INTERNATIONAL AIR LAW

SOME QUESTIONS ON AVIATION CABOTAGE

Nicky E. Hesse*

I

Cabotage, as we now conceive it, being the right of the state to reserve to its national instrumentalities of commerce all trade between two points of its territory, has never been — nos is it to-day — a firmly defined and limited concept of universal international law.

The term generally accepted in International Maritime and Fluvial Law since the beginning of the nineteenth century for the above defined right was introduced into International Air Law from the first consideration of international air traffic conventions.

Generally States use this right in International Maritime Law for traffic from port to port on the coast of one country, or from port to port on the different coasts of one country, the latter being understood as one political and geographical unit in contradistinction to colonial or other distant possessions. The latter traffic has, since Oppenheim's paper on the question of Maritime Cabotage[1] usually been referred to as "Colonial Trade". This practice in Maritime Law is, however, not universal. Portugal and the United States constitute the two major exceptions. They consider certain traffic to distant dependencies as cabotage — and reserve such traffic to their national flags.

Since Oppenheim's paper on this question various attempts have been made in International Conferences (the Barcelona Conference, 1921, and the Maritime Ports Conference, 1923) to restrict the right of maritime cabotage to the narrower sense as defined by Oppenheim. All these attempts have failed so far.[2]

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*Attorney-at-law, Member of the Bar of Heidelberg, Germany. Research assistant to the Institute of International Air Law, McGill University.

[1]Oppenheim, *The Meaning of Coasting-Trade in Commercial Treaties,* 24 L. Q. Rev. 328, 331 (1908).

[2]Convention of the Régime of Navigable Waterways Art. 5; Convention and Statute on Maritime Ports Art. 9; Transit and Communications, Doc. C. 29, M. 15 at 61 (League of Nations Publications, 2d Gen. Conference, 1924); Schueckling, Report on the Law of Territorial Waters, c. 10, art. 8 (League of Nations Comm'n of Experts for the Codification of Int'l Law).

The earliest legislation on cabotage or "coasting-trade", which is the Anglo-American term for this right, dates as far back as 1562.[3]

The present legal situation with regard to cabotage is still that this right can be used lawfully in a very wide sense and in a discriminatory way. The fear of retaliation appears to be the major reason for the generally limited customary practice of most States. It should be noted, that this right may at given occasions fulfil protective purposes for a weak national merchant marine. Further more it should not be forgotten that at the present time even practices to restrict colonial trade to the metropolitan country exclusively would not be unlawful, provided that contravening Conventions and Treaties have been renounced. This right is, of course, only of academic interest as any nation acting in this way would most certainly exclude herself from intercourse with the rest of the world. But the right is still existent.

Cabotage is a term which is applied to the same right in International Air Law. The word is found as a marginal note in Article 7 of the Chicago Convention,[4] though not part of the Convention as such. It has, however, in Air Law a meaning entirely different, so far as its application in practice goes, although defining the same basic right as in Maritime Law, to reserve the national traffic to the nation's flag. The basic difference is that a general custom exists in Maritime Law of the Nations restricting this right to territorial units as defined by Oppenheim. whilst the general custom with regard to aviation cabotage is on the contrary to apply it in the widest sense including "Colonial Trade".

It may appear striking that the same term is used for two different legal practices. The short and recent history of this split in the notion of cabotage is probably a quite unique example of how political, sociological and economic factors create law and even change established legal practices.

Originally in the first attempts to arrive at an international aviation convention, it was quite clear to all delegations participating that the concept of cabotage to be introduced in such a convention was intended to be the one generally known and practiced in Maritime and Fluvial Law. The first statement to that effect was contained in the 1910 German Draft Proposal for the then intended Paris Convention.[5]

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[3]Cf. STATUTES OF ENGLAND, 5 ELIZ., c. 5, §8.

[4]Art. 7 of the Chicago Convention reads: "Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such privilege from any other State."

[5]GERMAN DRAFT PROPOSAL FOR INT'L AVIATION CONVENTION Art. 14 in Conférence int'le de navigation aérienne (Paris 1910), Exposé des vues des puissances d'après les memoranda adressés au gouvernement français (Paris 1909).

The concept was that cabotage should be permitted to be practised only in cases when a flight does not leave the territory of one state to get to any other territory, be it even of the same State. No one raised any doubt in that respect, although another Article in this Draft Proposal provided that such Convention might be made effective for distant possessions.[6] Because there was no such doubt the question as to the application of cabotage in flights to such distant territory was not raised.

The final Convention of 1910 which was never signed, for reasons immaterial here, provided the same narrow application of cabotage, as the Minutes of the Conference show, although the text was less clear in that respect.[7]

When the Paris Convention of 1919 was drafted, what later appeared to be an error of omission entered the text of the Convention unintentionally, the omission capable of overthrowing the usual concept of cabotage. The question as to whether cabotage should be applied in the generally understood maritime sense was not raised. On other matters relating to cabotage there was some discussion indicating that had the question, so far not yet recognized, been raised, then probably no agreement might have been reached as to whether the maritime concept should hold true in the air or a new concept should be developed and agreed on. The Delegations were at any rate then not willing to agree to anything on which there as yet existed no practical experience.[8] And on aviation cabotage certainly none then existed.

The difficulty arises from the text of the 1919 Paris Convention providing in Articles 1 and 40 that *territory* should be understood as the metropolitan territory, colonial territories and the adjacent waters, and that furthermore protectorates and mandates should be legally assimilated to the territories of the protecting or mandatory state for the purpose of the Convention. These provisions aimed at a definition of what territories are considered as under the sovereignty of a contracting State. Then Article 16 of the Convention permitted a contracting State to exclude from the granted traffic-privileges cabotage traffic in favour of national aircraft "between two points of its territory".

Here lay a grave discrepancy, opening the way for an argument allowing the then unusual interpretation that traffic from the metropolitan territory to a colonial territory could be considered as *cabotage-traffic*. The text of the Convention clearly allowed such interpretation which left it to the discretion of the states concerned, whether or not to apply such a wide meaning of the notion of cabotage in air traffic.

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[6]GERMAN DRAFT PROPOSAL, *supra* note 5, Art. 40.

[7]Conférence int'le de navigation aérienne, PROCÈS VERBEAUX 103, 241, 281 and 322-23, Règle 3 (Paris 1910).

[8]DE LA PRADELLE, AÉRONAUTIQUE 263, 453-55, 484-85, 603 (1936).

Several years after the Paris Convention was signed, the Nations finally stated what they thought of the difficulty. They agreed almost unanimously to take full advantage of the interpretation giving them the right to extend cabotage to an apparently unintended meaning, although such interpretation was obviously and clearly against the basic idea of the same Convention into which it slipped. It may be of interest to scholars to refer to the studies of the Legal Subcommission of the International Commission for Air Navigation (ICAN), and in particular to Professor Ambrosini's Reports on the question in this Subcommission and the Commission itself.

The Minutes show clearly how, after the question was once discovered in 1931 on the occasion of a French *Questionnaire* relating to other cabotage questions, the Legal Subcommission for four years tried hard to bring home to the representatives of the sovereign Nations and Contracting States to the Convention that such an interpretation as allowed by the unfortunate text of Article 16, taken together with Articles 1 and 40, would be contrary to the sense of the Convention and was not intended when the Convention was drafted. This Expert-Commission was entirely overruled by the hard facts that sovereign Nations had to apply the Convention and wanted to apply it in a sense serving the national interests of each. The Commission could not get unanimity on a change of the text of Article 16 and the idea to bring aviation cabotage in line with maritime cabotage was finally dropped, ending with a Resolution to use with moderation the right permitted by the Convention.[9]

The objection might be raised that such a practice and interpretation was not intended at the time of the Draft and that an obvious error or slip cannot create right.

This legal objection must be answered to the effect that, after the error had been realised, the contracting parties stated that they did not want any change and, therefore, henceforth expressly *agreed* to this wide application of cabotage.

Thus the result is that the concept of cabotage was in fact very basically changed and was nearer to the old "Colonial Trade" rule.

The Paris Convention was superseded in 1945 by the Chicago Convention of 1944. There again was an opportunity to bring the narrower concept of maritime cabotage, allowing more freedom of international air navigation back

[9]Int'l Comm'n for Air Navigation [hereinafter ICAN], 1 MINUTES OF THE LEGAL SUBCOMM'N Minutes No. 1, Annex G (1931); *Id.* at 20, 21: the question raised by the Dutch Delegate, Dr. Schoenfeld; ICAN, MINUTES OF THE COMM'N Annex AI (1931); *Id.* at 45; *Id.*, Annex AE; *Id.* at 94 (1932); *Id.*, Annexes AT AS (1933); ICAN, MINUTES OF THE LEGAL SUBCOMM'N Annex C (1933); ICAN, MINUTES OF THE COMM'N 96 (1933); *Id.* at 94, Res. No. 672 (1933); ICAN, MINUTES OF THE LEGAL SUBCOMM'N 14 (1934); ICAN, MINUTES OF THE COMM'N 114 (1934).

into practice. The idea was not taken up by any mjor group and the same technical principle as in the Paris Convention of 1919 was incorporated in Articles 1, 2 and 7 of the Chicago Convention.

As a conclusion, it cannot be said that this very wide interpretation of cabotage in aviation law is against the rules of International Law. Admittedly there is no such commanding and binding universal rule in Maritime Law. Besides there is no cogent reason why Air Law should be subject to the rules built up in Maritime Law. Although obviously there had been legal thought in terms of analogy in the 1910 and 1919 Conferences, there is no controlling legal requirement to apply analogous thinking by all means wherever it may fit. And furthermore it is questionable whether Air and Maritime Law can be construed entirely by way of analogies. The media and means of transportation are distinctly different, both politically and economically. Air Navigation depends to a large extent on flying over territories of sovereign nations. Air Navigation is yet fairly young and in the stage of major development which may induce nations to protect the national growth of this branch of traffic before opening it to competition. Navigation of the seas is long established and is in a kind of international equilibrium. Thus there may be some purpose at the present time to practise cabotage as a broad protective means, although it should be realized that it is a practice opposed to freedom of traffic. This, at the same time, shows the weak side of the present cabotage rule in Air Law. If it hampers aerial traffic, time and again the attempt will be made within the framework of conventions and on the occasion of conferences to reduce this rule to a narrower interpretation, until it may finally disappear entirely in the changing bilateral or multilateral relations when air navigation and air traffic get firmly established. And this process, on our looking back at the last thirty years of practice, will certainly be much faster than it was in Maritime Law.

The present interpretation is lawful, though highly objectionable as a restriction of freedom of aerial traffic.

II

After the major question about the present practice of aerial cabotage with regard to the term *territory* and its international legality has been answered, a few more specialised and minor questions should be touched, and, as far as the scope and length of this article permits, answered to some extent.

It appeared that the term *aerial cabotage* covers something distinctively different from *maritime cabotage* by comprising both what may be termed *original cabotage* (understood as covering one single territorial unit) and *original colonial trade*. It might appear that the term should henceforth no longer be used in legal terminology as referring to air traffic, since it is misleading as a legal term, having only a vague relation to the term in

Maritime law language. It could be suggested to use a clearer term in contradistinction to the now commonly used term *international traffic in passengers, mail and cargo*[10] by naming what is so far called *cabotage-traffic*, as *national traffic* which would in this writer's opinion be clear to indicate all traffic reserved to any one nation as between any territories under such nation's sovereignty and/or jurisdiction. This term might easily be introduced into practice.

The present practice of cabotage in aviation appears dissatisfying to many. By keeping the incorrect term — by which something very definite is understood in International Law — for the dissatisfying practice, we will be able to keep the nations aware of some basic lack of liberty in air-traffic. We should think twice, whether under these circumstances we should replace the term cabotage by a term nations and individuals may get used to and take as legally for granted some day. An incorrect term for something we want to discard finally, may prove helpful in discarding it, if the term always serves to remind us of some very clear and definite right of the Nations which may really be applicable in the very same and original way one day in Aviation Law.

The right of a state to reserve traffic between two points of its territory to the national flag as defined by Articles 2 and 7 of the Chicago Convention raises some doubt with regard to the case of a Federal State being formed out of sovereign states, which are contracting Parties to the Chicago Convention, with regard to Condominia and finally with regard to Trusteeship-Territories. We shall briefly deal with each of them.

Federal States

A Federal State which is formed out of a number of sovereign states may only then create a new, wider cabotage area in which the right of cabotage is applicable to all national ircraft of the former single sovereign nations exclusively, if the new Federation legally embodies the creation of a new single external sovereignty for the Federation as one state. Without such transfer of external sovereignty to the new level of the Federation a claim to reserve cabotage to the members of the Federation could be considered a violation of Article 7 (second sentence) of the Convention by which

> Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other state . . .

To form an example, the Benelux nations presently could not reserve cabotage within the three territories and to the distant possessions under the sovereignty of Holland and Belgium, to the aircraft of Belgium, Holland and Luxemburg,

[10]See *International Air Agreements of the Chicago-Type*, Annexes (1946 ff.)

as the Benelux is not embodied with a single external sovereignty conferred to her from each of the member states.

On the other hand, if Europe would form a *United States of Europe* with a central government, having external sovereignty, the cabotage rule for all formerly sovereign members within their territories in Europe and from there to their distant possessions would be in conformity with Article 7, provided such distant possessions would at the same time be subject to the same single new sovereignty. Europe could, it appears, by uniting to one externally sovereign state exclude all foreign aircraft from traffic between two points within the European Continent and between Europe and her possessions without a violation of Article 7.

Condominia

Sovereignty over a condiminium is generally jointly exercised by two or more nations over a territory.[11] Examples are Canton Island, Sudan, New Hebrides, Western Germany under occupation.[12] If we apply this rule to Article 7 of the Chicago Convention, we have to conclude that the states holding such joint sovereignty are entitled to consider a flight from their territories to such a condominium as a cabotage flight and would therefore be entitled to exclude aircraft of third nations from such traffic. The present practice in the Sudan appears to indicate this.[13]

As regards the right of the inhabitants of such a given condominium to engage in aviation in such territory, it appears that such right to the exclusion of third nations would exist, but only in concurrence with the same right of the nations holding sovereignty. The question of the inhabitants engaging in aviation seems to encounter some difficulty with the present concept of aircraft nationality. This is only apparently so. Nothing prevents a sovereign from providing the inhabitants of a territory with a certain nationality status.[14] It cannot be seen, why a community under foreign sovereignty should be barred from aviation activity in its territory, although the Chicago Convention appears to presuppose sovereignty. There is in fact no presupposition in the Convention that a community must have sovereignty in

[11] 1 OPPENHEIM, THE LAW OF NATIONS 409, 410 (1948).

[12] As to Western Germany see SCHWARZENBERGER, INTERNATIONAL COURTS 142, 312-15 (1949); there is no unanimity as to the status of Western Germany.

[13] Cf. ABC TIME TABLE (1951).

[14] LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW 323 (1926); WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 457, 461, 477 (1930); Wright, 1924, AM. J. INT'L L. 306, 310, 314 (1924): Wrights conclusion is that the sovereign may by legislative acts determine the status of the inhabitants. The sovereign may likewise through legislative act provide a national status for aircraft belonging to a carrier who is a native and resident of such territory.

order to be permitted to fly. It can derive such right or privilege from the sovereign nation, if the latter agrees to it as it can agree to the right or privilege to run railways. Such a case may soon become a fact with the present plans to begin West-German Civil Aviation, if we consider Western Germany as being presently not a sovereign nation (opinions on this point are not unanimous). We have to foresee air traffic on both a long-distance and local scale, although presently there is chiefly long-distance traffic. In such a case there appears to be no violation of Article 7, if the inhabitants obtain the right to engage in aerial commerce in their territory together with the right of the nation sovereign over such territory.

Trusteeship Territories

The Paris and Chicago Conventions consider mandates, for the purpose of the Conventions, as under the sovereignty of the respective contracting parties.[15] It was not proposed to settle the implicit question as to who is the holder of sovereignty over mandates. The contracting parties agreed only among themselves that such territories should be considered as coming under the rules of the Conventions. It is known that no definition was ever given in the Covenant of the League of Nations as to who holds sovereignty over mandate territories. Neither did the Hague Court decide this nor did there ever exist any unanimity amongst the publicists in International Law on the question. When the League of Nations wound up, the question was still unanswered and five different opinions were then existing on this question.[16]

It appears that in the case of B-mandates the equality of treatment was embodied in the Covenant itself.[17] The legal situation has to be differently construed as between the Chicago Convention and the Charter of the United Nations:

a) We have to observe that the Chicago Convention was drafted prior to the existence of the United Nations Charter and of the trusteeship system and it therefore only provides for mandates in Article 2 and not for trusteeship-territories.

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[15]PARIS CONVENTION Art. 40; CHICAGO CONVENTION Art. 2.

[16]WRIGHT, *op. cit. supra* note 14, at 267, 397; 1 OPPENHEIM, *op. cit. supra* note 11, at 202-203; for the practice of aviation and cabotage in mandated areas, see Cooper, *United* Nations Trusteeships, 2 AIR AFFAIRS 115 (1949): Cooper stresses that cabotage could be applied in mandated areas, provided always that the terms of the mandate did not directly limit this right: Art. 23(e) of the *Covenant* of the League of Nations did not constitute such limitation since it only contained a moral, and not a legal obligation; see also the example given by Cooper about some lack of clarity in the mandate over Tanganyika; principally it may be said that in the mandate-system apparently the equality-treatment was governing by way of the terms of each particular mandate and that, no such general principle could be derived from Art. 22 and 23 of the *Covenant.*

[17]COVENANT OF THE LEAGUE OF NATIONS Art. 22, ¶5.

b) The Charter provides in Article 76(d), differing from the Covenant, equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals as a basic objective of the trusteeship system which the Covenant did not provide with regard to mandates (except B-mandates).

e) Paragraph *(a)* above may indicate that trusteeship territories cannot come within the provisions of the Chicago Convention. No nation holding a trusteeship would appear to be bound to apply these provisions. Practice, however, shows that the Convention is applied to such territories (as it appears natural, if we consider the amount of international uniform regulation introduced through the International Convention on Aerial Navigation and the Chicago Convention, the latter now being in force in 57 states of the world). We may say that such wilful practice amongst the nations is proof of their general belief that the Convention governs trusteeship territories for the sake of uniform practise in world aviation.

We may at the same time construe this from the Agreement Between the United Nations and the International Civil Aviation Organisation of 1947. In Article 1 of this Agreement, the United Nations recognise the International Civil Aviation Organisation (ICAO) as a *specialized agency* in the meaning of Article 91 of the Charter. In Article 8 of the Agreement, ICAO is bound to cooperate with the Trusteeship Council, particularly with regard to matters with which ICAO is concerned. This would involve that the Chicago Convention at least governs in all instances where its Articles do not conflict with Articles 75 to 91 of the Charter. It appears, however, that in conflicting legislation the Charter clauses would govern other legislation in a situation analogous to a written constitution governing a law enacted thereunder to support and regulate the practice of the constitutional principles of any given state, although in our case the Charter came into force after the Chicago Convention. Thus both practice and international legislation so far appear to be sufficiently clear to include trusteeship territories in the Chicago Convention. It appears that in due course, in order to achieve completeness and clarity, it would only be necessary to change the text of the Convention,

Therefore it is submitted that we cannot say that trusteeship territories are not covered by the Chicago Convention.

There are certainly constitutional distinctions to be made between mandates and trusteeship territories. This is, for instance, clearly shown by Article 77 of the Charter. We may probably say that the concept of trusteeship is an acknowledgment of the principle of the League to institute a type of territories to be granted independence and sovereignty at the earliest time, put on a broader and more detailed international constitutional foundation in the

Charter,[18] although apparently no obligation to place a territory under trusteeship exists under the Charter in contradistinction to the mandate-system. If a territory is placed under trusteeship, what may be called the international constitutional rules are more defined (though not altogether in clear language) than in the Covenant. Thus we may say that also from this viewpoint, the Chicago Convention must be construed to include trusteeship-territories by analogy, since as it does expressly include mandates in the text.

d) There is no clarity yet as to who holds sovereignty over trusteeship territories. This cannot be of any influence on the Convention. As for this Convention, we may say that trusteeship territories must be construed like mandates, as being under the sovereignty of the Trustee for the same practical purposes as in the case of mandates. This cannot be applied, naturally, in the sense of external sovereignty *complete and exclusive* in any instance where the governing principles of the Charter indicate the contrary, because the parties that adhere both to the United Nations Charter and the Chicago Convention are bound by treaty to apply the governing principles of the Charter in defining the extent of their fictitious sovereignty for the purposes of the Chicago Convention.[19]

We therefore need not locate sovereignty over trusteeship territories to define the rules of cabotage, as we may have the texts of the Charter and Convention for such purposes.[20]

We would have to distinguish, however, between the mandate system with its practised "open door-policy" in economical matters, of which many examples in the mandate system have been cited by Cooper,[21] and the trusteeship-system which appears in fact far more complicated, since it places the interests of the inhabitants of such territories above the principle of equal economical treatment for all nations in such territories.[22] But this distinction may at the same time give us the rule with regard to trusteeship territories comparable to the situation in mandate territories. In mandate territories there existed the principle of equal treatment for all, including the mandatory power. In trusteeship territories the interests of the advancement of the inhabitants will in each case have to be considered first, and only if these interests do not conflict with the principle of equal treatment of all other nations, the latter principle can be practised. This may give us the solution to the question, if a nation as a Trustee may for instance reserve cabotage to its aircraft.

[18]See BOYD, THE UNITED NATIONS ORGANISATION HANDBOOK 85 (1946); KELSEN, THE LAW OF THE UNITED NATIONS 566 (1951).

[19]CHICAGO CONVENTION Art. 2.

[20]As to sovereignty over trusteeship territories, see KELSEN, *op. cit. supra* note 17, at at 688 and 1 OPPENHEIM, *op. cit. supra* note 11, at 214; Lauterpacht and Kelsen principally diverging in their views.

[21]Cooper, *supra* note 16.

[22]1 OPPENHEIM, *op. cit. supra* note 11, at 205-206.

In case cabotage is reserved, (which some bilateral agreements indicate) and the reserve is contested, we would have to ask, if this right can be based on a paramount interest of the inhabitants of such territory. It is easily seen that such a situation is far from satisfactory, as it may give the Trustee the opportunity to cover his own interests with the alleged and probably even provable interests of the inhabitants of the trusteeship territory. In such a situation may easily arise what the French call *détournement de pouvoir*. The situation calls for clarification.

It is submitted that none of the Trusteeship Agreements[23] permits a Trustee to reserve cabotage to aircraft of his own flag. As regards cabotage for inhabitants engaging in aviation, what has been said in the case of condominia would apply to trusteeship territories.

Most of the Trusteeship Agreements grant the right to enact legislation in the trusteeship-territory in conformity with the laws of the Trustee and to apply Conventions to which the Trustee is a party (this does not involve any grant of sovereignty to the Trustee). This should only be possible within the limits of the principles and provisions of the Charter which must govern all such legislation. A regrettable exception has been constituted in the Trusteeship Agreement between the United States and the United Nations regarding the former Japanese Pacific Islands.[24] Article 8(3) of this agreement expressly excludes all foreign aircraft, unless they have been granted special permission by the United States to enter the territory. It is a case of a strategic area Trusteeship Agreement.[25] We may ask: who can tell for how long an area may be of strategic value? It appears that in this instance, as often in contractual practice, too much hurry has been applied to conclude a treaty. It now stands there binding, even when the strategic value of the territory may, due to some change in the strategic conditions of powers, have entirely disappeared. Such a treaty clause may then become a pretext to favour national aircraft without any justification, although I do not imply any such intent in the subject of the particular case. But this instance should serve as an example that it would have been more practical to draft any such clauses subject to revision by the Trusteeship Council at any time a nation may call for it, and to state this in an article or particular agreement to such an effect, because it appears impossible to revise any such article otherwise. Article 87(d) of the Charter appears to exclude such a revision. Article 15 of the Agreement indicates the same result. It is interesting to observe that the Soviet Delegation had proposed to insert a revision clause in the Trusteeship Agreements.[26]

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[23] 8 UNITED NATIONS TREATY SERIES [hereinafter U.N.T.S.] Nos 115-123; 10 U.N.T.S. No. 1.

[24] 8 U.N.T.S. No. 123.

[25] U.N. CHARTER Art. 82.

[26] Cf. KELSEN, *op. cit. supra* note 18, at 655 n. 8.

Freedom of aerial Navigation for nations not parties to a trusteeship agreement is expressly provided in the Trusteeship Agreements for Tanganyika (Article 9); Ruanda Urandi (Article 9); Cameroons (British Administration; Article 9); Cameroons (French Administration; Article 8); Togoland (British Administration; Article 9); Togoland (French Administration; Article 8). No such clause is contained in the Agreements for Western Samoa, New Guinea and Nauru. The exclusion of foreign aircraft is provided in the above mentioned Agreement for the former Japanese islands.

Since all Trusteeship Agreements contain clauses to the effect that the Trustee has to administer the trusteeship territories in conformity with the principles of the Charter and in particular with Article 76, no exclusion of other nations from cabotage-traffic appears permissible, with the exception of the strategic trusteeship territory of the United States. The indicated exception of a Trustee reserving cabotage to itself, if this is in the interest of the inhabitants of the trusteeship territory, need not be discussed here any further, since it would always constitute a matter to be decided in the particular case in question. No legal solution, as a construction of the human mind, can be so perfect as not to prove subject to question in particular cases.

e) Principally we may say that in trusteeship territories Article 76(d) of the Charter would have to govern the application of any rights reserved to a contracting party of the Chicago Convention under that Convention. It should be added that practice does not appear to apply these binding rules of the Charter.[27]

Exclusiveness

Article 7 (second sentence) of the Chicago Convention provides that cabotage privileges may not be granted from one contracting State to another State. There is a minor observation to be made as to this provision. It is submitted that this terminology does not really prevent an exclusive grant. A State may grant cabotage rights to one other State without anything in the agreement indicating any exclusiveness. It may not grant this same privilege to another State. Such other State has practically no chance to maintain that Article 7 (second sentence) has been violated, because it would have to prove the exclusiveness in the foregoing agreement. A State so charged will be able to give manifold reasons why cabotage privileges have "accidentally" been granted only in one agreement. It appears that only a grant with the express provision not to grant cabotage privileges to another third State would be a violation of Article 7, in practice, since a silent agreement to the same effect would not be binding, but could nevertheless be carefully observed by the parties.

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[27] 53 U.N.T.S. 248: Air Agreement New Zealand-France, with regard to Western Samoa, §1, in which only freedoms 1 and 2 have been granted.