NATIONALITY AND DIPLOMATIC PROTECTION IN MANDATED
AND TRUST TERRITORIES*

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I. INTRODUCTION

The Mandates system for German possessions and Turkish Near
Eastern provinces was suggested after the First World War by
General Smuts of South Africa, and adopted as a compromise between
the liberal attitude favoring international administration and the
conservative one urging annexation. Moreover, it was adopted as a
provisional regime at the time. But the "provisional regime, the
period of transition, lasted for longer than anticipated."2

Perhaps these two attributes of compromise and provisionality
account for the vague language of article 22 of the Covenant,
which established the principles of "sacred trust" and of inter-
national accountability for the administration of dependent
territories on the international level.

Article 22 did not touch on several essential issues. It did
not specify clearly enough the nature of the relationships it
established, and thus left room for speculation in appraising the
new system, running from "noblesse oblige,"4 to hypocrisy that
cloaks protectorates for the Class "A" mandates, and outright
annexation for Classes "B" and "C" mandates.5

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* Honor paper originally submitted for the Seminar on Inter-
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1. Wright, Mandates Under the League of Nations 24 (1930); Hall,
Mandates, Dependencies, and Trusteeship 112 (1948).

2. Hall, op. cit. supra note 1, at 133.

3. "Article 22...reads like a University extension lecture":
Baty, Protectorates and Mandates, 2 Brit. Yb. Int'l L. 109,
119 (1921-1922).
The Mandates system could not, however, be judged on the basis of article 22 alone. In a much quoted phrase of one of its early appraisers: "[L]e système des mandats sera en droit ce qu'il sera en fait."\(^6\) It simply restates the sociological law that social institutions, whether internal or international, legal or otherwise, once created, acquire new dimensions and lead a life of their own, independent, but not necessarily different from the anticipations of those who conceived and established them. Law can always find a way to accommodate itself to the novelties of social institutions and realities.

The Mandates system was no exception to this social law of evolution. From early uncertainties it developed through the practices and manipulations of the Mandatories and the reactions of the League. The rules of International supervision were effectively developed by the Permanent Mandates Commission, which was composed of elected persons independent from their countries, and which fought, diplomatically but bravely, on the side of international supervision and the Mandated peoples.\(^7\)

The Mandates system, being a new one in law, and vague enough at that, aroused great interest among jurists, political scientists and contemporary historians. For the jurists, aside from the technicalities of administration and supervision which were fully treated, it posed several highly theoretical questions which were important because of their logical and practical implications. These questions can be described as those of characterization of the nature of the system, the situs of sovereignty and the nationality of the inhabitants of the Mandated territories. In 1930, only ten years after the creation of the system, Professor Quincy Wright could put in his book on the subject a bibliography of the better known works on Mandates that ran into thirty pages in small print.\(^8\)

But these questions were not answered in a definitive way, and they still are not, at least in many of their details. We have

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6. Rolin, supra note 5, at 329.

7. Hall, op. cit. supra note 1, at 48-52, 165-212; Wright, op. cit. supra note 1, at 159-249; Boutant, Les Mandats Internationaux 54-86 (1935); Van Maanen-Helmer, The Mandates System in Relation to Africa and the Pacific Islands 79-143 (1929); Margalith, The International Mandates 69-92 (1930).

8. Wright, op. cit. supra note 1, at 639-668.
now, however, strong indications as to what appear to be better solutions.

The Second World War interrupted the working of the system. After the war, the United Nations was established and the League was liquidated. The United Nations Charter embodies in Chapters XII and XIII a new system of international supervision as to the administration of dependent territories under the denomination of the "Trusteeship system". It is essentially the same as the Mandates system, and poses the same questions. It also stimulated many studies, but these were mainly concerned with the descriptive and behavioral rather than the theoretical aspects.

The interest of the Trusteeship system is obvious. As to the Mandates System, it is not only interesting to us now as a pioneering historical experiment, but also it has topicality in that there still is one Territory under Mandate which is the subject of much controversy, and that there are still some unresolved legal problems originating from Mandates which have expired, such as the status and rights of the Palestinian Arab refugees.

It is against this general background that the present essay attempts to trace the problem of the nationality of inhabitants and their diplomatic protection under the two systems.

II. CLASS "A" MANDATES UNDER THE COVENANT OF THE LEAGUE OF NATIONS

A. International Instruments

Class "A" Mandates were to be applied, according to article 22, paragraph 4 of the Covenant, to "[o]ccurrences formerly belonging to the Turkish Empire [which] 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."

In the Mandate of Palestine and Trans-Jordan adopted by the Council of the League of Nations on July 24, 1922,9 article 7 dealt with nationality:

"The Administration of Palestine shall be responsible for enacting a nationality law. [There shall be included in this law provisions framed so as to facilitate the acquisition for Palestinian citizenship by Jews who take up their permanent residence in Palestine.]"10


10. On September 16, 1922, Lord Balfour, the British Foreign Minister, submitted a memorandum to the League Council, which
Article 12 dealt with diplomatic protection:

The Mandatory will be entrusted with the control of the foreign relations of Palestine.... He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.

The Mandate for Syria and Lebanon did not deal with nationality directly but article 3 on foreign relations referred to it:

The Mandatory shall be entrusted of the exclusive control of the foreign relations with Syria and the Lebanon....National of Syria and the Lebanon living outside the limits of the territory shall be under the diplomatic and consular protection of the Mandatory.11

The instrument of the Mandate for Iraq took the form of a Treaty between the Mandatory and the king of the Mandated State. Article 5 dealt with foreign relations:

His Majesty the king of Iraq shall have the right of representation in London and in such other capitals and places as may be agreed upon by the High Contracting Parties. Where his majesty the King of Iraq is not represented he agrees to entrust the protection of Iraq nationals to His Britannic Majesty....12

These arrangements did not become definitive, however, until the Treaty of Lausanne was signed and ratified in 1924.13 It brought formally to an end the sovereignty of Turkey over these detached Arab countries that were the subjects of Class "A" Mandates. The treaty dealt with the nationality problems arising from the detachment in articles 30 to 36.

Article 30 stipulated that:

Turkish subjects habitually resident in a territory which in accordance with the provisions of the present treaty is detached from Turkey, will become ipso facto, in the conditions laid down by the local laws, nationals of the State to which such territory is transferred.

was accepted by it, excluding Trans-Jordan from all the provisions of the Palestine Mandate concerning the Jewish national home, including the paragraph put in brackets in the text. Id. at 1390.

11. Id. at 1014.
B. The Controversy

With this abundance of explicit evidence there was little room for controversy over the distinct nationality of the inhabitants of Class "A" Mandated territories. Being referred to as independent nations in article 22 of the Covenant, and specifically mentioning their distinct nationality in the Mandate instruments left no place for doubt. Thus it has been considered as a settled question by the writers on the subject. This attitude was taken regardless of the theory on sovereignty they adopted for such territories; whether they called it misouverainete, quasi-regna or limited sovereignty.14

In the period between the creation of the Mandates system and the ratification of the Treaty of Lausanne, however, the inhabitants of these territories were theoretically still Ottoman subjects. But at the same time they had to avail themselves of British and French diplomatic protection abroad, according to the Mandate instruments.15 This was obviously an anomalous situation that could not be easily characterized in law.

The interpretation of article 30 of the Treaty of Lausanne could have also created a controversy. If interpreted in a vacuum it could be said that "nationals of the state to which such territory is transferred" meant nationals of the Mandatory. But such an interpretation in addition to straining the text, would be inconsistent with article 22 of the Covenant and with the Mandate instruments that preceded the text, and to which it was supposed to give emphasis and sanction.16

The issue was brought up in a case involving the extradition of two inhabitants of Palestine. It was argued that they should be treated as British subjects because in the absence of a Palestinian citizenship the inhabitants of a Mandated territory acquire the nationality of the Mandatory state.

The High Court of Palestine held that even if they were ex-Ottomans, they had not become British subjects as the Mandate had not established sovereignty in the British Crown.17


16. Bentwich, ibid; Ghalí, Les Nationalités Détachées de l'Empire Ottoman à la Suite de la Guerre 97 (1934).

C. Practice

The question was unequivocally answered after the ratification of the Treaty of Lausanne by the promulgation of laws and decrees of citizenship or nationality in all the Class "A" Mandated territories:18 In Iraq, by the law of October 9, 1924;19 in Palestine by the Palestine Citizenship Order in Council of July 24, 1925;20 in Lebanon, by Order No. 15/S of January 19, 1925;21 and in Syria, by Order No. 16/S of January 19, 1925.22

The establishment of these nationalities on the legal level did not solve all the problems that arose from the diplomatic protection extended by the Mandatory to the inhabitants. It is well established that diplomatic protection can be exercised in certain cases for non-nationals.23 But there remains the task of drawing the lines that separate one nationality from another and tracing the influence of the diplomatic protection on such a separation.

In the first place the scope of diplomatic protection was not the same for the inhabitants of Mandated territories as for the nationals of the Mandatory. The issue arose as regards the "Capitulatory system" that was still effective in Egypt at the time. In an exchange of letters between the Egyptian and the French governments, a modus vivendi was reached, according to which the Syrians and Lebanese would enjoy in Egypt French diplomatic protection, but that the privileges of the Capitulatory system would not be extended to them.24

The issue of the scope of diplomatic protection was also discussed on the theoretical level. According to one writer, the rule should be equality with nationals in protection. This would prevent using the protection as a persuasive factor for the inhabitants of Mandated territories to seek the nationality of the Mandatory. The protection does not extend, however, to special rights and privileges, acquired by treaty or acquiescence, that are not granted by the common international law, such as the

19. Flournoy and Hudson, Nationality Laws 348 (1929).
20. Id. at 151.
21. 20 Rev. de Droit International Privé 583 (1925).
22. Fournoy and Hudson, op. cit. supra note 19, at 301.
23. The treatment of this distinction is reserved to a later part of the discussion.
24. 20 Rev. de Droit International Privé 590 (1925).
capitulatory privileges and the elimination of the visa require-
ment. This solution was sanctioned by the Egyptian courts in
several case.

The case law as regards the issue of nationality of inhabitants
of Class "A" Mandated territories is abundant but somewhat incon-
sistent. The distinct nationality of these inhabitants was
recognized by the courts of the Mandatories, of the Mandated
territories, and of third parties. In one American case, however,
Palestinian citizens were not considered citizens or subjects of a
foreign state, within the meaning of the jurisdictional provisions
of the United States, so as to justify federal jurisdiction on the
basis of diversity of citizenship.

For purposes of conflicts of laws, the distinct nationality was
recognized, so as to draw the law of the Mandated territory, rather
than that of the Mandatory, into application when the case involved
an inhabitant of the Mandated territory. As to rights and
privileges attached to nationality, in one French case, a Syrian
was denied a judicial jurisdictional privilege reserved to French
nationals. But in another French case, the Conseil d'État upheld
a contract awarded to a Lebanese in a government bid to which only
suppliers of French status could tender.

These samples demonstrate the difficulty of effecting the
separation in concreto if we have only a general principle but no
operational criterion.

An interesting issue in this general area is that of the
international relations between the Mandatory and the Mandated
territory, as there is no reason to assume them away because of the
mere existence of the Mandate. Because of the separation of
nationalities, there are several points of international contact.

25. Stoyanovsky, op. cit. supra note 14, at 99-100; Note, National-
ity in Mandated Territories, 12 Brit. Yb. Int'l. L. 149, 151
(1931).


27. Moussali v. Thermoz, 56 J. de Droit International 98 (1929);

28. V. v. G., Tribunal Civil d'Alep, May 16, 1926, 54 J. de Droit
International 151 (1927).

Castorina Faria de Lima, [1935-1937] Ann. Dig. 110 (No. 30.).


V. v. G., supra note 28.

32. Moussali v. Thermoz, supra note 27.
For example, Palestinian citizens needed a British visa before entering the United Kingdom.\textsuperscript{34} It might be interesting in this connection to mention an agreement between the Post Office of the United Kingdom and the Post Office of Iraq for the exchange of money orders. This agreement was signed before the coming into effect of the Mandate instrument. The interest in it lies in the fact that the United Kingdom Foreign Office communicated this agreement to the League of Nations for registration as a treaty.\textsuperscript{35} Moreover, that the Mandate instrument in the case of Iraq took the form of a treaty between the Mandatory and the Mandated Territory is, in itself revealing.\textsuperscript{36}

The complicated issue would be, however, that of claims by the inhabitants of a Mandated territory against the Mandatory. It did not arise on the practical level, but was discussed theoretically.\textsuperscript{37} The conclusion was that neither a third party not the League nor the Permanent Mandates Commission could represent the inhabitants against the Mandatory. It could be said, though, that the inhabitants of a Mandated territory were at least in a better position than nationals, in that they had the right of petition to the Permanent Mandates Commission and as beneficiaries of the whole machinery of international supervision.

Finally, the recognition of the independent international personality of countries under Class "A" Mandates in article 22 of the Covenant, and the unanimous recognition of a proper nationality for their inhabitants might throw light upon the status and the rights of the Palestinian Arab refugees acquired under the Mandate.

III. CLASS "B" AND "C" MANDATES UNDER THE COVENANT OF THE LEAGUE OF NATIONS

A. International Instruments

Article 22 of the Covenant in paragraph 5 and 6 dealing with Class "B" and "C" Mandates does not mention independence. It refers to "communities" and "independent nations" in Class "A", "peoples" in Class "B", and "territories" in Class "C" Mandated

\begin{itemize}
  \item \textsuperscript{33} Chambre de Commerce de Bamako v. Société Commerciale de l'Ouest Africain, [1935-1937] Ann. Dig. 113 (No. 32).
  \item \textsuperscript{34} Note, Nationality in Mandated Territories, supra note 25.
  \item \textsuperscript{35} 12 L.N.T.S. 432.
  \item \textsuperscript{36} 35 L.N.T.S. 13.
  \item \textsuperscript{37} Stoyanovsky, op. cit. supra note 14, at 101-102.
\end{itemize}

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territories "can be best administered under the laws of the Mandatory as integral portions of its territory."

The mandate instruments for each of the territories in these two categories failed to make reference to independence, nationhood, sovereignty, nationality, or even diplomatic protection.

All the territories included in these two categories were former German colonies that were ceded by Germany in the Treaty of Versailles. It had several articles that bore directly or indirectly on the subject of nationality and protection.

Article 119 stipulates that:

Germany renounces in favor of the Principal Allied and Associated Powers all her rights and titles over her overseas possession.

Article 127 stipulates that:

The native inhabitants of the former German overseas possessions shall be entitled to the diplomatic protection of the governments exercising authority over those territories.

B. The Doctrinal Controversy

The omissions, the ambiguities and the undertones in these texts gave place to grave doubts as to the solutions to such problems as those of title, sovereignty, and nationality.

In addition, several terms have been used in reference to the inhabitants of these territories that had no precise legal significance. For example, such terms as inhabitants of Mandated territories, indigenous population (indigènes), natives, or people under Mandate were used on different occasions.

Several theories were advanced as to sovereignty. One approach considered that sovereignty lies in the Mandatory38 relying on such evidence as the use in article 22 of the Covenant of different terms in referring to inhabitants of Mandated territories of different Classes; the "integral administration" clause in article 22, paragraph 6; articles 117 and 127 in the Treaty of Versailles. To these were added the analysis and the conclusion that Class "B" and "C" Mandates did not differ in their essential elements from annexation.

Another approach contended that sovereignty was shared or

A third approach considered sovereignty as residing in the League of Nations. Still another one considered that sovereignty resided in the Principal Allied and Associated Powers. There had also been many theories that attributed sovereignty to the inhabitants. This sovereignty was either unqualified or qualified as virtual, suspended or limited. Finally, one theory negated the existence of sovereignty in Mandated territories.

The Mandates system as such, was characterized as a mandatum, a trust, an international public service, a system of guardianship (Tutelle), and a sui generis system.

The impact of this controversy on the question of nationality is obvious, as the answer to it depends on the theory of sovereignty one adopts. If sovereignty resided in the League of Nations, we would have a peculiar situation where the Mandated people would belong to an entity that is neither a state nor a super state, thus having no proper nationality. Furthermore, the League did not have the necessary diplomatic relations to discharge their international affairs. Also, there was no real link between the League and these people, except that of supervising the actual administration.

The thesis that sovereignty resided in the Mandatory would have entailed the extension of its nationality to the inhabitants of the Mandated territory. One writer summarized the case against this thesis in the following argument:

1. Nationality is extended only by annexation. Even a protectorate does not lead to such a result. It is highly doubtful that annexation took place in this case, because in both the Treaty

39. Lauterpacht, Private Sources and Analogies of International Law §86 (Residing in the League but exercised by the Mandatory) (1927); Wright, Sovereignty in the Mandates, 17 Am. J. Int'l. L. 691 (Residing in the Mandatory, but used with the consent of the League) (1923).

40. I Fauchille, Traite de Droit International Public 849 (Partie II) (1925).

41. Stoyanovsky, op. cit. supra note 14, at 83 (He uses the qualification virtual); Pelichet, La Personnalité International Distincte des Collectivités Sous Mandat 108 (1932).


of Versailles and the Treaty of Lausanne, every time there had been a case of annexation and transfer of sovereignty, an explicit stipulation was included to the effect of changing nationality ipso jure. Nothing of this kind was mentioned in the case of the Mandated territories.

2. Article 127 of the Treaty of Versailles on the diplomatic protection stated an exception rather than confirm a rule, as it would have been meaningless if nationality had been changed to that of the Mandatory.

3. It would be contrary to the spirit of article 22 of the Covenant which gave the impression that the aim of the system was the emancipation in the future of these people from their state of dependency. Moreover, it would be inconsistent with the supervision system and the right of petition, or at least, it would weaken them to the point of insignificance.44

This leaves us with two alternatives: either the inhabitants of Mandated territories did not have a nationality at all, or they had one of their own. The second solution was advocated by those who attributed sovereignty to the inhabitants.

C. The Controversy in the League of Nations

The question was brought to the League in relation to the German population in South West Africa. The Union of South Africa wanted to confer on them the British nationality by law. General Smuts, South African Prime Minister at the time, claimed that "in effect, the relations between the Southwest protectorate and the Union amount to annexation in all but name."45 He offered afterwards to make them citizens by a general act which would provide the opportunity of individual refusals.46

In its first session in 1921, the Permanent Mandates Commission could not reach a decision on the issue, in its discussion of the South African report. The Council of the League, according to the suggestion of the Commission, appointed a subcommittee of the Commission to study the subject and obtain the opinions of the different Mandatory Powers. This was done mainly through individual interviews.

The answers by the Mandatory Powers were revealing. Britain considered that neither the Mandate nor the "integral administration" clause affected the nationality of the inhabitants.47 The

44. Stoyanovsky, op. cit. supra note 14, at 90-93.
45. Permanent Mandates Commission, Minutes, II, 67 (1920).
Japanese representative considered it "contrary to the spirit of Article 22 to assimilate the inhabitants of mandated territory to the subjects of the Mandatory Power." but that "they should be accorded every advantage granted to the subjects of the Mandatory Power," and since they "occupied a new position in international law they ought to receive a new legal status.\textsuperscript{48} The representatives of the Dominions of Australia and New Zealand considered the natives as "British protected persons."

The only exception to that general trend was the Belgian attitude as expressed in a memorandum which read partly:

\begin{quote}

The nationality of an individual is the bond which makes him a dependent of a particular state. By Article 119 of the Treaty of Versailles this bond no longer exists between the natives of the Ruanda-Urundi region and the German Empire. Neither such a bond exist between these natives and a hypothetical Ruanda-Urundi State, or between them and the Five Principal Allied and Associated Powers, or the League of Nations.\ldots [I]t would appear that it is between the Belgian State and the native peoples that the relations which determine nationality should be established.\textsuperscript{49}
\end{quote}

This attitude, it was also argued by the Belgian Colonial minister, was necessary to enable Belgium to discharge its duty, of diplomatic protection as envisioned by article 127 of the Treaty of Versailles. But he was reminded that this would impose limitations of the right of petition, and the international supervision machinery created by the Covenant, and in its final written remarks, Belgium adhered to the general attitude.\textsuperscript{50}

The subcommittee prepared a report on the basis of which the Permanent Mandates Commission submitted to the Council of the League its final recommendations. They were discussed in the Council and the following, slightly changed version of them, were adopted on April 23, 1923:\textsuperscript{51}

\begin{quote}

The Council of the League of Nations. . .

Resolves, as follows:

(1) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the Mandatory Power and cannot be identified therewith by any process having general application.
\end{quote}

\textsuperscript{48} Id. at 592.

\textsuperscript{49} Id. at 607.

\textsuperscript{50} Ibid.

(2) The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by reason of the protection extended to them.

(3) It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalisation from the Mandatory Power in accordance with arrangements which it is open to such Power to make, with this object, under its own law.

(4) It is desirable that native inhabitants who receive the protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the Mandate.

This resolution decided the question in part only. It is negative in character. It made it abundantly clear that the inhabitants of the Mandated territories did not acquire the nationality of the Mandatory. But on the other hand it did not pass on their national status, and left it as ambiguous as before. In this regard the recommendations proposed by the Permanent Mandates Commission were superior to the Council's resolution. They suggested in paragraph 2 that:

A special law of the Mandatory Power should determine the status of the native inhabitants, who might be given a designation such as 'administered persons under mandate' or 'protected persons under mandate,' of the Mandatory Power.

Paragraph 4 of the resolution considered it desirable to give them a designation by some form of descriptive title, but it did not require it to be by a law which treated the subject of their status exhaustively.

D. Practice

The general principles became somewhat clearer after this resolution, but still remained the difficult problem of applying them in concrete.

In the Mandated territories under Britain and the then British Dominions of Australia and New Zealand, the inhabitants were considered "British protected persons," not British subjects, and as such they were put in the same position of the inhabitants of the protectorates. For the African Mandates, the description used on passports was "British protected person, native of the Mandated territory of British Cameroons, British Togoland and


Tanganika. This did not clarify the situation, as "British protected persons" was a loose label given to different categories of persons, but it conveyed the general idea of the "external, as distinct from the domestic, aspect of nationality." But they had to register as aliens in other British Countries.

There was no effort to regulate the internal national status in these Mandated territories on a comprehensive basis. The "British protected persons" were entitled to diplomatic protection. Where the then Dominions of Australia and New Zealand did not have diplomatic relations, the diplomatic protection of the inhabitants of their Mandated territories was exercised by Britain.

The inhabitants of the territories under French Mandate were designated as "administrés sous Mandat français" or "administrés français." The terms "protégés" and "indigènes" or indigènes sous Mandat were also used. These nominations did not solve any problem either, and no exhaustive law determining the national status of the inhabitants of these territories was passed, although there had been an attempt to create a political status for Togoland, including the creation of a Togolese nationality, that did not materialize.

In the Japanese Mandated Pacific islands the inhabitants were called "habitants des îles," and in the Belgian Mandated territory of Ruanda-Urundi "les ressortissants de Ruanda-Urundi" again without providing any regulation even for the internal nationality in these territories.

The Resolution of the Council of the League stated in paragraph 3 that it is not against the principles included in paragraphs 1 and 2, for the Mandatory to make arrangements for individual naturalization by the inhabitants of the Mandated territories. The whole issue was brought to the League because of the efforts of the Union of South Africa to impose the British nationality on the German

57. Professor Lampué makes the distinctions between the "administrés" and the "protégés" on the basis of the relation between France and their territories. One is a Mandate, and the other is a Protectorate. He considers a concept of "administrés" as an innovation in international law. Lampué, supra note 14, at 58.
inhabitants of the Mandated territory of South West Africa. The Council passed a resolution prior to the one that included the general principles, permitting the Union of South Africa, because of the exceptional circumstances of the case, to pass a general naturalization act, with the individual right to decline. By an Act No. 30 for 1924, the Union effected the automatic naturalization of Europeans (of late enemy nationality) domiciled in the South West Africa territory, unless they signed a written declaration that they did not desire to be so naturalized.

Other Mandatories relied on paragraph 3 of the Council's resolution to facilitate the naturalization of inhabitants of Mandated territories. The New Zealand British Nationality Act of 1928, provided for a system of local naturalization for those native inhabitants of Western Samoa who could not comply with the condition of adequate knowledge of the English language. A special decree was issued in France in 1930 to facilitate the acquisition of French nationality for the inhabitants of the French Cameroons and Togoland.

In 1927 the Union of South Africa passed the Union Nationality and Flags Act, which imposed the South African nationality on all British subjects within the jurisdiction of the Union. The Germans who received the British nationality by the 1924 Act were dissatisfied and the matter was discussed in the 16th session of the Permanent Mandates Commission, as an issue of imposition of nationality. The discussion revealed that the nationality was not imposed on the native inhabitants, but on those who were already British subjects, including the naturalized Germans by their consent (by not exercising their privilege to decline within the given period). The issue was then whether the narrower nationality could be imposed on them in addition to the larger one that they accepted previously.

The South African courts were more willing to assimilate the Mandated territory and its people to the Mandatory and its nationals, than the courts of other Mandatories. In one case, for the purposes of judicial jurisdiction and the effects of judgments, South West Africa was considered a part of the Union, and the judgments


63. Note, Nationality in Mandated Territories, supra note 61, at 150.
rendered by its courts as national judgments. In another celebrated case Christian v. Rex, the Supreme Court of South Africa considered that the Mandatory had enough "magestas" in the Mandated territory Class "C", to require from the inhabitants allegiance that might render them liable for treason.

Courts of other Mandatories were more reserved in their attitude. In one Australian case, birth in a Mandated territory was not considered enough to entitle the person to the nationality of the Mandatory. An in another Australian case, the Mandated territory was considered out of the dominion in which the Crown had jurisdiction.

Here, as in the case of Class "A" Mandates, the courts did not provide any general criterion of separation, but just ad hoc solutions to partial problems. However, the principle of the separation of the two nationalities had been well established. This principle is still relevant today in that it is a strong legal basis to challenge and resist the attempts of the Union of South Africa to absorb the Mandated Territory of South West Africa, and to recognize on the international level certain rights of the inhabitants of the Territory vis-a-vis the Union of South Africa.

IV. THE TRUSTEESHIP SYSTEM UNDER THE CHARTER OF THE UNITED NATIONS

In spite of the controversy that took place under the Mandates system about the issues of sovereignty and nationality, the Charter of the United Nations does not treat or refer to them in Chapters XII and XIII which deal with the Trusteeship system. Thus, these issues remain unsettled. They have not been treated adequately by what has been written about the Trusteeship system as yet. Perhaps the assumption is that they have been solved long ago. But as it is clear from the previous discussion, these were not solutions but


It might be interesting to mention in relation to allegiance that the Mandatories were barred by the instruments of Mandate from imposing military service on the inhabitants. Military service is considered the main sign of allegiance.


proposed solutions, although they have different weights as authority. Moreover, it is not clearly established that they could be extended to the new system.

A. Are the Rules Developed Under the Mandates System Applicable to the Trusteeship System?

Everybody would agree that the new system is historically and logically "the extension of the former Mandates system." The difficulty arises as to the existence of a legal connection between them. Is there a legal succession between the Mandates system and the Trusteeship system?

Professor Kelsen answers this question negatively on the basis that the former Mandates expired before the new Trusteeship agreements came into force. But this argument does not hold if one adopts the view that the Mandates instruments were dispositive and thus creative of real rights. Moreover, the International Court of Justice in its advisory opinion on "the International Status of South West Africa" upheld the view that the Mandate continued to exist after the liquidation of the League.

The other arguments used by Professor Kelsen and others are more relevant, and could be summarized as follows:

(1) It is true that article 77 of the Charter uses the words: "The Trusteeship system shall apply to such territories," but it is followed by the conditioning language: "as may be placed therein by means of Trusteeship agreements." Thus, the application of the new system to the Mandated territories mentioned as the first category in article 77 is not automatic. The article is only permissive. A trust agreement with the Mandatory is necessary. Article 77, paragraph 2, makes this even more obvious.

(2) The Assembly of the League of Nations in its last meeting adopted a resolution on April 18, 1946, on Mandates, paragraph 4 of which stipulated that:


71. Kelsen, op. cit. supra note 69, at 600. At the San Francisco Conference, the Egyptian delegate introduced an amendment to delete the words "subsequent agreement" from article 77 to give it an automatic effect, but this amendment was rejected. Hall, op. cit. supra note 1, at 273.
The Assembly....

4 - Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory powers. 72

It is obvious that there is no automatic succession as long as new arrangements have to be made.

(3) The International Court of Justice in its advisory opinion on "the International Status of South West Africa" alleviated any doubt which could have been left. It explicitly considered that the Mandatory Power was not under the obligation of putting the Mandated territory under the Trusteeship system, but that its obligations as Mandatory did not expire by the liquidation of the League. 73

The negation of automatic ipso jure succession should not be interpreted so as to sever all connections between the two systems. The relationships and similarities between them are quite obvious.

Even without legal automatic succession, a good case could be made to the effect that the legal regime developed under the Mandates system shall apply to the Trusteeship system, as long as it is not in conflict with Chapters XII and XIII of the Charter, or with the Trusteeship agreements.

The following arguments can be made on behalf of this solution:

(1) Although the envisioned scope of the Trusteeship system is wider than that of the Mandates system, the former Mandated territories are the first category to which it applies. In fact, it did not apply to any but former Mandated territories. The one Mandated territory that was not placed under the Trusteeship system, namely South West Africa, is still considered under Mandate, and supervised by the United Nations.

(2) The Resolution of the Assembly of the League of Nations of April 18, 1946, concerning Mandates, states the legal similarities of the two systems very explicitly in paragraph 3.


The Assembly....

3 - Recognizes that, on the termination of the League's existence, its functions with respect to the Mandated territories will come to an end, but notes that Chapters XI, XII, and XIII of the Charter of the United Nations embody principles corresponding to those declared in article 22 of the Covenant of the League.

(3) Both the Mandates system and the Trusteeship system are de novo institutions in international law, they are both based on the principle of the "sacred trust" and apply it through a system of international accountability for the administration of dependent territories. They are also similar in most of their details.

(4) Article 80, paragraph 1 of the United Nations Charter stipulates that:

Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

It could be argued that to the extent that the trusteeship agreements do not deal with the questions under consideration, this stipulation extends the solutions elaborated under the Mandates system to the Trusteeship system, as long as it embraces an ex-Mandated Territory.

It could easily be stated that, under such circumstances, the legal regime developed under the former can be applied by analogy to the latter. The logical, if not the legal, succession is too strong. No international tribunal would hesitate or find any difficulty in doing that.

B. Nationality and Diplomatic Protection in Trust Territories

If the above conclusion is accepted, then the solutions that were proposed under the Mandates system in this regard could be drawn into the sphere of the Trusteeship system. This does not give much comfort beyond stating the general principles.

Even if the legal regime developed under the Mandates system is not applicable under the Trusteeship system, the same general principles could be reached.

The Charter does not deal with the problem, nor do eight of the Trusteeship agreements. Two of the agreements, however, have articles dealing with it. In the Trusteeship agreement for the
Pacific Islands under the United States administration, article 11 stipulates that:

1 - The Administering Authority shall take the necessary steps to provide the status of citizenship of the Trust Territory for the inhabitants of the Trust Territory.

2 - The Administering Authority shall afford diplomatic and consular protection to inhabitants of the Trust Territory when outside the territorial limits of the Trust Territory or the Territory of the Administering Authority.\(^{74}\)

Also in the Trusteeship agreement for the Territory of Somaliland under Italian administration, in the Annex entitled "Declaration of Constitutional Principles," which is considered an integral part of the agreement, article 1 stipulates that:

The sovereignty of the Territory is vested in its people and shall be exercised by the Administering Authority on their behalf and in the manner prescribed herein by decision of the United Nations.

Article 2 also stipulates that:

The Administering Authority shall take the necessary steps to provide for the population of the Territory a status of citizenship of the Territory and to insure their diplomatic and consular protection when outside the limits of the Territory and of the territory of the Administering Authority.\(^{75}\)

It could be argued that the principles embodied in these articles apply to the other Trust territories because of the following reasons:

(1) Under the Trusteeship system, and contrary to the Mandates system, there is only one category of Trust Territories. Thus, the general rules developed for one, are applicable to the others, unless they are dealt with explicitly in the instruments of Trusteeship, in a different manner.

(2) It could not be argued that the establishment of a national status depends only on the extent of social, economic, and political development, because Somaliland and the Pacific Islands can easily be considered the limiting cases on that scale, with the rest of the trust territories falling in between.

\(^{74}\) U.N. T.S. 189.

The two agreements that dealt specifically with the national status of the inhabitants are chronologically the last ones. It could be inferred that the articles were included as an afterthought, expressing what had been assumed all the time. Moreover, these two agreements were more elaborately prepared because of their special circumstances; the Pacific Islands being the only strategic area Trust territory, and Italy not being a member in the United Nations when the Trusteeship agreement was adopted.

C. Practice

The establishment and functioning of the Trusteeship system were not free from conflict of interests. The egoism of the Administering Authorities manifested itself in relation to several issues: the deletion of the neutrality clause from the Trusteeship instruments; the creation within the Trust territories of the new category of strategic-areas; the addition of self government as an alternative to the goal of independence; and the whole controversy over the administrative unions.

The United Nations, in dealing with problems related to Trust territories, has always taken the attitude of emphasizing their distinct existence. In several resolutions by the General Assembly, according to the recommendations of the Trusteeship Council, "[a]ttainment by the Trust Territories of the objective of self-government or independence", 77 was emphasized. In other resolutions, it recommended the "[p]articipation of the indigenous inhabitants of the Trust Territories in the work of the Trusteeship Council." 78 It also emphasized that administrative unions "must remain strictly administrative...and that its operation must not have the effect of creating any conditions which will obstruct the separate development of the Trust Territory....as a distinct entity." 79

76. Johnson, Trusteeship: Theory and Practice, 5 British Yearbook of World Affairs 221 (1951).


The internal organization of the national status differs from one Trust territory to another.

A) In the Trust territory of the Pacific Islands under United States administration, there was no specification of the status of the inhabitants until December, 1952. The inhabitants were referred to unofficially as "citizens of the Trust territory." On December 22, 1952, the High Commissioner signed the Code of the Trust territory of the Pacific Islands. Section 660 of the Code specifies those who are considered citizens of the Trust territory. The Code also provides for the granting of a "permanent resident" status to immigrants, but it does not provide for naturalization.

B) In the Trust territory of Somaliland under Italian administration, there had been no law of nationality until December 1, 1957. Until then, the Administering Authority considered as originaires de la Somalie (a qualification used in passports and other official papers) all persons who did not possess a foreign nationality and who were born and resided in the territory, or who had resided in the territory since 1940.

A draft law of citizenship had been under consideration since 1951, however. It materialized in the form of the Citizenship Law No. 2 of December 1, 1957, which came into force on February 1, 1958. According to this law, Somali citizenship was conferred upon all persons: 1) whose father was a Somali originating from the Territory; or 2) whose father was a Somali not originating from the Territory and who, prior to the entry into force of the law, should have established fixed residence in the territory.

The Advisory Council noted that that law dealt only with the nationality of origin (at birth) but lacked provisions regarding naturalization, and drew the attention of the Administering Authority to the necessity of filling this gap. This was done in the new law on citizenship, adopted by the Legislative Assembly in February, 1960, to replace Law No. 2 of December 1, 1959.
Somaliland achieved its independence on July 1, 1960.  

C) In the Trust territory of Ruanda-Urundi under Belgian administration the inhabitants are referred to as "indigènes de Ruanda-Urundi." This term is not defined by law. In 1925, a law extended to them the status and rights granted to the inhabitants of the Belgian Congo before its independence on June 30, 1960. But within these confines, the status is not unified. "Indigenous inhabitants may be enrolled on the registers of the "civilized population" (Europeans, but not necessarily Belgians) and are then fully assimilated in legal matters to non-indigenous persons; moreover holders of civic merit cards are assimilated to non-indigenous inhabitants in some particular aspects."86

When the 1957 Visiting Mission discussed with the Administration the question of the institution of Ruanda-Urundi citizenship, it was informed that the indigenous elite would find it hard to agree to "Ruanda-Urundi" nationality and would demand two separate nationalities.87

The Trusteeship Council, in its 19th session, recommended the progressive abolition of these juridically distinct classes and sections, and the unification of the status of all inhabitants. In its 21st session, it also recommended "the adoption of a national name and national symbols acceptable to all inhabitants, as a means of promoting national unity, and defining more precisely the status of the inhabitants."88 The Territory is expected to achieve independence in the first half of 1962.89

D) The trust territories of the Cameroons and Togoland under French administration were considered "territories associés" under article 60 of the Constitution of the Fourth Republic. By that, they were considered a part of the French Union, and their inhabitants as citizens of the French Union. This created the impression of a mass automatic naturalization, specially as they were represented in the Union Parliament. The issue was clarified by distinguishing between the French nationality proper and the citizenship of the French Union. The former is exclusive, while the latter may coincide with another nationality or national status. Thus the inhabitants of the trust territories were citizens of the

85. Id. at 86.


88. Ibid.

French Union but not French citizens, and as such, they did not have the obligation of military service (which is prohibited by article 84 of the Charter). Their narrow national status was described as "administrés français." The situation was altered once more by the promulgation of the loi-cadre of June 23, 1956, which permitted a large amount of autonomy within the French Union. Under this law, two decrees dealing with the status of the Cameroons and Togoland were issued, thus transforming them to Trust States within the French Union. In each there is one article that establishes citizenship for the inhabitants of the territory (Togolese or Cameroonian). Another article guarantees them all the rights attached to French citizenship whether political, civil, civic or social, and guarantees in return, all rights attached to Cameroonian or Togolese citizenship to French citizens in the Cameroons or Togoland. Also there is an article to the effect that they are not required to serve in the French army but that they can volunteer.

The Constitution of the Fifth Republic creates the French Community to replace the French Union. The situation of the Trust states is not different under it. Although the distinct nationality has thus materialized, it is not clear, especially with such a fusion of rights attached to citizenship, where to draw the dividing lines.

In fact, the Legislative Assembly of the Cameroons adopted a resolution on June 12, 1958, in which it requested the French Government to amend the Statute of April 16, 1957, so as to recognize the option of the State of the Cameroons for independence upon the termination of the trusteeship, and to transfer to it all powers relating to the conduct of its domestic affairs. All the proposed changes were accepted by the French Government except for the one which would exclude from the rights granted to French and Cameroonian citizens their participation in the elections and in political and communal activities in each others' country.

The Trust Territory of the Cameroons under French administration achieved its independence on January 1, 1960.

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93. Ibid.
of Togoland under French Administration on April 27, 1960.\textsuperscript{94}

E) In the Trust territories under the United Kingdom, New Zealand and Australian administration, the inhabitants were all considered British protected persons until the British Nationality Act of 1948. The term is not very clear. It refers in a vague way to the external aspects of nationality. Moreover, British protected persons were considered by some as a category of British nationals,\textsuperscript{95} although in the municipal law they were considered aliens.

The British Nationality Act of 1948 gave more precision to the concept, by limiting it to certain classes of persons including the inhabitants of Trust territories. The British Protectorates, Protected states and Protected persons Order in Council of 1949, which follows closely the British protected persons Order in Council of 1934, provides the details, including schedules of the territories to which it is applicable. The third schedule extends it to the Trust territories of Tanganika, Cameroons under United Kingdom Trusteeship and Togoland under United Kingdom Trusteeship.

The Order provides the criteria of acquiring this status. It distinguishes the British protected persons from aliens in that they are not considered aliens for the purposes of the nationality law; they are not subject to certain alien disabilities and they are eligible for naturalization on more favorable terms than those applicable to other aliens.\textsuperscript{96} These aspects that increase the fusion of the two statuses do not help in clearing the confusion in many of the vague areas.

The internal status of the inhabitants of these three Trust territories has not been regulated at all, again adding to the confusion.\textsuperscript{97}

The Trusteeship of the United Kingdom over Togoland came to an end on March 6, 1957 upon its joining the Gold Coast in the independent state of Ghana. The Trusteeship over the Cameroons came to an end on June 1, 1961, when the Northern Cameroons joined the Federation of Nigeria as a separate province of the Northern Region of Nigeria; and on October 1, 1961 when the Southern Cameroons joined the Republic of Cameroons (formerly under French

\textsuperscript{94} Id. at 107.

\textsuperscript{95} Parry, \textit{op. cit. supra} note 55, at 12, 89.


Trusteeship). Tanganyika is to achieve independence on December 9, 1961.97

The British Protectorates, Protected States and Protected Persons Order in Council of 1949 does not deal with protected persons by virtue of connection with a Commonwealth territory.

The Trust territory of New Guinea is under the administration of Australia. Nauru is theoretically under the combined Trusteeship of the United Kingdom, New Zealand and Australia, but it is administered by Australia. The inhabitants of these territories are "Australian protected persons." The meaning of the term is identical to that of the British protected persons. The inhabitants of Western Samoa under New Zealand Trusteeship are "New Zealand protected persons" in the same way.98

In these territories, however, some steps were taken to regulate the internal status of the inhabitants. An ordinance dealing with the definition and grant of the "membership of the Nauruan Community" was promulgated in August, 1956, but commencement has been defined at the request of the Nauru Local Government Council.99 In Western Samoa, the Samoan Status Committee recommended the adoption of a Western Samoan Citizenship Legislation, and outlined its substance. The Working Committee completed this task and the 1959 Visiting Mission discussed the draft and proposed some changes which were accepted with few exceptions. The Legislative Assembly adopted on September 8, 1959, the Ordinance on Western Samoan Citizenship.100

Within the category of Samoan citizen, however, there were two categories of domestic status, namely Samoan and European. This distinction was basically relevant as concerns the electoral system, the ownership of land, and Samoan titles. The 1959 Visiting Mission remarked that it would be very difficult to maintain this distinction after the creation of a unified citizenship. It, also, recommended the elimination of all distinctions of status based on

98. Parry, op. cit. supra note 55, at 561 (for Australia), 654 (for New Zealand).
99. Australia, Report on the Administration of Nauru 1956-1957, at 11 (1957). The situation of Nauru has been complicated by its economic situation. It is dependent almost completely on its phosphates production, the deposits of which are expected to be exhausted in 40 years, which makes resettlement a real possibility for its inhabitants. See id. at 12, 60. In this case, it is difficult to go on with the creation of a complete national status which might have to be destroyed later on as a result of resettlement and integration in another country.
If some distinctions had to be kept, however, they should be limited to the field in question, and left to the free choice of the individuals concerned. This solution was adopted by the Constitutional Assembly.101

Western Samoa is to achieve independence on January 1, 1962.102

There is almost no case law on the subject under the Trusteeship system.103 One factor becomes obvious, however, from the study of the Trusteeship system. Several of the Trust territories are in the tribal or pre-nation stage. Some of them are multi-racial and in most of them there is some European settlement. The United Nations, in dealing with them, is trying to orient the Administering Authorities in the direction of creating the favorable and encouraging circumstances for national cohesion that would enable these societies to become states in the modern sense of the word, without having to undergo upheaval and crisis at the end of the Trusteeship. It is thus encouraging the adoption of a national name for the people of Ruanda-Urundi and New Guinea to create the feeling of national identification and the elimination of separate representation and the development of an inter-racial outlook in Tanganika. It is thus, trying to create the sociological basis of attachment between the individual and the community, that once legalized, is called nationality.


103. Few decisions by U.S. Courts have some relevance to the subject under study. The United States District Court, District of Hawaii held that for the purposes of naturalization, a trust territory as the Pacific Islands was not considered part of the United States. Application of Reyes, 140 F. Supp. 130 (1956). The same court held in another case that "Kajalein Island, as part of a Trust Territory," was "primarily under the sovereignty and jurisdiction of the United Nations," and was accordingly "foreign territory for immigration purposes." Aradanas v. Hogan, 155 F. Supp. 546 (1957). In a third case, Kwajalein Island was held to be "foreign country" within the meaning of the U.S. Federal Tort Claims Act. Callas v. United States, 253 F. 2d 838 (2d Cir. 1958), cert. denied, 357 U.S. 936 (1958).


105. Id. at 1.
D. The Framework

From the previous survey it is possible to construct a skeleton framework of the problem and the orientation of the solutions. The general lines of this framework could be summarized as follows:

1. The inhabitants of a Trust territory are not nationals of the Administering Authority.

2. The Administering Authority extends to them its diplomatic protection.

3. The inhabitants of the Trust territories should have, according to the legal regime applicable to the Trusteeship system, a nationality of their own which is regulated in such a way that it defines its scope and effects. However, this solution has not always been adopted.

4. Where there is no national status at all because of the stage of development of the society, the immediately needed efforts are in the extra-legal fields, as a pre-requisite to the introduction of the elaborate legal organization of the modern state.

5. Legal elaboration (on the legislative level) is needed most where the inhabitants have an external status but no internal one, such as the "British protected persons" under the Trusteeship of the United Kingdom.

6. In all cases, it would be a wise policy to determine the respective effects of the internal status and the external protection, especially as regards such consequences of nationality as rights and privileges attached to nationality, and the applicable law and the competent jurisdiction in conflicts when they are based on nationality. Perhaps the best way to do it is by enumerating the consequences of one status, preferably protection as it is supposedly provisional until self-determination, and attributing all the remaining consequences of nationality to the other status.

V. BEYOND PRACTICE: SOME CONCLUDING THEORETICAL REMARKS

Before concluding, it is necessary to tackle a question the answer to which was assumed throughout the exposition. This is by no means an attempt to answer it definitively or even to deal with it exhaustively. It is just to draw attention to its existence, and to the fact that it has been assumed away in most of the treatments of the subject. The question simply is: Can there be a nationality for the inhabitants of Trust territories under the existing concepts of international law? Can any of the links and relationships between the inhabitants and the Trust territory, the Administering Authority, or the United Nations fit into the notion of nationality according to present conceptions?
Nationality has been given many definitions, they all revolve around the idea of relating a person to a state. The Harvard Research Draft Convention on Nationality defines it as "the status of a natural person who is attached to a state by the tie of allegiance." But in the general comments it is mentioned that nationality "connotes...membership of some kind in the society of a state or a nation." Thus an alternative to the state is provided. On the other hand, some define it as a "legal relationship between the sovereign state and the citizen," and consider its fundamental basis the "membership of an independent political community." According to this definition, nationality requires not only a state but an independent state.

It is very important in this regard, not to confuse the legal and the sociological meanings of the term. Nationality in the legal sense is a link that has legal consequences between a person and a politico-legal organization. This organization in the present stage of development of the world, usually coincides with the sociological unit called the nation, but it does not have to be so. However, without a nation satisfying a certain minimum of national cohesion and specialization of functions it is impossible to develop, and in some cases even to impose, the politico-legal organization that makes it a subject of international law and bestows on its members the legal status of nationals from the point of view international law. It has been mentioned before, that in certain Trust territories, efforts are made to achieve this minimum of cohesion and specialization of functions. To have a state and a nationality, the sociological basis of attachment is a necessary condition, but it is not the only one. A transformation of the social realities into the legal order is also necessary.

Even if we have a politico-legal organization in a society and even if it establishes legal links with its members, this is not enough to characterize such links as nationality in the legal global (internal-external) sense. Again, a certain minimum in both the politico-legal organization and in the links it creates with its members, is necessary.

To specify these minima, it is necessary to examine the nature, scope, and effects of the legal concept of nationality. The external aspect of nationality is basically protection, diplomatic,

109. Hall, op. cit. supra note 1, at 79; Boutant, op. cit. supra note 7, at 182.
consular, and/or otherwise. But this general rule affords exceptions in both directions. In certain situations, states extend their diplomatic protection to non-nationals, and in other situations they withhold protection from their nationals.

In addition to protection, nationality has other manifestations on the international level such as the assertion of jurisdiction on the basis of nationality, the refusal to extradite nationals, the determination of enemy status in time of war, and the attribution of responsibility to the state for the acts of its nationals.

The internal aspect of nationality is the bond of allegiance and what it entails: political rights, military service, rights attached to nationality... etc. Within the internal sphere of nationality there is room to distinguish between nationals who are citizens and enjoy thus all the political rights and nationals who are subjects, and as such, do not enjoy these rights.

These two elements of nationality have been separated in certain cases. The Proteges and the British protected persons for example, enjoy the external element only. While, in certain areas where self government is guaranteed, only the internal element exists.

111. Borchard, Diplomatic Protection of Citizens Abroad 463-466 (1915).

112. 3 Hackworth, Digest 279-346 (1942).

113. Stark, op. cit. supra note 68, at 249.

114. Oppenheim, op. cit. supra note 18, 293; Harvard Research in International Law, op. cit. supra note 106, at 23; Mary, Contribution à l'Étude de la Condition Juridique des Territoires Sous Mandat de la Société des Nations 106 (1931); Bentwich, supra note 15, at 102. Bentwich considers that citizenship is allegiance to a state, while nationality is just belonging to a race or religion within the state, thus it has a narrower scope than citizenship (Bentwich, supra). He obviously confuses the sociological meaning of nationality with its legal meaning. The historical derivation of the terms is very indicative. Citizenship comes from the Greek institution of City-State, and emphasizes the participation the internal aspects like the participation in the public life of the city. Nationality does not emphasize these rights, but indicates the identification with the larger unit of the Nation-State which transcends the confines of the City-State.

115. Egypt, for example, in the period from 1880 to 1914, was nominally a part of the Ottoman Empire, but had a separate government with a separate army. The inhabitants were called "Egyptiens sujets local." Their internal national status was
It is not very clear to which extent either of these two situations would be considered as one of nationality. Some considered the British protected persons as British nationals, on the basis of protection. Thus, they reversed the reasoning, and established nationality on the basis of one of its consequences. It seems highly improbable, however, that a fragmented nationality concept would be accepted. Nationality means both elements tied together. It cannot be recognized as such in a situation where there is only one of them.

To have the international element, nationality has to be that of a sovereign state. Thus, nationality and sovereignty are two faces of a coin. Sovereignty might be limited, but once the limitation reaches the point of shutting the entity off the channels of international relations completely, it loses its identity as a subject of international law, regardless of the degree of its internal autonomy.

It is not easy, however, to determine what is the bare minimum that nationality has to satisfy on both the internal and international levels, in order to be qualified and recognized as such. One definitive rule in this regard is that the labelling of a certain status by the term nationality in a municipal legislation or an international instrument, does not by itself fulfil the minimum requirements of the institution of nationality.

Where does nationality in Mandated and Trust territories stand if we apply to it such a criterion? The obvious conclusion is that, with the exception of Class A Mandates, it does not exist in this legal sense. But we need not go that far. Law, being a complex of objective social rules, has managed to recognize and sanction future interests, rights and legal entities, if the probability of their materialization in the future justifies such a recognition and sanction.

Nationality in the legal sense, and a state of dependence are mutually exclusive. But if we can tie nationality with a future state of independence, it might be able to survive the actual state of dependence.

Article 1 of the "Declaration of Constitutional Principles" annexed to the Trusteeship agreement for Somaliland, adopts the theory of guardianship. It vests the sovereignty in the people of

regulated by several decrees for the purpose of defining those who are eligible for military service, elections, and government employment. See 1 Abdallah, Al-Qanun Al-Dawli Al-Masri (Egyptian Private International Law) 152-153 (3d ed. 1954).


Somaliland and the exercise of this sovereignty in the Administrating Authority under the supervision of the United Nations. This theory has been suggested several times,118 and is based on the distinction between "capacité de jouir" and "capacité d'agir." The former can exist without the latter, which entails that a person can exist as a subject of law, capable of acquiring rights, without being able to exercise these rights by himself. The divorce of the two is caused usually by minority, and is assumed to disappear at a certain stage, by the attainment of majority.

This analysis lead one recent writer to the conclusion that "[les territoires sous tutelle sont des personnes morales du droit international public sans capacité d'agir."119 With this characterization, it is possible to recognize a nationality in these territories, because the non functioning of its international aspect is considered as a transitional state of affairs that is bound to change.

It could be argued, however, that under the Mandates system, it was not clear that independence was the goal,120 and that under the Trusteeship system, self government is an alternative to independence. Attaining majority might not materialize at all.

This is a valid criticism. To avoid it, it is possible to develop an "Embryonic Theory" of sovereignty and nationality for Trust territories. To do that it is necessary to make use of the rule of probability. Under the Trusteeship system, one of the two goals, independence or self government, is supposed to be achieved within a reasonable time limit. In certain cases, there are even target dates for reaching the goal.

According to this theory, the materialization of the future entity is not certain, but its probability is such as to make the law recognize it and attribute to it status and rights in a precautionary way. The entity does not exist in fact, but by the construction of the law, and in anticipation of the future.

The law also attributes to the inhabitants an embryonic nationality which does not exist as yet, contrary to the guardianship theory, but to which the law attaches some aspects and consequences of nationality, because of the favourable probability of its coming into being in the future. But this attribution is just a precautionary and conditional measure. Like the embryo, if delivered alive, by achieving independence, the provisional international status and rights as to sovereignty and nationality become definitive retroactively. But if miscarried or born dead, by

119. Roche, supra note 90, at 413.
120. Van Rees, Les Mandats Internationaux 28 (virtual sovereignty and nationality) (1928).
an act of annexation or choice of self government under the sovereign-
ty of the Administering Authority, the provisional international
status and rights are considered as not having existed at all.

This tentative theory of Embryonic sovereignty and nationality
seems to accommodate the realities of the problem better than the
other proposed theories. It is by no means, a definitive one. The
whole area of nationality and international status of Trust terri-
tories under the theory of international law is far from being
exhausted. However, the writings on the Trusteeship system have been
dominated as yet by a descriptive and pragmatic attitude. In the
words of one of the adherents of the pragmatic school:

[t]he question of exactly where sovereignty over a
trust territory rests is being reduced to one of
sterility. Irrespective of where sovereignty may rest,
a practical method has now been worked out and approved
by the General Assembly for the placing of former
mandated territories under trusteeship; and trusteeship
may be lawfully terminated under the Charter by the
grant of self-government or independence for the trust
territory and its inhabitants.121

This argument is not persuasive. Theory is not a sterile
intellectual exercise. Theorization and systematization are
necessary, especially in the study of new social institutions, in
order to introduce structure and deduce consistent solutions in
filling their gaps or solving the problems they arouse.

Theory, however, does not work in a vacuum. It has to be
functional and purposeful, by taking into consideration the
objectives of the studied institution. In the case under study,
it is necessary to keep in mind that the purpose of the Trusteeship
system is to lead the inhabitants along the road of emancipation
from dependence and backwardness, and that the outcome of any
theoretical treatment of the subject should be consistent with this
goal.

121. Sayers, supra note 68. at 271-272.