ABSTRACT

The study has been divided into three Parts. Part I traces the evolution of the idea of international mandate up to the time when the Mandate System was established.

A brief survey is made at the outset of legal relations prevailing between Christian and non-Christian States of the pre-World War One era with special attention to the acquisition of colonies and the administration of dependent territories. Some consideration is given to the process of the secularisation of international law as a law applicable only between Christian States culminating in all dependent territories being granted the internationally recognised right to self-determination.

An outline is made of these developments up to the time when efforts were made by States on the international plane to protect by international treaties the rights of dependent peoples.

The Mandate System instituted by the League of Nations in 1920 was one such attempt. A detailed inquiry is made into the meaning and concept of "Mandate" in international law and the usefulness of private law analogies in the understanding of the concept of international mandate is assessed.

The first Part concludes with an examination of the juridical status of a mandated territory which is compared with the status of colonies and Protectorates in international law; the nature of the powers of a Mandatory is also discussed.

Part II discusses the methods used by the League for the implementation of the System, principally the supervision of the mandatory's administration by the League and the Permanent Court of International Justice (P.C.I.J.), later succeeded by the International Court of Justice (I.C.J.).

A detailed review is made of the role of the two Courts as instruments of judicial control of Mandates. Their work is studied from the jurisdictional angle. A critical appraisal is made of the handling by the P.C.I.J. of the jurisdictional issues in the Mavromatis cases, and by the I.C.J. of the jurisdictional issues in the South-West Africa cases, in the exercise of both its advisory and contentious jurisdiction. Issues raised by these cases, such as the juridical status of a Mandate Agreement in international law, the question of "legal interest - sufficient interest", the nature of the jurisdiction of the I.C.J. in the South-West Africa dispute, the rights of member States of the United Nations to invoke the jurisdiction of the I.C.J. in this dispute, are discussed whenever their discussion is considered useful in clarifying the jurisdiction of the I.C.J.

Finally a comparative study is made of the jurisdictional aspects of the South-West Africa Advisory Opinions and Judgments.

Part III reviews the legal situation obtaining under the Charter of the United Nations. Special attention is paid to the applicability of Chapter XII of the U.N. Charter to South-West Africa. The question as to whether South Africa is under an international obligation (under the Charter) to place the territory under the U.N. trusteeship system is examined in detail. The pronouncements of the I.C.J. on this question are reviewed critically.

The nature of the jurisdiction of the United Nations over the disputed territory is contrasted with that of the League, and an inquiry is made as to whether U.N. jurisdiction over the territory is legitimate even if it exceeds that of its predecessor. The pronouncements of the I.C.J. on this question are reviewed critically. Relevant issues such as the termination of the South-West Africa Mandate by the U.N., its legality, and its effect on the status of the territory are discussed.

Lastly Mandates are viewed within the contemporary Law of Nations. The prospects of international adjudication on mandate questions in the changing law of nations is assessed.

THE JUDICIAL CONTROL OF MANDATES AND ITS CONTRIBUTION TO THE THEORY AND PRACTICE OF THE MANDATE SYSTEM WITH SPECIAL REFERENCE TO SOUTH-WEST AFRICA (NAMIBIA).

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CONTENTS

APPENDICES

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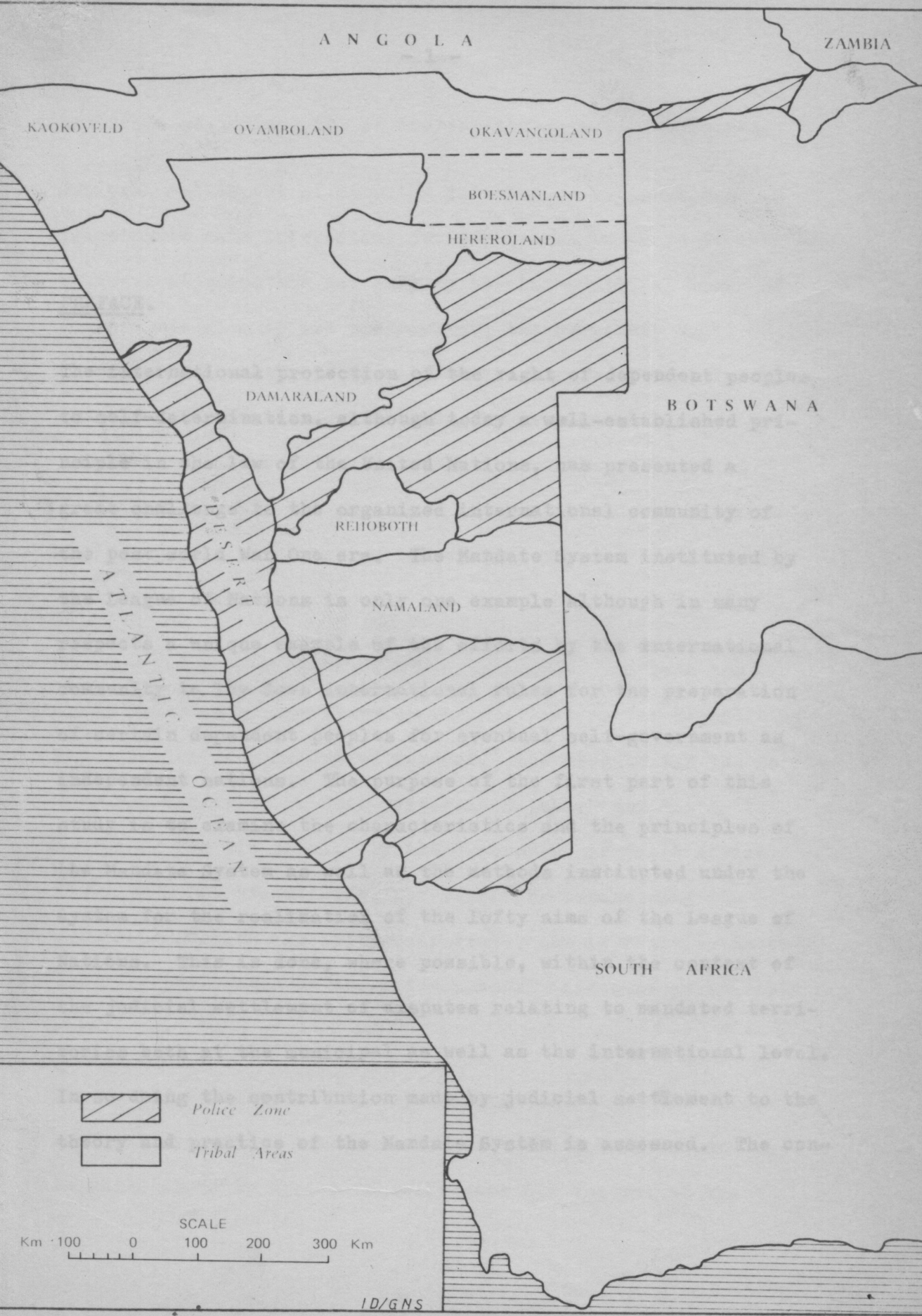
SOUTH-WEST AFRICA



PREFACE.

The international protection of the right of dependent peoples to self-determination, although today a well-established principle in the law of the United Nations, has presented a great challenge to the organized international community of the post World War One era. The Mandate System instituted by the League of Nations is only one example although in many respects a unique example of the efforts by the international community to lay down international rules for the preparation of certain dependent peoples for eventual self-government as independent nations. The purpose of the first part of this study is to examine the characteristics and the principles of the Mandate System as well as the methods instituted under the system for the realisation of the lofty aims of the League of Nations. This is done, where possible, within the context of the judicial settlement of disputes relating to mandated territories both at the municipal as well as the international level. In so doing the contribution made by judicial settlement to the theory and practice of the Mandate System is assessed. The con-

tribution of jurists is, of course, not entirely neglected.

Judicial settlement of disputes relating to mandates has illustrated some interesting jurisdictional problems of international adjudication not only by the International Court of Justice but also by its predecessor, the Permanent Court of International Justice. It will be the burden of Part Two to discuss these; the major portion of this part discusses the jurisdictional issues faced by the International Court of Justice during the six occasions on which the Court has been called upon to pronounce on the various aspects of the South-West Africa problem.

The territory of South-West Africa (Namibia) has been the focal point of a long-standing dispute between the Republic of South Africa and the United Nations. The mandate for the territory was conferred on "His Britannic Majesty" and was to be exercised "on his behalf" by the Government of South Africa. The latter has administered the territory mandated by the League of Nations for fifty-four years, but is right to do so has been challenged by the international community on numerous occasions.

The United Nations, having espoused the claims of the international community, has made several efforts to persuade the Republic of South Africa to relinquish its control of the

territory. The main issues of contention are the application of South Africa's domestic policy of apartheid in the territory of South-West Africa and the slow rate of development of its people in the sphere of education, economics and self-determination generally. Indeed South Africa has administered the territory almost as if it was the fifth province of the Republic and in a manner tantamount to an annexation of the territory. It is therefore also the purpose of this study to examine the strictly legal aspects of the dispute between the two parties as it has evolved through the efforts at the international level to settle the dispute by invoking the judicial process of the International Court of Justice.

The various jurisdictional issues discussed in Part Two will also explain the principles and indeed the general philosophy of the Mandate System as viewed by the above-mentioned two international judicial tribunals.

Part III discusses the legal situation obtaining under the Charter of the United Nations. It pays particular attention to the applicability of the United Nations Trusteeship System to the territory of South-West Africa and inquires whether the United Nations has any jurisdiction over the territory.

Chapter I gives a historical account of the origin and development of the principles of the Mandate System. It traces the

evolution of international law from the stage when it was applicable only between the early Christian States of Europe to the stage when it became applicable to all peoples of the world. It traces also the development of a more humanitarian outlook by this law towards colonised and other dependent territories of the world whereby these ceased to be regarded merely as objects of conquest. A brief examination is made of the various efforts by states at the international level to regulate the acquisition of colonies and their administration; among these the Mandate System is compared with such efforts preceding it. Lastly, the chapter gives an account of the crystallisation of the concept of the advanced nations having a "sacred trust of civilisation" to develop and guide certain peoples - regarded as not quite "ready" to govern themselves - up to the stage when they could govern themselves.

Chapter II makes an inquiry as to the precise meaning of the "sacred trust" as well as of the various private law concepts such as "trust" "tutelage" and "mandate" as used by the various Mandate Agreements and Article 22 of the Covenant of the League which set up the Mandate System.

Chapter III examines the juridical status of a mandated territory in international law as well as the limits to the authority of the states upon whom mandates were conferred.

In view of the nature of the mandatory's authority in a mandated territory and the limits to that authority an inquiry is made as to whether the acts of the Mandatory in South-West Africa have been within the prescribed limits.

Chapter IV examines the rôle of the various organs of the League in the administration of mandated territories and the extent to which these were capable of controlling breaches by the Mandatories of their respective mandates. This chapter finally examines the potential of judicial control of mandates.

Chapter V examines the jurisdictional issues faced by the Permanent Court of International Justice in the exercise of its jurisdiction under the Mandates System; and a critical review is made of the Court's handling of these issues.

Chapter VI deals with jurisdictional problems met by the International Court of Justice in the exercise of its advisory jurisdiction in respect of the South-West Africa cases. This chapter also discusses the juridical status of the Mandate for South-West Africa - a question raised by one of the Advisory Opinions of the Court.

Chapter VII examines critically the handling by the Court of the jurisdictional problems faced by it in the exercise of its contentious jurisdiction over the South-West Africa case.

Chapter VIII consists of a comparative study of the jurisdictional aspects of the Advisory Opinions and judgments of the Court on the South-West Africa cases.

Chapter IX reviews the legal situation under the Charter of the United Nations and the legal consequences for South Africa as a signatory to the Charter. Special attention is paid to the question of whether or not South Africa is under an obligation to place the territory of South-West Africa under the Trusteeship System of the United Nations.

The extent to which the United Nations can supervise the administration of this territory is discussed in Chapter X as is the validity of the termination of the Mandate for South-West Africa by the United Nations.

In Chapter XI, a brief examination is made of some comparatively recent changes in the contemporary law of nations which bear on the international rights of dependent peoples and their relevance to the law of the mandates is discussed. Finally, the prospects for international adjudication in this changing law of nations is assessed with reference to Mandates.

PART I

EVOLUTION OF THE IDEA OF INTERNATIONAL MANDATE AND THE ESTABLISHMENT OF THE MANDATE SYSTEM

CHAPTER I.

HISTORICAL BACKGROUND TO THE ORIGIN AND DEVELOPMENT OF THE PRINCIPLES OF THE MANDATE SYSTEM

Introduction.

The origin, the nature and the necessity of any major social institution is always better understood if it is assessed, at least as a first step, in the historical context within which the institution arose. The Mandate System, which easily qualifies as a major institution of international society, is no exception. It is therefore proposed in this and the succeeding chapter to give an account of the historical factors giving rise to the birth of this institution, as well as its meaning, its principles and its purposes.

In this chapter it is proposed first to outline the relations between the early Christian and non-Christian peoples at the stage when the world was on the threshold of a new era in which inter-state activity was increasing at a level and pace hitherto unknown. This activity was to trigger off once and for all the irreversible process for the evolution of certain commonly agreed principles of international intercourse which, collectively, have come to be known as international law. The development of this law in all its various spheres is of course

beyond the scope of this work. As will be seen presently, the Mandate System was devised to protect certain dependent peoples. Therefore, the development of international law is of interest here only in so far as it bears on the question of the place of dependent peoples under the new law of nations.

It is intended to show how the Mandate System stands as the most significant contribution of international law to the international protection of the welfare of dependent people who were, prior to it, generally regarded as mere objects of conquest. The institution of mandate in international law is important also because it has exerted a strong influence on the evolution of customary international rules regarding colonised and dependent peoples - a process which culminated in the principle of self-determination of all peoples being accorded a normative status in international law.

Early International Law and Dependent Territories

"International law, which was just beginning to form with the age of discovery, was in practice a law between the Christian states of Europe. Even among them war and conquest might create new conditions which could become rights through forced treaties or general acquiescence. Peoples outside of European Christian civilisation hardly came within its sphere at all.

They could be massacred and their villages pillaged without regard to the law of war. Conquest of their territory was considered meritorious. After annexation, though the imperial master might insist that foreign states accord them the benefits of international law, they had no protection against him except his humanity and sense of expediency....

"The sense of humanity was narrowly limited by race and religion."[1]

This is how Wright describes the principles governing relations between the European and non-European peoples up to the end of the fifteenth Century.

In the succeeding four centuries however, profound changes took place. Wright mentions first the development of a sense of responsibility towards the world amongst the conquering nations together with the development of a desire for the just government of subject territories and their indigenous inhabitants. Indeed such territories "ceased entirely to be a right of the imperial state" and "have become a responsibility, a trust of civilisation...."[2]

This change was brought about by a complex interplay of humanitarian, economic and political influences. Firstly, moralists and theologians such as Francisco Vitoria, Alberico Gentili and Hugo Grotius were among those whose writings helped the process

of the secularisation of international law and which also urged or encouraged humanitarian consideration of all subject races in the non-Christian world.[3]

The economic factor was the labour of the indigenous peoples of the newly discovered territories. This was an important economic asset without which the territory could not produce. These peoples had therefore to be given a certain minimum material standard of living.

The rise of nationalism in the various parts of the world, particularly in the United States and Latin-America, added a new dynamic to the changing attitude towards colonial and dependent territories. Thus not only was the conception of dependency administration shifting from that of a right to a responsibility, but the concept of the dependency itself was shifting from that of a piece of property to a personality.[4]

The dependent community came to be regarded as possessing something of a corporate personality - a personality as yet unprepared for immediate independence but one which was capable of development with the guidance of the imperial power.

"Thus the trust undertaken by the imperial power was not only for the administration of property but for the development of a ward. It resembled guardianship or tutelage."[5]

Nationalism as a political force reached its climax during the First World War, for by then it had begun to spread from Western Europe across the Atlantic and then to Eastern Europe and the Balkans as well as Asia and Africa. This was accompanied by the doctrine that imperial responsibilities of trusteeship and tutelage towards dependent territories were not merely moral in character but had crystallised into international obligations and constituted part of international law.

To quote Snow: "It would seem, therefore, that the general nature of the jural relationship which a civilised state exercises over all its colonies and all its dependent communities, whether these communities be in colonies, or within its domestic territory or located externally, or both is best described by the word trusteeship, using this word in its literal sense as implying a fiduciary relationship essentially personal... that the fiduciary power is plenary, in the sense that it is adequate to the needs of the situation of the particular personality to which it is applied, though limited to those needs...."[6]

Such a development must, logically, find expression eventually in international instruments having legal force. Accordingly, the Berlin Act of 1885, the Brussels Act of 1892, and the Algeciras Convention of 1906 were attempts to protect in one way or the other the rights of the dependent communities of the Congo, Central Africa and Morocco.

The Berlin Act sought to protect the natives of the conventional basin of the Congo "in their moral and material well-being".[7]

The parties to this treaty agreed "to co-operate in the suppression of slavery and the slave trade, to futher education and civilisation of the natives...."[8] There was however, little if any provision for supervision and enforcement of the agreement. At the Berlin Congress the Powers conferred on King Leopold of Belgium the powers to administer the Congo free state according to the terms of the Berlin Act - but, unfortunately, this was again without supervision to ensure compliance. Because of the lack of effective supervision Wright says that the "Leopoldian administration of the Congo not only failed to live up to the requirements of the trust but presently became an international scandal."[9]

In Algeciras in 1906 the Powers asserted the rights of Morocco to be eventually independent and also stressed its territorial integrity.[10] The United States proposed that France and Spain be made "the mandatory of all the powers for the purpose of at once maintaining order" in the territory and to preserve equal commercial opportunities for all in Morocco.[11]

The Algeciras Convention followed this suggestion but its defect was that it failed to provide for an effective system of supervision.

Therefore by the end of the First World War, effective international supervision was generally regarded as essential in the administration of territories considered to be "politically backward".[12] Thus on January 1, 1918, Beer in a report to a preliminary inquiry to the Paris Peace Conference dealt at length with the problem of the German colonies and elaborated the Mandates System as eventually adopted by the League of Nations using that term:

"Under modern political conditions apparently the only way to determine the problems of politically backward peoples, who require not only outside political control but also foreign capital to reorganise their stagnant economic systems, is to entrust the task of government to that state whose interests are most directly involved...." This, of course, was no more than a restatement of the traditional philosophy of colonial government. But Beer continues, ".... If, however, such backward regions are entrusted by international mandate to one state, there should be embodied in the deed of trust most rigid safeguards both to protect the native population from exploitation and also to ensure that the interests of other foreign states are not injured either positively or negatively."[13]

At a conference of British and American experts in international affairs in London in 1918, the two principles of the prohibition of forced labour and the education of the indigenous peoples of

territories to be mandated were endorsed.[14]

Finally, in 1918, General Jan Smuts of South Africa, who had commanded the British Forces that conquered two of the principal German colonies of South-West Africa and East Africa, put forward the system of government known as the International Mandate at the Peace Conference. In a brochure entitled "The League of Nations - a Practical Suggestion" (which was to become the immediate source of Article 22 of the Covenant of the League whereby the Mandate System was formally institutionalised) Smuts outlined the plan for the government of such conquered territories by individual Powers as mandatories or delegates of the International Society and subject to the international supervision of the League.[15]

Provision for a system of continuous international supervision which was lacking at Berlin in 1878 and 1885 and at Algeciras in 1906 was this time clearly made. At the same time the system represented a successful compromise between the various conflicting opinions as to what the political future of the conquered territories ought to be.[16] During the War the Allied Powers had occupied all the German colonies and overseas possessions in Africa, Asia and Oceania and the Arab provinces of the Ottoman Empire. They resolved not to return these territories either to Germany or Turkey. But there was however great difference of opinion as to the political future of the

territories. For example, it was suggested that they be annexed in the same way as colonies were annexed;[17] indeed Smuts, contrary to his own proposal of the mandatory system of government on behalf of the League, pressed for outright annexation of the territory of South-West Africa to South Africa on the ground that the territory was to be excluded from the Mandate System as its inhabitants were "barbarians who could not possibly govern themselves and that it would be impracticable to apply to them any ideas of political self-determination...."[18]

The Allied Statesmen had however made firm declarations against annexation, and the United States President, Woodrow Wilson, acting in Carroll's opinion," in response to Lenin's charges of capitalistic imperialism",[19] insisted on the principle of non-annexation as a term of peace.[20] The Arab peoples on the other hand demanded autonomy in their territories. Smuts' proposed system of government by mandatory powers each having a certain degree of authority depending on the stage of development of the inhabitants of the territories concerned - the degree being the widest in the case of the territories considered to be the least developed - was accepted as a means of conciliation between conflicting aims, and at the same time it prevented the wholesale annexation of the territories. To quote Bentwich,

"The Mandate System marked a reaction against the policy of

acquisitiveness which had hitherto characterised the relations of the Great Powers to backward peoples."[21]

Referring to the inadequacies of previous international arrangements under the Berlin Act of 1885 and the Brussels Act of 1892, Bentwich makes the following comment:

"The signatory Powers had no defined means of intervening if things were done contrary to the Covention; and, in fact, they did not interfere. The Mandate System on the other hand, prescribes definite obligations of the States governing the peoples under tutelage, and gives sanction to those obligations by making the guardian State responsible to a supervising body."[22]

Another writer has observed that what distinguished the Mandate System from all similar international arrangements of the past was "the unqualified right of intervention possessed by the League of Nations. The mandatories act(ed) on its behalf. They (had) no sovereign powers, but (were) responsible to the League for the execution of the terms of the mandate."[23]

It was stated above that the Mandate System prevented the outright colonisation or annexation of territories conquered from Germany. The difference between a colony and a mandated territory is illustrated by the following statements of Bentwich:

"The difference between the colonising and protecting State of the nineteenth century and the guardian or Mandatory State of the League is that the former obtained rights over the population and against other Powers, while the latter assumes obligations towards the population and towards the Society of Nations. The Mandatory is a protector with a conscience and - what is more - with a keeper of his conscience, required to carry on the government according to definite principles, to check the strong and protect the weak, to make no profit and to secure no privileges."[24]

The same author later adds:

"While a colony forms part of the dominion, and is included in the patrimony of a State, which exercises full rights thereover and is subject only to any voluntary restrictions, a mandated territory involves obligations of the Mandatory; and the rights of sovereignty which he exercises are delegated to him by the society. He is responsible to that society for the exercise of the rights delegated for the benefit both of the native inhabitants and of the society in whose name he acts. He obtains the guardianship of people, and not the ownership and dominion of a territory...."[25]

It can be seen from the foregoing that the International Mandate System carried the responsibility of the governing Powers a

step further than any previous international convention (a) by laying down the express terms of the government of each territory which in all cases involved the international duty to promote the interests and welfare of their indigenous populations, and (b) by establishing a regular international authority to which the governing state was to render an account periodically.

The Post World-War I International Order

Peace after the First World War was established by the Treaty of Versailles which came into force on January 10, 1920. By Articles 118 and 119 of the Treaty, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, and also undertook to recognise and to accept the measures taken by those Powers, in agreement where necessary with third Powers, in order to carry the consequences of her renuciation into effect. It then became the task of the Supreme Council of the Allies as the then highest international authority, to distribute the Mandates of the former German possessions.[26] The distribution of the Mandates for these territories was done by the Supreme Allied Council in May 1919 as follows: The Cameroons and Togoland were divided between Great Britain and France. German East-Africa was divided between Great Britain and Belgium, the eastern sector (Tanganyika) going to Great Britain while the western part (Ruanda-Urundi) being mandated to Belgium. The vast territory of South-

West Africa was alloted to the self-governing British Dominion of South Africa. Samoa was mandated to the Dominion of New Zealand while the Pacific Islands south of the equator to the Commonwealth of Australia. The Pacific Islands north of the equator were mandated to Japan.[27]

As part of the Treaty of Versailles, Article 22 of the Covenant of the League of Nations made detailed provisions for the future fate of "those colonies and territories which as a consequence of the late war have ceased to be under sovereignty of the States which formerly governed them and which are inhabited by people not yet able to stand by themselves under the strenuous conditions of the modern world".

The principle laid down by Article 22 was that "the well-being and development of such peoples form a sacred trust of civilisation".[28]

The article then proceeded to embody "securities for the performance of this trust". It declared that the best method of giving practical effect to the principle was that "the tutelage of such peoples should be entrusted to advanced nations", and that such tutelage "should be exercised by them as mandatories on behalf of the League".[29] The character of the mandate must, it was stated, differ according to certain circumstances,[30] and three classes were described. These have come to be known

as the A, B, and C Mandates. Class A was limited to territories detached from Turkey. The B and C mandates comprised the former overseas possessions of Germany in Africa and Oceania. The people in those territories which, owing to their advanced state of development, could be provisionally recognised as independent nations were under the A category of Mandates. Bentwich cites a Syrian case which illustrates the position of the A mandates. In this case it was held that in the territories detached from the Turkish Empire and subject to an A mandate the mandatory is required to abstain from all direct administration and to carry out only the functions of a guide and counsellor. The mandatory was held to be "much more (of) a curator than... a guardian; and in this respect is in a different position from the Mandatory in the B and C Mandates, where he is concerned with direct administration."[31]

The territory of South-West Africa falls into the C mandate category[32] and is specifically mentioned by name in Article 22 paragraph 6, which states that territories under this category could "best be administered under the laws of the mandatory as integral portions of its territory". Such wide powers were conferred on the mandatory on the theory that the inhabitants were "less developed" than, say, the inhabitants of any A mandate territory - hence the necessity of conferring greater powers on the mandatory. No doubt this went a long way towards

satisfying the original desire of South Africa's General Smuts who had hoped for outright annexation of the territory to that of South Africa. At the same time, however, the ingenious device of government by Mandate prevented complete annexation.

Article 22 made further provision for
(1) an annual report to be rendered by the mandatory to the Council of the League of Nations in reference to the territory "committed to its charge";[33]

(2) a permanent Commission with authority to examine the annual reports and to "advise the Council on all matters relating to the observance of the mandates";[34]

(3) a definition by the League's Council of the degree of "authority control or administration" to be exercised by the mandatory if this had not been "previously agreed upon by the Members of the League".[35]

The phrase "by the Members of the League" is ambiguous in this context. Does it contemplate (a) an agreement between the Mandatory and the League? or (b) an agreement between all the Members of the League inter se including the Mandatory?[36] If a literal meaning were to be given to the phrase the latter interpretation appears to be the correct one. In the overall context of the Mandate System, however, the first interpretation is preferable since the "agreement" was in reality a matter

which directly concerned only the mandatory and the League and could therefore be conveniently embodied in an instrument to which both were parties. However, this presupposes that the League had a treaty-making capacity whereas Article 22 is silent on the question.[37] It instead contains the rather vague reference to the degree of the Mandatory's authority as a matter which could be agreed upon by "the members of the League". Hence the ambiguity.

The Nature of the Mandate Agreements

It is appropriate at this stage to examine whether Article 22 paragraph 8, by providing that the authority of the Mandatory shall be "defined" by the Council in the absence of a previous agreement, gave the League Council the power to impose the terms of a mandate against the will of the Mandatory if no prior agreement had been made between the members of the League. For example, in the South-West Africa Mandate there was no formal agreement of this kind. In fact, the fourth paragraph of the preamble of this Mandate Agreement[38] specifically cites Article 22 paragraph 8 of the Covenant and states in effect that the Council, in view of the absence of such prior agreement, confirms the mandate and "defines its terms as follows:...."

Prima facie this shows that the "definition" by the Council of

the terms of the Mandate for South-West Africa was a unilateral act of imposition by the Council of the League on the Mandatory, and that the Mandate was not at all an "agreement" in the true sense due to an absence of a prior consensus ad idem. This question is now discussed and, where possible the travaux prèparatoires of the Council of the League in the confirmation of mandates will be utilised to shed light on the true nature of the Mandate Agreements.

On June 30, 1920 the Secretary General of the League of Nations stated that ever since the coming into force of the Treaty of Versailles, the "title to the territories which are to be placed under mandate" had been vested in the Principal Allied and Associated Powers, and that it was their "right and duty" to select "the mandatory Powers who shall exercise authority on behalf of the League".[39]

On August 5, 1920 the Council of the League of Nations adopted the report of the Belgian representative M. Hymans which stated inter-alia:

"It is not enough, however, that the mandatory Powers should be appointed; it is important that they should also possess a legal title - a mere matter of form perhaps, but one which should be settled, and the consideration of which will help towards a clear understanding of the conception of mandates.

"It must not be forgotten that, although the mandatory Power is appointed by the principal Powers, it will govern as a mandatory and in the name of the League of Nations.

"It logically follows that the legal title held by the mandatory Power must be a double one: one conferred by the principal Powers and the other conferred by the League of Nations. The procedure should, in fact, be the following:

"1. The principal Allied and Associated Powers confer a mandate on one of their number or on a third Power.

"2. The principal Powers officially notify the Council of the League of Nations that a certain Power has been appointed mandatory for such a certain defined territory.

"3. The Council of the League of Nations takes official cognisance of the appointment of the mandatory Power and informs the latter that it (the Council) considers it as invested with the mandate, and at the same time notifies it of the terms of the Mandate, after ascertaining whether they are in accordance with the provisions of the Covenant."[40]

The foregoing portions of the Report not only illustrate the method of appointment of mandatories and confirmation of mandates but it also shows that the terms of the mandates were notified to the mandatory at the time of appointment, thus

giving it an opportunity either to decline the appointment altogether or to object to the terms of the mandate.

A Judge of the International Court of Justice has held that the contractual element - showing that "agreement" of the mandatory did in fact exist in the Mandates - was present even in those Mandates whose terms were "defined" by the Council. The consent of the mandatory was either express or implied "not only because the Declaration (i.e. the defined mandate) was transmitted or notified to all the State Members (of the League) - including the Mandatory and without objection on its part - but, above all, because in fact the very exercise of the Mandate was objective evidence of the agreement of the Mandatory."[41]

The Mandate Agreement, it is submitted, was not unilaterally imposed on the Mandatory. It was defined as provided by paragraph 8 of Article 22 of the Covenant to which every Mandatory was a signatory. This could alternatively, be viewed as an acceptance in advance of the authority of the Council to define the details of the Mandatory's degree of authority. Thus Judge Bustamante says that the mandate was "the result of a prior understanding between the Council and the Mandatory. It should be added that as regards these details, the Council does not negotiate with the Mandatory: under paragraph 8 of Article 22 of the Covenant, the Council 'defines' and it is for the Mandatory to accept the responsibility or not."[42]

The above-mentioned Hymans Report, adopted by the Council of the League in August 1920, drew, inter alia, the following conclusions concerning the attitudes of the victorious Powers towards certain issues concerning the newly conceived Mandate System:

1. There was no disagreement that the right to allocate the Mandates belonged to the Powers.

2. On the question "By whom shall the terms of the Mandates be determined?" the report said:[43]

"It has not been sufficiently noted that the question is only partially solved by paragraph 8 of Article 22, according to which the degree of authority, control or administration to be exercised by the Mandatory, if not defined by a previous convention,[44] shall be explicitly defined by the Council."

3. As to the meaning of "Members of the League" as used in paragraph 8 of Article 22 it was concluded that this term could not be taken literally because if it was, it would mean that the Assembly of the League would have to determine the terms of the mandates since only the Assembly brought all the Members together. The report concluded that when the Article was drafted it was supposed that conventions dealing with Mandates would be included in the Peace Treaty and that only the Allied Powers would be the original Members of the League. The term "Members of the League"

in Article 22 paragraph 8 was thus intended to refer to all the signatories, except Germany, of the Treaty of Versailles.

4. The report recommended that the Council ask the Powers to inform the Council of the terms they proposed for the Mandates.

It is submitted that the foregoing leads to the conclusion that the terms of the mandates, although often specifically defined by the Council under Article 22 paragraph 8 of the Covenant, were the product of a prior understanding which had not been "defined by a previous convention" to use the words of the Hymans Report. The Council merely gave formal expression to ideas and principles previously agreed to between the Powers and their Mandatories.

Further confirmation of this is found in the second report by Hymans adopted by the Council on October 26, 1920. The report reads in part:

"... (W)e sincerely hope therefore that before the end of the Assembly the principal Powers will have succeeded in settling by common agreement the terms of the Mandates which they wish to submit to the Council."[45]

In May 1919 the Council of Four - comprising Great Britain, Italy, France and the United States (with Great Britain repre-

senting South Africa) - decided to allocate the Mandate for South-West Africa to the Union of South Africa.

On June 28, the Council decided to set up a Commission under Lord Milner to prepare drafts of the mandates. By July 15, the Commission had approved drafts for the B and C Mandates, and these were sent to the Council of the Principal Allied and Associated Powers. This included a draft convention on the allocation of South-West Africa to the United Kingdom for and on behalf of the Union of South Africa. The Council considered these drafts in December 1919.

By December 24 agreement had been reached between France, Great Britain, Italy, and Japan on the one hand, and the Union of South Africa represented by Great Britain, on the other, on the terms of the South-West Africa Mandate. The agreed terms included a provision for the compulsory jurisdiction of the Permanent Court of International Justice. The draft Convention, drawn up with Article 22 of the Covenant in mind, contemplated final confirmation by the Council of the League of Nations.

Thus, up to this point the Mandatory was bound by an international obligation to the Allied Powers to accept the Mandate for South-West Africa, to exercise it according to the agreed terms, and to submit to the jurisdiction of the Permanent Court disputes with other Members of the League concerning the

interpretation or application of the Mandate.[46] There was no radical change in the provisions of the final text of the Mandate as compared with those in the draft Convention.

The draft submitted to the Council was expressly submitted for "approval" which indicates that the Council was not expected to manufacture new terms but was merely to endorse an existing draft. The draft contained the following line:

"Hereby (the Council) approves the terms of the Mandate as follows:"[47]

This line was replaced by the following line which now appears in the final text:

"Confirming the said Mandate, defines its terms as follows:"[48]

The foregoing shows, once more, that the terms of each Mandate including that of South-West Africa, were not imposed by the Council upon any mandatory. Indeed, the English version of the fourth paragraph of the preamble of the final text of the South-West Africa Mandate is capable of misconstruction. It reads: "whereas, by the afore-mentioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations".

The French text, however, is more faithful to the historical origin of the terms of the Mandate as illustrated (above) by the preparatory work of the League concerning mandates:

"Considérant que, aux termes de l'Article 22 ci-dessus mentioné, paragraph 8, il est prevu que si le degré d'autorité, de contrôle ou d'administration à exercer par le mandataire n'a pas fait l'objet d'une Convention antérieure entre les membres de la Societé, il sera expressément statué sur ces points par le Conseil"[49]

A more accurate translation in English would be that if the degree of authority, control or administration to be exercised by the mandatory had not been the subject-matter of a previous convention, the Council shall define these terms. This would be more consistent with the conclusions of the Hymans Report adopted by the Council in August 1920. To quote from it once more, and at the expense of repetition: "... (T)he degree of authority, control or administration to be exercised by the Mandatory, if not defined by a previous convention, shall be explicitly defined by the Council."[50]

The fact that an agreement is not formally embodied in a Convention does not necessarily imply that no agreement was reached at all. Indeed "there may be an international agreement, but there may be no instrument embodying it...."[51]

Further, the 2nd paragraph in the preamble of the South-West Africa Mandate records that the Powers, having agreed to confer the Mandate to Great Britain on behalf of South Africa, "have proposed that the Mandate should be formulated in the following terms, ..." The Four Powers obviously could not have made a proposal jointly without having agreed upon it first. The third paragraph in the preamble shows Great Britain to have agreed on behalf of South Africa to accept and exercise the Mandate in accordance with the terms proposed. Finally, the fourth paragraph of the preamble of the same Mandate shows that the Council considered itself to be acting under Article 22 paragraph 8 of the Covenant. However Article 7 of the Mandate - giving jurisdiction to the Permanent Court - was outside the scope of paragraph 8 of Article 22 which related only to "the degree of authority, control or administration to be exercised by the Mandatory". This shows that Article 7, at least, stems from the agreement of the Principal Powers and the confirmation of the Mandate by the Council records that agreement.

If the foregoing is the correct interpretation of Article 22 paragraph 8 of the Covenant (and therefore of the fourth paragraph in the preamble of the South-West Africa Mandate and other similar mandates) it follows that there was intended to be a very clear consensual element in each mandate.[52]

British Dominion as Mandatories

It is now proposed to consider the responsibility of the Dominions as mandatories vis-a-vis the League.

On December 17, 1920 the Council of the League issued the Mandate for German New Guinea and all the German possessions in the Pacific Ocean lying south of the equator other than German Samoa and Nauru. The Mandate, in each case, was to be conferred upon "His Britannic Majesty, to be exercised on his behalf by the Government of the Commonwealth of Australia". Mandates were also issued, in similar terms, to the Union of South Africa and New Zealand in respect of the former German possessions of South-West Africa and Samoa. Australia, South Africa and New Zealand has each administered the territory committed to its charge as if it were "an integral portion of its territory" as provided by Article 22 paragraph 6 of the League Covenant.

Although these mandates were conferred upon "His Britannic Majesty, to be exercised on his behalf" by his three above-mentioned Dominions, the League and Great Britain regarded each Dominion as directly responsible to the League for the proper administration of the mandated territories.

As far back as the Peace Conference in 1919 these Dominions were

regarded as possessing at least a measure of international personality even though the question of whether they also enjoyed full juridical personality in international law may have been debateable.

Prior to World War I, the British Dominions and India were merely parts of the British Empire. Due to their military contributions during the War the Powers were prepared to give the Dominions a special status at the Peace Conference and ultimately to admit them as original members of the League.[53] Thus each Dominion was allowed to participate at the Peace Conference of 1919 and their representatives became signatories to the Treaty of Versailles, and Australia, New Zealand and South Africa and India was each allowed to become an original member of the League of Nations.

The Imperial Conferences of 1923 and 1926 recognised the power and autonomy of self-governing territories to enter into certain kinds of international treaties. In fact, O'Connell is of the opinion that the older British Dominions had acquired the faculty to enter into international treaties by the end of 1921 as they had gradually obtained a large measure of representative self-government and as their administrations were judicially separate from that of Great Britain except at the supreme constitutional level and also because of their activity

in international deliberations.[54]

For these reasons the Dominions as Mandatories were directly responsible to the League as far as their administration of mandates was concerned. To quote Professor Noel-Baker:

"The Dominions, naturally, control their mandated areas without any interference or control by the British Government; they make their annual reports on their administration direct to the League without previous consultation with the British Colonial Office; they appoint their own Dominion delegates to explain, defend, and amplify their reports before the Permanent Mandates Commission; their Assembly delegations defend their actions as mandatories when the Assembly discusses their reports."[55]

Having been admitted to the League as equal members the Dominions, in their relations with the League, were always treated as independent states.[56]

For these reasons, the fact that the mandates were formally conferred on "His Britannic Majesty" was of little, if any, practical significance. The Dominions have always been held to be independently and internationally responsible for their respective mandates. Nothing short of a mandated territory being granted self-determination and independence can change this position even today.

CHAPTER II

THE CONCEPT OF MANDATE IN INTERNATIONAL LAW

Introduction

Although Article 22 of the Covenant is the foundation of the Mandate System it has also been criticised as a document of "singular obscurity".[57] Stoyanovsky says that Article 22 was not drafted in the same way as the other Articles of the Covenant and that it was a product of "political considerations". This, he observes, has given it a "special character as to form and in a certain measure as to the substance itself." He adds that "it is not the work of experts and contains less of principle than of general direction. Its intentional vagueness is explained by the desire of the drafters to conceal divergencies of view among the different powers and to leave to the future and to experience the task of deciding certain fundamental principles."[58]

However, the vagueness of the phraseology intended to have legal effect cannot be a good cause for not interpreting the document at all. Article 22, in fact, successfully set up the Mandate System which, once it began to function, began to evolve its own theory and practice. As Carroll has obser-

ved, the vagueness surrounding the mandates was not the result of carelessness but was a reflection of lack of agreement among the parties concerned.[59] Consciously or unconsciously the parties concerned were, because of the lack of agreement, compelled to leave the detailed formulation of the theory and practice of the Mandate System to some time in the future. Perhaps, it may have been envisaged that no such detailed formulation was necessary nor would ever be necessary. However, as will be seen later, disputes and questions relating to Mandates arose and were on many occasions submitted for judicial settlement, leaving judicial tribunals, at municipal and international level, to expound the theory and practice of the System in the process of deciding the various questions before them.

One can, however, at least attempt to isolate the broad objectives of Article 22 without necessarily going into the detailed formulation of the theoretical principles of the system created by it. One useful method of construing any legal document whose meaning is not explicit is to inquire into its purpose. This is a legitimate canon of treaty construction in international law as well. The particular phraseology of the document may then be examined within the context of the overall purpose of the document. The purpose of Article 22 is, it is submitted, clear enough. It is to guide certain dependent

peoples to independence. In Wright's opinion, "Article 22 ... seeks not so much to define a status as to guide an evolution. It attempts not merely to provide for the transfer of territories and for the government of their inhabitants, but for the evolution in them of communities eventually capable of self-determination."[60]

Article 22 uses certain phrases which can only lead to the conclusion that the peoples of mandated territories should be guided towards independent self-rule: For example, Article 22 uses phrases such as "not yet able to stand by themselves", "well-being and development of such peoples form a sacred trust of civilisation", "tutelage", and "stage of development".[61]

The purpose being clear an inquiry can be made as to the meaning of the terms of Article 22. The article makes reference to three private law institutions: (a) Mandate ; (b) Tutelage ; and (c) Trust. The meanings of these terms in international law are not identical with those ascribed to them in the private sphere. It is now proposed to discuss the extent to which each of these private law concepts are applicable within the overall context of the Mandate System. In this way it is intended to lay the general foundation essential for the discussion of the various aspects of the judicial control of Mandates in the succeeding chapters.

Mandate

The term "mandate" was introduced at the Peace Conference by General Smuts who no doubt understood the term in the sense attributed to it by the Roman Dutch law of South Africa. Under Roman law, mandatum was a consensual contract involving what Wright calls a "gratuitous agency". He analyses the Roman law mandatum as having thirteen characteristics of which the following appear to be the most significant in view of the purpose of the Mandate System: (1) Its object must be pro bona mores; i.e. the object could not be illegal; (2) it must be intended to benefit someone other than the mandatory; (3) the mandans must have accepted responsibility of the contract; (4) the mandatory must have voluntarily accepted; (5) his service must be gratuitous; (6) he is bound to observe strictly the terms of the contract; (7) he is responsible to the mandans for an accounting and for faithful execution.

Lauterpacht observes in relation to the Mandate System that if the term "mandate" and "mandatory" are to be understood in the usual sense then the League was the mandant and "principal" from whom authority of the states to whom administration of mandated territories was entrusted was derived. From this Lauterpacht draws the conclusion that the League possessed sovereignty over mandated territories.[62] Wright seems to

agree with this conclusion but with one important qualification - that in the Roman law mandatum the mandans was not necessarily the owner of any property that might have been involved so that Lauterpacht's conclusion that the League had sovereignty over mandated territories does not necessarily follow. The extent to which the analogy of the Mandatum under Roman Law applied to Mandated territories is summarised by the following statement by Wright:

"Thus beyond the implication that the League is a principal and the mandatory an agent and as such bound to keep within the limitations of the mandate, few legal conclusions seem necessarily to flow from the term in respect of the status of the territories."[63]

A judge of the Supreme Court of one of the most problematic of mandatories - South Africa - has stated:

"The mandate is a trust which is delegated to one of the members of the League to be exercised by such member personally in the spirit of the Treaty (of Versailles), with more especial reference to the well-being of the indigenous populations, and under the safeguards provided by the Treaty and the terms of the mandate."[64]

Corbett makes the same point and emphasises the element of the

trust in the context: It will be recalled that Article 22 paragraph 8 of the Covenant of the League provides that the degree of authority of the Mandatory shall, if not agreed by the "members of the League", shall be defined by the Council. Corbett starts by commenting that the above quoted words of Article 22, paragraph 8 have thrown "the whole system of mandates as a legal institution into confusion."[65] He refers to instances when differences of opinion have arisen as to the meaning of the phrase, and cites authorities who have held that the reference to "the Members of the League" meant the Assembly of the League, so that when the Principal Allied and Associated Powers appointed mandatories, their action was unauthorised since only the League was competent to do so under Article 22 paragraph 8.[66] On the other hand, there has been the view that the phrase "the Members of the League" refers to those Members of the League to whom the sovereignty of the territories to be mandated was originally transferred, i.e. the Principal Allied and Associated Powers.[67] Indeed these Powers had in fact named the mandatories for certain territories even before the Treaty of Versailles was signed, that is to say, eight months before the League had come into existence.[68] Thus, it has been contended, the appointment by the Powers of mandatories was legitimate .

These two conflicting interpretations are cited by Corbett to

show that the institution of mandate in the international context does not correspond to mandate as that contract is understood in civil law,[69] for there the mandant chooses his own mandatory and the terms are settled between them or left to the common law. Corbett further points out[70] that the League was not given the unequivocal power to choose the mandatories nor did it have exclusive authority to settle the terms of the mandates. At the same time, however, the international mandate appears to retain the concept of guardianship in civil Law: "Like guardianship in Civil Law, the tutelage of the Mandatory involves an obligation and a responsibility rather than the confirmation of a right."[71]

Although the Mandate in the international context may not be identical with the contract of mandate, the private law idea of trust was obviously intended to be incorporated in the international Mandate System. Bentwich is of the opinion that the essential idea of the international mandate is to be found not so much in the Roman concept of agency and in the modern Civil Codes based on it as in the English conception of a trust, that is, property held by one person on behalf of and for the benefit of another, for a particular purpose, and subject to a duty to render an account of the administration when called upon, to a tribunal: "Among the characteristic features of the trust are: (a) that it recognises only obligations on the

part of the trustee, and rights on the part of the beneficiary; and (b) that the trustee may not derive from his trust any personal profit.... The Mandatory Power to which the government of a territory is delegated by the League of Nations holds the territory on a double trust, or, as it has been called, a dual mandate:

(a) On behalf of the inhabitants of the territory; and

(b) On behalf of the International Society."[72]

Corbett writes: "Article 22 was drafted in the first place in English, and though the language used, particularly in the first two paragraphs, is popular rather than legal, it is plain that the idea of trust runs through it. The territories dealt with are to be adminstered for the benefit of their population and in such a way as to secure their development to a stage where they will be 'able to stand by themselves'...."[73]

Before analysing the dominant principle of trust it may be useful to make a brief reference to the second of the three private law institutions mentioned by Article 22, namely, tutelage. The extent to which the concept of the first institution, mandate, is applicable to the international Mandate System was discussed above. It is now proposed to examine the second concept.

TUTELA in Roman law was a guardianship of children and this was its sole object.[74] Tutors or curators were appointed for this purpose - and these had to possess certain qualities. The tutor had the right of action against anyone who interfered with his tutorship. The tutor could not alienate the pupil's property except with the consent of the Court.

Wright makes the following observation as to the extent to which the institution of tutelage in private law applies to mandated territories:

"Application of the analogy would mean that the mandated community would eventually acquire independence and sovereignty of its territory, that the mandatory must act for the benefit of that community, may be removed by the League for malfeasance, and may be held to an accounting by the mandated community on termination of the relation or even before."[75]

The Concept of TRUST

Article 22 of the League Covenant provides in part:

"(1) To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them... there should be applied the principle that the well-being and development of such peoples

form a sacred trust of civilisation... (2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations... and that this tutelage should be exercised by them as mandatories on behalf of the League."[76] The underlining indicates that there is a simultaneous reference to three private law institutions in the Covenant, namely, trust, tutelage and mandate. But upon closer examination Article 22 paragraph 1 will be seen to say that "the well-being and development of such peoples form a sacred trust of civilisation" and that the "tutelage" to be exercised through mandate constitutes merely the means adopted for the end declared in paragraph 1, namely, the well-being and development of the peoples of mandated territories. In this sense, it is submitted, the notion of trust must have paramountcy over the other two private law analogies.[77]

Brierly offers the following analysis of Article 22: "Article 22 of the Covenant is so loosely worded that textual comment on it is difficult; but of three analogies with private law which it contains, tutela is introduced as being 'the best method of giving effect' to the trust which has been declared in the preceding words, and mandatum is then added to define the method in which the tutela is to be exercised. The language seems to point to the trust, and not either of the other concepts,

as the governing principle of the institution."[78] Brierly then proceeds to discuss the nature of a trust and quotes Lepaulle who maintains that a trust exists the moment there is a res and an appropriation of that res to some aim. He further points out that the essence of the trust does not lie in the existence of a right in personam of the cestui que trust against the trustee, nor in the apportionment of property rights between these two. Indeed, even a trustee is not necessary for the existence of a trust.

"The rights and obligations of the trustee will vary according to only one thing, his mission. Such mission always consists in insuring that the res be properly appropriated to the aim to which it has been devoted.... The rights that the trustee will have in each particular case depend on his obligations, they are tools given to him for the fulfilment of his duties, and such duties are determined by the appropriation to which the res has been devoted. Hence, it is apparent: that trustee, cestui, rights and obligations of either of them, are only means for reaching an end, that no one of these means is in itself essential to the existence of the trust; that the essence of such legal institution can only be found in the res and its appropriation to some aim. Trusts appear to us then, as a segregation of assets from the patrimonium of individuals, and a devotion of such assets to a certain function, a certain end."[79]

Judge Bustamante of the International Court of Justice, commenting on the regime set up under the Mandate System, has observed that:

".... (T)he legal concept is nearer to that of the unilateral contracts of private law rather than that of synallagmatic contracts. The rights granted to the Mandatory are for the purpose only of the better fulfilment of its obligations towards the country under tutelage. The concept of obligation predominates.... The mission of the Mandatory... must... serve the interests of the population under tutelage.... (A)s far as the Mandatory is concerned, the (mandated) territory is res aliena as in all the mandates, and its inhabitants are legal persons who will one day have the capacity to decide for themselves."[80]

If the essence of a trust is the "segregation of assets" for a certain aim then according to Lepaulle certain consequences follow. For example "the trust concept drives us to reconsider the traditional dogma of 'no right without a subject'." He concedes as true that Anglo-Saxon theory remains faithful to this dogma, and that only a person can enforce a right. But enforcement is not the right itself; "anything that is worth being protected by law should have rights : animals, things, ideas etc."[81]

The foregoing shows that the institution of trust creates a new species of rights and obligations which must be contrasted with those incidental to ownership. The essence of the trust institution and its consequences must, it is submitted, mutatis mutandis explain the essence of the international mandate. If the trust is considered within the context of the international Mandate System, there can be no doubt as to the existence of a trust and as to its meaning and object. There is quite clearly an appropriation of a res to an aim; the res being "those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them" (i.e. the mandated territories), the aim being the "the well-being and development"[82] of the inhabitants of these territories. An "international trust" may therefore be said to have come into existence.

If it is possible to argue in municipal law that a trust displaces the doctrine of "no right without a subject" then this should a fortiori be arguable in international law, where we have a tabula rasa to write upon and where the traditional doctrine of ownership has not yet taken root so as to blurr the distinction which exists even in municipal law between rights and obligations arising out of a trust and those out of ownership.

An analogy may be drawn between the regimes for property in municipal law on the one hand and the regimes for government in international law on the other: Anglo-Saxon law has two different regimes for property, viz. ownership and trust. International law has two different regimes for government, viz. sovereignty and mandate. Just as rights and duties incidental to ownership must, in municipal law, be distinguished from those incidental to a trust, so the rights and duties arising out of sovereignty must be distinguished from those arising out of a mandate. Brierly supports this approach: "It is idle to attempt to force the mandate, which is a social institution, into the individualist concept of sovereignty, as it is to force the trust into a scheme based only on private property."[83]

For the international Mandate System, Lepaulle's argument for reconsidering the dogma of "no right without a subject" has three important consequences. Firstly that a right under a trust is legally enforceable without a "subject", and secondly, that ideas or institutions are capable of protection under the international trust, and thirdly, that the enforcement of the trust is independent of the rights of the cestui que trust against the trustee (if indeed, one exists). In other words, the fact that the cestui que trust, is incapable of bringing an action under the particular system of law is irrelevant: Thus the fact that the

cestui is not a proper "subject" under that law is no bar to the enforcement of his trust as an idea or institution. Under the international Mandate System the cestui que trust, the inhabitants of the mandated territories, are not "subjects" of international law stricto sensu,[84] but this disability does not, it is submitted, invalidate the trust which remains enforceable and whose validity continues irrespective of the capacity (or the lack of it) of the cestui que trust to commence an action for its enforcement. It was quite consistent with the double title of the Mandatory for each member of the international community represented at the League to be given the right to invoke the jurisdiction of the Permanent Court in the event of a breach of the trust. It will be recalled that Bentwich regarded the Mandatory as holding a "dual mandate" or a "double trust" (a) on behalf of the inhabitants of the territory and (b) on behalf of the International Society.[85]

If the incapacity of the mandated communities does not affect the validity of the trust, the question as to who is entitled to sue for enforcement of the trust is then merely a procedural question, the substantive question of the validity of the trust having been resolved. The answer to this procedural question depends on the constitutional basis of the trust and the terms of the trust instrument itself. These would indicate the methods that were intended to be used for the effective discharge of the

trust when it was originally created.

The constitutional basis of the international Mandate System as a whole (and therefore each Mandate thereunder) is Article 22 of the Covenant. Paragraph 2 provides that the tutelage is to be exercised by advanced nations "as mandatories on behalf of the League". This shows an intention to make the mandatory internationally responsible to the League. This conclusion is reinforced by paragraphs 7, 8 and 9 of Article 22. Paragraph 7 provides that the Mandatory shall render an annual report to the Council of the League containing information about measures taken by it to administer the territory in question. Paragraph 8 of Article 22 provides that the degree of authority of the mandatory shall be defined by the Council if a prior agreement has not been concluded. The Council had to define the terms on several occasions - including the terms of the South-West Africa Mandate.[86] Paragraph 9 of Article 22 created the Permanent Mandates Commission for the examination of the mandatories' annual reports.[87]

A glance at a typical Mandate Agreement confirms the view that the Mandatory was to be responsible to the international community operating through the League. The third and fourth paragraphs of the Preamble in the South-West Africa Mandate provide respectively that the Mandate was to be exercised "on behalf of

the League of Nations" and that the Council had the authority to define the terms in the absence of a previous agreement. Article 6 of the Mandate incorporates the obligation to render annual reports to the Council but is more specific than Article 22 paragraph 7 of the Covenant, in that under Article 6 the report must be "to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3 4 and 5 (of the Mandate)."

Finally Article 7 provides that the consent of the Council is required for any modification of the terms of the Mandate. It also provides that each League Member could invoke the jurisdiction of the Permanent Court on any question of the interpretation or application of the Mandate. The ultimate weapon of enforcement of the mandate is therefore with the Members of the League acting jointly or individually. This right represented the logical end to the process described above, under Article 22 of the Covenant and the Mandate itself, of ensuring that the Mandatory discharged its trust strictly as envisaged by the League. This right of the Member States of the League also underscored the "double trust" or "dual mandate" of the Mandatory resulting in the latter having a trust not only on behalf of the mandated community but also on behalf of the International Society (as represented in the League). Despite

the absence of a "subject" of international law amongst any of the mandated territories, each mandatory owed its obligations under the international trust to all those states who collectively constituted the League of Nations, in short, the organised international community. The procedural question of enforcement was thus answered.

By way of conclusion, there is the remaining question of the meaning of the term "mandatories" as used by Article 22 paragraph 2 of the Covenant and the applicability of private law analogy there to. Is the term used in the same sense as it would be used in a private contract? Authority has already been cited to the effect that the international institution of Mandate corresponds only in some ways to the civil law contract. There can be no identity between the two concepts since under the civil-law mandate the mandant chooses his own mandatory and the terms of the mandate are settled between them only.[88] The importance of the precise meaning of this term is however diminished to the extent that the concept of trust is the dominant institution of the Mandate System as a whole, and the nature of this international trust has already been examined. The mandatory may, therefore, be regarded as an international trustee. This concept is sui generis in international law and while private law analogy may certainly be used to clarify its policy or meaning, private law concepts

should never be transported without modification into the international sphere. The consequences of the latter methodology would be disastrous for international law. The law of nations is by definition inter-national, and no single nation or group of nations can impose doctrines from its own municipal law on the inter-national law.

Judge McNair has stated that when international law borrows from or makes reference to private law institutions such institutions must not be imported into international law "lock, stock and barrell" as they exist in private law. These references should be understood in his opinion, as an "indication of policy and principles rather than as directly importing these rules and institutions."[89] Judge McNair relies on a decision of the Supreme Court of South Africa to illustrate his point: "Article 22 (of the Covenant) describes the administration of the territories and peoples with which it deals as a tutelage to be exercised by the governing power as mandatory on behalf of the League. Those terms were probably employed, not in their strict legal sense, but as indicating the policy which the governing authority should pursue."[90]

In Judge McNair's opinion the words "sacred trust of civilisation" in Article 22 are not susceptible of a technical meaning but were rather a description of the <u>policy</u> of the

Mandate System. Further confirmation of this approach is given by the following statement of the South African Supreme Court on the nature of the South-West Africa Mandate:

"South-West Africa is transferred to the people of the Union not by way of absolute property, but in the same way as a trustee is in possession of the property of the cestui que trust or a guardian of the property of his ward. The former has the administration and control of the property, but the property has to be administered exclusively in the interests of the latter. The legal terms employed in Article 22 - trust, tutelage, mandate - cannot be taken literally as expressing the definite conceptions for which they stand in law. They are to be understood as indicating rather the spirit in which the advanced nation who is honoured with a mandate should administer the territory entrusted to its care and discharge its duties to the inhabitants of the territory, more especially towards the indigenous populations."[91]

Lauterpacht has observed that the use in international law of private law analogy is only possible under certain defined circumstances. In his opinion such analogies are limited by four considerations: (1) The private law rule must be "recognised by the main systems of jurisprudence";[92] (2) there must

be a real analogy between the private and the international situation; (3) there must be no rule established by or easily deducible from international conventions or customs; (4) there must be sufficient international procedure to make application of the rule practicable.[93]

Although this would be a useful guide in the employment of private law analogies in international law, it expresses no opinion as to the extent to which a private law rule is applicable in international law given the fact that its analogy with a corresponding international rule is legitimate. This however does not reflect on the usefulness of the guide. The extent to which private law concepts ought to be applicable in international law cannot be laid down in any single general rule of universal application. The applicability of the meaning of any particular private law concept will be a matter of degree, varying with the development of international law in the area in which analogy is drawn with a private law source, and the clarity of the policy and purpose of the international rule in question.

The concept of "mandate" in international law is a novelty - or at least was so until the Mandate System was created. There was a near-total absence of international rules regarding this concept and this has resulted as shown above in a rather heavy reliance being placed on private law analogies for the clarifi-

cation of the concept of the international mandate. The difficulties of this task were however somewhat mitigated by the clarity in the overall purpose of the institution.

It will be seen from the foregoing, however, that not a single private law analogy is capable of expressing or explaining on its own all the various elements of the concept of mandate in international law. The detailed theory and practice of the System was to be worked out once the institution began to function.

Perhaps one of the best descriptions of the uniqueness of the mandatory system is contained in the following statement of Judge Wellington Koo of the International Court of Justice:

"But the mandates system, while it bears some resemblance to, and was probably inspired by the concept of guardianship or tutelle in private law, the similarity is very limited. Unlike the municipal law concept with its simple characteristics and limited scope, the mandates system has a complex character all of its own, with a set of general and particular obligations for the mandatory to observe and carry out, and with a scheme of multiple control and supervision by the League of Nations, with its Council, Assembly, member states and the Permanent Mandates Commission and with judicial protection in the last resort by the Permanent Court. It is a novel international

institution. Nothing of the kind existed before. It is sui generis."[94]

CHAPTER III

THE JURIDICAL STATUS OF A MANDATED TERRITORY IN INTERNATIONAL LAW AND THE NATURE OF THE POWERS OF THE MANDATORY.

Introduction.

As was pointed out earlier Article 22 of the Covenant created three categories of mandates.[95] The International Court of Justice has observed that "the difference between these categories lay in the nature and geographical situation of the territories concerned, the state of development of their peoples, and the powers accordingly to be vested in the administering authority, or mandatory...." The Court further explained that "...there were articles conferring in different degrees, according to particular mandate or category of mandate, certain rights relative to the mandated territory, directly upon the members of the League as individual states, or in favour of their nationals.... As regards the 'A' and 'B' mandates (particularly the latter) these rights were numerous and figured prominently - a fact which .... is significant for the case of the 'C' mandates also, even though in the latter case, they were confined to provisions for freedom for missionaries...."[96]

Every Mandate agreement (regardless of the category of mandate) contained a clause giving jurisdiction to the Permanent Court, and a clause providing that modification of a Mandate was possible only with the consent of the Council. However, there was one provision which was peculiar to the 'C' mandates - that the mandatory was to administer the mandated territory "as an integral portion of it own territory".[97]

Although the authority of the Mandatory was in each case to vary, as shown above, in accordance with the category of its mandate none of the above terms - either in Article 22 of the Covenant or in any of the mandates - made any attempts to define the precise status of the mandated territories or of their inhabitants.

It was explained above why a mandated territory does not have the same juridical status as a colony.[98] It is now proposed to compare the status of a protected territory and its inhabitants with the status of a mandated territory and its inhabitants. It will be seen that some similarities do exist between the two types of territories.

Mandated Territories and Protectorates

The legal relationship between a Mandatory vis-a-vis a mandated

territory is analogous to that between a Protectorate and a protecting state. The analogy was approved in the case of Frost v. Stevenson.[99] In R v. Crewe (Earl) Ex Parte Sekgome,[01] the Court of Appeal in England had to decide the status of the Bechuanaland Protectorate. One of the issues was whether the Protectorate was a "foreign dominion of the Crown" within the meaning of the Habeas Corpus Act 1862, which precluded the issue of a writ of habeas corpus by an English Court "into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ." It was held[02] that the protectorate was not a "foreign dominion of the Crown" and that the prohibition of the issue of a writ of habeas corpus applied "only to the territorial dominions of the Crown" the word "dominion" meaning "territorial dominion, and not dominion in the sense of power". The Protectorate of Bechuanaland was under His Majesty's dominion "in the sense of power and jurisdiction, but ...not...in the sense of territorial dominion.[03]

It was further held that "the protected country remains in regard to the protecting State a foreign country; and, this being so, the inhabitants of a Protectorate... do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State."[04]