THE ADMINISTRATION OF NEW GUINEA AND INTERNATIONAL OBLIGATIONS

I.

Australia administers the eastern part of New Guinea as the Territory of Papua and the Trust Territory of New Guinea. The two territories occupy the same position in municipal law, being treated as separate units with their own systems of laws, custom duties and taxes, but their international status and the international obligations concerning them differ. A brief outline of the history of New Guinea will explain these divergencies.

New Guinea was discovered early in the sixteenth century by Portuguese and Spanish sailors, but the first Power to annex territory on the island was the Netherlands which took possession of the western part of New Guinea in 1828. Although annexation of the balance of the island was at times advocated by the Australian Colonies, the British Government refused to be burdened with the responsibility for the administration until pressure of Australian opinion prevailed in 1884. Even then possession was taken only of the southern portion of the unoccupied part of the island; the northern portion and the adjoining island groups were annexed in the same year by Germany.

The British portion, under the name of British New Guinea, was administered by Special Commissioners as a Protected Territory until 4th September, 1888. From that date, under Letters Patent of 8th June, 1888, it became a British Possession, the control being shared by the British Government and the Colony of Queensland, acting also on behalf of the Colonies of Victoria and New South Wales.

By Letters Patent of 18th March, 1902, the Possession was placed under the authority of the Commonwealth, but until the appropriate Commonwealth law accepting the possession had come into force on 1st September, 1906, the Territory remained under the previous Letters Patent, except that the Commonwealth took over the powers and the responsibilities of the Colony of Queensland. The Commonwealth law, in the form of Papua Act 1905, changed the name of the Possession from British New Guinea to that of Papua.

S.122 of the Commonwealth Constitution makes provision for the Commonwealth to make laws for the government of any territory placed by the Queen under the authority of the Commonwealth and accepted by the Commonwealth. Since the Letters Patent of 18th

March, 1902, placed British New Guinea under the authority of the Commonwealth, and the Papua Act 1905 accepted it on behalf of the Commonwealth, the chain of authority is complete and the Commonwealth possesses full powers of sovereignty over the Territory of Papua.

The history of the Trust Territory of New Guinea was different. This portion of the island was a German Colony from 1884, and was administered first by a German private company and from 1899 by the German Government. On 11th September, 1914, the Territory was occupied by the Australian Military and Naval Expeditionary Force, and remained under military administration until 9th May, 1921. Despite the pressure for annexation by the Australian delegate to the Peace Conference, W. M. Hughes, the Territory shared the fate of other German overseas possessions and was put under the control of the League of Nations as a mandated territory. The Commonwealth, however, obtained full powers of legislation, administration and jurisdiction over the Territory. The status of the Territory was defined by a "C" type mandate, the terms of which were determined by the Council of the League of Nations on 17th December, 1920. The implementing Commonwealth legislation in the form of New Guinea Act 1920 was passed earlier and came into force on 9th May, 1921.

Under the mandates system, the problem of sovereignty over the mandated territories led to prolonged controversies and was not satisfactorily solved. Nevertheless, in the domain of international law, the powers of the Commonwealth to pass the New Guinea Act 1920 and to make other laws for the government of the Territory obviously result from its international status as a self-governing Dominion which was a signatory to the Treaty of Peace and a member of the League of Nations.

In municipal law, the power to make laws with extra-territorial operation, until expressly conferred by the Statute of Westminster, had to be based on the Constitution, and, although well-founded, was not explicit enough to prevent the formation of divergent theories. [1]

In World War II, Australian war legislation was extended to New Guinea, and on 14th February, 1942, the Papua and the New Guinea Acts were suspended. The administration of both Territories was jointly carried out by the Australian New Guinea Administration Unit of the Army (ANGAU). From 30th October, 1945, military control was gradually removed and was eventually entirely abolished on 15th June, 1946. The Papua-New Guinea Provisional Administration Act 1945 established civil administration for both Territories on a joint basis.

[1] The power was based on s. 122 and s. 51, pl. xxix, in *Mainka v. Custodian of Expropriated Property*, (1923) 34 C.L.R., 297. Dr. Evatt, in "British Dominions as Mandatories (Proceedings of Australian and New Zealand Society for International Law, Vol. 1, p. 40 ff.), preferred s. 51, pl. xxix, as a basis.

The mandatory regime was terminated and the Australian Government submitted to the United Nations a draft Trusteeship Agreement for the previous Mandated Territory of New Guinea. The Agreement was accepted by the General Assembly of the United Nations on 13th December, 1946. On 18th June, 1948, the Australian Government introduced in the House of Representatives a Bill to implement the Trusteeship Agreement.

II.

International obligations concerning the Trust Territory of New Guinea arise from the provisions of the Charter and of the Trusteeship Agreement. Those concerning the Territory of Papua arise from the declaration regarding non-self-governing territories, contained in Chapter XI of the Charter, which applies automatically.

The basic aims for both Territories are largely identical, but while the Trust Territory has an international status, and its administration is subject to control by the General Assembly of the United Nations and its subsidiary organ, the Trusteeship Council, the Territory of Papua remains under the sovereignty of the Commonwealth, and no procedure of international control is envisaged except the obligation to submit information on non-political subjects.

It appears that the declaration regarding non-self-governing territories contained in Chapter XI of the Charter applies also to the trust territories, since the purport of the trusteeship system is to constitute international control and to add some further-reaching objectives rather than to detract from the objectives of the Charter regarding non-self-governing territories. The wording of the Charter is unfortunate as Chapter XII repeats some provisions of Chapter XI, omits some, and substitutes different wording for others.

Article 73 of the Charter states that the Members administering non-self-governing territories

". . . recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligations to promote to the utmost, within the system of international peace and security established by the Present Charter, the well-being of the inhabitants of these territories . . . ."

The paramountcy of the promotion of the interests and the well-being of the inhabitants is unequivocal with the exception of considerations of international peace and security.

The term "inhabitants" is not defined and it may be interpreted as applying to all the inhabitants, or to indigenous inhabitants only. The meaning of the term under the mandates system was discussed by the Mandates Commission, but no definition was there reached. Grammatically it applies to all the inhabitants, both indigenous and immigrant, but protection for the indigenous inhabitants may be more in accordance with the spirit of the Charter.

The first basic objective enumerated in Article 76 of the Charter is "to further international peace and security." This undertaking results in the permission to "make use of volunteer forces, facilities and assistance" from the trust territory (Article 84 of the Charter) and

". . . . to take all measures in the Territory which it (the Administering Authority) considers desirable for the defence of the Territory and the maintenance of international peace and security" (Article VII of the New Guinea Trusteeship Agreement).

This contrasts with the prohibition of military training of the inhabitants and of military establishments under the mandatory regime.

The next basic objective mentioned in Article 76 is

"to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards 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";

This provision envisages:

(1) Political advancement, including progressive development towards self-government or independence. In this respect Chapter XII goes further both than the mandates system which envisaged independence for "A" type mandates only, and Chapter XI of the Charter which does not mention independence as the ultimate goal of political advancement of non-self-governing territories, but self-government only.

The New Guinea Trusteeship Agreement in Article VIII, para. 2(c) elaborates this duty by assuring to the inhabitants a progressively increasing share in the administrative and other services of the Territory.

(2) Economic and social advancement. More detailed economic and social objectives are enumerated in Article 73(d) of the Charter, being

". . . . to promote constructive measures of development, to encourage research, and to co-operate with one another and where appropriate, with specialized international bodies . . . ."

Provisions of Article 55 of the Charter, which may be in future further defined by the ECOSOC, have also application to the trust territories:

"(a) Higher standards of living, full employment, and conditions of social and economic progress and development;

"(b) Solutions of international economic, social, health and related problems."

Under the terms of Article VI of the New Guinea Trusteeship Agreement, the Australian Government undertakes to apply to the Trust Territory international agreements and recommendations of specialized agencies which, in its opinion, are suited to the needs of the Territory and conducive to the achievement of the basic objectives of the Trusteeship system. Moreover, the Agreement contains in Article VIII, para. 2, the following detailed undertaking:

"It (the Administering Authority) will, in accordance with its established policy—

(a) take into consideration the customs and usages of the inhabitants of New Guinea and respect the rights and safeguard the interests both present and future of the indigenous inhabitants of the Territory, and in particular ensure that no rights over native land in favour of any person not an indigenous inhabitant of New Guinea may be created or transferred except with the consent of the competent authority";

(3) Educational advancement. A more detailed programme will be prepared by the appropriate specialized agency, UNESCO. Educational and cultural advancement is mentioned also in Article VIII, para. 2(b) of the New Guinea Trusteeship Agreement.

The next basic objective mentioned in Article 76 is

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

Article VIII, para. 2(d), of the New Guinea Trusteeship Agreement enumerates the following fundamental freedoms: Freedom of speech, freedom of press, of assembly and of petition, freedom of conscience and of worship, and freedom of religious teaching. All these freedoms are guaranteed to the inhabitants of the Territory, subject only to the requirements of public order. This enumeration, however, cannot be regarded as exhaustive. Should the United Nations adopt a Bill of Human Rights which is more elaborate and advanced than the enumeration in the Trusteeship Agreement, this will apply to the Trust Territory by the force of Article 76(c) of the Charter. Therefore the definition of fundamental freedoms here cannot be regarded as more than an interim minimum measure.

The encouragement of recognition of the interdependence of the peoples of the world implies education in international affairs, particularly on the international status of the Territory.

The final objective mentioned in Article 76 (the "open door" clause) is

"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."

Under the mandates system, the "open door" clause was not similarly limited by considerations of international peace and security and of native welfare, but, according to the prevalent view accepted also by the Commonwealth of Australia, it was not applicable to the "C" class mandates. Consequently, if it comes into operation in the Trust Territory of New Guinea, it will be novel there. The traditional exclusion of Asiatic immigrants under the White Australia Policy, being in the interests of the natives, can be easily maintained, but the trade policy may be affected by the new obligation.

All the functions of the United Nations regarding trusteeship (with the exception of strategic areas) are exercised by the General Assembly, and the Trusteeship Council, operating under its authority, assists it in the carrying out of these functions (Article 85 of the Charter). Questions relating to the operation of the trusteeship system and the election of the members of the Trusteeship Council require a two-thirds majority of the Members present and voting. Under the League of Nations, mandatory supervision was not entrusted to the Assembly but to the Council, assisted by the Permanent Mandates Commission. Voting in the League of Nations Council required unanimity.

The actual supervision of the trusteeship system is carried out by the Trusteeship Council. Like the Permanent Mandates Commission in the League of Nations, it is only an advisory organ, but it plays a more important part in the United Nations machinery than the Mandates Commission did in the League of Nations. The constitution of the Trusteeship Council is contained in Chapter XIII of the Charter. In accordance with Article 87 the Council adpoted its Rules of Procedure on 23rd April, 1947.

The Trusteeship Council consists of the Members administering trust territories, non-administering permanent Members of the Security Council, and as many Members elected for three-year terms by the General Assembly as may be necessary to ensure the equality of the number of administering and non-administering Members (Article 86).

Article 87 of the Charter empowers the General Assembly and, under its authority, the Trusteeship Council, to use the following means of carrying out their functions under the trusteeship system: (1) Annual reports. [2] The annual reports are prepared on the basis of individual questionnaires for each trust territory which may be modified at the discretion of the Council. The Administering Authorities have the right to designate and have present a special representative who should be well informed about the territory. Such a representative has the right to participate without vote in the

[2] Articles 87 (a) and 88; Rules of Proceedure 68-75.

examination and the discussion of the report, except the discussion directed to the specific conclusion regarding it.

The idea both of annual reports based on questionnaires and of special representatives has been adopted from the mandatory system.

(2) Petitions. [3] The Trusteeship Council will be able to make greater use of petitions as a method of obtaining information than did the Mandates Commission. Under the mandatory regime all the petitions had to be addressed to the mandatory powers and oral petitions were not accepted. Now petitions may be addressed also directly to the United Nations or the Trusteeship Council representatives on official missions; moreover, oral petitions also are admissible.

(3) Visits to trust territories. [4] While the Permanent Mandates Commission had no rights of inspection, such rights were granted to the Trusteeship Council. They are not unlimited, since the time of the visit must be previously agreed upon with the Administering Authority.

The Rules of Procedure envisage both periodic visits which, according to a decision taken by the Council, will be made triennially, and, in agreement with the Administering Authorities, special investigations and inquiries, when the Council deems them desirable.

Article 87(d) empowers the organs of supervision to take also ". . . . other actions in conformity with the terms of the trusteeship agreements," but no other means of fact-finding or control were included in these or in the Rules of Procedure.

The main distinction between the obligations concerning trust territories and non-self-governing territories lies in their status. The former have a definite international status while the latter remain under the national sovereignty of the administering Powers. Consequently it appears that, although matters pertaining to the administration of non-self-governing territories form a legitimate object of discussion in the General Assembly, the Administering Powers may, if they deem it justified, invoke the provision of Article 2, para. 7, of the Charter, and claim the exclusion of any matters as lying essentially within their domestic jurisdiction.

Regarding non-self-governing territories, the Charter makes the following three departures from the provisions governing trust territories:

(1) The aim of political advancement is limited to self-government, while independence also is envisaged for trust territories;

(2) The "open door" clause is not applicable; and

[3] Article 87 (b); Rules of Procedure 76-93.
[4] Article 87 (c); Rules of Procedure 94-99.

(3) There is no system of international control, the only duty in this respect being the obligation stated in Article 73(e)

"to transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to the economic, social and educational conditions in the territories . . . ."

Any semblance of formal supervision is here carefully avoided. The information does not bear the formal name of report and is transmitted to the Secretary-General instead of the General Assembly or the Trusteeship Council; it is "for information purposes" only. Moreover, the information required is only statistical and technical, is subject to security and constitutional limitations, and does not include political topics.

The obligations under Chapter XI were broadly and rather loosely interpreted by some Members of the United Nations. Proposals were made for the establishment of a procedure for the examination of petitions, for the analysis of information on political progress, and even for a resolution calling on all Members administering non-self-governing territories to place them under the trusteeship system.

The procedure adopted by the General Assembly is as follows. A standard form has been adopted for the guidance of Members submitting information. The information transmitted is summarized and analysed by the Secretary-General and considered by an *ad hoc* Committee which reports to the General Assembly. Information on political subjects remains voluntary but is deemed to be in conformity with the Charter and is to be duly noted and encouraged. [5]

Official information will be supplemented by conferences of non-self-governing peoples which are to give expression to their wishes and aspirations. This institution is not based on the Charter but on a resolution of the General Assembly of 14th December, 1946, calling on Members to convene such conferences.

III.

Regarding the Trust Territory of New Guinea, the trusteeship system, which replaces the mandatory regime, retains the essential features of the latter: The Commonwealth remains designated as the sole administering authority of the Territory, and has the same powers of legislation, administration and jurisdiction, as if New Guinea were an integral part of its territory. [6] Moreover, the Commonwealth has been explicitly authorised to effect an administrative union of the Trust Territory with Papua, if in its opinion it would

[5] United Nations Weekly Bulletin, Vol. 111, No. 7, p.225; No. 11, pp. 336-37; No. 18, pp. 574-76; No. 20, pp. 622, 629-30.
[6] New Guinea Trusteeship Agreement, Articles II and IV.

be in the interests of the territory and not inconsistent with the basic objectives of the trusteeship system to do so. [7]

In contrast to the mandatory regime, the trusteeship system puts the Commonwealth under the obligation to use the resources of the Trust Territory for the carrying out of its obligations towards the Security Council undertaken for the maintenance of international peace and security, as well as for local defence and the maintenance of law and order.

The degree of international control has been slightly increased by admitting periodical visits of representatives of the Trusteeship Council, and by increasing the scope of petitions.

Regarding the Territory of Papua, the legal position remains unchanged, this Territory remaining under the national sovereignty of the Commonwealth. While Chapter XI of the Charter enumerates a number of far-reaching objectives, it is only a declaration of aims, and the only concrete duty is to supply regular information on non-political topics. Nevertheless, under the provisions of Chapter XI, matters concerning the administration of Papua have become a legitimate subject for discussions in and recommendation by the General Assembly, while previously, being exclusively under domestic jurisdiction, they could not be discussed by the organs of the League of Nations in a similar manner.

The basic objectives of the Charter regarding non-self-governing territories and trust territories were largely followed in the past administration of New Guinea, but they may require a more vigorous pursuit of developmental policies and particularly of advancement of native education and of self-governing institutions.

On the 7th February, 1947, the Commonwealth Government concluded an Agreement with the Governments of France, the Netherlands, New Zealand, the United Kingdom and the United States of America, establishing the South Pacific Commission, a regional organisation aiming to

". . . . encourage and strengthen international co-operation in promoting the economic and social advancement of the peoples of non-self-governing territories in the South Pacific region administered by them . . . ."

This organisation should prove an adequate tool for fulfilling the obligations of the Commonwealth concerning the economic and social advancement of the inhabitants of New Guinea, but regional co-operation has not been extended to the obligation of political advancement envisaged in the Charter.

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[7] *Ibid.*, Article V. The powers for amalgamation were subject to some doubt under the mandatory regime. Despite the authorisation in the Trusteeship Agreement, the amalgamation plan stated in the 1946-47 report was opposed by some Members of the Trusteeship Council who regarded it as detrimental to the development towards self-government, and thus inconsistent with the basic objectives of the trusteeship system

FRUSTRATION OF CONTRACT IN THE HIGH COURT

The volume of legal literature on the subject of frustration of contract is fast reaching massive proportions, and is being constantly fed by decisions of the English courts. Perhaps the most exhaustive analysis of the application of the doctrine and of the various judicial theories which have been propounded to explain it is to be found in McNair's *Legal Effects of War* (2nd ed.) c. 6. The object of this article is in no wise to attempt to improve on that or any other analysis. The writer's only excuse for adding to the volume of literature on the subject is that, strangely enough, the High Court of Australia has rarely been called upon to apply the doctrine, and that therefore some examination of the case of *Scanlan's New Neon Ltd. v. Tooheys Ltd.* [1] is justified, as, so far as Australian decisions are concerned, it must be regarded as the leading case. It is worth noting that not one High Court decision is referred to in any of the judgments in that case.

The facts of the case, very briefly, were as follows. The neon company's business was the erection and servicing of neon signs for advertising purposes. Their practice was to enter into contracts with a person requiring a sign whereby the company, described as the lessor, erected a sign on the land or building of the other party, described as the lessee, and kept it in repair in return for an agreed rental. In this case signs were erected on several of Toohey's hotels. During the war and while the contracts were current, blackout regulations were proclaimed by the Government of New South Wales, as in other States, prohibiting the illumination of neon signs. Although the neon company was bound to keep the signs in order, nothing in the contracts required them to guarantee illumination, and nothing bound the lessee to keep the signs illuminated. The blackout regulations, therefore, did not make performance of the contracts in their express terms impossible. But clearly (and the trial judge so found) the illumination of the signs was a most important consideration in the minds of both parties. Tooheys claimed that the contracts were frustrated and that they were therefore no longer liable to pay the rent for the signs. The High Court, however, consisting of Latham, C.J., McTiernan, J., and Williams, J., held that the contracts had not been discharged by frustration, and remained in full force.

The most widely accepted theory by which the doctrine of frustration is fitted into the general principles of contract is that of the implied term, based on the presumed intention of the parties at the

[1] (1943) 67 C.L.R. 169.