

Some Legal Problems with Trusteeship

Ruth E. Gordon

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Some Legal Problems with Trusteeship

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* Professor of Law, Villanova University School of Law. LL.M., The London School of Economics and Political Science, 1987; J.D., New York University School of Law, 1980; B.A., New York University, 1977. The majority of the research for this article was completed while the author was the Riesenfeld Fellow in Public International Law in residence at the University of California at Berkeley School of Law (Boalt Hall). I would like to thank Boalt Hall, and especially David Caron, for affording me the opportunity to research this rather complex topic without interruption. This article would not have been possible without that support, and for that I am eternally grateful. La Dell Dangerfield, III (Boalt Hall Class of 1995) and Ellen Petrowski and Jason Ewasko (Villanova University School of Law Class of 1995) provided valuable research assistance. An early draft of this article was presented at the Western Scholars of Color Conference where I received many worthwhile suggestions that ultimately influenced the direction this paper took. A later draft was presented at a Villanova University School of Law faculty colloquium, where I received invaluable input from my colleagues. Their comments came at a critical juncture in this project and were instrumental in helping to propel this project forward. I give my sincere thanks to all of my fellow law teachers who took the time to read and to provide comments on this project. Finally, I acknowledge and thank my friends and family for their unwavering patience and support.

Introduction

Somalia, Liberia, Afghanistan, Zaire, and perhaps the latest casualty, Haiti, indicate a disturbing trend in international society: the danger of disintegrating nation-States.¹ Civil war and/or overwhelming economic and social dysfunction have led to governments that cannot perform or deliver essential services. The ensuing human misery has generated appeals for international intervention.² Thus, the U.N. Security Council is shouldering comprehensive projects in Somalia, Cambodia, and elsewhere;³ the Secretary-General is promoting U.N. post-conflict peacebuilding;⁴ scholars and commentators are proposing paradigms to "save failed States,"⁵ to assist disintegrating States, or simply to bring back colonialism,⁶ and

1. See generally Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL'Y, Winter 1992-93, at 3; Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; Jon H. Sylvester, *Sub-Saharan Africa: Economic Stagnation, Political Disintegration, and the Specter of Recolonization*, 27 LOY. L.A. L. REV. 1299 (1994); John Darnton, *Zaire Drifting into Anarchy as Authority Disintegrates*, N.Y. TIMES, May 24, 1994, at A1.

2. Often television images prompt calls for action, while other situations are ignored because they lack media attention. Helmut Freudenschub, *Article 39 of the U.N. Charter Revisited: Threats to the Peace and Recent Practice of the U.N. Security Council*, 46 AUS. J. PUB. & INT'L L. 1, 22 (1993). In an effort to thwart international attention, the press may be controlled or barred in a particular situation. See, e.g., Donatella Lorch, *Drought and Fighting Imperil 2 Million in Sudan*, N.Y. TIMES, Feb. 10, 1994, at A3 (noting that the press has been restricted in covering the war in Sudan). Because American and other Western corporations dominate the media, what wars and conflicts are covered, and in what manner, is decided largely from a Western perspective. Consequently, public opinion, as a factor in deciding which situations are worthy of attention, skews the process towards crises that Western public opinion believes merit attention. Unequal attention to equally grievous situations may raise consistency problems. See Stanley Hoffmann, *Out of the Cold: Humanitarian Intervention in the 1990s*, HARV. INT'L REV., Fall 1993, at 8, 9. As for sub-Saharan Africa, the end of the Cold War has meant that the major powers have largely withdrawn, resulting in almost total marginalization. With the removal of external strategic and ideological considerations, Africa's problems now exist in regional and national, but not international, contexts. Francis Deng notes that the "[c]auses and effects of conflicts are increasingly recognized as primarily internal." Francis M. Deng, *Africa and the New World Dis-order: Rethinking Colonial Borders*, BROOKINGS REV., Spring 1993, at 32. These situations may be ignored unless principal Western powers perceive that significant national interests are at stake. This mode of decision-making also raises consistency problems. While the current trend is more or less to ignore these situations, State disintegration continues. At the same time, U.N. and foreign aid bureaucracies will continue to operate, thus insuring some effort to ameliorate these situations, however piecemeal and ineffective these endeavors may be under such adverse conditions. Sylvester, *supra* note 1, at 1323 & n.91. Consequently, it is important that the theoretical and legal parameters of possible solutions be explored, and this article is an effort to do so.

3. *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 48th Sess., Supp. No. 1, at 50-54, U.N. Doc. A/48/1 (1993) [hereinafter *Report of the Secretary-General 1993*]. These projects could be termed peacekeeping, peace-enforcement, peacebuilding, or some combination thereof. See BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING (1992) [hereinafter AN AGENDA FOR PEACE] (in which the Secretary-General explains his views on the content of these terms).

4. AN AGENDA FOR PEACE, *supra* note 3, at 32.

5. Helman & Ratner, *supra* note 1, at 3.

6. Paul Johnson, *Colonialism's Back - And Not a Moment Too Soon*, N.Y. TIMES, Apr. 18, 1993, at F22; Charles Krauthammer, *Trusteeship for Somalia; An Old-Colonial-Idea*

others critically appraise humanitarian intervention.⁷ The United Nations, or more specifically the efficient and apparently ever more powerful Security Council, is usually suggested as the instrument for action.⁸

This article will focus on difficulties raised under the U.N. Charter,⁹ and international law generally, by proposals to bring back various forms of trusteeship.¹⁰ Given some of the legal characteristics of trusteeship, it may prove difficult to conceptualize a modern trusteeship system that would address State disintegration. While concepts such as sovereignty, self-determination, and humanitarian intervention are currently in transition,¹¹ they still appear to preclude trusteeship, at least as it was originally

Whose Time Has Come Again, WASH. POST, Oct. 9, 1992, at A27; Claudio G. Segre, *Colonialism May Be Worth Bringing Back*, PHILA. INQUIRER, Aug. 3, 1993, at A7.

7. Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI-KENT L. REV. 203 (1992). A humanitarian crisis can be "structural," that is, "provoked . . . by the disintegration of a [S]tate." Hoffmann, *supra* note 2, at 9. In his critique of humanitarian intervention, Professor Roberts notes that its definition includes intervention if there is widespread starvation or the complete failure to ensure the most elementary conditions of life. Adam Roberts, *The Road to Hell. . . A Critique of Humanitarian Intervention*, HARV. INT'L REV., Fall 1993, at 10.

8. The importance of the Security Council has grown since the end of the Cold War, while that of the General Assembly has declined. Elizabeth Riddell-Dixon, *North-South Relations and the United Nations*, in THE STATE OF THE UNITED NATIONS, 1993: NORTH-SOUTH PERSPECTIVES 1, 8 (Academic Council on the United Nations System Reports and Papers No. 5, 1993). The Security Council has primary responsibility for maintaining international peace and security. U.N. CHARTER art. 24, para. 1. "The Security Council is also defining security more broadly and thus becoming involved in a wider range of issues, including the protection of human rights, the delivery of humanitarian assistance, and the war against narcotrafficking." Riddell-Dixon, *supra*, at 8. Many U.S. commentators favor the Security Council as an appropriate forum because of current U.S. dominance in that organ. Focusing on a particular organ (such as the Security Council versus the General Assembly) because of the influence that can be exerted in that particular forum is not new. See Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519 (1994).

9. While suggested functions for the United Nations vary considerably, all theorists support some role for the Organization, even if it is limited to giving territories to trustees. Johnson, *supra* note 6, at 22. Furthermore, this writer agrees with James Anderson that the United Nations is the only global forum where States cooperate on a vast array of international issues. It is a broadly representative arena, with an all time high of 185 members, and it is the logical starting point for any efforts to address trusteeship problems. See James Anderson, *New World Order and State Sovereignty: Implications for U.N.-Sponsored Intervention*, FLETCHER F., Summer 1992, at 127. However, the Organization and its organs are limited and empowered by the provisions of the Charter of the United Nations, which may limit certain actions or prescribe criteria for their exercise. See Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Advisory Opinion, 1948 I.C.J. 57, 64 (May 28). Consequently, there may be legal obstacles to taking over a country, even if the goal is to make it over in a better image.

10. A forthcoming article by the author will examine Secretary-General Boutros-Ghali's proposals for postconflict nationbuilding and the U.N. efforts in this sphere in Cambodia, Somalia, and elsewhere. Many thought that concepts such as colonialism and trusteeship had only historical significance. See generally Neta C. Crawford, *Decolonization as an International Norm: The Evolution of Practices, Argument, and Beliefs*, in EMERGING NORMS OF JUSTIFIED INTERVENTION 37 (Laura W. Reed & Carl Kaysen eds., 1993) (explaining the evolution of decolonization as a norm).

11. Much of the post-World War II legal order revolved around the Cold War paradigm. A subcontext, which was also influenced by the Cold War, was decolonization

conceived. Thus, this article contends that while it may be possible to reconceptualize trusteeship to address this problem,¹² employing the trusteeship approach would entail surmounting considerable legal hurdles.

Part I of this article sets forth in general the problem of disintegrating States. Defining when a State has disintegrated will be difficult, and it raises the problems of who should make this decision and how to control what could be a very political and subjective determination. While it may be futile to try to provide definitive answers given the myriad scenarios, various prospects will be considered, beginning with the viewpoints of commentators that have addressed the problem. The necessity of distinguishing between civil war situations and a slow, but continuous, breakdown in operative governance will also be considered.¹³ Part I will also describe various proposals to reinstate trusteeship and recolonization, along with their underlying theoretical and legal bases.

Parts II and III will turn to two fundamental concepts that pose significant obstacles to imposing trusteeship on States: sovereignty and self-determination. Sovereignty, the subject of part II, is a key concept both in imposing trusteeship and in determining the status of trust territories. Under the U.N. Charter, the trusteeship system is inapplicable to Member

and the emergence of countries that were generally capital poor, often natural resource rich, and populated mostly by black, brown, and Asian people. See Thomas Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3 (Catherine Brölmann et al. eds., 1994) [hereinafter *Postmodern Tribalism*] (noting that the period of 1945-1990 was characterized by two major historical tendencies, the Cold War and Third World decolonization). The conclusion of the Cold War and the demise of the Soviet Union have necessitated considerable reassessment within the international legal establishment. For example, the principle of self-determination developed primarily within the context of decolonization. *Id.* at 10; Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 25 (1992). In the post-Cold War era, however, many new claims that do not involve decolonization are being asserted. See, e.g., MORTON H. HALPERIN & DAVID J. SCHEFFER, SELF-DETERMINATION IN THE NEW WORLD ORDER 123-60 (1992); S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131, 132 (1993); Cass, *supra*, at 26-29; *Postmodern Tribalism*, *supra*, at 11. Similarly, the legal discourse on military intervention in civil wars revolved primarily around unilateral intervention and counter-intervention, concepts that explained, justified, or vilified Soviet and U.S. interventions, as they fought their ideological battle on Third World soil. Presently, there are new appraisals of intervention and sovereignty because of the willingness of the United Nations to intervene in the post-Cold War era and the present unwillingness of the remaining military superpower to intervene unilaterally. See generally Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601 (1990) (rethinking the international system in the wake of the ending of the Cold War and the central role of the U.N. in a new global order); W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT'L L. 859 (1990) (suggesting the need to re-think international law in the post-Cold War era).

12. A work by the author in progress will use critical race theory to critique whether we should bother to reconceptualize this paradigm to address State disintegration, even if the legal barriers could be surmounted. The theoretical, political, and racial foundations underlying the concept of trusteeship may render this entire approach questionable.

13. The two situations may pose different legal problems, given the Security Council's power to deal with threats to the peace. See U.N. CHARTER chs. VI, VII.

States because of the principle of sovereign equality.¹⁴ Given the changing nature of sovereignty, however, it is worth exploring whether it has eroded to the extent that it is now compatible with a modern form of trusteeship.

Self-determination, the subject of part III, is also a principle in the midst of redefinition.¹⁵ The concept developed largely within the context of decolonization and, to some extent, the trusteeship and mandate systems were viewed as vehicles to achieve self-determination.¹⁶ For our purposes, there are several issues. Does international control of a territory usurp the right of self-determination, making trusteeship impermissible, or can it be a vehicle to implement that right? If it is a vehicle to implement self-determination, what are the goals and how are they to be achieved?

Parts IV and V are efforts to reconceptualize trusteeship in the modern era. Part IV explores how a State might assume trusteeship status, and part V examines what trusteeship status would entail within the modern international legal system. Part IV discusses four possible scenarios. The first is a voluntary assumption of trusteeship by a State for some fixed period of time. It then turns to three involuntary methods: intervention when State disintegration is a threat to the peace,¹⁷ intervention when the threat to the peace merits humanitarian intervention,¹⁸ and intervention

14. U.N. CHARTER art. 78. Moreover, given the legal status of trust territories, sovereignty would seem to circumscribe its applicability to States.

15. See, e.g., HALPERIN & SCHEFFER, *supra* note 11, at 46-47; Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in *MODERN LAW OF SELF-DETERMINATION* 1, 2-8 (Christian Tomuschat ed., 1993); Anaya, *supra* note 11; Lea Brilmayer, Essay, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177 (1991); Cass, *supra* note 11, at 21; Lung-Chu Chen, *Self-Determination and World Public Order*, 66 *NOTRE DAME L. REV.* 1287 (1991); James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 *DEN. J. INT'L L. & POL'Y* 9 (1991).

16. Antony Anghie, "The Heart of My Home:" *Colonialism, Environmental Damage, and the Nauru Case*, 34 *HARV. INT'L L.J.* 445, 466 (1993).

17. This section will explore State disintegration as a threat to the peace in the sense that it may cause regional dislocations. The Security Council appears to be broadening the concept of threat to the peace from civil wars and internal conflicts, perhaps meaning that it does not need to have a catastrophic impact on neighboring countries. Gordon, *supra* note 8, at 533-37.

18. The permissibility of humanitarian intervention is undergoing a transition and is being actively debated by legal scholars. See, e.g., Ved. P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 *DEN. J. INT'L L. & POL'Y* 305 (1992). Its legality is generally being conceded when it is multilateral, as opposed to unilateral, intervention. See, e.g., Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, FLETCHER F., Summer 1993, at 201. The obstacle is the principle of nonintervention, which is a corollary to sovereignty. Nonintervention generally means that no State or group of States has the right to intervene, directly or indirectly, in the external or internal affairs of another State; every sovereign has the right to conduct its affairs without external interference. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 *I.C.J.* 4, 106 (June 27) [hereinafter *Nicaragua v. United States*]. The primary questions are determining the particular human rights that may be at risk when a State disintegrates and whether it is permissible for the Organization to ignore sovereignty or other claims and intervene in such an overwhelming manner to vindicate these rights.

in cases where States have disintegrated to the point that they can be considered non-self-governing territories of a sort and thus eligible for trust status.¹⁹

Finally, in part V, the legal status of a modern trust is explored. Given the legal status of trust territories under the U.N. Charter, we must determine whether a trust entity can be both a State and a trust territory at the same time. Making this determination entails trying to decide where sovereignty would lie in these circumstances. The legal attributes of States versus those of trust territories in the international system make this a difficult problem.

I. Disintegrating States: The Theory

A. The Concept of State Disintegration

Various commentators have described failed nation-States,²⁰ coming anarchy,²¹ statehood existing in legal terms only,²² and the widespread deterioration of conditions in specific countries and regions.²³ The common theme is overwhelmed governments that are almost, if not completely, unable to discharge basic governmental functions. Somalia is probably the current textbook example,²⁴ but this scenario is attributable to a con-

19. The discussion will explore what we mean by failed in the context of which states are eligible for trust status. The word "fail" is defined as, "to prove deficient or lacking; perform ineffectively or inadequately, or to be unsuccessful in attempting to do or become something." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (William Morris ed., 1981). The question is whether "failed" States that are potentially eligible for trust status are those that are merely inadequate or those that are defunct. This is an important question because sovereignty is an incident of statehood. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 72 (4th ed. 1990). Presumably it is at least open to question as to whether trusteeship status could be imposed on a defunct non-State.

20. Helman & Ratner, *supra* note 1, at 3.

21. Kaplan, *supra* note 1, at 44.

22. Robert H. Jackson, *Juridical Statehood in Sub-Saharan Africa*, 46 J. INT'L AFF. 1 (1992).

23. Sylvester, *supra* note 1, at 1299.

24. When Mohamed Siad Barre fled in January 1991, various clan militias turned on each other, and the country was eventually divided into twelve zones of control. Since that time there has been no functioning central government in Somalia. Jeffrey Clark, *Debacle in Somalia*, FOREIGN AFF., Winter 1992-93, at 109, 112. Efforts at political reconciliation have been difficult. *Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794*, U.N. SCOR, 44th Sess. at 3-5, U.N. Doc. S/25354 (1994) [hereinafter *Further Report of the Secretary-General Pursuant to Resolution 794*]. There are no longer national or regional institutions for civil administration. Schools are nonexistent, and there is a large refugee and displaced person population. Priority sectors identified by U.N. agencies include: health, water, food, security, nutrition, sanitation, employment, administrative rehabilitation, police forces, agriculture, and livestock. *Id.* at 6-8. These matters would appear to be the essence of governmental responsibilities towards its citizenry. In his latest report on the work of the Organization, the Secretary-General noted that Somalia is still without a central government. BOUTROS BOUTROS-GHALI, BUILDING PEACE AND DEVELOPMENT, at 238, U.N. Doc. A/49/1, U.N. Sales No. E.95.I.3 (1994).

siderable number of other States.²⁵

Professor Sylvester describes conditions in East and West Africa where poverty is widespread, dependence on foreign aid is high, and national economies are stalled.²⁶ He concludes that most sub-Saharan economies are not affording their populations even the most rudimentary standards of living in such fundamental areas as nutrition, housing, medical care, and education.²⁷ Sylvester posits that when an economy so completely deteriorates, government failure cannot be far behind, and thus, the political structures upon which such economies depend will also fail. Worse, he observes a general lack of public confidence that any of these problems can be effectively addressed.²⁸

Journalist Robert Kaplan paints an even more dire picture. In parts of West Africa, he depicts rampant demographic, environmental, and societal stress.²⁹ He writes:

Disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-states and international borders, and the empowerment of private armies, security firms, and international drug cartels are now most tellingly demonstrated through a West African prism.³⁰

Thus, Kaplan sees the breakdown of the nation-State in the government's failure to provide such elementary services as the policing and controlling of its territory.³¹

Governmental incapacity can also be a consequence of civil strife that disrupts essential governmental services, destroys food supplies and distribution networks, and brings the economy to a standstill.³² Rampant civil strife seems to be an emerging attribute of the post-Cold War world order, emanating from ethnic nationalism and accompanying desires to secede,³³ insurgencies against weak and/or corrupt governments,³⁴ and

25. Liberia, Afghanistan, Angola, Sudan, Bosnia, and Zaire have all been suggested as casualties. See, Helman & Ratner, *supra* note 1; Kaplan, *supra* note 1; Sylvester, *supra* note 1; Darnton, *supra* note 1; Tim Weiner, *Blowback From the Afghan Battlefield*, N.Y. TIMES, Mar. 13, 1994, at F53.

26. Sylvester, *supra* note 1, at 1299. Professor Sylvester travelled through parts of East and West Africa while he was a Fulbright Teaching Scholar.

27. *Id.* at 1306.

28. *Id.*

29. Kaplan, *supra* note 1, at 46. He believes this increasing lawlessness is more significant than any coup, rebel incursion, or episodic experiment in democracy.

30. *Id.* at 46. He believes this scenario may portend what is in store for much of the developing world.

31. *Id.* at 47.

32. Helman & Ratner, *supra* note 1, at 4-5. Powerful insurgencies have ensued and escalated in a number of States, leading to the described devastation. This has been compounded by natural disasters in Somalia and Sudan. *Id.* at 5.

33. Asbjørn Eide, *In Search of Constructive Alternatives to Secession*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 15, at 139. Nationalist ideology often asserts:

Nations are to be defined in ethnic terms, referring to a common past history, tradition, preferably also common language; secondly, nations should have their own States, so the society composing a State should, as far as possible, be

leftover effects from the Cold War.³⁵

Helman and Ratner, and Professor Jackson, also believe that the roots of these debacles can be found in what they view as the rush towards decolonization and the resulting proliferation of weak nation-States in Africa and Asia. Helman and Ratner maintain that not enough attention was paid to the long-term survivability of these new States.³⁶ Rather, the decolonization process suspended "the historical practice of extending recognition and membership in the international community only to credible governments of more or less cohesive states."³⁷ Instead, former colonies were recognized as States "whether or not they had developed the empirical characteristics of modern statehood,"³⁸ and today many of these

congruent with the nation, [sic] thirdly, the loyalty of members of nations to that nation overrides all other loyalties.

Id. at 143 (citations omitted). This ethno-nationalism "can be expansionist, exclusivist, and/or secessionist. In all of these modes it generates conflicts, sometimes with grave consequences for peace and for human rights." *Id.* at 144. Expansionist ethno-nationalism can pose "severe threats to the territorial integrity of other States." *Id.* An example might be Serbian expansion into Croatia and Bosnia Herzegovina. "Ethno-nationalism is inherently exclusivist [and, a]t its worst, it blends racism and xenophobia causing extreme human rights violations." *Id.* "[It] excludes, segregates and sometimes exploits on a basis of hierarchy." *Id.* "Ethno-nationalist minorities sometime engage in armed secession, whether in connivance with the 'mother country' or completely on their own." *Id.* An example would be the Armenian population, of the Azerbaijan enclave of Nagorno-Karabakh, which is involved in armed secessionist efforts against Azerbaijan with assistance from Armenia. See Boutros-Ghali, *supra* note 24. Another example is the Abkhazian population, in the Georgian enclave of Abkhazia, engaged in armed secession against Georgia with armed support from volunteers from the northern Caucasus region. *Id.*; *Report of the Secretary-General, supra* note 3, at 42-43. Claims to secede can also emanate from violations of minority rights. International law, however, has not generally accepted such claims to secede. HALPERIN & SCHEFFER, *supra* note 11, at 54-60.

34. Particularly long and brutal insurgencies against already weak governments with tenuous economies can totally destroy the ability to govern.

35. The Soviet Union and the United States often carried out their global struggle for ideological supremacy through proxy wars and by gaining the support of ideologically sympathetic governments. The superpowers sometimes attempted to change the social and political structure of a country in order to install a government aligned to their particular ideology. Once in place, the government received economic and military aid to counter any opposition and to strengthen the government. In some cases, superpower intervention was actually requested by a government to uphold law and order and to suppress opposing forces. Thomas Fleiner-Gerster & Michael A. Meyer, *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty*, 34 INT'L & COMP. L.Q. 267, 268 (1985). In sub-Saharan Africa, successive U.S. administrations cast their lot with many of Africa's most corrupt regimes, including Zaire's President Mobutu, Kenya's Daniel arap Moi, the repressive regime of Somalia's Mohamed Siad Barre (who at one point also received Soviet support), and Liberia's Samuel K. Doe. Michael Chege, *Remembering Africa*, 71 FOREIGN AFF. 146, 159 (1992). The continuation of several current civil wars, on an appalling scale, can in part be attributed to the massive supply of armaments by one or both superpowers during the Cold War. Prominent examples include Afghanistan and Somalia. Gordon, *supra* note 8; Weiner, *supra* note 25.

36. Helman & Ratner, *supra* note 1, at 4.

37. Jackson, *supra* note 22, at 2.

38. *Id.* Jackson explains that empirical statehood would encompass "an independent political organization of sufficient authority and power to govern a defined territory

governments are barely functioning.³⁹

Similar concerns exist regarding the survivability of the twenty or so nascent States that emerged from the dissolution of Yugoslavia and the USSR. Some of these States have little "practice in self-government . . . , weak civic institutions, limited economic prospects," and are beset by ethnic strife.⁴⁰

Of course not all States experiencing difficulties are disintegrating. Helman and Ratner identify three groups of struggling States:

First, there are failed States like Bosnia, Cambodia, Liberia, and Somalia, a small group whose governmental structures have been overwhelmed by circumstances. Second, there are failing States like Ethiopia, Georgia, and Zaire, where collapse is not imminent but could occur within several years. And third, there are some newly independent states in the territories formerly known as Yugoslavia and the Soviet Union, whose viability is difficult to assess.⁴¹

The authors propose different solutions for each of the above categories, and they recommend trusteeship for the first group.⁴²

B. Addressing Severe Cases of Governmental Distress

The possibility of using some form of recolonization to deal with governmental crises has been raised by several writers. Helman and Ratner advocate conservatorship as the conceptual paradigm for U.N. assistance, and they propose three models: governance assistance;⁴³ the delegation of

and population." *Id.* at 1. "Other incidents might include a national identity, political capability, military power, national wealth, bureaucratic efficiency, an educated citizenry or historical precedent." *Id.* at 5.

39. *Id.* at 7.

40. Helman & Ratner, *supra* note 1, at 5. The backdrop to this scenario is the end of the Cold War. The dissolution of the Soviet empire not only led to the establishment of a large number of weak States, but it also unlocked the communist grip on Eastern Europe, leaving in its wake States exhibiting widely divergent degrees of stability, economic viability, and experience as nation-States. While the Cold War balance of power paradigm caused much suffering in the form of covert wars, proxy wars, and other ideological battles, it also imposed a modicum of certainty and its own form of stability. Current uncertainty in the international realm may exacerbate internal instability.

41. *Id.*

42. *Id.* at 6.

43. This model assumes that there is still a regime in place that is effective to the degree that it maintains some control over the instruments of the State. *Id.* at 13. Examples "include Georgia, Zaire and possibly a handful of other States in Africa and Asia." *Id.* It builds on existing technical assistance, but it would be far more expansive. *Id.* "U.N. personnel would help administer the State, although final decision-making authority would remain with the government." *Id.* The United Nations might require economic changes; modify political structures and processes where they impact the health of the State; and foster democratic institutions by drafting constitutions, organizing free elections, and strengthening civic institutions such as political parties and judicial systems. *Id.* at 13-14. A variation on this theme is offered by Jeffrey Herbst. He notes that the International Monetary Fund, World Bank, and bilateral donors play an important role in economic decisions, and therefore, they should condition aid on political changes and other reforms. He posits that micromanagement will continue and expand. Jeffrey Herbst, *Challenges to Africa's Boundaries in the New World Order*, 46 J. INT'L AFF. 17, 23 (1992).

governmental authority to the United Nations;⁴⁴ and direct U.N. trusteeship when there is a total breakdown of governmental authority.

The last model would resurrect the old trusteeship system and apply it to failed States.⁴⁵ States would voluntarily relinquish control over their internal and external affairs for a defined period.⁴⁶ Local authorities would relinquish their power to the United Nations and follow its orders. The United Nations, or a group of States, would act as the administering authority. Helman and Ratner propose that the United Nations and the target State negotiate a trusteeship agreement containing the essential elements of the trust arrangement.⁴⁷ They suggest that the Security Council is the most efficient organ available for this process. However, given its limited experience with economic and social matters, a subgroup could be established to oversee each conservatorship; and management facilities could be developed in the U.N. Secretariat.⁴⁸

Paul Johnson, a historian,⁴⁹ believes that colonialism had some value and argues that the mistake of eradicating it too quickly has caused the current breakdown of normal government in a score or more African States.⁵⁰ He believes that the Security Council should commit such territories to one or more State trustees who would be empowered to impose order by force and assume political functions. The trustees would possess sovereign powers. The mandate would be of limited duration but should last until there is effective self-government (which could conceivably take up to one hundred years or more).⁵¹ Ultimately, however, the trust would be subject to Security Council supervision.⁵²

Johnson concludes that we must abandon the conventional wisdom that all peoples are ready for independence because some States are sim-

44. Here, governmental authority is actually delegated to the U.N. Cambodia is an example where warring factions delegated governmental power while still retaining final decision-making authority. Helman & Ratner, *supra* note 1, at 14.

45. The authors admit that this solution is currently precluded under the U.N. Charter. *See infra* part II.A.

46. Helman and Ratner conclude that States should not be the "unwilling object" of the trusteeship system. Helman & Ratner, *supra* note 1, at 16.

47. *Id.* at 16-17.

48. *Id.* at 18-19.

49. Johnson does not address the legal problems his proposals would entail. Rather, he focuses on reversing conventional political wisdom. Johnson, *supra* note 6.

50. *Id.*

51. *Id.* at 44. Johnson maintains that the "ultimate object would be to take constitutional measures to insure a return to effective self-government . . . [;] we must not repeat the mistakes of the 1960's. [Therefore,] trustees should not plan to withdraw until they are reasonably certain that the return to independence will be successful" *Id.*

52. *Id.* Professor Sylvester criticizes this proposal as "a return to colonialism of the thoroughly discredited sort." He notes that "economic exploitation inheres in bilateral relationships where there is fixed hierarchy." Moreover, the notion "that the 'mother-country' will embrace and champion the colony's interests is simply inconsistent with human history since the rise of the nation-State." Sylvester, *supra* note 1, at 1314 n.49.

ply not fit to govern themselves.⁵³ He believes a moral imperative exists: "the civilized world has a mission to go to these desperate places and govern."⁵⁴

II. Trusteeship and the Principle of Sovereignty

A. Applying Trusteeship to Member States Under the Charter

Article 77 of the U.N. Charter precludes applying the trusteeship system to Member States because they are sovereign States, and not territories under mandate or some other form of dependency.⁵⁵ Article 78 explicitly states that the trusteeship system does not apply to original or subsequent Members of the United Nations because of the principle of sovereign equality.⁵⁶ Therefore, unless we redefine sovereign equality, amend the

53. Johnson, *supra* note 6, at 44. "Their continued existence, and the violence and degradation they breed, is a threat to the stability of their neighbors as well as an affront to our consciences." *Id.*

54. *Id.* I agree with Professor Sylvester that the tone of Johnson's article is offensive. He uses such disparaging terms with respect to people of color and especially African people that one wonders if the intent is "to shock readers into recognizing the magnitude of the crisis." Sylvester, *supra* note 1, at 1314. Yet, he apparently meant the article to be a serious analysis of the situation, publishing it in the *New York Times*.

55. Article 77 provides:

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:
 - (a) territories now held under mandate;
 - (b) territories which may be detached from enemy states as a result of the Second World War; and
 - (c) territories voluntarily placed under the system by states responsible for their administration.

U.N. CHARTER art. 77, para. 1. Today, only section (c) could apply with some legal maneuvering. If not for Article 78, it is arguable that States could voluntarily place themselves under trusteeship. See *infra* note 56. However, section (c) contemplated that States administering colonies would place these territories under trusteeship. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 824-42 (1958). Since Member States are not territories, application of section (c) is problematic.

56. Article 78 provides: "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." U.N. CHARTER art. 78.

This article was included to ensure that the trusteeship system would not be applied to some of the participants at the United Nations Conference whose status was ambiguous. LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 239 (1st ed. 1946). For example, the status of Syria and Lebanon was not clear at the time of the conference in 1945. They were formerly French mandated territories. In 1941, they were declared "independent" subject to the conclusion of treaties redefining French rights. The treaties had not been concluded by the time of the Conference, but nonetheless, they became original Members. RUSSELL, *supra* note 55, at 627; JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 337-38 (1979).

Because Article 78 applied to both original and subsequent Members, the Trustee Council would not consider petitions or communications from former trust territories. Morton Halperin and David Scheffer propose an interesting reading of Article 78. They believe that the article eliminates from a modern trusteeship system the small group of independent States that were previously U.N. trust territories. Presumably other States, or parts thereof, could be potential candidates for the system. They admit this is a narrow reading of Article 78 and they do not discuss Article 77. HALPERIN &

Charter to extend the system to States, or determine that at some point a State is neither a Member of the U.N. nor a State, the Charter will not permit the imposition of trusteeship status on Member States.⁵⁷

B. Defining Sovereignty

“State system values presuppose the organization of the international community into territorially separate, politically independent States.”⁵⁸ Given this premise, the international legal system had to generate principles to prevent interstate conflict and to promote friendly relations.⁵⁹ One of these principles is the sovereign equality of States.⁶⁰

Under the U.N. Charter, all Members enjoy the privileges of sovereign States.⁶¹ These privileges include sovereign equality⁶² and protection from international interference in domestic affairs.⁶³ Sovereign equality means each State enjoys the rights inherent in full sovereignty. Sover-

SCHEFFER, *supra* note 11, at 113. However, Article 78 does not explicitly declare that it applies only to former *trust* territories that have become Members of the United Nations. The drafters apparently meant to preclude imposing trust status on any Member of the United Nations. RUSSELL, *supra* note 55, at 825. Moreover, Russell notes that Members are also described at other points in the Charter as “peace-loving [S]tates,” and therefore, the reservation was technically unnecessary. *Id.* (emphasis added).

57. Helman and Ratner admit that the system is not applicable to States as it is presently constituted, and they propose amending the Charter so that willing States can choose trusteeship as an option. Helman & Ratner, *supra* note 1, at 6, 12-17.

58. Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Political Affairs*, 83 AM. J. INT'L L. 1, 35 (1989).

59. *Id.* at 35-36.

60. *Id.* at 36. Others include: prohibiting the use or threat of force against the territorial integrity or political independence of any State; the equal rights and self-determination of peoples; and noninterference in the domestic jurisdiction of States. *Id.*

61. Bengt Broms, *States in International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 41, 60 (Mohammed Bedjaoui ed., 1991).

62. Sovereign equality is a principle of the Organization. U.N. CHARTER art. 2, para. 1. Sovereign equality has been interpreted to mean that: each State enjoys the rights inherent in full sovereignty; all States enjoy equal rights and duties as well as juridical equality; the territorial integrity and political independence of States are inviolable; each State has the right freely to choose and develop its political, economic, and cultural systems; and each State has a duty to respect the personality of other States. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Relations*]. While General Assembly resolutions generally are nonbinding, some have achieved the status of binding international law. Moreover, more formal declarations often express the *opinio juris* of the international community. This declaration has been particularly influential and has been termed an authoritative interpretation of the U.N. Charter. Adopted without a vote by the General Assembly after many years of negotiation, many believe the declaration states existing international law. Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 14 (1993).

63. U.N. CHARTER art. 2, paras. 4, 7. The principle of sovereign equality and the correlative duty of nonintervention in the domestic affairs of other States are cornerstones of international relations, as are the right to independence and the right to be free from intervention. Dorinda Dallmeyer, *National Perspectives on International Intervention: From the Outside Looking In*, in BEYOND TRADITIONAL PEACEKEEPING 20 (Donald C.F. Daniel & Bradd C. Hayes eds., 1995).

eignty, however, is one of the most difficult and controversial concepts in international law, and it is also a principle in transition.⁶⁴

A number of definitions and formulations are relevant. Sovereignty includes exclusive jurisdiction over a territory and its permanent inhabitants; accordingly, the State is the master of what transpires in its territory.⁶⁵ Sovereignty also connotes independence and autonomy in conducting both domestic affairs and foreign relations with other sovereign entities.⁶⁶ Due to these notions of independence and exclusive jurisdiction, Article 78 of the U.N. Charter precludes applying the trusteeship system to Member States.⁶⁷

C. Changing Notions of Sovereignty

While sovereignty has also been defined as the totality of powers States hold under international law,⁶⁸ this formulation is unsatisfactory because the totality of powers possessed by States changes.⁶⁹ Indeed, sovereignty is

64. Ruth Lapidoth, *Sovereignty in Transition*, 45 J. INT'L AFF. 325 (1992). See, e.g., MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 205-12 (1989). Koskenniemi notes the difficulties in trying to define sovereignty. *Id.* at 207. It is usually connected with independence, which is often termed external sovereignty, and self-determination, which is viewed as internal sovereignty. *Id.* at 207.

65. BROWNIE, *supra* note 19, at 287-88. Another view of the concept is that sovereignty means the State is supreme and therefore is not subject to the demands of any other authority. GOODRICH & HAMBRO, *supra* note 56, at 64.

66. "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe, is the right to exercise therein, to the exclusion of any other State, the functions of a State." *Island of Palmas Case, II, UNITED NATIONS, REPORTS OF INTERNATIONAL ARBITRATIONAL AWARDS* at 829, U.N. Sales No. 1949.V.1 (1928). James Anderson explains that sovereignty refers to a government's exclusive right "to manage its internal affairs without external interference" and "to conduct foreign affairs with other sovereign entities." Anderson, *supra* note 9, at 129.

Some commentators distinguish between internal and external aspects of sovereignty. Internal sovereignty effectively suggests internal self-government. It is the right of each State to organize itself and exercise within its territory a monopoly of legitimate physical coercion. Beyond internal self-government, internal sovereignty includes a potential competence and readiness to absorb all State tasks and to determine autonomously the tasks, means, and priorities of the State. Sovereignty is plenary international authority to administer territory. CRAWFORD, *supra* note 56, at 27. External sovereignty can be defined as independence—the power of a State to determine its responsibilities, "means, and structures independently from any foreign State or organization, subject only to international law." Luzius Wildhaber, *Sovereignty and International Law, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 436-37 (R. St. J. Macdonald & Douglas Johnston eds., 1983).

67. This preclusion is based on sovereign equality. See *supra* part II.A.

68. CRAWFORD, *supra* note 56, at 27. For example, Kamal Hossain views State sovereignty as "a distinctive characteristic of States as constituent units of the international legal system," as "freedom of action in respect of all matters with regard to which a State is not under any legal obligation," and as "the minimum amount of autonomy which a State must possess before it can be accorded the status of a 'sovereign State'." *Id.* at 26 n.105 (quoting Kamal Hossain, *State Sovereignty and the U.N. Charter* (1964) (unpublished Ms.D. Phil. dissertation, Oxford)).

69. Wildhaber, *supra* note 66, at 440-41. See also KOSKENNIEMI, *supra* note 64, at 211-12. Lapidoth explains that while the concept of sovereignty has been employed since ancient times, it has meant different things during different eras. During the Middle

a relative notion that has varied over time and has adapted to new situations and exigencies; it continues to evolve.⁷⁰

There is no doubt that the concept of sovereignty has been transformed in many respects during the fifty year history of the United Nations.⁷¹ There is also no doubt that the trend has been to lessen the number of matters that are solely within the dominion of sovereign States. Technology,⁷² economic integration,⁷³ and recognition of the indivisibility of the global ecosystem have altered perceptions of the State's ability to ensure the well-being of its populace by unilateral action.⁷⁴ As Professor Hannum notes:

This reduced sovereignty results in part from the increasing interdependence of a world in which real political or economic independence is impossible. It also results from conscious choices made by states to link their fates through countless international agreements on trade, human rights, culture, the environment, health, telecommunications, and other matters.⁷⁵

Ages, it was used by territorial rulers to justify their aspirations to free themselves from the influence of the emperor and the pope. In the 16th century, Jean Bodin was the first writer to develop a comprehensive theory of sovereignty aimed at reinforcing the French monarchy against feudal lords and rejecting claims of superiority from the pope and emperor. Bodin maintained that sovereignty was the absolute and perpetual power of a republic, meaning the totality of legislative power and the lack of higher earthly authority. He conceded, however, that the sovereign was subject to the laws of God and nature as well as to certain human laws. With Hobbes and his *Leviathan*, sovereignty became absolute, that is, free of any limits. Other authors including Hegel further developed this concept of unlimited sovereignty. The trend towards absolutism, however, discredited the concept of sovereignty with some 20th century authors. Lapidoth, *supra* note 64, at 326. The concept of absolute sovereignty is no longer accepted today. *Id.* at 327.

70. Wildhaber, *supra* note 66, at 441. For example, "the ultimate evidence of the sovereignty of States in 'classical' international law was their right to resort to intervention, aggression, war, annexation and colonization." *Id.* The U.N. Charter outlawed the use of force, yet continued to accept States as sovereign. "Sovereignty became readily imaginable without the right to wage war." *Id.* The different versions of sovereignty expounded during various phases of the subjugation of non-European peoples demonstrated the lack of any inherent logic to the doctrine of sovereignty. During the stages of initial conquest, 19th Century imperialism, the League of Nations Mandate period, and the United Nations era, varying views of sovereignty emerged, all of which supported the rights of European powers largely to the detriment of dependent peoples. For a detailed and brilliant discussion of this utilization of sovereignty doctrine, see Anghie, *supra* note 16. Competing versions of sovereignty also have been propounded to interpret principles such as self-determination and permanent sovereignty over natural resources.

71. MANNARASWARNIGHALA S. RAJAN, *THE EXPANDING JURISDICTION OF THE UNITED NATIONS 195-200* (1982). Some of these changes have been due to actions undertaken by the Organization and to provisions within the Charter.

72. See generally Walter B. Wriston, *The Twilight of Sovereignty*, 17 FLETCHER F. 117 (explaining how technology is weakening sovereignty).

73. Financial markets are interconnected; people, ideas, and lawbreakers move across borders in great numbers; and free trade agreements and common markets render ideas of a self-contained State economic system obsolete. Lapidoth, *supra* note 64, at 334.

74. Dallmeyer, *supra* note 63.

75. Hannum, *supra* note 62, at 68.

States belong to an increasing number of international organizations to which they sometimes transfer considerable powers.⁷⁶ While States are undoubtedly still the most important international entities, their relative significance within the U.N. system has declined since the Organization's founding in 1945.⁷⁷ Non-State actors such as multinational corporations, nongovernmental organizations, and, at least during the age of decolonization, national liberation movements⁷⁸ have emerged to exert influences on international governance in a fashion formerly attributed only to nation-States.⁷⁹

Thus, today a multiplicity of international actors⁸⁰ increasingly assume responsibility for matters which formerly belonged within the sole domain of sovereign States. Although the principle of sovereignty still remains central, sovereign authority must now compete with other norms for primacy in particular cases.⁸¹

Despite such erosion of sovereign authority, it is doubtful that the concept of sovereignty has diminished to the point where it would permit the imposition of trusteeship. However narrowly sovereignty is defined,

76. Lapidoth, *supra* note 64, at 334. On the relationship of States to international organizations, see FREDERIC L. KIRGIS, *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 142 (2d ed. 1993).

77. Riddell-Dixon, *supra* note 8, at 3. Professor Riddell-Dixon believes that loyalty to the State may decline as people realize that the State is "less able to engage in life-enriching, community-enhancing activities." As a result, primary allegiances may shift to associations that are based on considerations of race, ethnicity, or ideology. *Id.* "Trade and finance, violence in all shapes and forms, human rights abuses, famine and environmental degradation, drug trafficking, the spread of diseases such as AIDS, and the quest for greater justice and social equality all transcend State boundaries and require global approaches to meet the challenges they pose." *Id.*

78. For example, these movements have been accorded some legal capacity and have been permitted to participate in the proceedings of the U.N. as observers. Raymond Ranjeva, *Peoples and National Liberation Movements*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS*, *supra* note 60, at 101, 108-09.

79. This is not to claim that these entities possess the full panoply of rights, duties, and powers ascribed to nation-States. International legal personality does not connote the possession of the same rights and obligations as States. Bin Cheng, *Introduction to Subjects of International Law*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS*, *supra* note 61, at 23, 25; *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Apr. 11) (finding that the United Nations is an international person which exercises and enjoys functions and rights based on possessing a large measure of international personality, but that such legal personality, rights, and duties are not the same as those of a State) [hereinafter *Reparation for Injuries*]. In fact, since sovereignty legitimates the supremacy of the State within the United Nations, States generally resist reform efforts that undermine sovereignty and thus their privileged position. Riddell-Dixon, *supra* note 8, at 6.

80. Up until the Second World War, which can be described as the classical period of international law, the State was the sole subject of international law for whose benefit all rights and obligations were recognized. Ranjeva, *supra* note 78, at 102.

81. Riddell-Dixon, *supra* note 8, at 6. This is especially true in the human rights field. See *infra* part IV.B. For example, Secretary-General Boutros-Ghali has proposed a broad open-ended approach: "Underlying the rights of the individual and the rights of peoples is a dimension of universal sovereignty that resides in all humanity and provides all peoples with legitimate involvement in issues affecting the world as a whole." Riddell-Dixon, *supra* note 8, at 6.

trusteeship preempts the sovereignty of the State concerned because by definition it means that the entity being controlled is incapable of self-government, and that a foreign entity has plenary power over its internal and external affairs. Control of internal and external affairs is the essence of sovereignty, and surrendering all power over these matters to another entity is a relinquishment of sovereignty.⁸²

Trusteeship would also mean the State is no longer in control of defining its own economic, social, or political structures, which is an essential aspect of sovereign equality.⁸³ Rather, the United Nations would make these decisions.⁸⁴ Consequently, the principle of sovereign equality would appear to preclude applying the trusteeship provisions to Member States because trust status preempts sovereignty by usurping both external independence and plenary power over internal affairs.

Finally, while all States jealously guard their sovereignty, the concept is not equally significant to the North and South.⁸⁵ Partly due to their relative economic and political weakness, many Third World States have experienced even greater inroads into the prerogatives of sovereignty.⁸⁶ Weaker southern States are vulnerable to economic and military encroachment by major powers, and thus they steadfastly defend such concepts as State sovereignty and non-intervention.⁸⁷ Since trusteeship is likely to

82. While it is true that a State can relinquish aspects of its sovereignty in the exercise of its sovereignty, this is not the case when trusteeship is imposed. Rather, in this situation the State is compelled to relinquish matters that are central to sovereignty. Moreover, even if it is voluntary, it remains to be explored how much sovereign authority can be given away before a State ceases to be a State. See *infra* part V.B.

83. *Declaration on Friendly Relations*, *supra* note 62. Given the overwhelming influence of aid agencies, international banks and financial institutions, and other intergovernmental and nongovernmental entities, these matters have a much more international dimension. Nonetheless, these matters are still decisions that are important aspects of sovereignty.

84. See HALPERIN & SCHEFFER, *supra* note 11, at 90-91 (on the adoption of free-market oriented economic systems as a pre-requisite for recognition in self-determination cases); *Report of the Secretary-General 1993*, *supra* note 3, at 1 (on the introduction of democracy). This is not to say that these forms of economic and political organization cannot be freely chosen, nor is it to judge the merits of these particular systems. The question is whether these decisions should be made or imposed by external authorities. These matters would seem to be at the heart of sovereignty and within the domain of sovereign authority.

85. North and South are used here to connote the difference between the more industrialized nations, which are primarily located in the northern hemisphere, and developing nations, many of which are located in the southern hemisphere. It is acknowledged that this division is not universally applicable, that North and South are inexact terms, and that the States within these spheres differ markedly. The same problems of terminology are acknowledged for the term "Third World" especially in light of the collapse of the communist Second World.

86. Claims that sovereignty is diminishing are usually framed so that primarily Third World States lose sovereign prerogatives. For example, more intrusive measures by the World Bank, IMF, and other organizations have been encouraged and promoted. Herbst, *supra* note 43, at 23; HALPERIN & SCHEFFER, *supra* note 11. These measures would only affect Third World States.

87. Riddell-Dixon, *supra* note 8, at 6. These nations are suspicious of a right to intervention, which is often viewed as a subterfuge for domination by the major powers. Northern industrialized States are often willing to support intervention in other parts of

apply only to Third World States, these States are likely to resist vehemently any suggestion that there has been such a decline in sovereignty and that applying trusteeship to Member States is no longer precluded under Article 78.

III. Trusteeship and Self-Determination

Professor Hurst Hannum opines that

no contemporary norm of international law has been so vigorously promoted or widely accepted—at least in theory—as the right of all peoples to self-determination.⁸⁸ Yet the meaning of that right remains as vague and imprecise as when it was enunciated by President Woodrow Wilson and others at Versailles.⁸⁹

Self-determination has been, and remains, a difficult and controversial principle in international law.⁹⁰

A. Self-Determination and Decolonization

During and after World War I,⁹¹ self-determination in the form of political independence for national groups was advanced for Europeans.⁹² For

the world, but they intensely resent any interference in their own internal affairs. *Id.* Moreover, the economic and military might of the industrialized States, backed by four vetoes on the Security Council, makes such intervention highly unlikely. *Id.*

88. Hannum, *supra* note 62, at 2.

89. *Id.*

90. For a recent discussion of the rule's incoherence, see THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 150-82 (1990).

91. The principle was previously regarded as the right of nations to sovereign independence. For a detailed history, see UMOZURIKE O. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 3-26 (1972).

92. Not all European nationals to whom the principle potentially applied benefited. Historic rights, national security, and other matters sometimes took precedence. FRANCK, *supra* note 90, at 154-59. See also Hannum, *supra* note 62, at 4-5 (noting the uneven application of self-determination in the postwar environment). In introducing the concept to the League of Nations in 1919, Woodrow Wilson described it as "the right of every people to choose the sovereign under which they live, to be free of alien masters, and not to be handed about from sovereign to sovereign as if they were property." Cass, *supra* note 11, at 23-24. This view was advanced in the midst of the European turmoil of World War I. Anaya, *supra* note 11, at 147.

The peace treaties following World War I established a national system in Europe which drew boundaries on the basis of nationality. However, each State still had minorities, thereby necessitating minority rights regimes for those populations. Both models were based on the fledgling principle of self-determination. See Nafziger, *supra* note 15. Because of the oppression of minorities in some new States, some critics believed that the 1919 Peace Conference achieved national determinism rather than self-determination. UMOZURIKE, *supra* note 91, at 23.

Self-determination was probably not the primary rationale behind the post-World War I settlements. The dominant motives appear to have been rewarding faithful allies, dealing severely with conquered foes, and establishing a new balance of power. *Id.* at 24. See, e.g., RAMENDRA N. CHOWDHURI, *INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS, A COMPARATIVE STUDY* 45-46 (1955) (detailing the secret treaties negotiated by Britain during the First World War promising various territories to its allies). Moreover, this particular form of self-determination only applied to Europeans. Accordingly, non-European national groups of the collapsed Ottoman Empire were not accorded similar

non-Europeans, however, any semblance of self-determination was embodied in the League of Nations Mandate system.⁹³ Within this framework, self-determination meant being entrusted to the tutelage of "advanced nations" who were responsible for the well-being and development of their charges⁹⁴ and carried out this responsibility as a sacred trust of civilization.⁹⁵ Thus, the full exercise of self-determination was held in trust until undeveloped peoples were sufficiently mature politically to bear the responsibility.⁹⁶ Self-determination within this framework involved "independent existence"⁹⁷ or a form of political independence that these peoples were deemed not ready to assume.

rights. Self-determination also did not extend to the Third World. For an extensive history of self-determination, see UMOZURIKE, *supra* note 91; Hannum, *supra* note 62, at 1-31.

93. Self-determination was not actually articulated in the League of Nations Covenant. Rather, Article 22 of the Covenant provides for a sacred trust of civilization undertaken by advanced nations to develop peoples not able to stand by themselves in the modern world. This goal has been interpreted as being the seed of self-determination for those populations placed under mandate. UMOZURIKE, *supra* note 91, at 34.

94. Non-European countries were considered nonconversant with Western ideas and the institutions of modern government. Jackson, *supra* note 22, at 3. The eventual aim of the mandate system was to lead territories to self-determination. Cass, *supra* note 11, at 25. Umozurike maintains that the mandate system demonstrates "international recognition that the principle of self-determination applied to all peoples regardless of their stage of development." UMOZURIKE, *supra* note 91, at 40.

95. The ICJ determined in its 1950 Advisory Opinion on the International Status of South West Africa and its 1971 Advisory Opinion on Namibia that in setting up the mandate system, "two principles [are] of paramount importance: the principle of non-annexation and the principle that the well-being of such peoples form a sacred trust of civilization." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 28 (June 21) [hereinafter Status of Namibia]; International Status of South-West Africa, 1950 I.C.J. 128 (July 11) [hereinafter Status of South-West Africa]. The trust had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to possess the potential for independent existence upon the attainment of a certain stage of development. The mandate system was designed to provide peoples "not yet" able to manage their own affairs with the help and guidance necessary to enable them to stand by themselves.

Paragraph two of Article 22 considers the requisite means of assistance and indicates that those Powers who undertake the task envisaged act exclusively as mandataries on behalf of the League. "The mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilisation." Status of Namibia, *supra*, at 29. Acceptance of a mandate connoted assumption of an obligation of both a moral and a binding legal character. As a corollary of the trust, "securities for its performance were instituted in the form of legal accountability for its discharge and fulfillment." *Id.* Thus, mandataries had to report annually to the council, and a permanent mandates commission was created. *Id.*

96. The mandate was a preparatory stage which was meant to be temporary. UMOZURIKE, *supra* note 91, at 40. "Temporary," however, could perhaps mean a century. The assumption was that the mandate system would end when the mandated territories were able to stand by themselves. The inhabitants were to participate progressively in self-government until they achieved independence or freely chose some other relation. *Id.* at 40-41.

97. Status of Namibia, *supra* note 95, at 29.

Unlike the League of Nations Covenant, the U.N. Charter explicitly incorporates the principle of self-determination. Self-determination is among the purposes of the Organization⁹⁸ and is affirmed in U.N. Charter articles on economic and social cooperation and human rights.⁹⁹ Although not included in the articles on non-self-governing territories or the trusteeship system,¹⁰⁰ both paradigms have been regarded as regimes designed to achieve the goal of self-determination.¹⁰¹ According to the International Court of Justice, the U.N. Charter confirmed the principle of sacred trust and extended it to all territories whose peoples had not yet attained full self-government.¹⁰²

The ultimate objective of sacred trust was the self-determination and independence of the peoples concerned.¹⁰³ This principle made self-determination applicable to all territories under colonial regimes. Thus, tutelage became a means of executing self-determination. Trust territories were to be brought to the point where its inhabitants could freely choose their political status, and presumably that choice would be independence.

B. The Status, Scope, and Limits of Self-Determination

The International Court of Justice has found that self-determination is a

98. U.N. CHARTER art. 1, para. 2 provides that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

99. U.N. CHARTER art. 55.

100. U.N. CHARTER arts. 73, 75-91.

101. Anghie, *supra* note 16, at 466. Professor Higgins maintains that the U.N. Charter did not provide for self-determination in the form in which it has evolved. Rosalyn Higgins, *Commentary on Post Modern Tribalism, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW, supra* note 11, at 29-30. The few references in the Charter to self-determination, in Articles 1(2) and 55, refer to friendly relations based on "equal rights and self-determination." *Id.* at 29. According to Professor Higgins, in each context the U.N. Charter sought to protect the rights of the peoples of one State from interference by other States or governments. The U.N. Charter provided for the equal rights of States or governments, rather than the equal rights of peoples. "The concept of self-determination, as envisaged by the drafters of the Charter, did not refer to the right of dependent peoples to be independent, or indeed, even to vote." *Id.* There is no reference to self-determination in the parts of the Charter that deal with dependent territories. The provisions on trusteeship do not include self-determination, and independence was not assumed to be the only proper outcome of the system. Thus, Professor Higgins concludes that the idea developed "along paths significantly different from those originally envisaged." *Id.* at 30. *Cf.* RUSSELL, *supra* note 55, at 814-18. In early commentary on the U.N. Charter, Goodrich and Hambro stated that self-determination had a two-fold meaning: respect for the wishes of the people concerned in determining territorial changes, and the right of peoples to choose the form of government under which they were to live. They also noted that the delegations at the San Francisco Conference did not mean, by using these words, to encourage the peoples of dependent territories to demand their immediate independence. They believe this conclusion follows from Article 2(7) on domestic jurisdiction and the chapters dealing with non-self-governing peoples (Chapters XI, XII, and XIII). GOODRICH & HAMBRO, *supra* note 56, at 61-62.

102. Status of Namibia, *supra* note 95, at 31.

103. *Id.*

legal right specifically applicable to non-self-governing territories.¹⁰⁴ Moreover, some commentators maintain that the right to self-determination from colonial rule is a norm of *jus cogens* in international law; its existence is undisputed, and within the colonial context, its applicability is relatively irrefutable.¹⁰⁵ Extending self-determination beyond the decolonization context is currently a subject of debate.¹⁰⁶ Yet the principle's status within this framework is clear and unambiguous: non-self-governing people are entitled to a right of self-determination.¹⁰⁷ Thus, it is firmly established that the right of self-determination exists in international law, at least in this limited context.¹⁰⁸

While the principle, as enunciated in the U.N. Charter, may have been meant to apply more narrowly,¹⁰⁹ it has evolved to embrace the "right" of all peoples¹¹⁰ freely to determine, without external interference,

104. The I.C.J. discussed the right to self-determination in two cases which arose out of colonialism: The Advisory Opinion on the Status of Namibia, where the court affirmed the applicability of self-determination to non-self-governing territories, and the Western Sahara case, where the Court proclaimed the right of peoples to determine their political status by their freely expressed will. The Court found that self-determination was more than a principle to be heeded and promoted by the United Nations, but rather a full-fledged right that could be invoked by its holders to claim separate statehood and sovereign independence. Tomuschat, *supra* note 15, at 2; Status of Namibia, *supra* note 95, at 31; Western Sahara, 1975 I.C.J. 6, 31-33 (Oct. 16). During the 1960s and 1970s, self-determination became associated exclusively with the process of decolonization. Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 335 (1994).

105. Simpson, *supra* note 104, at 336.

106. See, e.g., MODERN LAW OF SELF-DETERMINATION, *supra* note 15; HALPERIN & SCHEFFER, *supra* note 11; Anaya, *supra* note 11; Brilmayer, *supra* note 15; Cass, *supra* note 11; Chen, *supra* note 15; Hannum, *supra* note 62; Maivân Clech Lãm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603 (1992); Robert McCorquodale, *Self-Determination Beyond the Colonial Context and Its Potential Impact on Africa*, 4 AFR. J. INT'L & COMP. L. 592 (1992).

107. Simpson, *supra* note 104, at 336.

108. *Id.* at 333-34. Professor Simpson points to a number of I.C.J. opinions affirming the right, numerous U.N. declarations and human rights treaties doing the same, and the weight of State practice during the period of decolonization, where a billion people were liberated under the banner of self-determination. What remains at issue is the scope or potential application of the principle, including its relationship with other principles of international law with which it may come into conflict, as well as who is entitled to claim the right. *Id.* at 334. See also Hannum, *supra* note 62 (exploring the current meaning of the right of self-determination and its relationship to the process of decolonization, to the possibility of secession, and to human rights).

109. Higgins, *supra* note 101.

110. Self-determination occupies a unique position in international law because it is attributed to an entity that is not a legal person under international law. Otto Kimminich, *A "Federal" Right of Self-Determination?*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 15, at 86. The Universal Declaration of Human Rights and the International Rights Covenants recognize community and solidarity values based on blood and history only with respect to self-determination. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Both International Rights Covenants provide in Article I: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

their political status and to pursue their economic, social, and cultural development.¹¹¹ Politically, this right is manifested through the establishment of a sovereign and independent State, free association or integration with an independent State, or any other political status freely determined by a people.¹¹² Thus, in the decolonization context, the absence of external domination was key, involving claims of a group within an established colonial entity to form a new entity—a sovereign State in most cases. Self-determination has meant freedom from the direct foreign control of other States.¹¹³

The right of a particular group of people freely to determine their own political, economic, cultural, and social systems seems to preclude outside forces from making or coercing these decisions because self-determination requires the absence of external domination. Thus, if self-determination currently means independence and freedom from all forms of foreign control, then trusteeship, which entails tutelage and dependence, is unacceptable.

111. *Declaration on Friendly Relations*, *supra* note 62. States also have a duty to respect this right. *Id.* According to the Declaration on the Granting of Independence to Colonial Peoples, self-determination is the right of all peoples to determine their political status and freely to pursue their economic, social and cultural development. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, para. 2, U.N. Doc. A/4684 (1960) [hereinafter *Declaration on Colonial Peoples*]; UMOZURIKE, *supra* note 91, at 3.

The right to self-determination may be defined as the right of a people or nation to determine freely by themselves without outside pressure their political and legal status as a separate entity, preferably in the form of an independent state; the form of government of their choice; and the form of their economic, social and cultural system.

Kimminich, *supra* note 110, at 85 (quoting Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace: Its Philosophical Background and Practical Application*, 69 REVUE DE DROIT INT'L 263 (1991)). This definition is similar to the definitions in the 1966 Covenants. *Id.* See *supra* note 110.

112. *Declaration on Friendly Relations*, *supra* note 62. In practice this has meant independent statehood. Tomuschat, *supra* note 15, at 11-13.

113. Self-determination has been further defined as having both external and internal components. Externally, it is the freedom of an ethnic group or nation to organize itself as a State without foreign control. Kimminich, *supra* note 110, at 88. Internally, it is the freedom of a nation, organized as a State, to adopt political institutions and techniques as it deems fit and to select forms of government as it pleases. *Id.* at 89. Both prongs insure democratic government and the absence of internal or external domination. UMOZURIKE, *supra* note 91, at 3. Professor Chen has divided claims for self-determination into two basic categories:

1. Claims involving establishment of a new entity—claims by a group within an established entity to form a new entity from part of the pre-existing State.
2. Claims not involving establishment of a new entity:
 - a. Claims of an entity to be free of external coercion;
 - b. Claims of a people to overthrow their effective rulers and establish a new government in the whole of an entity;
 - c. Claims of a group within an entity to special protection (e.g., autonomy).

Lung-Chu Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198, 206-07 (W. Michael Reisman & Burns H. Weston eds., 1976).

Moreover, it is difficult to go in reverse. It is one thing to conclude that already dependent territories are incapable of self-government and must be led to that point; it is quite another to reach the same conclusion with respect to already self-governing peoples. This is especially true in light of the history of self-determination, which has evolved to mean independence. Thus, at the very least, if self-determination means independence from colonial rule, including trust status, it precludes imposing trusteeships.¹¹⁴

Self-determination, however, also appears to include the right of a people freely to determine their own political status.¹¹⁵ While peoples have generally preferred independence when exercising that choice,¹¹⁶ it is feasible that they might choose a more or less benign form of outside control.¹¹⁷ Thus, if self-determination is interpreted as paying heed to the freely expressed will of peoples,¹¹⁸ then mechanisms could be established to enable a people freely to choose foreign supervision by an inter-governmental organization.

Procedural safeguards designed to insure that this choice is indeed the will of the people would be necessary. One potential model has been proposed in the decolonization context where self-determination is exercised by free association with a sovereign State: "[f]ree association with another state requires a 'free and voluntary choice . . . through informed and democratic processes,' and must include the right of unilateral modification of association by the peoples of the territory."¹¹⁹

114. The Declaration on Colonial Peoples called for immediate steps in both trust and non-self-governing territories to transfer all powers to the peoples of those territories without any conditions or reservations, in accordance with their freely expressed will and desire. *Declaration on Colonial Peoples*, *supra* note 111, para. 5. Thus, trusteeship is treated as a form of colonialism and part of the classic colonial paradigm where a people seek self-determination from a European imperial power. It is within this context that self-determination is unconditional. Simpson, *supra* note 104, at 337.

115. Moreover, in various contexts commentators have advocated that self-determination does not necessarily mean independence. See, e.g., Anaya, *supra* note 11; Lãm, *supra* note 106. These authors have proposed solutions for the problems of national minorities within nation-States. They do not advocate the type of complete control trusteeship would entail, however.

116. Sovereign statehood has not been the uniform choice. See Hannum, *supra* note 62, at 40 n.164 (describing the few territories that have attained a status of less than full independence).

117. This possibility raises the question of who constitutes "the people" for these purposes. The easy answer is the peoples of the State as a whole; however, there may be opposing factions which may make this assessment difficult. For example, in Somalia some factions desired U.N. intervention while others simultaneously demanded that the Organization leave the country. Mark R. Hutchinson, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624, 629 n.27 (1993). Another interpretation is that once a nation or ethnic group has attained statehood by exercising the right of self-determination, the State thus created is the sole subject of international law until a situation arises in which the right of peoples is revitalized. Kimminich, *supra* note 110, at 89.

118. *Declaration on Friendly Relations*, *supra* note 62.

119. Hannum, *supra* note 62, at 40 (quoting *Declaration on Colonial Peoples*, *supra* note 111, annex, principle VII).

Thus, foreign control should be exercised only in accordance with the will of the people, which must be ascertained through democratic processes.¹²⁰ Plebiscites¹²¹ have been repeatedly utilized to ascertain popular opinion on a suitable political status upon the demise of trusteeship. People exercised their right of self-determination through this device.¹²² It must be concluded that only through direct consent can trusteeship be implemented in a manner that does not contravene the right to self-determination. Whether any group would freely make such a choice remains to be seen.¹²³

IV. The Reversion to Dependency

In conceptualizing a modern trust, the first issue for consideration is how a sovereign nation-State might revert to trusteeship.¹²⁴ Four possibilities will be discussed. First, a State might voluntarily agree to trusteeship, presumably with the government entering into an agreement with the United Nations. Second, the Security Council, finding State disintegration in a particular case to be a threat to peace, might mandate the imposition of a trusteeship. A third scenario would be humanitarian intervention in the form of trusteeship, arising out of a critical humanitarian crisis or gross violations of human rights that are precipitated by a breakdown in governance.¹²⁵ Finally, if certain States have disintegrated to the point where they are no longer States, the Charter prohibition against applying the

120. This conclusion is in accord with Thomas Franck's thesis on an emerging right to democratic governance. Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992). While Professor Franck addresses internal self-determination, his thesis might apply to outside control exercised by international organizations. Thus, foreign control should be allowed only where the people select that option in accordance with democratic processes. Moreover, a supermajority requirement could be employed to ensure that a bare majority does not decide the fate of the entire nation.

121. Plebiscite is a subset of the larger category of referendum. It is a type of referendum wherein the proposal at issue concerns the matter of sovereignty. LAWRENCE T. FARLEY, *PLEBISCITES AND SOVEREIGNTY: THE CRISIS OF POLITICAL ILLEGITIMACY* 26 (1986). It is conceded that some situations may be so chaotic that it is impossible to hold any kind of plebiscite. Perhaps in such a case, a vote should be held as soon as it is logistically possible.

122. CHOWDHURI, *supra* note 92. It is a device with which the United Nations is familiar. While plebiscites previously involved peoples exercising their right to be free from external control and to govern themselves, here people would choose or reject foreign control as a mechanism to achieve sovereign statehood. Moreover, this foreign control would be exercised by an international organization, rather than by an individual State.

123. It is doubtful that there will be a rush towards trusteeship, because while many people welcome assistance, most do not willingly choose dependency. Nevertheless, it is conceivable that a particular situation could become so desperate that people would desire U.N. control for a specified period of time.

124. The word "revert" is purposely used here because trust territories occupied a lesser status than nation-States in the international community. *See infra* part V.A. Thus, a State which assumes trusteeship status would be reverting to a diminished position.

125. The Security Council's response to the situation in Somalia may suggest that violations of international humanitarian law can trigger Article 39's threat to the peace requirements for Chapter VII action. Hutchinson, *supra* note 117, at 632.

trusteeship provisions to Member States may no longer apply.¹²⁶ Each prospect will be considered in turn.

A. Voluntary Assumption of Trusteeship

Presumably a State can voluntarily relinquish all control over its internal and external affairs and cede this authority to the United Nations.¹²⁷ The sovereignty of a State empowers it to abdicate sovereignty and thus "commit suicide" under international law. This happens, for example, when a State enters a federation and loses its international personality.¹²⁸ Perhaps a disintegrating State could abdicate sovereignty for a temporary period of time.¹²⁹

Consent obviates domestic jurisdiction and non-intervention obstacles,¹³⁰ but it raises other difficult questions, such as who is authorized to give consent to such an overwhelming intervention. It is unlikely that many governments would voluntarily agree to completely follow the orders of an outside force, however benevolent, without retaining some veto authority, nor agree to be dependent to the extent trust territories were.¹³¹

In addition, if a government is so totally ineffective that trusteeship is warranted, it is questionable whether it can consent to outside interven-

126. See U.N. CHARTER arts. 77, 78; *supra* part II.A.

127. Helman and Ratner suggest this scenario. Helman & Ratner, *supra* note 1. Halperin and Scheffer also believe that a State would be willing to relinquish control over portions of its territory in order to resolve an intractable self-determination claim. HALPERIN & SCHEFFER, *supra* note 11, at 113-14. Originally, territories were placed under trusteeship by their administering authority which, in turn, entered into a trusteeship agreement with the United Nations. U.N. CHARTER arts. 75, 77, 81.

128. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 26-27 (1963).

129. Helman and Ratner insist that no State should be required to accept trusteeship. Instead, a State would voluntarily relinquish control over its internal and external affairs for a defined period. Helman & Ratner, *supra* note 1, at 16. Johnson does not discuss consent at all. Johnson, *supra* note 6. Would any government or insurgent force voluntarily agree to follow the orders of an outside force, without retaining some veto authority, or assent to be dependent in the manner trust territories were? In Cambodia, the political forces made decisions between themselves, with the U.N. as a fallback decision-maker that would get involved only if the parties could not agree. In Somalia, external forces were imposed under Chapter VII, and the results were disastrous. Hutchinson, *supra* note 117, at 629. Halperin and Scheffer raise the issue of consent with respect to a State placing a portion of its territory under international administration to resolve a self-determination claim. They believe that such consent might be furnished because it would not predetermine any particular future arrangement and could settle a seemingly insoluble dilemma for the involved State. HALPERIN & SCHEFFER, *supra* note 11, at 113-14.

130. Gordon, *supra* note 8, at 537. Measures based on the consent of the parties have not been viewed as intervention in U.N. practice.

131. The essence of sovereignty is being the sole legitimate authority within a territory. See also Sylvester, *supra* note 1, at 1317 (questioning whether there might be a U.N. coup in these circumstances). The more likely possibility is a Chapter VII declaration of a threat to the peace which would preclude the need for consent to intervene. The limits of the Organization's powers under Chapter VII have been open-ended since the end of the Cold War, but it is doubtful that it extends to imposing trusteeship on a member of the Organization. Gordon, *supra* note 8, at 538. See *infra* part IV.B.

tion as it may no longer represent the governed. If the consent of the government is open to challenge, then other entities might be able to consent. Smaller, decentralized entities or warring factions might request trusteeship or some other form of intervention. Different entities may simultaneously call for different solutions, such as humanitarian intervention, trusteeship, non-intervention, or other contradictory possibilities.¹³² Given the right to self-determination, perhaps none of these entities can consent to a loss of independence,¹³³ suggesting that consent must come directly from the people by plebiscite or some other democratic means.¹³⁴

A final obstacle to voluntary assumption of trusteeship is the explicit prohibition in Article 78 against applying the system to Member States.¹³⁵ Given this prohibition, it is open to question whether the United Nations can undertake this action, even with consent, because it would require the Organization to undertake an act that directly contradicts the Charter.¹³⁶ Thus, under the present Charter, there are impediments to a sovereign State consenting to trusteeship. Unless we amend Article 78, or disqualify certain States as Member States, voluntary trusteeship under the Charter may be problematic.

B. Disintegrating States as Threats to the Peace

The Security Council has broad latitude in situations involving a threat to the peace,¹³⁷ which raises the question of whether such a finding preempts Articles 77 and 78 of the Charter.¹³⁸ State disintegration may be the result of civil conflict,¹³⁹ and such internal conflicts have increasingly been found to be threats to the peace.¹⁴⁰ The Security Council might simply determine that a State should be under trusteeship; various factions

132. See Hutchinson, *supra* note 117, at 629 (discussing different factions in Somalia seeking different responses from the U.N.).

133. See *supra* part III.

134. In situations where there is a high level of chaos and disorganization, this may not be immediately feasible. In such a case obtaining consent should be of the highest priority and carried out as soon as possible.

135. U.N. CHARTER art. 78; see discussion *infra* part II.A.

136. The Organization may be precluded from undertaking certain actions under its own constitutional law regardless of an individual State's consent. Paul C. Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 345, 353-54 (1983).

137. Gordon, *supra* note 8, at 526. The Security Council is making this finding in an ever expanding variety of situations. *Id.*

138. Helman and Ratner suggest that it does and that the Secretary-General's peacebuilding proposals illustrate this point. Consequently, their article addresses situations where a disintegrating State is not a threat to the peace. Helman & Ratner, *supra* note 1, at 16-18. Others have argued that the U.N.'s role in Somalia amounted to trusteeship. See Krauthammer, *supra* note 6. Given the legal status of trust territories, the incompatibility of trusteeship with statehood, the absence of any trust agreement, and Somalia's continuing status as a nation-State, it is apparent that trust status was not legally contemplated by the Security Council.

139. It is certainly conceivable that a prolonged, intense civil conflict can lead to a weakening of central authority and the breakdown of governmental ability. Somalia may be the textbook example.

140. Gordon, *supra* note 8, at 562-81. The determinative factor does not seem to be significant transboundary effects, although a long and particularly brutal civil conflict

within a country might call for such intervention; or neighboring States that are being overwhelmed by refugees or other external effects of internal turmoil might request international action.¹⁴¹ The Security Council has found State disintegration and its apparently accompanying humanitarian crisis a threat to the peace under Chapter VII.¹⁴²

While a finding of a threat to the peace ameliorates domestic jurisdiction concerns,¹⁴³ imposing trusteeship status would directly contravene express provisions of the Charter.¹⁴⁴ This contravention would make it difficult to find that imposing trusteeship is part of the implied powers that arise out of the Security Council's broad authority to maintain international peace. This does not mean the Security Council is powerless.¹⁴⁵ Rather, the limitation indicates that the Council may not strip a State of its statehood, sovereignty, or government and declare that its sovereignty is in abeyance or that it resides in the United Nations.

C. Humanitarian Intervention

1. Definitions and Possible Scenarios

Humanitarian intervention occurs without the consent of the target gov-

could lead to significant transboundary effects such as a large outflow of refugees to neighboring States, a spillover in fighting to other States, and regional instability.

141. See Sylvester, *supra* note 1, at 1317.

142. Gordon, *supra* note 8, at 553-55. In Resolution 794 on Somalia, the Security Council used the following language:

Recognizing the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature . . . Determining that the magnitude of the human tragedy caused by the conflict in Somalia further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security . . . Gravelly alarmed by the deterioration of the humanitarian situation in Somalia and underlining the urgent need for the quick delivery of humanitarian assistance in the whole of the country . . .

S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 2-4, U.N. Doc. S/Res/794 (1992) [hereinafter Resolution 794]. The Security Council relied upon a letter by the Secretary-General where he specifically noted the lack of a government in Somalia. Letter Dated 29 November 1992 From the Secretary-General Addressed to the President of the Security Council, S/24868 (30 November 1992). During the debate on Resolution 794, many members of the Security Council noted the lack of government in Somalia as one of the causes for the humanitarian crisis and the overall deterioration of the situation. S/PV.3145, 3 December 1992, at 13 (Ecuador), 16 (China), 23-24 (Belgium), 41 (Venezuela), 49 (India), 26 (Russian Federation noting total chaos and the danger of disintegration).

143. The domestic jurisdiction question shifts because there is an exception to the nonintervention prohibition when the Security Council finds and addresses a threat to the peace. U.N. CHARTER art. 2, para. 7; see Gordon, *supra* note 8, at 538-44, 565-66.

144. See U.N. CHARTER arts. 77-78. Unlike the domestic jurisdiction exception, there is no exception in the Charter permitting the imposition of trusteeship where there is a threat to the peace.

145. See Gordon, *supra* note 8, at 563 (discussing possible actions that can be undertaken upon a finding of a threat to the peace). Given the broad powers the Security Council has recently exercised under the rubric of threat to the peace, it is not inconceivable that some Members would attempt to extend the Security Council's powers to include trusteeship if trusteeship was thought desirable in a particular situation.

ernment,¹⁴⁶ and includes both nonforcible and forcible action to stem systemic and large-scale human rights violations. While the U.N. Charter is not specific as to the particular human rights the U.N. will promote and protect, there are many treaties that do enumerate various human rights worthy of some degree of protection.¹⁴⁷

Imposing trusteeship would address human rights violations against the inhabitants¹⁴⁸ of a disintegrating State, which may result from acts of perpetration or omission.¹⁴⁹ The disintegration of governmental authority may be accompanied by a situation where the pre-existing government

146. Arnison, *supra* note 18, at 200. Scholars have proposed various definitions of humanitarian intervention, most of which limit the concept to forcible intervention. According to David Scheffer,

the classical definition of humanitarian intervention is limited to those instances in which a nation uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces.

David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. Tol. L. Rev. 253, 264 (1992). Professor Brownlie states that the definitions of several commentators include an immediate and extensive threat to fundamental human rights, particularly a widespread loss of human life; short-term use of force by a government in what would otherwise be a violation of the sovereignty of a foreign State for the protection of nationals of the acting State, and other States, from death or grave injury by removing them from the territory of the foreign State; and the existence of conditions of imminent danger and the occurrence or threat of a substantial deprivation of human rights values. He notes two distinct preoccupations in these definitions: first, grave injury or loss of life, and second, a broader and conceptual element of a threat to fundamental human rights or a deprivation of human rights values. He also notes a number of situations that would fall within these definitions, including, *inter alia*: genocide; deliberate or nondeliberate neglect by a government to take reasonable steps to remedy famine conditions; and a social structure maintaining or promoting slavery or analogous social relations. Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 139-41 (Richard B. Lillich ed., 1973).

147. See, e.g., *Universal Declaration of Human Rights*, *supra* note 110; *International Covenant on Economic, Social and Cultural Rights*, *supra* note 110; *International Covenant on Civil and Political Rights*, *supra* note 110; *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, G.A. Res. 2670, 3 GAOR, pt. 1, U.N. Doc. A/810, at 174 (Dec. 9, 1948); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195 (1966); *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 180 (XXXIV 1979), 19 I.L.M. 33 (1980).

148. One commentator postulates that an important step beyond state-centrism is implicit in the idea of an international system of human rights, since human rights belong to individuals or groups of individuals rather than States. Brown, *supra* note 7, at 204. Under traditional international law, the aspirations of individuals for justice, peace, and security are served by a system in which territorially identified Nation-States are internally and externally sovereign but are subject to the limiting norms of international law. Gray C. Dorsey, *The McDougal-Lasswell Proposal To Bring a World Public Order*, 82 AM. J. INT'L L. 41, 41-42 (1988).

149. Promoting and encouraging respect for human rights and fundamental freedoms is one of the purposes of the United Nations. U.N. CHARTER pmb., art. 1, para. 3. Thus human rights are clearly matters of international concern. See Brown, *supra* note 7, at 205. Yet the Charter is not very specific regarding the human rights and freedoms to be promoted. *Id.* at 206. It also contains principles that may potentially block international efforts to protect human rights, such as the sovereign equality of Member States and the prohibition against U.N. intervention in the domestic jurisdiction of its Members. U.N. CHARTER art. 2, paras. 1, 7.

is at war with opposition or secessionist groups. In such circumstances, the government (or opposition groups) may take measures that are inconsistent with human rights.¹⁵⁰

The domestic legal order in sovereign States generally serves as the primary means of protecting human rights; the demise of that legal order can lead to the demise of human rights protection. An inability to provide basic governmental services, such as police protection, may subject citizens to violent acts by warring factions, thugs, or other entities that arise in the absence of police forces.¹⁵¹ While the government itself may not be abusing its citizens, it may be powerless to stop others from doing so. Other human rights related consequences of government failure include widespread food shortages and lack of medicine, shelter, and other services necessary for survival. The delivery of food and other basic humanitarian assistance has increasingly become the subject of humanitarian intervention.¹⁵²

Further, the breakdown of central governmental authority often leaves no single authority accountable for human rights violations. The lack of central authority is particularly problematic because much of the international inducement to improve human rights performance stems from "shaming" established governments.¹⁵³ This technique is much less effective against ill-identified groups contending for power¹⁵⁴ or against a powerless governing authority.

2. *Nonintervention*

The conclusion of the Cold War has reinvigorated discussion of the legality of humanitarian intervention,¹⁵⁵ although its present legitimacy appears to rest on such interventions being collective, rather than unilateral, endeavors.¹⁵⁶ Much of the discussion has focused on multilateral intervention by the U.N. to halt human rights violations in a State or to ensure the delivery of humanitarian assistance. The competing principle

150. See Brown, *supra* note 7, at 209.

151. Kaplan, *supra* note 1, at 45-46.

152. Resolution 794, *supra* note 142.

153. Brown, *supra* note 7, at 210.

154. *Id.*

155. This is largely, but not solely, due to U.N. intervention in Iraq to protect the Kurds, *id.* at 222, and due to U.N. intervention in the humanitarian crisis in Somalia.

156. Arnison, *supra* note 18, at 201. Arnison notes that political motives were often the rationale behind forcible intervention and believes that unilateral intervention is now widely discredited. She also notes that collective efforts are preferable but could also be subject to abuse. For example, a humanitarian motive for intervention may mask the unwillingness of intervening countries to grant asylum on their own shores. *Id.* Humanitarian intervention may also serve as a pretext for meddling in the political affairs of other States. Developing States fear that larger powers will use collective humanitarian intervention as a veiled excuse to maintain power over them. Thus the unilateral use of force under the guise of humanitarian intervention remains controversial, especially where there are issues surrounding the popular will of the local people, the level of atrocities that warrant intervention, and the possibly ulterior motives of the intervening States. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 875 (1990).

of nonintervention, however, mitigates against such intervention in the affairs of a sovereign State.

Nonintervention is a corollary of sovereign equality;¹⁵⁷ it specifies that no State or group of States has the right to intervene directly or indirectly¹⁵⁸ in the external or internal affairs of another State.¹⁵⁹ Every sovereign has the right to conduct its affairs without external interference.¹⁶⁰ The U.N. Charter specifically prohibits the Organization from intervening in matters that are essentially within the domestic jurisdiction of Member States.¹⁶¹

A prohibited intervention is one which bears on matters each State is permitted to decide freely under the principle of State sovereignty.¹⁶² Yet, what each State is permitted to decide autonomously, *i.e.*, what is contained within the domestic jurisdiction of States, continually changes

157. *Nicaragua v. United States*, *supra* note 18, at 106; Anderson, *supra* note 9, at 128 (quoting Andrew Scott, *Non-Intervention and Conditional Intervention*, 22 J. INT'L AFF. 208 (1968)).

158. Recognition of a State's sovereignty, which is independence and freedom from any external dominance, excludes the possibility of intervention by third parties. Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 889 (1992).

159. "Armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements are violations of international law." *Declaration on Friendly Relations*, *supra* note 62, at 123. As Professor Damrosch notes, the norm of nonintervention has a long and noble textual foundation. It is found in numerous international instruments including universal, regional, and bilateral documents. Lori Fisler Damrosch, *Changing Conceptions of Intervention in International Law*, in EMERGING NORMS OF JUSTIFIED INTERVENTION, *supra* note 10, at 93. The U.N. Charter prohibits intervention in the domestic jurisdiction of Member States by the Organization, and several key principles implicitly reflect the right of States to be free from intervention by other States and the correlative duty to refrain from intervention. *Id.* See generally U.N. CHARTER art. 1, para. 2, art. 2, para. 7, art. 55 (affirming the principle of equal rights and self-determination of peoples). Additionally, art. 2, para. 1 provides that the Organization is based on the sovereign equality of its members, and art. 2, para. 4 requires States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. U.N. CHARTER art. 2, paras. 1, 4.

160. *Nicaragua v. United States*, *supra* note 18, at 106. One objective of nonintervention is autonomy, which aims to ensure that human beings organize themselves into political communities and that they create their own institutions for the realization of human liberty, free from external domination or repression. Damrosch, *supra* note 159, at 93. This principle is deeply enshrined in general international law. See Delbrück, *supra* note 158, at 889. It has its legal policy foundations in the principle of the sovereign equality of States, one of the constitutive elements of the international legal order.

161. U.N. CHARTER art. 2, para. 7.

162. These matters include the choice of a political, economic, and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion to require a particular alternative in these spheres. Obvious means of coercion include direct or indirect military action, or indirect support for subversive or terrorist armed activities in another state. *Nicaragua v. United States*, *supra* note 18, at 106.

because it is dependent on the current state of international relations.¹⁶³ The erosion of sovereignty has been accompanied by a reduction in matters within the domestic jurisdiction of States.¹⁶⁴ There has been considerably more intervention by the Organization as more concerns have been deemed international rather than domestic,¹⁶⁵ and this trend has accelerated with the end of the Cold War.¹⁶⁶

Trusteeship, however, entails total assumption of the internal and external affairs of a State, and, absent consent, it must be deemed intervention in the domestic affairs of a State. If domestic jurisdiction has shrunk to a point where all of the internal and external affairs of a State are no longer within the domestic sphere, there is no longer a concept of domestic jurisdiction; all has been transferred to the international sphere. Moreover, trusteeship is the ultimate intervention because, given the legal status of a trust territory, it is an intervention that may effectively destroy the State as a sovereign entity. No matter how narrowly domestic jurisdiction is defined, taking over all of the functions of the State would undoubtedly be intervention in its internal affairs. The issue then becomes when such intervention is nonetheless permissible.

Professor Riddell-Dixon has noted two fundamental struggles at work: respect for sovereignty versus demands for intervention, and communities of peoples versus communities of States.¹⁶⁷ On the one hand, Article 2, paragraph 7 of the U.N. Charter compels nonintervention in the domestic jurisdiction of Member States on the part of the Organization.¹⁶⁸ At the same time, there is a perceived need for the U.N. to intervene within State boundaries to uphold its responsibility in areas ranging from maintaining international peace and security to protecting human rights.¹⁶⁹ This balancing act may be particularly difficult when the proposed intervention is trusteeship, which is extraordinary and overwhelming.

The Security Council presently seems more inclined to find that humanitarian crises and human rights violations can pose threats to international peace,¹⁷⁰ even when these crises have little or no external

163. Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8, 1921, 1923 P.C.I.J. (ser. B) No. 4, at 156 [hereinafter Nationality Decrees Advisory Opinion]; Gordon, *supra* note 8, at 534-35.

164. See RAJAN, *supra* note 71, at 11.

165. See *id.* at 7. A broad construction of the concept of nonintervention relies upon interpreting the concept of sovereignty in a correspondingly expansive manner. See, e.g., Dallmeyer, *supra* note 63, at 21-22; Gordon, *supra* note 8, at 528-29.

166. Gordon, *supra* note 8, at 520.

167. Riddell-Dixon, *supra* note 8, at 5. The other two are: elite collaboration versus universal (or at least general) cooperation, and State equality versus concessions to the powerful.

168. U.N. CHARTER art. 2, para. 7.

169. Riddell-Dixon, *supra* note 8, at 6. Domestic jurisdiction has curtailed the U.N.'s ability to deal with wars between subnational forces, to address the root causes of conflicts, to protect human rights, to promote social and economic justice, and to rectify inequalities between States. Compare *id.* with Gordon, *supra* note 8.

170. In Resolution 688, the Security Council found the consequences of internal repression to be a threat to international peace and security. The harsh quashing of the Kurdish rebellion caused a massive number of Kurdish refugees to flee to Turkey

effects.¹⁷¹ Moreover, given the debate surrounding humanitarian intervention in Somalia, this current inclination to employ forcible intervention to address human rights concerns may be more acceptable when there is no functioning government. Member States repeatedly stressed the humanitarian imperative and the lack of any functioning government in Somalia.¹⁷² The Security Council was also more willing than it had been in previous situations to authorize the use of force to directly address the humanitarian crisis. Given previous resolutions addressing equally grievous situations, it may be that Member States do not have the same level of uneasiness regarding sovereignty and nonintervention when there is no functioning government. Thus, there may be a greater likelihood of intervention when a humanitarian crisis is coupled with governmental collapse.

Upon moving to the next phase of intervention in Somalia, UNOSOM II,¹⁷³ the U.N. undertook a broad range of activities that would contribute to a secure environment in Somalia.¹⁷⁴ The Security Council did not, however, use Chapter VII to strip Somalia of statehood and declare it under the control of the United Nations. Rather, every effort was made to bring about national political reconciliation because the Council recognized that it was ultimately up to the Somali people to rebuild their country.¹⁷⁵ The Secretary-General noted that while UNOSOM would assist in the rebuilding of their country, it would not substitute its will for the will of the Somali people.¹⁷⁶

and Iran, causing enormous apprehension in both countries. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 1, U.N. Doc. S/RES/688 (1991).

171. Security Council Resolution 794 found that the unfolding humanitarian crisis in Somalia, and obstacles to the delivery of humanitarian assistance, were threats to international peace and security. It then authorized military intervention to establish a secure environment for humanitarian relief efforts. The thrust of the resolution, and the rationale supporting the use of force, was the internal humanitarian crisis and the frustration of humanitarian assistance efforts. Resolution 794, *supra* note 142; Gordon, *supra* note 8, at 553.

172. See *supra* note 142.

173. The initial United Nations Operation in Somalia (UNOSOM) was established pursuant to Resolution 751 in 1992. S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg. at 2, U.N. Doc. S/RES/751 (1992). An expanded United Nations Operations in Somalia (UNOSOM II) was established by Security Council Resolution 814. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg. at 6, U.N. Doc. S/RES/814 (1993) [hereinafter Resolution 814].

174. Resolution 814 relied on the report of the Secretary-General of 3 March 1993 in expanding the size and mandate of UNOSOM II. Resolution 814, *supra* note 173, at 4. In this report, the Secretary-General delineated a number of primary military measures that would lead to disarmament and peace. *Further Report of the Secretary-General Pursuant to Resolution 794*, *supra* note 24.

175. Resolution 814, *supra* note 173, at 1. The Security Council stated, "Recognizing that the people of Somalia bear the ultimate responsibility for national reconciliation and reconstruction of their own country . . ." *Id.*

176. In the report upon which the Council relied in establishing UNOSOM II, the Secretary-General stated:

The mandate would also empower UNOSOM II to provide assistance to the Somali people in rebuilding their shattered economy and social and political life, re-establishing the country's institutional structure, achieving national

Given the broader definition of threat to the peace being employed by the Security Council and the willingness to find that humanitarian crises are threats to the peace, the humanitarian imperative may well be the most plausible rationale for imposing trusteeship. It is not inconceivable that in the face of devastating atrocities and suffering, extraordinary solutions might be considered necessary. It is in these circumstances that an extension of the Security Council's powers might be most warranted. But even here, it would seem that the Security Council is faced with Article 78 which prohibits applying trusteeship to Members of the U.N. The Security Council might also hesitate to take the drastic step of imposing trusteeship, given the legal consequences of this determination.¹⁷⁷ Nonetheless, it is most probable that trusteeship would be considered when governmental collapse leads to a horrific humanitarian crisis.¹⁷⁸ Whether it would be adopted remains to be seen.

D. Are Disintegrating States Still States?

Given the near total breakdown in governmental ability which prompts our discussion of trusteeship, we must ask ourselves if deteriorating States have failed to the point that they are no longer States. Although the U.N. Charter explicitly declares that the trusteeship system does not apply to Member States, it could nonetheless apply to a disintegrating State that has failed to the point that it has lost its claim to statehood. Perhaps failed States have failed to the point that they are no longer States,¹⁷⁹ and by inference, no longer Members of the United Nations.¹⁸⁰

political reconciliation, recreating a Somali State based on democratic governance and rehabilitating the country's economy and infrastructure.

Notwithstanding the compelling necessity for authority to use enforcement measures as appropriate, I continue to hold to my conviction that the political will to achieve security, reconciliation and peace must spring from the Somalis themselves. Even if it is authorized to resort to forceful action in certain circumstances, UNOSOM II cannot and must not be expected to substitute itself for the Somali people. Nor can or should it use its authority to impose one or another system of governmental organization.

Further Report of the Secretary-General Pursuant to Resolution 794, supra note 24, at 19-20.

177. See text and notes at part V, *infra*. If it did take such a step, perhaps it should be to address the immediate humanitarian crises and to restore order to a point where it could be determined if the peoples of the disintegrating State willingly choose trusteeship.

178. As the level of human rights abuses wrought by a crisis decreases, the decision to intervene on such an overwhelming level on human rights grounds will be less likely. It remains to be seen what level of human rights abuses will unconditionally trigger large scale multilateral intervention. The sweeping genocide in Rwanda in April 1994 was known to the international community, but it did not precipitate immediate or decisive international intervention. See generally Ruth E. Gordon, *Humanitarian Intervention by the United Nations and Iraq, Somalia and Haiti*, 31 TEX. INT'L L.J. (forthcoming 1996).

179. There is no specific organization that could make a binding decision on a particular case of extinction. Questions concerning the statehood of an entity remain a problem which must be resolved by those States that come into official contact with an organ claiming to possess the criteria of statehood. Broms, *supra* note 61, at 45.

180. Membership in the U.N. is limited to peace-loving states that accept the obligations contained in the Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. U.N. CHARTER art. 4, para. 1. But there are two

The trusteeship system originally applied to Non-Self-Governing Territories (NSGTs). Therefore, to be subjected to the trusteeship system, a State would have to be a NSGT of some kind.¹⁸¹ If a state has failed to the point of extinction, perhaps it can be categorized as a territory, rather than a State, and thus as an entity that is eligible for trusteeship. Extinction has generally meant that a new State has replaced the State found to be extinct. This would not be true in the case of a disintegrating State, however. Rather, it is conceivable that a disintegrating State is a territory that is non-self-governing in the sense that there is no central government.¹⁸² Admittedly, the term Non-Self-Governing Territories meant entities governed by an outside colonial authority, rather than a state that lacks central authority, and thus this characterization would expand the meaning of the term.

Customary international law does not supply definite criteria for determining when a State ceases to exist.¹⁸³ Moreover, scholars have not

types of membership in the U.N.—original Members and later—admitted Members. The original Members were States that participated in the U.N. Conference on International Organization or had previously signed the U.N. Declaration of 1 January 1942, and had signed and ratified the Charter. *Id.* art. 3. Original Members did not have to fulfill the conditions mentioned in art. 4, para. 1, and there were several Members whose statehood was at least doubtful. Broms, *supra* note 61, at 45-46; RUSSELL, *supra* note 55, at 350-51, 351 n.3. Later-admitted Members have had to meet the requirements in art. 4, and no non-State has been admitted as a full Member in the ensuing 50 years. Non-State entities such as the PLO have been accorded some of the incidents of membership in the U.N. system. See KIRGIS, *supra* note 76, at 166-75.

Perhaps loss of statehood does not automatically preclude membership status. Expulsion is by decision of the Organization, but the Charter does not provide for our scenario because expulsion is limited to persistent violators of the principles contained in the Charter. U.N. CHARTER art. 6. Because membership is limited to peaceloving States that are willing and able to carry out the obligations contained in the Charter, one could argue that failed States are unable to carry out the obligations contained in the U.N. Charter. However, given the admission and continued presence of micro-States, this argument is problematic. The U.N. Charter did not contemplate that a State might simply cease to exist with no substitute entity rising in its stead.

181. U.N. CHARTER, art. 77. Another alternative is simply to apply the trusteeship system to sovereign States. However, this alternative seems to contradict the definition of sovereignty, which includes independence and self-government, versus tutelage, which applies to those deemed in need of being governed by others. Another possibility is to declare some States to be somewhere in between sovereign States and trust territories.

182. This differs from extinction as traditionally defined, where the extinct State has been totally displaced by another State. When a State disintegrates, a strong central authority may be absent while there may be functioning local mechanisms. See, e.g., BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* 312-14 (1992) (describing such instances in Africa).

183. KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 7 (2d ed. 1968). Although writers have generally agreed as to what events constitute the birth of a State, no one has examined the events leading to the extinction of a State at any great length. *Id.* No one has tried to develop a conventional solution to the problem, nor have any international judicial decisions issued pronouncements on the subject. *Id.* The question of a State's continuity does not arise under normal and settled conditions. On the contrary, it arises in circumstances giving rise to legitimate doubts about the continued existence of the State concerned. "There must be a shock grave enough to cast doubt on the State's survival, such as belligerent occupation,

studied the problem of a State that no longer functions and has no new State which claims to operate in its place.¹⁸⁴ Continuity, identity, and extinction have depended on variants of the basic criteria of statehood:¹⁸⁵ a defined territory,¹⁸⁶ a permanent population,¹⁸⁷ a government,¹⁸⁸ the capacity to enter into international relations,¹⁸⁹ independence,¹⁹⁰ and, as

revolution, or revolutionary dismemberment." *Id.* at 4. In the case of an extinct State, that shock would presumably be the disintegration of the structures and abilities of the central government, to the point where it is no longer functioning at all, or it is functioning on an insignificant level.

184. Generally the inquiry has been whether a State has vanished and another stands in its stead under a new legal order, or whether the previously existing State continues as the same entity. *See, e.g.*, CRAWFORD, *supra* note 56, at 417-20; MAREK, *supra* note 183, at 1, 7-14. Thus, there are claims of extinction following internal revolution, territorial changes, or belligerent occupation. Revolution does not affect State identity and continuity. *Id.* at 7. With failed States, we are left with no central authority rather than a different central authority. Perhaps the closest analogy would be to internal revolution, with disintegration viewed as a revolution of a different type. Marek defines revolution as "every change in the legal order of the State other than one brought about by constitutional changes." *Id.* at 25. Disintegration would be a change in the legal order that is not brought about by constitutional means. Nonetheless, the result is different from a revolution that leaves a central authority exerting State functions. Here we are left with decentralized (or no) authority.

185. These qualifications, which the state should possess as a matter of international law, are found in the Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (also known as the Montevideo Convention on Rights and Duties of States) [hereinafter Montevideo Convention].

186. A reasonably stable political community must be in control of a certain geographic area. What matters is the effective establishment of a political community (rather than fully defined frontiers). BROWNLIE, *supra* note 19, at 73.

187. This criterion is intended to be used in association with the requirement for a defined territory and connotes a stable community. *Id.* From the standpoint of international law, the permanent population is identical to the nation. From the social or anthropological perspective, and thus from the perspective of domestic politics, this is not necessarily the case. Eide, *supra* note 33, at 140. In international law, "nation" is practically synonymous with the word "State." For example, when Article 15 of the Universal Declaration of Human Rights provides that "[e]veryone has a right to a nationality," it means everyone has a right to citizenship. *Id.* at 141; *see Universal Declaration of Human Rights, supra* note 110, art. 15. However, different usages of the word are also widespread. For instance, the Kurds consider themselves a nation without a State. Eide, *supra* note 33, at 141.

188. The existence of effective government with centralized administrative and legislative organs is the best evidence of a stable political community. BROWNLIE, *supra* note 19, at 73. Some States arose before a well-organized government came into existence. Moreover, the principle of self-determination was set against the concept of effective government when lack of an effective government was suggested as a rationale for the continuation of colonial rule. The relevant issue then was determining the legal purpose for which government was ineffective. The requirement of an existing government as a requisite of statehood at times approaches, and may overlap with, the requirement for independence. HIGGINS, *supra* note 128, at 21.

189. The capacity to enter into international relations can be equated with independence, which may also be described as external sovereignty. It means that a State is subject to no other authority except that of international law. HIGGINS, *supra* note 128, at 26.

190. While Article 1 of the Montevideo Convention does not include independence, Article 3, which proclaims the declaratory character of recognition, states that before recognition the State has the right to defend its integrity and independence. Montevideo Convention, *supra* note 185, art. 3. This assumes that a State possesses indepen-

subsidiary criteria, permanence and recognition.¹⁹¹ Arguably, a completely non-functioning government indicates the disappearance of several of the indicia of statehood, such as plenary authority over a territory and population and the ability to enter into relations with other States.¹⁹²

A State may become extinct with the disappearance of one of its elements, and it is rather easy to determine extinction as to the material elements of a State.¹⁹³ Yet, a State is not necessarily extinguished by substantial changes in territory,¹⁹⁴ population, or government,¹⁹⁵ or in

dence, which it has the right to defend. MAREK, *supra* note 183, at 165; Montevideo Convention, *supra* note 185, art. 3. Independence means that a State is not subject to the authority of any other State or group of States. MAREK, *supra* note 183, at 165-66 (quoting Customs Regime Between Germany and Austria, 1931 P.C.I.J. (ser A/B 57) No. 40 (sep. opinion of Judge Anzilotti)). As to the issue of whether statehood requires legal or actual independence, HIGGINS, *supra* note 128, at 26, it is apparent that absolute independence is impossible, given the increasing interdependence of the international community. See discussion, *supra* part II.C.

191. These secondary criteria may be important in doubtful or marginal cases. CRAWFORD, *supra* note 56, at 403. If statehood is to depend on recognition by others, the extinction of a State would depend on the will of third States. This raises the perennial problem of the constitutive versus the declaratory nature of recognition. As the source of the continued existence of a State, recognition would have to be constitutive rather than declaratory. Moreover, it would have to be a legal, and not a political, act. MAREK, *supra* note 183, at 131. By adopting the constitutive theory, however, the State may continue to exist for some and not for others. This may be a particularly difficult problem when addressing the continued existence of a State, which may be more controversial than the birth of a State. *Id.* at 132-33. Practice, however, indicates that in matters of both recognition and nonrecognition, objective international law determines the existence or nonexistence of a State. A State exists in accordance with objective norms alone, and the denial of such existence must equally be based on objective norms. *Id.* at 145. It is implausible to have objective criteria for a State's birth and pure consent as the criterion for its further existence. *Id.*

192. Historically, this inability to enter into foreign relations has been due to another State exercising this authority on behalf of the State or another State controlling the manner and method of conducting foreign relations. Yet, the existence of a government in a territory is a condition precedent for the normal conduct of international relations. CRAWFORD, *supra* note 56, at 47.

193. MAREK, *supra* note 183, at 7. Thus, if the territory were to disappear, *i.e.*, as with an island sinking, the State would clearly cease to exist. The same could be said for a population that disappeared by moving elsewhere. Obviously, these are not the typical cases.

194. State practice, judicial decisions, and doctrine confirm that substantial changes in territory do not affect the identity of a State. *Id.* at 16-18. This conclusion stems from the practical concern for the continued validity of the treaty rights and obligations of a State that has either lost or acquired territory. *Id.* at 15. One present example would be the devolution of the USSR to Russia. The USSR lost a substantial portion of its territory, but its continuity as a State went unquestioned. One exception may be if the loss in territory is either total or substantial. *Id.* at 23-24.

195. *Id.* at 7. Examples include revolution, dismemberment, merger with another State, and debellatio. One theory is that the yardstick for determining State extinction is found exclusively in the absence of the State's legal order. *Id.* at 8 (citing Kelsen). The classic exception has been belligerent occupation where the occupied State survives even though its legal order may have become totally ineffective throughout the territory. *Id.* In the post-World War II period, the Allied Control Council was eventually recognized as the government of Germany after the collapse of an effective or recognized German government. Moreover, the Berlin Declaration did not purport to

some cases by all three.¹⁹⁶ International law protects the State's existence against possible dangers that are not illegal per se, such as territorial changes, revolutions, and belligerent occupations.¹⁹⁷ Furthermore, there is a strong presumption in favor of the continuance, and against the extinction, of an established State.¹⁹⁸ Extensive civil strife and the breakdown of order through foreign invasion have not affected the personalities of established States.¹⁹⁹ Such States have also been immune to extinction because of revolution²⁰⁰ and prolonged anarchy.²⁰¹ In applying statehood criteria, questions of recognition, acquiescence,²⁰² and the view of the entity concerned,²⁰³ have been important, but not decisive.

Given the strong presumption in favor of retaining international personality, and taking into account recognition and the views of the entity concerned, failed States do not appear to have forfeited their status as States. In describing disintegrating States, commentators have primarily focused on the inability to fulfill essential governmental functions because

annex Germany. Given these two factors, Germany continued to exist as a State. CRAWFORD, *supra* note 56, at 274.

196. CRAWFORD, *supra* note 56, at 417. Extinction will result, however, where there is effective submersion or disappearance of separate State organs into those of another State over any considerable period of time. *Id.* This is especially true where no illegality is involved and where the previous State's organs voluntarily relinquished their separate identity (*i.e.*, where there is a union). *Id.*

197. MAREK, *supra* note 183, at 549.

198. CRAWFORD, *supra* note 56, at 417; MAREK, *supra* note 183, at 548. This reluctance to find State extinction stems from the nature of international law, which is based on the co-existence of separate independent States. *Id.* at 548. It is also explained by the natural tendency to provide for a maximum amount of security in international relations. Since extinction, absent universal secession, would abruptly discontinue a State's rights and obligations, this would not portend well for stability. *Id.*

199. MAREK, *supra* note 183, at 24-82.

200. *Id.* at 24-73. Marek states:

If [the] legal order breaks down in an already existing, *i.e.*, fully delimited State, its territorial and personal delimitation under international law remains It is true that the basic norm of the revolutionary State has been replaced by a new basic norm, with no internal legal connection between the two; but the old basic norm has not been replaced by the basic norm of any other state. The territorial and personal delimitation of the State concerned remaining in principle unchanged, the new basic norm has been produced from within the same international delimitation as the old one, and is valid for the same international delimitation.

Id. at 50.

201. CRAWFORD, *supra* note 56, at 417.

202. *Id.* at 417. Thus, another theory conditions continued existence on the unwillingness of third States to recognize *debellatio* and to continue their recognition of a conquered State. MAREK, *supra* note 183, at 8. One problem with this theory is that States do not apply principles of recognition in a uniform manner. *Id.*

203. Marek notes that the will and decision of the State alone cannot be dispositive. Rather, the State's own will and conviction may be admitted to a very limited extent as a controvertible piece of evidence of its identity and continuity. Such evidence will be stronger if it is found not only in diplomatic correspondence, negotiations, and the like, but also on the internal level where it is not intended to produce effects in the outside world. But even so, it will at best be very weak evidence which must yield before more objective criteria. It does not constitute a test in itself. MAREK, *supra* note 183, at 129.

of civil war or weak, collapsing governmental structures.²⁰⁴ The fundamental problem is the breakdown of effective government; the other indices of statehood remain in place. Yet, this scenario alone does not appear to have led to a loss of statehood. Territory and population remain in place, and the international community continues to treat these States as States, thereby recognizing that these States remain sovereign entities.²⁰⁵

The peoples of these States also appear to continue to view themselves as citizens of States, even where they are trying to carve out another area and form a smaller State.²⁰⁶ Governments or insurgent factions continue to operate on the international stage,²⁰⁷ and they continue to view themselves as vested with sovereign power.²⁰⁸ Since we are still dealing with sovereign States that remain Members of the United Nations,²⁰⁹ trusteeship cannot be imposed simply by finding that these States are no longer States.

However, this argument can be maintained with some degree of confidence only for the immediate future; indeed, the situations described by Kaplan and Sylvester may soon warrant a different analysis.²¹⁰ A contin-

204. For example, Helman and Ratner distinguish between stages of decay based on varying degrees of central governmental deterioration. Helman & Ratner, *supra* note 1, at 13-17. Johnson's rationale for re-imposing colonialism is the need for outside control of governmental operations where governments are unable to supply basic services. Johnson, *supra* note 6.

205. For instance, in Somalia, the U.N. found a threat to the peace partly in order to avoid obtaining consent to intervene. Thus, the Organization acted as if there were some form of a sovereign entity. Furthermore, aid agencies continue to deal with governments. Because there is no particular body with the authority to decide this question, determining the statehood of any entity depends upon the members of the community of nations. Broms, *supra* note 61, at 47.

206. For example, northern Somalia, which is made up primarily of members of the Issak clan, has attempted to cede from Somalia and form the independent State of Somaliland Republic. Clark, *supra* note 24, at 112.

207. This is true even in Somalia where factions are in control of territories and engage in international negotiations. *Further Report of the Secretary-General Pursuant to Resolution 794*, *supra* note 24, at 3-5 (detailing U.N. coordination of efforts to facilitate a political settlement between the various Somali factions). Security Council Resolutions have also been directed at these entities. U.N. SCOR Res. 733, 3039th mtg., U.N. Doc. S/RES/733 (1992) (seeking the commitment of all parties to permit humanitarian assistance). Moreover, Somalia still retains a seat at the United Nations. *THE WORLD ALMANAC AND BOOK OF FACTS 1995*, at 845-46 (Robert Famighetti ed., 1995) [hereinafter *WORLD ALMANAC 1995*]; Resolution 814, *supra* note 173; *The Situation in Somalia: Report of the Secretary-General*, U.N. SCOR, 47th Sess. at 1-3, U.N. Doc. S/25168 (1993).

208. For example, some factions in Somalia sought to keep the U.N. out, and the U.N. dealt with them partially as sovereign entities. Hutchinson, *supra* note 117. There may be little choice in situations of this type. See *WORLD ALMANAC 1995*, *supra* note 207.

209. All of the States cited as failed or failing are still Members of the United Nations.

210. The situations described by these commentators indicate that something more may be at issue. Both describe not only a breakdown of governmental authority, but also the disintegration of borders and something akin to a loss of national consciousness. In these circumstances, a closer examination of whether the State survives may be warranted because there is no functioning central government, borders, or defined population (if we equate people with nation). Thus, we may have the disappearance, as opposed to changes, of a number of the elements of statehood. In such cases, we may

ued lack of central authority may portend extinction if it reaches a point where there is an inability to engage in international relations and an incapacity to govern the territory and people over an extended period of time. Moreover, prolonged periods without central authority may lead the population to fail to view themselves as part of a State. At some point, the objective facts may indicate extinction.²¹¹

International personality²¹² is conferred by the makers of international law—that is, by States.²¹³ The international community has not previously faced the total breakdown of a State unaccompanied by some other centralized entity²¹⁴ claiming statehood. The potential reaction of States in these circumstances cannot be stated with any certainty.²¹⁵ Thus, we could face a situation where some States are no longer recognized as such by the international community. An assessment could be made by the piecemeal decisions of individual States or through the collective assess-

face an unknown occurrence that merits a different analysis. Such inquiry is beyond the scope of this article, however, and will be examined by the author elsewhere.

211. One problem here is the absence of some other State standing in place of the extinct State. Extinction has often meant that a State is replaced by another State.

212. International personality is legal capacity under the international legal system. It is the status enjoyed by subjects of international law, denoting their capacity to bear legal rights and duties under international law and making them the direct addressees of the rules of the system. Cheng, *supra* note 79, at 23.

213. There are problems with this, however. If the nonrecognized State and its inhabitants are neither protected nor bound by international law, then logically such State is free to act as it deems fit towards the international community and vice versa. For example, the unrecognized State could be freely invaded by other States or could itself invade others, without committing any illegal act and without any legal remedy. The citizens of the defunct State could be treated as outlaws in the territory of third States and vice versa. MAREK, *supra* note 183, at 146-47. Therefore, Marek rejects recognition as a test of State continuity and identity. Such a test is not reliable because of its inherent relativity. "[I]t withdraws the question of continued existence from the realm of objective norms and makes it dependent upon the will of third States," and it "may place the continuity of a State in jeopardy." Although recognition is not constitutive, and does not possess a legal character, but rather is "declaratory and political, [it] is still of considerable value as [prima facie] evidence" of extinction. *Id.* at 159. "Recognition granted or withheld in accordance with the principles of international law, is conclusive evidence. . . . Recognition granted or withheld for reasons which have nothing to do with these principles, but are overwhelmingly political to the extent of disregarding them, is not conclusive evidence." *Id.* at 160. Therefore, it is not the recognition, but the conformity with international law which is dispositive. *Id.*

214. There may be political formations on a more local level. DAVIDSON, *supra* note 182, at 294-95.

215. Much would depend on politics. In other words, it depends on whether some States have an interest in finding that other States are extinct. This would hinge on the course of action that would follow such a finding. Where the intention is to take over a State and put it under international supervision, a State could be deemed extinct. However, given that the international community is a community of States, it is unlikely that States would lightly begin to find other States extinct. This is especially true if the finding is made by a broadly representative body, such as the General Assembly, which consists of many small, weak States. Even the Security Council would have to deal with the political and legal consequences that would follow such a finding. Thus, the circumstances would probably be dire.

ment of some organ of the U.N.²¹⁶ Presumably, the purpose would be to divest the affected State of sovereignty and its perquisites. The rights and duties accruing to the entity as a sovereign State would disappear and the entity could possibly be subjected to international supervision without its consent. Evidently the international community is not ready to take such a drastic step. Accordingly, the response thus far has been to emphasize continuity. The Charter's prohibition on applying trusteeship to Member States presently remains an obstacle to applying trusteeship to these entities.

V. The Legal Status of Trust Territories

A. Legal Personality of Dependent Territories

Historically, States have been the entities possessing international personality with its full panoply of rights, duties, and obligations.²¹⁷ Colonies, international protectorates, and other dependencies possessed a lesser status.²¹⁸ In legal terms, colonies were part of the colonial polity. There was the potential for administering powers to view their mandate and trust territories in a manner analogous to their colonial possessions. Thus, the crucial issue with respect to mandates and trusts was their legal status vis à vis the administering State.²¹⁹

Trust or mandate status was an improvement on colonial status. Colonies explicitly lacked international personality and could not legally contest their treatment by the colonizer.²²⁰ They were not considered separate juridical institutions, and the metropolitan government exercised

216. For example, individual States could withdraw recognition or assistance. The General Assembly could pass a resolution on a particularly dismal situation where it believes that action is desirable. While such a finding might not be conclusive, it might be evidence of extinction. Whether the Security Council could or would make such a finding is a complex question for which there is little or no authority. Such a finding may also be politically untenable for a small unrepresentative body which could be acting beyond its competence.

217. A subject of the law is an entity capable of possessing international rights and duties and of maintaining its rights by bringing international claims. The principal formal contexts involving the question of personality include: the capacity to make treaties and agreements valid on the international plane, the capacity to make claims in respect of breaches of international law, and the employment of privileges and immunities from national jurisdiction. BROWNIE, *supra* note 19, at 60.

218. Public international law provides the criteria for determining whether a particular entity is sufficiently independent of other legal persons and whether States or organizations have a separate legal personality. *Id.* at 74-76.

219. Our problem is the legal status of a trust entity vis à vis the U.N., which may raise different issues. In one sense, mandate or trust status was analogous to the colonial power ceding aspects of its sovereignty over a part of itself, because it shared the responsibility for administration with the international community. This differed from a pure colonial situation where sovereignty over colonial possessions was complete. Nonetheless, even with some international supervision through mandates and trusts, the administering power retained considerable sovereign powers over mandate and trust territories. Most countries under mandate status were taken from the losers of the First World War, and trusts were generally former mandates that were transferred to the new system.

220. Anghie, *supra* note 16, at 494-47.

plenary authority over these territories.²²¹ Article 73 of the U.N. Charter, which applied to U.N. Members administering NSGTs, may have minimally limited the sovereignty of administering States over their colonial possessions.²²²

Both the League of Nations Mandate System and the U.N. Trusteeship System gave international status to administered territories. Extraneous agencies—international organizations and their members—were given the task of supervising the undertakings of the administering powers.²²³ The Trusteeship Agreement for Somaliland expressly vested sovereignty in the people of the territory, thereby expressing the right to self-

221. CRAWFORD, *supra* note 56, at 199. Under international law, the territory became part of the metropolitan State's territory by "subsequent 'grant, usage, sufferance or other . . . means'." *Id.* "The absence of formal annexation was not a barrier to characterizing territory as part of a particular State, where the authority exercised was in fact plenary." *Id.* at 199-200. Colonial protectorates were almost universally found in Africa. *Id.* at 200. Some colonial protectorate agreements were treaties made with recognized African States or with tribes with legal status.

The continuous accretion of powers by usage and acquiescence to the protecting State was—by virtue of the Berlin Act procedure—opposable to the parties to that Act and in practice a matter at the protecting State's discretion. As a result, the protecting State had international full powers: it was competent, for example, to cede protected territory without consent and in breach of the protectorate agreements.

Id.

Judge Fitzmaurice found in the Northern Cameroon case that the Republic of Cameroon, which at the time of the alleged wrong was a colony, was not then in existence as a State with a separate international persona, and therefore it could claim no injury. Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 129 (Dec. 2) (separate opinion of Judge Fitzmaurice). Judge Fitzmaurice also found that the trust conferred rights only on Members of the U.N. The applicant State (Republic of Cameroon) was not then a Member of the U.N. or even in existence as a State and separate international persona over most of the relevant period. *Id.* Judge Bustamante, in his dissenting opinion, argued that the Republic of Cameroon could demand the investigation of facts prior to its political emancipation. He likened it to the case of an infant examining his guardian's acts of administration during his minority. *Id.* at 169-70. CRAWFORD, *supra* note 56, at 395.

222. CRAWFORD, *supra* note 56, at 363. "To the extent that 'sovereignty' implies the unfettered right to control, or to dispose of, the territory in question, the obligations of Article 73(b), and the associated principle of self-determination, substantially limit the sovereignty of the Administering State." *Id.* at 364. Crawford asserts that it is uncertain "whether Chapter XI purports to deprive administering States of sovereignty over colonial territories, or that subsequent practice could have that effect." *Id.* However, whether sovereignty then resided in the people of the territory or elsewhere was another matter. Yet, as the right of self-determination matured, it was increasingly asserted that the status of colonial territories was separate from that of the ruling power. The Declaration on Friendly Relations states that the territory of a colony or other non-self-governing territory has a status that is separate and distinct from the territory of the State administering it. *See supra* note 62. This separate and distinct status exists until the people of the colony or NSGT exercise their right of self-determination in accordance with the U.N. Charter.

223. BROWNIE, *supra* note 19, at 62. The particular instrument establishing this authority could be interpreted in such a way that it gives the populations concerned a direct legal interest in carrying out the undertakings contained in the instrument, although their limited legal capacity required that they should have a representative. *Id.*

determination,²²⁴ and firmly depriving Italy of sovereign rights over the territory.²²⁵ Six trust agreements, however, provided that the trusts were to be administered as integral parts of the administering power,²²⁶ raising questions as to whether sovereignty vested in the administering authority.²²⁷

In the 1950 Advisory Opinion on the Status of South West Africa (Namibia), Judge McNair described a special regime for mandate and trust territories where the doctrine of sovereignty did not apply.²²⁸ These systems were a new species of international government which did not fit into previous understandings of sovereignty. Sovereignty over a mandated territory was in abeyance, and when the inhabitants of the territory obtained recognition as an independent State, sovereignty was revived and vested in the new State.²²⁹ Thus, these entities were not part of the administering state.

In a subsequent Advisory Opinion on Namibia, Judge Ammoun found that in colonial or mandate paradigms, virtual sovereignty resided in the people who were deprived of it by domination or tutelage.²³⁰ According to Judge Ammoun, sovereignty was inherent in every people, including those subject to mandate. Sovereignty had simply been deprived of freedom of expression temporarily.²³¹ Some commentators

224. CRAWFORD, *supra* note 56, at 336 n.10.

225. CHOWDHURI, *supra* note 92, at 231. The United States also stated that it did not intend to extend its sovereignty over the Pacific Islands. *Id.*

226. *Id.* at 232-333. See, e.g., *Trusteeship Agreement for the Territory of Ruanda-Urundi*, U.N. GAOR, 1st Sess., 62d mtg., U.N. Doc. A/258 (1946), which provided in Article 5 that the administering authority (Belgium) "shall have full powers of legislation, administration and jurisdiction in the territory of Ruanda-Urundi and shall administer it in accordance with Belgian law as an integral part of Belgian territory, subject to the provisions of the Charter and of this Agreement." Reprinted in DUNCAN HALL, *MANDATES, DEPENDENCIES AND TRUSTEESHIP* 354 (1948). Representatives of the trustees assured the General Assembly, at the time of the approval of the trusteeship agreements, that the terms were drafted for administrative convenience, and there was no intent to diminish the political identity of trust territories. CHOWDHURI, *supra* note 92, at 233.

227. Indeed, Kelsen argued that, "the state, which in its capacity as a territorial sovereign places a territory under trusteeship and becomes the administering authority, retains its sovereignty, though restricted by the trusteeship agreement, unless there is a contrary provision in the agreement." HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 690 (1950).

228. Status of South-West Africa, *supra* note 95, at 146, 150 (separate opinion of Sir Arnold McNair). He found that the mandate and trusteeship systems were new institutions with a new relationship between the territory and its inhabitants on the one hand, and the government which represented them internationally on the other. *Id.*

229. *Id.* at 150.

230. Status of Namibia, *supra* note 95, at 69 (separate opinion of Judge Ammoun). He also held that South-West Africa, as a German colony, was a subject of international law that was distinct from the German State, and that although it possessed international sovereignty, it lacked the exercise thereof. This legal personality, however, was denied by a law which is now obsolete. *Id.* at 68. Moreover, the mandate did not connote annexation of the territory.

231. *Id.* This view was also expressed by some Members of the U.N. For example, it was observed that:

Nations which have not reached full self-government, as it were, incomplete States which, while possessing the element of population and territory, lack

have noted that this supposition may have more moral and legal validity than other theories if the aim of full self-government or independence is achieved.²³²

This issue has not been definitely resolved.²³³ Others have argued that sovereignty vested in the U.N. because of the Organization's right to approve trust agreements and to determine the final disposition of trust territories. However, the consent of the administering authority was equally indispensable in establishing the trust agreement.²³⁴ Thus, it is doubtful that sovereignty resided in the U.N. when there was an agreement between the U.N. and an administering power.

It may be a different case, however, if the administering authority is the U.N. instead of a State. Administering powers had the capacity to incorporate their trust territories into economic and other forms of union with their colonial possessions,²³⁵ to exploit resources, alienate land, merge the territory with its own, or to use the territory for its own national purposes.²³⁶ The Member States of the U.N., on the other hand, wanted to supervise and exercise control so that the territory could achieve independence at the earliest possible moment.²³⁷

Presumably the U.N. as an administering authority would covet independence and would not harbor proprietary or other similar interests in a modern trust territory.²³⁸ Thus, conceivably sovereignty could reside in

only government or, in other words, the capacity of self-determination and self rule. For that reason, possession of their own territory is the inalienable right of the non-self-governing peoples and never of the administrators, whose only power over such territory can be compared with the powers under civil law of a guardian over a ward. We can no more speak of the sovereignty of an administering Power over a non-self-governing territory than we can speak of a guardian's ownership of his ward's property.

U.N. Doc. A/PV.485, at 146 (1954).

232. CHOWDHURI, *supra* note 92, at 234.

233. Crawford concludes that the concept of sovereignty is inapplicable to international regimes of divided competencies such as the mandate and trusteeship systems. CRAWFORD, *supra* note 56, at 366 n.10. Antony Anghie postulates that the issue of where sovereignty over mandated territories resided was never satisfactorily resolved. Possible candidates included the League of Nations, the mandatory, and the mandated territory itself, which could be characterized as possessing "latent sovereignty." Anghie, *supra* note 16, at 466. Thus, he asserts that mandates were not under the sovereignty of any State, but were of a status that was new in international law. *Id.*

234. CHOWDHURI, *supra* note 92, at 232. The Organization could not establish itself as an administering authority or confer trusteeship administration upon a State by a unilateral act. Professor Brownlie asserts that the U.N. cannot have territorial sovereignty, although it has been prepared to assume administrative functions in the context of maintaining international peace and security. BROWNLIE, *supra* note 19, at 175. Presumably this reasoning is based on the U.N. not being a State.

235. CHOWDHURI, *supra* note 92, at 88-89.

236. *Id.* at 90-91, 277-81.

237. *Id.* at 91-92.

238. The United Nations is an intergovernmental organization, however, that reflects the propensities of its Members. Given the diversity of its membership, presumably no one view would prevail. Yet, some Members are much more powerful than others and might require that their views prevail. Usually these perspectives will benefit those espousing them. Witness the calls for market economies and the like in countries

the U.N., which would have plenary authority over the internal and external affairs of the State. This is an odd conclusion, however, as heretofore only States have possessed sovereignty.²³⁹

An alternative argument follows Judge Ammoun's reasoning in the Advisory Opinion on Namibia. In a modern trust system, sovereignty could reside in the people who are temporarily deprived of its exercise by tutelage. Another alternative is that sovereignty is suspended and will be revived when the entity is again recognized as independent. But if sovereignty is latent, in abeyance, or the people are deprived of its exercise, submission to trusteeship is giving up sovereignty, if only temporarily. The State would be ceding an important part of its statehood and international personality by permitting some other entity to act on its behalf. Thus, trust status and sovereignty, an indispensable aspect of statehood, are incompatible.

B. Can a Modern Trust Remain a State?

This leads to our final issue of the degree to which independence or sovereignty may be ceded to another entity without a resulting loss of statehood. This question has been an ongoing enigma.²⁴⁰ The dilemma is further complicated by the State ceding its independence to an Organization instead of to another State.

The sovereignty of a State includes the right to limit itself by entering into treaty obligations.²⁴¹ Moreover, States can "commit suicide" by entering into a union with another State, whereby one of the States disappears.²⁴² Moreover, States have entered into protectorates and other semidependent classes.

James Crawford distinguishes protected States from international protectorates.²⁴³ Protected States qualify as States under international law despite protection.²⁴⁴ For such States, the necessary prerequisites for independence include retaining substantial authority in internal affairs, some degree of understanding and influence over the foreign affairs pow-

experiencing difficulties. Presumably, this benefits some nations, especially the more economically powerful.

239. The ICJ has held that the United Nations has international personality but not all of the attributes of international personality possessed by States. *Reparation for Injuries*, *supra* note 79, at 179.

240. HIGGINS, *supra* note 128, at 26-27. The question is: "at what stage has a state consented to such limitations on its independence that it is 'shorn of the last vestige of power' . . . ?" *Id.*

241. *S.S. Wimbledon Case*, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Jan. 16).

242. HIGGINS, *supra* note 128, at 27.

243. CRAWFORD, *supra* note 56, at 188-208.

The old concept of a really independent, but protected, State had disappeared by 1815. Instead a variety of political forms was developed, which sought to derive the greatest advantage for European States in terms of accessibility of markets and bases, and non-availability of territory to competitors, with the least disadvantages in terms of actual administrative responsibility. These entities were called protectorates but had little in common with classical protectorates. *Id.*

244. *Id.* at 188.

ers, and that metropolitan competencies be expressly based on delegation by treaty or some other instrument.²⁴⁵

International protectorates, on the other hand, were territories whose governments had agreed to protection and retained a separate status but nonetheless lacked a qualification of statehood such as independence.²⁴⁶ This status was created by formal agreement between the parties. Even where independent States were the subject of an international protectorate that substantially restricted their independence, they were often regarded as States for some purposes.²⁴⁷

In some respects a modern trust would resemble a protected State more than an international protectorate. If the State assuming trusteeship

245. *Id.* at 189. If these elements were absent, an entity generally would not be considered a protected State, but it could possess a lesser degree of personality. *Id.* at 194. However, some States, such as Monaco, were recognized as protected States even where these elements were not present.

246. *Id.* at 194. Crawford cites the controversial case of Morocco, which was generally recognized as a State, but was subject to an elaborate system of capitulations and spheres of influence. Under the Treaty of Fez, a major part of Morocco became a French protectorate. French rights in Morocco included stationing military forces in the territory at French discretion; maintaining order and the security of commercial transactions; directing that necessary legislative reforms be carried out by the Sultan; and appointing a French resident to be in charge of all matters concerning foreigners. Decrees of the Sultan, granting concessions, and making public or private loans required French consent. By 1925, the French Zone (a smaller coastal area had been recognized as being under a Spanish zone of influence) practically had been brought under direct French control; only the judicial system remained formally distinct. *Id.* at 195. In the Case Concerning U.S. Nationals in Morocco, the International Court of Justice held that in these circumstances Morocco retained considerable international personality. The Court found:

It is not disputed by the French Government that Morocco, even under the Protectorate, has retained its personality as a State in international law. The rights of France in Morocco are defined by the Protectorate Treaty of 1912 . . . Under this Treaty, Morocco remained a sovereign State, but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all the international relations of Morocco.

Case Concerning the Rights of Nationals of the United States of America in Morocco (France v. U.S.), 1952 I.C.J. 176, 185, 188 (Aug. 27).

Yet, it is problematic to define Morocco as a protected State at this point. Crawford notes the widespread prior recognition of the Sultan, the complexity and internationalized nature of the arrangements in Morocco, and the insistence by France on the continued statehood of Morocco as factors which mitigated in favor of national independence. *Id.* at 196.

247. These protectorates formed a separate class of territorial entities with a certain distinct legal personality. They were similar for many purposes to protected States.

[T]hey continue the personality of the State before protectorate so that its treaties remain in force. Their international relations, the exercise of which is normally vested in the protecting State, remain formally distinct. Their rulers are normally accorded sovereign immunity, at least in the protecting State's courts. They retain their own nationality, for municipal purposes at least, if not internationally. Their relations with the protecting State are 'contractual' in nature and continue to be governed by international law. Their status is terminated in substantially the same way as that adopted for Protected States.

Id. at 196-97. "The protectorate relation is not in general aimed at annexation but at secure separate government." *Id.*

status entered into the agreement establishing the trust, this would differ from trusteeship under the Charter where the territory, as a NSGT, had neither international personality nor standing to enter into an international agreement.²⁴⁸ Therefore, in this respect, a modern trust parallels a protected State, which by agreement relinquishes part of its sovereignty and whose relationship with the protecting State is contractual. Moreover, as was the case with international protectorates, a modern trust does not envision annexation, and a separate international personality is desirable.

Furthermore, in a modern trust, sovereignty is surrendered to an international organization. This is different from the case of international protectorates where crucial aspects of sovereignty were ceded to another State. As the surrendering entity cannot assume the attributes of the U.N., this entity should be deemed a State for such purposes as nationality and sovereign immunity. Presumably, the U.N. would not assume treaty and other international obligations of the trust territory.

On the other hand, a State assuming trust status would be relinquishing most of its independence and entering into a status that is even more dependent than an international protectorate. While it does not yield sovereignty to another State, it surrenders itself to an organization of States. The almost total lack of independence makes it closer to a colony, which had no international status, or at the very least a trust, where sovereignty was, at best, in abeyance.

Consequently, it may be difficult for a modern trust territory to retain its status as a State. Of course, this conclusion does not totally preclude attributing some form of international personality to such an entity, especially since some form of international personality is increasingly being accorded to entities other than States.²⁴⁹ Moreover, it would not preclude treatment of a modern trust territory as a State for some purposes.

Conclusion

There are formidable legal obstacles to applying the trusteeship system to sovereign States. The first hurdle is Article 78, which precludes application of the system to Member States of the United Nations because the relationship between these States is based on respect for the principle of sovereign equality. Thus, Article 78 would have to be amended, or the Organization would have to determine that a State is no longer a Member of the United Nations, and perhaps no longer a sovereign member of the community of nations, to apply the system to sovereign States.

While sovereignty is receding in many respects, trusteeship as envisioned in the Charter is incompatible with this concept, however narrowly it may be defined. Trusteeship entails ceding major attributes of sovereignty to an organization of States and may mean a loss of statehood itself. This author believes it is doubtful many governments would be willing to

248. The trust agreement was between the administering power and the U.N. U.N. CHARTER art. 77.

249. BROWNLIE, *supra* note 19, at 60-69.

take such a drastic step. Moreover, even if a government were so inclined, the principle of self-determination may render a decision to submit to trusteeship illegal, unless it emanates directly from the people. However, much self-determination may be in transition with respect to current international problems of secession, minority rights, and nationalism, as it is resolved with respect to colonialism. In this arena, it has evolved to mean independence, unless a different status is freely and directly chosen by the people. Thus, unless a people directly and freely choose trusteeship, this principle may preclude imposing trusteeship.

The possible scenarios whereby trusteeship would be established also suggest complications. Given Articles 77 and 78 of the Charter, it is unclear whether the United Nations can employ trusteeship even with the express consent of the target state, because the organization would be acting in contravention of the Charter. This would also apply to the Security Council imposing trusteeship in response to a threat to the peace or as a means of addressing a humanitarian crisis as a threat to the peace. While the Security Council has very broad powers to address these threats, it must do so in accordance with the principles and purposes of the United Nations Charter, and it is doubtful whether it can undertake endeavors that are in direct contravention of a specific article of the Charter.

Disintegrating States present a difficult problem which the international community must solve, so as to avoid the potential human catastrophe that may otherwise be wrought. However, trusteeship is not the answer, at least in its present form. Putting aside other conceivable objections,²⁵⁰ the legal obstacles are onerous. While it is always possible that the Charter could be amended to address the legal difficulties, and some consensus could be reached that would deal with the other legal hurdles, this writer believes this result is improbable. Moreover, perhaps it should be.

Trusteeship would bequeath the international community non-self-governing peoples, a status we have been attempting to eradicate over the past fifty years. Admittedly these entities would be under the tutelage of an international organization rather than individual States, and perhaps, like the original trusteeship system, this is a step beyond unadulterated colonialism. Yet trusteeship has always been, and would remain, a form of colonialism.

Colonialism and trusteeship were based on the assumption that certain peoples were to be governed by others because they were incapable of governing themselves. The international community is moving slowly, but inexorably, towards the principle that all peoples are capable of governing themselves. This ideal should hold true, in all of its myriad manifestations, for all human beings. Rather than focusing on various forms of dependency, we should explore creative mechanisms to assist, rather than direct, peoples in determining and realizing their ambition to determine and

250. Besides the moral and political objections to dependency, the costs and resources entailed in trusteeship may also be of concern.

control their own destiny. The means, as well as the ends, should be independence rather than dependency.

