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Neotrusteeship or Mistrusteeship? The "Authority Creep" Dilemma in United Nations Transitional Administration

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ABSTRACT

State failure poses one of the greatest threats to international peace and security. The collapse of governing institutions breeds civil wars, generates refugee flows, causes enormous civilian suffering, foments instability in neighboring countries, and provides safe havens for transnational criminal and terrorist organizations. As a result, commentators and policymakers have increasingly called for a remedy to the problem of state failure. One of the most compelling arguments is to draw on an old legal institution: international trusteeship by the United Nations (U.N.). This Article argues that while trusteeship may prove effective in managing state failure, it also carries risks. International interventions typically take limited control of the domestic environment of weak countries without absorbing their sovereignty. Trusteeship, in contrast, vests enormous authority and discretion in temporary international administrators, who in turn tend to centralize their power and decision-making in order to meet challenging mission mandates under difficult conditions. This "authority creep" absorbs sovereignty and in the process risks eroding incentives for leaders of failing states to cooperate with the U.N. Worse, unmitigated authority creep may weaken the political basis for successive international administration and reconstruction efforts. This Article concludes by outlining an alternative

system of oversight for U.N. transitional administrators as a means of preserving partial sovereign authority and control for domestic political actors.

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I. INTRODUCTION

State failure poses one of the greatest threats to international peace and security.[1] Failed and failing states foment widespread violence such as civil war and genocide, generate massive refugee crises, and provide safe harbors for terrorist and international criminal organizations. Tragically, international responses have been unable to contain the rising tide of state failure.[2] As the search for more effective responses to state failure widens, scholars and policymakers have with increasing vigor endorsed variations of trusteeship, an old international legal architecture designed to perform governance and state-building functions when a sovereign state is incapacitated.[3]

Most commentators envision casting the United Nations (U.N.) in the role of trustee[4]—a position that builds on the U.N.'s recent role

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1. The Center for International Development & Conflict Management's 2005 global survey of one hundred sixty-one countries identified thirty-one "at serious risk" of succumbing to governmental instability as a result of "societal crises" or conflicts. MONTY G. MARSHALL & TED ROBERT GURR, PEACE AND CONFLICT 2005: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS, AND DEMOCRACY 3–4 (2005), *available at* http://www.cidcm.umd.edu/publications/papers/peace_and_conflict_2005.pdf; *see also* DEP'T FOR INTERNAL DEV., WHY WE NEED TO WORK MORE EFFECTIVELY IN FRAGILE STATES 7 (2005), *available at* http://www.dfid.gov.uk/pubs/files/fragilestates-paper.pdf (identifying forty-six "fragile states of concern" from the standpoint of the United Kingdom's Department for International Development); Foreign Policy & The Fund for Peace, *Failed States Index*, 154 FOREIGN POL'Y 50, 50–54 (2005) (reporting a range of "at risk" and failed states). The Failed States Index was updated and republished in 2006 and 2007. Apart from concerns over the civil wars and humanitarian crises fomented by failed and failing states, the 2002 National Security Strategy of the United States directly links state failure to national security, arguing that "America is now threatened less by conquering states than we are by failing ones." NAT'L SEC. COUNCIL, EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002).

2. To date, individual states, the U.N. Security Council, the World Bank, and a broad constellation of regional and non-governmental organizations have deployed a variety of ad hoc measures, ranging from humanitarian assistance to limited intervention, in a disjointed and largely ineffective attempt at triage. *See* James D. Fearon & David D. Laitin, *Neotrusteeship and the Problem of Weak States*, 28 INT'L SECURITY 5, 11 (2004) (discussing the spread since 1988 in peacekeeping and state reconstruction in countries torn by civil war).

3. *See* discussion on U.N. trusteeship *infra* Part II.

4. *See* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, RESPONSIBILITY TO PROTECT 7 (2001) (arguing that the capacity for common action manifested by the U.N. in recent years suggests that it is the best choice to fill a trusteeship role). *See also, e.g.*, Robert O. Keohane, *Political Authority After Intervention, in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 275, 297 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

Adherence to unitary notions of sovereignty . . . is likely to hinder innovative and constructive institutional innovations that could consolidate the short-term accomplishments of the intervention . . . [into] the conditions for self-sustaining peace and security. . . . Effective solutions . . . require reconceptualizing sovereignty. . . . Domestic sovereignty can be strengthened through a strategy

in the management of war-torn countries.[5]   This management—the
transitional administration of sovereign territories[6]—offers a critical

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that incorporates external authority structures, thus renouncing Westphalian
sovereignty.

Peter Galbraith, *The United Nations Transitional Authority in East Timor (UNTAET)*,
97 AM. SOC'Y INT'L L. PROC. 210, 211–12 (2003) (drawing on Galbraith's own
experience, as a U.S. Ambassador who negotiated a treaty on behalf of East Timor that
governed oil exploration in the Timor Sea, to offer an implicit endorsement of a highly
centralized U.N. transitional authority if circumstances warrant); Gerald B. Helman &
Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1993) (considering the
emerging phenomenon of the failed nation-state and setting out approaches to dealing
with such states); Boris Kondoch, *The United Nations Administration of East Timor*, 6
J. CONFLICT & SEC. L. 245, 252 (2001) ("[T]he idea of bringing back the various forms of
trusteeship has been raised . . . in respect of failed states and self-determination
disputes."); Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFF., July–
Aug. 2002, at 127, 137.

> If . . . other methods of stanching failure prove unsuccessful and a weak state
> actually fails, earnest efforts at reconstruction are required. . . . [T]he
> accomplishments of the UN transitional administrations in Cambodia and East
> Timor . . . indicate that nation building is possible if there is sufficient political
> will . . . .

Martin Indyk, *A U.S.-Led Trusteeship For Palestine*, WASH. POST, June 29, 2002, at
A23 (arguing that the U.S. policy of "nationbuilding" should be replaced by the kind of
deep engagement represented by a trusteeship commitment); Michael McFaul, *Wrong
Time to "Stay the Course,"* WASH. POST, Aug. 24, 2003, at B7.

> What about creating an Organization for International Trusteeships?
> Founding countries would offer assistance in governing failed or new states
> (Palestine, Liberia, maybe even Iraq) in return for leverage over "sovereign"
> decisions in these places—a kind of IMF with guns and a focus on state
> building rather than economic reform. As a representative organ of all states,
> with a commitment to neutrality and a focus on diplomacy between states, the
> United Nations cannot effectively undertake such missions.

Suzanne Nossel, *A Trustee for Crippled States*, WASH. POST, Aug. 25, 2003, at A17
(arguing that a revitalization of U.N. trusteeship is necessary to remove the burden
from the U.S., which has assumed a kind of de facto trustee status); Rob Jenkins,
Collateral   Benefit,   DISSENT   (2006),   *available   at*   www.dissentmagazine.org/
article/?article=426 (noting that it is possible to discern

> a silver lining in the abject failure of basic institutions, let alone democracy, to
> take root in postwar Iraq . . . [namely] enhanced legitimacy in the international
> community for what has been called "neotrusteeship," an arrangement whereby
> multilateral institutions temporarily govern states that have collapsed in
> spasms of misrule and violent conflict.).

See also Paul Kennedy, *UN Trusteeship Council Could Finally Find a Role in Postwar
Iraq*, DAILY YOMIURI (Japan), May 9, 2003, *available at* http://www.globalpolicy.org/
security/issues/iraq/after/2003/0511trusteeshipcouncil.htm ("[I]f UN member states
don't wish to abolish [the UN Trusteeship Council], why not use it to assist the world
organization in the tricky issue of dealing with collapsed nations?").

    5.   *See* Fearon & Laitin, *supra* note 2 (noting in footnote 16 five existing or
past U.N. transitional administrations of war-torn countries: UNTAG (Namibia, 1988),
UNTAC (Cambodia, 1992), UNTAES (Eastern Slavonia in Croatia, 1996), UNMIK
(Kosovo in Serbia and Montenegro, 1999), and UNTAET (East Timor, 1999)).

lens through which to view the potential for and problems of trusteeship over failed and failing states.

A U.N. transitional administration is distinguishable from other forms of international intervention by the degree to which it assumes a state's sovereignty.[7] In contrast, the more common, less robust types of international interventions leave sovereignty to or share sovereignty with domestic political leaders. Sovereignty sharing often leads to consensus-building and collective-action delays that can frustrate the international authority's attempt to effectively implement governance and reconstruction operations. The transitional administration or trusteeship model typically minimizes sovereignty sharing with domestic political actors and places governing authority in the hands of an administrator appointed by the U.N. Secretary General.[8] This is seen by many as a more rapid and effective means of shoring up or reconstituting governing institutions in crumbling states, implementing reconstruction operations, and disbursing funds.

Notwithstanding the various permutations of trusteeship proposed in recent scholarship,[9] the general debate over international governance of sovereign territory has largely focused on the risks of failing to employ trusteeship, but has neglected to weigh these against the potential risks inherent to trusteeship itself.[10]

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6. Six operations to date have featured this level of authority: United Nations Transition Assistance Group in Namibia (UNTAG), 1989–1990; United Nations Transitional Authority in Cambodia (UNTAC), 1992–1993; United Nations Transitional Authority in Eastern Slavonia, Baranja, and Western Sirmium (UNTAES), 1996–1998; United Nations Transitional Administration in East Timor (UNTAET), 1999–2002; and the single currently ongoing transitional administration, the United Nations Interim Administration Mission in Kosovo (UNMIK), 1999–Present. *Id.*

7. For a detailed definition and discussion of sovereignty and its relationship to authority and control, see *infra* Part III.

8. The Secretary-General, however, frequently consults informally with Security Council members as well as states neighboring the "client" state of an intervention. For a brief discussion, see U.N. General Assembly, Security Council, *Report of the United Nations Panel on Peace Operations* (the "Brahimi Report"), ¶¶ 93–95, U.N. Doc A/55/305 (Aug. 21, 2000), *available at* http://www.un.org/peace/reports/peace_operations/docs/a_55_305.pdf.

9. *See, e.g.*, Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, INT'L SECURITY, Fall 2004, at 85, 119 (2004) (offering several potential architectures for trusteeship, including a role for regional or great powers in directly governing over failed states).

10. There are, of course, some important exceptions to this trend. Simon Chesterman, a particularly lucid commentator on U.N. transitional authorities, has argued that the "primary barrier" to transitional authority arrangements is not operational; instead, it is a simple lack of political will. Simon Chesterman, *Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations*, 1 J. INTERVENTION & STATEBUILDING 3, 5 (2007). William Bain, by contrast, has argued that trusteeship necessarily involves a relationship of asymmetric power and coercion in which the promotion of human rights through international administration corrodes those same rights by violating the dignity of self-determination. *See generally* William

This Article argues that Security Council resolutions vesting governing authority over sovereign territories in U.N. transitional administrations leave administrators to confront a dilemma. Administrators are given mandates that almost unavoidably contain significant ambiguity regarding the extent of their own power and the degree to which they must substantively share authority with local political actors. They must then choose between (1) using the discretion built into their mandates to exclude domestic political actors from the decisionmaking process in order to avoid the delays inherent in political consensus-building, or (2) governing by consensus with local political leaders, which may bolster the transitional administration's legitimacy, but risks delays or political entanglement.[11]   This problem is amplified by the limited (and sometimes uncertain) period of time available to transitional administrators to build and oversee local governing capacity and get reconstruction efforts underway.[12] This dilemma leads to what we call authority creep. Authority creep refers to the tendency for transitional administrators to use the discretion built into a mandate to centralize their authority.

The experiences of recent transitional administrations established to govern sovereign territories suggest that the administrators that are appointed to lead these missions tend to centralize their authority and are reluctant to share it with domestic political actors. Authority creep carries significant risks because it is at odds with state sovereignty. Sovereignty is a complex system of rights, capacities, and responsibilities emerging from the interplay between two distinct bundles of power: (1) political authority, which encompasses domestic and international legal sovereignty and carries—correctly or not—the implication of legitimacy; and (2) domestic control, or the ability to enforce compliance within a state's

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Bain, *In Praise of Folly: International Administration and the Corruption of Humanity*, 82 INT'L AFF. 525 (2006).

11.   Another difficulty of transitional administration is the tense relationship between the parallel projects of statebuilding and democratization. This issue has received a great deal of commentary, but it is worth noting that transitional administrators may also centralize power to avoid entrenching any one particular faction in a host country.

12.   *See generally* Simon Chesterman, *Imposed Constitutions, Imposed Constitutionalism, and Ownership*, 37 CONN. L. REV. 947, 947 (2005) (noting that international actors must be aware of the limited timeframe within which they can expect resources, or else they face difficulties in "sequencing").   Transitional administrators recognize that they have a sharply limited timeframe in which to build local capacity, undertake reconstruction, or implement reforms, since both donor states and the domestic political actors tend to expect—or at least want—speedy improvements in governance and security.

territory.[13] In a failed state, domestic control is often fractured along multiple axes or diffuse to the point of near-irrelevance.[14] In contrast, the other half of a state's sovereignty, its political authority—and in particular international legal sovereignty—is not as dynamic.[15]

Political authority is one of the key sources of legitimate power for leaders in weak and failing states.[16] It is often the only factor that distinguishes a warlord from a statesman. The most maligned dictator nevertheless signs binding legal commitments, receives diplomatic immunity, and represents the state in commercial transactions and dealings with external creditors. This source of authority and power becomes all the more important as a regime's degree of domestic control becomes more uncertain.

In such circumstances, warring groups seek territorial control and military dominance as a means to effective legal and political authority. In submitting to international intervention, actors in failed states exchange some of their means of domestic control, particularly control of their military forces, for a role in the transitional government, which confers upon them some portion of legal authority.

This Article views the problem of authority creep prospectively and argues that the tendency towards the deepening of international control during transitional administrations carries very real risks if viewed on a long time horizon. First, authority creep leads to maximal and typically contentious intrusion of a state's sovereignty. This pattern is thus likely to reduce the probability that the permanent members of the Security Council, especially those that adhere to the more traditional view of state sovereignty as noninterference (such as China and Russia), will approve mandates establishing future international transitional administrations.[17]

Second, and perhaps more importantly, authority creep also threatens to undercut the expectations of domestic political actors

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13. *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3–4, 9–10 (1999) (noting distinctions between political authority and domestic control). For a more detailed discussion of authority and control, see *infra* Part III.C.

14. *See* Fearon & Laitin, *supra* note 2, at 13–14 (explaining that state failure leads to a loss of domestic control and resultant destabilization).

15. *See id.* at 21 (noting that the lack of stable internal legal structures or legal authority within the failed state leads to "mission creep," in which ordinary peacekeeping operations cannot withdraw from the area without creating even more collapse, and a transitional administration becomes necessary).

16. *See* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 128–45 (2004) (noting that the collapse of state structures does not leave a total vacuum of power, but rather often creates conditions that enable non-state actors to assume political authority).

17. *See* DOMINIK ZAUM, THE SOVEREIGNTY PARADOX 64 (2007) ("Major non-Western states such as China, Russia or India . . . have been wary of the UN's 'new interventionism' since the 1990s.").

with respect to their sovereignty.[18] Sovereignty is the currency that determines the relationship between the transitional administration and prominent domestic political actors, since the latter often broker the peace arrangements that place sovereignty in the hands of an international authority in the first place.[19] These actors—whether leaders of factions contending for control of the state, or warlords operating in the absence of governing institutions—seek authority, power, and political survival.[20]   The fact that these actors were involved in peace negotiations and treated by the international community as de facto political representatives reinforces an expectation that they will be meaningfully involved in the decision-making process once the transitional administration begins. It is unrealistic to assume that these actors no longer want the authority for which they were previously fighting; it is more reasonable to assume that they have simply chosen to pursue their interests within the new political arena created by third party intervention, instead of relying on their own coercive or political capacity.

     This Article argues that the net result of these two effects will be that the U.N.'s role in achieving peace and stability in war-torn and failing states through trusteeship will be circumscribed if the problem of authority creep is not remedied, or at least managed.[21]

     The argument rests on several basic mechanisms that make authority creep possible. First, international legal agreements such as Security Council resolutions often lack precision[22] because the more specific the terms of an agreement become, the more likely it is that the agreement will favor one state's interests over another's.[23]

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     18.   For an in-depth discussion of sovereignty, see *infra* Part III.
     19.   *See* William J. Durch, *Getting Involved: Political-Military Context, in* THE EVOLUTION OF UN PEACEKEEPING 16, 20–22 (noting the U.N.'s shift to "brokered" peace operations that negotiate deals, including the transitional administration of countries, by involving the actors who have been creating the immediate conflicts).
     20.   *See* CHESTERMAN, *supra* note 12 (detailing the kinds of actors who have seized power in failing states and their history in previous transitional administration missions).
     21.   Put simply, the way in which the international community governs territories today will have a direct impact on subsequent attempts to govern similarly unstable territories. The persistence of weak, fragile, and failing states—such as Iraq Somalia, and Democratic Republic of the Congo—strongly suggests that, in the years ahead, the international community will have to repeatedly confront the question of whether it should govern war-torn sovereign territories. *See* Krasner, *supra* note 9, at 85–119 (discussing at length the problems created by unstable or failing nations, and the necessity for new strategies to confront them).
     22.   For a discussion of precision in international agreements, see Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 412–13 (2000) (explaining that precision "specifies clearly and unambiguously what is expected of a state or other actor . . . in a particular set of circumstances"). Also, for a discussion of the difficulties of crafting international legal mandates, see *infra* Part II.
     23.   The Security Council might also use mandate ambiguity to help account for the inherent unpredictability of post-conflict territories. The ambiguity would give a transitional administration maximum latitude to respond to unforeseen events.

The very nature of international compromise can necessitate generalities when the parties involved have competing or conflicting interests.[24] In the case of Security Council resolutions establishing transitional administrations, the conflicting interests and beliefs pivot on significantly different conceptions of state sovereignty.[25] A Security Council resolution establishing a transitional administration is thus likely to contain contradictory language that implicitly vests sovereignty in the international body while reaffirming the sovereignty of the territory being governed.[26] These competing pressures create ambiguity regarding the degree to which the transitional administration is expected to share sovereignty with domestic political actors. Effectively managing such contingencies requires operational flexibility and creativity.[27]

Clearly, the catastrophic consequences of state failure cannot be ignored.[28] However, unmitigated authority creep risks straying over the line separating productive and counterproductive forms of assistance, and may weaken the political basis for future U.N. interventions. We believe that the U.N. must play the central role in any attempt to manage or reverse state failure, and that some form of trusteeship is likely to emerge as a template for doing so. It is thus

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24. For a general discussion of the need for ambiguity to achieve international agreement, see HANS J. MORGENTHAU, POLITICS AMONG NATIONS 299–300 (6th ed. 1985) (arguing that international legal agreements are vague

> not by accident . . . but regularly and of necessity. For such documents, in order to obtain the approval of all subjects of the law, necessary for their acquiring legal force, must take cognizance of all the divergent national interests that will or might be affected by the rules to be enacted. In order to find a common basis on which all those different national interests can meet in harmony, rules of international law embodied in general treaties must often be vague and ambiguous, allowing all the signatories to read the recognition of their own national interests into the legal text agreed upon.).

25. *See, e.g.,* David M. Malone, *US-UN Relations in the UN Security Council in the Post-Cold War Era, in* US HEGEMONY AND INTERNATIONAL ORGANIZATIONS 73, 75 (Rosemary Foot et al. eds., 2003) (arguing that in the late 1990s, "serious tensions resurfaced in the Council over issues relating to state sovereignty.").

26. *See, e.g.,* Virginia Page Fortna, *United Nations Transition Assistance Group, in* THE EVOLUTION OF UN PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS 353, 361 (William J. Durch ed., 1993) (discussing the transitional assistance mandate for Namibia, which affirmed sovereignty since it "called for elections in the 'whole of Namibia as one political entity'" but used extremely vague language as to the extent of the U.N. involvement and mission specifics).

27. *See, e.g.,* Fortna, *supra* note 26, at 365–71 (noting that the UNTAG in Namibia had difficulty achieving mission goals because it would not integrate existing domestic structures with its own administration); *see also* ZAUM, *supra* note 17, at 64–65 (noting that the U.N. has assumed transitional authority where the affected territories had extreme internal turmoil and lacked functioning governments).

28. *See* Krasner, *supra* note 9, at 86 (noting that the potential for conflict spillover as well as the humanitarian implications of state failure make the issue one of paramount importance, for which the international community must develop coherent strategies).

imperative that scholars and policymakers weigh trusteeship's potential effectiveness in stabilizing and rebuilding failed states against the political risks propagated by its repeated use. This weighing is particularly important when the risks stand to threaten the U.N.'s political legitimacy and leverage over the long term. The critical variation among future transitional administrations will involve the degree to which Security Council mandates dictate the terms of the relationship between the transitional administration and domestic political leaders.

The Article proceeds as follows. Part II traces the genealogy of U.N. trusteeship. It reviews the legal architecture establishing U.N. management of post-colonial territories and traces the development of U.N. peacekeeping from early cross-border monitoring and stabilization missions to far more complex governance and reconstruction operations. It finally assesses the challenges inherent to crafting mandates for transitional administration missions that violate, to a greater or lesser extent, the sovereignty of host countries.

Part III illustrates sovereignty's fundamental connection with the success of transitional administration by reviewing and analyzing traditional understandings of the concept of sovereignty. Sovereignty embodies several distinguishable powers, rights, and responsibilities that can be divided into two broad dimensions: authority and control. The interplay of these dimensions influences the international response to state failure as well as the strategic calculus of leaders in weak and failing states that face international intervention.

Part IV surveys two recent instances of U.N. transitional administration. The cases demonstrate how authority creep runs against the domestic political leaders' pre-intervention expectations regarding sovereignty-sharing, which in turn leads to friction.[29]

Part V briefly summarizes the critical tensions inherent in U.N. transitional administration. It concludes by offering a policy recommendation that addresses the challenges outlined in the Article. Principally, the Article recommends that the U.N. create an adjudicative body to oversee transitional administrations as a means of breaking out of the authority creep dilemma. An official adjudicative body would provide a carefully balanced approach to intervention that preserves the U.N.'s operational efficacy and flexibility as well as its political credibility with key actors in weak and failing states, thus potentially strengthening trusteeship as a sustainable tool for managing state failure.

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29. It is worth noting that, typically, a Security Council resolution establishing a transitional administration reflects some of the domestic political leaders' expectations since the resolutions often incorporate the terms of a peace settlement brokered with those leaders.

II. THE GENEALOGY OF U.N. TRANSITIONAL AUTHORITY: FROM TRUSTEESHIP TO PEACEKEEPING, AND BACK AGAIN

The U.N.'s recent deployment of transitional administrations flows from its long history in temporary governance, from trusteeship to complex peacekeeping operations. In its original formulation, U.N. trusteeship followed in the footsteps of the League of Nations' mandate system[30] and provided for the international governance of a select group of former colonial territories.[31] The composition of this group reflected geopolitical realities at the close of World War II, including former League of Nations mandates, colonial territories "detached from" the former Axis powers, and territories voluntarily committed to U.N. oversight by their colonial rulers.[32] Trust territories were overseen by the Trusteeship Council, a principal organ of the newly-formed U.N. system, which in turn delegated functional administration of the trusts to specific U.N. member states. Trusteeship under the flag of the U.N. was designed to provide temporary governance while building local capacity for self-government.[33]

The principle of sovereignty remained a core concern in the design of the trusteeship system. Article 78 of the U.N. Charter expressly limited the scope of trusteeship to non-member states, noting that relations among members "shall be based on respect for the principle of sovereign equality."[34] For its part, the Trusteeship Council guided the trust territories towards either independence or mergers with other states; the bulk of the trusts achieved self-

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30. The League's Mandate system was designed to provide governance for territories deemed unready for self-rule. Article 22 of the Charter of the League of Nations framed trusteeship essentially as a matter of capacity-building, noting the necessity for the "advanced nations" to provide guidance and instruction in governance to Mandate territories. *See* League of Nations Covenant art. 22. See also Francis B. Sayre, *Legal Problems Arising From the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263, 264 (1948). Sayre draws a brief but illuminating comparison between the U.N. trusteeship and the League of Nations mandate system. *Id.* at 265–97.

31. *Id.* at 263–97 (detailing the trusteeship system and its various provisions for troubled states).

32. ZAUM, *supra* note 17, at 54–55 (noting that the Cold War era international administrations "were established to ease transition from colonial rule to self-governance" and "were all deployed with the consent of the affected states, or the states that controlled the territory").

33. U.N. Charter art. 73.

34. U.N. Charter art. 78.

governance by the early 1960s.[35] The Council suspended its activities in 1994, with the independence of Palau, the last trust territory.[36]

Despite the U.N.'s early experience with the governance of the trust territories, the deployment of transitional administrations is simply the most recent step in the evolution of U.N. peacekeeping operations. The Charter contains no provisions for peacekeeping, though such operations are arguably the U.N.'s most effective and publicized contribution towards world peace.[37] As Paul Kennedy has commented, "in 1945, [peacekeeping] meant keeping the peace among nations and checking those that threatened their neighbors or countries further afield."[38] The U.N. was largely designed as a mechanism to ensure collective security through good offices, consensual mediation and adjudication of disputes, and—most importantly—collective war-making under the authority of the Security Council as a means of last resort.[39] However, these mechanisms of collective security were rendered inoperable by the Cold War between the United States and the Soviet Union[40] because the symmetrical veto powers of the two members prevented the Security Council from taking a meaningful role in managing conflict.[41] Nevertheless, the U.N.'s neutrality and legitimacy provided an opening for it to undertake "more modest, but under the circumstances, more realistic objectives: the mediation of . . . conflicts, the monitoring of cease-fire agreements, and the separation of hostile armed forces."[42]

Throughout the Cold War, such undertakings took two forms: unarmed observer missions and peacekeeping operations.[43] Observer

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35.   United Nations, Dept. of Public Information, Trusteeship Council, http://www.un.org/documents/tc.htm (last visited Nov. 3, 2007) ("The aims of the Trusteeship System have been fulfilled to such an extent that all Trust Territories have attained self-government or independence, either as separate States or by joining neighbouring independent countries.").

36.   *Id.*

37.   Fearon & Laitin, *supra* note 2, at 15 (noting that the U.N. Charter does not specifically mention peacekeeping).

38.   PAUL KENNEDY, THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS 78 (2006).

39.   *See* William J. Durch, THE EVOLUTION OF UN PEACEKEEPING, *supra* note 19, at 1–3 (discussing the U.N.'s created purpose of establishing "global collective security," and the ways in which the U.N's structure has enabled it to carry out that purpose).

40.   *Id.* at 1.

41.   The sole Cold War exception is the Korean "police action," which was managed under the flag of the U.N. in the midst of a Soviet withdrawal from the Security Council. For a brief description, see Paul Diehl, *Peacekeeping Operations and the Quest for Peace*, 103 INT'L STUD. Q., 485, 486 (1988).

42.   *Id.*

43.   *See* Michael Doyle & Nicholas Sambanis, *International Peacebuilding: A Theoretical and Quantitative Analysis,* 94 AM. POL. SCI. REV. 779, 781 (2000) (detailing the various kinds of peacebuilding missions).

missions consisted of relatively small-scale bodies that were tasked with monitoring compliance with truces,[44] while peacekeeping operations represented more significant efforts to support the cessation of conflict through the insertion of lightly-armed international forces between warring parties.[45] Peacekeepers were charged with separating belligerent forces, monitoring their activities to ensure compliance with ceasefires and truces, and providing the transparency and stability necessary for effective negotiations.[46] Both observer missions and conventional peacekeeping operations were, as a rule, undertaken with the consent of the warring parties, the latter typically under the Chapter VI authority of the Security Council.[47] Although the U.N.'s more ambitious collective security mechanisms failed to function throughout the Cold War, the number of peacekeeping operations grew steadily.[48]

As the Cold War came to a close, the U.N. found itself unshackled and faced with the remnants of decades of superpower patronage and war-by-proxy in the developing world.[49] At the request of the Security Council, Secretary-General Boutros Boutros-Ghali drafted a report, the 1992 *Agenda for Peace*, that sketched a substantially expanded role for the U.N. in managing both international and sub-state conflict.[50] The Security Council, in turn, began to consider "threats to international peace and security" in much more expansive terms than ever before; this new conception would allow the U.N. to intervene to an unprecedented degree in internal conflicts it considered a threat to peace and security at large.[51]

The result of this expansive interpretation was a second generation of peacekeeping operations aimed at resolving civil

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44.   *See id.*
45.   *See* Diehl, *supra* note 41, at 486–87 (detailing various kinds of peacekeeping missions).
46.   *Id.* at 487; *see also* Doyle & Sambanis, *supra* note 43, at 779–91 (comparing and contrasting various kinds of peacebuilding operations along several variables).
47.   *See* ZAUM, *supra* note 17, at 55 (noting that Cold War era international administrations "were all deployed with the consent of the affected states, or the states that controlled the territory").
48.   *See* Michael Lipson, *A "Garbage Can" Model of UN Peacekeeping*, 13 GLOBAL GOVERNANCE 79, 79 (2007) (noting that after the Cold War ended, peacekeeping missions grew exponentially in terms of number of missions authorized by the Security Council, and also in terms of resources devoted to such missions).
49.   *See* Sayre, *supra* note 30, at 263–64 (discussing the problems for the international community that stemmed from the collapse of colonialism and imperialism).
50.   The Secretary-General, *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, delivered to the Security Council*, U.N. Doc. A/47/277-S/24111 (June 17, 1992).
51.   *See* CHESTERMAN, *supra* note 12, at 2–3 (detailing the "growth in activism" and "new interventionism" that characterized Security Council policy through the 1990s).

conflicts.   This   form   of   intervention,   often   described   as "multidimensional peacekeeping,"[52] involved a far broader menu of activities and was designed to support near-term peace and effective political settlements, as well as to reconstruct nations damaged by civil conflict.[53] Throughout the 1990s, multidimensional operations extended the U.N.'s reach far beyond the separation of forces to politically   and   operationally   complex   issues   such   as   the demobilization and social reintegration of soldiers, the reform of police and military organizations, the management and oversight of elections, and economic reconstruction.[54]

Multidimensional   peacekeeping   forms   the   conceptual, operational, and political basis for U.N. transitional administration. However, transitional administration stretches beyond even the most complex and expansive peacekeeping arrangements, as it is rooted in a grant of governance authority by a resolution of the Security Council.[55]   Administrators act as the custodians of governmental authority during the period of transition, whereas peacekeeping operations assist at most with specific (if still critical) aspects of domestic governance, and so infringe more weakly on *de facto* sovereignty, but not on *de jure* sovereignty.[56]

Transitional   administrations   are   "the   most   pervasive contemporary form of building institutions of governance . . . [and] have the most comprehensive mandates and authority over local institutions at their disposal."[57] As a practical matter, this expansive writ of power mirrors the complexity and challenge of governing, pacifying, and rebuilding war-torn societies.   Multidimensional peacekeeping operations tend to take place in very challenging environments, often politically complex war-to-peace transitions, while transitional administrations operate in even more fragmentary

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52.   Doyle & Sambanis, *supra* note 43, at 791.
53.   *See id.* at 786–91 (defining multidimensional peacekeeping as well as comparing it to other forms of peacebuilding).
54.   *Id.*; *see also* Lipson, *supra* note 48, at 88–89 (detailing the significant amount of emphasis and resources devoted to the U.N. peacekeeping missions).
55.   ZAUM, *supra* note 17, at 61 ("[T]he UN Security Council can assert authority over a territory under Chapter VII and delegate this authority to a transitional administration," which "has been understood to include the right to assume the governance of a specific territory under Article 41 of the Charter.").
56.   *See* Durch, *supra* note 23, at 21 (making the comparative claim between the remedies of transitional administration and peacekeeping using UNTAC as an example:

[A] 1989 initiative by the five permanent members of the Security Council, brokered through the Paris Conference on Cambodia, led to authorization of a UN Transitional Authority in Cambodia . . . designed to rebuild the country and oversee its transition to democratic rule.   Such settlements allow peacekeeping operations to be more than temporary palliatives.).

57.   ZAUM, *supra* note 17, at 2–3.

and divisive political, military, and economic conditions. As Michael Doyle notes, "the worse conditions are, the more Chapter VII authority, large and well-equipped troops, and extensive the transitional authority must be."[58]

A. *Security Council Mandates and Transitional Administration*

The defining feature of transitional administration—the factor separating it from other forms of complex peace operations—is the delegation of governance responsibilities and authority to a transitional administration.[59] This authority flows from a binding Security Council resolution, which contains the mandate for the transitional administration and articulates the scope of powers and responsibilities vested in the transitional administrator.[60]

However, Security Council resolutions have generally failed to articulate that scope with precision, via mandates that clearly delineate the extent (and limitations) of the transitional administrator's authority.[61] Instead, mandates underpinning transitional administrations typically describe a broad and complex cluster of mission objectives, featuring ambiguous rules and a wide scope for reasonable interpretation.[62] As such, Security Council mandates establishing transitional administrations typically provide what H.L.A. Hart referred to as secondary rather than primary rules.[63] Whereas primary rules directly require entities "to do or abstain from certain actions," secondary rules "do not impose clear obligations, but instead 'confer powers' to create, extinguish, modify, and apply primary rules."[64]

The distinction is important in the transitional administrative context for two reasons. First, efforts to secure a transitional authority must negotiate the complex political terrain of the Security Council deliberations and secure an effective consensus amongst its members. As in other areas of international politics, such consensus is facilitated by ambiguity—the more precise the terms of an

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58.   Michael Doyle, *The John W. Holmes Lecture: Building Peace*, 13 GLOBAL GOVERNANCE 1 (Oct.–Dec. 2007).

59.   *See* ZAUM, *supra* note 17 ("[I]nternational administrations present the most pervasive contemporary form of building institutions of governance. . . . [I]nternational administrations have . . . comprehensive authority over local institutions at their disposal.").

60.   *Id.* at 61 (noting that the Security Council can pass resolutions that empower other institutions to wield the Security Council's power over the specified territory).

61.   *See* Abbott et al., *supra* note 22, at 409–15 (discussing the various methods of achieving precision that international documents have used, and the rationale behind this drive to make precise agreements).

62.   For more on precision, see *id.* at 412–13.

63.   *Id.* at 403 (quoting H.L.A. HART, THE CONCEPT OF LAW 79 (1961)).

64.   *Id.*

international agreement, the more difficult it is to reach a consensus.[65]

Second, and more significantly, efforts to craft a clear, effective mandate are frustrated by the inability of actors to specify ex ante the terms, conditions, and scope of powers necessary for the transitional administration to fulfill the mandate. Complex peacekeeping operations and transitional administrations operate in extremely challenging and unstable political territory and require significant flexibility to manage inevitable unforeseen contingencies.[66] Yet as David Kreps has noted,

> [W]hen we speak of adaptation to unforeseen contingencies . . . we cannot specify *ex ante* how those contingencies will be met. We can at best give some sort of principle or rule that has wide . . . applicability and that is simple enough to be interpreted by all concerned.[67]

This problem inexorably drives Security Council resolutions towards imprecision and results in grants of maximum discretion to U.N. agents on the ground.

The grant of broad authority to carry out what is otherwise an ambiguous mandate gives a transitional administrator tremendous discretion to either share power with domestic political actors or retain authority. Each strategy has its own distinctive set of incentives. Administrators have a strong operational and normative interest in retaining legitimacy in the eyes of domestic elites, former warring parties, and the population at large, and may do so by sharing decision-making authority broadly.[68] Yet authority-sharing risks embroiling the transitional administration in political struggles between domestic elites, which may slow or block the building of effective, democratic governing institutions as groups compete for power and influence. Thus, administrators also have a strong incentive to centralize authority, particularly within the relatively brief duration of most missions. As later portions of the Article argue, this tendency effectively invades the sovereignty of sub-state actors and warring parties, who may see the advantages from accommodation with the U.N. eroded by the expansive authority of the transitional administration.

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65.   *See* MORGENTHAU, *supra* note 24, at 299–300 (describing the difficulty of reaching consensus where extremely precise terms have been established).

66.   *See* Doyle & Sambanis, *supra* note 43, at 781 (arguing that the volatile situation, warring factions, and civil unrest present in failed states require significant flexibility on the part of the international administrators).

67.   David M. Kreps, *Corporate Culture and Economic Theory, in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 93 (James Alt & Kenneth Shepsle, eds., 1990).

68.   *See* Doyle & Sambanis, *supra* note 43, at 781 (noting that trusteeship efforts must "overcome deep distrust and powerful incentives to defect from the peace. . . . [C]onscious direction by an impartial agent to guarantee the functions of effective sovereignty becomes necessary.").

III. SOVEREIGNTY AS STRATEGIC CURRENCY

Understanding how sovereignty acts as a currency is imperative to grasping the strategic decision-making of the domestic political actors of a territory placed under international administration. Sovereignty is a critical variable in transitional administrations relative to other forms of peacekeeping because the very essence of sovereignty, a state's autonomy from external intrusion into domestic affairs, is willingly and directly violated.[69] This scenario is played out to a lesser degree in other peacekeeping operations, which may involve similar delegation of sovereignty de facto, though not to the same degree. A transitional administration, unlike other forms of peacekeeping, assumes both de jure and de facto sovereignty.[70]

The concept of sovereignty has been revisited and re-conceptualized by international relations, political science, and legal scholars with each paradigmatic shift of the international system.[71] Sovereignty has been at the forefront of recent debates over the

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69. *See id.* at 779 ("[T]he responsibility for postconflict peacebuilding" leads states "to undertake extensive intrusions into the domestic affairs of legally sovereign states.").

70. For an excellent analysis of this dynamic, see RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION (2006). It should be noted, however, that Caplan's definition of transitional administration is broader than other common definitions and encompasses operations otherwise categorized as complex peacekeeping missions. *Cf.* Fearon & Laitin, *supra* note 2 (noting in footnote 16 that Bosnia and Afghanistan also feature a highly centralized authority but distinguishing these operations from five existing or past U.N. transitional administrations: UNTAG (Namibia, 1988), UNTAC (Cambodia, 1992), UNTAES (Eastern Slavonia in Croatia, 1996), UNMIK (Kosovo in Serbia and Montenegro, 1999), and UNTAET (East Timor, 1999)).

71. "Paradigm shifts" refers to events such as post-colonialism, the end of the Cold War, and the era of terrorism and weapons of mass destruction. For a survey of recent international legal literature, see, for example, Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1750 (2003) ("[D]ebates about how states should orient themselves to the international order dominate international legal scholarship. These debates typically presuppose a tension between the normative aspirations of state sovereignty and binding international obligation."); *see also* Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 259 (2004) ("Sovereignty has become an essentially contested concept. . . . The contemporary dispute over sovereignty is unavoidably a dispute over the future of the political."); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2030 (2003) (noting that it "is well accepted that, since the trials at Nuremberg and Tokyo, international law has reconfigured sovereignty."); Ian Ward, *The End of Sovereignty and the New Humanism*, 55 STAN. L. REV. 2091 (2003) (declaring sovereignty debates themselves a thing of the past). For recent articles by political scientists focusing on sovereignty, see, for example, Stephen D. Krasner, *Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT'L L. 1075 (2004) (analyzing sovereignty as a concept that has no stable definition except as it is revealed by the behavior of states); Robert A. Mundell, *Monetary Unions and the Problem of Sovereignty*, 579 ANNALS OF THE AM. ACAD. OF POL. SCI. 123 (2002) (discussing monetary sovereignty in the context of policy sovereignty and legal sovereignty).

establishment of the International Criminal Court,[72] the war in Iraq,[73] developments in international trade,[74] and human rights.[75] Intuition suggests that there should be a commonly accepted definition of a concept that is so important to the international system and legal institutions. Despite, or perhaps because of, its importance, a clear definition of sovereignty remains elusive and widely debated.[76]

Although a clear and consistent definition of sovereignty has not emerged, there is a popular, almost reflexive, understanding of the concept based on the Treaty of Westphalia (1648), which concluded the Thirty Years' War and has long been considered the foundation of the modern international system.[77] The lasting outcome of the Treaty was a legal assertion that European monarchs exercised "supreme power" within a defined territory.[78] "The disintegration of the Holy Roman Empire and the emergence of the independent kingdoms of England, France, and Scotland . . . destroyed the conception of the one and indivisible Christian order of the Middle

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72.   See, e.g., Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, the United States and the International Criminal Court*, 29 B.C. INT'L & COMP. L. REV. 1 (2006) (arguing that the United States and Britain's disagreement over the role and scope of the International Criminal Court can be accounted for by looking at their respective perceptions of sovereignty); Symposium, *Justice & Sovereignty: Implications of the International Criminal Court*, 8 UCLA J. INT'L L. & FOR. AFF. 3 (2003) (debating at length issues of sovereignty in light of the International Criminal Court).

73.   See, e.g., Symposium, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 CHI. J. INT'L L. 379 (2005) (debating the war on terror's implications for sovereignty).

74.   See, e.g., JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006) (documenting changes in sovereignty resulting from the creation of the WTO).

75.   See, e.g., GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (John Bell & James Crawford eds., 2004) (pointing out the discord between the international system's recognition of sovereign equality among states and its increasing support of holding states responsible for the preservation of human rights); Francis M. Deng, *Divided Nations: The Paradox of National Protection*, 603 ANNALS OF THE AM. ACAD. OF POL. SCI. 217 (2006) (evaluating the challenges raised by displaced people, who under traditional notions of sovereignty would remain within the jurisdiction of the very states now neglecting and persecuting them).

76.   See, e.g., Goodman & Jinks, *supra* note 71, at 1751–53 (comparing two accepted definitions of sovereignty (realist or constructivist) against a proposed "new model," which argues that "states are organizational entities embedded in a wider social environment"); Krasner, *supra* note 9, at 85 (defining sovereignty as "recognition of juridically independent territorial entities and nonintervention in the internal affairs of other states").

77.   For a summary of the International Relations literature attributing the formation of the modern state system to the Treaty of Westphalia, see Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001). Osiander questions these scholars and counters that the Treaty in fact "is silent on the issue of sovereignty." *Id.* at 266.

78.   MORGENTHAU, *supra* note 24, at 328.

Ages."[79] In addition to becoming the supreme authority within a territory, the monarch was also "precluded" from exercising authority within the territory of another monarch.[80] The Treaty of Westphalia, it is often argued, marked the codification of nonintervention doctrine and bound the supreme leader's authority or jurisdiction to territory.[81] Westphalia also defined the primary political unit comprising the international system: the nation-state.[82] Sovereignty is thus seen as the "hard shell" surrounding each state that thereby creates a territorially and juridically independent fortification.[83] Sovereignty gives each state its property of "impenetrability."[84] This is the popular understanding of modern state sovereignty.[85]

This widely accepted definition of sovereignty has been challenged recently, catalyzing debates over a more precise and contemporary meaning. These debates often center on two issues. The first issue concerns the fundamental sphere of rights and powers encompassed by modern conceptions of sovereignty. In particular, does sovereignty signify self-determination that is intertwined with the responsibility that states protect the human rights of their citizens, or does it signify territorial and political inviolability that shields a state from external interference? The answer is fundamentally political and it fluctuates as norms and the distribution of power within the international system change. The international community is thus left to struggle with a now-familiar dilemma: how do states advance international norms when doing so violates the sovereignty of another state? Legal scholars tend to assess this trade-off by weighing the degree to which one or the other

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79.   GEORG SCHWARZENBERGER, POWER POLITICS: A STUDY OF INTERNATIONAL SOCIETY 85 (2d ed. 1951).

80.   MORGENTHAU, *supra* note 24, at 328.

81.   *See, e.g.*, SEYOM BROWN, INTERNATIONAL RELATIONS IN A CHANGING GLOBAL SYSTEM: TOWARD A THEORY OF THE WORLD POLITY 69 (1992) ("Even to this day two principles of interstate relations codified in 1648 constitute the normative core of international law: (1) the government of each country is unequivocally sovereign within its territorial jurisdiction, and (2) countries shall not interfere in each other's domestic affairs.").

82.   Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 20 (1948) (stating that to the Peace of Westphalia "is traditionally attributed the importance and dignity of being the first of several attempts to establish something resembling world unity on the basis of states exercising untrammeled sovereignty over certain territories and subordinated to no earthly authority"); *see also* Krasner, *supra* note 9, at 87–88 (dating the rise of traditional sovereignty to the Treaty of Westphalia's language).

83.   John H. Herz, *Rise and Demise of the Territorial State*, 9 WORLD POL. 473, 474 (1957).

84.   *Id.*

85.   *See, e.g.*, Krasner, *supra* note 9, at 85 ("Although frequently violated in practice, the fundamental rules of conventional sovereignty—recognition of juridically independent territorial entities and nonintervention in the internal affairs of other states—have rarely been challenged in principle.").

violates international law.[86] The underlying logic is simple: the cost to the international system correlates with the magnitude of noncompliance with international law. The analysis usually ends there.

The second issue in the debate focuses on whether sovereignty is fundamentally changing and, if so, to what extent. How the evolving trade-off between competing notions of sovereignty affects the strategic decision-making of states is often not considered. For instance, each occurrence of the trade-off—whether in the form of humanitarian intervention or non-consensual peace enforcement— has an effect on the future strategic calculus of weak and failing state leaders, who are themselves vulnerable to intervention by stronger states. The conduct of weak and failing states' leaders can invite intervention by either stronger states or the U.N.[87] Whether the international community intervenes is based in no small part on its prevailing notion of sovereignty.[88] If sovereignty under the Westphalian tradition signifies non-interference, stronger states may be less inclined to intervene in the affairs of weaker states, since such intervention would violate a foundational principle of the international system. However, if sovereignty is understood to encompass issues of human rights, stronger states may consider themselves obligated to intervene in the affairs of other states. Thus, the perceived legal and political trade-offs of enforcing human rights at the expense of the traditional, Westphalian non-intervention model are based in large part on prevailing understandings regarding modern state sovereignty.

With these issues and questions in mind, this Part lays out four agendas. First, it explores the question of whether sovereignty is indeed changing, paying particular attention to literature on

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86.   *See, e.g.,* Bain, *supra* note 10, at 527–28 (noting that the redefinition of sovereignty as "responsibility" occurs without sufficient calculation of the possible evils arising from international administration, thus the possible importance of the traditional idea of sovereignty). *Cf.* Krasner, *supra* note 9, at 85 (arguing that the rules of traditional sovereignty "no longer work, and their inadequacies have had deleterious consequences for the strong as well as the weak. . . . [B]etter domestic governance in badly governed, failed, and occupied polities will require the transcendence of accepted rules." Krasner believes this decision calculus is justified because international conceptions of human rights demand intervention on behalf of the people facing abuses including genocide at the hands of the leaders of their failing states.).

87.   *See* Krasner, *supra* note 9, at 86 (listing considerations from security to humanitarianism as reasons why powerful states or institutions see the need to intervene in the affairs of failing states).

88.   *Id.* at 87–88 (noting that the traditional or "Westphalian/Vatellian" concept of sovereignty prevents strong nations from intervening before the crisis point for the failing states, and only when such ideas of sovereignty are demolished can frequent, effective intervention take place); Bain, *supra* note 10, at 527 (arguing that redefining "sovereignty" as "responsibility" is the necessary pre-requisite to the "America neo-conservative" "unabashed exercise of power for the sake of good").

international relations and political science. It uses as a baseline the Westphalian understanding of sovereignty that is rooted in notions of territorial inviolability and scrutinizes the ways in which sovereign authority interacts with evolving international norms regarding protection and human rights. Second, this Part explores the definition and usages of sovereignty more familiar to the legal community. Third, this Part proceeds to disaggregate sovereignty into observable rights, privileges, and immunities, relying heavily on Stephen Krasner's richly descriptive work on sovereignty.[89] Krasner's contribution to the literature allows us to analyze these privileges and immunities in terms of two distinct aspects of sovereignty—control and authority—and to analyze how these interact.[90] Finally, this Part moves the sovereignty literature from description to explanation by presenting a theory of how the gains or losses of the rights, privileges, and immunities in each respective bundle interact with each other and ultimately affect the strategic calculus of political leaders. Special attention is paid to the question of how gains or losses within these sovereignty bundles influence the strategic decision-making of both the U.N. and failing-state leaders during the negotiation and implementation of a U.N. peacemaking mission.

A. *What (if Anything) About Sovereignty Has Changed? International Relations & Political Science Conceptions of Sovereignty*

The question of whether sovereignty is changing has drawn the attention not only of international relations and international law scholars, but also of the U.N. itself. In "A More Secure World: Our Shared Responsibility," the U.N. Secretary-General's High-Level Panel on Threats, Challenges, and Change suggests that the new responsibility of states to respond to threats to international peace and security would require "a quite radical rethinking of sovereignty."[91] The report "asserts that all signatories of the UN Charter accept a responsibility both to protect their own . . . [f]ailure to fulfill these responsibilities can legitimately subject them to sanction."[92] The report declares that U.N. membership can no longer be used to validate

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89. *See generally* KRASNER, *supra* note 13, at 9–10 (describing a distinction between authority and control, and explaining four different meanings of sovereignty).

90. "Interact" refers to how the gain or loss of one power within one of the bundles—for instance, treaty signing authority—affects the relative importance of powers associated with the other bundle, and vice versa.

91. Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 620 (2005).

92. *Id.*

> sovereign status [nor as] a shield against unwanted meddling in a
> state's domestic jurisdiction. It is rather the right and capacity to
> participate in the United Nations itself, working in concert with other
> nations to sit in judgment of and take action against threats to human
> security whenever and wherever they arise.[93]

In essence, this perspective on changing sovereignty suggests that the
changes are deliberate and made by states themselves in order to
align with the higher expectations of changing human rights norms.

Others have posited that sovereignty has been diminishing over
time, and that this change is occurring in spite of states.[94] The
exigencies of the international system act on states, forcing them to
change the properties of sovereignty.[95] Some international legal
scholars have even claimed that "traditional conceptions of
sovereignty are under assault."[96] In the follow-up to his now famous
"The Clash of Civilizations?," Samuel Huntington writes that states
are

> suffering losses in sovereignty. . . . [I]nternational institutions have
> assumed important functions previously performed by states. . . . State
> governments have in considerable measure lost the ability to control
> the flow of money in and out of their country and are having increasing
> difficulty controlling the flow of ideas, technology, goods, and people.
> State borders have, in short, become increasingly permeable. All these
> developments have led many to see the gradual end of the hard,
> "billiard ball" state, which purportedly has been the norm since the
> Treaty of Westphalia in 1648.[97]

Some political scientists have taken this rationale a step further,
asserting that states have very different capacities of control, and
that "despite the legal fiction of sovereignty, states are not all
equal."[98] Keohane even warns that "[h]olding onto a classic unitary
conception of sovereignty in a post-intervention situation seems likely
to create unresolvable dilemmas."[99] These treatments or uses of
sovereignty often focus on variables of control and dependency.[100]

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93.   *Id.*
94.   *See* Anne-Marie Slaughter, *Sovereignty and Power in a Networked World
Order*, 40 STAN. J. INT'L L. 283, 284 (2004) (stating that since the 1990's, sovereign
goals have been increasingly "undermined by international political and economic
interdependence").
95.   *See id.* at 285 (proposing that effective modern sovereignty necessarily
demands that a state delegate some of its inherent power to other states so that they
may intervene in internal affairs).
96.   *Id.* at 283.
97.   SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING
OF WORLD ORDER 35 (1996).
98.   Keohane, *supra* note 4, at 277.
99.   *Id.* at 280.
100.   *See id.* at 281 (suggesting that a nation in endemic conflict is entirely
powerless without the aid of an external authority structure that empowers conflicting
groups to self-govern).

B. *What About Sovereignty Has Not Changed? (Legal Conceptions)*

A critical component of state sovereignty, in addition to a state's ability to control flows and activities, has always been the legal equality of states. This principle has been consistent and unchanging for centuries and can be credited with holding the international system together during that time.[101]

This expression of the principle of sovereignty and equality of states exists independently of capacity and control. One of the most dramatic examples of this occurred after the Allies defeated the Axis Powers in World War II. Despite the overwhelming asymmetry between the two sides in terms of military and coercive capacity, these countries nonetheless conducted the formalities of signing peace treaties to legally formalize the surrender of the Axis Powers.[102] The Allies were victorious and yet recognized their former adversaries as sovereign equals, worthy of entering into a formal legal agreement recognized only by equal players. This element of sovereignty has remained unchanged for hundreds of years.

The legal equality-of-states principle provides all states with what could be described as a bundle of rights and privileges that do not vary according to a state's level of sovereign control.[103] As long as there is some identifiable representative of a state, that

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101.   Sixteenth century Italian city-states provide an excellent example of the role that sovereign equality has played in ordering the international legal system. Before the Treaty of Westphalia and the birth of the modern territorial state, Italian city-states were faced with a problem: with undefined political boundaries, it was difficult for territorial entities to determine whose subjects belonged to whom. *See* Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 398–99 (1999) (stating that the Treaty of Westphalia caused the larger states of the treaty to respect as legitimate the borders of the smaller states). City-state relations were bound to disintegrate if this determination was based on measures of control and capacity. *See* Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 163 (stating that the Treaty of Westphalia was motivated by the common desire of the parties to minimize further "brutal and bloody" conflicts). However, the rising international trade system provided an answer: political representatives for the purposes of inter-state relations were those who signed treaties. *See* JULIUS GOEBEL, JR., THE EQUALITY OF STATES: A STUDY IN THE HISTORY OF LAW 63–64 (AMS Press 1970) (1923) (chronicling how the *dominium Venetiorum* came to be empowered with the authority to bind Venice to international treaties).

102.   *E.g.*, Paris Peace with Bulgaria, Feb. 10, 1947, 41 U.N.T.S. 21 (formal surrender of Bulgaria); Paris Peace with Hungary, Feb. 10, 1947, 41 U.N.T.S. 135 (formal surrender of Hungary); Paris Peace with Romania, Feb. 10, 1947, 42 U.N.T.S. 31 (formal surrender of Romania).

103.   *See* 1 OPPENHEIM'S INTERNATIONAL LAW 160–61 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("[I]n entering the Family of Nations a State comes as an equal to equals; it demands a certain consideration to be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy.").

representative will have a seat at the U.N.[104] This state will be able to sign treaties with other states, and will be afforded powers, protections, and authorities vested in every other sovereign state.[105] And these powers and protections are in no way scaled to reflect a weaker state's lack of domestic sovereignty, control, or capacity.

These dynamics were never more apparent than when the U.N. responded to the Congolese military attacks on refugee camps in 1997.[106]   The military massacred hundreds of thousands of refugees.[107] The U.N. High Commissioner for Human Rights ordered an investigation, and the U.N. Special Rapporteur for Congo concluded that Congo's army had committed genocide.[108] The very government that committed these atrocities against its own people responded by requesting that the U.N. remove the Special Rapporteur.[109] The U.N. obliged the Congo regime and agreed to allow Congolese officials to "escort" U.N. personnel while they were investigating massacre sights.[110] The U.N. also agreed to limit the investigation team to certain areas and not to investigate "crimes committed after Kabila took power."[111] The U.N.'s deference toward Congo's regime—presumably motivated by concerns over preserving Congo's sovereignty—illustrates a dark side of traditional sovereignty.

C. *Disaggregating the Concept of Sovereignty*

The above section highlights conventional definitions of sovereignty and existing controversies surrounding changes in how sovereignty is perceived.   This Part explores Krasner's more sophisticated analysis of the concept. Krasner identifies four "usages" or "meanings" of the term sovereignty: domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty.[112] Domestic sovereignty refers "to the organization of public authority within a state and to the level of effective control exercised by those holding territory."[113] Interdependence sovereignty refers "to the ability of public

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104.   *See* U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

105.   *See id.* art. 9, para. 1 ("The General Assembly shall consist of all the Members of the United Nations.").

106.   Kisangani N. F. Emizet, *The Massacre of Refugees in Congo: A Case of UN Peacekeeping Failure and International Law*, 38 J. MOD. AFR. STUD. 163, 169 (2000).

107.   *See id.* at 163 (citing reports that more than 200,000 refugees were executed in the Congo between October 1996 and September 1997).

108.   *Id.* at 169–70.

109.   *Id.* at 170.

110.   *Id.*

111.   *Id.*

112.   KRASNER, *supra* note 13, at 9–10.

113.   *Id.* at 9.

authorities to control transborder movements," while international legal sovereignty refers "to the mutual recognition of states or other entities."[114] Finally, Westphalian sovereignty refers "to the exclusion of external actors from domestic authority configurations."[115] The Westphalian version reflects the more common use of the term, which is predicated on the territorial exclusion and independence principles discussed above.

These four meanings of sovereignty can be distinguished from one another on the basis of their relationship to *authority* and *control*. For example, "Westphalian sovereignty and international legal sovereignty exclusively refer to issues of authority," or "a mutually recognized right for an actor to engage in specific kinds of activities."[116] Any of the following indicators can inform whether authority exists: recognition by other states as the holder of a state's sovereignty, juridical equality among states, the provision of diplomatic immunity, the authority to promulgate and effectuate domestic law, the authority to sign binding international agreements with other states, and the recognition by external creditors as the holder of the authority to enter into financial arrangements on behalf of a sovereign state.[117] These rights and powers are also reflected in the principle of sovereign equality of states codified in Articles 2.1 and 78 of the U.N. Charter.[118] The sovereign equality of states ensures that the leaders of the weakest and most powerful states possess equal political authority. In an international system dominated by power, this principle is one of the few guarantors of equality. In contrast with Westphalian sovereignty and international sovereignty, which are primarily concerned with issues of authority, interdependence sovereignty and domestic sovereignty refer to a state's control over issues that "flow" over its borders and "what happens within" those borders.[119] Control is closely correlated with capacity.[120]

While authority and control are often "coterminous" and mutually reinforcing, what differentiates them is that "control can be achieved simply through the use of brute force with no mutual recognition of authority at all."[121] Dividing the concept of sovereignty

114. *Id.*
115. *Id.*
116. *Id.* at 10.
117. *Id.* at 14–15.
118. U.N. Charter art. 2, para. 1; U.N. Charter art. 78.
119. KRASNER, *supra* note 13, at 10–11; *cf. id.* at 13 (stating that domestic sovereignty may refer to both authority or control).
120. *See id.* at 12–13 (positing that a state lacks sovereignty—due to a lack of control under interdependence sovereignty—when it lacks the capacity "to regulate the flow of goods, persons, pollutants, diseases, and ideas" across its borders).
121. *Id.* at 10 (asserting that "loss of control over a period of time could lead to a loss of authority . . . [and] effective exercise of control, or the acceptance of a rule for

into these two categories helps to illustrate how the rights, powers, and privileges associated with both categories interact with and reinforce each other. Some of these rights and responsibilities remain constant between states while others constantly change.[122] Understanding how the two types interact helps to explain the strategic decision-making of failing state leaders and U.N. administrators during a peacekeeping operation, especially one led by an international transitional or interim authority.

D. *Moving One Step Further: Strategic Decision-making as a Function of Political Authority and Domestic Control*

The ways in which widely accepted conceptions of sovereignty shape the strategic decision-making of strong states is fairly well understood. But how does the understanding of sovereignty advanced above explain the strategic decision-making of states facing intervention? If a U.N. peace operation in some way reconfigures a failing state's sovereignty, it stands to reason that the decision of a failing-state leader whether to accede to a U.N. mission may be a function of sovereignty's dual axes. A leader's decision is a function of the degree to which he thinks the U.N. mission will infringe or modify his or her authority and control. For example, some leaders have argued that sovereignty would have to be diminished before the state "would permit the imposition of trusteeship."[123] If a U.N. operation infringes on a state's sovereignty, thus altering or diminishing a state leader's power, how does the state leader weigh the diminution of his sovereignty against other options, such as continuing to fight a civil war rather than inviting the U.N. to intervene?

When a state, particularly a failing state, is recognized as sovereign, unique prerogatives are granted to the apparent rulers of that state, regardless of their level of domestic control.[124] Political authority, or what Krasner calls international legal sovereignty, is especially important to weak or failing states because it gives them

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purely instrumental reasons, could generate new systems of authority."). Krasner's definition of control is somewhat vague but seems to connote the sovereign's ability to influence the behavior of others in accordance with the sovereign's own ends. A.F.K. ORGANSKI, WORLD POLITICS 428 (1958).

　　122.　*See* ORGANSKI, *supra* note 121, at 428.

　　The effective exercise of control, or the acceptance of a rule for purely instrumental reasons, could generate new systems of authority. If a practice works, individual might come to regard it as normatively binding, not just instrumentally efficacious; conversely, if a mutually accepted rule fails to control behavior, its authority might be rejected over time.

　　123.　Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 315 (1995).

　　124.　William Reno, *Sovereignty and Personal Rule in Zaire*, 1 AFR. STUD. Q., http://web.africa.ufl.edu/asq/v1/3/4.htm.

"standing, influence, and support."[125]   Such authority is especially important for weak or failing states lacking control because it grants them "negative rights of nonintervention" and "positive rights or at least demands of external support" from international institutions such as the World Bank or the International Monetary Fund.[126] The legal equality portion of sovereignty is "a ticket of general admission to the international arena"[127] that does not vary with a state's capacity and control.

Moving beyond a sweeping conception of sovereignty to distinguish between powers of authority and control helps to illustrate how the international legal system shapes the decision-making of leaders active in weak or failing states. By definition, the government of a failing state has lost the capacity necessary to implement policies and enforce rules effectively.[128]   Those with authority usually have weak or sporadic control over the population.[129] As a consequence, the political body must search for and rely on alternative sources beyond coercion and control to legitimate its political leadership role; it must look for other sources that legitimate its authority.[130]

Zaire provides an example of how the ticket to admission becomes more valuable as a state's control and capacity wane. Under Zaire's President Mobutu Sese Seko, control and capacity did not exist "except to insure Mobutu's personal security and to keep ambitious political rivals . . . from eclipsing [him];" Mobuto's domestic sovereignty was minimal.[131] Under these circumstances of minimal domestic control,

> [g]lobal recognition of the sovereignty of the Zairian state was central
> to Mobutu's political strategy . . . as this allowed him to attract
> diplomatic support and foreign aid. . . . [U]nquestioned formal
> sovereignty also served the useful purpose of simplifying deals with

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125.   ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 114 (1990).

126.   *See id.* at 112 (discussing this dynamic in the context of "Third World" or "have not" states).

127.   MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 12 (1995).

128.   H.L.A. HART, THE CONCEPT OF LAW 50 (2d ed. 1994) (stating that in the context of a monarchy, the sovereign monarch fails when the subjects no longer habitually obey him).

129.   *Cf. id.* at 52–53 (hypothesizing that a supremely successful monarchy on an unflappable "habit of obedience" by the subjects).

130.   *See id.* at 54–55 (suggesting that the rule of law, whereby rights and titles are established, is needed to ensure the stability of power in the monarch to his successor).

131.   Jean-Germain Gros, *Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti,* 17 THIRD WORLD Q. 455, 459 (1996).

some foreign firms and creditors—another key component of Mobutu's politics.[132]

In short, sovereignty bestowed important prerogatives on Mobutu to which he otherwise would not have had access due to his lack of control-based Westphalian or domestic sovereignty.[133]

The ongoing political crisis in Somalia illustrates how warring groups both covet and leverage international legal sovereignty.[134] Despite several major shifts in political power in Somalia and no Somali government since 1991, the U.N. Security Council has repeatedly recognized "the Transitional Federal Government (TFG) and Transitional Federal Parliament (TFP) as the internationally recognized authorities to restore peace, stability and governance to Somalia."[135] The world's major powers continued to receive and accept the credentials of Somali ambassadors.[136] In addition, major powers such as China continued to enter into official international agreements with the TFG.[137] The reason for this is simple: the stability of the international state system depends on the integrity of its primary units.

In healthy governing systems, control and authority are mutually reinforcing, but in failed states, the types of temporary governance structures being proposed may actually create detrimental trade-offs between the two forms of sovereignty.

IV. REVITALIZING TRUSTEESHIP: TWO RECENT CASES

Peacekeeping operations have traditionally focused on interposing international forces between belligerents in order to monitor ceasefires and provide assurance of compliance with the

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132.   Reno, *supra* note 124.

133.   *Id.*

134.   *See* Press Release, Security Council, Security Council Expresses Support for Somalia's Transitional Government, Parliament; Says Prepared to Consider Exemption to 1992 Arms Embargo, U.N. Doc. SC/8773 (July 13, 2006), *available at* http://www.un.org/News/Press/docs/2006/sc8773.doc.htm (reaffirming the Security Council's commitment to restoring governance and peace to Somalia).

135.   *Id.*

136.   *See, e.g., Chinese President Accepts Credentials from New Ambassadors,* PEOPLE'S DAILY ONLINE (China), Dec. 29, 2005, http://english.people.com.cn/200512/29/eng20051229_231459.html (Somalia's Transitional Federal Government reporting that Chinese President Hu Jintao accepted the credentials of Somali ambassador Mohamed Ahmed Awil).

137.   *See, e.g., China Provides Six Million US Dollars Economic Aid to Somalia,* PEOPLE'S DAILY ONLINE (China), Dec. 27, 2005, http://english.people.com.cn/200512/27/eng20051227_230947.html ("Chinese Ambassador to Kenya Guo Chongli, on behalf of the Chinese government in Jowhar, Somalia on Monday signed several agreements with Somali President Abdulahi Yusuf Ahmed, providing over 6 million US dollars economic aid to Somalia.").

ceasefire or peace agreements,[138] while purposefully minimizing intrusions upon domestic sovereignty. This form of intervention typically applies to interstate conflicts.[139] However, as the postcolonial era has left many states in an institutionally fragile condition, traditional interventions are often not enough to restore peace and security.[140] Moreover, the massive rise in intrastate conflict has necessitated more complex peace operations that pierce "the shell of national autonomy by bringing international involvement to areas long thought to be the exclusive domain of domestic jurisdiction."[141] So-called multidimensional operations following intrastate conflict often necessitate activities that extend well beyond the certification of the peace.[142] Such arrangements can include the management of elections, post-conflict reconstruction, and—most importantly for this Article—civil administration.[143] Failing and failed states typically present the international community with the daunting and costly task of recreating and rebuilding institutional infrastructure in order to restore peace and security.[144]

Under most circumstances, it is extremely difficult to secure the necessary political and financial commitments among donor states to support such large-scale peacebuilding operations.[145] In addition, traditional peacekeeping missions are not designed to recreate and rebuild governing institutions.[146] The weak mandates of these missions lead to undue delays as donor states and domestic political leaders laboriously build a consensus around policy decisions.[147]

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138. Michael W. Doyle, *War and Peace in Cambodia, in* CIVIL WARS, INSECURITY, AND INTERVENTION 181, 190 (Barbara F. Walter & Jack Snyder eds., 1999).

139. *See id.* at 190, 194 (citing the use of such techniques after the signing of the peace treaty between Vietnam and Cambodia in 1991).

140. *See id.* at 181 (noting that peace "was very fragile" despite the removal of all colonial forces and the election of a Cambodian government in 1993, two years after the end of the Cambodian Civil War).

141. *Id.* at 205–06.

142. *Id.* at 206–07.

143. *Id.* at 207.

144. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 4, at 43, § 5.24.

145. *See id.* at 43 (acknowledging that the biggest hurdle to intervention in failed states is the cost due to the long period of intervention needed to restore civil society).

146. *See id.* at 45 (recognizing the tendency of international peacekeepers to have a more hands-on approach resembling "neo-colonial imperialism" rather than "doing themselves out of a job" by delegating responsibilities to facilitate "patterns of cooperation between antagonistic groups").

147. *See id.* at 70 ("There were too many occasions during the [1990's] when the Security Council, faced with conscience-shocking situations, failed to respond as it should have with timely authorization and support.").

Many see transitional administration, which we argue may "creep" into de facto trusteeship, as a more viable alternative. Some have argued that the few peacebuilding operations that have been successful have featured "a governing international administrative body that was granted tremendous authority."[148]   Unlike other peacekeeping missions, transitional administrations possess "full executive, as opposed to supervisory, authority"[149] and are thus better able to confront the operational challenges of state failure. These assumptions are behind the renewed interest in U.N. trusteeship or some variant thereof as a remedy for failed states.

There are also costs when transitional administrations exercise this centralized authority to its fullest. On one hand, this structure is better equipped to avoid interference or obstruction by domestic political actors and thus fulfill the U.N. mandate in a shorter period.[150] On the other hand, excluding domestic political actors from decision-making during transitional governance often leads to greater anti-U.N. sentiment.[151] The following cases illustrate how those costs manifest themselves. Based on these illustrations, this Article makes a prospective argument: the dynamics observed during recent transitional authority missions undercut U.N. credibility with local political actors   and may deter future leaders in failing states from consenting to U.N. intervention and governance.

A. *United Nations Interim Administration Mission in Kosovo (UNMIK)*

On June 10, 1999, NATO concluded its aerial bombing operations over Kosovo.[152] The same day, the U.N. Security Council passed Resolution 1244, which frames the international community's response to postwar Kosovo.[153]   Resolution 1244 authorizes the deployment of U.N. civil and security assets in order to support an interim administration for Kosovo.[154]   It also requests that the Secretary-General appoint a Special Representative to head the U.N. Interim Administration Mission in Kosovo (UNMIK).[155]

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148.   *Cf.* RICHARD CAPLAN, A NEW TRUSTEESHIP?: THE INTERNATIONAL ADMINISTRATION OF WAR-TORN TERRITORIES 39 (2002) (highlighting the shortcomings of administrative bodies in Bosnia that had less than full administrative authority).

149.   *Id.* at 10.

150.   *See id.* at 33 (linking the limited administrative authority by peacekeepers to delays from local authorities which prioritize partisan gains over general welfare).

151.   *See id.* (highlighting the competition between UN authorities and local parallel structures during the first six months of intervention in Kosovo).

152.   INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT 99 (2000).

153.   *Id.*

154.   S.C. Res. 1244, ¶¶ 6–10, U.N. Doc. S/RES/1244 (June 10, 1999).

155.   *Id.* ¶ 10.

The scope of authority granted to the Special Representative by Resolution 1244 is both sweeping and ambiguous.[156] Resolution 1244 places the Special Representative in charge of: "Promoting . . . substantial autonomy and self-government in Kosovo[,] . . . [p]erforming basic civilian administrative functions where and as long as required[,] . . . overseeing the development of provisional institutions for democratic and autonomous self-government," and ultimately "overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under political settlement."[157] It is not clear whether Resolution 1244 provides "for restoration of full sovereignty in Serbia" or whether the Security Council Members contemplated that Serbia would retain sovereignty during UNMIK's administration.[158]

Resolution 1244 also contains wording that appears to restrict the Special Representative's authority. It explicitly reaffirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" as well as "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo."[159] It also tasks the Secretary-General with establishing "an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia."[160] These two mandates appear to be in conflict, which is one reason to conclude that the Resolution places substantial limits on the interim administration's authority since one action by the administration that is consistent with one of the mandates would quite possibly violate the other.[161]

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156. U.N. Secretary General's Special Representative to Kosovo, Sergio Vieira de Mello, confessed that interpreting the U.N. mission was a challenge. Carlotta Gall, *Crisis in the Balkans: Peacekeeping; Ensnared in Logistics, U.N. Lags in Asserting Control*, N.Y. TIMES, June 27, 1999.

157. *Id.* ¶ 11.

158. Henry H. Perritt, Jr., *Final Status for Kosovo*, 80 CHI.-KENT L. REV. 3, 10 (2005).

159. S.C. Res. 1244, *supra* note 154, at 2.

160. *Id.* ¶ 10.

161. *Compare* DANIEL SVEN SMYREK, INTERNATIONALLY ADMINISTERED TERRITORIES-INTERNATIONAL PROTECTORATES? 198 (2006) ("Consequently, UNMIK's scope of activity is restricted. If UNMIK exceeds its competencies it will automatically violate either the sovereignty of the FRY or the democratic rights of the Kosovars."), *with* SIMON CHESTERMAN, INT'L PEACE ACAD., JUSTICE UNDER INTERNATIONAL ADMINISTRATION: KOSOVO, EAST TIMOR AND AFGHANISTAN 4 (2002), *available at* http://www.globalpolicy.org/intljustice/general/2002/0902justice.pdf (stating that

The central contradiction of the United Nations Interim Admission Mission in Kosovo's (UNMIK) mandate was that it lacked a political resolution for the problem of Kosovo. On the ground, it was swiftly recognized that returning Kosovo to direct control under Belgrade was inconceivable. Nevertheless, the authorizing resolutions and official statements emphasized continuing respect for the territorial integrity and political independence of the FRY. In itself,

When UNMIK arrived in Kosovo, it faced "a scene of chaos, economic ruin, extensive destruction, lawlessness, widespread retribution and, in many parts, largely empty of its population."[162] Progress toward achieving the Security Council's mandate in the first year of international interim administration was mixed. Murder rates, especially among minority groups, were unacceptably high.[163] Security in the province was deteriorating while "understanding and tolerance in Kosovo remain[ed] scarce and reconciliation . . . far from a reality" between the previously warring ethnic groups.[164] Infrastructure remained poor, and some critical public goods were in short supply.

UNMIK initially enjoyed a high level of "internal legitimacy."[165] However, UNMIK quickly faced strong criticism for its inability to provide basic governmental services only a few months after its inception.[166] UNMIK's legitimacy was gradually being "eroded."[167] UNMIK's chief, Bernard Kouchner, publicly complained of the inadequacy of donor state financial support needed for a variety of key services.[168]

UNMIK responded to its challenges and challengers by exercising "more extensive authority than any previous UN mission,"[169] opting for a decision-making and implementation process

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this contradiction presented a serious barrier to the re-establishment of the rule of law in Kosovo . . . .).

But cf. Andreas Zimmermann & Carsten Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo,* 70 NORDIC J. INT'L L. 423, 442 (2001) (arguing that UNMIK was granted sweeping authority beyond previous peacekeeping operations managed by an international body).

162.   The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo,* ¶ 2, *delivered to the Security Council,* U.N. Doc. S/2000/538 (June 6, 2000) [hereinafter *Secretary-General Kosovo Report*].

163.   *See id.* ¶ 122 ("Kosovo Serbs and other minority communities continue to be murdered, attacked and threatened. UNMIK staff members have also been murdered by extremists motivated by ethnic hatred.").

164.   *Id.* ¶¶ 123, 133.

165.   Perritt, *supra* note 158, at 10–11.

166.   Steven Erlanger, *Chaos and Intolerance Prevailing in Kosovo Despite U.N.'s Efforts,* N.Y. TIMES, Nov. 22, 1999, at A1 (quoting the editor chief of an Albanian newspaper who lamented that Kosovo did not "have the basics of a state—no justice, no security, no electricity, no water and no identity documents" despite the presence of over 40,000 U.N. and NATO personnel).

167.   Perritt, *supra* note 158, at 10–11; *see also* Erlanger, *supra* note 166 (quoting a young Albanian worker who lamented: "people still view [the U.N.] as saviors. But if they don't produce soon, they will spend all the glory [of NATO's victory]. People want civic structures here and a normal life").

168.   Erlanger, *supra* note 166.

169.   INDEP. INT'L COMM'N ON KOSOVO, *supra* note 152, at 114; *see also* Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration,* 95 AM. J. INT'L L. 583, 583 (2001) ("The United Nations is currently

that was less likely to be bogged down by consensus-building with local political leaders, and an extremely broad interpretation of its own powers.[170] UNMIK's chief and his staff "wield[ed] . . . authority at their discretion, appoint[ed] and dismiss[ed] Albanian officers, determine[ed] which laws [were] to be applied and which [were] not, [and] overr[ode], [when] they fe[lt] compelled to do so, the decisions taken by the elected bodies of the future."[171]

UNMIK's highly centralized approach did speed policy implementation; as a result, UNMIK was able to rapidly usher in macroeconomic improvements with the help of the European Union and international donors. Within a year of UNMIK's arrival, Kosovo's economy was "remarkably vibrant" as nearly three-quarters of Kosovo's private enterprises had "restarted" and surpassed pre-war (1998) production and employment levels.[172] In addition, "winter wheat planting was at 80 per cent of the historical average; and the construction sector [was] booming."[173] Around the same time, the Special Representative and head of UNMIK began to exercise extraordinary powers that arguably exceeded his mandate as set forth in Resolution 1244.[174] Kosovo's economic turnaround in 1999 coincided with several unusually bold administrative decisions made by the Special Representative of the Secretary-General, Bernard Kouchner.[175] The Special Representative, under the auspices of UNMIK, passed a regulation legalizing "the use of foreign currencies for payments and contracts in Kosovo," which local laws had previously forbidden.[176] UNMIK also "assumed the administration of all property, including monies and bank accounts, registered in the name of FRY or the Republic of Serbia, that [were] deposited in . . . Kosovo."[177] These acts arguably violated the Security Council's

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engaged in one of its most ambitious roles ever: the administration of two territories—Kosovo and East Timor.").

170.   *See id.* at 10 (noting that UNMIK was interpreted, although perhaps erroneously, to grant authority to "change political and economic institutions and alter property regimes").

171.   INDEP. INT'L COMM'N ON KOSOVO, *supra* note 152, at 114.

172.   *Secretary-General Kosovo Report, supra* note 162, ¶ 129.

173.   *Id.*

174.   *See* Perritt, *supra* note 158, at 10 ("Ultimate UNMIK authority was clear, although debate ensued over UNMIK's authority to change political and economic institutions and alter property regimes because of a mistaken application of the doctrine of belligerent occupation instead of a more flexible political-trustee concept.").

175.   SMYREK, *supra* note 161, at 198.

176.   U.N. Interim Admin. Mission in Kosovo, *On the Currency Permitted to be Used in Kosovo*, § 1, U.N. Doc. UNMIK/REG/1999/4 (Sept. 2, 1999); *see also* SMYREK, *supra* note 161, at 198–99 (discussing this regulation and whether UNMIK exceeded its mandated in passing it).

177.   SMYREK, *supra* note 161, at 201.

mandate set forth in Resolution 1244 since they "established a new economic system" within a sovereign state's economic system.[178]

However, despite some economic and infrastructural improvements, UNMIK's approach created resentment among Kosovo's leaders,[179] and the Independent International Commission on Kosovo in 2000 noted that UNMIK's working relationship with local officials was hampered by its over-centralization of power and lack of real consultation with domestic political leaders.[180]

UNMIK responded in December 1999 by creating the Joint Interim Administrative Structure (JIAS), which was designed to "[provide] the framework for sharing responsibilities for provisional administration with representatives of a broad cross-section of Kosovar society."[181] JIAS consisted of multiple "administrative units responsible for the management and delivery of public goods. . . ."[182] Each administrative department comprising the units was "co-directed by a Kosovar and a senior UNMIK international staff member . . . with the Kosovars being drawn from the principal ethnic groups and political parties."[183] This "dual desk system" was guided by two objectives: to facilitate the training of locals by international administrators,[184] and to share administrative power.[185] This power-sharing arrangement proved to be illusory,[186] as UNMIK maintained substantive control over policymaking and implementation.

In response to pressures on the ground, UNMIK proceeded to enact a series of policy decisions rooted in an extremely generous interpretation of its status as an interim governing body. A notable example of this broad interpretation took place in July of 2003, United Nations officials, acting on behalf of Kosovo and the Minister for Economy of Albania, signed a bilateral trade agreement that liberalized

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178.   *See id.* at 202; *see also* S.C. Res. 1244, *supra* note 154, at 2 (explicitly reaffirming "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" and "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo . . . .").

179.   *See* INDEP. INT'L COMM'N ON KOSOVO, *supra* note 152, at 115 ("Provisional mayors resented being subordinated to foreigners. As late as October 1999, UNMIK had only one U.N. official in each municipality. Where UN officials took a cautious and consultative approach, cooperation gradually emerged; where they behaved more assertively, confrontation tended to be the result.").

180.   *See id.* at 114, 115 ("[I]t is almost impossible to implement policy and sustain legitimacy without cooperation with, and indeed reliance on, local experts and persons of influence . . . .").

181.   *Id.* at 114.
182.   CAPLAN, *supra* note 70, at 99.
183.   *Id.*
184.   *Id.*
185.   *Id.* at 100.
186.   Chesterman, *infra* note 192, and accompanying text.

50 per cent of goods traded between them, while seeking to expand the amount to 90 per cent over the next six years. Only few industrial and some agricultural goods . . . remain[ed] protected under the Free Trade Agreement (FTA) signed by the head of the UN Interim Administration Mission in Kosovo (UNMIK), Michael Steiner, and Minister Arben Malaj. The FTA . . . is the first free trade agreement that has been signed for Kosovo.[187]

In addition, Special Representative Steiner "promulgated . . . the Criminal Code, which clarifies and modernizes definitions of offences and incorporates UNMIK regulations and international legal conventions . . . [and] also signed the new Criminal Procedure Code, which strengthens the powers of prosecutors and enhances protection of victims and defendants."[188]

In sum, UNMIK read its powers broadly on a range of fronts, effectively granting to itself international legal sovereignty (including the right to sign binding treaties with other states), as well as domestic control, which encompassed lawmaking, economic policy, and the reconfiguration of property rights. UNMIK's activism generated significant friction as domestic political leaders became increasingly disenchanted with the transitional authority.[189] Although some friction certainly developed from policy failures, much was rooted in UNMIK's limited grant of domestic control to Kosovar leaders.[190] To be sure, several successive administrative councils were designed to "provide [the transitional administration] with advice, [to act as] a sounding board for proposed decisions and help to elicit support for those decisions among all major political groups."[191] However, as Simon Chesterman has noted, "no one was under the illusion that these bodies wielded any actual power."[192]

Why did UNMIK subordinate domestic political leaders? In part, UNMIK administrators were "[f]rustrated with the slow pace of work" of the domestic political bodies.[193] UNMIK reacted by forging ahead with civil administrative policies and its institution-building

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187. *Top UN Official Signs Free Trade Agreement Between Kosovo and Albania*, UN News Centre, July 7, 2003, http://www.un.org/apps/news/story.asp?NewsID=7651&Cr=kosovo&Cr1=. By signing a treaty, UNMIK was essentially exercising a power traditionally limited to sovereign states.

188. *Id.*

189. INT'L CRISIS GROUP, TWO TO TANGO: AN AGENDA FOR THE NEW KOSOVO SRSG, at i (2003), *available at* http://www.crisisgroup.org/home/index.cfm?id=1618&l=1 (see recommendation 7).

190. *See generally* CHESTERMAN, *supra* note 12, at 132–36 (observing that the UNMIK governed Kosovo, "while structures were established through which Kosovar representatives could 'advise' it").

191. The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 20, *delivered to the President of the Security Council*, U.N. Doc S/1999/779 (July 12, 1999).

192. Chesterman, *supra* note 8, at 14.

193. INT'L CRISIS GROUP, *supra* note 189, at 7.

agenda.[194]   When Kosovar leaders attempted to exercise their own initiative, UNMIK "reacted angrily" and argued that its mission could ill-afford delays.[195]   The end result meant that Kosovar leaders "felt marginalised from the decision making process."[196]

As such, the Organization for Security and Cooperation in Europe (OSCE) "published a damning report in UNMIK's record" that cited UNMIK for its lack of "democratic principles[,] . . . rule of law," and respect for international human rights norms.[197]   The report concluded that Kosovo's people were "therefore deprived of protection of their basic rights and freedoms."[198]

B. *United Nations Transitional Administration in East Timor (UNTAET), 1999-2002*

1.   Events Leading Up to the Creation of UNTAET

East Timor's road to recognition as a sovereign nation-state was paved by years of U.N. stewardship.[199]   A former colony of Portugal, East Timor declared its independence in 1975, only to be invaded and occupied by Indonesia less than two weeks later.[200]   For the next twenty-five years, East Timor was embroiled in a guerrilla war with an eye toward independence.[201]   Over 200,000 persons lost their lives due to war and instability during this period.[202]

In 1999, Indonesia sat at the bargaining table and proposed "limited autonomy for East Timor within Indonesia."[203]   Indonesia, in concert with Portugal, agreed to entrust the U.N. Secretary-General "with organizing and conducting a 'popular consultation' in order to ascertain whether the East Timorese people accepted or rejected a special autonomy for East Timor within the unitary Republic of Indonesia."[204]   The U.N. Security Council followed by establishing the

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194.   *Id.*
195.   *Id.* at 6–7.
196.   *Id.* at 2.
197.   *Id.* at 14; Chesterman, *supra* note 8, at 11.
198.   OMBUDSPERSON INST. IN KOSOVO, SECOND ANNUAL REPORT 2001–2002, at 3 (2002), *available at* http://www.ombudspersonkosovo.org/repository/docs/E6020710a.pdf (last visited Nov. 27, 2007); *see also* Chesterman, *supra* note 8, at 11.
199.   *See* Anthony L. Smith, *East Timor: Elections in the World's Newest Nation,* 15 J. DEMOCRACY 145 (2004) (describing East Timor's path towards independence).
200.   *Id.*
201.   Naazneen H. Barma, *Brokered Democracy-Building: Developing Democracy through Transitional Governance in Cambodia, East Timor and Afghanistan,* 8 INT'L J. MULTICULTURAL SOCIETIES, 127, 146 (2006).
202.   Jarat Chopra, *The UN's Kingdom of East Timor,* 42 SURVIVAL 27, 28 (2000).
203.   U.N. Mission of Support in East Timor, Background, http://www.un.org/Depts/dpko/missions/unmiset/background.html (last visited Nov. 26, 2007).
204.   *Id.* Portugal was involved in the negotiations since it still had a legal claim to East Timor. *See* Smith, *supra* note 191, at 148 ("[Portugal] had remained East

U.N. Mission in East Timor (UNAMET).[205] UNAMET's Security Council mandate included organizing and conducting "a popular consultation . . . on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept [or reject] . . . special autonomy for East Timor within the unitary Republic of Indonesia."[206] UNAMET succeeded in registering over half of East Timor's approximately 800,000 residents for the vote.[207] "On voting day, 30 August 1999, some 98 per cent of registered voters went to the polls deciding by a margin of 94,388 (21.5 per cent) to 344,580 (78.5 per cent) to reject the proposed autonomy and begin a process of transition towards independence."[208]

Pro-Indonesia militia forces opposing the outcome of the referendum immediately initiated a violent campaign.[209] Jarat Chopra, former head of the United Nations Transitional Administration in East Timor (UNTAET) Office of District Administration, compared the destruction to "the razing and salting of ancient Carthage or the sacking of Troy."[210] In three weeks, the Indonesian military, in concert with the allied militias, executed a "scorched earth" policy which aimed to kill all Timorese over 15 years old and destroy East Timor's infrastructure.[211] The murderous campaign also displaced over 600,000 people, many of whom fled to hills or "were forcibly removed in ships and trucks to West Timor or neighboring islands."[212] Seventy percent of East Timor's "physical infrastructure was gutted."[213]

2. UNTAET's Mandate: Sweeping, but with Limits

The international community responded to the violence by organizing "the Australian-led International Force in East Timor (INTERFET)."[214] INTERFET provided a temporary response to the violence until the Security Council could establish a new mandate for

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Timor's legal representative at the UN."). Portugal relinquished its legal claim and pronounced UNTAET to be its successor. Chopra, *supra* note 202, at 29.

205.   S.C. Res. 1246, ¶ 1, U.N. Doc. S/RES/1246 (June 11, 1999) ("Taking note of the pressing need for reconciliation between the various competing factions within East Timor." (underline omitted)).

206.   *Id.*

207.   *See* Ian Martin, *The Popular Consultation and the United Nations Mission in East Timor—First Reflections, in* OUT OF THE ASHES: DESTRUCTION AND RECONSTRUCTION OF EAST TIMOR 136, 140 (James J. Fox & Dionisio Babo Soares eds., 2000) (noting that a total of 446,666 individuals registered).

208.   U.N. Mission of Support in East Timor, *supra* note 203.

209.   Barma, *supra* note 201.

210.   Chopra, *supra* note 202, at 27.

211.   *Id.*

212.   *Id.*

213.   *Id.*

214.   *Id.* at 28.

the reconstruction and administration of East Timor. The Security Council followed up by unanimously passed Resolution 1272 under its Chapter VII authority,[215] which established the U.N. Transitional Administration in East Timor (UNTAET).[216]   Resolution 1272 "endowed   [UNTAET]   with   overall   responsibility   for   the administration of East Timor and . . . empowered [it] to exercise all legislative and executive authority, including the administration of justice."[217]   It also authorized "UNTAET to take all necessary measures to fulfill its mandate."[218]   The burden of fulfilling this expansive mandate[219] fell on the shoulders of the Transitional Administrator.[220] The Secretary-General repeated the UNMIK model by placing the Transitional Administrator in charge of all administrative, security, and humanitarian operations.[221]

Resolution 1272 appears at first blush to grant the Transitional Administrator an unlimited amount of authority. UNTAET was indeed "the formal government of East Timor" and it possessed a single, individual, and final legislative and executive authority.[222] UNTAET marked the first time since the end of World War II that the U.N. exercised full sovereignty over a territory.[223]

Resolution   1272   may   have   granted   the   Transitional Administrator the final say on governance matters, but it certainly was not a blank check.   The Security Council instructed the Transitional Administrator to consult and cooperate with a number of domestic and international agents.[224] It explicitly stressed "the need

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215.   *See* U.N. Charter art. 42 ("[T]he Security Council . . . may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

216.   S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

217.   *Id.* ¶ 1.

218.   *Id.* ¶ 4.

219.   *See, e.g.,* Joao   M.   Saldanha   &   Marcelino   X.   Magno,   *Mission Implementation: Developing Institutional Capacities, in* U.N. INST. FOR TRAINING & RESEARCH ET AL., THE UNITED NATIONS TRANSITIONAL ADMINISTRATION IN EAST TIMOR (UNTAET): DEBRIEFING AND LESSONS 161, 161 (Nassrine Azimi & Chang Li Lin eds., 2003) (discussing and criticizing the mandate of UNTAET).

220.   *See* S.C. Res. 1272, *supra* note 216, ¶ 6 (stating that

The Security Council . . . [w]elcomes the intention of the Secretary-General to appoint a Special Representative who, as the Transitional Administrator, will be responsible for all aspects of the United Nations work in East Timor and will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones.).

221.   *See* The Secretary-General, *Report of the Secretary-General on the Situation in East Timor,* ¶¶ 39–45, U.N. Doc. S/1999/1024 (October 4, 1999) [hereinafter *Report on Situation in East Timor*].

222.   Chopra, *supra* note 202, at 29.

223.   Simon Chesterman, *East Timor in Transition: Self-determination, State-building and the United Nations,* 9 INT'L PEACEKEEPING 45, 46 (2002).

224.   S.C. Res. 1272, *supra* note 216, ¶¶ 8–10.

for UNTAET to consult and cooperate closely with the East Timorese people"[225] and requested that UNTAET "cooperate closely" with both the multinational peacekeeping force already deployed in East Timor and "humanitarian and human rights organizations."[226] In addition, Resolution 1272 reaffirmed "respect for the sovereignty and territorial integrity of Indonesia."[227] The Secretary-General in a separate report reiterated the need for UNTAET to be "in close consultation and cooperation with the people of East Timor."[228] However, Security Council directives did not prohibit the Transitional Administrator from vetoing the demands of the East Timorese political representatives after consultation.[229] This implied power would later become pivotal in relations between UNTAET and domestic power holders.

3. Not What They Bargained For: East Timorese Criticism of UNTAET's "Authority Creep"

UNTAET assumed that the U.N.'s administrative and humanitarian missions would have the support of the local population.[230] The National Council of Timorese Resistance (CNRT) was the lone Timorese "interlocutor with which to negotiate"[231] when Sergio Vieira de Mello, the U.N. Transitional Administrator over East Timor, arrived.[232] UNTAET initially enjoyed "conditions for success that are rarely available to peace missions."[233] Donor countries had committed "considerable funds" for East Timor's reconstruction, and "UNTAET had the administrative authority to harmonise international efforts[] and the legal authority to govern the population and the territory . . . [as well as] popular sympathy and political will."[234] In short, de Mello "arrived . . . to great expectations."[235]

The Transitional Administrator wasted little time centralizing authority. A month earlier, the CNRT had—as part of the

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225. *Id.* ¶ 8.
226. *Id.* ¶¶ 9–10.
227. *Id.* at 2. *Contra* Chesterman, *supra* note 223, at 46 (2002) (stating that the word "sovereignty" does not appear in Resolution 1272).
228. *Report on Situation in East Timor, supra* note 221, ¶ 30.
229. *See generally id.* (lacking any prohibition on the vetoing of demands from East Timorese political representatives).
230. *See generally* Martin, *supra* note 207, at 138–41 (discussing generally the events surrounding the referendum vote on independence, including the security situation and existence of a pro-integration militia, which received leadership from the Indonesian Armed Forces).
231. Chopra, *supra* note 202, at 27–28.
232. *Id.* at 29.
233. *Id.* at 28.
234. *Id.* at 29.
235. *Id.* at 32.

negotiations over U.N. involvement—submitted a "modest" proposal that reserved a limited role for the Timorese in the transitional administration's decision-making apparatus.[236]   However, the U.N. Transitional Administrator ignored this proposal; immediately upon his arrival, he "decided not to integrate Timorese into the transitional structure, but rather to recruit locally a separate civil service."[237]   The Transitional Administrator's "fail[ure] to consult and involve the people of East Timor in the decision-making process" made this transitional administration unique relative to previous ones.[238]   This was despite the fact that U.N. Security Council Resolution 1272 "stressed the need for UNTAET to consult and co-operate closely with the East Timorese people in order to carry out its mandate effectively."[239]

The Transitional Administrator's actions were met with swift criticism.   The CNRT publicly criticized UNTAET.[240]   Xanana Gusmao, East Timor's guerrilla leader and president of the CNRT, became "increasingly disillusioned and dissatisfied with de Mello's performance."[241]   Criticism led de Mello to create the National Consultative Council, which "provided the East Timorese with the possibility to express their opinion[s] in the legislative process, although the Transitional Administrator could ignore [their] advice."[242]   The National Consultative Council's authority was considered illusory by most Timorese since de Mello retained de facto veto authority over its recommendations.[243]

By early 2000, UNTAET's legitimacy was already in question, convincing de Mello to establish a Transitional Cabinet, in addition to yet another "co-government" body, the East Timorese National

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236.   *Id.*

237.   *Id.*

238.   Kondoch, *supra* note 4, at 250; *see also* Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 136 (2001) (noting difference between the U.N. transitional administration in East Timor and those in Cambodia and Eastern Slavonia, Baranja, and Western Sirmium).

239.   Kondoch, *supra* note 4, at 250.   *Contra* Galbraith, *supra* note 4, at 211 (according to Galbraith, UNTAET's transitional administrator, Sergio Veira de Mello, "resisted proposals that experts write the [East Timor] constitution, deferring it to an elected East Timorese constituent assembly.   While Vieira de Mello retained absolute authority, neither he nor the UN headquarters in New York ever overturned a decision made by the transitional government.").

240.   *See* Ruth Wedgewood, Letter to the Editor, *Trouble in Timor*, FOREIGN AFF., Nov.–Dec. 2000, at 197, 197–99 (discussing the UN's "course correction" after public criticism by the CNRT, and the problems that still exist for East Timor in its difficult road ahead).

241.   Chopra, *supra* note 202, at 32.

242.   Kondoch, *supra* note 4, at 250.

243.   *See id.* ("[T]he Transitional Administrator could ignore its advice."); *see also* Chopra, *supra* note 202, at 32 ("Gusmão has become increasingly disillusioned and dissatisfied with de Mello's performance.").

Council (ETNC).[244]   The U.N. Transitional Administrator did not chair the ETNC, which consisted of only Timorese political representatives.[245]   Nevertheless, UNTAET retained ultimate executive authority, which meant that the ETNC's and Transitional Cabinet's new "authority" was more symbolic than substantive.[246] Gusmao expressed his sentiments and those of the Timorese cabinet in the fall of 2000:

> We are not interested in a legacy . . . of development plans for the future designed by [people] other than East Timorese. . . . We are not interested in inheriting an economic rationale which leaves out the social and political complexity of East Timorese reality. Nor do we wish to inherit the heavy decision-making and project implementation mechanisms in which the role of the East Timorese is to give their consent as observers rather than the active players we should start to be.[247]

East Timorese cabinet members also threatened to resign in response to UNTAET's failure to share decision-making authority.[248]   They publicly complained of being "used [by UNTAET] as a justification for the delays and confusion in a process . . . outside [of their] control. The East Timorese Cabinet members are caricatures of ministers in a government of a banana republic. They have no power, no duties, no resources to function adequately."[249]

In summary, UNTAET went into East Timor with a sweeping Security Council mandate.[250]   The Transitional Administrator was placed in charge of both the civil and security components of the overall peacebuilding mission.[251]   UNTAET exercised "full treaty-making powers," and the "World Bank's International Development Association (IDA) was designated as the trustee of the reconstruction Trust Fund for East Timor."[252] However, the formal Security Council mandate also stressed the need for the Transitional Administrator to cooperate and consult with the Timorese political leadership. Instead, UNTAET quickly centralized power, presumably to expedite the implementation of its policies without having to work through consensus-building and collective action delays.   The Timorese political leaders were "alarmed" at the U.N.'s policies since "they had expected the U.N. to provide basic services, while they put their

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244.   Kondoch, *supra* note 4, at 250.
245.   *Id.*
246.   *Id.*
247.   Chesterman, *supra* note 223, at 67.
248.   Mark Dodd, *Give Us a Free Hand or We Quit, Leaders Say*, SYDNEY MORNING HERALD, Dec. 5, 2000.
249.   *Id.*
250.   *See* S.C. Res. 1272, *supra* note 216, ¶ 2 (resolution establishing the mandate).
251.   *Id.*
252.   Chopra, *supra* note 202, at 29–30.

political house in order."253   In the end, it is difficult to accurately assess UNTAET's legacy. Specifically, it is unclear how the U.N.'s actions on the ground may alter the decision of future failing states to invite future U.N. peacebuilding missions. One thing is certain: the Timorese had expectations regarding the scope of U.N. action, based on the Security Council's mandate and pre-intervention negotiations, which were not met by UNTAET's actions on the ground.

C. *United Nations Transitional Administration in Kosovo and East Timor: Increasing Authority, Increasing Friction*

U.N. transitional administrations in Kosovo and East Timor wielded unprecedented legal and executive power and authority. They enacted "'[r]egulations' in areas such as economic law, taxation, and court procedure"254 and negotiated international treaties on behalf of the territories they governed.255 The manner and degree to which transitional administrations felt compelled to exercise these sweeping powers demonstrates the inherent difficulty in managing the nexus between mandate ambiguity and the operational demands of transitional governance. Simon Chesterman has observed that "contradictions arise between the stated end of transitional administrations—legitimate and sustainable national governance— and the available means—benevolent autocracy under the rule of the U.N. Security Council or some other international actor."256 Autocracy is not necessitated by the mission mandates; it manifests itself through a process described herein as "authority creep."

The Transitional Administrators in Kosovo and East Timor took full advantage of the ambiguity in the mandates. The mandates' ambiguity meant that the Administrators could have taken the opposite course of action and shared domestic control with local political actors. Such a strategy, though difficult both politically and operationally, could have more effectively supported the U.N.'s legitimacy among the population and provided greater incentives for domestic actors to remain engaged and to comply with the transitional authority. However, the Administrators instead tended to centralize authority and to effectively limit the role of local political leaders in the substantive decision-making process. One reason for this approach was to speed the achievement of mission mandates and cut through collective-action problems and disagreements with local

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253.   *Id.* at 31.
254.   Matthias Ruffert, *The Administration of Kosovo and East-Timor by the International Community*, 50 INT'L & COMP. L.Q., 613, 622 (2001).
255.   *See* Linton, *supra* note 238, at 135 n.48 (providing examples of international agreements UNTAET has entered into on behalf of East Timor).
256.   Chesterman, *supra* note 8, at 6.

political actors;[257]   administrators face significant pressure, both external and internal, to meet the terms of their mandate, provide public goods, and show progress towards reconstruction and state-building. In some post-conflict environments, they must also balance competing political factions within the host country in which they operate—one solution to which is to simply centralize power during the transitional administration.

The Administrators' reasons for following this course of action are not of great importance to this Article. What *is* important is that the tendency towards authority creep evidenced in these cases of transitional administration may, over the long-term and across multiple cases of intervention, generate a counterproductive pressure against future U.N. attempts to intervene in and administer weak and failed states.

Explicitly mandated international trusteeship over failing states is unrealistic insofar as it directly violates the provisions of Article 78 of the U.N. Charter. However, trusteeship via "authority creep" is quite likely. The cases of Kosovo and East Timor indicate the degree to which the interplay between mandate ambiguity and operational challenges may compel U.N. transitional governors to read their mandates expansively and govern accordingly. Transitional authorities face extremely demanding conditions in weak and failing states. Poor infrastructure, sclerotic or simply non-existent bureaucracies, and restive or counterproductive pressure from political factions or leaders all exert severe pressure on international missions facing clear demands to achieve significant results in compressed timeframes. Such pressure leads to an understandable tendency to centralize authority. This tendency carries near-term operational benefits, but may ultimately have a corrosive influence on U.N. legitimacy and the ability of the international community to affect interventions in failing states.

V. CONCLUSIONS AND POLICY IMPLICATIONS

State weakening and failure poses a mounting danger to the international system and to vulnerable populations across the globe. While the level of human suffering resulting from institutional weakness and collapse clearly calls for an urgent and concerted response, the international community must also ensure that this response is politically sustainable over the long term.

Trusteeship—whether de jure or de facto—may offer a viable response to state failure, but it must be deployed with care, as its

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257.   Interviews with former UN officials (anonymous), Feb. 22, and Oct. 8, 2007 (on file with authors).

repeated application could undercut the international community's ability to negotiate successive interventions—both weakly—with political leaders in crumbling states. Specifically, repeated authority creep may weaken the political basis among states for the temporary governance of failing states under the banner of the U.N.

We believe that the U.N. must play a central role in the management and reconstruction of failed states, for several reasons: first, the organization carries unique legitimacy and a reputation for impartiality, certainly unmatched by other actors; second, it has amassed a great deal of technical expertise and capacity in transitional administration and post-conflict reconstruction, by virtue of its long and varied experience in peace operations; and third, although it is certainly possible to imagine other arrangements capable of supporting trusteeships in failed states, the U.N. already provides an established and largely accepted legal and institutional architecture on which to build such missions.

For the U.N. to play a successful role in the temporary administration of weak and failing states, it must pay close attention to the political dynamics within such societies, as well as the implicit incentive systems created by international interventions. It must also manage the risks inherent to authority creep with great care: U.N. transitional administrations face enormous pressures to meet difficult mandates in challenging environments, often under severe resource constraints caused by donor governments' tendency to support broad mandates with narrow (or uncertain) funding streams. In the near-term, administrators' tendency to centralize power to meet mission mandates may well speed decision-making and policy implementation, and may or may not lead to more effective governance and public goods provision. But in the long-term, untrammeled authority creep risks aggravating political actors in host countries (thus risking non-compliance), and eroding political support for trusteeship among both potential client and donor states alike.

It is certainly the case that political actors in weak states pay close attention to the dynamics of interventions elsewhere. This attentiveness was recently displayed in Afghanistan, where the U.N. has maintained a critical and high-profile assistance mission (the United Nations Assistance Mission in Afghanistan, or UNAMA). The U.N. proposed that Lord Paddy Ashdown, former U.N. High Commissioner in Bosnia and Herzegovina (BiH), be its primary envoy to Afghanistan and help reenergize its sagging mission there. However, Ashdown's reputation preceded him: while serving in BiH, Ashdown developed a highly centralized governing style, later noting that the main issue confronting him and BiH's domestic political representatives "was not whether to reform[,] [b]ut how fast, how

soon and, above all, who will drive the process of reform—you or me?"[258] Ashdown acknowledged that sharing political power with the domestic political leaders would lead to delays in reform implementation,[259] andhe pledged that he would "step in" and "remove [political] obstacles" when the slowing of reforms from the democratic process became too great.[260] Ashdown's appointment, consequently, was opposed and eventually rejected by Afghan President Hamid Karzai who was concerned that Ashdown would "come to Afghanistan with similar powers of bossing the government round."[261]

Weak and failed states are never political vacuums. Rather, they are complex and highly conflictual environments in which effective control is often fractured along multiple axes and among a range of actors competing for political authority. U.N. peace operations, with few exceptions, have been founded upon the substantive consent of domestic political leaders. Their consent (and, in some cases, promises to disarm and demobilize forces) is often a necessary prerequisite for the U.N. and donor states to commit the political, financial, and organizational resources necessary to support an effective intervention.[262] The donor governments that staff, fund, and politically animate international interventions are rarely willing to support extended multi-national, peace operations in any case. The consent of domestic political leaders in failing and failed states thus looms large: as Steven Ratner has noted, "durable strong consent has been and should remain a sufficient touchstone for member states' decisions to create new operations."[263] In return, the U.N. is often in a position to offer domestic leaders at least nominal local political participation when peacekeeping operations are managed by a transitional governance arrangement.[264]

In some cases the international community is able to employ military or economic pressure in lieu of negotiating or cultivating the consent of domestic political actors.[265] Such instances are rare. Most often, the international community lacks the political will to level

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258. Knaus & Martin, *Travails of the European Raj*, 14 J. DEM. 60, 60 (2003).

259. *Id.* at 60-61.

260. *Id.* at 61.

261. David Clarke, *Ashdown Withdraws from Afghanistan Envoy Contest*, Jan. 27, 2008, *available at* http://www.reuters.com/article/topNews/idUSL26294921200 80127.

262. *See* Kondoch, *supra* note 4, at 245–46 (describing second generation peacekeeping missions, which were based upon the consent of the parties).

263. STEVEN R. RATNER, THE NEW U.N. PEACEKEEPING: BUILDING PEACE IN LANDS OF CONFLICT AFTER THE COLD WAR 36 (1995).

264. *See id.* at 246 (noting that since the Cold War, the U.N., following consent of the parties, has provided administrators and peacekeeping forces to aid the parties in the implementation of peace plans, which the parties had negotiated).

265. *See, e.g.*, Ruffert, *supra* note 254, at 616.

credible threats, and attempts to compel consent are brittle and ineffectual.[266]

The temporary multilateral governance of fragile states should certainly not be abandoned. We believe that there are at least three circumstances in which a full-scale, international administration is both politically and operationally feasible as a means to govern, reconstruct, and reconstitute weak and failed states, without the risks identified above. In the event that a territory contains a true vacuum of political authority, or the domestic political agents are fragmented to the extent that collective action via U.N.-facilitated power-sharing is impossible, overt trusteeship may indeed prove effective and carry relatively few long-term risks. The use of transitional authority under such conditions is less likely to undercut U.N. leverage and legitimacy in the eyes of domestic actors, political leaders in other weak states, or other members of the international community. If the international community deems local political actors unsuitable for power-sharing—either because they are too violent or untrustworthy, or because they have violated foundational internal norms and covenants—trusteeship may be the best vehicle for intervention, provided that political will exists among donor governments to properly fund, staff, and support such a mission. International trusteeship could also prove beneficial where local actors have collectively consented to authoritative international governance, in which case the absorption of significant (or even total) sovereign authority by the U.N. may be justified by the degree of security and public goods provided.

Such conditions will likely prove exceptional. In the main, weak and failing states will remain well-populated by political agents[267] who are unlikely to willingly give up all of their stakes in a post-conflict governing body or to face easy removal. It is much more likely that the ability of the international community to pursue transitional governance arrangements will depend upon its capacity to credibly commit to some level of sovereignty-sharing with domestic political actors.

The manner in which the international community interacts with such actors has serious implications for the success of any single U.N. mission, as well as for the future political foundations of intervention. In the foregoing analysis, we have used two cases of de

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266.   Since without such consent, the only way the UN can act is under Chapter VII of the Charter. *Id.* For the Security Council to use this Chapter takes political will and agreement. *See* U.N. Charter ch. VII.

267.   Complete political vacuums are rare, even in failed states. *See, e.g.,* Abdulqawi Yusuf, *Somalia's Warlords: Feeding on a Failed State,* INT'L HERALD TRIB., Jan. 21, 2004, at 6, *available at* http://www.globalpolicy.org/nations/sovereign/failed/2004/0121feeding.htm (last visited Nov. 27, 2007).

facto trusteeship in weak states[268] as a vehicle to explore potential points of friction that are likely to emerge as international intervention moves beyond the assumption of partial domestic control to the absorption of sovereign authority and substantive control. At the time of intervention, Kosovo and East Timor were not vacuums of political authority and, prior to U.N. intervention, neither had achieved independence, let alone formal statehood. However, the fundamental tension between international governance via authority creep and expectations of local political leaders was apparent.

While the U.N.'s tenure in each case was limited, it should be noted that actors in failing and failed states are understandably sensitive to shifts in power that occur amidst peace processes or transitions to new forms of governance. These transitional periods present domestic political leaders with enormous opportunities to shape new governance institutions and carve out the long-term basis for political authority. U.N. missions that seize significant amounts of authority thus risk shifting the calculus of domestic leaders that are highly attuned to the exigencies of political competition. And such leaders are often in a position to destabilize the already delicate balance of politics, idealism, and power that facilitates peacekeeping operations.

The importance of these incentives for domestic leaders in failed states does *not* mean that the international community need surrender effective control of intervention to the whims of local leaders in order to secure access to the country. The international community can bring inducements or threats to bear; it need not compromise with domestic power holders on all issues or abandon the U.N.'s foundational concerns with justice, equity, and human rights. But the international community must, in considering trusteeship, be mindful of the short- and long-term ramifications of effectively sidelining local elites in the policymaking process. Carefully moderated transitional arrangements, which temper U.N. authority, may ultimately prove effective in balancing near-term operational demands with long-term political sustainability and trust amongst potential future "clients" of trusteeship arrangements.

This problem has not gone unnoticed, either by the U.N. or scholars, and the U.N. has evolved several mechanisms to improve oversight and accountability. Transitional administrators remain accountable to the Secretary-General and, through reporting mechanisms, to the Security Council itself.[269] Such continual

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268. As we have indicated, these cases do not reach the threshold of mandate (de jure) trusteeship, in which the Security Council in a resolution explicitly authorizes U.N. governing authority independent of local actors. Instead, they constitute cases of what we have referred to as "authority creep," in which U.N. administrators exercise powers that effectively constitute trusteeship.

269. CAPLAN, *supra* note 70, at 199.

reporting on transitional administration activities serves to provide some measure of transparency and accountability.

A second policy response to the problem of accountability—the ombudsperson—has already been implemented in East Timor and Bosnia with mixed success.[270] The ombudsperson "is an independent public official who receives complaints from aggrieved individuals against public bodies and government departments or their employees and who has the power to investigate, recommend corrective action, and issue reports."[271] The ombudsperson has, in the international administrative context, sought "to promote and protect the human rights and freedoms of individuals and legal entities within the [territory governed by a transitional administration]."[272] The overall jurisdiction and authority of the ombudsperson operating in conjunction with international transitional administrations, however, has thus far been limited.[273] In short, the ombudsperson's decisions are not controlling and—in the case of Kosovo—have not always been honored by the governing institutions against which complaints were filed.[274] The ombudsperson thus may achieve the level of impartiality needed to earn the trust of domestic actors but fail to achieve a necessary level of legitimacy, since its decisions have no binding effect on the transitional administration.

Scholars have also posed remedies to the problem of the political accommodation of transitional administrations with domestic political actors. In particular, Stephen Krasner's innovative solution, sovereignty-sharing contracts between the international governing authority and domestic political actors, offers some promise. In Krasner's model, international authorities would craft an agreement with domestic political actors, providing for shared administration with no specified sunset date.[275] The advantages of this approach lie in its long-term nature, which should dissuade spoilers eager to hasten the exit of international forces, enhance cooperation between locals and international authorities,[276] and promote the provision of effective authority incentives to domestic political elites in weak and failing states.[277] However, the approach faces several serious problems. First and foremost, the notion of shared sovereignty would stand little chance of acceptance by major powers such as China and

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   270.   *See id.* at 200–07 (discussing the function of an ombudsman and the use of one in Kosovo and East Timor).
   271.   *Id.* at 200. Caplan notes that this is consistent with the International Bar Association's definition. *Id.* at 200 n.17.
   272.   *Id.* at 201.
   273.   *Id.* at 202.
   274.   *Id.* at 203.
   275.   Krasner, *supra* note 9, at 115–16.
   276.   *Id.*
   277.   *Id.* at 115–17.

Russia that remain committed to a conventional reading of sovereignty and almost certainly wary of "permanent" shared governing arrangements.[278] Second, shared sovereignty would still leave substantial ambiguity regarding the distribution of power between domestic and international actors, and thus a contract between a transitional administration and domestic political actors would be based on nothing other than the good will of the parties. Lastly, sharing sovereignty with a specified set of domestic actors risks institutionalizing the balance of power amongst domestic groups at the outset of the agreement,[279] potentially generating friction as shifts in the distribution of power go unreflected by shared power structures.

This Article recommends two alternatives. First, the donor governments that fund and staff transitional administrations should be prepared to commit greater resources for a longer duration. Extended operations have a better chance of creating durable political institutions than brief bursts of "benign dictatorship," and longer-term operations place less pressure upon transitional administrations to generate near-term results, thus presenting fewer incentives to maximize their authority within the constraints of the mandate. There are many instances in which the added cost (in both time and funding) of following this course of action will be outweighed by the enhancement of the U.N.'s credibility, which will increase the probability that leaders of other failing and failed states will also invite and cooperate with U.N. intervention. In short, the U.N. would have more opportunities to save more lives.

Second, this Article argues that the dilemma facing transitional administrations can be avoided, or at least limited, by the establishment of an arbitration body capable of handing down decisions that bind transitional administrators.[280] As Perritt notes, transitional administrators "make decisions that have winners and losers. They must develop new legislation, grant and deny licenses to valuable public privileges . . . award contracts . . . and restructure industry."[281] When local actors and institutions prove "dysfunctional" in this decisionmaking process, the international administrators

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278. *See supra* note 14 and accompanying text.

279. For more on this particular problem, see Naazneen Barma, *Brokered Democracy Building: Developing Democracy Through Transitional Governance in Cambodia, East Timor, and Afghanistan*, 8 INT'L J. MULTICULTURAL SOCIETIES 127 (2006).

280. *Cf.*, Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT'L L. 1, 3 (2004) (proposing the establishment of "carefully circumscribed power for judicial review" of decisions made by a political trustee).

281. *Id.* at 14.

assume more sovereignty.[282]   Our proposal would combine the impartiality of the ombudsperson with the binding authority of the Security Council in order to provide domestic political actors in weak states with a transparent and enforceable mechanism to negotiate conflicts and preserve political power.   The decisions of the arbitration body would have to be public and transparent so as to enhance the legitimacy of international administrations and provide leaders and civil society in states subject to transitional administration with some meaningful levers of political authority— and thus greater incentive to accede to intervention.

A distinct arbitration body could be created for each mission, or a broader, standing arbitration commission could be created to serve claims from all outstanding transitional administrations or peace operations.   In either case, the body would be charged with hearing claims by both political- and civil-society organizations in the U.N.'s "client" countries, thus offering both a piece of sovereign currency and a measure of more direct accountability to both domestic leaders and civil society.   Although transitional administrations would remain answerable to the Secretary General, and required to continue to report to the Security Council, the arbitration body could provide a reasonably unbiased mechanism for the review (and if need be, remedy) of both transitional authority policymaking and governance.

Relying on the Security Council to select the members of the body would ensure that the Security Council powers would have an opportunity to support candidates who most closely adhere to their conceptions of sovereignty.   This would have the effect of giving the Security Council greater reason to pass resolutions for the establishment of future transitional administrations.

This recommendation stands upon existing law and practice; the U.N. Security Council already has the power to establish independent

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282.   *Id.* at 5 (specifcally referring to the "international trsuteeship" established for Bosnia).   Perritt suggests establishing a "tribunal" that would resemble the "ombudsman or a specialized court" while leaving "ultimate power to accept or reject [the reviewing body's] deicions" in the hands of the head international administrator. *Id.* at 73. The problem with this proposal is two-fold: first, judicial bodies performing judicial review need some constitution, procedural statute, or other hard source of law on which to base its decisions.   In short, judges need clear rules.   But if a transitional administration's   mandate is ambiguous in the first place, where will these rules come from?   The administrator can establish a separate administrative or procedural code filling this gap, but the administrator might be encouraged to write rules that prevent his or her ultimate authority challenged by the judicial body.   Second, the decisions of the body have to be binding on the transitional administration; otherwise, the purpose of the judicial body is undermined.   We believe an arbitration body has more flexibility to import and apply already established procedural rules (such as those recommended by the International Commission on Arbitration).   Finally, and critically, the arbitration body's decisions must be binding on the transitional administrator.

adjudicatory bodies,[283] which it exercised when it established the International Criminal Court for the Former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1995.[284] The Security Council also submits a list of judge candidates nominated by member states, from which the final judges are selected by the U.N. General Assembly.[285] Article 29 of the U.N. Charter also provides the Security Council with the power to "establish such subsidiary organs as it deems necessary for the performance of its functions."[286]

The Security Council effectively delegates authority over peacekeeping operations to the U.N. Secretary-General, who in turn possesses the authority to "create bodies to make the decisions necessary to carry out the tasks assigned to him."[287] In prior transitional administrations, the Secretary-General has delegated this authority to transitional administrators. Although administrators may indeed have the power to bind their own hands and submit to a self-created adjudicatory body, locating the body beneath the Security Council would provide for greater perceived independence, power, and visibility. With the advent of transitional administrations and increasing calls for neo-trusteeship, the U.N. has nearly come full-circle. Unilateral nation-building efforts notwithstanding, this Article anticipates that even a single, high-impact humanitarian or security meltdown in a failing or failed state may generate serious consideration of international trusteeship as a model for intervention. To be successful *and* sustainable, such intervention must take place under the auspices of the United Nations and must carefully balance operational and ethical demands with the political needs of actors in weak and failing states. Ignoring the hazards of authority creep risks undermining the long-term legitimacy of international assistance in crumbling states.

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283.   *See* U.N. Charter art. 41; Kondoch, *supra* note 4, at 256 (citing various Security Council actions using Article 41 authority).

284.   *See* Kondoch, *supra* note 4, at 256 (discussing the creation of the International Criminal Court for the Former Yugoslavia and the International Criminal Tribunal for Rwanda).

285.   *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 13, para. 2, U.N. Doc. S/25704 at 36, annex (May 25, 1993), *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute.htm#13 (prescribing this manner of election for the judges to serve on the International Criminal Court for the Former Yugoslavia).

286.   *Id.* at 28 (*quoting* U.N. Charter art. 29).

287.   *Id.*

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