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The Ultimate Intervention: Revitalising the UN Trusteeship Council for the 21st Century

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INTRODUCTION

After forty-seven years of operation the UN Trusteeship Council successfully completed the job it was created to do with the termination of the trusteeship of Palau in December 1994.[1] In all the Trusteeship Council and its proxies shepherded eleven territories to independence or voluntary association with a State.[2] Created to oversee the progressive development of Trust Territories towards self-government or independence[3] the Trusteeship Council now lies dormant and awaiting termination. Meanwhile the UN paradoxically finds itself increasingly involved on an *ad hoc* basis in state building and governance projects around the world.

As the UN struggles to meet new Post-Cold War challenges such as those posed by failed and disintegrating states and to find answers to more traditional threats to international peace and security such as territorial disputes there is a need to establish some form of framework within which to respond. The need for something of this nature was envisaged by former UN Secretary General Boutros-Boutros Ghali in his seminal paper Agenda for Peace[4] but all responses so far have been rooted in the actions of an increasingly overburdened Security Council.

It is my thesis that the solution lies in reviving and reinvigorating the Trusteeship Council. A number of commentators have addressed aspects of how this might be done and highlighted potential obstacles but as yet no one has tried to draw all the threads together. Part I of my thesis will address the historical context from which the Trusteeship Council emerged. Part II will examine the key principles of trusteeship. Part III will look at some of the contemporary challenges that the machinery of the Trusteeship Council could be used to address. Part IV will consider the legal obstacles that have been raised to extending the Trusteeship Council's activities. Part V will suggest a possible legal framework within which UN Trusteeships could be reintroduced. Finally, Part VI will offer some tentative conclusions.

PART I: THE HISTORICAL CONTEXT

a) The Origins of the Idea of Trusteeship

It has been argued that the essence of the International Trusteeship System is the protection of native rights.[5] Although they exercised little influence on their more mercenary contemporaries, early legal theorists such Jean Lopez de Palacios Rubios and Franciscus de Vitoria first raised this issue in

[1] C. Willson, *Changing the Charter: The United Nations Prepares for the Twenty First Century*, 90 American Journal of International Law 121 (January 1996)
[2] A. Groom, *The Trusteeship Council: A Successful Demise*, in P. Taylor and A. Groom, *The United Nations at the Milennium: The Principal Organs*, 142 (2000)
[3] R. Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 American Journal of International Law 583 (2001)
[4] *Agenda For Peace* 28, para. 46 (DPI/1247, 1992)

response to the discovery and exploration of the New World.[6] In *De Indis* de Vitoria argued that the New World should be developed in the interests of its native peoples and not just for the profit of Spaniards: "The property of the wards, is not part of the guardian's property… the wards are its owners."[7] Although de Vitoria did not see the Indians as equals he did characterise them as belonging to the same social universe.[8] De Vitoria's ideas were taken up by, among others, Jean Bodin, Domingo Soto and Balthasar de Ayala. In *Mare Liberum* Hugo Grotius applied di Vitoria's arguments to refuting Portuguese claims over the East Indes.[9]

The concept of trusteeship became more explicitly developed during the era of British colonial expansion and consolidation. The development of British parliamentary democracy was driven in part by the political philosopher John Locke's identification of the "social contract" that exists between the people and the legislature.[10] It was perhaps inevitable that this theory would also eventually colour Britain's relationship with its colonial territories. The prominent conservative theorist and politician Edmund Burke is widely credited as being the first to invoke the concept of "trust" in speeches addressing British policy in India and North America in the last decades of the 18th Century. It was Burke who coined the phrase "sacred trust" which appears in Article 22(1) of the Covenant of the League of Nations and Article 73 of the UN Charter.[11] Burke's paternalistic vision of Britain's civilising mission became an essential part of the mythology of British Imperialism perhaps best typified by Colonial Secretary Joseph Chamberlain's declaration in 1898 that in acquiring new territory the British were acting as the "trustees of civilisation for the commerce of the world."[12]

Interest in the concept of trusteeship was certainly not confined to the British Empire. At the same time that British imperialists such as Sir Thomas Stamford Raffles and Sir Thomas Munro were exploring ideas of trusteeship within the context of Britain's colonial possessions, Americans were exploring the concept at home in their relations with the Native American peoples. In 1831 Chief Justice Marshall of the Supreme Court held that the Cherokee nation had an undisputed right to the lands they occupied observing: "They are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."[13]

Other nations began to adopt similar policies. At the Berlin Conference of 1884-1885 fifteen European Powers met to alleviate the friction generated between them as a result of the rush to secure the remaining unclaimed territories of Africa as colonial dependencies. The conference produced a groundbreaking General Act which bound the signatories to "care for the improvement of the

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[5] A. Anghie, *The Heart of my Home: Colonialism, Environmental Damage and the Nauru Case*, 34 Harvard International Law Journal 454-455 (Spring 1993)
[6] R. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* at 18 (1955)
[7] R. Chowdhuri, *supra* note 6, at 21
[8] A. Anghie, *supra* note 5, at 492-493
[9] R. Chowdhuri, *supra* note 6, at 18
[10] N. Tsagourias, *Humanism and the Mandates System: Its Modern Revival*, Vol 13 Hague Yearbook of International Law 97 (2000)
[11] A. Groom, *supra* note 2, at 143-145
[12] R. Chowdhuri, *supra* note 6, at 14
[13] *Cherokee Nation v. State of Georgia*, cited by R. Chowdhuri, *supra* note ?, at 19 also

conditions of the moral and material well-being" of the natives of the Congo Basin which is generally regarded as the first treaty of its sort.[14]

By the dawn of the 20th Century the concept of trusteeship took on an added dimension as a number of statesman and radical thinkers began to look at the principle of international accountability.[15] As early as 1902 the left-wing British economist J. A. Hobson suggested in his influential study of Imperialism that the right to exercise control over dependent peoples should only be granted to a nation on condition that it so be accredited by a body "genuinely representative of civilization."[16] However, the real shift in attitudes was to come with the outbreak of the First World War during which the concept of trusteeship became increasingly linked with plans to create an international body to regulate and oversee international affairs.

The carnage of the First War World bred widespread discontent with old idea that peace in Europe could be ensured by maintaining a balance of power between the major powers. As the war dragged on more and more people embraced the idea of, in the words of Lord Robert Cecil, "an organisation… in essence universal, not to protect the national interest of this or that country… but to abolish war."[17] The idea attracted powerful advocates from across the political spectrum. In the United States Democrats and Republicans both flocked to join the League to Enforce Peace.[18] In Britain a special committee was formed under Sir Walter Phillimore to look at the idea and in France a commission chaired by former Prime Minister Léon Bourgeois drew up plans for an international organisation with its own army to police the peace.[19]

US President Woodrow Wilson caught the public mood when he unveiled his Fourteen Points for peace in an address to a Joint Session of Congress on 8th January 1918. For the purposes of this paper, two Points in particular stand out:

> Point V, which promised "a free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined."[20]
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> and

[14] R. Chowdhuri, *supra* note 6, at 21
[15] R. Chowdhuri, *supra* note 6, at 14-15 and 22-23
[16] J. A. Hobson, *Imperialism: A Study* (third edition) at 238-239
[17] M. MacMillan, *Peacemakers: The Paris Peace Conference of 1919 and Its Attempt to End War*, at 92-93 (2001)
[18] M. MacMillan, *supra* note 17, at 96
[19] M. MacMillan, *supra* note 17, at 96-97
[20] http://usinfo.state.gov/usa/infousa/facts/democrac/51.htm, 27 July 2002

> Point XIV, which called for the creation "a general association of nations… for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."[21]

Across Europe squares and streets were named after the US President. Posters appeared demanding "A Wilson Peace."[22] By the end of the war public expectations had grown to such a pitch that the British Prime Minister Lloyd George told the Imperial War Cabinet in December 1918 that it would be nothing less than "a political disaster" to return from the Peace Conference without a League of Nations.[23]

The idea of some form of international oversight for the colonies of the Western powers gathered pace in tandem with this new spirit of internationalism, particularly in the United States (the only major power essentially without colonial ambitions) and amongst European socialist parties. With the declaration of an armistice thoughts inevitably turned to the coming peace settlement.

In December 1918 The South African soldier-statesman Jan Smuts set out to bring Wilson's "rather nebulous ideas" more form in a paper (later released as a pamphlet) entitled "The League of Nations: A Practical Suggestion."[24] In addition, to sketching out a possible administrative structure for the League, Smuts also suggested that it should provide for the mandated administration of the territories belonging to Austria, Russia and Turkey by the victorious powers.[25] Smuts did not believe such a scheme should be extended to the German colonies of Africa and the Pacific which he felt were inhabited by "barbarians" more suited to annexation and direct colonial rule.[26] President Wilson was given a copy of Smut's paper by Lloyd George and when the President finally sat down in January 1919 to expand on his original ideas the draft he produced borrowed heavily from Smuts.[27]

b) The Mandates System

"Conceived in generosity but born in sin, it had grown up in repentance."[28]

On 25 January 1919 the Paris Peace Conference formally approved the establishment of a Commission on the League of Nations under the chairmanship of President Wilson. Right from the start the issue of mandates was one of the principal, and most contentious, items on the agenda. None of the victorious powers believed Germany should get back its colonial possessions – it was felt that Germany had

[21] http://usinfo.state.gov/usa/infousa/facts/democrac/51.htm, 27 July 2002
[22] M. MacMillan, *supra* note 17, at 21-23
[23] M. MacMillan, *supra* note 17, at 95
[24] M. MacMillan, *supra* note 17, at 98
[25] R. Chowdhuri, *supra* note 6, at 24
[26] R. Chowdhuri, *supra* note 6, at 43
[27] M. MacMillan, *supra* note 17, at 98-99
[28] Professor W. Rappard as quoted by R. Chowdhuri, *supra* note 6, at 25

demonstrated by her behaviour that she was unfit to rule other peoples.[29] The question was what to do with them.

President Wilson's vision went much further than that of Smuts and it was Wilson's vision that prevailed in Article 22 of the Covenant of the League of Nations. Article 22 extended the "Mandates System" to those colonies and territories belonging to Germany and Turkey "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world."

Wilson made it plain from the start that he expected the League to assume responsibility for all Germany's former colonies. He argued forcibly that the League would be a laughing stock if the annexation of enemy territory by the victorious powers were not invested with some "quality of trusteeship."[30] Wilson's first draft of the League System also included the principle of direct international administration - he originally intended for the League to entrust the task of administration to "some single state or *organized agency*."[31]

Britain and Canada broadly supported Wilson's suggestions. However, Wilson did not get it all his own way. Ranged against him were France and the increasingly independent British Dominions of South Africa, Australia and New Zealand who all favoured annexation. Wilson refused to condone what he termed "dividing the swag" and battle lines were drawn with Australia and New Zealand leading the charge over German islands in the Pacific.[32]

It was Smuts and Cecil who came up with a compromise solution: a three tier Mandates System. 'A' class mandates for nations which were nearly ready to run their own affairs. 'B' class mandates which would be run by the mandatory power. 'C' class mandates for territories contiguous or close to the mandatory power which would be run as an extension of its own territory subject to certain restrictions.[33] The Australian Prime Minster Billy Hughes was privately satisfied with this outcome commenting that although he had not secured a freehold on New Guinea and the Solomon Islands he had at least acquired a 999-year lease.[34]

Smuts also put paid to the idea of promoting international administrations as an alternative to a mandatory power which he argued would inevitably lead to "paralysis tempered by intrigue."[35] Smuts was strongly supported by the French Minister for Colonies Henri Simon who noted somewhat disingenuously that tentative experiments in international administration had "failed ignominiously."[36] However, some degree of international participation in the process was secured by the British

[29] M. MacMillan, *supra* note 17, at 107
[30] R. Chowdhuri, *supra* note 6, at 47
[31] R. Chowdhuri, *supra* note 6, at 56. The emphasis is mine.
[32] M. MacMillan, *supra* note 17, at 110-111
[33] M. MacMillan, *supra* note 17, at 112
[34] M. MacMillan, *supra* note 17, at 112
[35] R. Chowdhuri, *supra* note 6, at 56
[36] R. Chowdhuri, *supra* note 6, at 57

suggestion that an expert Commission be created to assist the League Council in the supervision of the Mandatory Administrations. This was incorporated into the League Covenant.

In the end, despite the wrangling of the colonial powers, the final draft of Article 22 of the League Covenant retained much of Wilson's original vision of "a quality of trusteeship". Article 22(1) stated that the Mandates System should apply "the principle that the well-being and development of such peoples form a sacred trust of civilisation" and that "securities for the performance of this trust" should be embodied within it.[37] Article 22(2) talked of the "tutelage" of such peoples "entrusted" to advanced nations.[38] In Article 22(5) the Mandatory Powers for class 'B' and 'C' mandates were charged with responsibility for ensuring that territories were administered "under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals."[39]

However, it should be noted that one final concession made to the colonial powers that were to administer the Mandates System was that Article 22 of the League Covenant made no mention of self-determination. In marked contrast to Wilson's espousal of self-determination in his Fourteen Points the right of mandates to self-governance was not established as a legal right within the System but as a question of fact – mandates' ability "to stand by themselves."[40]

At its inception in 1920 fourteen former German and Turkish territories encompassing some 20 million inhabitants were placed under mandate.[41] Three 'A' class mandates were established in the Middle East (Iraq, Syria-Lebanon and Palestine), six 'B' class mandates were carved out of the former German colonies of Togoland-Cameroons and German East Africa and five 'C' class Mandates created from former German colonies in South West Africa and the Pacific. The Administering Powers were Britain (including the Dominions of Australia, South Africa and New Zealand), France, Belgium and Japan.

Unfortunately, as the attitude of the Australian Prime Minster indicated, in the inter-war years the manner in which the administration of the 'B' and 'C' class mandates was approached looked very similar in consequence to direct annexation. However, for all its failings the Mandates System can lay claim to two important achievements. By the time the System was wound up in 1946 all but one class 'A' mandate - Palestine - had achieved independence[42], powerful reinforcement of the implied but unstated principle that the ultimate objective of all Mandatory Powers should be to prepare the territories under their "tutelage" for self-government.[43]

Furthermore, the provision made in Article 22(7) of the League Covenant obliging the Mandatory Powers to submit annual reports to the Permanent Mandates Commission concerning the

[37] http://www.yale.edu/lawweb/avalon/leagcov.htm, 27 July 2002
[38] http://www.yale.edu/lawweb/avalon/leagcov.htm, 27 July 2002
[39] http://www.yale.edu/lawweb/avalon/leagcov.htm, 27 July 2002
[40] L. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 Emory International Law Review at 139 (1995)
[41] R. Chowdhuri, *supra* note 6, at 24
[42] A. Groom, *supra* note 2, at 145
[43] A. Groom, *supra* note 2, at 146

administration of the territories under their control created established a body of practice and precedent relating to international oversight.[44] It is true that there was not much the Commission could do in the face of blatant breaches of the principles of Trusteeship by some of the Mandatory Powers – such as the Japan's decision to fortify its Pacific Island Mandates in 1937.[45] However, the Commission was able to establish an international standard of best practice against which recalcitrant states could be held up to public condemnation. In the words of A. J. R. Groom with the establishment of the Mandates System: "The genie of international accountability could not be put back into the bottle of untrammelled colonial possession."[46]

c) The International Trusteeship System

The creation of the United Nations at the end of the Second World War presented the international community with an opportunity to address the shortcomings that had become apparent in the Mandates System. The dramatic events of the inter-war years and the trauma of a second global conflagration ensured that the international climate had changed substantially since the Paris Peace Conference, not least because the practice of colonialism was now under fire from all sides. [47]

In the Joint Declaration known as the Atlantic Charter issued in August 1941 British Prime Minister Winston Churchill and US President Franklin D. Roosevelt stated publicly that they would respect the right of all peoples to choose the form of government under which they would live.[48] Churchill later sought to limit the scope of this declaration to Axis-dominated Europe but expectations had already been raised in the colonies.[49] The Atlantic Charter was subsequently endorsed by the *Declaration of the United Nations* made by 24 different nations in January 1942.[50]

The debate on the future of the Mandates System and of colonial territories in general was to set ally against and ally and create unusual alliances between competing powers. Despite their ideological differences the United States and Soviet Union both wanted to see the dismemberment of the old European Empires and to this end they held bilateral talks on how best to tackle the colonial issue as early as May 1942.[51] At the so-called Big Three Conferences held in Cairo and Tehran in 1943 Roosevelt actually proposed to Churchill and Soviet Premier Josef Stalin that all French dependent territories be placed under International Trusteeship. Roosevelt's suggestion was vehemently opposed by Churchill who saw an implicit threat to the British Empire in the proposal.[52]

[44] A. Groom, *supra* note 2, at 145-146
[45] R. Chowdhuri, *supra* note 6, at 25
[46] A. Groom, *supra* note 2, at 145-146
[47] A. Groom, *supra* note 2 at 146-147
[48] R. Chowdhuri, *supra* note 6, at 32
[49] R. Chowdhuri, *supra* note 6, at 48
[50] R. Chowdhuri, *supra* note 6, at 32
[51] R. Chowdhuri, *supra* note 6, at 32
[52] R. Chowdhuri, *supra* note 6, at 33

In the colonial territories themselves independence movements were gaining in strength supported by pressure groups in the West – particularly in the United States –made up of vocal members from the immigrant communities.[53] Public opinion was increasingly important. In part, colonial commitment to the Allied cause had been brought with hints and promises of changes to come and by the end of the war pressure was building for evidence of this. Furthermore, Japan's initial military success in Far East Asia against the European Powers had destroyed the myth of European invincibility and given hope to the more militant national liberation movements throughout the colonial world as the Dutch were to discover in Indonesia.[54]

In addition to the 'enemy without', some of the European nations, exhausted by war or occupation, had lost the will to continue as colonial powers. Progressive development and legislation at home sat uneasily with the autocratic rule of subject peoples abroad.[55] In November 1944 the governments of Australia and New Zealand held a conference in Wellington at which they officially accepted the principles of trusteeship and international oversight.[56] Churchill's defeat by Clement Attlee's Labour Party in the British General Election was another key development in this regard although it came too late to affect the discussions surrounding the creation of the international Trusteeship System. In 1943 the British Labour Party had issued a colonial policy statement in which it called for the development of self-government and "the attainment of political rights not less than those enjoyed or claimed by those of British democracy" for the colonial peoples of the Empire. The statement also proclaimed the Party's acceptance of the principle of international supervision and accountability.[57] Once in power, the Labour Party more or less remained true to this policy goal.

The question of an International Trusteeship System had not come up at the Dumbarton Oaks conference in August-October 1944 when the framework of a general International Organisation to replace the League of Nations was first sketched out.[58] However, it was discussed at the "Big Three" conference held in Yalta in February 1945 and an American proposal based on a draft plan produced by Leo Pasvolsky of the US State Department in 1942 was adopted. At both Churchill and De Gaulle's insistence there was to be no discussion of the actual territories to be affected at the forthcoming San Francisco Conference on the creation of the United Nations Charter.[59]

Like the Mandates System before it, the evolution of the International Trusteeship System at the San Francisco Conference was shaped by the need to find a suitable compromise between a variety of competing interests and, perhaps inevitably, it became one of the most contentious issues of the

[53] A. Groom, *supra* note 2, at 148
[54] A. Groom, *supra* note 2, at 147 and 166
[55] A. Groom, *supra* note 2, at 147
[56] R. Chowdhuri, *supra* note 6, at 34
[57] A. Groom, *supra* note 2, at 148-149
[58] Ironically, the issue was kept off the agenda largely at American behest. The US Joint Chiefs of Staff wanted more time to decide on how best to advance American interests in the Pacific – particularly in regard to Japan's former Mandate territories. A few months later it was the turn of the Soviets to sacrifice principle for national gain at Yalta when Stalin, having just secured the Kuriles Islands as the price of Soviet entry into the war against Japan, was noticeably less enthusiastic about extending Trusteeship to all colonial territories
[59] R. Chowdhuri, *supra* note 6, at 32-35

conference.[60] Equally inevitably, states' experience of the Mandates System informed their approach to the issue – indeed Duncan Hall has argued that the main contribution of the text of the UN Charter was to spell out in detail much of what was already implicit but undeveloped in the sparsely worded League Covenant.[61]

The International Trusteeship System was expounded in Chapters XII and XIII of the Charter and was uncoupled from the issue of colonial administration which was dealt with separately in the *Declaration Regarding Non-Self-Governing Territories* that formed Chapter XI. Chapter XII imposed a much more detailed set of obligations on Administering States than the Mandates System and the Trusteeship Territories were accorded a much more sophisticated personality than under the League Covenant.[62] The Charter also identified the promotion of political, economic, social and educational development towards self-government as one of the System's principle objectives. The text of UN Charter made it perfectly clear that Trusteeship Agreements were no 999-year leases.

The main departures from the Mandates System were substantial changes in the oversight mechanisms and in the security and economic relationship between the Administering Power and the Trusteeship Territory. Under Article 7(1) of the UN Charter the Trusteeship Council was accorded the enhanced status of being designated a "Principal Organ" of the United Nations.[63] The Council was to be composed of government representatives rather than private members as had been the case with the Mandates Commission. The idea was that government representatives would perforce be better informed about what was going on in the Trusteeship Territories than any private individual and would be able to speak in the Council backed by the full authority of his or her government.[64] The membership of the Council was to be evenly divided between Administering Powers and non-Administering Powers. Finally, to emphasise the importance attached to the Trusteeship provisions of the Charter Article 87 accorded ultimate authority on Trusteeship matters to the General Assembly.[65]

In the field of security and defence Article XII reflected the post-war obsession with preventing further conflict by charging the Administering Powers with ensuring the Trust Territory played its part in the maintenance of "international peace and security" - a sharp contrast with the effective demilitarisation sought under the League Covenant. Chapter XII went even further in Articles 82 and 83 creating the concept of Special Strategic Areas – an American proposal which had its roots in lobbying by the US Navy[66] - under which all or part of a Trust Territory can be placed under the jurisdiction of the Security Council instead of the General Assembly. Articles 82 and 83 were fairly opaque and it was not until the first Strategic Trust Agreement between the United States and Japan's former Pacific Mandate Territories in 1947 that the potentially far reaching implications of this exemption became clear.

[60] H. Duncan Hall, *Mandates, Dependencies and Trusteeships*, at 277 (1948)
[61] H. Duncan Hall, *supra* note 60, at 278
[62] A. Anghie, *supra* note 5, at 458
[63] F. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 267 American Journal of International Law Volume 42 (1948)
[64] H. Duncan Hall, *supra* note 60, at 278
[65] H. Duncan Hall, *supra* note 60, at 278
[66] H. Duncan Hall, *supra* note 60, at 279

Ultimately, this enabled the United States to establish a string of military bases in the Pacific where it had had none before.

The Mandates System was officially terminated on 18 April 1946 with the dissolution of the League of Nations. Article 77 of the UN Charter identified territories held under mandate as being suitable candidates for Trusteeship Agreements. However, the Charter made no definite provision for the future of the mandated territories as it was anticipated that the Mandatory States would automatically place their charges under the new system.[67] The majority of Mandatory Powers voluntarily submitted their remaining Mandates to the Trusteeship System.

At the opening session of the Trusteeship Council on 26 March 1947 UN Secretary General Trygve Lie told the Council that it would be working towards its own demise: "[the] ultimate goal is to give the Trust Territories full statehood... A successful Trusteeship System will afford a reassuring demonstration that there is a peaceful and orderly means of achieving the difficult transition from backward and subject status to self-government or independence, to political and economic self-reliance."[68] Held up to this standard, when the Trusteeship Council effectively suspended its operations after December 1994 it could reasonably claim to have discharged its obligations successfully.[69]

d) International Territorial Administration

In addition to the Trusteeship and Mandates Systems the international community has used one other *ad hoc* device for the international stewardship of peoples and territory which merits our attention – what Ralph Wilde has termed "international territorial administration."[70] As state practice is a fundamental factor in the development of any branch of international law a brief survey of the international community's attempts to exercise direct power of control over local situations is integral to any understanding of the principles that have shaped and underpinned the International Trusteeship System. Although international territorial administration has had a chequered history one common dominator can be said to unite all the various disparate initiatives launched by the international community – a desire to impose order on chaos and help territories and peoples no longer in a position to help themselves. This desire is the very essence of trusteeship.

i) Prior to World War I

The history of international territorial administrations can be said to have its origins in the European Danube Commission. Established by the Treaty of Paris of 1856 the Commission – made up of delegates from Great Britain, France, Austria, Prussia, Russia, Sardinia and Turkey - was initially

[67] J. Dugard, *The South West Africa/Namibia Dispute*, at 91 (1973)
[68] A. Groom, *supra* note 2, at 142
[69] A. Groom, *supra* note 2, at 175
[70] R. Wilde, *supra* note 3, at 585

envisaged as a temporary organisation charged with restoring the lower reaches of the Danube to a navigable state after years of neglect.[71] However, as the Commission successfully discharged its functions it steadily grew in power. By the outbreak of World War I it had been invested with the authority to levy charges, effect public works and regulate river traffic, its works and personnel were accorded neutral status, it operated in complete independence of territorial authority and an internationally recognised flag flew over its establishments.[72]

Another early manifestation of international territorial administration were the International Sanitary Councils accorded formal recognition by the International Sanitary Convention of 1892. Sanitary Councils operated in Constantinople, Alexandria and Tangier to prevent the spread of infectious diseases like Cholera. As Francis Sayre has pointed out, the successful operation of these Councils over many decades – notably in Alexandria and Tangier - constitute an early humanitarian challenge to the concept of absolute state sovereignty. [73]

Perhaps the most promising pre-League of Nations experiment in international territorial adminstration was disrupted by the outbreak of the First World War. The Spitzbergen Archipelago in the Artic had been considered *terra nullius* of little or no value until the discovery of workable coal deposits in 1900 energised international interest in the islands. In 1912 Norway, Sweden and Russia adopted a draft convention for the internationalisation of the Archipelago creating a “neutral” Spitzbergen open to all nationalities.[74] Sadly because of the outbreak of World War I the draft convention was never ratified but it became the blueprint for subsequent “free city” proposals. The status of Spitzbergen was discussed by the victorious powers at the Paris Peace Conference and the option of bringing it under the Mandates System was considered. However, this alternative was specifically rejected and instead the territory was placed under "the full and absolute sovereignty of Norway".[75]

However, despite these three largely successful examples of international cooperation, it must be acknowledged that most attempts at international territorial administration in this early period were not successful and it was these failures that were to have such a negative impact on the drafters of the League Covenant.

Most damaging of all was the experience of the Albanian International Commission of Control established in July 1913 to fill the vacuum left by the ousted Ottoman administration and shepherd the Albanians towards independence.[76] The timing was hardly propitious. Made up of one representative from each of the Five Great Powers and Albania, the Commission began operation in October 1913 in an atmosphere of heightened European tension and intrigue. It was an unmitigated disaster from the

[71] F. Sayre, *Experiments in International Administration* 40-41 (1919)
[72] F. Sayre, *supra* note 71, at 40-47
[73] F. Sayre, *supra* note 71, at 52
[74] F. Sayre, *supra* note 71, at 94
[75] Norwegian Prime Minster Gro Harlem Brundtland, *Speech on the occasion of the 75 anniversary of the Treaty concerning Spitsbergen,* at http://odin.dep.no/odinarkiv/norsk/dep/smk/1995/taler/099005-991540/index-dok000-b-n-a.html, Feb. 9, 1995 (2 September 2002)
[76] F. Sayre, *supra* note 71, at 56-62

start. The Great Powers offered the Commission little support and refused to send international troops to help impose some semblance of order on the chaotic territory. General unrest overwhelmed the Commission and with the outbreak of World War I in July 1914 its members withdrew leaving the country to its fate. After a year and a half of anarchy Albania was finally overrun and occupied by Austria at the beginning of 1916.

Another false step was the attempt at the Algeciras Conference of 1906 to create an International Police Force to maintain order in the Sultanate of Morocco and combat the growing tensions between the local population and resident – predominantly French - Europeans. The conference had been a German initiative designed to put the brake on French territorial ambitions in North Africa. The idea behind the International Police Force was that by ensuring the better protection of the European population and suppressing unrest it would deprive the French of a convenient excuse to occupy the Sultanate. The International Police – in reality a locally recruited force under Franco-Spanish instruction – were unequal to the task and France occupied Morocco in 1911.[77]

Finally, although not strictly speaking an example of an international territorial administration, the bruising experience suffered by France and Britain in attempting to jointly administer the New Hebrides had a profound impact on the approach of both States to the proponents of international government. The Anglo-French Accord of 1904 sought to address competing British and French claims to a number of territories around the globe. As neither side would relinquish its claim over the pacific islands of New Hebrides and attempts to arrive at a geographical partition proved unsatisfactory, the Accord created a state of condominium whereby both States shared sovereignty over the islands.[78] A poorly thought out Convention that did little more than allow two totally disparate legal systems to coexist on the islands led inevitably to repeated confrontations between the two expatriate populations. Shortly before the outbreak of World War I the situation had become so strained that the two sides had to resort to calling a diplomatic conference in the hopes of devising a solution to the problem.[79]

After World War I when President Wilson tried to make provision for the principle of direct international administration in the League Covenant he faced strong opposition from France, Britain and the British Dominions. The Albanian debacle, the failure of the Moroccan International Police force and the squabbling which had characterised the New Hebridian Condominium provided Wilson's opponents, such as Henri Simon of France, with all the ammunition they needed to ensure his proposal was rejected.[80]

[77] F. Sayre, *supra* note 71, at 62-68
[78] F. Sayre, *supra* note 71, at 97-99
[79] F. Sayre, *supra* note 71, at 102-104
[80] R. Chowdhuri, *supra* note 6, at 56-58

ii) The Inter War Years

Although the principle of direct international administration was purposely omitted from the League Covenant it was nevertheless pressed into service as a convenient solution to a variety of disparate problems during the inter-war years. Its absence from the Covenant did not seem to present an obstacle. The League of Nations possessed certain governmental rights between 1920 and 1939 in the 'Free City' of Danzig established by the Treaty of Versailles as a permanent and equitable solution to competing German and Polish claims for the city.[81] Although the city itself was self-administered it was placed under the protection of the League which was empowered to act to ensure that the city's 'free' status was not imperiled by the local administration.[82] However, it was in the Saar region and on the border of Colombia and Peru that the most significant developments of the period took place.

The terms of the Treaty of Versailles entitled France to obtain reparations from Germany through the exploitation of mines in the Saar region for a period 15 years. French ambitions to annex the Saar outright (on the basis of a dubious territorial claim dating from the French revolution) had been thwarted at the Paris Peace Conference.[83] Instead it was agreed that the League would administer the territory during the period reparations were extracted after which the citizens of the Saar would be given the opportunity to choose between union with France, union with Germany or remaining under League control. In the interim the League would effectively administer the territory in trust for Germany. In this manner it was hoped that French claims of sovereignty would be suspended – and the interests of both parties protected - until they could be addressed in a less recriminatory atmosphere. A plebiscite was held in 1935, the residents of the Saar voted for union with Germany and the League administration was dissolved, its task successfully fulfilled.[84]

In 1933 Peruvian irregulars occupied the Colombian border town of Leticia by force. Peru, while taking no responsibility for the original attack, pledged to come to the irregulars' aid if Columbia attempted to retake the town. Peru disputed Colombia's claim to Leticia and its surrounding district and tensions along the border were high. The League's help was sought to resolve the crisis and a solution was brokered in which the League took on the administration of Leticia in the name of the Colombian government for a fixed one-year term. The League Commission was supported in most respects by the Colombian government which paid for its operations and provided troops for its security. The solution suited both interested parties. As Wilde has observed, for Colombia the League's intervention simply facilitated the peaceful hand-over of control of the town to its forces while for Peru it meant that the district would be held in trust pending the wider settlement of the border dispute between the two countries.[85]

[81] R. Wilde, *supra* note 3, at 596
[82] A similar status – that of 'free territory' - was mooted for Trieste after World War II with the United Nations playing an analogous role
[83] M. MacMillan, *supra* note 17, at 206
[84] R. Wilde, *supra* note 3, at 590
[85] R. Wilde, *supra* note 3, at 587-588

In the cases of both Leticia and the Saar international territorial administration was employed as a device to tackle what Ralph Wilde terms "a sovereignty problem".[86] In the Saar the League was empowered by Treaty to establish a neutral Administration designed to preempt a looming dispute over sovereignty.[87] Intriguingly the League Administration was itself mooted as a permanent solution to the problem raising interesting questions about the possible international legal personality of such a putative State.[88] In Leticia the League intervened on its own initiative – another significant precedent - to facilitate the final resolution of a sovereignty dispute already being addressed by the parties concerned.[89]

iii) The Cold War

Post-war idealism and the "united nations" rhetoric which featured in Allied wartime propaganda ensured that the idea of international cooperation was once more in vogue – particularly amongst the minor Powers. Wilson's 1919 proposal that some form of provision be made for direct international government was adopted in spirit by the Chinese delegation at the San Francisco Conference in 1945. Despite initial opposition from all four of the other major powers, the United Nations Organisation was identified in Article 81 of the Charter as a potential Administering Authority under the auspices of the International Trusteeship System.[90] This helped to set the tone for a considerably more proactive international organisation than the League.

Early use of Article 81's endorsement of the United Nations as a potential Administering Authority was made in Libya – albeit outside the Trusteeship System. The Allied Powers' 1947 peace treaty with Italy empowered them to determine the future status of the former Italian colony.[91] The Allies passed the issue onto the General Assembly for consideration and the General Assembly appointed a United Nations Commissioner for Libya who was charged with preparing the territory for independence.[92] In the interim United Nations administered Libya in conjunction with two other Administering Powers – France and Britain. This arrangement lasted until 1951 when Libya successfully gained its independence.

A number of other experiments in international administration were mooted in this early period but never got off the drawing board. Perhaps the most significant concerned a possible solution to the vexed problem of Jerusalem. In November 1947 the UN General Assembly adopted a Resolution on the Future Government of Palestine[93] which assigned the Trusteeship Council responsibility for administering the City on behalf of the UN. In doing so the Assembly was delegating the Council with

[86] R. Wilde, *supra* note 3, at 587
[87] R. Wilde, *supra* note 3, at 589
[88] R. Wilde, *supra* note 3, at 591
[89] R. Wilde, *supra* note 3, at 589
[90] R. Chowdhuri, *supra* note 6, at 57
[91] A. Zimmermann and C. Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo*, Vol. 70 No.4 Nordic Journal of International Law 431 (2001)
[92] A. Zimmermann and C. Stahn, *supra* note 91, at 431-432
[93] UN doc. A/516, 25 November 1947

powers clearly not included in the Charter.[94] The Trusteeship Council was directed to prepare a draft Statute to make Jerusalem a *corpus separatum* under a Special International Regime.[95] The Council's plan provided for a Governor who would be appointed by and report to the Council for an initial three year period.[96] A Legislative Council composed of 25 elected members and no more than 15 nominated members would assist the Governor. The plan was dropped when fighting broke out in the city between Israeli and Jordanian forces during the 1948 war.[97] However, the fact that more than two-thirds of the votes cast in the General Assembly favoured the plan underlined the willingness of the Member States right from the outset to consider using the Trusteeship Council for tasks outside those explicitly stated in the Charter. One must acknowledge that in the shaping of international institutions the votes of members can sometimes equal judicial decisions in significance.[98]

Equally as disappointing as the failure of the Jerusalem proposal was the refusal of South Africa to place its former class 'C' Mandate South West Africa under the International Trusteeship System. South Africa had long harboured ambitions to annex this contiguous territory and with the formal dissolution of the League of Nations in 1946 it seized its opportunity.[99] As a result, the status of South West Africa became something of a *cause celebre* during the Cold War era resulting in four advisory opinions and two judgements from the International Court of Justice (ICJ) which have had an enduring impact on the development of international law in this area.[100]

In its first advisory opinion issued in 1950 the ICJ was asked by the General Assembly to consider whether or not South Africa was obliged to place South West Africa under the UN Trusteeship System. The Court found that it was not compulsory to place a Mandate under the Trusteeship System but neither was South Africa entitled to alter the international status of South West Africa unilaterally.[101] In essence the Court upheld the *status quo ante* emphasising that South Africa remained bound by the obligations laid down by the terms of the Mandate despite the dissolution of the League. Furthermore the Court found that the UN General Assembly had succeeded to the supervisory powers exercised by the League.[102]

Two further advisory opinions followed concerning the manner in which the General Assembly could exercise these powers. Most significantly in 1956 the ICJ found that the General Assembly's Committee on South West Africa could grant oral hearings to petitioners despite that fact that the League Council had never actually exercised this right.[103] South Africa continued to reject the Court's opinions arguing that international supervision of South West Africa had lapsed with the dissolution of the League.

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[94] F. Sayre, *supra* note 63, at 296
[95] H. Duncan Hall, *supra* note 60, at 277 and UN Doc. T/118/Rev. 1, 5 March 1948
[96] *Question of an international Regime for the Jerusalem Area and Protection of the Holy Places*, Special Report of the Trusteeship Council, G.A., O.R., Fifth Session, Supp. No. 9, Doc. A/1286, 1950, Annex II at 19-27
[97] A. Zimmermann and C. Stahn, *supra* note 91, at 431
[98] F. Sayre, *supra* note 63, at 295-296
[99] A. Groom, *supra* note 2, at 164
[100] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, at 328 (Seventh Edition)
[101] A. Groom, *supra* note 2, at 164
[102] A. Groom, *supra* note 2, at 165

In 1960 Liberia and Ethiopia instituted contentious proceedings against South Africa over South West Africa charging that South Africa had violated the terms of its Mandate by introducing *apartheid* into South West Africa. Liberia and Ethiopia argued that *apartheid* was a clear violation of the economic, social and political safeguards designed for the protection of the indigenous peoples laid out in Articles 2 and 22 of the League Covenant.[104] Article 22 in particular guaranteed that the territories would be administered in a manner that would guarantee the "well-being and development of such peoples."[105] Furthermore, Article 2(2) of the actual text of the Mandate Agreement adopted for South West Africa stipulated: "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory."[106]

However, South Africa was successfully – and somewhat scandalously in the eyes of many observers[107] – able to contest the jurisdiction of the Court. In 1966 the ICJ reversed a previous judgement to rule that neither Ethiopia nor Liberia, despite both having been members of the League of Nations, were entitled to enforce rights which did not belong to them. The Court's judgement outraged many in the Developing World who now sought redress through the UN General Assembly.

In October 1966 the General Assembly passed Resolution 2145 (XXI) which declared that South Africa had "failed to fulfill its obligations" towards South West Africa. The Assembly identified breaches of the Mandate, the UN Charter and the *Universal Declaration on Human Rights*.[108] Invoking its status as the League's legal successor the Assembly terminated South Africa's mandate forthwith and placed South West Africa under "the direct responsibility of the United Nations." The United Nations Council for South West Africa was established by Resolution 2248 in May 1967 to administer the territory but its entry into the territory was blocked by South Africa which refused to accept the withdrawal of its mandatory power.

In 1971 the ICJ issued an advisory opinion which confirmed that the General Assembly had succeeded to the League's supervisory powers and had acted lawfully in terminating South Africa's mandate. The Court advised that South Africa was under a duty to withdraw from South West Africa (now renamed Namibia by a further General Assembly resolution) but it wasn't until 1990 that South African forces finally withdrew under UN supervision.[109]

Although South West Africa/Namibia never actually became the subject of an international territorial administration it was clearly the General Assembly's intention that it should - Groom describes Namibia as a Trust Territory *manqué*.[110] Furthermore, the legacy of the *South West Africa* family of

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[103] A. Groom, *supra* note 2, at 165
[104] A. Groom, *supra* note 2, at 165
[105] P. Anker, *The Mandates System: Origin, Principles, Application*, at 52 (1945)
[106] P. Anker, *supra* note 105, at 52
[107] A. Groom, *supra* note 2, at 165
[108] A. Groom, *supra* note 2, at 165
[109] P. Malanczuk, *supra* note 100, at 329
[110] A. Groom, *supra* note 2, at 166

cases is such that a strong *corpus* of law has been developed touching on a number of key aspects of the Trusteeship System including its overall purpose, the powers invested in the General Assembly and the accountability of Administering Authorities.

The UN only made one substantive attempt during the Cold War period to exercise sole executive authority itself and this concerned the disputed territory of Irian Jaya (western New Guinea). Irian Jaya had not been included in the Transfer of Sovereignty over the Dutch East Indes from the Netherlands to the independent government of Indonesia in 1949. In a claim based largely on the principle of *uti possidetis* the Indonesian government asserted its right to the territory while the Dutch favoured allowing the inhabitants of Irian Jaya to exercise self-determination.[111] In a long running dispute one potential solution that was given serious consideration was a Malaysian proposal in 1960 that a trusteeship be created for the territory under the joint supervision of the Netherlands, Australia and Malaysia.[112] The proposal received qualified Dutch approval but was rejected by Indonesia on the grounds that "the logical end of a UN trusteeship was independence."[113]

Consideration of the Irian Jaya question coincided with an upswell in international interest in the principle of self-determination and the *Declaration of the Granting of Independence to Colonial Countries and Peoples*[114] passed by the General Assembly in 1960 had genuine impact on States' attitudes to the issue. In the teeth of strong opposition from the Indonesian authorities, the Netherlands declared that it would be prepared to terminate its sovereignty over the territory provided that the indigenous people's right to self-determination was safeguarded by a UN interim administration.[115]

The Dutch proposal was accepted by the international community but enormous pressure was placed on the Dutch to accept concession after concession aimed at appeasing the Indonesians. The United States was especially keen to win over Indonesia as potential South East Asian ally and the end result was a political process heavily weighted in favour of an outcome that would ensure the territory became part of Indonesia.[116]

The United Nations Temporary Executive Authority (UNTEA) was created by the General Assembly to manage the transitional period that would follow the withdrawal of the Dutch colonial authorities.[117] UNTEA was to run for just seven months from October 1962 to May 1963 after which it would be succeeded by an Indonesian administration. A plebiscite on the territory's future would not be held for further six years at which time it would be conducted under Indonesian supervision with the UN acting only in an advisory role.[118] The process was designed to ensure that Indonesia had all the time it needed to create the conditions which would ensure a vote in favour of Irian Jaya remaining part of

[111] A. Groom, *supra* note 2, at 166
[112] A. Groom, *supra* note 2, at 166
[113] A. Groom, *supra* note 2, at 167
[114] G.A. Resolution 1514 (1960)
[115] A. Groom, *supra* note 2, at 167
[116] A. Groom, *supra* note 2, at 167
[117] M. Matheson, *United Nations Governance of Post-conflict Societies*, 95 American Journal of International Law at 77 (January 2001)

Indonesia. When the opinion of the local population was finally sought in 1969 through a series of regional consultative assemblies this was the inevitable result.

The case of Irian Jaya is significant because it provides a working example of how the Trusteeship System was seriously considered as a potential solution to resolving a dispute over contested territory. The main reason why this course of action was not pursued was the strong opposition of one of the countries 'directly concerned' in the dispute and the fact that it was supported in this by a global superpower looking to pursue its own strategic interests in the region.[119]

iv) The Post Cold War Period

The end of the Cold War heralded a new era in international cooperation and the United Nations was in the forefront exercising its authority in a variety of new and imaginative ways to address a wide range of conflicts and humanitarian challenges.[120] However, these new challenges came at a time when the UN Trusteeship Council had almost completely disappeared from the international scene. Of the Trusteeship Agreements concluded after the Second World War all but one had long been terminated.[121] The Council was widely regarded as being as much a relic of a bygone era as the old colonial regimes it had helped to supplant and little serious thought had been given to finding it a new role in a rapidly changing world.[122] In the words of A. J. R. Groom the Trusteeship Council was "comatose but not yet quite dead."[123] Indeed some even suggested that the time had come to pull the plug – the United States proposed at the 50th Assembly in 1995 that the Charter Committee begin the termination process.[124]

In the 1990s all eyes in the diplomatic community were on the Security Council. Such action that was taken by the UN was done either with the consent of the state or states involved or by invoking Chapter VII of the UN Charter.[125] Either way it was the Security Council that provided the international community with leadership. In 1993 alone the Security Council passed 93 resolutions compared to an average of 15 a year between 1945 and 1988.[126]

The 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia involved the United Nations in its first full-scale exercise of governance. The leading Cambodian political factions agreed to delegate various aspects of governmental authority – including foreign affairs,

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[118] A. Groom, *supra* note 2, at 168
[119] A. Groom, *supra* note 2, at 169
[120] M. Matheson, *supra* note 117, at 76
[121] B. Simma (Ed.), *The Charter of the United Nations: A Commentary* 938-939 (1994)
[122] In fairness, the Government of Malta did circulate an *aide memoire* in 1996 suggesting rather vaguely that the Trusteeship Council move into new domains that would benefit its "essential characteristic as depository of the principle of Trust." In response to the Maltese initiative, a former President of the General Assembly issued a note entitled *A New Concept of Trusteeship* in which he suggested that the Trusteeship Council could become a forum through which Member States could exercise their collective Trusteeship for the environment and other matters of global concern. These proposals both seem to have since died a quiet death.
[123] A. Groom, *supra* note 2, at 175
[124] C. Willson, *supra* note 1, at 122
[125] M. Matheson, *supra* note 117, at 76
[126] W. Shawcross, *Deliver Us From Evil: Warlords and Peacekeepers in a World of Endless Conflict* at 32 (2000)

finance, public order and defence - to the UN Transitional Authority in Cambodia (UNTAC) established by the Security Council.[127] The fact that thirty years earlier UNTEA had been created by the General Assembly underlined just how much power the Security Council had accrued in the interim.

In the course of the next decade the Security Council was to take the lead time and time again to try to end conflicts, disarm hostile forces, resolve boundary issues, restore order, punish war criminals and ensure the delivery of humanitarian aid. As a consequence of the Dayton Peace Agreement the territories of Eastern Slavonia, Baranja and Western Slavonia in Croatia were placed under UN administration from 1996-1998.[128] A UN force deployed to Haiti to secure the replacement of the military regime with the democratically elected government of President Aristide.[129] The Security Council authorised an American led Unified Task Force (UNITAF) to use "all necessary means to establish… a secure environment for humanitarian relief operations in Somalia."[130]

The UN missions mentioned above comprise only a sample of the disparate "governance problems" that the UN tackled between 1988 and 1998 with a response that can be said to embody aspects of international territorial administration.[131] Yet my research has been unable to establish one instance in this period in which a serious suggestion was made by any government to enlist the aid of the Trusteeship Council. An academic debate was sparked off in 1992 by Gerald Helman and Steven Ratner's seminal article *Saving Failed States*. However, initially at least, the article attracted more interest because of its identification of state failure as a growing problem than for its "radical" suggestion that resurrecting the Trusteeship System might be one possible solution.[132]

This was all to change with the eruption of the Kosovo conflict in 1999. Within months of the taking on the task of governing and rebuilding Kosovo, the United Nations found itself engaged in a second similar task of comparable complexity in East Timor. Michael Bothe and Thilo Marauhn have described the UN interventions in Kosovo and East Timor as examples of "Security Council-Mandated Trusteeship Administrations."[133] The UN was back in the State-building business with a vengeance and commentators began to look at dusting off the Trusteeship Council as possible mechanism for meeting this new challenge.

I propose to discuss the United Nations interventions in Kosovo, East Timor and Somalia in more detail in Part III below.

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[127] M. Matheson, *supra* note 117, at 77
[128] R. Wilde, *supra* note 3, at 586
[129] M. Matheson, *supra* note 117, at 77
[130] UN Doc. S/RES/794 (1992)
[131] See R. Wilde, *supra* note 3, at 592-602
[132] G. Helman and S. Ratner, *Saving Failed States*, 89 Foreign Policy 16 (Winter 1992-93)
[133] M. Bothe and T. Marauhn, *UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration*, in Ed. C. Tomuschat, *Kosovo and the International Community* at 217 (2002)

e) Non-Self-Governing Territories

Although the history of colonialism - and therefore by logical extension decolonialism – is in many ways entwined with concepts of trusteeship I do not propose to dwell in any detail on Chapter XI of the UN Charter in this paper. Articles 73 and 74 of the UN Charter aim to commit Members State with colonial possessions or non-self-governing territories (NSGTs) to the same principles of good stewardship espoused by the Trusteeship System. The articles substantially differ only in committing colonial powers to nurturing subject peoples towards self-government rather than self-government or independence.

The first territories designated NSGTs were those voluntarily admitted to the UN regime by Australia, Belgium, France, the Netherlands, New Zealand, the United Kingdom and the United States.[134] However, when two new Member states – Portugal and Spain – refused in the 1950s to voluntarily comply with Chapter XI the General Assembly set out criteria for identifying NGSTs in Resolution 1541 (XV) of 1960.[135] Since this date the General Assembly has reserved the right – through a Special Committee - to designate certain territories NGSTs despite the opposition of the colonial or occupying power.

The Trusteeship System can claim some success in the area of NSGTs in that it exercised a benign influence on the coming to independence of practically all colonial territories.[136] The UN Trusteeships set a moral standard that the colonial powers had to match or be exposed to international criticism and in this respect the Trusteeship System became part of a wider movement to make formal colonialism "a relic of history".[137]

PART II: KEY PRINCIPLES OF TRUSTEESHIP

As Judge McNair of the ICJ observed in his Separate Opinion in the *South West Africa Case*: "nearly every legal system possesses some institution whereby the property (and sometimes the persons) of those who are not *sui juris*… can be entrusted to some responsible person as a trustee."[138] As discussed above international law is no exception. The legal framework of the UN Trusteeship System is laid down in Chapters XII and XIII of the UN Charter. In this Section I propose to examine the key principles that underpin trusteeship as they can be identified in the text of the Charter and from the subsequent operation of the Trusteeship System.

[134] T. Grant, *Extending Decolonization: How the United Nations Might have Addressed Kosovo*, 28 Georgia Journal of International and Comparative Law 27 (1999)
[135] T. Grant, *supra* note 134, at 28
[136] A. Groom, *supra* note 2, at 175
[137] A. Groom, *supra* note 2, at 142-143
[138] Separate Opinion by Sir Arnold McNair, *Advisory Opinion on South West Africa*, ICJ Reports (1950) at 149

a) Positive Development

"*The well-being and development of such peoples form a sacred trust of civilisation.*"[139]

The UN Trusteeship System takes Article 22 of the Covenant of the League of Nations and Article 1 of the UN Charter as its point of departure.[140] The core aims of the Trusteeship System are enumerated in Article 76 of the UN Charter as the furtherance of international peace and security; the promotion of political, economic, social and educational advancement; progressive development towards self-government or independence; respect for human rights and equal administration of justice.

It is clear from Article 76(a) that the Charter regards the establishment of the UN Trusteeship System as a means for further ensuring "international peace and security."[141] It is therefore the duty of the Administering Authorities to defend the territorial integrity of the Trust Territories under their stewardship from external aggression and to maintain public order internally.[142]

As Bruno Simma *et al* identified in their commentary on the UN Charter, "advancement is the main objective of the Trusteeship System."[143] The reference in Article 76(b) to "freely expressed wishes of the people" clearly indicates that the particular type of political advancement the Administering Authority is expected to foster should be based on democratic principles.[144] The Trusteeship Council was scrupulous in promoting this standard from the start recommending as early as 1948 that the Administering Authorities in Ruanda Urundi and Tanganyika should take immediate steps to effect a transition from tribal to modern political institutions based on electoral systems.[145] Similar recommendations followed in 1949 for the British Cameroons, Togoland and New Guinea.[146]

A territory can hardly be politically independent without a degree of economic independence and self-sufficiency but in pursuing the economic advancement of Trusteeship Territories Administering Authorities tread a difficult path been development and exploitation.[147] Most of the Trusteeship Agreements contain certain provisions for keeping the land and its natural resources in the hands of the local population.[148] The Trusteeship Agreement for Italian Somaliland goes further laying down Italy's economic commitments more precisely up to and including developing transportation and communication links.[149]

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[139] Article 22, Covenant of the League of Nations, http://www.yale.edu/lawweb/avalon/leagcov.htm, 27 July 2002
[140] B. Simma (Ed.), *supra* note 121, at 939-940
[141] B. Simma (Ed.), *supra* note 121, at 940
[142] C. Lakshmi-Narayan, *Analysis of the Principles and System of International Trusteeship in the Charter*, Thesis, L'Université de Genève (1951) at 144
[143] B. Simma (Ed.), *supra* note 121, at 940
[144] C. Lakshmi-Narayan, *supra* note 142, at 122
[145] C. Lakshmi-Narayan, *supra* note 142, at 123
[146] C. Lakshmi-Narayan, *supra* note 142, at 123
[147] C. Lakshmi-Narayan, *supra* note 142, at 125
[148] B. Simma (Ed.), *supra* note 121, at 942
[149] B. Simma (Ed.), *supra* note 121, at 942-943

Political and economic development would be fairly empty achievements if they were to come without social and educational improvements. Although this is not area that features in any great detail in most Trusteeship Agreements, it is to achievements in this field that Administering Authorities most often point to. The Trusteeship Agreement for Italian Somaliland is an exception giving a valuable insight into the positive changes that can be expected: slavery and child marriage is to be abolished, the sale of drugs, alcohol and firearms controlled and hospitals built.[150] In the education sector similar improvements can be cited – in Tanganyika the number of children in school increased from 35,000 in 1937 to 400,000 when the Trusteeship was terminated in 1960. In French Cameroons the figure was 100,000 in 1937 and 370,000 in 1961.[151]

Trusteeship Agreements are more explicit when it comes to the promotion of human rights and fundamental freedoms. Each agreement specifically guarantees freedom of speech, freedom of the press, freedom of assembly and the right of petition, freedom of conscience and freedom of worship.[152]

Finally, Article 76(b) also commits the Administering Authority to ensuring "progressive development towards self-government or independence." As Francis Sayre has observed the population of a territory may wish to exercise their right to self-government in one of three ways: independence, local autonomy within a larger association of some kind or even assimilation into a larger sovereign State.[153] The key question is at what stage the population of the Trust Territory can chose to exercise this right. This issue was to become a major source of tension between the Administering Powers and many countries in the developing world who, to prevent systemic abuse, sought to set some form of time limit on the Trusteeship Agreements.[154] Although the Permanent Mandates Commission of the League of Nations had given some thought to the issue, the UN never sought to define the point at which a Trust Territory could be said to have matured into a State.[155] In the event, no termination deadlines were imposed on the Trusteeship Agreements concerning the former League mandates but one of ten years was imposed on the Italian administration of Somaliland.[156] One can reasonably conclude from the operation of the Trusteeship Council that there is an expectation that Trusteeships should be concluded at the earliest viable opportunity subject to the concurrence of the indigenous population.

b) Eligibility

Article 77 of the UN Charter provides for three categories of territories eligible for Trusteeship. Article 77(1)(a) identified those territories which had been placed under the Mandates System. Article 77(1)(b) those territories that had formerly been controlled by the defeated powers of World War II. Article 77(1)(c) opened the door to any territory brought under the system voluntarily by the states responsible for their administration. It is this latter provision which constitutes the most adequate legal basis for the

[150] B. Simma (Ed.), *supra* note 121, at 943
[151] B. Simma (Ed.), *supra* note 121, at 943
[152] B. Simma (Ed.), *supra* note 121, at 947
[153] F. Sayre, *supra* note 63, at 281
[154] R. Chowdhuri, *supra* note 6, at 246-253
[155] B. Simma (Ed.), *supra* note 121, at 944
[156] B. Simma (Ed.), *supra* note 121, at 945

modern exercise of trusteeship[157] and thus merits further attention below. Eleven territories in all were placed under the Trusteeship System. Of these ten were former Mandates of the League of Nations. The Italian colony of Somaliland was the territory detached from a defeated protagonist of World War Two. To date no state has ever made use of Article 77(1)(c) to voluntarily place a dependent territory under the Trusteeship System.

c) Consent

"*In our state of dependency, we would have greatly preferred some form of international supervision to none*."[158]

Ramendra Chowdhuri has identified Article 77(1)(c) as the most distinctive feature of the International Trusteeship System.[159] Between 1945 and 1947 a number of interested parties – for the most part progressive writers on international affairs – suggested cases in which use could be made of this article. Owen Lattimore advocated temporary trusteeship for Indonesia and Iran – despite the fact that Iran was already a member of the United Nations by this time.[160] Similar suggestions were made regarding Puerto Rico, the Ruhr, India and Trieste.[161] Clearly size – great or small - was no bar to a territory being considered. The Council itself received a series of general petitions relating to the Polar Regions which it rejected in 1947.[162] Charles Pelton submitted an ambitious and comprehensive plan for internationalizing all dependent areas of the world.[163] In August 1945 a British Labour Party MP, Henry Hynd, publicly pressed the British government to place some of the crown colonies voluntarily under the Trusteeship System.[164]

However, the only serious government-backed attempt to promote the use of Article 77(1)(c) was made by India whose delegate to the UN, Sir Maharaj Singh, described the International Trusteeship System as: "The surest and quickest means of enabling the peoples of dependent territories to secure self-government or independence." At the first session of the General Assembly India sponsored a draft resolution seeking to establish if any of the states administering dependent territories intended to place them under the International Trusteeship System. The resolution failed to garner adequate support.

India was not to be discouraged so easily. In the Fourth Committee of the Second Session the following year Sir Maharaj Singh introduced a new resolution aimed at encouraging the colonial powers to consider voluntarily placing "relatively backward" territories and colonies afflicted by racial discrimination under the "progressive and impartial" supervision of the United Nations. This second Indian resolution provoked a storm of protest from the colonial powers but was nevertheless adopted

[157] E. Franckx et al, *An International Trusteeship for Kosovo: An Attempt to Find a Solution to the Conflict*, Vol. LII No. 5-6 Studia Diplomatica 157 (1999)
[158] Sir Maharaj Singh as quoted by R. Chowdhuri, *supra* note 6, at 142
[159] R. Chowdhuri, *supra* note 6, at 139
[160] O. Lattimore, "The Issue in Asia, A.A.A.P.S., Vol. CCXLVI (July 1946) as quoted by R. Chowdhuri *supra* note 6, at 139
[161] R. Chowdhuri, *supra* note 6, at 139
[162] T.C., O.R., Second Session, First part, Supp., Docs. T/PET/GEN/11, 15-18, June-September 1947, at 210-224
[163] T.C., O.R., Second Session, First part, Supp., Doc. T/PET/GEN/14, 28 March 1947, at 216-218

by the Fourth Committee.[165] On 1st November 1947 the resolution was hotly debated at the plenary meeting of the 2nd General Assembly where it was finally defeated by a tie vote of 24 to 24 with one abstention. This vote sounded the death knell for Post War hopes that the usefulness of the Trusteeship Council might be extended through Article 77(1)(c).

Article 79 also touches on the issue of consent. Article 79 states that the terms of trusteeship for each territory to be placed under the Trusteeship System must be agreed upon by "the states directly concerned." This Article perforce makes a state a necessary party to a Trusteeship Agreement to such an extent that any alteration or termination of such an Agreement must be made with its consent.[166] Clearly any state entitled to dispose of sovereign rights over a territory is "directly concerned." However, the fact that the Article also makes reference to "states" plural in this context opens the door for states that do not enjoy any measure of authority over a putative Trust Territory to register an interest in the manner of its administration. Ethiopia asserted its right in this regard during the framing of the Trusteeship Agreement for Somaliland.[167] As discussed above a consideration of this nature was also one of the main reasons the international community rejected the Malaysian proposal to create a UN Trusteeship for the Dutch colony of Irian Jaya in the face of Indonesian objections.[168]

d) Accountability

"It is the very essence of every trust to be rendered accountable."[169]

The Trust System is based on the relationship between the Trust Territory, the Administering Authority and the United Nations acting as the Supervising Authority.[170] In practice the Administering Authority has always been a State – or in the case of Nauru, three States – but Article 81 also provides that the UN itself can act as both Supervising and Administering Authority. Although technically feasible this would clearly raise a number of concerns regarding impartial oversight which would have to be met by the terms of any such Trusteeship Agreement.

The Trusteeship System introduced stronger supervisory mechanisms than those of the League under the aegis of the General Assembly assisted by a Trusteeship Council made up equally of Administering Powers and Non-Administering Powers. The Council's status as a "principal organ" of the United Nations Organisation gave its recommendations enhanced weight.

Articles 87 and 88 of the UN Charter laid out three basic oversight mechanisms with emphasised the level of co-operation that was expected between the General Assembly, Trusteeship Council and its Administering Authorities. The first of these, stipulated by Article 87(a), was simply the scrutiny of the

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[164] R. Chowdhuri, *supra* note 6, at 140
[165] R. Chowdhuri, *supra* note 6, at 141
[166] B. Simma (Ed.), *supra* note 121, at 953
[167] B. Simma (Ed.), *supra* note 121, at 954
[168] A. Groom, *supra* note 2, at 166
[169] Edmund Burke, *Speech on Mr Fox's East India Bill*, 1 December 1793 as quoted by N. Tsagourias, *supra* note 10, at 97
[170] E. Franckx et al, *supra* note 157 at 155

annual reports submitted by the Administering Authorities to a template designed by Trusteeship Council pursuant to Article 88 to monitor the "political, economic, social and educational advancement of the inhabitants of trust territories."[171]

Article 87(b) empowered the Council to accept and examine petitions from the inhabitants of trust territories. The Permanent Mandates Commission had accepted certain written petitions but had refused to hear oral petitioners.[172] The Trusteeship Council received both written and oral petitions - albeit in consultation with the Administering Authority – from both inhabitants of Trust Territories and "other parties".[173] In practice, it is probably fair to say that as most petitioners did not understand the constitutional limits on the Council's action they were disappointed with its decisions.[174] However, this should not in itself be seen to devalue the petition mechanism.

The Mandatory Powers had successfully resisted proposals that the Permanent Mandates Commission mount regular visits of inspection[175] but Article 87(c) of the UN Charter ensured that Visiting Missions became a regular feature of the Trusteeship System.[176] As Chetlur Lakshmi-Narayan has observed, the Missions amounted to "a projection of the Trusteeship Council and its supervisory activities into the Trust Territories" and there is little doubt about their positive effect.[177] For example, the 1948 report of the Visiting Mission for Ruanda-Urundi and Tanganyka led to the Trusteeship Council recommending to the Administering Authority of Ruanda-Urundi review its legislation to abolish all traces of racial discrimination.[178] The reports of Visiting Missions to Western Samoa, Ruanda-Urundi, Togoland, Cameroons and New Guinea led to two General Assembly Resolutions – Resolutions 323(IV) and 440(V) – "recommending" the abolition of corporal punishment in British-administered Trust Territories.[179]

The experience of the Island of Nauru provides an excellent demonstration of how much more engaged the international community was in the fate of the indigenous peoples under the Trusteeship System. Nauru is a source of extremely rich phosphate deposits – a very valuable component of fertilizer. It was annexed by Germany in 1888 and after the First World War became a 'C' class mandate of the British Empire.[180] Because of the potential value of the island's mineral deposits Australia, New Zealand and Britain all vied for practical control of the territory – the profits from which were eventually shared three ways under the terms of the Nauru Island Agreement concluded between the three Powers.[181]

[171] B. Simma (Ed.), *supra* note 121, at 966
[172] The PMC made a point of reserving the right to hear oral petitioners but in the event never made use of it. H. Duncan Hall, *supra* note 60, at 198-204.
[173] B. Simma (Ed.), *supra* note 121, at 967
[174] G. Thullen, *Problems of the Trusteeship System: A Study of Political Behaviour in the United Nations* at 77 (1964)
[175] H. Duncan Hall, *supra* note 60, at 204
[176] C. Lakshmi-Narayan, *supra* note 142, 185-189
[177] C. Lakshmi-Narayan, *supra* note 142, 187
[178] C. Lakshmi-Narayan, *supra* note 142, 187
[179] C. Lakshmi-Narayan, *supra* note 142, at 138
[180] A. Anghie, *supra* note 5, at 450-451
[181] A. Anghie, *supra* note 5, at 451

After the Second World War, and a period of occupation by Japan, the trusteeship for Nauru was awarded to Australia. The Nauruans quickly became dissatisfied with their minimal involvement in the political and economic life of the island. Following UN criticism of the manner in which Australia was administering the island the Nauru Local Government Council (NLGC) was formed in 1951.[182] Australia was keen to persuade the Nauruan people to agree to be resettled elsewhere to allow for the complete exploitation of the mineral deposits. Although the Nauruans did enter into negotiations in August 1964 Head Chief Hammer DeRoburt declared their intention to remain on the island.[183]

The Nauruans' decision raised the issue of who was going to be responsible for rehabilitating mined land for native use. In December 1965 the General Assembly reaffirmed the "inalienable right of the people of Nauru to self-government and independence" and resolved that Australia should take immediate steps to restore the island "for habitation by the Nauruan people as a sovereign nation."[184] The General Assembly's intervention – coupled with pressure from the Nauruans themselves – resulted in the formation of the Nauruan Legislative Council in 1966[185] and in 1967 the partner governments (Britain, Australia and New Zealand) sold the phosphate industry to the NLGC.[186] In January 1968 the Trusteeship was terminated and Nauru became an independent State. It is not too fanciful to claim that the General Assembly acting through the oversight mechanisms of the Trusteeship System played a major role in securing the Nauruans' island home and in ensuring their progress towards independence despite the reluctance of the Administering Power.

In June 1992, in a landmark decision, the ICJ ruled that it had jurisdiction to hear the *Certain Phosphate Lands in Nauru Case* – the first case in which a former dependent territory has brought action against an Administering Power.[187] Approximately 1/3 of the island was mined out while it was under Australian administration. The Nauruans claimed that Australia had failed to make any provision to rehabilitate the land it had mined or to ensure that the Nauruans received proper compensation for the deposits extracted.[188] They now sought restitution.

In the event the *Nauru Case* was settled by a "Compact of Settlement" between Australia and Nauru signed on 10 August 1993 under which Australia agreed to pay Nauru compensation amounting to A$107m. Of this A$2.5m will go each year for the next twenty years to jointly agreed rehabilitation and development projects. Australia requested that both Britain and New Zealand contribute to the settlement.[189]

[182] A. Anghie, *supra* note 5, at 452
[183] A. Anghie, *supra* note 5, at 459
[184] G.A. Res. 2111 (XX), U.N. GAOR, 20th Session, 1407th plen. mtg. (1965)
[185] A. Anghie, *supra* note 5, at 469
[186] A. Anghie, *supra* note 5, at 452
[187] Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 ICJ 240 (June 26) (Preliminary Objections, Judgement)
[188] A. Anghie, *supra* note 5, at 446
[189] A. Anghie, *supra* note 5, at 506

e) Legal Status

"We can no more speak of the sovereignty of an Administering Power over a non-self-governing-territory than we can of a guardian's ownership of his ward's property."[190]

Ramendra Chowdhuri identified the question of where sovereignty resided within the Trusteeship System as "one of the most complex legal problems" that the Trusteeship System had inherited from the Mandates System.[191] He identified six disparate theories that had attracted some support over the years:

1. Sovereignty rests with the Principal Allied Powers;
2. Sovereignty rests with the League or the United Nations;
3. Sovereignty rests with the Mandatory or Administering Authority;
4. Sovereignty rests with the indigenous inhabitants of the territory;
5. The theory of joint-sovereignty;
6. The theory of suspended sovereignty.

Chowdhuri felt that only theories 4 and 6 contained much merit. He noted that the theory that sovereignty ultimately rested with the indigenous people had attracted strong support from the Fourth Committee of the UN General Assembly.[192] The theory was also expressly endorsed by Article 1 of the *Declaration of Constitutional Principles* which forms an integral part of the Trusteeship Agreement for Italian Somaliland.[193]

However, although sovereignty might ultimately rest with the indigenous population it is also manifestly clear from the very nature of the Trusteeship System that they are not yet in a position to exercise it. Thus Chowdhuri argues that the theory of suspended sovereignty as first articulated by Campbell Lee comes closest to the generally accepted view: "The sovereignty of a Mandates area is in suspense pending the creation of a new state, pending the time when the people are able to stand alone."[194]

More recent – and more authoritative - support for this view comes from Judge McNair and Judge Ammoun of the ICJ. In the *International Status of South West Africa Case* of 1950 McNair argued in a Separate Opinion that the Mandates System and Trusteeship System had created "a new species of international government which does not fit into the old conception of sovereignty."[195] In McNair's opinion sovereignty over a mandated territory lay in abeyance: "If and when the inhabitants of the

[190] Trujillo of Ecuador speaking at the Plenary Meeting of the 9th Assembly, UN Doc. A/PV. 485, 1 October 1954 at 146
[191] R. Chowdhuri, *supra* note 6, at 229
[192] R. Chowdhuri, *supra* note 6, at 234
[193] R. Chowdhuri, *supra* note 6, at 234
[194] D. Campbell Lee, *The Mandates for Mesopotamia and the Principle of Trusteeship in English Law*, at 19 (1921)
[195] ICJ Reports, *Advisory Opinion on South West Africa*, at 150 (1950)

territory obtain recognition as an independent State… sovereignty will revive and vest in the new state."[196] In the interim what McNair felt really mattered were the rights and duties of the Mandatory in regard to the territory being administered by it.[197]

In the context of the ICJ's 1971 Advisory Opinion on Namibia Judge Ammoun issued a Separate Opinion in which he argued that in the colonial or Mandate paradigms, "virtual sovereignty" resided in the people who were deprived of it by foreign domination or tutelage. He maintained that sovereignty was inherent in every people, including those subject to Mandate, and that in such circumstances sovereignty had simply been temporarily deprived of freedom of expression.[198]

However, with sovereignty in suspension it does not necessarily follow that Trust Territories are entirely devoid of international legal personality. Since the UN Charter brought Trust Territories into existence it inevitably follows that they must possess a certain international legal personality.[199] Furthermore, this legal personality is clearly distinct from that of the Administering Power whose authority over the territory is constrained by the terms of the Trusteeship Agreement. As the ICJ highlighted in its *Advisory Opinion on the International Status of South West Africa* the indigenous peoples of Trust Territories enjoy passive rights that are not dependent on the bounty of the Administering Authority.[200] However, it is equally clear that Trust Territories do not enjoy the same active rights as fully-fledged States. Trusteeship Territories have not been able to enter into bilateral agreements with States. Trust Territories cannot become members of international conventions or indeed Trusteeship Agreements – such as the eight Agreements concluded in December 1946 demonstrate.[201] Judge McNair's description of Trusteeship Territories as "a new species of international government" seems unimpeachable.

PART III: CONTEMPORARY CHALLENGES

In 1939 nine colonial powers controlled 150 territories inhabited by 650 million people. Within 25 years the great colonial empires had disappeared almost without trace.[202] The end of the Second World War ushered in the era of decolonialism and self-determination of peoples resulting in a "vast proliferation" of new States but in the rush to self-government little thought was given to their long-term survivability.[203] Nowhere can this attitude be seen more clearly than in the text of the *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 1960 which explicitly states that "inadequacy of political, economic, social and educational preparedness should

[196] ICJ Reports, *Advisory Opinion on South West Africa*, at 150 (1950)
[197] ICJ Reports, *Advisory Opinion on South West Africa*, at 150 (1950)
[198] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, ICJ Reports (1971), at 69
[199] B. Simma (Ed.), *supra* note 121, at 937-938
[200] Advisory Opinion on the International Status of South West Africa , ICJ Reports (1950), at 150
[201] B. Simma (Ed.), *supra* note 121, at 937
[202] R. Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, American University Journal of International Law and Policy 953 (1997)
[203] G. Helman and S. Ratner, *supra* note 132, at 3

never serve as a pretext for delaying independence."[204] Against a majority in the General Assembly eager to consign all vestiges colonialism to the 'dustbin of history' even the Trusteeship System could not protect territories from premature statehood. This was starkly illustrated in the General Assembly decision terminating the Trusteeship Agreement for Ruanda-Urundi which was obliged to authorise the expenditure of US$2m "to ensure the continuation of essential services in the two countries" at the very moment that they were supposedly now able 'to stand by themselves.'[205]

The *status quo* enforced by the competing superpower blocs during the Cold War ensured that no matter how bankrupt and ineffectual a State it could find a backer on one side or the other prepared to underwrite its continued existence. However, with the end of the Cold War in the late 1980s this financial assistance dried up and those states with links to the Soviet Bloc were particularly hard hit.[206] Worse was to come. The disintegration of the Soviet Union and Yugoslavia created almost 20 new states many with disputed borders and unsettled nationalistic grudges against their neighbours.[207] The Secretary-General of the United Nations, Boutros Boutros-Ghali, responded to the changing global situation in June 1992 in a report entitled *An Agenda for Peace* in which he identified "post-conflict peace-building" as a new priority for the Organisation.[208] The Secretary-General's chosen medium for pursuing his agenda was the Security Council with its Chapter VII powers to "maintain international peace and security." His report made no mention of a role for the Trusteeship Council. The purpose of this Section is to examine three scenarios that that typify the challenges the Security Council has faced in the post-Cold War era, examine how the Security Council has tackled them and then assess whether or not there might have been a role for the Trusteeship Council.

a) State Failure

"Somalia confronted the United Nations with the reality that it is sometimes not enough to unload aid and expect a problem to right itself."[209]

The term "failed State" was coined by Gerald Helman and Steven Ratner as a label for a disturbing new phenomena - the total breakdown of a state without some other "centralised entity" emerging in its place to claim statehood.[210] In the absence of a holistic solution - such as might theoretically be offered by bringing the 'failed state' under a UN supervised trusteeship - the international community has struggled to find an appropriate response, more often than not pursuing a series of piecemeal initiatives which at best alleviate some humanitarian suffering but fail to address the underlying issues behind the

[204] G. A. Res. 1514 (XV), Dec. 14, 1960
[205] G. A. Res. 1746 (XVI), Jun. 27, 1962
[206] G. Helman and S. Ratner, *supra* note 132, at 4
[207] G. Helman and S. Ratner, *supra* note 132, at 5
[208] *An Agenda For Peace*, para. 5 (DPI/1247, 1992)
[209] K. Annan, *Peacekeeping in Situations of Civil War*, New York Journal of International Law and Politics 625 (Summer 1994)
[210] R. Gordon, *Some Legal Problems with Trusteeship*, 28 Cornell International Law Journal 333 (1995)

State's collapse.

Somalia has been described as the "textbook example" of a failed nation-state[211] and as a society that has reverted to the primal Hobbesian condition of *bellum omnium contra omnes*.[212] It has lacked any form of centralised government since 1991 – a fact formally acknowledged by a British Court in 1993.[213] At least two former provinces have managed to establish and maintain autonomous but unrecognised statelets (Somaliland and Puntland). There are no foreign diplomatic missions in Mogadishu and Somalia has not participated in UN General Assembly voting for almost 10 years. It does not even appear to be represented on regional intergovernmental bodies such as the Organisation of African Unity (OAU). To all intents and purposes Somalia has ceased to operate on the international plain.[214] Despite the fact that it possesses neither an effective government nor the apparent capacity to enter into relations with other States – two of the four generally accepted qualifications for statehood set out in Article 1 of the *Montevideo Convention* of 1933[215] - the notional Somali state has remained the focus of the international community's engagement with the territory.

The UN presence in Somalia was established with Security Council Resolution 751 of April 1992 which created UNOSOM.[216] UNOSOM was conceived as a classical peacekeeping mission seeking to uphold a tenuous cease-fire between a plethora of anarchic warring parties through diplomatic agreement and to provide a degree of security for the distribution of humanitarian aid. The mission had only a limited impact on what was rapidly becoming an acute humanitarian catastrophe.[217]

UNOSOM was succeeded in December 1992 by UNITAF, an American led Unified Task Force, authorised under Chapter VII to use "all necessary means to establish… a secure environment for humanitarian relief operations in Somalia."[218] UNITAF's intimidating presence effectively compelled the leaders of the various Somali factions to sign a general cease-fire agreement in Addis Ababa in January 1993. A further UN-sponsored *Conference on National Reconciliation* in March 1993 led to an agreement on a transitional period of two years during which it was planned a Transitional National Council (TNC) supported by regional and district councils would run the country and prepare a new constitution.[219]

In March 1993 the Security Council adopted Resolution 814 creating UNOSOM II an enormously ambitious project firmly in the spirit of *An Agenda for Peace*.[220] It was envisaged that the mission would address the situation in Somalia on three interdependent levels: humanitarian, political and

[211] R. Gordon, *supra* note 210, at 306
[212] D. Thürer, *The "Failed State" and International Law*, 81 International Review of the Red Cross 736 (1999)
[213] N. Wallace-Bruce, *Taiwan and Somalia: International Legal Curiosities*, 22 Queen's Law Journal 478-479 (1997)
[214] See G. Kreijen, *Somalia and the Withdrawal of Recognition*, at 11-13 and 57-59 [unpublished article 2000]
[215] P. Menon, *Some Aspects of the Law of Recognition*, 1 Revue de Droit International 171 (1989)
[216] UN Doc. S/RES/751 (1992)
[217] A. Parsons, *From Cold War to Hot Peace: UN Interventions 1947-1994*, at 199 (1995)
[218] UN Doc. S/RES/794 (1992)
[219] A. Parsons, *supra* note 217, at 202-203
[220] UN Doc. S/RES/814 (1993)

security.[221] If all went according to plan the UN would help create the basic building blocks that would enable the TNC to lead the country firmly back onto the road to recovery. Acting under Chapter VII Resolution 814 invested UNOSOM II with a wide range of responsibilities including providing humanitarian assistance, repatriating refugees and displaced persons, rehabilitating political institutions and the economy, promoting national reconciliation, establishing a national police force and reconstituting the legal system. It is important to note that the UNOSOM II's mandate would be to "assist" in carrying out these tasks and not to impose control from above.

The transition from UNITAF to UNOSOM II took place in the first week of May 1993. In just a few weeks the number of international troops in Somalia was reduced from 37,000 to 28,000 and the number of contributing nations went up from seven to thirty one.[222] The coalition's most powerful partner, the US, withdrew over 15,000 military personnel.[223] The reduction in UN forces encouraged the Somali warlords to start flexing their muscles once more and there was an upsurge in attacks on UN personnel. On 3rd October 1993 18 US Army soldiers were killed when an operation to capture the Somali warlord Mohamed Farah Aideed went very badly wrong.[224] Within days President Clinton announced that the US would withdraw from Somalia by the end of March 1994. Following America's lead the French, Belgian and Swedish contingents all made similar announcements. UNOSOM II staggered on until 3rd March 1995 but most security and political objectives were abandoned during the summer of 1994 in the face of escalating unrest.[225]

UNOSOM II was an intensely ambitious project of a type never attempted before which might be loosely characterised as 'enforced peace-building.' Jarat Chopra has argued that one of the principle reasons that UNOSOM II failed was that it ultimately subordinated political imperatives to military objectives resulting in each development on the ground being met by a military rather than political response.[226] The fact that out of a total of 28,000 mission staff only 200 were allocated to the political tasks entailed by the peace-building approach tells its own story.[227] The advantage of the Trusteeship approach is that it is firmly rooted in principles of governance not security.

b) Disintegrating States

Makau wa Mutua has argued that "the contrived and artificial citizenry of the African State" is the root cause of the continent's ills.[228] Political entities are trapped within arbitrary boundaries drawn up

[221] K. Annan, *supra* note 209, at 625
[222] W. Shawcross, *supra* note 124, at 98-103
[223] W. Shawcross, *supra* note 124, at 98-103
[224] See M. Bowden, *Black Hawk Down: A Story of Modern War* (1999)
[225] R. Cassidy, *Sovereignty versus the Chimera of Armed Humanitarian Intervention*, Flectcher Forum of World Affairs 55-56 (Summer/Fall 1997)
[226] J. Chopra, *Achilles' Heel in Somalia: Learning from a Conceptual Failure*, 31 Texas International Law Journal 519-520 (1996)
[227] J. Chopra, *supra* note 226, at 521
[228] M. Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Michigan Journal of International Law 1113

during the colonial period with little respect for the natural communities that pre-existed the arrival of the western powers. All too frequently Governments have little connection to large portions of their citizenry and this has become a major source of destabilisation. A similar effect could be seen in operation after the end of the Cold War in several of the former communist states of East and Central Europe most notably the Soviet Union and Yugoslavia.

In 1999 almost a decade of conflict in the Balkans culminated in the rump Federal Republic of Yugoslavia (FRY) seeking to 'ethnically cleanse' the formerly autonomous Serbian province of Kosovo of its predominantly ethnic Albanian population.[229] In the largest armed humanitarian intervention of its kind NATO forces conducted a sustained air campaign against the Yugoslav and Serb forces which ultimately forced their withdrawal from the province and led to the subsequent conclusion of the Kosovo Peace Accords of 3rd June 1999.[230]

On 10th June 1999 the Security Council adopted Resolution 1244 establishing a United Nations Interim Administration Mission in Kosovo (UNMIK) to be supported by an international military force (KFOR).[231] The Secretary General was mandated to build an international civil administration with the ultimate goal of creating the political conditions that would allow the Kosovar Albanians to exercise a degree of self-government within the framework of the Federal Republic of Yugoslavia. In the interim the Secretary-General's Special Representative assumed "all legislative and executive authority with respect to Kosovo"[232] although his authority expressly did not extend to KFOR, the military component of the mission.[233]

While UNMIK was responsible for the transitional administration it was also empowered to delegate tasks to other international organisations. The United Nations High Commission for Refugees (UNHCR) was asked to supervise the return of refugees and co-ordinate humanitarian aid efforts, the Organisation for Security and Co-operation in Europe (OSCE) took the lead on democratic governance issues and the European Union (EU) took on the reconstruction of ravaged towns and villages.[234]

KFOR was empowered by Resolution 1244 to use "all necessary means" to fulfil its own distinct responsibilities. These included the demilitarisation of armed groups (primarily the disparate forces of the Kosovo Liberation Army) and the deterrence of any future outbreak of hostilities. Initially, KFOR was also expected to carry out policing tasks, conduct criminal investigations and detain suspects.[235] As Andreas Zimmerman and Carsten Stahn have observed, in the absence of a functioning legal system

(1995)

[229] A. Zimmermann and C. Stahn, *supra* note 91, at 425

[230] A. Zimmermann and C. Stahn, *supra* note 91, at 451-452

[231] UN Doc. S/RES/1244 (1999)

[232] UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999)

[233] A. Zimmermann and C. Stahn, *supra* note 91, at 434. Some commentators have even suggested that the fact that KFOR remains under the unified command of NATO undermines the UN's *de facto* (if not *de jure*) claim to be the ultimate supervisory authority in the province. See E. Franckx et al, *supra* note 157 at 164

[234] M. Matheson, *supra* note 117, at 79-81

[235] A. Zimmermann and C. Stahn, *supra* note 91, at 444-448

suspects had few rights if they were detained by KFOR. Almost a year into the operation of the international presence in Kosovo an OSCE Review of the Criminal Justice System noted that the applicable law inside the province still did not possess a sufficient *habeas corpus* mechanism.[236] Furthermore KFOR personnel enjoyed wide scale immunities under UNMIK regulations and the UN Ombudsperson was not even authorised to receive complaints about alleged abuses committed by KFOR personnel.[237] Basic human rights standards were being sacrificed to security concerns.

However, the most contentious aspect of Resolution 1244 was that it specifically committed UNMIK to securing substantial autonomy for Kosovo within the Federal Republic of Yugoslavia despite the clearly expressed wish of its population for independence.[238] The Kosovar Albanians form a distinct ethnic and cultural group within a defined geographic area in which they constitute more than 90% of the population.[239] Except for a brief *interregnum* between 1974 and 1989 their right to internal self-determination had been consistently denied by the Serb authorities.[240] In September 1991 the members of the dissolved Kosovo parliament had held a "secret referendum" on the future of the province in which an overwhelming majority of the local population voted for independence.[241] Unsurprisingly, the brutal suppression that the Kosovar Albanians had suffered at the hands of the Serb authorities over the ensuing decade had only hardened this attitude. To many it would appear that Kosovo can present a *prima facie* case for secession but this aspiration has effectively been denied by the Security Council which has chosen instead in a binding resolution to uphold the territorial integrity of the Federal Republic of Yugoslavia. By only granting Kosovo the status of "autonomy" in Resolution 1244 (1999) Gerd Seidel has argued that the Security Council has for reasons of its own[242] effectively turned its back on Article 1(2) of the UN Charter and the *Friendly Relations Declaration* of 1970[243] to deny the Kosovar population the 'right' of secession.[244]

Kosovo cannot be considered a Trust Territory for the simple reason that no formal Trusteeship Agreement has been concluded between the States directly concerned and the UN and no attempt has been made by any of the actors involved to invoke the Trusteeship System.[245] However, there are many similarities and some commentators have argued that Kosovo represents a *de facto* trusteeship with the four express aims of trusteeship – peace and security, promotion of self-government, promotion of human rights and equal treatment – all forming part of the overall package created by Resolution

[236] A. Zimmermann and C. Stahn, *supra* note 91, at 448
[237] A. Zimmermann and C. Stahn, *supra* note 91, at 446
[238] A. Zimmermann and C. Stahn, *supra* note 91, at 427
[239] G. Seidel, *A New Dimension of the Right of Self-Determination in Kosovo*, at 205 in C. Tomuschat (Ed.), *Kosovo and the International Community* (2002)
[240] G. Seidel, *supra* note 239, at 209
[241] A. Zimmermann and C. Stahn, *supra* note 91, at 426
[242] Seidel suggests that these might have included fears that the establishment of a Kosovar state might destabilise the region or set a precedent that could be exploited by their own national minorities. Some states simply wanted to support Serbia, their traditional regional ally. See G. Seidel, *supra* note 239, at 213-214
[243] G.A. Resolution 2625 (XXV), 24 Oct., 1970
[244] See G. Seidel, *supra* note 239
[245] E. Franckx et al, *supra* note 157, at 164

1244.[246] It is my contention that "self-government" is not enough to qualify for this label. If trusteeship means anything it means ensuring a brighter future for those placed under its auspices and an expectation that the Trustees will act in the best interests of their charges not in the best interests of the global *status quo*. The great drawback of using the Security Council to create and administer *ersatz* trusteeships is that in this respect at least it can often find itself conflicted.

c) Disputed Territory

A few months after the United Nations took on the task of administering Kosovo, it found itself tackling a similar problem in East Timor on the other side of the globe. East Timor had been a Portuguese possession until 1975 when it was seized by Indonesian forces. After extensive diplomatic negotiation Portugal and Indonesia requested that the Secretary General effectively conduct a plebiscite in East Timor in 1999 to establish whether the inhabitants favoured independence or autonomy within Indonesia.[247] The United Nations Mission in East Timor (UNAMET) was established by the Security Council for this purpose.[248] 78.5% of the registered voters rejected autonomy within Indonesia and chose independence[249] prompting anti-independence militias backed by Indonesia to go on the rampage resulting in massive property damage and the displacement of hundreds of thousands of civilians.[250] Acting under Chapter VII the Security Council authorised an Australian-led multinational force (INTERFET) to restore order.[251] Once this had been achieved the Security Council passed Resolution 1272 to establish the United Nations Transitional Administration in East Timor (UNTAET) and empowered it to exercise "all legislative and executive authority" in the ravaged territory.[252]

UNTAET took on a similar variety of tasks as UNMIK in Kosovo but without the same level of support from other international organisations. In addition to seeking to establish an "effective administration", UNTAET also took on tasks aimed at developing "civil and social services" and "capacity-building for self-government".[253] The Transitional Administration promulgated rules for such matters as diverse as appointing and removing judges and regulating fiscal policy and currency transactions.[254]

UNTAET comes closer than all its predecessors to fulfilling the kind of role one might expect of an Administering Authority under the Trusteeship System. The Secretary General's Special Representative in East Timor was empowered to exercise all legislative and executive including the

[246] E. Franckx et al, *supra* note 157, at 164
[247] M. Matheson, *supra* note 117, at 81
[248] A. Zimmermann and C. Stahn, *supra* note 91, at 434
[249] A. Zimmermann and C. Stahn, *supra* note 91, at 434
[250] M. Matheson, *supra* note 117, at 81
[251] UN Doc. S/RES/1264 (1999)
[252] UN Doc. S/RES/1272 (1999)
[253] M. Matheson, *supra* note 117, at 82
[254] M. Matheson, *supra* note 117, at 82

administration of justice and - in a significant contrast to the situation in Kosovo - his authority extended over the military component of the mission.[255] Also - unlike UNMIK - UNTAET did not put any limits on East Timorese aspirations for self-government. Resolution 1272 'took note' of the expressed wishes of the East Timorese people and although it did not expressly state that UNTAET's mission was to prepare East Timor for independence this was the clear implication.

Zimmerman and Stahn have noted UNTAET marks the first occasion on which the United Nations has exercised "full and exclusive sovereignty" over a territory[256] - UNTAET even took on treaty obligations in the manner of an Administering Authority.[257] By assisting East Timor attain statehood on 20th May 2002 UNTAET can be said to have acted in the best interests of the East Timorese people as they themselves saw it.[258] In doing so it can reasonably claim to have adhered to the principles embodied by Chapters XI and XII of the UN Charter in way that previous experiments in international territorial administration – with the possible exception of Libya - have not. With UNTAET second generation peacekeeping has evolved to a point that one can legitimately talk about "Security Council-mandated Trusteeship Administrations."[259] However, the fact remains that this was not a function the Security Council was designed to fulfil.

PART IV: LEGAL OBSTACLES TO EXTENDING TRUSTEESHIP

In the words of Ruth Gordon there are "formidable legal obstacles" to applying the trusteeship system to sovereign States,[260] the purpose of this Section is to explore them. The first three obstacles would - unless solutions can be found - particularly inhibit the use of the Trusteeship System to tackle the challenges posed by state failure. The fourth and last, the issue of self-determination, raises questions about the validity of the entire principle of trusteeship, even when applied to non-self-governing territories, and these must also be addressed.

a) UN Charter Provisions Article 2(1) and Article 78

> "*The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.*"[261]

The first obstacle is textual. At the same time that Article 77(1)(c) of the UN Charter makes it possible

[255] A. Zimmermann and C. Stahn, *supra* note 91, at 434
[256] A. Zimmermann and C. Stahn, *supra* note 91, at 434
[257] In an exchange of diplomatic notes with Australia UNTAET assumed Indonesia's rights and obligations under the Timor Gap Treaty. See A. Zimmermann and C. Stahn, *supra* note 91, at 435
[258] *East Timor: Birth of a Nation*, BBC News, 19 May 2002 at http://news.bbc.co.uk/2/hi/asia-pacific/1996673.stm, (4 September 2002)
[259] See M. Bothe and T. Marauhn, *supra* note 133
[260] R. Gordon, *supra* note 210, at 345
[261] Article 78, *Charter of the United Nations*, DPI/511-October 1997-75M

for any non-self-governing territory to be placed under UN Trusteeship, Article 78 prevents the system being extended any Member State of the United Nations. Furthermore Article 78 also makes explicit reference to Article 2(1) which asserts "the sovereign equality of all its members." In doing so it would appear that the framers clearly intended to emphasise that placing one member state under the tutelage of another or indeed under that of the Organisation itself would violate this elemental principle.[262]

Article 78 has its origins in a dispute that occurred between France and its former Mandates Syria and the Lebanon at the San Francisco Conference of 1945. France maintained that its Mandates had not legally expired, however, as both Syria and the Lebanon had entered the Second World War on the Allies' side they had become legitimate members of the UN founding conference.[263] The Arab states sought additional protection from French territorial ambitions and the United States proposed the language in Article 78 for no higher purpose than to meet this concern.[264]

Bothe and Marauhn have argued that the particular historical origins of Article 78 dictate that it should be given a very "narrow interpretation" and not in itself be allowed to hinder the voluntary placement of a Member State, or any part of its territory, under the Trusteeship System.[265] However, at present the weight of scholarly opinion would appear to be against them. The Trusteeship System was designed to lead subject territories to independence or self-government under UN supervision. The conventional view is that either Article 78 would need to be amended or the UN would have to determine that a State is no longer qualified as a Member of the Organisation for this hurdle to be overcome.[266]

b) The Principle of Sovereign Equality

"*The territorial integrity and political independence of the state are inviolable.*"[267]

The theory of sovereignty has its origins in political science and the writings of the 16th Century French political philosopher Jean Bodin who defined sovereignty as the highest authority, independent of state laws, with respect to the subjects of the state.[268] In international law sovereignty implies the recognition of a state having right of jurisdiction over a particular people and territory and being solely answerable for that jurisdiction in international law.[269] However, most commentators agree that sovereignty is at best an ill-defined concept and Peter Malaczuk has even suggested that it would be better if the term was simply replaced by the word independence as this is in essence its salient characteristic.[270]

[262] B. Simma (Ed.), *supra* note 121, at 951
[263] B. Simma (Ed.), *supra* note 121, at 951
[264] E. Franckx et al, *supra* note 157, at 158
[265] M. Bothe and T. Marauhn, *supra* note 133, at 234
[266] R. Gordon, *supra* note 210, at 345
[267] *General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), Oct. 24, 1970
[268] P. Menon, *supra* note 215, at 165
[269] M. Shaw, *International Law*, at 149-151 (1997)
[270] see M. Shaw, *supra* note 269, at 149-153, R. Gordon *supra* note 210, at 311-317 and P. Malanczuk, *supra* note 100, at 17-18

Despite the vagueness of the term, Article 2(1) of the UN Charter identifies the juridical principle of the sovereign equality of states as one of the foundation stones of the United Nations system. Each new member joins the Organisation as an equal of the other states. This principle is further strengthened by Article 2(7) which broadly prohibits the UN from intervening "in matters which are essentially within the domestic jurisdiction of any state." One aspect of sovereignty is clear - states will not easily part with it.

In 1970 the General Assembly passed what is commonly referred to as the *Friendly Relations Declaration*. The Declaration was the product of many years of negotiation and was widely considered to represent a distillation of the *opinio juris* of the international community on wide range of related subjects including the issue of sovereignty.[271] The Declaration restated the principle of sovereign equality and identified a number of rights and duties it conferred. Among these were the right that the territorial integrity and political independence of all states should be held inviolable; that states should have the right to freely develop their own political, social, economic and cultural systems; and that each state had the duty to respect the "personality" of other states.[272] Although General Assembly resolutions are non-binding many consider this Declaration to be an authoritative interpretation of existing international law.[273]

However, more recently many have argued that traditional concepts of sovereignty have been irretrievably eroded by the trend for globalisation. Real political or economic independence is no longer a viable aspiration. Hurst Hannum points to the "countless" international agreements on trade, human rights, culture, the environment, health and communications as evidence of this.[274] There has been a proliferation of international organisations such as the European Union to which states sometimes surrender considerable powers.[275]

Hoping to capitalise on this new spirit of interdependence to garner support for his *Agenda for Peace* initiative, UN Secretary General Boutros Boutros Ghali wrote in 1992: "The time of absolute and exclusive sovereignty… has passed; its theory was never matched by reality."[276] While this may be true that does not mean that states are prepared to lightly countenance interference in their internal affairs. Despite its horse-trading origins, Article 78 embodies notions of independence and exclusive jurisdiction and, in the words of Ruth Gordon, "it is doubtful that the concept of sovereignty has diminished to the point where it would permit the imposition of trusteeship."[277]

[271] H. Hannum, *Rethinking Self-Determination*, 34 Virginia Journal of International Law 14 (1993)
[272] G.A. Res. 2625 (XXV), Oct. 24, 1970
[273] H. Hannum, *supra* note 271, at 14-16
[274] H. Hannum, *supra* note 271, at 68
[275] R. Gordon, *supra* note 210, at 315
[276] *Agenda For Peace* 28, para. 17 (DPI/1247, 1992)
[277] R. Gordon, *supra* note 210, at 315

c) Presumption in Favour of the Continuation of the State

"*There exist no fixed criteria of State extinction.*"[278]

If sovereign equality still poses a real obstacle to reintroducing trusteeship the next logical question we must ask next is whether or not a point can be reached in the course of state failure at which a failing state can no longer lay claim to this privilege. International law protects the State's existence against possible dangers such as territorial changes, revolutions, and belligerent occupations but there is no hard law which deals with the concept of total and prolonged state failure. State practice would suggest that there is a strong presumption in favour of the continuity of the state even in these circumstances. This presumption is rooted in notions of stability and ensuring the continued observation of international legal rights and obligations.[279] We need look no farther than the repeated attempts by the international community to tie its attempts at intervention in Somalia to some notional concept of Somali government as evidence of this.[280]

However, on the theoretical plane an argument can certainly be made, in Krystyna Marek's words, that "there is a beginning and an end to the state, as to everything else."[281] The generally accepted conditions of statehood laid down in international law are embodied in the so-called 'classical criteria' of the *Montevideo Convention*: government, defined territory, permanent population and the capacity to enter into foreign relations.[282] Logic dictates that if a state can be brought into being - either by possessing these characteristics (declaratory theory) or by having them recognised by other states (constitutive theory) - it can also be rendered extinct should it no longer possess them. As the legal theorist Hans Kelsen noted, a state's validity must surely rest on temporal as well as material, personal and territorial factors.[283] History teaches us that no state is immortal.

The concept of the identity and continuity of a state are intertwined.[284] The question therefore becomes at what point does the identity of the state become so diffuse that its continuity can no longer be assured? Thomas Baty ignited a vigorous academic debate when he wrote in 1934 that "to continue to be a state, the people must continue to have a government"[285] and his argument has been taken up by Kelsen who has argued that the criterion for state extinction is to be found exclusively in "the absence of effectiveness of its legal order."[286] However, here temporal factors also apply. As Karl Doehring has pointed out states can retain their identity during periods of great upheaval and governmental

[278] K. Marek, *Identity and Continuity of States in Public International Law*, at 9 (1968)
[279] See G. Kreijen, *supra* note 214, at 26
[280] R. Gordon, *supra* note 210, at 331
[281] K. Marek, *supra* note 278, at 5
[282] Article 1, *Montevideo Convention on Rights and Duties of States (1933)* in D. J. Harris, *Cases and Materials on International Law*, at 102 (Fifth Edition) and P. Menon, *supra* note 215, at 171
[283] See K. Marek, *supra* note 278, at 5
[284] K. Marek, *supra* note 278, at 6
[285] T. Baty, *Can an Anarchy be a State?*, 28 American Journal of International Law 444 (1934)
[286] See K. Marek, *supra* note 278, at 8

incapacity and thus "a certain probability" that effectiveness cannot be re-established must be demonstrated before a state can be said to be extinct.[287] Herein lies the problem, the question of extinction is a relative one which appears to "escape all definition"[288] and in the absence of hard and fast guidelines states continue to give ineffective governments the benefit of the doubt.

Marek concluded at the end of her exhaustive study of the question that the real test of the identity and continuity of a state was found in its independence.[289] Without being able to assert its independence - or sovereignty - a state can neither begin, nor continue to exist.[290] If a state has collapsed to the point that it can no longer service the most basic needs of its population without outside assistance then surely its independence must be called into question. As Baty observed: "It is unreasonable to expect foreign countries to stand by and watch with folded hands the development of anarchy."[291]

d) Internal and External Self-Determination

"*All peoples have the right of self-determination.*"[292]

One final issue that we need to consider in this section is whether or not the creation of a trusteeship would infringe the right of an indigenous people of a territory to self-determination and to what extent – if at all – such an infringement can be considered permissible.

Self-determination is mentioned twice in the UN Charter - in Article 1(2) and 55 - but as a "principle" not a right and in the "limiting context" of developing friendly relations between states.[293] It was in the context of decolonisation that this principle appears to have evolved into a right. This evolution was first recognised in the *Declaration on Colonial Independence* of 1960 which stated simply: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and pursue their economic, social and cultural development."[294] The right to self-determination was confirmed by treaty in Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* of 1966. Both Covenants can be considered sources of positive law under Article 38(1)(a) of the ICJ Statute.[295]

As with the principle of sovereign equality, most commentators accept that the *Friendly Relations Declaration* of 1970 sets out the existing position of international law as it now relates to the right of self-determination.[296] Most significantly this Declaration considers the goal of territorial integrity or

[287] K. Doehring, *Effectiveness*, in R. Bernhardt (Ed.), *Encyclopaedia of Public International Law*, Volume 7, at 71
[288] K. Marek, *supra* note 278, at 8
[289] K. Marek, *supra* note 278, at 589
[290] K. Marek, *supra* note 278, at 598
[291] T. Baty, *supra* note 285, at 455
[292] Article 1, paragraph 1, International Covenant on Civil and Political Rights (1966)
[293] H. Hannum, *supra* note 271, at 11-12 and A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, at 41-43 (1995)
[294] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN G.A.R. 1514 (XV), Dec. 14, 1960
[295] L. Hanauer, *supra* note 40, at 151
[296] H. Hannum, *supra* note 271, at 14

political unity to be a superior principle to that of self-determination in cases where the state concerned can reasonably claim to respect the social and representational rights of all its subjects.[297]

Self-determination has been described as being composed of two distinct components: external self-determination, that is the right of a people to be free of foreign domination and internal self-determination, the right of a people to assert its will against its own government.[298] Although the theory of internal self-determination still remains contentious there seems little doubt from the strong opposition that the United Nations demonstrated towards the *apartheid* regime in South Africa that it has some validity in international law.[299]

The precise rights conferred by the principle of self-determination remain unclear and only really seem to come into focus when applied to cases of manifest human rights abuse such as *apartheid*.[300] However, The ICJ has found in two landmark cases – the *Advisory Opinion on the Status of Namibia* of 1971 and the *Western Sahara Case* of 1975 - that self-determination is a legal right specifically applicable to non-self-governing territories.[301]

So where does this leave trusteeship territories where the reins of state rest in the hands of the Administering Authority? At first glance it would appear that the population of such a territory are being denied both the right to both external and internal self-determination. How do we square this evolving right with the textual provisions that predate it?

The UN Charter articles dealing with the Trusteeship System are at least cogniscent of the "principle" of self-determination. Article 76(b) states that the progressive development of Trust Territories towards self-government and independence should take into account "the freely expressed wishes of the peoples concerned." Furthermore, the Charter does not apparently see any conflict between trusteeship and self-determination, on the contrary the implication from Article 76(b) would seem to be that trusteeship is a vehicle through which this right can be realised. It would therefore appear that as with the notion of sovereignty, in Trusteeship Territories self-determination is a right held in suspension or abeyance until the Administering Authority can create the circumstances in which it can once more receive expression.

The ICJ came close to articulating this formula in the *Western Sahara Case* when it found in its Advisory Opinion that "special circumstances" might justify the General Assembly dispensing with the requirement of consulting the inhabitants of a given territory without prejudicing the principle of self-

[297] H. Hannum, *supra* note 271, at 16-17
[298] A. Rosas, *Internal Self-Determination*, at 227, in C. Tomuschat (Ed.), *Modern Law of Self-Determination* (1993)
[299] Security Council Resolution 556 (1984) of 23 October 1984 referred to the legitimacy of the struggle of the oppressed people of South Africa for self-determination and the establishment of a non-racial democratic society. See A. Rosas, *supra* note 298, at 236-238
[300] See H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, at 27 (1990) and A. Rosas, *supra* note 298, at 236
[301] R. Gordon, *supra* note 210, at 319-320

determination.[302] As the ICJ no doubt intended, the phrase "special circumstances" is open to wide interpretation and should easily encompass the scenarios envisaged in Section III of this paper. After all neither the populations of Kosovo, East Timor nor Somalia (anarchy is hardly self-government) can truly be said to have been enjoying self-determination prior to the involvement of the international community. The East Timorese, having emerged from a period of "Security Council-mandated Trusteeship", now do.

PART V: SUGGESTED LEGAL FRAMEWORK FOR REVIVING TRUSTEESHIP

Placing a non-self-governing territory such as pre-independence East Timor under the Trusteeship System would be relatively straightforward so long as the consent of the "states directly concerned" could be obtained. In the case of East Timor the administrative power prior to the territory's illegal annexation, Portugal, accepted UNTAET as its legitimate successor.[303] Furthermore, in accords agreed with Portugal and the United Nations in May 1999 Indonesia agreed to terminate its links with East Timor and transfer authority to the United Nations to oversee the territory's transition to independence if the 'popular consultation' on the territory's future status went against continued Indonesia rule.[304] Given this background it would certainly have been theoretically possible for Portugal to have invoked Article 77(1)(c) and for some form of trusteeship arrangement agreeable to both Portugal and Indonesia to be concluded – most likely with the UN acting as the Administering Authority.

As discussed in Section IV above scenarios involving sovereign states are more problematical. However, while the obstacles outlined in Section IV may be "formidable" it is my contention that they are certainly not insurmountable if sufficient support for reinvigorating the Trusteeship System can be found. There is no simple solution but a combination of practical and conceptual measures might provide a formula for extending trusteeship to failed and disintegrating states.

a) Amending the Charter

The UN Charter entered into force in October 1945. Since that date it has only formally been amended on three occasions.[305] In 1963-1965 it was amended to increase the size of the Security Council from eleven to fifteen Member States and the size of the Economic and Social Council from eighteen to twenty seven.[306] A second charter amendment was introduced from 1965-1968 to correct a textual oversight arising from the first amendment.[307] A third and final charter amendment was adopted

[302] ICJ Reports 1975, at 33
[303] A. Zimmermann and C. Stahn, *supra* note 91, at 435
[304] M. Matheson, *supra* note 117, at 83
[305] B. Simma (Ed.), *supra* note 121, at 1177-1178
[306] G.A. Res. 1991 A and B (XVIII), Dec. 17, 1963
[307] G.A. Res. 2101 (XX), Dec. 20, 1965

between 1971-1973 to increase the size of the Economic and Social Council to fifty-four member States.[308]

The procedures for amending the Charter are laid out in Articles 108 and 109 although in practice it is only Article 108 that has been used. Under Article 108 the Charter can be amended by a two-thirds vote of the General Assembly and the subsequent ratification of two-thirds of UN member States, including the permanent members of the Security Council.[309]

In 1974 Member States established the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (the Charter Committee), a sub-committee of the General Assembly's Sixth (Legal) Committee, to explore suggestions for updating or amending certain Charter provisions.[310]

The Charter Committee has become the focus for the most important initiatives for interpreting or amending the UN Charter. Over the years these have included attempts to reform the Security Council,[311] extend the powers of the General Assembly, confer the power to request an advisory opinion from ICJ on the Secretary General, codify peacekeeping powers and establish a Human Rights Council as a primary organ of the United Nations.[312]

However, the reality has been that competing national interests have blocked the Charter Committee from making any actual progress in this regard. It wasn't until 1995 that the Committee actually proposed making its first amendment – the deletion of references to "enemy states" from Articles 53, 77 and 107 of the Charter.[313] It is worth noting that even this relatively minor alteration has not yet been effected.

Some thought has already been given to formally amending the Charter Articles relating to the Trusteeship System. With the termination of the trusteeship of Palau and the completion of the Trusteeship Council's original mission the Secretary General recommended that the General Assembly take steps to eliminate the Council from the Charter.[314] The United States took up this proposal in the Fiftieth Assembly but the modern reluctance of member States to tinker with the Charter has so far saved it from extinction.[315]

On balance it seems most unlikely that sufficient unanimity will emerge in the foreseeable future for the Member States to agree on individual charter amendments designed to revitalise the Trusteeship Council. However, this does certainly remain a theoretical possibility. There has been a great deal of

[308] G.A. Res. 2847 (XXIV), Dec. 20, 1971
[309] C. Willson, *supra* note 1, at 117
[310] C. Willson, *supra* note 1, at 116
[311] See A. Fitzgerald, *Security Council Reform: Creating a more Representative Body of the Entire UN Membership*, 12 Pace International Law Review 319 (2000)
[312] See B. Simma (Ed.), *supra* note 121, at 1186-1189
[313] C. Willson, *supra* note 1, at 120-121
[314] C. Willson, *supra* note 1, at 122

talk in the past decade about reviewing the Charter but it has tended to stumble over the question of Security Council reform.[316] However, should a solution to this deadlock be found then a suitable forum for discussing wide-ranging amendments to the Charter – including Chapters XII and XIII - might yet emerge.

In addition to formal attempts to amend the Charter, some relatively minor – but not necessarily uncontroversial - modifications in the application of Charter provisions have been effected without amendment. For example, both the People's Republic of China and the Russian Federation occupy permanent seats on the Security Council despite the fact that the Charter allocated them to the Republic of China and Union of Soviet Socialist Republics.[317]

In instances where the Charter is unclear accepted State practice in interpreting the text plays a role in modifying and expanding its application. Article 27 of the Charter stipulates that the adoption of decisions by the Security Council requires concurring votes from all the permanent members. The Charter does not expressly clarify the significance - positive or negative - that should be accorded an abstention. The established practice of the Council has been to consider resolutions on which a permanent member has abstained to have been adopted.[318]

Some aspects of UN practice – such as the granting of Observer Status in the General Assembly to non-Member States such as Switzerland – have simply evolved through practice over time. Article 4 which deals with the criteria for UN membership does not raise the possibility of "Observer Status" and it is not mentioned anywhere else in the Charter. The UN has never formally addressed this issue but observers have nevertheless been admitted and the practice has even been extended to controversial national liberation movements such as the Palestine Liberation Organisation (PLO) and Non-Governmental Organisations like the International Committee of the Red Cross (ICRC).[319] This issue was finally referred to the Sixth (Legal) Committee in 1994 and on the basis of its report General Assembly Decision 49/426 (1994) was adopted limiting the granting of Observer Status to "states and to those intergovernmental organisations whose activities cover matters of interest to the Assembly."[320]

Perhaps the most significant evolved practice involving the United Nations is one of its most complex and varied global commitments: Peacekeeping. Former UN Secretary General Boutros Boutros Ghali has described Peacekeeping as "the invention of the United Nations"[321] which in many ways it is. The concept of Peacekeeping can be inferred from Chapter 6 and 7 of the UN Charter but as the practice has developed it has had to evolve support structures and rules of engagement all of its own.

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[315] C. Willson, *supra* note 1, at 122
[316] See C. Willson, *supra* note 1 and A. Fitzgerald, *supra* note 311
[317] C. Willson, *supra* note 1, at 118
[318] C. Willson, *supra* note 1, at 118
[319] C. Willson, *supra* note 1, at 119-120
[320] GA Decision 49/426, UN GAOR, 49th Sess., Supp. No. 49, Vol. 1, at 341, UN Doc. A/49/49 (1994)
[321] *Agenda For Peace* 28, para. 46 (DPI/1247, 1992)

The UN Charter has proved itself "a living and evolving instrument" which is flexible enough to adapt to new challenges consistent with its terms and spirit.[322] The emerging doctrine of consensus holds that the influence of the majority of states can create new norms of international law.[323] Article 78 was drafted in a time where the concept of state failure was almost unimaginable. If the majority of states were to consider Article 78 to be an obsolete relic of the colonial period it is possible that evidence of state practice along these lines could be used to directly challenge this Charter provision.[324]

b) Obtaining Consent

"*The irreducible minimum of sovereignty requires some form of consent from the host state. Whether that consent must be a formal invitation or simply the absence of opposition would seem to depend upon the circumstances.*"[325]

As Malcolm Shaw has observed, "one cannot ignore the role of consent in international law"[326] and consent may prove the key to overcoming many of the obstacles identified by Ruth Gordon. Gerald Helman and Steven Ratner envisaged that disintegrating or failing states would approach the United Nations for assistance and the experience of the Paris Agreements in Cambodia would indicate that this scenario is not inconceivable.[327]

Hans Kelsen's analysis of Article 78 suggests that consent might invalidate its provisions. Kelsen noted that "no prohibition to place certain territories under the trusteeship system is necessary when this effect can be brought about only voluntarily, that is to say, with the consent of the state which has the right to dispose of the territory concerned."[328] On this basis he considered Article 78 "superfluous".[329] If we were to extend Kelsen's argument further the logical corollary would be that should a government of an independent state give its consent then it should be possible to place the state under the system. Such a scenario raises an intriguing paradox – the state's exercise of sovereignty in opting for this course of action would effectively be blocked by a measure designed to ensure the free exercise of that sovereignty. Consent is the foundation on which the trusteeship system was built.[330] It seems reasonable to infer – given the genesis of the Article - that it was not the framers' intent to subvert this principle or curtail state sovereignty.

Article 78 aside, there does not seem to be any basis in law why a state could not, at least in theory, voluntarily relinquish all control over its internal and external affairs and vest this authority in the United Nations.[331] The sovereignty of a state presumably empowers it to abdicate sovereignty and thus

[322] O. Schachter, *United Nations Law*, 88 American Journal of International Law 7 (1994)
[323] M. Shaw, *supra* note 269, at 9
[324] M. Bothe and T. Marauhn, *supra* note 133, at 234
[325] G. Helman and S. Ratner, *supra* note 132, at 13
[326] M. Shaw, *supra* note 269, at 9
[327] G. Helman and S. Ratner, *supra* note 132, at 14-15
[328] H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, at 574 (1950)
[329] H. Kelsen, *supra* note 328, at 574
[330] H. Kelsen, *supra* note 328, at 572-573
[331] R. Gordon, *supra* note 210, at 324

commit suicide under international law. If a state enters becomes part of a federation or otherwise seeks union with another state it loses its international personality.[332] There seems no reason therefore why a state might not enter into an agreement to temporarily suspend its sovereignty in the manner outlined by Judges McNair and Ammoun. As the Permanent Court of International Justice found in the Lotus Case: "The rules of law binding upon states… emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."[333]

I would contend that should a Member State consent to be placed under the Trusteeship System it would be difficult to make a persuasive case that it should be prohibited from pursuing this course of action.

c) Resolution 1541 (XV)

"International law is… asked to perceive a distinction between the historical subjugation of an alien population living in a different part of the globe and the historical subjugation of an alien population living on a piece of land abutting that of its oppressors."[334]

I have discussed the possibility that the Trusteeship System could be used as a mechanism in instances of state disintegration to place a territory seeking self-government under UN supervision. Should the state in question consent to this it would be relatively straightforward to implement the decision under Article 77(1)(c) but what options exist should the state refuse its consent?

As discussed in Section I, the General Assembly has the right – through a Special Committee - to designate certain territories non-self-governing territories or NSGTs despite the opposition of the occupying power. This power has been utilised successfully on a number of occasions - most recently in 1986 when the French colony of New Caledonia was declared an NSGT in General Assembly Resolution 41/41A.[335]

Thomas Grant has noted that the designation of a territory as an NSGT has a transformative effect. Prior to being designated as an NSGT the territory is juridically indistinguishable from the metropolitan or parent State.[336] After being designated as an NSGT the territory takes on a new distinct status. As such an NSGT can be removed from metropolitan jurisdiction without violating the territorial integrity of the parent State. The special juridical status of NSGTs could be used to the international community's advantage in cases of state disintegration.

The principle obstacle to successfully using Resolution 1541 in this manner is the so-called "saltwater rule". The rule recognises the well-established right of all states to seek to maintain their territorial

[332] R. Gordon, *supra* note 210, at 324
[333] *Lotus case*, P.C.I.J., Series A, No. 10 (1927) at 18
[334] L. Buchheit, *Secession: The Legitimacy of Self-Determination*, at 17 (1978)
[335] UN Doc. A/RES/41/41A, Dec. 2, 1986
[336] T. Grant, *supra* note 134, at 32-33

integrity and was introduced to discourage minority groups within established states seeking NSGT status.[337] Most international instruments that seek to codify community rights carry provisos that they in no way derogate the right of states to maintain their territorial integrity.[338] Resolution 1541 achieves this by defining NSGTs as being geographically separate and ethnically or culturally distinct from the occupying power.

Grant has written persuasively in favour of extending the process begun by Resolution 1541 so that it can be applied to contiguous territories with a distinct character such as Kosovo.[339] While recognising that this would involve a "momentous transition", he notes that the law on decolonisation has a dynamic history often evolving in defiance of systematic obstruction.[340] Resolution 1541 itself presented a massive – and ultimately successful – challenge to well established interests. Grant argues that if a conviction were to crystallise that international law does not adequately protect minorities deprived of their right of internal self-determination the "saltwater rule" might be subject to review. He notes that the development of armed humanitarian intervention – which in itself "cuts a broad swathe through existing international rules" – suggests that this possibility is not too far fetched.[341]

d) Withdrawal of Recognition

"*Recognition is not a contract or a grant. It is a declaration of capacity as determined by objective facts. These facts are not necessarily enduring.*"[342]

In cases of total state collapse it may not be possible to find anyone capable of credibly giving the United Nations consent to intervene although David Thürer has argued that this might be inferred from the community's inherent right to self-determination.[343] It has also been suggested that if a state has failed to the point of extinction it might become a non-self-governing territory of some kind and that this neat piece of sophistry would bring it under the remit of Chapter XII.[344] This seems a useful point of departure but the concept would hinge on being able to declare the state extinct and as discussed in Section IV this is far from being straightforward proposition. The question we need to consider in this final section is not so much 'can a state die' as 'how exactly does one mark its passing?' The answer is inextricably bound up with the issue of state creation and the declaratory and constitutive doctrines of state recognition.

Constitutive theory is derived from the positivist approach to international law which holds that its content – and thus by extension its subjects - should be subject to the consent of states.[345] According to George Keeton constitutive theory attributes three important characteristics to recognition:

[337] See T. Grant, *supra* note 134, at 22-23
[338] T. Grant, *supra* note 134, at 23
[339] See T. Grant, *supra* note 134, 10-54
[340] T. Grant, *supra* note 134, at 34
[341] T. Grant, *supra* note 134, at 35 and 41
[342] H. Lauterpacht, *Recognition in International Law*, 349-350 (1947)
[343] D. Thürer, *supra* note 212, at 737
[344] R. Gordon, *supra* note 210, at 333

"creativeness, arbitrariness and relativity."[346] Constitutives argue that a new state has no existence prior to recognition and that established members of the international community are under no obligation to extend recognition to a newcomer. It therefore logically follows that if recognition lies in the exclusive and arbitrary gift of established states a right to withdraw this recognition can reasonably be inferred. Kelsen termed this the *actus contrarius* of the act of recognition.[347] With the withdrawal of recognition the former state would lose its sovereign status.

Declaratory theory holds that a state exists as a subject of international law from the moment that it fulfils the basic conditions of statehood laid down in international law.[348] The primary function of recognition, as Brierly observed, is thus "to acknowledge as a fact something which has hitherto been uncertain… and to declare the recognising state's readiness to accept the normal consequences of that fact."[349] For the declaratorist recognition accepts but does not create a state and so it therefore follows that the withdrawal of recognition cannot, in itself, bring a state's life to an end. Verhoeven has suggested that a state can be said to cease to exist not because of the withdrawal of recognition but because the circumstances that led to this recognition have been nullified as a "*consequence automatique*" of state failure.[350] Just as the state did not require the consent of other nations to come into being, it follows that it does not require their sanction to become extinct. To paraphrase Brierly, in this instance the withdrawal of recognition by other members of the international community would simply serve the purpose of bringing a period of uncertainty in fact to an end.

Despite one's view of the significance of the act of recognition the fact remains that there are no persuasive instances of recognition ever having been withdrawn from a state by the international community with no successor regime in sight.[351] Existing doctrine deals only with traditional examples of state extinction such as dismemberment, merger with another State and occupation leading to *debellatio*.[352] As nature (and the law) abhors a vacuum it seems reasonable therefore to ask whether or not a prohibition on such action might exist in international law.

Certainly there is no explicit prohibition enshrined in law and state practice offers little guidance as the failed state is still a very new phenomenon. The *Lotus Presumption*, as expounded by the Permanent Court of International Justice in the *Lotus Case*, dictates that where the law is unclear or there is cause for doubt a presumption must exist in favour of the freedom of action of states.[353] Furthermore, support for the concept of withdrawing recognition from failed states can be inferred from the work of one of the most respected of legal publicists - Oppenheim is quite forthright on the subject: "A state may lose its independence; a government may cease to be effective… In all these cases withdrawal of

[345] P. Menon, *supra* note 215, at 169
[346] G. Keeton, *National Sovereignty and International Order*, 39 (1939)
[347] H. Kelsen, *Recognition in International Law*, 35 American Journal of International Law 611 (1941)
[348] P. Menon, *supra* note 215, at 171
[349] J. Brierly, *The Law of Nations*, at 139 (1963)
[350] J. Verhoeven, *La Reconnaissance Internationale dans la Pratique Contemporaine*, 657-658 (1975)
[351] H. Lauterpacht, *supra* note 342, at 350-351
[352] K. Marek, *supra* note 278, at 7
[353] J. Crawford, *The Creation of States in International Law*, 32-33 (1979)

recognition is both permitted and indicated."[354] On balance I can see no legal obstacle to the withdrawal of recognition so long as such a decision is made on the basis of sound legal principle and fact.

Without some form of positive action from the international community the example of Somalia demonstrates that a state can retain its international legal personality in defiance of all empirical evidence that it is no longer capable of operating effectively. Whether the act of withdrawing recognition amounts to a mercy killing or simply serves notice of a failed state's decease, one way or another in the aftermath of the act it is reasonable to assume that the state concerned can be considered legally extinct. If the General Assembly - or the perhaps the Security Council - were to adopt a resolution recognising that a state had failed then the rights and duties accruing to the territory as a sovereign state would disappear and it could then be brought under the Trusteeship System.[355]

PART VI: CONCLUSION

I have sought to demonstrate that the practice of international territorial administration is well established in international law and that the principles which underpin the trusteeship system are more timeless than their historical origins in the colonial era would suggest. The appearance on the international scene of "Security Council-mandated Trusteeship Administrations" proves that there is a continuing role for some form of trusteeship mechanism applicable to non-self-governing territories. There is absolutely no textual reason why the Trusteeship System could not, with the consent of the relevant parties, meet this need.

Indeed there are many good reasons why it would preferable to see modern trusteeships handled under the purview of the Trusteeship Council rather than that of the Security Council. The Trusteeship Council has one purpose – assisting non-self-governing territories achieve self-government or independence. The goal of the Security Council is the maintenance of international peace and security. These two goals are not always perceived as being mutually inclusive as the example of Kosovo clearly demonstrates. Utilising the Trusteeship Council would also inject a measure of real accountability that is missing from the operations of the Security Council. Finally, the Trusteeship Council is not subject to the veto power of the Permanent Five. To paraphrase Judge McNair the Trusteeship Council exists to protect "unmight" against "might".[356] The Security Council is a more political animal where the domestic political concerns of its members often outweigh any other consideration.

The issue becomes more complicated if one seeks to use the Trusteeship System as a possible solution to the phenomenon of failed states. Ruth Gordon described trusteeship as "the ultimate intervention"

[354] Oppenheim, *International Law*, 150-151 (1955)
[355] R. Gordon, *supra* note 210, at 339
[356] *Advisory Opinion on the Status of South-West Africa*, ICJ Reports (1950) at 149

and this seems an apt description.[357] A successful trusteeship administration transforms the character of a territory. Gordon was concerned that in the context of state failure a trusteeship would effectively destroy the state as a sovereign entity.[358] I have argued that it could save it. As Gerald Helman and Steven Ratner noted "failed states are self-governing only in the narrowest sense."[359]

We have seen that in a trusteeship, sovereignty – whether it rests with the state or with its people – is not destroyed but simply held in suspension until it is capable once more of reasserting itself. Mechanisms – either textual or conceptual – can be developed to circumvent the objections that have been raised to placing a former state under some form of international supervision. Such a nurturing response to the overwhelming humanitarian catastrophe that is state failure is surely entirely consistent with the principles of trusteeship and the aims and purposes of the United Nations as a whole.

As Michael Matheson has observed much will depend on whether or not the United Nations is ultimately judged to have succeeded or failed in Kosovo and East Timor.[360] If these ventures are considered a success – and at present the omens are promising - the United Nations will have a window of opportunity to develop a new role for one of its principle organs, perhaps drawing on the evolution of peacekeeping for inspiration. The challenges of the post-Cold War era require a new approach and the Security Council cannot hope to be a panacea for all ills. The 1947 plan to internationalize the City of Jerusalem demonstrated the sort of imaginative leap that lies within the reach of the Member States. We need a Trusteeship Council for the 21st Century and the key to its successful revival will be the development of what one might term 'Chapter XII ½' Trusteeship Administrations.

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[357] R. Gordon, *supra* note 210, at 330
[358] R. Gordon, *supra* note 210, 330
[359] G. Helman and S. Ratner, *supra* note 132, at 17
[360] M. Matheson, *supra* note 117, at 83

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