# Abstract of the doctoral thesis „Mandate and Trusteeship in International Law“

*by Raoul Jacobs, LL.M. (Manchester)*

## I.Introduction

“… in its future development the law governing the trust is a source from which much can be derived.”[1]

This statement made by Judge Sir Arnold McNair in the opinion on the status of South-West Africa in 1950 suggests that even after the independence of the last trusteeship territory in 1994, the strategic zone of the Pacific Islands, the concept of trust, and also the closely related concept of mandate may be a desirable object of research in international law.
Recent developments in international hot spots like Somalia, Bosnia-Herzegovina, Kosovo and East Timor among several others have brought up again the concept of trust and trusteeship in the acadamic debate. In this context Caplan points out:

“An idea that once enjoyed limited academic currency at its best – international trusteeship for failed states and contested territories – has become a reality in all but name.”[2]

Stimulated especially by these recent developments I aimed at covering the concepts of mandate and trusteeship in a systematic way. So the thesis is basically divided into three parts: the past, the present and the future.
In the first part it is examined when and where the ideas of mandate and trusteeship exactly emerged and how they acquired the form they have today. Also, similar concepts like the ones of colony, internationalisation and protectorate are shortly looked at.

---

[1] Sir Arnold McNair, Separate Opinion, Status of South-West Africa, ICJ Reports 1950, p. 149

In the second part three cases are examined in which the provisions of the mandate respectively of the trusteeship agreement were and still are important with regard to recent disputes. In the case of South-West Africa it was decisive whether or not the mandate was still in force after the dissolution of the League of Nations and whether South Africa had violated the provisions of the mandate.
In the case of Israel an interesting question is whether the contested territories of Judea and Samaria can be justly allocated using the provisions of the Mandate for Palestine.
In the case of Nauru the question arose whether the state that was formerly a trusteeship territory is entitled to damage compensation after the trusteeship has ended, if the former administrative powers violated the provisions of the trusteeship agreement.

In the third part cases of international peace-keeping operations involving nation-building tasks in failed states or other war-torn territories such as Somalia, Cambodia, West Iryan, Bosnia-Herzegovina, Eastern Slavonia, Kosovo, Afghanistan and East Timor are examined, in particular under the question in which respect “new trusteeship” is comparable to “old trusteeship”.
Also, proposals for a reactivation of the UN Trusteeship Council either for failed states or for the “common heritage of mankind” are discussed.

## II.The Past

The mandate territory is quite similar to what is also designated as colony. A colony means a dependant territory which serves the interests of the motherland. The mandates were in fact treated in that way, what becomes quite clear in the case of Nauru which was used for the exploitation of phosphor. Of course, in the mandate provisions there were a lot of humanitarian obligations for the mandatory power, but similar obligations existed in the administration of colonies. These obligations were either self-imposed, for example the concept of the “dual mandate”[3] and “sacred trust of civilisation” in the British Empire, or accepted in an international agreement, for example the Berlin Congo Agreement of 1885.

---

[2] Caplan, A New Trusteeship? The International Administration of War-Torn Territories, Oxford 2002, p. 7

[3] Lugard, The Dual Mandate in British Tropical Africa, London/Edinburgh 1922

Similar is also the concept of protectorate. Protectorate means that a certain state is “protected” by a more powerful state and gives something in exchange for this “protection”, usually a loss of sovereignty in different areas. The term “protectorate” acquired a negative meaning throughout history, particularly because it was often used as a cloak for annexation, for example the German protectorate “Böhmen und Mähren”. But there were also good forms of a protectorate, for example the religious protectorate of France for Christians in the Levante.

Also similar is the concept of internationalisation. That means that sovereignty over a certain territory may be vested in an international organisation, for example the administration of the Saar territory by the League of Nations or later the plan to internationalise the city of Triest to be administered by the UN.

Although according to Art. 22 of the Covenant of the League of Nations the League of Nations seems to be the Mandatory for the mandatory territories, the mandate system is not an internationalisation. These territories were ceded to the Allied Powers after the end of WWI, for example by Germany in Article 119 of the Versailles Peace Treaty. That means that sovereign is the Mandatory who has “full powers of legislation and administration” according to the mandate provisions.

Sovereignty continued to be vested in the administrative power even under the UN trusteeship system so that in the trusteeship agreements it is pointed out that the administrative power possesses “full powers of administration, legislation and jurisdiction.”[4]

So one may sum up that the concept of mandate in the system of the League of Nations and the UN trusteeship system are concepts sui generis, but resemble most the concept of colony, since the administrative authority has sovereign power like a colonial ruler.

With respect to the roots of the concept of mandate in the mandate system of the League of Nations one can clearly distinguish the great influence of two statesmen, Woodrow Wilson and Jan Christiaan Smuts. During WWI within different national societies the desire for peace came up strongly and was articulated by different groups, for example “The Round Table” in the UK, a British think tank, also British Labour and a strong peace movement in the US like the “League to enforce Peace”.

---

[4] for example UNTS, Vol. 8, p. 192

Smuts put these desires for a more peaceful world in book form, called “The League of Nations, A Practical Suggestion”.[5] In this book he drafted his concept of a mandate system which was principally the working paper for the mandate system in the Covenant of the League of Nations. Also Wilson pushed the idea of a League of Nations strongly and relied much on Smuts “Suggestion”. Both statesman acted with a lot of idealism and wisdom, characteristics that statesmen of our times sometimes may lack.

The concept of trust has an even longer history in international law. When the Americas were discovered by Columbus a scholar of the early 16th century called Franciscus de Victoria argued that the Spanish were trustees for the natives who had to act for their well-being, “propter bona et utilitatem eorum”.

Later in the colonial British Empire, a conservative named Edmund Burke took up again the thought that colonies have to be administered in trust for the local inhabitants. He called this “sacred trust of civilisation” and even indicted governor of British India Warren Hastings for violating this trust.

Also, there were humanitarian developments such as the fight against slavery, especially by William Wilberforce, which lead to the foundation of Liberia consisting of former slaves. In this case the American Colonization Society was a sort of trustee for Liberia.

Finally, one should point of that the legal principle of trust has a long history in Roman law which forms some kind of basis for many national jurisdictions. It should be clear that the concept of trust in Roman law can only in a limited way be compared to the concept of trust in international law which differs due to the differences of national and international law.

## III.The Present

### 1.South West Africa/Namibia

The case of former South West Africa was a very political case. The presence of South Africa’s Apartheid regime in this region was not really welcomed by the international community. So the UN were instrumentalised to kick South Africa out of its quasi-colony and bash the regime. Unfortunately, international law was used as a means to accomplish the political objective. The Union of South Africa was mandatory power for the territory of South West Africa, a former German colony. The

[5] London/Toronto/New York 1918

territory was not put under the new UN trusteeship territory, so that –after the dissolution of the League of Nations – the question arose whether South Africa was still bound by the provisions of the mandate demanding certain humanitarian standards. In the advisory opinion of 1950 the ICJ came to the conclusion that the provisions of the mandate still create obligations for South Africa and that the UN succeed the League of Nations in monitoring the mandatory power. One can hardly say that in this case the result was unfair, but it is nevertheless questionable from the legal point of view. The court could not convincingly justify the outcome by assuming an objective regime that survived the dissolution of one of the contracting parties. Also, the replacement of the League of Nations by the UN in monitoring the mandatory power has "not any legal ground"[6].

But if one takes the reasoning in the 1950 opinion seriously, it must consequently implied in the former mandate territory of Palestine, now Israel.[7] Then the disputed territories must be allocated to Israel, since the main objective of the mandate for Palestine was the establishment of a national home for the Jews.

Later, in 1962 and 66, Ethiopia and Liberia sued South Africa for violation of the mandate. They invoked a clause in the mandate, also called "Tanganyika-clause", which entitled any member of the League of Nations to go to the PCIJ when a dispute with the Mandatory arose. Article 37 of the ICJ statute provides that whenever a treaty or convention in force allows litigation at the PCIJ, the issue should be referred to the ICJ. The problem was that the clause in the mandate for South West Africa is not a "treaty or convention *in force*". Nevertheless, the ICJ ruled in the 62 decision that the litigation clause in the mandate was a treaty or convention in force, whereas in 66 the ICJ decided in the merits of the claim that the plaintiffs lack "any legal right or interest."[8] The 66 decision was criticised a lot, even though it was legally sound, in contrast to the 62 decision. So another opinion of the court was needed to bash South Africa. After the UN GA had "decided to take over the Mandate"[9], the ICJ was asked for another advisory opinion he delivered in 1971. Nine new judges had been put on the bench and at least one of the judges was

---

[6] Lord McNair, Separate Opinion, ICJ Reports 1950, p. 161

[7] Rostow, „Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate, Yale Studies in World Public Order 1979 (5), p. 172

[8] ICJ Reports 1966, p. 51

[9] Res. 2145, 26th of September 1966

outspokenly against South Africa. Also, the outcome of the opinion was somehow formulated before, when the court was asked about the consequences of presence of South Africa in the territory violating some resolutions urging to leave it. The Court couldn't really rule that instead of South Africa's presence in the territory the resolutions were illegal.

So especially the 1971 opinion is a sad example of the decline of the ICJ from a respectable body taking care of law and justice to a political instrument. The reputation of the UN probably suffered a lot from these practices.

In the case of Walvis Bay which was never part of the mandate territory of South West Africa the SC showed why a "legally sanctioned hegemony"[10] should be feared. SC Res. 432 that demanded the reintegration of Walvis bay into Namibia cannot be described other than ultra vires. So in the future attention should be paid that the SC does not extend its practice to deal with issues he is not in charge of.

**2.Israel/Palestine**

The question whether or not an independent state in the so called occupied territories should be founded is a hot potato. An aspect that wasn't mentioned so often in the discussion were the implications of the mandate for Palestine. The Balfour declaration which favours the establishment of a national home for the Jewish people in Palestine was incorporated and according to article 6 the immigration of Jews should be fostered. Unfortunately, the mandatory power was not so faithful to the spirit of the mandate. Large parts of the mandate, the Golan and the "east bank", were cut off. The making of Transjordan east of the Jordan is described by Haushofer as "a simply artificial product".[11] Particularly unjust seems the fact that Holocaust survivors were refused immigration to Israel and deported somewhere else instead.

After WWII the UN attempted to solve the dispute between Arabs and Jews over the land with a proposal to divide the land, the so called Partition Resolution. The resolution was rejected by the Arabs who later claimed that it was legally binding, after Israel had conquered more land in the 6-day-war. It should be clear that recommendations of the GA are not legally binding.

One of the most disputed questions is the status of the so called occupied territories, gained by Israel in the 6-day-war. Among Western authors it is not really doubted that

---

[10] Arangio-Ruiz, The Federal Analogy and UN Charter Interpretation: A Crucial Issue, EJIL 1997, p. 22

[11] Haushofer, Bericht über den indo-pazifischen Raum, Zeitschrift für Geopolitik 1928 (5), p. 112

Israel acted in self-defence in that war. So the possibility of a “defensive conquest” arises.[12]

Also, the close ties of the Jews to the land have to be considered, for example Genesis 28, verse 13. The Palestinian side is sometimes incorrect when they emphasise the war of the Israelites against the Philistines, since the Philistines are a completely different people coming from Greece. Besides, the Arab link to the land is overstated. Before the Jews recultivated the land in the end of the 19th century it was hardly populated.[13] So Rostow concludes that “Israel’s position in the West Bank and the Gaza Strip is much more than that of a belligerent occupant under international law.”[14] SC Res. 242 is not contradictory, since it just demands “withdrawal of Israel armed forces from territories occupied”. As it doesn’t say “all territories occupied”, Israel has already fulfilled the demand by withdrawing from Sinai.

Also highly debated is the refugee question. Resolution 242 demands “a just settlement of the refugee problem”. Solving this problem the Jewish refugees that roughly equal the Arab refugees have to be considered as well.[15]

Finally, the concept of a right of self-determination in this context seems problematic. Some scholars argue convincingly that “no right of self-determination exists under customary international law”.[16] But even when the principle of self-determination is applied one has to consider that Arabs and Jews already have concluded an agreement with regard to their self-determinations claims, the Feisal-Weizmann-Agreement. According to this agreement “all such measures shall be adopted as will afford the fullest guarantees for carrying into effect the (Balfour declaration)”.[17]

Considering that in the Middle East many independent Arab states were established but only one small Jewish state the status quo doesn’t seem as unfair as most of the Arabs claim. So one may reconsider some claims of the Palestinians and ask whether they may be inappropriate.

---

[12] Schwebel, What Weight ot Conquest, AJIL 1970 (64), p. 347

[13] Mark Twain, The Innocents Abroad, London 1881, p. 441

[14] Rostow, „Palestinian Self-Determination”: Possible Futures for the Unallocated Territories of the Palestine Mandate, Yale Studies in World Public Order 1979 (5), p. 157

[15] Lewin, Locked doors, The Seizure of Jewish Property in Arab countries, Westport 2001.

[16] Briggs, The Law of Nations, 2nd edition, London 1953, p. 65

**3.Nauru**

Nauru is a small island formerly called “Pleasant Island”. After Australia, New Zealand and the UK had administered the territory as “joint Authority” for about 50 years, it was not so pleasant any more, since big parts of the island were simply taken away in order to exploit phosphate.

The question arose whether Nauru was entitled to damage compensation after the termination of the trusteeship agreement. A similar question is presently highly debated, compensation for colonial injustice. So the case of Nauru can serve as a good orientation in this debate.

In the Northern Cameroons Case the ICJ had to deal with the question whether after the termination of the trusteeship agreement violations of the agreement can be litigated. In this case one part of British Cameroon was administered together with the colony of Nigeria which was contrary to Article 5 § B of the agreement. The ICJ decided that after the termination of the trusteeship agreement generally Member States of the UN cannot reprimand violations of the agreement any more.[18]

An exception may be made, if a damage that was caused within the trusteeship period is still existing.[19]

So in the case of Nauru a right to damage compensation does not seem excluded. However, it may be unwise to allow those claims, because this may lead to a flood of lawsuits which may result in a hate-filled atmosphere between first and third world.

In the case of Nauru the claim could have been dismissed on the ground of the monetary-gold-doctrine. This doctrine that was referred to also in the East Timor case says that the claim has to be dismissed, if it has to do with conduct of a third party that forms “the very subject matter of the decision” [20] and this third party has not accepted the jurisdiction of the ICJ. In the Nauru case New Zealand and the UK being part of the “joint authority” were not parties to the lawsuit. However, the ICJ didn’t apply the monetary-gold-doctrine in the Nauru case, since “the interests of New Zealand and the United Kingdom do not constitute the very subject matter of the judgement.”[21] Considering that Nauru was administered jointly by Australia, New

---

[17] Agreement of 3rd of January 1919

[18] ICJ Reports 1963, p. 34

[19] ibid., p. 35

[20] ICJ Reports 1954, pp. 19

[21] ICJ Reports 1992, p. 261

Zealand and the UK the decision of the ICJ is not very convincing. So the dispute had to be settled out of court which blessed a couple of thousand people with over 100 million Australian dollars, enabling the country of Nauru to run a national airline with jumbo-jets.

## IV.The Future

### 1.New trusteeship

The discussion about new trusteeship emerged in the case of Somalia, after Helman and Ratner had published their article "Saving Failed States"[22]. The term failed states shouldn't be regarded as an accurate legal concept, but as a fancy name for war-torn territories that are in a state similar to anarchy. In Somalia there was the threat of mass starvation, because armed gangs simply robbed international relief organisations, so that help couldn't be provided to all the people in the region, especially not to the African Banthu. So the SC initiated UNOSOM II, acting under chapter VII of the charter and thus allowing the use of military force.[23] Also considering the nation-building tasks of this operation according to Freudenschuß "this comes as close to establishing a trusteeship over a failed State as it probably ever will."[24]

Another question is whether the SC was competent to deal with the case. According to article 24 of the charter the SC is responsible for the maintenance of *international* peace and security, that means not situations affecting mainly a single country.

However, Somalia was a kind of model case for future similar operations that may be designated as "new trusteeship"[25]. Similar operations took place in Bosnia-Herzegovina, Eastern Slavonia, Kosovo, Afghanistan and East Timor. Particularly far-reaching was the operational mandate in Kosovo and East Timor. In Kosovo "all legislative and executive authority" is vested in the Special Representative of the Secretary-General,[26] in East Timor UNTAET is responsible for "the legislative and

---

[22] Foreign Policy 89 (92/93), pp. 3-21

[23] Res. 814, 26th of March 1993

[24] Freudenschuß, Threats to peace and the Recent Practice of the UN Security Council, Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht 94/95 (46), p. 22

[25] Hufnagel, UN-Friedensoperationen der zweiten Generation, Vom Puffer zur Neuen Treuhand, Berlin 1996

[26] Section 1, para. 1 of UNMIK Reg. No. 1999/1 of 25th of July 1999

executive power".[27] This broad mandate and the huge grant of power is comparable to the position of the mandatory power in the mandate system or to the authority in the trusteeship system. That's why the term "de facto trusteeship" for these new forms of UN operations is appropriate. One critical remark may be that the circumstances of these interventions were in some cases doubtful, especially in the case of Kosovo. In this case the question arises whether the attitude toward Serbia was a neutral and impartial one.

**2.Proposals for a Reactivation of the TC**

Some scholars propose to reactivate the TC and transform it into "a modern international clearinghouse for self determination"[28] or provide "a mechanism for direct international trusteeship"[29] for failed states. Problematic in this respect is that article 78 of the charter excludes territories that have become members of the UN from the trusteeship system. However, there are different ways to interpret this norm. The question is whether article 78 also bars the application of the UN trusteeship system on territories that are not itself a member state, but form part of the member state, for example Kosovo. An extensive interpretation of article 78 would be that also parts of member states are excluded from the trusteeship system. This interpretation is most convincing, since it serves the spirit of article 78 best. This article aims at upholding the status of once sovereign countries. The sovereignty of a country would be violated, if part of it was put under the trusteeship system. That is why the UN trusteeship system should not be applied in cases like Kosovo. That means that the charter must be changed in order to cover failed states as objects of the trusteeship system. However, the procedure of changing the charter involves significant efforts to reach a political consensus which is often difficult. Therefore the approach of changing or amending the charter is not very promising.

---

[27] SC Res. 1272 of 25th of October 1999, para. 1

[28] Halperin/Scheffer/Small, Self-Determination in the New World Order, Washington 1992, p. 113

[29] Helman/Ratner, Saving Failed States, Foreign Policy 92/93 (89), p. 12

Another approach in environmental law suggests to let the TC take care of the global natural resources, also called “common heritage of mankind”. Brown Weiss elaborated on the idea of holding “the earth in trust for future generations”.[30]

Also, Borgese has proposed a draft article in a revised chapter of the trusteeship system. According to her draft “the TC shall hold in sacred trust the Principle of the Common Heritage of Mankind”.[31] SG Annan took up this idea in his report about “Renewing the United Nations: … A new concept of trusteeship”.[32]

However, up to now no immediate steps have been taken to implement the above mentioned ideas. So the proposal to reactivate the TC to take care of the global commons seems presently to be a rather remote vision.

## V.Conclusion

The idea of trust has a long history, also in international law. In some present cases the provisions of the mandate still seem to be of importance.

Although the trusteeship system of the United Nations is not active any more, proposals to reactivate this system are not lacking.

Also, there are new forms of peace-keeping involving nation-building tasks which can be described as a de facto trusteeship.

So the concept of trusteeship is not only a topic of historic interest, but an issue relevant for present problems in international law. The latest proposal is “to create a trusteeship for Palestine”[33], an idea that clearly demonstrates the up-to-dateness of the concept of trust in international law.

---

[30] Brown Weiss, Intergenerational Equity: A legal framework for global environmental change, in: Brown Weiss (ed.), Environmental Change and International Law, Tokyo 1992, p. 395

[31] Borgese, Ocean Governance and the United Nations, Dalhousie 1995, p. 240

[32] UN Doc. A/51/950 of 14th of July 1997

[33] Indyk, A Trusteeship for Palestine?, Foreign Affairs May/July 2003, pp. 53