THE LEGAL STATUS OF THE AIRSPACE OF TRUSTEESHIP TERRITORY

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A Thesis

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PREFACE

Nearly all of the sovereign states of today developed as political manifestations of small, isolated areas, separated from one another by geographical barriers, precluding commercial intercourse. Within broad limits, human society shapes its political order so as to facilitate economic life and to maximize its security. As human skill in utilizing the earth's resources improves--i.e., the development of technology--by the same token, the political horizon widens. The observable features of the mature state are territorial sovereignty and a political pattern superimposed upon a portion of the earth's surface and extending into airspace. The tacit understandings and agreements which constitute international law develop as the technology of transportation and communication advances to reduce the impediments of physical barriers. The effect of technological development is the reduction of time and space factors which, in turn, intensifies the mutual interplay of geography and existing internation regulation. Nowhere is this phenomenon more apparent than in international aviation.

Public international air law is concerned with two basic problems: (1) the determination of the legal status of the airspace over the various parts of the earth's sur-

face, and (2) the legal regulation of flight, for the purpose of transit or commerce, into that space. The primary concern of this paper is with the first problem as it obtains in the trusteeship territories. Although aviation activity exists in airspace of uncertain legal status, the legal development involved in the second problem is held in abeyance pending resolution of the first problem.

That every State has complete and exclusive sovereignty over the airspace above its territory is a basic principle of international law, and it is the fundamental legal referent. It is a truism that the extent of sovereignty depends upon the definition of territory. The several areas on the earth's surface, the territory of which is not attached by the complete and exclusive sovereignty of a State, possess a kind of "no man's land, yet all men's land" characteristic. This characteristic does not vary in kind but in degree, whether one thinks of the high seas, the polar regions, trusteeship territories or outer space. With the failure to place with certainty the locus of sovereignty, new legal entities spring forth.

The inter-state agreement is the result of the weighing and balancing of interests and values, which sovereign states feel need regulation between themselves and, then, between themselves and dependent or other areas. The three inter-state agreements pertaining to the international legal

status of trusteeship territories are The Charter of the United Nations, The Convention on International Civil Aviation, and the several trusteeship agreements. Another source is the International Court of Justice, from which to date one advisory opinion has issued that has a bearing on the status of trusteeship territory.

With the failure of the provisions of the Convention on International Civil Aviation to encompass the trusteeship territories, the provisions of the Charter of the United Nations and the terms of the several trusteeship agreements jointly obtain. It is clear that under the provisions of the Charter, the airspace of trusteeship territories could have had a freedom approaching that of the airspace over the high seas. That the terms of the trusteeship agreements endowed the Administering Authorities with crucial economic and security rights, which lend themselves too readily to the obscuring of the non-discriminatory policy intended by the Charter for all members of the United Nations and their nationals, is also clear. The reluctance of the various States to use the International Court of Justice to clarify the multifarious legal problems engendered by the ambiguous text of the Charter is regrettable. The legal complexities and the political questions inherent in the foregoing factors suggest the need for the several States to give further international consideration

to the problem of civil air transportation into the trusteeship territories. Any aspect or phase of air jurisprudence not sufficiently clear is detrimental to the economic welfare, and a constant threat to the security of society as a whole.

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Chapter I

INTRODUCTION

1. Aviation and International Affairs

Aeronautical progress has thrust upon each of the politically active inhabitants of the globe, in more peremptory fashion each year, the task of reconciling his opinions as a human being with his opinions as a citizen. Those who believe that men in the mass ultimately act in accord with their interests and ultimately formulate their interests in accord with human considerations will foresee the emergence of a world community assuring peace and justice. Those, on the other hand, who believe that man in the mass is carnal, do not expect him to act consistently in support of his interests as he formulates them, or to formulate them in terms requiring vision beyond the horizon of the traditional social group.

As human beings, men want to maximize their security, their freedom and their welfare, and to consider all organizations, societies and communities including the state as means to this end.[1] They want to consider the state

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1. Myres S. McDougal and Gertrude C. K. Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action." 59 Yale Law Journal 60 (1949).

for man, not man for the state. As citizens, most want first of all the state of their allegiance to be secure, independent, and properous. They are willing to conform their wants as human beings to what the constitution, laws and customs of the state permit. The good citizen is even ready to ignore the wants of other peoples, nations, states and governments if his state refuses to admit them, and to assist his state at the risk of his life and property in utilizing resources, technology, science, administration, and the art of war to render impotent other governments, states, nations, or peoples who persist in demands opposed by his state.

While action to promote the economic and social needs of individuals often conflicts with action to promote the political and military needs of the state, this is not always the case. The individual in pursuing his private ends may be convinced that he is acting for the good of the state, and in forwarding national policies he often thinks he is serving his private ends. In emergencies, however, he will often find that such reconciliations do not free him from the necessity of choosing between human and national interests. This conflict is but an aspect of perennial problems of the individual and the group. Anthropologists observe that even the rigorous mores of the primitive tribe do not entirely suppress the individualism of human nature.[2] Sociologists,

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2. Ruth Benedict, The Chrysanthemum and the Sword. Boston: Houghton Mifflin Company, 1946.

while insisting that personality and culture continually interact, and that consequently the dichotomy of individual and group is a fiction, have not been able to evade the problem latent in all societies, and occasionally emerging in violent revolts against established laws and customs, under the banner of individual rights and human freedom.[3]

International lawyers from Victoria, Suarez, and Grotius down to the present time have discussed the question of whether international law should protect only the rights of states, including the "rights" to tyrannize over their nationals and to conquer their neighbors, or should also protect the rights of man against both foreign states and his own. It has been suggested that international law, though primarily designed to protect the independence of states, imposes limits upon the exercise of that independence in the interest not only of other states but also of individuals and the human race.[4] The civil law of the state, as Grotius pointed out, springs from the authority of natural law which imposes on all men and institutions respect for human personality.[5]

We are today aware that sovereignty can subject the human being to its will at home, and subject him to its

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3. Gunnar Myrdal, The American Dilemma. New York: Harper & Bros., New York, 1944.

4. The Lotus, P. C. I. J., Series A, No. 10 (1927).

5. Hugo Grotius, De Jure Belli ac Pacis, Prolegomena, Sec. 16.

destructive power abroad in a manner unsuspected in previous centuries. We are aware too of the helplessness of international law and natural law in a world infected by threats of totalitarianism and its accompanying power. It is more necessary and difficult than ever before for men to be at the same time citizens of the state and citizens of the world. In this paper treating the legal status of the airspace of trusteeship territory, it is appropriate to consider trends in aviation and trends in world politics in the course of framing the issue that seeks resolution--that of enhanced amicability between men and groups of men in the face of restrictions, commitments, and allegiances.

a. Tendencies of Aviation

In the years that have passed since the airplane was first flown in 1903, the trend of development has been regular and continuous, with some temporary aberrations resulting from two world wars. The following indices merit mention:
(1) The number of airplanes in the world has increased from one to a maximum of over a quarter of a million at the end of World War II. Nonmilitary planes are continually and rapidly increasing in number.
(2) The average weight of planes has increased from less than half a ton to more than ten tons. While this average will probably decrease as the proportion of "personal" and "feeder"

types of aircraft become greater, the weight of transport and bombing planes will continue to increase.

(3) The average speed of planes has increased from thirty to over two hundred miles per hour, of military planes to almost four hundred miles per hour, and of jet planes to supersonic speeds.

(4) Transport plane safety has increased from twenty-seven fatalities to less than two fatalities per hundred million passenger-miles of travel.

(5) Passengers carried per year in the U.S. has increased in number from none to a rate of more than six million.

(6) Passenger miles flown on regular routes in the U. S. has increased from none to more than four billion a year.

(7) Passenger travel cost has decreased from twelve to less than five cents per mile.

(8) The quantity of mail and express cargo has risen from nothing to over a hundred million ton-miles a year.

(9) The length of commercially feasible flights has increased from nothing to over three thousand miles.

(10) The number of types of planes has increased from one to hundreds specialized for peace and war. Nonmilitary planes are specialized for speed, safety, water and ground landing, long and short hops, commercial and personal use. Military planes specialized for transport, bombing, attack, reconnaissance, and water, ground, and carrier landing have pro-

liferated in many types. The helicopter and other types for slow-speed landing in limited space have developed, as have types for greater speeds, higher flights and longer flights.

(11) Regular operative flights have increased in number to encompass a world network.

(12) The number of airports in the world has increased from none to thousands.

(13) The equipment in airports and airways has improved with the development of means for providing accurate weather information, radio beacons, radar control, and other facilities for minimizing the influence of weather or regularity of schedules, and particularly safety of landing.

(14) The schedules of commercial planes have increased in regularity, reliability and frequency.

(15) The number of nations participating in the production of planes, the organization of airlines, and the licensing of pilots and air-routes has increased.

(16) Civil aviation has tended to be controlled by national governments in domestic commerce through government operation or regulation, and in international commerce through government-owned or controlled "chosen instruments."

(17) While military aviation has predominated in number of planes used, the relative importance of civil aviation has tended to increase.

(18) As a military arm, aviation has predominated in numbers of units added by way of increase, as compared with armies and navies. The independent mission of the air arm, that of attack on the enemies' industry and morale, has proved increasingly important in comparison with the navy's basic mission of blockade and the army's basic mission of territorial occupation, and even in comparison with the mission of all these arms in destroying the enemies' armed forces in being.

(19) The military characteristics of the airplane in performing its independent mission have developed steadily in all the elements which contribute to an efficient weapon: mobility, striking power, protection, and holding power.

(20) Use of the air arm in war has tremendously increased the power of the offensive compared with that of the defensive, particularly since the invention of the atom bomb greatly augmented the plane's striking power. This increase can be measured by the ratio of the cost of weapon to its destructiveness in terms of man-hours, which with the atom bomb borne by airplane or rocket may rise to an order of a thousand man-hours of life and property destroyed to one man-hour expended in constructing and operating the weapon.

(21) Aviation has greatly increased the area over which government can exercise effective power to maintain order and justice. In the course of world history, land forces

alone could never have been adequate alone to implement world government. By a suitable distribution of bases and the organization of a relatively small policing force of reconnaissance, combat and bombing planes, international government today could prevent aggression and maintain justice and order throughout the world. The problem of world order has ceased to be primarily technical and has become almost entirely political.[6]

In summary, the trend of the airplane has been toward increasing efficiency and increasing use as an instrument of transport, of communication, of commerce, of cultural diffusion, and of offensive war. The trend has progressively reduced technical and strategic distances in the world. It has diffused techniques and cultures, and has tended to reduce the differences of civilization. It has increased the vulnerability of peoples everywhere to attack and has reduced the value of distance or geographic barriers as defenses against military attack, cultural penetration, or economic competition. It has created the technical possibility of a world police force capable of preventing aggression.[7]

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6. "Commission to Study the Organization of Peace, Fourth Report," Security and World Organization, International Conciliation, No. 396 (January, 1944), pp. 56ff.

7. Quincy Wright, Problems of Stability and Progress in International Relations. Berkeley: University of California Press (1954), p. 300.

b. The Condition of World Politics

During the aforedescribed period, the power structure in international relations has been marked by the following developments: (1) War has been more frequent, widespread, and destructive than in any period of similar length, at leas t since the seventeenth century and probably in all human history.

(2) The centers of major military and political power have decreased in number and these centers have tended to exercise influence over the smaller states in their regions, thus augmenting the differential between the few great powers and the other states.

(3) The balance of power has become less stable, international law has been less observed, and confidence in peace and order has suffered a decline.

(4) The governments of national states have tended to become more centralized and to plan economy and control opinion more completely and efficiently than ever before.

(5) War and preparation for war has tended to absorb a larger proportion of the population and the economic activities of countries than ever before.

(6) Persecutions and massacres under public authority or public tolerance have occurred with a barbarity and on a scale unprecedented in human history.

(7) International organizations in the technical, economic, humanitarian, and political fields have been more generally accepted, more comprehensive, and more active than ever before.

(8) International legislative treaties have been more abundant, more comprehensive, and more generally ratified than ever before.

(9) Institutions and procedures of international adjudication, conciliation, consultation and inquiry have been accepted and used more widely than before.

(10) Declarations by governments, individually and collectively, have professed greater devotion to universal peace, to international justice, to human welfare and to human rights than ever before.

These conditions manifest the extreme and conflicting developments, on the other hand, of government actions and policies supported by national sentiments oblivious to considerations of humanity, liberty, justice, and peace, and, on the other, of determination of all nations to promote the welfare and liberty of mankind, to pursue international peace and justice, and to develop a stable and orderly community of nations. It is civilization's problem, that while aviation has manifested a continuous and consistent trend toward greater efficiency and wider utilization, world

politics has been characterized by ever greater confusion, inconsistency and violence, and self-contradiction.[8]

2. The Legal Concept of "Sovereignty over the Airspace"

The development of air navigation since the beginning of the twentieth century has brought with it a series of international problems of great importance from the points of view of economic activity and security. These problems have been the subject of theoretical study and of official negotiation, and the partial and temporary solutions recommended or achieved afford an excellent illustration of motives and methods in the contemporary movement toward international law and organization. Salient characteristics in the movement are the facts that governments no longer leave the development of common institutions to the spontaneous, but slow, evolution of custom, but are constrained to join in a conscious collective endeavour to devise bits of mechanism capable of achieving a common purpose, at the same time eschewing doctrine for the more realistic objectives of keeping intact their freedom of action, necessarily tempered by the realization of a pressing need for joint regulation and compromise.[9]

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8. Quincy Wright, ibid., pp. 300ff.

9. P. E. Corbett, Law and Society in the Relations of States. New York: Harcourt, Brace and Co. (1951), p. 157.

Up to the first World War, the discussion of sovereignty in the air was mainly academic, and legal theory had its day. While the law was concerned with the use by man of surface land rights, the maxim cujus est solum ejus est usque ad coelum et ad inferos, voiced by Coke, James V. C., and Lord Ellenborough in early English cases, if only to receive criticism, came in for considerable attention.[10] This doctrine, that the subjacent State should have unlimited sovereignty in its air, was countered with the view, res communis omnium, that the air, like the sea, should everywhere be open to all. Such view was espoused in Justinian's Institutes, and during the reign of Queen Elizabeth,[11] although some view Roman law as having taken the position suggested by the first doctrine.[12] Another thesis put forward by a renowned professor of international law was the favoring of sovereignty coupled with a right of innocent passage for foreign aircraft such as international law recognized for surface vessels through the marginal seas.[13] A further modification would have admitted sover-

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10. Col. O. M. Biggar, "The Law Relating to the Air," Canadian Law Times, Vol. Twelve (1921), Toronto: The Carswell Co., Ltd., pp. 667ff.

11. John A. Eubank, "Who Owns the Air Space?" 63 American Law Review, Number 1, page 1 (Jan. Feb. 1929).

12. Francesco Lardone, "Airspace Rights in Roman Law," Air Law Review, Vol. 2, No. 4 (Nov. 1931), pp. 455ff; also J. C. Cooper, "Roman Law and the Maxim 'Cujus est Solum'" in International Air Law, 1 Institute of International Air Law, p. 2.

13. "Westlake at Institute of International Law, 1906 Session," Annuaire de l'Institut de droit international, Vol. 21, 1906, p. 297.

eignty in the lower belt of the air, as in the marginal sea, but left all above this common.[14]

The views have been diverse and the sources manifold. One of the earlier English cases prompted this comment where an action was brought for damages for invasion of airspace:

> I do not think it is a trespass to interfere with the column of air superincumbent on the close. If this board overhanging the plaintiff's garden be a trespass it would follow that an aeronaut was liable to an action quaere clausum fregit at the suit of every occupier of a field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded.[15]

A New York decision involving a telephone company resulted in the court's holding that "the space above land is real estate, the same as the soil beneath, and the law regards empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly."[16] At the Hague Peace Conference in 1899 an international agreement was made by which the representatives of the Great Powers bound themselves to prohibit the launching of

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14. Kenneth W. Colegrove, International Control of Aviation. Boston: World Peace Foundation (1930), pp. 42ff.

15. Pickering v Rudd, 4 Campbell 219.

16. Butler v Frontier Telephone Company, 186 N. Y. 486.

projectiles and explosives from balloons or any other form of aircraft for a period of five years. Emperor Nicholas of Russia, at whose invitation the first Peace Congress met, had commended the subject of aircraft developments to the study of the delegates. In 1907, the Second International Peace Conference at The Hague renewed the compact.[17]

The 1910 Paris conference adjourned without reaching any signed convention as to the extent to which international air navigation should be free of political control by the State flown over.[18] A writer of the day urged that the doctrine of freedom of the air, even limited by the States' so-called right of conservation, lacked historical and juridical soundness, and that it rested on no solid rock of consistent principle. The doctrine of ownership of private individuals, and of the sovereignty of States in airspace, on the other hand, was said to offer "a firm and solid basis for the sound growth of public and private aerial law in the future."[19] Air progress was held to be best furthered by limiting both the landowner's right of

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17. William Marshall Freeman, Air and Aviation Law. London: Sir Isaac Pitman and Sons, Ltd. (1931), pp. 1ff.

18. Kenneth W. Colegrove, op. cit., p. 48.

19. Harold D. Hazeltine, The Law of the Air. London: University of London Press (1911), p. 142.

property and the State's right of sovereignty in the airspace by the necessary international conventions and national statutes. The view that the high air, like the high sea, should be open to the commerce of all peoples, serving as a new world's highway for a time seemed likely to prevail, reinforced as it was by analogies drawn from existing international law, the right of innocent passage in territorial waters, and the supposed right of navigation of national rivers.[20] However, it may be said that the conference evidenced tacit but actual agreement of the delegations that each State had full sovereignty in flight-space over its national lands and waters as part of its territory; that any division of such territorial flight-space into zones is impractical and unnecessary; and that no general right of international transit or commerce exists for aircraft of other States through such territorial flight-space.[21]

By an exchange of notes, the French and German governments made a provisional agreement dealing with the special conditions under which the military and nonmilitary aircraft of each State would be received on the territory of the other, but no attempt was made as of this date in

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20. Arthur K. Kuhn, "The Beginnings of an Aerial Law." 4 American Journal of International Law 109 (1910).

21. J. C. Cooper, "The International Air Navigation Conference, Paris, 1910." 19 Journal Air Law and Commerce 143 (Spring, 1952).

July, 1913, to establish any general principle.[22] In 1916, a Pan-American Aeronautical Conference was held in Santiago, Chile, at which principles defining conduct in the air were advanced.[23] It remained for the developments of the First World War to precipitate action of a reasonably definitive nature in the field of aviation.

a. Developments after the First World War

Military considerations during the war forced general acceptance of the sovereignty of each nation over its airspace. Air boundaries, as well as land boundaries were closed for security reasons, and belligerent aircraft flying over neutral territory were forced to land and their crews interned just as if surface boundaries were crossed.[24] At the close of hostilities, the various participants found themselves with large numbers of aircraft and trained pilots and some impetus was thus provided for the regularizing of conditions under which these aircraft might be employed in international commerce.[25] The Aeronautical

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22. William Marshall Freeman, op. cit., pp. 1ff.

23. Ibid.

24. J. C. Cooper, "Air Transport and World Organization." 55 Yale Law Journal 1175 (1946).

25. Manley O. Hudson, "Aviation and International Law." Air Law Review, Vol. 1, Number 2 (April 1930), pp. 183ff.

Commission of the Versailles Peace Conference was directed to prepare an air navigation convention, the purpose of which was to afford an opportunity for a common approach to aviation legislation, at a time when the States involved found agreement easier to reach than in any normal period.

b. Conferences and Conventions

i. The Paris Convention

The Convention on Aerial Navigation signed at Paris on October 13, 1919 was the fruit of efforts exerted at the Peace Conference, the Treaty of which contains little of new importance to aviation. The principles accepted but not signed at the Paris Conference of 1910 were the bases of the present legislation.[26] The latter's "air clauses" required demobilization of Germany's air forces, limited the manufacture and importation of aircraft for a short period, prohibited possession of any military or naval aircraft or of dirigibles, and gave to the Allied powers, during the period of occupation, freedom of passage through the air, and freedom of transit and landing for their aircraft. The Treaty also set up an Inter-Allied Commission of Control, empowered to investigate Germany's execution of the "air clauses." The terms of peace thus exacted were severe, as

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26. J. C. Cooper, "The International Air Navigation Conference, Paris 1910." 19 Journal Air Law and Commerce 128.

a consequence of which, subsequent modification became necessary. An agreement made at Paris on May 22, 1926, provided that Germany was bound to "see that German civil aviation was kept within the bounds of normal development." By part XI of the Treaty of Versailles, the Allied powers were given a special privilege of air navigation over German territory, designed to secure treatment equally beneficial with that given to German nationals, but it was the kind of privilege that couldn't be made permanent unless it were reciprocal, and the treaty itself provided for its expiration in 1923.[27]

The Paris Convention was brought into force on July 11, 1922, by fourteen of the twenty-six signatory States (including the British Dominions) and Persia which had promptly adhered to it. Sixteen of its adherents were European States, two (Chile and Uruguay) were South American, and four (India, Japan, Persia and Siam) were Asiatic. The ratifying or adhering parties were: Australia, Belgium, Bulgaria, Canada, Chile, Czechoslovakia, Denmark, France, Great Britain, Greece, India, Irish Free State, Italy, Japan, Netherlands, New Zealand, Persia, Poland, Portugal, Roumania, Saar territory, Siam, South Africa, Sweden, Uruguay, and Yugoslavia.[28]

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27. Op. cit.

28. 11 "League of Nations Treaty Series 174" Official Bulletin of the International Commission for Air Navigation (Number 15), p. 51.

The United States took an active part in the preparation of this Convention but did not ratify it.

It was the design of the framers of the Paris Convention that it should create an International Air Union into which all States might be eventually admitted. But special conditions were set for non-signatory States which had taken part in the war, i.e., Germany, Austria, Hungary, and Turkey, and the admission of these States was to be conditioned on either membership in the League of Nations or a three-quarters vote. Bulgaria was the only one of this group of States to become a party to the Convention. Article five of the Convention provided that

> no contracting States 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.

This was a s trange provision to include in any effort at general international legislation, although it was indubitably consistent with the first article which provided:

> The High Contracting Parties recognize that every power has complete and exclusive sovereignty over the airspace 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.[29]

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29. Ibid., Official Bulletin No. 26, Department of State Publication 2143 (1944).

Article two of the Convention provided that each contracting State should undertake in time of peace to accord "freedom of passage" above its territory to the aircraft of the other contracting States. In Article fifteen it was provided that every aircraft of a contracting State should have the right to cross the airspace of another State without landing following the route fixed by the State flown over, with an additional proviso that the State flown over might require the aircraft to land for security reasons.[30]

A protocol dated May 1, 1920,[31] provided that derogations might be granted at the request of signatory or adhering States. A protocol of amendment was signed and brought into force on December 14, 1926, which made it possible for any contracting State to conclude with a non-contracting State a special convention for the latter's enjoyment of its airspace, on condition it should not be in conflict with the general Convention.[32] A protocol dated June 15, 1929, amended and clarified the rights of air transport described in Article 15, stating:

> 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.[33]

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30. J. C. Cooper, op. cit., pp. 1193-1194.

31. 11 League of Nations Treaty Series 307.

32. British Treaty Series No. 12 (1925).

33. Roper, La Convention Internationale du Octobre 13, 1919 (1930).

Each contracting State was said in the Convention to be "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 legislation 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."[34] As subsequently amended, and "as an exceptional measure and in the interest of public safety," each contracting State was authorized to permit flight over such prohibited areas by national aircraft, and to reserve "the right in exceptional circumstances in time of peace and with immediate effect" temporarily to restrict or prohibit flight over its territory or part thereof, on condition that such restriction or prohibition should be applicable without distinction of nationality to the aircraft of all the other States.[35]

The phrase "conditional on its prior authorization" contained in Article 15 connoted the need to observe requirements imposed by the State over whose airspace flight was sought. Such aircraft could be obliged to land if

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34. Charles Cheney Hyde, International Law. Boston: Little Brown and Company (1945), pp. 595ff.

35. Article 3, Paris Convention; Hyde, op. cit.

ordered to do so; no aircraft capable of flying without a pilot could so fly without special consent; each contracting State was acknowledged to have the right to establish reservations and restrictions in favor of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory;[36] in case of war, the freedom of action of the contracting States either as belligerents or neutrals was to be unimpaired.[37] The provision imposing restrictions in connection with the carriage of persons and goods was the first specific air cabotage clause that received international approval,[38] and was complemented by Article 17 which stated that the aircraft of any State which did establish such restrictions could be subjected to similar restrictions in any other contracting State, even though that State did not ordinarily impose any restrictions on other foreign aircraft. "Territory" was defined in Articles 1 and 40 substantially to include land areas and adjacent waters under the sovereignty, protection, or mandate of the State.

While the original maritime concept of cabotage included only navigation and trading between ports on the

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36. Article 16, Paris Convention.

37. Article 38, Paris Convention.

38. W. M. Sheehan, "Air Cabotage and the Chicago Convention," 63 Harvard Law Review 1157, 1158 (1950).

same coast belonging to one State, and the right of the State to reserve such trade to its national ships was based on its jurisdiction over adjacent territorial waters,[39] the Convention provision gave the State of origin and destination absolute control over commerce and trade even when intermediate stops were made at some foreign point, international as the concern might consequently become. It has been suggested that while air cabotage might be expected to be subject to more international control than maritime cabotage, since changes in rates have generally greater international repercussions, the control over air cabotage derived from a background of postwar tension in which nationalistic pressures predominated.[40]

Forty-three States, not including the United States, eventually ratified the Convention. Article 42, the provision that placed restrictions upon the non-signatory States that took part in the war of 1914-1918, was modified by a protocol of June 15, 1929, which entered into force on May 17, 1933, and it then provided that "any State shall be permitted to adhere to the convention."[41] Special conventions reached under the amending protocol of this date were

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39. L. Oppenheim, International Law, Vol. 1, p. 446 (6th Edition, 1947).

40. W. M. Sheehan, op. cit., p. 1159.

41. Charles Cheney Hyde, op. cit., pp. 595ff; Article 41, Paris Convention.

required to be consistent with the general principles of the Convention, and were to be communicated to the International Commission for Air Navigation which was to notify the other States.[42] The essential purpose of this body was to facilitate: (a) the joint determination from time to time of the conditions under which aircraft and crews would be licensed for international flight; (b) the exchange of information regarding technical developments, particularly new safety devices, improvements in wireless communications, and advances in meteorology and medicine with a bearing on air navigation; and (c) the reception and communication, or original suggestion, of proposals for amending the main text of the convention. To the main text was attached a series of annexes chiefly concerned with the regulation and air worthiness certification of aircraft, licensing of personnel, logbooks, nationality marks, and maps. Keeping these provisions up to date was a special concern of the commission, and for this purpose it was empowered to make amendments by majority vote. Amendments approved by such majority as required became binding even on States which has voted against them.[43]

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42. "Protocol concerning amendments to certain articles of the 1919 Convention concluded June 15, 1929," League of Nations Treaty Series, CXXXVIII, 418.

43. P. E. Corbett, op. cit., pp. 159-160.

It was this Convention Relating to the Regulation of Aerial Navigation, signed at Paris in 1919, that marked the first reasonably complete attempt to codify rules of international flight. It was the first World War which made clear the significance of the various factors to be reckoned with in applying theory to the formulation of rules for general guidance. These factors have been described to be (a) the effect of the operation of the law of gravity upon all bodies heavier than air passing over the subjacent land, (b) the indispensability of air itself to the inhabitants of the earth, and (c) the practical importance of transportation and communication through the airspace over foreign territory.[44] An overview of this Convention discloses that the most important subsequent development in civil aviation was left unprovided for. Nations not only could and did prohibit foreign aircraft from landing, they even forbade transit through the airspace, thus necessitating long and dangerous detours on much traveled air routes. Because of the continuation of the policy embedded in this first piece of broad-scale international legislation, the establishment of international airways became, and appears to continue to be, a matter for bilateral, or, at most, limited multi-lateral agreement.[45] But it would betoken confusion of thought to

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44. Charles Cheney Hyde, op. cit., p. 585.

45. P. E. Corbett, op. cit., p. 160.

intimate that in the absence of agreement there is, in international circles, no law of the air. The evidence is abundant that States have reached an agreement, unanimous in nature, that they have a right of control over the airspace above their territories. Such right may be regarded as exemplifying a principle of international law.[46]

Great Britain's Air Navigation Act of 1920, a national bit of legislation, reflected the policy of sovereign control of the airspace when it spoke, in its preamble, to the effect that:

> Whereas the full and absolute 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.[47]

The same view was embodied in the Uniform Aviation Act adopted by the Conference of Commissioners on Uniform State Laws at San Francisco on August 7, 1922, it having provided that the ownership of space "above the lands and waters of this state is declared to be vested in the several owners

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46. Charles Cheney Hyde, op. cit., pp. 604, 605; Herbert W. Briggs, The Law of Nations. New York: Appleton-Century-Crofts, Inc. (1952), pp. 323, 324.

47. Air Navigation Act, 1920, 11 Geo. 5, c. 80; Briggs, op. cit., p. 321.

of the surface beneath."[48] This is the case notwithstanding the fact that a right of flight is recognized at the appropriate height in the Uniform Law,[49] and that the British Act disallows a cause of action against aircraft flying "at a reasonable height above the ground, having regard to all the circumstances of the case."[50] The United States Air Commerce Act of 1926 reflects comparable policy in that it declares:

> Section 6.(a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above these portions of the adjacent marginal high seas, bays and lakes.[51]

ii. The Madrid Convention

The Paris Convention served as inspiration for the convocation of an Ibero-American Convention on Aerial Navi-

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48. William R. McCracken, "Air Law," The American Law Review, Vol. 57, page 97 (Jan.-Feb. 1923).

49. Article 4; McCracken, op. cit.

50. Clement L. Bouve, "The Development of International Rules of Conduct in Air Navigation," Air Law Review, Vol. 1, No. 1, p. 1 (Jan. 1930).

51. As amended June 23, 1938; 52 Stat. L. 1028, 49 U. S. C. A., Sec. 176.

gation in Madrid, Spain, on October 25, 1926. Signature was effected on November first by representatives of twenty-one States including Spain and Portugal and nineteen American republics. Five States--Costa Rica, Mexico, Paraguay, Spain and the Dominican Republic--none of which were parties to the Paris agreement--ratified the Convention by the end of 1928.[52] Following closely the terms of the Paris Convention, it was opened to the adhesion of any non-signatory State. It provided for the creation of an Ibero-American Commission for Air Navigation, much in keeping with the International Commission of the Paris accord. Such amendments of the Paris Convention that were provided for were of little bearing with respect to change upon the sovereign's right over the supervening airspace of a State, the freedom of innocent passage, or the rules of conduct to be observed by aircraft or the State flown over.[53]

iii. The Havana Convention

A separate convention on commercial aviation was effected by the Sixth International Conference of American States meeting in Havana, February, 1928. Signed by the

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52. Manley O. Hudson, op. cit.; 11 Revue Juridique Internationale de la Locomotion Aerienne 97 (1927).

53. Clement L. Bouve, op. cit.

United States and twenty-four Latin American States, it was but a further affirmation of the doctrines of air sovereignty and innocent passage.[54] Like the Madrid Convention, it followed closely, if not in the same terms, the principles embodied in the Paris Convention. For want of pressing needs for change, no new principles were set forth, nor was any new International office created.[55] The general transit problem improved little as a consequence; few world routes were involved, as the only ratifying States, in addition to the United States, were Mexico, the Dominican Republic, and certain of the Central and South American States. The rights of innocent passage, so far as scheduled air transport operations are concerned, have been construed as if this Convention contained a requirement for special license for such operations.[56] Although the Havana Convention does not follow the plan of the 1919 Convention by providing for a permanent organization to perform the executive, administrative, and advisory functions for which procedures were established, to the extent that basic principles were re-

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54. Charles Cheney Hyde, op. cit., pp. 595ff.

55. Bouve, op. cit., pp. 1ff.

56. J. C. Cooper, op. cit., p. 1194; Latchford, "The Right of Innocent Passage in International Civil Aviation Agreements," 11 Department of State Bulletin 19 (1944).

iterated, similarity does obtain. The construction that special consent is necessary for rights of flight over the domain of States involved has filled the void created by failure of the Convention to specifically state that the establishment and operation of regular air transport services shall be subject to such States' approval.[57]

c. The International Civil Aviation Organization

It was the International Civil Aviation Organization, created at Chicago in 1944, that became the successor to all previous international endeavours in the direction of aeronautical agreement.[58] Nations, in sum, relinquished precious few concessions to foreign airlines during the pre-World War II period, recognized no general right of free passage over each other's territories, and demanded high prices for the few concessions they were willing to grant.[59] Nor has the ICAO undertaken to effect a radical revolution in the precedents established. It may be said to be a highly centralized, efficient, and active organization, well suited to the task

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57. Hyde, op. cit.

58. Arnold Duncan McNair, The Law of the Air. London: Stevens and Son, Limited (1953), p. 3.

59. Daniel S. Cheever and H. Field Haviland, Jr., Organizing for Peace. Cambridge: Houghton Mifflin Co. (1954), p. 255.

of developing and standardizing technical procedures, but not equipped to deal effectively with some of the larger and more fundamental issues, especially those of economic import. Compared with organizations of the League of Nations era, such as the International Commission for Air Navigation (ICAN) of 1919, and the Comite Internationale Technique d'Experts Juridiques Aeriens (CITEJA),[60] which evolved as a result of a conference called in 1925 by the French government to discuss the ramifications of private air law, ICAO represents progress.[61] It is broader in membership; more far-reaching in the range of its activities; more practical and less legalistic in its approach; equipped with stronger authority; better coordinated; directed by firmer leadership, and served by a larger staff with funds.[62]

The ICAO Convention was adopted by representatives of fifty-two States, prior to which a provisional or interim agreement (PICAO) was drawn up to operate until the formal establishment of the permanent organization.[63] ICAO's aims

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60. Gerard J. Mangone, A Short History of International Organization. New York: McGraw-Hill Book Company (1954), p. 221.

61. R. Y. Jennings, "Some Aspects of the International Law of the Air." Academie de Droit Internationale Recueil des Cours (1949), II, p. 33.

62. Cheever and Haviland, op. cit., p. 255.

63. Yearbook of the United Nations (1953), p. 754.

and objectives, as stated in the Convention, are: "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport," so as, among other things, "to ensure the safe and orderly growth of international civil aviation; encourage aircraft design and operation and the development of airways, airports and air navigation facilities; ensure that the rights of contracting States are fully respected; promote safety of flight in international air navigation; and promote generally the development of all aspects of international civil aeronautics."[64] ICAO came formally into existence on April 4, 1947, thirty days after the Convention on International Civil Aviation had been ratified by the required twenty-six States. The Convention superseded, as between contracting States, the provisions of such earlier agreements as the Paris Convention establishing ICAN, and the Havana Convention of 1928.[65] An agreement establishing the relationship between the United Nations and ICAO came into force on May 13, 1947, with its approval by the Assembly of ICAO, having been approved by the UN General Assembly on December 14, 1946.[66]

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64. Yearbook of the United Nations (1953), pp. 754ff.

65. Ibid.; Arnold Duncan McNair, op. cit., pp. 3ff; R. Y. Jennings, op. cit., p. 525.

66. Leland M. Goodrich and Edvard Hambro, Charter of the United Nations: Commentary and Documents. Boston: World Peace Foundation (1949), p. 333.

ICAO's governing bodies are an Assembly and a Council; the Assembly comprises the representatives of member States (sixty-one by December 31, 1953) and is convened by the Council. It meets annually, and is responsible for the Organization's finances. The Council is the executive body of the Organization; it meets in virtually continuous session and derives its authority from the Assembly and Convention itself. The Council comprises twenty-one member States elected by the Assembly for a period of three years. In electing these States, the Assembly must give adequate representation to (a) those member States of major importance in air transport; (b) those member States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and (c) those member States not otherwise included, the election of which will ensure that all major geographical areas of the world are represented. The Council adopts standards for international air navigation, and may conduct research into all aspects of air transport which are of international importance. It may further act as an arbiter between two or more members of ICAO in any dispute concerning the interpretation or application of the Convention and its annexes and also where requested by parties in case of dispute of any kind concerning international civil aviation.[67]

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67. Yearbook of the United Nations (1953), pp. 754ff.

ICAO encourages the use of safety measures, uniform regulations for operation, and simpler procedures at international borders. With the cooperation of members, it has evolved a pattern or established international standards for meteorological services, traffic control, communications, radio beacons and ranges, search and rescue organizations, and other facilities required for safe international flight. It has secured much simplification of government customs, immigration, and public health regulations.[68] Surveys have been conducted by it with a view toward determining what aids, services and equipment are necessary.[69]

Article one of the Chicago Convention asserts, in keeping with the precedent provided that:

> The contracting States recognize that every State has complete sovereignty over the airspace above its territory.[70]

Territory, as defined in the Convention, includes territorial waters, following the earlier precedents.[71] Further-

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68. James T. Shotwell, Aims of the United Nations. New York: E. P. Dutton and Company, Inc. (1955), p. 67.

69. Marie Zocca and Louis Zocca, Action for Peace. New Brunswick: Rutgers University Press (1955), p. 18.

70. International Civil Aviation Conference, Chicago: 1944, Final Act and Related Documents, Dep't of State Conference Series 64 (1945), 59.

71. Ibid.

more, Article two, provides that "for the purposes of the Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate" of such State. Article five gives certain limited rights of transit to the aircraft not engaged in scheduled international air services of contracting States, and Article six describes in strong terms the rights of each State as to scheduled 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.

When the International Civil Aviation Conference met at Chicago from November to December 1944, there was much disagreement between the convening factions. The United States led a small group of nations, including the Netherlands and Sweden, which felt themselves strong enough to hold their own or better in a freely competitive development of international air transport, and emphasized the economic benefits of such an approach for all countries, whether they developed their own aviation systems or used those of other countries. This faction wanted an organization which would review performance, recommend standardized technical procedures and equipment, and arbitrate disputes, but would not

have any comprehensive binding regulatory authority. This viewpoint was supported too by a group of so-called "consuming" nations which had long been associated with United States aviation interests, chiefly the Latin American states and China, and expressed strong interest in the world commerce which air transport brought them.[72]

The United Kingdom faction led the opposition. They argued that certain countries, especially the United States, which had continued to produce transport planes during the war while the British built fighters, had an undue competitive advantage and that the "free-for-all" approach would not necessarily result in the most desirable or efficient development of international air services. Australia and New Zealand, led by labor governments, took the most revolutionary position by advocating outright international ownership and operation of air transport services on designated trunk routes.[73] A few months later, Assistant Secretary of State Adolf A. Berle, Jr., then head of the United States delegation, wrote:

> ...This was and is a noble conception, and one to which the world will increasingly turn as the years roll by. But it cannot be expected to become a reality until all na-

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72. Cheever and Haviland, op. cit., p. 250.

73. Ibid., p. 251.

> tions are prepared to pool their interests; unhappily perhaps for all of us, this has not yet occurred.[74]

The United Kingdom, Canada and India, joined subsequently by New Zealand and Australia as well as certain European countries, wanted a strong regulatory agency, allegedly modeled after the United States Civil Aeronautics Board (CAB),[75] with authority to allocate routes, regulate frequency of service and fix rates without going so far as to assume ownership and management. The Canadian delegates undertook to mediate with a view toward reconciling the conflicting philosophies of the United States and British factions, and, in this effort, developed the concepts around which the conference tended to revolve:

> (1) Flight over another country without stopping (comparable to "freedom of transit" and "innocent passage" on the surface of the earth).
>
> (2) "Non-traffic landings," i.e., for refueling and overhaul without discharging or picking up passengers.
>
> (3) Carrying traffic from a plane's homeland to another country.
>
> (4) Picking up in another country traffic destined for a plane's homeland.

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74. Adolf A. Berle, Jr., "Freedoms of the Air." Harper's Magazine, Vol. 190, No. 1138 (March, 1945), p. 331.

75. Frederick A. Ballard, "Federal Regulation of Aviation." 60 Harvard Law Review 1235 (1947).

(5) Carrying traffic between two or more countries other than a plane's homeland.

Two optional draft agreements were finally formulated and opened for signature: (a) an International Air Services Transit Agreement (appellated the "Two Freedoms" or "Transit" Agreement) which guaranteed the first two minimal freedoms listed above which were thought to be generally acceptable; and (b) an International Air Transport Agreement (the "Five Freedoms" or "Transport" Agreement) which guaranteed all the freedoms listed above and was opposed by the Commonwealth nations. Disputes under either agreement were to be submitted to the ICAO Council, and a country failing to take suitable corrective action recommended by the Council could be suspended by a two-thirds vote of the ICAO Assembly.[76]

The Conference additionally adopted the constitution of ICAO, the Convention on International Civil Aviation. In part one, the general principles to which the Conference subscribed such as those dealing with aircraft nationality, airspace sovereignty, conditions governing flight over another nation's territory, measures to be taken to facilitate air transport, and twelve technical annexes (Appendix V of the Conference's Final Act) which could be revised by two-thirds vote of the Council, such decisions to be binding on

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76. Cheever and Haviland, op. cit., pp. 251-252; Arnold Duncan McNair, op. cit., pp. 3ff.

all members unless rejected during a certain period by a majority of the members. Part two of the Convention deals with the structure and authority of ICAO. The third part deals with the developing and regulating of international air transport (the "Five Freedoms") and could do little more than refer to the optional agreements. The fourth part includes provisions for registering all aeronautical agreements (abandoning the traditional secrecy in this area), outlawing discriminatory concessions which had long been prevalent, recognizing the Council as an arbitral body on disputes, and amending the annexes (by two-thirds vote of the Council and the Convention itself (by two-thirds vote of the Assembly).[77]

The cabotage provisions of the Chicago Convention[78] are similar to those of the Paris Convention of 1919, except that any exclusive grant of exemption from cabotage restrictions to a foreign State is prohibited. It is provided that:

> 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...

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77. International Civil Aviation Conference, op. cit. (1945).

78. Article 7.

> State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis...[79]

That the cabotage provisions of the two Conventions are essentially alike is largely attributable to the fact that both were drafted in periods when war-inspired nationalism prevailed over internationalism; both were drawn without reference to a unified machinery for international rate control, a development which occurred only after the Chicago Conference.[80] It has been demonstrated that the effective functioning of any international rate-making machinery is at the mercy of individual States, at least under the foregoing provision.[81]

Air cabotage is classifiable in one of several ways: (1) "true cabotage"--cabotage wholly within a State or within any of its dependencies; (2) "overseas cabotage"--carriage wholly between a State and/or any of its overseas dependencies; (3) "international cabotage"--carriage from one point in a State or any of its dependencies to another point in such State or dependency, with one or more stops for traffic purposes at intermediate foreign points; (4)

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79. Ibid.

80. W. M. Sheehan, op. cit., p. 1160.

81. Ibid.

"international overseas cabotage"--carriage between a State and/or any of its overseas dependencies, with one or more stops for traffic purposes at intermediate foreign points. "Stops for traffic purposes" refers to the taking on or discharging of passengers, mail, or cargo at stopping points either to enable transfer to a connecting carrier, to permit a delay en route, or to pick up new, or discharge old, traffic.[82] An effective international control of cabotage affected with international interest would necessitate changes in the Chicago Convention provision along lines of the following order: (1) Change of the definition of "territory," which under the Chicago Convention includes all the colonies, protectorates and mandates of a State,[83] to one that would apply to each metropolitan territory or dependency separately. This would eliminate "overseas" and "international overseas cabotage," and would make subject to International Air Transport Association rates[84] all hitherto reserved cabotage rights. The desire for untrammelled State-dependency communication would have to be weighed against the strong international interest in the stabilization of international rates. (2) If intermediate foreign traffic stops were treated as breaking cabotage, only "true cabotage" and

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82. Ibid., p. 1165; Art. 96, Chicago Convention.

83. Article 2, Chicago Convention.

84. Provisions for the Regulation and Conduct of the Traffic Conferences of IATA, Art. VII (1945, as amended, 1947, 1948, 1949).

"overseas cabotage" would be protected, not "international" or "international overseas cabotage." Attempted circumvention could be minimized by the requirement that the cabotage State confer permission to pick up or discharge traffic.[85] (3) Only protect "true cabotage," which would relegate the various individual States to a strict concept of territorial jurisdiction, and would severely limit their control of communications with remote dependencies. Such modification would make possible the most effective control of international rates.[86]

In appraising the role which the conflicting ideologies played at Chicago, it should not be forgotten that behind the philosophical merits of the schemes proposed lay some very real and bothersome economic pressures. During World War II, the United States was the only principal member of the United Nations which did not suffer invasion or bombardment from the enemy. The Western Hemisphere remained the only area where large scale commercial flying was feasible, and American commercial airlines were the only ones that remained intact and functioning. The vast store of techniques and methods necessary to the operation of long-range international air routes had been acquired by American

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85. Articles 5 and 6, Chicago Convention.

86. W. M. Sheehan, op. cit., p. 1166.

flyers and personnel in the operation of the Air Transport Command. It was naturally evident to the governments of the United Kingdom, Canada, and France, at the termination of hostilities, that both in operational facilities and in the production of aircraft suitable for international commercial use, the United States would have a commanding lead which, under a system of competitive individual enterprise, might well prove to be insuperable. The United States, on the other hand, desired the maximum amount of freedom that was possible under the circumstances, because her highly developed aircraft industries, capable of meeting the demands of a large market, would benefit.[87] A segment of American opinion espoused the system of bilateral agreements that obtained prior to the war, the theory being that the self-interest of the United States would in this way be best served.[88] In support of the American position were the majority of the Latin-American states who did not so much regard themselves as competitive operators of air transport as consumers of the facilities provided by foreign airlines.[89]

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87. Wellington Koo, Jr., Voting Procedures in International Political Organizations. New York: Columbia University Press (1947), p. 48.

88. William Burden, Blueprint for World Civil Aviation. U. S. Department of State, p. 18.

89. Stokely W. Morgan, International Aviation Conference at Chicago, What it Means to the Americas. Blueprint for World Civil Aviation. Department of State Conference Series 70 (1945), p. 13.

The machinery of inter-government world organization now available to meet the fundamental and difficult problems of international air transport is ineffective today. The Convention has given ICAO very limited economic powers, and these are largely of an administrative and advisory character, such as research, study of operation of international air transport, including ownership of international services on trunk routes; investigation of situations appearing to present avoidable obstacles to the development of air navigation; collection and publication of information, including cost of international operations and subsidies from public funds. Under certain circumstances ICAO may provide and administer airports and facilities required by international air services. But ICAO has no power to fix or control rates, allocate routes, or control operating frequencies or capacity. Nor can it require any State to admit into its territory air-transport operations of another State. The legal unilateral ability of any State to control world air trade routes and the ability of any State to affect world economy by excluding or admitting to its territory the scheduled air transport of other States have not been affected by the Chicago Convention.[90]

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90. J. C. Cooper, op. cit., pp. 1206-1207.

The International Air Services Transit Agreement, constituting the "two freedoms" (the privilege to fly across the territory of a contracting State without landing, and the privilege to land for non-traffic purposes), to which adherence was obtained only after it was brought forward (together with the Air Transport Agreement) separately to cover the economic control problems omitted from the permanent Convention, received limited acceptance. Had its provisions (or that of the Transport agreement) been included in the main Convention, certain States would have declined any participation. If the Transit agreement were universally accepted in more permanent form, it would solve, to great degree, the difficulties caused by the legal right of any State to prevent the establishment of world air trade routes through its territory. In addition to the air transit privilege, the Agreement also authorizes any State flown over to require the international operator to land and offer reasonable commercial services; it meets the security problem by allowing each State to designate the route and airports to be used in its territory; it gives added powers to ICAO by authorizing any State, which deems that action by another State is causing injustice or hardship under the Agreement, to request ICAO to investigate; and authorizes ICAO to suspend the guilty State if corrective action is ordered and not taken. However, the transit

agreement is not now an adequate part of world organization. Not all important world route States have accepted it. As it can be denounced by any adherent on one year's notice, it is not a basis for permanent routes.[91] Acceptance of these agreements by the United States has been attacked as illegal on the ground that they are invalid as Executive Agreements, and that their subject matter required execution and submission to the U. S. Senate for ratification as treaties.[92] Defense of the Government's position has not been wanting, in this connection.[93]

Nor can the International Air Transport Agreement be considered to be part of a permanent world organization. Supported vigorously by the United States at Chicago, it includes the freedoms contained in the Transit agreement, as well as three others: the privilege to put down passengers, mail, and cargo taken on in the territory of the State whose nationality the aircraft possesses; the privilege to take on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses; and the privilege to take on passengers, mail,

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91. Ibid., p. 1208.

92. International Commercial Aviation, Resolution of the Committee on Commerce, Sen. Doc. No. 173, 79th Congress, Second session (1946).

93. "Concerning Acceptance of Aviation Agreements as Executive Agreements--Exchange of Letters between Sen. Bilbo and Sec. Grew." 12 Department of State Bulletin (1945), 1101.

and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail, and cargo coming from any such territory. In this agreement, however, there is to be found no provision for rate control, or limitation of capacity and frequencies, although there are limitations with respect to the route and airports to be used in national territory, which may be designated by the State flown over, as in the Transit agreement; in the operation of through services, it being provided that "due consideration shall be given to the interests of the other contracting States so as not to interfere unduly with their regional services or to hamper the development of their through services"; in the application of the Fifth Freedom privilege in that any State may refuse to accord it or refuse the right of other States to take on and discharge traffic destined to or coming from the territory of a third contracting State; in the Fifth Freedom itself, in that traffic is limited to traffic between contracting States; in the Third, Fourth and Fifth freedom privileges (i.e., the commercial privileges), in that they are applicable only to "through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses"; and in the matter of termination, in that the agreement may be renounced

on one year's notice.[94] Provisional in nature, it has been said that the Agreement goes too far in relinquishing economic control by the State flown over.[95]

One of ICAO's accomplishments is the creation of a network of ocean weather stations in the North Atlantic, which has the greatest volume of transoceanic traffic and some of the most unpredictable weather in the world. The vessels operating this network cruise at designated locations. They send helium-filled balloons to a height of 60,000 feet, with mechanisms attached to give readings of the humidity, temperature and pressure of the air. The upper-air observations are made every six hours, and surface weather conditions are recorded every three hours. These ships provide the current weather data which air transport requires, act as communications relay points for aircraft, and serve as rescue points for planes in distress. A dramatic rescue took place in 1947 as a result of this service; sixty-nine passengers were saved from the Bermuda Sky Queen. A year later, four crew members were saved from a sinking U. S. Air Force plane. Passengers of sinking ships have additionally been rescued, and at least one ship saved from the ice.[96]

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94. J. C. Cooper, op. cit., pp. 1208, 1209.

95. Ibid.

96. Amry Vandenbosch and Willard N. Hogan, The United Nations: Background, Organization, Functions, Activities. New York: McGraw-Hill Book Company, Inc. (1952), pp. 263-264.

Also of ICAO origin is the Icelandic joint-support agreement. Iceland is the logical location for weather observations, radio aids, and an area traffic center. Because of the cost of services of this nature, however, ten nations have shared in the burden of providing area traffic control, meteorological stations, and communications services in Ireland.[97] Legal problems such as the conclusion of a convention on the international recognition of aircraft rights have been attempted by ICAO also; the importance of a convention of this type rests in the fact that the very mobility of the airplanes makes for difficulty in taking out mortgages. If a person loans money and takes a mortgage on aircraft, the property might be seized in another country for debt, and the investor would lose his money. The new convention makes it possible for mortgages and other property rights contracted in one country to be generally recognized, thus facilitating the borrowing of money for the purchase of new equipment.[98]

The Chicago Convention represents a very thorough degree of international organization in a field whose development has been conditioned largely by political, rather than economic factors. The rapid growth of international

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97. Ibid., p. 264.

98. Ibid.

air transport had created a situation in which the need for economic control had overcome the desire for political control, and the nations at Chicago, although representing widely divergent political viewpoints, were nevertheless able to achieve far more than had either the Paris Convention of 1919 or the Havana Convention of 1928. But unlike economically oriented organizations, the ICAO rapprochement, notwithstanding its concern for technical problems, embodied within its subject matter many political issues. To the extent that this was so, the functions and powers of ICAO are limited and do not attain the degree of authority envisaged in the draft of the United Kingdom, which draft was rejected, having mentioned that voting powers in the Operational Executive would be "determined on an equitable basis."[99] To the extent, however, that nonpolitical issues constituted the main goal of the Conference, the Organization is clearly based on a degree of functional representation which is essential to the effective operation of all international organs. Only to the extent that non-weighted voting and an unqualified right to join in the membership of the Assembly have been incorporated into the Convention has the concept of equality been given any degree of recognition.[100] In

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99. Proposal of the Delegation of the United Kingdom (Text of a White Paper, Cmd. 6561. Presented by the Secretary of State for Air to Parliament, October, 1944), Doc. 48, 1/5.

100. Wellington Koo, Jr., op. cit., p. 61.

effect, a category system has been created, allowing for the establishment of a Council that affords representation in the first place to those member States of major importance in air transport. It has been quite appropriately pointed out that international air transport has but recently emerged from the cocoon of political protectionism (if indeed it has), and that restricting membership on the Council to states classified entirely by ton-mileage, or the number of passengers and businesses served, tends to overlook the realities of the political status of the several States. While it has concededly little to do with their contribution to international air transport, it may have a very vital bearing on the effective operation of an organization which recognizes in its very first article[101] the principle that every State has "complete and exclusive sovereignty over the air space above its territory."[102]

3. Other Bi-Partite and Multi-Partite Instruments

The competing themes that have been operative in the course of development of an international basis for air transportation--that the airspace is free, subject only to the rights of the State required in the interests of self-

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101. Article 1, Chicago Convention, 1944.

102. Wellington Koo, Jr., op. cit., pp. 60-61.

preservation; that there is over the land and waters of each State a lower zone of territorial airspace and a higher and unlimited zone of free airspace, upon the analogy of the maritime belt or territorial waters; that a State has complete sovereignty in its superincumbent airspace to an unlimited height; and that there exists with respect to the latter thesis a servitude of innocent passage for foreign nonmilitary aircraft,[103] have served to forge the significant landmarks in air jurisprudence. From international diplomatic conferences on matters involving private air law there have emanated conventions which, upon acceptance by the signatory or adhering States, have constituted international obligations, calling for faithfulness of performance and through which the contracting parties impose burdens upon aircraft operators, yielding at the same time specified privileges.[104]

Apart from CITEJA, previously mentioned, there has been signed a convention at Warsaw, as of October, 1929 (Protocol to amend the Convention, September, 1955)[105] in which the form and legal effect of transportation documents such as passenger tickets, baggage checks, and airway bills

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103. Arnold Duncan McNair, op. cit., p. 6.

104. Charles Cheney Hyde, op. cit., p. 602.

105. Gerard J. Mangone, op. cit., p. 222.

used in international transportation have been set forth, and in addition to which provisions concerning the liability of air carriers for air damage caused in the transportation of persons and property have been contained. The carrier is permitted to claim under certain conditions a limitation of liability, although limitation or exclusion of liability may not be availed of if the damage is caused by willful misconduct or such default as may be equivalent to misconduct.[106]

The Rome Convention of 1933 for the unification of Certain Rules Relating to the Precautionary Attachment of Aircraft manifested recognition by the contracting parties of the advantage of adopting uniform rules on that subject. These concerned the privilege of attachment, substitution therefor, or release therefrom, their adequate bond, and the exemption from attachment of specified classes of aircraft. The Convention thus provided a means of safeguarding foreign aircraft from harsh and arbitrary proceedings instituted by attachment in the courts of a territorial sovereign without depriving the complainant of an adequate remedy.[107]

The Rome Convention of 1933 and 1952, for the codification of Certain Rules Related to Damages Caused by Air-

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106. Protocol to amend the Convention for the Unification of Certain Rules Relating to the International Carriage by Air. The Hague, September 28, 1955.

107. Charles Cheney Hyde, op. cit., pp. 602ff.

craft to Third Parties on the Surface was concerned with the character of the damage caused by or from aircraft in flight to persons or property on the surface, which should give them a right of compensation; with defining the category of persons to whom responsibility should attach; with the laying down of limitations of pecuniary liability subject to conditions when they were not to be available; with the invocation of measures requiring compulsory insurance as a condition precedent to flight over foreign territory; and with the establishing of bases of jurisdiction for tribunals whose judicial aid might be invoked.[108]

Work has been done toward effecting a Convention in the new field of aerial collisions ~~new,~~ wherein the possible application of the Rome Convention, the Warsaw Convention, and local laws would apply to the liability of one or both of the operators of two aircraft that have collided.[109]

At the Fourth International Conference on Private Air Law in Brussels during September, 1938, a Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea was adopted in which

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108. Ibid.; Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. Rome, October 7, 1952.

109. See Working Paper, subject No. 15.17, ICAO, Air Transport Committee, Economic Aspects of the Liability Limits in the Proposed Aerial Collisions Convention.

an obligation was placed upon commanders of aircraft to go to the assistance of other aircraft or surface vessels in distress at sea where such assistance could be given without danger to the aircraft rendering assistance.[110] A similar obligation is placed upon the commanders of vessels to assist aircraft in distress at sea. The Convention reveals respect for some principles which found expression in the Maritime Salvage Convention concluded at Brussels on September 23, 1910, including provisions for remuneration to salvors for the saving of lives and property. The Brussels Convention of 1938 contained, however, an important innovation in the additional provision for payment of indemnity to the salvor for actual expenses, within certain limits, incurred in the course of rendering assistance.[111]

The aforedescribed conventions have been supplemented in the field of international air transport agreement by a series of bi-partite arrangements terminable on sixty days' written notice, which, in somewhat varying terms, make appropriate provision relative to the operation within the domain of either contracting party of civil aircraft duly registered within the territory of the other. An example is that of the United States-Canada Air Navigation Arrange-

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110. Fourth International Conference on Private Air Law, Brussels, September, 1938, Report of American Delegation to Secretary of State, 1939, 8-16, and Annexes C and D.

111. Charles Cheney Hyde, op. cit., pp. 602ff.

ment of July 28, 1938,[112] in which it was provided that the establishment and operation by an enterprise of either party of a regular air route or service over the territory of the other party shall be subject to the consent of such other party. An arrangement between the United States and Canada relating to air transport services was effected by exchange of notes on August 18, 1939,[113] in which it was provided that certain principles were to be applied in the establishment and development of air transportation services between the two countries, and that the details of the application of the principle of reciprocity contained in the agreement shall be the subject of amicable adjustment between the aeronautical authorities of the parties to the arrangement.[114]

The Germany-United States Air Navigation Arrangement of May 31, 1932,[115] declared that pending conclusion of a convention between the contracting parties on the subject of air navigation, the operation of civil aircraft of the one country in the other country should be governed by certain provisions; that the parties undertook to grant liberty

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112. United States Executive Agreement Series No. 129.

113. United States Executive Agreement Series No. 139.

114. Charles Cheney Hyde, op. cit., p. 592.

115. United States Executive Agreement Series No. 32.

of passage above its territory in time of peace to the aircraft of the other party provided the conditions set forth in the arrangement were observed; that the establishment and operation of regular air routes by an air transport company of one of the parties within the territory of the other party or across such territory, with or without intermediary landing, should be subject to the prior consent of the other party.[116] Arrangement was made for subjection of the aircraft of each party, together with their crews and passengers, while within the territory of the other, to the general legislation in force in that territory, as well as to the regulations therein pertaining to air traffic in general, to the transport of passengers and goods, and to the public safety in general, insofar as they might be applicable to all foreign aircraft, their crews and passengers.[117] Permission for import and export of merchandise as well as the carriage of passengers by aircraft into or from the respective territories of the contracting parties was yielded,[118] each of the two parties being entitled to reserve to its own aircraft air commerce between any two points neither of which was in a foreign territory. Each party was to enjoy the right to prohibit air traffic over certain of its ter-

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116. Article 4, United States-Germany Air Navigation Arrangement.

117. Article 5.

118. Article 5.

ritory, provided that no distinction in such matter was made between its aircraft engaged in international commerce and the aircraft of the other party likewise engaged.[119] The conduct of an aircraft finding itself over prohibited areas;[120] the carrying of clear and visible nationality and registration marks recognizable during flight; the matter of certificates of registration and airworthiness together with other documentary requirements; the possession by members of the crew of specified documents and certificates and licenses as well as the freedom not to recognize certificates of competency and licenses issued to one party's nationals by the other party for the operation of aircraft of such other party under the terms of the agreement;[121] and conditions for the carrying and use of wireless apparatus by aircraft of either party within the territory of the other[122] were dealt with in the agreement. So too were arrangements for the use of aerodromes open to public air traffic, and the assistance of the meteorological and kindred services.[123]

These second numerous other agreements which have been signed since the end of the First World War, on a bi-

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119. Article 6.
120. Article 7.
121. Article 8.
122. Article 9.
123. Article 12.

lateral plane, represent, if in varying terms, attempts to reach some common denominator in the quest for airway standards. For the most part, similar terms were embodied in them, such matters as the qualifications of aircraft for international flight, the rights of the states flown over, and the duties of the states flown over, as well as the rights and obligations of aircraft engaged in international flight, being given most attention. In most, if not all, the sovereignty of the State is reiterated, rights of innocent passage frequently being also provided for.[124] A list of the many agreements would constitute a veritable catalogue of geographic pairings.[125]

Of significance as a base for future bilateral arrangements, and even of a multilateral agreement,[126] is the United States-British compromise, the so-called "Bermuda Agreement," in which the United States for the first time conceded a certain measure of control of economic questions, including international rate regulation by the governments concerned (with a reference to PICAO, the provisional organ-

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124. Clement L. Bouve, op. cit., pp. 1ff.

125. Ibid., Manley O. Hudson, op. cit., pp. 183ff.; 75 League of Nations Treaty Series 8, 40.

126. J. C. Cooper, "Some Historic Phases of British International Civil Aviation Policy," International Affairs, April, 1947.

ization, or its successor, ICAO), and Great Britain waived its prior insistence on direct international control of traffic and frequencies and capacities.[127] The routes to be used in providing service were agreed upon, although the Bermuda Agreement does not constitute a general "right to trade" by air as between the two countries. Similar agreements have since been concluded between the United States and France, and between the United States and Belgium. Reference is made in the Bermuda Agreement (in connection with the inter-government control of rates) to the rate-making conference procedure of IATA, the International Air Transport Association. This Association, organized after the Chicago Conference, now includes in its membership practically all of the important international air transport operators in the world. Through regional rate traffic conferences, somewhat similar to steamship rate conferences, IATA seeks to stabilize traffic conditions and prevent rate wars. Pursuant to the Civil Aeronautics Act of 1938, the United States Civil Aeronautics Board was authorized to approve rate and other intercarrier agreements when United States air carriers were involved. The existence and utility of the IATA rate conference machinery, thus recognized

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127. Final Act of the Civil Aviation Conference held at Bermuda, January 15 to February 11, 1946, United States Treaty Series 1507 (1946).

in the Bermuda Agreement, may prove to be a useful indirect asset in future world economic control.[128]

That the early twentieth century has been marked by numerous agreements[129] on both multilateral and bilateral planes that have been designed to effect the harmony needed for international communication and transportation does not intimate that in the absence of such agreement there exists no international law of the air. The evidence is abundant that States have reached a degree of unanimity in their assertion of the right of control over the airspace above their territories which suffices to warrant the conclusion that that right is to be regarded as exemplifying a principle of international law.[130] It is appropriate to point out, however, that the evolution of that law, still in its infancy, is inexorable, and that a legal system accentuating more of what is permitted than what is excluded appears inevitable by reason of the community of economic interests that obtains among states in whose interest it is to let down barriers of interference to increased intercourse.[131]

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128. J. C. Cooper, op. cit., pp. 1209-1210.

129. Robert Rembert Wilson, The International Law Standard of the United States. Cambridge: Harvard University Press (1953), pp. 12, 287, 266, 283ff.

130. Hans Kelsen, Principles of International Law. New York: Rinehart and Company, Inc. (1952), pp. 226-227.

131. Charles Cheney Hyde, op. cit., pp. 587-588.

The task of developing the law regulating flight, or establishing principles decisive of rights and obligations flowing from the granting by states of the privilege of use of their airspace, is necessarily retarded by the slowness with which the several members of international society find it possible to agree on what is to be deemed responsive to fresh and changing conditions that confront them.[132]

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132. Ibid., pp. 604-605.

Chapter II

DEPENDENT AREAS AND THE AERONAUT

1. The League of Nations

Dealing as this paper does with the legal status of the airspace over trusteeship territory, it is as appropriate to consider the background of the present-day trusteeship areas as it has been to consider the background of prevailing airspace law and principle. As the twentieth century has been a period of developing doctrine in the area of air law, it also has been a period of collaboration in the field of political affairs in contradistinction to the stress during the nineteenth century upon international consultation. One of the high points during the first fifty years of the twentieth century has been the League of Nations; before its formation there had been no permanent agency through which states could collaborate continuously on the grave problems that had a bearing upon the peace of the world.

The League of Nations did not spring full grown from the minds of wise statesmen; its origins can be traced back to the various congresses of the nineteenth century culminating in the two international peace conferences at The

Hague. As the Napoleonic Wars had interrupted the rudimentary peace parleys of the eighteenth century only to be revived in the splendid Congress of Vienna,[1] so did the First World War suspend the universal conferences at The Hague only to realize a more articulate association of nations. The painful, fumbling breakdown of negotiations among the chancelleries of London, Paris, Berlin, Vienna, and St. Petersburg in 1914 bore tragic witness to the need for some standing agency of international conciliation.[2] Between 1815 and 1914 the consultations of the Great Powers had averted several crises, but the lack of any regular meetings, the failure to delegate any powers to some permanent agency for political adjustments, and the ability of any one of the Great Powers to frustrate even the calling of a conference--as on the eve of the First World War--showed the fundamental inability of that system to prevent the quarrels that lead to war. By creating a permanent panel of jurists available for international arbitration, The Hague Peace Conferences had pushed the amicable settlement of disputes into the spotlight of world attention. Commissions of inquiry had been recommended to find facts for the adjudication of controversies, while an international

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1. C. K. Webster, The Congress of Vienna. New York: Oxford (1919).

2. Gerard J. Mangone, op. cit., p. 128.

prize court and a court of arbitral justice, both permanent tribunals with full-time judges paid from an international fund, had been proposed in 1907.[3] Neither of these permanent courts, however, came into being, and the international community urgently needed some standing agency of international conciliation. It was upon this track that the first exponents of a league of nations set their wheels.

During the sanguinary struggles of World War I much progress was made in the developing of ideas favoring an overall international organization. A large number of drafts of plans for the maintenance of peace were devised by individuals and peace groups, one of the most influential of which was that outlined by South Africa's General Jan Christiaan Smuts. Woodrow Wilson became an eloquent leader in the movement; the last of his famous Fourteen Points for the peace settlement stipulated that:

> A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.[4]

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3. The Project Relative to a Court of Arbitral Justice. New York: Carnegie Endowment (1920).

4. Address delivered at a Joint Session of the two houses of Congress, January 8, 1918 (Excerpt), Ray Stannard Baker and William E. Dodd, The Public Papers of Woodrow Wilson, War and Peace. Vol. 1. New York: Harper (1926), pp. 159-161.

That the proposed League of Nations be created as an integral part of the general treaty of peace was urged by Wilson. He probably feared that unless this were done there might be no League, as governments might fail to ratify the constitution for the international organization if it were separated from the peace treaties.[5]

The League Covenant was shaped primarily by the interests of the major Allied and Associated Powers which emerged from World War I the exhausted victors over the even more exhausted Central Powers. That the two nations with the greatest economic and military resources, the United States and Great Britain, were also the most influential architects of the Covenant should occasion no surprise. The final product was a British machine guided by certain Wilsonian principles. The French and Italians, although included among the Big Four of the Peace Conference, played decidedly secondary roles. The smaller members of the wartime alliance and certain neutral countries submitted proposals and were consulted briefly, but exerted relatively little influence. The views of the enemy powers received even less attention. From a substantive point of view, the preoccupation of the Allied Powers was to prevent another world war, through the limited functions of peace-

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5. Gerard J. Mangone, op. cit., p. 132; Amry Vandenbosch and Willard N. Hogan, op. cit., p. 65.

ful settlement of disputes and international sanctions, rather than to attempt any far-reaching surrender of national sovereignty or extensive economic and social cooperation.[6]

The Covenant of the League of Nations was an unusually well-drafted document; that it was drawn up by a small group, which also happened to include men of exceptional ability for this type of work, accounts for this. The commission responsible for this task had in the beginning only ten members, two representatives from each of the five Great Powers; later, after protest from the small states; it was enlarged by nine additional members. President Wilson served as chairman of this committee. As Part I of the Treaty of Versailles, the Covenant was signed on June 28, 1919; it likewise became Part I of the other peace Treaties made in 1919-1920. After obtaining the required number of ratifications the treaty went into effect on January 10, 1920.[7]

The original members of the League of Nations were divided into two groups: (1) signatories of the Covenant which also ratified it; (2) invited states, thirteen in number, which were also named in the Annex of the Covenant.

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6. Daniel S. Cheever and H. Field Haviland, Jr., op. cit., p. 46.

7. Vandenbosch and Hogan, op. cit., pp. 65-66.

Other states could be admitted to the League of Nations by a two-thirds vote of the Assembly, and any member could withdraw after two years' notice of its intention to do so, provided all its international obligations, both in general and under the Covenant, had been fulfilled at the time of the withdrawal. Altogether sixty-two states were members of the League at one time or another; the largest number of members at any time was fifty-eight during 1937-1938.[8]

The League operated through three major organs: (1) a Council, originally composed of Britain, France, Italy, Japan, and four smaller states designated by the Assembly; (2) an Assembly, consisting of all the member states, originally forty-two in number; (3) a permanent Secretariat whose chief officer, the Secretary General, was nominated by the Council and approved by a majority of the Assembly. Even in these rough divisions the structure utilized the experience of the nineteenth century with its concert of major powers, its general assemblies such as The Hague Conferences, and the institutions of dispassionate international secretariats most notably in the form of bureaus. On any matter extending beyond administrative regulations, equality of votes and unanimity of voice had ruled international procedure. To this precedent the League adhered.

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8. D. H. Miller, The Drafting of the Covenant. London and New York: Putnam (1928). Two volumes.

But permanency and continuity were reflected by the Covenant requirement that the Council meet at least once a year, and that the Assembly convene at stated intervals. The Council in practice held 106 regular sessions while the Assembly met every September between 1920 and 1940.[9]

In keeping with the chief objective of the League--that of staving off the blows of war--each member was pledged to submit its own controversy with another member to either judicial remedies or the Council of the League before undertaking to resolve its grievance through the use of non-diplomatic measures, i. e., war. Regardless of what happened, every state admitted that there should be a "cooling-off" period of ninety days between a complaint and an overt act of warfare, but if the Council should issue a unanimous opinion (not including the votes of the disputants), each member agreed not to go to war with the party which accepted this opinion. The state which violated these prescriptions and failed to apply to conciliation committed, in the eyes of the League, an act of war upon the community, in punishment for which all members promised to sever commercial and financial relations with the aggressor. If the Council should decide upon further coercion "to protect the covenants of the League," it could invite member states to sup-

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9. Covenant of the League of Nations; Gerard J. Mangone, op. cit., p. 132.

ply contingents of military or naval forces. Such troops would be permitted to cross the territory of all member states in order to approach the outlaw.[10] Article Ten of the Covenant embodied the pledge:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.[11]

The basic functions of the League may be said to have been four in number. One was the formulation of plans for "the reduction of national armaments to the lowest point consistent with national safety."[12] Another was to preserve the territorial integrity to which reference is made in Article Ten; together with Article Eleven, which lays down the principle of collective security, the core of the Covenant was so constituted. The settlement of international disputes[13] constituted the third important function of the League. The fourth was incorporated in Article Nineteen,

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10. Covenant of the League of Nations, Articles 12-16.
11. Ibid., Article 10.
12. Ibid., Article 8.
13. Ibid., Articles 12-16.

which provided the means for peaceful change by making permissible Assembly advice to consider treaties "which have become inapplicable" and "conditions whose continuance might endanger the peace of the world."[14] While many other functions of the League were provided for, these four were the ones that, in the course of the short history of the League, were called most into play, and the ones by which the League's success or lack of success was to be judged.[15]

Disease, communications, traffic in arms, and slavery, all subjects of nineteenth-century regulation, fell directly or indirectly under League supervision; conditions of labor and traffic in drugs, looming on the twentieth-century horizon of international cooperation, became a subject of interest to the League also. Under Article Twenty-four, the League provided that the existing international bureaus and commissions be placed under its direction, but where the parties to the basic convention were not amenable to supervision the League offered at least to collect and distribute all relevant information. By Article Twenty-five, the member states agreed to encourage the establishment of national Red Cross societies--which had finally achieved the status of international neutrality in 1906. Never in the history of international organization had any agency made

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14. Ibid., Article 19.

15. Vandenbosch and Hogan, op. cit., p. 68.

such impressive strides toward a world community, for as time went by the League took an active interest in virtually all aspects of economic and social life, in their effect not only upon nations but also upon individuals. The League's actual work lay in the collection of statistics, the dissemination of information, the planning and calling of conferences on topics of economic or social import, and a gentle but persistent pressure upon governments to take steps either by international convention or by national statutes to improve the world's welfare.[16] Agencies of importance, the existence of which was owed to the League, were the Economic and Financial Organization (consisting of two committees of experts who conducted investigations into such matters as tariffs, clearing agreements, and taxation); the Communications and Transit Organization (which acted to encourage international conventions in the field of transportation and communication and fostered agreements upon maritime ports, international railways, regulations for international touring, and development of waterpower projects affecting more than one state); the Health Organization; the Refugee Organization; the Intellectual Cooperation Organization; the Advisory Committee on Traffic in Women and Children; and the Advisory Committee on Traffic in Opium and Other Dangerous Drugs. In Article Twenty-two

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16. Gerard J. Mangone, op. cit., pp. 134-135.

of the Covenant, the mandate system of the League of Nations, to which reference will be consistently made in this chapter, was created. Comprising nine subsections, the need for applying "the principle that the well-being and development of...peoples (who under the strenuous conditions of the modern world are unable to stand by themselves) forms a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant" was voiced,[17] as was the proposition that the tutelage of such people should be entrusted to advanced nations.[18]

In the period between 1920 and 1927, the League's growth was most pronounced, notwithstanding the United States' abstention from participation, the British lack of enthusiasm stemming from the American position and the differing views of both governments, and the wedge that evolved in Franco-British relations. With Germany and the policies to be employed in relation to her serving as the primary source of conflict, the contrasting views of Britain and France were thus epitomized: France regarded the League as an "incomplete superstate," while Great Britain looked upon it as "a cooperative association of independent states" and a "center of influence."[19] The absence of the United States

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17. Covenant of the League of Nations, Article 24 (1).

18. Covenant of the League of Nations, Article 24 (2).

19. Sir Alfred Zimmern, The League of Nations and the Rule of Law, 1918-1935. London: Macmillan (1936), p. 339.

from the League was largely responsible for the failure to place all international bureaus under its aegis--prewar agencies such as the Telegraphic Union and the Universal Postal Union were not brought into it. There was, nevertheless, a system of international administrative cooperation, some of the aforementioned permanent advisory commissions having been created. During this period the League succeeded in stopping a Greek invasion of Bulgaria (1925) and facilitated the signing of the Locarno treaties, as a result of which Germany became a member of the League (1926).[20]

From 1927 to 1932, the League's history might best be characterized by the term uncertainty. During 1927 and 1928 the Briand-Kellogg Pact was negotiated. It was signed on August 27, 1928 by fifteen governments; it came into force on July 24, 1929. Other states were invited to adhere, and within a few years it had more adherents than the League had members. The adherents of the Briand-Kellogg Pact renounced war as an instrument of national policy; no state could go to war without violating the Pact, and though the latter contained no implementation provisions, it was hoped that in the case of the application of sanctions against an aggressor by the League, the United States might at least give some passive support. But the world economic depression of 1929 and the years following resulted in a rampant

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20. Gerard J. Mangone, op. cit., p. 147.

economic nationalism and an ending of the rapprochement between France and Germany (1929). In September of 1931 occurred the Manchuria "incident," which soon developed into a case of flagrant aggression. This clear violation of the Covenant, the Nine Power Treaty, and the Briand-Kellogg Pact was met with little coordination of action or policy between Washington and Geneva. None of the powers upon whom the enforcement of sanctions would fall were prepared to join in any form of collective proceedings which might involve military action. On January 7, 1932, the United States announced that it would not "recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928." The Assembly adopted the Stimson nonrecognition doctrine for application by League members with respect to the Japanese violation of the Covenant in March of the same year. In 1932, after many years of preparation, the Disarmament Conference assembled, but by this time the world situation had so deteriorated as to doom from the start any efforts for the limitation of armaments.[21]

From 1932 to 1939 the League's decline and collapse were the outstanding features. On March 27, 1933, Japan

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21. Vandenbosch and Hogan, op. cit., pp. 70-71; Cheever and Haviland, op. cit., pp. 399ff; League of Nations, Ten Years of World Cooperation. Geneva: League Secretariat (1930).

gave notice of its intention to withdraw from the League, and Germany followed with similar action on October 24; these members terminated their participation pursuant to the two-year requirement in 1935. Denunciation of the Locarno Treaty by Germany occurred in 1936 (after having set aside several provisions of the Treaty of Versailles); in 1935, Italy invaded Ethiopia, and on May 9, 1936, she declared that country annexed. League sanctions, half-heartedly applied and never extended to include military measures, failed to stop aggression; a flight from the League followed. Paraguay gave notice of withdrawal in February, 1935; Nicaragua, in June, 1935; Guatemala, in May, 1936; Honduras, in July, 1936; El Salvador, in July, 1937; Italy, in December, 1937; Venezuela, in July, 1938; Hungary, in April, 1939; and Spain, in May, 1939.[22] Too weak to do anything to prevent or to suppress armed hostilities, the League performed a courageous but quixotic act in expelling the Soviet Union, on December 14, 1939, for attacking Finland. After this, the League became dormant, to meet again only on April 8, 1946, for the purpose of legally terminating its existence and transferring its assets to the newly created United Nations. The absence of the will to make it work resulted in its demise.[23] Whatever the reality of aggression proved,

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22. Vandenbosch and Hogan, op. cit., pp. 71-72.

23. Ibid., pp. 72-74.

the fledgling international organization in 1931 and 1936 could not soar beyond its own limitations: the provincialism of the United States, the pessimism of France, the conservatism of Great Britain, the opportunism of the Soviet Union, all shuddered under the ruthless arrogance of Japan, Italy and Germany while the small states, too, frequently played with callous ambition or petty covetousness.[24]

2. The Mandate System

Community means social responsibility, a sense of obligation to follow men. Since the colonial-mercantile period of European expansion, wars had often resulted in gross territorial exchanges with no regard to the wishes or welfare of the native inhabitants. Africa's development first awakened the states of the world to the urgency of international surveillance over peoples unable to comprehend or resist modern civilization.[25] "Mandates" had been given by a conference of powers to an individual state in the nineteenth century--Britain over the Ionian Islands in 1815 and over Cyprus in 1878, France in the Lebanon in 1860 to protect Christian minorities, King Leopold of Belgium over the Congo Basin in 1885 following on the scientific

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24. Gerard J. Mangone, op. cit., p. 153.

25. Ibid., p. 135.

and humanitarian missions sponsored by the International African Association, and the police power granted to France and Spain over Morocco in 1906--no single coordinating agency which fixed international responsibility upon the mandatory power existed until the League of Nations took shape.[26] Indeed, the Covenant only inscribed the principles of the mandate system; it left the actual allocation of territories to the peace settlement of 1919.[27]

The mandates idea has not always been an altruistic notion. Within Britain and the United States, and in France among some socialists, there had been a "no annexations" cry from liberals opposed to economic exploitation of colonies and conservatives interested in humanitarianism. However, the need for meeting the promises of independence made to the Arabs, while keeping control over their strategic areas, also motivated Britain and France in advocating mandates for the Middle East, while Britain had special problems with her Dominions of the Union of South Africa, Australia, and New Zealand which pressed for annexations of nearby territory but were eventually persuaded to accept mandates over them.[28] At the time of the armistice of the

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26. Ibid., p. 135; p. 227.

27. Ibid., p. 227.

28. Ernst B. Haas, The League and Colonial Policy Aims. International Organization, Vol. 6, No. 4 (November, 1952), pp. 521-536.

First World War, General Smuts of South Africa was thinking of applying mandates to central European territories and Russian border areas; Great Britain thought that Armenia, Albania, Persia, Constantinople with the straits, Anatolia, and the Belgian Congo might be put under the new international system of accountability. President Wilson rashly proposed that the United States assume a mandate over Armenia, rash insofar as the Senate was his audience. The Supreme War Council of the Allied Powers finally ground down all claims, sifted the arguments, and limited the mandates to the former German colonies in Africa and the Pacific Ocean, as well as Iraq, Syria-Lebanon, Palestine and Transjordan.[29]

While the mandates given to certain states over dependent territories detached from Germany and Turkey veiled an outright control by the victors of the First World War, the mandatory powers made certain pledges for the improvement of the peoples under their administration. Pursuant to Article Twenty-two of the Covenant of the League, the mandates created were designed to differ "according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances."[30] Three types of mandates were

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29. Mangone, op. cit., p. 227.

30. Article 22 (3), Covenant of League of Nations.

provided for, later to be designated A, B, and C mandates. Certain communities formerly belonging to the Turkish Empire were recognized as having "reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone."[31] These were to be the "A mandates," of relatively short duration in intention. Peoples of Central Africa were described as being "at such a stage that the Mandatory must be responsible for the administration of the territory" under conditions which would guarantee freedom of conscience and religion, and prohibition of certain abuses such as slave traffic and arms and liquor exchange, and would secure "equal opportunities of trade and commerce of other Members of the League."[32] Territories such as South West Africa and certain of the South Pacific Islands were classified as "C mandates"...

> ...owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances...[33]

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31. Covenant of the League of Nations, Article 22 (4).

32. Ibid., Article 22 (5).

33. Ibid., Article 22 (6).

they were deemed to "be best administered under the laws of the Mandatory as integral portions of its territory."[34]

a. Class A Mandates

The class A mandates were Iraq, Syria and Lebanon, and Palestine and Trans-Jordan. Only Iraq, with a population of 3,700,000, and an area of 116,600 square miles, had acquired its independence before World War II, having become independent in 1932, at the same time becoming a member of the League of Nations. Its Mandatory until this time was Great Britain. Syria and Lebanon had a combined population of 3,650,000, and an area of 77,220 square miles; their Mandatory was France. Palestine and Trans-Jordan were 26,230 square miles in area and had a population of 1,700,000; their Mandatory was also Great Britain.[35]

Principles determinative of the manner in which the mandatories were to be granted their independence were established in Iraq's early quest for freedom. The Arabs of Mesopotamia had revolted against the British Mandate, and Britain had seen fit to recognize the Kingdom of Iraq with Feisal, son of King Hussein of Hejaz, as its ruler. In approving the Anglo-Iraq treaty of 1922, negotiated to con-

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34. Ibid.

35. Daniel S. Cheever and H. Field Haviland, op. cit., p. 672.

firm Britain's mandatory role, the Mandates Commission established as criteria to govern the granting of independence: (1) the existence of a stable government including the capacity to maintain territorial integrity and political independence, and (2) the existence of a clear intention to fulfill international responsibilities.[36]

The northern boundary of Iraq remained unsettled by the treaty of Lausanne (1923), but under the terms of that treaty the question was submitted to the League of Nations Council which awarded most of Mosul to Iraq on December 16, 1925. The award, however, was contingent upon British continuance of the mandate for twenty-five years unless Iraq earlier became a member of the League. A new treaty complying with this requirement was concluded between Great Britain and Iraq in January, 1926, and on March 11, 1926, the Council finally ratified the Mosul award. By an agreement of June 5, 1926 between Great Britain, Iraq, and Turkey, the latter recognized this boundary with slight rectifications in return for ten percent of Iraq oil royalties and neutralization of the frontier.[37] On December 14, 1927, Great Britain signed a new treaty with Iraq. This, however,

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36. W. H. Ritsher, Criteria of Capacity for Independence. Jerusalem: Syrian Orphanage Press (1934).

37. Quincy Wright, "The Mosul Dispute." 20 American Journal of International Law 453 (1926).

was not ratified and on November 4, 1929, the British Government announced that it would recommend Iraq for admission to the League in 1932 according to article 3(i) of the January 1926 treaty.[38] A Treaty of Alliance was concluded between Iraq and Great Britain, to come into force when Iraq was admitted to the League, in 1930.[39] In 1931 the League Council adopted a resolution to the effect that the degree of maturity of mandated territories which it may in the future be proposed to emancipate shall be decided, having regard to the circumstances of each particular case, in light of principles laid down by the Mandates Commission.[40] In 1932 the Council declared in favor of the termination of the mandate subject to certain guarantees to be given by Iraq on such matters as the protection of minorities and respect of acquired rights.[41] The thirteenth Assembly thereupon admitted Iraq to membership in the League.[42]

Negotiations for the Syria and Lebanon mandate entailed approval of the French draft by the United States in

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38. "Permanent Mandates Commission," Minutes XVI, 183.

39. League of Nations Treaty Series No. 15 (1931).

40. Official Journal of League of Nations (1931), p. 2055.

41. Official Journal of League of Nations (1932), pp. 474, 1213, 1347, 1483.

42. Quincy Wright, Mandates Under the League of Nations. The University of Chicago Press (1930), p. 61; L. Oppenheim, International Law, 8th Ed., Ed. by H. Lauterpacht. London: Longmans, Green (1955), pp. 216ff.

July, 1922, and objection to its confirmation by Italy until it was, insofar as title was concerned, cleared through ratification of a peace treaty with Turkey. She had also objected because the failure of the treaty of Sevres had deprived her of the spheres of interest which she had been accorded in compensation for her approval of the French and British spheres by the agreement of August 10, 1920, dependent on that treaty.[43] Italy sought a renewal of assurances with regard to economic, educational, and missionary privileges in Syria and Palestine which she had renounced in the sphere of interest agreement. Great Britain had already given assurances to Italy with regard to Palestine, and during the Council meeting in July, 1922, Italy and France began negotiations with the result that the Syrian and Palestine mandates were confirmed with assurances that Catholic and Moslem interests in Palestine would be protected, to go into effect on July 24 when Franco-Italian agreement was announced.[44] This announcement was made on September 29, 1923, the peace treaty with Turkey having been signed at Lausanne on July 24, 1923.[45]

Syria and Lebanon were part of the seven Arab states of Egypt, Iraq, Trans-Jordan, Saudi-Arabia, Yemen, and

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43. Quincy Wright, Mandates Under the League of Nations, p. 57.

44. League of Nations, Sec. Gen. Report to Third Assembly, Supp. (August 29, 1922), p. 13.

45. Quincy Wright, op. cit., p. 57.

Syria and Lebanon, the imagination of the peoples of which was manifested in the growing Arab nationalism that obtained in the interwar period; in 1931 nationalist leaders met in Jerusalem and drew up an Arab Covenant in the name of the "Arab nations" pledged to the goal of "complete independence." Largely as a result of British encouragement, closer inter-Arab cooperation was achieved. But France's bungling colonial administration, featuring military commissioners, a stiff bureaucracy, and ragged economic measures, harvested revolution in 1925, resulting in all of Syria; except for Lebanon, being placed under nationalist control. In 1926 Lebanon was splintered off from Syria and declared a republic, yet French negotiations continued until 1936, when a treaty was proposed which would have made Syria almost independent, allowing France certain diplomatic and military privileges.[46] A similar treaty was concluded (subject to ratification) in November, 1936, by means of which Lebanon's official independence was to be credited. But an increasingly fearful French parliament remained inactive and the High Commissioner suspended Syrian self-governance in 1939. Two years later, after the invasion of France, the Free French, determined to continue the struggle against Germany, announced their intention of ending the mandatory regime over Syria and Lebanon, subject to agreement in the matter

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46. Gerard J. Mangone, op. cit., p. 264; L. Oppenheim, op. cit., p. 216.

of French rights in those countries. Only the strikes of the populace and the diplomatic pressure of the British constrained the French to yield a large measure of autonomy to the Arabs in 1944, but the concessions, made during the war and unconfirmed by any French parliament, remained precarious. Great Britain, the United States and some other states recognized the full independence of Syria and Lebanon in 1944; both were invited to the San Francisco Conference at which the United Nations was originated in 1945, and both became original members of that world organization.[47] French troops were withdrawn in 1946.[48]

Palestine's legal position was grounded not only in Article Twenty-two of the League of Nations Covenant but also in the obligation of Great Britain laid down in the Palestine mandate, to put into effect the British decision of November, 1917, called the Balfour Declaration, and accepted by the other principal Allied Powers, in favor of the establishment in Palestine of a national home for the Jewish people. Such acceptance was contingent upon respect afforded the civil and religious rights of existing non-Jewish communities in Palestine.[49] The terms of the Palestine mandate were ob-

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47. Gerard J. Mangone, op. cit., p. 264.

48. Ibid., p. 266.

49. L. Oppenheim, op. cit., p. 217.

jected to by the papacy in 1922 as giving too great privileges to the Jews who had been promised a national home; by various Moslem organizations for the same reason; by several Jewish organizations as limiting the privileges of the Jews too much, and by the British House of Lords as contrary to the wishes of the majority of the inhabitants of Palestine.[50] The terms of the mandate were agreed upon by the United States and Great Britain in 1922.[51]

Arab-Jewish tensions were not serious until Nazi persecution and anti-Jewish sentiment in other areas led to an enormous influx of Jewish immigrants into the Promised Land. Despite the Balfour Declaration, Britain sharply curtailed further immigration in 1939 in order to placate the Arabs and maintain her Near East position. Violence increased with the continuance of the refugee problem after World War II. The Palestine administration, supported by British soldiers, came increasingly under the attack of extremists. The United States sought to persuade Britain and the Arabs to reopen Palestine to Jewish immigration; in 1946 an Anglo-American Committee of Inquiry recommended the immediate entry of 100,000 Jewish refugees and a United Nations trusteeship for Palestine which should be neither

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50. Quincy Wright, op. cit., p. 56.

51. Ibid., p. 57.

Arab nor Jewish but a state protecting Moslems, Christians, and Jews alike. These proposals proved unattainable. In April, 1947, the General Assembly of the United Nations, at request of the British government, was asked for recommendations concerning the future government of Palestine; the Assembly appointed its own Committee on Palestine (UNSCOP) for this purpose. In the same year, partition was voted for: there was to be an Arab and a Jewish state linked in a U. N.-supervised economic union, with Jerusalem as a separate entity. Conflict persisted in Palestine, and in May, 1948, one day before the demise of the British mandate under the League of Nation's Covenant, a Mediator, Count Bernadotte, was appointed to promote a compromise. He was assassinated, to be replaced by Ralph Bunche, who managed to successfully negotiate a series of armistice agreements. By the summer of 1949, the necessary agreements had been [illegible]ated, to be administered by mixed commissions headed by U. N. observers, but solution has been long wanting, in view of the dissatisfaction of both Jews and Arabs over the boundary lines delimited.[52]

Israel became the fifty-ninth member of the United Nations in May of 1949. Charges and countercharges continued to be brought before the Mixed Armistice Commission

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52. Vandenbosch and Hogan, op. cit., pp. 213-214; Cheever and Haviland, op. cit., pp. 440ff.

and the Security Council itself relevant to violations of the armistice frontiers. The problem's difficulty was compounded by the vast numbers of Arab refugees whose fate was uncertain and tentative; UNRWAPR, or the United Nations Relief and Works Agency for Palestine Refugees, with a $250 million program, was formed to take some steps to alleviate this difficulty. An independent state of Trans-Jordan, with membership in the United Nations, also was formed in connection with the Palestine "problem."[53]

b. Class B Mandates

The Class B Mandates under the League of Nations were Tanganyika, with a population of 5,200,000 and an area of 360,000 square miles (Mandatory: Great Britain); Ruanda Urundi, with a population of 3,450,000 and an area of 20,500 square miles (Mandatory: Belgium); British Togoland, with a population of 340,000 and an area of 13,041 square miles; French Togoland, with a population of 750,000 and an area of 21,893 square miles; British Cameroons, with a population of 840,000 and an area of 34,136 square miles; and French Cameroons, with a population of 2,520,000, and an area of 166,489 square miles.[54]

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53. Cheever and Haviland, op. cit., p. 544.

54. Ibid., p. 672.

c. Class C Mandates

The Class C Mandates were Southwest Africa, with a population of 300,000 and an area of 318,099 square miles (Mandatory: South Africa); New Guinea, with a population of 670,000 and an area of 93,000 square miles (Mandatory: Australia); certain North Pacific Islands, often classified as Micronesian, and comprising the Northern Marianna, Caroline and Marshall Islands, with a population of 100,000 and an area of 960 square miles (Mandatory: Japan); Western Samoa, with a population of 60,000, and an area of 1,130 square miles (Mandatory: New Zealand); and Nauru, with a population of 3,400, and an area of 9 square miles (Mandatory: Great Britain).[55]

3. The International Legal Status of Mandated Territories

As a result of the formation of these mandated interests by the League of Nations after World War I, a number of problems were posed with respect to the rights and duties of the mandatories vis-à-vis the mandated territories and each other and the remaining sovereign states. There has been a host of literature dealing with the status under international law of these areas, and the views have not all been consistent with each other. Does the sovereignty

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55. Ibid.

over these areas reside in the Mandatory, or in the mandate? One source declares that it lies in the Mandatory,[56] and the Appellate Division of the Supreme Court of South Africa has held, in a case involving a crime committed by an inhabitant of Southwest Africa, that the Mandatory had sufficient internal majestas to support a conviction for high treason under Roman-Dutch common law, the opinion being cited in support of the theory of full sovereignty in the Mandatory.[57] An eminent scholar has taken the position that the Mandatory, acting with the consent of the Council of the League of Nations, has sovereignty over the mandated area.[58] Another view urges that sovereignty resided in the principal Allied Powers.[59] One has argued that sovereignty rests in the League of Nations.[60] Another contends that sovereignty is to be found in the inhabitants of the mandated area, but temporarily in suspense.[61]

The significance of this issue may seem debatable, but it would appear to be of incontestable importance where

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56. Henri A. Rolin, Annuaire de l'Institut de Droit International. 34 (1928), p. 35.

57. Rex v Christian, Case No. 12, Annual Digest 1923, 1924.

58. Quincy Wright, 17 American Journal of International Law (1923), p. 691.

59. L. Oppenheim, op. cit., p. 222.

60. Norman Bentwich, The Mandates System (1930), p. 19.

61. J. Stoyanovsky, La Theorie Generale des Mandats Internationaux (1925); Pic, Revue Generale de Droit International Public. 30 (1923), p. 321.

a specific problem dealing with the one with which this paper is concerned were presented. To what extent can the Mandatory control aeronauts in flight over its territory? To what extent can the mandate itself prescribe with respect thereto? When the conception of sovereignty was first developed in the latter part of the sixteenth century with reference to the new phenomenon of the territorial state, it referred in legal terms to the elemental political fact of that age, namely, the appearance of a centralized power which exercised its lawmaking and law-enforcing authority within a certain territory. This power vested at that time primarily, but not necessarily, in an absolute monarch, was superior to the other forces which made themselves felt within that territory, and after a century was unchallengeable either from within or from without. It was, in other words, supreme. By the end of the Thirty Years' War, sovereignty as supreme power over certain territory was a political fact, signifying the victory of the territorial princes over the universal authority of Emperor and Pope, on the one hand, and over the particularistic aspirations of the feudal barons, on the other. Throughout the modern period of history the doctrine of sovereignty has retained its importance and has served as a potent political weapon in the claims and counterclaims of rival nations.[62]

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62. Hans J. Morgenthau, "The Problem of Sovereignty Reconsidered." 48 Columbia Law Review 341 (1948).

From the standpoint of international law, sovereignty is ultimately susceptible to analysis, division, and limitation. From that standpoint, it is the capacity to have jural relations with other sovereigns, and the slightest familiarity with international law shows that its inventiveness in distinguishing varieties of legal capacity has been very great.[63] Thus to define the degree of sovereignty of a given entity, one must investigate its existing jural relations with other entities.[64] Through the terminological maze that comprises such referents as mandate (deriving from the mandatum, a consensual contract in Roman Law described by most writers as a gratuitous agency), tutelage (in Roman law a guardianship of children under fourteen, implying a fiduciary relationship between tutor and pupil), and trust (an institution of Anglo-American law whereby property is held or duties are undertaken by a person for the benefit of another), the essential questions to be resolved ought to be capable of discernment: (1) Who has title to mandated territories in the sense of ultimate power to change their status? (2) Who has ultimate responsibility for injuries to other states arising from acts or omissions

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63. Quincy Wright, Mandates Under the League of Nations, p. 286.

64. Charles G. Fenwick, International Law. New York: Appleton-Century-Crofts, 1948; Quincy Wright, op. cit., p. 286.

of the governments of the territories? (3) Who has authority to change the fundamental law binding the inhabitants of each area? (4) Whom does the policy of the system contemplate as the eventual sovereign?[65]

International law has treated territorial sovereignty like real property the title to which can be determined by tracing back valid transfers as far as the memory of man or to original acquisition. It recognizes certain legitimate modes of acquisition or transfer and assumes that sovereignty of territory can exist only by virtue of proper original acquisition of res nullius or proper transfer from the former sovereign. As a rule, only he who has title can give title. Sovereignty of a territory thus involves ultimate power of disposal under international law and so is distinguished from jurisdiction or de jure control of the administration in whole or part, permanently or temporarily as in leases, protectorates, and foreign administrations and also from merely de facto control as in military occupation. Occupation not only original but also adverse may develop in time into sovereignty as by prescription or by completed conquest, consequently it gives some evidence of sovereignty in the absence of other data. Title in the sense of ultimate power of disposal established by the final instrument in a chain of valid transfers from a former sovereign may be regarded

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65. Quincy Wright, op. cit., p. 500.

as the best evidence for determining the sovereignty of the mandated territories. This is significant, for if the conventional rule concerning airspace is to be properly applied,[66] a condition precedent to the finding of rights in airspace is the finding of rights in the surface land area.

Germany was undoubtedly the sovereign of the African and Pacific territories before 1914,[67] and by Article 119 of the peace treaty she renounced them in favor of the Principal Allied and Associated Powers. Was this a transfer of sovereignty to these Powers? Since the same phrase was used as to Danzig, the Saar, Memel, and other places which were clearly given a different ultimate disposition by other clauses of the treaty and since a different ultimate disposition was specified for the mandated territories themselves in Article Twenty-two of the Covenant, the answer would appear to be in the negative.[68] The Principal Allied and Associated Powers were not given sovereignty of the territory in the sense of discretion to keep it or alienate it. They were merely given a commission to dispose of it in a specified manner. This disposition was described

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66. Ibid.

67. M. F. Lindley, The Acquisition and Government of Backward Territory in International Law. London: Longmans, Green & Co., Ltd., 1916, pp. 205-206.

68. Quincy Wright, op. cit., p. 501.

by Article Twenty-two of the Covenant which prescribed that all of these territories should be administered by "mandatories in behalf of the League."[69]

This commission was performed by the Principal Powers through resolutions assigning the territories to mandatories on May 7, 1919, and May 20, 1920; through subsequent agreements on the boundaries; and through notification of these decisions to the League Council. All of this is recorded in the preambles of the mandates, which are in the form of grants by the League of Nations reciting Article 119 of the Versailles treaty; the agreement of the principal powers to entrust the administration of the territory to the named Mandatory "for the purpose of giving effect to the provisions of Article Twenty-two of the Covenant"; the acceptance by the Mandatory, and also the provision of Article Twenty-two, that "the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the members of the League shall be explicitly defined by the council of the League of Nations."[70]

A plausible interpretation of these mandates is that the principal powers, having performed the mission intrusted to them by the treaties, passed out of the picture. While

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69. Covenant of the League of Nations, Article 22 (2).

70. Ibid., Article 22 (8).

the evidence of definitive transfer from the principal powers is not as conclusive as it might be in that there is no formal treaty signed and ratified by them but merely the record of their resolutions, of their notifications to the League, and the preambles of the mandates, the duty laid upon them by fair implication from the terms of Article Twenty-two which they had ratified formally would appear to have obviated the necessity for further formal ratification. They did what they agreed to do and the territories came under the regime established by Article Twenty-two.[71]

In the case of the mandates of Palestine and Syria, it was provided that the Principal Allied Powers would intrust the territory "which formerly belonged to the Turkish Empire"[72] to the Mandatory in accord with Article Twenty-two, with no indication of the method by which Turkey lost her sovereignty. The treaty of Sevres by which she renounced these territories was never ratified, and the Lausanne treaty by which she renounced them was not made when the mandates were assigned. The transfer from Turkey at the time the mandates were assigned could be accounted for only on the

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71. Quincy Wright, op. cit., pp. 319f f, 502; Robert Lansing, The Peace Negotiations. Boston: Houghton Mifflin & Co., 1921, pp. 149ff.

72. Palestine (and Trans-Jordan) Mandate Preamble (In Wright, p. 600) and Syria and Lebanon Mandate (In Wright, p. 607) (Preamble).

principle of successful revolution or completed conquest.[73] In the case of Iraq, the treaty of 1922 between Great Britain and that country recites an acknowledgment of Hussein as constitutional king and makes no mention of the mandate, which would appear to connote recognition of Iraq's independence. But the League Council's decision of September, 1924, defining the Iraq mandate, recites Article Sixteen of the Lausanne treaty by which Turkey renounced the territory, Article Twenty-two of the Covenant, and a British statement asserting that Iraq had passed under British occupation, that the Principal Allied Powers had intended to confer on her a mandate, that she had accepted, but in view of the rapid progress of Iraq had concluded the treaty of alliance "to ensure the complete observance and execution in Iraq of the principles which the acceptance of the mandate was intended to secure."[74] While the term "mandate" did not appear in the Anglo-Iraq treaty, Iraq's agreement in that document to the British exercise of power adequate to fulfill the mandate was apparent.[75]

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73. Quincy Wright, op. cit., pp. 490, 502.

74. Decision of the Council of the League of Nations Relating to the Application of the Principles of Article 22 of the Covenant to Iraq, Wright, op. cit., p. 593.

75. Treaty Between His Britannic Majesty and His Majesty The King of Iraq (signed at Bagdad, October 10, 1922), Wright, op. cit., p. 595.

In summary, analysis reveals that for all the mandated areas except Iraq title passed from Germany or Turkey to the Principal Powers, who, however, never had full sovereignty but merely a transitional title of which they divested themselves in transfering title to the regime set up by the Covenant. For all the areas except Iraq full sovereignty is located as defined in the Covenant, and for Iraq, which has been recognized as independent, it was so vested except for a portion of sovereignty retained by the government of that country itself.[76]

Of pertinence to the status of mandated territory as defined in Article Twenty-two of the Covenant is the question of what authority or combination of authorities had power to change that status. Such change would have been possible through modification of the article, performance of it, or an act which was legally effective though in violation of the article. The Covenant, a treaty between the fifty-six members of the League, could be modified only in accord with its own terms or by consent of all the parties. Termination by conclusion of a new treaty among all the parties, by obsolescence, or by application of the rebus sic stantibus doctrine were remote possibilities. War does not ordinarily affect multilateral treaties in law. The

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76. Wright, op. cit., p. 503.

only practical way for Article Twenty-two to have been modified would have been through the amending procedure defined in Article Twenty-six of the Covenant, i.e., through ratification of an amendment by the members of the League whose representatives composed the Council and a majority of those whose representatives composed the Assembly.[77]

Since Article Twenty-two of the Covenant applied to certain territories "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world,"[78] performance of that article would occur if the inhabitants of one of the territories evolved out of that stage, and the status prescribed would no longer obtain. Use in the article of the word "tutelage," the express assertion that some of these communities "have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone, and the reference to "the stage of the development of the people," warrants this interpretation. Achievement of that evolution occurred in the case of Iraq, the admission of which to the League followed a two-thirds vote in the Assem-

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77. Wright, op. cit., p. 504.

78. Covenant of the League of Nations, Article 22 (1).

bly. Under international law, political claims may become legal rights through general recognition; the assertion by a community that it no longer needed tutelage, and recognition by the states of the world of that claim would change the status of that community, improbable as such general recognition would have been without formal League action, however.[79]

Change of status might also have been effected through annexation by the Mandatory, conquest by some other power or revolution, or ousting of the Mandatory by the inhabitants of the territory.[80] Any of these means would have been in violation of Article Twenty-two. While such changes might have acquired de jure character through subsequent general recognition or long acquiescence in the changed situation, they would have to come about in face of the restrictions imposed. The Mandatory was precluded from doing, by the terms of the mandates, many of the things that an owner could rightfully do; it agreed to exercise its mandate on behalf of the League and the mandates contained no cession of territory to the Mandatory.[81] The clauses of the treaties whereby Germany and Turkey divested themselves of rights in respect of the territories placed under mandate

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79. Wright, op. cit., p. 505.

80. Ibid.

81. L. Oppenheim, op. cit., p. 220.

suggested a dereliction rather than a cession, and the effect of the clauses relating to this was to divest the inhabitants of these areas (apart from the special case of the German subjects of European origin) of their former German or Turkish nationality and not to invest them automatically with any new nationality. In April 1920, the League Council adopted resolutions with regard to the national status of the inhabitants of the "B" and "C" mandated areas, the substance of which was that they had a distinct status from that of the Mandatory's nationals, and while not disabled from obtaining individual naturalization from the Mandatory, did not become automatically invested with its nationality. In the case of the "C" mandated area of Southwest Africa, the Mandatory, with the consent of the Council of the League of Nations, and with the assent of the German government, passed legislation offering collective naturalization to all persons of German origin, subject to the right of any of them to decline the British nationality offered to them.[82] In the case of all "A" mandated territories, the inhabitants of the mandated areas acquired a new nationality: Iraq's inhabitants acquired citizenship pursuant to the Iraq law of October 9, 1924; Palestinians became such as a consequence of the British Order in Council of July 24, 1925; Syrian and Lebanese citizenship was provided for pursuant

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82. Oppenheim, op. cit., p. 220.

to Article Three of the mandate[83] and decrees of the French High Commissioner.[84]

Authority for the proposition that sovereignty did not pass to the mandatories is so strong as to require little reiteration. The mandates aimed to establish a better system for the administration of backward areas than had existed under the regime of colonies, protectorates or spheres of influence--better in the sense that it would more effectively secure the liberty, material welfare, and opportunity for development of the native inhabitants, and that it would more effectively secure the opportunity of all states of the world to equal participation in the trade and resources of these areas. The League's supervision was the distinctive feature of the mandates system. Its functions consisted of (1) confirming the original mandates and subsequent modifications, (2) organizing agencies for supervising the mandatories, (3) discovering and verifying facts in regard to the mandated communities, (4) assuring the continuous application of the mandate provisions, and to this end, (5) ascertaining and formulating standards, principles, and rules for governing the mandated areas. The first of

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83. J. W. Gey Van Pittius, Nationality Within the British Commonwealth of Nations. London: P. S. King & Son, Ltd., 1930, pp. 177-201.

84. Oppenheim, op. cit., pp. 220, 221.

these functions was clearly implied in the Covenant stipulation that "the degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the council."[85] The third function was implied by the requirement that the mandatories "render to the council an annual report in reference to the territory committed to its charge" and the requirement that the Commission "receive and examine" these reports.[86] The fourth function was the raison d'être of the League's activity in respect to mandates and followed from the very conception of "mandatories in behalf of the League" and from the requirement that the Commission "advise the council in all matters relating to the observance of the mandates."[87] The second and fifth functions, in light of the fact that the Covenant itself establishes the Council and the Permanent Commission with certain powers, are best explained by the following quotation:

> ...a mandate is a self-imposed limitation by the conquerors on the sovereignty which they obtained over conquered territories. It is imposed by the Allied and Associated Powers themselves in the interests of what they con-

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85. Covenant of the League of Nations, Article 22 (8).

86. Ibid., Article 22 (9).

87. Ibid.

> ceive the general welfare of mankind; and they have asked the League of Nations to assist... It is the League's duty...to see... that the terms of the mandate conform to the ...Covenant, and...that these terms shall, in fact, regulate the policy of the mandatory powers in the mandated territories.[88]

Experience has demonstrated that the principles established by the Covenant were not so exhaustive as to preclude a need for interpretation--hence the constant supervisory role was necessitated.[89] But at no time was it intimated that sovereignty was vested in the mandatories.[90]

It has been often assumed that political organization is impossible unless ultimate legal power over a territory is vested in an individual or group with a single will and adequate physical power to enforce it.[91] Such hypothesis rests on the assumption that men and groups can be induced to act together only by coercion or threats of coercion, a hypothesis which is not supported by the findings of social psychologists, advertising men, educators and propagandists.[92]

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88. League of Nations Yearbook, III, p. 138.

89. Wright, op. cit., p. 107.

90. Permanent Mandates Commission Minutes, III, pp. 216, 221, 222.

91. William Archibald Dunning, A History of Political Theories from Rousseau to Spencer. New York: The Macmillan Co., 1936.

92. Graham Wallas, The Great Society. New York: The Macmillan Co., 1917, Chap. vi.

Human action may in fact be directed by many methods other than coercion. As for jurisdiction to settle a dispute as being a practical necessity of political organization, the possibilities of political organization which relies on ultimate settlement by negotiation or settlement until the dispute becomes obsolete, rather than on the exercise of compulsory jurisdiction, should not be overlooked. In this spirit the League of Nations attempted to conduct affairs.[93]

4. The Problems Posed for International Aviation

The creation of the mandates system raised problems, the impact of which was not felt for years after they became incipient. In the field of international aviation the potentialities were apparent, however, even before flight became the commonplace thing that it is at the midpoint of the twentieth century. An analysis of the relevant documents shows that some, although hardly complete, consideration was accorded the matter of flight rights over mandate territory. The legal problems on their face appeared knotty in view of the ephemeral status of the mandates in international law, or at least their relatively novel role in international society. Such questions as the extent to which the Mandatory could control transit through the man-

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93. Wright, op. cit., pp. 269ff.

date's airspace, and the conditions to which, if any, foreign aircraft could be made to subscribe as a precedent for rights of passage were naturally causes of concern.

Of special importance were Palestine, Tanganyika, and the Pacific Islands, although these were not to really come of age in the field of international air transport until World War II. Several of the routes between Europe and India (including United States air transport operations) pass through Palestine; a number of north-south routes on the African continent pass through Tanganyika; and the location of several of the Pacific Islands, placed under the Japanese mandate by the Covenant of the League and the treaties drawn up, were of not inconsiderable importance to the air routes that were to be established in that area.[94]

The relationship between international aviation and the League mandatory system was apparent when the Convention Relating to the Regulation of Aerial Navigation (The Paris Convention) was drawn in 1919. This pact was signed as part of the system of treaties which created the League. Having become parties to the Paris Convention, most of the members of the League were subject to that provision which stated that

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94. J. C. Cooper, "United Nations Trusteeships," Air Affairs, Vol. 2 (1947), pp. 115ff.

> The territories and nationals of Protectorates or of Territories administered in the name of the League of Nations, shall, for the purpose of the present Convention, be assimilated to the territory and nationals of the Protecting or Mandatory States.[95]

That the Mandatory could consider the territory in the mandate as part of its national territory for the purposes of international aviation administration under the terms of the Convention, unless the mandates specifically provided otherwise, would appear to have been thus established. Construed along with Articles One, Fifteen, and Sixteen[96] of the Paris Convention, Article Forty would appear to have recognized the right of each Mandatory to fix the terms under which aircraft of other States could operate commercial airlines across or into the mandated territory, and could consider such mandated territory as part of its own territory for cabotage traffic, within the mandate or between the mandate and other territory of the Mandatory, provided that the terms of the mandate did not specifically limit these privileges. The concept of mandatum dictated that it be intended to benefit some one other than the Mandatory, that the Mandatory be responsible within defined limits to third parties for its acts, and that the Mandatory keep within the terms of the contract. Furthermore:

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95. Paris Convention, Article 40.

96. Ibid., pp. 11, 13.

> ...mandatum might be for the benefit of the mandans, of the mandans and the mandatarius, of a third party, of a third party and the mandatarius, but an apparent mandatum where the mandatarius alone benefited was considered mere advice and not actionable.[97]

This rule of construction--that the trustee cannot construe the trust instrument to its personal advantage where rights and privileges are involved in those for whom the trust has been created--was necessarily applied in light of the fact that under the mandates all members of the League had certain rights in mandated territories.[98]

References to aviation are found in the treaties providing for the mandate arrangement. In the treaty between "His Britannic Majesty and the King of Iraq," Article Eleven provided that:

> There shall be no discrimination in Iraq against the nationals of any State, member of the League of Nations, or of any State to which His Britannic Majesty has agreed by treaty that the same rights should be ensured as it would enjoy if it were a member of said League...as compared with British nationals or those of any foreign State in matters concerning...commerce or navigation...or in the treatment of merchant vessels or civil aircraft.[99]

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97. Wright, op. cit., p. 379; Justinian Institutes, iii. 26. 1-6.

98. Covenant of the League of Nations, Article 22 (2).

99. Great Britain-Iraq Treaty, Article 11 (1922).

Article Eleven of the Syria and Lebanon mandate provided that:

> The Mandatory shall see that there is no discrimination in Syria or Lebanon against the nationals...of any state member of the League of Nations as compared with its own nationals...or with the nationals of any other foreign state in matters concerning ...navigation, or in the treatment of ships or aircraft. Similarly there shall be no discrimination in Syria or Lebanon against goods originating in or destined for any of the said states; there shall be freedom of transit...across the said territory.[100]

Article Eighteen of the British mandate for Palestine was practically identical to Article Eleven of the Syria and Lebanon mandate with the exception of the word merchant vessels instead of ships.[101] Article Nineteen provided that the Mandatory should adhere on behalf of the administration of Palestine

> to any general international conventions already existing or which may be concluded hereafter with the approval of the League of Nations, respecting the slave traffic, the traffic in arms and ammunition, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property.[102]

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100. Syria and Lebanon Mandate, Wright, op. cit., p. 609, Article 11.

101. Ibid.

102. Palestine and Trans-Jordan Mandate in Manley O. Hudson, International Legislation. Washington: Carnegie Endowment for International Peace (1931), Vol. 1, pp. 109-120.

The Tanganyika and Ruanda-Urundi mandates avoided specific mention of civil aviation but did provide for freedom of transit, navigation, and commercial equality:

> The Mandatory shall secure to all nationals of states members of the League of Nations the same rights as are enjoyed in the territory[103] by his own nationals in respect of entry into and residence in the territory...
>
> Further, the Mandatory shall ensure to all nationals of states members of the League of Nations, on the same footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality...[104]

The terms of Article Eighteen of the Palestine mandate prohibiting discrimination in matters of commerce or navigation or treatment of civil aircraft appear to have effectively precluded invocation of Article Forty of the Paris Convention, according to whose terms the mandate could be considered mandatory territory for the purposes of international aviation. The terms of the mandate appear to have quite specifically limited the privileges of the Mandatory over territory entrusted to it. The policy objectives of the Covenant of the League of Nations would be flaunted wrongfully if such were not the case. It was the Covenant which

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103. The words "in the territory" are omitted in the Ruanda-Urundi mandate.

104. Tanganyika Mandate in Hudson, op. cit., pp. 84-92.

provided that the tutelage of peoples "not yet able to stand by themselves under the strenuous conditions of the modern world" should be intrusted to advanced nations "as Mandatories on behalf of the League."[105] The trust principle prohibiting application of the mandate for the advantage of the Mandatory where rights and privileges are involved of those for whom the mandate has been created would be operative as well. The fact that the Mandatory was not endowed with sovereignty over the mandate would also militate against any construction that would have afforded the Mandatory sovereign rights over the airspace above territory entrusted to it, particularly where the cestui que trustent stood to be deprived.

In 1925, the United States entered into an agreement[106] with Great Britain whereunder the United States and its nationals were accorded all the rights and benefits secured under the terms of the mandate to members of the League and their nationals. The United States thereupon became the beneficiary of the same transit and commercial aviation privileges in Palestine to which the aircraft of Great Britain and other League member states were entitled. But

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105. Covenant of the League of Nations, Article 22 (1,2).

106. Convention Between the United States of America and Great Britain, signed at London, December 3, 1924. In U. S. Department of State, Papers Relating to the Foreign Relations of the United States. (1924), Washington: U. S. Government Printing Office, 1939, Vol. 21, p. 212.

this in no way enlarged the aeronautical prerogatives of the Mandatory or, for that matter, the members of the League, all of whom were obligated to continue within the framework of the Covenant of the League. The fact that the United States was not a signatory of the Covenant would appear to have necessitated her having made an independent agreement. The fact that a mandate agreement did exist in the first place, pursuant to the terms of which "His Britannic Majesty ...accepted the mandate in respect of Palestine and undertook to exercise it on behalf of the League of Nations,"[107] clearly demonstrated international recognition of the fact that Palestinian territory was not ipso facto British territory.

Not that this point of view has been unequivocally maintained in the international documents that came into being after creation of the mandate. In the Final Act of the Civil Aviation Conference[108] held at Bermuda in 1946, the so-called "Bermuda Agreement," Palestine appears to have been treated as part of British territory for the purpose of granting commercial and transit rights. This agreement was between the United States and Great Britain and it authorized service by air carriers of the United States, on routes passing through Europe and Palestine en route to

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107. Palestine Mandate Preamble.

108. United States Treaty Series 1507 (1946).

India and the Far East, by permitting aircraft of the United States to stop at Lydda, the principal airport in Palestine. That Lydda was listed in the Bermuda Agreement as British territory and not as territory under mandate seems to at least connote confusion in the eyes of the signatories, the rectification of which would be in the interest of generally increased harmony among potential international travelers.

The provisions of the Tanganyika mandate to which reference has already been made,[109] and in which no direct reference to civil aviation was made, were supplemented by Article Nine of the same agreement, one that was practically identical with Article Nineteen of the Palestine mandate,[110] pursuant to which the Mandatory undertook to adhere to already existent international conventions, or those to be effected with League approval, respecting, among other things, aerial navigation. These articles and the interpretation accorded them are of considerable significance because Tanganyika was and is of major importance in the development of major air routes, geographically situated as it is. It is bordered on the north by British Kenya and Uganda, on the west by the Belgian Congo and Belgian mandated territory (Ruanda-Urundi), on the south by British

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109. Article 7, Tanganyika Mandate, p. 65, supra.

110. Article 19, Palestine Mandate, p. 65, supra.

Rhodesia and Nyasaland, on the southeast by Portuguese Mozambique, and on the east by the Indian Ocean. The principal north-south route between Cairo and the Union of South Africa passes through Tanganyika. Air transport from French Equatorial Africa to Madagascar, a French overseas territory, ordinarily passes through Tanganyika. Notwithstanding these facts, and the potentially greater role that this former German colony might have in air travel, the international aviation terms of the Tanganyika mandate have been alleged to be likewise confused in that through invocation of Article Nine of the mandate, terms of the Paris Convention of 1919 could be applied, pursuant to which Great Britain might conceivably insist on controlling the entry of non-British commercial airlines into the mandate, and the reservation to British aircraft of cabotage privileges within the mandate and between the mandate and the adjoining British colonies to the north and south. Such construction would be based presumably upon Article Forty of the Paris agreement, the use of which would be as much in contravention of the policy objectives of the Covenant of the League and the well-established principles of trust law cited, in the case of Tanganyika, as it would be in that of Palestine. It would likewise appear to defy the terms of Article Seven[111]

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111. P. 65, <u>supra</u>.

by which other League members were ensured "freedom of transit and navigation, and complete economic, commercial and industrial equality." Like the Bermuda agreement however, the agreement between Great Britain and France of February 28, 1946, under which air transport routes and privileges were exchanged, French commercial air services were authorized to engage in international civil aviation at Lindi, an airport in Tanganyika, Lindi being described in such agreement as being in British territory.[112]

Comparable argument has been made with respect to the provisions of the Chicago Convention on International Civil Aviation of 1944. Article Two of that Convention was the counterpart of Article Forty of the Paris Convention.[113] Article Five accorded rights of transit to contracting states; Article Six denied passage, as to scheduled aircraft, to contracting states in the absence of special permission; Article Seven gave to each contracting state the right to reserve cabotage privileges to its own aircraft within its territory. In conjunction with the express recognition given by Article One to the doctrine of complete and exclusive sovereignty over the airspace above the contracting states' territory, it would appear that these provisions

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112. Cooper, op. cit., p. 121.

113. P. 63, supra.

operated in a fashion similar to that established under the Paris Convention in that transit, traffic, and cabotage privileges could be controlled by the Mandatory on the theory that the mandated area was part of the territory of the Mandatory, unless otherwise provided by mandate.[114]

The significance of the issues raised by the documents quoted and the interpretations, varied as they have been, that have been made of the provisions contained in them, merits close attention. Conceivably they pose mere problems raised by terminological inexactitude; they represent, on the other hand, considerable confusion in the minds of those entrusted with the task of implementing harmonious and effective international aviation policy. That the League of Nations Covenant is no longer an operative framework of principle does not minimize the importance of the constructions that are made, or should have been made, because the League Covenant served as a forerunner of the currently determinative Charter of the United Nations, in the interpretation of which League Covenant precedent has played, and will continue to play, a far from unimportant role.

That the airspace above territory has been traditionally considered to be subject to rules and regulations

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114. Cooper, op. cit., p. 121.

laid down by the territorial sovereign requires no repetition. That the mandatories were not technical sovereigns has also been reiterated consistently, in the literature of international law and the pronouncements of persons and organizations entrusted with the task of construing the meaning of the mandates that were forged following the signing of the Covenant at Versailles. It is evident, however, that definition has been lacking in the field by reason of the ambiguity to be found in purportedly controlling documents, the misinterpretation of which has been encouraged for want of specificity, as well as the perplexity of which has been rampant for want of uniformity. In the period following the Second World War, the need for increased consistency has become of manifest importance. The shrinking size of the globe, effected through constantly growing transportation networks, necessitates close attention, lest the harmony that is universally sought give way to obscurity, dubiety, and conflict.

Chapter III

UNITED NATIONS AND THE INTERNATIONAL TRUSTEESHIP SYSTEM

The successor to the League of Nations was the United Nations, the Charter of which was signed at the San Francisco Conference in 1945, at a time when World War II's end was approaching. The preamble of this charter resolved to save succeeding generations from the scourge of war by establishing the "conditions under which justice and respect for international obligations arising from treaties and other sources of international law"[1] could be maintained. It proposed, further, to promote social progress and better standards of life in larger freedom, to practice tolerance, to unite our strength to maintain international peace, and to employ international machinery for the promotion of the economic and social advancement of all peoples.[2]

The United Nations was a war product; it was not planned as a universal organization, though this lay somewhere in the background of thought as an ultimate objective. Its original membership was limited to those who had sided with the United Nations against the Axis foe, and its chief

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1. Charter of the United Nations, Preamble.
2. Ibid.

purpose was to provide security, largely against that same foe. Even more than the League of Nations, the United Nations was the consequence of war and the manufacture of the victors. The idea for this international organization was first adumbrated in the Atlantic Charter by the United Kingdom and the United States; the entry of the Soviet Union into the war made them three, and these three, along with China, added by way of courtesy, laid at Dumbarton Oaks the foundation for the new "international security organization." These four invited to the United Nations Conference on International Organization at San Francisco those who were participants in the war to the extent of signing the Declaration by United Nations.[3]

The predominant position which the Great Powers claimed for themselves was justified on the grounds that they won the war, and that they would be able to contribute most to security against the enemy in the future. Although a provision[4] of the United Nations Charter deprives the organization of responsibility for the enemy states, the arguments of the Great Powers showed that the aggressors whom they had in mind as they shaped the Charter were Germany,

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3. James T. Shotwell, Aims of the United Nations. New York: E. P. Dutton and Co., Inc., 1955, p. 19.

4. Charter of the United Nations, Article 107.

Italy and Japan. The Great Powers made the potentially formidable sanctions of the Security Council inapplicable to themselves, and such array of power was not necessary against any smaller state. Against resurgence of danger from their former enemies they protected themselves in various ways; no new member could be admitted without the approval of the Security Council, in which each Great Power has a veto; action against former enemies is provided for,[5] with "enemy state" defined in one article.[6] The provisions regarding trusteeship,[7] and even those concerning amendment[8] bear some relationship to this preoccupation. But the way to admission of a former enemy state is not barred should the Five Powers agree that it is desirable.[9]

The United Nations is made up of six main organs acting as agencies of international supervision. There is (1) A General Assembly composed of all members, each with one vote, charged with laying down the policy of the United Nations; (2) A Security Council of eleven, with the Big Five (China, France, Great Britain, U. S. S. R., and the U. S.) as permanent members, entrusted with the primary re-

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5. Ibid.

6. Ibid., Article 53.

7. Ibid., Articles 75-91.

8. Ibid., Articles 108-109.

9. Clyde Eagleton, "The United Nations: Aims and Structure." 55 Yale Law Journal 976 (August, 1946).

sponsibility for maintaining the peace; (3) An Economic and Social Council of eighteen members whose task is to promote the welfare of peoples and to further human rights and fundamental freedoms; (4) A Trusteeship Council which supervises the welfare of dependent peoples placed under the United Nations and helps them toward self-government; (5) An International Court of Justice for the settlement of legal disputes; (6) A Secretariat--the administrative and office staff of the United Nations under a Secretary-General as its chief officer.[10]

The General Assembly, like the Assembly of the League of Nations, includes all members of the organizations. Each member is entitled to one vote, and a maximum of five representatives, appointed by the respective members. General Assembly functions may be termed deliberative, supervisory, financial, elective, and constituent. The first function refers to the provisions for discussion, study and recommendation.[11] It means discussion or consideration with a view toward choice or decision. The power of discussion implies the authorization to obtain the facts and information needed for discussion; Article 13 of the Charter requires the General Assembly to initiate studies for the purpose of promoting international cooperation in various fields.

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10. Marie and Louis Zocca, op. cit., p. 5.

11. Charter of the United Nations, Article 13.

Reports and information may be requested from other organs of the United Nations and legal opinions may be sought from the International Court of Justice. The General Assembly's supervisory function refers to its powers of control and regulation of other organs and agencies of the United Nations; as the central body, it receives and considers reports from the other organs. While the Security Council is coordinate with the General Assembly, its annual and special reports include an account of measures which it has decided upon or taken to maintain international peace and security. These reports are discussed by the General Assembly, and recommendations may result.

General Assembly approval is required for the Economic and Social Council to call international conferences, to make agreements with the specialized agencies, or to request an advisory opinion of the International Court of Justice. All UN functions with regard to trusteeship agreements for nonstrategic areas are vested in the General Assembly, and the Trusteeship Council operates under its authority in regard to such areas. It is important to note that the General Assembly possesses the power to alter the terms of the Trusteeship Agreement or to terminate it with the consent of the Administering Authorities, whereas the League Assembly could only exercise indirect control upon the Mandatory Power in determining whether a Mandated Territory had matured

politically to a point where the Mandate was no longer necessary. Regulations for the appointment of the staff of the Secretariat are also established by the Assembly. From the standpoint of the financial function, General Assembly responsibility embraces budgetary arrangements of the UN and the apportionment of expenses among the members.

The article[12] providing for consideration and approval by the General Assembly of the budget of the Organization is important because it involves the power to review the work of the other organs when their expenditure estimates are presented, and to exercise a degree of control by deciding which activities will receive financial support, and to what extent. The Assembly is free to establish its own criteria in deciding upon the assessments against each country. The basic principle has been that of ability to pay, although there have been deviations from the automatic application of this concept. First, a ceiling on the maximum contribution of any one member has been recognized. Some consideration has been given to a per capita limitation on every member state, the contribution not to exceed the per capita contribution of the member bearing the highest assessment. As a further limiting factor upon the ability to pay standard has been the need for Assembly discretion in light of the inadequacy of statistical information in

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12. Ibid., Article 17 (1).

some cases.[13] The elective function of the General Assembly has to do with the admission of new members into the UN, and the choice of members for other organs.[14] Election to membership is accomplished by the General Assembly upon the recommendation of the Security Council. No new member can be admitted without favorable affirmative action by the Assembly. Also of Assembly concern is the basis for losing membership: a member with its contribution in arrears may lose its voting rights, and a member against which preventive or enforcement action is being taken may be suspended by the Assembly upon Council recommendation, though the latter alone may restore it to the exercise of the rights and privileges of membership. The Assembly elects the six nonpermanent members of the Security Council, all eighteen members of the Economic and Social Council, and some members of the Trusteeship Council. Acting as a coordinate body with the Security Council it participates in the election of judges to the International Court of Justice. The Secretary General is "appointed" by the General Assembly upon the recommendation of the Security Council. The constituent function of the Assembly refers to the provision[15]

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13. Vandenbosch and Hogan, op. cit., pp. 118-119.

14. Ibid., pp. 122-123.

15. Charter of the United Nations, Article 108.

that amendments to the Charter are proposed, or "adopted," by that body prior to their referral to members for ratification. The General Assembly also participates with the Security Council in calling a general conference of members to review the Charter.[16]

The Security Council has the "primary responsibility for the maintenance of international peace and security."[17] It is noticed that strategic trust areas (Pacific Island Trust Territory) have responsibility to the Security Council, whereas all other present trust territories have responsibility to the General Assembly. The Security Council acts on behalf of all the members of the United Nations. Its main functions are deliberative, enforcement, and elective. Under deliberative activities are discussion, investigation, and recommendation phases. In the case of international disputes, there is an obligation upon the parties to seek a solution by peaceful means of their own choice. The Council may call upon parties to settle their disputes by such means, and it is specifically authorized to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or

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16. Vandenbosch and Hogan, op. cit., p. 123.

17. Charter of the United Nations, Article 24 (1).

situation is likely to endanger the maintenance of international peace and security."[18]

Appropriate procedures or methods of adjustment at any stage of such a dispute or situation may be recommended: the Security Council is empowered to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles Forty-one and Forty-two, to maintain or restore international peace and security."[19] The Council, among other things, is responsible for formulating plans for the establishment of a system for the regulation of armaments.[20] Enforcement functions embrace the power to decide what measures shall be taken to maintain or restore international peace and security, if both peaceful settlement among the parties and recommendations of the Security Council fail in this objective. Initial steps in such case would comprise interruption of economic, transportation, communication and diplomatic relations.[21] Military action is authorized if these measures are unsuccessful.[22] Elective functions of

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18. Charter of the United Nations, Article 23 (1).
19. Ibid., Articles 39ff.
20. Ibid., Article 26.
21. Ibid., Article 41.
22. Ibid., Article 42.

the Council include responsibilities relating to the admission of new members and to the constitution of other organs of the UN; this task is discharged along with the General Assembly.[23]

The Security Council, like the League Council, is the fulcrum of the World Organization, and in many ways acts like an Executive Committee of the General Assembly. Under the Covenant, matters relating to the Mandates were directly in the hands of the League Council which exercised supervisory authority and control over the Mandatory administration.[24] The Charter, on the other hand, deprived the Security Council of the supervision of the non-strategic Trusteeship but expressly vested it with "all functions" relating to strategic area trusteeships.[25]

The fuctions of the Economic and Social Council lie in the areas of studies and reports, discussion and recommendations, and coordination. A charter provision stipulates that "the Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters..."[26]

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23. Vandenbosch and Hogan, op. cit., p. 141.

24. Covenant, League of Nations, Article 22, Paragraph 8.

25. Charter of the United Nations, Article 83.1.

26. Ibid., Article 62 (1).

The lamentable dearth of adequate statistical and other information about economic and social conditions throughout the world has necessitated the compilation of factual information and statistics by this international agency. The Economic and Social Council has made studies dealing with such subjects as the problems of refugees, the world shortage of housing, the reconstruction of devastated areas, and the economic status of women. Cooperation in studying and reporting on international economic conditions leads in the direction of a definition of areas of agreement on important factual information and on the identification of the problems of general concern. It is an important phase of the practice of international cooperation. The authority of the Economic and Social Council to make recommendations extends to international cooperation in economic, social, cultural, educational, health, and related matters. In matters of coordination, the Economic and Social Council's most important function extends and relates to the specialized agencies of the United Nations. It is provided that:

> the various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations...[27]

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27. Charter of the United Nations, Article 57 (1).

The specialized agencies[28] to which reference is made are primarily the international agencies or organizations created by intergovernmental agreement such as the International Labor Organization, the Food and Agriculture Organization, the United Nations Educational, Scientific and Cultural Organization, the International Bank for Reconstruction and Development, the International Monetary Fund, the Universal Postal Union, the International Telecommunication Union, the World Health Organization, the International Refugee Organization, the World Meteorological Organization, the International Maritime Consultative Organization, the International Trade Organization, and of extreme concern to the problem of international aviation, the International Civil Aviation Organization.

Under Article 57 of the Charter[29] and terms of the Convention on International Civil Aviation, which provide that that organization may, with respect to air matters within its competence, affecting world security, enter into arrangements with any general organization set up by nations of the world to preserve peace;[30] and further, that the or-

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28. John Maclaurin, The United Nations and Power Politics. New York: Harper and Bros., 1949, pp. 221ff; 308ff.; How Peoples Work Together: The United Nations and the Specialized Agencies. Department of Public Information, UN. New York: Manhattan Publishing Co., 1952, p. 58.

29. Charter of the United Nations, Article 57 (1).

30. Convention on International Civil Aviation, Article 64.

ganization may enter into agreements with international bodies for the maintenance of common service, for common arrangements concerning personnel and for facilitation of its work,[31] an agreement was effected.[32]

This agreement provides for reciprocal representation,[33] exchange of information and documents,[34] assistance to security council,[35] assistance to the Trusteeship Council,[36] non-selfgoverning territories,[37] relations with the International Court of Justice,[38] and liaison activities,[39] among others.

The Economic and Social Council is empowered to draft conventions for submission to the General Assembly with respect to matters falling within its competence.[40] It may also call, in accordance with rules prescribed by the United

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31. Ibid., Article 65.

32. "Agreement between the United Nations and the International Civil Aviation Organization," United Nations, Lake Success, New York, 1947.

33. Ibid., Article III.

34. Ibid., Article VI.

35. Ibid., Article VII.

36. Ibid., Article VIII.

37. Ibid., Article IX.

38. Ibid., Article X.

39. Ibid., Article XVIII.

40. Charter of the United Nations, Article 62 (3).

Nations, international conference on matters falling within its competence.[41]

The International Court of Justice is the principal judicial organ of the United Nations. Provision is made for it in Article 92 to 96 of the Charter, and a detailed statute[42] to govern its functioning is made an integral part of the Charter by reference. The Court decides cases brought before it and gives advisory opinions on legal questions. For a case to reach it, it must involve a dispute or contending claims between states; be justiciable, or subject to settlement on the basis of law; be referred to the Court.[43] Jurisdiction extends to all cases which the parties refer to it and all matters provided for in the Charter of the United Nations or in other international agreements.[44]

An indirect international judicial supervision over the Administering Authorities was a feature common to both Mandates and Trusteeship systems. Eight out of the eleven Trusteeship Agreements closely follow a similar clause in all Mandates to the effect that: if any dispute whatever

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41. Ibid., Article 62 (4).

42. Statute of the International Court of Justice.

43. Vandenbosch and Hogan, op. cit., p. 193.

44. Charter of the United Nations, Article 96.

should arise between the administering Authority and a Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by direct negotiation or other means, shall be submitted to the International Court of Justice.[45] Thus the jurisdiction of the Court is limited to legal disputes involving only a Member State and a Trustee Power. The court then would function to interpret the terms of the Trusteeship Agreements. It is interesting to note that there is no express provision as above for adjudication of disputes in the Trusteeship Agreements for the Pacific Islands Trust, New Guinea and Nauru territories. However, under Article 96 of the Charter, the General Assembly may request the International Court of Justice to give an advisory opinion on any legal question concerning the Trusteeship System. Furthermore, the Assembly has also authorized the Trusteeship Council to request an advisory opinion of the Court on legal issues "arising within the scope" of its activities.[46] Prior to the existence of the Trusteeship System, the Permanent Court had played only a limited role in the supervising machinery of the Mandates

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45. U. N. "Treaty Series," Vol. 8 (1947), Article 16 of Western Samoa, p. 80; Article 13 of French Togoland, p. 176 and the Cameroons, p. 140; Article 19 of Tanganyika, p. 102; British Cameroons, p. 132, and Togoland, p. 162; Article 19 of Ruanda-Urundi, p. 116; Article 22 of Italian Somaliland, U. N. "Document" A/1294, 1950, p. 8.

46. U. N. Document A/519, January 8, 1948, Resolution 171 (II) B, November 14, 1947, p. 103.

System and had indirectly assisted the League Council in settling contentious questions.[47] So far there has been no judicial dispute between an Administering Authority and a Member State respecting the interpretation or the application of the provisions of the Trusteeship Agreement. However, an interesting case to be discussed later is the 1950 decision by the International Court of Justice concerning the international status of the South West Africa Mandate.[48]

The Secretariat consists of the Secretary-General and the staff of the United Nations. The Secretary-General is the "chief administrative officer"[49] of the UN: his functions include administrative and service, political, and representational tasks. In the first class of functions falls the responsibility for organizing and directing the complex and varied activities which are necessary for the operation of the UN. The Secretary-General is obliged to oversee the performance of essential staff work in all of the organs of the UN. His political functions derive from the provision[50] that

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47. N. Feinberg, "La jurisdiction de la Cour Permanente de Justice internationale dans le systeme des mandats," Rousseau, Paris, 1930, p. 221.

48. International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, "International Status of South West Africa, Advisory Opinion," July 11, 1950. A. W. Leyden: Sijthoff, Sales No. 42, 1950, p. 133.

49. Charter of the United Nations, Article 97.

50. Ibid., Article 99.

> the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

This makes it possible for the Secretary-General to present information and state opinions, to exercise initiative and wield influence. The representational function arises from the fact that the Secretary-General is the only person who stands for the UN as a whole.[51] The secretariat, the UN's civil service, comprises a number of subdivisions: the Department of Security Council Affairs, the Department of Economic Affairs, the Department of Social Affairs, The Legal Department, Conference and General Services, Administrative and Financial Services, the Department of Public Information, and the Department of Trusteeship and Information from Non-Self-Governing Territories.[52] The Department of Trusteeship and Information from Non-Self-Governing Territories of the United Nations Secretariat, like the Mandates Section of the League Secretariat, is the binding force between (1) the meetings of the General Assembly and the Trusteeship Council, and (2) the 20,000,000 inhabitants of the eleven Trust Territories and their seven Administering Authorities. The Department through continuous liaison

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51. Ibid., Article 98.

52. Vandenbosch and Hogan, op. cit., pp. 182ff.

activities contributes to the effective international supervision over the Trust Territories. The Trusteeship Division has four sections: (1) Trusteeship Agreements, (2) Petitions, (3) Reports, Questionnaires and Visits, and (4) Territorial Analysis and Research.

The Trusteeship Council is also one of the six principal organs of the United Nations, although it is, relatively speaking, a subordinate body. It functions as an auxiliary organ to the General Assembly in supervising the administration of nonstrategic trust territories, and to the Security Council in the case of strategic areas. It has a composition different from that of the Mandates Commission of the League of Nations. While the members of the Mandates Commission were experts appointed by the League of Nations Council and were not representatives of their governments, the Trusteeship Council comprises member states. It is therefore a more vigorous political body. The considerations underlying its organization reflect its membership: (1) members administering trust territories, (2) such of the permanent members of the Security Council, i.e., the Five Great Powers, as are not administering trust territories, and (3) as many other members elected for three-year terms by the General Assembly as may be necessary to equalize the number of members who administer and those who do not administer trust territories.[53] The Trusteeship

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53. Ibid., p. 170.

Council assists the Assembly in supervising nonstrategic trust areas and the Council in performing "those functions of the United Nations under the trusteeship system relating to political, economic, social and educational matters in the strategic areas."[54] It carries out its functions chiefly in three ways: (1) by considering reports submitted by the administering authority, (2) accepting and examining petitions, (3) sending missions to investigate conditions in the trust territories. Each administering authority must submit an annual report for each of its trust territories. In preparing this report it must follow a detailed questionnaire of nearly 250 questions prepared by the Trusteeship Council on the political, economic, social, and educational advancement of the trusteeship territories.[55]

Under an agreement with the United Nations, ICAO agrees to cooperate with the Trusteeship Council in carrying out its function, and in particular agrees that it will to the greatest extent possible render such assistance as the Trusteeship Council may request in regard to matters with which the organization is concerned.[56]

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54. Ibid., p. 173.

55. Charter of the United Nations, Article 88.

56. Assistance to the Trusteeship Council, Agreement Between the United Nations and the International Civil Aviation Organization, U. N., Lake Success, 1947, Article 8.

1. The Transition from Mandate to Trusteeship Status

Trusteeship under the aegis of the United Nations goes back to the Mandate System of the League of Nations. This again had two roots: necessity and idealism. It was necessary for the victorious powers to dispose of the colonies taken from the defeated powers, and they found it difficult to agree on how to divide the spoils and openly to annex territories in the face of their public promises during the war. These difficulties opened the door to the idealists who for decades had been urging justice for colonial peoples. The Mandate system was the result. The League supervised the administration through a specially appointed Mandates Commission.[57]

After the second world war a similar situation arose. Some of the old mandated territories had gained independence, others remained, and new territories, whether mandated or not, were taken from the defeated powers. The Trusteeship system of the United Nations was the result. The theory behind it has been that trust territories are not owned by the administering powers but held in trust for their inhabitants until they are able to stand on their own. In the interim the administering government is accountable to the United Nations for its stewardship. Trusteeship obli-

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57. Maclaurin, op. cit., p. 329.

gations are more tightly drawn than under the League and the supervision of the Trusteeship Council, acting under the General Assembly, is closer.[58]

At the mid-point of the twentieth century, one-tenth of the world's peoples lived in non-self-governing territories. The resources of these territories, their potentiality as markets, their manpower, their strategic location, and their military weakness have in the past invited rivalries among nations which desired to extend control over them. International friction arising from the situation has contributed in substantial degree to the fomenting of wars. The two hundred million people of these dependent territories are becoming increasingly aware of their strategic and commercial importance to the world. They have been chafing under political, economic and social disabilities. Their demands have been for greater participation in the management of their own governmental affairs, for freedom from disease, hunger and malnutrition, and for opportunity to participate in full degree in the economic development of their countries. Many are becoming restless under foreign control. Organized nationalist forces in many of the dependent territories are today insistently demanding a greater or at least an independent voice in the management of their own affairs.[59]

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58. Ibid.

59. Ralph Bunche, "The International Trusteeship System," Peace on Earth. New York: Hermitage House, 1949, pp. 113-114.

The so-called colonial powers have not, perhaps of necessity, been insensitive to the needs and demands of these peoples in the modern world. Consequently, there are to be found empires in the process of reorganization; new states emerging; liberal constitutional changes evolving; educational, health and social welfare measures increasing; new economic and development plans being introduced. It was recognized at the San Francisco Conference, where was technically born the United Nations, that the well-being of colonial peoples was a matter of vital international concern. The world was no longer to rely upon a traditional humanitarian and exclusively national approach to the problem of colonies. National and international self-interest, as well as the moral pressure of humanitarianism, motivated the Charter provision on Trusteeship and Non-Self-Governing Territories.[60]

In the broad interest of world peace, as well as because of concern for the well-being of the dependent peoples, three of the nineteen chapters of the Charter of the United Nations are devoted to the non-self-governing peoples. Two of these chapters--XII and XIII--are devoted to the Trusteeship System, which has taken the place of the League Mandates System. Chapter XI is a Declaration Regarding Non-Self-Governing Territories which goes far

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60. Ibid., p. 114.

beyond any previous international instrument in the responsibilities undertaken on behalf of colonial peoples. While the Mandates System of the League of Nations was a great step forward in increasing international responsibility for the peoples of dependent territories, introducing a new element of formal and direct responsibility to the international community through the media of annual reports submitted by the administering powers to the Mandates Commission, the advent of the second world war caused a suspension, for all practical purposes, of the operations of the Mandates System. The clearly existent need for a system of international supervision and administration of non-self-governing territories which had a wider scope, broader functions and powers, and greater potentialities than that of the Mandates System was to large degree fulfilled by the International Trusteeship System that rose from the ashes of the great war for survival and the attempts made for harmony and coordination at the San Francisco Conference.[61]

A major departure in the Trusteeship system from the League Mandates System is that the overall reins of the trusteeship system were placed in the hands of the General Assembly of the UN rather than the Security Council, except for "strategic trusts," which are under the Council. While anti-imperialist states tended to welcome this change,

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61. Ibid., p. 115.

the United Kingdom suggested that all trust-administering states and the trusteeship commission report to the Economic and Social Council on non-security matters and to the Security Council on security questions. The United States plan, providing for exercise by the General Assembly of UN functions bearing upon non-strategic territories, and assistance by the Trusteeship Council in carrying out these functions, was adopted and incorporated in the Charter.[62] Since the League Assembly, though lacking explicit constitutional authority, boldly assumed the right to debate mandate questions, the role assigned the General Assembly is not wholly new but a further development of the League pattern. The fundamental importance of this change is that it has been indicative of a change in the direction of a broader, freer and more anti-colonial scrutiny of trusteeship problems.[63]

Strategic trusts were placed under the Security Council,[64] it being provided that the Trusteeship Council might assist in the performance of UN functions.[65] This move by the United States was seconded by the Soviet

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62. Charter of the United Nations, Article 85.

63. Cheever and Haviland, op. cit., p. 308.

64. Charter of the United Nations, Article 83 (1).

65. Ibid., Article 83 (3).

Union because the Russians could exert greater influence in the Council than in the Assembly. The United Kingdom opposed this view because it jeopardized the effective handling of economic and social problems in the strategic areas; it would be difficult "to draw a hard and fast line separating strategic from non-strategic areas"; and great power control of security functions within trust areas could be assured just as effectively by placing those functions, rather than whole geographic areas, under the Security Council's supervision.[66] The British view was finally embodied in Article 84 of the Charter which provides that "it shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security."[67] The striking difference between the role of the Security Council and that of the League Council in trusteeship matters is that the former is not responsible for supervising the entire trusteeship system, but merely security aspects affecting the maintenance of peace. The Council may exercise this limited authority with regard to either non-strategic trusts, in accordance with the Council's general security responsibilities, or strategic trusts. Over the latter

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66. Cheever and Haviland, op. cit., p. 309.

67. Charter of the United Nations, Article 84.

territories the permanent members can wield a veto on all questions, including economic and social matters, on the assumption that they are all related to international security.[68]

With respect to the Trusteeship Council, membership thereof was significantly different from that of the League Mandates Commission. The members were to be "specially qualified" state representatives, rather than individual experts without formal governmental connections, and to be divided equally between administering and non-administering states. The major disruptive influence was the Soviet Union's insistence that all permanent members of the Security Council, whether administering trust territories or not, be admitted to the Council. The anti-colonial forces wanted the number of non-elected members to be balanced by an equal number of Assembly-elected members. The United States and pro-colonial countries, while bowing to the Soviet proposal, wanted a balance of administering and non-administering powers. The Charter provision[69] sought to balance the interests by providing for membership of members administering trust territories, permanent members of the Security Council, and "as many other members

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68. Hearing before the Committee on Foreign Relations on the Charter of the United Nations. July, 1945, U. S. Senate, 79th Congress, 1st session, pp. 315-316.

69. Charter of the United Nations, Article 86.

elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not;[70]

Opening the first session of the Trusteeship Council on March 26, 1947, the Secretary General of the UN indicated one difference of mechanism between the League of Nations and the UN, in that "for the first time in history a permanent international body, whose membership is composed solely of official representatives of governments, is assembled to deal exclusively with the problems of non-self-governing peoples."[71] Whereas the League Council acted through its Permanent Mandates Commission of private citizens, the General Assembly, except for strategic trust territories which are reported directly to the Security Council, acts through the Trusteeship Council composed equally of trustee and nontrustee states--including the five permanent members of the Security Council. While some frankness and impartiality may have been sacrificed by the substitution of official representatives for private representatives, the recommendations of the Trusteeship

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70. Ibid., Article 86 (1) (c).

71. United Nations, Trusteeship Council, Official Records, First Year, First Session, March 26, 1947-April 28, 1947, p. 1.

Council bear the weight and responsibility of governments. Whereas the members of the Mandates Commission rarely visited a mandated territory, under the UN annual visits have been arranged for four-man visiting teams by the Trusteeship Council in collaboration with the administering powers. Within the first three years of its existence the Council sent visiting missions to East Africa, West Africa and the Pacific. Late in 1952 a four-man team representing Australia, El Salvador, Belgium, and China visited the Togolands and the Cameroons under British and French administrations, while early in 1953 another team representing the Dominican Republic, Great Britain, France and Syria was dispatched to the Pacific Islands placed under the United States administration, Nauru and New Guinea under Australian administration, and Western Samoa under New Zealand's administration.[72]

A basic difference between the Colonial System and the International Mandates or Trusteeship System is the provision in the latter for international supervision over the Trust Territories. A key element, which pervades the administration of the Trust Territory, is the principle of international accountability whereby the Trustee Power exercises its authority in accordance with the decision of the international community, and the feelings of the inhab-

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72. Mangone, op. cit., pp. 229, 230.

itants or beneficiaries of the Trust. Whereas the League permitted written petitions to be sent from a territory only through the mandatory power, the rules of the Trusteeship Council allow the Secretary-General to accept petitions either through the administering authority or directly for submission to the Council. In some instances even oral testimony from a petitioner is permitted. While many of the petitions that have been submitted are trivial, they are another device to publicize actions within a trust territory, and they do come under the eye of fellow states who may call for an explanation. At its tenth session in 1952, by way of illustration, the Trusteeship Council went to work on 301 petitions from African territories and one from New Guinea. Seventy-one petitions were actually examined and decisions were granted on thirty-five. Thus, the Trusteeship Council and the General Assembly, with its universal forum to discuss the recommendations of its own, have pursued the shining ideals of the Permanent Mandates Commission and the League. Certainly the Trusteeship Council has been stymied at times by the jealousy, inertia, or downright obfuscation of the administering power, but it has constantly probed, exposed, and encouraged the very conscience of international society in respect to dependent peoples.[73]

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73. United Nations, The International Trusteeship System and the Trusteeship Council (1949). Department of Public Information; Mangone, op. cit., p. 230.

The trusteeship system, in essence, is a new wine in an old bottle, richer, more potent, and of greater potentiality. The basic similarity between the two is clearly evident in the continued emphasis on the voluntary submission of territories, direct "administration" by national states (although the United Nations Charter leaves room for international administration), and only "supervision" by the international organization with no power to command, merely to veto, recommend, and publicize. The differences between the new and old are chiefly in the direction of expanding the horizons of the trust populations. Giving over-all supervisory authority to the Assembly places trusteeship problems under the wing of a larger and a more anti-colonial forum than the League Council. Making the Trusteeship Council a "principal organ" composed of governmental representatives, rather than a body of independent experts, with strong anti-colonial representation, has made it more authoritative and less conservative than the Mandates Commission. The objectives of the trusteeship system, to which attention will be presently given, are more vaguely expansive, more committed to independence as the ideal goal, and more concerned with general economic and social progress than was the mandates system. Two other changes may or may not benefit the dependent peoples: the new emphasis on compelling the territories to share the burdens of collec-

tive security and on modifying the "open door" policy in the interests of these peoples.[74]

The policy orientation of the new provisions for direct international administration, as well as those for the submission of other than ex-enemy and former mandated areas to trusteeship, is unquestionably intended to favor the non-self-governing populations. New and stronger instruments have been placed in the hands of the international organization in the form of visiting missions, examination of direct and oral petitions, and specific authority to formulate questionnaires which the administering authority is compelled to answer. There has been a general spirit of expansion throughout the system. The pertinent chapters of the Charter are far more comprehensive than the terms of the twenty-second article of the Covenant. The Trusteeship Council's rules are four times as long as the Mandate Commission's. The new questionnaire contains three times as many questions as the old one. The Secretariat trusteeship staff is six times as large as in League days; its budget ten times that of its predecessor. This growth is all the more notable in view of the decrease in the number of trust territories from fourteen to eleven.[75]

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74. Cheever and Haviland, op. cit., p. 323.

75. Ibid., pp. 323-324.

Of perhaps primary importance is the political fact that since 1919, the problem of colonialism has become more, rather than less, intense; and the mood of the international organization more, rather than less, anti-colonial. The growth of the trusteeship system is both explained and justified by the fact that its shadow falls far beyond the mere handful of trust territories; it falls across all dependent lands. These are the areas in which the 170 million dependent people who live outside the trusteeship system are to be found. While the relationship of the UN to these peoples is only a thin thread, it is still stronger than that that existed under the League. Covenant Article 23 provided merely that League members "secure just treatment of...native inhabitants" and recognize a few special responsibilities toward all peoples regarding labor conditions, traffic in women and children, traffic in drugs and arms, and health. The UN Charter, on the other hand, contains an entire chapter[76] which deals exclusively with the members' obligations toward their non-self-governing territories in a far wider range of areas and compels the members to report regularly to the UN on conditions in those territories.

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76. Charter of the United Nations, Articles 73-74; Bunche, op. cit., p. 123.

2. Territories Under the Trusteeship System

One of the most complex of legal problems is the location of sovereignty over the Trust Territory. An American jurist observed in 1919 that: "It is not an overstatement to say that nine-tenths of all international controversies arise over questions pertaining to the possession of sovereignty and the conflicts of sovereign rights..."[77] In 1946, the British representative, Ivor Thomas, declared that "the question of where sovereignty of trust territories resided was a complicated point of international law and could not be decided by a vote of the General Assembly."[78] The problem of sovereignty over Trust Territories is intensified because of the words "as an integral part" in six Trust Agreements; of the refusal of the Union of South Africa to place the mandate of South West Africa under Trust; of the resolution of the General Assembly for flying the UN flag over these Territories; and of the "Administrative Union" of some of them with the neighboring colonial area under the sovereignty of the same Administering Authority.

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77. R. Lansing, "Some Legal Questions of Peace Conference," American Journal of International Law, Vol. XIII, p. 640.

78. General Assembly, O. R., First Session, Part II, Fourth Comm., Part I, A/C, 4/85, December 11, 1946, p. 160.

The theory that sovereignty resided either in the League of Nations or the United Nations is untenable. Supporters of this theory in the days of the League depended upon the words of the Covenant and of the preambles of the Mandates which empowered the Mandatory Powers to administer the Mandates "on behalf of the League of Nations." However, the League lacked the essential features of a sovereign state territory, population, and force--and it exercised moral rather than legal control over its members. Lord Balfour declared that "The Mandates were neither made by the League nor can they in substance be altered by the League...that the League is not the author of the policy, but the instrument."[79] It could be argued that the UN is sovereign over the Trust Territories because of its right of approval of the Trust Agreements and of final disposition of Trust Territory. However, the consent of the Administering Authority as a contracting party is indispensable. The UN "cannot establish itself as an administering authority or confer the trusteeship administration upon a state by a unilateral act."[80] In Kelsen's opinion the Charter has ruled out the possibility of concluding a Trusteeship

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79. League of Nations, Official Journal, III Year, June, 1922, at 547.

80. Kelsen, op. cit., p. 693.

Agreement only by the Organization as a territorial sovereign and a state designated as Administering Authority.

As to the theory of sovereignty residing in the Mandatory, this was refuted by the International Court of Justice in its recent (1950) advisory opinion on the question of South West Africa.[81] Earlier, it was observed: "If the theory that the Mandatory State is the holder of sovereignty is accepted, a surprising conclusion would then be reached. For...we must conclude that the Mandatory Power will be governing a part of its own territory, not by its own sovereign right but rather on behalf of the League of Nations."[82] There is a somewhat stronger argument for the theory that sovereignty is with the Administering Authority. The terms of the Trusteeship Agreements (excepting New Guinea and Somaliland) provide for "full powers of administration, legislation and jurisdiction over the territory." However, the Administering Authority does not possess any right of cession or alteration of the status of the Trust Territory without approval of the General Assembly. Kelsen's view is that "the state, which in its capacity as a territorial sovereign, places a territory under trusteeship and becomes the administering authority,

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81. International Court of Justice, op. cit., p. 129.

82. Min. P. M. C., III Session, 1922, Annex 2, p. 200.

retains its sovereignty, though restricted by the trusteeship agreement, unless there is a contrary provision in the agreement."[83] The practical question is, of course, whether the state placing territory in trusteeship in fact had sovereignty over the conveyed territory.[84] The U. S. representative stated in Security Council that Japan never possessed sovereignty over the former Mandated Pacific Islands and that the U. S. did not intend to extend U. S. sovereignty over this Trust Territory.[85] The Trust Agreement for Somaliland expressly deprives Italy of sovereign rights over the Territory.[86] The ultimate aim of self-government or independence of these territories "emphasizes the absence of the intention to transfer sovereignty to the Administering States."[87]

Perhaps the strongest moral argument finds sovereignty resting in the inhabitants of the mandated or trust territories. If the objective of full self-government or independence as provided in Article 76 is implemented, the sovereignty is in the people. "The essence of both the

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83. Kelsen, op. cit., p. 690.

84. See Chapter II, Section 3.

85. Security Council, O. R., 2d Year, No. 23, 116th meeting, March 7, 1947, pp. 471-472.

86. General Assembly, O. R., Fifth Session, Supp. No. 10, Doc. A/1294, p. 10.

87. L. Oppenheim, ed. Lauterpacht, op. cit., Vol. 1, p. 216.

Mandates System and the Trusteeship System was that the title of a territory under trust belongs to its people..."[88] The foregoing represented the thinking of the non-colonial powers. At the plenary meeting of the ninth Assembly, Trujillo of Ecuador observed that "nations which have not reached full self-government, as it were, incomplete States which, while possessing the element of population and territory, lack only government or, in other words, the capacity of self-determination and self-rule. For that reason, possession of their own territory is the inalienable right of the non-self-governing peoples and never of the administrators..." It is interesting to note, however, the Indian proposal to insert into the Trust Agreement a clause relating to the restoration of all public property to the peoples in recognition of their "right to sovereignty and independence" on termination of the Trust, was rejected by the Administering States.[89] Had this clause been introduced into the Trust Agreements there would have been a strong legal fiber to implement the numerous moral fibers.

a. Objects of the Trusteeship System

It was felt generally at the termination of the second world war that the basic principles of the Mandates

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88. General Assembly, Journal No. 14, supp. No. 4-A/C. 4/6, p. 16.

89. General Assembly, Journal No. 25, supp. No. 4-A/C. 4/45, p. 13.

System of the League of Nations had stood the test of experience, that they were fully in conformity with the humanitarian objectives which official declarations and public opinion included among the major purposes of the war, and that they ought to be made an integral part of the new international organization. This notwithstanding the fact that improvements were felt to be needed and that steps were to be taken to effect them. That a change of name and machinery were brought about has been denied to have connoted an intention to limit the purpose of the system,[90] except with regard to territories which were to be granted independence.

The framers of the trusteeship system staked out much more expansive, but less explicitly defined, objectives than in the case of the League mandates system. This was attributable to conflicting viewpoints: interests like those of the United Kingdom sought to have a flexible framework within which to fit their own concerns, resigned as they were to the tendency to strengthen, rather than weaken, the mandates system and concept; anti-colonial powers, such as the United States, on the other hand, sought too, to have flexibility so that the trusteeship system and, its objectives might grow to meet changing circumstances. Moreover, while the League Covenant provided for three

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90. Oppenheim, op. cit., p. 223.

types of mandates, each with its own distinctive set of objectives, there sprung from the UN Charter only one breed of trusteeship, singular in objective, or set of objectives.

The objectives were embodied in the Charter.[91] They were pre-eminently that of (1) Maintaining peace and security on an international basis; (2) Assisting in the direction of political advancement; (3) Assisting in the direction of economic and social advancement. Insofar as international peace and security are concerned, the memory of the breach in the terms of the Covenant of the League motivated some change. In 1919 President Wilson and others thought seriously of disarmament, and, in that spirit, mandatory powers were barred, with respect to "B" and "C" territories, from the "establishment of fortifications of military and naval bases" and "military training of the natives for other than police purposes and the defense of territory." But the Japanese not only armed their Pacific Mandates and used them as bases for attack in World War II, but also benefited from the naked condition of the mandated territories in the hands of Australia and New Zealand (New Guinea, Nauru, and Western Samoa). Deriving from this was the provision incorporated in the Charter of the UN deal-

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91. Charter of the United Nations, Article 76.

ing with strategic areas,[92] and the first stated objective of the trusteeship system.[93]

Although the United States began its trusteeship planning by avowing an obligation to adhere to "independence" as a primary objective, it had, by the time of the San Francisco Conference, compromised sufficiently with the pro-colonial forces to speak in more chastened terms of "political advancement" and "progressive development toward self-government."[94] It was the Soviet Union, China and other more radical anti-colonials that wanted the term "independence" specifically mentioned. British influence operated to modify the term "self-government" with the qualifying phrase, "as may be appropriate to the particular circumstances of each territory."[95] The final compromise was not to mention "independence" specifically in Chapter 11 of the Charter, dealing with all non-self-governing peoples, but to include it under the trusteeship system in Chapter 12. Article 76 (b) reads thus as follows:

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92. Charter of the United Nations, Articles 82-83.

93. Ibid., Article 76 (a).

94. United Nations, Documents of the United Nations Conference on International Organization, San Francisco, 1945 (New York and London: UN Information Organizations, 1945-1946), III, p. 599.

95. Charter of the United Nations, Article 76 (b).

> ...to promote the political...advancement of the inhabitants of the trust territories and their progressive development toward self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement...

Under the League mandates system, independence and consideration of the "wishes" of the "communities" were specifically pledged only in the case of the "A" mandates. Neither independence nor self-government was mentioned in the case of "B" and "C" mandates.

In the area of economic and social advancement the major conflict was between the countries like the United Kingdom that wanted this objective left vague and flexible, and those like Australia, that wanted to transplant to the Charter some of the principles embodied in the League Covenant, such as those relating to freedom of conscience, freedom of religion, suppression of traffic in slaves, arms and liquor. At the behest of the United States a passage on "human rights" was finally added, and, at the request of the Soviet Union, "educational advancement" was included. Otherwise the details of the League Covenant were assumed to be implicit in the broader United Nations framework. As adopted, Article 76 (b) and (c) reads:

> b. To promote the...economic, social, and educational advancement of the inhabitants...

> c. To encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world...

In connection with the matter of equal treatment, the United States advocated "nondiscriminatory treatment...with respect to the economic and other appropriate civil activities of the nationals of all member states."[96] The United Kingdom was opposed to such an explicit and far-reaching commitment on the grounds that it perpetuated, in the case of "B" mandates, a principle that had allowed exploitation of resources that had occasionally been harmful to native interests and would compel "C" mandates to observe a principle which they had not been obliged to do under the League. The Netherlands emphasized the former point; the Union of South Africa, the latter. The final compromise was incorporated into the Charter:

> to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80 (protecting existing rights under the League mandates).[97]

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96. United Nations Conference on International Organization, op. cit., p. 599.

97. Charter of the United Nations, Article 76 (d).

Implementation of the objectives of the Trusteeship system has called into play many of the tools with which the UN and the Trusteeship Council have been provided. The question of what kinds of territories would be subjected to the trusteeship system was decided by the Charter when it listed the territories held under mandate, the territories to be detached from enemy states as a result of World War, and the territories voluntarily placed under the system by states responsible for their administration.[98] The question of who was to decide what territories should be placed under trust was resolved in the same provision. The matter of formulation of the trusteeship terms was dealt with in the article which provided that:

> The terms of trusteeship...including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.[99]

In the case of the League mandates, the draft agreements were first negotiated by the Allied and Associated Powers through the Allied Supreme Council, and then examined and approved by the League Council. The question of the agency to be entrusted with direct administration was the subject

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98. Charter of the United Nations, Article 77.

99. Ibid., Article 79.

of considerable discussion, it having been proposed that the international Organization itself do the administering, instead of a single state or group of states. The provision adopted permitted flexibility:

> The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.[100]

In fact, all trust territories so far have one state as administering authority although Nauru is nominally in trust to three states, as it was when a mandate. The possibilities of administration by more than one state have been contemplated nevertheless. Korea, by the Moscow declaration of 1945, was to be under four-power trusteeship. The Italian colonies were proposed in 1945 by the United States and in 1949 by the Soviet Union for administration by the organization itself. The Trusteeship Council itself was placed under a duty to administer Jerusalem, although not as a trust territory, in 1949.[101]

The weapon that is publicity is another in the arsenal of tools of the Trusteeship Council. The annual question-

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100. Ibid., Article 81.

101. Eugene P. Chase, The United Nations in Action. New York: McGraw-Hill Book Co., 1950, p. 294.

naires and reports that must be submitted serve as an extremely searching device. The assembly line process by which individual annual reports are sifted is systematic: (1) a report based upon the questionnaire must be submitted to the United Nations within four months of the end of the year it covers; (2) written questions may then be directed by members of the Trusteeship Council to the administering authority's "special representative"; (3) the Council's oral consideration of the report begins with an opening statement by the special representative; (4) this is followed by questioning; (5) there is general debate; (6) the views expressed are incorporated in a report prepared by a small ad hoc drafting committee; and (7) after this report is finally adopted by the Council it is incorporated in a report for the Assembly. The questionnaire and report system goes far beyond the League process in both coverage and intensity. It has been criticized on the ground that the questioning is too long and complicated, requires excessive effort on the part of the local administrators, reveals regrettable lack of understanding of and sympathy for the administering authority's problems, tends to be superficial and incomplete, is uncoordinated with the visiting missions and petitions, and is so far behind the pace of events that the Council lacks control of current policies.[102]

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102. Cheever and Haviland, op. cit., p. 319.

In the action that can be taken on the petitions forwarded by trust territories, to the extent that they do not seek to defy "judgments of competent courts of the administering authority or...lay before the Council a dispute with which the courts have competence to deal";[103] in the provision that sanctions "periodic visits to the respective trust territories at times agreed upon with the administering authority";[104] in the acknowledged right of the Security Council to deal with trusteeship violations as potential disturbances or threats to the peace,[105] additional measures were made available to the Trusteeship Council by way of making trusteeship status something more than a vague, transient matter, subject to the whim of the administering authority. In these measures it is apparent that, in the political context of the postwar world, the emphasis is more upon the promotion of the advancement of the inhabitants of the trust territories. These areas are not areas for exploitation by the administering powers, but are areas where the development of backward peoples is stipulated to be an international concern.[106]

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103. UN Doc. T/1/Rev. 1, Rule 81.

104. Charter of the United Nations, Article 87.

105. UN Conference on International Organization, op. cit., III, p. 616; X, pp. 547ff.

106. Chase, op. cit., p. 297.

b. Trusteeship Agreements

The Trusteeship Agreements are of fundamental importance since they constitute the basic laws which are applicable in the day-to-day administration of more than twenty million inhabitants of the Trust Territories. In each case, the Agreement was voluntarily signed between the prospective Administrating Authority in de facto control of the Territory and the States directly concerned on the one hand, and the international organization which was to exercise the supervising authority on the other. As legal instruments distinct from the Charter, they possess "a dispositive or conveyancing as well as a contractual character."[107]

To become a Trust territory an area must have the country responsible for it present the draft of a Trust Agreement for approval by the General Assembly. The agreements vary, but, in general terms, most contain these basic elements: a definition of the territory, name of the proposed Administering Authority, a description of its rights and obligations, and its promise to submit any dispute with another UN member over interpretation or application of the agreement to the International Court of Justice.[108] The

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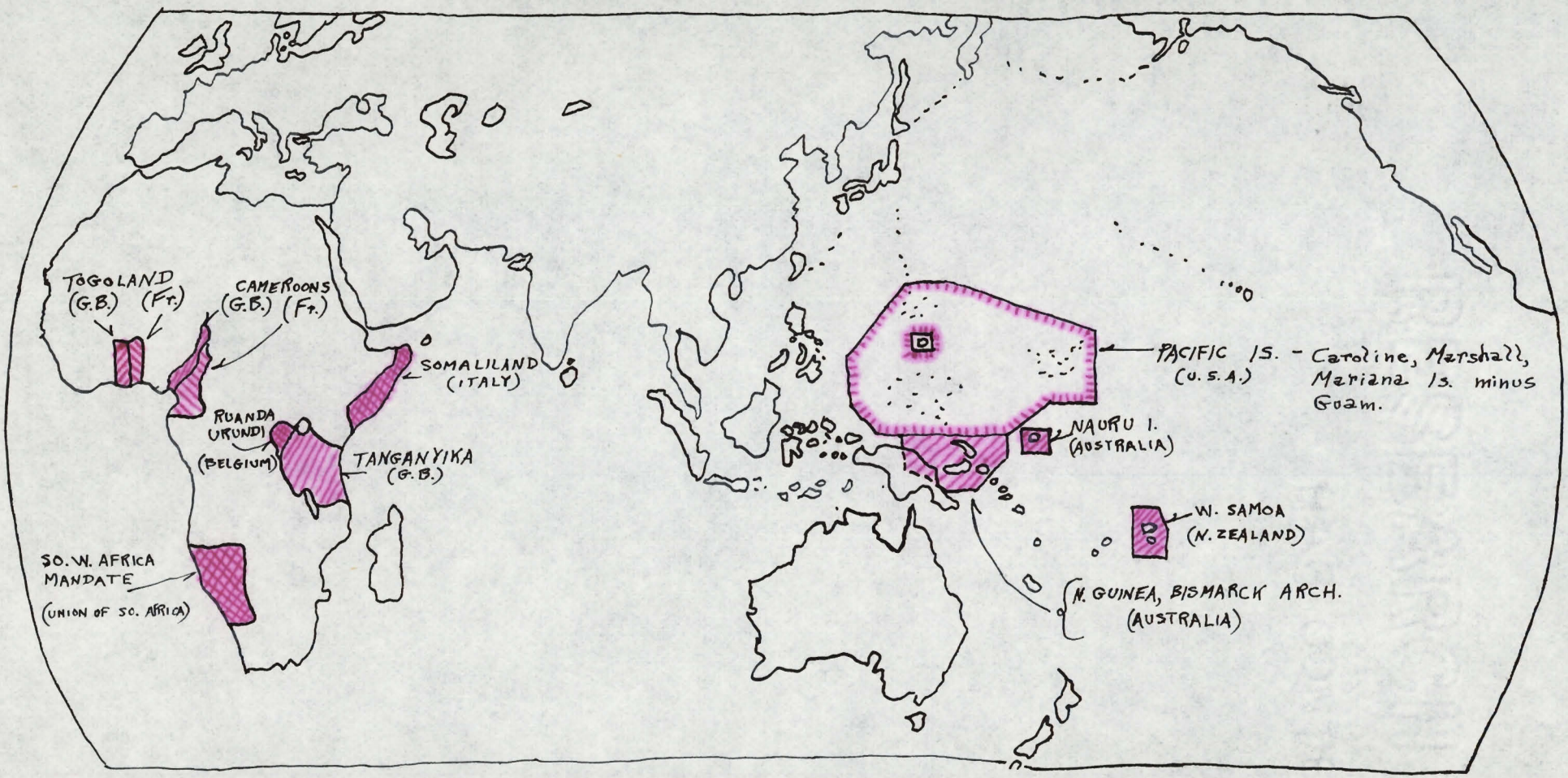
107. C. Parry, "Nature of Trusteeship Agreements," British Yearbook of International Law, Vol. XXVII, p. 185.

108. Eleanor Roosevelt and William DeWitt, UN: Today and Tomorrow. New York: Harper & Bros., 1953, p. 22.

TRUSTEESHIP AREAS



obligations of the administering authority entail administration so as to achieve the basic principles of Trusteeship as contained in the Charter; to be responsible for the peace, order and good government of the territory and to ensure that it plays its part in the maintenance of international peace and security; to develop free political institutions and to give the inhabitants an increasing share in the government; to protect native rights over land, and not to allow native land or natural resources to be transferred except with the previous consent of the competent public authority; to ensure equal treatment in social, economic, industrial and commercial matters for all United Nations Members and their nationals, provided that the interests of the territory's inhabitants come first; to develop education...subject only to requirements of public order, to guarantee to the inhabitants freedom of religion, worship, speech, press, assembly, and petition.[109] The rights of the administering authority generally entail full powers of legislation, administration, and jurisdiction in the territory, certain agreements specifying that it may administer the territory as an integral part of the authority's territory, subject to the provisions of the Charter and the Agreement. The right to constitute the territory

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109. United Nations, Everyman's United Nations (1953), p. 288.

into a customs, fiscal or administrative union or federation with adjacent territories under its control; to establish naval, military and air bases, erect fortifications, and take other measures necessary for defense, using volunteer forces, facilities, and assistance from the territory in carrying out obligations to the Security Council and for local defense; to organize public services and works on conditions it thinks just; to create fiscal monopolies if they serve the interests of the inhabitants, and other monopolies under conditions of proper control, provided that in the case of monopolies granted to non-governmental agencies, there is no discrimination on the grounds of nationality; and to arrange for the cooperation of the territory in regional organizations.[110]

Territorially, the Trusteeship System closely resembles the Mandates System. Initially, the latter was applied to fourteen territorial units; however, the mandate for Iraq was terminated in 1932; Syria and Lebanon were declared independent in 1941; and in 1948 the Palestine Mandate was liquidated. The remaining territorial units became Trust Territories, except South West Africa, which remained a mandate with the Mandatory being the Union of South Africa. The Trusteeship Territories in Africa account for 89 percent of total Trusteeship area, and 93 percent of

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110. Ibid.

total trusteeship population. Thus in terms of territory, population and economic geography, trust territories are predominantly an African problem.

Following in subsections "i" to "ix" are factors of economic geography, physical geography (chart) and political geography which have a bearing upon the international relations involving these trust territories.

i. Nauru

The Trust Territory of Nauru, administered by Australia on behalf of itself, New Zealand, and the United Kingdom, is a small isolated island near the Equator in the Pacific. It has a population of 3,434 inhabitants,[111] of whom 47 percent are native Nauruans. Most of the non-Nauruans are Chinese workers who are employed by the phosphate company that has been formed by the three Governments and which constitutes the main economic endeavor of the island, about 80 percent of the island being phosphate-bearing. The extraction of the phosphate leaves the mined areas unfit for further use and this has constituted a major problem to the administering authority whose concern it is to assist in the island's economic development. The phosphate deposits on this territory are expected to be exhausted in about 70

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111. Report by the President to the Congress for the Year 1954, U. S. Participation in the U. N. (1955), Department of State Publication 5769.

years, so the Trusteeship Council has been studying the long-range problem of eventual resettlement of the indigenous inhabitants of this 82-square-mile island. The trusteeship agreement for Nauru was approved by the General Assembly on November 1, 1947, and the powers of legislation, administration and jurisdiction are all in the Australian government which administers the island on behalf of the three governments, including itself, that it represents.[112] In 1951 an ordinance was enacted which reconstituted the Council of Chiefs into the Nauru Local Government Council, the nine members of which are elected for a maximum of four years from district constituencies by adult suffrage. The Council is authorized to advise the administrator on any matters affecting the inhabitants and has the power, subject to the approval of the administrator, to make rules not inconsistent with the legislation of the territory for regulating the conduct of its business and for the peace, order and welfare of the Nauruans. It may also finance and engage in any business or enterprise and provide or cooperate with the administrator in providing any public or social service.

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112. Stephen S. Fenichell and Philip Andrews, The United Nations...Blueprint for Peace. Philadelphia: John C. Winston Co., 1954, pp. 29ff.

ii. New Guinea

The Trust Territory of New Guinea is administered by Australia too, in conjunction with the territory of Papua. Bordered on the north by the Equator, it consists of the northeast portion of the island of New Guinea as well as some 600 islands of the Bismarck Archipelago. Its 93,000 square miles are made up for the most part of rugged mountains covered by dense tropical vegetation, and its population of over one million represents a variety of ethnic groups among whom over fifty different languages are spoken. The New Guinea trusteeship agreementwas submitted to the General Assembly and approved in December, 1946.[113] The chief economic activities of the territory are crop production, processing of agricultural products and mining. The Australian report to the Trusteeship Council in 1951 announced that European skills and knowledge were being combined with indigenous efforts to develop agricultural and land resources. The joint Legislative Council, provided for in the Papua and New Guinea Act of 1949 was formally inaugurated on November 26, 1951, and consists of the administrator, 16 official members, and 12 non-official members. Of these, 10 represent the area; two of these 10 represent the indigenous inhabitants. At the 1954 summer session of the Trusteeship Council, methods of associating the indige-

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113. Chase, op. cit., p. 299.

nous representatives in the work of the territory's Executive Council were advocated, as was a long-range coordinated program for the sound economic development of the territory. The eradication of illiteracy through formation of plans for the educational advancement of the population was also urged.[114]

iii. Western Samoa

The Trust Territory of Western Samoa, administered by New Zealand, consists of two large islands and several lesser islands and islets lying to the west of American Samoa in the South Pacific. These islands, covered with rugged mountains, support a population of 91,043, of which 4,704 persons (including many part-Samoans) have European status. Like the trust agreement for New Guinea, the Samoan pact was approved by the General Assembly in December, 1946. Political changes instituted in 1948 by New Zealand have been carried into effect with the establishment of a Council of State and a Legislative Assembly. The Council of State, made up of the High Commissioner of the trust territory and the two Fautua, who are chiefs of the highest standing, is regularly consulted on matters affecting the welfare of Western Samoa. The Legislative Assembly con-

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114. U. S. Participation in the U. N., op. cit. (1951), p. 213; (1952), p. 171.

sists of the Council of State, 12 Samoan members elected by the traditional Samoan governmental body called the Fono of Faipule, 5 elected European members, and 6 official members. With the approval of the administering authority the Assembly enacts legislation on all purely domestic matters. Surveys have been made in the territory in the economic, labor and education fields, and steps taken toward convening a constitutional convention at which plans for the progressive attainment of self-government or independence could be formulated. More intense measures are being taken in the direction of an overall increase in production, a diversification of crops, and the establishment of secondary industries.[115] Road construction, improvements in medical and health facilities, and enlarged educational plant have been provided for.

iv. Cameroons

There are two trust territories in the Cameroons of West Africa. That under British administration is a small portion of the former German colony of Kamerun in the equatorial belt, which was placed under British mandate at the end of the first world war. The larger portion of the former Cameroon area was placed under the mandate, and then

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115. Ibid. (1954), p. 167.

the trusteeship of France. The British trust area consists of two separate mountainous strips of land extending along the eastern frontier of Nigeria from the Atlantic Ocean inland to Lake Chad. It has an estimated indigenous population of 1,083,000, with but a small number of permanent European residents. It is administered by the United Kingdom as an integral part of the adjacent colony of Nigeria, sharing a common constitution, common budget, and common administrative and technical services. The new 1951 constitution provided for increased representation of Northern Cameroons in the Legislature of Northern Nigeria, the removal of Southern Cameroons from the Eastern region of Nigeria to become a quasi-federal territory with its own Legislature and Executive Council. A 1952 Visiting Mission concluded that the inhabitants of the British Cameroons were less interested in the unification of the British and French Cameroons than in participating in the increased self-government granted them under the new Federal Constitution of Nigeria. The Trusteeship Council recommended the further development of local government away from traditional tribal institutions and toward councils with a broader and more representative base. Despite the fact that the territory is poor in natural resources, the economic situation has been buoyant, primarily because of the activity of the Cameroons Development Corporation, a statutory public en-

terprise operating plantations which provide the territory's principal export product, bananas, as well as some rubber and palm products. Communications, soil conservation, and illiteracy are the areas receiving much attention now.[116]

The major portion of the former German colony of Cameroon, with an area of 166,795 square miles and a population in excess of three million, is under French administration. In shape it resembles a triangle and from the Atlantic coastal region tapers inland toward Lake Chad. Unlike British Cameroons, it is not administered as an integral part of the neighboring colony of the administering power, in this case, French Equatorial Africa, but forms a part of the French Union as an "Associated Territory." Political progress in the territory is marked by the enactment in 1951 of a law that further extended the franchise and resulted in a notable increase in the number of registered voters, and a law passed in 1952 pursuant to which the Representative Assembly was transformed into the Territorial Assembly, with a proposed extension of its powers provided for in legislation before the French Parliament. In the economic field, a transition from an essentially agricultural and lightly equipped economy to one that under the strong stimulus of governmental and private investment is growing is reported. The Trusteeship Council has noted in

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116. Ibid. (1952), p. 174.

particular the expansion of trade, the implementation of a 10-year development plan, the growing industrialization of the territory, the increase of hydroelectric power, and the growth of investments by the administering authority and by private individuals.[117] The trusteeship agreement for the Cameroons (both British and French) was approved by the General Assembly in a resolution dated December 13, 1946.[118]

v. Togoland

The smallest of the trust territories in West Africa is the narrow, land-locked strip of territory known as Togoland under British administration which is administered as an integral part of the neighboring British colony of the Gold Coast. With an area of 13,040 square miles, and a population of less than 400,000, Togoland's people are almost entirely African. In 1951, a new constitution was introduced for the Gold Coast and Togoland, Togoland's trusteeship status being guarded by provisions to the effect that any Gold Coast law repugnant to any provision of the trusteeship agreement would be to the extent of that repugnancy void in the trust territory and the Governor may use his reserve powers to make certain that there is no infringe-

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117. Ibid. (1952), p. 176.

118. Chase, op. cit., p. 300.

ment of the trusteeship obligations. Togoland under British administration is preponderantly agricultural, and the methods of production have been generally primitive. British Togoland's economy has been closely integrated with that of the Gold Coast, both through the inward and outward flow of private trade and through such other arrangements as the unified budgetary and monetary structure and the controlled marketing of cocoa and other produce.[119]

Togoland under French administration is a small territory of limited resources which lies between British Togoland and the French territory of Dahomey. Like the French Cameroons, French Togoland has the status of an "associated territory" in the French union. Its indigenous population is over one million, almost two and a half times that of British Togoland. It has an area of 21,236 square miles, and like British Togoland became a trust territory under the agreement that was approved on December 13, 1946, by the General Assembly. As in other territories of West Africa, the pace of political advancement in French Togoland has accelerated. The territory's Representative Assembly, whose members were previously elected in two groups by French citizens and by a limited number of Africans voting under separate electoral systems was transformed early in

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119. U. S. Participation in the U. N., op. cit. (1952), p. 177.

1952 into a Territorial Assembly elected by a much larger number of voters under a single electoral system. In addition a draft law that would extend the powers of the Territorial Assembly was reported to be under consideration by the French authorities. The territory's primarily agricultural economy showed a favorable trade balance as of one reported year, and the process of opening up this relatively poor territory was continuing with improvements in communications, ports, railways, and public services made possible by French-allocated funds under a 10-year plan. Recommendations by the Trusteeship Council for 1952 emphasized the need for disseminating agricultural information to indigenous farmers, assuring the conservation and regeneration of the soil, combating plant diseases, and further developing secondary industries. Health services, educational improvements, and technical and vocational training have improved.[120]

United Nations consideration of problems involving the Trust Territories of British and French Togoland underwent a change in emphasis in 1954 by reason of the movement in these territories for unification under a single administration. The rapid political advance of the Gold Coast toward independence caused a further evolution of the Togoland problem. In June, 1954, the United Kingdom informed

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120. Ibid., p. 178; Vandenbosch and Hogan, op. cit., p. 297.

the Secretary-General of the United Nations that it would be unable to administer British Togoland, as a trust territory after the Gold Coast achieved its independence and would therefore ask for a termination of the trusteeship. The British recommended integration with an independent Gold Coast.[121]

vi. Tanganyika

Of the trust territories in East Africa under United Nations supervision, the Trust Territory of Tanganyika administered by the United Kingdom is by far the largest and is capable of the greatest development. Lying along the Indian Ocean south of the Equator, it covers 362,000 square miles and has a population in excess of eight million. Its very considerable agricultural and mineral resources are largely undeveloped because of such difficulties as water shortages, tsetse fly infestation, and an inadequate communications system. The development of the territory is also complicated by the multiracial character of its population, which included significant European and Asian groups in addition to the large majority of Africans. Although a land of plains and plateaus for the most part, Tanganyika in-

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121. U. K. Participation in the U. N., op. cit., p. 173 (1954).

cluded within its boundaries the massive snow-capped Mount Kilimanjaro, rising to 19,565 feet above sea level, and the deep troughlike depression filled by the waters of Lake Tanganyika, the world's second deepest lake. The political developments in Tanganyika are marked by the first appointment of an African to the Executive Council in 1951 and prospect for greater representation thereafter. The establishment of regional councils and additional municipal councils has been advocated by the Trusteeship Council. A 1948 visiting mission, in considering the British policy of allowing the alienation of land to nonindigenous inhabitants, expressed the view that colonization should be curtailed and the strictest control exercised to keep it at the barest minimum consistent with the development of the Territory and the present and long-range needs and interests of the African inhabitants. In the economic field, steps have been taken to develop secondary industries to balance the territory's economy, as well as for progress in agricultural development, in provision of grain storage-facilities, in improvement of road and rail communications, and in prospecting for coal and other minerals. A National Resources School has been opened, cooperatives developed, and steps taken for the improvement of the standard of living. Improvements have been noted in the fields of hous-

ing, public health, criminal jurisprudence, and education.[122]

British policy in Tanganyika has been said to be double--to help Tanganyika develop toward self-government, but "not too fast for its own good. Tanganyika is manifestly unfit for anything like complete self-government as yet if only because (a) it is still largely a collection of tribes, (b) the great bulk of the population is illiterate. Meantime its chief distinguishing mark is...a much healthier racial atmosphere than in any other country in East or Central Africa."[123]

vii. Ruanda-Urundi

The Trust Territory of Ruanda-Urundi under Belgian administration is a small, mountainous, heavily populated area on the eastern border of the Belgian Congo. With almost 4,000,000 inhabitants in its 20,000 square miles, it is the most densely populated area in Africa. The primary problem of the administration is to raise the economy and standard of living of the indigenous farmer--a problem that is complicated by the existence on the land of approximately one million head of cattle which are venerated as a symbol of wealth and power, and which vie with the human population

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122. Ibid., p. 170; (1951), p. 221; (1952), p. 179; Maclaurin, op. cit., pp. 336ff.

123. John Gunther, Inside Africa. New York: Harper Bros. (1955), p. 411.

in securing an existence from pasture land that could be better used for cultivation. The administration has been urged to endeavor to modify the intricate social structure, based on the undue importance attributed to cattle ownership, and thereby reduce the number of cattle--efforts which, though supported by the territory's two African kings and the younger generation, are strongly opposed by the majority of the population. In the political field, the Trusteeship Council has recommended increased representation on the Council of the Vice Governor General with the training of Africans for higher positions in the administration. More representative councils with African membership at various levels were notable in 1953. Educational, social and economic recommendations have been made to the administering territory by the Trusteeship Council: increased educational facilities, particularly in the fields of secondary education and the education of girls; removal of restrictions on the personal liberties of the inhabitants, including the curfew, transport and passport restrictions and corporal punishment; the development of the territory's economy by the promotion of processing and other secondary industries; the encouragement of indigenous inhabitants in undertaking new economic activities, especially through the development of cooperatives; and improvement of methods of cultivation to increase production.[124]

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124. U. S. Participation in the U. N., op. cit. (1954), p. 169.

> I asked the Mwami [The King of Ruanda] if... the people at large felt a double sense of security because of trusteeship by the UN. His reply was that the UN "made no difference." I asked him if there would ever be political parties...and he replied, "What good do parties do?" I asked him about nationalism, and he scarcely seemed to understand the meaning of the word.[125]

viii. Somaliland

Somaliland is unique among trust territories. It is the only trust territory that was not formerly under League of Nations mandate, the only one with a fixed date for independence, and the only one administered by a nation not a member of the United Nations. It is one of the colonies that Italy lost as a result of World War II, but Italy was asked to return as administering authority for a ten-year period ending in 1960, when Somaliland is to achieve its independence. Italy will be the administering authority during this period, assisted by an advisory council comprising the representatives of Colombia, Egypt, and the Philippines. At its sixth session in January, 1950, the Trusteeship Council compiled and approved the draft Trusteeship Agreement for Somaliland, and Italy assumed provisional administration of the territory on April 1, 1950. Seven months later the fifth session of the General Assembly approved the draft Trusteeship Agreement placing Somaliland

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125. Gunther, op. cit., p. 688.

under Trusteeship until 1960. Italy's first administrative report on the territory was considered by the Trusteeship Council at its ninth session in June, 1951.[126]

Somaliland is the most thinly populated of the East African trust territories, consisting of a barren 600-mile-long strip of land lying between Ethiopia and the Indian Ocean and containing about a million and a quarter inhabitants, the majority of whom are nomadic. The problem of developing a productive economy in this extremely poor territory has been recognized by the Trusteeship Council as one of the most difficult problems faced by the administration; however, in 1952 the Council did note that the economic situation in the second year of Italian administration had shown improvement over the previous year. Italy was then commended for cooperating with the technical assistance program of the United Nations and its specialized agencies and was urged to draw up a comprehensive plan for economic development in order to encourage both the investment of private capital and further assistance from international agencies. The Council also approved the administration's measures to train Somaliland farmers in modern agricultural methods, which included the establishment of an agricultural school and of farmers' cooperatives. Labor, health, education, and nomadism were also problems urged for

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126. Everyman's United Nations, op. cit., p. 287.

solution.[127] Whether Somaliland will be capable of effective self-government by 1960 is an open question; a good deal of financial aid will at least be needed.[128]

ix. Trust Territory of the Pacific Islands

The Trust Territory of the Pacific Islands, which is composed of the Marshall, Caroline, and Mariana Islands (except Guam), contains 98 island groups scattered over three million square miles of ocean with a population of some 57,000. Formerly a League of Nations mandate under Japanese administration, these islands were occupied by U. S. military forces during World War II. On July 18, 1947, a trusteeship agreement entered into force between the United States and the U. N. Security Council, which placed the territory under U. S. administration as a strategic trust territory. The United States Department of Interior administers all of the trust territory except for the Saipan district which is administered by the United States Department of the Navy.[129] Determinative of the legal status of the territory is, apart from the trust agreement, the proclamations of the High Commissioner, and the Code of the

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127. U. S. Participation in the U. N. (1952), op. cit., p. 182.

128. Gunther, op. cit., p. 282.

129. U. S. Participation in the U. N. (1954), op. cit., p. 164.

Trust Territory, a series of executive orders, signed by the President of the U. S., providing for administrative responsibility. The Code of the Trust Territory defines all persons born therein as citizens thereof except those who at birth acquire another nationality, and those whose principal, actual dwelling place has not been in the territory or Guam at any time between July 18, 1947 and December 22, 1952, the effective date of the Trust Territory Code. No special status, nationality-wise, has been conferred by the administering authority, nor have qualifications or means for acquiring national status been prescribed. An intricate political structure has been provided for, along with local government, civil service, suffrage, political organizations, judiciary, and legal system. Economic advancement has been encouraged through the financing of the territorial and municipal government(s), taxation by the trust territory and the municipal governments, credit facilities provided by the Bank of America and local agencies, and a general policy that favors and encourages investment and enterprise. Subsistence agriculture and fishing are the basis of the economic system in the trust territory; the coconut tree is the mainstay of the economy, while livestock such as poultry and swine are raised. There are substantial fisheries resources, vegetation and forestry

preserves, and some, though little, minerals.[130] This territory, it will be noted, has unique status in light of the fact that it has been classified as a strategic area and is consequently not subject to the Trusteeship Council nor the General Assembly, but rather to the Security Council to which body the United States is accountable under Article 83 of the UN Charter.[131]

3. The Status of International Civil Aviation Under Trusteeship Agreements

As is the child the father of the man, and as was the mandate system of the League of Nations the precursor of the trusteeship arrangements that were formulated in the days following on the conclusion of the Second World War, so too have the problems that confronted international society in the definitive interpretation of the agreements bearing upon international aviation during the post World War I period tended to repeat or reassert themselves. The terms of the mandates with respect to aviation rights were not as clear as they might have been, in large degree, because of the relatively minor role that international air

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130. Department of State, Trust Territory of the Pacific Islands (1954), Publication 5735, April, 1955.

131. Chase, op. cit., p. 300.

transport played before the Second World War. That ambiguity and indefinition still obtain in the purportedly perfected system that is the trusteeship order attests to an urgent need for reexamination and reform.

Prior to the signing of the United Nations Charter at San Francisco on June 26, 1945, the International Civil Aviation Organization (PICAO) was brought into existence on December 7, 1944. Its avowed purposes and achievements have been already discussed in this paper in some detail, but it is well, by way of acquiring the desired perspective at this point, to reconsider what it was the ICAO was created for. The purposes of ICAO were clearly laid down in the Preamble to the Convention on International Civil Aviation:

> Whereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples...
>
> Whereas it is desirable to avoid friction and to promote...cooperation between nations and peoples...
>
> Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner...[132]

The purposes behind ICAO's activities have been summarized thusly:

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132. Chicago Convention, Preamble; Trygve Lie, In the Cause of Peace. New York: The Macmillan Co., 1954, p. 147; Herbert V. Evatt, The Task of Nations. New York: Duell, Sloan and Pearce, 1949, p. 27.

> ICAO is an association of national governments which have recognized the need for working together for the good of civil aviation and for the healthy development of international relationships. No one nation acting within its own resources can make civil aviation as safe, as reliable, as economical, or as useful as it could be if that nation worked together with its neighbors....Recognition for the need of constant cooperation has brought most of the world into the ICAO membership.[133]

Despite the clarity with which the policy objectives of the International Civil Aviation Organization has been set forth, ambiguity is claimed to prevail, particularly in respect of United Nations relationships, because of the absence in the Chicago Convention of any provision authorizing the inclusion, automatically, of trusteeship territory as part of the Administering Authority for the purpose of the Convention. Doubt inheres in regard to the applicability to the trusteeship territory of the whole Chicago Convention with its technical and air navigation controls through ICAO.[134] Article 77 of the United Nations Charter substantiates this contention providing as it does for applicability of the trusteeship system to territories under mandate, territories which may be detached from enemy states as a result of the Second World War, and territories voluntarily placed under

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133. Graham Beckel, Workshops for the World. New York: Abelard Schuman, 1954, p. 40.

134. Cooper, op. cit., p. 123.

the system by states responsible for their administration, in each case as these categories of territories "may be placed thereunder by means of trusteeship agreements." Subdivision two of the same article leaves little doubt as to the inappropriateness of any automatic inclusion of trusteeship territory as part of the administering territory when it says that:

> It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.[135]

That trust territory is not per se territory of the administering authority would be arguable from the mandate-sovereignty analogy, in addition to the several theories previously analyzed. Mandates and trust territories represent separate legal entities, and further international consideration must be given to determine airspace status, unless the trusteeship agreements clearly provide otherwise. By comparing and analyzing the trusteeship agreements under which the administering powers assumed authority, the absence of uniformity becomes apparent, at least with respect to the provisions that might conceivably relate to international aviation.

The terms of the trusteeship agreements that bear in any way upon aviation are best approached with the provisions

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135. Charter of the United Nations, Article 77 (2).

of the UN Charter setting forth the objectives of the trusteeship system in mind. Article 76 of the Charter holds as the basic objectives of the system the furtherance of international peace and security; the promotion of political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development toward self-government; the encouragement of respect for human rights and fundamental freedoms; and the ensuring of equal treatment in social, economic, and commercial matters for all UN members. To what extent are these objectives materialized with respect to aviation?

Article Seven of the trust agreement with Western Samoa provides that the Administering Authority (New Zealand) undertakes to apply the provisions of any international conventions and recommendations as drawn up by the United Nations or its specialized agencies which are, in the opinion of the Administering Authority, appropriate to the needs and conditions of the trust territory and which would be conducive to the achievement of the basic objectives of the trust agreement, objectives like those of the UN Charter's preamble and provision on trusteeships.[136] This provision permits the administering authority to invoke an international convention on aviation if it deems appropriate to do so in the interest of the territory, but it does not require

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136. T/A/4 June 9, 1947, Sales No. (UN) 1947 V 1 A3.

it to do so. In an agreement for exchange of air-traffic rights in the South Pacific between New Zealand and France[137] under which France was given rights of air transit, and traffic stops in the trust territory of Western Samoa, Article Three provided:

> that rights granted shall not import for either party any obligation in respect of provision of accommodation for crews and passengers or compliance with ICAO standards regarding aerodromes and ground installations.

Further provisions included that rates would be subject of agreement between the two parties; that the French airline would be licensed by New Zealand and that air navigation would be conducted under the law of New Zealand. The inoperability of any provision of law prevailing in the Administering Authority's territory that might conflict with the objectives of the Charter or the trust agreement is not provided for, nor is there any other provision in the agreement that bears in any particular way upon international aviation or transit rights.

Article Six of the Trust Agreement between Nauru and Australia[138] is identical with Article Seven in Western Samoa's agreement with New Zealand; the same lack of preci-

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137. U. N. Treaty Series, I; 785, Vol. 53, p. 247.

138. Treaty Series No. 89 (1947), Cmd. 7290.

sion exists. The same situation obtains with respect to the trust agreement between New Guinea and Australia.[139] These agreements do contain general provisions pursuant to which the Administering Authority undertakes to administer the territory in accordance with the provisions of the Charter and in such manner as to achieve the basic objectives of the international trusteeship system set forth in Article 76 of the Charter, including the non-discriminatory commercial provisions.[140] But no other general anti-discriminatory commercial provisions inhere, nor are there specific references to aeronautical transit rights which would serve to define and delimit in unambiguous fashion. Of general significance is the provision of the type that is Article Four of the New Guinea agreement whereby the Administering Authority is made responsible for the peace, order, good government and defense of the territory "and for this purpose will have the same powers of legislation, administration, and jurisdiction in and over the territory as if it were an integral part of Australia, and will be entitled to apply to the territory, subject to such modifications as it deems desirable such laws of the Commonwealth of Australia as it deems appropriate to the needs and conditions of the

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139. Ibid., No. 68 (1947), Cmd. 7200.

140. Ibid, Article 3.

territory." That confusion obtains is borne out by provisions of the agreement in the nature of those above. An airline might desire to operate international service into or through New Guinea, or between New Guinea and Australia, urging that as an airline of a state that is a member of the U.N., it has implied authority under Article 76 (d) of the Charter which ensures "equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals." Australia, on the other hand, could, under Article 4 of the trust agreement, invoke its authority to apply its own laws to New Guinea, under which it might have the right to control the entry of such foreign aircraft into New Guinea if New Guinea is considered as "an integral part of Australia."[141]

Article Seven of the agreement between Tanganyika and the United Kingdom is like Article Seven of the Western Samoa-New Zealand agreement, and Article Six of the Nauru-Australia and New Guinea-Australia agreement. Article Nine of this agreement mentions transit rights in its general concern for non-discrimination:

> Article 9: Subject to provisions...the Administering Authority shall take...steps to ensure equal treatment in social, economic, industrial and commercial matters for all Members of the U. N. and their nationals and...

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141. Cooper, op. cit., p. 126.

> a. shall ensure the same rights to all nationals of Members of the U. N. as to his own nationals in respect of entry into and residence in Tanganyika, freedom of transit and navigation, including freedom of transit and navigation by air...
>
> b. shall not discriminate on grounds of nationality...
>
> c. shall ensure equal treatment...[142]

The article concluded by providing that the rights conferred by it on nationals of Members of the United Nations "apply equally to companies and associations controlled by such nationals and organized in accordance with the law of any Member of the United Nations."[143] Construed along with Article 76 (d) of the U. N. Charter, and the provisions of the Chicago Convention which defined the territory of a State to include land areas..."under the sovereignty, suzerainty, protection or mandate of such State"[144] confusion reigns, because in no case, even if the documents caused trust territories to be construed as mandates, could there be any justification for invoking the limiting provisions[145] of the Chicago Convention in face of the broad commercial and air navigation anti-discriminatory provisions of Article

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142. Treaty Series, No. 19 (1947), Cmd. 7081, Article 9.

143. Ibid.

144. Chicago Convention, Article 2.

145. Chicago Convention, Articles 1, 2, 5, 6, 7.

76 (d) of the Charter and Article Nine of the Tanganyika agreement. Transcendence would appear to belong to the policy objectives of the Charter and trust agreements, notwithstanding restrictions imposed by the allegedly controlling Convention on Civil Aviation consummated at Chicago. The incongruency that prevails is at any event apparent.

The same point of view may be applied with respect to the Ruanda-Urundi-Belgium agreement because of the similarity of its provisions[146] to those of the Tanganyika-United Kingdom trust agreement; the British Cameroons-United Kingdom agreement;[147] the French Cameroons-France trust agreement;[148] the British Togoland-United Kingdom trust agreement;[149] and the French Togoland-France trust agreement.[150] With the exception of minute variations in numerical designation, the provisions of these agreements are substantially alike and, with respect to the anti-discriminatory-transit provision such as that quoted from the Tanganyika-United Kingdom trust agreement, are practically identical.

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146. Treaty Series, No. 64 (1947), Cmd. 7196.
147. Ibid., No. 20 (1947), Cmd. 7082.
148. Ibid., No. 66 (1947), Cmd. 7198.
149. Ibid., No. 21 (1947), Cmd. 7083.
150. Ibid., No. 67 (1947), Cmd. 7199.

The trusteeship agreement under which the United States assumed administrative authority over the Pacific Islands merits consideration on a separate basis because of the strategic area designation of this trust territory and also because of differing provisions in the agreement. As a strategic area, the territory falls within the purview of Article 82 of the U. N. Charter which provides that "there may be designated in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies," without prejudice to any special agreement or agreements made under Article 43 [a provision dealing with action with respect to threats to the peace, breaches of the peace, and acts of aggression]. The consequent authority of the Security Council under Article 83 is subsequently set forth, subsection 2 limiting the basic objectives set forth in Article 76 "to the people of each strategic area"[151] and not ensuring, pursuant to Article 76 (d), equality of commercial treatment in the trusteeship territory between members of the United Nations.

Article Three of the Pacific Islands trusteeship agreement is similar in purport to Article Four of the New

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151. Charter, Article 83 (2).

Guinea-Australia trusteeship agreement[152] wherein it is provided that the administering authority shall have full powers...over the territory, subject to provisions of the agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of its own laws as it may deem appropriate. Article Four states that:

> The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the U. N., and the provisions of this agreement, and shall, as specified in Article 83 (2) of the Charter, apply the objectives of the international trusteeship system...to the people of the trust territory.

Article Five of the agreement empowers the administering authority, as do most of the agreements to establish naval, military and air bases in keeping with the objective of international peace and security. Article Eight treats of anti-discrimination:

> In discharging its obligations under Article 76 (d) of the Charter, as defined by Article 83 (2)...the administering authority...shall accord to nationals of each Member of the U. N. and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favorable than that accorded therein to nationals, companies and associations of any other United Nation except the administering authority.

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152. P. 104, <u>supra</u>.

Subdivision two pledges equal treatment to the Members of the United Nations and their nationals in the administration of justice. Subdivision three evidences a marked departure from the apparent intent of the Charter and the terms and objectives of other of the trusteeship agreements:

> Nothing in this Article shall be so construed as to accord traffic rights to aircraft flying into and out of the trust territory. Such rights shall be subject to agreement between the administering authority and the state whose nationality such aircraft possesses.

The door would appear to have been left open for discriminatory commercial treatment in favor of the nationals, companies, and associations of the Administering Authority as against those of other members of the United Nations. Article Eight (3) leaves little question but that flight into the airspace over the Pacific Islands for commercial purposes is permissible only when the United States grants the privilege by agreement. Article Three authorizes the United States to apply to the trust territory such of local laws or U. S. laws as prohibit entry into the territory of foreign airships. Complete control of the right of foreign aircraft, including the rights of flight of aircraft of other members of the U. N. would appear to inhere in the U. S., whether it be to fly into, over or away from the

Pacific island trusteeship territory, whether it be for transit or traffic purposes.[153]

The trusteeship agreement between the Pacific Islands and the United States,[154] particularly in view of its Article Three, poses the significant question of whether all American laws are effective without further ado, or whether legislative or administrative action is necessary to put them into effect. The resolution of this question would appear to depend upon the relation of the trust territory to the United States, a question not unlike that which sought clarification of the relationship between mandatories and the mandated areas after the First World War. The language of the trust agreement has been conceded to be unclear; the provision of Article 76 of the Charter ensuring equal treatment[155] argues against including the trust territory within the "customs territory" of the U. S., since such inclusion would result in imposition of tariffs on exports to the trust territory from all nations except the U. S. But Article 76 (d) can be regarded as precatory, since Article Three of the trusteeship agreement makes no exception for tariff laws.[156]

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153. Cooper, op. cit., p. 128.

154. Treaty Series, No. 76 (1947), Cmd. 7233.

155. Ibid., Article 76 (d).

156. Sedgwick W. Green, "Applicability of American Laws to Overseas Areas Controlled by the United States" 68 Harvard Law Review 781,803 (1955).

The status of the trust territory, like the mandate, has been the subject of dispute: trust territories have been said to be under the territorial sovereignty of the states which, in the exercise of their right to dispose of these territories, placed them under trusteeship by agreements entered into with the United Nations, and have become administering authorities.[157] The United States has been held, on the other hand, to have not acquired any sovereignty over trust territory by virtue of trust agreement.[158] As a strategic area, the Pacific Islands are subject to Security Council disposition; as a permanent member of the Security Council, the U. S. can veto any proposal with respect to this territory and therefore could be said to have absolute control thereover. Sovereign for all purposes would not be a far removed position. It has been stated that in substance the U. S. can administer the territory as if it were a colonial possession.[159] But since the goal of trusteeship is self-government or independence, the implication of nonpermanence is there. The United States' view is perhaps best reflected in a Supreme Court decision[160] involving an American citizen employed on a government con-

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157. Hans Kelsen, Principles of International Law 167 (1952).

158. Brunell v United States 77 Fed. Supp. 68, 70 (1948).

159. H. R. Rep. No. 889, 80th Congress, 1st Session 4 (1947).

160. Vermilya-Brown Co. v Connell, 335 U. S. 377 (1948).

tract at a leased base in Bermuda. In a suit for damages brought by the citizen for failure of the defendant to pay an overtime rate under the Fair Labor Standards Act, where the issue was whether the base was a possession for purposes of applying the Fair Labor Standards Act, the Court held it was; that it was not bound by executive determinations that it was not; and that no congressional action is needed to make an area a "possession" if it meets the standard of a certain quantum of American control. The absence in the U. S.-Pacific Islands trust agreement of any expression that the trust territory was not to be covered by American statutes applicable to possessions warrants the conclusion that, at least for certain purposes, the trust territory is a possession. The potentially non-permanent nature of the United States' interest may be said to compare with that in Bermuda in the Supreme Court decision.[161]

The use of technical concepts of sovereignty in determining jurisdictional authority has, as was the case under the mandates system, been subject to much criticism.[162] "It is for the executive and legislative departments to say in what relations any other country stands toward it. Courts of justice cannot make the decision....And, unless the po-

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161. Ibid.

162. Ueno v Acheson, 96 F. Supp. 510, 515-516 (1951).

litical department of our government has decided otherwise, the judiciary recognizes the condition of things with respect to another country which once existed a n d is still existing because of no other recognition...the state is perpetual, and survives the form of its government."[163] Of course there is dictum to the effect that the trust territory is "foreign,"[164] based on a State Department opinion which rested on lack of "sovereignty,"[165] but in practice the policies sought to be effected by statutory reference to foreign areas would appear to be inapplicable in light of the terms of at least the Pacific Island trust agreement.[166] Article Fourteen thereof, quite like Article Seven of the Western Samoa-New Zealand trust agreement, affords, if only implicitly, discretion in this regard.

a. The Need for Clarification and Clarity

The foregoing factual conditions and legal considerations warrant attention in the necessary endeavor to achieve exactitude in international civil aviation in the airspace over trusteeship territory. The Charter has not provided a

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163. Ibid., p. 515.

164. Brunell v United States, 77 F. Supp. 68, 72 (1948).

165. Ibid., p. 70.

166. Green, op. cit., pp. 805-806.

satisfactory solution; in fact, it has created an uncertain and ambiguous legal complex. However, as far back as 1927 it was observed that the legal relationship between the mandated territory and the Mandatory was "clearly a new one in international law, and for this reason the use of some time-honored terminology of sovereignty in the same way as previously was perhaps inappropriate to the new conditions."[167] In 1950, Sir Arnold McNair of the International Court of Justice made a like observation in reference to the legal status of South West Africa.[168] The Trusteeship System is a

> new institution...a new species of international government which does not fit into the old conception of sovereignty....The doctrine of sovereignty has no application to this new system...what matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory (or Administering Authority) in regard to the territory being administered by it. The answer... depends on the international agreements creating the system and the rule of law which they attract.[169]

The intent of the drafters of Chapters XII and XIII of the Charter (establishment and function of the trusteeship system) was to activate measures best in keeping with the

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167. League of Nations, Official Journal, VIII year, p. 1118.

168. International Court of Justice, Yearbook, 1949-1950, Advisory Opinion on International Status of South West Africa, Sales No. 44.

169. Ibid., p. 84.

idealistic expression of the needs of the world community in general, and of the needs of the inhabitants of the trust areas in particular. For air transportation it was possible under the terms to give wide rights of transit, and equitable distribution of commercial air rights.

The United Nations is affirmed by the Charter to be based upon the principle of the sovereign equality of all its members, but it is undeniable that unequal rights, privileges and responsibilities are also recognized.[170] Nor can it be denied that the executive and legislative pronouncements of the various governments permit some inequality. The trusteeship agreements demonstrate a lack of uniformity with respect to crucial airspace, but they do show in common a preponderance of economic rights in the hands of the Administering Authorities, with little obligation to share these rights with member states and their nationals. The clarification of the relationship between the Administering Authorities and the United Nations is indicated when one views, on the one hand, the ideals embodied in the Charter and, on the other, the practices prevailing under the terms of the trusteeship agreements.

There is some doubt as to the extent to which the Chicago Convention of 1944, and the powers of the Interna-

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170. P. C. Jessup, A Modern Law of Nations. New York: The Macmillan Company, 1952, p. 30.

tional Civil Aviation Organization created by the Convention, are applicable to trusteeship territory even though the Administering Authority is a party to that Convention. However, in the case of the South West Africa Mandate, the Convention would apply through Article Two, where the definition of territory includes mandates, and Article 80 of the Charter which provides: "...nothing shall be construed to alter...the rights...of any state or any people or the terms of existing international instruments to which Members of the United Nations may respectively be parties." That the mandate is a separate legal entity from the trusteeship territory, and that trusteeship territory cannot by any construction be a part of the territory which is subject matter of the Chicago Convention, leaves the status of the airspace subject jointly to the quasi-constitutional terms of the Charter and the separate trusteeship agreements. That under the bare terms of the Charter the airspace of trusteeship territory could have had a freedom for air transportation comparable to that over the high seas is clear. With the imposition of the trusteeship agreements, the fundamental requirements of international aviation--privileges of transit and commerce--are no broader than the privileges under ICAO. Moreover, in the trust areas there is less obligation to maintain ICAO's standards and recommended procedures.

The lack of clarity of meaning to be adduced from the text of the Charter, the inter-state character of the trusteeship agreements operating free of the moral directives of the Charter, the non-use of the International Court of Justice to clarify the relationships among the several interests, together with the questionable relationship of the Chicago Convention with trusteeship airspace, suggest the need for further international consideration to precipitate the open political and legal questions. These problems remedy themselves when the inhabitants of the trust areas receive sovereignty; however, in the interim, the geopolitical significance of the air age for these areas of the earth's surface demand prompt consideration.

Chapter IV

IMPROVING THE SENSE OF WORLD COMMUNITY AND RESPONSIBILITY

The legal position of air transport poses serious economic problems to any world organization. The decision of a State to admit or exclude foreign aircraft engaged in international commerce, either in transit elsewhere or for the purpose of discharging and picking up cargo, directly affects world trade and the internal economy of the State taking such action and that of other States.

Air transport has become an inseparable part of the complicated fabric of world transport. Its role in the development of international commerce is increasingly expanding. Along with ocean shipping, the public is served by both of these instruments of national transport and communication policy; both enter foreign territory to compete with local services for international trade. But the right of a State to control the use of these two world economic forces has developed differently in certain respects.[1] While any State may refuse to allow the entry of aircraft of a second State, it would be guilty of an almost unfriendly

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1. Oliver Lissitzyn, International Air Transport and National Policy. New York Council on Foreign Relations, 1942, pp. 373-402.

act if it refused the entry of merchant vessels of that State.[2]

When the Paris Convention was being drafted, aviation security questions, not commercial problems, were still uppermost in the minds of men. Aircraft flying over cities and into the interior posed problems quite different from those of the entry of merchant vessels into coastal ports. With the emergence of new airborne weapons of mass destruction, these security questions seem even more important today. When the law of the air became fixed and national sovereignty of the airspace was accepted, the license to enter national territory for trading purposes, claimed by Grotius in his tract on merchant shipping,[3] was denied to air transport. Control was retained by the State flown over. Any maritime State could unilaterally determine the volume and cost to the public of ocean shipping under its flag engaged in international trade to and through the open ports of a second State, irrespective of the economic effect on the latter or on world trade; and the second State could, at the same time, unilaterally determine the volume of the air transport of the first State which it may allow

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2. J. C. Cooper, "Air Transport and World Organization." 55 Yale Law Journal 1191 (1946).

3. Hugo Grotius, Freedom of the Seas. Joseph Van Deman Magoffin's Trans. Introd. Note. New York: Oxford University Press, 1916.

to enter its territory and may fix any conditions or limitations on such entry, irrespective of the economic effect on the first State or on world trade. The international conflicts inherent and resulting in this situation are clear: they must be faced by any world organization.

The arbitrary right of any State to control world trade and trade routes insofar as is possible by barring or admitting foreign aircraft, irrespective of the effect on other States, is difficult to defend except when local national security and economic conditions are directly and vitally effected. Unjustified control and regulation, whether it be by a single State or an international body, must be kept to a minimum and the needs of the public for adequate transportation always retained as a significant consideration. The right to trade by air must be fostered, but at the same time controlled, so that world trade and the internal national economy of the State concerned is not at the mercy of the unilateral action of any one State, whether it be the State dispatching its aircraft in world trade or the State through or to which they will fly. These are international questions to be decided accordingly.[4]

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4. Cooper, "Air Transport and World Organization," op. cit., pp. 1204, 1202.

1. Effecting the Intent of the United Nations Charter

To the extent that any State consents to control or limitation of its civil air transport by the act of any other State or any international body, it foregoes one development of its potential air power. Within the bounds of international comity every State is entitled to bend its efforts to attain its legitimate national objectives through such activities and instrumentalities as it may choose.

Not only in clearly improper cases, such as in situations involving aggressive acts or cases entailing flagrant disregard of binding commitments does the development of international air transport come into conflict with world interests, however. In the race for foreign commerce and national expansion, subsidy wars may develop; local air service of smaller and weaker nations may be forced to discontinue; national economy of other states may be seriously affected. Things occur that, in the meaning of the United Nations Charter, would create a "situation which might lead to international friction." Such possibility was admitted by the Chicago Conference. The Preamble of the Convention on International Civil Aviation provides that

> the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the

> nations and the peoples of the world, yet its abuse can become a threat to the general security.[5]

The development of national air transport of one State may injuriously affect another or cause a dangerous dispute. There must be a forum and machinery to remedy such a situation. World organization will require sufficient international control to prevent air transport from becoming an instrument of ineffective or unfair nationalistic competition or political aggression and thus the source of serious international misunderstanding and dangerous ill-feeling.[6]

Among the objectives of the United Nations are "to take effective collective measures...for the suppression of acts of aggression...and to bring about by peaceful means ...settlement of international disputes or situations which might lead to a breach of the peace;"[7] also "to achieve international cooperation in solving international problems of an economic...character."[8] The General Assembly[9] is

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5. International Civil Aviation Conference (1944), Final Act, U. S. Treaty Series 1507. Washington: Dept. of State, 1946, p. 59.

6. Osborne Mance, International Air Transport (1944). London: Oxford, 1944, p. 103.

7. Charter of the United Nations, Article 1 (1).

8. Ibid., Article 1 (2).

9. Ibid., Article 13.

directed to initiate studies and make recommendations for the purpose of promoting international cooperation in the political field, and also international cooperation in the economic field. The Security Council[10] may investigate any dispute or any situation which might lead to international friction;[11] determine the existence of any threat to peace or act of aggression;[12] and may decide what measures not involving the use of armed force are to be employed to give effect to decisions, including "complete or partial interruption of economic relations and of...air...and other means of communications."[13]

The Economic and Social Council[14] is responsible under the authority of the General Assembly for economic problems; may[15] make or initiate studies and reports with respect to international economic matters and make recommendations on such matters to the General Assembly; may[16]

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10. Ibid., Article 34.
11. Ibid.
12. Ibid., Article 39.
13. Ibid., Article 41.
14. Ibid., Article 60.
15. Ibid., Article 62.
16. Ibid., Article 63.

enter into agreements with specialized agencies established by inter-government agreement and having wide international responsibility in the economic field; may[17] take appropriate steps to obtain reports from such specialized agencies and communicate its observations on these reports to the General Assembly; may[18] furnish information to the Security Council and shall assist the Security Council upon its request.

As mentioned earlier is the significance of the agreement between the International Civil Aviation Organization and the United Nations pursuant to the terms of which the Council is authorized to arbitrate disputes between the member nations of the U. N. over air rights. A dispute was presented to the Council in 1952 wherein India had complained that Pakistan refused to permit Indian aircraft to fly over Pakistan territory from New Delhi to Kabul in Afghanistan. The interdiction of the U. N. agency served to dissipate the violent aspects of the dispute, and an agreement was forged which not only allowed Indian planes to pass but provided for Pakistan to ship fuel to Afghanistan so that the planes could refuel in Kabul for the return trip. The settlement was accepted by both governments.[19]

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17. Ibid., Article 64.

18. Ibid., Article 65.

19. David Cushman Coyle, The United Nations and How It Works. New York: Signet Books (1955), p. 55.

No society can be stable unless it is founded on justice and the rule of law.[20] The legal and organizational framework of the international community is far from perfect but it is nonetheless strong enough to enable the world to hold itself together and to progress toward the time when a real security can be achieved. Effecting the terms and intention of the United Nations Charter will materialize this prospect.

2. Recent Developments

Despite the varied approaches that history records to the question of status of territory under tutelage, the preponderant weight of authority is in favor of the position that essentially reinforces the trust concept. The question of sovereignty over trust territory has been confused because of the allocation of mandates under the League of Nations. While it was reasonably certain as to where governing authority resided at the outset, in that it devolved to the principal Allied and Associated Powers through the instruments of renunciation signed by Germany and Turkey, confusion reigned as to where sovereignty lay after the mandates were approved by the League and the governing respon-

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20. A. H. Feller, United Nations and World Community. Boston: Little, Brown and Co. (1952), p. 138.

sibility passed to the mandatories under League supervisory jurisdiction. When the General Assembly of the United Nations came to approve the trusteeship agreements, consternation resulted over the prospect of unraveling the legal web spun at Versailles and thereafter. To resolve what appeared insoluble, the decision to proceed pragmatically was made, and the issue of sovereignty as such was avoided, the theory being that the terms of the U. N. Charter and the agreements themselves would be sufficiently clear to define the respective roles, rights and privileges of the peoples of the territories, of the administering authorities, and of the United Nations and its organs. The fact is that the terms were never clear enough, however. Administering authorities made statements which varied in language but which amounted to declarations either that they did not claim sovereignty or that they were content to permit the legal issue to remain as it was--unclear. No administering authority has alleged, however, that it was clearly the sovereign of a trust territory.[21]

So the problem continues, marked by developments which serve to enhance the importance of an ultimate solution. Changes in the trust territories continue with the assistance of the supervising or administering authorities;

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21. L. Larry Leonard, International Organization. New York: McGraw Hill Book Company Inc. (1951), pp. 509ff.

world trade and commerce continues and grows; the need for clarification becomes more evident in light of the greater interdependency of man and the nations of the earth. Recently the people of British Togoland voted in a plebiscite that was designed to ascertain what their attitude toward integration with the Gold Coast was. The majority voted in favor of the merger, a step which has been deemed significant in the trend toward autonomy of dependent peoples.[22]

The seventeenth session of the Trusteeship Council in 1956 was marked by consideration of the nuclear tests conducted in the Pacific areas by the United States, receipt of 731 petitions from African trust territories and 35,000 communications from the French Cameroons, admission into the Trusteeship Council of Italy in view of the fact that she recently became a member of the United Nations and has been an administering authority (over Somaliland), and election of Burma to the Council to maintain the balance of non-administering members to administering members (with Italy, there are now 14 administering representatives).[23] Reports from the various other trust territories were also sifted, progress reported in Tanganyika and Ruanda-Urundi,

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22. "People of Togoland Vote on Their Country's Future," United Nations Review (June, 1956), Vol. 2, No. 12, p. 8.

23. "Report on Seventeenth Session of Trusteeship Council," United Nations Review (May, 1956), Vol. 2, No. 11, p. 14.

and a proposed survey of progress in the African areas announced.

In 1955 the International Civil Aviation Organization called attention to a new international agreement to limit the liability of airlines for passengers killed or injured in flights from one country to another, to be in force when ratified by thirty countries.[24] The tenth conference of ICAO opened in June, 1956, in Caracas, Venezuela, with an agenda consisting, inter alia, of the problem of jurisdiction over outer space for satellites, the improvement of communications for jet operation and technical assistance for countries whose civil aviation is underdeveloped, and matters such as landing charges, air mail, and public air law. The question of interplanetary skyways and outer space will be studied with a view toward formulating some agreement in regard to the questions of sovereignty and privileges in outer space. The principle that every state has complete and exclusive sovereignty over the air space leaves the question of whether state sovereignty extends beyond the bounds of superadjacent air space open. The problems raised by jet and turbine-propelled planes are more immediate since the cruising speed of planes will double in less than five years and altitudes will be much

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24. "ICAO, 1955," United Nations Review (April, 1956), Vol. 2, No. 10, p. 24.

higher. Communications will consequently have to be accelerated.[25]

3. Conclusion

Although the majority of the trusteeship agreements between the United Nations and Administering Authorities provide that the trust territories shall be administered as an integral part of the administering state, there is no implication that the administering state has a claim to sovereignty to or over the trust territory.[26] The relation of trust or tutelage or fideicommission implies fundamentally a relation of service and delegation incompatible with any exclusiveness of rights of sovereignty on the part of the supervising States.[27] Notwithstanding this fact the terms of agreements deriving from the arrangements established before and after creation of trust territories by the United Nations connote an intention to pre-empt for exclusive use airspace which, in light of the principles of the U. N. Charter, rightfully belong to the community of nations. The

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25. "Air Parley Faces Issues of Jet Age," New York Times, June 20, 1956, p. 62.

26. Security Council Official Records, 2nd Year No. 23 (1947), p. 476 (General Assembly Doc. A/258, December 12, 1946, p. 6).

27. L. Oppenheim, op. cit., p. 237.

advancement of world trade and the progress desired for promotion of harmony and political and commercial intercourse necessitate clarification in order that the great objective of present-day international civil aviation--the removal of all doubt as to where, how, and in what manner international air commerce may flow between the nations of the world--may be realized.

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