

- (a) *Distinction between the jurisdictional clauses in different categories of mandates ;*
- (b) *Mechanism of judicial control.*
- 5. *Role of the League Members vis-a-vis the Mandates system.*
- 6. *Modification of the terms of the Mandate.*
- 1. **Historical background :**
  - (i) *President Wilson's Fourteen Points*

#### 1966 Judgment

#### Dissenting opinions

#### JUDGE WELLINGTON KOO

"..... As we all know, it was President Wilson, author of the Fourteen Points, who first made the radical proposal in the Council of Ten of the Versailles Peace Conference to renounce in fact the time-honoured principle of annexation by conquest and to set up in its stead a new international mandates system to be operated by the League of Nations and based upon the concept of a sacred trust entirely in the interest of the inhabitants of the territory to be placed under mandate. He had at first even proposed direct administration by League of Nations of the territories taken from the Central Powers. He advocated the mandates system so strongly as to make it practically a *sine qua non* in the peace settlement....."<sup>1</sup>

#### JUDGE KORETSKY

"The mandates system arose in the conflicting conditions of the post-War I international situation, when the Principal Allied and Associated Powers, or some of them, realised that they should try—parallel with their endeavour to reconcile their contradictions—to mitigate the colonial forms of undisguised domination, to respond, in

<sup>1</sup> *South West Africa (second phase) Judgment, 1966, at p. 217.*

the epoch of national liberation movements in colonial territories to the struggle of dependent peoples striving for independence, to pacify them, to give a hope to those people that they would be able to achieve their freedom by peaceful means, through the mandates system. It was then that the notion of a sacred trust of civilisation found expression.

This made it possible for the Court to say in its 1950 Advisory Opinion (p. 132): The Mandate was created in the interest of the inhabitants of the territory and of humanity in general, as an international institution with an international object—a sacred trust of civilisation." Reference was made in the Court to President Wilson's words: "The fundamental idea would be that the world was acting as trustee through a mandatory."<sup>2</sup>

#### JUDGE JESSUP

"..... It is of course true, that two points of view were aired at the Paris Peace Conference. On the one hand, there were those who advocated the annexation of the colonial possessions of the enemy powers. The interests of some of the victorious Powers which advocated this point of view attached differing importance to the Middle Eastern area and to the African area, President Wilson was vigorously opposed to the idea of annexation...."<sup>3</sup>

#### Comments

In respect of the colonies formerly under the enemy, two points of views were put forth at the Paris Peace Conference. Some of the delegates from the victorious powers were in favour of annexation of these territories. President Wilson of the U.S.A., on the other hand, "first made the radical proposal in the Council of Ten of the Versailles Peace Conference to renounce in

<sup>2</sup> *South West Africa (Second phase) Judgment, 1966, at p. 245.*

<sup>3</sup> *Ibid.*, at p. 397.



fact the time honoured principle of annexation by conquest and to set up in its stead a new international mandate system to be operated by League of Nations and based upon the concept of a sacred trust entirely in the interest of the inhabitants of the territory to be placed under mandate. He had at first even proposed direct administration by the League of Nations" of the said territories.<sup>4</sup>

Some of the Principal Allied and Associated Powers favoured the idea as being necessary "in the epoch of national liberation movement in colonial territories" in order to give a hope to those people that they would be able to achieve their freedom by peaceful means through mandate system."<sup>5</sup> As pointed out by Judge Koretsky, the International Court of Justice in its 1950 Advisory Opinion on the international status of South West Africa said: "The Mandate was created in the interest of the inhabitants of the territory and of humanity in general as an international institution with an international object—a sacred trust of civilization."

(ii) *Opposition to President Wilson's idea and conciliation by Lloyd George*

#### 1966 Judgment

##### Separate opinions

##### JUDGE VAN WYK

"It was with great reluctance that the Respondent, New Zealand and Australia agreed to the mandates system devised in Article 22 of the Covenant...

Indeed, it was in order to avoid a stalemate that the Respondent and other States were prepared to accept Article 22 of the Covenant as a compromise...."<sup>6</sup>

4 In the words of Judge Wellington Koo.

5 In the words of Judge Koretsky.

6 *South West Africa (second phase) Judgment*, 1966, at p. 87.

#### Dissenting opinions

##### JUDGE WELLINGTON KOO

"....It was, however, opposed at first with equal firmness by some of his principal allies in the war, notably some of the British Dominions. The confrontation of the two opposing theses became so serious as to constitute not only a deadlock but even to threaten for a time the break-up of the Peace Conference. It was largely through the conciliatory efforts of Lloyd George that an agreement was finally reached on this difficult question."<sup>7</sup>

##### JUDGE JESSUP

".....There is no need here to dwell upon the familiar incidents at the Paris Peace Conference in the last few days of January 1919, but it may be recalled that at this stage President Wilson had succeeded in gaining the support of Mr. Lloyd George for the principle of non-annexation and the establishment of the mandates system. The other members of the 'big Five' were no longer in opposition. The final 'compromise' based on the memorandum presented to the Council of Ten by Lloyd George on 30 January (the text of which with only some modifications became Article 22 of the Covenant) was a domestic matter concerning the internal arrangements of the British Empire....."<sup>8</sup>

#### Comments

Wilson's idea was opposed by the States favouring annexation of the colonial territories of the enemy (mostly the British Dominions) to such an extent as "to threaten for a time the break-up of the Peace Conference." However, with the support of Lloyd George, who made efforts to conciliate between

7 *South West Africa (second phase) Judgment*, 1966, at p. 217.

8 *Ibid.*, p. 397.



the opposing view-points, he succeeded in arriving at a compromise with such States in the shape of Article 22 of the Covenant. Thus the mandates system was brought into being. (See Annexure I to this Study).

Erenest A. Gross pointed out that the "Mandate was established in 1920. At the Paris Peace Conference the South African Government had manifested its desire to annex the territory outright and incorporate this former German colony into the Union. The bid was supported by the British and French representatives of the Allied and Associated Powers, but vehemently, and in the end successfully, opposed by Woodrow Wilson. The result was that, rather grudgingly one can say from the record, the South Africans undertook the responsibility as Mandatory under a broadly stated charter....."<sup>9</sup>

## 2 The Sacred Trust of Civilization

### (i) Nature of the Trust

#### 1962 Judgment

"The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the people of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory"; and the recognition of "a sacred trust of civilisation" laid upon the League as an organised international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights."<sup>10</sup>

<sup>9</sup> In his article on "The South West Africa Cases : On the Threshold of Decision", *Columbia Journal of Transnational Law*, Vol. 3, 1964, No. 1, p. 11.

<sup>10</sup> *South West Africa, Preliminary Objections, Judgment, I.C.J., Reports, 1962*, p. 329.

#### 1966 Judgment

"As is well known, the Mandates system originated in the decision taken at the Peace Conference following upon the World War of 1914-1918, that the Colonial territories over which, by Article 119 of the Treaty of Versailles Germany renounced "all her rights and titles" in favour of the then Principal Allied and Associated Powers, should not be annexed by those Powers or by any country affiliated to them; but should be placed under an international regime, in the application to the peoples of those territories, deemed "not yet able to stand by themselves", of the principle, declared by Article 22 of the League Covenant, that their "well-being and development should form "a sacred trust of civilisation."<sup>11</sup>

#### Dissenting opinions

#### JUDGE TANAKA

"If we seek some type of legal concept analogous to the mandate agreement in the field of private law, we can mention the terms "mandatum" "tutelage" and "trust". These institutions possess some common elements with the mandates system, although the principles governing the latter cannot be exhaustively explained by those governing the former. The point which we indicated above, namely, the identity of aims between the parties, exists in the case of guardianship, tutelage and trust.

Secondly, the long-term nature of the mandate agreement is what characterises it from other contracts. This character derives from the nature of the purposes of the mandates system, namely the promotion of material and moral well-being and social progress of the mandated

<sup>11</sup> *South West Africa (second phase) Judgment, 1966*, at p. 24.



territories, which cannot be realised instantaneously or within a foreseeable space of time.

Thirdly, the mandate agreement requires from the Mandatory a strong sense of moral conscience in fulfilling its responsibility as is required in the case of guardianship, tutelage and trust. "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory..... The obligations incumbent upon the Mandatory are of an ethical nature, and therefore unlimited. The mandate agreement is of the nature of a bonafide contract. For its performance the utmost wisdom and delicacy are required."<sup>12</sup>

#### JUDGE PADILLA NERVO

"The purpose of the Mandate for South West Africa—in the terms defined by the Council—is to give practical effect to the principle of the sacred trust of civilisation. The Mandate is the "method" chosen by the Allied and Associated Powers to accomplish that end."

And

"The sacred trust is not only a moral idea, it has also a legal character, and significance; it is in fact a legal principle. This concept was incorporated into the Covenant after long and difficult negotiations between the parties over the settlement of the colonial issue."<sup>13</sup>

#### Comments

The Mandates system recognised the rights of the inhabitants of the colonial territories, formerly belonging to Germany, their well-being and development, and provided for adequate safeguards for the protection of such rights. As has already

<sup>12</sup> *South West Africa (second phase) Judgment*, 1966. at p. 267.

<sup>13</sup> *Ibid.*, at p. 453.

been pointed out, the system prevented annexation of the said territories by the victors. According to Judge Tanaka, the purpose of the system was "the promotion of material and moral well-being and social development of the mandated territories, which cannot be realised instantaneously or within a foreseeable space of time." In order to give practical effect to the said purpose, the system postulated an international regime of tutelage to be exercised, under the supervision and control of the League of Nations, by an advanced nation as a "Mandatory" on behalf of the League.

The Mandatory was, like a trustee, tutor or guardian, required to carry out "the sacred trust" entrusted to him with the utmost wisdom and delicacy", since the "obligations incumbent upon the Mandatory are of an ethical nature, and therefore unlimited." The legal framework for the obligation was provided by the Mandates system.

#### (ii) *Instruments embodying the Trust*

#### 1966 Judgment

"It follows that any enquiry into the rights and obligations of the Parties in the present case must proceed principally on the basis of considering, in the setting of their period, the texts of the instruments and particular provisions intended to give juridical expression to the notion of the 'sacred trust of civilisation' by instituting a mandates system."<sup>14</sup>

#### Dissenting opinions

#### JUDGE WELLINGTON KOO

"Moreover, while it may be true that acceptance of the concept of a sacred trust of civilisation in and of itself does not necessarily imply more than a moral or humani-

<sup>14</sup> *South West Africa (second phase) Judgment*, at p. 23.



tarian obligation to respect it, once this concept is made the "corner-stone" of the mandates system and implemented in the legal instruments based upon it such as Article 22 of the Covenant and Article 7(2) of the Mandate Agreement for South West Africa, full account must be taken of this fact in interpreting the legal relations, the rights and obligations of the parties to these instruments....."<sup>15</sup>

#### JUDGE PADILLA NERVO

"The Covenant is in the nature of a constitutional legal instrument, which is the source of rights and obligations relating to the system of mandates, and to the securities and safeguards for the performance of the sacred trust.

The principle proclaimed in Article 22 and its provisions are binding on the Members of the League, which were willing to accept the tutelage and exercise it as mandatories on behalf of the League, in the interest of the indigenous population.

And

The legal obligations stated in the Covenant were translated and spelled out in the specific case of each mandate, 'according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.'"<sup>16</sup>

#### Comments

Inasmuch as the legal framework for the Mandates System is provided by Article 22 of the League Covenant and the mandate agreement relating to the territory concerned, it is to these instruments we have to turn in order to determine "the

<sup>15</sup> *South West Africa (second phase) Judgement, 1969*, at p. 228.

<sup>16</sup> *Ibid.*, at p. 453.

legal relations, the rights and obligations of the parties." Moreover, these instruments gave "judicial expression" to the moral or humanitarian idea of the "sacred trust of civilisation", which was meant to be exercised "in the interest of the indigenous population." (See Annexures I and II to this Study).

Whereas the Covenant served as a constitutional document concerning the Mandates System, the mandate agreement relating to the territory concerned was drawn up after taking into consideration "the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances."

(iii) *Tutelage entrusted not to the League, but to certain Mandatory on behalf of the League*

#### 1966 Judgment

#### Separate opinion

#### JUDGE VAN WYK

" . . . . Paragraph 2 (of Article 22 of the Covenant) states in terms that the best method of giving practical effect to the principle that the well-being and development of the peoples of the territories concerned form a sacred trust of civilisation, 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 could best undertake this responsibility. This tutelage was entrusted to certain countries as mandatories on behalf of the League; it was not entrusted to the League. The tutelage became the responsibility of the mandatory. In the case of South West Africa, paragraph 6 of Article 22 provided in express terms that it "can best be administered under the laws of the Mandatory as integral portion of its territory." The only qualification of this wide statement was that such administration was to be subject to the safeguards



mentioned in the interests of the indigenous population, i. e., provisions relating to freedom of conscience and religion, the slave trade, arms traffic, liquor traffic, military training of natives etc....."<sup>17</sup>

### Dissenting opinion

#### JUDGE TANAKA

"The mandates system is from the structural viewpoint very complicated. The parties to the Mandate, as a treaty or convention, are on the one side the League of Nations and on the other the Mandatory-in the present cases, the Respondent. The latter accepted the Mandate in respect of the Territory of South West Africa "on behalf of the League of Nations." Besides these parties, there are persons who are connected with the Mandate in some way, particularly who collaborate in the establishment or the proper functioning of this system, such as the Principal Allied and Associated Powers, to which these territories had been ceded by the Peace Treaty, Members of the League, and those who are interested as beneficiaries, namely the inhabitants of the mandated territories. . . ."<sup>18</sup>

### Comments

Judge van Wyk pointed out that tutelage under the mandates system was entrusted not to the League of Nations, but to a certain mandatory on behalf of the League; and that in case of South West Africa, which was required to be "administered under the laws of the Mandatory as integral portion of its territory", such tutelage became the responsibility of the mandatory. According to him, the only limitation upon the mandatory's authority was "that such administration was to be subject to the safeguards mentioned in the interests of the indigenous population" specified in the mandate agreement.

<sup>17</sup> *South West Africa (second phase) Judgment*, 1966, at pp. 160-161.

<sup>18</sup> *Ibid.*, at p. 265.

Judge Tanaka expressed the view that even though it was the mandatory who accepted the tutelage on behalf of the League and not the League itself and the parties to the mandate were the League and the mandatory, yet there were other persons who were concerned "in the establishment and proper functioning of this system." These included the Principal Allied and Associated Powers which conquered the territories concerned, devised the mandates system and placed such territories under the system, Members of the League and the inhabitants of the mandated territories, who were concerned in the proper function of, and fulfilment of the objectives behind, the mandates system.

### (iv) *Type of regime set up by the mandates system*

#### 1962 Judgment

"... The rights of the mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations. The fact is that each Mandate under the Mandates system constitutes a new international institution, the primary, overriding purpose of which is to promote "the well-being and development" of the people of the territory under Mandate."<sup>19</sup>

### Separate opinion

#### JUDGE BUSTAMANTE

"... The legal concept is nearer to that of the unilateral contracts of private law rather than that of synallagmatic contracts. The rights granted to the Mandatory are for the purpose only of the better fulfilment of its obligations towards the country under tutelage. The

<sup>19</sup> *South West Africa Cases, Preliminary Objections, Judgment*, I.C.J., Reports, 1962, at p. 329.



concept of obligation predominates. Once the Mandate has been accepted, the mission of the Mandatory becomes a mission which, to a varying extent, must always surpass the Mandatory's own interests and, first and foremost, serve the interests of the population under tutelage. The 'C' Mandates do not constitute an exception to this rule. It is true that under them the Mandatory enjoys wider powers and may even legitimately obtain greater economic benefits by the use made of the ex-colonial territory, but as far as the Mandatory is concerned, the territory is *res aliena* as in all the Mandates, and its inhabitants are legal persons who will one day have the capacity to decide for themselves."<sup>20</sup>

#### 1966 Judgment

##### Separate opinion

#### JUDGE VAN WYK

" . . . . . The object was, in a sense, to define the international status of South West Africa, to create an international regime ; but an integral part of the definition of the regime was supervision by the Council of the League. This appears clear not only from the very provisions of Article 22 of the Covenant, but also from the *travaux préparatoires*, which reveal that the general provisions would not have been agreed to had the Article not contained the specific provisions relating to the methods devised to give practical effect thereto . . . . ."<sup>21</sup>

##### Dissenting opinions

#### JUDGE WELLINGTON KOO

"But the mandates system, while it bears some resemblance to, and was probably inspired by, the concept of

<sup>20</sup> *South West Africa Cases, Preliminary Objections, Judgment, I.C.J., Reports, 1962*, at p. 357.

<sup>21</sup> *South West Africa (second phase) Judgment, 1966*, at p. 86.

guardianship or tutelle in private law, the similarity is very limited. Unlike the municipal law concept with its simple characteristics and limited scope, the mandates system has a complex character of its own, with a set of general and particular obligations for the mandatory to observe and carry out, and with a scheme of multiple control and supervision by the League of Nations with its Council, Assembly, member States and the Permanent Mandates Commission and with judicial protection in the last resort by the Permanent Court. It is a novel international institution. Nothing of the kind had existed before. It is *sui generis*."<sup>22</sup>

#### JUDGE KORETSKY

"Two kinds of securities for the performance of the trust were created, (a) political supervision by the Council of the League of Nations, to whose satisfaction the Mandatory was required to make an annual report, and (b) judicial supervision by the Permanent Court, which had to decide whether the Mandatory's interpretation or application of the provisions of the Mandate were correct."<sup>23</sup>

#### JUDGE TANAKA

"The Mandate, constituting an aggregate of the said diverse personal elements—presents itself as a complex of many kinds of interests. The League and Mandatory, as parties to the Mandate, have a common interest in the proper performance of the provisions of the Mandate. The inhabitants of the mandated territories possess, as beneficiaries, a most vital interest in the performance of the Mandate."<sup>24</sup>

<sup>22</sup> *South West Africa (second phase) Judgment, 1966*, at p. 217.

<sup>23</sup> *Ibid.*, at p. 245.

<sup>24</sup> *Ibid.*, at p. 266.