Civilization and the Mandate System under the League of Nations as Origin of Trusteeship

Nele Matz

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 9, 2005, p. 47-95.

I. The Origin of Trusteeship Concepts in International Law: Introduction

The Trusteeship System of the United Nations as established by Chapter XII and XIII of the UN Charter was designed as a mechanism to safeguard stability in a territory's transitional process of attaining self-governance. The importance of stability in state-building and nation-building processes[1] and the fundamental difficulties experienced when attempting to compel a Western understanding of democracy on societies with a distinct history, different cultural values and religious beliefs is *inter alia* reflected by the present situations in Afghanistan and Iraq.

Despite long years of struggle to establish self-government and democracy either in states in which the former government was overthrown by armed conflict or in territories that were former colonies, the UN Trusteeship System is to some extent a victim of its own success. With the independence of Palau, the last UN Trust Territory, on 1 October 1994 the Trusteeship Council suspended operation a month later.[2] One of the recommendations made by the High-level Panel on Threats, Challenges and Change in its report on the reform of collective security and the UN proposes the deletion of Chapter XIII, i.e. the final and formal abolition of the Trusteeship Council.[3] As the reason for this recommendation the High-level Panel states that the Trusteeship Council assisted with ending the era of colonialism and steered many successful cases of decolonization, but that it was time for the United Nations to formally turn its back on any references to colonialism and

---

1 Although often used interchangeably in legal and political writing on the issue, state-building and nation-building differ according to their relevant objects, their purposes and the means employed to achieve the relevant aims. See the contribution by A. von Bogdandy et al., in this Volume.

2 This, however, does not mean that colonialism in the broader sense of foreign authority over non-self governing territories had ended completely. Yet, in contrast to the era of colonialism the circumstances as well as international perception of such administration are different, particularly because of the general recognition of a right to self-determination for all peoples, and cases of foreign administration are considerably fewer.

3 Report of the High-level Panel on Threats, Challenges and Change – A More Secure World: Our Shared Responsibility, Doc. A/59/565, para. 299.

to counter any potential attempts to return to such mentalities by abolishing the Trusteeship Council.[4]

Nevertheless, the experiences made with UN trusts may serve either as examples of how to assist a nation with the establishment of stable structures of democratic self-governance or of what mistakes should be avoided. However, to draw practical conclusions for the future of state-building, it is important to also examine the historical development of the administration of territories on the way to eventual self-government prior to the foundation of the United Nations.

The UN trusteeship approach was not the first attempt undertaken by the international community to stabilize emerging states in times of their establishment, particularly, in the process of decolonialization. In addition to some approaches to international territorial administration prior to World War I,[5] the League of Nations elaborated a so-called "Mandate System" to govern non-self-governing entities and to supervise powers performing colonial and post-colonial administration in such territories.[6]

---

4 Ibid. As a consequence of this recommendation, it is questionable whether a proposal made by the Secretary-General in 1997, Report of the Secretary-General – Renewing the United Nations: A Programme for Reform, Doc. A/51/950, will be pursued in the future. In para. 85 of this report the Secretary-General had recommended the possible transformation of the Trusteeship Council into a forum through which Member States could exercise collective trusteeship for the global environment.

5 E.g. the General Treaty for the Re-Establishment of Peace between Austria, France, the United Kingdom, Prussia, Sardinia, Turkey and Russia, the so called "Treaty of Paris", 1856, CTS Vol. 114, 409 et seq., that created the European Danube Commission. On further examples before and after World War I see B. Deiwert, "A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea be Applied to a Twenty-first Century Iraq?", *Ind. Int'l & Comp. L. Rev.* 14 (2004), 771 et seq. (781 et seq.).

6 The existing literature on the League of Nation's Mandate System is extensive and ranges from a large number of early monographies such as Q. Wright, *Mandates under the League of Nations*, 1930, which must be considered the most comprehensive work in this field; D. Hall, *Mandates Dependencies and Trusteeship*, 1948; C.L. Upthegrove, *Empire by Mandate*, 1954; to more recent articles that attempt to analyze different aspects of the system, e.g. A. Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations", *N.Y.U.J. Int'l L.& Pol.* 34 (2001), 513 et seq. This paper does not aim to examine the body of literature on mandates *in toto*. It shall rather

The main underlying philosophy of the Mandate System itself can be traced back to the trusteeship concept established under British law and is to a certain extent analogous to the concept of tutelage or guardianship known from private law.[7] In international relations the idea of administering over-sea territories as trusts developed mainly in regard to British colonial policy during the late 18th century and was more widely explored during the 19th century.[8] The question whether different models for political trusteeship offer solutions to current difficulties, e.g. with regard to the governance of so-called "failed states" has resurfaced in recent years.[9]

The experiences with the League of Nations Mandate System as one of the first international concepts of political trusteeship modeled on a common law trust serve as a background to the UN Trusteeship System. To some extent the Trusteeship System was a "natural evolution"[10] of the Mandate System. Due to the historical setting at the times of their respective creation, the two systems differ in regard to their more specific aims. While the Mandate System cannot be analyzed without taking into account the colonial realities at that time and closely related allegations that some societies were not yet developed or civilized enough to determine their political fate by themselves, the Trusteeship System in times of its operations understood itself as a stabilizing, albeit only temporary institution to assist with the establishment of structures for self-government, without denying the general capacity of and right to self-determination.

Although from our perspective today the Mandate System seems inseparably linked to the general policies of colonialism and to such colonial mentalities in particular that survived the first attempts to end colonial rule over certain territories between the two World Wars, the analysis of certain elements might shed some light on today's success

---

serve as an introduction to and explanation of the developments of how the international community has been dealing with non-self-governing territories from the former colonies to the current situations in Kosovo or Iraq respectively.

7 F. Ermacora, "Mandates", in: R. Wolfrum (ed.), *United Nations: Law, Policies and* Practice, 1995, 871 et seq. (871).

8 For a more detailed overview see Deiwert, see note 5, 773 et seq.

9 See e.g. Deiwert, see note 5, 773 et seq. On political trusteeship models and their conceptions see also H.H. Perritt, "Structures and Standards for Political Trusteeship", *UCLA J. Int'l L. & For. Aff.* 8 (2002), 385 et seq.

10 Perritt, see above, 396.

and failure with state-building activities under foreign or international governance.

This paper examines the reasons for as well as the function and structure of the historical League of Nations' Mandate System with regard to its relevance for the UN Trusteeship System and for current state-building processes with international involvement or under international supervision. Particular weight is put upon the issue of civilization of peoples in its historical, i.e. colonial and post-colonial, and modern context and its relevance in international law.

The paper first discusses the historical development from colonial rule to the beginning of the Mandate System (II.) and, in a second step, the structure and function of different types of mandates (III.). In this section, particular emphasis is put upon the international experiences made with the administration of the territory today governed by the state of Namibia, the former German South West Africa. This integrated case-study shall serve as an illustration of the general implications as well as of a malfunctioning of the Mandate System. In the section following the case-study the paper briefly addresses the development from mandates to trusts after the foundation of the United Nations (IV.). Some considerations on the question whether modern post-conflict state-building can profit from the experiences with models for political trusteeship in general and the Mandate System in particular are summed up in the conclusions (V.).

II. From Colonial Rule to Mandates: Perspectives on Colonization and Decolonization

It is not the aim of this paper to give a detailed chronological overview of colonial history and the significance of the Mandate System as a cornerstone of this development.[11] Instead, the following subsections attempt briefly to highlight the end of World War I as the political setting for the creation of the Mandate System by the League of Nations and

---

11 The establishment of the Mandate System can be classified as a cornerstone that marks the end of the second phase of the history of colonization, colonial rule and its gradual decline. The first significant event in the history of colonial rule was the Berlin West Africa Conference that consisted of a series of negotiations held between November 1884 and February 1885. The third phase is marked by the entry into force of the UN Charter in 1945.

then to discuss the various factors that enabled and required the leading powers to establish and operate a system dealing with former colonies.

1. The End of World War I

During World War I it was realized that the maintenance of future peace depended to a significant extent upon an internationalization of colonial policy.[12] After the war the question what should become of the colonies of the conquered belligerents led to controversies. To those victorious states that were themselves colonial powers such as the United Kingdom and France the former colonies of Germany and the Ottoman Empire were perceived as the spoils of war to be shared among the victors. In fact the United Kingdom, France, Russia, Japan and Italy had already agreed separately on the allocation of the enemies' colonies with the clear aim of annexation to enlarge their respective territories.[13] Hence, from the perspective of the victorious colonial powers it was clear that the former German and Ottoman colonies would remain colonies, albeit under different sovereign authority.

The United States with their own colonial history of dependency from the English Crown and the long and painful struggle for independence were generally opposed to annexation of the colonial territories by the victors.[14] By the United States' political influence, particular by President W. Wilson's programmatic approach to establish safeguards for future peace,[15] the idea of – if not full and immediate at least

---

12 Upthegrove, see note 6.

13 D. Rauschning, "Mandates", *EPIL* III (1997), 280 et seq. (280).

14 To justify colonial rule over the Philippines, the United States claimed not to pursue economic and imperial interests, but to assist the peoples with development on various levels. Such reasons for foreign government were repeated in the context of the Mandate System, although, as will be shown in particular in regard to class C mandates, the line between foreign assistance with the administration of a peoples' territory and colonial rule is often difficult to draw.

15 President Wilson elaborated a program of the so-called "Fourteen Points" that dealt with the establishment of a system of world peace and called for *inter alia* diplomacy, restrictions to armament, disarmament, unrestricted trade and freedom of navigation and the creation of a "league of nations". Although Wilson's ideas were to some extent pursued with the establishment of the League of Nations, his further requests only found a weak reflection in the League's political and legal outset.

eventual or gradual – self-determination of societies and decolonization of dependent territories found its way into the political deliberations for post-war international relations.

Before the United Nations was founded, it was again the US American President F.D. Roosevelt, who proclaimed together with the British Prime Minister W. Churchill that they would respect the right of all people to choose the form of government they wished to live under.[16] However, at the time of the foundation of the League of Nations such a perspective was far from being a common understanding, despite first attempts to change colonial policies. The proposed change rather focused on finding compromise between existing and potential colonial powers to prevent possible acts of aggression against one another and not on the liberation of peoples from foreign domination, since the issue of controversy about over-sea territories was perceived a likely reason for future aggression and a threat to world peace.[17]

The origins of the League of Nations and the origin of the Mandate System are closely connected with the efforts of two men, Wilson who proposed the League of Nations on the one hand and the South-African General J.C. Smuts on the other. Smuts made the main proposals for the administration of territories under the supervision of the League of Nations that were to some extent incorporated into the Mandate System.[18] However, originally Smuts had only envisaged a system of international control based upon non-annexation and self-determination for those territories formerly under domination of Russia, Austria and the Ottoman Empire. With regard to the former German colonies Smuts opposed any concepts of self-determination and clearly favored annexa-

---

16 The joint declaration known as the Atlantic Charter, 1941, is accessible online at <http://usinfo.state.gov/usa/infousa/facts/democrac/53.htm>, last visited 6 March 2005.

17 P. Baker, "The Making of the Covenant from the British Point of View", in: P. Munch (ed.), *Les Origines et l'Œvre de la Societé des Nations*, Vol. II, 1959, 16 et seq., (55 et seq.) states that there was no reason to explain why the question of mandates was considered of primary importance for a new order of peace and stability, since it was "universally agreed by all thinkers and politicians that rivalry in securing political control and trade privileges in backward parts of the world has been a prolific cause of international misunderstanding and trouble".

18 In his publication "The League of Nations – A Practical Suggestion", which became known as the "Smuts Plan", reprinted in: D.H. Miller, *The Drafting of the Covenant*, Vol. 2, 1928, 23 et seq., Smuts made the first concrete plans for trusteeship.

tion.[19] Most likely, South-African interests in the territory of German South West Africa, which South-Africa had occupied in the course of the war, played a significant role in this distinction.

The Mandate System that was developed and eventually established by the Covenant of the League of Nations (the Covenant)[20] was a compromise to meet a political dilemma that comprised a variety of factors. The difficult political background to the creation of the Mandate System and the at least partially ambiguous response by the League of Nations justifies the question whether the Mandate System was designed to negate colonialism or to recreate it in an albeit different form and setting.[21]

Indeed the issue whether colonial authority should be maintained by different powers or whether some other form of foreign government was to be established was the crucial question after the peace negotiations at the end of World War I. Article 119 of the Versailles Peace Treaty 1919[22] withdrew authority over her former colonies from the German Reich by providing that:

> "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions."

In a similar process the Ottoman Empire lost authority over her territories in Northern Africa. In order to *inter alia* prevent destabilization of the territories that were liberated from German and Ottoman colonial authority but considered to be not yet capable of self-government, the victorious powers established a kind of condominium over most of these former colonies.[23] The League of Nations created a legal basis for agreement on administration of the relevant territories by establishing the Mandate System in one lengthy article of their newly adopted stat-

---

19 As Smuts stated in the "Smuts Plan", ibid., 28, "the German colonies in the Pacific and Africa are inhabited by barbarians, who not only cannot possibly govern themselves, but to whom it would be impracticable to apply any idea of political self-determination in the European sense".

20 League of Nations, *Pacte de la Societé des Nations/ Covenant of the League of Nations*, 1932; an online version of the document in English is accessible at <http://www.ku.edu/carrie/docs/texts/leagnat.html>, last visited 6 March 2005.

21 Anghie, see note 6, 568.

22 CTS Vol. 225, 188 et seq.

23 Some territories formerly under Turkish rule, e.g. Armenia and Kurdistan, never became mandates.

ute: article 22 of the Covenant.[24] In its para. 1, article 22 of the Covenant emphasizes as one of the core principles the well-being and development of peoples living in those colonies that as a result of the war have lost their former colonial sovereign as a sacred trust of civilization. The central provision for the legal concept of the Mandate System is established by para. 2 that refers to the notion of sacred trust:

> "The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experiences or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

Although decolonization is not explicitly referred to, the overall concept expressed by article 22 of the Covenant may be regarded as the first manifestation of the ultimate goal to abrogate the colonial system that was still being pursued by many European states. A reflection of the goal to end colonialism is that the Mandate System does not explicitly promote continued or new colonial power. The circumstance that colonial powers had to give up their legal position and transfer structures into a regulated mandate or trusteeship is one of the most important issues in the decolonization process, although it is only a first step on the way to self-government of formerly dependent territories. Additionally, the Mandate System distinguishes different stages of development and links them to potential self-determination for the most developed, thus allowing a process of gradual self-government to at least some societies.[25] This first legal attempt to initiate a process of decolonization later found further elaboration in Chapters XI and XII of the UN Charter and the Decolonization Declaration of the UN General Assembly.[26]

---

24 Article 22 is reprinted as an Annex to this article.

25 Article 22 para. 4 Covenant relates to the former Ottoman colonies that are perceived as developed enough to only require some assistance by a Mandatory until "they are able to stand alone" and recognizes their independence on a provisional basis. Yet, the distinction between different territories and different degrees of self-determination has rightly been criticized as inconsistent and arbitrary, see D. Raič, *Statehood and the Law of Self-Determination*, 2002, 196.

26 Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514 (XV) of 14 December 1960.

At the same time, the Mandate System may be perceived as an instrument of imperial power policy,[27] because it continued the practice of foreign rule over the former colonies based upon an assessment of capability and civilization according to the leading states' perspectives on African and Asian peoples. In contrast to the formal principles one might even state that some of the victors actually increased the size of their overseas empires without any serious commitment to leading the native population to obtain control over their political future.[28] These two perspectives on the same system – progress in a decolonization process on the one hand and manifestation of imperial rule over peoples on the other – most precisely reflect the compromise-like character of the Mandate System. In order to better understand the further underlying reasons for the establishment of mandates for government over peoples in African and Asian territories after the end of World War I, a variety of interrelated issues has to be discussed and put into perspective and relation, namely the relation between colonial rule and international law, the evolution of a right to self-determination and different standards of civilization.

2. Colonial Rule and International Law

The relationship between colonialism and international law comprises a variety of further legal and political issues. Definitive approaches to the different issues have changed over time as have the relationships between them. Hence, any analysis must give special attention to the legal and political views of the relevant time under review. In principle, a right to self-determination of peoples is closely connected to the issue of (state) sovereignty and discussions on both topics were, at the time of the League of Nations, very closely tied to views on different degrees of civilization.

The realities of colonialism at the time of the foundation of the League of Nations cannot be discussed without examining the (European) opinion on different standards and forms of civilization. Neither can the issue of decolonization be examined without referring to the beginning universality of international law and the understanding of state sovereignty. The issue of state sovereignty is also linked to civilization, since the definition of sovereignty as power over a territory under

---

27 Ermacora, see note 7, 871.

28 T.M. Franck, *The Power of Legitimacy among Nations*, 1990, 160.

a leader was adapted to exclude (most) African and Asian societies by a reference to a necessary degree of civilization.[29]

a. Colonialism and the Right to Self-Determination at the Time of the League of Nations

In our political relations today colonialism in the narrow sense of the meaning seems to have been overcome, even if the foreign policy of some states is criticized as being an expression of neo-imperialist ideas. Nevertheless, as long as there exist non-self governing territories,[30] the United Nations continues to deal with the implementation of the Decolonization Declaration of 1960,[31] e.g. by regularly evaluating the report of the Special Political and Decolonization Committee.[32] The acknowledgement of the general right to self-determination of peoples and the integrity and sovereign equality of all states are the main reason why colonial rule over territories is no longer recognized and approved by the community of states. Instead the establishment of (new) colonial rule by a state over a territory not part of its own and against the will of the people of the territory would in most cases be regarded an infringement of universal international law and be treated accordingly by the UN Security Council.

In our times almost all surface of the earth, with exemption of Antarctica and few territories whose status is unclear, belongs to the territory of some sovereign states, even if certain borders continue to be questioned. Consequently, any attempt by a state to establish colonial

---

29 On the link between sovereignty and civilization and the struggle of European legal and political thinkers to modify the definition of sovereignty in order to prevent recognition of certain African kingdoms that would otherwise fulfil the criteria for sovereign states and, hence, would qualify as members of the family of nations, see A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harv. Int'l L. J.* 40 (1999), 1 et seq. (25 et seq.).

30 Particularly in the Pacific region several small island territories are administered by foreign authority, e.g. Tokelau that is administered by New Zealand. On the neglected issue of "anachronistic colonial domination" over such micro-territories see Y. Collart, "La Societé des Nations et le colonialisme – Le Mandat international: Une vielle idée pour demain?", in: *The League of Nations in Retrospect – Proceedings of the Symposium*, 1983, 384 et seq.

31 See note 26.

32 The latest resolution on the issue is A/RES/59/136 of 10 December 2004.

rule by annexation of a territory belonging to another sovereign state without consent would be a breach of the prohibition of the use of force established by Article 2 UN Charter. In the age of colonialism all territory not governed by a recognized nation was considered *terra nullius*, despite the fact that it was inhabited by native peoples. The question whether or not a territory was *terra nullius* when coming under the rule of a colonial power is the same as the one concerning the relation between certain governments and indigenous populations, e.g. in Australia, New Zealand or the United States.

In the case of Australia the High Court explicitly recognized that at the time of the discovery of the continent and the subsequent settlement of people of European origin the territory had not been *terra nullius* only because it was not governed by a recognized state.[33] However, from the perspective of recognized international law at the time before the creation of the League of Nations the evaluation of the status of territory inhabited by "savages" was clearly different. Not only was territory considered to be no-man's-land, if no other European power exercised governance, neither were the people recognized as societies with a right to self-determination, despite the evolution of the principle as such.

A right to self-determination of the people and even their right to resistance against oppression and, in the case of American independence the right to free themselves from unjust colonial rule, had been postulated by the American Declaration of Independence, of 4 July 1776[34] and the French Déclaration des Droits de l'Homme et du Citoyen, of 26 August 1789[35], however, these rights were not easily recognized universally. Even the French postulate of equal human rights for all people, while not explicitly distinguishing between different peoples, tied the issue of sovereignty to the nation. Nations, however, were at that time those recognized as belonging to the family of (civilized) nations. Hence, it must be presumed that while all French people and potentially the other European people were considered free and equal, such a

---

33 See the Decision by the High Court of Australia in *Mabo and others v. Queensland* (no. 2), 1992, HCA 23.

34 An online version of the Declaration of Independence of the thirteen colonies can be accessed at <http://www.law.indiana.edu/uslawdocs/declaration.html>, last visited 6 March 2005.

35 An English online version of the French Declaration of the Human Rights can be accessed at <http://www.elysee.fr/instit/text1.htm>, last visited 6 March 2005.

notion with all their consequences for internal and external relations was largely denied in regard to societies of a non-European origin. The explicit reference to the right to self-determination and equal human rights of the peoples in dependent territories in the preambles of later French constitutions, namely the one of 1946 and 1958 further creates doubt whether the original declaration extended to non-European societies.

At the time of the creation of the League of Nations, a right to self-determination was first introduced into international relations by some legal scholars and politicians, yet without general recognition. Wilson, who referred to safety for all peace-loving nations of the world and equal treatment of all peoples in his Fourteen Points of 8 January 1918[36] and elaborated on the issue in several further speeches, was not able to achieve explicit recognition of a right to self-determination in the Covenant.[37] This failure must be qualified as significant, since many minority groups which had believed in the promises of self-governance as an absolute principle with which the allied powers had provoked resistance to destabilize their enemies, were dissatisfied when they found themselves excluded from the privileged categories effectively granting self-determination.[38]

When the American and French revolutions resulted in the liberal theories of governments deriving their legitimacy only from the consent of the governed and the supreme authority of the people, the implications for the people living under the rule of colonial powers were at first rather insignificant, since the European colonial powers concluded that peoples in colonial territories were incapable of governing themselves and benefited from the imperial power.[39]

---

36 Reprinted in J.A.S. Grenville, *The Major International Treaties 1914 – 1973: A History and Guide with Texts*, 1974, 57 et seq. Wilson was aware that colonialism would not be abolished on a short term basis. Consequently, he called for an – at least – "free, open-minded, and absolutely impartial adjustment of all colonial claims" that took into account the interest of the population concerned; to be found in his point No. Five of the Fourteen Points.

37 On the relation between Wilson's Fourteen Points and the later Covenant see also W. Schücking/ H. Wehberg, *Die Satzung des Völkerbundes*, Vol. 1, 1931, 21 et seq.

38 Raič, see note 25, 189.

39 C.E. Toussaint, *The Trusteeship System of the United Nations*, 1956, 5.

b. The Linkage between Sovereignty and Civilization in 19th and early 20th Century Theory and Practice

The rise and decline of colonial rule just like the acknowledgement of a right to self-determination are closely tied to the issue of civilization of peoples. The main underlying question in this context is why colonial authorities but also the Mandate System denied some peoples the right to immediate self-governance and subsequent recognition as sovereign and equal subjects of the evolving international law. In addition to economic considerations, the spreading of Western civilization as well as of Christianity were the main reasons for colonialism of allegedly uncivilized peoples within certain territories by, particularly, Spain, Portugal, France, the United Kingdom and the Netherlands.[40] Concerning the American continent and its native inhabitants the US Supreme Court noted in 1823 in *Johnson v. Mackintosh*[41] that:

> "(...) the character and religion of its inhabitants offered an apology for considering them as people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new world , by bestowing on them civilization and Christianity, in exchange for unlimited independence."

The general understanding by colonial powers that the spreading of Western civilization was a benefit for the "uncivilized" peoples in the colonial territories was only slowly and gradually overcome by a different perception of humanity. Whereas the claim of superiority due to a higher degree of civilization first resulted in alleged rights to civilize and exploit territories, moral change resulted in the notion of a duty of the civilized nations to assist and protect peoples who had not yet reached the same level of development. Still, civilization was the main element of distinguishing between peoples and nations and the resulting inequality between peoples and societies was not countered but legalized by international law and its recognized notion of sovereignty as a foundation of international law.[42]

---

40 Ibid.

41 8 Wheat. 543 (1823).

42 On the linkage between concepts of state sovereignty and inequality in international law see B. Kingsbury, "Sovereignty and Inequality", *EJIL* 9 (1998), 599 et seq.

From the paternalistic perspective of 19th and early 20th century political thinking, a process of decolonization meant that a society first had to be educated to be civilized and then be granted self-determination before it could be recognized as an equal sovereign partner in international relations. While, as mentioned above, one of the most obvious reasons for colonial power is economic interest, i.e. use of the dependent territories for the exploitation of raw materials and as markets for homeland goods, this was not the only reason for denying self-government to a territory's people. From the perspective of the colonial powers pre and post World War I the question why not to grant self-determination to peoples in their colonies was most likely answered with a paternalistic notion of "they are not ready for it". In this context, one has to thoroughly examine for what a people must be "ready" in order to gain self-governance, what preconditions must be met and, first of all, who, if anyone at all, is competent to decide on such issues. A foreign decision on preconditions for self-governance, even if today elaborated by the United Nations, could easily come into conflict with a peoples' equal right to self-determination as we understand it today.

A normative understanding of sovereignty at the turn of the 19th century like today is understood to comprise independence and authority in the form of supremacy over territory and supremacy over persons.[43] Colonies lack sovereignty by definition because they are governed and administered by another sovereign state on which they are fully dependent. The issue of sovereignty as one of the preconditions to become a recognized subject of international law is of vital importance when analyzing relations between European states and non-European territories in the 19th and early 20th century. Sovereign states, already at the turn of the 19th century, could rely upon equality in relation to other sovereign states.[44] As Oppenheim stated:

> "In entering the Family of Nations a state comes as an equal to equals [...]. The quality before International Law of all member-

---

43 L. Oppenheim, *International Law*, Vol. 1, 1905, 101.

44 In recent times, however, this principle has been questioned from the perspective of legitimacy and representation of people. In some fields of international relations, e.g. in the realm of voting procedures in international financing, the principle "one state – one vote" that is a result of the principle of equality of sovereign states has been modified to provide for enhanced fairness and legitimacy.

states of the family of nations is an invariable quality derived from their International Personality."[45]

Statehood and equality, however, as already indicated by reference to a membership in the "family of nations" were further linked to the prior recognition as sovereign states.[46] The theory of recognition that evolved during the 18th century and transformed into a constituent precondition for membership in what was in 19th century language called the "family of nations" and what in today's terminology is marked as the "international community" served to exclude societies from the privilege of sovereign equality in international law.[47]

Likewise the UN Charter states in Article 2 para. 1 that "the Organization is based on the principle of the sovereign equality of all its Members". From this it follows, that entities that were not recognized as Member States of the family of nations or that do not qualify for membership in the United Nations today, could not and cannot automatically benefit from recognition and equal treatment. While it becomes clear that sovereignty and equality in international law are closely linked, this does not as such explain why territories were denied membership in the family of nations even if they had political structures that allowed territorial and personal supremacy; i.e. why they were denied recognition.

In principle, a traditional definition of sovereignty and the resulting right to equal treatment contradicts the circumstance that many non-European territories were first colonized and later administered by Mandatories, including those inhabited by societies that were politically organized and engaging in diplomatic relations. The main reason for denying non-European peoples and their political organization in a certain territory recognition as sovereign subjects of international law was the introduction of civilization as an additional condition for membership in the family of (civilized) nations. By this shift, civilization and membership in the family of civilized nations became the decisive factors for the recognition of sovereign states; not because the definition of sovereignty was modified but because civilization of society was added

---

45 Oppenheim, see note 43, 160 et seq.

46 On statehood and personality in international law in relation to a right to self-determination see Raič, see note 25.

47 On the relevance and historical development of the principle of recognition see G. Abi-Saab, "International Law and the International Community: The Long Road to Universality", in: R.St. Macdonald (ed.), *Essays in Honour of Wang Tieya*, 1993, 31 (36 et seq.).

as a precondition to be allowed into the family of nations.[48] This informal doctrine of a "membership test" that founded upon the distinction between European and Christians and all others and that was promoted by the Eurocentric thinking was sometimes described as the "standard of civilization".[49] Different standards of civilization and, in this case, the European standard of civilization were used to define societies and states inside and societies outside a group defined by the standard.[50]

Hence, even if a territory would have qualified as a state according to structures of territorial and personal supremacy, it was denied recognition and equal treatment if it was not "civilized", unless it was for the benefit of the European authority. Despite the denial of recognition as a sovereign and equal state, European colonial powers recognized treaties concluded with local leaders, if they transferred sovereignty to the foreign authority. The contradiction between not recognizing sovereignty due to a lack of membership in the family of civilized nations, while at the same time referring to the establishment of legal authority due to a transfer of sovereignty by treaty with a former leader, cannot be solved.[51] From this theoretical outset that, in practice, allowed colonization and other forms of administrative authority over "uncivilized" societies in accordance with international law, it is a long way to grant independence to the relevant societies and to recognize them as sovereign and equal members of the community of states.

One step in the direction of such a development was the recognition of a right to self-determination of all peoples. The postulate of the equality of peoples that shared a common right to self-determination called for the formation of new states which would then in turn enjoy the principle of equality of all states. Yet, the acknowledgement of an equal right to self-determination for all peoples necessarily meant abolishing standards of civilization. When the League of Nations was founded, the Japanese proposal to include a clause on racial equality that would have set the basis for self-determination of non-European peoples was rejected and demonstrated the weak position of even the

---

48 Anghie, see note 29.

49 Kingsbury, see note 42, 605.

50 G.W. Gong, *The Standard of 'Civilization' in International Society*, 1984, 3.

51 On the issue see also O. Yasuaki, "When was the Law of International Society Born? - An Inquiry of the History of International Law from an Intercivilizational Perspective", *J. History Int'l L.* 2 (2000), 1 et seq. (3 et seq.).

already recognized Asian and African states in the Versailles peace process on the one hand and a profound and general resistance to racial equality as a political or even legal principle on the other.[52]

It follows from the combination of normative and informal doctrinal elements that, at the time of the establishment of the Mandate System, only being a member in the allegedly civilized family of nations together with power over a territory under the authority of a leader could result in recognition as a sovereign state. Only those states qualified as subjects of international law and hence qualified for membership in the League of Nations, and were allowed to create and implement a Mandate System for the well-being of the uncivilized former colonies. It was only in retrospect that a concept of sovereignty that was inherent in every people was referred to by some.[53] The idea that mandated territories had sovereignty but that this sovereignty was temporarily deprived of actual expression was not common when the Mandate System was created but was introduced later to explain contradictions in legal and political theory.

c. Approaches to Different Standards of Civilization

When setting aside the common and "natural" understanding that dominated 19th and early 20th century thinking that African and Asian peoples were uncivilized, the central difficulty that remains is to define the content of the term "civilization" or a "standard of civilization". Obviously, approaches to defining the meaning of civilization strongly depend upon the time and situation, the cultural background as well as upon philosophical considerations. In general, the understanding of what constitutes civilization varies considerably with the relevant context in which the question is examined. In the context of admittance to the family of nations the standard of civilization also gained a legal dimension, albeit without much agreement in legal writing as to how to define such a standard.[54]

When international law introduced the requirement of civilization as a precondition to be recognized as an actor, different approaches as to

---

52 See Kingsbury, see note 42, 607.

53 E.g. in the separate opinion of ICJ Vice-President Ammoun in the case Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971), 16 et seq. (67 et seq.).

54 Kingsbury, see note 42, 605.

what constituted the necessary degree of civilization existed, although it was in principle agreed that it had to be a standard of civilization in the European sense. In essence the importance of being a member of the civilized part of the world in colonial and post-colonial times does not define the preconditions for being recognized as civilized other than being as European as the European powers at the time of the League of Nations. Consequently, European values, standards and modes of behavior had to be copied and, furthermore, nations had to assimilate in a commercial sense, i.e. they had to engage in constant commercial relations with the European states.[55] Likewise international law evolved from a "law of Christian nations" to a "public law of Europe" to a "law of civilized states" including the assimilated non-European states.[56]

First of all the encounter of European and non-European cultures in Africa and Asia but also with native Americans, native Australians or with New Zealand's natives was exactly that: a clash of different cultures. In the end European culture and a European understanding of standards of civilization prevailed. However, the superiority that resulted in defining what amounted to civilization according to its own cultural standards was not established by an assessment of the values of the different cultural convictions – if suchlike would be possible at all – but by the accompanying military force and superiority. By the combination of military superiority with the missionary spreading of culture and religion non-European societies had no choice but to accept the standard of "civilization" as something worth attaining[57] in order to ultimately be granted self-determination. Only assimilation promised recognition.

It was hardly questioned by the Eurocentric perspective on international law that peoples living in Africa and Asia were uncivilized if compared with the European societies or societies descendant from the European peoples such as America or Australia and New Zealand. Although certain African and Asian states were recognized due to their standard of civilization, which was e.g. in the case of the recognition of Japan mainly demonstrated by military might, they remained outside the inner circle of European actors: tolerated but not considered fully-fledged Member States.[58]

---

55 Abi-Saab, see note 47, 36 et seq.

56 Gong, see note 50, 238.

57 Ibid., 98.

58 Abi-Saab, see note 47, 37.

The Mandate System reflects the distinction between the civilized and the uncivilized by referring to tutelage as a sacred trust of civilization that can only extend – although not explicitly referred to as such – to the uncivilized or not yet sufficiently civilized societies. Despite its careful wording, the idea behind the establishment of different types of mandate was clearly based upon allegations that some peoples were not civilized enough to be able to govern themselves on a short-term or even medium-term basis.

The Eurocentric understanding common at that time that the peoples in the dependent territories of Africa and Asia were too uncivilized to establish public order, public administration, stable governmental structures, a civil society, education and a viable economy was proliferated by political and legal opinion and writing at that time. Nineteenth century classification of "humanity" distinguished either between the "civilized", "semi-civilized" and the "uncivilized" or in a different terminology between "civilized humanity", "barbarous humanity" and "savage humanity".[59]

Reasons for such a common understanding that was reflected in European societies in general, can partially be explained with reference to socio-cultural implications at that time. Contacts to African and Asian people were, at least for the ordinary European citizen, very limited. Relations to non-European societies and cultures were often restricted to tales of seafarers and adventurers. The fact that, mainly African, people were exhibited by their participation in shows held *inter alia* in German and Austrian zoos[60] further promoted the picture of exotic but savage peoples and assisted the manifestation of a common understanding of superiority of the (European) "civilization".

---

59 See ibid., 38 for further categories and references to late 19th century sources.

60 In the late 19th and early 20th century shows with "exotic" people were a great success throughout Europe. The German zoo Hagenbeck in Hamburg, for example, held more than 60 so-called "Völkerschauen". In these shows members of African, South-American and other native peoples performed "tribal dances" or were exhibited in their allegedly normal surroundings performing their daily chores to the fascination of the public. In accordance with the fashion of the time, shows were often provided with an alleged scientific background to attract an even greater audience. On the history and setting of these shows see *inter alia* H. Thode-Arora, *Für fünfzig Pfennig um die Welt – Die Hagenbeckschen Völkerschauen*, 1989; L. Dittrich/ A. Rieke-Müller, *Carl Hagenbeck (1844-1913) – Tierhandel und Schaustellungen im deutschen Kaiserreich*, 1998.

From our perspective today, "civilization" and a "high standard of civilization" might be equaled with the implementation of certain human rights standards. However, taking into account the violence and unrestricted brutality with which allegedly civilized states fought against each other during World War I, it is questionable whether at the time of the Mandate System there was any linkage between civilization and humanity in more concrete forms. In essence "civilization" at the time of the Mandate System was a notion of cultural arrogance if not a tendency towards racism that perceived as uncivilized those peoples that did not share European culture, religion and traditions.

d. Implications for Current Policies

Although democracy as the result of a process of self-determination of a people to govern their affairs internally and externally, is the indispensable foundation of many states that are important actors in the international arena, this development is relatively young. The idea to protect societies from undemocratic forms of government does not explain the historical reasons for denying self-government and is questionable even today. In the high time of colonial powers, most of the states exercising authority over overseas territories were monarchies with more or less strong approaches to democratic self-government of their own people. A lack of ability to democratically govern themselves at that time and even directly after World War I, when democratic republics were strengthened, could not have been the decisive factor. Instead civilization and the lack thereof was turned into the central issue that served as an interrelating factor for the issues of colonial rule, tutelage, sovereignty and self-determination.

Relics of the distinction between the civilized and the uncivilized peoples remain in the texts of current international law, although they have lost their practical relevance. The most prominent example is given by Article 38 para. 1 lit. c. of the Statute for the ICJ.[61] This article refers to "general principles of law recognized by civilized nations" as one of the sources of international law to be applied by the court. The provision with its reference to civilized nations has its origin in article 38 of the Statute for the Permanent Court of International Justice (PCIJ),[62] the ICJ's predecessor, that was adopted on 13 December 1920. The PCIJ served as the dispute settlement institution for the Member States

61 UNCIO Vol. 15, 355 et seq.

62 LNTS Vol. VI No. 170, Statute.

of the League of Nations and its statute clearly reflects the perception of international law at the time of its creation.

The reference to civilization to define the sources of law is a clear reflection of the origins of international law in the Westphalian system of sovereign states. Although each source named in Article 38 para. 1 of the ICJ Statute was originally linked to a standard of (European) civilization, the frequent use of the phrase "recognized by civilized nations" started to become an issue of embarrassment in international law and international relations in the 20th century.[63] The fact that the reference to general principles of law of only the civilized nations as a source of international law was not deleted from the later Statute for the ICJ demonstrates that the Eurocentric era of international law was not yet completely over when the UN was founded, despite the acknowledgement of a right to self-determination and efforts to promote decolonization.

Today, the term "civilized nations" in Article 38 para. 1 lit. c. ICJ Statute is understood to have no limiting or in any way restrictive character but refers – if not to all recognized states of the world – at least to all UN Member States.[64] This understanding reflects that a practice of differentiating between the civilized and others has formally been given up in international legal relations and that the exclusively Eurocentric perspective on law has been overcome despite continuing economic and political dependencies between developed and developing states. Yet, the issue of different standards of civilizations might resurface even in our times, either as a "clash of civilizations" or as the question whether globalization forces a diverse cultural system to conform to a Western standard.[65]

With a view to current world relations one might all too easily apply the measuring stick of a Western understanding of democracy to determine whether societies are capable of governing themselves or whether foreign assistance in a broad sense of meaning is necessary. From a perspective that often has a decidedly paternalistic notion, a people that is not ready for democracy must be protected from instability or from villainous tyrants. According to such a line of argumentation a people requires guidance towards democratic self-government that can only be granted by some kind of external administrative authority. This, how-

---

63 D.P. Fidler, "The Return of the Standard of Civilization", *Chi. J. Int'l L.* (2001), 137 et seq. (138).

64 W. Heintschel von Heinegg, in: K. Ipsen, *Völkerrecht*, 2004, §17, para. 2.

65 On this issue see Fidler, see note 63, 137 et seq.

ever, leads to a distinction between the "able" and the "unable", the "knowing" and the "unknowing" that is more or less equivalent to the distinction between the "civilized" and the "uncivilized", which has – at least formally – been abolished from modern political theory. In both cases, post World War I and today, the underlying scenario – Western nations use international law to impose policies, institutions and values embedded in Western civilization upon non-Western societies[66] – is virtually the same.

With a view to world politics of the last years the tendency is to replace the former distinction between civilized and uncivilized societies with a distinction between undemocratically and democratically governed peoples. Whether such a distinction is an advisable criteria for modern world politics is questionable. The relevant questions are caught in the dilemma between actively promoting human rights standards and respecting the integrity of states even if they are qualified as "failed states" by parts of the world community.

III. Structure and Function of the Mandate System

The conceptual structure of the Mandate System demonstrates its overriding objective not to treat the detached colonies as spoils of war to be transferred under new colonial rule but to create a system of controlled administration under supervision of the League of Nations. The system clearly is of an international nature, although the direct administrative authority is vested in single Member States, the Mandatories, in contrast to an approach of direct international government.[67] The balance of a Mandatory's power on the one hand and supervision and control by the League of Nations on the other reflects the political compromise and shows certain deficiencies. The League of Nations itself had no legal competencies to transfer the administration of mandated territories un-

---

66 Ibid., 139.

67 On the distinction between different models of direct administration after the foundation of the United Nations either as Direct Administration by the United Nations or as Direct Administration by UN Member States see E. de Wet, "The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law", *Max Planck UNYB* 8 (2004), 291 et seq.

der its direct control should the Mandatory fail to comply with obligations under the mandate.[68]

1. Governing Principles: Non-Annexation and "Sacred Trust"

Different levels of objectives and goals have to be distinguished when examining the Mandate System. One of the main political ideas behind the system was the prevention of exploitation of native peoples in dependent territories. This objective was supplemented by the one to promote the well-being and development of the people. These political deliberations were implemented and supported by a number of principles. Primarily, two elements formed the core of the Mandate System: the principle of non-annexation of the territory on the one hand and its administration as a "sacred trust of civilisation" on the other. While these considerations addressed some problems, e.g. the general restriction of the powers of the Mandatories, they raised others, particularly with regard to who had sovereignty over the territory.

The circumstance that the Mandatories had to administer the mandated territories without annexation, while to some extent countering imperial desires of the existing colonial powers, did not solve the question of whether or not and to what degree any entity had sovereignty over the territories at all. The mandated territories were considered not yet capable of sovereignty, which would have meant self-determination in all respects. Under colonial rule the governed colonies by definition lack sovereignty. Yet, in these cases sovereignty and jurisdiction is with the colonial power. The Mandatories, as opposed to colonial authorities, administered the territories in accordance with the terms of the mandate and on behalf of the League of Nations. Hence, the performance of rights according to the mandate can only relate to conferred rights and not to original ones held by the Mandatory. At the same time the conferral of administrative rights does not necessarily transfer sovereignty. Furthermore, in order to be transferred from the League of Nations to a Mandatory it must have first been attributed to the organization.

---

68 In contrast thereto, the UN Charter crafted an idea of direct international government into its Article 81. Under this provision the United Nations could act as a potential Administrating Authority within the Trusteeship System.

This, however, must be denied when interpreting the Covenant. The Covenant is silent on the issue of new sovereignty over the territories. Article 22 only mentions that they have ceased to be under the sovereignty of the states governing them before the war. From the further wording it follows that the territories themselves are not ready for sovereignty. No indications are given that "tutelage" involved sovereignty. The League of Nations' involvement in the Mandate System and the position of a supervisor over the Mandatories did neither transfer territorial sovereignty to the institution itself nor, as already explained, to the Mandatory. As a result, the mandated territories remained entities that were governed by international law without being recognized subjects of international law. Mention has already been made of – later – theories of "dormant" sovereignty that at all times lay with the people in dependent territories but that was only re-established[69] when the territory became independent.

The principle of administration as a "sacred trust of civilisation" was designed to prevent a practice of imperial exploitation of the mandated territory in contrast to former colonial habits. Instead, the Mandatory's administration should assist in developing the territory for the well-being of its native people. A difficulty with the concept of "sacred trust" is its lack of definable content and its – from our perspective today – decidedly paternalistic tone. If anything, it can serve as a negative definition to detect the abuse of power, e.g. if in the case of the exploitation of gold and silver or minerals for the benefit of the Mandatory the latter is not treating the territory as a "sacred trust". Apart from this, the term is without specific legal or even political meaning but rather affirms a moral duty to care. Although the idea behind the system is reflected by the use of the term "sacred trust", it does not give guidance on how to actually perform the Mandatory's function. Furthermore, it cannot serve as a measuring stick when controlling a Mandatory's performance. This changed only when, after the creation of the United Nations and the establishment of the principle of self-determination, what

69 Technically it was for most territories not even a re-establishment of sovereignty but its first exercise, particularly because colonial powers arbitrarily drew borders of territories that had nothing in common with ethnic groups or societies inhabiting the land. When these borders were affirmed by the borders of the mandated territories they comprised societies that had formerly never exercised sovereignty as one people.

was formerly called a "sacred trust" was equaled with speedy development of structures for self-government.[70]

2. Establishment and Classification of Mandates

All mandates[71] were established by a Mandate Agreement, which set the terms for the administration by the Mandatory Power. By such a procedure rights and duties of the Mandatories were specified for each territory. Article 22 of the Covenant in accordance with its overall aim to guarantee the well-being and development of the peoples inhabiting the former colonies provides that:

> "the character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances".

Different groups of territories are further elaborated upon by article 22 paras 4-6 Covenant with reference to the different stages of cultural, political and economic development as well as certain particularities that require varied degrees of administration. Such differences are in further detail recognized by the specific mandates. Article 22 of the Covenant and the different mandate agreements have led to the classification of dependent territories as A, B and C mandates according to the degree of involvement of the Mandatory and the corresponding degree of self-governance.

The so-called A mandates consisted of former Ottoman Empire colonies and comprised Iraq, Palestine including Transjordan, and Syria including Lebanon. According to article 22 para. 4 Covenant the societies living in these territories had developed in such a way that "their existence as independent nations can be provisionally recognized". Although formally mandated territories, these A mandates were only nominally governed by foreign authority as the Mandatory was offering advice and support in the process of self-government.

In contrast to the relatively far-reaching self-determination of the societies in A mandates, authorities that were mandated with category B mandates had far greater powers over the administration of the territory. Mandatory states exercised full administrative control under the

---

70 Franck, see note 28, 160.

71 For the distribution of mandates and figures concerning the area of the territories and their population (as of 1938) see Hall, see note 6, 295.

supervision of the League of Nations' organs that were responsible for the Mandate System. Category B mandates included the British and French rule over Cameroon and Togo[72], German East Africa (Tanganyika) and Rwanda-Burundi.

By its concept and degree of power, rule over C Mandate territories came closest to colonial rule. The relation between the Mandatory state and the mandated territory reminds of the relation between imperium and dominium.[73] Article 22 Covenant names South-West Africa and certain South Pacific islands as being best administered as integral parts of the Mandatory's territory:

> "owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their contiguity to the territory of the Mandatory … ".

Australia was mandated with the former German territories South of the equator, Japan with those North of the equator. Nauru was mandated to the United Kingdom, Western Samoa to New Zealand and former German South West Africa came under the Mandate of the Union of South Africa. The last mandate became a particularly problematic matter of international politics and international law and shall be given a closer look in some of the following sections.[74]

3. The Main Institutional Features of the Mandate System

According to article 22 para. 7 of the Covenant Mandatories had to report annually on the situation in the territories they administered, as part of the balance between relatively far-reaching powers and League of Nations supervision. Those reports had to be submitted to the Council. However, in accordance with Article 22 para. 9 of the Covenant, the League of Nations established the so-called Permanent Mandates Commission to examine the annual reports and to advise the Council on matters related to the Mandate System. The creation of reporting requirements as part of a compliance procedure and compliance control has experienced growing approval in international human rights law and international environmental law in the last decades. To this ex-

---

72 In both cases parts of the territories were mandated to the United Kingdom and others to France.

73 Ermacora, see note 7, 872.

74 Infra at III. 4.

tent reporting requirements are still considered a modern and viable tool of institutions. However, a reporting scheme is hardly sufficient, if it is not accompanied by further means to influence the behavior of states should they fail either their reporting obligations or their substantial duties.

In the case of the Mandate System the degree of actual control was relatively low. Although the Permanent Mandates Commission reviewed the reports, it did not verify the situation in the mandated territories. Neither was the Permanent Mandates Commission itself competent to decide on formal or substantial deficiencies concerning compliance with the relevant mandates.

Another element already introduced by the Mandate System that is experiencing a revival in current international relations consists of the possibility for individuals to submit petitions. The right of petition was not expressly referred to in the Covenant. Nor was mention of such a right made by the texts of the different mandates. The Council established the system by the adoption of a Procedure in Respect of Petitions in 1923.[75] The system *inter alia* served as a means of gathering additional information about the situation in a particular mandated territory for the Permanent Mandates Commission.[76] In our times such a mechanism was *inter alia* introduced with the creation of the World Bank Inspection Panel to enhance accountability. However, the petition system that formed part of the Mandate System hardly functioned as an effective procedure to achieve a change of policy of the Mandatory. Petitions from inhabitants of the mandated territory were only accepted if they were transmitted by the Mandatory itself, which could either suppress petitions because inhabitants lacked trust in the Mandatory or because the Mandatory in fact refrained from transmitting such petitions.

4. The Example of German South West Africa (Namibia)

In addition to the case studies performed by other contributions to this Volume, the following subsections focus on governance of the territory of the former German South West Africa to illustrate the setting and

---

75 Reprinted in Hall, see note 6, 314 et seq.

76 S. Slonim, *South West Africa and the United Nations: An International Mandate in Dispute*, 1973, 47.

some of the failures of the Mandate System of the League of Nations.[77] In contrast to other case studies, this article with its focus on the Mandate System and the issue of civilization does not attempt to draw the full and chronological picture of events from the negotiation of the Mandate for the territory to its independence. Rather this paper concentrates on briefly summarizing the main steps undertaken by the League of Nations and later the United Nations in regard to Namibia insofar as they are relevant for an assessment of the Mandate System and its deficiencies and a discussion on potential future models for trusteeship and state-building.

As mentioned above, the Union of South Africa that was in this context represented by General Smuts played a significant role in creating the Mandate System. From the beginning South Africa expressed her will to be mandated with the territory of the former German colony South West Africa that lies adjacent to her own territory. When the Mandate System was initiated, "His Britannic Majesty" was mandated with the former German territory and, since the mandate was "to be exercised on his behalf by the Government of the Union of South Africa",[78] the latter administered it for more than half a century to great international concern regarding the means of administration and the political system established.

The general acceptance of the name "Namibia" that stems from the Namib Desert instead of the former designation of the territory as "South West Africa" results from a UN General Assembly Resolution in 1968.[79] Acceptance of the name by the community of states underlined the formal recognition of the territory's right to rid itself from both its colonial label and from administration as part of the South African state territory. By such a proceeding the United Nations meant to emphasize the Namibian people's claim to self-determination. The need for explicit re-statements of Namibia's special, international status has

---

77 On the mandate and later UN involvement see *inter alia* Slonim, ibid. 76; G.M. Cockram, *South West African Mandate*, 1976; I. Sagay, *The Legal Aspects of the Namibian Dispute*, 1978. For a fuller picture on Namibia's final independence and the role of the numerous political actors involved see e.g. V.J. Belfiglio, "The Issue of Namibian Independence", *African Affairs* 78 (1979), 507 et seq.; S. Soni, "Regimes for Namibia's Independence: a Comparative Study", *Colum. J. Transnat'l L.* 29 (1991), 563 et seq.

78 Preamble to the Mandate for German South West Africa, reprinted in Slonim, see note 76, 369 et seq.

79 A/RES/2372 (XXII) of 12 June 1968.

to be seen in the context of the long-term controversy between South Africa and the League of Nations and, particularly, the UN over the administration of the former colony that began shortly after it became a mandated territory and ended with Namibia's independence and full recognition as a sovereign state in 1990.[80]

a. The Controversy about the Status of Namibia as a Mandated Territory: The Question of Sovereignty

When Germany had to renounce all rights concerning overseas territories according to article 119 of the Versailles Peace Treaty, the former German protectorate of South West Africa was classified a type C Mandate. On 17 December 1920 the Government of the Union of South Africa represented by the King of England was mandated with the administration of the territory. According to the regulation in article 22 para. 6 of the Covenant, South West Africa was allowed to administer the territory as part of its own. The far-reaching powers of the Mandatory are also referred to by article 2 of the German South West Africa Mandate according to which:

> "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory […]".

Apart from that general outline, the degree of administration and control was to be defined by the Council of the League of Nations in accordance with article 22 para. 8 of the Covenant. This article is also referred to in the preamble of the Mandate for German South West Africa. As mentioned above, category C mandates come closest to colonial rule, due to the far-reaching powers of the Mandatory, although the principle of the "sacred trust" was meant to prevent colonial exploitation. The example of Namibia demonstrates the difficulties to define the legal status of class C mandates. Despite the circumstance that the Mandatory state was allowed to exercise full administrative and legislative powers as if the territory was a portion of its own, in legal terms this did not result in an annexation of the territory. However, the apparent contradiction between the principle of non-annexation and *de lege lata* treatment as part of the Mandatory's territory leads to a *de facto* annexation. In the case of Namibia the *de facto* annexation to-

---

80 Namibia was admitted to membership of the United Nations on 23 April 1990.

gether with the profound difficulties in defining the issue of sovereignty for class C mandates resulted in a lack of clear rejection of South African claims in the time of the League of Nations.

The mandated territory remained a particular subject of international law: neither sovereign itself nor formally a part of another sovereign state's territory. Yet, the League of Nations was doubtful how to react when South Africa challenged exactly this conclusion. The wording of the Mandate for German South West Africa[81] is already ambiguous as far as the issue of sovereignty over the territory is concerned, since it does not clearly reject South African claims to sovereignty over the territory, but instead affirms full powers.[82]

In 1926, six years after the beginning of the mandate, South-Africa first formally claimed the possession of sovereignty and initiated a controversy with the League of Nations that resulted in a very vague interpretation of South African sovereignty over the territory which was accepted by South Africa.[83] The granting of factual power and the fictional treatment of the territory as if it were part of the Mandatory's state territory together with relatively weak institutional control, however, paved the way for a more obvious abuse of powers in the decades to come.

The initial reasons why, according to the League of Nations, the territory was to be administered by another state – a society allegedly too uncivilized to take its governance into its own hands – differed considerably from the later South-African reasons for not leading the territory towards self-determination and independence. Due to the common border with the territory it was mandated with, South-Africa claimed a threat to national security by Soviet Union influences on organizations operating in the territory, namely the South West Africa People's Organization (SWAPO).[84]

---

81 See note 78.

82 Ermacora, see note 7, 875. This difficulty, although it became most apparent in the case of Namibia, was shared by other class C mandates as well. The mandate for the German Possessions in the Pacific Ocean Lying North of the Equator, reprinted in Hall, see note 6, 307 et seq., that concerns those Pacific islands brought under Japanese authority after World War I is formulated in equally sparse and ambiguous words, in fact, article 2 of the Japanese mandate uses in its relevant parts exactly the same wording as article 2 of the mandate for German South West Africa.

83 Ermacora, see note 7, 875.

84 Belfiglio, see note 77, 507.

Hence, the reason for continued administration was South-African national-security and not the well-being of the people of the mandated territory and their education towards self-government. Although the Mandate for German South West Africa misses a provision that the territory's population should be gradually led to self-governance, article 22 para. 6 Covenant refers to the interests of the population that are to be safeguarded and not to the political interests of the Mandatory state. In addition to the questionable reasons for continuing administration of the territory by the Mandatory, the treatment of the indigenous population of South West Africa, whose interest article 22 para. 6 Covenant explicitly mentions, gave rise to concern when South-Africa introduced a system of apartheid in Namibia that contradicted the duty to safeguard the well-being of the native population.

b. The Termination of the Mandate

When the League of Nations dissolved and the United Nations was created the controversy about the status of Namibia entered into a new round. Although the League of Nations under which the Mandate System was established no longer existed, in legal terms the mandates continued. In principle, three different options existed in regard to Mandatories and their relation to the community of states and the newly founded United Nations: (1.) to terminate the mandate and leave the territories in a state of self-determination and independence; (2.) to transfer the mandates into the UN Trusteeship System and continue administration under its conditions; or (3.) to continue the mandate without transfer and without the League of Nations institutional setting. The last mentioned option is the one with the most difficult legal status with regard to control of the Mandatory's continuous administration.

South Africa explicitly refrained from formally transferring her administration of the territory she had been mandated with into the UN Trusteeship System as envisaged by Article 77 of the Charter, despite numerous resolutions adopted by the UN General Assembly to the effect that South Africa was obliged to put the territory under UN Trusteeship.[85] Nevertheless, in addition to the declaration that South Africa

---

[85] See e.g. A/RES/141 (II) of 1 November 1947. The ICJ, in its first Advisory Opinion dealing with Namibia, later held that there was no obligation by South Africa to enter into a trusteeship agreement with the United Na-

would comply with her obligations of the mandate, she also issued reports to the Trusteeship Council. When criticism within the United Nations concerning South Africa's administration of Namibia grew significantly in 1949, South Africa stopped the submission of reports arguing that she was not obliged to report to the United Nations but had only done so on a voluntary basis.[86] Despite the controversy about the administration of the territory and reporting obligations, South Africa, once again, confirmed her determination to continue authority in accordance with the spirit of the mandate.

In its Advisory Opinions the ICJ upheld the opinion that the mandated territory continued to have an international status, since the mandate was not terminated with the League of Nation's dissolution on 18 April 1946.[87] Although the court explicitly stated that South Africa was not competent to alter the status of the territory unilaterally, this did not abrogate South Africa's claim to sovereignty over the territory and the related lack of intent to lead the territory to self-determination and eventual self-government. Furthermore, criticism concerning the question whether South Africa ruled for the well-being of the people in the mandated territory rose significantly when the Mandatory prepared to establish a regime based upon apartheid that extended to the territory.

Since Advisory Opinions do not result in decisions that are legally binding, the ICJ opinions did not lead to any change of behavior on part of the Mandatory. Furthermore, South Africa's refusal to submit to supervision and to cooperation in this respect, contrasted with any effective supervisory powers by the United Nations. Since the territory of Namibia was not transferred into the Trusteeship System, the institution of the Trusteeship Council had no competencies in this matter. The rather weak powers the League of Nations had held in regard to supervision of the Mandatories were now considered to lie with the UN General Assembly.

When South Africa showed no signs of intent to comply with the obligations under the mandate, Ethiopia and Liberia, relying upon article 7 of the 1920 Mandate,[88] submitted claims to the ICJ stating that

---

tions, see International Status of South West Africa, ICJ Reports 1950, 128 et seq. (139 et seq. and 144).

86 On the different positions see A/RES/337 (IV) of 6 December 1949.

87 See e.g. International Status of South West Africa, ICJ Reports 1950, 128 et seq.

88 In its relevant part, the article reads as following: "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and an-

South Africa seriously violated her duties as a Mandatory. The ICJ's decisions in this matter revealed the weaknesses of proceedings according to the Statute for the ICJ in general and did little to establish trust in the efficient settling of disputes in international law. Although the ICJ had on a preliminary basis in 1962 rejected South Africa's claim that the applicants lacked standing to bring the case before the court, it dismissed the applicants' claim four years later finding that they lacked a legal interest in the settling of the matter.[89]

In contrast thereto, the United Nations was held to have such an interest in claiming compliance with the obligations accepted by South Africa under the mandate. However, the United Nations as an international organization was excluded from applying for a binding court decision. According to article 34 para. 1 of the ICJ Statute only states can be parties to dispute settlement procedures. Likewise, the obligation to follow a decision made by the ICJ extends only to states that are parties to the relevant dispute, Article 94 UN Charter. In accordance with Article 96 para. 1 UN Charter the only means to achieve a ruling by the ICJ on the matter was the application for another non-binding Advisory Opinion by the General Assembly or the Security Council.

Finally, lacking effective judicial possibilities to influence South Africa's behavior concerning the territory, the United Nations decided on 27 October 1966 to terminate the mandate because of South Africa's constant lack of fulfillment of her obligations under the mandate.[90] As a consequence of the termination of the mandate, the United Nations claimed that the territory had come under direct responsibility of the United Nations and on 19 May 1967 the organization established the UN Council for South West Africa that was later designated as the UN Council for Namibia.[91] The UN Security Council quickly recognized the mandate's termination and reacted to the new situation by calling upon South Africa to withdraw her administration over the territory as the continuation of South African presence in Namibia was contrary to

---

other Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

89 South West Africa, Second Phase, ICJ Reports 1966, 6 et seq., particularly paras 15 et seq.

90 A/RES/2145 (XXI) of 27 October 1966.

91 As to the composition of the Council, see D.S. Haase, "Namibia Council", in: Wolfrum, see note 7, 1995, 914 et seq.

international law and therefore illegal.[92] Furthermore, the Security Council stated that due to the illegality of South African presence in Namibia, all acts taken by the South African Government in relation to Namibia after the termination of the Mandate were illegal and void.[93]

When the Security Council requested another Advisory Opinion by the ICJ to clarify the legality of the termination of the mandate and its consequences, the court confirmed the UN's position.[94] In its Advisory Opinion the ICJ held that:

> "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately".[95]

By S/ES/301 (1971) of 20 October 1971 the United Nations endorsed the court's conclusions, but just like previous resolutions adopted by the General Assembly or the Security Council on the issue, South Africa disregarded the decision and the ICJ's opinion. The vote taken by the 29th General Assembly to deprive South Africa of its seat in the Assembly as a sanction to her continuous refusal to comply with United Nations and the ICJ's decisions on Namibia did not lead to the expulsion from the United Nations as such and did not result in a change of behavior on South Africa's part.

c. Namibia's Independence

In the light of the circumstance that South Africa did not give up her factual authority over the Namibian territory, the United Nations undertook a variety of political strategies to pave the way for eventual independence. What seemed impossible at the time of the League of Nations – an immediate right to self-determination for the Namibian people – was reaffirmed constantly and accompanied by more concrete action. The concept of administration as a "sacred trust of civilisation" had changed over the years. With the creation of the United Nations and its Trusteeship System foreign authority over territories was in this context understood as assistance to the realization of the peoples' right

---

92 S/RES/264 (1969) of 20 March 1969 and S/RES/269 (1969) of 12 August 1969.

93 S/RES/276 (1970) of 30 January 1970.

94 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, 16 et seq.

95 Ibid., para. 133.

to self-determination. South Africa, however, still relied upon the distinction between civilization represented by the white South African Government and the "uncivilized" natives. She had apparently not followed this new understanding when she refused to transfer Namibia into the Trusteeship System and instead acted in accordance with her divergent comprehension of civilization.[96] The refusal to transfer the territory into Trusteeship together with the refusal to withdraw from Namibia and to grant it independence openly contradicted South Africa's proclaimed policy of self-determination.

When political pressure rose significantly in the 1970s this was only to a lesser extent due to a different or stronger interpretation of the right to self-determination compared to the time of the founding of the United Nations, but mainly due to the many new states that had emerged during the process of world-wide decolonization. These states were particularly sensitive concerning questions of foreign and illegal rule over territories. The result from a debate that was dominated by "militant Africans"[97] consisted of a resolution that endorsed a report on resort to "armed struggle" that at least partially contradicted the UN Charter.[98]

The UN Council for Namibia that was established as the legal administering authority until the territory's independence was a subsidiary organ of the General Assembly according to Article 22 of the Charter. Although the Council for Namibia was charged with *inter alia* administrative and legislative functions until a Namibian legislative assembly was established, its actions failed to gain any influence on the internal affairs of the territory due to South Africa's refusal to recognize competencies of the Council for Namibia. However, in regard to the external affairs of the territory the Council for Namibia was more successful in representing Namibia in conferences and concerning international treaties convened under the auspices of the United Nations.[99]

The main role of the United Nations in the question of Namibia and the right to self-governance of its people lay in the search for a political solution. In particular the Security Council emphasized the need for

---

96 Belfiglio, see note 77, 512.

97 Ibid., 513.

98 See A/RES/31/146 of 20 December 1976.

99 For an overview see E. Klein, "Namibia", *EPIL* III (1997), 485 et seq. (488 et seq.).

free elections under UN supervision and control.[100] To achieve this aim, the United Nations and the South African Government had to cooperate, which led to the peculiar situation that the United Nations as the *de iure* administrator had to negotiate with the illegal but *de facto* administrator of the territory in order to finally establish a situation of self-determination for the Namibian people.

Only when Canada, France, Germany, the United Kingdom and the United States as the five Western members of the Security Council in 1978 formed the so-called "Contact Group" and made concrete proposals for achieving Namibia's independence by the end of 1978 could the assent by South Africa and SWAPO[101] be attained. The Contact Group's diplomatic efforts have to be regarded as an "extra-UN" initiative that responded to the failure of the United Nations to solve the Namibian problem. Yet, it did not operate without linkage to the United Nations. Not only did the United Nations take up the main Contact Group's proposals in its Security Council Resolution 435 (1978), the proposals also foresaw an institutional role for the United Nations in the independence process. The most important institutional proposal made by the Contact Group in relation to the UN's role in assisting Namibia in the time of transition from South African rule was the establishment of the UN Transition Assistance Group (UNTAG). This institution, when it finally came into operation, consisted of a civil and a military section to effectively safeguard a peaceful process of self-determination by free and fair elections.

In the years following the first proposals by the Contact Group, the implementation of Security Council Resolution 435 (1978) was the focus of UN activities concerning Namibia. South Africa seriously delayed the process by attempting to link the implementation of the resolution to withdrawal of Cuban forces from Angola.[102] Arguably the "linkage regime" that was sponsored by the United States, despite the

---

100 S/RES/385 (1976) of 30 January 1976 that called for such elections was passed by an unanimous vote.

101 On SWAPO's role in the process of independence and its relationship with the United Nations see Klein, see note 99, 489 and Belfiglio, see note 77, 507 et seq.

102 This condition for Namibia's independence was originally initiated by the US President Ronald Reagan in 1981, who wanted to link the two issues to settle the question of Cuban forces in Angola, and found, quite naturally, South Africa's appraisal, F. Ansprenger, *Freie Wahlen in Namibia – Der Übergang zur staatlichen Unabhängigkeit*, 1991, 22.

significant delays, succeeded eventually, when South Africa, Angola, Cuba and the United States entered into negotiations.[103] A breakthrough in diplomatic activities came in 1988, when South Africa, Angola and Cuba affirmed the right to self-determination of the people in the region and South Africa and Cuba promised to withdraw troops from Namibia and Angola respectively in the tripartite Agreement on the Independence of Namibia on 22 December 1988.[104]

The first general elections to a constituent assembly that were recognized and supervised by the United Nations[105] took place in November 1989. After the elaboration of a Namibian constitution and its adoption by the Assembly, Namibia finally gained independence on 21 March 1990.

d. UNTAG as a Model for State-Building?

While the United Nations attempted for decades to pave the way to free and fair elections with its proposals and resolutions, it ultimately failed to achieve the essential consent by South Africa, Angola and Cuba for a political solution. UN efforts, e.g. by the Council for Namibia, were unsuccessful due to South African resistance. Yet, the United Nations gained institutional weight again when it was "re-introduced" into the political process to provide for a mission to ensure that the first elections were free and fair: UNTAG operated under a Secretary-General Special Representative for Namibia and performed civil, police and military tasks. This specific UN function was important to ensure the final success of decades of struggle for self-determination of the Namibian people.

One might say that in the context of discussing models for current and future state-building under international involvement it is not sufficient to step in at a rather late stage of the process to safeguard elections. It is true that a mission like UNTAG with a largely political mandate – despite its military section – is not comparable to political trusteeship. However, it is not the purpose of the contributions to this

---

103 Soni, see note 77, 565.

104 Doc. S/20325. An online version of the agreement can be accessed at <http://www.c-r.org/accord/ang/accord15/c07.shtml>, last visited on 6 March 2005.

105 Previous attempts to hold elections that were initiated by political groups operating in Namibia were not recognized due to a lack of freedom and fairness of procedures.

Volume to create fixed models for state-building. Every case of state-building differs in regard to its historical and political setting. There can only be elements that can be defined as desirable in the respective context. One of these elements is the safeguarding of free elections, no matter how the situation of regime change was actually achieved and how it has to be assessed from the view of international law. The safeguarding of free elections is a task for which the United Nations or another credible and legitimate organization is absolutely necessary to counter allegations of unilateral (Western) domination likely to occur otherwise.

Particularly with a view to the situation in Iraq, UN involvement at a later stage, e.g. to safeguard the holding of free elections and to further accompany the following period of a constitutional development, is better for the organization's credibility as well as for the acceptance of the results in the emerging state in question which helps avoid giving way to unilateralism that is likely to lead to *ressentiments*. Yet, with view to the fuller picture of state-building under international law, a mission like UNTAG can only be part of a system that takes international political trusteeship seriously. Insofar, the UN's role in Namibia's struggle for independence has elements of failure, i.e. in the light of years of unsuccessful attempts to change an occupation illegal under international law, as well as a success.

e. League of Nations and UN involvement in the Issue of Namibia: A Brief Conclusion

The only gradual conceptual difference between administration of class C mandates and colonial rule, the lack of effective control and the ambiguous behavior concerning South Africa's early claim to sovereignty over Namibian territory are clearly significant failures of the League of Nations' Mandate System. Nevertheless, the drafting of the specific Mandate for German South West Africa contributed to the institutional weaknesses by lacking any references to the status of the territory as well as to eventual self-governance of the native people. Consequently, even at the times when South Africa still affirmed her will to exercise her powers in the spirit of the mandate, there was hardly any possibility to insist on granting self-determination to the people and on cutting back South African competencies by relying on the wording of the mandate. That South Africa contradicted her own proclaimed policy of self-determination is a distinct matter.

The denial of an explicit right to self-determination, although it can be explained by reference to the Eurocentric distinction between the

civilized and the uncivilized at the time of the League of Nations, is a significant shortcoming of the Mandate System that facilitated a *de facto* annexation of class C territories. However, despite the circumstance that the system facilitated the abuse of power by the Mandatory and, hence, contributed to the illegal occupation, it was first of all South Africa's lack of will to act in accordance with international law that led to a continuous refusal of a right to self-determination even after this right was formally recognized and constantly reaffirmed, i.e. after the foundation of the United Nations. Furthermore, although the case of Namibia reflects the shortcomings of the Mandate System as well as certain weaknesses of the United Nations, it shall not be overlooked that Namibia was the only case in which a Mandatory illegally occupied the territory subjected to administration by the League of Nations.

The approach that was pursued by the United Nations in regard to Namibia is ambivalent. On the one hand the peaceful, political solution preferred by the United Nations was in the end successful; on the other hand the weakness of the political strategy is reflected by the fact that the process from South Africa's refusal to cooperate with the United Nations in the matter of Namibia until the latter's independence took almost 40 years. Furthermore, the breakthrough in diplomatic negotiations was not a result of direct UN involvement, although the years of political efforts shall not be underestimated.

It shall not be denied that state and nation-building are processes that require much time. Yet, in the case of Namibia it was not the actual transitional period but the political process of achieving a stage of transition that took the most time. When one takes into consideration that the United Nations and, in particular, the Security Council were weakened considerably during the time of the Cold War, it is questionable whether there actually have been missed opportunities that would have led to a more straight-forward process of independence. In this context it shall be again noted that South Africa claimed a threat to her national security by the Soviet Union's activities in Africa and used this argument to justify her continuing *de facto* annexation of Namibia.[106] UN Security Council Resolution 435 that adopted the proposal of the Contact Group was only possible, because the Soviet Union finally agreed to abstain from a negative vote. The delay in pursuing the process of independence by the United States and South African linkage of the question of Namibia with the withdrawal of Cuban troops from Angola is another example for the particularities of the Cold War era.

---

[106] See Belfiglio, see note 77, 507

IV. From Mandates to Trusts

As already mentioned in the context of the case-study on Namibia, the breakdown of the League of Nations in the course of World War II and its dissolution on 18 April 1946 did not result in the abrogation of the Mandate System.[107] However, international institutional control over the Mandatories, while never particularly strong, ended completely. The ending of institutional supervision destroyed one of the theoretical pillars of the Mandate System: control over those powers mandated with the administration of a territory and prevention of annexation of the former colonies. Formally, the Mandate System was only terminated completely, when the United Nations terminated South Africa's mandate for the administration of Namibia in 1966, i.e. when the last mandate concluded under the League of Nations' system ended.

Of the other mandated territories, some gained self-governance when the League of Nations was dissolved, while controlled international administration was re-established for others. Whereas those mandated territories that had been classified as A mandates, with the exception of Palestine, were finally granted full independence in addition to the already established structures for provisional self-governance, the others, with the exception of Namibia, were voluntarily transferred into the Trusteeship System established by the newly founded United Nations.

When the United Nations was established, political thinking in regard to colonialism and self-determination of peoples in dependent territories had changed considerably. After Roosevelt and Churchill had proclaimed the right to self-government for all peoples of the world in the Atlantic Charter in 1941,[108] the right to self-determination became one of the central principles of the new collective efforts for world peace and security. In addition to an acknowledgement of a right to self-determination, the Trusteeship System sought to lead the Trust Territories to "full statehood",[109] i.e. sovereignty and membership in the community of states and its relevant organizations. This objective goes further than mere proclamation of a right to self-determination, because it explicitly recognizes the need to assist with state-building in order to create sovereign and equal actors in international law.

---

107 Different Deiwert, see note 5, 779, who claims that the Mandate System was terminated at this time.

108 See above note 16.

109 Deiwert, see note 5, 779.

When colonial territories started to develop independence movements and the European colonial powers faced difficulties to uphold colonial rule under the strains of the war and post-war era, public attitude generally shifted away from colonial aspirations.[110] The process of decolonization was fuelled by this circumstance, yet, the creation of the new UN Trusteeship System was, like its predecessor, again an issue of controversy from the time of its first discussion at the Yalta Conference in 1945 onwards and characterized by the necessity of compromise.[111]

Inter alia because the relatively sparsely worded provisions on the Mandate System in the Covenant had led to difficulties of interpretation and operation of the mandates, after the end of World War II states aimed to modify the League of Nations' Mandate System and to regulate the new system in considerable detail, without abrogating the principle idea of administrating territories on their way to independence. The idea of political and administrative trusteeship that had already been an underlying concept of the Mandate System was stressed by the explicit labeling of the UN institution as the Trusteeship System. This new institution was established by Chapters XII and XIII of the UN Charter and was indeed significantly more detailed than the Mandate System that consisted of only one, albeit lengthy, article in the Covenant.

Like its forerunner, the Trusteeship System set up structures for the administration of certain territories. Yet, in regard to security, oversight and economic relationships between the trusteeship territory and the administrating power, the two systems differed considerably.[112] A core element of the system was UN supervision of the administration. Experiences with the Mandate System led to a tightening of institutional control over the Mandatory's management. Furthermore, the obligations imposed upon the administering authority were formulated more stringently to avoid ambiguity and *de facto* annexation of territories.

---

110 Ibid., 777.

111 Ibid., 777 et seq.

112 Ibid., 778.

V. Conclusions: Are there Lessons to be Learnt from the Mandate System?

When analyzing the experiences with administration of non-self-governing territories under the League of Nations and the United Nations, it is questionable whether the Mandate System has much to offer for the establishment of models for current and future transitional regimes under foreign involvement. Certainly, the Mandate System as such cannot be directly employed as a model for current or future state-building activities for a variety of reasons. Not only the colonial context under which it was established, but also the distinction between the civilized and the uncivilized and the corresponding lack of a right to self-determination for the latter forbid its immediate application as a prototype transitional regime. In this context the Mandate System seems too much a child of its own time to be of significant relevance today.

However, it is too narrow a perspective to regard the Mandate System only as the historical predecessor of the Trusteeship System and not to analyze more closely its elements and, particularly, its many shortcomings with a view to current and future assistance to state-building processes. The main idea that formed both the Mandate System and the UN Trusteeship System is the concept of political trusteeship. This underlying concept has to be assessed in regard to its ability to be applied in the context of modern state-building efforts, i.e. without reference to past colonial structures. Even if, after an evaluation, one can find no positive elements in the idea of trusteeship at all, some lessons can at least be learnt from the deficiencies of the Mandate System with a view to establishing feasible United Nations missions in the future. Two different issues must be distinguished: the institutional shortcomings and especially problems concerning effective institutional supervision on the one hand and the underlying legal and theoretical difficulties that might also lead to *ressentiments* on the other.

1. Institutional Conditions

In regard to institutional failures of the Mandate System one must not forget that it operated for fewer than twenty years, which – in terms of state-building processes – is not a long period of time to gain fundamental practical experiences. Yet, some problems with the system became apparent even during the relatively short time of its operation.

The main shortcoming that was reflected by a number of unresolved or problematic issues resulted from the limited competencies of the League of Nations concerning the Mandate System. Information about the situation in the mandated territories was limited, since the League of Nations relied exclusively upon the annual reports. Inspection visits were not provided for and never carried out.

Any future foreign involvement has to avoid such weak competencies concerning the supervision of the power undertaking administrative activities. For UN state-building activities under Chapter VII of the UN Charter the supervision of the involvement is strictly regulated. Supervision and accountability in regard to the organization[113] is also central for other UN missions that do not come under Chapter VII. However, if certain single states accept responsibility for state-building and administration of territories with the approval of the United Nations, supervision and accountability must be safeguarded to avoid a situation of abuse of powers as experienced under the League of Nations.

That the colonial past and neo-colonial thinking are left behind must also be expressed by the institutions involved in state and nation building. A revival of the UN Trusteeship Council is not feasible, no matter how effective the concept of trusteeship may be, since the institution itself is, in the mind of many former colonies, inseparably linked to a slow and painful and not always successful process of decolonization. Hence, one will have to distinguish between certain ideas and lessons learnt from the Mandate System of the League of Nations and the UN Trusteeship System, e.g. the political trusteeship model itself, on the one hand and the institutional setting on the other.

2. The Legal Dimension

With a view to the legal dimension of difficulties future trusteeship models have to face, the issues of sovereignty and self-determination remain particularly prominent examples. These issues were already problematic at the times of the Mandate System, yet the difficulties have slightly changed. At the creation of the League of Nations the issue of

---

113 Whether accountability should not foremost be owed to the people living in the administered territory is a question to be distinguished from the accountability in relation to the organization approving the administration, e.g. the United Nations or in early times the League of Nations.

sovereignty was an issue of concern, both because a Eurocentric understanding of international law aimed at the exclusion of "uncivilized" nations from the definition of a sovereign state and because it was unclear who held sovereignty over a mandated territory. Today the issue is problematic, because political trusteeship may be contradictory to state sovereignty, despite the latter's flexibility and modifiable understanding.

The UN Trusteeship System with Article 78 of the Charter explicitly states that no member of the United Nations can be put under trusteeship due to the principle of sovereign equality. In essence, such a concept must be valid for other forms of political trusteeship as well. In the context of failed states and particularly after an invasion and occupation of states, like Iraq, however, the occupied state may be said to at least partially lose sovereignty. Hence, the situation may be equivalent to the "dormant" sovereignty of mandated territories that is revived at the moment of independence or the ending of an occupation. To assess the legality of trusteeship concepts in such a case one would have to analyze the situation under which a state loses sovereignty as well as the following establishment of political trusteeship. It seems questionable, whether occupation that was initially not in accordance with the UN Charter could be turned into legal trusteeship, since the legalization of an unlawful loss of sovereignty by the concept of trusteeship might pose a general threat to collective security and the principle of sovereign equality that continues to be one of the foundations of the international community. In contrast thereto one might understand political trusteeship, at least if it follows a certain set of criteria, as providing for a (new) doctrine for international intervention into the affairs of sovereign states.[114] In this case, however, the concept of an intervention that aims at trusteeship to defend human rights or re-establish internal self-determination by temporarily also denying external self-determination and sovereignty must be fixed by clear criteria in the UN Charter to counter unilateralism and allegations of neo-colonialism.

In regard to the issue of self-determination at least the external component is threatened, if foreign administration is imposed upon a people. At the time of the League of Nations such a right was not yet acknowledged but it may be seen as one of the Mandate System's ultimate goals to prepare a people to exercise such a right. Even the UN Trusteeship System did not seem to find a conflict between self-determination and governance by an Administering Authority, since it appears that in

---

[114] Perritt, see note 9, 471 et seq.

accordance with Article 76 lit. b. of the Charter a right to self-determination is held in suspension until the Administering Authority has created circumstances that allow for its exercise.[115] In contrast thereto, however, one might understand the right to self-determination to be an obstacle to political trusteeship, at least if the relevant people do not chose a political status that allows for assistance in a transitional period.[116]

3. Perceptions of Foreign Authority and Ressentiments

Another important deficiency of the Mandate System that has some relevance even today, albeit on a slightly different level is how the people living in administered territories are, first, regarded with a view to their capabilities and, second, involved in a state-building process as this is vital for the acceptance and feasibility of foreign administration, i.e. the success of a state-building mission.

If political trusteeship is not to come into conflict with the right to self-determination, the role of either the United Nations or a regional organization or a state or group of states "mandated" with political trusteeship is largely reduced to stabilize a territory in preparation of free and fair elections that are supervised by the United Nations or another international organization. The tensions arising in this context, however, have already been mentioned above and include *ressentiments* of the people against an electoral system and its performance imposed upon them by a foreign authority. The time-factor is equally difficult. If a territory is rushed to elections this might lead to chaos and a result perceived as illegitimate. If, however, too much time goes by, the organization or state administering the territory looses credibility concerning respect for self-determination and might be perceived as a neo-colonial authority sparking resistance and violence.

The perception of the administration by the Mandatories in the mandated territories was in many cases that of a colonial rule. The lack of equality of the Mandatories and the people in the mandated territo-

---

115 Deiwert, see note 5, 802.

116 If the people chose to transfer authority to a foreign or international institution, its exercise is not problematic. This was the case e.g. in Cambodia where the UN Transitional Authority in Cambodia (UNTAC) was mandated with duties including foreign affairs, finance and defence. See also the contribution by L. Keller in this Volume.

ries that was explicitly laid down in the Covenant is one reason for this perception and should be an important enough reason not to directly apply the Mandate System as a model for today's situation. However, some similarities that may be dangerous for stable state-building processes remain. Although a right to self-determination is universally acknowledged as far as internal self-determination is concerned, we sometimes experience references to the ability of peoples to wisely use that right. A distinction between the "knowing" (West) and the "unknowing" reminds us of the overcome distinction between the civilized (West) and the uncivilized in the context of the League of Nations.

In particular the issue of democracy and democratization that does not come from within but is imposed on a people by the administering foreign power sometimes seems to rely on such a distinction. The danger that results from alleging that our understanding of democracy is the primacy of the civilized peoples that has to be brought to those "not yet able to stand for themselves" leads back to considerations rooting in the era of colonialism. Such a proceeding will almost certainly lead to *ressentiments* against foreign rule whether under UN supervision or not and should therefore be avoided.

Likewise, one of the main difficulties experienced with modern state-building activities is a lack of clarity about the objectives and the relationship between the authority and the governed people. If the only objective pursued with foreign governance of non-self governing territories in our times is a process of creating stable structures for self-government, any behavior that reflects self-interest of the administrating power has to be avoided by all means to avoid lack of credibility and the corresponding creation of *ressentiments*.[117] When, as a result, models for future state-building must build upon clear and straightforward procedures for creating self-government that nevertheless refrain from necessarily imposing Western standards and from involving self-interest of the administrating power, one must conclude that models must involve either the United Nations or regional organizations, since unilateral administration will in most cases not be suitable to achieve this – in any case particularly difficult – task.

---

[117] The lack of clarity in operations with a view to potential self-interest of the involved states has been critized by S. Chesterman, *You, the People*, 2004, 12, who states that: "For all their reprehensible elements, colonial forms of administration were at least clear about this relationship."

Annex

Article 22 Covenant of the League of Nations

(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 and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

(2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

(3) The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

(4) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

(5) Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and

will also secure equal opportunities for the trade and commerce of other Members of the League.

(6) There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

(7) In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

(8) The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

(9) A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.