INTERNATIONAL AIR LAW

THE RIGHT OF INNOCENT PASSAGE

Sheila F. Macbrayne*

This title was one of the four subjects set by Professor John C. Cooper for research papers during the 1953/54 Session to the Members of the Institute of International Air Law. Much of the theoretical discussion concerning this subject, in relation to Air Law, was written between about 1870 and 1910 and is in French, German and Italian.

Mr. Ivan Vlasic (Yugoslavia) discussed the subject "with special regard to the development of the similar principle in the law of the sea"; Mr. T. C. Novak (Canada) "with regard to commercial aviation"; Mr. G. Gamacchio (Italy) "in the light of the International Air Conferences"; and the present writer (Scotland) discussed "the Fauchille theory in relation to the right of innocent passage". These papers are available in the Law Library of McGill University.

In order to find out if it were permissible, or even possible, to assimilate the law of the open sea, or of territorial waters, to that of the air space, Mr. Vlasic dealt with the origin of the right of innocent passage under maritime law, including in this portion a short discussion on the meaning of the term "innocent passage". This right of innocent passage for the merchant vessels of other nations which has grown up in the marginal sea, in which the littoral state has jurisdiction, is one that emerged after centuries. It is significant that, at the Hague Conference in 1930, called in an endeavour to codify maritime law, and not crowned with over much success, at least no challenge was heard against this right of innocent passage.

The starting point in Mr. Vlasic's paper was the position under the Roman Empire, including, as it did, the Mediterranean. The Roman jurists were not called upon to consider the maritime problems which later developed; they looked upon the Mediterranean, for example, simply as a medium of communication.[1] It was "res communis omnium" par excellence, defying both public and private ownership alike. The Roman jurists were barely interested in more than the rights on the shore.[2] With the emergence of states as entities during the Middle Ages, claims began to be put forward by these states to jurisdiction beyond their land territory. It took considerable in-

*Member of the Institute of International Air Law, McGill University.

[1]Raestad, *La Mer Territoriale*, Paris, 1913, p. 2.

[2]Gidel, *Le droit international public de la mer*, Paris, 1934, Vol. III, p. 25.

[3]*Op. cit.*, p. 13.

genuity on the part of the Italian Glossators and post-Glossators (13th and 14th Centuries), seeking inspiration almost in vain in the Roman texts, to find legal grounds on which to found these proposals. The Canon Law text was more helpful, says Raestad.[3] According to this Norwegian writer, to Bartholus de Saxoferrato, and his pupil Baldus de Ubaldis, must go the credit for the very first discussion on territorial waters; the former considered that two days' sailing from the land (approximately 100 miles) might be reasonably claimed by the littoral city-state as an extension of its "districtus", within which it might punish delicts committed on the sea; and Baldus introduced into this marginal sea the idea of sovereignty along the lnes of present day thnking.[4]

Mr. Vlasic works his way through the intervening centuries on to the first Elizabeth's reign with her "freedom of the seas" stand against Mendoza, the Spanish ambassador, trying at that time to impose on the English Queen his Sovereign's right to the exclusive use of the waters of the Indies. Mr. Vlasic's paper seeks to point out that this right of innocent passage was established, even before the theory of the freedom of the seas had been universally accepted itself. Without this right, navigation on the open sea by vessels of all nations would in fact be an impossibility. Thereafter the writer gets into the realm of air laws.

Mr. Novak, after dealing with the maritime position, discusses the law of the air. In his second chapter, he examines the legal status of the air space, touching briefly on the theories of the various jurists who commenced writing from 1870 onwards. At the opening of the present century, the battle between the proponents of the "freedom of the air" and the "sovereignty of the air" theories, with their respective refinements, was really under way.

Fauchille, the French jurist, whose famous 1901 statement on air law[5] was analysed by the present writer, was consistent, in as much as he transposed into this sphere his considered views concerning the law of the sea and territorial waters. Fauchille claimed, to begin with, that the "air is free" but, at the same time, he recognized that the sub-jacent state had rights, extensive rights, which he chose to designate under the term "droit de conservation" (right of self-preservation). His "freedom of the air" might well be so heavily undermined with limitations that it soon became apparent that, under this theory, the air space could be more restricted than under the theory of sovereignty. Nevertheless, Fauchille refused to equate this right of self-preservation to sovereignty. The height at which he originally fixed the limit within which a state might exercise these various rights was later reduced, from 1,500 to 500 metres, and his "freedom of the air", some ten

[4] *Ibid.*

[5] Fauchille, "Le domaine aérien et le régime juridique des Aérostats", Revue Générale de Droit International Public, 1901, Vol. 8, pp. 414 *et seq.*

years later, had resolved itself into "aerial circulation is free".[6] Was Fauchille, who stressed the interdependence of states to the detriment of the single state, anticipating the difficulties which were to arise in the development of international civil aviation as a result of sovereignty in the air space? Was he searching for a formula with which to keep the air open and, at the same time, give to the sub-jacent state the necessary right of protection for its nationals and their belongings? The present writer dealt also with the jurists whose theories had preceded Fauchille, as well as those who subsequently either agreed with him or denounced his theory. There were sophisticated writers, for example, like the Belgian jurist, de Visscher, who canvassed neither "freedom" nor "sovereignty". For de Visscher, the sphere of competence of a state was much wider than the air space above the territory (i.e. the land and territorial waters) of the sub-jacent state. He naturally found analogies in the open sea where all states have concurrent jurisdiction. But it is difficult to convince students of air law that states are no more vulnerable from the air than they are from the open sea.

In this connection, however, the reader's attention is called to an interesting article written by another Member of the Institute in which he discussed the U.S. and Canadian Security Regulations which oblige pilots approaching Air Defence Identification Zones to notify their position within a belt much farther out than the air space over their territorial waters.[8]

Mr. Novak dealt with the 1906 Meeting of the Institut de Droit International at which, for the first time, the legal status of the air space was debated, although papers on the subject had been prepared for the Institute's meeting in 1902, both by Prof. Nys, the Belgian jurist and supporter of complete air space freedom, and M. Paul Fauchille already mentioned. Prof. Westlake, the English jurist, at the 1906 meeting took up the challenge. He concerned himself more with the question of the necessary protection of a state than with the possible future development of aviation. The theory which he propounded was that of sovereignty in the air space for the sub-jacent state, subject to the right of innocent passage for foreign aircraft. Over the high seas the air space was free.[9]

Mr. Novak, turning his attention, as did the other Members of the Institute, to the following international air conferences and conventions, shows that no such right of innocent passage, as propounded by Prof. Westlake, has ever been declared to exist:— *viz.* the International Air Navigation Conference, Paris, 1910, called by the French Government, and at which

[6]Haseltine, *The Law of the Air,* London, Univ. of London Press, 1911, p. 20.

[7]De Visscher, "Zeitschrift fur das Gesamte Luftrecht", Vol. 2, 1928, pp. 4 *et seq.;* also *Annuaire de l'Institut de Droit International,* 1927, t. 1, p. 341.

[8]Martial, "State Control of the Air Space over the Territorial Sea and the Contiguous Zone", 1952 Can. B. Rev. 245.

[9]*Annuaire de l'Institut de Droit International,* 1906. See also *Convention on International Civil Aviation,* 1944, Article 12, in which the Convention has delegated to ICAO the power to draw up rules which will be applicable to the High Seas.

a final agreement just failed to be adopted on account of two important missing Articles—19 and 20—dealing with the restrictions which a state might impose on foreign aircraft in the air space above its territory—in other words, as Prof. Cooper says, the breakdown was political;[10] the Convention relating to the Regulation of Aerial Navigation of 1919, held at the time of the Peace Conference; the Habana Convention held in 1928; and the Convention on International Civil Aviation in Chicago in 1944.

Mr. Gamacchio, in addition, studied the Conference of Jurists at Verona which opened on May 31, 1910 and which was held currently with the Paris inter-governmental Conference called by the French Government, May 18—June 29/1910. It is interesting to note that Prof. Anzilotti, who later became President of the PCIJ, and whose contribution greatly influenced this meeting of the mainly Italian jurists, propounded the theory of sovereignty for the sub-jacent state because he was unable to dissociate the activity in the air space from that of the surface of the earth; for Prof. Anzilotti it made one unit. The sovereignty of a state might be maintained without its territory necessarily extending into the sea; it could not be so maintained without extending its territory into the air. The Conference therefore declared sovereignty of the air space for the sub-jacent state; it added, however, that in the territorial air space the transit and circulation of air vehicles was to be free, providing, however, that the necessary norms for protection of the public and private interests of states were maintained.

By the time the First World War broke out, there is ample evidence that European states had, by legislation, enclosed the air space above their territory.[12]

When the above mentioned Members of the Institute came to analyse the 1919 Convention, what did they find? Under "General Principles," Article 1 (1) reads:—"The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above

[10]Cooper, "The International Air Navigation Conference, Paris, 1910", *Journal of the Law and Commerce,* 1951, Vol. 19, p. 140.

[11]Primo congresso giuridico internazionale per il regolamento della locomozione aerea, Verona 31 Maggio, 1910, *Atti e relazioni.*

[12]British Aerial Navigation Aca, 1911: 1 & 2 Geo. V., C. 4; amended by British Aerial Navigation Act, 1913: 2 & 3 Geo. V., C. 22;

French Presidential Decree: November 21, 1911;

Germany: Brandenburg 1910; Prussia: October 22, 1910, January 17 and August 5, 1913; Bavaria: October 11, 1911: Air Navigation Bill, January, 1914, to be applicable throughout the Empire, introduced into Reichstad (still pending at outbreak of War 1914);

Franco/German Agreement: July, 1913;

Austria/Hungary: Decrees October 22 and December 20, 1912. January 20, 1913;

Russia: closed the Russo/German border, December, 1912:

U.S.A.: *e.g.* Connecticut Act, 1911; Massachusetts: Air Navigation Law, 1913.

its territory." Par. (2):—"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." And by Article 2, what did Contracting States accord to one another? "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." For "freedom" the French text uses "liberate", as opposed to "droit" in Article 3 which gives States the right to prohibit flight over certain zones in her territory. And what of the much debated Article 15? Par. (1) "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." And Par .(3): "The establishment of international airways shall be subject to the consent of the states flown over." In practice, how did states interpret these Articles 1, 2 and 15? Despite the liberal principles drawn up for study by the Aeronautical Commission,[13] the "freedom of innocent passage" without prior permission accorded by Article 2 had apparently been so much restricted by Article 15 that states had construed this to mean that the privilege should apply only to the aircraft of other contracting parties making either special flights (pleasure or touring purposes) or the occasional non-scheduled flight of a commercial nature. The text of Article 15, Par. (3) made it plain that no scheduled flight of a commercial enterprise could take place without the prior consent of the sub-jacent state.

When the representatives of the States which had ratified this Convention met again in 1929 to amend Article 15, the majority vote unfortunately revealed that this restricted interpretation reflected the feeling of the times. Far from there being a right of innocent passage, irrespective of treaty, one might legitimately ask just how much states were willing to accord in this respect, even by agreement.

Some of the clearest thinking on the right of innocent passage with regard to the air has been done by Mr. Stephen Latchford who, in an article[14] written shortly before the Chicago Convention in 1944, suggested that this term "right of innocent passage" be dropped from international conference language and that, if states meant to accord anything at all, they do so in plain unvarnished language and not wrap the agreement up in ambignous langnage.

And what of the existing position under the last multilateral agreement, namely that of Chicago 1944? Article I — Sovereignty — reads: "The con-

[13]Latchford, "Freedom of the Air", U.S. Documents and State Papers, 1948, p. 305.

[14]Latchford, "Right of Innocent Passage in International Civil Air Navigation Agreements", Dep't of State Bull. Vol. XI, No. 262, July 2, 1944, p. 19.

tracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory." 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 with 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 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."

And Artcle 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."

It will be noted that the term "innocent passage" has been dropped from the Chicago Convention and this, according to Mr. Latchford's 1948 article, 15/ in itself constitutes an improvement over the text of the Paris Convention of 1919.

After examination of these documents, the Members of the Institute working on this subject unanimously came to the conclusion that there is no right of innocent passage under customary international law which entitles foreign aircraft to pass through the air space of sub-jacent states without prior permission. In other words, there is no right of innocent passage in the air space comparable with the right of innocent passage in the territorial waters of a littoral state which enables merchant vessels of foreign states automatically to pass along this marginal belt of water.

Any right of innocent passage through the air space of states that is accorded at all is always carefully outlined by agreement and such an arrangement must be included either within the terms of Article 5 of the Chicago Convention of 1944, appropriate only to contracting states, or made by special agreement between the two states concerned.

Owing to the absence of any customary right of innocent passage through the air space, it has been the practice of states to enter into "The International Air Services Transit Agreement, 1944", drawn up at the same time as the Chicago Convention in 1944, containing what has come to be known as "The Two Freedoms":—

1) The privilege to fly across the territory of a state without landing;

2) The privilege to land for non-traffic purposes;

and to which many states have already adhered.

---

[15]Latchford, *op. cit., supra* note 13, at p. 316.