UNITED NATIONS GOVERNANCE OF FAILED STATES: PROPOSING THE FOUNDATIONS OF A COMPREHENSIVE FRAMEWORK

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This paper proposes the foundations of a broader legal framework of United Nations governance of failed states. The author considers the background to the post-Cold War interventionism that has sparked this phenomenon, before turning to the wider theoretical and historical contexts against which such governance occurs. The author argues that the skeletal framework of black-letter law that currently oversees the international administration of failed states is insufficient because it lacks constraints on the way governance occurs. This renders it susceptible to the normative criticisms of trusteeship and neocolonialism and reduces the likelihood that such missions will achieve their stated aims. Accordingly, the author seeks to critically situate the black-letter sources of law and recent case studies of transitional post-conflict governance within these broader contexts, in order to propose basic normative principles that can credibly constrain the current positivist framework. These principles are designed to address the central challenge of UN governance: to confer on the international body the legal authority needed to maintain peace and security and improve the welfare of citizens, but to avoid the risk of a regime that politically symbolises a form of western, neo-colonialist subjugation.

'Government is an evil; it is only the thoughtlessness and vices of men that make it a necessary evil. When all men are good and wise, government will of itself decay.'[1]

I INTRODUCTION

The end of the Cold War sparked a striking transformation in the role played by the United Nations in the maintenance of international peace and security. Freed from a deadlocked Security Council to address a multitude of armed conflicts across the globe,[2] the UN began to exercise its powers under the United Nations Charter in unprecedented ways. One innovative solution it adopted was to assume the powers of sovereignty and governance over formerly independent

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1 Percy Bysshe Shelley, *An Address to the Irish People* (1812).
2 For example, in the five years between 1990 and 1995 there were 93 wars involving 70 countries and 5.5 million deaths: Jarat Chopra, 'Introducing Peace-Maintenance' in Jarat Chopra (ed), *The Politics of Peace Maintenance* (1998) 1, 1.

territories. The early successes of missions in Namibia (1989) and Cambodia (1991) generated enthusiasm in the ability of the UN to administer war-torn territories and direct their reconstruction.[3] In the years since, successive UN operations have been empowered with increasing levels of authority, culminating in situations where the UN has effectively acted as sovereign in the administration of transitional, post-conflict territories. Such a level of control by an external entity has not been seen since the era of UN Trusteeship, a regime long dormant following the empowerment and independence of the developing world through the decolonisation and self-determination movements.

Driving this transformation in UN operations in the post-Cold War era was the fact that most armed conflicts were now internal in nature, ranging from low-level violence and lawlessness to full-scale civil war. The distinctive challenge posed by internal armed conflict is that it can render the afflicted state incapable of discharging the basic functions of governance, giving rise to the term 'failed states'.[4] Such states have come to be viewed by the international community as constituting potential threats to collective security.[5] It is argued that the removal of these threats requires not only intervention to end hostilities, but longer-term measures to ensure lasting peace.[6] Hence the concept of an active, if not authoritative role for the international presence in the reconstruction process, to establish enduring domestic stability and prosperity. Prime Minister Tony Blair in 1999 recognised that '[i]n the past we talked too much of exit strategies. But having made a commitment we cannot simply walk away once the fight is over'.[7] This sentiment was echoed by President George W Bush on the first anniversary of the September 11 attacks:

> *More than ever, we know that weak states ... can pose a great danger to the peace of the world ... [P]overty, corruption and repression are a toxic combination in many societies, leading to weak governments that are unable to enforce order or patrol their borders and are vulnerable to terrorist networks and drug cartels.*[8]

Yet the concept of the international post-conflict administration is yet to achieve clarity in its identity, form or scope. Each UN-orchestrated mission to date has been based not on a clear set of legal rules, but on political compromise, the willingness of donors to provide resources and historical circumstance. Consequently, the responses have been selective, varied, inconsistent and often

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3   Jacob Kreilkamp, 'UN Postconflict Reconstruction' (2003) 35 *New York University Journal of International Law and Politics* 619, 622.
4   Richard Caplan, *A New Trusteeship? The International Administration of War-Torn Territories* (2002) 7, n 2. On failed states see Gerald Helman and Steven Ratner, 'Saving Failed States' (1992) 89 *Foreign Policy* 3.
5   Christopher Clapham, 'The Challenge to the State in a Globalized World' in Jennifer Milliken (ed), *State Failure, Collapse and Reconstruction* (2003) 25, 25. See below Pt II C.
6   See Michael Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 *American Journal of International Law* 76, 83-4.
7   Tony Blair, 'Doctrine of the International Community' (Speech delivered at the Economic Club of Chicago, Chicago, 22 April 1999) cited in Caplan, above n 4, 8.
8   George W Bush, 'Securing Freedom's Triumph', *New York Times* (New York), 11 September 2002, 33.

self-interested, described at best as *ad hoc*,[9] and at worst as a repeated failure.[10] In order to resolve this problem Secretary General Kofi Annan has suggested that 'the role of the Trusteeship Council could be reviewed, in light of new kinds of responsibility that ... [have been] given to the United Nations in recent years'.[11] Parallels with the UN Trusteeship System have, however, sparked sharp criticism in other quarters. It is argued that, even in a modern, more 'enlightened' incarnation, trusteeship remains 'based explicitly on a condition of inequality'[12] that 'might be corrosive of the post-colonial project of a universal society of states grounded in the universal legal equality of its members'.[13] This line of argument views UN governance of failed states as antithetical to the fabric of an international society based on the right to self-determination and the sovereign equality of all states.[14]

The aim of this article is to reconcile the polar perspectives on this recent and controversial area of international legal and political concern. It is submitted that such a reconciliation can only be accomplished through the development of a coherent legal framework, the foundations of which are then proposed. The article first traces the emergence of the concept of failed states, presenting arguments as to why UN governance is necessary (Part II). The lessons of history and the interplay of 'politics' on this issue are explored, including the sensitive questions of colonialism and UN Trusteeship, the elimination of which was seen as indispensable in efforts of the international community to shape its legal and political order following WWII (Part III).

The central contention of this paper is that a strictly objective, black-letter law exposition of the relevant legal documents and evidence of past practice is an insufficient basis for proposing a broader legal framework of UN governance (Part IV A). Rather, one must look beyond formal sources of law and have regard to the historical context and theoretical basis upon which the justification for the external administration of territories rests. Such regard is a precondition to the development of a legal regime that has the potential to enjoy universal credibility within the international community and can successfully achieve the goals to which the UN administration of failed states is directed.

Accordingly, this paper seeks to identify the existing black-letter sources of law (Part IV B) and assess their strength and effectiveness in light of the patchwork of recent examples of transitional post-conflict governance (Part IV C). This

9   Henry Perritt Jr, 'Structures and Standards for Political Trusteeship' (2003) 8 *UCLA Journal of International Law and Foreign Affairs* 385, 385.
10 Lakhdar Brahimi, *Report of the Panel on United Nations Peace Operations*, UN GAOR, 55th sess, Provisional Agenda Item 87, 1, UN Doc A/55/305- S/2000/809 (2000) ('Brahimi Report').
11 Kofi Annan, 'Adoption of Policy of Pre-emption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary-General Tells General Assembly' (Press Release, 23 September 2003), UN Doc SG/SM/8891 GA/10157 (2003).
12 William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (2003) 26.
13 Ibid 163. See also Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (1998) 79-80.
14 See, eg, *The Declaration on the Granting Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), 15 UN GAOR Supp No 16, [66], UN Doc A/4684 (1961) ('GA Res 1514 (XV)').

analysis is combined with the insights of history and theory discussed in earlier parts to formulate basic normative principles designed to anchor the positivist framework of black-letter law (Part IV D). These principles are intended to address the central challenge faced by UN governance – conferring on the international body the legal authority needed to maintain peace and security and improve the welfare of citizens, while avoiding the risk of imposing a regime that symbolises a form of western, neo-colonialist subjugation (Part V). It is hoped that these norms can be used to guide future post-conflict administrations and ultimately serve as the foundation of further research into a broader, more comprehensive legal framework.

II INTERVENTION IN THE FAILED STATE: BACKGROUND, DEFINITION AND JUSTIFICATIONS FOR INTERVENTION

A *Background: The United Nations and the End of the Cold War*

The end of the Cold War triggered a major shift in the conduct of international relations and the direction of public international law. The UN in particular was elevated in its relevance, importance and power, an outcome largely driven by the demise of the 'bipolar' power structure of international relations. Free from the paralysis of Soviet-US *realpolitik* and the near-guarantee of Security Council veto, the UN was freed to pursue more actively and vigorously the principles entrusted to it by the UN Charter. In other words, the mantras of 'sav[ing] succeeding generations from the scourge of war', 'maintain[ing] international peace and security' and 'promoting and encouraging respect for human rights'[15] could now justify UN intervention in novel and innovative ways. Simultaneously, the collapse of the Soviet Union caused a swift deterioration of the political and economic stability within and between many states. States and regimes previously made viable only though the support of a superpower were abandoned. Already weakened by factors such as years of war, sanctions, ethnic tension, regional instability, economic and political mismanagement, natural disasters and general social disorder, many of these states teetered on the brink of collapse. Yet political turmoil and economic distress within these states was no longer as strategically relevant to the great powers,[16] leaving a vacuum of responsibility for the UN to fill.

Many of the new responsibilities assumed by the UN were qualitatively different from its orthodox 'peacekeeping' role. The complete breakdown of law and order, guerilla and irregular warfare, ethnic cleansing and massive human rights abuses were issues with which UN staff and soldiers had little experience, being

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[15] *Charter of the United Nations*, arts 1(1) and 1(3).
[16] Richard Falk, 'Sovereignty and Human Dignity: The Search for Reconciliation' in Francis Deng and Terrence Lyons (eds), *African Reckoning: A Quest for Good Governance* (1998) 25.

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far removed from traditional inter-state conflicts.[17] In addition, after overcoming these hurdles, the international presence would now be required to remain to enforce laws, manage economies and provide basic public services. The qualitative differences in these responsibilities presented two related challenges – one practical and one legal – that have plagued UN operations in the post-Cold War era.

The practical difficulty was that the UN tried to fill onerous roles for which it lacked both prior experience and an established legal regime within which to operate. In describing the UN's recent security operations (in particular in Yugoslavia and Somalia), John Ruggie commented in 1993 that the UN

> has entered a domain of military activity - a vaguely defined no-man's-land lying somewhere between traditional peacekeeping and enforcement - for which it lacks any guiding operational concept. It has merely ratcheted up the traditional peacekeeping mechanism in an attempt to respond to wholly new security challenges.[18]

The unsuitability of the UN apparatus jeopardised the success of UN missions, resulting in, at its worst, failures to prevent tragedies such as those occurring in Rwanda in 1994 and Srebrenica in 1995.[19] Even where successful, what was practically feasible, politically desirable and legally permissible for any given UN mission was not readily identifiable.

The associated legal difficulty, therefore, was to actually determine the scope and limitations of UN authority to address these new situations. From the viewpoint of its then Secretary General, Boutros Boutros-Ghali, the UN was rightfully assuming greater responsibility in conflict resolution and post-conflict peace-building. In his ambitious 1992 'Agenda for Peace', Boutros-Ghali appeared boldly to forecast the direction of UN operations, to incorporate

> the option of considering in advance collective measures, possibly including those under chapter VII when a threat to international peace and security is involved, to come into effect should the purpose of the United Nations operation systematically be frustrated and hostilities occur.[20]

At the same time, scholars began to recognise that intervention was needed in states afflicted by the chaos borne of armed conflict or overwhelming economic

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17   W Andy Knight, 'Establishing Political Authority in Peace-Maintenance' in Chopra, above n 2, 19, 21.
18   John Ruggie, 'Wandering the Void: Charting the UN's New Strategic Role' (1993) 72(5) *Foreign Affairs* 26, 26.
19   Despite forewarning, in 1994 the UN did not intervene to prevent the apocalypse in Rwanda which cost a million lives. In 1995, a vastly inadequate team of Dutch UN peacekeepers was sent to protect the 'safe area' of Srebrenica, only to helplessly watch as thousands were abducted and later found in mass graves. See Christian Scherrer, *Ethnicity, Nationalism and Violence: Conflict Management, Human Rights and Multinational Rights* (2003), 290-302.
20   *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General, UN GAOR/SCOR, 47th sess, Preliminary List Item 10, [68], UN Docs A/47/277-S/24111 (1992).

and social dysfunction. Gerald Helman and Steven Ratner first introduced the notion of a 'failed' state that was unable to discharge the essential functions of governance.[21] While in such situations the crisis was typically internal, they argued that intervention was nevertheless needed to safeguard international peace and security.

However, the ambitions of the UN leadership and the work of scholars such as Helman and Ratner did not translate into a structured legal framework for post-conflict governance of failed states. Rather, as UN missions were afforded increasing governmental responsibility, they became subject to the inveterate tension that exists within the text of the Charter, between the 'non-intervention' clause in article 2(7), and other Charter goals such as international peace and security and human rights protection. No recognisable attempt was made visibly to relieve this tension or affirm a dominant priority that could guide the UN as it ventured further into territorial administration.

In hindsight, the increased activism by the UN in the 1990s precipitated a paradigm shift away from non-intervention, eroding the once-strong principle of absolute state sovereignty.[22] New terminology emerged to describe the evolution in the roles played by the UN roles, particularly the function of governance. Peacekeeping became 'peace-maintenance'.[23] Absolute sovereignty and the formal equality of states gave way to the realities of global interdependence and were diluted into concepts such as 'earned sovereignty'[24] and 'intermediate sovereignty'.[25] What was lacking was an inquiry into what, if anything, constrained this new-found power to intervene. No prohibitive norms emerged to restrict the creation or operation of post-conflict administrations. Boutros-Ghali even noted the dangers of UN intervention in failed states, commenting that 'unless there is the agreement of the Member States … we will be accused of neocolonialism'.[26]

B *The Failed State Defined*

The concept of the 'failed' state emerged in the early 1990s to describe a sovereign state that either cannot or will not perform the basic functions of governance. Decision-making is inoperative, laws are not made and order is not

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21 Helman and Ratner, above n 4; See also I William Zartman (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (1993); Cf Ralph Wilde, 'The Skewed Responsibility Narrative of the "Failed States" Concept' (2003) 9 *ILSA Journal of International and Comparative Law* 425.

22 David Malone, 'The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter' (2003) 35 *New York University Journal of International Law and Politics* 487. See also below Pt II C.

23 See Jarat Chopra, 'Introducing Peace-Maintenance' in Chopra, above n 2, 1.

24 See Paul Williams, Michael Scharf and James Hooper, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty' (2003) 31 *Denver Journal of International Law and Policy* 349.

25 See Public International Law and Policy Group, *Intermediate Sovereignty as a Basis for Resolving the Kosovo Crisis* (1998) International Crisis Group <http://www.crisisweb.org/home/index.cfm?id=1596&l=1> at 28 June 2004.

26 Boutros Boutros-Ghali, *Transcript Of Press Conference By Secretary-General Boutros Boutros-Ghali Held At Headquarters*, UN Doc SG/SM/5297 (1994).

preserved. This incapacity derives from the collapse of the state as the authoritative domestic political institution.[27] The first failed states were identified in post-colonial Africa, where years of civil war, corrupt governance and ethic tension saw a number of states descend into near-anarchy.[28] The concept was then expanded to other strife-ridden regions of the world, whether in the aftermath of a civil war (eg, Cambodia), a civil war leading to the break up of a state (eg, the former Yugoslavia), the independence of a new state (eg, East Timor), or most recently, by the toppling of an oppressive regime through foreign military operations and the installation of a new governing authority (eg, Afghanistan and Iraq). A failed state is therefore not necessarily underdeveloped, rather, it is distinguished in either of two ways. First, the state is plagued by overwhelming and 'uncivilised' violence performed in clear defiance of established codes of international conduct and to which governing authorities are unable or unwilling to prevent.[29] Alternatively, the state suffers forced disintegration through foreign military intervention that devastates existing structures and institutions of governance.[30] This paper will not seek to analyse or pass judgment on the causes of state collapse (though it will suggest that the typology of causes will influence the approach of a transitional administration).[31] It is sufficient for present purposes to identify those states whose governing apparatus have been so devastated through internal or international armed conflict that any emerging power structure finds it difficult, if not impossible, to rebuild the institutions of order and good governance.[32]

The paradox of the 'failed state' is that it would probably not have survived under the 'classical' order the governed international law and relations in the 18th century. Under this system, effective government was the critical element of sovereign statehood and the recognition by other states was not imperative because source of authority came from within the state.[33] In contrast, modern

27 I William Zartman, 'Introduction: Posing the Problem of State Collapse', in Zartman, above n 21, 1, 5-6.
28 See Helman and Ratner, above n 4; Zartman above n 21; Ruth Gordon, 'Saving Failed States: Sometimes a Neocolonialist Notion' (1997) 12 *American University Journal of International Law and Policy* 903; See also Robert Kaplan, 'The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism and Disease are Rapidly Destroying the Social Fabric of Our Planet' (1994) 273(2) *The Atlantic Monthly* 44; Robert Rotberg, 'The New Nature of Nation-State Failure' (2002) 25(3) *The Washington Quarterly* 85.
29 See Bain, above n 12, 142-3. Bain notes that prior to decolonisation, membership in international society was conditioned upon a state's ability to fulfill its 'civil' obligations. Passion and violence, the hallmarks of barbarism, excluded 'uncivilised' peoples from membership for their inability to respect the law of nations: Ibid 143.
30 This situation has a tenuous link to the Allied assumption of sovereignty over Germany and Japan following World War II. Yet there is controversy as to the exact legal basis for the Allies' title, in particular to Germany, and whether the law of occupation of the doctrine of deballatio applied: See Eyal Benvenisti, *The International Law of Occupation* (1993) 91-8.
31 For the purposes of this part and the paper generall,y the legality and propriety of the interventions in Kosovo, Afghanistan and Iraq are irrelevant. It will proceed on the assumption that, for whatever reason, state structures and institutions have collapsed and reconstruction is virtually impossible without outside assistance in some form. However, the cause of state collapse will be of significance in informing the framework of post-conflict governance. See below n 173 and accompanying text.
32 See Gordon, above n 28, 922.
33 See James Crawford, 'The Criteria for Statehood in International Law' (1976-7) 48 *British Year Book of International Law* 93, 116-17; Cf Jennifer Milliken and Keith Krause, 'State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies' in Milliken, above n 5, 1, 3.

failed states, having already achieved the minimum requirements of statehood, possess the full juridical status and same external rights and responsibilities as all other states. This right to exist, once attained, is not generally affected by the internal breakdown of the state and its institutions, whereas such breakdown would, under classical principles, be fatal to the state's sovereign status. As William Bain observes, failed states are products of the normative shift that occasioned decolonisation and are sustained, somewhat perversely, by these new constitutive norms – norms which 'help ensure the survival of what are otherwise unviable states'.[34] This irony was manifested neatle by the UN when, in terminating the Trusteeship Agreement for Ruanda-Urundi in 1962, the General Assembly had to authorise US $2 000 000 'to ensure the continuation of essential services' at the precise point that the two countries were supposedly able to 'stand by themselves'.[35]

Robert Jackson terms these states 'quasi-states' and points out that they are exempt from the power contest on the international plane that would historically have engineered their downfall; the weakness or backwardness of states can no longer justify conquest or colonisation.[36] Rather, the principle of sovereignty disavows intervention in states' internal affairs, protecting them from juridical extinction, even if their empirical extinction – via descent into anarchy – is an imminent reality. As Jackson notes, 'this categorical right derives from new international norms such as anti-colonialism, ex-colonial self-determination, and racial sovereignty underwritten by [western] egalitarian and democratic values'.[37] Accordingly, intervention in failed states relies on questioning either the theoretical foundations of the sovereign equality of states of its applicability in certain circumstances.

C The Erosion of Sovereignty and Justifications for Intervention

The sovereignty and equality of states is the keystone of international law. Born of the Peace of Westphalia in 1648, the triumph of the state was hailed as the solution to the challenge of political order. Instability and disorder - obstacles to stable society - could be overcome by viable governments exercising firm control over territory and people.[38] A relative degree of stability on the international plane was ensured under the doctrine of the formal equality of states. For over three centuries international public order rested chiefly on the principle that each state was an original, discreet and autonomous political entity that was immune

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[34] Bain, above n 12, 143. On another level, sovereignty arguably serves as a shield for corrupt and despotic elites. One publicist accuses the protection of the principle in the UN Charter as 'protect[ing] and encourag[ing] the criminals who rule too many states': James Owens, 'Government Failure in Sub-Saharan Africa: The International Community's Options' (2003) 43 *Virginia Journal of International Law* 1003, 1036.

[35] *The Future Of Ruanda-Urundi*, GA Res 1746, UN GAOR, 16ᵗʰ sess (1962).

[36] Robert Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (1990) 21-5.

[37] Ibid 24.

[38] Francis Deng et al, *Sovereignty as Responsibility· Conflict Management in Africa* (1996) 2. See also Thomas Hobbes, *Leviathan* (first published 1651, 1960 ed) chapter XVII.

from the intervention of other states. This Westphalian rule of sovereignty served as the primary precept of international law.[39]

Even as the extinction of colonialism seemingly cemented the independent state as the supreme form of political organisation, the Westphalian concept of sovereignty began to wane. Theoretically, the state is often seen as being obligated by a social contract to meet the basic needs of its people and carry out the functions expected of an effective government.[40] This means that sovereignty does not inhere in the state itself, but in its citizenry, and it depends upon the respect for the rights of people for its legitimacy.[41] Consequently, a state's failure to protect the welfare of its people can arguably bring the inviolability of the state's sovereignty into question. In other words, the principle of non-intervention can only be maintained if states are at least benign (if not beneficial) places to live.[42] There is no utility in respecting the independence of a state if, for example, its subjects gain no protection from state authorities and live in fear – either of the government, fellow citizens, or both.[43]

Arguably, an important causal factor in the erosion of sovereignty was the development of the global human rights regime. The second half of the twentieth century saw a dramatic rise in the authority and content of international human rights law, beginning with the Universal Declaration of Human Rights in 1949.[44] While article 2(7) of the UN Charter purports to protect sovereign states from intervention on humanitarian grounds, it is now widely acknowledged that problems relating to human rights are an area of international concern.[45] Sweeping statements can be found which assert that questions relating to human rights no longer fall exclusively within the domestic jurisdiction of states.[46] Although uncertainty continues to surround this area of law,[47] tyrannical regimes are progressively less likely to succeed in using the defence of sovereignty to avoid responsibility for their actions.[48] Rather, it is increasingly recognised that the international community has a residual responsibility – as the ultimate

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[39] See Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2607-9.
[40] Deng et al, above n 38, xii-xiii.
[41] See Falk, above n 16, 13.
[42] Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (2000), 299. ('The Global Covenant').
[43] Ibid. This notion was apparently confirmed by the General Assembly in the 1970 *Declaration on Principles of International Law Concerning Friendly Relations* which indicated that the right of territorial integrity took precedence over the right to self-determination only so long as the state possesses a government representing all people regardless of race: GA Res 2625, UN GAOR, 25ᵗʰ sess, Supp No 28, 121, UN Doc A/8028 (1970). See also Michael Scharf, 'Earned Sovereignty: Juridical Underpinnings' (2003) 31 *Denver Journal of International Law and Policy* 373, 381-2.
[44] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3ʳᵈ sess, [71], UN Doc A/810 (1948).
[45] Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2ⁿᵈ ed, 2002) 161.
[46] Ibid.
[47] See, eg, Antonio Cassese, 'Ex inuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10(1) *European Journal of International Law* 23.
[48] Falk, above n 16, 17.

guarantor of universal standards – to protect victims of internal injustice.[49] Such responsibility could include temporary international territorial administration where it is deemed that domestic governing institutions cannot, or will not, protect the local population, or parts of it, from human rights abuses or humanitarian catastrophe. Such a view shifts the position of individuals to *subjects* of international law rather than as *objects* of sovereign will, whose welfare therefore can, when abused on a considerable scale, constitute an assault on international public order.[50]

The most important factor used, however, to justify the intervention in and governance of failed states has been the geo-political expansion of the law of collective security. Of more recent prominence, and due in part to the growing threat of terrorism, there is increasing concern that the shield of sovereignty protects and promotes terrorist activity.[51] This fear has justified intervention in failed states in order to destroy terrorist networks, remove the regimes that support them, and even to assume governmental authority temporarily this assisting in the long-term elimination of the terrorist threat.   Yet this interventionist mindset did not begin with the war on terror. Since the end of the Cold War the Security Council has often intervened in civil conflicts. In doing so, it has redefined what can *legally* constitute a 'threat to international peace and security',[52] thereby conferring upon itself the competence to act under chapter VII of the UN Charter, while bypassing the non-intervention clause in article 2(7).[53] A considerable overlap exists between the broadening of the ambit of 'international peace and security' and the increasing activism regarding human rights and humanitarian concerns. However, the underlying motives behind international intervention may, on occasion, transcend questions of terrorism or human rights. Richard Caplan argues that states will also be motivated by concerns of *realpolitik*. For example, regional security concerns would no doubt have helped persuade the members of the EU to intervene in the former Yugoslavia, or Australia to readily offer assistance to East Timor in the lead-up to and aftermath of that country's independence.[54] Yet, notwithstanding any geo-political aspect of the underlying motives, these practices have helped contribute to a redefinition and broadening of the concept of collective security in the global community, paving the way for international territorial administration.

In summary, the three factors outlined above – the welfare of citizenry, the protection of human rights and the broadening of collective security – assisted perhaps in part by the *realpolitik* motives of state actors, have diminished the

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49 Francis Deng and Terrence Lyons, 'Introduction: Promoting Responsible Sovereignty in Africa' in Deng and Lyons, above n 16, 7.
50 See generally Louis Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1.
51 See, eg, Moises Naim, 'The Five Wars of Globalisation' (2003) 134 *Foreign Policy* 28.
52 *Charter of the United Nations* art 39. See below Pt IV B.
53 See Malone, above n 22, 509-10.
54 Caplan, above n 4, 8.

sovereignty of individual states.[55] If one views the specific deficiencies of failed states in light of this broader erosion of individual state sovereignty, such deficiencies arguably justify the forfeiture of an even greater degree of sovereignty. Accordingly, a persuasive case for intervention may be made in the category of failed states, where such intervention would, of necessity, encompass not just action to bring and end to hostilities, but continued engagement to restore order and assist in reconstruction and state-building. Enter the concept of international post-conflict administration.

Before considering past and potential legal frameworks of international administration, it should be noted that the above argument in part rests on four assumptions, that Robert Jackson thinks are

> worth noticing about a conjectured reformation of international society of this sort. First... that a state's will and capacity to establish and enforce domestic civil conditions and to carry out international obligations should be a requirement for political independence. Second ... that states which fail to meet that standard should forfeit their independence until they can be prepared and equipped to re-enter international society ... Third, it justifies foreign intervention and governance of independent states with or without the consent of their government. Finally, it presupposes that successful states would take on the heavy responsibility of reforming failed states by taking them over for a period of time.[56]

Any fallibility in these assumptions may undermine the case for international governance of failed states. While the assumptions may to some extent be defensible under a broader understanding of the concept of international peace and security, legitimate normative concerns are nevertheless raised that '[a]ll of this points toward an international change comparable to decolonisation, but operating in reverse gear, a counter-reformation of international trusteeship'.[57]

III EARLY MODELS OF TERRITORIAL ADMINISTRATION

A *Colonialism, Mandates and Trusteeship*

1 *The Historical Legacy of Colonialism*

The origins of twentieth century trusteeship lie in the colonial empires of Western Europe. Colonialism justified the right of empire, provided that the colonial power exercised its authority with 'sensitive appreciation of and due attention to

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55 For a supporting argument using these and other factors see: Stehpen Krasner, 'Pervasive Not Perverse: Semi-Sovereigns as the Global Norm' (1997) 30 *Cornell International Law Journal* 651. Krasner writes that 'stable solutions to international conflicts do not depend on conformity with all of the principles that are conventionally associated with sovereignty': Ibid 652.

56 Jackson, *The Global Covenant*, above n 42, 300-301.

57 Ibid s301.

its imperial responsibilities'.[58] Its normative basis was eloquently expressed by British statesman Edmund Burke in a parliamentary debate regarding the East India Company's dominion over colonial India:

> [A]ll political power which is set over men, and ... all privilege claimed or exercised in exclusion of them ... ought to be some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion ... then such rights, or privileges ... are all in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable.[59]

Colonial principles were passed on to the broader international community in the wake of WWI. They became embodied in the League of Nations Mandate System and helped shape its successor, the United Nations Trusteeship System. Compared, therefore, to colonialism, '[m]andates and international trusteeship were not a new species', there being 'abundant evidence of the continued operation of the historical connection between the two'.[60]

2 *The League of Nations Mandate System*

The Mandate System embodied two broad sets of obligations: substantive obligations of the Mandate to protect native peoples and advance their welfare and procedural obligations under a system of supervision by the League designed to ensure proper administration of the mandate territory.[61] With an underlying theme of tutelage,[62] Mandates undertook as a 'sacred trust of civilization' to promote the well-being and development of those peoples (apparently) not yet able to stand by themselves.[63] The underlying premises and structure of the Mandate System demonstrate that, at the time, international law continued to support the concept of superior and inferior peoples, perceiving a need to elevate inferior peoples to the European standard of 'civilisation'.[64] In his seminal work on Mandates in 1948, Duncan Hall wrote '[t]here are no mandates, no trusteeships, no dependent peoples within the well-ordered peace area of a strong, advanced national state, such as metropolitan France or Great Britain'.[65]

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[58] Peter Lyon, 'The Rise and Fall and Possible Revival of International Trusteeship' (1993) 31 *Journal of Commonwealth and Comparative Politics* 96, 97.

[59] Edmund Burke, 'Speech on Fox's East India Bill' (Speech delivered at the British House of Commons, London, 1 December 1783) <http://www.econlib.org/library/LFBooks/Burke/brkSWv4c5.html> at 2 July 2004.

[60] Duncan Hall, *Mandates, Dependencies and Trusteeship* (first published 1948, 1972 reprint) 93-4.

[61] Antony Anghie, 'Colonialism and the Birth of International Institutions' (2002) 34 *New York University Journal of International Law and Politics* 513, 523-5. The procedural obligations of Mandates were the first formal realisation of Burke's principle of 'accountability' conceptualised 'internationally' rather than 'nationally': Simma, above n 45, 1100.

[62] Gordon, above n 28, 941.

[63] See *Covenant of the League of Nations* art 22.

[64] Gordon, above n 28, 946.

[65] Hall, above n 60, 9.

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3 *The United Nations Trusteeship System*

The UN Trusteeship System replaced and expanded upon the League Mandate System. Like the Covenant of the League of Nations which preceded it, article 73 of the Charter acknowledged in similar language the 'responsibilities' of certain UN member states 'for the administration of territories whose people have not yet attained a full measure of self-government'. This article established the substantive framework for trusteeship agreements, serving as the standard applied in UN oversight of trust territory administration.[66] Unlike the Mandate System, the principles of UN Trusteeship expressly included the objective of progressively developing trust territories toward self-government or independence.[67] Moreover, the purposes of the Trusteeship System itself were more broadly defined, including 'to promote the ... advancement of the inhabitants of the trust territories', but also 'to further international peace and security' and 'encourage respect for human rights'.[68] The new system also contained a far more rigorous regime of international supervision under the newly-formed Trusteeship Council, which required a more detailed level of information to be provided by administrators, with the Council itself possessing investigative powers to consult with trust peoples.[69]

At the opening session of the Trusteeship Council, Secretary General Lie stated that the Trusteeship Council was to work for its own demise with the 'ultimate goal ... [of giving] the Trust territories full statehood'.[70] Yet Charmian Toussaint, in her influential work on the UN Trusteeship System, took the view that it was simply the most comprehensive and recent system of international colonial control.[71] Although given the opportunity by article 77(1)(c) of the Charter, none of the colonial powers chose to subject their own dependent territories to the supervision of the Trusteeship System.[72] Thus, as a new post-war regime, trusteeship had little direct effect on the prevailing colonial paradigm. This was, however, of debatably of little consequence, because the Trusteeship Council nevertheless became a standard-setting body. If a colonial power of a non-Trust Territory wished to attain international legitimacy, it was obliged to adopt the standards and practices of the trusteeship regime.[73] Accordingly, an assessment of the UN Trusteeship System – whose activities were suspended indefinitely in 1994 – depends on where the emphasis is placed. On one hand, it served as a

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[66] Simma, above n 45, 1106.
[67] *Charter of the United Nations* art 76(b). Note that states responsible for Non-Self-Governing-Territories, subject to the Declaration in chapter XI but not the Trusteeship system (ie colonies), were only required to promote self-government, not independence: art 73(b).
[68] *Charter of the United Nations* art 76(a)-(c).
[69] Gordon, above n 28, 950.
[70] A J R Groom, 'The Trusteeship Council: A Successful Demise' in Paul Taylor and A J R Groom (eds), *The United Nations at the Millennium: The Principal Organs* (2000) 142, 142.
[71] Charmian Toussaint, *The Trusteeship System of the United Nations* (first published 1956, 1976 reprint) 17; See also Lyon, above n 58, 102: 'the trusteeship system ... is based as much as the mandates systems ... on the principle of tutelage by advanced nations'; cf Groom, Ibid 170.
[72] Ibid 248; James Crawford, *Creation of States in International Law* (1979) 335, n 6. Accordingly, trust territories under chapter XII were confined to existing mandates (all but two of which converted to trust territories) and those territories detached from the defeated powers of WWII.
[73] Groom, above n 70, 170.

model for good governance and successfully oversaw the transition of its eleven
Trust Territories into statehood. It emphasised the protection of indigenous
peoples from abuse and the development of political, social and economic
institutions that would result in self-determination.[74] On the other hand, it merely
prolonged the League Mandate system in perpetuating the colonial mindset of
superior and the inferior civilisations. This new regime was simply a different
means to oppress and exploit colonial peoples.[75]

As trusteeship was closely linked to Western colonialism, the abolition of
colonialism extinguished the legitimacy of trusteeship.[76] The central premise of
trusteeship had been the factual incapacity of colonial peoples to govern
themselves.[77] In contrast, decolonisation and the associated right of self-
determination expressly rejected the notion that subjugated peoples were required
to satisfy any empirical preconditions of 'readiness' or 'civilisation' before they
could be freed of their colonial bondage.[78] In other words, the mere fact of
historical exploitation, and not an empirical readiness for the responsibilities of
sovereignty, became the valid criteria to achieve juridical statehood.

Unsurprisingly, the demise of colonialism did not, of itself, remove the problem
that trusteeship was designed to address. The rejection of the dichotomy of
'civilised' and 'uncivilised' peoples was not accompanied by effective
institutional changes needed to achieve substantive and not merely formal
equality between states. Ironically, it was the prevailing attitudes of the
decolonisation movement which thwarted the central ambition of self-
determination - independent and sustainable self-government. The result of such
attitudes was a glaringly insufficient effort by all sides to develop the necessary
domestic institutions and prepare local peoples for self-government. Rather, ex-
colonial powers came under pressure to depart as quickly as possible, often being
forced out by the actions of (increasingly violent) independence movements.[79]
Newly emerging political elites in the former colonies were eager to move swiftly
to assume power, irrespective of the readiness of state institutions for
independence. These outcomes disregarded the ideals of chapters XI and XII of
the Charter which, in seeking the 'progressive development of ... free political
institutions'[80] and the 'progressive development towards self-government',[81]
clearly aimed for the development of stable and sustainable self-government.
The political movements which seized power following decolonisation consisted
of battle-hardened and even ruthless former-leaders of colonial independence

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74 Ibid 171.
75 For a brief history of arguments supporting its demise, see Bain above n 12, 137-9.
76 Jackson, *The Global Covenant*, above n 42, 303.
77 Bain above n 12, 134-5.
78 See, eg, GA Res 1514 (XV), above n 13.
79 See Wendell Gordon, *The United Nations at the Crossroads of Reform* (1994) 139-41.
80 The relevant *Charter* provisions relating to colonial control were contained in chapter XI – The
   Declaration Regarding Non-Self-Governing Territories. Article 73(b) required assistance in the
   progressive development of free political institutions as a precursor to self-governance in a
   manner appropriate given individual circumstances: See Ibid 140.
81 Article 76(b) of the *Charter*, in applying to Trust Territories, sought their 'progressive
   development towards self-government or independence'.

movements. Their mandate was seldom based on a demonstrated ability to govern, with ineffective and corrupt governance – hallmarks of state failure – often the result. However, under the principles of sovereign equality and non-intervention, such elites were free to use violence and repression to remain in power.[82]

Ultimately, decolonisation, and the overwhelming rejection of the colonialist system that occasioned it, did not provide the complete solution of fully and effectively integrating former colonies into the international community. From birth, these new states were hamstrung by systemic structural and institutional weaknesses, and were largely ill-prepared and ill-equipped for independence. The wake of the Cold War fully exposed these deficiencies, probably contributing to much of the internal strife that has since crippled many of these states.

B *Other Early Successes of International Organisations*

Outside of the framework of Mandates or Trusteeship, examples of governance by both the League and the UN can be identified as providing empirical evidence of the utility – in certain situations – of an international presence exercising some governmental authority in order to resolve disputes or provide stability during a transitional period.

1 *The League of Nations: Danzig and Leticia*

The first example of territorial administration by an international organisation was the Free City of Danzig. The city was placed under the control of League of Nations in 1919 under the Treaty of Versailles, lasting until Nazi occupation in 1939. While the League had wanted to cede jurisdiction of the city to Poland, thereby giving the Poles access to the Baltic Sea, this was precluded due to concerns for the majority German population.[83] A League High Commissioner was appointed, whose responsibilities were to guarantee democratic governance under the Constitution, to protect Danzig from international aggression (ensuring its free city status) and to provide for the settlement of differences between Danzig and Poland. The High Commissioner had the right to veto any amendment to Danzig's Constitution, but had no power to influence normal legislation.[84]

The second example is the Colombian district of Leticia. In 1933 as part of a wider border dispute, Peruvian irregulars invaded and occupied the area.[85] To defuse the conflict, the League assumed administrative powers for a one-year period, facilitating the withdrawal of the irregulars. Such an outcome satisfied the interests of both parties, as for Colombia it constituted a mere interim measure

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82   See Wendell Gordon, above n 79, 142-3.
83   See Peter Farrand, 'Lessons for BRCKO: Necessary Components for Future Internationally Supervised Territories' (2001) 15 *Emory International Law Review* 529, 568-72.
84   Ibid 570-71.
85   See Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' (2001) 95(3) *American Journal of International Law* 583, 587-8.

leading to the district's eventual reintegration, while for Peru it ensured that transfer would not occur until the wider border dispute was resolved. Thus, by removing the possibility of administrative control by either party, the League effectively 'insulate[d] the territory from further conflict while the disputants conducted comprehensive negotiations on all outstanding issues'.[86]

These two cases are salient examples of the potential efficacy of an international authority assuming some form of administrative control over territory. In the Free City of Danzig, the League created and promoted a certain territorial status in the face of competing claims to sovereignty as a long-term solution that met the primary needs of the competing parties. It did not need to assume total plenary authority. In Leticia, the League assumed a plenary role as a short-term intermediary whose presence facilitated and ultimately helped realise the resolution of a wider dispute over sovereignty. In both instances, the solution was tailored to the problem.

2 The United Nations: Namibia and Cambodia

In 1967 the UN set up the Council for South West Africa/Namibia to administer Namibia following the termination of South Africa's mandate. South Africa did not depart quietly however, blocking the Council's access until 1988. At this time, the United Nations Transitional Assistance Group (UNTAG) entered with a Security Council mandate to 'supervise and control' elections.[87] In the end, UNTAG's role was purely advisory, with South African officials administering most aspects of the election, albeit working closely with UN officials who had the power to certify each stage of the electoral process.

The UN took a greater role in the aftermath of the Cambodian civil war.[88] The novelty of the Security Council plan was that rather than adopting orthodox methods of UN peacekeeping such as combining military forces with the insertion of some personnel into the state's existing bureaucracy (typically known as 'technical assistance'), the plan combined a conventional peacekeeping force with partial UN *control* over Cambodia's civilian administration.[89] This resulted in domestic stability, the organisation of relatively free and fair elections and the eventual departure of the military and civilian officials in 1993.[90]

3 Making the Case for UN Governance

A link can be drawn between these successful empirical examples of both League and early UN administration of territories and the activism of the UN subsequently endorsed by Boutros-Gali in his *Agenda for Peace*. Indeed,

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[86] Cited in Ibid 588, n 24.
[87] SC Res 435, UN SCOR, 33ʳᵈ sess, 2087th mtg, UN Doc S/RES/435 (1978). See also SC Res 632, UN SCOR, 44th sess, 2848th mtg, UN Doc S/RES/632 (1989).
[88] For details of the operation see below notes 100-106 and accompanying text.
[89] Diane Criswell, 'Durable Consent and a Strong Transitional Peacekeeping Plan: The Success of UNTAET in Light of the Lessons Learned in Cambodia' (2002) 11 *Pacific Rim Law and Policy Journal* 577, 581 [emphasis added].
[90] See Steven Ratner, *The New UN Peacekeeping* (1995) 177-81, 186-8.

criticisms of the operations in Namibia and Cambodia, while minor, actually bemoaned the *lack* of authority exercised. Roger Hearn is troubled by 'the weakness of the mandate in Namibia' and that 'the full powers offered under the mandate were not utilised',[91] while Michael Doyle laments that in Cambodia 'a peacekeeping operation that went relatively well turned into a peace-building exercise that wasted the political opening created by the former'.[92] Perhaps it was such criticisms, when combined with the new enthusiasm for UN intervention and a recognition that the disintegration of states could not and should not be permitted to continue, that helped to justify the revolution in UN governance that was to follow.

IV PROPOSING THE FOUNDATIONS OF A MORE COMPREHENSIVE LEGAL FRAMEWORK FOR UNITED NATIONS GOVERNANCE OF FAILED STATES

The aim of this part is to identity the existing legal framework governing international territorial administration and propose normative principles to address deficiencies in the existing framework. These normative principles could anchor the development of a broader, more comprehensive framework to apply whenever UN or other international administration is contemplated in failed states (primarily in the post-conflict context).

The revolution in UN-sponsored governance, spurred by the early successes in Namibia and Cambodia, has been swift and comprehensive. It began in 1995 with Bosnia and Herzegovina and reached its peak in 1999 with the operations in East Timor and Kosovo, where UN representatives were imbued with full executive and legislative authority to govern these territories. In contrast however, the UN played a diminished role in the operations in Afghanistan in 2001 and Iraq in 2003, because either a local administration (Afghanistan) or a US-led international coalition (Iraq) instead exercised sovereign control. The vast differences between these operations indicate that a consistent approach to international administration is yet to emerge. That each mission has been the subject both of glowing praise and damning criticism by legal publicists, political scientists, politicians and diplomats, has precluded the crystallisation of a coherent, comprehensive and universally respected legal regime.

A *The Need for a Comprehensive Framework*

Hans Kelsen observed in 1951 that the UN 'is not authorised by the Charter to exercise sovereignty over a territory which has not the legal status of a trust territory'.[93] Textually, this appears correct, as the Charter does not expressly

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91   Roger Hearn, *UN Peacekeeping in Action: The Namibian Experience* (1999) 226, cited in
      Kreilkamp, above n 3, 625.
92   Michael Doyle, 'Peacebuilding in Cambodia: Legitimacy and Power' in Elizabeth Cousens et al
      (eds), *Peacebuilding as Politics: Cultivating Peace in Fragile Societies* (2001) 153, 181, n 71.
93   Hans Kelsen, *The Law of the United Nations* (1951) 651.

confer on the UN the ability to exercise plenary governmental powers. Yet the examples of East Timor and Kosovo, where the Security Council authorised plenary UN governance, demonstrate that UN member states have not felt constrained by the lack of a precise textual basis in the Charter for the Security Council to create UN administrations, or sanction non-UN international administrations (as was done more recently in Iraq).[94] Thus, in more recent times, the positive legal competence of the Security Council to engage in post-conflict governance of failed states has not been questioned, with legal scholars acknowledging the wide scope of Security Council powers.[95]

The deficiency in the preceding proposition is that in these *ad hoc* responses the international community has not sought to clearly constrain the exercise of such governmental authority.[96] No prohibitive rules have emerged to address the normative criticism – often made by political scientists – that UN post-conflict governance is a form of neocolonialism, punctuated by the trusteeship principles of tutelage and the inability of a state to stand equal with its sovereign peers.[97] In addition to this neocolonialist taint, the uncertainty generated by the lack of proper legal constraints has led to many of the problems that have jeopardised UN missions, particularly concerning the division of power between local and international actors, the transfer of sovereignty and the internal and external legitimacy of the mission. In other words, the international community has not fully learnt from its experiences with colonialism and trusteeship nor reconciled these experiences with the justifications for international administration. This has precluded the emergence of a legitimate, robust and sustainable legal framework.

Such a framework, enjoying universal support and adaptable to all circumstances, is needed to direct the UN and the international community when the prospect of international post-conflict governance arises. The regime should be comprehensive, setting the criteria for initial intervention, the extent of governmental control to be exercised, the legitimate goals to be achieved and prohibitive rules to constrain the behavior of the international administration. Ideally, the ultimate goal would be for such a regime to achieve near-universal status, with widespread recognition of its ability to protect the interests of all relevant parties, thereby advancing the legitimacy of future international administrations.

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[94] Saira Mohamed, 'From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council' (2005) 105 *Columbia Law Review* 809, 821. Mohamed notes that despite the establishment of fifty-nine UN peacekeeping operations since 1945, no state has promulgated an amendment to the Charter to contemplate peacekeeping [or other novel forms of UN intervention] explicitly: ibid.

[95] See, eg, Perritt, above n 9.

[96] Simon Chesterman, *You the people: The United Nations, Transitional Administration, and State Building* (2003) International Peace Academy <http://www.ipacademy.org/PDF_Reports/YOU_THE_PEOPLE2.pdf> 2, at May 22 2005. Chesterman comments: 'The fact that such operations continue to be managed by the UN Department of Peacekeeping Operations is suggestive of the ad hoc approach that has characterized transitional administration, an historical accident perpetuated by the reluctance to embrace temporary governance of post-conflict territory as an appropriate and necessary task of the United Nations.'

Yet is such a legal regime possible? The ad hoc nature of past responses makes it clear that there is no consensus in the international community on the best approach to post-conflict governance, and neither the drafting of a comprehensive treaty nor the crystallisation of customary norms is therefore likely to occur in the short to medium term. Accordingly, the remainder of this paper will identify first the current 'black-letter' legal rules in this area then, drawing on theories (of intervention) and history (of colonialism and trusteeship) discussed above and with reference to recent case studies of UN governance, it will suggest fundamental normative principles that should anchor a wider framework. These principles, it must be noted, are not submitted as an alternative to the current legal framework. One does not yet properly exist. Rather, in the submission of this paper, the principles represent best practice as identified in past experiences, which it is hoped can achieve universal acceptance. If these norms can be successfully implemented, with time and extensive work in this area the necessary political consensus may form, allowing a more substantive, comprehensive legal regime to emerge.

B *Black-Letter Legal Authority for UN Governance*

The method used by the Security Council to pursue post-conflict governance has been recourse to its powers under chapters VI and VII of the Charter.

1 *Chapter VI: Consent-Based Authority*

Chapter VI, which describes the role of the UN in the peaceful settlement of disputes, requires as a prerequisite the *consent* of the parties involved.[98] Chapter VI does not come aloes to sanctioning UN administration; article 36 allows the UN merely to make non-binding 'recommendations'. Any authority that is conferred on the UN under chapter VI is subject to the overriding decision-making power of local stakeholders. This allows the experience and expertise of the UN in post-conflict governance to be utilised, but gives the parties themselves the final say over the transitional process. The UN's involvement in Cambodia is a useful study of the application and limitations of chapter VI.

In the aftermath of the Cambodian civil war, a 1991 Agreement invited the UN to aid in the post-conflict rebuilding process through the performance of various governmental functions.[99] These were to be exercised by the UN Transitional Authority in Cambodia (UNTAC), a body formed by Security Council Resolution 717[100] under its chapter VI powers[101] and whose legitimacy stemmed from the consent of the parties inherent in the Agreement.[102] Although not strictly characterized as 'recommendations' pursuant to article 36, UNTAC's powers

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[97] See especially Bain above n 12.
[98] See Ratner, above n 90, 57.
[99] *Agreement on a Comprehensive Political Settlement of the Cambodian Conflict*, 23 October 1991, art 6, annex 1, (1992) 31 ILM 183, 184 ('Paris Accords').
[100] SC Res 717, UN SCOR, 46th sess, 3014th mtg, UN Doc S/RES/717 (1991).
[101] See Janet Heininger, *Peacekeeping in Transition: The United Nations in Cambodia* (1994) 66.
[102] UNTAC was responsible for deploying a military and civilian presence, disarming the competing factions and administering the departments of foreign affairs, defence, finance and information.

were limited by the requirement that it follow any 'advice' given by the Supreme National Council (SNC) – the Cambodian representative body under the Agreement. UNTAC was permitted to determine whether the 'advice' was 'consistent' with the main Agreement, but otherwise had to implement the instructions of the SNC. This meant that, consistent with the methodology of chapter VI, the consent of the various Cambodian parties was an essential ingredient of the legal basis for UNTAC's mandate,[103] with the SNC being the sole 'legitimate body and source of authority'.[104] This had the benefit of the SNC providing UNTAC with symbolic legitimacy but, less helpfully, it also meant that if the SNC itself became deadlocked,[105] Cambodian factions could use the impasse to block UNTAC-inspired reforms.[106]

Ultimately, the consensual nature of the powers in chapter VI mean that concerns about neocolonialism and the invasion of sovereignty are far less potent. Accordingly, no further attention will be given to chapter VI in the consideration of a broader framework.

2 *Chapter VII: Without Consent*

The Security Council is empowered under chapter VII of the Charter to make a determination of a threat to the peace (article 39) and to take measures not involving the use of armed force to maintain or restore international peace and security (article 41), without the consent of those parties subject to the measures. Nevertheless, using these articles to confer broad executive and legislative powers on UN administrations requires a broader construction of the articles than that which has been applied historically.

Chapter VII is enlivened when the Security Council under article 39 'determines' a 'threat to the peace'. Ordinarily, this concept applies to threats posed by inter-state conflicts.[107] Post-Cold War resolutions evidence, however, that the Security Council considers 'peace' to mean not just the security situation *between* states, but that *within* states.[108] This view is supported by the argument that the cessation of armed conflict does not necessarily extinguish the 'threat to the peace'. In any event, given that the 'determination' under article 39 rests with the Security Council alone, few challenge the notion that it enjoys 'considerable discretion' in determining what constitutes a threat to the peace.[109] Its practice to date indicates the adoption of a very broad construction that includes not only internal conflicts and their consequences, but also grave human rights violations, humanitarian

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[103] Matheson, above n 6, 77.
[104] Paris Accords, above n 99.
[105] See Sally Morphet, 'Organizing Civil Administration in Peace-Maintenance' in Chopra, above n 2, 41, 51-2.
[106] Criswell, above n 89, 581.
[107] Simma, above n 45, 723.
[108] Matthias Ruffert, 'The Administration of Kosovo and East-Timor by the International Community' (2001) 50 *International and Comparative Law Quarterly* 613, 617 [emphasis added].
[109] See Simma, above n 45, 719.

disasters and terrorism[110] – the hallmarks of failed states.

Such a broad construction was evident in the UN's response in the aftermath of the NATO campaign in Kosovo in 1999, which had been designed to drive the Serb army out of the province amid widespread humanitarian abuses.[111] The NATO campaign has left Kosovo in a state of economic and social chaos.[112] Without international intervention to re-establish security and stability and to fill the power vacuum, 'the chaotic situation would present a continuing, acute threat of escalating violence and regional instability, as well as a serious humanitarian crisis'.[113]

In response and pursuant to chapter VII of the Charter, the Security Council adopted Resolution 1244, deploying under UN auspices international civil and security presences. It authorised NATO to use 'all necessary means' to restore security and created 'an international civil presence … in order to provide an interim administration for Kosovo'.[114] This led to the United Nations Mission in Kosovo (UNMIK), headed by a Special Representative of the Secretary General who immediately passed a regulation assuming 'all … executive authority with respect to Kosovo'.[115]

Historically, the use of article 41 was narrowly confined to measures such as the imposition of economic sanctions and arms embargoes.[116] Nevertheless, the creation of UNMIK provides an example of the Security Council adopting a far broader interpretation of its discretion under the article regarding which non-force measures it may legally take in response to a threat.[117] Can such breadth – including that creation of administrative and judicial structures and the promulgation of laws – be legally justified? This question was raised by the Security Council's novel creation of two *ad hoc* international criminal tribunals

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[110] See ibid, 723-6. Such an interpretation of 'threat to the peace' also circumvents the rule of non-intervention in domestic affairs in art 2(7), as the article expressly denotes measures under chapter VII as being outside of its protection.

[111] The bombing campaign followed the collapse of the 'Rambouillet Accords', peace negotiations that had been designed to create democratic self-government in Kosovo and prevent the escalation of conflict between FRY forces and Albanian Kosovars: See Paul Williams, 'Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status' (2003) 31 *Denver Journal of International Law and Policy* 387, 402-4.

[112] Roughly three quarters of the population had been driven out or displaced. The Serb government in Belgrade had withdrawn all funding along with its officials and technical personnel. There was vast material destruction, no functioning system of law and continuing ethnic resentment: See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo 12 July 1999,* UN Doc S/1999/779 (1999). Moreover, the massive cross-border displacements of refugees posed a serious risk to neighbouring states: See Andreas Zimmerman and Carsten Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo' (2001) 70 *Nordic Journal of International Law* 423, 437.

[113] Matheson, above n 6, 78.

[114] SC Res 1244, UN SCOR, 54th sess, 4011th mtg, UN Doc S/RES/1244 (1999) ('SC Res 1244').

[115] UNMIK, *On the authority of the Interim Administration in Kosovo*, UNMIK Regulation 1999/1, 25 July 1999, < http://www.unmikonline.org/regulations/1999/re99_01.pdf > at July 7 2004.

[116] Simma, above n 45, 738.

[117] The Council has similar authority to authorise military presences under Art 42: See Michael Bothe and Thilo Marauhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration' in Christian Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (2002) 217, 231-2.

for the Former Yugoslavia (ICTY) and Rwanda (ICTR).[118] In response to a legal challenge that article 41 was insufficiently broad to allow the creation of criminal tribunals, the ICTY Appeals Chamber said:

> It is evident that the measures set out in article 41 ... do not exclude other measures ... Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so.[119]

In other words, the scope of article 41 is unlimited as a matter of treaty construction. This position is strengthened by applying principles of treaty interpretation under the Vienna Convention on the Law of Treaties,[120] because 'subsequent practice' by the Security Council regarding chapter VII (for example in East Timor and Kosovo) evidences, as set out by the Vienna Convention, 'the agreement of the parties regarding its interpretation'.[121] Simply put, the Security Council Members have reached a sufficient consensus that post-conflict governance falls within the scope of article 41. A further justification can be found in the 'implied powers' under which it is arguable that the international administration in the case of failed states is, for the maintenance of international peace and security, 'by necessary implication ... essential to the performance of [the UN's] duties'.[122]

The merit in these legal arguments[123] is evident when one considers the situation that confronted the UN in East Timor in 1999.[124] A campaign of violence and intimidation in the lead up to East Timor's independence resulted in the killing of hundreds of people, the destruction of local infrastructure and the forced displacement of over three quarters of East Timor's population.[125] In response, the Security Council (acting under chapter VII) dispatched a multinational force to restore order.[126] Yet given the extent of the chaos and destruction, an

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118 SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (1993); SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994).

119 *Prosecutor v Tadic*, Appeal on Jurisdiction, No IT-94-AR72, paras 32-38 (1995). This was also confirmed in the International Criminal Tribunal for Rwanda: *Prosecutor v Kanyabashi*, Decision on Jurisdiction, No ICTR-96-15-T, para 7 (1997).

120 See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 311 (entered into force 27 January 1980) ('VCLT').

121 Ibid art 31(3)(b).

122 *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ 174, 182; See also Ruffert, above n 108, 620-1.

123 The work of publicists evidences an acceptance of one of more of these arguments: see Matheson, above n 6, 83-4; see also Michael Ottolenghi, 'The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation' (2004) 72 *Fordham Law Review* 2177, 2193-4; Zimmerman and Stahn, above n 112, 438; Ruffert, above n 108, 618-21.

124 A former Portuguese colony, East Timor came to the attention of the world in 1975 when it was controversially occupied by Indonesian forces. It was not until May 1999 that negotiations finally led to a UN-administered referendum that voted in favour of East Timorese independence.

125 See *Question of East Timor. Progress Report of the Secretary-General*, 13 December 1999, UN Doc A/54/654 (1999); *Report of the Secretary-General on the Situation in East Timor*, UN SCOR, 54th sess, UN Doc S/1999/1024 (1999); Jarat Chopra, 'Building State Failure in East Timor' in Milliken (ed), above n 5, 223, 226-7.

126 SC Res 1264, UN SCOR, 54th sess, 4045th mtg, UN Doc S/RES/1264 (1999). This Australian-led force, known as the International Force for East Timor, managed to restore order swiftly.

international transitional administration was also needed to address what was
quickly escalating into a severe humanitarian crisis.[127]   Once more acting under
chapter VII, the Security Council created the United Nations Transitional
Administration in East Timor (UNTAET), endowing it with 'overall
responsibility for the administration of East Timor', including the power 'to
exercise all legislative and executive authority'.[128] Both legislative and executive
powers were vested in a single individual, the Special Representative of the
Secretary-General and 'Transitional Administrator', Sergio Vieira de Mello. He
alone had the authority to enact 'laws and regulations',[129] which, in the absence
of an elected legislature, effectively constituted national legislation.[130]

Finally, it should be noted that action taken pursuant to article 41 need not be
carried out by the UN itself, but can be delegated under article 48 to 'some'
Members. Notably, this enabled the situation extant following the recent Iraq war
to be brought within the chapter VII framework.[131] Operation Iraqi Freedom was
aimed at, and successfully achieved, the removal of a sovereign regime.[132]
Accordingly, Iraq's reconstruction required new governing institutions and
authorities. While debate raged as to the best way to administer the defeated Iraqi
state,[133] the political reality was that the US, at least initially, intended to retain
full control of Iraq's civil administration through its Coalition Provisional
Authority (CPA). The UN chose to acknowledge this reality, with the Security
Council acting under chapter VII to confer upon the CPA similar powers to those
previously conferred upon UNTAET in East Timor and UNMIK in Kosovo.[134]
This resulted in the CPA exercising the 'powers of government'[135] in its
administration of Iraq over the subsequent months.[136] With the CPA acting as

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[127] Beauvais writes that the population of East Timor had 'a literacy rate of thirty percent and
included only about sixty lawyers, thirty-five doctors, and a handful of engineers. Most of the top
echelons of the occupying Indonesian administration had fled, leaving the territory virtually
bereft of an administrative class': Joel Beauvais, 'Benevolent Despotism: A Critique of UN State-
Building in East Timor' (2001) 33 *New York University Journal of International Law and Politics*
1101, 1137.
[128] SC Res 1272, UN SCOR, 54th sess, 4057th mtg, para 1, UN Doc S/RES/1272 (1999).
[129] Ibid para 6.
[130] The resolution stressed 'the need for UNTAET to consult and cooperate closely with the East
Timorese… with a view to the development of local democratic institutions': ibid para 7. A
National Consultative Council (NCC) was set up to facilitate the consultation process. In reality
however, consultation was a mere courtesy – the council was a strictly advisory body and was
comprised of East Timorese appointed by Vieira de Mello, who at all times had overriding
authority: See Jarat Chopra, 'Building State Failure in East Timor' in Milliken, above n 5, 227.
[131] See generally Ottolenghi, above n 123, 2211.
[132] For the case made under international law by the US, see Ibrahim Gassama, 'International Law
at a Grotian Moment: The Invasion of Iraq in Context' (2004) 18 *Emory International Law
Review* 1.
[133] See, eg, Lawrence F. Kaplan, 'Preoccupied – The UN Tries Again in Iraq', *The New Republic*
(Washington, DC), 7 April 2003, 15.
[134] SC Res 1483, UN SCOR, 58th sess, 4761st mtg, UN Doc S/RES/1493 (2003). Paragraph 4 calls
upon the 'Authority' to 'promote the welfare of the Iraqi people through the effective
administration of the territory' [SC Res 1483].
[135] *The Coalition Provisional Authority*, Coalition Provisional Authority Regulation Number 1,
CPA/REG/16   May   2003/01,
<http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_
Authority_.pdf > at July 11 2004.
[136] For   a   full   list   of   Regulations   and   Orders   see
<http://www.iraqcoalition.org/regulations/index.html#Regulations > at 11 July 2004.

civilian administrator, the UN itself was limited to a supporting and advisory role through its Special Representative.[137]

3 *Summary*

This black-letter legal framework that identifies the competence of the Security Council to authorise comprehensive UN (or other international) administration over territories is not without fault. Epaminontas Triantafilou validly questions why none of the resolutions under chapter VII have been grounded in the construction of specific articles. Perhaps, he argues, it is because 'such a loose approach sweeps too far and ignores the restraints built into the Charter'.[138] Conclusive weight is given to the principle of international peace and security at the expense of other Charter principles, such as the 'sovereign equality of [nations]' enshrined in article 2(1) and the non-intervention clause in article 2(7). By itself, the elevation of international peace and security alone is probably defendable. As seen in Part II, the welfare of citizenry, the protection of human rights and a broader understanding of collective security argue for a departure from the principle of absolute sovereign equality. However, it must be remembered that the drafters of the Charter also chose to place sovereign equality at the heart of the United Nations system. As termed by Triantafilou, 'loose' departures from this core principle are open to criticism, because they do not clearly limit the extent to which this ideal – revered by the international community since WWII as a foundation of international public order – may be eroded.

While such criticisms did not prevent the creation of UNTAET or UNMIK or the empowering of the CPA, they do suggest the desirability of normative limitations on the discretion of the Security Council, thereby assuaging any concern that articles 2(1) or 2(7) may be rendered irrelevant. Before turning to the content of such limitations, the influence of other areas of law should be considered.

C *The Trusteeship System and the Law of Occupation*

The Trusteeship System, as it currently stands, cannot be used to create modern UN administrations. The Trusteeship System can only apply to three different categories of trust territories, none of which has any relevance in the 21st Century.[139] Furthermore, article 78 of the Charter dictates that '[t]he trusteeship system shall not apply to … Members of the United Nations'. Therefore without

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[137] SC Res 1483. Paragraph 8 appoints the Special Representative, and confers on them the role of reporting and coordinating UN activities, which include coordinating humanitarian and reconstruction assistance and promoting the return of refugees.

[138] Epaminontas Triantafilou, 'Matter of Law, Question of Policy: Kosovo's Current and Future Status Under International Law' (2004) 5 *Chicago Journal of International Law* 355, 360.

[139] See *Charter of the United Nations*, art 77(1)(a)-(c). These were (a) former League Mandates, (b) territories detached from enemy states following WWII, and (c) territories voluntarily placed under the system by states responsible for their administration. As explored in Pt III:C above, decolonisation marked the demise of the Trusteeship System, with the operations of the Trusteeship Council being suspended indefinitely on the independence of Palau in 1994. See Zimmerman and Stahn, above n 112, 436-7; *Contra* Mohamed, above n 94.

amendment to chapter XII or other areas of the Charter,[140] this avenue is unavailable.[141]

The unavailability of the Trusteeship system does not necessarily preclude its usefulness in a potential normative framework limiting the chapter VII authority of the Security Council. Articles 76 and 83 provide for a minimum degree of protection for the inhabitants of trust territories, balancing their 'political, economic, social and educational advancement' against the objective of effectively maintaining international peace and security. Both the Security Council and, indirectly, UN-sanctioned administrations, should be similarly accountable under like principles.[142] As such, norms arising from the practice of the Trusteeship Council and its administering powers should not be wholly consigned to history. Rather, they should be viewed as useful contributions to a broader normative framework but that need not signal a return to colonialism. For example, stringent reporting requirements were imposed upon the administering powers of the UN Trusteeship regime, which ensured a minimum level of accountability in the governance of trust territories. A similar concern arose in connection with the governance of Iraq[143] and was addressed by the passing of a Security Council resolution that sought to impose reporting requirements modeled on those of the Trusteeship System.[144]

Unlike like the Trusteeship System, the law of occupation, codified in the Hague Regulations of 1907[145] and the Fourth Geneva Convention of 1949,[146] does not appear to have any real place in the development of the broader normative framework of post-conflict governance. As both Scheffer and Ottolenghi have persuasively argued, the fundamental premise underlying the two bodies of law is different.[147] The law of occupation seeks to maintain the status quo, while protecting occupying forces and meeting urgent humanitarian needs. Beyond these powers, however, no transfer of sovereignty is recognised and the

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[140] See below Pt IV D 2.

[141] Ruth Gordon, 'Some Legal Problems With Trusteeship' (1995) 28 *Cornell International Law Journal* 301, 312; *contra* Mohamed, above n 94. Aside from the textual constraint in art 78, it is likely that, in relation to self-determination disputes in particular, most central governments will try to thwart independence through refusing consent to trusteeship arrangements. Moreover, once the civil conflict degenerates to the point where the central government ceases to exist, it will be difficult to identify the responsible authority with which to enter a trusteeship arrangement: see Michael J Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999) 101-2.

[142] See Simma, above n 45, 744.

[143] Thomas Grant, 'The Security Council and Iraq: An Incremental Practice' (2003) 97 *American Journal of International Law* 823, 840-1.

[144] SC Res 1511, UN SCOR, 58ᵗʰ sess, 4844ᵗʰ mtg, [6], UN Doc S/RES/1511 (2003) ('SC Res 1511').

[145] *Hague Convention No IV Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, s 6 Stat 2277 (entered into force 26 January 1910).

[146] *Geneva Convention (IV) for the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

[147] See David Scheffer, 'Beyond Occupation Law' (2003) 97 *American Journal of International Law* 842; Ottolenghi, above n 123, 2211. For an opposing view, see Michael J Kelly, above n 141. Kelly argues that the law of occupation 'provides the basis upon which a force can relate to a civilian population, particularly in an indigenous authority vacuum where the occupying power has in fact become the sole effective authority': 216. For other potentially applicable bodies of law see Perritt, above n 9, 410-18.

occupying power is prevented from taking any action that will have long-term consequences. The object is that the territory be as unaltered as possible on the occupant's departure.[148] In contrast, the central ambition of post-conflict governance is the maintenance of international peace and security via the pursuit of radical transformations of failed states. Policies are implemented that aim to stablise conditions on the ground and advancing the welfare of the local population through the provision of immediate assistance and the promotion of long-term sustainability through institution-building. In some instances, this will be best achieved through the assumption of unencumbered sovereign control by the international presence. The law of occupation is ill-suited to such designs, indicating the need for a novel framework, to apply in the cases of failed states, that regulates both civilian administrators and the military forces that usually accompany them.[149]

D *Towards a Credible Normative Framework: Limitations on the Authority of the Security Council and Post-Conflict Administrations*

Both the law of occupation and the UN Trusteeship System have in the past operated as credible frameworks that were widely respected by the international community and helped regulate the conduct of international actors. While the Trusteeship System is now extinct and the continuing relevance of the law of occupation is under serious doubt,[150] each in their respective situations was, at one time, the chief source of the applicable rights and obligations. For a law of post-conflict governance to aspire to a similar status, the permissive nature of the powers conferred on the Security Council under chapter VII must be qualified by normative limitations, addressing the concerns regarding this unique assumption of sovereign control by an international administration. While reflecting the theoretical justifications for intervention and international administration, these limitations should balance the tensions that exist within the black-letter legal framework (in particular the status of the 'sovereign equality of [nations]' under article 2(1)), acknowledge the historical lessons of colonialism and trusteeship and take account of the UN's post-Cold War experience.

The black-letter legal framework places the creation of post-conflict administrations solely in the hands of the Security Council under chapter VII of the Charter. It is proposed that in order to address the central challenges of post-conflict governance identified in this paper, the norms below should qualify the exercise of the Council's power under chapter VII. As noted above in the introduction to this part, at present such norms can at present only offer 'best practice' guidelines for the UN and its member states as future situations arise.

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[148] See Scheffer, above n 147, 851.
[149] Ibid 859-60; Ottolenghi, above n 123, 2214-18.
[150] For the extinction of the Trusteeship System see above n 138-40 and accompanying text. On the questionable status of the law of occupation: see Benvenisti, above n 30, chs 6 and 8; Scheffer, above n 146; Ottolenghi, above n 123.

1 *Always Act for the Maintenance of International Peace and Security*

The text of chapter VII clearly sets out that the Security Council must first identify a threat to the peace before it can act to maintain international peace and security. In other words, the purpose of a 'chapter VII administration' must be to restore international peace and security – once restored, the administration should come to an end, thereby preventing unlimited or 'neo-colonialist' international administration.[151]

Yet this apparently simple textual requirement hides a deeper tension. While this paper has refrained from using the terminology of 'international trusteeship' to describe UN post-conflict governance, many publicists have, and recent missions such as UNMIK and UNTAET possess many similarities with the common law trust relationship, which imposes an equitable obligation on the holder of property (the trustee) in favour of another (the beneficiary).[152] By analogy, international post-conflict administrations exercise sovereignty for a limited time for the benefit of the local population. Just as the termination of a trust reverts legal title back to the beneficiary, termination of the administration returns sovereign control to local governing institutions. Moreover, just as trustees owe duties to the beneficiaries of the trust, it is argued that Security Council-mandated administrations should be accountable under similar types of obligations towards local peoples as those imposed under the Trusteeship System in chapters XII and XIII of the Charter.[153]

The tension, therefore, is whether the 'maintenance' of international peace and security and the 'benefit' of the local people will ever diverge, or whether in fact acting for the benefit of the local population will always be in the interests of international peace and security. This is an argument that could be made with regard to any given decision by a transitional authority, as highlighted by a situation that arose in Bosnia and Herzegovina. Empowered under the Dayton Agreement[154] of 1995 and endorsed by the Security Council (acting under chapter VII),[155] the Office of the High Representative (OHR) is comprised of a combination of international military and civil presences and is charged with implementing the Dayton Agreement and guiding the new state of Bosnia and Herzegovina. The evolution of the system created by Dayton has seen the development of parallel Bosnian institutions to perform most functions of governance, while the OHR has retained the important power to dismiss elected representatives seen to be interfering with the implementation of the Agreement,

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[151] Bothe and Marauhn, above n 117, 236.
[152] J D Heydon and P L Loughlan, *Cases and Materials on Equity and Trusts* (5th ed, 1997) 435, 436-8.
[153] See above Pt IV C.
[154] *General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes*, 14 December 1995, Bosnia and Herzegovina-Croatia-Yugoslavia, 35 ILM 75.
[155] SC Res 1031, UN SCOR, 50th sess, 3607th mtg, UN Doc S/RES/1031 (1995) (endorsing the Dayton Agreement); SC Res 1035, UN SCOR, 50th sess, 3613th mtg, [3], UN Doc S/RES/1035 (1995) (confirming the authority of the OHR).

particularly where such interference threatens Bosnia's fragile ethnic stability.[156]
This power is the unique feature of the international engagement in Bosnia and
Herzegovina. Clearly the major concern in conferring this power was to avoid a
return to the divisive nationalist politics that led to the original breakdown of the
Yugoslavian state and many thousands of deaths.

Action to remove elected representatives, however, brings the tension between
international peace and security and the benefit of the local people into sharp
focus. In June 2004, 60 Bosnian Serb officials were dismissed over their failure
to arrest top war crimes suspect Radovan Karadzic.[157] On one hand, this act
removed a source of ethnic tension, thus contributing to the stability of the region,
the overriding concern of the international community's focus on collective
security.   On the other, it undermined the development of local governing
institutions, thus arguably slowing the development of the necessary culture and
institutions that could make possible the transition to sustainable self-
government.[158]

In such situations, it is doubtful whether decisions of the Security Council or its
administrations would be subject to judicial review by a body other than the
Council itself.[159]   Nevertheless, it is submitted that, to avoid accusations of
paternalism and neo-colonialism, if a given action cannot be characterized as
being in the furtherance of 'international peace and security', the UN should not
be sanctioning that particular assumption of sovereign control.[160] In this sense,
UN administrations are less like common law trusts because 'there is an
expectation that the Trustees will act in the best interests of their charges not in
the best interests of the global *status quo*'.[161]   There is no doubt that UN
administrations must act for the welfare of the local population, but this is
because their overriding aim is to restore international peace and security. In this
light, the removal of the Bosnian Serb officials can be justified. Action to
maintain collective security should be taken even where it potentially hinders the
development of local institutions. The alternative preference of acting for the
'benefit' of the local peoples is precisely the colonialist paradigm that must be
avoided.

Interestingly, what emerges from this analysis is that of the three theoretical
justifications for intervention and the erosion of sovereign equality discussed in

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[156] Office of the High Representative, *Decision removing Ante Jelavic from his position as the Croat
member of the BiH Presidency*, 7 March 2001,
< http://www.ohr.int/decisions/removalssdec/default.asp?content_id=328 > at 5 July 2004.
[157] 'Bosnia Envoy Fires 60 Serb Officials Over Karadzic', *Reuters* (web), 30 June 2004,
< http://www.reuters.com/newsArticle.jhtml?type=worldNews&storyID=5552348 > at 3 July
2004.
[158] See generally David Chandler, *Bosnia: Faking Democracy After Dayton* (2nd ed, 2000).
[159] See Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review:
What Lessons from Lockerbie?' (1999) 10 *European Journal of International Law* 517.
[160] Cf Bothe and Marauhn, above n 117, 236.
[161] Tom Parker, *The Ultimate Intervention: Revitalising the UN Trusteeship Council for the 21st
Century* (2003) Centre for European and Asian Studies at Norwegian School of Management,
<http://www2.bi.no/dep2/ceas/03-03The%20Ultimate%20Intervention.pdf> [36], at May 22
2005.

part II, only the 'collective security' argument may be employed as the headline justification for action. This is for two reasons. First, of the legal tools afforded to the UN under the Charter, only the maintenance of international peace and security via the Security Council can override the prescription in article 2(7) that a state's internal affairs are its own. Resting an argument in favour of intervention solely on the welfare of citizenry and protection of human rights may not be sufficiently supported by the text of the Charter. Second, as suggested above, operating solely within the rubric of international peace and security neatly side-steps the 'neo-colonialist' critique, avoiding any reference (expllicit or otherwise) to trusteeship while recognising the important role that post-conflict administrations must play.

2 *Respect the Sovereign Identity of Pre-Existing States*

If it is accepted that the Security Council can rightfully authorise post-conflict administrations in the furtherance of international peace and security, the question turns next to the legal mechanism by which post-conflict governance ought to administered over those states which, prior to their 'failure', previously enjoyed full sovereign identity. Some, including Kofi Annan, have suggested the revival of the Trusteeship Council.[162] (It is argued that the Security Council is not the best suited to oversee post-conflict governance, because its 'busy agenda and notoriously short attention span argue in favor of a dedicated, more operational body to oversee this core function'.[163]) It will be recalled however that, at present, the Trusteeship Council is unavailable because the Charter prevents the Trusteeship System from being applied to UN Members.[164] This prohibition reflects the principle of 'sovereign equality' enshrined in article 2(1) of the Charter. Accordingly, to apply a modern form of UN Trusteeship to existing Members would require significant textual amendments. Article 78 would have to be repealed and article 77 amended to add a new category of territories able to be placed under the Trusteeship System (the category of 'failed states').[165] Alternatively, a bolder option would be to establish a threshold test through which failed states effectively 'lost' the privileges of statehood (or at least full membership of the UN), thereby permitting the application of the present Trusteeship regime without dramatic amendment to chapter XII.[166]

Proposals to revive the Trusteeship System for the purpose of post-conflict governance are, it is submitted, ill-advised because they so directly repudiate the principle of sovereign equality. Such a symbolic (and indeed legal) redefinition of sovereignty is inimical to the current system of international order. Any designation that a state was no longer a full Member of the UN or had forfeited the rights of sovereignty rails against the core premise of the decolonisation

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162 See above n 11 and accompanying text.
163 Suzanne Nossel, 'A Trustee for Crippled States' *Washington Post* (Washington, DC), 25 August 2003, A17; see also Mohamed, above n 94.
164 See Pt IV C.
165 Artlcle 81 already allows the UN itself to administer trust territories.
166 In effect, this is suggested by Mohamed, above n 94, 833-4.

movement. In other words, a return to UN Trusteeship would signify a return full-circle by the international community to a regime that was deliberately abandoned in the 1960s.[167] The political resistance alone to this legal change would guarantee its failure. Accordingly, it is vital that any legal regime addressing the post-conflict governance of pre-existing states must respect their sovereignty and avoid any the adoption of trusteeship principles.

In this spirit, the continuing emphasis on Iraqi sovereignty in the Security Council resolutions following the removal of Saddam Hussein is understandable and commendable, as it clearly avoids any implicit reference to colonialist principles or the Trusteeship System. Resolution 1483 included a mechanism to commence the development of indigenous governing institutions, via its 'support' for the creation of an 'Iraqi interim administration' by the Iraqi people with the 'help' of the CPA.[168] As the immediate governing authority, the CPA began this process by promulgating a regulation which nominated a Governing Council of Iraq ('GCI').[169] The establishment of an indigenous authority meant that the Security Council was later able by resolution to stress the temporary nature of the CPA's power, and declare that the GCI and its ministers were 'the principal bodies of the Iraqi interim administration, which ... embodies the sovereignty of the State of Iraq during the transitional period'.[170] Local institutions were subsequently given responsibility for the development of a constitution and the holding of UN-sponsored elections.[171] At the same time, the CPA was called upon 'to return governing responsibilities and authorities to the people of Iraq as soon as practicable'.[172] Accordingly, in a relatively short timeframe, control was transferred to an interim sovereign government and the process of elections and negotiating a permanent constitution began. The UN was able to facilitate this transition even though it itself was not governing Iraq; through the Security Council it provided symbolic leadership of the transition process, by sanctioning the authority of the CPA and then immediately setting out a framework for the handing back of sovereign control to the Iraqi people. In this context, the flavour of the Security Council resolutions and the approach of the CPA during the transitional period were clear: a fervent emphasis on continuing Iraqi sovereignty and the swift return of power to Iraqi hands.[173] Thus, even while the practical reality saw the CPA (and not the UN itself) exercising plenary

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167 See above Pt III A 3.

168 *The Situation Between Iraq and Kuwait*, SC Res 1483, UN SCOR, 58th sess, 4761st mtg, [9], UN Doc S/RES/1483 (2003).

169 *Governing Council of Iraq*, Coalition Provisional Authority Regulation Number 6, CPA/REG/13 July 2003/06 (2003), <http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf> at 11 July 2004.

170 SC Res 1511, [4].

171 Ibid para 10; Perritt, above n 9, 409.

172 SC Res 1511, [6].

173 As an aside, an additional benefit to this attitude was the fact that Iraq had 'failed' by reason of foreign military intervention. While the cause of Iraq's collapse did not affect the legal status or powers of the transitional governing authority, it arguably made emphasis on continuing Iraqi sovereignty an imperative. In other situations such as Kosovo however (see below Pt IV D 3), where competing parties are asserting sovereignty, there is a clear normative benefit in protracting international control until sovereign status is resolved.

authority, this was done relatively covertly and in a manner far less provocative than would have been the case if, for example, Iraq had been placed in the hands of the Trusteeship Council.

While it is the only UN organ with the legal authority, the Security Council does not have all of the procedural mechanisms necessary and appropriate for post-conflict administration.[174] It is also the only major organ of the UN that lacks a system for receiving information and proposals from independent non-governmental sources.[175] One proposal addressing these concerns, but that is not redolent of neocolonialist trusteeship, would be to create a sub-committee of the Security Council under article 29 of the Charter, which would then monitor situations globally where the UN could potentially play a transitional role.[176] This would allow oversight by a specialised committee, having the power to make recommendations to the Security Council and serving as a conduit between Council Members and the specific administrations themselves.   The sub-committee would thus assume an ongoing role in the life of an administration, in effect creating a regime similar in operation to the Trusteeship System, with administrations required to submit periodic reports, and the sub-committee visiting and preparing surveys on each administration.   Working within the existing regime has the dual benefits of effective oversight and accountability while maintaining the focus on international peace and security.

3   *Avoid Treating Conflicts as Issues of Final Status or Self-Determination While Ensuring Local Participation*

A specific extension of the first two norms concerns the role that international administrations should play when the sovereignty of all or part of the territory (subject to post-conflict governance) is in dispute, as is often the case in failed states. The final status of Kosovo has, for the parties, remained its central issue, with the Security Council and UNMIK being faced with the competing claims of the former sovereign and a vigourous independence movement. No current legal rule prevents UNMIK from taking action to promote a certain final status for the province, such as independence or permanent autonomy.   Despite the absence of a prohibitive rule, the political reality of such situations (as the conduct of UNMIK to date shows) is that the UN deliberately refuses to take sides in such sensitive issues.[177]

The effect of Resolution 1244 was to transfer supreme civil authority from the Federal Republic of Yugoslavia (later Serbia and Montenegro) to the UN, leaving UNMIK as 'the only legitimate authority in Kosovo'.[178] This occurred ostensibly

174 Mohamed, above n 94, 822.
175 Cited in Mohamed, above n 94, 824.
176 A similar suggestion was made in 1992 regarding the issue of self-determination: See Morton Halperin, David Scheffer and Patricia Small, *Self-Determination in the New World Order* (1992) 112.
177 *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo 26 June 2003*, UN Doc S/2003/675 (2003).
178 *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo 23 December 1999*, UN Doc S/1999/1250 (1999). See also *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo 12 July 1999*, [9], UN Doc S/1999/779 (1999).

without the consent of the Serb government. Many UN Members feared that
'granting [Kosovo] full independence could create a dangerous precedent that
violent insurgent movements could gain independence even when they could not
win a war of independence on their own'.[179] Accordingly, the language in
Resolution 1244 regarding Kosovo's final status was left deliberately ambiguous.
Its Preamble recognised continuing Yugoslav sovereignty in Kosovo while
nevertheless vesting UNMIK with 'basic civilian administrative functions where
and as long as required', and also allowing Kosovo 'substantial autonomy within
the [FRY]'.[180]

Coupled with the desire to recognise continuing Serb sovereignty in Kosovo was
the concern that Kosovar institutions were unable to guarantee the protection of
human and minority rights amid continued ethnic tension.[181] Given the recent
history of the region, there remains a deep mistrust in the ability of the parties to
resolve these issues, a mistrust only strengthened in the wake of widespread
ethnic violence between Kosvars and minority Serbs in March 2004.[182] This
prompted the Secretary General to observe that 'there continues to be a lack of
commitment among large segments of the Kosovo Albanian population to
creating a truly multi-ethnic society in Kosovo'.[183] Such instability underlined the
importance of keeping UNMIK in control as well as the necessity of keeping
questions concerning Kosovo's final status open.[184] Meanwhile, in order to
pursue policies to develop the capacity for autonomous government and self-
reliance,[185] UNMIK adopted a 'standards before status' approach,[186] emphasising
the development of stable, democratic institutions as a necessary precondition to
discussions on final status.[187] However, with Kosovar politicians continuing to
reject anything short of full independence, 'unless that were accepted by Serbia—
and supported, economically and militarily, by outsiders—its mere proclamation
could simply bring fresh violence'.[188]

The efforts of the UN to insulate the mission in Kosovo from the quagmire of
final status was also a feature of the international community's approach to Iraq,

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[179] Kreilkamp, above n 3, 644.
[180] SC Res 1244, [11].
[181] The welfare of Kosovo's Serb minority being the primary concern.
[182] *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo
30 April 2004*, [37], UN Doc S/2004/348 (2004).
[183] Ibid [52].
[184] For a concise discussion regarding the alternatives for Kosovo's final status see Triantafilou,
above n 138, 365-8.
[185] Wilde, 'From Danzig to East Timor', above n 85, 595.
[186] UNMIK, *Standards Before Status* (2002)
< http://www.unmikonline.org/pub/focuskos/apr02/benchmarks_eng.pdf > at 5 July 2004.
[187] UNMIK, 'Address to the Security Council By Michael Steiner Special Representative of the
Secretary-General' (Press Release, 24 April 2002), UNMIK/PR719 (2002)
< http://www.unmikonline.org/press/2002/pressr/pr719.htm > at July 7 2004.
[188] 'Crab-Like Progress' *The Economist* (London), 20 June 2004. The author notes that, at the time
this article was being revised for publication, the Secretary General appointed a special envoy to
lead the political process that would determine Kosovo's final status. While the UN expressed the
view that this process would likely lead to independence or significant autonomy for Kosovo,
management of the situation remained conciliatory, strongly supportive and focused on
compromise: see *Letter Dated 7 October 2005 from the Secretary General Addressed to the
President of the Security Council* (with Annex), UN Doc S/2005/635.

where the issue of final status has never been in question. At all times the ultimate goal of a sovereign, free and democratic Iraq has been emphasised by all sides in the international media. Nor was final status a contentious issue in East Timor, with both Indonesia and Portugal consenting to the popular ballot.[189]

The practice of avoiding controversial and difficult issues of final status was first adopted by the League of Nations in Danzig and Leticia and has been continued by the United Nations in Kosovo, Iraq and East Timor. While the certainty and stability provided by this approach should be applauded, normative grounding of this core practice remains necessary. There is a significant risk that ethnic conflicts such as that in Kosovo might be exacerbated, with mismanagement by the international administration potentially deepening the rifts between sections of society.[190] It is not for the international community to take a central role in determining final status. Any such attempts should be deemed as overstepping the boundaries within which intervention in the internal affairs of states and the temporary assumption of sovereignty are deemed legitimate.

The principle of avoiding issues of final status can be extended to prohibiting permanent changes to a territory's domestic legal system such as promulgating a permanent constitution.[191] In Iraq and East Timor the creation of constitutions has been left to the local people, with interim laws promulgated by outside authorities never purporting to be permanent. Again, political sensitivities render any other outcome practically unlikely, yet the importance of the local people retaining this aspect of sovereignty characterise the principle as a normative imperative in a broader legal framework.

It is also questionable whether the UN should even be in the business of actively promoting democracy. Efforts to import the values of Western-style liberal democracy have not always been a successful match with the preferences of local people and existing political and social traditions and institutions.[192] Yet, the international and internal legitimacy of a post-conflict administration demands a minimum level of political participation by the local people in determining their future. Ideally, the best approach would be for the UN to wholeheartedly avoid treating conflicts as issues of final status, self-determination or even democracy. Rather, as argued in this paper, it should approach failed states as matters of

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189 Indonesia arguably never possessed sovereignty over the former Portuguese colony in any event. Prior to independence, East Timor was classified as a 'non-self-governing territory' under chapter XI, a status confirmed by the 1960 General Assembly Resolution 1542 (XV) which rejected Portugal's claim of sovereignty: *Transmission of Information Under Article 73e of the Charter*, GA Res 1542(XV), UN GAOR, 15th sess, 948th plen mtg, UN Doc A/RES/1542 (1960). Indonesia's subsequent annexation did not change this status, being repeatedly rejected by the international community: see *Question of East Timor*, GA Res 3485, UN GAOR, 30th sess, 2439th plen mtg, UN Doc A/Res/3485 (1975); SC Res 389, UN SCOR, 31st sess, 1914th mtg, UN Doc S/RES/389 (1976).

190 Bothe and Marauhn, above n 117, 239.

191 A question posed by Matheson: above n 6, 85.

192 See Kirsti Samuels and Sebastian von Einsiedel, *The Future of UN State-Building: Strategic and Operational Challenges and the Legacy of Iraq* (2003) International Peace Academy <http://www.ipacademy.org/PDF_Reports/FUTURE_OF_UN_STATE_BUILDING.pdf>, 3 at 10 July 2004.

international peace and security. Under this rubric, matters such as the protection of human rights and minorities, the establishment of decent and secure living conditions and general peace maintenance can be legitimately considered. Commendably, this appears to have been the methodology of the Security Council in Resolutions 1244 and 1272 regarding Kosovo and East Timor.[193] In particular, the 'standards before status approach' of UNMIK placed the correct emphasis the development of the structures and institutions needed to promote internal stability and welfare. Once developed, it will be more likely that many of the obstacles currently preventing resolution of final status issues, such as the protection of minority rights, will have diminished in significance.

4 Respect Principles of Human Rights, Remain Accountable and Transparent

On its face, this norm appears to be simple and undoubtedly crucial to the legitimacy of international administrations. That the agents of the administration are bound by established rules of human rights and humanitarian law should be vigorously affirmed. Clearly, neither the administration nor its agents should be engaging in killing, torture, arbitrary detention, discrimination or any other abuses of the local population. A clear chain of accountability from the Security Council to the Special Representative and downward should be established, allowing swift and comprehensive administrative review of decisions.[194] Importantly, given that the administration will be solely responsible for maintaining law and order, the only protections the host population will receive will be those that derive their force from the Security Council resolutions that establishes and empowers the administration, and the rules and regulations promulgated by the administration itself.[195] Great care must thus be taken in drafting the relevant documents to ensure that the appropriate protections are included.

Such accountability should not hinder the day-to-day governing of the territory, but should nonetheless provide firm leadership and oversight from above. Understandably, the habit of the Security Council of conducting closed general proceedings is regrettable, as is the private deal-making often done by the five permanent members.[196] In this context, the development of a specialised sub-committee within the Security Council would partially mitigate these difficulties.

The challenge in drafting a more comprehensive framework will be to strike a

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[193] Bothe and Marauhn, above n 117, 238-9.
[194] The issue of administrative or judicial review of the decisions made by post-conflict administrations is highly complex because such review, in the sense that it exists in domestic law, does not exist under international law. Decisions of the Security Council are not subject to judicial review (see above n 159 and accompanying text). Arguably however, it would be possible to implement an administrative regime within the failed state, with the Special Representative sitting at its apex as the final avenue of executive appeal. From there, rules could be established allowing the further appeal of certain decisions to the Security Council (or a sub-committee). These are only preliminary proposals – much further work in this area is needed. For a useful introduction and more complex analysis, see Henry Perritt Jr, 'Providing Judicial Review for Decisions by Political Trustees' (2004) 15 *Duke Journal of Comparative and International Law* 1.
[195] See Mohamed, above n 94, 829.
[196] Ibid 824.

sustainable balance in situations where the goals of the international administration come into conflict with certain human rights.[197] For example, the right to due process and the right to freedom of association may, on occasion, clash with the short-term aims of the administration to establish order and address urgent humanitarian needs. Economic, social and cultural rights are even more problematic. There is no easy resolution to this issue. Transparent and accountable decision-making will help to legitimse the international administration and foster the necessary local institutions to take over when the administration departs. The international administration should operate in an open and engaging manner, acknowledging that as time progresses its presence will probably become less and less popular.[198] Ultimately, the chances of success can only be maximised by the administration itself exemplifying the principles of good governance that it is charged with fostering within local institutions.

5 *Maintain Flexibility in Power Sharing Arrangements*

The most difficult element in the drafting of a normative framework is the question of initial power-sharing between international and local institutions and the timeline for the complete restoration of local executive authority. Whatever direction is taken has its strengths and weaknesses. At one extreme, absolute international authority such as that in East Timor (with a centralised command) allows for quick, impartial and expert action to meet humanitarian needs and establish stability. Being vested with full executive and legislative authority saw the Transitional Administrator, over the life of UNTAET, make decisions regarding what laws to apply, the appointment of judges, the regulation of fiscal and budgetary matters, police and prisons, banking, the official currency and currency transactions.[199] UNTAET also held effective treaty-making powers and negotiated on behalf of East Timor on a future treaty with Australia concerning resources in the Timor Gap.[200] It is unsurprising that Vieira de Mello himself conceded that the UN was acting 'with mandates and powers comparable to colonial regimes' and that its role in the transitional administration was one of 'good governance through benevolent despotism'.[201] Such extensive authority was however necessary because, in the absence of local administrative institutions, UNTAET needed to fill with haste the power vacuum created by Indonesia's departure. The near total devastation in East Timor meant that, in addition, there was no infrastructure on which to append a traditional peacekeeping mission.[202]

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[197] See Perritt, above n 9, 438-9.
[198] Ibid 467-9.
[199] A complete list of UNTAET Regulations can be found on the UN Website:
    < http://www.un.org/peace/etimor/UntaetN.htm > at 5 July 2004.
[200] See Simon Chesterman, *East Timor in Transition: From Conflict Prevention to State-Building* (2001) International Peace Academy.
    < http://www.ipacademy.org/Publications/Reports/Research/PublRepoEastTimor_body.htm >, at 5 July 2004; Peter Galbraith, 'The United Nations Transitional Authority in East Timor (UNTAET)' (2003) 97 *American Society of International Law Annual Meeting Proceedings* 210, 211-12.
[201] Cited in Kreilkamp, above n 3, 656.
[202] Criswell, above n 89, 592.

Excessive international authority can result in a loss of credibility with the local people and hamper reconstruction efforts. A lack of internal legitimacy became a minor concern in East Timor, when the lack of genuine involvement by the East Timorese in the early stages saw many come to perceive UNTAET's presence as replicating the Indonesian style of administration that they had fought to expel.[203] UNTAET sought to remedy this criticism by instituting 'co-government', a more representative administrative model that gave the East Timorese greater control over the early stages of the policy process. While Vieira de Mello retained all executive authority, Joel Beauvais finds that the action 'led to a considerable increase in the legitimacy of the administration, both within East Timor and abroad'.[204]

Extensive international authority is also typically accompanied by a lack of local participation, an element vital to the long-term development of independent and sustainable institutions.[205] The opposite approach, termed the 'light expatriate footprint', embodies the belief that the control of the reconstruction process should be placed squarely in local hands, thereby maximising the chances of long-term success, even at the expense of some short-term stability. This approach was adopted by the UN in the rebuilding of Afghanistan in the aftermath of the US military campaign to oust the Taliban regime in 2001.

The Bonn Agreement, negotiated in December 2001 between Afghan representatives and the UN, denoted a shift away from the East Timor-Kosovo model of post-conflict governance.[206] Its Preamble reaffirmed 'the independence, national sovereignty and territorial integrity of Afghanistan'. An interim Afghan authority was established to be 'the repository of Afghan sovereignty',[207] responsible for the 'day-to-day conduct of the affairs of state', and having 'the right to issue decrees for the peace, order and good government of Afghanistan'.[208] No actual authority was granted to the United Nations, though its 'assistance' was sanctioned eight times in the document.[209] In March 2002 and pursuant to the Bonn Agreement, Security Council Resolution 1401 established the United Nations Assistance Mission in Afghanistan (UNAMA).[210] There was no reference made in the text of the resolution to chapter VII of the Charter.

The architect of the Bonn process was Lakhdar Brahimi, a UN diplomat and administrator on record as questioning the sovereign-like role assumed by the UN administrations in East Timor and Kosovo.[211] He was appointed as the Secretary General's Special Representative to Afghanistan and, under his leadership,

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[203] Kreilkamp, above n 3, 653.
[204] Beauvais, above n 127, 1129.
[205] Ibid 1105, 1113-18.
[206] *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, UN SCOR, 56th sess, UN Doc S/2001/1154 (2001).
[207] Ibid art I(3).
[208] Ibid art III(C)(1).
[209] Ibid, arts I(6), II(2), III(c)(4), (5), (6) (twice), (9) and V(6).
[210] *The Situation in Afghanistan*, SC Res 1401, UN SCOR, 57th sess, 4501st mtg, UN Doc S/RES/1401 (2002).
[211] Brahimi Report, above n 10; See also Kreilkamp, above n 3, 665-6.

UNAMA adopted the guiding principle that its primary role was to bolster Afghan capacity – both official and non-governmental – with the maximum use of local staff and as little reliance on an international presence as possible.[212] According to the Secretary General, the international presence was only to leave a 'light expatriate footprint',[213] with the ultimate responsibility for implementing the Bonn Agreement resting with the Afghan people. Accordingly, UNAMA's role was to encourage Afghan leaders from all sides to view their interests as being furthered by buying into a political process that immediately empowered Afghanis rather than international administrators.[214]

It is clear that no single approach to international post-conflict administration is universally applicable and a normative legal framework must therefore be significantly flexible on this issue. The framework should emphasise the importance of Members of the Security Council and other donor states making every effort to inform themselves of all the complexities of the 'failed state' when considering possible UN roles. The final decision will then balance the short-term benefits of centralised international control against the long-term need to develop local capacity.

V CONCLUSION: POST-CONFLICT GOVERNANCE AND THE GHOSTS OF TRUSTEESHIP

In recognising the new role adopted by the UN in post-conflict governance, Bothe and Marauhn maintain that

> [t]he analytical debate should not … focus primarily on the establishment of a foreign military presence, nor solely on the original territorial sovereign being barred from further exercising its powers, nor on the new authority… [being] characterized as a 'protecting power' or a 'trustee' …. , [such] concepts… are ideologically still linked to particular political and historical situations, related to traditional armed conflict or to colonialism.[215]

Labeling a mission such as UNTAET and UNMIK as 'neo-colonialism'[216] or a modern form of 'trusteeship' is unhelpful because it assigns a politically sensitive term to a sincere attempt to address a serious post-Cold War challenge to international public order.

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[212] *The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General 18 March 2002*, UN GAOR, 56th sess, Agenda Item 43, [98] (d), UN Doc A/56/875-S/2002/278 (2002).
< http://www.ipacademy.org/PDF_Reports/afghanistan0902.pdf > at July 8 2004.

[213] Ibid [98] (d). See also Testimony Before the Senate Committee on Foreign Relations, United States Congress, Washington DC, 6 December 2001, (Richard Haass),
< http://www.state.gov/s/p/rem/6757.htm > at 10 July 2004.

[214] Simon Chesterman, *Tiptoeing Through Afghanistan: The Future of UN State-Building* (2002) International Peace Academy, 4, < http://www.ipacademy.org/PDF_Reports/afghanistan0902.pdf > at July 8 2004.

[215] Bothe and Marauhn, above n 117, 218.

[216] See Kreilkamp, above n 3, 642-57.

Yet while the casual use of loaded terminology is unhelpful, understanding the historical context to foreign intervention in failed states is essential. A legal analysis of the governance of failed states in the post-Cold War era must not ignore the theoretical reasons why intervention is necessary nor the (often unintended) implications it entails. Importantly, the concept of a 'failed state' not being able to function as a 'normal' state is not far removed from the benevolently colonialist crusade to 'civilise' otherwise 'uncivilised' peoples. Indeed, in the view of Antony Anghie, the recent 'war against terror' invokes the Kantian premise that a state's lack of a civil society causes injury to and thereby justifies intervention by its civilized neighbours.[217] The developed world might genuinely comprehend UN intervention only within the black-letter legal framework that safeguards 'international peace and security'. For the developing world, however, such intervention can easily be seen as a paternalistic assault on the principle of self-determination which, to these states, is the backbone of international society and represents the ultimate guarantee of a 'just' form of international order.[218] Therefore, to achieve universal legitimacy, the positivist solutions tailored by the international community must be tempered by normative rules and constraints that reflect these concerns.

Is the resemblance to colonialism and trusteeship sufficient to preclude the post-conflict governance of failed states? Legally, the answer is no, as powers of the Security Council under chapter VII of the Charter are, both textually and as evidenced by Council practice, sufficient to override other Charter principles such as sovereign equality, self-determination and non-intervention. Normatively however, some embrace the opposite viewpoint. To Bain:

> [i]t is not enough to call trusteeship by another name in order to escape the opprobrium of [its] ... ugliness. It is not enough to merely assert a preference for human rights or some other value in order to embrace trusteeship while avoiding the stigma of empire.[219]

Bain is right when he states that 'to justify trusteeship solely for the sake of material advantage is to neglect the anti-paternal claim of post-colonial society, if not to miss it entirely'.[220] Yet, neither 'material advantage' nor mere 'preferences for human rights' actually constitute the basis for intervention in failed states. The role of UN administration is the maintenance of international peace and security, a legal principle that has undergone a recent transformation. This transformation is not a mere policy preference, but a recognition that modern international public order is both threatened by and averse to widespread internal bloodshed, the harbouring of terrorist networks, massive human rights violations and humanitarian catastrophes. In some instances these crises can only

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[217] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), 296.
[218] See Bain above n 12, 129-36. But see generally Jarat Chopra, 'The Space of Peace-Maintenance', (1996) 15 *Political Geography* 335, 339-41.
[219] Ibid 172. In a broader critique, Anghie argues that colonialism was central to the constitution of international law and the sovereignty doctrine: see Anghie, above n 217.
[220] Ibid 171.

be stopped by an external authority stepping in and assuming temporary control.[221]

Political and academic debate on the issue of post-conflict governance can only increase, particularly if the Security Council continues upon its increasingly interventionist path. Meanwhile, new situations emerge around the globe where the strength, experience and leadership of UN-backed authorities appears sorely needed. For example, Security Council Resolution 1556 called for the withdrawal of the apparently government-backed militia from the Sudanese region of Darfur,[222] militia accused by the US Congress of engaging in 'genocide'.[223] The conflict has its roots in long-standing ethnic tensions and regional rivalries and, it might be said, accordingly exhibits many of the hallmarks of state failure. Even once the armed conflict has ceased, questions about post-conflict governance for this troubled region will (and should) arise. Moreover, the coming months and years in particular in Kosovo, Afghanistan and Iraq will also be telling for the future of this legal doctrine and for the broader approach that the international community will adopt towards the challenge of failed states. It will be in these locations where the pressures will be greatest and the effects most lasting. As Percy Shelley recognised almost two centuries ago, '[g]overnment is evil',[224] and in modern global society, international administration may be worse. But when faced with the 'thoughtlessness and vices of men', manifested through the political, economic and humanitarian crises of failed states, government is a 'necessary evil'. Its negative aspects must simply be moderated through the application of a comprehensive framework grounded in history, theory and recent experience.

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[221] In a more complex and subtle critique, Anghie argues that even while international law has sought to institute a new order, it has reproduced, in effect, the old colonial structures of the 'civilising mission': above n 217, 315. It may be that Anghie is correct in identifying the colonial origins of the sovereignty doctrine, and indeed the broader imperialist bias in public international law. With respect however, it is submitted that such an astute observation does not of itself dispose of the practical challenges posed by failed states to the international community.

[222] *Report of the Secretary- General on the Sudan*, SC Res 1556, UN SCOR, 59th sess, 5015th mtg, UN Doc S/RES/1556 (2004).

[223] 'Declaring Genocide in Darfur, Sudan', H CON RES 467 (passed 22 July 2004). See also 'Fleeing the Horseman Who Kill for Khartoum'. *The Economist* (London), 13 May 2004, 20.

[224] See above n 1 and accompanying text.