on service with his fleet (equally regarded as "his territory"). This control, however, is quite different from that really contained in the territorial sea, in which we are particularly interested. This is part of his theory: ratione territorii.

Grotius determines the extent of this control by a method which may be described as a novelty in the law of nations. This control (ratione territorii) is acquired from the territorial point of view as far as one may control from the land all those who are within the nearest part of the sea, just as though they were on the land itself. The method of control of which he is speaking is quite naturally the cannons placed on the neighbouring coast.[27] Since Grotius nowhere makes any reference in his works to the 100 miles Italian limit, probably it is safe to conclude that he did not approve of it. In any case, he does find exorbitant the former pretentions of Venice and Genoa on the sea.

Raestad[28] states that Grotius' ideas are in general in advance of his time, both as regards the countries surrounding the Mediterranean and those of Western Europe. So far as navigation and fishing went, with the exception of Norway and Scotland, the practice of most other countries was in line with his ideas. However, concerning the maritime jurisdiction, most of the states did not hesitate if they found it expedient to extend their jurisdiction beyond the limits indicated by Grotius.

According to Professor Fulton,[29] the first occasion on which this method of delimiting the extent of the territorial waters by cannon shot was used was in the year 1610, during the discussions between the Dutch and the British plenipotentiaries, and in James I's famous proclamation regarding fishing abuses in the coastal waters around the U.K. James I, having reversed the traditional Elizabethan principles, the Dutch found themselves arguing according to the Law of Nations, by which "the boundless and rolling sea was as common to all people as the air 'which no prince could prohibit'. No prince, they said, could challenge further into the

sea than he could command with a cannon, except gulfs within their own land from one point to another." Professor Fulton is of the opinion that this phraseology certainly belongs to Grotius, even though he was not present at the discussions. In any case, it should be remembered that Grotius was the close personal friend of one of the important Dutch ambassadors, Elias van Oldenbarnevelt, at this time, and this opinion seems to be corroborated by Grotius himself in his 1622 brief.[30)]

Raestad states that these rather vague declarations made by the Dutch ministers in 1610 are certainly clarified later by Grotius in his de jure belli et pacis,[31)] namely, that under this theory of ratione territorii the control of the sea is acquired by reason of the territory as far as it is possible to employ force against those who are in the nearest part of the sea, just as though they were on land itself, and the method of control - let us make no mistake about this - are the cannons placed on the coast.

One would be committing a very grave error if one were to identify the cannon shot range thus formulated by Grotius with the system later introduced by Bynkershoek.[32)] Grotius himself is careful to point out that the control of which he is speaking is not the immediate consequence of the possession of the proximate land or territory.[33)] Accordingly, Grotius is seen to be breaking away completely from the former Italian school (Bartolus, Baldus, etc.) who considered that the jurisdiction of the maritime territory was simply an extension of their land jurisdiction: 'territorium etian in acquis se extendit'. For Grotius, there is one justification for the State, in possession of the coastal land, to extend her control or jurisdiction and that is by the physical placement of cannons on the shore. No cannons, no control.

Grotius, by his own vague terms, confused certain writers; in fact Ulric Huber thought that he was following along the same lines as his illustrious compatriot in attributing to the coastal state jurisdiction on the adjacent sea, simply on the ground that it could, if necessary, control by shot. Well, he was mistaken. Both in the passage quoted from de jure belli et pacis, as well as in the phraseology of 1610, Grotius was being realistic. He was thinking purely in terms of cold iron. But Raestad seems to think that it was largely because of the uncertainty left by Grotius, that the Bynkershoek formula, later discussed, eventually had so much success.

Mare Clausum: Welwood and Selden

Now, it is impossible to mention Grotius, without in addition mentioning briefly both Welwood and Seldon, respectively Scottish and English writers, whose writings were undoubtedly inspired on account of the reversal in maritime policy between the Tudors and the Stuarts.

Professor Fulton says in referring to the policy of Elizabeth: "So far from adopting any policy of this nature or making any claim to a special sovereignty in the surrounding seas, Elizabeth steadily opposed all claims which other nations put forward to mare clausum. Long before Grotius, she was the champion of the free sea, although it must be admitted that the action of the English Queen was no more based on considerations of the general good of mankind than were the efforts of the Dutch publicist; both had in view the interests of their native land. Elizabeth's motive was to secure liberty of trade and fishery for her subjects, which was threatened by the pretensions of Spain and Portugal on the one hand and by Denmark on the other."[34] So that her officers of state, Dee and Plowden, in suggesting that foreigners should be taxed for fishing in British seas, were decidedly previous. Professor Fulton quotes her famous statement regarding the Bishop of Rome whose prerogative she could

not recognize nor "that he should bind princes who owe him no obedience", and her subjects would continue to navigate "that vast ocean", since "the use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, for as much as neither nature nor regard of the public use permitteth any possession thereof".[35)]

"Free seas" in fact was her policy. As stated previously, England was one of the countries which did not prevent foreigners fishing in the coastal waters. But not so in Scotland, to which the question of fishing was quite literally a matter of life and death. Accordingly, with the advent on the throne of James I, the Scottish policy of excluding indiscriminate fishing by foreigners was introduced. In support of this, we find even Albericus Gentilis, the notable Italian jurist who had become involved, on account of his Protestant faith, in disputes in his own country, and who had settled in England, advocating, without too much success, the 100 miles' limit, in accordance with the Italian school of thought. However, the first to interpret the sentiments of James I was Welwood in his "De dominion maris". A state, according to Welwood, required to protect her coast against both navigation and fishing and that protection could only be effective when combined with jurisdiction; in its turn, jurisdiction required effective control. In addition, he discusses the 100 miles' theory of the Italians. Undoubtedly, according to Welwood, the sea is annexed to the coastal state. Beyond this coastal belt, he is prepared to throw the high seas open for general use.

Welwood concerns himself particularly with the question of fishing stating that approaching foreigners casting innumerable nets too near to the shore were dispersing the fish and diminishing the economic possibilities to the detriment of the coastal states whose inhabitants are dependent thereon.

His solution is that the foreigner should not be entirely excluded; let him continue to fish, provided he pays an additional tax beyond that paid by the nationals of the coastal state.

Both Gentilis and Welwood may be considered to be the advance guard of Selden; both, however, expressed themselves with prudence and moderation in comparison to the bombastic thesis undertaken by Selden in his 'Mare Clausum'. This work, in which Selden attributed to the British King, both then and from time immemorial, possession of vast tracts of sea surrounding the British Isles in all directions, was undoubtedly written with the backing and approval of James I. James, at that time, was reversing the Elizabethan tactics and the work was submitted to the royal patron in 1618. The author, in fact, has given an account of this in his pamphlet entitled "Vindicae". James I, however, not wishing to win the disfavour of his brother-in-law, Christian IV, recommended certain modifications to the author. These were unquestionably made but the point is worth noting that this work did not appear until 1635 and then it was dedicated to Charles I, who, by that time, was on the throne. It was useful to Charles because he was again at grips with the Dutch on the question of fishing.

Well merited criticism has been levelled at Selden, both on account of his false interpretation of history, as well as his false appreciation of the juridical side of the question. In addition, one grave fault that he commits is in discussing the Italian 100 miles' theory; he does so without apparently having understood or attempted to differentiate between their concepts of ownership, use, jurisdiction and protection, says Raestad.[36] So far as Selden is concerned, he is nonplussed by the former foolishness on

the part of Bracton and his successors regarding the free use of the sea. Selden deliberately fails to admit that in mediaeval England, jurisdiction on the sea was something quite apart from the use of the sea.

It is not surprising that people were thrown into confusion between the various theories propounded in the Mare Liberum and Mare Clausum,[37] and that writers[38] came to the rather hasty conclusion that the extent of the territorial sea must be determined by the custom in vogue in each individual country.

Raestad shrewdly comments further that, in fact, this statement corresponds rather well with the contemporary juridical conditions. "The real sources of the history of the territorial sea in the 17th Century are in fact the individual legislations, the treaties, the political and diplomatic correspondence. It is therefore in the daily practice that new ideas were formulated slowly regarding the delimitation of the territorial sea and on the prerogatives of coastal states on the sea."[39] (translation ours) This seems to ring rather a familiar bell with students who are not infrequently cautioned that it is more reliable to base their conclusions, not so much on what jurists have theoretically argued, but on what states have in fact enacted.

Towards the Bynkershoek Formula

For Grotius, the control of the sea meant criminal jurisdiction, that is, the maintenance of security on the sea. In the Middle Ages it had been largely due to the activities of pirates that the Italian jurisprudence, involving its 100 miles' theory, had gained so much popularity, and when piracy had given place to privateers, the problem of ensuring the maintenance

of a peaceful enough sea for the merchantmen had been just as great. Naval warfare became more and more frequent during the 17th and 18th Centuries; in fact, it seems to have been almost constant. It accordingly became a necessity, both for belligerent and neutral states, to know just exactly where they stood in the matter of jurisdiction on the sea; particularly near their coasts. So that the adoption of the cannon shot range was not due to any theoretical considerations.[40] The rules that were beginning to emerge were due to the everyday practice and necessity of the times.

The discussion which arose as to whether or not coastal states could in fact occupy their marginal waters was probably what led the 18th Century jurist, Bynkershoek, compatriot of Grotius, to consider all these questions.

For Bynkershoek,[41] the sea could perfectly well be occupied and possessed by a coastal state. Not only the coastal strip (mare terrae proximum) but also the high seas (mare exterum). He thought very much along the same lines as Selden on this question. Once taken into possession by a state, that state had full rights of ownership. The state which had control of the sea was in a perfect position to prohibit others from either navigating or fishing; in fact, it would only be on humanitarian grounds that it would permit such activities by foreigners.[42]

But the question for Bynkershoek was that of <u>permanent</u> possession, because it was this permanent possession which would fix the limit, the measurement, of the marginal seas in which the coastal state would have jurisdiction and of course he also reverted to cannon.[43] 'Eo potestatem terrae extendi, quosque tormenta exploduntur'. That was the extent of our possession and control. His original formula : 'Potestatem terrae finiri ubi finitur armorum vis', he finally amended in 1737 in his Questiones juris publici to read "Imperium

terrae finiri, ubi finitur armorum potestas".[44]

In his "de dominio maris", Chapter 5, he considered the position of Great Britain and the impressive claims made on her behalf by Selden. Great Britain, says Bynkershoek, may have been in possession at one time of the sea beyond the range of cannon but these days were finsished and she now, like other states, had to retrench behind the formula which he propounded.

Bynkershoek naturally argues against the theories of his compatriot Grotius but, as Raestad remarks,[45] the strange thing is that he takes no notice of the theory which Grotius propounded, the 'ratione territorii'; it is all the more strange in view of the fact that Bynkershoek himself canvassed this theory so ardently.

If Grotius had been accused of great complexity, Bynkershoek was accused of terseness of expression and the theories which he advocated had to wait for some time before gaining favour.

17th and 18th Century Writers:

The approach which had been made by Pufendorf, who was born in Germany in 1632, in his Jus Gentium, prior to the writings of Bynkershoek, seemed to suit the considerations of the jurists in the early 18th Century better than the later Dutch writer.

Pufendorf had considered the coastal sea more as a barrier of protection (munimentum) to the coastal state than anything else. It was the main reason which justified a State having control in the marginal sea. He considered

that the coastal sea was to the State what fortifications were to a city. According to Pufendorf, it would be extremely difficult to fix a measurement that would be applicable to every case. So far as fishing went, only these fish which were particularly rare and which could be bred with difficulty, together with pearls, amber, etc., should be reserved to the nationals of the coastal state. (Book 4, Chap. 5,/7 and 8).

Wolff, writing after Bynkershoek in 1749, maintains that the high seas are incapable either of ownership or occupation, but the coastal state could occupy and own the marginal sea, as far as it is able to maintain that position - 'Quo usque dominium in iisdem tueri possunt'. And why? Because fish are not inexhaustible, nor is navigation always innocent. To the extent to which the State can maintain her possession, she has full ownership and jurisdiction in the coastal waters. Here are significant words: Everyone has the right to navigate even on those parts of the sea occupied by other states, provided this navigation does not give reason for any fear on the part of the coastal state. Any cause for alarm, however, would justify the coastal state in prohibiting activity or in obliging the intruders to submit to certain conditions.[46)]

The German 17th Century jurist, Wolff, considered both the rights of transit and commerce. Like Selden, in the previous century, Wolff dealt largely with existing law. Wolff did not hesitate to give jurisdiction in the territorial sea to the coastal state; neither did he deny to peaceful foreign shipping the privilege of passing along this belt of water but the coastal nation should always be in command of the situation. If it considered that its territory or subjects were in any way threatened, it could deny such passage. The onus probandi was definitely on the visiting nation

wishing to make use of this privilege. (We shall have an opportunity later, when dealing with the 1929 Conference, convened by the 'Comité international de navigation aérienne' in Paris, to see the same principle at work in the discussion led by Sir Sefton Brancker. Wolff, like the chief British delegate in 1929, expected man to be "reasonable".)

Wolff also considered that it was highly desirable that nations should trade one with the other but there should be no compulsion. There was no onus on a nation refusing to trade to state why it did not wish to trade. Wolff's argument led into the doctrine of "imperfect rights of commerce"; he expected nations to embody their plans in an agreement and, in fact, until the agreement was signed and dried, there was no right to enforce.

Vattel, the Swiss jurist of the 18th Century, who, in turn followed Wolff, carried on the German writer's argument. Vattel, primarily a diplomat, probably owes his popularity to the fact that he was one of the first great jurists to write in French, thereby reaching a wider reading public than his predecessors. Vattel, whose works inspired both American and British jurists, stated clearly that there was a right of innocent passage in territorial waters for the merchant shipping of other nations; but he excluded naval vessels therefrom. While the presumption for merchant shipping was there, like Wolff, the coastal state should always be in command, with the right to cancel the privilege for just cause. Vattel attached no width to the territorial sea, being of the opinion that a State should, and would, extend its jurisdiction to the point where it was necessary for the protection of its territory and subjects. (Vattel presumably would therefore have agreed that both the U.S.A. and Canada were acting within their rights in controlling certain foreign planes

approaching their countries before they enter the air space above the three mile territorial limit.) Vattel treated also of the rights of commerce. Again like Wolff, his conception of trade between nations was that embodied in a treaty; the extent of the privileges could be spelled out from the agreement. Vattel was a practical man in an era when nations were beginning to feel their importance.

CHAPTER I

Footnotes

1. Digest, 43.8.3.1.

2. Coleman Phillipson. The International Law and Custom of Ancient Greece and Rome. Vol.II.

3. Ibid., p.75.

4. Ibid., p.76.

5. Ibid., p.77.

6. Ibid., p.78.

7. Gilbert Gidel. Le Droit international public de la mer. Vol. III, p.25.

8. Arnold Raestad. La Mer Territoriale. p.13.

9. Angelus de Perusio. Comm. Digest, 47.10.4. (Cited by Raestad in La Mer Territoriale, p.34, Note 2.)

10. Raestad. Op.cit. p.15.

11. Gidel. Op.cit. pp.26 and 27.

12. Ibid., p.28.

13. Ibid., p.29.

14. Coleman Phillipson. "Franciscus a Vitoria". The Journal of the Society of Comparative Legislation. Vol.15, 1915 (New Series), pp.175-197.

15. Ibid., p.183.

16. Ibid., p.180.

17. Ibid., p.184.

18. Ibid., p.182.

Footnotes

19. Raestad, op.cit., p.88.

20. Ibid., p.91.

21. Ibid., pp.91-2.

22. Hugo Grotius. De jure belli et pacis, 2.2.5.

23. Hugo Grotius. Defensio capitis quinti maris liberi. 2.2.3.

24. Ibid., pp.360-1.

25. Ibid., pp.360-1.

26. Hugo Grotius. De jure belli et pacis. 2.3.8.

27. Ibid., 2.3.13.2. "Videtur autem imperium in maris portionem eadem ratione acquiri qua imperia alia, id est.... Ratione personarum, ut si classi, qui martimus est exercitus aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperientus..."

28. Raestad, op.cit., p.95.

29. Thomas Wemyss Fulton. The Sovereignty of the Sea, 1911, p.155.

30. Ibid., pp.155 and 157.

31. Raestad, op.cit., pp.106-7.

32. Ibid., p.106.

33. Grotius. De jure belli et pacis, 2.3.11.

34. Fulton, op.cit., p.105.

35. Ibid., p.102.

36. Raestad, op.cit., p.98.

37. Ibid., p.100.

38. Morisotus (France). Orbis maritimus; Potamus (Denmark). Discussiones historicae; Schookuis (Holland) Imperium maritimum.

Footnotes

39. Raestad, op.cit., p.102.

40. Ibid., p.114. See Gidel, op.cit., p.38.

41. Cornelius van Bynkershoek. De dominio maris; (Also Raestad, op.cit., p.113 says concerning Bynkershoek: "Se rangant du cote de Selden et ces disciples, Bynkershoek s'ingénie à prouver que la mer est susceptible d'être occupée et possédée".)

42. Bynkershoek, ibid., Chapter III. "Alia est humanitatis, alia juris regula".

43. Ibid., Chapter II.

44. Cornelius van Bynkershoek. Questiones juris publici, 1737. Book I, Chapter VIII.

45. Raestad, op.cit., pp.114, 115 and 116.

46. Wolff. Jus gentium. Paras. 120-132.

CHAPTER II

INTERNATIONAL MEETINGS AND THE THEORIES PROPOUNDED BY JURISTS OF THE 19TH and 20TH CENTURIES

Difficulties in Legally Justifying "Right of Innocent Passage":

Gidel[1)] makes the illuminating comment that, from the point of view of juridical science, it is a vain task to try and justify the right of innocent passage in the territorial waters of a coastal State. The right of innocent passage, says this celebrated writer, is as difficult of explanation as the theory of liberty on the high seas from which it emerges as a normal consequence, at least insofar as it is a question of passage either leading into or out of the interior waters, harbours, etc. of a foreign State.

It is only possible to declare the existence of the right of innocent passage as a rule of customary international law, Gidel says, in accordance with the assumption which men have admitted, and substantiated, in their relations one with the other. So long as this freedom of communication does not in any way impinge on, or threaten, the independence of any State, States must be able to communicate with one another. It is because this right of passage has never been contested that the "doctrine" has judged it useless to submit the theory to any deep examination.

Institute of International Law, 1894:

At the meeting of the Institute of International Law in 1894, this whole subject came up for very close examination. Mr. Barclay, later

Sir Thomas Barclay, brought forward his report which had been prepared for the previous meeting but which had only been discussed within the third Commission.

After much discussion regarding the extent of the territorial sea, the Committee eventually arrived at Mr. Barclay's proposition No. 6.

The contents briefly of point No. 6 were as follows:
1) all ships without distinction have the right of innocent passage in the territorial sea; 2) crimes and delicts committed on board a foreign ship, passing through the territorial sea, and in no way violating the rights or interests of the riparian State, or its subjects, are outwith the jurisdiction of the said coastal State; 3) on the riparian or coastal State falls the responsibility of seeing that the security of navigation in the territorial waters is maintained and that vessels, availing themselves of this right, conform to the special police rules enforced by the coastal state in the interest of navigation. (Translation ours)

By way of going to the heart of our discussion, let us take a look at the observations made by M. Kleen on the subject of Mr. Barclay's proposal No. 6.

M. Kleen observed: "I have never been able to convince myself about the possibility for a coastal State 'to ensure the security' of her maritime territory if her sovereignty therein is not respected. Moreover, sovereignty necessarily implies jurisdiction and becomes, without it, a vain word. There is a contradiction. It represents a lack of reciprocity and connection between the right and the duty to impose such a burden on a State, with all the attendant responsibilities attached thereto, if the control is to be denied to that State. It is for this State, and no other,

to decide if such and such a passage in her coastal waters is innocent or not. That State will very often find harmful what the offender will consider innocent, and who will be the judge? You either have undivided sovereignty or you don't have it at all, and if, according to the basic principles of your modified conclusions, sovereignty is there, the State must exercise its control or authority in the territorial sea. I cannot subscribe to Paragraphs 1) and 2) of proposal No. 6. According to my way of thinking, far from offering any sort of guarantee against eventual conflict between ships and the local authorities, they will, on the contrary, provoke conflict. Free passage is always presumed; that much I grant, but the coastal State must be in a position to prohibit the free passage if necessary. It is a question of fact, and not of right."[2] (Our own translation)

The most important principles which emerged from the deliberations of this Meeting were contained in Article 5/9 which are to be found translated in Moore's "International Law Digest":[3]

"Article 5:

"All ships without distinction have the right of innocent passage through the territorial sea, subject to the right of belligerents to regulate and for purposes of defence even to bar such passage, and subject also the right of neutrals to regulate the passage of ships of war of all nationalities."

"Article 6:

"Crimes and offences, committed on foreign ships passing through territorial waters by persons on board such ships against persons or things also on board, are, as such outside the jurisdiction of the bordering state, unless they involve a violation of the rights or interests of the bordering state, or of its inhabitants who are neither members of the crew or passengers."

"Article 7:

"Ships traversing territorial waters must conform to special regulations of the bordering state in the interest or for the security of navigation and maritime police."

"Article 8:

"Ships of all nationalities, by the fact of being in territorial waters, unless only passing through, are subject to the jurisdiction of the bordering state."

The bordering state may continue on the high seas a pursuit begun in territorial waters, to arrest and try a ship which has committed a violation of law within the limits of those waters. In case of capture on the high seas, the fact shall be made known without delay to the state whose flag she bears. The pursuit is interrupted the moment the ship enters the territorial waters of her own or of a third country. The right of pursuit ceases when the vessel enters a part of her own or of a third power."

"Article 9:

"The particular situation of ships of war and of those assimilated to them is reserved."

M. Kleen's observations, of course, bring us up against key words, sovereignty, jurisdiction, rights and duties.

Critique and Analysis by Fauchille:

Among other legal writers, M. Paul Fauchille has probably discussed this matter as fully as any other writer; he has done it in his customary painstaking manner. Fauchille, in his "Traite de Droit international public"[4], reviews the theories of a great number of writers. This learned writer discussed these theories one by one, examines them closely, because he proposes to discard them for his own theory of the Right of Self-Preservation.

Fauchille states that there are two possible main divisions: 1) by the enumeration of such rights as a State may possess in the territorial sea; 2) by way of a general formula from which the rights of the State must flow. He agrees with the majority of jurists who have worked on the latter basis.

(In this connection, Professor Westlake, under the heading of "Innocent Passage a Servitude", remarks: - "The circumstances that the right of the littoral state is limited by the right of innocent passage has led to the question whether, instead of speaking of sovereignty over territorial seas subject to the latter right as a servitude or easement, it would not be more suitable to say that the littoral sea and gulfs are not territorial, though subject to certain rights of the littoral state, which in their turn would thus assume something of the character of servitudes. The Institute of International Law decided by a large majority in favour of the existence of a territorial sea subject to sovereignty, and rightly as we think for several reasons. First, the occupation which is the ground of sovereignty is possible. Secondly, either way certain rights will have to be treated as exceptions to those implied in the terminology adopted, and these can be more simply stated if they consist in innocent passage than if we have to enumerate all the rights reserved to the littoral state. Thirdly, if on any occasion it should be questioned whether the enumeration of the rights to be treated as exceptions to those implied in the terminology is exhaustive, the predominant part in deciding on the new case will be given to the littoral state if it is regarded as sovereign, and this is as for its safety it should be."[5])

Reverting to Fauchille's discussion, this learned French author states that there are five principal conceptions regarding the territorial sea, embracing two categories. Those two categories are: - 1) the territorial sea forms part of the maritime territory of a state; 2) a denial of this.

The argument is that if the right of <u>ownership</u> is admitted, then unquestionably the territorial sea is part of the land territory. However,

if the right of sovereignty is admitted, then this is less certain. There is disagreement between the proponents of this latter theory. Some have said that the territorial sea is outwith the land territory, e.g. Renault, Rostworosski, Sheldon-Amos, Travers-Twiss, i.e. that there is the right of sovereignty but that the territorial sea is not necessarily part of the State's territory. On the other hand, such writers as Bonfils, Bluntschli, Despagnet-de Boeck, Hautefeuille, Hershey, Merignhac, Oppenheim, Perels, Rivier and Travers, while not according ownership - and therefore presumably agreeing to sovereignty of the State - have contended that the coastal State may include within its maritime territory the territorial sea.

In accordance with one's views, so will the frontier either stop at the shore or at the extreme limit of the territorial sea.

Fauchille deals first with the legal conceptions which justify a State including in its maritime territory, the territorial sea, embracing as it does a) the right of ownership, or b) the right of sovereignty.

a) The right of ownership implies title, dominium. Accordingly, a state which claims ownership may admit or refuse navigation to foreign ships. As a refinement of this, he mentions the additional theories; - i) of accessory and principal, the former following the latter; ii) the theory that the bottom of the sea, near the shore is simply a continuation of the land territory; and iii) that, as a result of the conquest of the water of this land continuation, the coastal state is entitled to claim the territorial sea as compensation for the conquest.

What are the consequences of the right of ownership? The coastal state is master; it is able to open or close at will the territorial sea; it has the right to impose regulations on any ships permitted to enter, to

impose civil or criminal jurisdiction, to determine the ceremonial pattern to be observed; it is entitled to control all the riches and potentials; to dispose of this territorial sea in a similar manner to its land territory; to prohibit in time of war any hostile act of any belligerent state. This theory was maintained in the 17th Century by the Scotsman, Craig of Riccarton, in the 18th Century by Valin and Vattel, in the 19th Century by Azuni, Fiore, Hautefeuille, Kluber, Phillimore, Pradier-Fodere, de Rayneval, Schiatrealla and Wheaton.

b) Right of Sovereignty: There is a double argument here. The theory must meet two conditions, namely that the State must be able to impose its control over the subject matter in question and the sea can be considered as a suitable subject matter. This theory was maintained in the 17th Century by Solorzana Pereira, in the 18th Century by Bynkershoek, in the 19th Century by Barclay, Bluntschli, Bonfils, Cobbett, Despagnet-de Boeck, Heilborn, Hershey, Kleen, Lawrence, de Louter, Merignhac, Oppenheim, Ortolan, Perels, Renault, Rivier, Schucking, von Ullman, Visser and Westlake.

Two of these writers, Bluntschli and Merignhac, however, have qualified this theory by saying that this sovereignty is "very incomplete", It is reduced through the necessity of sharing a certain number of interests of first class magnitude.

Fauchille states that both theories, right of ownership and right of sovereignty, lead to very much the same conclusions but of course he discards ownership immediately because he denies that a State can really possess the sea, even the territorial sea, and, as for diminished or incomplete sovereignty, he agrees with M. Kleen that sovereignty must be there in all its full force or not at all.

So far as maintaining sovereignty by cannon shot is concerned, this method is highly unsatisfactory. One can only have sovereignty in the portion of the sea which the cannon can protect and the cannon must be there; in other words, Fauchille appears to be in agreement with Grotius; there must be no supposition about it. Otherwise, sovereignty is only temporary. It is also variable as the range of cannon becomes wider. The method of visual command, which is also variable, is just as unsatisfactory.

If either right of ownership or right of sovereignty prevails, then automatically a State will be able to deny the right of innocent passage which could be most harmful to international communications.

This writer then discusses the legal conceptions which deny that a State can include the territorial sea in her maritime territory.

He says that it is unrealistic to divide the sea into the high seas and the territorial sea; it is all one. If, in the entire sea, each State can exercise the rights which belong to it, it can only do so in such a manner that will cause no harm to the similar rights of other States.

This is one of these beautiful moments in which M. Fauchille admits the reader into a rather rarified atmosphere, an atmosphere of extremely reasonable and peaceful men, Gidel comments.

(In passing, it is worth noting that Lauterpacht takes the opposite point of view. He states: "Although the maritime belt is a portion of the territory of the littoral State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for inoffensive navigation, sabotage excepted. And it is the common conviction that every State has by customary International Law the right to demand that in time

of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the open sea, for without this right navigation on the open sea by vessels of all nations would in fact be an impossibility.")[6]

Fauchille thereafter treats of the system of "a right of sovereignty". This is an interesting discussion. He goes back to Article 1 of the Resolutions of the Institute of International Law in Paris in 1894, March 31st. "The State has a right of sovereignty in the strip of sea which borders her coast with the exception of the right of innocent passage." We are asked to note that it is not the right of sovereignty, but "a right of sovereignty", i.e. this is a "pouvoir sui generis" into which "the nature of things" intrudes. Fauchille states that, according to the Institute's theory at that date, the State has in the territorial sea not imperium, but a special right which is motivated by justice, in other words, a right which is limited by the objective which it seeks, i.e. defence of its territory, the security of its coasts, the guarantee of its economic interests. He calls particular attention to the fact that there is no doubt about the construction which the Institute wished to apply to this first Article. The Institute Meeting in 1894 only voted in favour of this, after having rejected a former proposal which it had admitted in an earlier session, namely, one in which it had declared formally that "the State had exclusive sovereignty" in the territorial sea.

If the coastal State has only a right of sovereignty in the territorial sea, what do other nations possess in the same strip of water, he asks. And with alacrity he turns to the Institute's Article 5 (1894)

above mentioned: "that States have for their ships, without distinction, the right of innocent passage." This is a right and not a concession which outside nations have in the territorial sea of a coastal State.

There was no novelty about this Resolution of the Institute's in 1894. During earlier Centuries, Bartolus, Cryphiander, Loccenius, Rocco and Grotius had propunded it, considering the word "sovereignty" to be too strong, they left behind them the less energetic term - and infinitely more vague - "jurisdiction". In the 19th Century, von Bar, Calvo, Chretien, Fiore, Godey, Harburger, Heffter, Nuger, Nys and Stoerk were equally only willing to accord to the coastal State the right to legislate, to police and the right of jurisdiction; but not the complete and exclusive right of sovereignty, says Fauchille.

This point of view exposes itself quite naturally to the kind of criticism which M. Kleen levelled at Mr. Barclay's proposition No. 6 already mentioned.

Before turning his attention to his own system, Fauchille discusses the theory of M. de Lapradelle, i.e. the system of servitudes.

Servitudes:

The territorial sea should not be included in the maritime territory of a country, according to M. de Lapradelle; there can be no question of either right of ownership or right of sovereignty. There is not even a question of "a right of sovereignty" in the opinion of de Lapradelle. According to the Institute's Resolutions in 1894, the State can only have certain powers but - and here is the difference between the Institute and M. de Lapradelle, according to Fauchille - these powers only consist of a

group of servitudes; for de Lapradelle, the territorial sea is part of the free sea; it is res communis, belonging to the society of states; the coastal state, because of her geographical position possesses certain coastal servitudes destined to guarantee her interests.

In brief, de Lapradelle argues as follows: the territorial sea is not included in her maritime territory; the coastal state cannot make of the subject therein jure soli; the courts of the coastal state do not have competence, civil or penal; the coastal state cannot prevent ships, commercial or war, from passing through the territorial sea in peace time or during war.

The state therefore has only those rights (which are non-conventional) that necessity imposes; a) right to prohibit naval warfare at its approaches in order to prevent damage on its coast; b) right to defend itself on the coast, next to the shore, against contraband; and c) a right to defend itself against any epidemic of disease from overseas. The State cannot prevent the subjects of other nations fishing in the territorial sea, and it has no right to cede the servitudes which belong to that particular coastal state, and to no other.

According to Fauchille, even among those jurists who admit servitudes in the law of nations - and the majority of jurists do not admit them - there are those who say that you can only have conventional servitudes; that there are no more natural servitudes in international law than there are in municipal law. However, de Lapradelle's system implies natural servitudes. (Hall on p. 203 says "they are the creatures not of law but of compact"[7], and Westlake, as we have mentioned on P. 56 seemed to treat the right of innocent passage as a servitude.)

These servitudes suggest two territories, one the dominant and the other the servient. Is this the situation here, asks Fauchille? The land territory is certainly the dominant territory but he finds the proposition that the sea is the servient territory, more than doubtful. De Lapradelle recognizes that the sea, which is res communis, is the property of the nations. Fauchille disagrees; according to him, the sea, res communis, cannot be the property of anyone; the sea is simply there for "the use" of all.

Thereafter Fauchille proceeds to the discussion of his own theory, that of the right of Self-Preservation and the key word very rightly is Defence.

Right of Self-Preservation:

Self-Preservation is the fundamental right of a State; moreover, it is the firm duty of the State to protect its citizens. The State is authorized to take all measures necessary for the preservation of her existence and against any act which threatens her territory, her population and her material wealth. But her right of self defence cannot be practised on, or in, the territory of any other State because, in that way, that action would compromise the right of the other State. But these rights nevertheless can be practised outside her frontiers and also on things which, like the sea, belong to no one, on condition that the first State respects the right of self-preservation of any other State. In this way, the State is in a position to oppose all acts which tend to threaten her territory, to ward off attacks, to take precautions to preserve her security and the health of her population, to protect her economic interests, and those of her subjects, not only on her own soil but also in the sea washing her coasts which, as such, is a part of the vast ocean and free of all sovereignty.

Being neither owner nor sovereign of the coastal sea, it is not for the coastal State to defend the territorial sea; it is not the right of the State to impose its will on that part of the sea; it is simply its right and duty to assure or guarantee its own sovereignty and territorial independence. These are the only two elements which a State is called upon to preserve from any threat. Apart from fulfilling this mission, the State must not interfere with the waters surrounding her coasts. Fauchille invokes the statement made by Imbart-Latour in this connection: "The territorial sea cannot be assimilated to the land territory, and the State can only practice on the territorial sea rights relative to the defence and security of her coasts, to the protection of the economic interests of the State and those of the inhabitants of the coastal State."

What are the results of this system of the Right of Self-Preservation for the State? Fauchille says that these rights will be less extensive than under the system of ownership and sovereignty; on the other hand, they will be more numerous than under the system of "a right of sovereignty" or coastal servitudes. This theory which Fauchille here propounds is practically the same as that canvassed by him later in relation to airspace.

Views of Other Writers:

However, other well-known writers have also discussed this Right of Innocent Passage. What do they state?

Jessup, with a footnote on the Barcelona Convention on the Freedom of Transit, signed April 20th, 1921, states: "The right of innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing

the necessity of granting to littoral states a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas. As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law."[8)]

Jessup, however, notes that one of the two points on which there is divergent opinion appears to be the extent to which war vessels may exercise this right. He not only cites Hall, but also Root, who, in dealing with the North Atlantic Coast Fisheries Arbitration at p. 2006 said: "Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and re-pass because they do not threaten."[9)]

Hall, with regard to war vessels, on p. 198 states quite categorically: "This right of innocent passage does not extend to vessels of war. Its possession by then could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual State."[10)]

Sir R. Phillimore in the case of the Franconia - Regina v Keyn 2 Ex.D.63, 46 L.J.M.C.17 - to which we shall presently refer further, makes the following statement, embracing also passage over land: "According to international law, it is certainly the right incident to each State to refuse a passage to foreigners over its territory by land, whether in time of peace or war; but it does not appear that a nation has the same right with

respect to preventing the peaceful passage of foreign ships in time of peace over this portion of the high seas (i.e. territorial waters)." And Hall, who refuses the right of innocent passage to vessels of war, states with regard to commercial ships: "Even the earlier and more uncompromising advocates of the right of appropriation reserved a general right of innocent navigation; for more than two hundred and fifty years no European territorial marine water which could be used as a thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the Nineteenth Century no such waters have been closed in any part of the civilized world. The right therefore must be considered to be established in the most complete manner."[11)]

Of these "earlier and more uncompromising advocates", Lauterpacht at p. 447 says: "Some writers (Kluber and Padier-Fodere) maintain that all nations have the right of inoffensive passage for their merchantmen by usage only, and not by the customary Law of Nations, and that, consequently, in strict law a littoral State may prevent such passage. This view cannot be accepted. An attempt on the part of the littoral State to prevent free navigation through the maritime belt in time of peace would meet with stern opposition on the part of the other States."[12)] This is not surprising since the advocates mentioned by Lauterpracht were proponents of "ownership" in the territorial sea.

Let us turn to the question of jurisdiction which the coastal State has in the territorial sea. What do we find?

Jessup on p. 120 Chap. 3 remarks: "In so far as concerns the extent to which merchant vessels passing through territorial waters are subject to the authority of the local sovereign, there is little express

authority. This is due to the fact that national laws and decrees rarely specify whether the vessels dealt with therein are those bound for the national ports or those merely passing through on a foreign voyage. It is interesting to note that for nearly one hundred and twenty-five years the American customs laws providing for the examination of foreign ships within twelve miles of shore (and therefore also within territorial waters) were applicable only to ships bound for American ports. Since the Tariff Act of 1922, even ships in passage are included within the letter of the law."13)

Jurisdiction:

France, by a decision of the Chambre Civil of the Cours de Cassation, in the case of Proux v Courcoux, Gazette du Palais 635, February 18th, 1919, seemed to indicate that the territorial sea was not within the competence of the Court. Nevertheless, both a decree of August 29th, 1854 and a law of December 14th, 1897, on the question of safety and collision, on the other hand, indicate more definitely that the territorial sea is included within the jurisdiction.

Two of the cases which have aroused as much attention as any in Great Britain are those of Regina v Keyn, already mentioned, and Mortensen v Peters 1906 14 S.L.T. 226.

In Regina v Keyn (better known as the Franconia case), the Franconia was a German merchant ship which in 1876 ran into and sank the "Strathclyde", a British ship, within three miles of Dover. The master of the Franconia was tried for the manslaughter of a passenger on board the "Strathclyde" who was drowned. The case was argued twice and it was decided by seven to six Judges (one Judge having died before the decision who would have agreed with the majority), that no British Court had jurisdiction over

a crime committed by foreigners on board a foreign ship within three miles of the British coast; such jurisdiction had never been claimed by any English King and was not conferred by any English law. It was not a question that, by international law, any State could assume jurisdiction within three miles of its coast. The minority judges, i.e. six, held that there was jurisdiction on the ground that the sea within three miles of the coast constituted part of the territory of England. (It should be noted that the position in Scotland apparently is that there has always been jurisdiction over the maritime belt.) As a result of this case, Parliament in 1878 passed the Territorial Waters Jurisdiction Act. The pre-amble of this Act declares that the jurisdiction of the Crown extends, and has always extended, over the open seas adjacent to the coast to such a distance as is necessary for defence and security. It is enacted that an offence committed by any person within the territorial waters shall be an offence within the administrative jurisdiction, although committed on a foreign ship. Proceedings under the Act against a foreigner are not to be instituted in the United Kingdom except with the consent of the Secretary of State. The Act defines territorial waters as such part of the sea adjacent to the coast of the United Kingdom as are deemed by international law to be within the territorial sovereignty of the Crown and for the purposes of offences under the Act any part of the open sea within one maritime league of the coast measured from low water mark. It should be noted that the Act does not define territorial waters for general purposes of international law as one maritime league from low water mark.

In other words, the majority Judges said: "Yes, there is jurisdiction in the territorial sea by international law but the jurisdiction rests in Parliament; until an act is passed, <u>giving the Courts competence</u>, the common law stops at the shore." Thereafter, the necessary legislation was passed.

In the Scottish case of Mortensen v Peters, already mentioned, Mortensen, a captain of a Norwegian fishing vessel, was charged with using a method of fishing prohibited by the Herring Fisheries (Scotland) Act 1889 (passed to prevent indiscriminate fishing near the breeding grounds). The Statute referred to the specific area around the coasts and expressly includes the Moray Firth, within a line from Duncansby Head to Rathin Point, Aberdeenshire, i.e. the area referred to by statute includes waters which are outwith the territorial jurisdiction of the British Courts, according to the view of international law, which Britain accepts.

Mortensen was convicted and fined by the Sheriff at Dornoch; he appealed and the High Court of Justiciary confirmed the verdict of the Sheriff, asserting that, whether or not the Moray Point could be considered as territorial waters, the Court was bound by a British Act of Parliament, even if such an act violated a rule of international law.

The Government recognized that, while the Courts were bound by the Statute, the foreign vessel could not be bound by an act which was not in conformity with international law in so far as it imposed conditions having effect outwith the territorial limits. Accordingly, the Government remitted the fine. To remedy the conflict between the Act of 1889 and International Law, Parliament passed the "Trawling in Prohibited Areas Prevention Act of 1909" by which no prosecution could take place for the exercise of prohibited fishing methods beyond the three mile limit but fish so caught may not be landed or sold in the United Kingdom.

In concluding this chapter, it should be noted that Gidel, commenting upon the Final Act of the Conference for the Codification

of International Law in 1930 at The Hague, notes that in Article 2, relating to territorial waters, which reads:-

> "Le territoire de l'Etat riverain comprend aussi l'espace atmosphérique au-dessus de la mer territoriale, ainsi que le sol recouvert par cette mer et le sous-sol.
>
> "Les dispositions de la présente convention ne portent pas atteinte aux conventions et aux autres règles du droit international relatives à l'exercice de la souveraineté dans ces domaines."

the precaution has been taken to dissociate the maritime legal principles from the air law principles, and not to pin down a comparable margin in the air space superincumbent upon these territorial water limits. Gidel says: "rien n'empechera que la zone aérienne dans laquelle les Etats ont une 'souveraineté complète et exclusive' ait une largeur plus grande."[14)]

Squadron-Leader Murchison in his thesis "The Contiguous Air Space Zone in International Law" is apparently of this opinion also.[15)]

It is a particularly interesting point at the present time when Canada has notified the United Nations Organization that she intends to increase the width of her territorial waters to twelve miles in order to protect her fishing. She has intimated that she will discuss this question within the U.N.O. and that she will continue to protect the historical claims of certain nations which have been fishing in these territorial waters for some considerable time.

C H A P T E R II

Footnotes

1. Gilbert Gidel. Le droit international public de la mer. Vol.III, p.203.

2. L'Annuaire de l'Institut de Droit International, 1894-95. Vol.13, pp.151-152.

3. Moore's International Law Digest. Vol.I, p.701.

4. Paul Fauchille. Traite de droit international public. Tome ier, 2eme partie (Paix), pp.131-172. Condition juridique de la mer territoriale.

5. John Westlake. International Law. Part 1 (Peace), p.195.

6. L. Oppenheim. International Law. 8th Ed. edited by H. Lauterpacht, Vol.I (Peace), p.493.

7. W.E. Hall. A Treatise on International Law. 8th Ed. edited by A. Pearce Higgins, p.203.

8. Philip C. Jessup. The Law of Territorial Waters and Maritime Jurisdiction (New York, 1927), Chapter III, p.120.

9. Ibid., p.120.

10. Ibid., p.120.

11. W.E. Hall. Op.cit., p.197.

12. L. Oppenheim, op.cit. 7th Ed. edited by H. Lauterpacht, Vol.I (peace).

13. Philip C. Jessup, op.cit., p.121.

14. Gilbert Gidel, op.cit., Vol.III, p.337.

15. S/Ldr. John T. Murchison. The Contiguous Air Space Zone in International Law. (Thesis in Institute of International Air Law, Law Faculty, McGill University).
See also: Jean A. Martial. State Control of the Air Space over the Territorial Sea and the Contiguous Zone. (The Canadian Bar Review, March 1952, p.245).

PART II : RIGHT OF INNOCENT PASSAGE IN RELATION TO THE AIRSPACE

C H A P T E R III

Theories propounded by Jurists during the formative period 1870-1910

We now turn to the question of the air space.

About the period at which we finished Chapter I, the period at which Vattel, the Swiss jurist, was developing his ideas regarding the nationality of States (their rights of transit and their rights of commerce), the Montgolfier Brothers in France were busy perfecting the construction of their hot air balloon which was to enable MM. J.F. Pilatre de Rosier and d'Arlandes to become the first men to fly in 1793. The jurists were interested from the first and, "Putter discussed the question as to whether, in case the 'air-balls', as he called them, succeeded in becoming practically useful for public purposes, the German Emperor would be entitled to make anything out of them as regalia."[1)]

The series of experimental tests which took place between then and 1903, the year in which the Wright Brothers demonstrated at Kitty Hawk that heavier than air machines could be made to fly, are fairly well known. They have recently been the subject of an interesting series of articles by Mr. Walter T. Bonney for the Fairchild Engine and Airplane Corporations Journal "Pegasus".[2)]

The incident, however, which really touched off a discussion at the very root of our subject, and which was to last for a considerable number of years, took place during the siege of Paris at the time of the Franco/Prussian War, 1870-1, when one of the escaping balloons was forced down over the German lines. On board this balloon was an Englishman,

by the name of Worth, who was found with some rather incriminating documents in his possession, and Bismarck's first re-action was to order the man to be shot as a spy.

Though the command was later modified, by so ordering Bismarck very clearly intimated that he considered the air space above the French territory, of which he was in de jure control, came within his territorial jurisdiction.

Between then and 1912, one of the most keenly argued debates was as to whether the air space above the subjacent State was free or whether it fell within the jurisdiction of the State below. In a paper, written in 1954, we have reviewed this question in considerable detail.[3)]

To the French jurist, Joseph Louis E. Ortolan fell the distinction of being the first man to challenge Bismarck's right to act in the above mentioned manner. M. Ortolan protested, in an address before the Faculté de Droit in Paris, against Bismarck's right to treat French aviators, obliged to descend, as spies; this was comparable with crews on board ship forcing a blockade, he said. To warrant such a view, Ortolan demanded a physical blockade, not an imaginary, paper, one. The address was later published in a French legal review and must have reached a wide public.[4)]

Thereafter, the German jurist, Bluntschli, was given the assignment of defending the German position. Bluntschli, who until then had rather favoured the freedom of the air theory, was obliged to reorient his position. He accordingly officially took the view that, while there might be a certain amount of freedom in the upper space, the Bynkershoek rule should be applied to the space immediately superincumbent upon a State's territory.[5)]

The Fauchille Theory

In 1901, a contribution of some considerable magnitude was offered in this outstanding debate by M. Paul Fauchille who, in an article entitled: "Le domaine aérien et le regime des aerostats" and published in the "Revue générale de droit international public, 1901"[6] set forth his views on the matter.

His rather lengthy thesis may be summarized as follows:- Fauchille considered that the air space was neither susceptible of ownership by a State, nor could it be subject to a State's sovereignty. He was willing to concede that, up th the highest point of construction (at that time 300 metres - the height of the Tour Eiffel) a State might own the air space (but the refinement here was that it was the construction that was owned rather than the air space).

Additionally, he stressed the fact that what could neither be owned nor governed by a State, could certainly not be owned nor governed internationally.

So that for Fauchille, beyond this 300 metres' mark, the air was free. It had to be, he said, otherwise, if you conceded sovereignty to the subjacent State, air navigation would, or could be impeded.

But here, Fauchille was faced with a dilemma if a State's territory was to be two-dimensional, and not three. How were States to protect themselves against a variety of dangers?

The answer was "the Right of Self Preservation" and, in the name of this right, he was prepared to allow States, as far as was necessary to preserve their integrity, to exercise this right up to the greatest possible height. He was rather proud of this because, as he explained at the time, if you were to concede sovereignty to the subjacent State, it could only be ex-

tended as far as existing projectiles could reach, whereas with his system, a State, in the name of self preservation, could take action up to the greatest possible height. He had early in his discussion discarded both cannon shot and vision as unsatisfactory methods of acquiring sovereignty; they were too variable. "Etre souverain, c'est commander en maitre".

To begin with Fauchille fixed arbitrarily the height of 1500 metres as the mark below which foreign aircraft might not freely navigaate above another State's territory on account of the sinister possibility of aerial photography. Later, owing to the progress made in this field, he realized that 1500 metres was unsatisfactory and he reduced the height to 500 metres, prohibiting aerial photography altogether unless with the permission of the appropriate State.

So that briefly for Fauchille, aerial navigation would circulate freely above this 500 metres' mark, and the rules for air navigation would be worked out internationally.

Moreover, if an aeroplane violated some established right or custom under the law of nations, e.g. committed a crime, the State which was harmed thereby could exact reparation.

Thus, while refusing ownership or sovereignty to subjacent States, Fauchille did accord them, to the extent necessary, and under the name of self preservation, very extensive rights. At the same time, all States would recognize and respect comparable rights of other States.

We review later the discussion which took place regarding this subject in the various international conferences.

Theory of Sovereignty

May we simply add at this point that in 1910, 1911 and 1912, the three main proponents in support of exactly the opposite theory to M. Fauchille, i.e. the theory of sovereignty, were: Dr. Jenny F. Lycklama a Nijeholt of Holland in her book "Air Sovereignty", Professor Harold D. Hazeltine, in the lectures which he gave in London in 1911, and Sir H. Erle Richards, in a lecture which he delivered before the University of Oxford in 1912.[7)]

The frailties of the Fauchille theory were thoroughly exposed by these writers and jurists. They showed how necessary it was to concede that a State's territory was three dimensional. The tendency had been to seek analogies in maritime law so Dr. Lycklama, in her second section, compared the air space with the open seas, the maritime belt, the land, the international rivers and with ports and gulfs. She states: "We saw that the high seas and the airspace are so little alike in relation to the land, that there may be no question of analogous adoption of the freedom principle. Even the rights of the maritime belt, though most liberal towards the riparian State, could not come into consideration for analogy because of the fundamental difference - authority in the air being a necessity for the groundstate; rights over the maritime belt, on the contrary, not more than a privilege for the riparian State. Then we saw, there is neither any reason why one should take the regime of the international rivers as an example for the airspace. But what above all stands out clearly after these comparisons is the fact, that it is most unjust to call sovereignty an impediment for the development of international traffic. If aerial intercourse of some importance proves to be practically possible, state sovereignty, though it may touch the utter limit of the

atmosphere, need not be, nor is it probable to be, an obstacle for such development."[8)]

These jurists found that, however much the "freedom of the air" theory was to be restricted by rights accorded to States, the result would still be unsatisfactory, for one thing the onus probandi would be on the subjacent State to prove the act or omission. They concluded that nothing short of sovereignty was sufficient. Like Professor Westlake at the meeting of the International Institute of Law in 1906, they asked: Which is the more important? The protection of the State, or the facilities for aerial navigation?

Sir Erle Richards says: "Indeed, it is not too much to say that sovereignty over the land can never be made effective if the air be beyond the jurisdiction of the sovereign power. The bed-rock fact is that the user of the air cannot be treated as a thing distinct from the user of the territory beneath it; the two are inseparably connected, and can never be dissociated until the law of gravity ceases to have effect. If that be so it follows inevitably from the admitted principles of International Law that States are entitled to absolute sovereignty in the air space above their territories."[9)]

Professor Hazeltine thought "it is going too far in the present conditions of aerial progress and of our understanding of the far-reaching consequences of this new method of navigation, to concede at the present time as a principle of international law the right of all innocent aerial navigators, foreign as well as domestic, to fly wherever they wish. It is possible that international law in the future will recognize some such doctrine, but states must at present feel their way cautiously.

The doctrine of full sovereignty - without any restriction as to height, and without this most important concession of a right of passage - safeguards the interests of states and permits each state to contract with other states, step by step, as best accords with its rights and interests, the rights and interests of its inhabitants, and the rights and interests of aerial navigators."[10)]

Dealing with Fauchille's theory of a zone or protection, Prof. Hazeltine says: "In reality, if we examine the doctrine of a zone of protection or isolation, we find that it is a doctrine arbitrarily announced in order to proclaim the freedom of the air, while at the same time according to the territorial state certain rights which it, strictly speaking must have, even at the expense of the unlimited freedom of aerial navigation. But Fauchille and his school give with one hand and take away with the other. They give to aerial navigation a so-called 'freedom of the air', and at the same time they rob this so-called freedom of much - very much - of its significance, by giving the territorial state most important rights within this protective zone, for it is precisely within the limits of such a zone - the airspace above the land up to a certain height - that aerial navigation must largely be carried on. Fauchille's theory of freedom, therefore, turns out to be not strictly a theory of complete freedom at all, but a theory of limited freedom. The whole doctrine lacks firm basis in analogy and a consistent development in legal principle."[11)]

These then were some of the ideas canvassed in the early days of this new medium of transportation. The subject has not been over-elaborated because in the forthcoming pages we shall see how much discussion took place regarding this subject in the various conferences on both sides of the Atlantic.

It is interesting to note that neither Lycklama, Hazeltine nor Richards and their supporters anticipated that there would be undue trouble in the development of aerial navigation arising out of the principle of sovereignty in the airspace for the subjacent State. This, however, was to prove at times a real barrier to the development of aerial transportation.

Let us now turn to these meetings in order to see the various positions which were taken by States when they met around the conference table.

C H A P T E R III

Footnotes

1. Harold D. Hazeltine. The Law of the Air. First of three lectures delivered in the University of London at the request of the Faculty of Laws. (University of London Press.) 2nd par.

2. Walter T. Bonney. The Heritage of Kitty Hawk. Series of Articles in "Pegasus", Journal published by the Fairchild Engine and Airplane Corporation, U.S.A. April, July, August and December of 1955, and March of 1956.

3. S.F. Macbrayne. Right of Innocent Passage, Irrespective of Treaty: The Fauchille Theory in Relation thereto. (Term paper, Institute of International Air Law, Law Faculty, McGill University.)

4. Revue des Cours litteraires de la France et de l'Etranger, 1873.

5. See Prof. H.D. Hazeltine's lecture referred to under Footnote 1 in which he reviews the theories propounded by a considerable number of jurists of the period.

6. Paul Fauchille. Le domaine aerien et le regime des aerostats", Revue generale de droit international public, 1901.

7. Jenny F. Lycklama, Holland. Air Sovereignty.

   Prof. H.D. Hazeltine, op.cit.

   Sir H. Erle Richards. Sovereignty over the Air. Lecture delivered before the University of Oxford, October 26, 1912. (Clarendon Press, Oxford)

8. op.cit., Section 2.

9. op.cit., p.9.

10. op.cit., 3rd last par.

11. op.cit., par. 28.

CHAPTER IV

THE INTERNATIONAL AIR NAVIGATION CONFERENCE

PARIS 1910 - May 10th-June 29th

"The influence of this conference on subsequent developments mark it as second in historical importance only to the 1919 Conference after World War I when the celebrated Paris Convention was drafted and signed. When the 1910 Conference met, no acceptable plan existed for international flight regulation. When the Conference adjourned, it had completed all but a few clauses of a draft convention...."[1)]

The clauses referred to are the missing Articles 19 and 20, Chapter III, on which agreement finally broke down. "The Conference came to final disagreement on this purely political question as to what restrictions could be applied by the sub-jacent State to aircraft of other contracting States. The breakdown was not, as popularly supposed, due to opposed theories of freedom of the air and State sovereignty", says Professor Cooper.[2)]

The unsolved problems therefore were political, not legal, with the exception of one which could have been overcome - with France and Germany on the one side and Great Britain on the other. The exception was the legal problem which involved the legal status of private property rights in flight space.

Accordingly, in the light of this position, and in order to appreciate more fully the part played by some of the delegates to the 1910

Diplomatic Conference, it is desirable perhaps to look at the background to this Conference.

Background to Conference:

With regard to the invitation which was addressed by the French Government to the various European States, Mr. Kuhn in his article published in January 1910, a few months prior to the Conference, says: "Recognizing the new conditions introduced by the latest accomplishment of science, especially in respect of intercourse between nations, the French Cabinet of Ministers resolved, on December 15, 1908, to invite the governments of the world to a conference to meet at Paris, to be devoted to the legal problems of aerial navigation. No date for the same was set and in fact nothing of a more definite nature has come to the knowledge of the writer. When the time is ripe for such a conference, it will undoubtedly be held. But even a conference composed of the ablest jurists cannot readily produce results of value without long advance preparation, reflection, and discussion upon the practical problems involved." (The American Journal of International Law, 1910, p.110.)

Apprehension on both sides of the Channel:

Why had the French Government taken the initiative?

M. Clemenceau, in his communication emanating from the headquarters office of National Security and dated March 12, 1909, to the Prefet de la Meuse, M. Ponse-Laville, gives us a very good indication. This is what M. Clemenceau transmits:

"The frequent landings of foreign balloons on French territory has forced the Government to give consideration to this matter. It has been decided that these balloons will be subject to the payment of Customs duty and that further, as a result of this decision, the following measures will be taken:

'On the occasion of each balloon landing on French territory, the mayors, police and special commissioners will notify you of such event. They will, in addition, advise, without delay, the Customs Officers, if such officers are established at the place of landing, or failing that, the tax commissioners, in order to make sure that the necessary customs duties are in fact paid. The balloon will be detained until the time of such payment.

'The pilots of such machines will be obliged to give their name, status and domicile. If they are military pilots, they will be obliged to indicate the rank they hold, as well as the corps or service to which they are attached.

'Moreover, the mayors and police commissioners will have the responsibility of determining whether the flight has been undertaken with a purely scientific object in mind or whether the pilots have carried out any investigation which might compromise the national security.

'Such information will be communicated to me by telegraph and will indicate, at the same time, the place of landing of the balloon.

'These instructions, which should be acknowledged, will be brought to the attention of all sub-prefets, mayors and police commissioners.' (s) G. Clemenceau." 3) (Translation ours)

And, in fact, according to the Echo de Paris, April 9th, 1909, M. Ponse-Laville, carried out his instructions, the preceding day at Charleville.

Perusing the Journal de Droit international privé, we find such reports as the following:

"France: Landing of Foreign Balloons. Customs Duties.

'A German balloon landed yesterday at Villiers-la-Montagne, near Longwy. The balloon had been flown by a former (German) officer and three other people, of whom one was a woman. A camera, together with plates, were confiscated by the police. The Customs have demanded 500 frs. in duties.'
(Taken from "Le Temps" : 6th August, 1909.)"4) (Translation ours)

On p. 353 of the same source:

"France: Foreign Balloons : Frankfurt Exhibition : Exemption of Customs Duties.

'At the instance of M. Lang, honorary French Consul at Frankfurt, the French Government has just decided that in future, the German balloons (l'Ila) leaving from the Frankfurt Exhibition and landing on French territory will be admitted free of customs duty provided that the pilots are furnished with the necessary document signed by the French Consul General and declaring that the balloons have in fact been launched from the Exhibition.

'This arrangement being retroactive, two German Pilots, Captain Heraldt and M. Riedinger, who were obliged to pay 700 frs. as entry fees a few days ago, have just been re-imbursed.'"[5] (Translation ours)

One gathers that public attention was considerably agitated during this time about the development which was taking place in aeronautical construction. There was discussion, both in the Chambre des Deputés in Paris, as well as in both Houses - Commons and Lords - in England. In addition, there was a considerable amount of writing on both sides of the Channel.

Views seemed to vary, for example M. Fr. Mallet says: "The conquest of the air negatives the most carefully conceived plan; every military construction collapses like a pack of cards ... fortifications, camps behind the lines, natural or artificial barriers, rivers, tunnels, will no longer count for anything in future warfare. The gigantic effort of nations to protect the security of their frontiers dissolves like mist in the sun's rays. The conquest of the air ruins the very foundations of the present system and organization of war."[6]

On the other hand, M. Catellani says: "According to several military authorities, of whom M. Charles Malo was one,[7] neither aeroplanes nor

airships will ever have to be feared as diabolical machines for invasion purposes or as engines capable of serious destruction; both will remain only useful appendices of campaigning armies. According to the most prudent assessment, the airships themselves would be incapable of operating a serious bombardment but they would be capable of provoking panic among the population; still less could one expect an effective bombardment from aeroplanes, since they are scarcely capable of transporting one or two explosives of light weight. To M. Charles Malo, aeroplanes appear useful only for exploration service where they would be able admirably to complement the work of cavalry; as for airships, they would simply be supplementary elements in future warfare."[8)]

However, General Peigne, former President of the Technical Committee, French Artillery, in answer to an interrogation in the "Petite Republique" stated that airships could probably achieve success firing 16 times out of 20, and that of the 20 corresponding shots fired from the ground, not one might attain its objective. Germany, of course, had not neglected this side of the activity, having already at her disposal what appears to have been the first of the tanks in steel with a revolving cannon.[9)]

While such discussion and writing was going on in France and elsewhere, in England public opinion was becoming agitated by the possibility of effective invasion from the Continent, this time led by a future William the Conqueror who would arrive by air and be capable of violating British soil. This alarm caused a show-down in the House of Commons on the question of airships and aeroplanes in time of war, on 2nd August, 1909. The Government apparently entrenched itself behind the serenity of the Home Secretary

who informed the House that he was awaiting the results of studies being made by a consultative committee before choosing the type of machine required and accelerating the construction of military aeroplanes. This reply moved some quite well-known and well-qualified people to sound the alarm, including Lord Roberts who, in a speech before the Royal United Services Institution on 8th December, 1909, found the inconsequent manner of the Government strange on a matter of such extreme seriousness. He stated that if the Government could visualize the type of warfare likely to be experienced in future, the Government would be shaken out of its complacency. Likewise Major Baden-Powell anticipated that these machines would not be employed in future as isolated units but in groups, thus changing warfare radically by quickening the tempo and by extending indefinitely the field of hostilities.[10)]

In the House of Lords on 13th April, 1910, Lord Montagu of Beaulieu, asking the Government how many airships and aeroplanes the U.K. could put in the field, both then and within one year, noted the incredible progress that had been made by Germany in this direction within the last year. He recalled that Germany had far outclassed, in this new air service, the example that Britain had been able to produce in maritime weapons. Whereas the British Navy was held on a "Two Power Standard", Germany's air strength had a number of airships equal to that of all the other states combined.

(A few days previously, in the Journal des Debats, 2nd April 1910, according to the French Senator Reymond, Germany possessed 12 finished airships, 11 in construction, as well as 15 finished and belonging to private individuals. In addition, Germany possessed 25 military hangars dispersed throughout her territory.)[11)]

Lord Montagu recalled that, apart from use in the observation service, aeroplanes could be used for launching explosives, destroying lines of communications, paralyzing most active centres of cities and demoralizing armies. Further, he discussed cannons and tubes of compressed air which had been manufactured by both France and Germany and by means of which projectiles could be launched downward with such precision that the Palace of Westminster, as well as the Houses of Commons and Lords, could almost certainly be struck.

According to "Le Temps", January 30, 1909, plays were actually being inspired in the theatre upon this theme.[12)]

Catellani notes that when the German company Zeppelin wished to establish a landing field at Skagen, in connection with an aeronautical expedition to the North Pole, the Danish population had become alarmed and permission had not been granted.[13)]

According to Mr. Baldwin,[14)] Professor Meili of Zurich, speaking about the Internationale Vereinigung fur Vergleichende Rechtvissenshaft in Berlin about this time, strongly recommended the convening, after due preparation and consultation, of an international conference for the purpose of arriving at an international agreement.

In order to appreciate still more fully the part played by some of the delegates to the 1910 Conference, a few words might be said about some of the discussion at the two Peace Conferences held at The Hague in 1899 and in 1907.

In so far as concerns our subject, these Conferences have been very well reviewed by Mr. Kuhn in his article published in January 1910.[15)]

Mr. Kuhn reminds his readers that balloons had been used quite extensively in the actual conduct of war for some time, the outstanding example, of course, being during the Franco/Prussian War when they were used both for reconnaissance purposes by the French over the Prussian lines, as well as by individuals wanting to get out of the besieged city of Paris. Gambetta himself had been such an excursionist and had succeeded in reaching the French provinces.

Bismark, we know, referring to the British subject, Mr. Worth, who had been intercepted in a French balloon over the German lines, quite categorically said that both Mr. Worth's arrest and court martial as a spy "would have been justified, because he had spied out and crossed our outposts in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained, to our prejudice."[16] This original statement of Bismark's had caused a great deal of discussion.

"This attitude had been discussed and criticized by writers on international law, including even German writers, of whom one had been Zom. Hall even went the length of saying that 'neither secrecy, nor disguise, nor pretence' is possible for persons travelling in aircraft", states Mr. Kuhn.

Peace Conferences of 1899 and 1907:

Accordingly at the first Peace Conference in 1899, this matter had come up for discussion and a negative definition had been arrived at, i.e., it had seemed easier to decide who was not a spy than who was, and in the class of persons not subject to such a charge "belong likewise persons sent in balloons for the purpose of transmitting dispatches and, generally,

"for maintaining communications between different parts of an army or territory." So that, as Mr. Kuhn points out, it was not a question of all aeronauts being exempt under all circumstances, but simply those who were acting on emissaries and he noted that "reconnaissance" was not covered.

In addition, in view of the development in the manufacture of aeronautics which had so far been restricted in war to the transport of those people carrying out reconnaissance and bearing messages, the question arose as to the desirability of prohibiting the throwing of projectiles or explosives from balloons from the air.

To which army command should go the distinction of first including such activities in their future plans, may well be a matter of speculation but it would seem certain that, from the circular letter of January 11, 1899, which Count Mouravieff (Russia) sent out to the various powers proposing to meet at The Hague that same year, and endeavouring to set their agenda, he was aware of such plans. Of the eight proposals which it contained, the third read as follows: "To prohibit the use in military warfare of the formidable explosives already existing and to prohibit the throwing of projectiles or explosives of any kind from balloons, or by any similar means."

Mr. Kuhn says: "The general spirit of humanitarianism which dominated the Conference induced it to agree to prohibit a means of warfare suspected to be capable of great destructivity, but still so undeveloped that the persons or objects injured by throwing explosives from them may be entirely disconnected from any conflict which may be in process, and such that their injury or destruction would be of no practical advantage to the party making use of the machine."

On motion of the American Military Delegate, Captain Crozier, the full committee added a time-limit of five years for the prohibition, after the sub-committee had voted that it be perpetual. It was this American motion perhaps that saved the rejection of the proposal in its entirety. At all events, it was passed in this form by the Conference and ratified by all of the participating nations except Great Britain, Italy, Japan and Luxembourg, says the writer.

By the time the Second Peace Conference met in 1907, this declaration, of course, had expired and Belgium quite naturally moved at the Conference that this declaration be renewed in exactly the same terms. Anticipating trouble in the discussion, two of the delegates in a sub-committee had suggested amendments: one put forward by Russia to limit forever attacks by aircraft upon undefended places; the other by Italy, that no projectiles or explosives should be launched from balloons not dirigible and manned by a military force, and that the restrictions resting upon land and naval warfare should apply to aerial warfare 'wherever compatible with this new method of combat'. The original proposal was, however, again adopted by the Conference with a feature suggested by Great Britain that the prohibition was to extend until the close of the Third Peace Conference.

Twenty-seven nations ratified this Convention: seventeen failed to do so, including France, Germany, Italy, Mexico and Russia. "To explain the change of attitude on the part of France, Germany and Russia against the prohibition and of Great Britain in its favour, is not an easy matter", says Mr. Kuhn in this same article. Among other reasons stated, he says: "Reluctant as we may be in arriving at such a conclusion, the change of front can be satisfactorily explained only by the change in the technical

position of the respective Powers in their land and naval forces and the relative advance that each has made in aeronautics. A superior naval power may well find its advantage largely reduced, if not entirely overcome, in a contest with a nation of well-built and skilfully manned aircraft. The military isolation of Great Britain can no longer be assumed since it has been demonstrated that even heavier-than-air machines in their present admittedly imperfect stage can cross the English Channel. English writers of considerable conservation and not inclined towards phantasmagoria, admit the 'aerial peril'. It is certainly significant that from a position adverse to the prohibition, Great Britain has now changed to one of loyal support. Russia's change of attitude may be accounted for by the loss of her navy since the First Hague Conference. (The writer is of course referring here to the Russo/Japanese War of 1904) That Germany refrained from ratifying the Declaration seems clearly the result of her progress in the use of dirigible craft and of the great expenditure of money made on this account. Germany has developed not only the defensive weapon for use against aircraft which has already been mentioned, but a special aerial artillery for offensive use as well."[17] (Parenthesis ours)

The Second Peace Conference, amending Article 25 of the 1899 Convention, regulating the laws and customs of land warfare, finally made it read as follows: "The attack or bombardment, by any means whatsoever, of towns, villages, dwellings, or buildings, which are undefended, is prohibited", and it was thus adopted by all the great Powers. Mr. Kuhn, after further discussion, says that "it is fair to assume that the prohibition is ample to cover aerial craft constituting an auxiliary to naval as well as land forces."[18]

The International Air Navigation Conference, 1910:

Such, therefore, is generally the atmosphere that was reigning on both sides of the Channel when this important International Air Navigation Conference was called, by invitation of the French Government, for May 10th, 1910. Eighteen European States participated and three important positions were taken up, i.e., those of France, Germany and Britain. (See Chart at end of Chapter)[19] It was not a world Conference as Mr. Kuhn anticipated in his article;[20] it is interesting to reflect what might have been the outcome had, for example, the United States been present at the 1910 Conference.

Of the three Statements, at least the one presented by the United Kingdom is a plain unambiguous statement. The U.K. gave good warning that she recognized absolute sovereignty in the air space above her territory and considered that no regulations should be formulated which in any way impaired the right of a State to legislate or operate within that territory. In addition, she recognized private property rights in the air space.

With regard to the German proposition, the German delegation, of whom Kriege, Legal Adviser to the Foreign Office in Berlin, was the chief delegate, submitted for the consideration of the Conference, a complete Draft Convention. It contained some brilliant pieces of work, including the rules which he proposed should apply in determining the status of the nationality of aircraft. While Germany was obviously in favour of territorial sovereignty in the air space, she admitted it with great reluctance. With regard to the additional statement which she filed during the Conference, Professor Cooper regards this as "a careful, shrewd and not altogether frank document." In fact, it was deliberately confusing. As stated in the

chart, in this additional statement, the phraseology which had read in the Draft Convention: "aircraft should be authorized in principle to take off or land in or pass over the territory of other contracting States" had been converted into "aircraft should be authorized in principle to take off or land in or pass overthe territory of foreign territory". "Foreign territory was not defined but, as Professor Cooper pointedly remarks, "To support the principles of national treatment for foreign aircraft and reservation of cabotage, the German statement cited the precedents of maritime treaties of commerce and navigation covering conditions of foreign entry into national ports and harbors. Such treaties grant privileges of entry and commerce only as between contracting States. The use of the reference to such treaties as precedents coupled with subsequent discussions in the commission makes it evident that the German statement had not changed the original position as evidenced by the draft convention. Germany still favoured only those rights of entry into the air space over foreign territory which would be authorized by a convention in the nature of the well-known reciprocal treaties of commerce and navigation."

Therefore let us not be mistaken, the German draft convention was only appropriate to, and consistent with, the principle of sovereign ty in the air space, and in addition, it was only operable between "the contracting States" - the private club - but it was this principle later (1929) at the 16th CINA Conference to which Kriege's compatriot, Dr. Wegerdt, took great exception.

So far as the French position is concerned, the statement undoubtedly came from the pen of M. Fauchille himself. In the month of March of 1910 a few weeks before the Diplomatic Conference, at a meeting of the Institut

de Droit International in Paris, Articles 7, 8 and 9 of M. Fauchille's new proposition for a Draft Aerial Convention had read:

> "Article 7: La Circulation Aérienne est libre. Néanmoins les Etats sousjacents gardent les droits nécessaires à leur conservation, c'est-à-dire à leur propre sécurité et à celles des personnes et des biens de leurs habitants.
>
> "Article 8: Pour sauvegarder leur droit de conservation, les Etats peuvent fermer à la circulation certaines régions de l'atmosphère. Ils ont notamment le droit d'interdire la navigation au-dessus ou aux alentours des ouvrages fortifiés.
>
> "Les parties de territoire au-dessus desquelles il est defendu de circuler seront déterminées par des marques visibles pour aéronautes.
>
> "Article 9: La circulation des aérostats est entièrement libre au-dessus de la plaine mer et des territoires sans maitre." (Annuaire de l'Institut du Droit International, Vol. 23, 1910, p.307)

In his Report to the Institute at the same meeting, Fauchille had said:

> "Je me suis préoccupé uniquement du résultat qu'il est souhaitable d'atteindre. Je n'ai donc pas examiné si l'espace doit être déclaré libre ou assujetti à la souveraineté des Etats, je me suis contenté de proclamer 'la liberté de la circulation aérienne', en réservant aux Etats sous-jacents 'les droits nécessaires à leur conservation, c'est-à-dire à leur propre sécurité et celle des personnes et des biens de leurs habitants.'"

At the Diplomatic Conference in 1910, Fauchille took up this same position; for a jurist of M. Fauchille's calibre, it seems strange that he should seek to evade the basic issue. The grand question therefore is, what transpired between the original apprehension of the French Government in December, 1908, and the sending out of the invitations to the European countries, with the questionnaires, by which time it was considered that this basic question should not figure on the agenda? This question eventually came in, of course, as one of two supplementary questions.

Kriege, in the German "exposé" recognized the seriousness of the question: "L'examen du principe de l'admission de la navigation

aérienne dans les limites et au-dessus d'un territoire étranger est peut-être la tâche la plus importante de celles qui ont été départies à la première Commission. Il s'agit, en effet, d'une question fondamentale dont depend l'existence même d'une navigation internationale dans les airs et par conséquent la raison d'être d'un code international concernant cette navigation."[21] But he too sought to avoid the issue.

Fauchille, Renault, who was President of the Conference, and Kriege should have known how impossible it was to try and draft a Convention before the very premises, on which it was to be built, were thrashed out and accepted.

The "Exposé" of the French Delegation[22] contains a great deal of wishful thinking. The two main reasons which Fauchille gave for there being no need to consider the basic position regarding air space are the following: 1) he feared that there would not be agreement on this purely theoretical point which he considered more in the academic, professorial field than that of practice; 2) he considered that in practice, the question was not, after all, so important; the proponents of "sovereignty", like the proponents of "freedom" being in agreement that the principle in each case must undergo some restriction, i.e. the right of sovereignty should be restricted by the right of innocent passage and the principle of "freedom" should be compromised by the rights of self preservation accorded to subjacent States." The greatest nonsense of all is contained in the last sentence "that, in any case, each of the opinions leads to the same practical consequences." M. van der Linden (Holland) in the discussion clearly pointed out that there was a very great difference; in fact that there would be a distinct reversal in the onus probandi.[23]

Fauchille declares: "La Circulation aérienne est libre. Et il n'y a pas à dire ici d'où vient cette règle. Tous les Etats peuvent l'accepter, quelles que soient leurs idées juridiques, qu'il la fassent dériver du droit de passage innocent des aérostats dans l'atmosphère territoriale ou de la liberté de l'espace temperée par le droit de conservation des Etats."[24])

It is noticeable that during the Conference when Fauchille is obliged to oppose the "sovereignty" theory to that of "freedom", he deliberately restricts the "sovereignty" theory with this "right of innocent passage". This was an insinuation for which there was surely no excuse. The inability to find suitable text for Articles 19 and 20 ought to have convinced him finally that no such right was admitted. In any case, since Fauchille had already declared before the Institute (when advocating the freedom of the air in 1902), that: "Une question de principe des plus importantes est née en effet du developpement pratique et scientifique de l'aérostation. C'est celle de savoir s'il est juridiquement possible de faire un usage absolument libre de l'atmosphère et toutes ses parties, ou si, au contraire, les Etats riverains ne doivent pas avoir sur elle un droit primatif dont il faut déterminer le caractère et l'étendue", his attitude in 1910 simply does not make sense. (In 1902, Article 7 of his Draft Convention had read: "L'air est libre. Les Etats n'ont sur lui en temps de paix et en temps de guerre que les droits nécessaires à leur conservation. Ces droits sont relatifs à la repression de l'espionnage, à la police douannière, aux nécessités de la défense.")[25])

However, it will be recalled that in 1906, at the Institute Meeting at Ghent, when the status of the air space had been debated in relation to Wireless Telegraphy, Fauchille had had a clash with Professor Westlake.

Put to the vote, Professor Westlake's "sovereignty of the air" theory, restricted by innocent passage, had been defeated by those in favour of the theory of the "freedom of the air" by 10 votes to six. While the theory of sovereignty later prevailed, it was never again to emerge as restricted by the right of innocent passage.

In 1910, at the Institute's Meeting, there had been a further modification in Fauchille's original conception, namely in the height of the zone up to which a State might exercise her powers of self-preservation; in other words, his 1500 metres were now reduced to 500 metres. It will be noted that in the text prepared for the Diplomatic Conference, the height was to be fixed by the Convention; and this height was to be regulated in accordance with scientific progress.

But these were only concessions which Fauchille appeared to be making. He did not move one iota from his original position because, at the Institute Meeting in Paris in 1910, a few weeks before the Diplomatic Conference, he is quoted as saying: "Je persiste, en effet, à croire que, sur ce point la verité est que l'air est libre, les Etats n'ayant sur lui, en temps de paix et en temps de guerre que les droits nécessaires à leur conservation." La nature de l'atmosphère me permit toujours s'accorder assez mal avec l'idée de souveraineté."[26)]

In other words, Fauchille was still unwilling to equate the various restrictions which a State might impose on aircraft in the air space above her territory (in the name of self preservation), with sovereignty. The French words which are used respectively in the three first restrictions are: 1) "defense"; 2) "defense"; 3) "Prohibition"; it would be difficult to find more completely restrictive words in the French language. But according to the French delegation this was not sovereignty. Scientific discoveries seemed to be moving too fast for Fauchille.

During the Conference the British delegation likewise prepared an additional statement mainly directed at the German proposals. In substance, the principal parts read as follows:

"1) Apart from municipal legislation, and decisions of the British Courts, any abstract authorization that sought to state in general terms that aircraft might navigate above foreign territory or land therein, would neither be recognized nor sanctioned so far as British Courts are concerned.

Accordingly the British delegation could not accept the German delegation's first proposition; the British delegation was unable to anticipate what attitude the British Courts would take if asked to apply such a rule.

2) Moreover, while desiring, in as great a measure as possible, to encourage and develop aerial navigation, it was obviously necessary to safeguard both State interests and sovereignty and, although the German delegation would undoubtedly admit this obligation, their proposals do not seem to be complete in this regard.

3) Owing to the danger of making abstract declarations about a mode of transportation, still in its initial stages, admission of foreign aircraft over the air space of a sub-jacent State should be effected by international courtesy."[27] (Translation ours)

The proposals therefore contained in the British statement produced during the Conference were:

1) Each State would have the right to take whatever measures it considered necessary in order to restrict aerial navigation

above its territory as soon as these measures seemed indispensable to the State's national defence.

This would enable a State to determine the special places at which foreign aircraft might land, to indicate the prohibited zones over which navigation would not be permitted (to be indicated on the aeronautical maps) and, in cases of emergency, to prohibit the passage of all foreign aircraft above its territory, provided that this information had been clearly disseminated.

2) Each State is obliged, in accordance with international courtesy, to provide all reasonable facilities for foreign aircraft which will permit them both to fly over a State's territory, as well as to land therein, with the exception of such restrictions as a State may consider absolutely essential in order to assure the security of its subjects.

The British delegation was entirely in agreement with the German delegation on the subject of their third proposal concerning the right of a State to retorsion and aerial cabotage.

We have already called attention to the apprehension which was prevailing in European circles generally regarding this entire aerial question and therefore it was not surprising that on June 29th - after a five days' adjournment during which it had not been possible to reach final agreement - Admiral Gamble, head of the British Delegation made the following announcement:

"By order of the Government, the British delegation has the honour to propose that the Conference be adjourned.

"This proposal is made because the British Government feels that the great importance of the questions which had been treated by the commissions makes necessary a profound examination by the Government itself before the draft convention may be approved." (Translation ours)

As already noted on Page 71 Professor Cooper points out that: "When the Conference adjourned, only one legal point stood between Great Britain on one side and Germany and France on the other. This involved the legal status of private property rights in the air space. The continental powers did not deny the existence of rights of the landowner in space over his surface properties, but they felt that each State must undertake to make such changes in its local laws as were required to permit foreign aircraft to enjoy the flight privileges granted by such State without interference from local landowners. As stated in the previous section, Great Britain finally suggested that it would 'take all practical measures' to conform its local laws to the proposed convention. No one can suppose that compromise on this question would have been impossible if other non-legal questions could have been solved."[28)]

There is an interesting account of Colonel MacDonogh's remarks in the Minutes of this discussion.[29)] Having stated that several of the Continental Codes, including those of Germany, the Canton des Grisons (Switzerland), Switzerland, the French Napoleonic Code, as well as Blackston in England, whose magnanimity in this respect is impressive: "Cujus est solum, eus est usque ad coelum", all accorded rights in the air space to private landowners up to various degrees of height, the Colonel considered that the broad sweeping declaration of the French delegation, i.e. "La circulation aérienne est libre" seemed little in harmony with the conservative tendency of the law of nations as it actually stood. Moreover, the Colonel

stated that the British delegation considered that the Conference should understand that there was little hope of the British Parliament voting any project whose main effect would be to restrict the rights of private owners.

Looking back at this discussion, it would now appear that the Colonel, in his turn, was then engaging in the side-stepping that had been generally done throughout the Conference. As we now know, the real reason that the Conference broke down was on account of the apprehension which was felt in the military field through the possession by Germany of such a ponderable air fleet and who, at the same time, was asking for the same privileges to be accorded to both foreign and national aircraft.

Catellani[30] commenting on this position, and referring to articles in the "Times" (29th November and 16th December, 1910) entitled "Code of the Air", observes that: "The British Government were largely responsible for the indefinite postponement of the Conference in not wishing, even in the interests of peace, 'to bind itself to a series of resolutions involving unforeseen and quite unexpected results'. And the delegate who justified this prudence on the part of the British Government, in regard to rules for peacetime relations, approved the Conference's reserve relating to wartime conduct, remarking that 'it is a point of great importance that the Draft Convention does not propose to interfere with the liberty of action of belligerents or the rights and duties of neutrals'. The truth is that this part of the subject is almost wholly unexplored....So many uncertainties hang over all parts of the subject that no code for many years to come can be anything but experimental. We should certainly adopt none without providing for its denunciation on short notice if this be found expedient."

Despite efforts on the part of the French Government, the Conference was never reconvened after June 29th, 1910, and the important Draft Convention, minus the two missing Articles 19 and 20, was left at that point.

Articles 19 and 20 were the opportunity par excellence for European states to accord whatever rights or privileges in the air space above their respective territories they intended to accord. Far from being willing to put their signature to "aerial navigation is free", they were obviously unwilling to declare that there was sovereignty in air space, restricted by the right of innocent passage. Whatever the theoreticians might say, States were in fact taking up the position that in the air space over their respective territories, States had not only sovereignty but absolute and exclusive sovereignty.

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acting States".)

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to limit such freedom of navi-
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terests of the security of the
or the protection of persons
ds of its inhabitants, and
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nd of cabotage, outlined in
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ı the draft convention.

British Position at the Conference

Principle:

The Principle was stated in a British inter-ministerial memorandum dated October 11, 1909, filed with the French Government before the Conference as part of the British reply to the questionnaire.

"It is desirable that no regulation be instituted which implies in any manner whatsoever the right of an aircraft to fly over or land on private property, or which excludes or limits the right of every State to prescribe the conditions under which one may navigate in the air above its territory."

It recognized the existence in air space of private property rights of the landowner and of full sovereignty rights of the subjacent State.

C H A P T E R IV

Footnotes

1. John C. Cooper. The International Air Navigation Conference, Paris 1910. (Journal of Air Law and Commerce, Vol. 19, Spring 1952, No.2, p.127.)

2. Ibid., p.140.

3. Journal de Droit International privé, 1909, Vol.36, pp.1281-3.

4. Ibid., 1910, Vol.37, p.352.

5. Ibid., p.353.

6. E. Catellani. Le Droit Aérienne (trans. from Italian), p.160, Footnote (2).

7. Ibid., p.161.

8. Ibid., p.162.

9. Ibid., p.164.

10. Ibid., pp.162 and 163.

11. Ibid., p.163.

12. Journal de Droit International privé, 1909, Vol.36, p.602.

13. E. Catellani, op.cit., p.102. (This incident took place in 1909.)

14. The Law of the Airship. The American Journal of International Law, 1910, Vol.4, p.106.

15. Arthur K. Kuhn. The Beginnings of an Aerial Law. The American Journal of International Law, 1910, p.111.

16. Ibid., p.116.

17. Ibid., p.119.

18.. Ibid., p.121.

Chapter IV contd.

Footnotes

19. Chart: Positions taken by the French, German and British Delegates at 1910 Conference.

20. Op. cit., p.110.

21. Conférence internationale de Navigation Aérienne. Procès-verbaux des Séances et Annexes, Paris, May 18 - June 20, 1910, p.239.

22. Ibid., p.242.

23. Ibid., p.274.

24. Ibid., p.243.

25. Annuaire de l'Institut de Droit International, 1902, Vol. 19, p.32.

26. Ibid., 1910, Vol.23, p.298.

27. Conférence internationale de Navigation Aérienne, Procès-verbaux des Séances et Annexes, Paris, 1910, p.270.

28. John C. Cooper, op.cit., p.139.

29. Conférence internationale de Navigation Aérienne, Paris, 1910, p.276.

30. E. Catellani, op.cit., p.159.

CHAPTER V

PERIOD 1910-OUTBREAK OF WORLD WAR I.

The 1910 Conference has been commented upon by one author in the "Journal du Droit international privé" as follows:

"Unfortunately, the International Conference on Aerial Navigation - which met on the initiative of the French Government and at which 18 States were represented - was obliged to disperse without having arrived at any useful conclusions. A great deal of trouble has been taken at quite a high level in order to hide, as far as possible, from the public the real reasons for this fiasco and the Minister of the Interior has even pushed diplomatic discretion to the point of forbidding the Officials in charge of the National Library to allow too curious readers to see the volume edited by the National Printers and in which one may find the minutes of the laborious and sterile sessions of this unfortunate Conference. The truth is that the error was committed of taking, as a point of departure for this discussion, a project for which the honourable Monsieur Fauchille is responsible, and which takes as its basis of international air law a false premise, i.e. that of the freedom of the air.

"In spite of the correctives and restrictions which the author himself was obliged to apply to this principle - both on account of the glaring necessities of national defence, as well as from the point of good common sense - this false legal premise brought the Conference to an impasse from which it was unable to retreat.

"Mare commune omnium est sicut aer... Free Air! Aerial space escaping by its very nature from all ownership on the part of the State...! This is an old axiom of Ulpian which quite a number of both foreign and French jurists have supported until recent years. Bluntschli, Pradier-Folere, de Nys have maintained this absolute liberty of space. It has taken the rapid development of aerial navigation of recent years to make evident the absurdities to which the acceptance of this theory would lead us - Just fancy! Foreign military planes would be able to come and inconsequently fly over Nancy, Rheims and Paris and the subjacent French state ought to allow them? Imagine! In time of war, enemy squadrons would have the right to fly through the aerial territory of neutral States and if they met one another, they would be at liberty to engage in battle."[1] (Our translation) This is a very strong indictment of the French position taken at the Conference and a strong plea on behalf of sovereignty in the air space for the sub-jacent state.

The following matters might be described as the sequel to the almost complete Draft Convention prepared by the 1910 International Conference, and particularly to the missing Articles 19 and 20, Chapter III, about which there had been so much discussion, and the text of which had finally not been written.

Between 1910 and the outbreak of war, legislatures were inspired to act on the legal status of the air space; in addition, there was much legal writing, and further discussion took place and resolutions were passed within international association meetings.

Legislative Measures

The position in the U.K. was consistent and is shown clearly from a document prepared in 1918 by the Civil Aerial Transport Committee, reporting to the Air Council, with which we will have occasion to deal more specifically later.[2)]

In part, it states that:-

"Before the War the control of aerial navigation in the United Kingdom was dealt with by two Acts of Parliament, the Aerial Navigation Act, 1911 (1 and 2 Geo. 5, C.4) and the Aerial Navigation Act, 1913 (2 and 3 Geo. 5, C.22). Under the first of these two Acts power was conferred upon the Home Secretary to prohibit the navigation of aircraft over prescribed areas, and an Order by the Home Secretary under that Act, dated 22nd September, 1913 (S.R. and O., 1913, No. 1090) prohibited the navigation of aeroplanes over so much of the County of London as lay within a circle, the centre of which was Charing Cross and radius of which was four miles in length. The Act of 1913 extended the power of the Home Secretary to regulate aircraft and provided for compulsory landing of aircraft coming from any place outside the United Kingdom. Orders and Regulations made by the Home Secretary dated 1st March, 1913 (S.R. and O., 1913, Nos. 228 and 243) made provision for (a) prohibited areas; (b) portions of the coast line prohibited to aircraft from abroad; (c) landing areas for aircraft from abroad; and (d) conditions imposed on aircraft from abroad. On August 2nd, 1914 (S.R. and O., 1914, No. 1117), an Order was made by the Home Secretary prohibiting navigation of all, except Naval and Military, aircraft over the whole area of the United Kingdom.

"These Acts, Orders, and Regulations represent the only legislative enactments made before the war. Some similar legislation had been passed in other portions of the British Empire.

"In anticipation of the early development of aeronautics, the Home Office, in 1911, prepared an Aerial Navigation Bill, which represents what in that year would have been the basis of a complete code of law controlling aerial navigation. This Bill has been of the greatest assistance to the Special Committee in this branch of their enquiry, and though later aeronautical developments render modification of some of its provisions necessary, the Special Committee approve of the general lines on which the Bill is drawn. .....

"In the Preamble to the Bill will be found an assertion of sovereignty and rightful jurisdiction of the Crown over the air superincumbent on all parts of H.M. Dominions and the territorial waters adjacent thereto."

The Preamble to this Draft Bill for the Regulation of Aerial Navigation reads as follows:

> "WHEREAS the sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto;
>
> "And where it is expedient to regulate the navigation of aircraft, whether British or foreign, within the limits of such jurisdiction, and in the case of British aircraft to regulate the navigation thereof both within the limits of such jurisdiction and elsewhere:"

The U.K. was claiming that she had sovereignty, and rightful jurisdiction, in the air space superincumbent upon her territory; in addition, she was finding it expedient to regulate the navigation of all aircraft within that jurisdiction, as well as all British aircraft wherever they might be.

In France, whose representatives at the 1910 Conference had made such a theoretical stand for the "freedom of aerial navigation", a Presidential Decree was passed on November 21, 1911, and was published a few days later (November 25) in the "Journal Officiel". In accordance with this decree, no aircraft were to be put into service in France without permits, which would be issued under stated conditions. Pilots would hold licences. In addition, certain Articles carried prohibitions, ranging from zones over which flight was prohibited to the exclusion of foreign military planes over French territory.[3)]

Between this decree of November 21, 1911, and the one which repealed it, namely that of December 17, 1913, which was more elaborate, the proposed "Regulation of Aerial Navigation" was placed before the French Parliament on May 7, 1913; it set out the conditions and formalities which had to be satisfied before aircraft could either enter or depart from French soil. There was also the statute of October 24, 1913, which contained detailed instructions regarding the areas over which flight was prohibited.

In France, we might add, there was no lack of aerial incidents to attract the attention of the public to this method of transportation. The two outstanding events were, of course, the unfortunate arrival on French soil of the German Zepplin-IV and a bi-plane of the Heller type which respectively landed at Luneville and Avricourt on April 3 and 22, 1913. The former was in charge of the pilot Glund, with, in addition, several important military personnel on board. There is an excellent account of this incident in the "Journal de Droit international prive", [4)] together with comments by both French and German press, as well as the statements of several jurists whose clarification had been sought as to the juridical position of such machines.

The French officials, acting in accordance with instructions from the War Minister which included a thorough investigation of the facts in each case, acted with great correctness. Their behaviour was highly commended in the press; perhaps all the more so since the Strassburger Post had previously suggested that French pilots perpetrating such manoeuvres and landing on German soil should be shot at. From the extensive account given it is apparent that the public from a wide area flocked to the scene of the grounded and guarded zepplin, taxing the local hotel accommodation far beyond capacity. The French authorities quickly released the erring airship, said to have strayed off course on account of wind and mist.

As a result of these and similar incidents on both sides of the border, the two countries, France and Germany, came to an agreement in July 26, 1913, as to the conditions under which their respective air fleets, both civil and military, might pass over the frontier. This Agreement is contained in an exchange of correspondence between M. Jules Cambon, French Ambassador at Berlin, and M. de Jagow, Secretary of State, in Charge of the German Foreign Office. Military aircraft thereafter would be permitted in the air space of either countries, only by invitation or authorization, and the fourth point in connection with civilian aircraft was that the pilots should be furnished with an exit permit issued by the appropriate diplomatic representative or consular official in the territory of the state from which the aircraft was to depart. In other words, German and French pilots would arrive respectively in France and Germany with the appropriate visas. The entire context of this correspondence is to be found in the "Journal de droit international privé".[5)]

In Germany, the governments of Brandenburg, Prussia and Bavaria between 1910 and August 5, 1913, issued decrees which covered the following matters: pilots were to be furnished with certificates duly approved by the International Air Federation; flight over German air space generally was regulated; conditions were outlined under which pilots' licences would be issued; flight of foreign aircraft over the Russian/German border was prohibited (February 1, 1913); zones over which flight by foreign machines was prohibited were extended (August 5, 1913). (See Revue juridique internationale de la locomotion aerienne, 1910, pp.190-191).

Like the U.K. and France, a complete aerial navigation regulation was worked out in Germany and placed before the Reichstag in January 1914; the outbreak of World War I interrupted its parliamentary procedure.

Likewise Austria-Hungary in her decree of October 22, 1912, dealt with licenses for aircraft; her statute of December 20, 1912, dealt with the police measures to be taken in connection with danger from aircraft likely to be sustained by both the public as a whole, as well as private individuals;[6] and the statute of January 20, 1913, dealt with prohibited zones over which flight might not take place.

As a result of the incident on the Russian-German border, Russia closed her frontier to foreign aircraft for 6 months as from January 1, 1913.[7]

An Italian decree of September 1914 denied any flights by foreign aircraft through Italian air space unless previously authorized.[8] A decree of the Netherlands in August 1914 forbade foreign aircraft from crossing Dutch frontiers. Similar decrees were proclaimed by Norway, Sweden and

Switzerland in the late summer and Fall of 1914. Belligerent aircraft were also forbidden passage through the airspace above the Panama Canal Zone by the U.S. Presidential proclamation of November 13, 1914. Belligerent aircraft which ignored this, whether from intent, inadvertance or distress, were quickly shot down whenever possible.

While no legislation was passed by the Federal Government in the U.S.A. until the Air Commerce Act of 1926, Governor S.E. Baldwin, who was a member of the Committee of the International Law Association and responsible for the preparation of the Report on Aviation presented to the Meeting at Madrid in 1913, was instrumental in having passed the Connecticut Act of 1911 in that State. This Act dealt with both Registration and Licenses. The Massachusetts Act of 1913 likewise dealt with these two matters and, in addition, regulated the height at which aerial traffic might pass over the cities of that State.

At the outbreak of World War I, there was clearly little evidence that there was much left of the famous Fauchille theory "l'air est libre". States generally had asserted their sovereignty and jurisdiction in the air space superincumbent upon their territory.

Activity within the various Juridical International Associations between 1910 and the Outbreak of War, 1914.

This is an epoque in which a great deal of the conference discussion which had been taking place concerning our subject, in what now seems like rather a rarefied atmosphere, culminated in the sterner realities of war.

Institut de Droit International

In 1900, at the Institute's meeting in Neuchatel, at M. Fauchille's

suggestion, the subject "Le regime juridique des aerostats" was placed on the Institute's programme.[9)]

For the meeting in 1902, both M. Fauchille and M. Nys prepared reports and M. Fauchille additionally prepared a Draft Convention relating to aerial navigation containing some thirty odd articles in length. Their respective contributions are to be found in the Institute's Annuaire for 1902 at pp. 19-86 and pp. 86-114.[10)]

The meeting declared its main interest in Article 7 (legal status of air space), Articles 29 and 30 (aerostats captifs) and Articles 31 and 32 (aerostats libres non-montes).

The text of Article 7, which is of primary importance to us, read as follows:-

> "Article 7: L'air est libre. Les états n'ont sur lui en temps de paix et en temps de guerre que les droits nécessaires à leur conservation. Ces droits sont relatifs à la repression de l'espionnage, à la police douannière, à la police sanitaire et aux nécessités de défense."

It was decided that M. Fauchille and his colleagues should continue to work on these themes.

In 1906, at the Institute's meeting in Ghent, the question of the legal status of the air space flared up with considerable violence in a discussion on the question of telegraphy. There ensued a most notable verbal battle when M. Fauchille, who considered that the air space should be declared free, crossed swords with Professor Westlake, who declared that the subjacent State had sovereignty over the air space superincumbent on its land territory and territorial waters, but subject to the right of

of innocent passage for aircraft of other nations in that territorial air space. A vote was taken and Prof. Westlake's assertion was defeated.[11]

It is interesting to speculate what might have been the result had the voting been in favour of Prof. Westlake's proposition. As it was, this was the last time we were ever to hear such a proposition, argued in precisely that way, in international debate.

The contention therefore that "l'air est libre" was adopted by the Institute and it remained so until some years later.

For the Institute's meeting in 1910, M. Fauchille revised his former material, including his Draft Convention, which now contained the statement that, instead of "l'air est libre", "la circulation aerienne internationale est libre". He thus sought to avoid discussion on the legal status of the air space in this way. M. Fauchille was not the man to spare himself and for the three chosen subjects: (1) Le régime des aérostats en temps de paix, (2) Le régime des aérostats en temps de guerre, and (3) Le régime des aérostats captifs et des aérostats libre non-montés, he had prepared three separate Draft Conventions, respectively 28, 34 and 5 Articles in length.[12] Mr. von Bar accepted the change from "l'air est libre" to "la circulation aerienne internationale est libre" and appended his observations plus a modest "reglement" of five articles. He considered that Fauchille's Draft Convention with regard to time of war was far too long.

As the material was most voluminous, it was proposed that, owing to lack of time, the whole discussion thereon should be postponed until the following meeting.[13]

At Madrid, therefore, in 1911, this entire question was due for

discussion. The 18th Commission of the Institute devoted a great deal of time to the subject, being recorded at length on pp.23-155 of the Institute's Annuaire for that year.[14]

The text voted at the end of the meeting contained the following statement:

> "Temps de Paix:
> (3) La circulation aérienne internationale est libre, sauf le droit pour les Etats sous-jacents de prendre certaines mesures, à determiner, en vue de leur propre sécurité et de celle des personnes et des biens de leurs habitants."[15]

It was to remain on the Books of the Institute, as a reflection of their opinion, for some considerable time. No decision therefore was taken directly regarding the legal status of air space.

At the Lausanne meeting of the Institute in 1927, M. Fernand de Visscher, who was then Rapporteur on this question, regretfully saw the old text replaced by the following:

> "Il appartient à chaque Etat de regler la circulation aérienne internationale au-dessus de son territoire en tenant compte, d'une part, des nécessités de la circulation internationale aérienne (y compris l'atterrissage), d'autre part, des exigences de sa sécurité ainsi que de celle des personnes et des biens de ses habitants. Les regles établies à cet egard seront appliquées sans distinction de nationalité."[16]

Apparently nothing short of war will remove resolutions from certain Minute Books. The new text was certainly more in conformity with the era.

Congrès juridique international pour la reglementation de la locomotion aérienne.

This Committee held a most interesting discussion at Verona in 1910, meeting almost concurrently with the Diplomatic Conference being

held, under the auspices of the French Government, in Paris. The results of the Verona meeting are dealt with in the Journal de Droit international prive for that year and the text voted by the meeting is there recorded, as well as elsewhere.[17)]

In five short paragraphs, the delegates voted for sovereignty in the air space for the subjacent State, among other principles.

Comité juridique international de l'aviation

This Committee met at Paris for the first time in 1911 and passed the first 17 Articles of a proposed Air Code. The Management Committee was in Paris and the members of the association were composed of national committees which would, in due course, endeavour to influence the appropriate authorities in their respective States in order that, finally, this international air code would be as widely accepted as possible.

Their Article 1 read exactly as quoted above under the Institute's 1911 Text: Temps de Paix, par. 3., revealing immediately the persuasive influence of M. Fauchille and his adherents.

In 1912, therefore, when the Committee met for the second time, they were due to proceed with Article 18 which read, as prepared by the Paris directive committee, as follows: "L'aéronef qui se trouve en dehors des limites de tout Etat, au-dessus de la pleine mer ou l'un espace désertique, est soumis à la legislation et à la juridiction du pays dont il a la nationalité."

There was quite a battle between the French group and Mr. Perowne, representing the U.K., and he was considerably aided by the German delegate, M. Meyer.

Text which Mr. Perowne suggested to replace the Paris version of Art. 18, quoted above, and for which he did not care, unfortunately contained the word "sovereignty" regarding flight space (anathema to the French members) and it produced a profound effect on MM. Henri-Couannier and Talamon.

Article 19, par. 1, as proposed by the Management Committee in Paris, read as follows: "Un aéronef qui se trouve au-dessus du territoire d'un Etat étranger, reste, en principe, soumis à la législation et à la juridiction du pays dont il a la nationalité."

Again there was heated discussion between the French and English delegates.

A statement which has gone almost unnoticed and which appears to be extremely important was that of M. Lachenal, former President of the Swiss Confederation, which we have translated as follows:

"The discussion to which we are listening is extremely interesting but I am nevertheless a little astonished to find that, in the Chapter devoted to the legislation applicable to aerial navigation (Articles 18/20), you begin by the affirmation of the principle that the legislation and jurisdiction applicable is that of the State whose nationality is borne by the aircraft, that it must constantly be applied, with the sole exception of cases in which the security or public order of the subjacent State might be compromised. Undoubtedly, Gentlemen, this affirmation of principle is made in all good conscience and I am sure that it is upheld by strong reasons. However, I would like to submit an observation to the Congress: Until now, we have been in the habit of considering that States are sovereign, not only on their own territory, but in the part situated

above, as well as below, this territory. Now, by this affirmation of principle, you declare that an aircraft, although flying over the territory of a certain State, is not submitted to the legislation and jurisdiction of that State, and that the legislation and jurisdiction of that State are only applicable in certain exceptional cases.

"Evidently there has been an effort to adopt the rules concerning the high seas to the question of aerial navigation but the analogy between aerial navigation and the high seas is not however complete. I would like to ask the Congress, and the Management Committee in particular, to give an explanation which justifies this energetic declaration of principle contained in Article 19 and the categoric avoidance of the principle of State sovereignty. You will require the sanction, the ratification of the majority of States, without which your vote will be a dead letter. It is necessary therefore to explain things, to make the State authorities understand, especially the small States, very jealous of their sovereignty, why you accord to aircraft the benefit of such a complete ex-territoriality which is only limited exceptionally, namely, in the case of facts touching upon the security and public order of the subjacent State. I would be very happy to receive an explanation because I have not understood the explanations which have been given by the Congress and I do not know the motives which have inspired the Management Committee to the extent of declaring itself in favour of the thesis adopted in Article 19. I am sorry not to be better informed but it is the interest which I take in your work which induces me to ask that a little light be thrown on this subject." (Applause).[18)]

In a conference where applause is seldom recorded, it is worthy of note that M. Lachenal's statement appears to have been warmly received.

M. Lachenal's remarks were more in keeping with the European political climate at the time.

This Committee met again in 1913 at Frankfurt am Main and the results of their efforts in the matter of a Draft Code are reproduced by M. Roper in his work (La Convention Aeirienne Internationale) as Annex G.

International Law Association

A more realistic appreciation of the times seems to have been taken in the meetings of this Association. For its session in Paris in May 1912, certain papers on the question of flight space had been prepared, expressing both views which supported freedom in the air space, as well as State sovereignty.

At Justice Phillimore's suggestion, a Committee was set up to consider the whole question and to report to the next session.

At the meeting in Madrid in 1913, before Mr. Perowne presented the special committee's report, Sir Erle Richards addressed the meeting, making a statement of the position as he saw it at the time. For succinctness and clarity of thought, this statement must surely have commended itself to his audience. We have already cited his lecture at Oxford; his address to the meeting contained much of this material in a condensed form.

There after Mr. Perowne read a well considered report which contained the following two draft resolutions:-

1. It is the right of every State to enact such prohibitions, restrictions, and regulations as it may think proper in regard to the passage of aircraft through the air space

above its territories and territorial waters.

2. Subject to this right of subjacent States liberty of passage of aircraft ought to be accorded freely to the aircraft of every nation.

When Prof. Niemeyer opposed the conclusions to which the Committee had come, Mr. Barratt from London, with a copy of a Paris "Le Journal" in his hand, asked to be permitted to read certain extracts to the meeting.

This article dealt with the various parts of German territory, through the air space over which flight was already prohibited by legislation. In addition, Mr. Barratt referred to "Le Temps" for August 14th of that year, in which the correspondence between M. Cambon and M. de Jagow had been so fully set out. As we know, that correspondence contained the French/German Agreement which controlled flight of aircraft of both countries over the frontier between the two countries. Unmistakably, countries were legislating heavily in their airspace territory, including Prof. Niemeyer's own country.

When the Committee's report was put to the vote for adoption, there was a convincing result of 21 votes against two in its favour.[19)]

There may have been some confusion of thought among <u>certain</u> of the juridical groups but, as we have seen, there was no confusion on the part of States as to what they should do in face of a European situation which was definitely moving towards a war of first magnitude. One by one, the aerial frontiers were firmly and resolutely being closed.

C H A P T E R V

Footnotes

1. Journal de Droit international privé, 1913, Vol.40, p.1138.
2. The Civil Aerial Transport Commission, London, 1918, H.M. Stationery Office: Command 9218.
3. Journal de Droit international privé, 1913, Vol.40, p.537.
4. Ibid., pp.512-540.
5. Ibid., pp.1385-1392.
6. Ibid., p.1544.
7. Ibid., p.1426.
8. Captain H. Desaussure. International Law and Aerial Warfare. Thesis, Institute of International Air Law, Law Faculty, McGill University, p.5.
9. Annuaire de l'Institut de Droit international, 1900, Vol.18, p.262.
10. Ibid., 1902, Vol.19.
11. Ibid., 1906, Vol.21, p.297.
12. Ibid., 1910, Vol.23, pp.297-311.
13. Ibid., p.497.
14. Ibid., 1911, Vol.24
15. Ibid., pp.303-345.
16. Ibid., 1927, Vol.33, Tome 3, p.237.
17. A. Roper. La Convention aérienne internationale. Portant Reglementation de la Navigation Aérienne, Annex A, p.211.
18. Compte rendu des séances du Congrès international du Comité Juridique de l'Aviation, Genève, les 28 & 29 mai, 1912, p.59.
19. Minutes of the 28th Meeting of the International Law Association, Madrid, 1913, pp.522-545.

CHAPTER VI

CONVENTION RELATING TO THE REGULATION OF INTERNATIONAL AERIAL NAVIGATION (PARIS 1919)

AERONAUTICAL COMMISSION:

This Convention was the work of the Aeronautical Commission, a body officially recognized by the Supreme War Council as part of the Peace Conference on March 15, 1919.

Particulars in regard to the creation of this Commission appear to be briefly as follows:-

In September 1917, an Inter-Allied Aviation Committee had been set up by the Allied Powers. In 1918, this Committee, whose duties were mainly devoted to the study of the problems connected with the manufacture, distribution and unification of aviation material, was functioning with two representatives each for France, the U.K., the U.S.A. and Italy, plus a Secretary who was French. Towards the end of 1918 and the beginning of 1919, responsible parties in the French Department for Military and Naval Aviation Affairs called the attention of Monsieur Clemenceau, President of the French Council, French Minister of War and President of the Peace Conference, to the fact that it might be useful to re-organize, on a permanent basis, this Committee and have it in readiness to advise the Supreme War Council on matters pertaining to its realm of aviation. Particularly, it was recalled that the Paris 1910 Conference, which had been endeavouring to work out an international convention to regulate aerial navigation, had left matters in rather an unfinished condition and that in view of the stride which aviation had taken during the war, it would be necessary to work out some kind of aerial convention.

Accordingly, on January 24, 1919, Monsieur Clemenceau addressed a communication to the Governments of the U.S.A., the U.K. and Italy, in which he embodied the above mentioned suggestions. He proposed that the Allied Governments send special delegates to attend a meeting on February 6, 1919, but as replies were not received in time to prepare a meeting for this date, no decision on February 6th could be taken.

Replies, however, were received: from the Italian Government (February 5, 1919) which accepted the proposal without reservation; from the American Government (February 7, 1919) which agreed, in principle, that a Committee should continue but they did not, in view of the circumstances which were changing from war to peace, agree with the re-organization proposed in the communication; from the British Government (February 12, 1919) which answered with a counter proposal, namely, they suggested a new Inter-Allied Commission with two representatives each from the U.S.A., the U.K., France, Italy and Japan, and five representatives to be nominated by the other States attending the Conference. This would be a consultative body, assisted by technical and other experts, which would advise the Conference on matters pertaining to aeronautical matters generally, as well as prepare the regulations for aerial navigation and this body should eventually be on a permanent basis.

The French Government agreed to this British proposal on February 15th and the Aeronautical Commission held its first meeting at 10 o'clock on March 6, 1919, with Colonel Dhe, Director of French Aviation, in the Chair. In the course of this meeting, both American and Italian delegates reached agreement with their French and British colleagues regarding their functions and it was decided that the work should be entrusted to three sub-commissions.[1)]

On the same day, March 6, 1919, the preliminary terms, military, naval and air, were placed before the Supreme War Council. In presenting the Air Terms on behalf of the Committee which had drawn them up, the French general, General Duval, stressed the fact that it was proposed to suppress the whole German Air Force, commercial as well as military. Lloyd George (U.K.) appears to have accepted this suggestion as the correct modus operandi but Lansing (U.S.A.) flatly objected to such terms. The inability of Lansing to understand that a nation's air power is one and indivisible is dealt with by Professor Cooper in his book "The Right to Fly".[2)]

Article IX of the Air Terms, to which Lansing took objection read as follows:- "The rules relative to the organization of a commercial air service in Germany after the signature of the definite Treaty of Peace, and to its being granted international circulation shall be determined by the said Treaty of Peace." This, Lansing considered was going too far and the grand question of the day therefore became: How could definitions be arrived at which would permit Germany to indulge in commercial air activity, and, at the same time, suppress, her military instincts in this highly explosive realm of transportation.

Accordingly, the Supreme War Council decided on March 12th, at Balfour's (U.K.) suggestion that this aeronautical commission, of which we have spoken, be officially recognized (which it was on March 15th) and that this question of German participation in commercial air transport be referred to the Commission for thorough consideration, together with other problems arising out of the work of the Peace Conference. Additionally, the Commission were asked to set to work on the preparation of a Draft Convention for the Regulation of International Air Navigation.

At their meeting on March 14th, in which General Groves (U.K.) took a prominent part, the Aeronautical Commission discussed the possibility of converting civil aircraft into military aircraft, as well as the question of the amount of commercial air transportation in which Germany should be allowed to engage. As a result of their deliberations, they decided: 1) that any commercial air fleet was capable of being utilized for military purposes; 2) that to Article IV of the Air Terms, which read as follows: "The manufacture of parts of aeroplanes, hydroplanes, water gliders, dirigibles and motors shall be forbidden in the whole of German territory until the signature of the definite Treaty of Peace" there should be added the words "et pour un délai après la signature de la paix" -- (regarding the addition, there was a reservation on the part of the U.S. delegation who neither considered the addition wise nor possible); 3) that Article IX should be suppressed.[3)]

This decision, which was to have been discussed in the Supreme Council the following day, March 15th, was postponed until March 17th in order that President Wilson, who was returning from the U.S., should be able to participate in the discussion.

On March 17, 1919, when this text, now in the form of Article 45 of the Peace Conditions, and reading as follows: "The manufacture and importation of aeroplanes, parts of aircraft, seaplanes, flying boats or dirigibles, and of engines for aeroplanes, shall be forbidden in all German territory until the signature of the final Treaty of Peace, and after the signature of the Treaty of Peace during a period to be fixed by the Treaty of Peace" came up for discussion, President Wilson refused to consider even for a moment the addition of these words on which the British, French, Italian and Japanese

delegates had resolved. It is truly surprising that neither Lloyd George, Clemenceau, Orlando nor Saionji should have challenged Wilson's obstinacy.

Thereafter, with the resolution taken that Germany should participate in commercial aviation, the legal experts in the Aeronautical Commission really had their backs to the wall to work out a convention which would not only meet the then existing situation but be capable of expansion, i.e. to draft a convention to which neutral countries could later adhere and in which enemy States could eventually participate, once they had given evidence of more pacific intentions.

So perturbed were the Aeronautical Commission by the Supreme Council's decision of March 17th, that the Aeronautical Commission, together with its Military Subcommission, subsequently re-discussed this matter and embodied their apprehensions in a report to the Council on April 7th. There is, however, no evidence that this report was considered by the Council. Later, on June 11, 1919, General Duval again called the attention of the Council to the reports of March 15th and April 7th, in the hope that the matter could yet be discussed on June 16th at a meeting of the "Council of Four" but again no action appears to have been taken in the matter.[4)]

At its meeting on March 17, 1919, the Aeronautical Commission, having been officially recognized by the Peace Conference on March 15, 1919, drew up the basic principles on which their work would be built, i.e. they worked out terms of reference which would guide the sub-commissions, technical, military, and economic, legal and financial, in their work. Of the twelve

basic principles, Nos. 1, 2 and 7 are the ones most closely related to our subject. Translated, they read as follows:

1. Recognition - (1) of the principle of the full and absolute sovereignty of each State over the air above its territories and territorial waters, carrying with it the right of exclusion of foreign aircraft; (2) of the right of each State to impose its jurisdiction over the air above its territory and territorial waters.

2. Subject to the principle of sovereignty, recognition of the desirability of the greatest freedom of international air navigation in so far as this freedom is consistent with the security of the State, with the enforcement of reasonable regulations relative to the admission of aircraft of the contracting States and with the domestic legislation of the State. (Underline ours)

7. Recognition of the right of transit without landing for international traffic between two points outside the territory of a contracting State, subject to the right of the State traversed to reserve to itself its own internal commercial aerial traffic and to compel landing of any aircraft flying over it by means of appropriate signals.

In addition, lists of questions to be referred to the sub-commissions for study and discussion were drawn up.[5)]

The calibre of the experts was high. It might be useful to examine briefly the position taken by the main participants in the Aeronautical Commission.

The French Position:

Shortly after the 1910 Conference, a French decree of July 11, 1910, permitted Monsieur Millerand, who was then Minister of Public Works, as well as of Post Office and Telegraph, to set up a Special Committee "for the study

and preparation of regulations governing aerial navigation". This was a permanent ministerial commission and was composed of prominent men, including Monsieur G. de Lapradelle, Member of the Institute of International Law, and a distinguished professor in the Faculty of Law in Paris. M. de Lapradelle was one of the outstanding French delegates of the Aeronautical Commission. France, like Britain, and several other countries, had been giving considerable study to this question since the 1910 meeting. Monsieur d'Aubigny (France) presided over the Economic, Legal and Financial Sub-commission, and Monsieur Pierre-Etienne Flandin was another of the delegates.

The French delegation tabled an already prepared Draft Convention which is reproduced in Monsieur Roper's work at page 274,[6] and to which we shall refer later.

The British Position:

At the first meeting, on March 6, 1919, General Sykes (U.K.) suggested that they take as basis for their work any draft international conventions which had been worked out prior to the war and any material that had been worked out in Paris since the end of the war. He proposed to call the attention of the meeting to the British Parliamentary Bill to regulate aerial navigation over the territory of the U.K. which Britain had been working on since 1911.

It will be recalled that Britain had passed two Air Navigational Acts in 1911 and 1913, giving the Minister for Home Affairs wide powers to control the air space above the U.K. territory, and indeed he had had occasion to use these powers both before and during the War.

This Air Navigation Bill, to which General Sykes now made reference, had in fact been commenced in 1911 but its passage through Parliament had been impeded on account of the war. Once passed by Parliament, General Sykes informed the meeting, it would be used domestically until such time as an international convention would be in operation.

In 1913, the Committee on Imperial Defence had set up a Subcommittee to study aerial problems and this Subcommittee had drafted an able report to the main committee on July 17, 1913.

How assiduously the U.K. had been working on these matters can best be appreciated from British Command Paper No. 9218.

On May 22, 1917, the British Air Council had set up a Civil Aerial Transport Committee, whose work was delegated to five Special Committees, and to Special Committee No. 1 fell the responsibility of studying the international and legal problems in relation to aerial navigation, together with questions involving municipal legislation.

This Committee acknowledged their indebtedness to Lord Drogheda, who was apparently able to place at their disposal certain Foreign Office documents substantiating very fully the actions taken by the British Government between 1910-1913.

Apparently, no sooner had the 1910 Conference adjourned, than the British Government instructed all its Representatives in the European capitals "that no regulations should be framed which in any way exclude or limit the right of any State to prescribe the conditions under which the air above its territory should be nevigated."

In addition to the Foreign Office papers referred to, Special Committee No. 1 also acknowledged its gratitude for the assistance rendered by the Report of the Sub-committee of the Committee on Imperial Defence (July 17, 1913) already referred to. In the first Interim Report to the Air Council the Civil Aerial Transport Committee states quite plainly that "military considerations dictated the opposition of the British delegates to the proposal pressed by the German representatives at the Conference in Paris in 1910." It will be recalled that, on June 29, 1910, Admiral Gamble (at the 4th Plenary Session of the 1910 Conference) announced that, by order of his Government, he proposed the adjournment of the Conference because his Government considered that the principles they were discussing were of such importance that only after profound study could any approval be arrived at concerning an international convention.

This Interim Report of the Civil Aerial Transport Committee, addressed to the Air Council, states that the members had "been informed by the Foreign Office that in the opinion of that Department, if it is desired to set on foot negotiations for the conclusion of an International Aeronautical Convention, no time should be lost in approaching certain Allied and friendly Governments."

It becomes quite clear from perusal of all the above documents that, when the members of the Civil Aerial Transport Committee were asked to sit down and advise the British Air Council what line of action it should take, they realized they were faced with a double-sided situation.

First, the geographical position of the U.K., which makes her so vulnerable to air attack, made it imperative that her Defence position be considered primarily. Accordingly, these British legal advisers in Special Committee No. 1 were obliged to state that any international convention, bearing the signature and ratification of the U.K., should clearly state that the air space superincumbent on H.M. territory and territorial waters adjacent thereto came under the sovereignty and jurisdiction of His Majesty.

On the other hand, they realized only too well also that, on account of this same geographical situation, in order to maintain free aerial communication with the other parts of the realm, the U.K. would be dependent on satisfactorily worked out arrangements with many other countries through whose air space the U.K. planes would have to fly in order to reach her overseas possessions. In this connection, the legal advisers naturally saw the advantage of proclaiming sovereignty only up to a certain height, with a free zone above, but in the long run defence measures had to prevail.

Therefore, in order to reach a compromise, the recommendation was that the U.K., while maintaining air space sovereignty, could not be too categoric about the use of the air space; the members of the Committee definitely saw that the U.K. had more to gain by being rather magnanimous, than by making too many restrictions for foreign aircraft, whose countries would undoubtedly turn round and offer them reciprocal treatment. It is noteworthy, but not in any way surprising, that when the proposed British Draft Convention came before the 1919 Conference, the Second Article contained fairly wide privileges which, to-day, might be said to amount to what became known during the 1944 Chicago Conference as Fifth Freedom Commercial privileges.

To show the importance of the 1910 Conference, and the influence it had on the British Authorities, it is worth mentioning that Special Committee No. 1 of the Civil Aerial Transport Committee concluded its work by a survey of the articles agreed to in Paris in 1910 - and it will be remembered that only Articles 19 and 20 were lacking when the Conference was finally adjourned.

Not only did Special Committee No. 1 of the Civil Aerial Transport Committee in 1918 make a survey of the 1910 Paris articles but, in addition, they had the benefit of a previous survey of these same articles which had been made by the Sub-committee of the Committee on Imperial Defence in 1913.

Under Chapter III of the 1910 Draft Convention, which should have contained Articles 19 and 20 of the 1910 Convention, the Imperial Defence Sub-committee had inserted Rules 1/5 and, with relatively minor amendments, Special Committee No. 1 of the Civil Aerial Transport Committee in 1918 endorsed these rules. In addition, Special Committee No. 1 worked out two further (substitute) Rules which, however, were only to be used in the event of Rules 1/5 not being acceptable to the French Government. As a result of the deliberations of Special Committee No. 1, the aforementioned Rules 1/5 were reduced to four and read as follows:

1. Each contracting State shall permit for so long as the present Convention is in force the aircraft of the other States to fly within the limits of and above its territory, subject to the restrictions laid down in the following rules:-

2. Each State shall have the right to impose restrictions on the navigation of foreign aircraft, and, more particularly, to forbid such navigation so far as it deems necessary in order to guarantee its own security or that of the lives and property of its inhabitants.

These restrictions shall be applied without any inequality to the aircraft of every other contracting State. It is, however, agreed that any contracting State may refuse to accord to any other contracting State any facilities which the latter does not itself accord under its regulations.

It is, however, agreed that on personal grounds, independent of its nationality, a State can exempt an aircraft of any other contracting State from any one of the restrictions imposed in virtue of the first paragraph.

3. (Special Committee No. 1 decided that this Rule No. 3 should be deleted.)

4. In cases of accident verified by an authority of the country where an aircraft has been compelled to land, the right of access, which under the provisions of Rule 2, paragraph 1, might be forbidden, cannot be refused.

The provisions of Rule 2, paragraph 2, do not apply to the measures which, in extraordinary circumstances, a State may take to safeguard its security.

5. The contracting States undertake to adopt or to propose to their legislatures such measures as may be required in order to make the private law of their country conform to the above provisions.

Over and above this work, Special Committee No. 1 examined the Aerial Navigation Bill, commenced in 1911 by the Home Office, which had been in its final stages prior to the outbreak of war. Special Committee No. 1 dealt with each clause seriatim, recommending changes and amendments. (This was the legislative document to which General Sykes called the attention of his colleagues on the Aeronautical Commission in 1919 at its first session on March 6, 1919, which the U.K. proposed to use until an international convention had been worked out.)

On the municipal side of the question Special Committee No. 1 ran into the difficult position of striking a compromise between the rights

of the landowner who, in England, had been encouraged to believe that his property rights extended usque ad coelum,[7] and the development of aerial navigation. Special Committee No. 1 realized that if private landowners' rights were to be recognized usque ad coelum, it would be detrimental to aerial navigational development, domestic or otherwise, and they accordingly endorsed the special legislation which was recommended in the Bill whereby owners of subjacent property would have no right of action, merely as a result of their property being over-flown by aircraft, i.e. in other words, there was to be no tresspass action permitted against aviators for simply flying through the air space but the common law rights and remedies of persons in respect of injury to property or person against an aircraft would be preserved. In fact, Special Committee No. 1 did not consider that the Bill had gone far enough in this respect and suggested further legislation.

Special Committee No. 1 also touched upon an important subject which had not been dealt with in Paris in 1910, namely, that of damage done by visiting foreign aircraft to the U.K. and suggested, in order to overcome this difficulty, that a system of insurance should be worked out, especially with the countries whose planes were most likely to be arriving in the U.K.

The Civil Aerial Transport Committee, in concluding its report to the Air Council, took the opportunity of expressing their thanks to

several people, including Mr. Tindal Atkinson, Assistant Secretary. This is interesting because Mr. Tindal Atkinson was one of the most important members of the British delegation to the 1919 Conference and made an outstanding contribution.

Amongst the members of the Civil Aerial Transport Committee, there were several dissenting opinions on a few points. For example, Mr. Frank Pick held rather different views on the question of sovereignty in the air space for the subjacent State. Mr. Pick stated that, while he had his nation's defence at heart, he foresaw difficulties in the way of the development of international aviation through the declaration of sovereignty for the subjacent State in the air space above its territory and territorial waters. He suggested that "in taking any steps towards the establishment of laws or of rules and regulations for civil aerial transport at this time care should be taken to avoid any commitments which would hinder the adoption of the second alternative (i.e. "of an international code of laws ..... to be applied openly and equally among all nations upon some mutually enforceable sanction") at the earliest favourable moment". Mr. Pick thereafter deals both with the strategic position of the U.K., as well as with the interests of the people both commercially and industrially. The Draft Convention proposed by the British is reproduced on p. 256 of Mr. Roper's work already referred to.

American and Italian Positions:

On the main Commission, the U.S. was represented by Rear Admiral Knapp and Major General Patrick. Three other members took part in the Legal Subcommission's work, including Captain Bacon (an American lawyer who had been serving with the Air Services). Unlike the French and British delegates, the American delegates did not arrive with a draft convention prepared and appear to have contented themselves at first with what might be described as a critique of the British draft, and with which they seemed to go a long way in agreement. Thereafter, records show that they redrew a fresh Draft Convention during the meeting. How different were the principles contained in the redraft to those contained in the first critique of the British draft has only too clearly been shown by Professor Cooper in his article in the Journal of Air Law and Commerce entitled "United States Participation in Drafting Paris Convention 1919".[8] In fact, the author's main purpose in writing the article is to show that, at one of the most crucial moments of the discussion, i.e. the discussion on what became Article 15, the Americans, by adding their vote to the votes of the French and Italians, assisted in deciding against the relatively free principle contained in the British proposals and which, as we have said, amounted to almost fifth freedom commercial rights for contracting States. The Convention was never ratified by the U.S. but the part they played in the making of it was considerable.

Italy had five delegates on the Aeronautical Commission, including Monsieur Buzzati, on whom, with his colleagues in the Drafting Committee, fell the onerous duty of taking the 1910 Draft Convention, as well as the French

and British drafts, and endeavouring to produce a Draft Convention which would reflect the views of the States present. This formed the main basis for discussion. Monsieur Buzatti, a lawyer and one specially interested in aviation law, had taken a prominent part in the Verona Conference in 1910, the resolutions of which are reproduced by M. Roper at page 211.[9] These Resolutions passed at Verona, make an interesting comparison with the impasse which arose in Paris at the 1910 Conference meeting almost concurrently with the Verona meeting, on the question of the legal status of the air space.

The various Draft Conventions:

Article 1 of the French Draft Convention does not mention the word "sovereignty" but it states in substance that only aircraft belonging entirely to owners whose nationality is that of one of the contracting States will be authorized to fly in the territory of contracting States; in addition, aircraft will satisfy conditions 1, 2 and 3 as per Annexes A, B and C. The French Draft contained 14 Articles with Appendices A/E.

Articles 1 and 2 of the proposed British Draft, which contained 36 Articles, ran as follows:-

> "Article 1 - The High Contracting Parties recognize the full and absolute sovereignty and jurisdiction of every State over the air above its territories and territorial waters, but subject thereto the aircraft of a contracting State may fly freely into and over the territories of the other contracting States provided they comply with the regulations laid down by the latter. Such regulations will permit the free navigation of foreign aircraft except in so far as restrictions appear to the State to be necessary in order to guarantee its own security or that of the lives and property of its inhabitants

and to exercise such jurisdiction and supervision as will secure observance of its municipal legislation. The regulations shall be imposed on foreign aircraft without discrimination except in times of great emergency when a State may deem it necessary to safeguard its own security. It is, however, agreed that any one contracting State may refuse to accord to the aircraft of any other contracting State any facilities which the latter does not itself accord under its regulations.

Article 2 - Each contracting State shall have the right to impose special restrictions by way of reservation or otherwise with respect to the public conveyance of persons and goods between two points on its territory, but such restrictions may not be imposed on a foreign aircraft where such aircraft is proceeding from one point to another within the territory of the contracting State either for the purpose (1) of landing the whole or part of its passengers or goods brought from abroad or (2) of taking on board the whole or part of its passengers or goods for a foreign destination, or (3) of carrying between the two points passengers holding through tickets or goods consigned for through transit to or from some place outside the territory of the contracting State."

Articles 1/5 of the American Draft Convention, which contained 26 Articles, ran as follows:[10)]

"ARTICLE 1 - The contracting States recognize the full and absolute sovereignty and jurisdiction of every State in the air space above its territory and territorial waters.

"ARTICLE 2 - The contracting States recognize the right of every State to establish such regulations and restrictions as appear to the State to be necessary in order to guarantee its own security or that of the lives and property of its inhabitants, and its right to exercise such jurisdiction and supervision as will secure observance of its municipal legislation. These regulations shall be imposed on foreign aircraft without discrimination, but it is agreed that any one contracting State may refuse to accord to the aircraft of any other contracting State any facilities which the latter does not itself accord under its regulations.

"ARTICLE 3 - Each contracting State shall have the right to impose special restriction by way of reservation or otherwise with respect to the public conveyance of persons and goods between two points on its territory.

"ARTICLE 4 - Each contracting State undertakes in time of peace to accord the liberty of innocent passage above its territories to the aircraft of the other contracting States, subject to the conditions established by this Convention.

"ARTICLE 5 - Each contracting State has the right to prohibit the aircraft of other contracting States from flying over certain zones of its territory.

Articles in the Convention appropriate to our subject:

As a result of discussion and deliberation, both in the Aeronautical Commission and in the Legal Subcommission, what sort of Articles were turned out in 1919 in relation to our subject, the Right of Innocent Passage?

The most appropriate are Articles 1-5, and Article 15. As originally written they were written as follows:

"ARTICLE 1. The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.

"For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.

"ARTICLE 2. Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

"Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

"ARTICLE 3. Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting States, under the penalties provided by its legilsation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory.

"In that case the locality andthe extent of the prohibited areas shall be published and notified beforehand to the other contracting States.

"ARTICLE 4. Every aircraft which finds itself above a prohibited area shall, as soon as aware of the fact, give the signal of distress provided in Paragraph 17 of Annex D and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State unlawfully flown over.

CHAPTER II

Nationality of Aircraft

"ARTICLE 5. No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.

CHAPTER IV

Admission to Air Navigation above Foreign Territory

"ARTICLE 15. Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

"Every aircraft which passes from one State into another shall, if the regulation of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.

"The establishment of international airways shall be subject to the consent of the States flown over."

Discussion:

The discussion which surrounded the above Articles in question in 1919 is as follows:

In the Legal Sub-committee, 20 March 1919, there was an interesting

discussion in the first session on the question of "frontiers and territorial waters". M. de Lapradelle (France) had to take Lt. Col. Saconney up on the latter's explanation of "territorial waters" whose line of demarcation, Col. Saconney said, was drawn at three miles from the coast. M. de Lapradelle had to explain that there were, taking France as example, several lines of demarcations, depending on whether it was a question of customs, fishing rights, neutrality, right of innocent passage, etc. So that fixing the rights of subjacent States in the air space over their territorial waters was a question which might require very special consideration.

To those students particularly interested in the question of territorial waters, the Minutes of the Legal Sub-committee of the special morning session of April 5, 1919, are of great interest.

M. Rolin-Jaequemyns (Belgium) suggested that, on account of the difficulty of arriving at a satisfactory boundary line for the territorial waters, thereby enabling the superincumbent air space to be placed under the sovereignty of the coastal stage, Article 1 should be suppressed.

M. de Lapradelle, as we know, considered that the sovereignty of the coastal state stopped at her coast line; according to him, the coastal state only held very slender jurisdiction in what is commonly referred to as "territorial waters" and he considered that if it were necessary for defence measures to extend the limits in the air space beyond the shore, it should be extended to a definite number of miles, e.g. 3, 6, 10 miles, or whatever the technical experts might recommend.

Captain Atkinson (U.K.), on the contrary, suggested that the term "territorial waters" be used, and Commander Pollock, the American delegate,

was in agreement with him, for the very good reason that it was generally understood that, at least, a limit of three miles was accepted by practically all states.

Captain Atkinson's suggestion put to the vote, resulted in its adoption, being supported by the U.S.A., Japan and the U.K.; Belgium voted against and France abstained.

When neutral zones were discussed, e.g. between France and Germany, Professor Buzzati reminded members present that they were in the process of making a convention that would operate between allies, that they had no need to preoccupy themselves with the position of countries who were not, in any case, going to belong to the "association" ("union" in French text). This raised the very natural question as to just what kind of convention they were, in fact, intending to turn out.

Having looked at the British activities between 1910-1919, it is not therefore surprising to find Captain Tindal Atkinson expressing the desire that he hoped they were about to make a Convention which would, in due course, be applicable to the entire world. M. de Lapradelle, on behalf of the French delegates, went so far as to state "that the Convention, for the moment limited to the Contracting parties, should be conceived in such a manner as to render it capable of enlargement to third parties."

On the subject of neutral zones or "zones de tolerance", Captain T. Atkinson stated that the British point of view was that aerial navigation should be as free as possible, i.e. as free as minimum defence measures would

permit, and he foresaw difficulties for international navigation if aeroplanes had to make detours on account of the above-mentioned zones. According to Captain Atkinson, contracting States should undertake, in the Convention, to encourage the development of aerial navigation and they should accordingly indicate the routes across their frontiers that aircraft of contracting States were to take. If States indicated a very narrow passage, then he hoped that they would be able to justify their "restrictions" by genuine military reasons.

At the afternoon meeting on 24th March, Professor Buzzati, who had been appointed Rapporteur of the Drafting Committee, before beginning to deal seriatim with the Articles the Committee had drawn up, stated that he had had, as material to work on, both the French and English Draft Conventions, as well as the almost completed 1910 Convention. As both the French and English projects were heavily influenced by the 1910 text, we need have no hesitation in saying that the influence of the 1910 Conference was extremely strong among the members of the Drafting Committee.

In speaking of the word "sovereignty" in Article 1, Professor Buzzati remarked: "I have spoken of the right of sovereignty in the air space, and not the air, the latter being incapable of containment."

At the request of the British delegation, the words "colonies and protectorates" were omitted in order that each State might have the right to extend the effects of the Convention to their overseas possessions if they considered it desirable.

In discussing Article 2, Professor Buzzati said that he had chosen the words "chaque Etat contractant s'engage aadmettre" - "admettre" and not "arreter", the latter being an unfortunate word to use when it was a question of granting "liberté de passage inoffensif". Professor de Lapradelle suggested that a still more appropriate word would be "accorder" and this was agreed to.

At this juncture, we find another interesting comment being made by Captain Atkinson, perfectly understandable, namely that he wished to reserve his opinion on this Article 2 until he saw what the subsequent Articles were to be. He stated that the British delegation, in studying the matter beforehand, had wished to stretch the limits as far as possible in the Convention, in the interest of the development of aerial navigation, and they did not want to see the Convention contain too many restrictions.

Professor Buzzati hastened to re-assure Captain Atkinson that he considered that the subsequent Articles would give the British delegate entire satisfaction and Professor de Lapradelle discoursed on the advantages which Article 2 provided for time of peace, and those which Article 3 provided for time of tension.

Article 5 is directly concerned with our subject. The text, as proposed by the Drafting Committee, and read by the Rapporteur, was as follows:-

> "Un aéronef n'est regi par la presente convention que si'il possède la nationalité d'un Etat contractant. Aucun des Etats contractants n'admettrala circulation au-dessus de son territoire d'un aéroef qui ne repondrait pas à cette condition, sauf la possibilité d'accorder une autorisation speciale ettemporaire."

Professor de Lapradelle went straight to the words "sauf la possibilite d'accorder une autorisation speciale et temporaire" which had originated in the British text (Article 3) and the French text (Article 5). Where had these words come from, he wanted to know?

Professor Buzzati hastened to explain that, in the event of a French plane wanting to acquire an Italian nationality, a special and temporary authorization would be necessary in order to allow the plane to proceed between France and Italy.

Captain Atkinson supplied another example, a Spanish company might want to buy an English aircraft; it would be a great economy for Spain, not to require to register in England and then in Spain, so a special and temporary authorization would be required from France, over whose territory the flight would largely take place.

Professor de Lapradelle was satisfied and the meeting proceeded to the next Article.

During the morning session of 26th March, the Legal Sub-committee tackled Article 15 as present by the Drafting Committee.

The Chairman, M. d'Aubigny, read out Article 15 as written by the Drafting Committee:-

> "Chaque Etat contractant aura la faculte de reserver le transport professionnel des personnes et des marchandises ayant lieu entre deux points de son territoire aux aeronefs nationaux seules, aux aeronefs de certains Etats contractants, et de soumettre cette navigation a des restrictions speciales."

Captain Atkinson's contribution thereafter must surely be almost historic. He made his plea for what we might describe as third, fourth and fifth freedom rights. He saw no reason, for example, why a plane flying between London and Constantinople, and stopping at Paris, should not: first, take up passengers at Paris for Constantiniple - (according to Article 15, France could prevent the U.K. taking on passengers at Paris for Marseilles. The British delegation wanted it to be stated clearly in the Convention that the U.K. could, e.g., take on passengers at London for Paris and at Paris for Constantinople); second, supposing the aircraft landed both at Paris and Marseilles, France could claim, according to the text of the Draft Convention, that the aircraft was flying between two points in French territory and that she was entitled to such cabotage and it was exactly this claim that the U.K. delegation did not wish to see figuring in the Convention.

Captain Atkinson was basing his remarks, of course, on Article 2 of the proposed British draft which he wished to see added to Article 15. He maintained that Article 15, as proposed by the Drafting Committee, had been borrowed word for word from an international treaty concerning maritime navigation, according to which States reserved the right of cabotage to themselves. "We (i.e. the British delegation) would like to see the aircraft of every contracting State having the right to exercise flights on the territory of foreign States," said Captain Atkinson.

We realize, in reading the Minutes, that here was a momentous point in the discussion. Unfortunately, neither the French nor the Italian delegates felt as did Captain Atkinson.

Professor de Lapradelle stated that, having made the basis of the convention "sovereignty" in the air space for the subjacent state, they had thereafter relaxed that principle to the point of allowing the aircraft of contracting states the right of transmit. Once the international "ligne" was established, then the aircraft of contracting states would have the right to pass over the route but without making a halt or a predetermined stop ("arret" and "escale" in the French text). He felt concessions should stop there and certainly that contracting states should have the right of absolute control of the navigation within their territory. He could neither agree that the aircraft on the route London/Constantinople should be allowed to transport passengers or goods between two points within France, nor that the same aircraft should be allowed to unload passengers and goods coming in from England at a French town or pick up passengers and cargo there for Constantinople. It was in the interest of contracting states that they should remain absolutely master of the conditions and regulations within their territory. Professor de Lapradelle felt that they had had too little experience to justify reducing any further the principle of "sovereignty" they had set up in Article 1. It might be that circumstances would arise which would lead France to exercise her right in a favourable manner in the interest of the development of aerial navigation in transit over France, but for the present, it would be extremely imprudent for France to enter into any such agreement.

Professor Buzzati was in entire agreement with the French delegate. Most definitely States must reserve transport between two points within their territory to themselves, he said, and secondly, with regard to the London/Constantinople journey, and Captain Atkinson's suggestion that the said aircraft

might pick up passengers or goods at Paris for Constantinople, the Italian delegate would be astonished if, in the event of France having an airline herself between Paris and Constantinople, she would accede to any such request. "C'est un terrain nouveau ou nous entrons et pour lequel l'avenir est gros de mysteres". (This is new ground we are breaking, in connection with which the future is full of surprises.)

It was therefore in accordance with these views that he had added the following text:-

> "L'etablissement des lignes internationales de communication aerienne dependra de l'assentiment des Etats interesses qui en regleront l'exploitation."

Of course, Buzzati had gone straight to the 1910 Conference text, Article 21 of which had read:-

> "Chaque Etat contractant aura la faculte de reserver le transport professionnel de personnes et de marchandises, ayant lieu entre deux points de son territoire, aux aeronefs nationaux seuls ou aux aeronefs de certains Etats contractants ou de soumettre cette navigation a des restrictions speciales.
>
> "L'etablissement de lignes internationales de communication aerienne dependra de l'assentiment des Etats interesses."

It is important to note the attitude adopted by these various delegates in the light of what followed; in any case, it is another occasion on which "freedom" was discussed and discarded.

Article 15 came up for discussion again later in the same day and the remarks of Captain Atkinson are really worth noting. He referred to commercial treaties bearing on navigation where one finds practically always the right of cabotage reserved to the State but that morning, the British delegation had opposed this suggestion in regard to Article 15; if possible the contracting states must try to avoid a multiplicity of separate agree-

ments between two States cutting across each other. Captain Atkinson wanted to see above all an international regime. The British delegation was not following a purely selfish political policy because the advantages to be drawn from the British proposal would be just as likely to benefit France and Italy as they were to benefit the U.K. It was perfectly logical to consider a French aircraft, for example, leaving Paris for India wanting to take on a passenger in Italy. "Above all, I want to see an international regime," said Captain Atkinson.

Professor de Lapradelle's reply in the evening was, if anything, more reactionary than it had been in the morning. So far as reciprocity went, he was doubtful if the U.K. could offer France the same advantages that France could offer the U.K. He suggested that the whole matter was too new and they were without experience. If France made an agreement with the U.K., it would be separately; in that way, better control could be kept of the situation.

The British delegate, Mr. White Smith, endeavoured to strengthen what Captain Atkinson had stated by pointing out to Mr. de Lapradelle that he was wrong in thinking that the U.K. could not offer reciprocal advantages to France; France might quite well desire to pass over Egypt in going to the interior of Africa, or to pass over India in going to the Extreme Orient.

Captain Atkinson, as we know, in the morning had suggested that Article 2 of the proposed British Draft be added to the text of Article 15, as prepared by the Drafting Committee. When this suggestion was put to the vote, the result was that the U.S.A., France and Italy voted against the adoption and the U.K. and Japan voted for its adoption.[11)]

With reference to the text which Professor Buzzati added to Article 15 and which, as we have stated, came straight from the 1910 Conference text with the addition of a few words:-

> "L'établissement des lignes internationales de communication aérienne dependra de l'assentiment des Etats interessés qui en regleront l'exploitation."

At the afternoon session of the Legal Sub-committee meeting on 9th April, 1919, this text came into prominence and Captain Atkinson said quite frankly he did not like this paragraph; he would rather see the establishment of free transit, he said. On a line between London and Cairo, for example, permission to transport passengers should be given in the international agreement; according to the paragraph above, it would be necessary for the U.K. to ask the consent of France.

To this statement, Professor de Lapradelle, on behalf of the French delegation, replied: "Yes, that is what we want."

Captain Bacon (U.S.A.) immediately asked what exactly this paragraph implied and Professor de Lapradelle said that it meant that if, for example, one wanted to establish a line between England and France, that was international because it passed over two countries and the consent of both the U.K. and France would be necessary. Then said Captain Bacon: "I propose that it be taken out."

But M. Rolin-Jaequemyns considered that this paragraph was necessary; one could not attempt to establish a regular line of communication between two countries without the consent of the country in whose territory the aircraft would land. If it were desirable to establish a line over Belgium,

he thought the consent of Belgium would be necessary; for without it, no line could be established.

Thereafter, the Chairman, M. d'Aubigny, sought analogies in railroad law and the Belgian delegate, M. Rolin-Jaequemyns, was considerably moved at the thought that, in the event of Germany eventually adhering to the Convention, she would be in a position to establish international lines, for example, over Belgium, without the latter's consent. If Captain Atkinson maintained his point of view, said the Belgian delegate, then Captain Atkinson could be sure that Germany would want to establish a line between Berlin and Cairo. To which the Captain replied, that the U.K. would both be better prepared than Germany and have better machines.

Put to the vote, this famous paragraph, which later proved so troublesome, was maintained by Belgium, U.S.A., France and Japan; only the U.K., it seemed, appeared to favour such out and out freedom.

When the Articles which mainly concern our subject, i.e. Articles 1, 2, 5 and 15 as proposed by the Legal Sub-committee came before the Aeronautical Commission for discussion on April 15th, 1919, with Colonel Dhe (France) in the Chair, Articles 2 and 5 went through with little discussion but Articles 1 and 15 came in for some additional attention.

Article 1, with the first paragraph only, had been passed unanimously and the meeting was proceeding to the discussion of Article 2 when M. Chiesa (Italy) wished it to be made quite clear that, so far as the Convention went, "national territory" was understood to include dominions, colonies and protectorates. General Sykes (Gt. Britain) and Colonel Norton de Mattos (Portugal) were obliged to state that, while in principle their

dominions, colonies and protectorates were understood to be in agreement, these territories had not had an opportunity to sign. Canada had expressly asked for time to consider the question.[12)]

Accordingly, the voting in connection with the addition of Paragraph 2 was as follows:- Great Britain voted for Article 1, para. 1, but was unable, at this stage, to vote for para. 2; Portugal voted in favour of Article 1, paras. 1 and 2, but made a reservation with regard to para. 2.

The U.S.A., Japan, Brazil, Greece, Rumania and Serbia voted for Article 1, paras. 1 and 2.

France, Italy, Belgium and Cuba voted for Article 1, paras. 1 and 2, but reserved their adherence to the Convention until the adoption of this Article 1, paras. 1 and 2 had been accepted by the Dominions, Colonies and Protectorates of Great Britain.

During the afternoon session on the same day, Article 15 came before the Aeronautical Commission.

The Chairman (Colonel Dhe, France), said that he intended to put the fourth paragraph to the vote. Para. 4 was now in the following text:-

> "L'etablissement des lignes internationales de communication aerienne est subordonne a l'assentiment des Etats survoles."

General Sykes (Great Britain) considered that this paragraph should be taken out of the Convention because the right of transit had been given to aircraft to cross the air space of contracting states, i.e. without landing; therefore, it was logical that such aircraft should have the right

to choose the shortest route in conformity with the best meteorological conditions. However, all difficulty in regard to the adoption of this Article would disappear if the word "ligne", instead of representing a straight line of communication, referred to a wide zone, thereby enabling the aircraft to follow the most favourable route, i.e. the route under the best conditions.

After discussion, the Chairman proposed that the word "ligne" be replaced by the word "voies". He considered that the word "assentiment" did not imply the idea of an impediment. It was difficult to conceive of France, for example, not assisting, by every means in her power, the establishment of an international airline. Moreover, all difficulties in this respect would be taken care of by bringing such matters for consideration before C.I.N.A., established by Article 34.

Admiral Knapp (U.S.A.) declared that this paragraph was not at all necessary since a state had the right both to prevent the establishment of a landing ground and of any construction whatsoever on its territory, as well as to prevent any aircraft flying over certain parts of its territory.

Notwithstanding this discussion, with the exception of the reservation made by the American delegation on this last paragraph - not because it opposed it on principle but because it judged the insertion unnecessary - the text of Article 15, with para. 4 as follows:- "L'etablissement des voies internationales de communication aerienne est subordonne a l'assentiment des Etats survoles", was passed unanimously by the Aeronautical Commission.

Reactions to the Convention relating to the Regulation of Aerial Navigation (Paris 1919):

Whether it had been prudent (it certainly was understandable), to confine the preparation of the Convention to the Members of the Allied Powers exclusively became quite a practical point.

Switzerland on November 1, 1919, was the first to point out that, were she to adhere to the Convention, Article 5, as it stood, would preclude her from admitting to the airspace above her territory, aircraft registered in other than contracting States to the Convention, e.g. Germany. Additionally, as she had been a neutral state during the war, she would be deprived of the benefit of the terms contained in Article 313 of the Treaty of Versailles and Article 276 of the Treaty of St. Germain. These special conditions allowed the Allied Powers to make use of the airspace above the German and Austrian territory because, of course, Article 1, para. 1, of the Convention contained the bold assertion that: "The High Contracting Parties recognized that every Power has complete and exclusive sovereignty over the airspace above its territory." Switzerland, at the time, was endeavouring to develop a postal airline with Warsaw, etc., and this would have meant for her a considerable détour in order to avoid German airspace.

As the Aeronautical Commission of the Peace Conference, on the completion of its work, had been dissolved in July 1911, the Swiss communication, addressed to the French Government, was passed to the Conference of Ambassadors and it fell to their Aeronautical Commission to make a study of the matter.

The communication presented difficulties because, by the terms of Article 34, there could be no amendment to the Convention unless the point in question had been studied by the CINA (Commission internationale de navi-

gation aerienne) and this Commission could only start to function when 14 States had ratified the Convention. (This eventually took place on July 22, 1922.)

The Aeronautical Commission considered that there were three possible solutions:

1. Suppression of Article 5 or else a very wide interpretation of the same;
2. Adherence by Switzerland with a reservation regarding Article 5;
3. Addition of a Protocol to the Convention.

This last solution was considered the best and accordingly text was developed which would enable Switzerland (and neutral States) to adhere to the Convention. The suggestion was that on each occasion when a neutral Member State wished to avoid the restrictive conditions of Article 5, it would place the matter before CINA and, if approved, an exception would be made in its favour. Until such time as CINA became active, it was agreed that requests of this nature should be addressed to the French Government who would transmit them for approval to the appropriate governments.

This was eventually embodied in a Protocol (October 27, 1922) but was not considered a satisfactory solution by the States which had been neutral during the war.

The planes were soon ready to go but, unfortunately, it could be seen that CINA was not going to be able to function for still some time. Accordingly, the States whose planes wished to fly were forced to enter into bilateral agreements with one another.

There were, however, several States who were prepared to ratify the Convention quite early but as the Convention would have been operable between them, Article 5 and the Protocol would have placed them in a dilemma as regards other States which had not already ratified the Convention. M. Roper explains the interesting solution which was introduced, on the suggestion of the U.K., in order to cause no crisis between the States about to ratify and those which would eventually do so, as well as the ex-neutral States.[13)]

The paragraphs which caused the most heartbreaks to the ex-neutral States were, of course, Articles 5 and 34; Article 5 being the article which prevented them from admitting to their airspace territory, aircraft registered in other than contracting States' territory; and Article 34 which established the system of voting and accorded to the five Great Powers the majority of votes. (We will presently have a few more remarks to make about these articles.)

Several European Conferences were held, the participants being Denmark, Spain, Finland, Norway, Netherlands, Sweden and Switzerland. In September 1922, they met for the second time and voted upon the text which they would like to have seen replace the then existing Article 5. This was not immediately published and, unfortunately, later that year the CINA (not aware of this text) decided upon an amendment which, however, did not quite coincide with the text of the neutral States. At the next meeting of the neutral States, the Secretary of CINA was invited to be present and, as a result of compromise, Sweden, Denmark and the Netherlands found it possible to adhere to the Convention during 1927 and 1928.[14)]

The Ibero/American Convention relating to Air Navigation, drawn up at Madrid in October 1926:

For historical purposes, this document has been reproduced in English in the Journal of Air Law, Volume 8/1937, pp.263/269.

This meeting took place as a result of Spain having withdrawn from the League of Nations. With 19 Latin-American States, with which they had cultural and other relations, both Spain and Portugal signed the Convention which, with very few exceptions, resembles closely - almost word for word - the text of the 1919 Convention. In the English reproduction, referred to above (Journal of Air Law), the editors have italicized the articles and paragraphs with which this 1926 Convention differs from that of 1919 signed in Paris.

One of the most important differences is contained in Article 5. In October, 1926, the text of Article 5 of the Paris 1919 Convention still read as follows:-

> "No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State."

As a result of the Protocol of October 27, 1922, the new text was due to come into force on December 14, 1926, and it read as follows:-

> "No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State, unless it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting parties to the present Convention and must conform to the rules laid down by the said Convention and its annexes. Such special convention shall be communicated to the International Commission for Air Navigation, which will bring it to the knowledge of the other contracting States."

Spain, as we know, was one of the States which considered that this language was most uncompromising on the part of the draftsmen of the Convention and accordingly it is not surprising to read in Article 5 of the Ibero/American Convention 1926 a complete change of policy:-

> "The contracting States shall be entirely free either to authorize or to prohibit the flight over their territory of aircraft possessing the nationality of a non-contracting State."

Other notable changes in the text of the Ibero/American Convention, which bear less directly on our subject, were contained in Articles 7 and 34. Article 7, dealing with the question of nationality and registration of aircraft, is to the effect that, if anything contained in the Ibero/American Convention was found to be incompatible with municipal legislation, the State in question could incorporate the necessary reservation in an additional Protocol to the Convention.

Article 34, dealing with <u>representation</u> and <u>voting</u>, in the 1919 Convention, had originally provided that the U.S.A., France, Italy and Japan should have two representatives on the CINA, and that there should be one representative for Great Britain and one each for the British Dominions and for India, while each of the other States had only one. The text in regard to the <u>voting</u> had originally read as follows:-

> "Each of the five States first named (Great Britain, the British Dominions and India counting for this purpose as one State) shall have the least whole number of votes which, when multiplied by five, will give a product exceeding by at least one vote the total number of the votes of all the other contracting States. All the States other than the five first named shall each have one vote."

In other words, the voting power was unequal.

When this Article 34 of the 1919 Convention was amended at the 4th Meeting of CINA in London, on June 30, 1923, a great deal of discussion had taken place in regard to the voting strength. As a concession for equalizing the votes, the Great Powers had insisted on the inclusion of the following text which, in its turn, has been the cause of much indignation:-

> "Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modifications shall have been approved by three-fourths of the total possible votes which could be cast if all the States were represented; this majority must, moreover, include at least 3 of the 5 following States: the United States of America, the British Empire, France, Italy, Japan. Such modification shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States."

Spain criticized this language and consequently, in the Ibero/American Convention, Article 34 gives one vote to each State and, in addition, states:-

> "Any modification of the provisions of any one of the Annexes may be adopted by the Ibero/American Commission for Air Navigation when such modification shall have been approved by three-fourths of the absolute total of votes, that is to say, of the total number of votes which could be cast if all the States were represented."

The only other differences which we need note in passing are that no Commission similar to that of CINA was set up; and that, whereas in the 1919 Convention, disputes are to be submitted to the Permanent Court of International Justice, under the Ibero/American Convention, disputes are to be settled by arbitration (Article 37).

Article 43 of the 1926 Ibero/American Convention states that:-

> "The signature of the present Convention does not imply the cancellation of agreements concluded on the same subject in previous conventions by the Ibero/American contracting States."

In other words, States entering into obligations under the Ibero/American Convention, and being members of the CINA, did not need to withdraw from the earlier convention.

The 1926 Ibero/American Convention (CIANA - Convenio Ibero Americano de Navigation Aereo) was not particularly successful. Writing in 1932, Dr. Warner, in his article entitled "The International Convention for Air Navigation: and the Pan American Convention for Air Navigation: A Comparative and Critical Analysis", states:-

> "After having been signed by two European and nineteen Latin-American States it has been ratified by only five, is not being pressed for ratification anywhere else, and now appears as of purely academic and historical interest." 15)

The Pan-American Convention signed at Habana in 1928

The preparatory work of this last mentioned Convention with which we shall presently deal, was effected during an aviation display and a series of meetings on aeronautical questions held in Washington, in May 1927. The following year, the Pan-American Conference met in January (1928) and the Pan-American Convention for Air Navigation was completed and signed by twenty-five States in Habana on February 20, 1928.

It would appear that the European and American Continents were far enough apart at that time to justify the necessity for both North and South America to consider the working out of a Convention of their own but, to

quote again Dr. Warner:-

> "By a curious coincidence the preliminary draft, predicated on the assumption that aviation in the western and eastern hemispheres could be considered as entirely distinct and that separate international codes could be prepared for the two, was completed on the very day on which Charles A. Lindberg left Roosevelt Field on the flight that was the first to link the American and European continents by a passage of heavier-than-air craft without intermediate stops." 16)

C H A P T E R VI

Footnotes

1. La Paix de Versailles. Commission de l'Aéronautique. Conférence des Préliminaires de Paix, p.9.

2. John C. Cooper. The Right to Fly, p.76.

3. La Paix de Versailles, op.cit., p.12.

4. John C. Cooper, op.cit., p.72.

5. A. Roper. La Convention Aérienne internationale, pp.41-45.

6. Ibid.

7. John C. Cooper. Roman Law and the Maxim "Cujus est solum" in International Air Law. (Institute of International Air Law, McGill University.)

8. John C. Cooper. Article in Journal of Air Law & Commerce, 1951, Vol.18, pp.266-280.

9. Op.cit., p.211.

10. John C. Cooper. Article cited, Journal of Air Law & Commerce, 1951, Vol.18, pp.277-280.

11. a) La Paix de Versailles. Op.cit., p.274.
    b) John C. Cooper. U.S. Participation in Paris Convention, Journal of Air Law & Commerce, p.276, Vol.XIII, 1951.

12. La Paix de Versailles. Op.cit., p.45.

13. A. Roper. Op.cit., p.71.

14. Ibid., p.93.

15. Edward P. Warner. The International Convention for Air Navigation: and the Pan-American Convention for Air Navigation: A Comparative & Critical Analysis. (Reprint from Air Law Review, July, 1932, Vol.III, No.3, p.2.

16. Ibid., p.3.

C H A P T E R VII

THE PAN-AMERICAN CONVENTION ON COMMERCIAL AVIATION OF 1928.

Undoubtedly the most thorough review of the Pan-American Convention of 1928, which was signed at Habana as a result of the refusal of the United States and some South American Republics to become parties to the Paris Convention, is contained in Dr. Warner's Article: "The International Convention for Air Navigation: and the Pan-American Convention for Air Navigation: A Comparative and Critical Analysis."[1] Dr. Warner goes through the Paris articles from the beginning, article by article, taking the appropriate articles from the 1928 Convention, comparing and stating which text, in his opinion, is the better from the point of view of the development of international aviation.

Another excellent comparison between the Chicago Convention and the Paris and Habana Conventions is contained in an article by Mr. Stephen Latchford in a Department of State Bulletin.[2]

Along with the Paris and Madrid Conventions, the 1928 Convention was the subject of attention by Dr. Alfred Wegerdt, Counsellor of the Communications and Transport Ministry of the Reich. In - what Dr. Warner refers to as - Dr. Wegerdt's "classic memorandum,[3] the German Counsellor outlines on Page 12, the seventeen outstanding deviations between the Paris Convention and the Habana Convention.

We may add that this "classic memorandum", written in 1929, was the document which propelled the 16th and Extraordinary Meeting of Commission International de Navigation Aerienne (CINA) into life; in fact, so epoch-making was Dr. Wegerdt's review of the Paris Convention that this 16th Meeting of CINA used it as the main guide in its discussions. We shall shortly have to deal with this document and this meeting, following our remarks on the 1928 Habana Convention.

Main Deviations between Paris and Habana Conventions:

We need refer only to those deviations which bear directly on our subject. Deviation number one concerns the matter of "colonies". This term which figures in Article 1 of the Paris Convention, is missing in the Pan American text but, as Dr. Warner says: "The inclusion of the specific mention of the territory of colonies perhaps removes a point of possible doubt on the part of the layman, but the phrasing of the Pan American Convention could hardly be misunderstood by lawyers."[4)]

Deviation number two is that, in the Pan American Convention, it is expressly stated that the Convention applies only to private aircraft. If the Paris Convention does not say this, it, at least, implies it in Articles 30-33.

In passing, we must note what Dr. Warner says regarding the former dispute, i.e. freedom versus sovereignty of the airspace: "Obviously, nothing is left of the doctrine, once espoused by many international lawyers and especially by those of French nationality, of the freedom of the air. Experience during the war did away with all that. Every conference that has dealt with the subject since 1918 has started with an unquestioning

assumption of unqualified national sovereignty in air space, extending upward to an unlimited altitude. The classic dictum of Coke retains but little force in the realm of private ownership, but it applies in the fullest degree to the rights of the State, which are now universally recognized as extending literally 'usque ad coelum'. Incidentally it is noteworthy that, whatever the consensus of individual French students of legal theory may have been, no government has been firmer than that of France in official insistence upon the retention of unlimited sovereign rights in the air above national territory."[5)]

Both the Paris and the Habana Conventions, Articles 2 and 4 respectively, at least pay lip service to the term "right of innocent passage", although this term is not defined. Dr. Warner puts the situation in a nutshell when he says: "....both conventions make it clear that freedom of innocent passage is granted as a privilege, not at all conceded as a natural right. There is no question of any subjection of sovereignty to a servitude in the matter of innocent passage, such as was often discussed by the early students of the theory."[6)]

The phraseology of the Habana Convention is less elegant, more cumbersome, than that of the Paris Convention. This is probably due to the fact that the Paris Convention embodied a good deal of detail in the Annexes which form part of the Convention, thus relieving, in a desirable way, the text contained in the various articles. This, however, was one of the serious reasons why the United States was unable to ratify the 1919 Convention because actual power was delegated to the CINA whereby this Organization could amend the Annexes A/G on behalf of the Contracting States, on which the amended form was binding without further discussion or voting.

Not unnaturally, the United States Senate was unable to accept this form of amendment. Annex H was outwith the scope of CINA's amendment, being concerned with the uniformity of Customs' procedure and duties.

Deviation three in the Pan American Convention crystallizes itself into this, that the equal treatment of national and foreign aircraft, to which flight over prohibited areas is forbidden, applied only to aircraft engaged in international commercial aviation; in other words, to use Dr. Warner's phraseology: "The Pan-American Convention limits the guarantee of non-discrimination to aircraft, of whatever nationality, engaged in international commerce."[7] Briefly, the main difference was that, whereas the Paris Convention was generally extremely helpful to private flights of an international and non-commercial nature - in fact, in the long run, it was one of the few illustrations of the type of flight to which anything resembling "the right of innocent passage" was accorded - "Under Article 5 of the Pan-American Convention he (i.e. the private flier) (parenthesis ours) is deprived of every guarantee, and becomes a football of governmental whim. There is nothing to prevent the setting up of prohibited zones, applying only to non-commercial foreign aircraft, so extensive as to impose almost intolerable burdens on the tourist."[8]

On the other hand, however, the text of the Habana Convention (Article 5) does permit a State to allow certain of its own private aircraft to fly over prohibited areas for certain specific purposes, whereas Article 3 of the Paris Convention allowed for "no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory."

Deviation four is contained in the latter part of Article 5 (Habana) whereby "each contracting State may prescribe the airway to be followed by the aircraft of other contracting States in the neighbourhood of prohibited areas or of certain aerodromes to be defined. The prescribed route must be exactly defined and notified."[9)]

Comparison of Article 4 (Paris) with Article 5 (Habana) points up the usefulness of the Annexes contained in the Paris Convention. Dr. Warner finds the Paris text infinitely superior here; the Pan American text he finds vague. In fact, at the time, 1928, Article 6 of the Habana Convention must have meant very little indeed. Those details were apparently to have been worked out in 1932 at a Conference in Montevideo which was postponed on account of the prevailing economic conditions.

Comparing Article 5 (Paris) with Article 30 (Habana), Dr. Warner seems to suggest that the latter was written in that express way for the purpose of enabling the United States to enter into agreement with Panama, the situation in the Canal Zone being one which the United States intended to keep under control. However, Dr. Warner asks: "How far it is possible for a special convention to depart from the terms of a general one without 'impairing' or 'infringing' the rights of other states contracting under the general convention is a question about which there can be many legiti - mate differences of opinion."[10)] He finds commendable the sentiments contained in the phrase "these regulations shall in no case prevent the establishment and operation of practicable inter-American aerial lines and terminals." (Article 3 - Habana). "It establishes a sort of international eminent domain, with recognition that the general interest is of greater importance than the quest of some single nation for some petty national profit. It establishes the principle that no single State has the right to

set up barriers against the free flow of commerce and travel on a continental and inter-continental scale."[11] But, Dr. Warner cautiously adds: "How far it will accomplish its purpose, however, remains to be seen."

We will have occasion to add a few comments on Article 5 (Paris Convention) dealing with the 1929 CINA Conference.

So unwieldy is the text of the Habana Convention that, in order to compare Article 15 (Paris), Dr. Warner is obliged to take Articles 18, 19 and 21 of the Habana Convention. "To prescribe in detail, in an international convention, that the permit shall 'clearly express the distinctive marks which the aircraft is obliged to make visible whenever requested to do so' is ridiculous and redundant. In general, Article 18 seems to be about 50 per cent longer than it need be, even taking into account the absence of any technical annexes.

"Article 19 of the Pan-American Convention is 100 per cent redundant. It conveys an interesting suggestion but, the authority that it extends would be implicit in any case."[12]

We shall have comments to make on Article 15 (Paris Convention) when dealing with the 1929 CINA Meeting.

As stated, Mr. Stephen Latchford is another writer who has dealt with the Habana Convention of 1928; he deals with Articles 4, 12, 21 and 30 in an article entitled "Comparison of the Chicago Convention with the Paris and Habana Conventions."[13]

Mr. Latchford noted that by Article 4 (Habana Convention) a contracting State undertakes in time of peace "to accord freedom of innocent passage above its territory to the private aircraft of the other contracting States, provided the conditions laid down in the present convention are observed."[14]

He further remarks that the Habana Convention contains no right of transit, similar to that contained in the first paragraph of Article 15 (Paris), nor does the Habana Convention indicate that prior authorization was required by contracting States before another contracting State operated a regular and scheduled air transport line either into or across the territory of another contracting State.

However, in practice, Mr. Latchford remarks the convention was not interpreted in that way, that is as granting the right to conduct a regular or scheduled commercial air service into or across the territory of any contracting State without its prior authorization.[15)]

Article 12 (Habana) would seem to indicate that the only limitation on the right to engage in air commerce would be with respect to air worthiness regulations; and Article 21 (Habana) would seem to grant what is known as fifth freedom rights.

However, the point to note is that between 1928 and 1944, the United States concluded a number of bilateral agreements and, unlike the Habana Convention, says Mr. Latchford, "these bilateral agreements very specifically provided that the operation of regular or scheduled international air-transport services into the territory of either party would be subject to its prior authorization. Therefore the effect of the provision in the bilateral air-navigation arrangements was to accord rights similar to those granted in the Habana convention only with regard to non-scheduled operations."[16)]

Taken literally, Article 21 (Habana) reads well but, as pointed out by Mr. Latchford, "the restrictive interpretation of the Habana convention effectually prevented any enjoyment as a matter of right of any fifth-freedom privilege by foreign air lines under the terms of Article 21 of the Habana Convention."[17)]

Like Dr. Warner, Mr. Latchford finds the language in Article 30 (Habana), had it been implemented, impressive; he says, it "was another indication of the apparent purpose of the framers of the Habana convention to encourage in every way the establishment and operation of regular international air-line services."[18)]

Conclusion of Both Writers:

Both writers are obliged to come to the same conclusion: Mr. Latchford says: - "It will be seen that from the point of view of the right to conduct regular or scheduled air services the practical result of the application of the Paris and Habana conventions was the same with respect to each of them. Countries that were parties to the Paris convention of 1919 appear to have taken advantage of the ambiguous wording of the last paragraph of Article 15 before its amendment, in order to require prior authorization for the entry or transit of foreign scheduled aircraft, and in taking a similar position it is assumed that countries which became parties to the Habana convention relied upon the absence of any very specific language in the convention which would have prevented them from requiring their prior authorization for air lines of a contracting State to conduct services into or across their territory. However, in order to make its position absolutely clear in advance, the Chilean Government ratified the Habana Convention with a reservation to the effect that the operation of regular air-transport services into or over its territory would be subject to its prior consent. Apparently none of the other contracting States took exception to this reservation, probably because it was in line with the interpretation which they had given in practice to the terms of the convention."[19)]

Dr. Warner expressed the same thoughts in slightly different language: "In practice, however, it is doubtful if the difference between the two codes is really as great as appears on the surface, for a country that is hostile to a particular air line will have no difficulty in making the commercial life of that line quite impossible under any convention that may be drawn. The present provisions of the second part of Article 12 of the Pan-American Convention, for example, furnish a weapon powerful enough virtually to put any foreign air line out of business at will."[20] The offending text is that which is contained in these rather brutal words: "....each and every contracting State mentioned in the certificate of airworthiness of any foreign aircraft where inspection by a duly authorized commission of such State shows that the aircraft is not, at the time of inspection, reasonably airworthy in accordance with the normal requirements of the laws and regulations of such State concerning the public safety." (Article 12 - Habana).

The unfortunate and ambiguous term "right of innocent passage" seems to have insinuated its way, so far, through three conventions, without, in practice, meeting with any success or enthusiasm from the Contracting States once they started to put the Conventions to work.

C H A P T E R VII

Footnotes

1. Edward P. Warner. The International Convention for Air Navigation: and the Pan-American Convention for Air Naviga tion: A Comparative and Critical Analysis. (Air Law Review, July 1932, Vol. III, No.3.)
2. Stephen Latchford. Department of State Bulletin, Vol.XII, No.298, March 11, 1945, pp.411-420.
3. Edward P. Warner. Op.cit., p.33.
4. Ibid., p.6.
5. Ibid.
6. Ibid., p.7.
7. Ibid., p.8.
8. Ibid., p.9.
9. Ibid., p.8.
10. Ibid., p.16.
11. Ibid., p.17.
12. Ibid., p.44.
13. Stephen Latchford. Op.cit., pp.411-420.
14. Ibid., p.412.
15. Ibid.
16. Ibid. (See also Stephen Latchford "The Right of Innocent Passage". Department of State Bulletin, July 2, 1944. Vol. XI, No.262.)
17. Ibid.
18. Ibid.
19. Ibid.
20. Edward P. Warner. Op.cit., p.48

CHAPTER VIII

COMMISSION INTERNATIONALE DE NAVIGATION AERIENNE
16TH AND EXTRAORDINARY MEETING - PARIS 1929

Object of the Meeting

Reference has already been made to the 16th and Extraordinary Session of the CINA in 1929 and to Dr. Wegerdt's memorandum on the 1919 Convention. The object of the 1929 CINA Meeting was to review and, if necessary, amend the 1919 Paris Convention in order that ex-enemy and neutral States which, at that time, did not adhere to the Convention should be induced to become parties to it.

Dr. Warner refers to Dr. Wegerdt, who died in the early part of this year, as "the most distinguished German authority on the subject and counsellor to the Communications and Transport Ministry of the Reich".[1] This fact nevertheless, did not preclude Dr. Wegerdt from writing rather an embittered and one-sided memorandum. Commenting on Article 15 of the Paris Convention, Dr. Warner says: " ... but there is little doubt that his (i.e. the German delegate) -(parenthesis ours) vote was influenced by bitterness over the aerial clauses in the Treaty of Versailles and by German determination that Germany should remain in a position to exert as much pressure as possible upon the lately Allied Powers through embarrassing their development of commercial aeronautics to the limit until such time as the bonds thrown around German aerial activity should have been further relaxed."[2]

Dr. Wegerdt opened his memorandum by attacking the spirit in which the 1919 Convention had been made. He remarks: "Even before the end of

the War, negotiations took place among the Allied and Associated Powers for the drawing up of a Convention on civil air traffic."[3] And further, he says, "It is not surprising that the CINA having been suggested by the Allied and Associated Powers alone, whilst the War was still in progress, and having been drafted in close connection with the Treaty of Versailles, should have been governed by the spirit of that Treaty. This fact was manifested particularly clearly in the original wording of Article 5, which forbade any contracting party, except by special and temporary authorisation, to permit the flight above its territory of aircraft not possessing the nationality of a contracting state. Germany, who could not but regard this clause as being directed especially against her, was thus precluded from sharing on equal terms in the development of international aviation."[4]

It is worth noting that in 1918, in its Final Report, the British Civil Aerial Transport Committee to the Air Council states: "In conclusion we desire to point out that preliminary action has already been taken by several of our Allies for the purpose of preparing for civil aerial transport, in some cases by the institution of experimental postal services. It has been reported also that enemy countries have moved in this direction."[5] (underlining ours) It would appear, therefore, that the Allied States were not alone in preparing for the future role aerial transport was to play before the war came to an end. Had the War of 1914-1918 resulted in a German victory, it would have been surprising had we not had a German plan signed in Berlin, instead of the Allied convention signed in Paris.

It is interesting to note that Dr. Wegerdt attended the CINA Meeting in 1929 with certain other German delegates, whose names shortly afterwards became rather well known under the Nazi regime. So that when Dr. Wegerdt, in his denunciation of the way in which the German aviation industry had been

handicapped by the Treaty of Versailles stated: "For Germany's interest does not lie in the re-introduction of military aviation, but rather in the general prohibition, as far as possible, of armed air forces, so that the anxiety aroused by the almost unimaginable horrors of a future war in the air may be lifted from all nations. But, what connection has the extent of Germany's civil aviation with the prohibition of the maintenance of military air forces?"[6] That, precisely, was the sixty-four dollar question which had perturbed the Contracting States of the Paris Convention in 1919. Dr. Wegerdt's memorandum is a highly political document and one is left rather unmoved by these emotional appeals.

However, the fact remains that Dr. Wegerdt and his staff, as might have been expected, had studied not only the 1919 Convention, but also the Madrid and Habana Conventions of 1926 and 1928 respectively, minutely; they understood very well the details and the possibilities which the Conventions contained.

So impressed were the Contracting States with Dr. Wegerdt's memorandum that the CINA decided to make it the basis of their discussion and proceeded article by article as Dr. Wegerdt had criticized and commented on the 1919 Convention, to study the various points he raised. Consequently, as a result of this modus operandi, we have the regrettable result sometimes in the discussions of seeing this highly Teutonic memorandum split the Contracting States among themselves in the most unfortunate manner, to the point where, for example, we find M. Giannini of Italy desiring "to make an endeavour to reunite all the Delegations; at all events those of the States already parties to the Convention."[7]

The meeting was under the rather able chairmanship of Mr. Pierre-Etienne Fladin and a few comments only are necessary on the articles which bear on our subject.

Colonies

Dr. Wegerdt had raised the matter of "colonies" under Article 1 and the air space above their territories. Were Contracting States at liberty to fly through the air space above the territory of the colonies of Contracting States, he wanted to know. Dr. Wegerdt was satisfied with the explanation that the Contracting States had never experienced difficulty in this respect and did not propose to change the text. Similarly, under Article 1, Dr. Wegerdt raised the question of the status of the air space over straits. M. Giannini reminded the delegates present that, as there was as yet no unanimity on the question of the status of the straits themselves, it would be extremely difficult for the CINA Meeting to improvise a general rule for the air. And the matter, after a certain amount of discussion, was finally left there.

Dr. Wegerdt would have liked to see a statement corresponding to Article 2 of the Pan-American Convention inserted at the beginning of the Paris Convention, to the effect that the Convention only related to private aircraft. Inasmuch as the Conference felt that this was dealt with under Article 30 of the Paris Convention, the question did not long engage the attention of the meeting at this point. When the matter finally came to be dealt with under Article 30, it was decided to leave the 1919 text as it stood.

Article 3

Article 3 of the Paris Convention on the question of prohibited zones produced a good deal of discussion. Dr. Wegerdt's main preoccupation here was that there was "at present no clause giving the contracting States the right in exceptional circumstances temporarily to restrict or prohibit air traffic above their territory, wholly or in part, and with immediate effect. Such a stipulation seems necessary, as it is otherwise impossible to forbid traffic by foreign aircraft at times of internal unrest."(8)

At the time, the position in certain parts of India and in the Dutch East Indies was giving cause for consideration and the delegates speaking on behalf of these territories took a prominent part in the discussion. The net result was that, rather than introduce Pan-American Convention text into the 1919 Paris Convention, as had been suggested, Article 3 of the Paris Convention was amended as follows: "Each contracting state may, as an exceptional measure and in the interest of public safety, authorize flight over the said (i.e. prohibited) areas by its national aircraft." - (parenthesis ours) In addition, notification of these exceptional circumstances was to be made to the CINA.

Article 5 of the Paris Convention

Article 5 of the Paris Convention had given trouble right from the start. Dr. Wegerdt felt that, in its original text, it had been aimed directly at his country. Even in its then amended form in 1929, he did not have a good word to say for Article 5 and suggested its complete deletion.

Article 5 had originally read as follows:

> "ARTICLE 5. No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State".

This article had been amended by protocol on October 27, 1922, to read:

> "No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State, unless it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting parties to the present Convention and must conform to the rules laid down by the said Convention and its annexes. Such special convention shall be communicated to the International Commission for Air Navigation, which will bring it to the knowledge of the other contracting States."9)

This was the form in which it read when the 16th Extraordinary Meeting of CINA met in Paris.

The Polish delegate, however, M. Babinski, took up Dr. Wegerdt's remarks about the deletion of this article. It seemed to M. Babinski that, at the same time as Dr. Wegerdt was coming forward as the champion of a unified aerial public international law, he was trying to destroy one of the provisions most calculated to promote a generally acceptable law.

When the delegates had had their say, the Chairman rather cleverly broke the matter down into its component parts; first, nothing any of the delegates had said would lead the meeting to think that anyone wished to see the rights of Contracting States infringed by special conventions between Contracting States and non-Contracting States; the first part having been taken care of, the Chairman suggested that what was required was a text to take care of the second part, i.e. that agreements which Contracting States

might conclude with non-Contracting States would have due regard to the general provisions of the Convention.

Several states, as well as Germany, would have liked to see the deletion of Article 5, for example, the United States which had not ratified the 1919 Convention, and which were regulating their aerial agreements with Canada - which was a party to the 1919 Convention, - in the form of temporary authorizations. The Canadian delegate, who would also have liked to see the deletion of Article 5, admitted that these temporary authorizations were complicated and difficult. Also Spain, which was not a party to the 1919 Convention, but which had been the prime mover in the Ibero/American Convention of 1926 (by which Contracting States were at libery to conclude agreements with non-contracting States for the flight of aircraft of non-contracting states over their territory), would have liked to see Article 5 of the Paris Convention disappear. Such bilateral agreements, originally, under the Paris Convention had simply had no recognition whatsoever. Another source of worry, particularly for the American delegation in 1929, was the mention of Annexes under Article 5, a subject on which we have already touched.

It was suggested that the American delegation work out a proposed text for the consideration of the meeting which would enable the United States to become a party to the Paris Convention. When the subject was again raised at the afternoon session of 12th June, the American delegation produced the following: "The provisions of such conventions shall not be in contradiction with the principles contained in Articles 1 to 4 of the present Convention." 10)

M. Giannini took pains to explain that the General Principles of the 1919 Convention were not simply contained in the first four Articles but were to be found throughout the Convention and the result of a rather long discussion was that Article 5 was finally amended as follows and inserted as the last article of Chapter I.

> "Each contracting State is entitled to conclude special conventions with non-contracting States.
>
> "The stipulations of such special conventions shall not infringe the rights of the contracting Parties to the present Convention.
>
> "Such special conventions in so far as may be consistent with their objects shall not be contradictory to the general principles of the present Convention.
>
> "They shall be communicated to the International Commission for Air Navigation which will notify them to the other contracting States."[11])

It is perhaps worth noting the statement made by M. do Paco, Brazil, at a later session in relation to the discussion under Article 5 of the Paris Convention. It is certainly directly in line with our subject and at the same time illuminating; it concerns sovereignty in the air space - at least an American conception of it. At the second sitting on June 12th, 1929, M. do Paco is reported in the Minutes as follows:

> "It has been unanimously admitted that the principles relating to sovereignty of the air, freedom of passage and prohibited areas were general principles. In the matter of prohibited areas it should be stated that long and laborious debates had taken place at the meeting of the Pan-American Air Commission and that the text finally adopted contained specific provisions, the purport of which merited examination. (See Article 30 of the Pan-American Convention, Annex D hereto, page 8).

"On examining this text it was quite conceivable that the American Delegation was particularly desirous that the provisions in question, due to the initiative of the United States, should not be considered as inconsistent with the adhestion of that country to the Paris Convention. Now, according to the latter, the faculty of creating prohibited areas is granted to the States flown over in the sole interest of their own security; it is a prerogative of the exclusive sovereignty of each State.

"With the Pan-American Convention it is altogether different. The principle of sovereignty has undergone on the American continent certain transformations unknown in the European international law, and peculiar to the regional rules frequently denominated American international law; it is a matter in reality of certain typically American cases of what may be called international servitudes. Thus, at the time of the Pan-American Conference the Delegates of the United States declared very plainly that they intended to reserve the right to conclude special agreements in which might be prohibited not only flight over certain areas of their territory but also the United States did not conceal the fact that it had particularly in mind for the time being the protection of the Panama Canal, and for the future the protection of any canals that might be established in Central America.

"It was evident that if Article 30 of the Pan-American Convention just as it was worded could be inserted in the Paris Convention full satisfaction would be given to the United States in regard to this delicate question, for it was necessary to realize to how great a degree it was a matter of concern to the United States that it should be able to create prohibited areas in certain foreign countries even though those countries might only be very indirectly interested in such measures.

"Such a faculty was evidently in disagreement with the general principles of the Paris Convention, but this was due to the fact that there was to be found in American public law a different concept of sovereignty relationships between States."[12)]

Such a principle, as was contained under Article 30 of the Pan-American Convention, was never injected into the Paris 1919 Convention. The U.S.A. never ratified the Paris Convention of 1919.

Article 15 had originally read as follows:

> "ARTICLE 15. Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.
>
> "Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.
>
> "The establishment of international airways shall be subject to the consent of the States flown over."

The ambiguity of the third paragraph had been discussed both in the first meeting of the CINA in 1922, and again at its meeting in 1928, without the Commission clearly pronouncing on the substance of the text. The time had come when Article 15 had to be relieved of its ambiguity. It was impossible any longer to avoid a conclusive debate on the third paragraph of this lengthy contentious article.

The French text of the third paragraph, of which the above is the English translation, was as follows:

> "L'établissement des voies internationales de navigation aerienne est subordonné à l'assentiment des Etats survolés."

The question was, what did it mean?

It should be noted that this whole question had also been thoroughly discussed at the 8th Congrès du Comité Juridique International de l'Aviation at Madrid in 1928 and, at the afternoon session of June 1st,[13] the

definitions of "route", "voie aerienne" and "ligne aerienne" were reviewed. It is very evident that "voie aerienne" and "ligne aerienne" are two entirely different propositions. It might be noted that originally "voie aerienne" had quite wrongly been translated into the Italian version of the 1919 Convention as "linee aeree" which, in English, means "air line", and "voie aerienne" has nothing to do with commercial air lines.

Whereas, as was pointed out at the Madrid meeting, the words "route" and "voie" are almost interchangeable, "ligne aérienne" to the French lawyer meant the organization of regular commercial lines for which prior permission had to be sought from the overflown state.

On that occasion in Madrid, Major Beaumont took the view that, if permission had to be sought from every Government whose territory was overflown in order to establish a commercial air line, any liberty in the air would be dead.[14)]

In 1929 therefore Dr. Wegerdt considered that this text had to be made clear and further he was of the opinion "that the institution and operation of regular air lines from one contracting state into or over the territory of another contracting state, with or without intermediary landing, is subject to a special agreement between the two states in question".[15)] So the 1929 CINA Meeting proceeded to try and satisfy Dr. Wegerdt.

Sir Sefton Brancker's reply is probably known by heart to almost every aviation lawyer. In outlining the British position, in opposition to Dr. Wegerdt, the Minutes record Sir Sefton in the following manner:

> "Referring to the discussion which took place in the I.C.A.N. at Geneva in June 1928, he (i.e. Sir Sefton Brancker) stated that

> the English Foreign Office had at that time consulted their jurists on the interpretation to be given to Article 15 of the Convention of 1919. These jurists considered that, in application of Article 15, each contracting State was entitled to prevent foreign air navigation companies which operated lines crossing its territory, from installing the aerodromes that they might consider requisite for their needs. It follows from this interpretation that each country has the right to fix, within its territory, the international airways, but that when such airways, marked out by organized aerodromes, have been established, the aircraft of any other contracting States are entitled to use them."[16] (Parenthesis ours).

It should be pointed out that the Chairman corroborated this British interpretation later in the discussion.[17] New and unambiguous text was called for.

In other words, Great Britain was in favour of the greatest liberty of flight, but, of course, she was prepared to abide by the decision of the majority.

The British had had unfortunate experiences with both Belgium and Persia who were, like the United Kingdom, parties to the 1919 Convention. In the first case, in 1928, Belgium was not prepared to allow Imperial Airways to develop a route to the Belgian Congo without prior permission from Belgium to land there; and in the second case, in 1929, Persia had withheld, for two years, transit rights over her territory from Imperial Airways for the airline which it wished to develop to India. Persia eventually had only agreed to a temporary authorization and had, in this way, shown the United Kingdom how restrictive certain countries intended to make Article 15. Both the American and Dutch delegates expressed themselves in favour of the British viewpoint. It was decided therefore by the Chairman that a vote should be taken first on the "restrictive", as opposed to "the

greatest possible freedom", interpretation of Article 15. And the result was that, with the already mentioned three countries - Britain, U.S.A. and the Netherlands - only Sweden was willing to associate herself. This meant a vote of 27 to 4 in favour of the "restrictive" interpretation. This is what Dr. Warner rather neatly refers to as "the inevitable consequence of the recognition of full sovereignty in the air space."[18)]

Sir Sefton Brancker made a further suggestion, namely, that, to the text now proposed:

> "Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."

there should be added the proviso that "such authorization may be refused only on reasonable grounds."

Accordingly, a further vote was taken and the British delegate's suggestion was defeated by 19 to 11 votes.[19)] The text was therefore amended as above without Sir Sefton Brancker's proviso. This was a depressing day for the proponents of the "right of innocent passage" theory.

In connection with the revision of the second paragraph of Article 15, it should be noted that, at the request of the German delegate, the following text was proposed for insertion: "No pilotless aeroplane of a contracting state may fly over the territory of another contracting state or land therein, unless it has received a special authorization."

As finally amended by the meeting, Article 15 read as follows:

"Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

"No aircraft of a contracting State capable of being flown without a pilot shall, except by special authorization, fly without a pilot over the territory of another contracting State.

"Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.

"Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."[20]

The text of the second paragraph is worth noting because the principle re-appears in the Chicago Convention of 1944 with which we shall presently have to deal.

Article 34

The original text of Article 34 provided Dr. Wegerdt with an opportunity to offer severe criticism. He found it entirely out of keeping "with the much vaunted democratic principles of the former Allied and Associated Powers."[21] Originally, the five great Allied powers had had both extra representation, as well as additional voting power, i.e. the U.S.A., France, Italy, and Japan had two representatives, and Great Britain, the British Dominions and India, one each, while all the other contracting States had only one representative each. These paragraphs had been amended

at the 4th Meeting of the CINA in London on December 14th, 1926. Paragraph 5 was changed to read:

> "Each State represented on the Commission (Great Britain, the British Dominions and India counting for this purpose as one State) shall have one vote."

and paragraph 6 was deleted. Even so, that meant that the U.S.A. (which had not ratified the Convention), France, Italy and Japan could still send two representatives, while Great Britain, each of the British Dominions and India could send one, and the other Contracting States could still only send one representative. This still gave a sense of deep irritation both to the Spanish, as well as the German delegates. Accordingly, after the 1929 meeting, Article 34 (paragraphs 1 - 4) was amended to read as follows:

> "There shall be instituted, under the name of the International Commission for Air Navigation, a permanent Commission placed under the direction of the League of Nations.
>
> "Each contracting State may have not more than two representatives on the Commission.
>
> "Each State represented on the Commission (Great Britain, the British Dominions and India counting for this purpose as one State) shall have one vote."

The consitutional position of Great Britain, however, had changed and this Article 34, was further amended on December 11th, 1929, to read as follows:

> "Each State represented on the Commission shall have one vote."

Articles 41 and 42

In addition, Dr. Wegerdt found Articles 41 and 42 insupportable because should Germany wish to adhere to the Convention, she was to be treated differently to former neutral States.

These three articles accordingly came up for review and, as a result of much discussion, certain changes were suggested and approved.

Under Article 34, the U.S. delegation were perturbed on account of CINA's relationship with the League of Nations and in order to overcome this apprehension, it was suggested that CINA endeavour to associate itself more closely with the Pan-American Union. But, as the Secretary General of the CINA pointed out in his useful memorandum, the League of Nations had already outlined its relationship with CINA and other more or less similar international bureaux.

The question of the United Kingdom and her voting capacity, as a result of the Imperial Conference of 1926, which had given autonomy to various parts of the Empire, was introduced by the British delegate, Sir Sefton Brancker, who was now asking that Great Britain, Northern Ireland, and the Crown Colonies have one vote, and that Canada, Australia, New Zealand, South Africa, the Irish Free State and India each have separate representation and votes. However, as this matter had not figured on the Agenda, it was considered impossible on account of administrative rules to take a vote at the meeting and this question had to be postponed until a later meeting by which time the Governments had had time to consider the proposition and the amendment finally took place. As the 1929 Meeting had reduced the representation of certain States, from two to one, it was accordingly only fair that their annual contribution to the budget should be reduced too; finally, after much discussion, this matter was left to CINA itself to work out.

The decision regarding the representation and voting capacity of States resolved itself into the following amendment:

> "Each contracting state may have not more than two representatives on the Commission."
>
> "Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three fourths of the total votes of the States represented at the Session and two thirds of the total possible votes which could be cast if all the States were represented."
>
> "The expenses of the International Commission for Air Navigation shall be borne by the contracting States in the proportion fixed by the said Commission."

In order to reduce the causes of German irritation, Article 41 was amended to read: "Any state shall be permitted to adhere to the present Convention." And Article 42 was deleted.

As has been stated, the object in holding this 16th and Extraordinary Meeting of the CINA was to induce certain States, at that time non-adherents of the 1919 Convention, to become parties to it. The principal States in question were undoubtedly Germany, U.S.A. and Spain. Spain eventually did adhere to the 1919 Convention; the other two States mentioned did not.

C H A P T E R VIII

Footnotes

1. Edward P. Warner. The International Convention for Air Navigation and the Pan-American Convention for Air Navigation: A Comparative & Critical Analysis. (Reprint from Air Law Review, July 1932, Vol.III, No.3, p.6.)

2. Ibid., p.48.

3. International Commission for Air Navigation, 16th Session, Paris (Extraordinary Session), Sittings of June 10, 11, 12, 13, 14 and 15, 1929. Annex B: Germany and the Paris Convention Relating to the Regulation of Air Navigation, dated October 13, 1919 (C.I.N.A.) by Dr. Alfred Wegerdt, Ministerialrat in the Reich Ministry of Communication, Par. 1 of Ch.1.

4. Ibid., Annex B., p.28.

5. British Command Paper 9281, 1918. H.M. Stat. Office.

6. International Commission for Air Navigation, 16th Session, Paris. Op.cit., Annex B, p.28.

7. Ibid., Minutes: p.31.

8. Ibid., Annex B, p.17(d).

9. A. Roper. La Convention aérienne internationale, pp.89-90 and 354-357.

10. International Commission for Air Navigation, 16th Session, Paris. Op.cit., Minutes, p.86.

11. A. Roper, op.cit., pp.354-357.

12. International Commission for Air Navigation, 16th Session, Paris. Op.cit., Minutes: p.88.

13. Comité Juridique International de l'Aviation, 8ème Congrès, Madrid, 1928, p.224.

14. Ibid., p.225.

15. International Commission for Air Navigation, 16th Session, Paris. Op.cit., Annex B, Par.21.

Chapter VIII contd.

Footnotes

16. Ibid., Minutes: p.45.

17. Ibid., p.58.

18. Edward P. Warner, op.cit., p.88.

19. International Commission for Air Navigation, 16th Session, Paris. Op.cit., Minutes: p.64.

20. A. Roper, op.cit., pp.354-357.

21. International Commission for Air Navigation, 16th Session, Paris. Op.cit., Annex B,p.2.

CHAPTER IX

INTERNATIONAL CIVIL AVIATION CONFERENCE NOVEMBER 1ST - DECEMBER 7TH, 1944

Background

As early as March 11th, 1943, when the British Coalition Wartime Government was in office, Sir Archibald Sinclair, on behalf of H.M. Government, expressed the following view on post-war civil aviation in the House of Commons: "Some form of international collaboration will be essential if the air is to be developed in the interests of mankind as a whole, trade served, international understanding fostered and some measure of international security gained."

It is generally understood that about that time the General Council of British Shipping, in trying to assess what the post-war requirements would be, were finding it difficult to arrive at a satisfactory estimate. British merchantmen had gone down like ninepins during the German U-boat menace and would require to be replaced. How many would be required, asked the Council? What proportion of their former trade, passengers and cargo, was likely to be carried in aircraft, rather than in ships? If the post-war civil aviation picture was clearer, then perhaps the General Council of British Shipping might be able to form their plans.

It will be recalled that Lord Beaverbrook re-entered the Government, and took office as Lord Privy Seal, on September 24th, 1943, and that he was entrusted particularly with civil aviation matters. Indeed, the Imperial Conference which met to determine air policy in October of 1943 was presided by himself. There were differences of opinion, naturally, but it was the general feeling at that Conference that these differences could be resolved

in the interests of inter-Commonwealth relations. The Canadian delegates, even at that meeting, had their first draft of a plan ready and placed it on the Conference table.

In addition, during 1943, high powered American officials were in contact with their counterparts in various countries, discussing American theories on the post-war civil aviation situation, as well as listening to many foreign viewpoints, and in April 1944, Mr. Adolf Berle, Assistant Secretary of State in charge of U.S. Aviation, was in London, exchanging views with Lord Beaverbrook.

According to Mr. Berle: "The British Government, in August 1944, requested that the United States call a conference on civil aviation, adding that if it were inconvenient for the United States to do so, the British Government would be glad to convoke one in London. The Canadian Government presented a similar request." 1)

Accordingly, on September 11th, 1944, the American Government sent out an invitation to the Governments of 55 countries asking them to send representatives to the Conference which the American Government proposed should be held in Chicago on November 1st of that year. This invitation was accepted by all the countries but 54 States only were represented at the Conference, the U.S.S.R. at the last moment failing to have itself represented. For an interesting anecdote in connection with this subject, readers are referred to Mr. Osterhout's article written after the Conference. 2)

The Conference: United States Position

Let us consider how our subject "The Right of Innocent Passage" fared during the Chicago Conference which began on November 1st, 1944, in the old Stevens Hotel.

Mr. Berle, Chairman of the Conference, outlined the U.S. position at the Second Plenary Session. [3] The U.S. required very few restrictions. They had the planes, and the routes they wished to develop had been worked out; they were looking for "takers", i.e. States with which they could make reciprocal agreements. They had planes on loan for those wishing to co-operate. If a route pattern were widely enough adopted, then it could perhaps be incorporated into the Convention. Yes, they would agree to have an international bureau but of an advisory nature; no economic or commercial control was needed. Laissez-faire was still to be the order of the day internationally for the country whose domestic civil aviation was so beneficially regulated by the Civil Aeronautics Board. "Public convenience and necessity" is, in fact, the motto of the C.A.B.

Mr. Berle, in his opening remarks, expressed himself in a colourful racy fashion; he even invoked the help of no less a jurist than Hugo Grotius. There may have been a little uneasiness on the part of some delegates when the Chairman sought the aid of the eminent 17th Century Dutch jurist. Grotius was par excellence a sophisticated thinker, charged throughout portions of his life with important political briefs. Students have sometimes been known to experience difficulty in reconciling statements he made at the end of his stupendous career with those he made at the beginning. Grotius was apparently susceptible of change. Accorded the experience of the last two world wars, who knows what Grotius might have propounded?

Most delegations arrived well prepared for the Conference, in particular those of the U.S.A., Canada, the U.K., Australia and New Zealand. The American and the Canadian Governments had thought the matter through

completely and tabled Draft Conventions, albeit of a very different kind. The U.K. and the Australian/New Zealand Governments tabled very positive statements.

The Draft Convention, tabled by the U.S., contained the fewest novelties of any. The U.S. had studied the Paris Convention of 1919, brought it up to date, eliminating the vexed question of the amendment of the Annexes, and, as stated by Mr. Berle, they proposed the setting up of an international body, "an International Aviation Assembly", to advise technically and assist administratively, but with practically no economic directive powers. In other words, this was an international body with which the American Constitution would harmonize, and the contents of the document were well adapted to what the American post-war civil aviation picture was likely to be.

Article 5 of the U.S. Draft Convention gave transit rights to aircraft of other contracting States engaged in scheduled airline services but reserved the right to withhold or revoke permission where substantial ownership or control of the aircraft "is vested in nations of a State not a party to the Convention."

Subject to compliance with local laws, Article 6 of the U.S. Draft gave transit rights to the aircraft of other contracting States not engaged in the carriage of passengers, cargo or mail for hire, without the necessity of obtaining prior permission.

Article 7 of the U.S. Draft gave transit privileges to the aircraft of other contracting States engaged in the carriage of passengers, cargo and mail for hire on other than scheduled services without prior permission. Further, such aircraft were entitled to discharge and take on

passengers, cargo and mail, subject to Article 21 (defining cabotage), and also subject to the right of the State flown over being able to impose "such regulations, conditions or prohibitions as it may consider necessary."

Article 8(a) of the U.S. Draft provided that, so far as the aircraft of contracting States engaged on scheduled services were concerned, they could take on and discharge passengers, cargo and mail in the territory of other contracting States only under a special agreement with the States concerned, and copies of such special agreements would be filed with the Executive Council of the International Aviation Assembly. Paragraph (b) of Article 8 stated that such agreements would be subject to all the applicable provisions of the Convention and paragraph (c) took care of cabotage.

Article 21 of the U.S. Draft dealt with the Assembly which it was proposed to set up. There was provision for an Executive Council, which was to be composed of 15 members, the U.S.A., the U.S.S.R. and the British Commonwealth of Nations being accorded two members each, and one member each to Brazil, China and France. It was suggested that the remaining six members should represent their regions. (This sort of unequal representation, it will be remembered, had caused trouble in the 1920's as a result of the contents of the 1919 Convention Relating to the Regulation of Aerial Navigation.)

The Canadian Position

The Canadian Draft Convention, on the other hand, was full of revolutionary ideas. New, fresh breezes had been blowing through the Canadian offices in Ottawa interested in such matters. The Canadian Draft Convention contained provision for what they referred to as the first Four

Freedoms (freedom of air transit over the airways of all the member States; the right to land at airports for refuelling, repairs and in emergency; the right to carry passengers, mails and cargo from the home state to any other member state; and the right to bring back passengers, mails and cargo to the home state from any other member state). These four Freedoms were to be granted by contracting States in the Convention, and the Fifth Freedom - rights to handle traffic originating in a foreign state and destined for a foreign state - would be secured, not under the international Convention, but as a result of special agreements between the governments concerned. An International Air Authority, working along the lines of the CAB in the United States, would be set up and would consist of an Assembly and a Board of Directors which would have power to set up Regional Councils vested with extensive responsibilities. They would have power to issue certificates to all operators within their regions, as well as to allocate routes, fix frequencies and outlets, deal with capacities and to fix and adjust rates.

This proposal had been presented to the Canadian Parliament on March 17th, 1944, by the Hon. C.D. Howe, Minister of Munitions and Supply, when he explained the necessity for such a Convention, and it had been thoroughly approved. So he spoke on behalf of Canada with confidence.

The United Kingdom Proposal

The U.K. Proposal was not drawn up in Draft Convention form but the plan closely resembled the general lines of the Canadian plan. As now presented at Chicago, the U.K. proposed that the first Four Freedoms were to be included in the Convention and the Fifth Freedom was to be a matter

for negotiation between the appropriate States, as was the recommendation of the Canadian Draft. International air routes were to be defined and they would be subject to international regulations. The U.K. proposed, as international machinery to regulate these matters, an International Air Authority, with an Operational Executive and Regional Panels, together with Sub-commissions to deal with technical matters. Furthermore, this Authority would be placed in proper relationship to the World Security Organization.

This was all embodied in a White Paper, Command 6561, and had been presented by the Secretary of State for Air to Parliament in October, 1944, just prior to the opening of the Chicago Conference.

Australian/New Zealand Position

On January 21st, 1944, it may be remembered, Australia and New Zealand had signed their "Co-operative Agreement", part of which had embraced post-war international air transport and, under the title of "International Ownership and Operation of Air Services on Prescribed International Trunk Routes", the delegates from these two countries put forward their scheme to the Conference as a resolution. Having stated the objectives, which were in line with the Atlantic Charter, they suggested that the Conference:

> "AGREE that these objectives can best be achieved by the establishment of an international air transport authority which would be responsible for the operation of air services on prescribed international trunk routes and which would own the aircraft and ancillary equipment employed on these routes; it being understood that each nation would retain the right to conduct all air transport services within its own national jurisdiction, including its own contiguous territories subject only to agreed international requirements regarding landing and transit rights, safety facilities, etc., to which end it is desirable that this Committee of the Conference should consider the organization and machinery necessary for the implementation of this resolution." 4)

In fact, so inspired had the British Labour Party been with the combined statement originally made by Australia and New Zealand - in which countries there were labour governments at the time - that, as part of its propaganda, the British Labour Party brought out its well-known pamphlet "Wings for Peace". Undoubtedly this idea of an International Air Authority with "teeth" was popular in one form or another throughout the Commonwealth countries. The British Labour Party had spoken of a "World Air Authority".

The U.S.A./U.K. Clash

Volumes have been devoted to the discussions at Chicago and to the inability of the U.S.A. and the U.K. to agree on the question of the economic control of international air transport, a subject which was brought into prominence on account of the form in which the U.K., Canada, Australia and New Zealand had put forward their proposals; control of air transport could not be dissociated from the international air authority which these countries wished to see regulate that control. When the Australian/New Zealand statement was voted down in Committee I, these countries ranged themselves on the side of the Canadian plan.

Once the Conference started to grapple with this question of air transport, it became painfully clear that it would be difficult to reconcile the view-points of the U.S.A. and the U.K., the latter leading a certain section of the European school. No better article on this subject has surely been written that that by Mr. Harold Stannard of the London "Times". 5) In it, the author traces the whole historical background leading up to Chicago, as did Mr. George P. Baker in a lecture at McGill University in Montreal on

April 18th, 1947. [6] The clash was bound to come. The war had increased the tempo of change; changes which, in more normal conditions, would have been resolved gradually, were there in a wartime accumulation demanding immediate solution. Civil aviation in Europe and civil aviation in the U.S.A. had developed along entirely different paths; the geographical situation on either side of the Atlantic was so different, the whole philosophy behind air transport was different, and the U.S.A. had the planes.

During ten palpitating days, the work of the main conference appears to have been almost suspended, while the Canadian delegates sat between the U.S. delegates on the one hand and the U.K. delegates on the other, trying to reduce the conflicting view-points to manageable form. "It was agreed that the choice of routes should be left to the operators. The question of rates proved more difficult, but it was eventually agreed that they too should be left to the operators, meeting in conference after the fashion of the Atlantic shipping lines." [7] But the crux of the situation then was the question of frequencies and capacities. The U.S. delegates stated that, providing no undue harm was done to local services, en route, they wanted carte blanche on long distance routes. Routes to South America under which only 15% of the original passengers were usually left in the plane at the end of the journey, were dragged in by way of illustration. Once aircraft set out on long distance flights, the seats had to be filled up as passengers from the originating point got out, said the American delegate. How else, asked the U.S.A., could the lines be made to pay without subsidies from the Governments? This was a philosophy with which, particularly, the U.K. could not agree. The U.K. considered the U.S.A. demands unfair and the U.S.A. considered the U.K. proposals unprofitable.

It looked at one time as though the famous Canadian "escalator" clause might provide the necessary compromise, i.e. that, provided 65% of the capacity was filled up, the airline would be entitled to increase its services. One of the last attempts at compromise suggested that long distance runs should be broken down into segments and that the "escalator" clause might be applied thereto.

Undoubtedly a Convention, in the hands of such experts as were present, could have been worked out on the basis of the first Four Freedoms but unfortunately the U.S. were unwilling to dissociate Freedoms 3, 4 and 5, with the result that there was an "impasse" and separate documents, containing the Five Freedoms, became necessary.

Howard Osterhout writes: "It was a battle basically, between the English modified cartel idealogy and the American principle of free enterprise, in which the Americans, aided mostly by a number of the smaller Latin American countries, finally won out. There were, naturally, disappointments and heartburns, and the conference left much to be desired, when viewed in the light of a reasonable appraisal of its present de facto global results." 8) It would have been surprising if the Latin Americans had opposed their U.S. colleagues and, in any case, the Latin Americans, at the time, had few aviation interests and were desirous of attracting as much trade as possible.

Technically, the Conference was a great success. Committee II did the expert job required of them. Committee III got rather involved on the question of routes, and Committee IV was entrusted with the setting of the provisional framework, and permanent framework, of an international body to deal with the unfinished business. Committee I took the "raps".

After dealing with the five possible general alternatives, four of which were seriously considered at the Conference, Dr. Warner, in an article written after the Conference, says: "Specifically, the insuperable obstacle proved to be the determination of the type and degree of limitation, if any, that should apply to the 'capacity' of the carriers of each nation over each of its routes." 9) And a little further on, he says: "The Chicago Conference, then failing to agree either to dispense with regulatory control altogether, or to put regulatory powers in the hands of an international authority, turned to the last of the five courses mentioned above: regulation by self-operating formula." 10)

And the sequel to that? Mr. William A.M. Burden also supplies an answer: "Once it became clear that there was an honest but irreconcilable difference of opinion on the subject of control, the Conference abandoned the idea of frequency control by formula or by an international commission with regulatory power. Taking the opposite tack, it proceeded to establish as much freedom of air transport operation as the varying points of view of the nations present permitted." 11)

International Air Services Transit Agreement and Transport Agreement

During the discussion on December 2nd, 1944, in a Joint Sub-committee of Committees I, II and III, 12) the subjects of "The International Air Services Transit Agreement" and "The International Air Transport Agreement" were introduced into the Conference. "The transit agreement, colloquially known as the 'two-freedom agreement', was formally proposed by the senior Dutch representative - a very appropriate sponsor, in view of the unremitting struggle of the Netherlands for greater freedom in the air for more than 20 years past — and was vigorously supported by the French delegates.

It was introduced after a dramatic plea made by Mayor LaGuardia and following a statement by Lord Swinton that the United Kingdom would view a transit agreement with sympathy. The agreement was thereupon made a conference document, open to separate signature then or later. By February 20th it had been signed by 33 nations." [13] The International Air Services Transit Agreement was later ratified by 29 States. In other words, 29 States showed themselves willing to allow the planes of other contracting States to fly over their territory and to touch down for non-traffic purposes without prior notice. (29 States were offering the privilege of "Innocent Passage".) In addition, the International Air Transport Agreement, embracing all five Freedoms, and sponsored heartily by the U.S.A., was opened for signature as well. With how much success? Eventually this agreement was ratified by 13 States, including the U.S.A. and some of the Latin American States, together with Sweden and the Netherlands. It was obvious therefore that many bilateral agreements would be necessary to begin post-war air transport operations. The United States gave notice of withdrawal from this agreement on July 25, 1946; it became effective on July 26, 1947. The document nowadays, to all intents and purposes, is of purely historical interest.)

Areas of Disagreement

An impassioned appeal to the Conference by Mayor LaGuardia, delegate of the U.S.A., as well as appeals by other delegates, was made in an endeavour to include the Five Freedoms within the main Convention; if not the Five, said Mayor LaGuardia, then let us have the first Four; and if not the first Four, then at least the transit rights, i.e. the first Two. [14]

However, it became apparent during the Conference that delegations which had come to the Conference, e.g. the Canadian, the British, the Australian and New Zealand, prepared to incorporate the Freedoms within a Convention, regulated by an International Air Authority with real power, were not prepared to sign away such rights in a Convention making provision only for an international advisory body, as desired by the American delegation.

Many people were disappointed with the results of the Conference; nevertheless the Chicago Convention did provide the first real international framework within which international air navigation and air transportation problems could be studied and discussed, the Paris and Habana Conventions having been regional in effect. The absence of the U.S.S.R. delegates was regretted, especially as "the Soviet Union controls about one-sixth of the land area of the world." 15) The U.S.S.R. were, and probably still are, more interested in air transport from the domestic and military, rather than from the international and civilian, point of view; they probably considered that they stood to gain very little by participation in the 1944 Conference, even though the U.S. Draft Convention was apparently willing to allow them two seats on the Council of the proposed international air authority. It is difficult to conceive of them according even rights of transit over their territory.

In the "Right to Fly", the author remarks, apropos of the U.K. position at Chicago: "The British position was certainly inconsistent with that taken at Paris in both 1919 and 1929 when freedom of flight was urged by the British delegates. The 1944 position seemed also be be inconsistent with the traditional British view that merchant shipping should be allowed

to trade at will in any friendly port in the world." [16] Other authors have made similar comments. [17]

In 1944, the British position could not afford to be "traditional". The cream of British securities in the United States had been sold in the early days of the war to pay for badly needed material and Britain in 1944 had neither the civilian planes nor the dollars with which to purchase them. (The question of the American loan to Britain comes into the picture later.) Moreover, the U.K. had quite succinctly, in referring to the regime of Paris and Habana, stated in Paragraph 4 of her proposal: "Neither of these Conventions made provision for international regulations in the economic, as opposed to the technical, field. In the result, the growth of air transport was conditioned by political rather than economic considerations and its development as an orderly system of world communications was impeded. Summed up, the major evils of the pre-war period were, first, that any country on an international air route could hold operators of other countries to ransom even if those operators only wished to fly over or refuel in its territory; secondly, that there was no means of controlling the heavy subsidization of airlines which all too often were maintained at great cost for reasons mainly of national prestige or as a war potential; and thirdly, that the bargaining for transit and commercial rights introduced extraneous considerations and gave rise to international jealousies and mistrust." [18]

It is difficult to see how there could have been any other outcome to the Chicago Conference than the one which in fact did result. It is even surprising that there was as much agreement as that recorded. "Chicago" was a clash of constitutions and philosophies.

It seems to have been the desire of certain delegations that the international authority, which it was proposed to set up, should act along the lines of the American Civil Aeronautics Board but the C.A.B., operating domestically and internationally, is two entirely different propositions.

The Civil Aeronautics Board

In an article on the structure of the C.A.B., written in 1951 for the International Air Transport Association [19], Mr. D.W. Rentzell, then Chairman of the C.A.B., suggests that, before trying to understand the functions of the Board, which is well known but probably little understood abroad, it is first and foremost necessary to understand how the U.S. Government works as a whole. How right he is! Air law students who have postponed study of this question can afford to procrastinate no longer. The American Constitution is there, and since not only the Americans, but every one of us, have to live with it, then with a stout heart we must try to understand it.

Mr. Rentzell says: "It seems to me that there are four basic elements in the American system of government which must be considered in connection with the regulatory role played by the Board. The first of these is the principle, established by the United States Consitution, of separation of the legislative, judicial and executive powers of the government into three distinct branches. It is true that separation of functions exists in many other countries, but thisseparation is not, I believe, of the same rigidity as under the United States Consitution."

Also, says Mr. Rentzell, one of the factors which it is necessary to bear in mind, "is not a law, it is rather a philosophy and as such it is deeply ingrained in the people. It finds its expression perhaps in the statement that 'the best government is the least government.' Various provisions in the American Constitution are designed to limit the powers of the government over the people. This philosophy was a reaction to what was considered the despotism of royalty in the latter part of the 18th Century, at a time when the rights of the individual were predominant. The framers of the U.S. Consitution were more afraid of despotism in government than any of other one thing. Thus they provided for a system of checks and balances in the tri-partite form of government, wrote specific safeguards respecting individual liberties into the Consitution and in general attempted to provide a political system which would have the least power consistent with the orderly development and government of the nation."

(Whether there is always an adequate number of "Philadelphia" lawyers on hand to elucidate this system of entanglements and precautions, Mr. Rentzell does not say.)

In addition to which, there is the Fifth Amendment to the Constitution, i.e. the "due process" clause, and the American fear of monopoly to be kept in mind.

Thereafter, Mr. Rentzell deals with the organization and functions of the Board, its judicial responsibilities, its executive functions, as well as the C.A.B. in relation to international agreements, outlining the importance of the foreign air carrier permits and the scope of its rate fixing functions.

A recent article by Mr. Calkins on "The Role of the Civil Aeronautics Board in the Grant of Operating Rights in Foreign Air Carriage" [20] underlines all the points made in the previous article and enters into even more detail. He discusses sections of the American Civil Aeronautics Act, 1938, particularly 402, 801, 802 and 1102, together with Section 6(b) of the Air Commerce Act, to show the relationship of the C.A.B. to the President of the U.S.A., to Congress and the various branches of the U.S. Government.

In order to show the dual roles which the C.A.B. plays domestically and internationally, Mr. Calkins quotes a passage from the Court's opinion in the case of C & S Air Lines v. Waterman Corporation (Supreme Court, 333 U.S. 103). The Court, having pointed out that, whereas the C.A.B., in exercising its functions in regard to interstate commerce, was free of executive control - although naturally its orders were always subject to judicial review - the role of the C.A.B. in international commerce was quite the reverse.

The Court said further: "But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country, or any carrier seeks the sponsorship of this Government to engage in overseas or foreign air transportation, Congress has completely inverted the usual administrative process. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication even can take place. Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amend-

ment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions and limitations of the order. (49 U.S.C. par.601.) Thus, Presidential control is not limited to a negative but is a positive and detailed control over the Board's decision, unparalleled in the history of American administrative bodies."[21])

In connection with American fear of monopoly, Mr. Berle, President of the 1944 Conference, states: "Americans rarely realize how thoroughly competition has been discarded across the Atlantic, and how increasingly European progressive thinking looks toward socializing, rather than destroying, the cartels."[22])

The Final Act of the Conference contained:- The Interim Agreement on International Civil Aviation; the Convention on International Civil Aviation; the International Air Services Transit Agreement; the International Air Transport Agreement; and the Drafts of the Technical Annexes.

The Chicago Convention

The Convention itself covers a great deal of familiar ground. After a notable Preamble, with which it might be useful for contracting States to refresh their minds more often, "Sovereignty" in the air space is declared for the subjacent State in Article 1.

Articles 5 and 6 are most directly connected with our subject. How much right of innocent passage do they accord? This is certainly the place in the Convention for granting rights, for expressing generosity if that is the intention. Do these Articles in fact do so?

Articles 5 and 6 respectively read as follows:-

"Article 5 : Right of non-scheduled flight

"Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

"Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo or mail subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

"Article 6 : Scheduled air services

"No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." 23)

To begin with, the titles of the Articles should be noted. On first reading, it would appear that, by Article 5, non-scheduled international air services generally have been well treated, while, on the contrary, by Article 6, the scheduled international air services have been denied operation over or into the territory of a contracting State, except by permission of the appropriate State, and that the terms of that permission will regulate all movement of international scheduled air services over or into that State. There is no dubiety about the meaning of Article 6; so far as scheduled international air services are concerned, the air space over the sujacent contracting State is neatly labelled "keep out except by special permission". This is language which Vattel, the 18th Century Swiss jurist, would have understood and approved.

But Article 5 is worthy of close inspection. Article 5 contains in the second paragraph what the writer has most appropriately heard described as weazle words.

In the first place, the Convention does not define the term "scheduled international air services" and for that reason the Council of ICAO has given consideration to this subject, with a view to assisting contracting States determine their responsibilities under the Convention. The Second Assembly of ICAO (Resolution A2-18) requested the Council to adopt the following definition:-

"A scheduled international air service is a series of flights that possesses all the following characteristics:

(a) it passes through the air-space over the territory of more than one State;

(b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;

(c) it is operated, so as to serve traffic between the same two or more points, either

(i) according to a published time-table, or

(ii) with flights so regular or frequent that they constitute a recognizably systematic series."

Further, for the Fourth Session of the Assembly, the Council analyzed very fully Article 5 which is embodied in ICAO Document 7278-C/841 : 10/5/52. This was discussed and approved. It is an excellent and detailed analysis.

Having arrived at a definition of "scheduled international air service", by the process of elimination, we arrive at approximately what is meant by "non-scheduled international air services", and it is with the latter category that Article 5 attempts to deal.

As mentioned, Article 5 has two paragraphs, the first of which appears to extend great generosity of treatment. Paragraph 1 states that, subject to the observance of the terms of the Convention, each contracting State agrees that all aircraft not engaged in scheduled international air services (i.e. non-scheduled international air services) have the right to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission. But paragraph 2 makes a distinction in the term "on other than scheduled international air services" by breaking it down into two component parts, i.e. those aircraft engaged in commercial flight and those not so engaged.

And how does the second paragraph of Article 5 treat aircraft engaged on "other than scheduled international air services" whose mission is commercial flight? It states that: "Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable." The words "to impose such regulations, conditions, or limitations as it may consider desirable" are the weazle words.

Briefly, if it so desires, a contracting State may even go to the length of imposing on the non-scheduled international air services which engage in commercial flight the same "regulations, conditions or limitations" as it does on the aircraft dealt with under Article 6, i.e. scheduled international air services.

A clear illustration of what can be done is the instruction laid down in Section 402 of the American Aeronautics Act of 1938. Mr. Calkins, in dealing with this very question, says: "One of the restrictions in United States law is that if the operation be in foreign air transportation, the foreign aircraft will not be permitted to come into the United States unless a permit is obtained pursuant to Section 402 of the Civil Aeronautics Act. This is a very substantial restriction in view of the fact that many non-scheduled operations are in common carriage. With respect to commercial operations by foreign aircraft not in common carriage, the Congress has made provision for granting the rights by delegating authority to the Board (i.e. the Civil Aeronautics Board) in Section 6(b) of the Air Commerce Act." 24)

We have been discussing, under Article 5, the regulations, conditions or limitations which contracting States may impose. It is understood that, in fact, all contracting States do not go to the limits they could in this respect and it is encouraging to note that, under Article 11 of the Convention, the terms accorded to aircraft of all contracting States should be dispensed without distinction as to nationality. Accordingly, the writer takes the view that these "regulations, conditions, or limitations" which a contracting State may impose are economic in character and not political.

So what, in fact, does Article 5 really do? While Article 6 precludes scheduled international air services even from transit into or transit non-stop across the territory of a contracting State, or from making stops for non-traffic purposes without permission, Article 5 allows the <u>transit</u> flights of non-scheduled international air services, and <u>all</u> flights of non-scheduled international air services <u>not</u> carrying passengers, cargo or mail for remuneration, complete freedom to fly over the territory of all contracting States and this freedom

is not qualified by the possibility of "regulations, conditions or limitations." Here, therefore, is the real difference between being a scheduled international air service and being a non-scheduled international air service for it decides whether an operator can freely fly over, and make non-traffic stops in all the contracting States of ICAO or whether the operator must first obtain permission beforehand. It is accordingly not too difficult to understand why operators of international charter services are interested in the exact meaning of the term "non-scheduled international air services" in the Chicago Convention.

The ICAO analysis of Article 5 of the Convention is most illuminating. It relates the various terms contained in the Article to the appropriate Articles throughout the Convention. In other words, provided contracting States comply with the conditions contained under Articles 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 20, 68 and 96, then the position is as outlined in the above paragraphs.

On page 509 of the article already referred to by Mr. Stannard, he says: "It has sometimes been alleged by the American press that the United States stood for the freedom of the air. Nobody at Chicago stood for the freedom of the air. It was agreed that each national was sovereign over its own air, and that its sovereignty covered cabotage, i.e., the right to reserve to its own national services traffic between points on its own territory. If Great Britain and the United States had mutually conceded the five freedoms, not a single British plane would have been entitled to fly between New York and Chicago and not a single American plane between London and Belfast except as a consequence of special agreement between the two Governements." 25)

The position at Chicago has been stressed because unless it is thoroughly understood the importance of the sequel, namely the Bermuda Conference in 1946, cannot be fully grasped.

C H A P T E R IX

Footnotes

1. Adolphe A. Berle, Jr. Freedoms of the Air - Blueprint for World Civil Aviation. U.S. Department of State Publication 2348, Conference Series 70, p.7. (Article is reprint from March 1945 issue of Harper's Magazine.)

2. Howard Osterhout. A Review of the Recent Chicago International Air Conference. Virginia Law Review, Vol.31, No.2, p.376.

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4. Ibid., Vol. 1, p.540.

5. Harold Stannard. Civil Aviation: A Historical Survey. 21 International Affairs, October 1945, pp.497-511.

6. George P. Baker. The Bermuda Plan as a Basis for a Multilateral Agreement. (Lecture given at McGill University, April 18, 1947.)

7. Harold Stannard. Op.cit.

8. Howard Osterhout. Op.cit., p.377.

9. Edward P. Warner. The Chicago Air Conference, Accomplishments and Unfinished Business. Blueprint for World Civil Aviation, U.S. Department of State Publication 2348, Conf. Series 70, p.28. (Article is reprint from April 1945 issue of Foreign Affairs.)

10. Ibid., p.30.

11. William A.M. Burden. Opening the Sky, American Proposals at Chicago. Blueprint for World Civil Aviation, etc., p.21. (Article is reprint from March 1945 issue of Atlantic Monthly.)

12. Proceedings of the International Civil Aviation Conference, Chicago. Nov. 1-Dec. 7, 1944, Vol.1, p.510.

13. Edward P. Warner. Op.cit., p.24.

14. Proceedings of the International Civil Aviation Conference, Nov. 1-Dec. 7, 1944, Vol.1, p.464.

Chapter IX contd.

Footnotes

15. John C. Cooper. The Right to Fly (New York, 1947). P.197.

16. Ibid., p.172.

17. William A.M. Burden. Op.cit., p.19.

18. Proceedings of the International Civil Aviation Conference, Chicago, Nov. 1-Dec. 7, 1944, Vol. 1, p.567.

19. Delos Wilson Rentzel. U.S. Regulation and the CAB. International Air Transport Association Bulletin, No. 13, June 1951, p.21.

20. G. Nathan Calkins, Jr. The Role of the Civil Aeronautics Board in the Grant of Operating Rights in Foreign Air Carriage. The Journal of Air Law and Commerce, Vol. 22, Summer 1955, No.3, p.253.

21. Ibid., p.266.

22. Adolphe A. Berle, Jr. Op.cit., p.5.

23. Proceedings of the International Civil Aviation Conference, Chicago, Nov. 1-Dec. 7, 1944, Vol. 1, p.148.

24. G. Nathan Calkins, Jr. Op.cit., pp.255-6.

25. Harold Stannard, op.cit., p.509.

C H A P T E R X

THE BERMUDA PLAN

Background

No survey of action at government level in relation to air services would be complete without consideration of what is known as the Bermuda Plan. This is the bilateral Agreement signed between the United Kingdom and the United States at Bermuda on February 11th, 1946. Without fail, all writers on the subject of the Bermuda Agreement refer to this Agreement as a compromise. Following, as it did, fourteen months after the clash between two of the main participants at Chicago, the signing of this Agreement between these two States makes an outstanding event in aviation history.

How far it was necessary to compromise on either side is suggested by one of the British aviation journals at the time:- "The British viewpoint has travelled a long way in the direction of the American Fifth Freedom since the days of Chicago. When the Conference at Bermuda was announced, a prominent American air transport official said it was difficult to see how the result could be anything but stalemate, because of the consolidated divergence of views. Well, the miracle has happened, the divergence of views has been reconciled, although on the face of it the respective distances travelled by the British and American points of view, in order to attain this reconciliation, would seem to be in direct proportion to the respective distances travelled by the delegates from London to Bermuda and from

Washington to Bermuda in order to attend the conference."[1] Further, the article states: "The worst feature of the agreement, and we suppose it is inevitable, is that the operation of air services is now inextricably bound up with all the other elements of power politics, including oil concessions, loan agreements, spheres of interest and several disturbing elements of peace."[2]

This would seem to have been a somewhat pessimistic assessment. The great point is that the Bermuda Plan - admittedly rather elastic - has worked.

Delivering a lecture entitled: "The Bermuda Plan as the Basis for a Multilateral Agreement" to McGill University on April 18th, 1947, Dr. George P. Baker, Chairman of the American Delegation at Bermuda, dealt, among other things, with the question of the American loan to the United Kingdom mentioned above because he considered that it was undoubtedly an important part of the background to the Bermuda discussions. From Dr. Baker's remarks on what he calls "the over-all relationships", it is apparent that, in both countries, top level officials were rather dissatisfied that those entrusted with aviation matters at Chicago had been unable to make a better showing between the two countries and were insisting that aviation relationships between the two countries be considerably patched up.

In connection with this loan to Britain, it will be recalled that the British financial position at the end of the war was critical. In fact, it plaintly had been since 1941. In his "Cases in Court", Sir Patrick Hastings recalls the position at that time, 1941, when he

deals with the famous Courtauld Arbitration. "In order to provide the dollars with which to pay for their requirements in the United States, the Government had compulsorily acquired all the marketable American securities in private hands, and there were no more left. England was practically penniless."[3)]

Accordingly, in those desperate circumstances in 1941, in order to facilitate the passage of the American Lend-Lease Bill, together with its necessary adjunct, the Seven Billion Dollar Appropriation Bill, through the Senate, and at the same time, placate the Isolationists, further marketable securities simply had to be found. It was contended by the United States that there still existed business concerns in America owned by British shareholders and, in the forefront of these, was the American Viscose Company, practically the whole of whose shares were held by the British firm of Courtauld's. This firm, therefore, was asked to sell their American interests to the British Government who intended to use the assets in order to effect the loan. Undoubtedly, anything British and marketable still left in the United States was used up in the same way at that time. The German Armies and Air Forces being firmly established on the other side of the Channel, it would appear that the British Government had no option but to act as they did.

By 1946 therefore, the British financial condition was acute and Professor Baker says: "The fact is that there were those in the United States and in Great Britain who felt that it was to our mutual advantage, and I stress the word 'mutual', that such a loan be arranged and there were those in the United States and Great Britain who felt

that such a loan was inimical to the interests of each country. Those who held sway in the administrations in both countries strongly favoured the working out of such a loan and it was, of course, absolutely essential in having that policy approved by Congress that major areas of disagreement in the economic relationships of the two countries be worked out."[44] It is necessary to understand this background in order to understand the Bermuda Agreement.

During 1945, general trade discussions had been taking place in Washington between representatives of the two nations but the United Kingdom had refused to include the subject of telecommunications and aviation. However, they did agree, in the Fall of 1945, to discuss separately at a Conference in Bermuda the subject of telecommunications and, so successful had this conference been, that it was further agreed to discuss the question of air transport on January 12th, 1946.

This then was the climate in which the Bermuda Air Services Conferences opened.

British position as stated at Chicago

We have just dealt with the Chicago Conference where we saw that the British position had been directly opposed to that of the United States.

At Chicago, the British plan had called for a convention which would embrace the first Four Freedoms, the Fifth being a matter for special negotiation between the appropriate States. An "International

Air Authority, with Regional Panels" was to be set up which would regulate the questions of frequencies, capacities, routes and rates. There was nothing revolutionary about this idea for the United Kingdom or, for that matter, for the majority of the European countries, because in any case most of the airlines were either wholly or partially owned and controlled by the Governments in question. Owing to the chaotic condition of aviation in Europe before the War, most of the airlines had been heavily subsidized, a condition, it was hoped, which could be improved. The question of rates, it was thought, should be a matter of strict control and the United Kingdom considered that one of the best methods of doing this was by working out agreed rates between the airlines of the different countries through the mechanism of an international trade association (e.g. the International Air Transport Association).

So far as frequency and capacity were concerned, traffic was to be carefully apportioned between the lines operating over any route and traffic not coming out of, or destined for, a country of which the airline was a national was to be prohibited. Formulae to control both frequency and capacity between the lines on any given route should be sought.

Briefly, that was the position of the United Kingdom at Chicago.

United States' position as stated at Chicago

With regard to the United States' position, we saw that they considered it most desirable that the development of air transport all

over the world should be entirely free either from rate or traffic control. They considered, in fact, that competition between private airlines would indirectly control both rates and traffic in the public interest. Aggressive airline management was to experiment constructively with the amount of service required and offered. In addition, the international body that the United States was proposeing to set up was to be "an International Air Assembly", to advise technically and assist administratively but with no directive powers.

So far as the United States' rate structure was concerned, the position was unique. Their Civil Aeronautics Board had power to fix rates domestically but had no such powers in relation to rates for international carriage undertaken by the United States carriers.

It would seem therefore that there could not possibly be two more directly opposed plans for the development of air transport.

The Bermuda Conference

The Conference which began on January 12th in Bermuda terminated successfully a month later on February 11th, 1946. The Plan as agreed between the two countries, the United Kingdom and the United States, is embodied in: 1) the Final Act; 2) the Bilateral Agreement between the Governments of the U.K. and U.S.A., plus the Annex; and 3) Heads of Agreements relating to the civil use of leased air bases.

Privileges

Both countries had, of course, signed the International Air Services Transit Agreement and the outline of the Bermuda Plan is

succinctly summarized by Professor Cooper as follows:- "Each nation grants to the air carriers of the other nation transit privileges (freedoms one and two) to operate through the airspace of the other and to land for non-traffic purposes on routes anywhere in the world subject to the provisions of the Chicago Transit Agreement, including the right of the nation flown over to designate the transit route to be followed within its territory and the airports to be used. Each nation also grants to the other commercial privileges of entry and departure to discharge and pick up traffic (freedoms three, four and five); but these commercial privileges are valid, in contrast to the transit privileges, only at airports named in the agreement and on routes generally indicated, and in accord with certain general traffic principles and limitations. Rates to be charged between points in the territory of the two nations are to be subject to approval of the governments within their respective powers. As to frequencies and capacities, each nation, or its designated air carrier, is free at the outset to determine for itself the traffic offered to the public on the designated commercial routes, but the operations must be related to traffic demands and conducted according to the agreed principles affecting frequency and capacity."5)

Routes

The specific routes which were worked out separately were the result of two weeks' effort on the part of Members of the CAB (part of the American delegation) and Members of the British delegation and the routes as agreed are reproduced in pages 1217/1221 of "Shawcross and Beaumont on Air Law", 2nd Edition. The points at which Fifth Freedom

privileges were agreed were clearly marked.

Rates

The regulation of the rate structure is contained in Chapter II of the Annex and it is most adequately dealt with by Dr. Gazdik in Bulletin No. 9 of the International Air Transport Association.[6)]

Rates to be charged for carriage between two points in the territory of either country were to be the subject of the approval of the Contracting Parties within their respective constitutional powers and obligations.

In addition, the CAB which has only power to fix rates for U.S. air carriers domestically, announced its intention to approve, for a period of one year, the rates agreed on by U.S. air carriers, flying internationally, through the mechanism of the International Air Transport Association. Dr. Gazdik brings out very clearly in his paper why the CAB should have made any such announcement. The writer notes that the only substantial power that the Board has over the rates charged by U.S. carriers, operating internationally, arises as a result of U.S. air carriers either entering into rate agreements with each other or with foreign air carriers. By Section 414 of the Civil Aeronautics Act, unless U.S. air carriers operating internationally, and entering into such agreements as above mentioned, procure the approval of the CAB on the rate structure they propose to use, they may find themselves caught up by the U.S. anti-trust laws.

Any new rate proposed, or any dissatisfaction with an already agreed rate, on either side requires 30 days' notice to the aeronautic authorities of the other Contracting Party.

In addition, Chapter II of the Annex contains the procedure which will be applied in the event of alteration in the rate structure.

As action was being taken to obtain from Congress power for the CAB to fix and control rates internationally as they have domestically, two periods are envisaged.

First, in the event of that power being conferred on the CAB, each Contracting Party will exercise its authority to prevent any new rate which is considered unfair or uneconomic. Either dissatisfied party shall notify the other within the first 15 days of the 30 days' notice period. If agreement is reached, then each Contracting Party will exercise its statutory powers in order to give effect to such agreement. If no agreement is reached, then the matter may be referred to PICAO, or later ICAO.

Prior to the time when the CAB shall have these powers conferred on it, and as yet no such powers have been conferred on the Board, if one party is dissatisfied, then it shall notify the other party within 15 days of the 30 days' notice. If agreement is reached, then each Contracting Party will use its best efforts to implement the agreement. In the event of disagreement, and on the expiry of the 30 days' notice, then the Contracting Party raising the objection to the rate may take such steps as it may consider necessary to prevent the

inauguration or continuation of the service in question at the rate complained of. If no agreement is reached with a reasonable time, then the matter may be referred to PICAO.

Frequency and capacity

The regulation of both Frequency and Capacity are contained in the Final Act in Paragraphs 3) to 7) and, as has been stated with regard to these subjects, "each nation, or its designated air carrier, is free at the outset to determine for itself the traffic offered to the public on the designated commercial routes, but the operations must be related to traffic demands and conducted according to the agreed principles affecting frequency and capacity."

Apparent points of difference in interpretation

In dealing with the Agreement in 1946, Professor Cooper raised certain points in his article, on the interpretation of which the American and British Governments seemed to be at variance.[7] The writer quoted Lord Winster, Minister of Civil Aviation, who, on February 12th, 1946, recognized in the House of Lords that pre-determination on the basis of estimated traffic potentials was beset with practical difficulties and stated that the principles on which the Agreement was based was the maintenance of close relationship between capacity operated on the various routes of mutual interest and the traffic offering. The Minister considered that this could be made most practically effective by an ex post facto review and stated that machinery for close and con-

tinuing co-operation between the two governments was to be established with that end in view.[8]

When the Debate on the Bermuda Agreement came up in the House of Lords some days later, on February 28th, the former Minister for Civil Aviation, Lord Swinton, who had been Chairman of the British delegation at Chicago, took Lord Winster up on this very point. The Agreement, as understood by Lord Swinton, represented a half and half participation in capacity and frequency between the two countries. Replying, Lord Winster called special attention to Paragraphs 4) and 5) of the Final Act and to the tribunal which would be set up to adjudicate on difficulties.[9] All of which certainly would seem to indicate that the British indeed considered that eventually, when both countries had the planes going, there would be an equal share of traffic.

This, however, was not the interpretation given to the Agreement by President Truman when he made a statement on February 26th, 1948, in which he stated that the Bermuda Agreement "gives to the airline operators the great opportunity of using their initiative and enterprise in developing air transportation over great areas of the world's surface."

When Dr. Baker delivered his lecture in Montreal in April 1947, he stated that he wished specially to refer to some of the questions raised by Professor Cooper in his 1946 article, particularly those arising out of paragraphs 4) and 5) of the Final Act which read as follows:

> 3) That the air transport facilities available to the travelling public should bear a close relationship to the requirements of the public for such transport.

4) That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex.

It will be recalled that Dr. Baker was Chairman of the American delegation at Bermuda and this is how he dealt with the questions raised earlier by Professor Cooper: "Some interpreters of these phrases, subsequent to the signing of the Agreement, have felt that they involved equal allocation of frequencies or capacity. The purpose of the two statements mentioned was, as they were drawn up at Bermuda, to protect against 'unfair trade practices' and I remember clearly in the discussions which took place while the wording of these paragraphs was being formed that it was well understood by all concerned that the freedom of the management of an airline company to put on or take off schedules would be the same as the present freedom of either of two competing bus lines between New York and Washington to experiment with their schedules without restriction." Dr. Baker said further: "Appeals to PICAO after services had been inaugurated would be to determine whether certain practices actually in use were limiting fair and equal opportunity of one carrier to give competitive service adequate to enable the public free choise to use that line if it so desired. There was certainly no intention that free opportunity to compete on a fair basis and the right to do half the business were, as concepts, even distantly related." Dr. Baker underlines these remarks by saying: "It was away from just such an equal apportionment philosophy that the British had moved in order to reach a compromise agreement and it was in return for British movement away from such a position that the United States was willing

to give what amounted to full rate control. I can categorically say, as Chairman of the United States Delegation, that there would have been no Bermuda Agreement signed by the United States if that Agreement were understood to approve or condone the inter-governmental allocation of capacity."[10]

The Compromise

The Bermuda Plan was in fact a compromise. Rates, the control of which the British delegation had stressed at Chicago, were now to be as strictly controlled as possible in view of American law and, in addition, Congress was to be asked by the Administration to confer power on the CAB to control rates adopted by the U.S. international carriers.

With regard to Fifth Freedom traffic, the freedom which was agreed upon was again a compromise. The complete and absolute freedom required by the American delegation at Chicago was replaced by a system which enabled carriers to fill up their planes on through journeys. To quote partially paragraph 6) of the Final Act, capacity was to be related: "a) to traffic requirements between the country of origin and the countries of destination; b) to the requirements of through airline operation, and c) to the traffic requirements of the area through which the airline passess after taking account of local and regional services."[11]

And last, but by no means least, both countries agreed to refer their difficulties to PICAO.

Bermuda Agreement : Model for Bilaterals

At an epoque when nothing seemed less popular than a multilateral agreement on commercial rights in international civil air transport, the Bermuda Plan served a most useful purpose.

Within a few weeks of Bermuda, the United States signed an almost similar agreement with France and later that year entered into agreements with seven other countries, all modelled on the lines of the Bermuda Plan. During 1947 and later, the United States continued to enter into similar agreements with many other parties.

The other contracting Party at Bermuda, the United Kingdom, within several weeks of Bermuda also signed a similar agreement with France and, like the United States, continued in her treaty making to use the Bermuda Plan as a model.

In Dr. Gazdik's article, already referred to, a very clear analysis is made of the existing bilateral agreements at that time. As this last writer says: "Most of the bilateral agreements provide that, if a general multilateral convention comes into force, the agreements shall be so amended as to conform with its provisions."[12)]

Let us now examine the attempts which have been made through the International Civil Aviation Organization to reach agreement on such a multilateral Agreement.

CHAPTER X

Footnotes

1. Aeroplane, February 22, 1946. p.235.

2. Ibid.

3. Sir Patrick Hastings. Cases in Court - The Courtauld Arbitration, pp.195-207.

4. George B. Baker. The Bermuda Plan as the Basis for a Multilateral Agreement. (Lecture delivered at McGill University, April 18, 1947, Multilithed copy, p.6.)

5. John C. Cooper. The Bermuda Plan : World Pattern for Air Transport. Foreign Affairs, 1946, Vol.25, p.59.

6. Julian G. Gazdik. International Rate Making. International Air Transport Association Bulletin, No.9, July 1949, p.61.

7. Opcit., Chapter IV "Frequency and Capacity".

8. Ibid.

9. Ibid.

10. Op.cit., p.10.

11. Shawcross and Beamont on Air Law. 2nd Ed. edited by K.M. Beaumont and Patrick E.M. Browne, Appendix 8, (8001), p.1210.

12. Op.cit., p.75.

C H A P T E R XI

PROVISIONAL INTERNATIONAL CIVIL AVIATION ORGANIZATION (PICAO) - INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

The amount of "unfinished business" to which PICAO (the Organization set up by the Interim Agreement signed by the Contracting States at Chicago) fell heir was considerable. Professor Baker, discussing the important consequences of the Chicago Convention, mentions first "the setting up of the Provisional International Civil Aviation Organization which thereupon got off to an energetic and productive start."[1)]

There was no more urgent problem than that of attempting to draw up the draft of a multilateral agreement on commercial rights which would be acceptable to the Contracting States to the Convention, and the Air Transport Committee proceeded forthwith to work on this aim and object with the idea of presenting a draft agreement to the First Assembly of PICAO which was to meet in May and June of 1946 in Montreal.

First Assembly of PICAO, 1946:

At the First Plenary Session of this Aseembly, the Hon. C.D. Howe, on behalf of the Government of Canada, admirably and succintly outlined the position with regard to international civil aviation as he then saw it. Canada can certainly be proud of her chief representative and the sentiments which he expressed. Among his remarks, the Canadian Minister said in referring to Chicago: "Long and strenuous efforts were made to reach common ground, which efforts were in the end unavailing; but they were reflected in the express direction, by the nations there assembled, to the Provisional

Organization that special and immediate attention should be given to the preparation and recommendation to this Assembly of additions to the convention to cover the matters which had been temporarily postponed at the Chicago Conference. It was the unanimous opinion of the fifty-three nations, there represented, that this should be done and the desirability of a complete multilateral agreement was adopted as fundamental for proper international air transport."

Mr. Howe added: "Either we believe the utterances of lofty motives that have echoed through our meetings in the past, or we do not. If we do, let us take steps to implement them, with wise provisions that will do a service to civil aviation, and let not each of us calculate the extent of our cooperation with a view only to selfish national interests.

"A multilateral system means that certain freedoms are granted by all adhering States to all others. The opponents of multilateralism may call a limited granting of rights 'restriction', while ignoring the fact that national borders now constitute 'restrictions' which cannot permanently be broken down except by tedious and constantly recurring bilateral negotiation. Some of these bilateral arrangements are liberal in removing a large measure of the nationalistic restrictions that now exist and are being hailed as the answer to our problem.

"I cannot agree with those, if any, who say that enough of these bilateral arrangements will make a multilateral agreement unnecessary and will go further toward 'Freedom' than any multilateral agreement. Bilateral agreements develop from pair to pair of States - are limited in duration, are subject to change in terms and differ in terms between one and another. Such agreements may be discriminatory in effect, if not in word;

favours not always given without regard for political consideration and the hope of influencing commercial rights apart from aeronautical matters. The results may exclude large sections of the world's civil aviation from important territories because of such 'parcelling out' of favours. Such causes of international friction are sources of potential wars."[2)]

As a basis for discussion, the Air Transport Committee had prepared the draft of a multilateral agreement on commercial rights in international civil air transport. (PICAO Doc. 1577-AT/16 and reproduced in PICAO Doc. 2089-EC/57 at Page xiii.) This draft formed the basis for discussion in Commission 3 of the First Assembly of PICAO.

It may be appropriate to quote Resolutions IV and V passed at this Assembly meeting of PICAO. They are as follows:

"RESOLUTION IV: Desirability of a Multilateral Agreement

RESOLVED: That the First Interim Assembly affirms the opinion of its members that a multilateral agreement on commercial rights in international civil air transport constitutes the only solution compatible with the character of the International Civil Aviation Organization created at Chicago."

"RESOLUTION V: Development of a Multilateral Agreement

WHEREAS: The Assembly of the Provisional International Civil Aviation Organization desires to establish a program for the development of a multilateral agreement which will be acceptable to Member States as rapidly as is possible; and

WHEREAS: The Assembly is in accord that a final multilateral agreement on commercial rights should not be completed or presented for signature by the Member States present at this Assembly:

NOW THEREFORE BE IT RESOLVED:

That Commission Number 3 of this Assembly be directed to proceed immediately with a frank and open discussion of all of the problems involved in developing a multi-

lateral agreement, so that the national points of view of the Member States may be made known with respect to all matters which may be the subject of such an agreement, and that in such discussion the Commission take into account the documentation now or hereafter before the Commission for its consideration; and further

RESOLVED: That the discussion resulting therefrom be incorporated into a document which would serve as a basis of further study by the Air Transport Committee of the Council for the purpose of developing a multilateral agreement, which will take into account such national points of view, for submission to the next annual Assembly; and further

RESOLVED: That each Member States be required, during the coming year, to furnish to the Council for reference to the Air Transport Committee any additional views which it may have on the subject and the Council is requested to circulate such views and information as to progress to Member States during such period, to the end that the Air Transport Committee may present to the next annual Assembly a document which will embody the experience of nations with operations under existing or future agreements, that may be of benefit in developing a multilateral agreement." (PICAO Doc. 2089-EC/57).

The outstanding features of this Draft Agreement which Commission Number 3 used were briefly those: After three lines of preamble, Chapter I conferred on Contracting States (Members of ICAO to be) the Five Freedoms and Articles 2/9 stated the conditions under which the Freedoms would be exercised. Chapter II dealt with Permissive Rate Differentials, Chapter III with the thorny subject of Capacity, Chapter IV with Rates, Chapter V with Unfair Practices, Chapter VI with Other Arrangements, Chapter VII with the International Civil Air Transport Board which it was proposed to set up, and Articles 26/36 outlined the scope of this body which was to have wide powers of direction to interpret and administer the Agreement. These powers extended even to that of recommending to the Assembly the suspension of recalcitrant Contracting States. Subject to the approval of the future ICAO Council, the Board might make its own rules of procedures, was to be able to hold hearings, administer oaths, examine witnesses and receive evidence

at any place designated by the Board. Chapters VIII and IX dealt respectively with Definitions and Ratifications, etc. (PICAO Doc. 2089-EC/57). A bold plan.

Interesting discussions under all of these headings are to be found in this interesting PICAO document, one of the outstanding novelties being that on Page 34 in which the United States would have liked the Agreement and the Convention to be separate: "We therefore think that this multilateral agreement ought to stand on its own feet", said the United States Delegate. Most other delegates thought otherwise.

Resolution XXVIII, passed at the First PICAO Assembly at the end of the discussions by Commission Number 3, is worth quoting:

"RESOLUTION XXVIII: Development of a Multilateral Agreement

RESOLVED: That the document resulting from the discussion of the problems involved in the development of a multilateral agreement on commercial rights in international civil air transport .... shall consist of:

a) A verbatim transcript of the oral discussion on the subject which took place in Commission Number 3 during the current session of the Assembly, as edited and placed in the hands of the Secretariat on or before June 30th, 1946;

b) Written comments of Member States submitted at the meetings of said Commission;

c) Such further written comments as may be received from Member States on or before June 30th, 1946." (PICAO Doc. 2089-EC/57).

The written comments which had been supplied by Member States are contained in pp. 133/178 of that document.

In other words, the Air Transport Board was told to take the original draft agreement, together with all relevant material thereon, and work

out a fresh Draft Agreement for the consideration of the next Assembly Meeting. Member States were given until June 30th, 1946, to supply any additional comments they might care to make on this subject.

Draft Multilateral Agreement Prepared By Air Transport Committee:

Thereafter the Air Transport Committee proceeded to carry out their instructions and, at its meeting on September 11th, 1946, appointed a Sub-committee which held 23 meetings between October 24th, 1946 and January 22nd, 1947, and which lost no time in the preparation of a new draft of a multilateral agreement for the consideration of the Air Transport Committee.

On January 26th, 1947, the Sub-committee submitted to the Air Transport Committee its report, together with the text of a new Draft Agreement, subsequently embodied in Part 1 of ICAO Doc. 2761-AT/163, dated February 10th, 1947. While the report was submitted on behalf of the Sub-committee, the majority concurring in its views, statements by the Members of the Sub-committee who found themselves at variance with the views of the majority were submitted simultaneously. These views are contained in Parts II and III of ICAO Doc. 2761-AT/163.

These documents were considered by the Air Transport Committee on January 31st, 1947, in the course of which several amendments were made.

Finally, on February 26th, 1947, the Air Transport Committee passed the following Resolution:

"RESOLVED: To adopt the draft Multilateral Agreement attached as Appendix A to the Report of the Chairman (Doc. 2866 - AT/169), together with the Commentary on said Agreement attached thereto as Appendix B, as the final texts

> for transmission to the First Assembly of ICAO in compliance with Article III, Section 6, Par. 3a(4) of the Interim Agreement and Resolution V of the First Interim Assembly of PICAO."

This new draft of a multilateral agreement, reproduced in the Journal of Air Law and Commerce, Vol. 14, No. 2, 1947, pp. 241/246, was said to contain three essential features. These are outlined on p. 238 of the Journal mentioned as follows:

> "First, a grant of a general right (not confined to particular routes) to operate commercially to a reasonable number of traffic centres serving, as conveniently as is practicable, each State's international traffic;
>
> "Second, a basic regulatory provision dealing with the amount of capacity to be provided with subsidiary provisions designed to prevent abuses;
>
> "Third, a provision for the settlement of differences through arbitral tribunals with power to render binding provisions."

The main point of difference within the Sub-committee had been whether the Draft Multilateral Agreement should seek to provide a complete set of rules under which international civil air transport could be conducted without requiring, and indeed without admitting, the possibility for supplementary bilateral arrangements as regards routes and similar matters.

We are indebted to Professor Cooper for a review of this proposed Multilateral Agreement. In an article, written for the Journal of Air Law and Commerce, Professor Cooper analyzes this proposed agreement which "seeks to confer regulated freedom of the air under which all States will have equal and reciprocal commercial rights."[3] Quoting Articles 1, 6 and 68 of the Convention, the author plainly shows that reconciliation between the new draft agreement and the Convention is just not possible. The term

"Freedom of the Air" and the term "Sovereignty of the Air" are mutually exclusive, says the writer. The author thereafter deals with the Commentary of the Air Transport Committee in which it is explained that the right to fly conferred by the Agreement is not confined to particular routes but is a general right. Professor Cooper finds himself more in agreement with the minority Commentary which, in part, states:

"In our view, it is more practicable at this stage to lay down certain uniform principles which all States would agree to observe in settling routes, which principles must be so drawn that in practice they may be capable of meeting the needs of differing circumstances. Therefore, we consider that route arrangements must continue to be subject to bilateral negotiation within the framework and in accordance with the principles of a multilateral agreement."[4)]

In addition, Professor Cooper deals with the proposals for capacity, rates, subsidies and disagreements. Pointing out the dangers and weaknesses in the proposed text, he concludes:

"As I said in the earlier part of this article, I hope that the missing air transport provisions in the Chicago Convention can be agreed upon and settled. But when settled and accepted, they must, without question, provide a basis for both equality of opportunity and sound and economical air transport operations. One should not be sacrificed for the other. A balance must be found."[5)]

The Air Transport Committee decided to present this new proposal to the First Assembly of ICAO, which had come into being on April 4th, 1947,[6)] the necessary number of ratifications having been deposited, and meeting in May 1947. The deliberations on the subject by Commission Number 3 are contained in Vol. I of ICAO Doc. 4510 A1-EC/72.

It might be appropriate to mention that other two subjects, not unrelated to this subject of a multilateral agreement, were discussed, namely: 1) that of international ownership and operation of trunk air routes; and 2) the distinction between scheduled and non-scheduled operations in international civil air transport. They were the subject of Resolutions passed both at the First Interim Assembly of PICAO, as well as at the First ICAO Assembly (see ICAO Doc. A1-p/45, May 3rd, 1947).

First Assembly of ICAO:

The Resolution which the First Assembly of ICAO passed (A1-38 : A1-P/45 dated 3/6/47) in connection with the development of a multilateral agreement on commercial rights in international air transport was as follows:

"A1-38: Development of a Multilateral Agreement on Commercial Rights in International Air Transport

WHEREAS: It is apparent from the exchange of views during the present Assembly that considerable agreement has been reached as to the need for adequate principles and provisions on which a Multilateral Agreement on Commercial Rights in International Civil Air Transport may be based; and

WHEREAS: such exchange of views indicates a hopeful possibility of reaching a satisfactory result if the efforts of Member States are continued; and

WHEREAS: the First Assembly of ICAO desires to reaffirm its adherence to the objects of Resolution No. IV of the InterimAssembly of PICAO;

NOW THEREFORE BE IT RESOLVED:

That, as a next step in such efforts and in continuation of the work at this Assembly, a commission, open to all Member States, should be convened not later than October 1947 at Rio de Janeiro, for the purpose of developing and submitting for consideration of Member States an agreement respecting the exchange of commercial rights in international civil air transport." (Doc. A1-P/45 : 3/6/47).

Commission Convened Geneva, 1947:

In fact, the meeting which was to have been held at Rio not later than October 1947 took place in Geneva between November 4th-27th, 1947. The Draft Agreement which resulted from the labours of this Commission is contained in Vols. I and II, ICAO Doc. 5230 A2-EC/10. The Summary of the Minutes of these twenty days' meetings informs us that "no specific draft was adopted as a basis for discussion. The Majority Draft of the Air Transport Committee submitted to the First Assembly in 1947 was used as a general guide to content, while from time to time drafts of particular articles submitted by individual delegations were adopted as the basis for discussion of particular subjects." (ICAO Doc. 5230-EC/10, P. 126.)

The three possible approaches which could form the basis of a multi-lateral agreement were considered to be the following:

"1) That the Multilateral Agreement should comprise the grant of the Third, Fourth and Fifth Freedoms, but that authority to operate over specific routes should be subject to separate bilateral negotiation, without obligation to grant any such authorization;

2) That the Multilateral Agreement should grant the Third and Fourth Freedoms automatically, leaving only the Fifth Freedom to be negotiated bilaterally: provided, however, that if this freedom be granted, it shall be granted in accordance with certain principles, some guarantees being given that routes would not unreasonably be refused;

3) That the right to exercise Fifth Freedom traffic should be recognized as subsidiary to the right of every State to operate air services to carry its own Third and Fourth Freedom traffic, notwithstanding the fact that Fifth Freedom rights could be granted on a complementary basis at the discretion of the interested States." (ICAO Doc. 5230-EC/10, P. 126)

Against this background, the major questions which were discussed and analyzed by several Working Groups, were: i) Nature of the rights to be

granted (the so-called Freedoms); ii) Authorization of Air Routes; iii) Capacity; iv) Rates; and v) Arbitration.

Capacity, together with the nature of the rights to be granted, seems to have been the ground on which the Commission was mainly divided; the disagreement is recorded in the following rather dismal record:

> "Certain delegations were of the opinion that, as stated in the minutes of the seventeenth meeting, if a route agreement authorizes stops in the territory of States other than the parties to the route agreement, such agreement shall, subject to the conclusion of appropriate agreements with such other States, also authorize taking on and putting down international traffic destined for or originating in such other States under the conditions of Chapter III (Capacity). Other delegations favoured a system under which the granting of Fifth Freedom rights would remain optional. The latter alternative prevailed. It was this conflict of views that led to statements by certain delegations that an agreement acceptable to them was no longer attainable." (ICAO Doc. 5230-EC/10, P. 129)

The text as worked out at this unsatisfactory meeting is set out between pp. 133/150 of the latter document mentioned, in the form of another Draft Multilateral Agreement on Commercial Rights. Hesitancy and lack of confidence on the part of Contracting States are evident on every page.

Second Assembly of ICAO:

However, this Draft was eventually presented to the Second Assembly of ICAO meeting in Geneva in June 1948. After due consideration of this document, the Assembly passed the following Resolution:

> "A2-16: Further Action to secure a Multilateral Agreement
>
> WHEREAS: A commission on a Multilateral Agreement on Commercial Rights in International Civil Air Transport was convened at Geneva, Switzerland, on 4 November 1947, pursuant to Resolution A1-38 of the First Assembly; and

WHEREAS: the said Commission decided that, because of the divergence of views on important issues, the submission of an agreement in a form recommended for signature would not be justified; and

WHEREAS: the Report of the said Commission has been submitted to Contracting States and to this Assembly for decision as to further measures to be taken toward the consummation of a Multilateral Agreement;

THE ASSEMBLY RESOLVES:

1. That it hereby expresses its appreciation of the work the Commission and especially of the results of its deliberations as set forth in Annex III to its Report;

2. That Contracting States study and consider the elements contained in Annex III and make use, if found suitable, of certain elements thereof in agreements to which they may become parties in the future;

3. That Contracting States study the Report and the various views expressed in Doc. 5230 A2-EC/10, Volume I and Volume II, Parts 1 and 2 (the Verbatim record of the proceedings of the Commission) and submit to the Council by 30 June, 1949;

   a) their comments and recommendations on the substantive issues presented; and

   b) such factual data based upon operational experience as may bear on their comments and recommendations; and

   c) their suggestions for further action to secure a Multilateral Agreement; and

4. That the Council, not later than 31 December, 1949, circulate for the information and consideration of Contracting States a digest of the submissions received and, in the light of those submissions, its conclusions on further action to secure a Multilateral Agreement." (ICAO Doc. A2-P/57 : 21/6/48.)

Resolutions were likewise passed on the subject of: 1) the organization and operation of international air transport, including joint ownership and operation of international air services; and 2) application of Article 5 of the Chicago Convention (right of non-scheduled flight), together with "Definition of scheduled international air service". These Resolutions were A2-13 and A2-17 and 18 respectively.

Fourth Assembly of ICAO, 1950:

At the Third Assembly, June 7th-20th, 1949, no resolutions were passed on the above subject, but the following year, 1950, all three subjects were back on the agenda, discussed, and resolutions passed thereon. The Resolution (A4-16) on the subject of a multilateral agreement on commercial rights, read as follows:

"A4-16: Further Action to Secure a Multilateral Agreement on Commercial Rights in International Air Transport

WHEREAS: the International Civil Aviation Conference recommended, in December 1944, that the Interim Council give continuing study to a number of matters on which it had not been possible to reach agreement between the States represented, such matters being mainly related to the multilateral exchange of commercial rights in international civil aviation; and

WHEREAS: the first Session of the ICAO Assembly resolved that such a multilateral agreement was the only solution compatible with the spirit of the Chicago Convention; and

WHEREAS: the second Session of the Assembly, after the unsuccessful attempt to conclude such a multilateral agreement at the Geneva Conference, resolved in Resolution A2-16 that Contracting States should contribute to the Organization factual data, comments and suggestions so as to secure a multilateral agreement; and

WHEREAS: the replies to Resolution A2-16 reflect a continuing desire for a multilateral agreement, but nevertheless are insufficient in number and in most cases inadequate in substance for the Council to propose further action pursuant to that Resolution; and

WHEREAS: Contracting States have again been requested to comply fully with the third resolving clause of Resolution A2-16 by 1 April 1951, and the Council has recommended that in the meantime no discussion of the substantive issues of a multilateral agreement be held at this Session of the Assembly;

THE ASSEMBLY RESOLVES:

1. To endorse the aforementioned action of the Council and to leave it to the Council to recommend, in due time, what further action should be taken in this matter;

2. To urge Contracting States to comply fully with Resolution A2-16 by 1 April 1951, the time established by the Council's action, giving to the Organization the full benefit of their knowledge and experience in international civil aviation in fulfilment of the requirements of the third resolving clause of that Resolution." (ICAO Doc. 7017-A4-P/3 : 20/6/50)

At the meetings of the ICAO Assembly in 1951 and 1952, the subject of the development of a multilateral agreement on commercial rights in international civil air transport was again lost sight of but, at Brighton in 1953, events took a slightly different turn.

Seventh Assembly of ICAO, 1953:

As the result of a request received by ICAO Council from the Council of Europe, the following Resolution (A7-15) was passed:

"A7-15: Prospects of and Methods for Further International Agreement on Commercial Rights in International Air Transport - Scheduled International Air Services

THE ASSEMBLY

(1) IS OF THE OPINION that there is no present prospect of achieving a universal multilateral agreement, although multilateralism in commercial rights to the greatest possible extent continues to be an objective of the Organization;

(2) APPROVES, in these circumstances, the favourable reception given by the Council to the request for co-operation addressed to the Organization by the Council of Europe with a view to convening a regional conference including in its agenda the study of commercial rights;

(3) EXPRESSES its desire that the Council keep under review the possibilities of partial solutions including those considered by this Assembly and undertake a study of those partial solutions which, in the Council's view, would produce results of practical value to the Contracting States consistent with and thereby assuring sound progress toward the Organization's objective with respect to a multilateral exchange of commercial rights;

(4) URGES Contracting States to co-operate fully in supplying data required in connection with the studies initiated by the Council and to keep the Council fully informed of important problems

> arising from the application of bilateral agreements and of any developments achieved or contemplated which tend toward the objective of multilateralism in the exchange of commercial rights." (ICAO Doc. 7417, A7-P/3).

In addition, Resolution A7-16 was passed dealing with the prospects of and methods for further international agreement on commercial rights in international air transport, particularly non-scheduled air transport operations.

Subsequently, on December 15th, 1953, the Council of ICAO adopted, in response to the Resolution of the Committee of Ministers of the Council of Europe passed on March 13th, 1953, a Resolution to convene a Conference on the Co-ordination of Air Transport in Europe. This Conference opened in Strasbourg on April 1st, 1954.

Indeed, prior to this Conference, considerable thought had already been given to the possibility of a multilateral agreement for Europe. There was the Bonnefous proposal to create a European High Authority for Transport, more or less corresponding to the authority for national resources proposed by the French Foreign Minister, M. Schumann. When the original plan was laid before the Consultative Assembly of the Council of Europe in November 1950, transport generally was dealt with, including aviation. This plan was subsequently studied by a Special Committee on Transport, M. Bonnefous himself being Rapporteur.

When the plan came before the Consultative Assembly later, M. Bonnefous, in submitting the report, expressly stated that it did not include aviation. This plan was thereafter referred to the Permanent Committee on Economic Questions and, so far as we are concerned, this plan fades out of our picture.

Then there was the Italian plan in 1951, sponsored by Count Sforza, for European Air Unification which envisaged: 1) a joint airspace; 2) a joint supra-national air authority; and 3) a European Air Syndicate to conduct all operations in the European airspace. With additions, this plan was submitted to the Committee of Ministers but no action on it was taken.

In addition, a study on the Coordination of Inter-European Air Transport had been undertaken by the Committee on Economic Questions, of whom Mr. J. van de Kieft was Rapporteur. The report reviewed the position as it was then; it included all efforts made at coordination and therein mentioned specifically ICAO, IATA and SAS. The report proposed to remedy the European Air Transport situation by the creation of a single European company - "a charter company or syndicate of existing companies" to operate their own trans-Atlantic routes. In a draft recommendation, the Report suggested "a conference of government experts to examine, among other things, the possibility, by means of an association of the airline companies, of establishing a single European body which would assume the operation of air routes between member States in accordance with certain principles which would be examined hereafter". These plans are all discussed in an ICAO document entitled: "Proposals with respect to European Air Transport Pending before the Council of Europe" and dated April 25th, 1952.

Conference on the Coordination of Air Transport in Europe, 1954:

Accordingly, when ICAO convened the Conference on the Coordination of Air Transport in Europe, in Strasbourg in April-May 1954, the above mentioned work had been done on the subject, together with studies by the ICAO Secretariat, as well as the Air Research Bureau in Brussels which is composed

of the following airlines, all Members of the International Air Transport Association: Air France, British European Airways, KLM Royal Dutch Airlines, SABENA (Societe Anonyme Belge d'Exploitation de la Navigation Aerienne), SAS (Scandinavian Airlines System), Alitalia (Aerolinee Italiana Internazionali) and Deutsche Lufthansa.

Among others, Dr. L.H. Slotemaker, Executive Vice-President of KLM, reviews the results of this Conference. Referring to the non-success at Geneva in 1947 to make any headway with a multilateral agreement on commercial rights in air transport, the author adds: "This became apparent at ICAO's 7th Assembly at Brighton, where the conclusion was reached that a universal multilateral treaty was not then possible and that it would, therefore, be preferable to strive for regional and/or partial solutions. The Strasbourg Conference for the Coordination of European Air Traffic in 1954 offered an excellent opportunity to achieve one such solution."[7)]

At this Conference on the Coordination of Air Transport in Europe, held at Strasbourg, April-May 1954, the Governments of Austria, Belgium, Denmark, Finaldn, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom were represented by duly authorized delegations. Greece and Iceland were likewise invited to be members of the Conference, but were unable to attend. Other countries, including the U.S.A., had observers present, as did several European and international agencies. (The complete list of delegates is contained in ICAO Doc. 7575-CATE/1, pp. 39/43).

In all, 29 Recommendations were passed. In the ICAO Report of the Conference (ICAO Doc. 7575-CATE/1), the work is broken down into five parts. Part I deals with "The Exchange of Traffic Rights" (covered by Recommendations 1/6); Part II deals with three items: i) Interchangeability of Aircraft,

ii) Helicopter Operations, and iii) Routes of Low Traffic Density (covered by Recommendations 7/12); Part III treats of "Facilitation and Related Questions" (covered by Recommendations 13/24); Part IV deals with "Air Navigation Facilities in Europe" (covered by Recommendations 25/27), and Part V deals with "The Methods of Organizing Future Work" (covered by Recommendations 28 and 29).

Discussing the results of the Conference, the background of which was primarily in Articles 5 and 6 of the Chicago Convention, Dr. Slotemaker states: "Some bold plans were put forward at this Conference; a British plan advocated the abolition of the distinction between one country's traffic and another's, but at the same time it made the right to operate a route dependent on the amount of traffic an operator's country could generate, and it thus took back with one hand what it had given with the other. There was also a Scandinavian proposal for a general multilateral treaty based on complete freedom; and a French/Netherlands proposal to grant airlines greater freedom and operational rights on routes to and from their countries. Partial solutions were also put forward: greater freedom for non-scheduled traffic, greater freedom for freight traffic.

"The final recommendations passed by the Conference, which were of a more limited character than the plans mentioned above, advocated among other things, progressive cooperation between airlines to be furthered by Governments; the drafting by the ICAO Council of a European Multilateral Treaty for scheduled air services; greater freedom for "all freight services" within Europe; framing of a multilateral treaty for non-scheduled air services and an interim liberalization of certain categories of non-scheduled flights.

"At the same time there was a proposal to institute a 'European Civil Aviation Conference' which would normally meet once a year and supervise the implementations of the recommendations."[8)]

The documents resulting from this Conference, together with the Recommendations passed, seem to evidence a certain amount of desire on the part of the delegates present to work out solutions to existing problems. The Conference appears to have closed on a reasonably cheerful note. However, lest the non-initiated might tend to feel over optimistic, it is perhaps useful to quote Para. iv of Recommendation No. 2:

> "embody safeguards to enable governments if necessary to prevent the development of excessive competition and to ensure fair treatment for each carrier; it being understood that routes would continue to be granted by bilateral or plurilateral negotiations between governments and that the multilateral agreement should not interfere with the fundamental principle of the sovereignty of each State over its air space." (ICAO Doc. 7575-CATE/1, p. 9.)

If the green light is in fact ever to be given to freedom, it is apparently to commence with an indescribable paleness.

European Civil Aviation Conference, 1955:

Between May 1954 and November 1955, the drafts of two multilateral agreements for both scheduled and non-scheduled European civil air transport were prepared by the ICAO Secretariat and ECAC and circulated to States, in accordance with Resolutions 2 and 5. The First Session of the ECAC, as proposed in Recommendation No. 28, was convened for November 1955 in Strasbourg. This Recommendation stated, among other things, that the functions of the Conference should be consultative and its conclusions and recommendations should be subject to the approval of governments, that the Conference should

maintain close liaison with ICAO, and that the Conference should at least, at the outset, not establish a separate secretariat of its own, but should request the Council of ICAO to provide, to the extent practicable: a) secretariat services for studies, meetings, or otherwise; b) maintenance of records of the meetings, correspondence, etc. in the ICAO Paris Office. ICAO was to arrange, in consultation with the States concerned, the calling of the first meeting of the Conference.

It may be too soon to judge the results of the deliberations of the 1955 Conference. To the student, it would appear to have been less successful than that of 1954.

As compared with the previous year's work, there emerged from the 1955 Conference two Resolutions and five Recommendations.

Briefly, here are the fruits of the 1955 discussions: The permanent ECAC was set up as an organization which is purely consultative in character. With a President and three Vice-Presidents in office from one annual meeting to the following one, the Organization will maintain close liaison with ICAO. There will be further discussion regarding this matter, including the important question of finance, at the 10th ICAO Assembly Meeting in Caracas in June 1955. Within the last few days, a very full explanatory ICAO Working Paper has been distributed in relation to this question A10-EX/7:28/3/56.

After lengthy discussion, and using as a basis thereon, the draft multilateral agreement for scheduled services in Europe, two main schools of thought emerged. First, that of the European central states, based on a Belgian proposal, whereby great liberalization should take place. France, e.g. stated that, provided a safety clause was included, she was prepared

to open twenty airports at which customs, police and health services are permanently maintained to other contracting States. (ICAO Doc. 7676-ECAC/1, p. 111). On the other hand, more conservative thought, including the U.K., seemed to desire a continuation of the bilateral system. The argument here was that airlines were, in fact, already cooperating with one another and should know better than any other group what further co-operation should take place and when. This was, of course a reversal in her previous position of 1954.

The conclusion of this discussion is summed up as follows:

> "The discussion of these two proposals indicated that although both had considerable support, neither could command general approval and it was decided not to make any recommendation to States in connection with a multilateral agreement for scheduled air services, thus leaving the recommendations on this subject of the 1954 Conference unchanged." (ICAO Doc. 7676-ECAC/1, p. 12).

With regard to the discussion based on the draft of a multilateral agreement for non-scheduled services in Europe, the text of a multilateral agreement was arrived at whereby full traffic rights were granted to certain categories of non-scheduled flights and conditional rights to certain others. In the former class, there are flights for emergency or humanitarian purposes, single person charters and such loosely defined categories as taxi-class operations, passenger flights for aircraft with six seats and less and single flights at the rate of one flight per month between two points. On the other hand, conditional grant is given to some others, with the requirement that flights shall stop if they prove injurious to the interests of States, parties to the agreement. These include a) all-freight operations, and b) passenger operations between regions which have no reasonably direct connection by scheduled air services.

Recommendation No. 2 reads as follows:

"THE CONFERENCE RECOMMENDS:

> That the States members of the Conference sign and ratify the Multilateral Agreement on Commercial Rights in Non-Scheduled International Air Services within Europe that appears as Appendix B of this Report. It further recommends to the International Civil Aviation Organization that said Agreement be opened for signature at the ICAO Paris Office as from 30 April 1956." (ICAO Doc. 7676, ECAC/1, p. 15).

The text of this proposed multilateral agreement on commercial rights of non-scheduled services in Europe appears at P. 31 of the ICAO Doc. 7676, ECAC/1 and whether some of the clauses therein contained are consistent with the parent Chicago Convention may require a little more consideration on the part of States.

Article 1 of the proposed agreement states the type of civil aircraft to which the agreement applies: a) registered in a State member of the European Civil Aviation Conference, and b) operated by a national of one of the Contracting States duly authorized by the competent national authority, when engaged in international flights for remuneration or hire, on other than scheduled international air services, in the territories covered by this agreement as provided in Article 11.

The effect of these provisions is that the non-scheduled operator of any Contracting States may lease, interchange or otherwise take over the aircraft registered in a European State, even though such State be not a party to the non-scheduled Convention. But the same operator may not similarly use aircraft registered in States that are not Members of the ECAC. Whether such a condition of affairs is consistent with the Chicago Convention is surely matter for thought since ICAO Members in Europe generally now appear to be broken up into: 1) those who are Members of the ECAC, and

2) those who are not. And do not let us forget that the Preamble to the Chicago Convention speaks about international air transport services being established on the basis of equality of opportunity.

We are, of course, forced back on an interpretation of Articles 5 and 11 of the Chicago Convention and the grand question is, do the last four words of the second paragraph of Article 5 have an economic import or a political import? If it is economic, then there might be some room for discrimination but if these words are consistent with the tenor of Article 11, then the words "without distinction as to nationality" would imply that all regulations, conditions and limitations should be employed without distinction as to nationality.

With regard to Article 2(2) of the ECAC Agreement, under which there is a conditional grant of free entry for: a) the transport of freight exclusively; and b) the transport of passengers between regions which have no reasonably direct connection by scheduled air services; countries deeming such activities harmful to the interests of their scheduled services may require the abandonment of such services.

With regard to the "Interchange of Aircraft", Belgium who produced an inter-European multilateral agreement on aircraft interchange was anxious to have some kind of European arrangement on this question. As a result of the discussion here, a Study Group was set up and States were asked to indicate by February 15th, 1956, if they were willing to participate in the work therein. This subject has become very much interrelated with that of the Charter and Hire of Aircraft.

Recommendation No. 5 of the Conference covers the question of helicopter services which the Conference considered might produce problems diffe-

rent from those of fixed wing aircraft and recommended that the next ICAO Meeting on Air Navigation in the EUMED Region should give consideration to this matter. In addition, States within the ECAC are asked to apply their minds to this subject.

Prior to the Strasbourg Conference of 1955, Mr. William Deswarte, Managing Director of SABENA, prepared a most instructive article entitled "Cooperation" for the Review Interavia.[9] Mr. Deswarte hopes, it would seem, that too many cooks in Europe will not spoil the broth. On P. 757 of the above mentioned Review, he calls attention to the Transport Commission which is now functioning as an arm of the European Coal and Steel Pool and a subcommission of which now concentrates on some of the problems which ECAC considers it their duty to elucidate and improve. In any case, the author finds such representation inadequate (at least as representing European air transport), as he does the scope of their immediate work, i.e. "the creation of a European finance company for flying equipment, and the exchange of routes so as to improve the efficiency of the European network". Have they forgotten, asks Mr. Deswarte, that an Air Research Bureau was set up in 1952 under the capable leadership of Professor de Groote, former Belgian Minister for Economic Coordination and a transport expert. "It is the conclusions reached by the Bureau that have inspired the careful, and hence constructive, attitude of the governments assembled at Strasbourg.

"Professor de Groote showed perfectly objectively that the weakness of the European network arose essentially from the low frequency of air services and that the latter was due in the main to Europe's highly developed ground transport system and to the low average income level of its population.

"In fact, the European net work is far more concerned with collecting and distributing long-distance passengers than with providing real inter-European services. Unless non-profitable services are to be developed, and hence the chronic deficits of Europe's short-distance transport operators to be still further increased, only the expansion of traffic as a whole, and primarily inter-continental traffic, can lead to what Professor de Groote calls 'auto-coordination'."

If regions begin to show discrimination as between Members of ICAO, and restrictions set in - in fact it might be possible to find other regions where restrictive practices could be still more extensively developed - then one naturally asks, has the day for regionalism passed? Perhaps nothing less than arrangements on a world-wide scale are now adequate enough.

ECAC is apparently going through the period generally known as "teething troubles". A clearer picture may materialize after June 1956 when the relationship between ICAO and the ECAC will be discussed. The financial aspect of the matter could play a most important part in the matter.

It is extremely difficult to see in Par. (1) a)/d) and Par. 2 of Article 2 of the ECAC Agreement on non-scheduled air transport services much freeing of the air. It could surely only be described as a very hesitant step in this direction. If the "right of innocent passage" in the air advances, it does so slowly, most laboriously.

C H A P T E R XI

Footnotes

1. George P. Baker. The Bermuda Plan as the Basis for a Multilateral Agreement. (Lecture delivered at McGill University, April 18, 1947. Multilithed copy, Par.1.)

2. ICAO Doc. 2089-EC/57, p.185.

3. John C. Cooper. The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport. (Journal of Air Law and Commerce, Vol. 14, Spring 1947, No. 2, p.125.

4. Ibid., p.135.

5. Ibid., p.149.

6. ICAO Doc. 7300, p.3.

7. Dr. L.H. Slotemaker. Thoughts on Strasbourg. The First European Civil Aviation Conference: Challenge to Europe. Interavia, Vol. X, October 1955, pp.753-755.

8. Ibid., p.753.

9. Willem Deswarte. Cooperation. Interavia, Vol. X, October 1955, pp.756-7.

All other ICAO Document Nos. placed in body of text to avoid confusion.

CONCLUSION

"The Right of Innocent Passage" - a term, at the same time difficult of definition, elusive and thought provoking.

Reviewing the 1919 Convention and the theory of freedom of the air as opposed to airspace sovereignty, Lord McNair says in his article "The Beginnings and the Growth of Aeronautical Law":

> "Then came the great war, and it accelerated a decision as between those competing theories, and the one which triumphed by treaty in Europe, including Great Britain, in the year 1919, was the third, the theory of complete sovereignty, subject to a mutual treaty right of the free entry and passage of the non-military aircraft of other countries.
>
> "I lay emphasis upon the fact that that is merely a treaty right, not considered to exist by customary international law, and therefore requiring an express treaty for its creation."[1)]

Few planes navigate the skies for pleasure. Indeed planes are usually dispatched with specific purposes and the point is that while the State, in which the plane is registered, may consider the passage "innocent", the other States over which the plane has to pass may consider that the passage is anything but "innocent". In fact, the ten, twenty, overflown States might all have entirely different views on the matter, depending on their relations with the registering State, their geographical position, their economic position, etc.

It was probably one of the most significant notes of the Chicago Conference in 1944 that so many States were prepared to sign the International Air Services Transit Agreement, involving the first two freedoms: 1) the privilege to fly across its territory without landing; and 2) the privilege to land for non-traffic purposes in respect of scheduled international air transport; and in Strasbourg

more recently, there is evidence on the part of States of willingness to relax still a very little further their vigilence in regard to activity in their aerial territory. But the chances of arriving at multilateral agreements embracing more extensive principles in which a sufficiently large number of States are willing to participate actively seem to be difficult of achievement.

Monsieur M. Saporta underlines this in his article "Crise de Croisance". [2] The participation of many States in Conferences, he finds, is of doubtful benefit. He witnesses the number of signed Conventions to which there has been but lip service paid. The author concludes by mentioning some of the possibilities which could be adopted in anticipation of the day when States might be prepared to delegate power to an international authority. For example, one might restrict the number of participating States in any Conference, or one might work on the Bermuda principle, i.e. the type of agreement which is originally entered into by two States, but the suitability of which commends itself to other pairs of States; or there is the system adopted by ICAO in regard to the Annexes to the Chicago Convention; or again one might do nothing at all but resort to "laissez faire, laissez passer". The author does not pretend to indicate the choice; he merely mentions the various possibilities.

We have worked our way through many centuries of maritime history in order to see evolve the "right of innocent passage" which exists in territorial waters. Two thousand years. Slowly and painfully, the present position materialized.

After which, we reviewed the formative period in air law and thereafter, we worked our way through the main aviation public law conferences, beginning with that of 1910 in Paris, when air navigation was the question par excellence, up to the most recent Strasbourg Conference of 1955.

What have we found? In 1910, we saw Fauchille who, in the course of ten years, had altered his principle "l'air est libre" to "la navigation internationale aerienne est libre", encountering grave difficulties during the Diplomatic Conference on Air Navigation in Paris. We saw the Draft Convention of the Conference left incomplete by two important articles from purely political, not legal, reasons, the Conference never having been re-convened for the purpose of completing the work.

Between 1910 and the outbreak of World War I in 1914, we saw States, by legislation, closing their earial frontiers. It was understandable that, when the Allied Powers met in 1919 to draw up an agreement on aerial navigation, they should declare sovereignty in the air for the subjacent state to be complete and exclusive. At first, it seemed to be rather a selective group they were forming than an international agreement they were making, but nevertheless we did notice, for example, that the United Kingdom delegates envisaged the day when it might be judicious to admit other States as well. We saw Spain in the year 1926, with certain South American States with which she had cultural and other relations, entering into practically the same agreement as that drawn up in 1919, the differences between the text of 1919 and that of 1926 being comparatively few in number.

In 1928, we saw the Americas entering into a Convention on Commercial Aviation. Although the minutes of these discussions have been treated with tremendous discretion (if they have ever been released beyond the interested States at all), it was presumably easier to arrive at conclusions at Habana because the States concerned may have had more in common to defend. The ~~dark~~ and now obsolete slogan "The Americas for the Americans" was still being canvassed.

In 1929, we examined some of the discussions at the extraordinary CINA Meeting in Paris, convened at the express request of Germany who felt herself aggrieved at this time. Just then, in some miraculous way, she had neither started nor lost the First World War. At this Conference, we saw Sir Sefton Brancker, on behalf of the United Kingdom, doing his best to remedy some of the restrictive practices which had arisen in the 1920's; unfortunately, he got little support.

At the Chicago Conference in 1944, we saw two quite separate schools of thought confronting one another. The United States, representing one school, and the United Kindgom representing the other. In fact, in 1944 the Commonwealth countries, together with supporting continental European countries, came hard up against the American Constitution. The United States, with the help of the South Americans, won the day.

Thereafter, we traced the results of the Bermuda and Strasbourg

Conferences, the former setting the vogue in bilaterals, and the latter endeavouring, with Articles 5, 6 and 77, among others, of the Chicago Convention, as a background, to reach deeper agreement within the European region. Unfortunately, the 1955 Strasbourg Conference, although it may be premature to judge, appears to have been less satisfactory than the 1954 Conference, with the United Kingdom having almost done a volte face within the year in the matter of a multilateral agreement on scheduled services.

What is the present technical background to all this discussion in the month of August 1956? A few months ago, the United Kingdom announced that her Fairy Delta No. 2 had accomplished 1,132 miles per hour at a height of 50,000 feet. The sequel might have been expected. During the course of the same afternoon, the United States claimed that, within a certain number of months, she hoped to be able to accomplish 1,600 miles per hour, probably at an increased altitude. And all the while, Wehrner von Braun, formerly in charge of V1 and V2 German production, on behalf of the United States relentlessly pursues his experiments by which he claims that within a comparatively short time he hopes to establish a United States space station or platform in outer space, to which space ships will travel and from which excursion parties to other planets will be the order of the day. Indeed interplanetary travel is much discussed. Rockets, capable of penetrating this outer space, are promised as a novelty for the International Geophysical Year (1957).

In this connection, it is interesting to note the following ICAO release dated April 4th, 1956:

"OUTER SPACE SOVEREIGNTY AGREEMENT NEEDED

Agreement on the use of outer space by the nations of the world will have to be reached soon, according to a report which will be put before the Assembly of the International Civil Aviation Organization when it meets in Caracas, Venezuela this June. The report, which describes the activities of ICAO in the field of air law, points out that there is good reason to believe that "mechanical contrivances" will travel beyond the earth's atmosphere in the near future.

None of the rules which furnish legal guidance to states on problems of sovereignty apply to trips into outer space. The Convention on International Civil Aviation, which has been ratified or adhered to by all of ICAO's 67 member nations, gives each of these nations complete and exclusive sovereignty over the airspace above its territory, but it makes no mention of whether this sovereignty extends upwards beyond the boundary of the air. There is at present no United Nations Specialized Agency responsible for working out agreements on sovereignty and rights and privileges in this area, but the ICAO report notes that, as any space craft would have to pass through the atmosphere before it reaches outer space, ICAO itself will be interested in the matter."

In his address to the International Astronautical Congress at Stuttgart on September 5th, 1952, Dr. Alex Meyer dealt with the matter of outer space and space ships. In the course of his address, he disclosed the information that Vladimir Mandl in 1932 had produced a booklet entitled "World space law; the problem of space flight". This evidence of early interest on the part of Mandl was discovered in the Library of Cologne University which had been heavily damaged during World War II.

Dr. Meyer seems to be very much in agreement with Mandl. Dr. Meyer compared airspace, over which subjacent States have complete and exclusive sovereignty, with world space.

It is natural, Dr. Meyer finds, that airspace should be corelated with the earth's surface, for, without air, men could not breathe, and within airspace, i.e. within the sphere of the force of gravity, surveillance is essential on the part of underlying States. But no such connection exists between the earth's surface and outer space.

In order to justify jurisdiction, and exercise its sovereignty, a State must, in relation to territory, comply with two conditions: 1) the territory or space must have definable boundaries, though they need not necessarily be visible; and 2) there must be a possibility of a State exercising effective control (factual possession is not necessary, provided the State can, if it chooses, effectively control).

These two conditions, Dr. Meyer says, can be effectively met in airspace; they are extremely doubtful, if not impossible, in outer space.

Accordingly, the legal status of outer space is comparable with the legal status of the airspace over the sea. The law of the flag will be applicable to incidents on board space ships in outer space.

In regard to boundaries in outer space, Dr. Meyer considered that it would hardly be possible, even by drawing fictitious vertical planes above a State's borders therein, to determine in this way specific territory which could be corelated to the borders of a State on the earth's surface. With such a distance, e.g. 400 kilometres or more, between the earth's surface and the outer space, it would

be difficult to say that a particular event took place in the outer space territory of a particular State. It must be remembered, Dr. Meyer says, that the solar system is itself always in motion and, within this motion, the earth itself is rotating, following a fixed orbit. The possible extension, therefore, of vertical boundaries from the earth being continued into world or outer space can accordingly be ruled out.

In view of the different heights at which air may become so thin as to be almost negligible, it might be necessary to fix arbitrarily the distance at which outer space begins, e.g. 200 - 300 kilometres from the earth's surface.

In answer to the question, is it legally permissable to establish space stations in outer space (which, of course, would always be in motion), Dr. Meyer recalls the discussions in 1930 which took place in the Comite Juridique de l'Aviation Internationale in connection with sea-dromes and these were not "res communes"; the applicable law to sea-dromes was found to be that of the establishing nation which was to give due notice of the establishment. Disputing States were to have time to lodge a protest and the matter, if necessary, could eventually be brought before the Tribunal of the League of Nations. Dr. Meyer considered comparable rules should be applied to space platforms.

Dr. Meyer saw no reason why existing air law rules should not be applicable to space ships as they pass through the air space. In fact, he suggested that they might not be travelling at much greater speed than some very modern aircraft; it looks as though Dr. Meyer's estimate may be correct.

If the space ships are unmanned, then Article 8 of the Chicago Convention will apply. If the space ship carries a pilot, air law rules will apply within air space and, beyond, until rules have been worked out (preferably by Convention), then the pilot will have a duty of care to see no harm is done if it can be prevented. Jellinek spoke of a "categoric imperative" under the law of nations.

In any case, if burned out rocket parts in the airspace dropped down and caused harm, presumably the Convention for the Unification of Certain Rules on Damage caused by Foreign Aircraft to Third Parties would apply as between contracting States, parties to the Convention.

In addition to Dr. Meyer,[3] these subjects have been treated by Professor J.C. Cooper at Mexico City in 1951 and recently in Washington,[4] by Welf Heinrich, Prince of Hanover, in his "Luftrecht und Weltraum", and reviewed by Dr. Achtnich.[5] Dr. Meyer also reviewed Ming-Min-Peng's study,[6] and disagreed with the latter's argument that airspace could be equated to usuable space, thereby extending the territory of a subjacent State into world or outer space.

In his address in Washington, on April 26, 1956, Professor Cooper suggested that a new convention might include these solutions:

"(a) Reaffirm Article I of the Chicago Convention, giving the subjacent State full sovereignty in the areas of atmospheric space above it, up to the height where "aircraft" as now defined, may be operated, such areas to be designated "territorial space."

"(b) Extend the sovereignty of the subjacent State upward to 300 miles above the earth's surface, designating this second area as "contiguous space," and provide for a right of transit through this zone for all non-military flight instrumentalities when ascending or descending.

"(c) Accept the principle that all space above 'continguous space' is free for the passage of all instrumentalities."

This is one of the last pronouncements on the subject to our knowledge.

.....

While these valuable and learned discussions are going on, the economic side of the whole question has a way of intruding itself into any discussion. It is on this note that we should like to conclude. It has been announced by the International Air Transport Association that, of the entire amount of civilian air transport that was done in 1955, approximately 30 percent was international in character. Could this have been still higher, had there been fewer restrictions to overcome?

Discussing the Bermuda Agreement in Foreign Affairs, Professor Cooper asked: "Should this problem of exonomic control be met by asking the nations of the world to yield part of their sovereign power over their own national transport - a thing never done in merchant shipping? Or is it better to reach a definite treaty agreement as in the Bermuda plan, and leave to each nation the responsibility for carrying out its air transport obligations, exactly as every country is expected to abide by other international obligations and to control its own citizens accordingly? That is the question running through all the great decisions of our time."[7] The operative words seem to be "yield part of their sovereign power". Since the moment when controlled flight was demonstrated, a continual struggle for compromise between the rules applicable to this international medium of transport, on the one hand, and the legislation of national

States, on the other, has gone on. Is the bickering regarding the question of "routes, rates and rights" to continue? Do the Australian/ New Zealand scheme, and the Canadian plan, and the United Kingdom suggestion, as outlined in 1944, still seem so many remote propositions as certain States considered them at the time, almost twelve years ago.

The comment of Sir William Hildred, Director of IATA, after the Bermuda Agreement in 1946, is significant: "It is permitted to me to observe that in my opinion those two States at Bermuda (i.e. the United States and Britain) were the victims - unwilling victims at first if you like - of an impelling evolutionary process, a movement toward the light. And to add that what they did in helping to free their mutual air was something which will have to be done sooner or later, with good grace or with ill grace, by other States when they face the same problems. In one sentence, as international operators see the position, increased freedom to fly the air routes of the world has got to come."

Dr. L.H. Slotemaker, in the article already referred to, and written prior to the Strasbourg Conference in 1955, speaks of the necessity of subordinating national interests to the common interest.[8)]

The Hon. C.D. Howe, who realizes just as well as any Minister the responsibility of States to the inhabitants of their territory, nevertheless put the matter clearly in 1946. It will be recalled that his words before the First Interim Assembly of PICAO ten years ago were: "Either we believe the utterances of lofty motives that have echoed through our meetings in the past, or we do not. If we do, let us take steps to implement them, with wise provisions that will a service to

civil aviation, and let not each of us calculate the extent of our cooperation with a view only to selfish national interests."[9)]

What world shattering event must we await in order to implement, with wise provisions, these steps which will lead us into a more enlightened era of Civil Aviation, an era which will more amply demonstrate a "right of innocent passage".

CONCLUSION

Footnotes

1. Arnold D. McNair. The Beginnings and the Growth of Aeronautical Law. 1 Journal of Air Law, pp.383-392.

2. M. Saporta. Crise de Croissance du Droit International Aerien. Revue Generale de l'Air, 1955, pp.191-8.

3. Dr. Alex Meyer. Address delivered at 3rd International Astronautical Congres, Stuttgart, September 5, 1952. (Printed in Zeitschrift fur Luftrecht, Vol.II, p.31 et seq.)

4. John C. Cooper. High Altitude Flight and National Sovereignty. Address delivered at Mexico City before the Escuela de Derecho on January 1, 1951. (Reproduced in International Air Transport Association Bulletin No. 13, June 1951.)

   Same author: Legal Problems of Upper Space. Address delivered to the American Society of International Law, Washington, D.C., April 26, 1956.

5. Welf Heinrich Prinz von Hanover. Luftrecht und Weltraum. Address at Goettingen, 1953. (Reviewed by Dr. Achtnich in Zeitschrift fur Luftrecht, Vol.III, 1954, p.78.)

6. Ming-Min-Peng. Le Vol a haute altitude et l'article 1 de la Convention de Chicago, 1944. Revue francaise de Droit aerien 1952, Vol.4, p.390.

7. John C. Cooper. The Bermuda Plan : World Pattern for Air Transport. Foreign Affairs, 1946, Vol.25, p.59.

8. L.H. Slotemaker. Thoughts on Strasbourg. The First European Civil Aviation Conference. Challenge to Europe. (Interavia, Vol.10, Oct., 1955, p.253-5.)

9. ICAO Doc. 2089-EC/57, p.185.

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