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From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers

RALPH WILDE

I. INTRODUCTION

In 2007, the year in which the centenary of the Hague Peace Conference of 1907 was being commemorated, the treatment of several hundred men by the United States at its base in Guantánamo Bay was a very prominent issue on the global human rights agenda. Of course, the impact on human rights of state action abroad is a much larger phenomenon. Beyond Guantánamo and secret Central Intelligence Agency (CIA) “black” detention sites, there was in 2007 a series of occupations, from the longstanding Israeli occupation of Palestinian territory to the

* UCL Faculty of Laws, ralph.wilde@ucl.ac.uk, http://www.ucl.ac.uk/laws/wilde. Thanks to Dr. Silvia Borelli and Sara Corris for research assistance. This is an expanded version of a chapter contributed to 173 VERÖFFENTLICHUNGEN DES WALther-SCHÜCKING-INSTITUTS FÜR INTERNATIONALES RECHT, A Wiser Century?—JUDICIAL DISPUTE SETTLEMENT, DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE 333-370 (Thomas Giegerich ed., 2009). It draws together, with further analysis, ideas explored in parts of the following: RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY ch. 8 (2008); Ralph Wilde, Are Human Rights Norms Part of the Jus Post Bellum, and Should They Be?, in JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE 163 (Carsten Stahn & Jann K. Kleffner eds., 2008); Ralph Wilde, Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations, 12 INT’L PEACEKEEPING: Y.B. OF INT’L PEACE OPERATIONS 93, 93-110 (2008); Ralph Wilde, Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights, 26 MICH. J. INT’L L. 739, 739-806 (2005).
occupation of Iraq since 2003, initially conducted through the Coalition Provisional Authority (CPA).\(^1\) Alongside state-

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conducted occupation was the administration of territories by international organizations, what I term, "International Territorial Administration" (ITA). An example of ITA is the United Nations Interim Administration Mission in Kosovo (UNMIK), which


2. On ITA, see generally, RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY, passim (2008) [hereinafter WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION] and the sources cited therein. On the definition of "International Territorial Administration" (ITA), see id. at ch. 1, § 1.4.
operated from 1999 to 2008. Although given relatively less attention, these administrations also came under critical scrutiny on human rights grounds. For example, in 2002 the independent Ombudsperson Institution in Kosovo stated:

UNMIK is not structured according to democratic principles, does not function in accordance with the rule of law, and does not respect important international human rights norms. The people of Kosovo are therefore deprived of protection of their basic rights and freedoms three years after the end of the conflict by the very entity set up to guarantee them. ... It is ironic that the United Nations, the self-proclaimed champion of human rights in the world, has by its own actions placed the people of Kosovo under UN control, thereby removing them from the protection of the international human rights regime that formed the justification for UN engagement in Kosovo in the first place.

As will be discussed further in this piece, analysis of the question of the rights and obligations of foreign and international actors administering territory that is not their own sovereign territory has tended to focus on particular instances. Even when a broader frame of reference has been adopted, often arbitrary, question-begging classifications have been adopted to distinguish between situations. One notable distinction of this sort is between


occupation, on the one hand, and trusteeship, on the other. A second such distinction is between state-conducted activity, on the one hand, and international-organization-conducted activity, on the other.

This piece examines the assumptions that lead to such classifications and distinctions, and, in the light of this analysis, considers the extent to which these classifications and distinctions assist in understanding both the political character of, and the human rights norms applicable to, the activities to which they relate. It will be argued that the distinction commonly made between trusteeship and occupation is without merit, and the differences between foreign state and international-organization-conducted territorial administration are of much less significance than they have been made out to be. It will be suggested that a crucial insight in relation to this enquiry is offered by a return to the worldview of 1907 and the concept of occupation contained in the Hague Regulations, when that concept is then analyzed within a broader historical context.\(^6\)

II. WHAT IS OCCUPATION IN INTERNATIONAL LAW AND PUBLIC POLICY?

Before engaging in a comparative analysis between them, it is necessary to consider some of the concepts under evaluation separately. Commencing with occupation, this term is used in law to denote territorial control by a state or group of states over territory the title to which is not vested in the state or states concerned; in law, claiming or altering this title through the occupation is legally prohibited.\(^7\) Many instances of occupation...
Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Convention Relative to the Protection of Civilian Persons in Time of War arts. 2, 27-34, 47-78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; OSCAR M. UHLER ET AL., COMMENTARY—GENEVA CONVENTION IV: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1958) (See, in particular, commentary to Article 2 (2), 21-2) [hereinafter COMMENTARY ON THE FOURTH GENEVA CONVENTION]; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004); Sylvain Vite, L’applicabilité du droit international de l’occupation militaire aux activités des organisations internationales, No. 853 INT’L REV. RED CROSS 9 (2004) (Fr.); HANS-PETER GASSE, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 240-79 and sources cited therein (Dieter Fleck ed., 1995); GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW ch. 25 (1995); THE OCCUPATION OF JUSTICE, supra note 1; Arnold Wilson, The Laws of War in Occupied Territory, 18 TRANSACTIONS OF THE GROTIAN SOCIETY 17 (1932); Gerson, Trustee Occupant, supra note 1; Roberts, Transformative Military Occupation, supra note 1; David J. Scheffer, Beyond Occupation Law, 97 AM. J. INT’L L. 842, (2003); Bhuta, supra note 1; Steven R. Ratner, Foreign Occupation and International Territorial Administration: The Challenges of Convergence, 16 EUR. J. INT’L L. 695, 696 (2005); Daniel Thurer, Speech at 6th Bruges Colloquium: Current Challenges to the Law of Occupation (Oct. 20-21, 2005), available at http://www.icrc.org; BENVENISTI, supra note 1. Under Article 42 of the Hague Regulations 1907, “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Article 43 of the Hague Regulations 1907 refers to “"the authority of the legitimate power having in fact passed into the hands of the occupant.” According to Roberts, What is a Military Occupation?, supra at 251-52, the test in Article 42 “consists of direct control” by the “armed forces” of the occupying state. This test has an “implicit assumption that an occupant exercises authority directly through its armed forces, rather than indirectly through local agents.” Id. This implicit assumption “is also evident” in Article 43, and “also seems to be taken for granted” in Articles 48-49, 51-53 and 55. Id. Roberts concludes that “at an open and identifiable command structure is thus a central feature of the Hague definition of military occupation.” Id. On the Hague test for applicability, see also Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber Judgment, ¶ 217 (Mar. 31, 2003) [hereinafter Naletilic, Trial Chamber Judgment]. Common Article 2 to the Geneva Conventions of 1949 makes the conventions applicable to “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” See Geneva Convention I, supra at art. 2; Geneva Convention II, supra, at art. 2; Geneva Convention III, supra, at art. 2; Geneva Convention IV supra, at art. 2. More generally, see Geneva Convention IV supra, at arts. 27-34, 47-78. On the test in occupation law generally, Roberts states that “at the heart of treaty provisions, court decisions and legal writings about occupations is the image of the armed forces of a state exercising some kind of domination or authority over inhabited territory outside the accepted international frontiers of their State and its dependencies.” Roberts, What is a Military Occupation?, supra at 300. BENVENISTI, supra note 1, at 4, defines occupation as “effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of
involve the conduct of administration. As a matter of law, administration is treated separately from the mere exercise of control, in that the fact of the exercise of control triggers substantive obligations that presuppose the conduct of administration.  

Many occupations result from military conflict. As a matter of law, the Hague formulation of 1907 (replicating the formulation of
1899) seems to presuppose a belligerent context as part of the trigger for applicability, whereas the Geneva formulation of 1949 does not. Commentators now prefer to use the generic term “occupation” to cover both belligerent and non-belligerent occupations, even if in some respects the applicable legal regime may differ between each. In the words of Eyal Benvenisti:

The law of occupation developed as part of the law of war. Initially, occupation was viewed as a possible by-product of military actions during war, and therefore it was referred to in legal literature as “belligerent occupation.” But the history of the twentieth century has shown that occupation is not necessarily the outcome of actual fighting: it could be the result of a threat to use force that prompted the threatened government to concede effective control over its territory to a foreign power; occupation could be established through an armistice agreement between the enemies; and it could also be the product of a peace agreement. Moreover, because of many occupants’ reluctance to admit the existence of a state of “war”

9. Article 42 of the Hague Regulations 1907 states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.” Hague Regulations 1907, supra note 6, at art. 42. See also, in identical terms, Hague Regulations 1899, supra note 6, at art. 42. Adam Roberts states that this provision “appears to be based on an assumption that a military occupation occurs in the context of a war.” Roberts, What is a Military Occupation?, supra note 7, at 251. See also U.K. MINISTRY OF DEFENCE, supra note 7, at 274, ch. 11, ¶¶ 11.1.1, 11.2. Common Article 2 to the Geneva Conventions (on scope of application) provides:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Geneva Conventions I-IV, supra note 7, at art. 2, ¶¶ 1-2. The Commentary on the second paragraph by the International Committee of the Red Cross states that:

[t]he wording adopted was based on the experience of the Second World War, which saw territories occupied without hostilities, the Government of the occupied country considering that armed resistance was useless. In such cases the interests of protected persons are, of course, just as deserving of protection as when the occupation is carried out by force.

...[the paragraph] does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances.

COMMENTARY ON THE FOURTH GENEVA CONVENTION supra note 7 at 59-60.
or of an international armed conflict, or their failure to acknowledge the true nature of their activities on foreign soil, the utility of retaining the adjectives "belligerent" or "wartime" has become rather limited. Today the more inclusive term, "occupations," is generally used. The emphasis is thus put not on the course through which the territory came under the foreign state's control, whether through actual fighting or otherwise, but rather on the phenomenon of occupation. 10

III. WHAT IS TRUSTEESHIP IN INTERNATIONAL LAW AND PUBLIC POLICY?

A. General Concept

The concept of trusteeship in international law and public policy seeks to explain the basis on which foreign rule should operate and, potentially, the basis on which it might be brought to an end. 11 The introduction of international trusteeship can be

10. BENVENISTI, supra note 1, at 3-4 (citations omitted).
understood as a response to two distinct conceptions of the pre-existing governance structure in the territory. In the first place, covering colonial trusteeship as well as state-conducted foreign territorial administration under the Mandate and Trusteeship systems, the racialized concept of a "standard of civilization" was deployed to determine that certain peoples in the world were "uncivilized", lacking organized societies, a position reflected and constituted in the notion that their "sovereignty" was either completely lacking, or at least of an inferior character when compared to that of "civilized" peoples. In the second place, also covering certain forms of colonial trusteeship, foreign state-conducted territorial administration under the Mandate and Trusteeship systems, occupation and international territorial administration, foreign rule has been introduced after conflict, often in circumstances where governance in the territory was degraded in some way by the conflict, for example, through the collapse of a defeated government and the destruction of infrastructure.

Understanding the exercise of administrative prerogatives over territory in these two circumstances as "trusteeship" conceptualizes the relationship between the foreign actor and the territory and its people in a particular manner: the trustee/guardian entity controls the beneficiary/ward territory,
acting on behalf of the latter entity – the "sacred trust of civilization" or the "civilizing mission."  

**B. Colonial Trusteeship**

Trusteeship became associated with some forms of post-Renaissance European colonialism, as illustrated in Edmund Burke's influential recitation of the concept in relation to British rule in India in 1783:

[A]ll political power which is set over men and . . . all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion, and every description of commercial privilege, none of which can be original self-derived rights, or grants for mere private benefit of the holders, then such rights or privileges, or whatever you choose to call them, are all, in the strictest sense, a trust.  

14. *Id.*

15. Burke, *supra* note 11, at 411 (emphasis in original). In its 1923 parliamentary White Paper on Kenya, the British Government stated that they [sic] "regard themselves as exercising a trust on behalf of the African population." GR. BRIT. COLONIAL OFFICE, *supra* note 11, at 10, *quoted in Bain*, *supra* note 11, at 62. On this statement see, e.g., RONALD HYAM, *BRITAIN'S IMPERIAL CENTURY, 1815–1914* 265 (2002); SIMPSON, *supra* note 11, at 291. So for Brian Simpson, in the case of British colonial ideology, "the basic justifying conception, derived from the common law tradition, was trusteeship; colonial peoples were the beneficiaries, the colonial power the trustee." *Id.* The increased significance of trusteeship ideas to colonialism over time is reflected in the comment by James Hales that "despite the diversity of colonial aims in the nineteenth century, it is clear that since the institution of the Mandate System, the governing principle behind all colonial administration is that of trusteeship." JAMES C. HALES, *The Reform and Extension of the Mandate System*, 26 TRANSACTIONS OF THE GRØTIUS SOCIETY 153, 155 (1940) [hereinafter Hales, *Reform and Extension*]. One of the definitions of "trusteeship" in the Oxford English Dictionary is "[t]he function of a colonial power or other dominant people as protectors of a subject people." OXFORD ENGLISH DICTIONARY 626 (2d ed. 1989), available at http://www.oed.com [hereinafter OXFORD ENGLISH DICTIONARY] (search for "trusteeship"). On the association of trusteeship with colonialism generally, see all sources cited *supra* note 11. This association was taken up by the international lawyers of the time, as reflected in the following statement by JOSEPH HORNUNG in 1885: "[w]e accept the hegemony and trusteeship of the strong but only in the interests of the weak and in view of their full future emancipation." HORNUNG, *supra* note 11, at 559. On the relationship between trusteeship and international law generally, see, e.g., the discussion in ANGHIE, *IMPERIALISM, supra* note 11, ch. 2; KOSKENIEMI, *supra* note 11, ch. 2. As for the notion reflected in the quote from Edmund Burke that colonial trusteeship denotes the colonial power acting on behalf of the colonial peoples, this of course references the general idea of a legal trust whereby the trustee acts on behalf of the beneficiary, not on its own behalf.
A concept of trust was implicit in Article VI of Chapter I of the General Act of the Berlin Conference of 1884–85, under which the colonial powers in Africa were bound to “watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being.”

In the United Nations Charter, the Declaration Regarding Non-Self-Governing Territories (Chapter XI) states:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.

The *Oxford English Dictionary* defines “trust” in the law of property as “[t]he confidence reposed in a person in whom the legal ownership of property is vested to hold or use for the benefit of another.” *Oxford English Dictionary* 624 (2d ed. 1989) (emphasis added), available at http://www.oed.com (search for “trust”). Applying this to international trusteeship, “ownership” is best understood in terms of the right to administer the territory, as opposed to the enjoyment of territorial title (although title may sometimes subsist). On the idea that international trusteeship denotes selfless rule, James Hales states that “in perfect trusteeship, that the guardian of colonial peoples... cannot seek any advantage for himself.” Hales, *Reform and Extension*, supra at 176-77. See, however, the idea of the “dual mandate”, discussed in *Wilde, International Territorial Administration*, Ch. 8, text accompanying n. 139 et seq. Edmund Burke is popularly regarded as the original theorist of colonial trusteeship, but the concept is evident in the ideas of Francisco de Vitoria and Bartolomé de Las Casas in relation to Spanish colonialism in the sixteenth century. See *De Vitoria*, supra note 11, at 231-92. For commentary, see Anghie, *Francisco de Vitoria*, supra note 11; ANGHIE, IMPERIALISM, supra note 11, Ch. 1; BAIN, supra note 11, 15 et seq.; CHOWDHURI, supra note 11, at 20-24.


17. U.N. Charter art. 73. For commentary, see Ulrich Fastenrath, *Article 73, in 2 The Charter of the United Nations: A Commentary* 1089-93 (Bruno Simma et al. eds., 2d ed. 2002); H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 285 (Kraus Reprint Co. 1972) (1948) [hereinafter HALL, MANDATES] (“The Declaration fully recognizes national trusteeship in dependent areas. It defines the principles upon which
As the language of these quotes suggests, the concept of trust was understood by its proponents as a way of placing colonial rule on an ethical, humanitarian footing. The move to humanize colonial rule arose in part from concerns related to that which 'trusteeship' administration was called upon to replace: earlier forms of state colonialism and/or control by corporate entities like trading companies understood in terms of neglect, exploitation, profit, and general irresponsibility.

C. Mandate and Trusteeship Arrangements

Trusteeship was formally adopted as the basis for the Mandate and Trusteeship systems after the two world wars, conceived in relation to the detached colonies of the defeated powers. The Trusteeship system also covered former Mandated national trusteeship should operate, thus giving international recognition to the long-established national principle of the 'sacred trust'.

18. See, e.g., BAIN, supra note 11, passim, especially at 1, 27-53; HALL, MANDATES, supra note 17, at 98-99, and sources cited therein. This in turn reflected one of the reasons for the idea of the standard of civilization as explained by Gerrit Gong: "Europe's need to explain and justify its overlordship of non-European countries in other than merely military terms." GONG, supra note 11, at 42.

19. Indeed, in the case of British colonialism, ideas of trusteeship originated in attempts to regulate the activities of the British East India Company, the perceived failure of which leading to calls for rule by the Crown and the eventual dissolution of the company. See generally the discussion in ANGHIE, IMPERIALISM, supra note 11, at 69, and sources cited therein; BAIN, supra note 11, ch. 2. Antony Anghie reports that "[b]y the end of the nineteenth century ... [t]he direct involvement of European States in the whole process of governing resulted in a shift in the ideology justifying Empire from the vulgar language of profit to that of order, proper governance and humanitarianism." Anghie, Finding the Peripheries, supra note 11, at 37. In 1945, the international lawyer Philip Marshall Brown stated that: "[a]rbitrary rule and selfish exploitation has gradually given way to the recognition of the right of such [colonial] peoples to attain self-government and enjoy their own material resources. The present war has given a great impetus to the acceptance of the principle that colonial administration must be considered as a trusteeship in behalf of the subject peoples." Philip M. Brown, Imperialism, 39 AM. J. INT'L L. 84 (1945). On the notion that trusteeship administration would replace control by "private companies that pursue no other objective than immediate personal enrichment" (CHARLES SALOMON, L'OCCUPATION DES TERRITOIRES SANS MAÎTRE 186 (1889)), see the discussion in KOSKENNIEMI, supra note 11, at 144. On the general idea of the civilizing mission as a shift towards a humanitarian ethic for colonialism, see DAVID K. FIELDHOUSE, COLONIALISM 1870-1945: AN INTRODUCTION 173 (1981); KOSKENNIEMI, supra note 11, at 129-30, 151.

20. On the Mandates system generally, including the system of oversight exercised by the League Council and Mandates Commission under Article 22 of the League Covenant, see SYDNEY OLIVIER, THE LEAGUE OF NATIONS AND PRIMITIVE PEOPLES (1918); FREDA WHITE, MANDATES (1926); AARON M. MARGALITH, THE INTERNATIONAL MANDATES (1930); WRIGHT, supra note 11; LEAGUE OF NATIONS, THE MANDATES
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territories, and was open to those territories “voluntarily placed under the system by States responsible for their administration,” but no placements in the latter category were made.\textsuperscript{21} The twin notions of incapacity for self-administration and foreign state administration on a trusteeship basis were the hallmarks of both systems. According to Article 22 of the Covenant, the people of Mandated territories were deemed “not yet able to stand by themselves” and the administration of Mandated territories was a “sacred trust of civilization.”\textsuperscript{22} In the UN Charter, the concept of...
trust is reflected in the name given to the arrangements, and the designation of incapacity made by implication in the provision for trusteeship itself and the objectives for trusteeship administration, such as the promotion of development. Thus, the imperial concept of colonial trusteeship was refashioned as the explicit basis for a set of modified colonial arrangements.

**D. Occupation as Trusteeship**

With respect to the relationship between occupation and trusteeship, (Sir) Arnold Wilson stated in 1932:

"[E]nemy territories in the occupation of the armed forces of another country constitute (in the language of Art. 22 of the League of Nations Covenant) a sacred trust, which must be administered as a whole in the interests of both the inhabitants and of the legitimate sovereign or the duly constituted successor in title."  

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*International Trusteeship,* 31 J. COMMONWEALTH & COMP. POL. 96, 99 (1993). In its definition of “trusteeship,” the *Oxford English Dictionary* covers colonial trusteeship and the UN Trusteeship arrangements, but not the Mandate arrangements. *OXFORD ENGLISH DICTIONARY,* supra note 15 (See definitions cited supra note 15, infra note 23). In one of the examples given of the use of the word to refer to UN Trusteeship, however, the previous status of the UK Trust Territory of the Cameroons as a British Mandate is mentioned. *Id.* (See definition cited infra note 23).

23. One of the definitions of ‘trusteeship’ in the *OXFORD ENGLISH DICTIONARY,* supra note 15, is “[t]he administration of a territory by a nation acting on behalf of the United Nations Organization.”

24. On the common origins and bases for both systems, see, e.g., *CHOWDHURI,* supra note 11, *passim,* and especially 8-12 and ch. III; *OPPENHEIM'S INTERNATIONAL LAW,* supra note 20, § 89; *HARRIS,* supra note 21, at 130. The notion that Mandated territories were a class of colonies is illustrated, for example, in the sub-title of James Hales' study of the Mandate arrangements, ‘A Study in International Colonial Supervision’. See Hales, *Reform and Extension,* supra note 15.

25. *WILSON,* supra note 7, at 38. Gerhard von Glahn defines occupation as “a temporary right of administration on a sort of trusteeship basis.” *VON GLAHN,* supra note 7, at 668. Adam Roberts states that “the idea of ‘trusteeship’ is implicit in all occupation law... all occupants are in some vague and general sense trustees.” Roberts, *What is Military Occupation,* supra note 7, at 295 (citing *WILSON,* supra note 7; *VON GLAHN,* supra note 7 (the same quote contained in an earlier edition)). For Roberts, the law of occupation in both the Hague Regulations and the Geneva Conventions “can be interpreted as putting the occupant in a quasi-trustee role.” *Id.* See also the discussion by Perritt, who describes the occupations of post-Second World War Germany and Japan, and the CPA occupation of Iraq, as instances of the exercise of trust. *Henry H. Perritt, Jr., Structures and Standards for Political Trusteeship,* 8 UCLA J. INT'L L. & FOREIGN AFF. 385, 410-16, 422 (2003) (general discussion of trusteeship and occupation); *id.* at 393-95 (on Germany); *id.* at 395-96 (on Japan); *id.* at 407-10 (on Iraq). In 1973, Allan Gerson proposed a concept of “trustee occupation” to be applied to Israel’s presence in the Palestinian Territories. The idea was that this would enable the situation under evaluation
Gerhard von Glahn considers occupation to operate on a trusteeship basis denoting a “temporary right of administration” operating “until the occupation ceases.” Eyal Benvenisti states that the “occupant’s status is conceived to be that of a trustee.” As with ideas of colonial trusteeship, those who advocate understanding occupation as trusteeship explain the concept as a reflection of an underlying objective to humanize the basis for and the conduct of occupations. Occupation as trusteeship reflects the policy objective that, as mentioned earlier, occupying powers do not enjoy sovereignty over the territories concerned, and are to be prevented from claiming such sovereignty through a prohibition to this effect in occupation law. The objective is promoted by conceiving the relationship between the occupant and the occupied territory as one of trusteeship; the notion of acting on behalf of the beneficiary obliges the occupier to protect, not alter (or claim for itself) the sovereignty of the occupant. Gerhard von Glahn conceives occupation on a trusteeship basis on the grounds that “the legitimate government of an occupied territory retains its sovereignty,” which is only “suspended in the area for the duration of the belligerent occupation.” Elaborating on this theme, Eyal Benvenisti states:

The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid
transfer of sovereignty. From the principle of inalienable sovereignty over a territory spring[s] the constraints that international law imposes upon the occupant. The power exercising effective control within another sovereign's territory has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign. Thus the occupant's status is conceived to be that of a trustee.31

The central "humanizing" element of the occupation law conception of trusteeship, then, is the objective of preventing occupations from enabling occupiers from obtaining title through force, echoing the reason why rule over the Mandated and Trust territories was also conceived in this way. More broadly, conceiving occupation as "trust" is an attempt to rein in the impulse of occupying states to use the occupation to pursue self-serving objectives.32 The "humanitarian" norms of occupation law, concerned with protecting individuals and maintaining order, can similarly be understood as a means of humanizing the conduct of occupations, seeking to rule out, for example, abusive practices such as sexual assault and rape, retributonal attacks on civilians, pillage, and the failure to restore order historically associated with occupations.33 The humanitarian explanation for the norms of occupation law is further reinforced by the instrumental approach of those who seek to define the factual test of "occupation," which, if met, triggers substantive obligations, in terms of activity that they consider to require regulation by the obligation sthat would be so triggered.34

31. BENVENISTI, supra note 7, at 5-6, footnote omitted (on the contents of the omitted footnote, see above, note 27).
32. Discussing the rationale for occupation law, Eyal Benvenisti states that "... in the heart of all occupations exists a potential—if not an inherent—conflict of interest between occupant and occupied;" BENVENISTI, supra note 7, at 4.
33. On these norms, see the instruments and sources cited above note 7.
34. The factual definition of occupation in law is discussed above. See supra note 7. Discussing "specific cases differing in some respect from the most classic forms of occupation", Roberts states that there are nonetheless "some markers which may help to indicate the existence of an occupation, or may suggest the need for the law on occupations to be applied." Roberts, What is Military Occupation?, supra note 7, at 300. In setting out these markers without explaining whether they are indicative in relation to occupation as fact or occupation as the need for regulation—or both—the issues of how occupation is defined factually so as to trigger occupation law, and what circumstances require the norms of occupation law as a matter of principle, are elided. All the factors set out can be understood to implicate the latter issue; for Roberts:
E. The Twin Objectives of Trusteeship: Care and Improvement

The conception of occupation as trusteeship aimed at safeguarding the status quo is at odds with how many occupations have been conducted and, more broadly, how trusteeship as it developed in the context of colonialism sometimes operated, where transformation of the political and economic system of the territories concerned was evident. Generally, in many instances of trusteeship as defined here, the role of the trustee was understood to have a two-part character: first, to care for the ward; and second, to exercise tutelage of the ward to ensure that it can mature and eventually care for itself. In the context of colonialism, the idea of the “civilizing mission” was to govern in such a way as to address the perceived incapacity for self-government (or at least governance that met the standard of civilization) and also to build up local capacities, sometimes with the goal of making self-administration, meeting the standard, eventually possible.

The general contours of this idea are evident in the earlier quotation from the General Act of the Berlin Conference, with its obligation to “watch over” and “care for . . . improvement.” In what appears to be a similarly instrumental approach, Steven Ratner adopts a broad definition of occupation, as “occupation in a functional sense to describe control of territory by outside entities,” Ratner, supra note 7, at 697.

35. See generally sources cited supra note 11. For Bill Ashcroft, Gareth Griffiths and Helen Tiffin, through the civilizing mission, “colonialism could be (re)presented as a virtuous and necessary civilizing task involving education and paternalistic nurture.” ASHCROFT ET. AL., supra note 11, at 47. Anthony Anghie describes the civilizing mission as the idea of “extending Empire for the higher purpose of educating and rescuing the barbarian.” ANGHIE, IMPERIALISM, supra note 11, at 96. See also ibid., 96 et seq.; KOSKENNIEMI, supra note 11, at 145, 147, 168.

36. Berlin General Act, supra note 16, at ch. I, art. VI. In its 1923 parliamentary White Paper on colonial rule in Kenya, the British Government stated that the ‘object’ of
the same way, Article 22 of the League Covenant articulates the "sacred trust of civilization" forming the basis for the Mandate arrangements in terms of the "well-being and development" of the people in Mandated territories. The provisions of the UN Charter concerning non-self-governing territories and Trust territories are similarly concerned with ideas of both care and advancement.

F. Common Concept of Trusteeship

To summarize, the idea of humanizing the conduct of occupation that is the underlying idea of occupation law can be viewed as a species of the broader normative enterprise of humanizing the conduct of foreign rule through the concept of trusteeship. So in one sense the ideas underlying the Hague conception of occupation built on ideas in the Berlin General Act, and would later find expression in the Covenant and the Charter.

IV. HOW DO OCCUPATION AND TRUSTEESHIP RELATE TO INTERNATIONAL TERRITORIAL ADMINISTRATION?

A. Trusteeship Characteristics

Where, then, does international territorial administration fit into the general concept of trusteeship, and how does it relate to occupation? ITA has occurred since the creation of the League of Nations. Although the word trusteeship is not officially used in relation to ITA, the activity it involves clearly manifests the central elements of a trust relationship: a "ward" people placed under the care of an international organization that performs administrative functions understood as not being for its own gain but, rather, in the ward's own interest, with the dual role of remedying perceived incapacities for governance and transforming the situation so that these incapacities no longer exist and the local population is able to run its own affairs. In East Timor, for example, the United

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37. On this, see further the dictum of the International Court of Justice in International Status of South West Africa, 1950 I.C.J. at 128, 131.
38. See U.N. Charter art. 73 (for Non-Self-Governing Territories); id. art. 76 (for Trusteeship Territories).
39. On ITA generally, see WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2. On its history in particular, see id., ch. 2.
40. See id. passim, and in particular, ch. 6, 343-63 and sources cited therein.
Trusteeship and Self-Determination

Nations Transitional Administration in East Timor (UNTAET) was introduced on the basis that, in the short term, local people were deemed incapable of self-administration, the objective being to both provide governance and build up local capacities. Despite this, many commentators resist associating ITA with state-conducted trusteeship and occupation.

B. Michael Bothe and Thilo Marauhn's “Security Council Trusteeship Administration” Concept

The leading academic opponents of comparing ITA with state-conducted trusteeship and occupation are Michael Bothe and Thilo Marauhn. Bothe and Marauhn conceptualize UNMIK and UNTAET as “Security Council trusteeship administration.” Although they use the word “trusteeship,” they resist any comparison between their concept and state-conducted trusteeship. In the first place, they state:

The concepts of occupation, protectorate and trusteeship as such are ideologically still linked to particular political and historical situations, related to traditional armed conflict or to colonialism. Simply referring to or relying upon these concepts may give rise to fears that the UN provides a forum for a new form of “benevolent colonialism.”

What, however if one were not simply to refer to or rely upon such concepts, but, rather, consider their potential significance in detail? Should this not be done? And even if it should not, and a simple reliance on such concepts led to the fears outlined, would the fears necessarily be wrong as opposed to being unproven? The passage continues:

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41. See id. at 2-5, 2 n.2, 6 n.16, 9-11, 16-17, 20, 26, 32, 34 n.95, 39, 42 n.116, 43, 47, 55, 60, 75, 82-83, 93, 95, 100, 172, 183-89, 198, 206-07, 213, 222, 223 n.130, 225-31, 234, 251 n.45, 252, 255, 257, 259-61, 265, 272-74, 275-77, 287, 290, 292 n.12, 294-95, 298 n.31, 344-48, 349 n.240, 351, 359-62, 376 n.341, 379-80, 382-84, 405-07, 413, 419-20, 424-26, 427 n.553, 430, 439, 433, 441 n.11, 443, 448, 450, 452, sources cited therein, and the works listed id., in the List of Sources, § 5.1.3 and the relevant parts of §5.1.1.


43. Id. at 218, footnote omitted.
In order to avoid such misconceptions it is necessary to take a closer look at the context of the UN Security Council mandated interim administrations in Kosovo and East Timor...

Bothe and Marauhn move to consider the two missions within the taxonomy of peace operations exclusively. They conclude that if one thinks about the missions “from the perspective of peacekeeping and peace-building,” then “the concept, legality and limitations of such operations can be more easily discussed without giving rise to concerns about neo-colonialism...”

So the authors identify the potential relevance of the colonial analogy, but pull back from it immediately, choosing to try to find a way of thinking about the missions other than through the colonial comparator, via the “context” of the missions and the “perspective” of peace operations. Why the classification of the missions as peace operations somehow takes them out of the arena of any meaningful comparisons with colonialism is unexplained. More fundamentally, the authors seem to take as their premise a need not to “give rise to concerns about neo-colonialism.” But one cannot avoid such concerns by failing to face up to them. Such an approach is as limited as the approach they highlight of “simply referring to or relying upon” colonial comparisons; it may be right, it may be wrong, but its advocates have not provided any substantive arguments to explain why they have adopted it.

Bothe’s and Marauhn’s attempt to situate UNMIK and UNTAET within a broader policy framework avoids the colonial comparator; the “trusteeship” in their notion of “Security Council trusteeship administration” is based on an analogy from domestic law concepts of trust in the area of property law, from which they assert that “the establishment of a foreign presence in a territory... may be termed a trusteeship administration.”

Addressing UNMIK and UNTAET, they conclude:

The concept of trusteeship seems applicable because such an administration is exercised in the interest or on behalf of another corporate body, the “old” or “new” sovereign and/or the population of the territory. This other corporate body, in the technical sense, can be considered to be the “cestui que trust” or the “trustor” [beneficiary]. While there may be cases

44. Id.
45. Id. at 219.
46. Id. On the significance of the domestic law analogy, see also the discussion above, in note 15.
in which it is difficult to identify the trustor and while there may even be cases involving several trustors, this does not affect the underlying concept as such.7

Bearing in mind these observations in light of the earlier review of international trusteeship herein, one might conclude that, in acting in the way described by the authors, UNMIK and UNTAET are nothing new and fit within the general idea of international trusteeship as articulated, for example, by Edmund Burke. However, Bothe and Marauhn take a different approach. They argue that the two missions are merely “first steps” towards “Security Council mandated trusteeship administration.”48 UNMIK and UNTAET constitute “modern trusteeship” and “demonstrate the need to re-conceptualize the trust in public international law.”49 The authors acknowledge the existence of earlier ITA projects, but insist that:

None of these cases have, however, been extensively discussed as an example for a modern trust under public international law. Obviously, the simple fact that an international organization assumes governmental powers does not seem to be the decisive criterion for distinguishing such a modern trust [i.e., UNMIK and UNTAET] from other forms of second-generation peacekeeping.50

For Bothe and Marauhn, then, the mere fact that the potential significance of trusteeship to these earlier projects has not been “extensively discussed” means that it cannot exist. The authors do not explain why this particular conclusion is chosen over, say, the explanation that commentators missed the significance of trusteeship. As with their earlier denial of the relevance of colonialism by seeking to avoid an exploration of the potential for such relevance, here the authors find evidence for the idea that UNMIK and UNTAET as “trusteeships” are entirely “new” simply from the absence of much discussion about the relevance of trusteeship to the earlier ITA projects.

Bothe and Marauhn do offer substantive reasons for newness: the projects are “unique” within UN territorial administration missions because they have long-term objectives, they are acting

47. Bothe & Marauhn, supra note 42, at 220 (footnote omitted).
48. Id. at 222.
49. Id.
50. Id. at 223. For the discussion of the earlier projects, see id. at 220-21.
“fully as interim governments” (meaning “their tasks go far beyond the scope of past UN peacekeeping operations”), they have plenary competence, and they cover territories which “form part of another State and whose future status is not quite certain.”

Taking all this together, “the characteristic criterion” distinguishing UNMIK and UNTAET “from other, more traditional forms of peacekeeping, is that the UN in Kosovo and East Timor has replaced the government of the State to which the territory in question belongs in toto.”

One might dispute this picture of UNMIK and UNTAET as exaggerated—what is to be said of the United Nations Temporary Executive Authority in West Irian (UNTEA) in the 1960s and the United Nations Transitional Administration in Eastern Slavonia, Baranja, and Western Sirmium (UNTAES) in the 1990s? But, assuming that, in some ways, the two missions can be considered unique, what is served by treating them entirely separately from other ITA missions, bearing in mind what is lost in terms of being able to appreciate commonalities? As the earlier exploration of state-conducted forms of international trusteeship suggests, a situation can be regarded as one of trust where some sort of control by an outside actor is exercised ostensibly on behalf of the local population, even if it does not manifest the scale and ambition of the Kosovo and East Timor projects.

C. Do Trusteeship and Occupation Presuppose Imposition?

One other feature of the overall trusteeship concept that might challenge the notion of a common policy institution is the question of whether or not it presupposes that the arrangements were considered to be imposed on the territories concerned. One of the leading scholars of international trusteeship from the discipline of international relations, William Bain, sees imposition

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51. Id. at 224. Kosovo, during the UNMIK period, did indeed form part of a state (the former Federal Republic of Yugoslavia). See Wilde, International Territorial Administration, supra note 2, ch. 4, sec. 4.5.3, and sources cited therein. East Timor, however, did not form part of any state in the sense that another state enjoyed sovereignty, meaning title, over it. See Id., ch. 5, section 5.7 and sources cited therein.

52. Bothe & Marauhn, supra note 42, at 224.

53. On this, see further the discussion in Wilde, International Territorial Administration, supra note 2, at ch. 1, section 1.2.1. On UNTEA, see ibid., 4, 13, 43, 50–1, 50–1 n. 18, 60, 94, 153, 167–70, 188, 193, 195–6, 199, 205 n. 57, 233, 242, 245, 266 n. 98, 274, 278, 345, 380, 403–5, 437, 440; on UNTAES see ibid., 56, 58, 58 n. 37, 142 n. 202, 243.
as crucial to the general concept.\textsuperscript{34} This is rooted, however, in Bain's commitment to state sovereignty and sovereign equality; trusteeship itself, as articulated by Edmund Burke for example, does not denote imposition as an essential component.\textsuperscript{35} Nevertheless, does occupation under the international law of occupation presuppose imposition, potentially placing into question the meaningfulness of any collective treatment of imposed and consensual arrangements of foreign territorial control?

Given that imposed occupations are generally the result of military force, the debate here intersects with the general issue discussed earlier regarding whether the definition of occupation only covers those situations that have their origins in warfare.\textsuperscript{36} Certain scholars, including Eyal Benvenisti, consider the absence of consent by the host sovereign entity to be a key element of the definition of occupation.\textsuperscript{37} Others, including Adam Roberts, consider both consensual and non-consensual occupations in their treatment of the topic.\textsuperscript{38} If occupation is understood to be limited to "imposed" arrangements, then it cannot be understood to map across the concept of trusteeship generally.\textsuperscript{39}

Steven Ratner argues that occupation should be viewed as covering both consensual and imposed arrangements.\textsuperscript{40} As mentioned above, Adam Roberts appears to endorse this view. Whereas he speculates that the tendency of characterizations of many of the peace operations since the end of the Cold War, including certain ITA missions, not to use the term "occupation" might be explained in part by the degree of consent that was

\textsuperscript{34} BAIN, supra note 11, at 149-54. See also the discussion in WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2, at 346-53.

\textsuperscript{35} See the discussion in WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2, at 346-53.

\textsuperscript{36} See supra note 8 and accompanying text.

\textsuperscript{37} BENVENISTI, supra note 1, at 4 (Benvenisti's definition includes the requirement that the control is exercised "without the volition of the sovereign of the territory"). See also Vité, supra note 7, at 14; U.K. MINISTRY OF DEFENCE, supra note 7, at 274-75.

\textsuperscript{38} See generally Roberts, What is a Military Occupation?, supra note 7, passim, and in particular, the view expressed therein at 249; Roberts, Transformative Military Occupation, supra note 1, at 603 (the existence of formal consent does not render impossible the applicability of the law of occupation).

\textsuperscript{39} So, for example, in setting out a definition of occupation that appears to exclude arrangements involving consent, the UK Ministry of Defence invokes certain ITA projects as examples of situations that would be excluded. U.K. MINISTRY OF DEFENCE, supra note 7, at 274-75.

\textsuperscript{40} Ratner, supra note 7, at 697-98.
forthcoming in relation to them, he nonetheless affirms the applicability of occupation law to consensual arrangements. For present purposes, this broader definition of occupation speaks to the essential commonality concerning the structure of external control that exists across occupation and all the other forms of international trusteeship.

D. Does Occupation Only Cover State-Conducted Activity?

Steven Ratner's argument that the category of "occupation" should be broad enough to cover both imposed and consensual arrangements is made as part of a more general thesis advocating the conceptualization of ITA within the occupation paradigm. One approach to defining "occupation," which might seem to contradict this is the idea that the term only covers activities by states, and not those by international organizations. Clearly, the law of occupation traditionally understood is so limited. Perhaps

61. In a 1984 article, Roberts states that, if missions are operating on the basis of a status of forces agreement with the host state, "they would not be in occupation of the territory as the term has been traditionally used in international law. It is just conceivable, however, that in different circumstances a peacekeeping force could find itself organizing some kind of 'occupation by consent.'" Roberts, What is a Military Occupation?, supra note 7, at 291 (citation omitted). Discussing when such different circumstances might prevail, Roberts covers the scenario of state collapse, and cites ONUC in the Congo (one of the early UN projects involving ITA) as an example. Roberts' consideration of these issues in his later article Transformative Military Occupation (supra note 1), is at 603.

62. Ratner, supra note 7, passim.

63. Id. at 698.

because of this, some commentators have defined occupation itself as being limited to the actions of states.  

In the same way, some commentators seem to understand occupation as always something following armed conflict, perhaps reflecting the traditional Hague-era conception of occupation discussed earlier. From this, it is sometimes suggested that the main commonality between occupation and ITA relates only to those ITA missions that come after conflict. More broadly, for many, the term "occupation" is pejorative, and is therefore resisted as inappropriate for the ITA missions.

65. Roberts' general definition of occupation in a 1984 article is an activity involving "the armed forces of a State exercising some kind of domination or authority over inhabited territory." Roberts, What is Military Occupation?, supra note 7, at 300. But see infra note 69 for comments on peacekeeping. In a later article, Roberts states that the tendency in characterizations of post-Cold War interventions, including the ITA projects, for the occupation label not to be used, might be explained in part because "the foreign presence had a multinational character." Roberts, Transformative Military Occupation, supra note 1, at 603-04. On the potential causal relationship between the restriction of the legal definition and the formulation adopted in more general definitions as far as the state/international organization issue is concerned, see, e.g., Ratner, supra note 7, at 697. For a discussion of the fit between the norms of occupation law and ITA, see the discussion below, text accompanying note 104, et seq.

66. The earlier discussion is located in the text accompanying note 9, et seq.

67. Commentators considering the link between occupation and ITA include Ratner, supra note 7; Roberts, Transformative Military Occupation, supra note 1; BENVENISTI, supra note 1, at xv-xvii; RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION 3-4 (2005); SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATIONS, AND STATE BUILDING 6-7, 11-12, 145 (2004) [hereinafter CHESTERMAN, YOU, THE PEOPLE]; WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2, Ch. 8, §§ 8.2.5, 8.3 and ch. 9, at 440-41. For example, when discussing occupation and ITA, Richard Caplan states that "insofar as the two . . . are initiated and sustained by force, they can . . . be said to exhibit a strong family resemblance." CAPLAN, supra at 3.

68. Such resistance exists in the case of certain state occupations as well. Adam Roberts identifies one "reason for reluctance to use the word 'occupation': the adverse connotations of the word itself. To many, 'occupation' is almost synonymous with aggression and oppression. Thus there has been widespread use of terms with a supposedly better ring: protectorate, fraternal aid, rescue mission, technical incursion, peacekeeping operation, military operation, civil administration, liberation and so on. Sometimes these terms are used in addition to the term 'occupation,' in order to qualify it, to highlight the special features of a situation, and to clarify the purpose of the military action in question. Sometimes, and perhaps more often, these terms are used in total substitution for 'occupation.' Occasionally there may be some merit in not classifying a situation as an occupation: the maintenance of a fiction that a country retains its independence may act as a lever for gradually reasserting independence as a fact." Roberts, What is a Military Occupation?, supra note 7, at 301. Steven Ratner makes this point in relation to ITA missions in particular. See Ratner, supra note 7, at 696-97.
However, if one wishes to foreground, not avoid, normative implications, whether or not they are pejorative, the activity of state-conducted occupation does bear important similarities with ITA; it is more helpful to emphasize the similarities, rather than the differences, between the two.\(^6\) As Steven Ratner states, "[b]oth missions can resemble each other in the eyes of those living in the occupied or administered territory,"\(^70\) and as Richard Caplan states, "many of the challenges between the two may be similar . . . ."\(^71\) Ratner argues:

[T]he disconnect between the ways international law and organizations have conceptualized occupations and territorial administrations and the ways these missions are actually carried out—is no longer tenable. In fact, the two sorts of operations share a great deal, and lines separating them, adopted by international elites and reflected in international law, are disappearing. Although numerous works have examined state occupations or international administrations separately, my claim here is that only an understanding of them together will enable both lawyers and policy-makers to develop optimal doctrine and operating procedures . . . .\(^72\)

So Ratner chooses to define occupation broadly, as "control of territory by outside entities."\(^73\) As the final part of the longer quotation above indicates, the objective is to develop a taxonomy of interventions in order to be able to compare like with like on

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69. For examples of commentators who define occupation to include the actions of international organizations, see, e.g., BENVENISTI, supra note 1; Vité, supra note 7, Ratner, supra note 7, passim. Although, as mentioned, Adam Roberts’ general definition of occupation in 1984 was exclusive to state occupations, his discussion of peacekeeping generally, and the role of ONUC in the Congo in particular, suggests an acknowledgement of the connections between state-conducted occupations and what was the first UN-conducted ITA project:

"[I]f central authority in the host State were to collapse, a peacekeeping force might find itself extending its authority and taking full charge of such matters as public order and safety. The situation in the Congo during the United Nations operation in 1960-4 affords one example illustrating the possibility of a United Nations peacekeeping force finding itself in a role closely analogous to that of an occupant . . . . Congolese political developments made it unclear for a time who was the constitutional government, and there was United Nations intervention in administrative activities and in internal conflict beyond what had originally been envisaged."

Roberts, What is a Military Occupation?, supra note 7, at 291 (footnote omitted).
70. Ratner, supra note 7, at 696.
71. CAPLAN, supra note 67, at 3.
72. Ratner, supra note 7, at 697 (emphasis in original).
73. Id.
two normative/operational issues: the legal framework and the legitimacy of coercion used during such missions.\(^7\) The analysis offered earlier in the present piece suggests that such a taxonomy also has broader utility in emphasizing the commonality that exists in terms of the nature of the activity performed and the policies with which it is associated.

E. Holistic Category of "Trusteeship" Encompassing Colonialism, Occupation and International Territorial Administration

Although considerable resistance exists among commentators and in public discourse generally to drawing parallels between colonialism and occupation, on the one hand, and international territorial administration, on the other, if one focuses simply on the underlying enterprise being engaged in, as opposed to differences ascribed to the normative character of the administering actors involved, the trusteeship concept illuminates a commonality across foreign territorial administration generally. This commonality has been more apparent to expert commentators in the past than it seems to be to observers at present.\(^7\) Writing in 1939, Quincy Wright stated that the League of Nations’ administrative activities in Danzig and the Saar were "analogous" to the Mandate system.\(^6\) Discussing the League administration in the Saar and the Mandate arrangements, H. Duncan Hall asserted in 1948:

> What matters is the substance and not the form. The Saar Territory was under the Saar Governing Commission and not the Permanent Mandates Commission . . . such differences are largely a matter of the internal economy of the League . . . .\(^7\)

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74. See id., passim.
75. On the popular resistance to drawing these comparisons, see the discussion in Wilde, International Territorial Administration, supra note 2, ch. 8, section 8.1.
77. Hall, Mandates, supra note 17, at 11. Indeed, the provisions in the Treaty of Versailles that created the Saar arrangements utilized the trust concept: “Germany renounces in favour of the League of Nations, in the capacity of trustee, the government of the territory.” Treaty of Peace Between the Allied and Associated Powers of Germany
Discussing in 1975 the character of the administrative mandate given to the UN Council for South West Africa/Namibia, Itse Sagay stated:

[The legal status of the United Nations is that of a trustee, rather than a sovereign. Its political relationship with the mandated territory is that between an administrative authority, or a *de jure* government and a territory under its rule. From the point of view of the extent of powers and authority, there is no difference between the position of the United Nations in South West Africa, and a sovereign authority in its own territory. However, fundamental and decisive differences exist with regard to the aims and the goal of the United Nations in the Territory, and its corresponding obligations, and the aims and goal of a sovereign authority in its own territory. In the first place, the United Nations' administration is carried out primarily in the interest and for the benefit of the inhabitants of the Territory; an indispensable element of a trust regime. A sovereign authority in its own territory, on the other hand, rules primarily for its own benefit, or could do so lawfully, while the United Nations cannot. Moreover one of the specific and fundamental obligations of the United Nations is to prepare the mandated territory for immediate independence. In the case of a sovereign authority, the position is the same where a colony is concerned. If, however, the territory concerned is its home territory the question of independence would not even arise.]

In foregrounding the idea that administration is performed by an external actor “primarily in the interest and for the benefits of the inhabitants of the Territory,” Sagay reflects the general way in which this activity has been understood by those involved in it. In describing the activity in question in terms of trusteeship, Sagay’s approach suggests a common link between colonial trusteeship, the Mandate and Trusteeship arrangements, the concept of occupation trusteeship, and ITA. All of these practices can be regarded as species of a common institution, “international trusteeship.” The reasons that give rise to these arrangements, the

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art. 49, June 28, 1919, reprinted in 13 AM. J. INT’L L. SUPP. 151, 167 (1919). For further discussion, see WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2, at 112 n.18.

78. SAGAY, supra note 20, at 268-69. See also id. at 271. On the UN Council for South West Africa and Namibia, see WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2, at 21 n.63, 50-1, 51 n.19, 94, 97, 153, 165 n.48, 170-72, 188, 205-66, 205 n.57, 208, 212-13, 216, 226-27, 233, 245, 249, 344, 360, 364, 377, 379-80.
way the arrangements operate and seek to alter the political and economic regime in the territories concerned, and the extent to which attempts are made to improve local capacities may differ significantly between them, but the central conception of alien actors exercising administrative control ostensibly on behalf of the people of the territories is the same. 79

Many of the general areas of policy promoted in the context of state-conducted trusteeship are reflected in the purposes and policies of ITA. 80 For instance, colonial-era policies of population transfers resonate with the use of ITA to enable migration policy, such as the work of the Office of the High Representative (OHR) in Bosnia and Herzegovina in using property legislation as a way of enabling the transfer of displaced persons to their pre-war homes. 81 Similarly, the colonial model of legislative reform, whereby local laws were altered if they were incompatible with the “standard of civilization,” was adopted by UNMIK in Kosovo and UNTAET in East Timor. The two missions determined from the outset the applicable law in the territories subjected to their administration, accepting that existing law was to be applicable only insofar as it was compatible with the standards of international human rights law; in the case of East Timor, this general test was supplemented with the repeal of certain expressly stipulated laws. 82 Obviously, in some ways ITA does not replicate

79. Eyal Benvenisti states that UNTAET and UNMIK are “trusteeship of the kind the law of occupation is designed to address.” BENVENISTI, supra note 1, at xvi. See also the discussion in Roberts, Transformative Military Occupation, supra note 1.
80. See generally WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 1, at chs. 6–7 (on the purposes and policies associated with ITA); id. §§ 8.3.1-8.3.2 (on the purposes and policies associated with other forms of foreign territorial administration).
83. See ANGHE, IMPERIALISM, supra note 11, at 169 text accompanying n.208.
the colonial paradigm, for example, in not facilitating the direct extraction of human resources (the exploitation of material resources, however, has sometimes been a feature of ITA). In the general mode of operation, however (the use of territorial control to pursue certain policies concerning the nature of governance), there is a clear link, and in many of the substantive policies similar ideas are in play.

To bring together the foregoing analysis on the relationship between occupation, colonial trusteeship, the Mandate and Trusteeship arrangements, and ITA, one might say that there is a general institution in international public policy that can be termed "international trusteeship." This policy institution covers a relationship of administrative control by an international actor or a group of such actors (whether states or international organizations) over a territorial unit. The identity of these territorial units is understood as something 'other' than that of the administering actor or actors, in most cases because of the lack of title. This relationship of administrative control is conceptualized in terms of the administering actor or actors performing the administrative role on behalf of the administered territory.

How should the issue of rights and obligations in the various manifestations of international trusteeship be understood? And what is the significance to this inquiry of considering the various practices holistically as trusteeship? This inquiry is pursued in the following four sections. First, the general questions that need to be resolved in order to determine what law does apply are set out. Second, general issues relating to the question of what law should
apply are considered. Third, this piece addresses what the law should be, considering the specific issue of accountability, and the relevance of the trusteeship concept to this issue. Finally, in the fourth stage the significance of the self-determination entitlement to this general inquiry is reviewed.

V. APPLICABLE LAW—WHAT LAW DOES APPLY?

A. General Issues

Although the nature of the activity across the different manifestations of trusteeship shares a certain elemental commonality, the applicable normative regime is, of course, highly variated. One axis of variety is the different obligations that can operate as between different international legal persons. For example, during the Coalition Provisional Authority (CPA) occupation of Iraq, the United Kingdom was bound under its international obligations not to enable the death penalty in Iraq, but the United States was under no such international obligation. The difference is acute when state-conducted trusteeship is compared with the same activity conducted by international organizations, since these entities are not bound in their own right to international treaties on occupation law or human rights.

Another axis of variety across individual manifestations of trusteeship concerns whether or not the Security Council is


87. On the issue of the application of the laws of war and the law of occupation generally to international organizations, see supra Part IV.D, "Does Occupation Only Cover State-Conducted Activity?"
involved in ostensibly providing additional authority and competence to the administering authorities, an issue with potential relevance to both applicable law and the question of legal responsibility. The legal significance of this authority, when it is forthcoming, in terms of applicable law, implicates a further, broader issue of how the relationship between potentially overlapping regimes of law is understood and mediated. Here, account needs to be given to the special modalities that exist in international law addressing the situation of a multiplicity of applicable legal regimes. Notably, Article 103 of the UN Charter, as far as Security Council-authorized action is concerned; the related idea of other obligations enjoying *jus cogens* or peremptory status; and the *lex specialis* status that international humanitarian law and occupation law have in armed conflict and occupation contexts respectively.


In seeking to interpret the relevant applicable treaties, the standard methodological choice between an originalist and teleological approach has to be made. To give the example of a human rights treaty, the European Convention on Human Rights (ECHR), is one to look only at the original purpose of the Convention on an issue, whatever that might be, as the European Court of Human Rights appeared to in the Banković case concerning the potential applicability of the treaty in the context of the NATO bombing of what was then called the Federal Republic of Yugoslavia in 1999.90 Or, alternatively, must one also take on board the notion of the treaty articulated in the Tyrer case as a “living instrument, which ... must be interpreted in the light of present-day conditions,” a dictum which, although not made in the context of an extraterritorial situation, is regarded as a general principle of Convention interpretation?91

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And what is the relevance of state practice to the enquiry? Again in the Banković case, the European Court of Human Rights cited the general lack of derogations entered by states in relation to certain foreign activities as somehow being indicative of a view taken by them that treaty obligations did not apply extraterritorially to the activities in question. Drawing such a conclusion simply from this evidence is, however, difficult. It may well be that the states concerned did not consider their obligations under the Convention to apply for reasons other than the foreign locus of the acts in question. For instance, in situations of armed conflict, those states could have took the view that the Convention had somehow been overridden by humanitarian law, as the lex specialis applicable in the circumstances. Or, perhaps, officials had simply not considered the issue, especially if the activity in question was short-lived. It might even be speculated that states took the view that the requirement of a declaration of derogation meant something different in the foreign context, with perhaps, when it was forthcoming, the existence of an international mandate for their foreign operations somehow regarded as constituting an implicit activation of the derogation regime without the need for an explicit statement to this effect.

B. Human Rights Law in Particular: Whether and How it Applies Extraterritorially

Considering the extraterritorial application of human rights law in more detail, some of the states that would be subject to the law here because of their engagement in extraterritorial activity make various arguments refuting applicability. For example, a secret memo prepared for the United States Department of Defense in March 2003, reported that the United States has “maintained consistently” that the International Covenant on Civil and Political Rights (ICCPR) “does not apply [to the U.S.] outside the United States or its special maritime and territorial jurisdiction, and ... does not apply to operations of the military during an international armed conflict.”

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Here, then, are two suggestions of non-applicability. Treating
them in reverse order, first is a suggestion concerning subject-
matter: human rights law does not apply in situations of armed
conflict. This contention implies that the laws of war and human
rights law are mutually exclusive in terms of the situations in which
they apply. When one area of law is in play, the other is not. The
laws of war apply only in times of "war" and, in the case of
occupation law, military occupation; human rights law applies only
in times of "peace."

Whereas the first contention is correct, the second is difficult
to sustain given the affirmation of applicability by several
authoritative sources, including the International Court of Justice
(ICJ) in the Nuclear Weapons and Wall Advisory Opinions and the
DRC v. Uganda case. A typical affirmation of the applicability of
human rights law in times of "war" comes from the decision of the
Inter-American Commission of Human Rights in the Coard case
of 1999, which concerned the detention of seventeen individuals by

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94. On the scope of application of the law of occupation, see supra note 7.
95. On the applicability of international human rights law in times of armed conflict,
see the relevant sources, including the ICJ decisions mentioned, cited supra note 89. See
also the provisions, cases and commentary relating to derogations in human rights treaties
cited infra note 122.
U.S. military forces during the 1983 U.S. invasion of Grenada.\textsuperscript{96} The Commission stated that:

[While international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict.\textsuperscript{97}]

Even if, then, human rights law can apply in armed conflict situations, what is to be made of the other supposed contention, that it doesn't apply extraterritorially? The main human rights treaties on civil and political rights do not conceive state responsibility simply in terms of the acts of states parties. Such 'free standing' applicability is the case, for example, in common Article 1 of the Geneva Conventions of 1949, in which contracting parties "undertake to respect and to ensure respect for the present Convention in all circumstances."\textsuperscript{98} Instead, responsibility is conceived in a particular context: the state is obliged to secure the rights contained in the treaty only within its "jurisdiction."\textsuperscript{99} Thus a nexus to the state—termed jurisdiction—has to be established before the state act or omission can give rise to responsibility.

The consistent jurisprudence of the relevant international review mechanisms and the ICJ has been to interpret jurisdiction

\textsuperscript{97} Id. ¶ 39 (citations omitted).
\textsuperscript{98} Geneva Conventions I-IV, supra note 7, at art. 1.
\textsuperscript{99} See, e.g., ICCPR, supra note 95, at art. 2; Optional Protocol to the ICCPR, supra note 95, at art. 1; ECHR, supra note 95, at art. 1; Am. Convention, supra note 95, at art. 1; Convention on the Rights of the Child art. 2, Nov. 1989, 1577 U.N.T.S. 3; United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85, [hereinafter Convention Against Torture]. Some obligations are limited to the state's territory. See, e.g., Protocol No. 4 to the European Convention on Human Rights art. 3, Sept. 16, 1963, Europ. T.S. No 46. Note that the ECHR and its Protocols have separate provisions on applicability to overseas territories. See, e.g., ECHR, supra note 95, at art. 56.
as operating extraterritorially in certain circumstances. A blanket denial of extraterritorial applicability is very difficult to
sustain in the face of this extensive authority. In the jurisprudence and other authoritative interpretations, the key question has not been whether human rights law treaty obligations apply extraterritorially, but, rather, in what circumstances this happens. The term “jurisdiction” has been understood in the extraterritorial context in terms of the existence of a connection between the state and either the territory in which the relevant acts took place—a spatial connection—or the individual affected by them—a personal connection.101 Within these two categories, however, there is

considerable uncertainty due to the sparse nature of case law and a variety of views taken by states and expert commentators. ¹⁰²

Assuming that it has been determined how, if at all, the meaning of human rights law has been mediated through the interplay of this area of law with other applicable legal regimes, it is then necessary to determine what human rights law substantively amounts to in the extraterritorial context. All things being equal, does human rights law require the state to do, or not do, the same things in foreign territory as it does in its own sovereign territory? A relevant factor to consider is the profoundly different political basis for the state administrative presence, where it is acting as a foreign occupier rather than as the sovereign, as highlighted in the quote by Itse Sagay earlier. Should the nature of the control exercised by the state somehow mediate the scope of its obligations? Should it matter that the state is not able to influence what happens in the foreign territory to the same extent as it can in its own territory? How might actions that might be considered justified by the special circumstances of insecurity and conflict that often prevail in the extraterritorial locus, for example security detentions, fit within what is permissible in human rights law?

These and other issues feed into the question of what rights themselves mean in the occupation context, and how derogation provisions might be understood, including the requirement in the trigger for such provisions that an emergency “threatens the life of the nation.” In the particular context of the ECHR, might the “margin of appreciation,” whereby deference is given to a state’s own determination of the permissibility of restricting rights, have special relevance in the extraterritorial context? ¹⁰³

¹⁰². For case law and commentary, see the sources listed supra notes 99, 101.

VI. APPLICABLE LAW—WHAT LAW SHOULD APPLY?

A. Why Consider This Question

Any consideration of applicable law also needs to account for the debates regarding whether the law should apply. It might be suggested, by way of criticism, that to consider such a question is to discuss the law as it should be rather than the law as it is. But legitimate forms of intellectual inquiry on the law should not be limited to the law as it is. It is crucial to critically appraise why the law exists, what the law should cover, and on the basis of such inquiry, how the law should change. What follows in the remainder of this piece is a consideration of the range of issues relating to international trusteeship that such an appraisal needs to take into account.

B. Occupation Law: Compatibility with Transformation and Adequacy as a Framework for Regulation

The occupation of Iraq by the CPA in 2003 brought to prominence the long-standing question concerning the extent to which occupation law prevents occupying powers from transforming the political and economic structures of occupied territory and, if so, whether the operation of this law should be questioned and/or modified or supplemented by other rules. Clearly, the notion that a territory is not to be considered part of the sovereign territory of the occupant is tied to the notion that the occupier should not alter the economic and political status quo. Comparing annexation with political and economic transformation, Adam Roberts states that although they are "conceptually and legally very different, they do have one thing in common—they tend to involve extending to the occupied territory the type of political system adhered to by the occupying power." 104

This takes things back to 1907 (and beyond that, to the Hague Regulations of 1899), since the norm of occupation law most often cited to illustrate a status quo orientation is the obligation in the Hague Regulations that occupying states are obliged to respect,  

104. On the issue of a lack of sovereignty as title, see supra text accompanying note 7.  
105. Roberts, Transformative Military Occupation, supra note 1, at 582-83.
“unless absolutely prevented, the laws in force in the country.”

Some scholars, such as Adam Roberts, seem to take a fairly expansive view of what is permissible under occupation law. Others, such as David Scheffer, argue that occupation law does have a strong status quo orientation and, as such, is at odds with the transformation agenda. On their own terms, the latter

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106. Hague Regulations 1907, supra note 6, art. XLIII. See also, in identical terms, Hague Regulations 1899, supra note 6, art 43. For commentary, see, e.g., BENVENISTI, supra note 1, at 7.

107. In his survey of occupations published in 1984, Adam Roberts describes how many, in their transformatory activities, “went beyond the letter of the Hague regulations, yet fell short of annexation or assumption of sovereignty.” Roberts, What is a Military Occupation?, supra note 7, at 269. In both that survey and a later piece written in the context of the occupation of Iraq, Roberts takes a fairly expansive view of what is possible under occupation law, but also, in the latter article, accepts that this normative framework can be supplemented from other sources in the case of so-called “transformational” occupations. See Roberts, Transformative Military Occupation, supra note 1. Eyal Benvenisti states that “[t]he occupant’s powers have expanded through time to cover almost all the areas in which modern governments assert legitimacy to police, a far cry from the turn of the century laissez-faire conception of minimal governmental intervention.” BENVENISTI, supra note 1, at 6. Discussing Security Council Resolution 1483 of May 22, 2003, which some claim authorized the political and economic transformation of Iraq by the CPA, Benvenisti states that the resolution:

[E]nvisions the role of the modern occupant as the role of the heavily involved regulator, when it calls upon the occupants to pursue an “effective administration” of Iraq. This call stands in contrast to the initial orientation of the Hague Regulations, which envisioned the disinterested occupant who does not intervene in the lives of the occupied population. Id. at 11.

108. Scheffer, supra note 7. In general, Scheffer argues that transformation “requires strained interpretations of occupation law.” Id. at 843. The law of occupation in Geneva Convention IV is “far more relevant to a belligerent occupation than to an occupation designed to liberate a society from its repressive governance and transform it as a nation guided by international norms and the self-determination of its liberated populace.” Id. at 849. Discussing peacekeeping in particular, he argues that the full operation of occupation law may be “inappropriate and even undesirable in many situations.” Id. at 848. Discussing Adam Roberts’ broad conception, in his 1984 article, of what is possible under occupation law, Scheffer argues that the attempt to square occupation law with the realities of modern occupations is “increasingly artificial and begs for an alternative legal framework that more accurately reflects the development of key areas of international law and that recognizes...the political realities of modern practice.” Id. at 848-49. Simon Chesterman and Steven Ratner have made similar arguments about ITA missions. Simon Chesterman states that “[a]s the purpose of transitional administration is precisely to change the laws and institutions, further legal authority is therefore required.” CHESTERMAN, YOU, THE PEOPLE, supra note 67, at 7. The principles of occupation law are “at odds” with those ITA projects...where the entire purpose of temporary occupation was to change the political structures in the occupied territory.” Id. at 145. Discussing this issue, Steven Ratner states that “for international organization missions, the status quo is a problem to be overcome, not a situation to maintain.” Ratner, supra note 7, at 700. Scheffer, discussing peacekeeping, states that the full operation of
arguments are sometimes overstated when they are made in relation to all forms of international trusteeship. Some manifestations of this activity might not involve transformation, as discussed further below. UNTAES in Eastern Slavonia, for example, was primarily concerned with enabling territorial transfer, rather than “state-building.” More fundamentally, however, these arguments assume that transformation is something that is legitimate and to be enabled by international law. This assumption will be considered further in due course.

David Scheffer’s argument covers not only the question of occupation law prohibiting certain aspects of transformatory projects, but also, more broadly, whether occupation law by itself is sufficient as a general regime of regulation, given the wide-ranging activities engaged in during such occupations. He argues that “the dominant premise of occupation law has been that regulation is required for the military occupation of foreign territory, but not necessarily for its transformation.” For Scheffer, it is necessary to move “beyond” occupation law, to a wider normative regime, taking in “other principles of modern international law pertaining, for example, to human rights, self-determination, the environment, and economic development . . . .”

C. Human Rights Law: Should it Apply?

The suggestion that human rights norms are needed as part of the regulatory framework brings things back to the discussion of the extraterritorial application of that area of international law. The question of whether human rights law should apply relates to the earlier question of whether it applies, since one must consider what the underlying rationale for international human rights law is in this regard. For example, the norms of treaty interpretation require a consideration of the “object and purpose” of the instrument in question when construing the meaning of the substantive norms contained within it. Indeed, this form of occupation law may be ‘inappropriate and even undesirable in many situations’; Scheffer, supra note 7, at 848.

109. On UNTAES generally, see supra note 53.
110. Scheffer, supra note 7, at 848 (citation omitted).
111. Id. at 843.
inquiry is especially significant for issues where the relevant provisions are on their face unclear, the cases and other authoritative commentary provide only limited assistance, and state practice is not particularly helpful in suggesting a clear, consistent, or unified position. All of these elements are present in the case of the extraterritorial application of human rights law. 113

One relevant issue of principle is the idea of the social contract: rooting the requirement of rights and their protection through law in the contract between members of the community and the state, which in turn provides the legitimacy for the state. 114 A traditional basis on which the community has been understood is in terms of nationality. Contractual theories, by definition, do not address requirements of justice arising in the context of the interaction between the community (and its officials) and individuals who do not belong to it. When “belonging” is defined according to nationality, foreigners are left outside the frame. Thus, John Locke excludes foreigners from the social contract and the protection of citizenship rights:

*Foreigners*, by living all their Lives under another Government, and enjoying the Privileges and Protection of it, though they are bound, even in Conscience, to submit to its Administration, as far forth as any Denison; yet do not thereby come to be *Subjects or Members of that Commonwealth*. 115

Although ideas of rights and their protection through law have shifted so that most international law rights guarantees are not now understood as being tied to citizenship exclusively, 116

113. See generally sources cited supra note 100.


115. LOCKE, supra note 114, at 349 (italics in original).

116. In international human rights law, the shift away from nationality exclusively is effected through conceiving human rights obligations in relation to the state’s “jurisdiction” rather than its own nationals. On this conception of responsibility, see the sources cited above supra, note 100. As noted by the Human Rights Committee in relation to ICCPR, “[i]n general, the rights set forth in the Covenant apply to everyone . . . irrespective of his or her nationality or statelessness.” U.N. Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 1, (Apr. 11, 1986), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 18, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) [hereinafter General Comment No. 15]. The preamble of the American Declaration of the Rights and Duties of Man states that “the essential rights of man are not derived from the
contemporary rights discourse is perhaps still focused predominantly on the nexus between the state and its territory. John Rawls’ contractarian theory of justice, for example, concerns “the basic structure of society conceived for the time being as a closed system isolated from other societies.” 117

Bodies representing three leading international judicial or quasi judicial institutions monitoring the application of international legal instruments on civil and political rights—the United Nations Human Rights Committee, the Inter-American Commission on Human Rights, and the European Court and Commission of Human Rights—have all made statements to the effect that, as a matter of principle, this area of international human rights law should apply extraterritorially. 118 In particular, it has been suggested that human rights law should apply to extraterritorial state action in order to prevent three outcomes from occurring as a consequence of the extraterritorial nature of the action:

1. A double standard of legality operating as between the territorial and extraterritorial locus; 119
2. A generalized distinction in the degree of human rights protection operating indirectly on the grounds of nationality; 120
3. A vacuum in rights protection being created through the act of preventing the existing sovereign from safeguarding rights. 121

The point is not that these three outcomes are necessarily unjustified in all circumstances (though they might be), but, rather,

fact that he is a national of a certain state, but are based upon attributes of his human personality.” American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, OAS Res. XXX (1948), preamble. On the rights of aliens in international human rights law, see, e.g., General Comment No. 15, supra, passim.

117. RAWLS, supra note 114, at 7.
118. See Wilde, Legal “Black Hole”? supra note 100, at 790-7.
that they should not subsist merely because of the extraterritorial locus in which the acts take place. It is this situation that is avoided through the application of human rights obligations to extraterritorial state actions.

Arguments are also made on the other side, for example, asking whether the application of human rights norms somehow prevents an occupying power from doing all it needs to, given the special policy requirements in the occupation context. Does one of the key elements for permissible derogations in the main human rights treaties on civil and political rights mentioned earlier—that there is a war or public emergency threatening the life of the nation—only apply to domestic emergency situations, thereby preventing the state from being able to enter derogations in relation to its activities abroad, in turn preventing it from taking all the measures necessary in the occupation context? 122

Another relevant issue of principle is the right of self-determination of those in the occupied/administered territory. It might be asked here whether it is compatible with this right for a foreign state’s own human rights obligations to be, in a sense, imposed on the population of an occupied territory. Within this general question, it is necessary to consider whether a distinction should be made between universal standards and/or standards binding on both the occupied territory and the occupying state, on the one hand, and the standards binding only on the latter entity and/or conceived with a particular, spatially-defined political community in mind, such as the European Convention on Human Rights (ECHR) and its Protocols, on the other hand. Moreover,


124. The Preamble to the ECHR states that, "[t]he governments signatory hereto, being members of the Council of Europe ...[b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration ..." ECHR, supra note 95, at pmbl. ECHR jurisprudence frequently references this "common heritage" when construing the meaning of treaty provisions. See, e.g., Golder v. United Kingdom, App. No. 4451/70, 18 Eur. Ct. H.R. (ser. A) ¶ 34 (1975), available at http://www.echr.coe.int/ (select case-law; select HUDOC; select Decisions; search Case Title "Golder"); United Communist Party of Turkey and Others v. Turkey, App. No. 19392/92, 1998-1 Eur. Ct. H.R. 1, ¶ 45, available at http://www.echr.coe.int/ (select case-law; select HUDOC; select Decisions; search Case Title “United Communist Party of
would the requirement of the provision of remedies flowing from applicability of human rights law be impractical—would this lead to overstretch on the part of national and international judicial bodies concerned with human rights, and are national courts, given their remoteness from the theatre of operations, capable of handling cases concerning actions abroad?\footnote{125}

It is, of course, difficult to approach these issues in the abstract since much depends not on whether human rights law applies, but rather what it would require if it were to apply, something which is, in part, mediated by the issue discussed earlier of the interplay between human rights law and other areas of law also applicable in the occupation context.

VII. TRUSTEESHIP AND ACCOUNTABILITY

David Scheffer's argument about the inadequacies of occupation law is made by focusing on transformatory occupations: if the status quo policy associated with the Hague Regulations is not followed in certain occupations and, implicitly, if this is, in some cases, legitimate, then the regulatory regime needs to move on and accommodate a broader range of activities performed during occupations. In certain respects, this echoes colonial-era arguments about placing colonial administration under a structure of accountability. One benefit of acknowledging the connections between occupation and colonial trusteeship—between Hague 1899/1907 and Berlin in 1884–1885—is in being able to draw on those related debates. Before doing so, it is necessary to review the provision of international accountability mechanisms in relation to some of the main forms of international trusteeship.

\footnote{125. On the provision of remedies, see, e.g., ICCPR, \textit{supra} note 95, at art. 2(3); ECHR, \textit{supra} note 95, at art. 13; Am. Convention \textit{supra} note 95, at art. 25; Convention Against Torture, \textit{supra} note 99, at arts. 13, 14; Convention on the Rights of the Child, \textit{supra} note 99 (contains no explicit requirement of provision of a domestic remedy for violation).}
In one sense, international territorial administration is a fully internationalized version of international trusteeship, in that the actor involved as trustee is an international organization rather than an individual state or groups of states. In another sense, however, international territorial administration marks a step away from internationalization, in that, in certain respects, it is not subject to international scrutiny equivalent to that which operated with respect to the Mandate and Trusteeship arrangements, and, as far as the UN Charter is concerned, colonialism. With the Mandate arrangements, oversight of different kinds was provided by the League of Nations Assembly, the Council, the Permanent Mandates Commission (to whom individuals in the Mandates could bring petitions), the Mandates section of the Secretariat, other League bodies, and the possibility that issues relating to the Mandates could be brought before the Permanent Court of International Justice. Oversight was exercised in relation to Trust Territories by the UN General Assembly and the Trusteeship Council and through the possibility that issues relating to Trust Territories could be brought before the International Court of Justice. Oversight was exercised in relation to Non-Self-Governing territories through the reporting obligations under Article 73(e) of the UN Charter.

126. See generally the relevant sources cited supra, note 17, and in particular HALL, MANDATES, supra note 17, passim, especially at 32, 48-52, pt. III, Annexes VII, VIII, IX and, on the ILO in particular, 249-55; Hales, Reform and Extension, supra note 15, at 204-63; ANGHIE, IMPERIALISM, supra note 11, at 151 et seq (on the Permanent Mandates Commission in particular); CRAWFORD, ARGUMENT AND CHANGE IN WORLD POLITICS, supra note 20, at 265-73 (also on the Permanent Mandates Commission in particular).

127. See the relevant sources cited supra, note 17.

The UN Trusteeship Council was mothballed with the end of the final Trust arrangement in 1994. However, the Trusteeship System was and still is open to further territories, and can include arrangements where the administering authority is the UN. Indeed, some commentators have proposed that the Trusteeship Council should be revived to provide oversight of ITA missions. East Timor fitted into the category of a Trust territory when the UN mission began in 1999. It had been detached from what was, in effect, a kind of colonial power, and its people enjoyed a right of self-determination but were deemed incapable of self-administration in the short term. Despite this, the Trusteeship Council was not revived for the East Timor administration project. Indeed, there seems to be an international consensus that the Council be abolished, as proposed by then Secretary-General Kofi Annan and endorsed by the General Assembly in 2005. Attention has shifted towards the new Peacebuilding Commission as a body that might become involved in such oversight, although the prospects here would not seem to be that significant.

Not only have ITA trusteeships not been subjected to much international oversight; as mentioned at the start of this piece, they have also been criticised on human rights grounds, for the lack of review mechanisms on the ground, and particular practices conducted, notably the use of security detentions in Kosovo.

130. See U.N. Charter arts 77, 81.
132. On the legal status of East Timor during the period of UN administration, see WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2 at 178-188, and sources cited therein.
135. OMBUDSPERSON INST. KOSOVO, supra note 5, at 3, 7. For criticism of UNMIK, see the first three annual reports and the ten special reports of the Ombudsperson Institution in Kosovo, available at http://www.ombudspersonkosovo.org. For criticism
Underlying such commentary is the widely-held assumption that ITA should be made fully accountable. If the UN is acting as the government, then it should be subject to the same checks and balances as any other government.

As previously mentioned, trusteeship was seen as a means to reconceive colonial rule as humanitarian,\textsuperscript{136} in some cases to replace earlier forms of rule understood as having been exploitative.\textsuperscript{137} In the context of the belligerent occupations to which the Hague Regulations apply, the desire was to prevent abuses and exploitation commonly associated with the conduct of such occupations in the past.\textsuperscript{138} Trusteeship requires accountability because of the imbalance in the power relationship between the trustee and the ward, and the resulting possibilities for abuse. As Michael Reisman observes in his discussion of the law applicable to trusteeship arrangements, the requirement of accountability is rooted in the fact that “the power relationship between the parties concerned is manifestly asymmetrical.”\textsuperscript{139} In other words, it is not enough to humanize forms of foreign domination to ensure that they operate for the benefit of the local population; there must also be mechanisms to ensure these humanitarian standards are adhered to. Those who advocated reconceiving colonialism to operate on the basis of trust did so in part because this would provide a basis for subjecting colonial administration to third party

\textsuperscript{136} See supra, text accompanying note 18.
\textsuperscript{137} See supra text accompanying note 19.
\textsuperscript{138} See supra, text accompanying note 34.
\textsuperscript{139} Reisman, supra note 20, at 232.
review. So Edmund Burke regarded accountability to be "of the very essence of every trust." 

Who, then, should international trusteeships be accountable to? In the context of ITA, Richard Caplan asks:

Whose opinion should count . . . ? International transitional authorities cannot function as governments answerable primarily to the people whose territories they administer. International trusteeships are not representative democracies . . . .

Even if the international administrators have not been elected by the people they govern, does this necessarily mean that they should not be answerable to them? Again in the context of ITA, Simon Chesterman argues:

[Final] authority remains with the international presence and it is misleading to suggest otherwise. If the local population had the military and economic wherewithal to provide for their security and economic development then a transitional administration would not have been created. Where a transitional administration is created, its role is—or should be—precisely to undertake military, economic, and political tasks that are beyond existing local capacities.

The suggestion is that direct accountability to the people is at odds with the underlying enterprise: foreign actors have taken over control of governance precisely because of a judgment concerning the inability or unwillingness of the local population to perform this role themselves, either at all, or in a manner that conforms to certain policy objectives. To render the projects directly accountable to the local population in any meaningful way—i.e., in a way that meant policies were altered to take into account the views of the population—would be to miss the point of the enterprise. In Bosnia and Herzegovina, for example, the High Representative sometimes removed elected officials from office, because the policies espoused by the officials in question, such as what was deemed to be extremist nationalism, ran counter to the political agenda OHR had for Bosnia and Herzegovina. Necessarily, this goes against the popular will insofar as it was

140. See sources cited supra note 7.
141. Burke, supra note 11, at 411.
142. CAPLAN, supra note 67, at 246 (citation omitted).
143. CHESTERMAN, YOU, THE PEOPLE, supra note 67, at 143.
144. On OHR, see supra note 82.
meaningfully exercised in the vote that brought the official in question to office in the first place.

Even on its own terms, however, such an argument only goes so far. It only applies to policies concerned with remedying problems associated directly with the local population. For missions concerned with enabling the transfer of the territory from one political group to another, for example, such as UNTAES transferring control from local Serbs to Croatia, there is nothing contradictory with the mission's objective in making the policies it promotes during the period of administration accountable directly to the local population.\textsuperscript{145} The fact that a mission is intended to hand the territory over to another sovereign after an interim period does not by itself necessitate, for example, an ability to make decisions about the economy of the territory during that period without having to account to the local population in doing so.

Even in ITA mandates responding to perceived problems with the way local actors carry out governance, the mandate itself should not be taken for more than it is. A mandate to foster economic development and reconstruction, for example, does not by itself presuppose that the local population should not determine the economic model being implemented in the territory. In the case of East Timor, for example, development was needed because the East Timorese had been denied self-determination, not because the local population was incapable of making decisions on economic matters.\textsuperscript{146} Part of the answer to the accountability issue, then, concerns the scope of the mandate and what this means in terms of decision-making.\textsuperscript{147}

Moreover, accountability issues run much wider than the particular policies being promoted: corruption, mismanagement, and human rights abuses are not part of the mandate of the projects, and to exercise scrutiny over them is not to undermine the policy objectives of the missions. Effective accountability mechanisms concerning such matters are not incompatible with

\textsuperscript{145} On UNTAES, see supra note 53.
\textsuperscript{146} On the background to and UN administration mission in East Timor, see the citation supra note 41.
\textsuperscript{147} In both Kosovo and East Timor, the UN set up bodies to which certain prerogatives were devolved, but final authority on decision making always resided in the head of the UN mission. See the discussion in WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION Ch. 1, notes 1 and 2.
the idea of trusteeship itself. Indeed, for those projects concerned with transforming the politics of the territory along the lines of the rule of law and the promotion of human rights, a key component of "tutelage" is leading by example.

As reflected in the quotation from the Human Rights Ombudsperson at the start of this piece, critics of the unaccountability of the ITA projects often express surprise at this situation via wry remarks about the irony of the UN seeking to promote democracy, human rights, and the rule of law while acting in a manner that is undemocratic, violative of human rights, and above the law. As far as mechanisms to remedy this at the international level go, critics often call for the Trusteeship Council to be revived to supervise ITA missions.

These arguments, however, perhaps fail to give due weight to the possibility that in the case of international organization-conducted trusteeship, the modern counterpart to the trusteeship of the Hague Regulations of 1899 and 1907 operates in a climate of unaccountability precisely because it is conducted by the UN; moreover, the lack of effective international scrutiny of all modern trusteeships can be understood, in part, somewhat paradoxically because the idea of trusteeship itself is of questionable international legitimacy.

When the trusteeships of today are placed in the correct historical context, including the key moment of the Hague Regulations, their unaccountable nature is less of a surprise. The non-revival and proposals to dismantle the UN Trusteeship Council make sense. In the case of UN-conducted trusteeships, one part of the explanation is the normative portrayal of international organizations as humanitarian and acting in the interests of the international community as a whole. This is contrasted with the normative portrayal of states as always potentially imperial and self-serving. However simplistic and problematic such ideas may be, they are relevant in explaining why the same normative push for international accountability in the context of colonial (i.e., state-conducted), and occupation trusteeship, has not been evident in the case of ITA. More

148. See generally OMBUDSPERSON INST. KOSOVO, supra note 5.
149. See supra note 131.
150. See WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION, supra note 2, at ch. 8 § 8.7.1 and sources cited therein (on critiques of colonial trusteeship based on the normative character of states as colonial administrators); id. at ch. 8 § 8.7.2.3. (on ideas of
fundamentally, however, one has to take into account a further, key normative regime in international law and public policy that is often overlooked in discussions of trusteeship, and yet, is potentially relevant to all forms of trusteeship.

VIII. THE MISSING ISSUE AND AREA OF INTERNATIONAL LAW—SELF-DETERMINATION

Half way into the lifespan of the Hague Regulations of 1907, the profound shift in international policy and law that led to the self-determination entitlement repudiated the legitimacy of the idea of introducing and maintaining trusteeship. Administration by outside actors, necessarily preventing self-administration, was considered *ipso facto* objectionable. The Hague model of mitigating existing occupation through trusteeship continued, but, crucially, there was now a clear obligation to bring such occupations, alongside other situations of foreign domination, to a quick end and, indeed, not to engage in them in the first place.

In the particular case of foreign administration operating on a trust basis, freedom and independence were no longer to be granted if and when the stage of development had reached a certain level as in the past; it was now an automatic entitlement. Under Article 3 of General Assembly Resolution 1514 of 1960,
[I]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.\(^{13}\)

As Robert Jackson states:

Independence was a matter of political choice and not empirical condition.\(^{14}\)

Moreover, in the words of William Bain:

[Decolonization] abolished the distinction upon which the idea of trusteeship depended. There were no more “child-like” peoples that required guidance in becoming “adult” peoples: everyone was entitled by right to the independence that came with adulthood. Thus it no longer made any sense to speak of a hierarchical world order in which a measure of development or a test of fitness determined membership in the society of states.\(^{15}\)

Concerns by western states regarding “underdevelopment” in the global south, and activities by them to try and “improve” this situation shifted into the arena of what is now called “aid” or “development assistance.”\(^{16}\)

Given this normative position, it is possible that, although, in fact, trusteeship continued, this was only deemed acceptable in a few places. More generally, there is considerable international resistance to trusteeship as a general idea, particularly, obviously, amongst G77 states.\(^{17}\)

To revive the Trusteeship Council would be to accept that the self-determination paradigm has somehow become qualified—that trusteeship is back as a legitimate feature of international public policy. Formalizing an accountability mechanism would inevitably

\(^{13}\) G.A. Res. 1514, \textit{supra} note 123, ¶3.

\(^{14}\) See J\textit{ACKSON, THE GLOBAL COVENANT,} \textit{supra} note 11, at 95. Of course, which particular associations of people could claim independence or, put differently, which territorial units would form the basis for independence were, in part, a matter of the “empirical condition.”

\(^{15}\) B\textit{AIN,} \textit{supra} note 11, at 135.

\(^{16}\) For an example of commentary on this link between contemporary notions of development assistance and the activities of colonial trusteeship, see \textit{id.} at 7.

represent the formalizing and legitimizing of the trusteeship paradigm itself. If there is no general acknowledgment that trusteeship is back as a legitimate feature of international public policy, then it becomes more difficult to make the case for greater international accountability. The denial of accountability, then, is in one sense structurally connected to the self-determination entitlement.

The self-determination entitlement is crucial not only in terms of the legitimacy of the existence of trusteeship; it is also fundamental to the legitimacy of what is done during trusteeships, including occupations. As previously discussed, the Hague model of preserving the status quo is seen as passé by commentators such as David Scheffer because it is viewed as placing an impediment to profound political and economic transformation. So, to borrow Scheffer’s word, it is necessary to move “beyond” this paradigm. Such an argument must, however, take into account the fact that international law did move “beyond” merely humanizing the conduct of foreign domination as was attempted at the Hague, more radically to repudiate the legitimacy of this domination itself. As mentioned, David Scheffer includes human rights law as one of the normative regimes he sees as potentially helpful as a regulatory regime for transformative occupations, but one right in particular—self-determination—is arguably a serious impediment to such transformations. The practice in some occupations of altering existing law to ensure it does not violate universally accepted human rights may not be a problem here, but of course, transformation goes far beyond this, for example, profoundly reorienting the economies of the territories affected without the approval of the local population.

The Hague model, then, may actually be more consonant with contemporary international norms than is generally acknowledged. Although its modest ambition of reining in occupation does not go as far as modern self-determination in providing a clear basis for ending foreign control, this notion remains a powerful concept in those situations where administration by foreign actors has been allowed to happen and where choices are being made about the extent to which foreign actors are going to determine the economic and political system under which the local population will live.