1-1-2005

From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council

Saira Mohamed
Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
NOTES

FROM KEEPING PEACE TO BUILDING PEACE:
A PROPOSAL FOR A REVITALIZED UNITED NATIONS
TRUSTEESHIP COUNCIL

Saira Mohamed*

Since the end of the Cold War, as the focus of the UN has turned from
interstate conflict to internal state collapse, the nature and purpose of
peacekeeping has shifted. Peace operations now encompass postconflict
peacebuilding—action that seeks to rebuild failed states and prevent the re-
surgence of conflict. Despite this change, the Security Council remains the
organ responsible for peace operations. To remedy problems of legitimacy and
accountability resulting from Security Council control, this Note proposes
split management of peace operations. While the Security Council should
continue to manage the military and police aspects of peacekeeping, a revital-
ized Trusteeship Council should be responsible for the peacebuilding elements
of missions. Responding to arguments that trusteeship is both legally and
politically unfeasible, this Note proposes a mechanism to overcome the hurdle
that Article 78 of the Charter poses to revived trusteeship and explains how
changed conceptions of sovereignty and responsibility support revival of
trusteeship.

INTRODUCTION

As the Cold War ended, the United Nations (UN) turned toward a
new era of opportunity and challenge. No longer paralyzed by the super-
power rivalry that repeatedly had prevented the Security Council from
taking action, the UN saw new avenues for international cooperation in
matters of international peace and security.1 At the same time, it con-
fronted a surge of civil wars, humanitarian crises, and gross human rights
abuses throughout the world.2 As the UN struggled to adapt to these


1. The Security Council's Cold War rivalries, of course, did not preclude it entirely
from addressing its duties of maintaining peace and security. See Michael W. Doyle,
Introduction: Discovering the Limits and Potential of Peacekeeping, in Peacemaking and
Peacekeeping for the New Century 1, 17 n.3 (Olara A. Otunnu & Michael W. Doyle eds.,
1998) [hereinafter Doyle, Introduction] (recognizing that members of the Security
Council refrained at times from using veto power to block action and did respond to
certain "severe and prolonged violations of human rights" during the Cold War); Ismat
Kittani, Preventive Diplomacy and Peacekeeping: The UN Experience, in Peacemaking
and Peacekeeping for the New Century, supra, at 89, 93 (describing instances in late 1980s
of permanent members acting in concert on major conflicts).

2. The swell in such conflicts resulted at least in part both from superpower policies
during the Cold War and from circumstances accompanying the warming of superpower
relations. See Mohammed Ayoob, State Making, State Breaking, and State Failure, in
demanding situations, the Security Council became the organ to undertake the organization’s greatest endeavors to date. In East Timor, Liberia, Kosovo, Somalia, and elsewhere, the UN transformed the nature and purpose of peacekeeping, the mechanism chosen to respond to state collapse.

Recognizing the need not only to end conflicts but also to rebuild communities and prevent the resurgence of violence, the Security Council added the crucial task of postconflict peacebuilding to its peacekeeping operations. Consequently, the mandate of peacekeeping grew from its original goals of “interposing lightly armed troops to monitor a truce, to observe, perhaps to rebuff some small trans-border terrorist incidents,” into a new spectrum of responsibilities, “including supervising and running elections, upholding human rights, overseeing land reform, delivering humanitarian aid under fire, [and] rebuilding failed states.” Today, peacekeeping includes not only keeping peace, but also building peace; establishing a system of international administration that entails all of the responsibilities of governance now appears to constitute a common element of peace operations.

The expansion of the Security Council’s mandate has focused attention on whether the underlying legal authority for peacekeeping—the Security Council’s authority under Chapters VI and VII of the UN Charter—provides a legitimate foundation for these new missions. Moreover,


it raises the question of whether this new breed of peace operations has outgrown the Security Council's policies and procedures. Because the mechanisms of Security Council action were established with a view toward traditional peacekeeping, rather than postconflict peacebuilding, scholars and practitioners have debated the need for a better framework for intervention to replace the current, ad hoc system of Security Council action. Some commentators have pondered the idea of transferring the administration and reconstruction of collapsed states to the now-dormant Trusteeship Council, the UN organ responsible for steering dependent territories to independence. These proposals, however, have failed to

to "any threat to the peace, breach of the peace, or act of aggression." Id. art. 39. For discussion on the specific legal bases of peacekeeping operations, see infra Part I.C.

7. See infra note 62 (discussing calls for reform of peacekeeping operations).


9. The Trusteeship Council was established as the governing body of the UN trusteeship system. Trusteeship derived from the League of Nations Mandates System, which was responsible for colonies and territories that at the end of World War I were "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world." League of Nations Covenant art. 22, para. 1; see also Dietrich Rauschning, United Nations Trusteeship System, in 4 Encyclopedia of Public International Law 1193, 1193-94 (Rudolf Bernhardt ed., 1st ed. 2000) (discussing concept and history of trusteeship); Francis B. Sayre, Legal Problems Arising from the United Nations Trusteeship System, 42 Am. J. Int'l L. 263, 263-68 (1948) (outlining history and structure of trusteeship system). The UN trusteeship system is "[b]uilt on the League of Nations mandate system," Kenneth W. Abbott & Duncan Snidal, Why States Act Through Formal International Organizations, 42 J. Conflict Resol. 3, 20 (1998), but it has refined the purposes of trusteeship. The League focused on "tutelage of . . . peoples," League of
explicate how to implement this transfer, and they have met criticism regarding both the legal viability of a renewed trusteeship system and the political implications of the very idea.\textsuperscript{11}

This Note contends that the UN system of trusteeship should be revived to provide a framework for UN interventions in failed states—a framework that is both legally viable and politically advisable. Specifically, this Note proposes split management of peacekeeping. While the Security Council should continue to control the military and police aspects of UN intervention, the Trusteeship Council should assume exclusive responsibility for the governance tasks that fall within the category of postconflict peacebuilding.\textsuperscript{13} Peace operations are no longer confined to issues of security. Because they now extend into governance and reconstruction, they encompass matters quite distinct from those addressed by traditional peacekeeping. This Note argues, accordingly, that the transformation in the goals of peace operations must trigger a transformation in their legal and functional mechanisms as well. Revived trusteeship can satisfy this need.

Part I examines how the UN has shifted its focus from interstate war to intrastate conflict and examines the consequent move from traditional to complex peacekeeping. Part II discusses the gaps in legitimacy and accountability resulting from extending the Security Council’s formerly limited responsibilities to authority over the governance aspects of peacekeeping and explains why trusteeship is better suited to perform governance-related peacebuilding tasks. Responding to concerns about how trusteeship can be implemented, Part III proposes a mechanism to overcome Article 78 of the UN Charter, the primary legal barrier to revived trusteeship. Finally, Part IV considers arguments that the renewal of trusteeship is politically unfeasible in light of trusteeship’s colonial roots, and it examines how changes in conceptions of statehood in International Covenant art. 22, para. 1, without reference to eventual independence or self-determination. In contrast, UN trusteeship aims above all to steer subject territories toward “self-government or independence.” U.N. Charter art. 76, para. 3. The last trust territory of Palau acceded to independence in 1994. Since then, the Trusteeship Council has been inactive, but it remains in existence, and debate over renewal of its activities abounds. See supra note 8 and accompanying text.


11. See Gordon, supra note 10, at 346–47 (drawing parallels between trusteeship and colonialism and asserting that “trusteeship has always been, and would remain, a form of colonialism”); Paul Kennedy & Bruce Russett, Reforming the United Nations, Foreign Aff., Sept./Oct. 1995, at 56, 67 (discussing suspicions in developing nations that renewed trusteeship—and UN intervention generally—“could be a form of neocolonialism”); Wedgwood, Evolution, supra note 4, at 636 (acknowledging “uneasy resemblance” between peacekeeping and colonialism).

12. See infra notes 18–19 and accompanying text.

13. For description of those tasks, see infra Part I.B.2.b.
national law and politics support—and, indeed, propel—revival of the trusteeship system.

I. NEW PROBLEMS NEED NEW SOLUTIONS: FAILED STATES AND COMPLEX PEACEKEEPING


The absence of massive international conflict at the end of the twentieth century, however, has not provided the Security Council any respite. “Conflict has not diminished, . . . it has merely changed shape,”\footnote{16.} and the attention of the international community has largely shifted to intrastate conflict.\footnote{17.} Subpart A explains the phenomenon of the “failed state” underlying this change in focus and discusses the debate over how the UN should respond to state collapse. Subpart B then describes the changes in peace operations that have resulted from the new focus on intrastate conflict.

A. The Concept and Chaos of State Collapse

The concept of state failure was introduced by Gerald B. Helman and Steven R. Ratner to refer to a nation-state “utterly incapable of sustaining itself as a member of the international community” as a result of circumstances such as political instability and government breakdown, random warfare, and gross human rights abuses.\footnote{18. Gerald B. Helman & Steven R. Ratner, Saving Failed States, Foreign Pol’y, Winter 1992–1993, at 3, 3.} Suplementing this
formulation, which considers a state's inability to function on the international level, is the explanation of Robert Jackson, who defines failed states by their inability to provide for their own population. These states "cannot or will not safeguard minimal civil conditions for their populations: domestic peace, law and order, and good governance." The combination of the two descriptions presents a picture of failed states as those that are unable or unwilling to protect their populations, and so are no longer in good standing in the international community.

State collapse is characterized by a wide range of circumstances: failure of the government to maintain a monopoly on the use of force and the presence of armed civilians and militias, violence targeted at civilians, massive refugee flows, and breakdown of essential public services. These conditions often escalate rapidly and precipitate additional crises. Failed state situations are further distinguished from interstate conflicts in the manner that the international community enforces laws and obligations. "Mobilization of shame," a method relying on reputational harm, relies on states' desire to participate in the international commu-

19. Robert Jackson, The Global Covenant: Human Conduct in a World of States 296 (2000); see also id. at 295 (describing categories of circumstances, such as disruptions caused by natural disasters, state collapses resulting from international war, or simple absence of democracy, that do not constitute the conditions creating "failed states"); I. William Zartman, Introduction: Posing the Problem of State Collapse, in Collapsed States: The Disintegration and Restoration of Legitimate Authority 1, 1 (I. William Zartman ed., 1995) ("State collapse is a deeper phenomenon than mere rebellion, coup, or riot. It refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new.").

20. Abram and Antonia Chayes have put forward a theory of sovereignty that contends, "[S]overeignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life." Abram Chayes & Antonia Handler Chayes, The New Sovereignty 27 (1995). Under their theory, then, failed states, which have lost good standing in the international community as a result of their failure to protect their populations, have lost the attributes of sovereignty. For further discussion of changing notions of sovereignty, see infra Part IV.A.

21. See Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, ¶¶ 12-13, U.N. Doc. A/50/60-S/1995/1 (1995) [hereinafter Supplement to Agenda for Peace] (distinguishing conditions of state collapse from circumstances accompanying interstate wars); Gordon, supra note 10, at 328 (describing progressive deterioration from state's inability to provide governmental services to violence by warring factions to lack of accountability for human rights abuses); Kennedy & Russett, supra note 11, at 67 ("[A] key challenge to international stability is the phenomenon of internal conflicts in which authority implodes, ethnic and religious conflicts erupt, many lives are lost, and millions flee across international borders.").

nity and need for other states' respect, and thus provides little stimulus to factions warring for control.23

The origin of failed states can be traced to the "vast proliferation of nation-states . . . since the end of World War II," according to Helman and Ratner.24 During the transformation of colonial territories to independent states, they argue, the UN exalted the ideal of self-determination of peoples25 above the need for long-term survivability of states. This engendered the notion that states functioned simply by virtue of being independent—and invalidated any suggestion that states could fail to function properly as states.26 Because the UN emerged at a time when colonial territories were on the verge of independence, the Charter focused on "the need to ensure that no member states, especially smaller ones, would suffer outside interference."27 Although this principle suited the organization's original concerns, it did not account for the internal crises of state collapse that would preoccupy the organization in later years.

B. The New Peacekeeping

1. The UN Response to Failed States. — The formal sovereignty of failed states, then, has been nourished and maintained by the norms of traditional international law—the principles of nonintervention, respect for state sovereignty, and equality among states—while those same norms have threatened the international community's equally significant legal obligations to protect and ensure respect for human rights.28 As UN interventions in failed states have occurred with increasing frequency in


23. See Gordon, supra note 10, at 328 (explaining that shaming is "much less effective against ill-identified groups contending for power or against a powerless governing authority").

24. Helman & Ratner, supra note 18, at 3.

25. See U.N. Charter art. 1, para. 2 (including development of relations among nations "based on respect for the principle of equal rights and self-determination of peoples" in purposes of UN).

26. Helman & Ratner, supra note 18, supra note 18, at 4 ("The idea, then, that states could fail . . . was anathema to the raison d'etre of decolonization and offensive to the notion of self-determination. New states might be poor, it was thought, but they would hold their own by virtue of being independent.").

27. Kennedy & Russett, supra note 11, at 67; see also Walter Clarke & Jeffrey Herbst, Somalia and the Future of Humanitarian Intervention, Foreign Aff., Mar./Apr. 1996, at 70, 80–81 ("The United Nations since 1945 has basically been a decolonization machine: Its primary purpose has been to proclaim as quickly as possible that every newly independent country is able to govern itself.").

28. See Humanitarian Intervention and the United Nations 42 (Richard B. Lillich ed., 1973) (noting tension between dual motives of UN Charter—one reflecting concern for protections against intervention in domestic matters, and the other reflecting need for safeguards against human rights abuses within state borders—and acknowledging resulting ambiguity in law of the UN). The UN Charter places equal emphasis on the importance of these dual motives, as it sets out in its preamble the goal of "reaffirm[ing] faith" not only
recent years, debate surrounding these actions has swelled. At the heart of the controversy regarding how the UN should intervene in failed states are conflicts over whether to recognize sovereignty based on a state’s capacity to function or on its formal legal status as a state, and whether recognition of a state’s sovereign right to noninterference is contingent on fulfillment of its responsibilities toward both its citizens and the international community. Despite the UN Charter’s explicit prohi-

"in fundamental human rights, in the dignity and worth of the human person," but also "in the equal rights . . . of nations large and small." U.N. Charter pmbl.


30. This raises the question of whether a failed state ceases to be a state. International law appears to invalidate the notion that a state could fail to the point that it no longer constitutes a state. As a matter of international law, statehood depends on four criteria: “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25; see also Ian Brownlie, Principles of Public International Law 70–72 (5th ed. 1998) (discussing criteria for statehood). But international law does not provide a standard for determining whether a state has ceased to be a state. The simple absence of one or even all of the above factors does not strip a territory of its statehood. Id. at 71–72. Instead, states enjoy a strong presumption in favor of retaining statehood, and even states in the midst of collapse maintain their international legal personality as states. See Jackson, supra note 19, at 296 (“[F]ailed state’ is something of a misnomer. . . . Such states . . . exist because the outside world recognizes them and respects their sovereignty regardless of their domestic conditions. They have a juridical existence but little if any empirical existence.”); Gordon, supra note 10, at 332–39 (discussing perspectives on statehood of failed states). But cf. Krystyna Marek, Identity and Continuity of States in Public International Law 8 (1954) (noting view of scholar Hans Kelsen that “the criterion of state extinction is to be found exclusively in the absence of effectiveness of its legal order”); Thomas Baty, Can an Anarchy Be a State?, 28 Am. J. Int’l L. 444, 444–55 (1934) (arguing that “the state must ipso facto cease to exist” when it ceases to function). In practice, the international community adheres to the constructive existence of failed states. The extreme lengths to which the sovereignty principle can be stretched to preserve nominal statehood can be seen in the continued presence of a Somali representative to the UN in the 1990s, despite his country’s collapse in the midst of war among rebel factions, and the recognition of a Khmer Rouge representative in Cambodia’s UN seat until 1992, even though the Khmer Rouge had been driven from the country in 1979 and was accountable for the killing of more than one million Cambodians. See Guillaume Debré, Taliban Asks: What Does It Take To Join the UN Club?, Christian Sci. Monitor, Sep. 26, 2000, at 7; Paul Lewis, Why Cambodia’s U.N. Seat Is ‘Unattended,’ N.Y. Times, Dec. 16, 1990, § 1, at 10.

bition against intervention in a state's domestic matters, since the end of the Cold War the UN has intervened regularly in the internal crises of failed states. In the cases of Liberia, East Timor, Kosovo, and Somalia, among others, the organization has discarded the mantle of blind adherence to the principle of nonintervention, and it has taken action, in various degrees and approaches, under its Chapter VII powers. These interventions should not be regarded as aberrations from a general policy of noninterference or consent-based intervention. Instead, they signify the beginning of a policy of intervention based on need for international action, a policy under which the UN has newly defined itself as an organization that recognizes the problem of failed states and considers itself the vital instrument in managing state failure and stemming its consequences.

2. The Transformation of Peacekeeping. — Peacekeeping is, according to former UN Secretary-General Boutros Boutros-Ghali, “the invention of the United Nations.” Accordingly, the UN has transformed its “invention” over time to suit the exigencies of the crisis at hand. Although the organization had confronted the challenge of a failed state in the Congo operation of the early 1960s, intrastate conflicts did not emerge as the primary focus of the Security Council until the late 1980s. As a result of

32. U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .”).


35. This subpart distinguishes between UN peacekeeping before and after the Cold War in order to highlight the assumption of new governance responsibilities beginning in the early 1990s. Other formulations, in contrast, classify peacekeeping according to three types of activity: first-generation, or traditional operations; second-generation, or multidimensional operations; and third-generation, or peace-enforcement operations. For a description of this taxonomy, see Michael W. Doyle, War Making and Peace Making: The United Nations’ Post-Cold War Record, in Turbulent Peace, supra note 2, at 529, 532-33 [hereinafter Doyle, War Making and Peace Making].

36. Agenda for Peace, supra note 3, ¶ 46.

37. See Jarat Chopra, UN Civil Governance-in-Trust, in The United Nations and Civil Wars 69, 77-78 (Thomas G. Weiss ed., 1995) [hereinafter Chopra, UN Civil Governance-in-Trust]; see also infra note 39 and accompanying text (characterizing UN mission in the Congo as a unique departure from traditional peacekeeping operations).

38. For statistics on the shift from interstate to intrastate conflict as the main focus of UN peacekeeping operations, see Supplement to Agenda for Peace, supra note 21, ¶ 11 (providing statistics on peacekeeping operations).
this shift, the Security Council has expanded the concept of peacekeeping from its classical origins into a new framework of complex operations.

a. Traditional Peacekeeping. — Traditional peacekeeping, which constituted the majority of UN operations during the Cold War,\footnote{The UN mission in the Congo from 1960 to 1964 is the exception. See supra note 32 and accompanying text. For a discussion of Operations des Nations Unies au Congo (ONUC) as an aberration in Cold War peacekeeping, see Edward Mortimer, Under What Circumstances Should the UN Intervene Militarily in a “Domestic” Crisis?, in Peacemaking and Peacekeeping for the New Century, supra note 1, at 111, 127–28.} entails the deployment of peacekeepers and observers assigned with responsibilities such as supervising buffer zones, monitoring ceasefires, and supporting disarmament plans.\footnote{Doyle, War Making and Peace Making, supra note 35, at 532–33; Michael W. Doyle & Nicholas Sambanis, International Peacebuilding: A Theoretical and Quantitative Analysis, 94 Am. Pol. Sci. Rev. 779, 781 (2000); Marrack Goulding, The Evolution of United Nations Peacekeeping, 69 Int‘l Aff. 451, 457 (1993).} Administrative functions are generally limited to management of the mission itself, rather than management of the territory.\footnote{Chopra, UN Civil Governance-in-Trust, supra note 37, at 79.} Quite simply, traditional peacekeeping consists of keeping the peace. Consent of the parties, neutrality of the peacekeepers, and minimal use of force, generally only for purposes of self-defense, are key principles of this type of intervention.\footnote{Goulding, supra note 40, at 453–55.} The UN missions in Cyprus, the Golan Heights, and Kashmir are representative of traditional peacekeeping operations undertaken by the UN.\footnote{For history and analysis of UN peacekeeping during the Cold War, see id. at 452–53.}

b. Peacebuilding as Peacekeeping. — Following the end of the Cold War, the UN embarked upon a new type of peace operation. The mandate of these missions extended beyond matters of war and security and required UN peacekeepers to undertake a range of civilian functions in addition to the military and policing responsibilities of traditional Cold War era peacekeeping.\footnote{Doyle, War Making and Peace Making, supra note 35, at 532.} Peacekeepers’ administrative duties now regularly consist of managing not only the mission but also the territory itself, so that the UN serves as the administrator of the territory. The wider scope of these operations reflects the Security Council’s greater capacity and willingness to act in the wake of the Cold War.\footnote{Olara A. Otunnu suggests that the changed environment resulted not only from increased capacity because of warming of superpower relations, but also from increased confidence. The success of the 1989 UN operation in Namibia and a sense of “triumph” after the Gulf War “injected a new feeling of confidence in the UN, thereby creating enlarged expectations about what the organization could accomplish.” Otunnu, supra note 15, at 297. The UN consequently assumed “a more ambitious program of peace activities, with its operations growing in number and complexity.” Id at 297–98.} Beginning with the 1989 Namibia mission, and in operations during the 1990s such as those in Cambodia and Eastern Slavonia, the UN assumed responsibility for po-
lice functions, election monitoring, and some executive powers as well.\textsuperscript{46} More recently, in East Timor and Kosovo, the organization has crossed over into comprehensive governance of territories.\textsuperscript{47}

The UN's assumption of these governance functions has been labeled postconflict peacebuilding: "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict."\textsuperscript{48} Whereas peacekeeping sets out to enforce and police formal peace, peacebuilding seeks to revitalize civil society, rebuild infrastructure, and restore institutions that have been destroyed by internal conflict—or to create these where they never existed—in order to prevent a state's disintegration into renewed warfare.\textsuperscript{49} The UN now assigns its missions sweeping objectives,\textsuperscript{50} including "reintegrating former combatants into civilian society, strengthening the rule of law, ... improving respect for human rights, ... [and] providing technical assistance for

\begin{itemize}
\item 47. In June 1999, armed with only limited experience in the administration of territories, the Security Council ordered the creation of a transitional civil administration for Kosovo. Three months later, the UN was charged with a similar task in East Timor. The resulting operations, vesting in the UN responsibility for executive, legislative, and judiciary functions in the two regions, demonstrate the wide divergence between peacekeeping as it was originally conceived by the Security Council, and peacekeeping as it is practiced in contemporary failed states. For information on the UN mission in Kosovo, see Report of the Secretary-General on the United Nations Interim Administration in Kosovo, U.N. Doc. S/1999/779 (1999); Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), U.N. Doc. S/1999/672 (1999); S.C. Res. 1244, supra note 33. For information on the UN mission in East Timor, see Report of the Secretary-General on the United Nations Transitional Administration in East Timor, at 7–9, U.N. Doc. S/2000/53 (2000); S.C. Res. 1272, supra note 33.
\item 48. Agenda for Peace, supra note 3, ¶ 21; see also High-Level Panel Report, supra note 8, ¶ 229 ("[T]he core task of peacebuilding is to build effective public institutions that, through negotiations with civil society, can establish a consensual framework for governing within the rule of law.").
\item 49. Agenda for Peace, supra note 3, ¶ 15; Brahimi Report, supra note 34, ¶ 13. Because the conditions characteristic of state failure tend to escalate rapidly and trigger additional crises, see supra text accompanying note 21, it is critical to stem those conditions in order to establish stable peace in a territory.
\item 50. Ralph Wilde challenges the traditional belief that international territorial administration, such as the missions in East Timor and Kosovo, represents a new practice, and points to both the League's history and the UN's history in governance of territory as evidence. See Ralph Wilde, Notes and Comments, From Danzig to East Timor and Beyond: The Role of International Territorial Administration, 95 Am. J. Int'l L. 583, 583 (2001) ("Actually, the involvement of international organizations in varying degrees of territorial administration has a long history, stretching back to the start of the League of Nations."). Professor Wilde is correct in pointing out the background, and his perspective is especially important in establishing his argument, but for the purpose of this Note, it is important to recognize that East Timor and Kosovo do nevertheless signal a new trend in UN peace operations that suggests that UN administration of territory is becoming the norm rather than a last-resort response.
\end{itemize}
democratic development. The tasks required to achieve these goals include returning refugees to their homes, establishing health services, supervising elections, setting up independent media, collecting taxes, training police, establishing a judicial system, reforming legal codes, and implementing mechanisms to investigate human rights abuses. In short, peacebuilding is statebuilding.

C. The Legal Basis for Peacekeeping

As the framework for Security Council intervention has shifted from traditional to complex peacekeeping, the legal basis of peacekeeping also has changed. Although the UN Charter does not explicitly authorize peacekeeping, the Security Council has grounded its peacekeeping missions in Chapters VI and VII—and in the space in between those provisions. Chapter VI applies to peaceful settlement of disputes and grants the Security Council authority only to make recommendations, and not to take military action; parties to a dispute must voluntarily carry out those recommendations. Chapter VII, in contrast, deals with Security Council measures, including the use of force, to maintain or restore international peace and security without the consent of the parties. Traditional peacekeeping does not fall into either category: Establishing and carrying out a peacekeeping mission is quite distinct from the mere recommendations provided for in Chapter VI, but, because the parties consent, it does not constitute Chapter VII action either. As a result, the legal foundation of traditional peacekeeping was said to lie in “Chapter VI/2,” a term coined by former Secretary-General Dag Hammarskjöld. In contrast to Cold War “Chapter VI/2” peacekeeping operations such as Cyprus and Kashmir, which occurred with the consent of the parties but used military force, in recent years the Security Council’s peacekeeping missions have instead relied directly on Chapter VII.

---

52. Agenda for Peace, supra note 3, ¶¶ 55–59; Brahimi Report, supra note 34, ¶¶ 13, 77; Goulding, supra note 40, at 459; Otunnu, supra note 15, at 298.
54. See id. arts. 39–51.
UN member states, however, have not been troubled by the lack of precise legal basis for Security Council authority over peacekeeping, both during the Cold War and since the advent of complex peace operations. Despite the establishment of fifty-nine UN peacekeeping operations since 1945, no state has promulgated an amendment to the Charter to contemplate peacekeeping explicitly. This is perhaps explained by the position of international tribunals that peacekeeping is justified under UN law. In 1962 the International Court of Justice upheld traditional peacekeeping on the grounds that, because peacekeeping "warrant[ed] the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations," it was not ultra vires. More recently, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) addressed the breadth of the Security Council's Chapter VII powers. Rejecting a challenge to the legality of the Council's establishment of the ICTY, the Appeals Chamber held that the Security Council has broad discretion in determining the measures it may take under its Chapter VII powers. Significantly, it maintained that the Council "has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen." On the basis of the ICTY's interpretation of Chapter VII, the Security Council has legitimate legal authority to carry out peace operations, whether traditional peacekeeping missions or complex international administration of territories.

That the legal foundation of peacekeeping is sound, however, does not end the analysis. Although the Security Council has a formal justification for its peacebuilding operations, its capacity to effectively fulfill the

---


60. Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 35 I.L.M. 52, ¶ 32 (Int'l Crim. Trib. Former Yugoslavia, Appeals Chamber, Oct. 2, 1995); see also id., ¶ 33-36 (noting that Article 41 of the Charter, which sets out measures the Security Council can take not involving the use of force, "is a negative definition" and "do[es] not exclude other measures").

61. See, e.g., Michael J. Matheson, United Nations Governance of Postconflict Societies, 95 Am. J. Int'l L. 76, 84 (2001) (relating Tadić argument to Security Council authority over peacekeeping); see also Paul C. Szasz, The Security Council Starts Legislating, 96 Am. J. Int'l L. 901, 904 (2002) (observing that "the Security Council, suddenly freed from its Cold War deadlock, has greatly expanded the repertory of devices available to it under Charter Chapter VII" and noting that the primary legal constraint on the Security Council is the requirement that its actions "must relate to the maintenance of international peace and security").
responsibilities of its new peacekeeping mandate is questionable. The creators of the UN envisioned the Security Council as an organ equipped to confront interstate wars, and they left the Security Council without the procedural mechanisms necessary and appropriate for intrastate peacebuilding. Do any mechanisms provide for accountability in UN peacekeeping? Does the Security Council have the capacity to manage such a broad range of tasks within its peacekeeping mandate? Is there a body within the UN better suited to take on governance functions? Despite these and other questions that call into doubt the current state of peacekeeping, the UN has taken no action to restructure the framework for peace operations.

II. Why Trusteeship Is Needed

Although the legal basis for Security Council peacekeeping is apparently sound, in performing its current peace operations the Security Council undertakes actions that lie outside the scope of its intended responsibilities, which narrowly focus on security, and fall instead within

62. Doubts about the success of peacekeeping operations have come not only from outside the UN, but also from within the organization. In 2000 the UN Secretary-General convened a Panel on United Nations Peace Operations to make recommendations for reform of the peacekeeping system. The final report of the panel, known as the "Brahimi Report," contained "blunt criticisms" and wide-ranging proposals, warning that "[w]ithout significant institutional change, . . . the United Nations will not be capable of executing the critical peacekeeping and peace-building tasks that the Member States assign it in coming months and years." Brahimi Report, supra note 34, ¶¶ 1, 8. The Secretary-General later reiterated the message of the Brahimi Report:

Given the potentially large challenges and costs such comprehensive peace-building often encompasses, it is essential to ensure that all key parts of the United Nations system are fully engaged in a collaborative and constructive fashion. . . . [N]o single department or agency can be expected to devise and implement, on its own, all the elements of a comprehensive peace strategy.

No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations: Report of the Secretary-General, ¶ 21, U.N. Doc. S/2001/394 (2001). For criticism outside of the UN, see Chopra, UN Peace-Maintenance, supra note 57, at 341 (stating that "[i]nsufficient regard has been given to other parts of the U.N. Charter" that may provide a more fitting framework for peace operations); Helman & Ratner, supra note 18, at 7 ("[T]he emergence of additional failed states suggests the need for a more systematic and intrusive approach."); Otunnu, supra note 15, at 312-13 (describing importance of economic and social recovery in peacekeeping, questioning "whether all these issues of security belong to the agenda of the Security Council," and positing "implications for the division of labor" between Security Council and other UN organs).

the much broader province of the Trusteeship Council. The Security Council, and its procedures and institutions, were not designed to handle statebuilding and governance. The Trusteeship Council, in contrast, possesses special competence in these matters and has been equipped since its creation with mechanisms that provide for legitimacy and protect accountability in governance operations. This is significant not because the Security Council has stepped beyond its explicit powers, but rather because the Security Council's lack of competence in peacebuilding has compromised the integrity of UN peace operations. Accordingly, the Trusteeship Council is a better UN organ to manage the governance tasks of contemporary peacebuilding.

A. Legitimacy

1. The Procedural Limitations of the Security Council. — The legitimacy of Security Council peacekeeping missions is threatened in large part by the structure of the Security Council. Authorization of peacekeeping operations by the Security Council means only a maximum of fifteen UN members approve actions against a member state—actions that often occur without the consent of the target state and entail massive expenditures and profound commitments of personnel. The composition and procedures of the Security Council make these far-reaching decisions vulnerable to heavy criticism. Because of its extremely limited membership, many states, especially smaller ones, consider the Council the agent of its most powerful members—France, the United States, and the United Kingdom. Moreover, because the Council is exercising powers that are

64. The stated functions of the constituent bodies of the UN indicate that the Security Council was not meant to manage peacebuilding and governance operations. While the Security Council seeks to maintain international peace and security, see U.N. Charter art. 24, para. 1, the trusteeship system's principal aims are:

(a) to further international peace and security; (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement; (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and (d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Id. art. 76.

65. See supra notes 59–60 and accompanying text (discussing decisions broadly construing Security Council powers and power of peacekeeping).

66. See infra Part II.A–B (describing lack of legitimacy and accountability in peacekeeping operations).

not authorized by the explicit provisions of Chapters VI and VII and is acting in Chapter VII operations without consent of the target state, it becomes even more susceptible to accusations that it is "exceeding its powers, acting in bad faith and failing to be accountable to the larger community."

Security Council procedures give further grounds for attacking the body's legitimacy. The Security Council is the only major organ of the UN that does not have a system in place for receiving information and proposals from independent sources such as nongovernmental organizations and think tanks. Moreover, the Council's typically closed general proceedings and the frequent consultations among the five permanent members in private meetings reduce the transparency of Security Council decisionmaking.

2. The Financial Limitations of the Security Council. — The legitimacy of peace operations also suffers because member states do not necessarily have a direct interest in the mission. The Security Council is authorized to impose expenditures on member states only for matters that fall within its areas of concern—the maintenance of international peace and secur-

(discussing perception that Security Council is dominated by France, United Kingdom, and United States). The Secretary-General's High-Level Panel has proposed two models for Security Council reform, both of which call for enlargement of the Council. See High-Level Panel Report, supra note 8, ¶ 249–260.

68. See supra text accompanying notes 32–34.

69. Chopra, Peace-Maintenance, supra note 57, at 343; see also High-Level Panel Report, supra note 8, ¶ 245 ("The paucity of representation from the broad membership diminishes support for Security Council decisions."); Comm'n on Global Governance, Our Global Neighborhood 237 (1995) ("With a larger role . . . comes an insistent need for more than formal legitimacy . . . [The Security Council's] current unrepresentative character is the cause of great disquiet, leading to a crisis of legitimacy. . . . [W]ithout legitimacy . . . it cannot be truly effective in its necessary role as a custodian of peace and security."); Jose E. Alvarez, The Once and Future Security Council, Wash. Q., Spring 1995, at 5, 5 ("The . . . revival of the . . . Security Council has come with a price: many UN members are questioning the Council's legitimacy and calling for its restructuring.").

70. Onn, supra note 15, at 314.


72. See Comm'n on Global Governance, supra note 69, at 238 (noting "frequent resort to consultations" among permanent members and widely acknowledged need for reform).
A REVITALIZED TRUSTEESHIP COUNCIL

Accordingly, actions other than the traditional military model of peacekeeping—including peacebuilding measures—must be financed through voluntary contributions, as traditional understandings of international peace and security under Chapters VI and VII “place[ ] economic and social stability largely outside the Security Council’s reach.”

As a result, member states do not necessarily contribute funds to the peacebuilding portion of the mission, and those who do not contribute may not perceive themselves as stakeholders in the peacebuilding process. The success of the operation may be compromised not only because funding must be obtained through voluntary contributions, but also because states with no significant financial interest in peacekeeping operations do not give these missions sufficient attention or concern. The resulting lack of support by the organization as a whole indicates that the mission has a weak foundation at best, and the legitimacy of the mission then suffers.

3. Correcting the Legitimacy Gap. — This deficiency of legitimacy is significant not only for UN members, who find the organization involved in missions approved by only a minority of members, but also for the individuals in the territories placed under UN administration, who will question the authority of international officials to enter their homelands. The legitimacy of a peace operation is especially critical for its governance functions because developing local institutions and facilitating a return to local control demand that the persons under administration trust the international regime.

73. U.N. Charter art. 24, para. 1 (“Members confer on the Security Council primary responsibility for the maintenance of international peace and security . . . .”).

74. Dirk Salomons & Dennis Dijkzeul, The Conjurers’ Hat: Financing United Nations Peace-Building in Operations Directed by Special Representatives of the Secretary-General 13 (Fafo Inst. for Applied Social Sci. Report No. 359, 2001). Although the organization has become somewhat more flexible in its financing schemes, the distinction between funding for peacekeeping and peacebuilding activities remains intact. Id. at 43.

75. See id. at 13 (noting that “fragmentation of financing” that gives the Security Council authority only to impose expenditures for matters of peace and security “places a disproportionate burden on those member states who are most committed to see peacekeeping and peace building succeed, rather than on the Organization as a whole”).

76. The Security Council is understaffed, overworked, and exhausted and has more on its agenda than it can handle. Legitimacy, of course, is thus compromised even further, as legitimacy will suffer if resources are insufficient to execute the mission properly.

77. See Salomons & Dijkzeul, supra note 74, at 13–14 (noting that “a double standard in how Member States share the burdens of peacekeeping and peace-building can undermine political and diplomatic support for missions at the Security Council or in the General Assembly” and warning that “[a]ny hint of a lack of political will in New York or in various capitals can have an immediate impact on operations, undermining the mission’s ability to engage with the parties to the conflict with unambiguous political backing”).

78. See, e.g., Wendy S. Betts et al., The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law, 22 Mich. J. Int’l L. 871, 872–82 (2001) (noting how local trust in international administration in Kosovo suffered as a result of the mission’s failure to assert its legitimacy or incorporate local elements into transition process).
legitimacy in two ways. First, the Trusteeship Council is a more representative body. It operates under the authority of the General Assembly, which is the UN forum of universal membership, and the General Assembly must approve trusteeship agreements. Accusations that peace operations are expressions of narrow Security Council interests thus would no longer be valid. Because the General Assembly is a truly multilateral body, in membership and thus in perspective, interventions that infringe on matters traditionally falling within domestic jurisdiction would be shielded from suggestions of imperial, neocolonialist motivation. Second, legitimacy would be enhanced because UN administration through peace operations would be identified for what it truly represents: trusteeship. Transparency is crucial in this process; only by openly acknowledging the nature of its administration will the UN gain the support of local persons and institutions.

Moreover, legitimacy provides a basis of authenticity and authority that enables an organization to experiment with innovative solutions without fear of losing standing in the community. In its current position, the Security Council must be cautious and pragmatic in its approach to collapsed states: "[T]he legitimacy of the Security Council would suffer if its practice in the long term was seen as departing too radically from the explicit stipulations of the Charter." Although some restraint is useful, of course, the problems of failed states require innovative solutions—attempts at new forms of governance and institution building. If the Security Council is compelled by its precarious legitimacy to avoid such solutions because of concerns about its reputation, then the success of peacekeeping necessarily suffers. The Trusteeship Council therefore

79. U.N. Charter art. 9, para. 1.
80. U.N. Charter art. 85, para. 2; id. art. 16.
81. The General Assembly consists of all UN members, id. art. 9, para. 1, and each member has one vote, id. art. 18, para. 1. The General Assembly "may discuss any questions or any matters within the scope of the . . . Charter or relating to the powers and functions of any organs provided for in the . . . Charter," id. art. 10, and it "shall receive and consider reports from the other organs of the United Nations," id. art. 15, para. 2. Decisions "on important questions" are made by a two-thirds majority of the members present and voting, while decisions on other matters are made by a simple majority. Id. art. 18, paras. 2-3.
82. See Doyle, War Making and Peace Making, supra note 35, at 543. Professor Doyle observes:

None of these intrusions into domestic sovereignty would work were it not for the genuinely multilateral character of the United Nations, which in itself serves as a guarantee of nonimperial motivation—and nonimperial capacity. The very multilateralism that makes the United Nations such an ineffective war maker is what makes it such an acceptable . . . peace maker.

Id.
83. Chesterman, supra note 63, at 4 ("Openness about the trustee-like relationship between international and local actors would help locals by ensuring transparency about the powers that they will exercise at various stages of the transition.").
84. Otunnu, supra note 15, at 312.
would have more freedom to take measures necessary to build peace in
the trust territory.

B. Accountability

The accountability of Security Council-authorized peace operations
suffers in two ways. First, under the current system, the Security Council
is reviewed only by itself.85 The range of perspectives that can affect
peacekeeping is, therefore, quite limited.86 Exercise of review by the
Trusteeship Council and General Assembly, in contrast, would hold
peacebuilding operations accountable to a greater constituency within
the UN.87 More member states—including those subject to such opera-
tions in the past—could voice their concerns and raise suggestions re-
garding the mission.

Second, accountability in peace operations is lacking in that Security
Council-authorized missions provide no protections against peacekeeper
abuses. At present, peacekeepers are accountable for their actions only
to their home countries; they bear no criminal responsibility to the UN,
and the UN does little to investigate claims of abuse.88 As such,
peacekeepers who commit abuses against civilians often go unpun-
ished.89 Although the Secretary-General has noted this problem and has

85. See Faiza Patel King, Sensible Scrutiny: The Yugoslavia Tribunal's Development
    of Limits on the Security Council's Powers Under Chapter VII of the Charter, 10 Emory
Int’l L. Rev. 509, 522 (1996) ("The Security Council's broad discretion in the area of
international peace and security is buttressed by the absence of any mechanism for
reviewing its actions."); see also Andrew K. Fishman, Comment, Between Iraq and a Hard
Place: The Use of Economic Sanctions and Threats to International Peace and Security, 13
Emory Int’l L. Rev. 687, 715 (1999) ("[N]o... organ of the UN has the authority to review
Security Council decisions."); Yogesh K. Tyagi, The Concept of Humanitarian Intervention
that the Security Council can do no wrong. It does not envisage any mechanism to review
Security Council action.").
86. See supra notes 67-72 and accompanying text (discussing limited input from
member states and other organizations on Security Council matters).
87. See supra notes 79-82 and accompanying text.
88. Associated Press, U.N. Focuses on Peacekeepers Involved in Child Prostitution,
N.Y. Times, Dec. 9, 1996, at A9; see also Jennifer Murray, Who Will Police the Peace-
Builders? The Failure to Establish Accountability for the Participation of United Nations
Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina, 34
peacekeepers for abuses); United Nations Development Fund for Women, Issue Brief on
Women, War, and Peacekeeping 5-7, at http://www.womenwarpeace.org/issues/
peacekeeping/peacekeeping_pf.pdf (last visited Feb. 4, 2004) (on file with the Columbia
Law Review) (noting that "[c]ontributing states are responsible for taking action against
peacekeepers that commit crimes"). The UN does not keep systematic records of
accusations against peacekeepers. Id at 20.
89. Cases of sexual exploitation of women and violence against women and girls are
heavily documented. See Report of the Secretary-General on Women, Peace, and Security,
problem of women and security within peace operations): Press Release, Subcommission
on Promotion and Protection of Human Rights, 53rd Sess., Subcommission on Promotion

HeinOnline -- 105 Colum. L. Rev. 827 2005
called on states contributing personnel to investigate and prosecute cases of alleged abuse and to set up "adequate accountability mechanisms and disciplinary measures," the UN has little authority beyond this plea to enforce accountability, and victims of abuse have no legal recourse.

In contrast to the Security Council, which has no built-in mechanisms to ensure accountability in peace operations, the Trusteeship Council could remedy some of these problems in peace operations through existing mechanisms in the UN Charter and Trusteeship Council regulations that enhance accountability of UN personnel in trust territories. Articles 87 and 88 of the UN Charter establish three oversight mechanisms to ensure proper administration of trust territories; applied to peace operations, these provisions could ensure more intrusive monitoring of missions and thus more protection for host populations. First, administering authorities must submit reports on the trust territories to the General Assembly and Trusteeship Council. Those bodies use the reports as the basis for evaluation of petitions, which either the inhabitants of a trust territory or other parties may submit concerning the affairs of a trust territory or the operation of the trusteeship system overall. The petition system is crucial, as victims of abuse, or any person with concerns about the trusteeship system, can submit a petition to the General Assembly and Trusteeship Council, and both bodies are required by law to review it. This process means that peacebuilding missions managed by the Trusteeship Council would necessarily be open to thorough review. Second, the Trusteeship Council and General Assembly can

and Protection of Human Rights Begins Debate on Administration of Justice (Aug. 3, 2001), available at http://www.unhchr.ch/huricane/huricane.nsf/0/72827CF112131035C1256AA000289BF2?opendocument (on file with the Columbia Law Review) [hereinafter Subcommission Press Release] (describing reports of alleged abuses). Other types of abuse are rampant as well. One recently publicized case concerned an Austrian member of the United Nations Mission in Kosovo (UNMIK) police force who allegedly beat and threatened a man in police custody. Claiming later that they were concerned that the suspect would have committed suicide, Austrian authorities flew him back to Vienna as the UN was beginning its investigation. The incident was regarded as a typical example of the difficulty the UN has experienced in holding personnel responsible for crimes committed during UN missions. He returned to work as a police officer with no suspension. Colum Lynch, Austria Is Said to Aid Flight of Suspect; U.N. Officials Assail Thwarting of Probe, Wash. Post, Mar. 6, 2002, at A11; UNMIK Div. of Public Info., Accused Police Officer Martin Almer Is Now Working as Police Courier, July 6, 2002, at http://www.unmikonline.org/press/2002/mon/july/lmm060702.htm#4 (on file with the Columbia Law Review).

90. SG Report on Women, supra note 89, ¶ 45.
91. See supra note 85 and accompanying text.
make periodic visits to the trust territory.\textsuperscript{94} These visiting missions have consisted in the past of four representatives of the Trusteeship Council who report directly to that body.\textsuperscript{95} This power to oversee the details of administration of the trust territory through visits is particularly important because it both would expose systematic abuses by UN officials such as bribery or theft of local resources and would provide greater protection for the inhabitants of the territory. Third, the Trusteeship Council must prepare a survey on political, economic, social, and educational advancement and protection of human rights\textsuperscript{96} within the trust territory, and each administering authority must make an annual report to the General Assembly on the basis of this survey.\textsuperscript{97}

Accountability for abuses in peacebuilding is critical not only because the protection of the territory's inhabitants must be the ultimate goal of peacekeeping operations, but also because accountability reinforces the principles of accountable government and respect for human rights that lie at the heart of these operations. Moreover, accountability of peacekeeping personnel is especially important in peacebuilding missions because the UN itself often is solely responsible for maintaining order—there is no system of law, no judges or courts to safeguard basic rights, and no police to provide security.\textsuperscript{98} The only protections for the host population are the those that the rules and regulations of peacebuilding missions provide. The notion that peacekeepers should always have immunity indeed has legitimate justifications in the context of traditional peacekeeping missions—preservation of the mission's independence by protecting individuals from liability in the host state and reciprocity of respect between the host state and states sending representatives.\textsuperscript{99} But in the new breed of peace operations, where the target state typically has no legal system and the UN is essentially standing in the place of the sovereign power, immunity means that peacekeepers are exempt from laws that the UN itself creates and enforces. Therefore, when the UN is engaged in a governance operation, the protections afforded to peacekeepers become illegitimate, unnecessary, and incompatible with the values of good governance, accountability, and respect for human rights that UN peacebuilding missions seek to promote. Transferring management to the Trusteeship Council thus provides an avenue for holding UN personnel accountable for their actions and holding the UN

\textsuperscript{94} U.N. Charter art. 87(c).
\textsuperscript{95} The Charter of the United Nations: A Commentary, supra note 56, at 967.
\textsuperscript{96} Id. at 968.
\textsuperscript{97} U.N. Charter art. 88.
\textsuperscript{98} See Subcommission Press Release, supra note 89 (statement of Louis Joinet noting that because of "judicial void when peacekeeping operations took effect[,] there was bound to be a transitional period; it was not possible to bring people before courts because courts did not exist").
to the same standards that it seeks to impose on the territories in which it operates.

III. IMPLEMENTING TRUSTEESHIP

Although the transformation of UN peacekeeping since the Cold War has imposed new responsibilities on the UN that the Security Council has struggled to fulfill, the case for trusteeship is still not clear. That the Security Council's peacekeeping missions have suffered, of course, is not a novel claim, and calls for the reform of the UN are pervasive.\(^{100}\) Still, proposals to revive trusteeship are typically dismissed as impossible to achieve because of the UN Charter. Those criticisms, however, ignore accepted methods of interpreting the Charter that reveal why trusteeship remains a viable avenue for peacebuilding.

A. The Challenge of the Charter

Commentators have suggested that even if revived trusteeship is advisable, the UN Charter makes it legally impermissible.\(^{101}\) The conflict centers not on the powers of the UN, but rather on the status of its members. While Article 104 grants the organization great power in specifying that the UN "shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes,"\(^ {102}\) the sovereign status of member states is heavily protected by Article 78, the principal obstacle to reviving trusteeship. That provision asserts: "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."\(^ {103}\) A plain reading of the text would preclude application of trusteeship to any territory that has been a UN member, and thus essentially to every state. Nonetheless, established methods of interpreting the Charter, in addition to UN practice and the Charter's negotiating history, suggest that the text of Article 78 does not rule out the transfer of peacebuilding activities to the Trusteeship Council.\(^ {104}\)

---

100. See, e.g., Kennedy & Russett, supra note 11 passim (proposing reforms to the UN); Stopford, supra note 57, at 514-21 (same). Calls for reform specifically of the Security Council also are pervasive. See, e.g., Comm'n on Global Governance, supra note 69, at 283-41; Gareth Evans, Cooperating for Peace: The Global Agenda for the 1990s and Beyond 180-81 (1993) (proposing Security Council reform).
102. U.N. Charter art. 104.
103. Id. art. 78.
104. An alternative to the proposal of this Note is to amend the Charter. The procedure and politics of that process, however, are beyond the scope of this Note. For information on amending the UN Charter, see The Charter of the United Nations: A Commentary, supra note 56, at 1163-89. For political commentary on the difficulties of
1. Interpreting the Charter. — A four-corners reading of the Charter is hardly typical. Traditional peacekeeping itself, for example, is not mentioned in the Charter as a power of the Security Council, so it has been grounded in the legal fiction of Chapter VI 1/2. Outside of the peacekeeping realm, perhaps the most famous example of the traditional flexibility in interpreting the Charter is the decision of the Security Council that even though Article 27 states that decisions of the Security Council on nonprocedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members," an abstention would not be read as having the effect of a veto and therefore would not preclude a Security Council decision requiring the affirmative vote of nine members. Thus, as these examples demonstrate, instead of deferring to the text of the Charter, the practice of the UN has been to consider the document a "living instrument" that should be interpreted not by sole reference to its text, but rather in light of its purposes, and applied flexibly to situations that were unforeseen at the time of its drafting.

2. Historical Interpretation of Trusteeship Provisions. — The practice of the UN shows no deference to the text of the Charter in defining the limits of the trusteeship system. Most notably, in 1947 the General Assembly entrusted the Trusteeship Council with administration of Jerusalem. The city would become not a trust territory, but a corpus separatum under a Special International Regime, and the Trusteeship Council would serve as the Administering Authority on behalf of the UN. This plan clearly exceeded the powers delegated to the Trusteeship Council in the Charter, which provides the Council with powers only with respect to amending the Charter, see Shashi Tharoor, If the U.N. Were Being Created Today . . ., N.Y. Times, Mar. 15, 2003, at B9.

105. See supra notes 53-55 and accompanying text.
106. U.N. Charter art. 27.
109. See id. at 594–95 (promoting "a constitutional view of the Charter" that "requires adequate mechanisms to ensure the constitutionality of the conduct of the organs established under the Charter"); see also J.L. Brierly, The Covenant and the Charter, 23 Brit. Y.B. Int’l L. 83, 83 (1946) ("Constitutions always have to be interpreted and applied, and in the process they are overlaid with precedents and conventions which change them after a time . . . . [W]e must expect the Charter to do the same."). But cf. Yehuda Z. Blum, Eroding the United Nations Charter 6 (1993) (arguing that the loosening of U.N. Charter interpretation has created "an atmosphere of lawlessness").
trust territories. Nonetheless, more than two-thirds of the votes cast in the General Assembly supported administration of Jerusalem by the Trusteeship Council, and thus supported allowing the Trusteeship Council a role not granted by the Charter.

One might respond that the General Assembly’s decision to violate the Charter was made on a purely pragmatic basis, with a view toward resolving a unique and urgent matter. That is an accurate representation, but it must be noted that in practice the UN often violates the text of the Charter because the organization exists for the purpose of resolving unique and urgent matters. As former U.S. Representative to the Trusteeship Council Francis B. Sayre states, “it must be recognized that in the shaping of political organizations such as the United Nations and in the determination of their powers, the votes of member states are often of even greater significance than the determinations of judicial tribunals.”

3. Negotiating History of Article 78. — The provision’s negotiating history, another significant guide for Charter interpretation, also supports the position that the text of Article 78 should not impede the revival of trusteeship. The travaux préparatoires indicate that Article 78 originated in a dispute between France and its former mandate territories of Syria and Lebanon. Although Syria and Lebanon had become full members of the UN founding conference upon their declarations of war against Germany, France believed that its mandate remained in operation. The drafters consequently adopted Article 78 to assure Syria and Lebanon that they could not be placed under French trusteeship. Because it was adopted for an extremely limited purpose, Article 78 should not be held to apply in strict terms.

111. The functions and powers of the Trusteeship Council are set out in U.N. Charter ch. XIII.
115. The Vienna Convention on the Law of Treaties, the rules of which have become accepted as customary international law, specifies that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340. Where interpretation of the text and context “[l]eaves the meaning ambiguous or obscure,” however, “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion . . . .” Id. art. 32, 1155 U.N.T.S. at 340.
117. See Michael Bothe & Thilo Marauhn, U.N. Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration, in Kosovo and the International Community: A Legal Assessment 217, 234 (Christian Tomuschat ed., 2002) (“Article 78 of the Charter, for historical reasons, must be given a narrow interpretation.”). The preceding arguments, see supra Part III.A, also apply
B. Overcoming Article 78

Based on the accepted methods of interpreting the UN Charter, which look to text, parties’ intent, or the object of the agreement, Article 78 should be considered in light of its history and stated purpose: preserving equality among members. Manipulating UN membership makes trusteeship a legally viable option. If a territory subject to trusteeship were to be denied the full benefits of membership, Article 78 would no longer be relevant because that territory would no longer be entitled to the protections of membership. Thus, sovereign equality among members would not be at issue.

Such an interpretation of membership is permissible under the UN Charter. Although the UN has advocated broad membership, the drafters of the Charter limited membership to states fulfilling certain conditions, articulated generally in Article 4. The International Court of Justice defined the criteria of membership according to this article, stating: “[T]o be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.” The suspension of privileges of membership, however, does not arise simply from failure to fulfill these conditions. Instead, the Charter allows—but does not require—suspension for states “against which preventive or enforcement action has been taken by the Security Council.” Although the Charter does not define “preventive or enforcement action,” the term “enforcement action” has been construed as Chapter VII action, by virtue of the Article 2(7) provision on “enforcement measures under Chapter VII.” Preventive action, however, lacks such clear scope. As the Charter offers no guidance, UN prac-
tice provides the strongest evidence of its statutory definition. In 1963, the General Assembly decided that the request for an embargo against South Africa on the sale and transportation of weapons, which was pronounced in a Security Council resolution, as well as the embargo itself, was sufficient to constitute "preventive action" for the purpose of Article 5.124 Under this interpretation, a Security Council resolution calling for an end to conflict in a failing state, for example, would constitute "preventive action." The fact that a collapsed state would likely contravene the Article 4 membership obligations of being peaceloving and being able to carry out the obligations of the Charter—especially the protection of human rights and maintenance of peace and security—would make the case even stronger and would strengthen the legitimacy of any preventive action by the Council that would lead to membership suspension by the General Assembly.125

The mechanism, then, would proceed as follows: Suppose a state is in the midst of civil war and humanitarian crisis; its government has collapsed, and factions, none of which have legitimate authority in the state, are violently fighting for control. By its own decision, or upon recommendation of the General Assembly or Trusteeship Council, the Security Council endorses preventive or enforcement action with respect to this state. The General Assembly then votes on and approves Article 5 suspension of this state’s rights and privileges of membership. The territory is then considered a trust, and the Trusteeship Council has the opportunity to oversee the peacekeeping mission’s governance functions; the Security Council proceeds under its own mandate with traditional peacekeeping functions such as enforcing a ceasefire and monitoring buffer zones. The Trusteeship Council continues its civil administration of the territory until the objectives of peacebuilding are secured and the state is sufficiently stable to return to self-government. At that time, it resumes full exercise of its own governance, and Article 5 suspension expires. The state then returns to full membership.

IV. THE ETHICS OF TRUSTEESHIP

Critics may respond that even if trusteeship could resolve some of the legitimacy and accountability problems resulting from Security Coun-

124. The Charter of the United Nations: A Commentary, supra note 56, at 178. Preventive action is mentioned three times in the Charter but is not defined or elaborated.

125. The UN has not yet imposed an Article 5 suspension on a member. There have, however, been numerous discussions of suspension in General Assembly debates, most of which have focused on Israel and South Africa. See 1 Repertory of the Practice of United Nations Organs, Supp. No. 6, at 128 (2001). Significantly, member states have also argued that membership issues brought before the General Assembly through mechanisms other than Article 5 and Article 6, which covers expulsion, were invalid because they contravened those articles of the Charter. See id. at 130. This suggests that even though the General Assembly has not exercised its powers under Articles 5 and 6, member states consider those provisions the exclusive valid legal routes for modifications of the rights and privileges of membership.
cil management of peacebuilding, and even if it can be implemented in accord with the Charter, it remains an impermissible intrusion on state sovereignty. Indeed, when the idea of reviving trusteeship was first suggested in the wake of the "failed states" theory, it encountered wide suspicion and aroused much controversy. One decade later, however, the climate has changed, and UN intervention in failed states has grown more common and more complex over time. The reality is that a significant element of UN peacekeeping has transitioned into UN governance. As a result, conceptions of sovereignty and of responsibility also have transformed. This normative shift suggests that it may be possible to delink trusteeship from its colonial roots and rid it of its paternalistic undertones, thus enabling revival of the Trusteeship Council and improvement of UN peace operations.

A. Sovereignty

State sovereignty lies at the heart of the UN system. Article 2(1) of the Charter sets forth as a fundamental principle of the organization the "sovereign equality of all its members." Article 2(7) protects this sovereignty by prohibiting UN intervention in matters "essentially within the domestic jurisdiction of any state." Notions of sovereignty have transformed, however, as international cooperation has increased and as international human rights law has normalized intervention in a state's internal matters. International law formerly regulated conduct among states and stayed clear of a state's treatment of its own citizens. But throughout the twentieth century, the reach of the law began to encompass a wider range of state behavior, invalidating the notion that a state's actions within its borders are exempt from international law. Sovereignty is now seen as a fluid concept, one that is mitigated by the needs of preserving peace and responding to threats to international security.

127. Id. art. 2, para. 7.
128. See Report of the Secretary-General on the Work of the Organization, U.N. GAOR, 54th Sess., 4th plen. mtg. at 1, U.N. Doc. A/54/PV.4 (1999) ("The sovereign state... is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be the servant of its people, and not vice versa."); William A. Schabas, International Law and Response to Conflict, in Turbulent Peace, supra note 2, at 603, 605 (noting that "[b]y the 1950s and 1960s 'intervention' had become a dirty word and 'sovereignty' a sacred and intangible value, but by the end of the century the pendulum was to swing back in the other direction," and observing that "it was the growth of the human rights discourse that authorized the international community to claim the right to involve itself in areas that had been beyond its reach in the past").
129. Schabas, supra note 128, at 615.
130. The trusteeship system, in fact, may have contributed to this fluid understanding of sovereignty. Judge McNair stated in the International Status of South-West Africa Case that trusteeship had defined "a new species of international government, which does not fit into the old conception of sovereignty. ... [I]f and when the inhabitants of the territory obtain recognition as an independent State... sovereignty will revive and vest in the new
This new conception has been recognized by the UN itself, as well as by scholars. In a significant report, former UN Secretary-General Boutros Boutros-Ghali announced that, although sovereignty remains a crucial norm in international relations, "[t]he time of absolute and exclusive sovereignty . . . has passed; its theory was never matched by reality."\textsuperscript{131} Boutros-Ghali noted a "new dimension of insecurity" caused by oppression and armed conflict\textsuperscript{132} and urged the UN not only to fulfill its vital function of peacekeeping,\textsuperscript{133} but also to implement the crucial tasks of post-conflict peacebuilding in order to avoid the resurgence of conflict.\textsuperscript{134} Scholars have echoed the view that sovereignty is not absolute,\textsuperscript{135} basing their opinion in large part on the UN interventions in Cambodia, Kosovo, and Somalia. These missions demonstrated that the Security Council will indeed penetrate the shield of sovereignty imposed by Article 2(7).\textsuperscript{136}

\[\text{T}h\text{e world is moving away in fits and starts from the idea that state sovereignty serves as an all-purpose rationalization for narrowly defined national interests and lurching toward a situation in which states are more accountable for their actions, whether inside or outside their borders. In short, sovereignty is no longer a safe diplomatic sanctuary when abuse of civilians occurs.}\textsuperscript{137}

\footnotesize{State." 1950 I.C.J. 128, 150 (July 11) (opinion of McNair, J.). Sovereignty was, in effect, in suspension until the end of the trusteeship.}

131. Agenda for Peace, supra note 3, ¶ 17.
132. Id. ¶ 13.
133. Id. ¶ 15.
134. Id. ¶ 21; see also High-Level Panel Report, supra note 8, ¶¶ 221, 223 (noting that peacebuilding is "one of the best investments that can be made for conflict prevention" and warning that "failure to invest adequately in peacebuilding increases the odds that a country will relapse into conflict").
136. See Helman & Ratner, supra note 18, at 9–10 (discussing history of "exaggerat[ing]" the importance of sovereignty and Article 2(7) and noting that the "tide is slowly changing" in favor of greater intervention).
Moreover, intervention is seen not only as a mechanism for the protection of human rights, but also as a vehicle for the recovery of full sovereignty. The ultimate purpose of the UN mission in Kosovo, for example, is to transition Kosovo to self-government.138 Thus a major obstacle to reviving trusteeship—the notion that trusteeship infringes on vital sovereignty—is, under current standards, a problem of lessening degree as the international community recognizes the underlying purpose of UN intervention and consequently becomes more involved in the tasks of peacekeeping and governance in failed states.

B. Human Security

Associated with this new understanding of sovereignty is the concept of human security, the view that the protection of persons is as vital as the protection of interstate peace.139 Human security has become a core element in the UN theory of intervention. In noting that the drafters of the Charter issued that document in the name of “the peoples,”140 rather than in the name of states, and sought not only to preserve international peace and security but also to protect human rights,141 Secretary-General Kofi Annan commented, “The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity.”142 Thus in its contemporary formulation, which considers the significance of human security in addition to international security, state sovereignty—formerly a shield against external intervention in state matters—has yielded to the sovereignty of peoples. It now serves as a protection against state abuse of human rights and failure to protect fundamental rights and freedoms.

138. See High-Level Panel Report, supra note 8, ¶ 261 (explaining that need for new UN organ dedicated solely to peacebuilding is based on “a clear international obligation to assist States in developing their capacity to perform their sovereign functions effectively and responsibly”); Chopra & Weiss, supra note 135, at 98 (describing 1991 General Assembly debate on emergency assistance in wars, in which parties argued that humanitarian assistance is an expression of state sovereignty and recommended that humanitarian intervention be termed “humanitarian solidarity” to mitigate reluctance to intervene in intrastate matters); Kennedy & Russett, supra note 11, at 68 (“[G]overnments will need to understand another political paradox, which is that the only purpose of the intrusion by the world organization is to help the peoples concerned recover their real sovereignty—that is, their capacity to influence their own fate and to conduct their own affairs peacefully.”).


140. U.N. Charter pmbl.

141. Id.

C. Responsibility

The emerging notion of responsibility within the international community further strengthens the case for trusteeship. The international community recently has embraced the position that sovereignty confers responsibility on a state not only to protect its people, but also to intervene in another state that fails to fulfill the duties owed to its population. The Secretary-General has repeatedly emphasized the responsibility of UN member states to respond to failed states and local crises and has criticized the lack of "a common vision of our responsibility in the face of massive violations of human rights and humanitarian catastrophes occasioned by conflict"\footnote{SG Report on Millennium Declaration, supra note 8, ¶ 10.} and the "hesitant and tardy" response to such crises.\footnote{Id.} He cited the report of an independent group, the International Commission on Intervention and State Sovereignty, for its recognition and exploration of the duties of states in this new environment. The report, entitled The Responsibility to Protect, announces a new dimension of state responsibility: "Where a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."\footnote{Int'l Commission on Intervention & State Sovereignty, The Responsibility to Protect xi (2001) [hereinafter Responsibility to Protect].} The roots of this responsibility lie in the transformation from "sovereignty as control" to "sovereignty as responsibility."\footnote{Id. at 13; see also David M. Malone & Simon Chesterman, A Neighbor's Duty to Act Next Door, Int'l Herald Trib., Dec. 17, 2001, 2001 WL 28585664 (supporting notion of responsibility to protect and noting that "[w]here governments make good-faith efforts to fulfill this responsibility, they have little to fear for their sovereignty, even when the circumstances of their countries condemn their citizens to poverty," but "[w]here governments are unwilling or unable to protect their citizens from avoidable catastrophe, however, that responsibility must be borne by the broader community of states").} The Commission cited the responsibility of the UN to protect international peace and security, obligations under human rights and humanitarian law, and state practice as additional roots of this responsibility to protect.\footnote{Responsibility to Protect, supra note 145, at xii.}

Revival of trusteeship provides a practical answer for how the international community can live up to its responsibility to protect ailing populations. The report, in fact, proposes that the trusteeship system may provide "useful guidelines" for intervention and post-conflict governance and suggests a "constructive adaptation" of the UN Charter provisions on trusteeship.\footnote{Id. at 43.} Perhaps the greatest challenge is resistance to the connotations of the word "trusteeship." Even though the type of trusteeship proposed by this Note—international administration of territory by the UN—bears no resemblance to the traditional colonial model of trusteeship—with one state exercising control over a territory in an effort...
to develop a backward people and exploit the resources of a territory—to many, the word still smacks of colonialism, paternalism, and the League of Nations concept of tutelage by advanced nations of backward peoples. Labeling the system "international administration" may provide a simple solution to this quarrel over semantics.\textsuperscript{149} The primary concern is whether the international community can welcome the revival of an organ of the UN devoted solely to postconflict governance. The organization's massive interventions in missions such as Kosovo and East Timor, coupled with the normative shift in conceptions of state sovereignty, security, and responsibility, indicate that trusteeship is a viable avenue for peacekeeping.

CONCLUSION

This Note supports a revitalization of the Trusteeship Council on the grounds that it offers a superior mechanism to manage the governance functions of UN peace operations. The recent experiences of the UN suggest that failed states are not an aberration in world politics. Civil war and humanitarian crisis, unfortunately, will persist, and the international community will continue to respond in ambitious, though faltering, peacebuilding missions. Even if the UN never again exercises full sovereign powers over a territory, as it did in East Timor, the problems of state collapse, and the statebuilding and governance tasks required for recovery, will remain a preoccupation of the organization. Better UN response to these situations is critical. The missions are slowly improving: "U.N. officials now acknowledge that...Kosovo got the operation that should have been planned for Bosnia four years earlier, and East Timor got that which should have been sent to Kosovo."\textsuperscript{150} But for the sake of the inhabitants of these territories, and for the sake of the standing of the UN in the international community, the organization must do better.

Reviving the Trusteeship Council would provide a stronger mechanism for peacebuilding operations. Because of its institutional legitimacy and systematic means of securing accountability, the Trusteeship Council offers benefits over the Security Council in peacebuilding. Because of the transition in international legal and political thought about sovereignty and responsibility, moreover, trusteeship can be discussed as a jus-

\textsuperscript{149} For example, when asked whether he "envision[ed] a kind of trusteeship" in Somalia, then-UN Secretary-General Boutros Boutros-Ghali responded, "No, I don't like the word trusteeship," but nonetheless stated that he would consider creating a UN authority to administer the country if the Somalis were unable to form a provisional government. Stanley Meisler, Leading a Revived United Nations Toward Peace in a Changing World, L.A. Times, Dec. 27, 1992, at M3. Professor Noah Feldman, writing about what he characterizes as the U.S. trusteeship in Iraq, notes that although the "paternalistic impulse runs deep in the project of nation building," it is possible to rid trusteeship of its paternalism by acknowledging that the trustee is "no different from an ordinary government and eschews ambitious claims of special expertise." Noah Feldman, What We Owe Iraq: War and the Ethics of Nation Building 70, 87 (2004).

\textsuperscript{150} Chesterman, supra note 68, at 11.
tifiable, valid avenue in peacekeeping. As long as the UN continues to confront the types of crises it currently faces, the Security Council will struggle to defend its mandate, fulfill its responsibilities, and legitimate its actions in interventions that have little to do with war and peace. And as long as the Security Council faces this struggle alone, the Trusteeship Council will remain inactive, while its purposes are more pertinent than ever to the work of the UN.