

**Failed and Failing States: Causes and Conditions
By**

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Abstract

Through scholarly consideration this study evaluates structural competency gaps that precipitate state failure and examines the resulting consequences for the world community. As an elected official for over seventeen years, including service as a Member of Parliament, I have travelled to many of the regions reviewed in this study. I have heard firsthand accounts from witnesses of the consequences of state failure in countries including Afghanistan, Sudan, Democratic Republic of the Congo and Haiti. Failing states have overlapping characteristics of structural competency failure, including the inability to provide healthcare, education, food, legitimate policing and economic sustainability. There are economic inequalities present as well as a loss of legitimacy, corruption and reduced social cohesion. Failure of rule of law is manifested in areas of judicial adjudication, security, reduced territorial control and systemic political instability. The international community often confronts these challenges in a manner that actually complicates issues further through lack of consensus among actors. Consequently, a new and emerging concept of sovereignty needs to be reviewed in terms of the post-modern state. The new and emerging human security compact, evolving globalization and the decline of the state redefine it within the new global order. In some instances the best interests of these failing and failed states would be best served by shared sovereignty with the international community; that is, trusteeship. International actors attempting to 'fix' failed states must focus their attention on the issues affecting structural competency that have actually caused the state to fail in the first place. By addressing the structural competency of failed states with an understanding of the causes, it is possible to create the practical framework for a global model of statehood that prevents state failure. Effective policies of integrated state-building and resources targeted at bridging structural competency gaps require a better understanding of both the challenges and the solutions.

Introduction

There has been a renewed focus on failed and failing states in view of the increasingly significant localized, regional and international impacts on the global community. The potential implications of this new reality for international security and the maintenance of regional and global peace and stability are considerable. In particular, the significant and enduring role of structural competency in avoiding state failure requires sustained and meaningful attention from the world community.

This thesis will examine the character of state failure, its causes, the impact of structural competency failure and, finally, will enunciate a solution to state failure to be found in a renewed manifestation of trusteeship that is globally sanctioned.

It is important to take note that the definitional issues associated with failed states represent in and of themselves a significant challenge to scholars, with a veritable avalanche of definitions and categorizations emanating from academic and political circles in recent years.

This reality has solicited considerable contemporary debate within the international community.¹ This thesis will state that many scholars generally concur with the notion that certain core indicators illuminate the primary reasons as to why states fail. The research question that this thesis will pose is why core structural competency issues are fundamental to the understanding and identification of failed states. Regardless of the differing definitions, the thesis will argue that it is impractical to refute the assertion that failed states perform in a consistently compromised manner when

¹ Jonathan Di John, *Conceptualising The Causes And Consequences of Failed States: A Critical Review of the Literature*, London: Crisis States Working Papers Series No. 2, London School of Economics (January 2008) at Introduction

compared to functional states with respect to structural competency indicators.

This thesis defines structural competency of a functioning state as existing where the primary and fundamental needs of citizens are met and respected. These include social and economic conditions; rule of law with an effective independent judicial system; security and social cohesion; political stability; legitimate use of force for the public good and the existence of a functioning bureaucratic infrastructure. Concurrent to these internal parameters is a fundamental respect for human rights consistent with international standards.

Consistent with the preceding definition, failed states are identifiable by the disintegration of key structural competencies. The author will address this more specifically throughout the discussion of the causes and structural indicators in Chapter 2.2.

The author will further assert that central to any successful mitigation of the consequences of state failure is a fundamental question: what actually causes state failure?

This thesis maintains the position that the most pertinent contributory factor to state failure is the accumulation of structural competency gaps over a period of time which create an environment of domestic and regional instability and a 'threat to peace'. Secondly, by identifying the core contributory factors to state failure, a subsequent question will emerge and will be addressed within this thesis: what coordinated international actions can be initiated to either preclude state failure, or in the case of an already failed state, to restore such a territory to health, functionality and stability consistent with generally accepted definitions of a functioning state?

A significant number of the identifiable gaps in structural competency ultimately lead to conflicts that can be linked to the prospect of security threats, regional instability, displaced populations, humanitarian disasters, anarchy and chaos and even civil war. All of these constitute a threat to both neighbouring countries and the international community in general. There is also the risk of heightened terrorist activities as opportunities for such are created within the vacuum of a failed state. A better understanding of what creates state failure should assist the international community in dealing with the issue more effectively, as well as addressing the relationship between failed states and human security.

There are multiple factors that have contributed to the increase in state failure in the modern era. Among these is the end of colonialism in the twentieth century along with the emergence of states created by the victorious Allies at the end of the Second World War. In the 1990s the implosion of the Soviet Union contributed to the creation of several failed or failing states, chaos and the subsequent deterioration in personal security.

The ability to facilitate personal security, rule of law and public welfare for the citizens of these failing states seems beyond the capacity of these emerging nations, and as such a vacuum has developed both domestically and internationally

State failure presents enormous and varied challenges not only for those states and their citizens, but also for the international system as a whole. Humanitarian challenges arise from the reality that state failure is both created and exacerbated by overwhelming human need. The flow of displaced persons due to political and economic reasons, in addition to poverty, disease, violence and terrorism clearly strains aid budgets and philanthropic resources. The reality of such a matrix of failure invariably leads to state decline and generally precipitates internal strife that although

exists principally at the local level often rapidly develops into situations that affect all states and which pose challenges to human security in general. The inter-connectedness of countries in the 'new globalism' has made it difficult for any state to insulate itself from regional conflict.

As we have learned from the terrorist attacks of September 11, 2001, failed states have provided convenient bases from which extremism and terrorism can be exported with disconcerting ease, in this case the al-Qaeda terrorist network.

The fact that failed states provide a base from which terrorist activity is exported has made stable states, particularly in the West, pay more attention to the phenomenon of failing states before they descend into chaos.

This thesis will seek to answer the question: what is the best and most effective mechanism that the international community can adopt to address the challenges posed by failing and failed states? Perhaps one of the most readily identifiable examples is Afghanistan. The international response to a situation that has expanded into a regional crisis has been inadequate, inconsistent and misguided.

Although the Afghanistan situation is not completely devoid of success, it has effectively been limited in its ability to control the violence of powerful state and non-state actors as well as terrorist organizations such as al-Qaeda and the Taliban. Such ineffectual international action as seen in Afghanistan can be mirrored in other regions and can be identified by the proliferation of organizations like the Hezbollah and al-Shabaab in Somalia, to name but a few.

The international community can no longer assess the challenges posed by failing and failed states through the prism of superpower conflict and must find an effective way to reassess these challenges and identify more

promising methods to respond to them. The author is proposing a new paradigm which encompasses the universal principles of legitimacy; accountability; respect for human rights; political, social and economic stability; and the existence of the rule of law.

As members of the United Nations and regional bodies, individual countries have the obligation to protect not only their citizens but also the citizens of failing states from human rights abuses and to hold to account abusers of human rights through the International Court of Justice. Therefore, there is now a recognition that the so-called primacy of state sovereignty in the Westphalian order is outmoded. It has been replaced by new principles: the respect for human rights and the existence of state stability. In the revised modern context, human rights and human security constitute the pre-eminent standards for state accountability. For example, states must not, and indeed cannot, secure legitimacy for massacres of their own citizens by appealing to the notion of an outdated international principle of state sovereignty, as in the case of Syria.

The challenges that emerge following the failure of the state system also require the application of the principles that are associated with the modern state; chiefly, generally accepted human rights standards, the rule of law and the existence of security. If human rights are to be the central universal principle of a functioning state and a foundational building block of the modern global political system, then state failures must constitute the primary threat to the bedrock of such an international order.

This new global order requires an approach that honours a multilateral perspective and must include consideration of the question as to whether states and the international community have the capacity to effectively deal with state failure irrespective of where it occurs.

After the genocides in Cambodia, Rwanda, Bosnia and Kosovo and the examples of failed states such as Afghanistan, Haiti, Somalia, Liberia, the Democratic Republic of the Congo, Sierra Leone and Iraq, many western developed nations have been faced with the prospect of a lack of global institutional capacity to address such situations.

However, the failure to attain consensus among the five permanent members of the United Nations Security Council illuminates the deep and persistent nature of the challenges of internationally coordinated action in these areas.

Under international human rights law, states are required by obligation to protect their citizens and ensure that their human rights are respected. While the United Nations Charter clearly outlines the point at which intervention under Chapters VII is to be considered, there is an emerging paradigm to be found within the Responsibility to Protect doctrine which asserts that sovereignty can be breached. The conditions under which such breaches are to be considered include the need to protect people who are under threat. The international community in such circumstances has an obligation to respond effectively as most states are signatories to United Nations human rights covenants and treaties and are thus bound by international law to protect both individual sovereignty as much as state sovereignty. It seems that this re-definition of the modern state is a reality that some states have difficulty accepting.

A new conversation on re-defining the state must once again take place. States throughout the centuries have often been re-made as great empires were dissolved. Traditionally, the state has been promoted as the new political organization with the answer to the prevailing problems of social

and economic upheaval, conflict and war.² These assumptions of statehood as an international legal principle have implications for understanding both state failure and state-building. The widely accepted legal recognition of statehood alone does not effectively define the sovereignty of a state. There is an emerging consensus from the international community that it is necessary to address the structural competency of failed states, which is a point that the author will address.

This thesis will undertake consideration of the complex nature of current and past failed states by utilizing the concept of the structural competency of the state. Failed states pose not only security and development challenges for the international community, but also legal challenges. As a result of their inability to enter into or abide by treaties and agreements, these dysfunctional governments create a range of problems for an international system premised on state sovereignty and state consent. Military conflict within failed states creates enormous challenges for both domestic and international institutions, with efforts further complicated, for example, by the recruitment of traditionally precluded combatants such as child soldiers. The use of child soldiers in conflicts such as the civil war in Sierra Leone has been universally condemned and is prohibited under international law.

As states fail, they are marked by overlapping characteristics of disastrously low levels of structural competency. These include the failure to provide healthcare, education, food, a legitimate security force and economic sustainability; the possession of significant economic inequalities; a loss of legitimacy; a culture of corruption; a lack of social cohesion; a failure in rule of law, such as in judicial institutions, loss of security and territorial control; and systemic political instability.

²Jennifer Milliken and Keith Krause, "State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies," in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 10

The difficulty for the international community in reversing the process of state failure is further complicated by a lack of consensus among policy makers concerning the character of the required strategy. As a consequence, the emergence of a new concept of sovereignty needs to be reviewed in terms of the post-modern state.

The new social compact of human security, the emergence of globalization and the decline of the state have redefined the state within the context of the new world order. In specific instances of state failure it is in the best interests of those states and in particular their citizens to see the international community retain a prescribed role in the shared sovereignty of the given state. This would likely have to take the form of a trusteeship, revised from the traditional concept of such intervention, as a possible solution to state failure and reconstruction.

Such an imposed partnership, if it is to be successful, will require resources and significant political will. However, as history has demonstrated, the difficulty with this solution is found in the fact that rarely is there international agreement as to how state-building is to be achieved – in terms of appropriate intervention – nor is there substantive agreement as to what actually constitutes state-building because key UN members are trapped in the old paradigm. This is often the result of states choosing to protect their regional or political interests rather than subverting such considerations in favour of the best interests of the failed state and its citizens.

This thesis, therefore, will argue that international actors attempting to ‘fix’ failed states need to address the prevailing number of issues affecting structural competency that have caused the state to fail in the first place as states are not by nature failures. Each state has its own particular circumstances and there is certainly no one model that fits all; however, by addressing the structural competency of failed states and gaining a better understanding of the causes of such failure, one can work towards a more

practical framework for policy makers to better predict and develop a global model of statehood and in so doing prevent further state failures.

There is an increasingly urgent need to build effective, capable, stable and sustainable states in order to create social order and reduce poverty as well as tackle the issues of security and wealth creation. The ever increasing disparity between the rich and the poor in all regions of the world, as well as the erosion of essential social services where in fact they existed, has led to wide gaps in the distribution of national wealth, which has fuelled animosities and rivalries along the lines of class and ethnicity. The consequence of these realities is further domestic and international instability.

If this approach is adopted, it will require first, the understanding and acceptance of the paradigm of structural competency, second, the identification of structural competency gaps, and third, the design of effective policies of integrated state-building and resources aimed at bridging structural competency gaps. In order for this to occur, there needs to be a better understanding of both the challenges and the solutions associated with failed states. Unwillingness by the national and international community to address these gaps will only serve to make what is an already dire situation even worse.

Tailoring assistance to the specific vulnerabilities of individual failing states requires active and unprecedented co-operation among leading states and regional and international agencies to ensure success in addressing issues of security, development and challenges related to building effective political institutions. If the international community is to properly address these issues, appropriate mechanisms and concepts must be developed to achieve these ends. The new concept of state sovereignty must be addressed, as governments that have claimed immunity in their abrogation

of human rights too often appeal to the international legal principle of state sovereignty.

This thesis further aims to facilitate the development of a mechanism that should assist states in preventing failure in the first place and taking remedial measures to halt the slide and move towards becoming a functioning state. States are more numerous than a century ago and much more complex. Governments and many scholars have a tendency to look for one particular cause or source as justification for state failure and propose a boiler-plate, low cost, easily implemented solution. What is clearly required is a more thorough analysis of the factors leading to the failure of a particular state, and a full consideration of the responses and required involvement of external parties.³ In spite of this, the new paradigm of sovereignty is not yet widely acknowledged.

Part I analyzes the state as a legal entity, its historical development, the principles that define statehood and the main challenges that lead to state weakness and subsequent failure. Chapter 1 will attempt to briefly define the historical characterization of the state in international law as well as the criteria and conditions for statehood, ranging from ancient times to the present.

The author will focus on the duties of the modern state as well as the principles of sovereignty and self-determination based on the prevailing view of a defined territory with permanent populations and sovereign governments. Chapter 2 will introduce the concept of state failure and the causes and conditions that are characteristic of failed states as well as the political, economic and security indicators that state failure presents. These

³ Martin Doornbos, "State Collapse and Fresh Starts: Some Critical Reflections," in Jennifer Milliken (ed.) *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 46

include but are not exclusively confined to issues of corruption, poverty, violence, anarchy, loss of social cohesion, weakening institutions and the absence of the rule of law. The author will also address the problems of colonial legacies.

Part II will review the various approaches that rely on the instruments of international law to address issues of human security. The emerging concept of human security will also be examined in the context of human rights and humanitarian law, as failing and failed states almost always manifest failure to protect human rights.

In Chapter 3, the author will examine the humanitarian challenges that are created by state failure in the context of human rights protection under treaties and conventions. There will be a particular focus on several instruments of international law that have been established for the protection of human rights.

Chapter 4 will deal with the general principles of peremptory norms and the responsibility to prosecute individuals who allegedly violate human rights standards, which almost always contributes to state failure. The author will discuss the development of customary international law in addressing state failure in the context of the role of humanitarian intervention and the impact of Security Council Resolutions. The emergence of the Responsibility to Protect doctrine as an international security and human rights norm will be discussed in the context of state failure. The author will link the duty to prevent human rights abuses to the new paradigm of the state.

Part III of the thesis will incorporate an examination of the challenges posed by state-building as well as the role the international community plays in the reconstruction of failed states.

Chapter 5 considers the array of issues and requirements for state-building and reconstruction. The establishment of rule of law, accountability and economic security as well as social and economic reconstruction will be considered.

Finally, the analysis in Chapter 6 will present a possible solution to the concept of 'shared sovereignty' as a new form of trusteeship as a tool for the UN to use under certain circumstances. The author will also examine the challenges presented to the international community and the role of the United Nations in conflict prevention and state-building.

In the concluding chapter, the author will reiterate the idea of a failed state and why the concept of a failing state is preferred. The author will again show the limitations of the Westphalian consensus and discuss the new paradigm of the responsibility of states to intervene when egregious violations of human rights occur. It will be demonstrated that the original idea of structural competency can be used both as an early warning system against state failure and to create institutions that stop the descent into failure.

Part I

The Origins of State Formation

Chapter 1: The State in International Law - Historical Background

Dating back thousands of years states have existed in a various forms and have been led by autocracies or groups of leaders that have wielded authority over specific territories. For the most part, these enormously varied states were affiliated with imperial structures that exercised political and military dominion over the populations contained within them.

Ancient civilizations such as the Egyptian, Mesopotamian, Persian, Roman, Indian, Chinese and Mayans, among others, were characterized by complex political organizations. Historically, states emerged over conquered territory with the common denominator being the application of force by one group over another with the objective of an imposition of the victor's will.

More specifically, better known philosophers such as Plato and Aristotle, among others, often wrote or spoke in support of the *poleis*, the body of citizens of the city state system that was in place in ancient Greece.⁴ The equivalent term for *poleis* used by the Romans was the Latin word *civitas*. The *poleis* were not ruled by an autocratic authority (i.e. a king) but rather by a political entity of a body of citizens.

Amy Chua examines the most notable empires, from the Persian, Roman, Chinese, Mongol and Dutch to more recent imperial manifestations of Great Britain and the United States and argues that empires rise through toleration and fall through closed-mindedness.⁵

⁴ *The New Encyclopaedia Britannica*, 15th Ed., "Polis," Chicago: Encyclopaedia Britannica Inc. (2002) at 9:561

⁵ Amy Chua, *Day of Empire*, New York: Anchor Books (2007)

During the time of the Holy Roman Empire, the Free Imperial Cities exercised relative autonomy guaranteed by the Lubeck law.⁶ City States were also prominent during the European Renaissance period, most notably in Italy, but over time the majority of them were absorbed into empires and nation states.

Central to the earliest forms of statehood and prevalent throughout history up to the present time is the notion of the use of force by a given state and either its deemed legitimate application or perceived inappropriate use.

Niccolò Machiavelli, the renowned political thinker and public servant of the Florentine Republic, reinforced the notion of the use of force as an indispensable element of the state.⁷ Similarly, the influential German sociologist Max Weber defined the state as an entity that successfully claims a “monopoly on the legitimate use of violence”.⁸ Weber further noted that a state is a “human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory”,⁹ even when “the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it”.¹⁰

Over the course of the seventeenth and eighteenth centuries, commonly referred to as the Age of Enlightenment, theorists such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau presented the concept of a social contract to illuminate the reason why sovereigns should continue to be obeyed when their rule was no longer ordained by God. In the end, the people granted

⁶ *The New Encyclopaedia Britannica*, “Lubeck Laws,” Chicago: Encyclopaedia Britannica Inc., 15th Ed. (2002) at 7:534

⁷ Minh Nguyen, “The Question of ‘Failed States’ Australia and the notion State Failure,” Sydney’s Kings Cross: Uniya, JRS Paper No. 8 (March 2005) at 3

⁸ Max Weber, “Politics as a Vocation,” speech at Munich University (1918).

⁹ *Ibid.*

¹⁰ *Ibid.*

the “state the right to rule over them in return for the state providing security from civil disorder and war”.¹¹

For Hobbes, the only political model that guaranteed the protection of human rights and the conditions necessary for the enjoyment of those rights was that of the state.¹² Hobbes recognized that states “could provide the essential basis for a reasonably stable political order, which in turn permitted the establishment of the conditions required for economic development and social stability”.¹³ Life without government, as Hobbes would maintain, would be “solitary, poore, nasty, brutish, and short”¹⁴ and, as will become evident in this thesis, in locations where there exists substantively weak institutions within the state structure there has concurrently been a marked retreat of government structures. Somalia provides a profound example of such a state characterized by failure.

Order is a central element in Hobbes's classic definition of a sovereign state in that people must concede to the broader state a prescribed amount of personal freedom with the caveat that in return they will enjoy state sustained peace and security. The sovereign protects the members of a society, irrespective of whether or not they desire that this be the case. State failure, in the sense of a failed public authority, is defined by the uses and organization of coercion rather than by the weakness or configuration of particular institutions.¹⁵

¹¹ Jennifer Milliken and Keith Krause, “State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 6

¹² Michael Reisman, “Designing and Managing the Future of the State,” *European Journal of International Law*, Vol.8, No.3 (1997) at 418

¹³ Christopher Clapham, “The Challenge to the State in a Globalized World,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 27

¹⁴ Thomas Hobbes, *Leviathan*, Middlesex: Penguin Books (1968) at 186

¹⁵ William Reno, “Sierra Leone: Warfare in a Post-State Society,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 75

Hugo Grotius, the Dutch jurist and scholar, viewed the state, not unlike Locke, as “a complete association of free men, joined together for the enjoyment of rights and for their common interest”.¹⁶ However, he diverges from Locke in so far as he believed that sovereignty could be transferred to a monarch and that it therefore did not and could not reside ultimately with the people, as the absolute right of rebellion would be detrimental to the natural order of society.

Today, the emergence of the modern state can be traced back to the *Peace of Westphalia* of 1648, characterized by its treaties which effectively concluded the Thirty Years War¹⁷ and initiated a renewed legal framework for the modern state within a sovereign territory. The treaties resulted in a new political order emerging across central Europe founded upon the concept of state sovereignty. However, only states that were “recognized as sovereign by other sovereign states possessed sovereign rights, and the legal claim of sovereignty had to be asserted in practice - rulers had to gain and keep *de facto* control”.¹⁸

From the outset, the edicts represented an ideal of sovereign territoriality to which states aspired but few achieved.¹⁹ However, they did assist in the development of the foundations of the modern state, replacing the monarch with the enduring concept known as the rule of law. This evolution of sorts constituted a considerable departure from the notion espoused by French King Louis XIV to Parliament in 1755 when he infamously stated ‘*L’Etat c’est moi*’ (I am the State).

¹⁶ Hugo Grotius, *On the Law of War and Peace*, New York: Bobbs-Merrill (1925) at 44.

¹⁷ Denotes the two peace treaties of Osnabruck (15 May 1648) and Munster (24 October 1648) that ended the Thirty Years' War (1618–1648) in the Holy Roman Empire, and the Eighty Years' War (1568–1648) between Spain and the Republic of the Seven United Netherlands.

¹⁸ Jennifer Milliken and Keith Krause, “State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 3

¹⁹ *Ibid.*

It is somewhat inaccurate to presume that the popular conception of the state is in fact a relatively recent invention. Indeed, the notion of a modern administrative state within a shared territory was almost certainly enunciated in advance of many other postulators by Lord Acton.²⁰ Many modern nation states are in fact surviving fragments of exhausted and long forgotten empires, although few contemporaries would longingly seek the restoration of imperial rule as a contemporary model for the state.²¹

With the creation of the United Nations, states constituted the foundations upon which world order is maintained and even in circumstances where states fail, their existence as a matter of law has remained effectively unchallenged. Failed states have rarely forfeited, voluntarily or otherwise, their membership in international organizations, nor have they witnessed comprehensive suspension of their diplomatic relations. Indeed, even their pre-existing international treaties have remained in force.²²

It is, however, important to recognize, that state failure and the violent disintegration and palpable weakness of selected states threatens the very foundation of the system that currently predominates. Understanding the nature of state failure and establishing clear criteria for distinguishing failure from general weakness is of critical importance. In fact, it is central not only for the purposes of identification but also for the development and application of solutions to state failure.

As the twentieth century commenced, and in the wake of the disintegration of the Ottoman and Austro-Hungarian empires, there were fifty-five recognized

²⁰ Roger Scruton, *England and the Need for Nations*, London: The Institute for the Study of Civil Society (2004) at 13

²¹ *Ibid.* at 1

²² Daniel Thürer, *The 'Failed State' and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

national polities. Since the conclusion of the Second World War, the number of such states reached sixty-nine and in relatively short order. With the granting of independence to many colonial territories in Africa and Asia alongside the implosion of the Soviet Union, the number of nations jumped to 191.

East Timor's independence in 2002 brought that total to 192.²³ As of 14 July 2011, with South Sudan becoming the most recent recognized state, the number of Member States of the United Nations has reached 193. These 193 states represent virtually all of the world's nations. There remain two recognized independent states, the Vatican City and Kosovo,²⁴ which although independent are non-Member States of the United Nations.

1.1 Criteria and Conditions for Statehood

The notion of the state as the ultimate authority in the international system remains a widely held belief and is directly linked to the principle of state sovereignty.²⁵ An analysis of state failure requires an appreciation of the role of the state in the international system. The inability of a state to maintain effective internal control alongside the provision of security for its citizens creates a serious dilemma for the international system and its *de facto* desire to honour state sovereignty. In Somalia, for example, the failure of the state to provide good governance, security and respect for the rule of law is at the

²³ "Timor-Leste: UN Admits Newest Member State," UN News, New York (27 August 2002)

²⁴ Kosovo declared independence on 17 February 2008 and is still awaiting a positive decision from the Security Council for membership

²⁵ The sovereignty principle is entrenched in the Treaty of Westphalia (1648 Peace of Westphalia) and the legal implications of this sovereignty are marked by the 1945 United Nations Charter. *See generally* Brad R. Roth, *State Sovereignty, International Legality, and Moral Disagreement*, paper presented on March 3, 2006 at University of Georgia School of Law International Law Colloquia

very core of the country's endemic conflict. In the case of Somalia, these deficiencies in the minimum conditions for statehood have also fuelled piracy and afforded a place ripe for terrorist activity both localized and exported internationally.

It is a long-held principle of international law that each state retains the right to conduct its domestic affairs without interference from another state.²⁶ The 1933 *Montevideo Convention on the Rights and Duties of States* identifies some of the fundamental legal characteristics of a state.²⁷ The *Convention* constituted a significant evolution in the codification of the declarative theory of statehood as part of customary international law. These legal characteristics included a permanent population, a defined territory and a government capable of maintaining effective control over its land as well as the conduct of international relations with other states and the attainment of international recognition.²⁸

Article 1 of the *Montevideo Convention* declares that:

The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.²⁹

Historically, the definition and understanding of states was founded upon these criteria; however, a contemporary assessment of countries such as the Democratic Republic of the Congo, Somalia and Haiti reveals pressing

²⁶ Ibid.

²⁷ *Montevideo Convention on the Rights and Duties of States* was a treaty signed at Montevideo, Uruguay, on December 26, 1933, during the Seventh International Conference of American States. The Convention codified the declarative theory of statehood as accepted as part of customary international law.

²⁸ Ibid. See also Oona A. Hathaway, "International Delegation and State Sovereignty," *Law & Contemporary Problems*, Vol. 71 (Winter 2008) at 115, 147–48

²⁹ Ibid. at Article 1

concerns about the adequacy of this traditional definition.³⁰ As a result, the concept of failed states has emerged, along with notions of human security and the responsibility to protect.

By exploring in detail the structural competency in countries such as Somalia, Afghanistan, Haiti and the Democratic Republic of the Congo, *inter alia*, one can gain a better understanding of the issues relating to failed states. One of the most prominent and pressing issues relates to regional instability which results when failed states such as Somalia provide refuge to terrorist organizations that incorporate piracy as a revenue tool to facilitate the acquisition of weapons.

The piracy activities identified off the coast of Somalia has had a significant impact upon international commerce and maritime security, and the lack of a functioning central government seriously impedes efforts to address this problem.³¹ The offshore piracy occurring in the Gulf of Aden provides a concrete confirmation of the state of anarchy existing within Somalia.³²

It is not possible to confront piracy without addressing the disintegration of the Somali state and the resultant poverty, governance issues and absence of the rule of law in this troubled region.³³ If this were not enough, the ongoing civil war occurring in Somalia has led to the internal displacement of millions of people and, as a result, has facilitated the use of the country as a safe refuge for suspected terrorist organizations.³⁴ The international community certainly must assume a more prevalent role in peace-building and state reconstruction if

³⁰ The Fund for Peace, "The Failed States Index," *Foreign Policy* (July-August 2009) at 81

³¹ Mario Silva, "Somalia: State Failure, Piracy and the Challenges to International Law," *Virginia Journal of International Law*, Vol. 50, No. 3 (Spring 2010) at 555

³² Alemayehu Fentaw, "Anarchy, Terrorism, and Piracy in Somalia: New Rules of Engagement for the International Community," *American Chronicle* (27 May 2009)

³³ Mario Silva, "Somalia: State Failure, Piracy and the Challenges to International Law," *Virginia Journal of International Law*, Vol. 50, No.3 (Spring 2010) at 555

³⁴ Alemayehu Fentaw, "Anarchy, Terrorism, and Piracy in Somalia: New Rules of Engagement for the International Community," *American Chronicle* (27 May 2009)

Somalia and the global system is ever to effectively address the issue of piracy in the horn of Africa.

The example of Western intervention in Somalia clearly demonstrated that military action alone cannot effectively provide implementable solutions to the multi-faceted challenges with which a failed state must contend. The roots of the issues that created the failed state in the first place require redress concurrent or prior to any attempt to restore order through the application of force.

If a full comprehension of state failure is to be realized, then a thorough conception of the manner in which states are defined is central to this understanding. Although the terms nation, state and country are often used interchangeably, there exists often subtle and sometimes substantial differences in definition between them. As previously noted in this paper, international law, in deference to the *Montevideo Convention*, maintains that a state is defined as an entity with a defined territory and a permanent population under control of its own government, which has the capacity to engage in diplomatic relations with other states.³⁵

The *Montevideo Convention on the Rights and Duties of States* codified the declarative theory of statehood as accepted as part of customary international law, defining the rights and duties of states. Article 2 of the *Montevideo Convention* states that “[t]he federal state shall constitute a sole person in the eyes of international law”.³⁶

³⁵ Boleslaw A. Boczek, *International Law A Dictionary*, Lanham: The Scarecrow Press (2005) at 119

³⁶ *Montevideo Convention on the Rights and Duties of States* was a treaty signed at Montevideo, Uruguay, on December 26, 1933 at Article 2

There are various theories put forward by leading legal scholars as to when a state should be recognized as sovereign, including the constitutive theory that defines a state as a person of international law only when recognized by other states. However, this creates a challenge as demonstrated by the contemporary case of Kosovo. In this instance, there are states that recognize the legitimacy of Kosovo while others refuse to do so. In 1912, Lassa Oppenheim expressed the following on the constitutive theory of state recognition:

...International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.³⁷

Other legal scholars have expressed the declarative theory of statehood that permits statehood independent of recognition by other states if the given entity meets the criteria as expressed in the *Montevideo Convention*. Article 3 of the *Montevideo Convention* defines the political existence of the state as:

independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.³⁸

In 1930, in the context of this notion of state recognition, Mexican foreign minister, Genaro Estrada argued that governments should recognize states and not specifically align this recognition to the governments that operate the state in question. This is to say, simply because one state may take exception to the character of the government of a state, it does not preclude the former state

³⁷ Lassa Oppenheim, *International law: a treatise*, Vol. 1, New Jersey: The Lawbook Exchange, Ltd. (2006) at 135

³⁸ *Montevideo Convention on the Rights and Duties of States* was a treaty signed at Montevideo, Uruguay, on December 26, 1933 at Article 3

from recognizing the existence of the latter.

Additionally, another definition of a state is one whereby a political entity is recognized as the highest political authority for a specific territory by other states and is thus afforded equal footing by the international community. According to this definition, diplomatic recognition by other states is not required.³⁹ However, since the founding of the United Nations it has generally been recognized that state validity is aligned with general acceptance by the United Nations as is manifested in the form of membership in this international body. This is particularly true in relation to recognition by the United Nations Security Council which can veto any request for entry by a proposed state. Such is the case for Kosovo, which has received wide support from many Member States of the United Nations but to date (2012) has not been successful in securing the support of the five permanent members of the Security Council which retain the veto power.

A major facet of the state is the reality that most states retain and exercise considerable control over the conduct of their citizens. Max Weber described the political organization as an entity in which “administrative staff successfully upholds the claim to the monopoly on the legitimate use of physical force in the enforcement of its orders”.⁴⁰ According to Weber, a state exists where a political community possesses:

- 1) an administrative and legal order that is subject to change by legislation;
- 2) an administrative apparatus that conducts official business in accordance with legislative regulation;
- 3) binding authority over all

³⁹ Minh Nguyen, “The Question of ‘Failed States’ Australia and the notion State Failure,” Sydney’s Kings Cross: Uniya, JRS Paper No. 8 (March 2005)

⁴⁰ Talcott Parson (ed.), *Max Weber, The Theory of Social and Economic Organizations, The Free Press* New York: Oxford University Press (1947) at 154

persons (citizens) and most actions taking place in the area of its jurisdiction the legitimation to use force within this area if coercion is permitted or prescribed by the legally constituted government.⁴¹

A state's endurance, to a large extent, requires the ability to secure compliance from its population and control over its territory as well as the ability to gain extensive recognition from the international community.⁴²

According to Christopher Clapham states have:

historically derived from various specific and by no means universally realized conditions, and the global political system has until recent times comprised areas under the control of states, areas regulated by other forms of governance, and areas with no stable governance at all. The idea that the state is a universal form of governance is of very recent origin, and rests on uncertain foundations.⁴³

Irrespective of the foregoing, the reality is that the world is in fact divided into states, and this is recognized as the universal norm. Many of these new states, especially those which received independence from colonial powers, were not sufficiently strong enough to exercise full authority over their territories and populations, and in some instances this remains the case.⁴⁴

Notwithstanding the importance of territorial integrity and the requirement that states actually control their territory, the emergence and formation of so many varied states following the Second World War has made these stipulations more problematic due to the challenges presented by pre-colonial boundaries

⁴¹ Herbert R. Barringer, George I. Blanksten and Raymond W. Mack, *Social change in developing areas: a reinterpretation of evolutionary theory*, Cambridge: Schenkman Pub. Co. (1965) at 105

⁴² Christopher Clapham, "The Global-Local Politics of State Decay," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 77

⁴³ Ibid.

⁴⁴ Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 79

that for the most part took no account of linguistic, religious, cultural and topographic differences.

Although financial resources are required to maintain a state, statehood is not exclusively a matter of economics.⁴⁵ It has been argued that societies with a long history of statehood display obedience and discipline in relation to the nation, which is difficult to replicate in places where statehood has been recently imposed.⁴⁶

A considerable number of African states have experienced problems of state formation, including Somalia, Sierra Leone and the Democratic Republic of Congo, to name but a few examples. The historic weakness within an absence of the state has been complicated and the problem exacerbated by a lack of development in the area of human welfare.

Many of these failing states create problems for the international system. The decline of governance capacity also reflects a broader inability to maintain institutional structures that had been created throughout the colonial era,⁴⁷ such as a well-trained indigenous public sector and a satisfactorily functioning judiciary. Ultimately, power derives from the ability of a state to make binding decisions that are adhered to by the respective society. They must also provide infrastructure and ensure security; this must include the ability to exude its power and influence into territories in order to implement the prescribed state agenda.⁴⁸

⁴⁵ Christopher Clapham, "The challenge to the State in a Globalized World," in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 27

⁴⁶ *Ibid.* at 28

⁴⁷ *Ibid.* at 28

⁴⁸ Michael Mann, *The Source of Social Power. The Rise of Classes and Nation-States*, Cambridge: Cambridge University Press (1993) at 59-60

1.2 Emergence of the Modern State System

The emergence and formation of so many states in the twentieth century has created unique and enduring challenges to international law and facilitated the emergence of a number of conflicts. Within the context of international diplomacy, states more often than not recognize states rather than governments, as noted above in reference to the Estrada Doctrine of 1930. For example, in 2011 and 2012, many Western countries recognized the National Transitional Council of Libya in Benghazi as the new legitimate government of Libya long before the autocratic ruler Colonel Muammar Gaddafi was actually removed from power and killed by rebels.

Most states function with an executive, a bureaucracy, courts and other institutions with the ability to generate revenue and operate security forces including domestic law enforcement as well as a military force. These states can range in size, from enormous China to tiny Andorra, while others such as Poland disappear and re-appear. Others may be amalgamated and then separated as was the case for Czechoslovakia. States can also fail, as has occurred in Somalia and Afghanistan where their governing institutions disintegrated due to a multitude of factors including civil war and associated internal strife.⁴⁹

The modern state has always been a work in progress.⁵⁰ Since its inception, the United Nations, with its *Universal Declaration of Human Rights* which represents a global expression of human rights for all people, has permitted the

⁴⁹ Robert I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators" in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 5-11

⁵⁰ Jennifer Milliken and Keith Krause, "State Failure, State Collapse and State Reconstruction: Concepts, Lessons and Strategies," in Jennifer Milliken (ed.), *State Failure, Collapse and Reconstruction*, Oxford: Blackwell Publishing (2003) at 1

emergence on stage of sovereign states, many receiving independence from colonial countries.

The United Nations General Assembly also assisted with the independence of many of these colonial entities and their subsequent emergence as independent states with the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*⁵¹. The vote took place at the General Assembly rather than in the Security Council given that some states worried that a permanent member could veto the *Declaration*. The *Declaration* provided the legal and moral assistance to those entities and peoples that sought to achieve independence from their colonial states.

It was not very long after the invocation of the *Declaration* that many of these new states actually received their independence. Others states, such as Angola, Mozambique and several Portuguese colonies did not receive independence until the dictatorial regime in Portugal was overthrown in 1974.

Since the milestone Resolution 1514 of the United Nations General Assembly, it has been and still remains as challenging to “justify colonialism as it is to justify slavery or racism”.⁵² It is against this backdrop of the modern state, with its legal obligations as enunciated by the United Nations Charter, that an analysis and thorough understanding of state success or failure must take place. As Jennifer Milliken and Keith Krause have observed:

Concern over the possibility of state failure thus often has as much to do with dashed expectations about the achievement of modern statehood, or the functions that modern states should fulfil, as it does with the

⁵¹ General Assembly Resolution 1514(XV) (14 December 1960)

⁵² Robert H. Jackson, “The Weight of ideas in Decolonization,” in J. Goldstein and R. O. Keohane (eds.), *Ideas and Foreign Policy*, Ithaca: Cornell University Press (1993) at 138

empirically-observed decomposition or collapse of the institutions of governance in different parts of the world.⁵³

The modern state, exemplified in its charters, treaties, conventions and the emergence of human rights law, as noted above, is a relatively recent development. European state formation after the conclusion of the Second World War has for the most part been relatively peaceful, with the glaring exception of the dissolution of the Socialist Federal Republic of Yugoslavia.

Legal scholars, such as Rosa Ehrenreich Brooks, take a critical view of state formation in developing countries and note that:

Weak, failing, and failed states are not the exception in many parts of the world. They are the norm, and have been since their inception...such states rarely exercised anything approaching a monopoly on violence within their territories; to a significant extent, their borders were unmanageably porous, and the reach of government authority often barely extended beyond their capital cities and a handful of other urban centers...During the Cold War, these faux states were propped up by the competing superpowers; with the end of the Cold War, many were revealed as the houses of cards they had been all along...If the "descent" into failed state status requires some prior period as a functioning state, places such as Sierra Leone and Afghanistan can hardly be considered failed states. They never really were states to begin with.⁵⁴

It is therefore not entirely surprising to discover that state failure occurs in places where the prerequisite for state formation is already weak and at risk. It is legitimately argued that state formation is critical to the understanding of state success and failure. However, central to the analysis of state failure is not only the historical context of such a development but also the structural competency of the given state. As noted, failed states invariably create a power

⁵³Jennifer Milliken and Keith Krause, "State Failure, State Collapse and State Reconstruction: Concepts, Lessons and Strategies," in Jennifer Milliken (ed.), *State Failure, Collapse and Reconstruction*, Oxford: Blackwell Publishing (2003) at 2

⁵⁴Rosa Ehrenreich Brooks, "Failed States, or the State as Failure?," *University of Chicago Law Review*, Vol. 72, No. 4 (Fall 2005) at 1159

vacuum, resulting in misery for their people. As a result of the emergence of globalism, these developments also constitute regional and international risks for peace and security far beyond the borders of these states. What is invariably true, as history has repeatedly demonstrated, is the fact that reconstruction of failed states is an enormously challenging endeavour to state the obvious.

1.2.1 The Principle of State Sovereignty

The principle of state sovereignty is fully enshrined in international law as outlined within the United Nations Charter. Much of the twentieth-century literature on the principle of state sovereignty has focused on the Westphalian notion of the state as a unitary agent. However, it is significant to note that in the context of failed states, the more recent and emerging body of research focuses upon the compatibility of state sovereignty with other international legal norms. Within international legal and political architecture, the existence of state failure can affect the behavioural framework of other states towards the failed state and lead to belligerent acts between bordering states or, in severe circumstances, to intervention.

James Crawford has observed that “[i]f a state is, and becomes an international person through recognition only and exclusively, then rules granting any right to statehood are *a priori* impossible”.⁵⁵ He further notes that “[a] state is not a fact in the sense that a chair is a fact; it is ... a legal status attaching to a certain state of affairs by virtue of certain rule”.⁵⁶ Each of the 193 Member States of the United Nations has the benefit of international legal recognition as conferred by the United Nations Charter. However, notwithstanding the general criteria for state sovereignty, collective recognition by the United Nations can only happen with the required nine votes of the Security Council

⁵⁵ James Crawford, *The Creation of Statehood in International Law*, Oxford: Oxford University Press (1979) at 4

⁵⁶ *Ibid.*

and the approval of the five permanent members, hence the reason that Kosovo has yet to receive coveted membership in the United Nations.

The international community's recognition of legitimate sovereign states as manifest in their right to United Nations membership status has not been consistent. This was illustrated on 19 September 1992, when the Security Council adopted Resolution 777, which did not permit the Federal Republic of Yugoslavia (Serbia and Montenegro) to claim membership on the basis of prior membership of the former Yugoslavia, therefore requiring that they apply for a new membership to the United Nations.⁵⁷ This specific example resulted in further complication in that some regions of the former Yugoslavia have been recognized as states while others such as Kosovo have not. It is to be noted that at the time of admission Bosnia did not meet the traditional requirements of having a stable population and effective control of its territory and yet it was admitted to the United Nations as a member state.

The dissolution of the republics of the Soviet Union also created a myriad of legal issues for the United Nations. By virtue of successor state status Russia could legitimately its right to essentially retain a Security Council seat. This assertion was not challenged by Member States of the United Nations. However, the United States and the European Union assumed a much different approach to application of traditional criteria in respect of recognition of certain states from the Soviet Bloc. The United States announced that in addition to the traditional criteria, "recognition should be accorded only in the light of, *inter alia*, the prospective state's adherence to democracy and the rule of law, including respect for the *Helsinki Final Act* and the Charter of Paris".⁵⁸ The *Charter of Paris for a New Europe* sought to provide an opportunity for

⁵⁷ Security Council Resolution 777 (19 September 1999)

⁵⁸ Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs, *Foreign Policy Bulletin*, Vol. 2, No. 3 (1991) at 42

integration in the wake of the former communist bloc states being dismantled; however, it is important to note that this would take place within a Western ideological framework.

The European Community also issued the *Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'*, which enunciated their predisposition to recognize new States which “have constituted themselves on a democratic basis, have accepted appropriate international obligations and which have committed themselves in good faith to a peaceful process including with respect to negotiations”.⁵⁹

In this manner, the newly emerged states from the dissolved Soviet bloc were assigned more restrictive criteria than those ascribed to Russia. Internationally, there is no legal obligation to recognize new states based simply on their status as democratically constituted entities. However, as the number of democratic states seemingly increases, there is almost certainly going to be a considerable trend towards democratic legitimacy as an important factor in the recognition of new sovereign states.⁶⁰

Although substantial consequences may result, large scale recognition reversal is unlikely, regardless of however many other sanctions respecting a modified course of state development may emerge. The case of Zimbabwe is one where clearly many countries within the international community take issue with the manner in which the country has developed, or more specifically, with the administration of the state by the Zanu-PF Government of Robert Mugabe.

⁵⁹ Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,” *European Journal of International Law* (16 December 1991) and in Sean D. Murphy, “Democratic Legitimacy and the Recognition of States and Governments,” *International and Comparative Law Quarterly*, Vol. 48, No.3 (July 1999) at 559

⁶⁰ Jean Salmon, “Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?,” in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht: Martinus Nijhoff Publishers (1993) at 253-282

While issue is taken with the government of the country itself, even those concerned with Mugabe's rule do not fail to recognize the existence of Zimbabwe or suggest it not be recognized as a state within the international community.

Sovereignty, in accordance with the Westphalian concept, provides for a level of certainty in international relations as sovereign states at least *prima facie* are legally regarded as equals irrelevant of their size or wealth. This principle of the 'sovereign equality' of states is enshrined in Article 2.1 of the United Nations Charter. As well, as stated in the Responsibility to Protect report, sovereignty denotes:

the capacity to make authoritative decisions with regard to the people and resources within the territory of the state. Generally, however, the authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.⁶¹

Enshrined in international law are the concepts of both "sovereign equality of all its Members"⁶² and of non-interference in the sovereignty of another state, as "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are exercise exclusive and total jurisdiction within its territorial borders."⁶³ According to the International Commission on Intervention and State Sovereignty (ICISS) report, if that principle is violated:

the victim state has the further right to defend its territorial integrity and political impendence. In the era of decolonization, the sovereign equality of states and the correlative norm of non-intervention received its most emphatic affirmation from the newly independent states.⁶⁴

⁶¹*The Responsibility To Protect*, International Commission on Intervention and State Sovereignty (December 2001) at 2.7

⁶² UN Charter, Article 2.1

⁶³ *Ibid.* at 2.8

⁶⁴ *Ibid.*

Today, the trend in international law has been to move away from the state absolutism of the Westphalia model and towards an international system that embraces legitimacy, good governance and respect of human rights as a basis to promoting international peace and security.

There are of course serious contemporary challenges to the absolute integrity of state sovereignty. The reality of geopolitics has manifested itself more clearly in the last decade (2001-2011). The United States-led invasion of Iraq in 2003 was undertaken with what was most assuredly a tenuous resolution of the United Nations which the so-called 'Coalition of the Willing' invoked to justify their *prima facie* violation of Iraqi sovereignty. Many states took exception to the rationale for the invasion including the use of the UN resolution and the entire episode certainly raised issues relating to how states should respond to illegitimate government conduct (Saddam Hussein's regime), state sovereignty, the limits of internationally sanctioned use of force and the notion of building a coalition of states to rationalize a violation of sovereignty. Most of these questions remain unresolved even with the final withdrawal of United States forces from the country in late 2011 and early 2012.

1.2.2 Principle of Self-determination

With the crumbling of the European empires in the twentieth century came the expectation that democracy would act as a force for integration capable of consolidating failed states.⁶⁵ The principle of self-determination is in many respects directly associated with nationalism as it emerged in the wake of the First World War.

⁶⁵ Marina Ottaway, "Democratization in Collapsed States," in William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder, CO: Lynne Rienner (1995) at 242

United States President Woodrow Wilson's Fourteen Points⁶⁶ argued for an adjustment to colonial claims of self-determination. Although the points put forward by Wilson did not materialize as fully as he would have envisioned, they were included in several international legal instruments following the Second World War, which led to the decolonization of many parts of Africa and Asia. Ironically, in the context of the foregoing, the meetings of the Grand Alliance at Yalta in February 1945 represented perhaps the worst of geopolitical horse trading over spheres of influence and concurrently the reduced importance of state sovereignty that consumed copious amounts of debating time on issues such as the new Polish border, where leaders often referenced the 'Curzon Line' of Lord Curzon of Kedleston notoriety dating back to the post-World War I era.⁶⁷

With the ratification of the United Nations Charter and its two Covenants, the principle of self-determination was inserted into the framework of international law. Chapter 1, Article 1.2 of the United Nations Charter states that the purpose of the Charter is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”.

Common article 1 of both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) states that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. This fundamental principle of self-determination of peoples extends to nations the right to freely decide upon their sovereignty, although it does not specify what

⁶⁶ Wilson, Woodrow, “The Fourteen Points,” speech to a joint session of Congress (8 January 1918).

⁶⁷ S.M. Plokhy, *Yalta, The Price of Peace*, New York: Viking Press (2010) at 167-68

form this is to assume. Similarly, it does not point to a full independent state as the only means of self-determination nor to what the outcome should be, nor indeed even to what constitutes a nation.⁶⁸

Many hoped that the International Court of Justice 2011 opinion on Kosovo would have served to provide clarity with respect to this concept.⁶⁹ On 17 February 2008, the Assembly of Kosovo declared Kosovo an independent Republic.⁷⁰ Following the declaration, the Serbian government requested that the United Nations General Assembly ask for an advisory opinion from the International Court of Justice on the issue of Kosovo's unilateral declaration. Serbia, the previous parent nation, does not recognize the unilateral declaration of the independence of Kosovo and considers Kosovo an integral part of its territory as approved by the Constitution of Serbia which was adopted by the National Assembly on 30 September 2006.⁷¹

On 8 October 2008, the resolution sought by Serbia was adopted by the United Nations.⁷² On 22 July 2010, the International Court of Justice issued a nonbinding advisory opinion, which stated that general international law did not prohibit declarations of independence and so Kosovo's declaration of independence did not violate general international law.⁷³

⁶⁸ Betty Miller Unterberger, Self-Determination, Encyclopedia of American Foreign Policy, (2002). Available at:< http://findarticles.com/p/articles/mi_gx5215/is_2002/ai_n19132482/> accessed March 18, 2012

⁶⁹ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 July 2010)

⁷⁰ Text of the Kosovo declaration of independence can be found at *The Journal of Eurasia Law*, Duke University (2008) at 207

⁷¹ English translation of the Serbian Constitution prepared by the European Commission for Democracy Through Law (2006)

⁷² General Assembly Resolution 63/3 (8 October 2008)

⁷³ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 July 2010)

In requesting an advisory opinion from the International Court of Justice, various Member States of the United Nations sought to receive clarification and support for their positions from the Security Council. The issue of the Republic of Kosovo, which has been recognized as an independent state by 79 Member States of the United Nations,⁷⁴ has left members of the North Atlantic Treaty Organization, the European Union and the United Nations Security Council divided with respect to the matter.

Before the International Court of Justice opinion on the Kosovo declaration of independence, international law had not addressed the possibility that a non-colonized state might be able to secede from its parent state. Previously, the general rule in international law had been that ethnic minorities or peoples within a state could not claim the right to secede absent evidence of discrimination or colonization.⁷⁵ The *United Nations Declaration on Friendly Relations*,⁷⁶ adopted in 1970, “disfavoured secession so long as the government of a State is ‘representing the whole people belonging to the territory without distinction as to race, creed, or colour.’”⁷⁷

There have been a few examples of severe and systemic human rights abuses and undue restrictions upon a community’s right to self-determination within a state, but international law had been silent on the issue of non-oppressed groups of people successfully attaining their independence.⁷⁸ In fact, international law contains no systemic codification for self-determination.

⁷⁴ A non-governmental website in Kosovo—www.kosovothanksyou.com—is devoted to thanking the countries that have extended diplomatic recognition to Kosovo. At the time of this writing, Kosovo Thanks You lists 79 countries that have recognized Kosovo.

⁷⁵ Patrick J. Monahan and Michael J. Bryant with Nancy C. Cote, *Coming to Terms with Plan B: Ten Principles Governing Secession*, C. D. Howe Institute Commentary, No. 83 (June 1996) at 1-8

⁷⁶ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, UN GAOR, 25th Sess., 1883rd plen. mtg., Supp. No. 28, at. 121, UN Doc. A/8208 (24 October 1970)

⁷⁷ *Ibid.* at Preamble

⁷⁸ Théodore Christakis, “Le droit à l’autodétermination en dehors des situations de décolonisation,” Paris : Documentation française (1999) at 72, 83. See also Derege Demissie, “Self-Determination

Indeed, while the right to secede in such cases is not expressly permitted by international law, neither is it expressly prohibited. Hence, it is an area of uncertainty, although certain guiding principles may apply. The ‘freedom principle’, stemming from the ‘effectivity principle’, which is often invoked by states when there is a legal void, is generally seen as the default rule when there is no prohibitive rule in place. According to this principle:

the freedom to act outside of all pre-established rules is the fundamental principle of public international law. Only specific voluntary restrictions, or those established by undisputed custom, can affect it. What is not forbidden is legally permissible.⁷⁹

While the freedom principle may arguably be invoked by non-colonized territories wishing to separate, such an outcome may indeed be tempered by other principles. For example, the *uti possidetis* principle, which was formulated in order to maintain the borders of former colonies that had recently acquired their independence, “has been referred to in non-colonial contexts and with respect to both historical external and internal boundaries.”⁸⁰

In reference to the Province of Québec, the Supreme Court of Canada considered the existence of a right to self-determination under international law:

International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be

Including Secession vs. the Territorial Integrity of Nations-States: a Prima Facie Case for Secession,” *Suffolk Transnational Law Review*, Vol. 20 (1998) at 165, 168

⁷⁹ Théodore Christakis, “Le droit à l’autodétermination en dehors des situations de décolonisation,” Paris : Documentation française (1999) at 79

⁸⁰ Sean D. Murphy, “Democratic Legitimacy and the Recognition of States and Governments” in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge: Cambridge University Press (2000) at 127

permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people.⁸¹

The court concluded that:

international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part.⁸²

The ramifications of the International Court of Justice's advisory opinion on the Kosovo declaration have been the subject of intense debate, with some taking the view that a change in law has occurred by establishing that unilateral secession is not contrary to international law. However, in reality the International Court of Justice took great care to limit its analysis to the Kosovo situation and avoided taking a position on more general issues related to declarations of independence and secession. According to one commentator, "[t]echnically, [the ICJ judges] are not confirming that the declaration of independence made by the Kosovo Assembly on 17 February 2008 is legal. Nor are they ruling on whether Kosovo is a State today".⁸³ In fact, the International Court of Justice asserted only that "general international law contains no applicable prohibition of declarations of independence".⁸⁴

It would appear likely then that secessionist movements around the world will strive to rely on this part of the advisory opinion. For example, a Belgian jurist has said that the opinion "opened the door" for Flemish separatists.⁸⁵

⁸¹ Reference re Secession of Quebec, 2 S.C.R. 217, Canada (1998) at 112

⁸² Ibid.

⁸³ *La décision de la Cour de La Haye, une large victoire pour Pristina*, Le Monde (22 July 2010)

⁸⁴ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 July 2010) at 32

⁸⁵ *La décision de la Cour de La Haye, une large victoire pour Pristina*, Le Monde (22 July 2010)

According to Stéphane Beaulac, Constitutional Law Professor at the Université de Montréal, this opinion is “a slight evolution in international law that applies in extreme circumstances”.⁸⁶ He added that the opinion could be used to aid separatist movements in such places as Québec, Scotland and Catalonia, but only in cases in which “the door has not been shut to unilateral declarations”.⁸⁷ However, like the International Court of Justice, Beaulac cautions that the precedential value of the advisory opinion is limited:

[T]he decision regarding Kosovo’s independence does not constitute a precedent for all other cases. The situation in Kosovo was such that it made sense to acknowledge its independence as a *fait accompli*. This situation does not exist in Québec, Catalonia or Scotland.⁸⁸

François Crépeau, International Law Professor at McGill University, was cautious to specify that “the Court said only that nothing prohibited secession; it did not, however, say that secession was permitted”. He added that “when a country exists politically, international law does not oppose it. When secession occurs, international law acknowledges it”.

The International Court of Justice, the principal judicial body of the United Nations, successfully demonstrated that, in general, international law contains no applicable prohibition on declarations of independence and, therefore in the opinion of the International Court of Justice, Kosovo’s declaration did not violate general international law.

At present, the Kosovo opinion appears to cast aside the need for negotiated independence settlements, instead legitimizing unilateralism as a principle of

⁸⁶ *Le Kosovo n’a pas violé le droit international*, Le Devoir (23 July 2010) at A1

⁸⁷ *Ibid.*

⁸⁸ Judith Lachapelle, *Kosovo: la décision n’est pas ‘un précédent pour tout autre cas’*, La Presse (23 July 2010)

international law. Moreover, as noted previously the opinion will undoubtedly be invoked by separatist movements in support of their objectives. Already, several websites and blogs supporting the Palestinians and Tamils are hailing the International Court of Justice advisory opinion as an important step towards their own unilateral declarations of independence.⁸⁹ However, notwithstanding the opinion, unilateral declarations of independence will continue to constitute substantial challenges. These include the successful pursuit of membership in the United Nations since any member of the Security Council can veto United Nations membership, some of these states being for a variety of reasons pre-disposed to do so.

In the post-Cold War era, the debate on self-determination has grown significantly and is multifaceted. Tensions have increased between assorted groups which claim self-determination as a right and also amongst states that argue for territorial integrity as stipulated by international law. Contributing further to these tensions is the heightening debate associated with the rights of minorities, especially as it relates to political rights.

Political theorists such as David Miller argue that nations are 'ethical communities' and that states are the most effective co-ordinating mechanisms for nations and therefore the best available institutions for social justice, and the justification for wanting to be politically self-determining.⁹⁰ The argument elicits several questions in response to the claim that only nation-states constitute the best institutions to provide justice for their citizens.⁹¹ Kamal Shehadi has argued that the international community must balance the principle of territorial integrity as defined by international law with the

⁸⁹ John V. Whitbeck, "After Kosovo, Palestine?," *Khaleej Times* (29 July 2010) and Daya Gamage, "Kosovo statehood a special case," *Asian Tribune* (25 July 2010)

⁹⁰ David Miller, *On Nationality*, Oxford: Clarendon Press (1995)

⁹¹ An argument put forward by Michael Freeman, *Human Rights: An interdisciplinary approach*, Cambridge: Polity Press (2002) at 126

aspirations of aggrieved nations and additionally that there should be a settlement according to the rule of law and not of force.⁹² However, this also demonstrates the great difficulty of reconciling the self-determination of peoples within a world comprised of states.⁹³

Concepts of self-determination and the decolonization of several states illustrate through this process just how ingrained statehood has become in the modern imagination.⁹⁴ Accordingly, statehood has left many scholars to render it as the only achievable form of governance for the world despite the ‘pseudo-statehood’ of several of the candidate states.⁹⁵ Most colonial states that were secured independence did not qualify for statehood under customary international law as they lacked, namely, “the existence of effective government, with centralized administrative and legislative organs”.⁹⁶ However, shortly after independence, these new governments took on authoritarian and dictatorial powers and were treated by other governments as legitimate representatives of national communities.⁹⁷ Post-colonial states in Africa resulted in the formation of what Robert Jackson has called ‘quasi-states’:

... more a personal- or primordial-favouring political arrangement than a public-regarding realm. Government is less an agency to provide political goods such as law, order, security, justice, or welfare and more

⁹² Kamal S. Shehadi, *Ethnic Self-determination and the Break-Up of States*, London, Brassey’s (1993) in Freeman book at 126

⁹³ Michael Freeman, *Human Rights: An interdisciplinary approach*, Cambridge: Polity Press (2002) at 126

⁹⁴ Jennifer Milliken and Keith Krause, “State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 11

⁹⁵ *Ibid.*

⁹⁶ Ian Brownlie, *Principles of Public International Law* (3rd edn.), Oxford: Clarendon Press (1979) at 74

⁹⁷ Jennifer Milliken and Keith Krause, “State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 11

a fountain of privilege, wealth and power for a small elite who control it.
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The governments in such ‘quasi-states’ are unable or unwilling to enforce the rule of law throughout the state, rendering these states merely collections of allegiances and identities akin to those that existed in medieval Europe.⁹⁹ Brooks takes the view, noted above, that these former colonial failed states were never really states in the first place, as exemplified by the Democratic Republic of the Congo, Sierra Leone and Somalia:

With their boundaries often drawn by colonial and imperial powers, these faux states made for tidy maps and possessed seats at the United Nations and had international juridical personalities, but they rarely possessed the attributes of robust states in anything other than a purely formal legal sense.¹⁰⁰

One notes with interest the fact that many of the relatively new former colonial states in Africa that were constituted after the founding of the United Nations have reasserted the importance of the principle of state sovereignty over that of self-determination. A significant attribute of the Organization of African Unity¹⁰¹ was the extent to which state sovereignty was privileged amongst its members. Of the seven core principles affirmed by the Organization of African Unity, four sought to prohibit any form of external interference.¹⁰² The preceding is noted notwithstanding that many of these newly emerged states inherited flaws associated with the colonial partition of their territories; the fragility and navigational perils of the post-Cold War economic and political

⁹⁸ Robert H. Jackson, “Quasi-states, Dual Regimes, and Neoclassical Theory,” *International Jurisprudence and the Third*, *International Organization*, Vol. 41, No.4 (1987) at 527-528

⁹⁹ *Ibid.*

¹⁰⁰ Rosa Ehrenreich Brooks, “Failed States, or the State as Failure?,” *University of Chicago Law Review*, Vol. 72, No. 4 (Fall 2005) at 1159

¹⁰¹ Organization of African Unity was established on May 25, 1963 in Addis Ababa

¹⁰² Michael Byers and Simon Chesterman, “Changing the rules about rules? Unilateral humanitarian intervention and the future of international law,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 190

terrain also contributed to their circumstances, and a number of these flaws still haunt many of them.¹⁰³

In the nineteenth century, boundaries were described by Lord Curzon of Kedleston as:

the razor's edge on which hang suspended the modern issues of war or peace, of life and death to nations, adding that just as the protection of the home is the most vital care of the private citizen, so the integrity of her borders is the condition of existence of the State.¹⁰⁴

A boundary can be expressed as “an alignment, a line described in words in a treaty, and /or shown on a map or chart, and/or marked on the ground by physical indicators such as concrete pillars or cairns of stone”.¹⁰⁵ In the African Great Lakes region that includes Rwanda, Burundi, Uganda and eastern Democratic Republic of the Congo, for example, ethnic groups such as the Tutsis and Hutus confirm the arbitrary character of state boundaries where “ethnic fault lines tend to replicate across national boundaries, thus creating a deadly potential for conflict to expand and escalate”.¹⁰⁶ Eight years after the war that claimed the lives of approximately five million people, the eastern Democratic Republic of the Congo continues to be plagued by armed groups which attack civilians as well as United Nations peacekeepers. The crisis is often characterized by a changing “short-term alliance between different armed groups keen to use instability to control land and resources”.¹⁰⁷

¹⁰³ Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 2

¹⁰⁴ Adekunle Ajala, “The Nature of African Boundaries,” *African Spectrum*, Vol.18 (1983) at 177

¹⁰⁵ Ian Brownlie, *African Boundaries – A Legal and Diplomatic Encyclopaedia*, London: C. Hurst & Co. (1979) at 3

¹⁰⁶ René Lemarchand, “The Democratic Republic of the Congo: From Failure to Potential Reconstruction,” in Robert I. (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 35

¹⁰⁷ “Rebels kill 10 in eastern Congo attacks,” *Reuters Africa* (6 October 2011)

Post-colonial states across the African continent often include boundaries that were established by a colonial power but which were never fully accepted. The disdain with which these boundaries were viewed attracted even more intense antipathy when independence occurred, and the resultant new states have had considerable difficulty enforcing these demarcations.¹⁰⁸ The colonial political configuration has significantly contributed to many of the current crises existing in Africa.¹⁰⁹ It has also, however, afforded combatants an all-too-convenient alibi for ruthless dictatorial regimes to “hide their incompetence and indifference to the suffering of their people”.¹¹⁰ Moreover, colonial political structures have also contributed to conflict within the state premised upon ethnic or religious differences.¹¹¹

In Somalia, the Somaliland and Puntland regions both assert claims to self-determination. Somaliland maintains it has established independence as a sovereign nation identified as the Republic of Somaliland, although this entity has no international recognition.¹¹² Puntland remains part of greater Somalia, but, generally speaking, administers its own affairs with its own military force and government architecture.¹¹³ The two regions have, however, “fought for years over the Sool and Sanag regions, part of which Puntland claim[s] on an ethnic basis, while Somaliland says [the regions] are part of its territory under the colonial border Britain left”.¹¹⁴

¹⁰⁸ Ibrahim A. Gambari, “The Role of Foreign Intervention in African Reconstruction,” in I. William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner Publishers (1995) at 222

¹⁰⁹ Obiora Chinedu Oka, *Re-defining legitimate statehood*, Leiden: Martinus Nijhoff Publishers (2000) at 24

¹¹⁰ Ibrahim A. Gambari, “The Role of Foreign Intervention in African Reconstruction,” in I. William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner Publishers (1995) at 222

¹¹¹ Simon Chesterman, Michael Ignatieff, Ramesh Thakur, (eds.), *Making State Work: State Failure and the Crisis of Governance*, Tokyo: United Nation University Press (2005) at introduction

¹¹² Jason McLure, “The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?,” *3 CQ Global Researcher* (2009) at 157-58

¹¹³ Ibid.

¹¹⁴ David Clarke, “Somaliland, Puntland Clash over Disputed Turf Again,” *Reuters* (9 April 2007)

Somaliland's 'capital' city of Hargeysa maintains a government which includes a legislative branch, a police force, a currency, passports and a constitution which received ratification in 2001.¹¹⁵ The dependence of Somaliland on the Port of Berbera for revenue significantly undermines its claim to sovereign status.¹¹⁶ As a result of the fact that there is virtually no recognition of Somaliland as an independent state outside the region, there has been no foreign aid or benefits of note to Somaliland.¹¹⁷

Puntland, in the northeast of Somalia, is the domain of the Majerteyn, a sub-clan of the Darod clan.¹¹⁸ It is comprised of many supporters of the former Transitional Federal Government's president, Abdullah Yusuf Ahmed, who left office in late 2008. The self-declared Puntland State of Somalia was established in 1998, and while it did not declare full independence, it functions as a virtual 'state' independent of the alternative forces within Somalia.¹¹⁹ Due to the ongoing dangers posed to foreign aid workers, there is no appreciable external assistance received in this region.¹²⁰

Walter Clarke and Robert Gosende raise the question of how Somalia with its apparent common cultural traditions, language and religion has emerged as a failed state. Conceivably, they argue that "it never constituted a single coherent territory, having been part of the colonial empires of two suzerains, with other

115 Jason McLure, "The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?," *3 CQ Global Researcher* (2009) at 157

116 Shoreh Naji et al, *Somalia: A Risk Assessment Brief*, Ottawa: Carleton University (28 February 2009) at 4

117 Somaliland Mission, Republic of Somaliland: Accomplishments and Remaining Challenges. Available at: < <http://www.somalilandgov.com/challenges.htm> > accessed 16 August 2012

118 Jason McLure, "The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?," *3 CQ Global Researcher* (2009) at 157

119 Ibid.

120 Shoreh Naji et al, *Somalia: A Risk Assessment Brief*, Ottawa: Carleton University (28 February 2009) at 5

Somalis living outside the boundaries of the two colonies”.¹²¹ However, as has been previously noted, the clan-specific loyalties characteristic of the Somali people has ensured allegiance to these groups rather than to any central state.

Self-determination in many parts of the world was won, as observed by Michael Ignatieff, “on the cruelest possible terms: they have been simply left to fend for themselves. Not surprisingly, their nation-states are collapsing.”¹²² One of the problems confronting states with boundaries established by colonial administrations is “the dogma of the preservation of colonially inherited boundaries”¹²³ which fashions diverse people into groups defined by their inhabitation of given territories and which is clearly artificial in nature and difficult to sustain.

The struggle for national self-determination and the so-called politics of belonging, along with membership to a particular state, remains very prominent. There are a number of modern states that have diverse communities with no national homogeneity but which retain a community of citizenship rather than national membership.¹²⁴ Nevertheless, even in functioning states with strong structural competency, such as Canada and Belgium, there remain internal groups (aboriginal or linguistic) that aspire to some form of self-determination.

In international law the principle of state succession is easily recognized when, as noted by Daniel Patrick O’Connell, “one State ceases to rule in a territory, while another takes its place”.¹²⁵ When a new nation emerges from state

¹²¹ Robert I. Rotberg, (ed.), “*State Failure and State Weakness in a Time of Terror*,” Washington D.C.: Brookings Institution Press (2003) at 11

¹²² Michael Ignatieff, *Blood and Belonging*, Toronto: Viking Press(1993) at 8

¹²³ Nzongola- Ntalaja, “The National Question and the Crisis of Instability in Africa,” London: Institute of African Alternatives (1987) at 79

¹²⁴ Taso G. Lagos, “Global Citizenship – Towards a Definition What Is a ‘State’?.” Available at:

<<http://depts.washington.edu/gcp/pdf/globalcitizenship.pdf>> accessed March 18, 2012

¹²⁵ Daniel Patrick O’Connell, *State Succession in Municipal Law and International Law*, Cambridge: University Press (1967) at 3

failure, loss of sovereignty, revolution or civil war it is still in many cases held responsible for the consequences of its predecessor's acts.¹²⁶ There are scholars who argue for the 'clean slate' (*tabula rasa*) thesis for new or reconstructed states,¹²⁷ while others maintain that there is indeed flexibility in international law governing the doctrine of state succession, as "the substance of the law of State succession ... seems to come down to an obligation to negotiate".¹²⁸ James Crawford emphasizes the distinction between the principle of State continuity and State succession where in principle State succession is dependent upon the conclusion as enunciated by State personality, such as identity and continuity.¹²⁹

1.2.3 State Formation

The role of the state as a provider of goods to its citizens is paramount to the creation and sustenance of state stability as well as pivotal in retaining loyalty to the state. As noted above, several scholars have demonstrated that when states failure occurs, this loyalty is generally absent.

Consequently, state formation must focus upon "the utility of the states".¹³⁰ Grotius defined the State in terms that could be characterized as more philosophical than legal when he wrote, "a complete association of free men, joined together for the enjoyment of rights and for their common interest."¹³¹

¹²⁶ Ibid. at 3

¹²⁷ Rosalie Schaffer, "Succession to Treaties: South African Practice in Light of Current Developments in International Law," *International and Comparative Law Quarterly*, Vol. 30 (1981) at 593

¹²⁸ Helene Ruiz Fabri, "The Place of Law and Legal Documents in Regulating the Pan-European Situation," in Brigitte Stern (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, Leiden: Martinus Nijhoff Publishers (1998) at 171-77

¹²⁹ James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford: Clarendon Press (2006) at 35

¹³⁰ Jens Meierhenrich, "Forming States after Failure," in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 153

¹³¹ Grotius is quoted in James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford: Clarendon Press (2006) at 6

The American historian Joseph Strayer argues that in order to have state formation, there must also be a belief in the state, for “[a] state exists chiefly in the hearts and minds of its people; if they do not believe it is there, no logical exercise will bring it to life”.¹³² Jens Meierhenrich, who has written on the subject of genocide in Rwanda, asserts a complimentary position to Strayer when he references the requirement of a belief in the values of the state as essential. Meierhenrich maintains that “[s]tate formation is about the inculcation of values. It is not the state per se that matters in changing societies, but rather the state's presumed future, that is its potential value as a social institution as perceived by interacting agents”.¹³³

The rule of law, a functioning independent justice system and a bureaucracy are all essential components of state formation as are the attitudes of citizens in general and the elite members of a given society or entity. In both cases, there can be a desire to “‘lock in’ stakes for those who stand to lose from the reformation of a state”.¹³⁴ As well, law has an important “symbolic value in state formation after state failure”.¹³⁵

Strong institutions based upon the principles of the rule of law and protection and respect for human rights, as well as on the provision of public goods by agents which endorse these principles, are essential to state formation. Whenever there has been an atmosphere of state failure, the result has been “elite attitudes and behaviour such that they preferred to pursue short-term private interests rather than to adopt long-term goals involving the provision of public goods”.¹³⁶

¹³² Joseph R. Strayer, *On the Medieval Origins of the Modern State*, Princeton University Press (1970) at 5

¹³³ Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 155

¹³⁴ *Ibid.* at 156

¹³⁵ *Ibid.* at 157

¹³⁶ *Ibid.* at 154

Institutional capacity that is well developed is “a minimum requirement for state formation ... In the absence of administrative capacity, enforcement of any kind is difficult”.¹³⁷ Following the realization of independence, a disturbing number of African nations failed to realize a functioning bureaucracy or institutional structure. In such circumstances, the likelihood of state failure is dramatically increased.

State formation is a process not without considerable challenges. Scholars like Michael Mann have used the Weberian definition of the state to consider the power relations within the modern state as:

a differentiated set of institutions and personnel embodying centrality, in the sense that political relations radiate to and from the center, to cover a territorially demarcated area over which it exercises some degree of authoritative, binding rule making, backed up by some organized physical force.¹³⁸

In his extended study in *The Source of Social Power*, Mann further differentiates between the two forms that state power can take, either “infrastructural or despotic”.¹³⁹ He explains that:

[i]nfrastructural power refers to the state’s institutional capacity to implement decisions, whereas despotic power refers to the distributive power of state elites over civil society. In terms of despotic power, the modern state is relatively weak. This, moreover, is a direct consequence of its expanded infrastructural power, which, by bringing the state and civil society into a closer and more direct relationship, enables civil society groups more opportunities to influence the state’s activities.¹⁴⁰

¹³⁷ Ibid. at 157

¹³⁸ Michael Mann, *The Source of Social Power. The Rise of Classes and Nation-States*, Cambridge: Cambridge University Press (1993) at 5

¹³⁹ Ibid. at 59-60

¹⁴⁰ Ibid.

In the Spring of 2011, considerable upheaval across the Arab world demonstrated in strikingly practical terms the inherent issues illuminated in Mann's notion enunciated above. The conflict between despotic power, infrastructural power and how this had manifested itself in civil society was characterized by instability, reactionary brutality, revolutionary activities and upheaval. In several instances, these events resulted in regime change. However, in many of these cases, the emphasis was upon change in regime rather than state failure, which has not occurred. It is important to note that in early 2012 there remains in many of these states a mood of instability and uncertainty. The extent to which this uncertainty translates into weakness and potential challenges to a state remains to be seen.

A primary example of this is the status of the Syrian state in February 2012, where insurrection continues and international intervention remains minimal in view of domestic Syrian resistance and, more importantly, a lack of consensus on action primarily manifested in the positions adopted by United Nations Security Council members China and Russia. The Syrian state has certainly been weakened but to date (February 2012) appears unlikely to fail in the definitional sense, irrespective of what is occurring on the ground.

Weak states, according to Mann, experience a conflict between despotic and infrastructural power.

James Crawford, in seeking to clarify an understanding of how the state appears under international law and of what it consists, has referenced statehood in the context of effectiveness.¹⁴¹ He further argues that “‘effectiveness’ is and should be a necessary, but not a sufficient criterion for statehood”.¹⁴² It has also been argued that legality and legitimacy determine

¹⁴¹ James Crawford, *The Creation of States in International Law*, 2nd edn., Oxford: Clarendon Press (2006) at 37

¹⁴² Ibid.

statehood. However, in an age of globalization, the criterion of effectiveness is not absolute, as “no state, facing interdependence and powerful business and financial actors, is fully effective”.¹⁴³

On 27 August 1991, a commission was established as a result of the effective disintegration Yugoslavia. The commission's objective was to provide legal advice on the Yugoslav situation. The commission, chaired by French Minister of Justice Robert Badinter, provided opinions pertaining to legal issues on state formation and self-determination. The Arbitration Commission of the Peace Conference on the Former Yugoslavia (commonly known as Badinter Arbitration Committee) defined the state as a “community which consists of a territory and a population subject to an organized political authority [and] that such a state is characterized by sovereignty”.¹⁴⁴ The Commission further noted in its advisory opinion that “[t]he existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory”.¹⁴⁵

According to leading Chinese international legal scholar Ti-Chiang Chen, in “the declaratory theory, recognition of a new State is a political act, which is, in principle, independent of the existence of the new State as a subject of international law”.¹⁴⁶ Crawford, also noting the importance of recognition, cites the following passage of United States Chief Justice Taft’s famous 1928 *Tinoco* decision:

The non-recognition by other nations of a government claiming to be a national personality is usually appropriate evidence that it has not

¹⁴³ Georges Abi-Saab, *Cours général de droit international public*, Vol. 207, The Hague : Martinus Nijhoff Publishers (1987) at 68

¹⁴⁴ Alain Pellet, “The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples,” *European Journal of International Law*, Vol. 3 (1992) at 182

¹⁴⁵ *Ibid.* at 182

¹⁴⁶ Ti-Chiang Chen, *The International Law of Recognition: With Special Reference to Practice in Great Britain and in the United States*, London: Stevens (1951) at 52-54

attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by enquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned...Such non-recognition for any reason...cannot outweigh the evidence disclosed...as to the *de facto* charter of Tinoco's government, according to the standard set by international law.¹⁴⁷

Therefore, in the light of these observations, determining statehood does not turn on the issue of legality or even legitimacy as, according to Dionisio Anzilotti¹⁴⁸ writing in 1928, "there are no legitimate and illegitimate states. The legitimacy of the state resides in its existence".¹⁴⁹ This also affects the view of secession in that it is "neither prohibited nor allowed by international law. Secession happens in an international legal vacuum. 'Lawfulness' is simply no category for evaluating secession".¹⁵⁰

In considering the legal conditions that prevent statehood from being achieved through use of force, Anne Peters notes that:

If these principles are violated in the course of an attempt to state-building, no state can come into existence, despite being effective in the sense of functional. Put differently, these standards of legality have worked as a barrier impeding the acquisition of statehood. They are thus additional, negative criteria of statehood. The two cases that gave rise to this new rule were Southern Rhodesia and the Turkish Republic of Northern Cyprus.¹⁵¹

¹⁴⁷ James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford: Clarendon Press (2006) at 23

¹⁴⁸ Anzilotti was the secretary-general of the League of Nations expert commission preparing the Permanent Court of International Justice. He was a member of that court from 1921 to 1946.

¹⁴⁹ Dionisio Anzilotti, *Corso di Diritto Internazionale*, Vol. I, Roma: Athenaeum (1928) at 154-55

¹⁵⁰ Anne Peters, "Statehood after 1989: 'Effectivités' between Legality and Virtuality," *European Society of International Law*, Vol.3 (2010) at 8

¹⁵¹ *Ibid.*

In the case of Southern Rhodesia in 1965, she writes that the principle of self-determination:

had been disregarded. The foundation of that political entity, based on a racist ideology, violated the right of the (black) majority population. The entity was therefore no state in the sense of international law, although it was initially fully effective. The Security Council stated that Rhodesia's 'declaration of independence had no legal validity.' The political entity was considered to be an 'outlaw' not capable of being recognised as a state.¹⁵²

There are a number of other examples of how declarations of independence that violate the principle in international law of self-determination lead to their effective non-recognition as states by both the United Nations General Assembly and the Security Council. Included in these examples are "the homelands (Transkei, Bophutswana, Venda and Ciskei), created as a kind of reservation by the South African Apartheid regime for blacks, and declared to be independent states in 1976, 1977, 1979, and 1981 respectively".¹⁵³ The republic of Transkei, for example, was set up by the South African apartheid regime and lacked any legitimacy or credibility in the international community.

Under international law, it is generally considered to be true that state formation cannot occur by force. The principle prohibiting the use of force is a *jus cogens* norm. As can be seen in the case of the Turkish Republic of Northern Cyprus (TNC):

Because the Turkish invasion was an unlawful use of force, the republic proclaimed in 1983 is not a state, although it has enjoyed a high degree of effectiveness (in the sense of stability) until today, and is inevitably taken into account as a political player in the negotiations on the territorial questions in Cyprus.¹⁵⁴

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid. at 8-9

The prohibition on the use of force was similarly manifest in the case of the Baltic States, which never ceased to be states, despite the 1940 annexation by the Soviet Union.¹⁵⁵ To explain how these two principles have come into such prominence, it must be shown that:

[t]he doctrinal justification for elevating these two principles to negative indices of statehood is that these principles pertain to the body of *jus cogens*. If a treaty violating these rules is void, then the creation of a political-territorial entity which violates them must be a legal nullity also, and its result as well. The product of a nullity cannot be an international legal person, and hence no state in the sense of international law. In that sense, 'wrongful birth' precludes statehood.¹⁵⁶

In the case of Cyprus, Security Council Resolution 541, “[c]alls upon all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus; Calls upon all States not to recognise any Cypriot state other than the Republic of Cyprus”.¹⁵⁷ Another example, previously referenced but worth restating, is the unlawful state formation of Southern Rhodesia in 1965. At that time, the government led by white minority leader Ian Smith unilaterally declared independence from the United Kingdom.¹⁵⁸ However, the doctrine of self-determination did not apply in this case as it lacked legitimacy and the British Government continued to be in the eyes of the international community the legitimate power.¹⁵⁹ Rhodesia (renamed Zimbabwe) would only become a recognized independent state in 1980, after the United Nations admitted the new country and declared its legitimacy.

These framework of norms of international law concerning territorial

¹⁵⁵ Ibid. at 9

¹⁵⁶ Ibid.

¹⁵⁷ Security Council Resolution 541 (18 November 1983)

¹⁵⁸ David J. Harris, *Cases and Materials on International Law*, London: Sweet & Maxwell (1998) at 111

¹⁵⁹ Jericho Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis*, Oxford: Oxford University Press (1985) at 54-58

sovereignty are challenged by the ongoing dispute concerning Western Sahara. The former Spanish colony is principally under the control of Morocco with the remainder of the territory under controlled by the Polisario Front (*Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro*) and administered by the so-called Sahrawi Arab Democratic Republic. The United Nations Mission for the Referendum in Western Sahara (MINURSO) was established by Security Council Resolution 690¹⁶⁰ to assist with a transitional period within which a referendum for the people of Western Sahara would choose between independence and integration with Morocco. The right of self-determination is a fundamental principle of international law, yet Western Sahara remains a non-self-governing territory in 2012.

In 1975, the United Nations General Assembly adopted Resolution 3292, requesting the International Court to provide an advisory opinion on the following questions:

I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If the answer is negative, the *ICJ should* address, “II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?”¹⁶¹

The Court decided negatively on the first question, since at the time of the Spanish colonization the territory was not *terra nullius*:

In law, ‘occupation’ was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid ‘occupation’ that the territory should be *terra nullius*. According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court

¹⁶⁰ Security Council Resolution 690 (29 April 1991)

¹⁶¹ General Assembly Resolution 3292 (13 December 1974)

shows (a) that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; (b) that Spain did not proceed upon the basis that it was establishing its sovereignty over *terrae nullius*: thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.¹⁶²

For the latter question, the Court decided that there were legal ties of allegiance between this territory, the Kingdom of Morocco and the 'Mauritanian entity'. The Court defined the meaning of legal ties to be obtained in the object and purpose of Resolution 3292:

It appears to the Court that they must be understood as referring to such legal ties as may affect the policy to be followed in the decolonization of Western Sahara. The Court cannot accept the view that the ties in question could be limited to ties established directly with the territory and without reference to the people who may be found in it.¹⁶³

The Court also examined the resolutions adopted by the General Assembly on the subject in the *Declaration on the Granting of Independence to Colonial Countries and Peoples*¹⁶⁴ and concluded that the:

decolonization process envisaged by the General Assembly is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right to self-determination, which is not affected by the request for advisory opinion and constitutes a basic assumption of the questions put to the Court, leaves the General Assembly a measure of discretion with respect to the forms and procedures by which it is to be realized.¹⁶⁵

Predictably, the Court Advisory Opinion was interpreted in different ways by each party, Morocco and Mauritania both finding that the Court had

¹⁶² Western Sahara Advisory Opinion, ICJ Report (16 October 1975) at paras. 75-83

¹⁶³ Ibid. at paras. 79-81.

¹⁶⁴ General Assembly Resolution 1514 (XV) (14 December 1960)

¹⁶⁵ Western Sahara Advisory Opinion, ICJ Report (16 October 1975) at paras. 23-74

established legitimate and historical recognition of their claims while the Polisario Front found that the Advisory Opinion did not hinder the ongoing referendum for self-determination.

The process of state formation in many of the world's failed states bears the imprint of the legacy of colonialism, and it is against this background and in response to this assumption that the following chapter defines the various structural competency issues of state failure.

Chapter 2: Failure of State Formation - International Dimensions

State failure, whether narrowly or broadly defined, has significant consequences for the international community. The terminology of state failure varies and is often subject to when and where it is applied. State failure ranges in degree from weak, failing to fully failed state.

There are of course a myriad of terms that run the gamut with respect to the broader issue of state failure. These include those noted above, although many writers also use terms such as collapsed or fragile, amongst others. The specificity of the terminology is not as relevant as the conditions it describes which are inherently similar in character. The primary focus of this thesis is not overly concerned with descriptive explanations or nuances associated with terminology, but rather the reasons why these states have in fact failed or are in the process of failing.

The degree of state failure, the indicators that suggest failure and the process by which failed states can realize restoration is eminently more important and is directly linked to the structural competency of the state.

State failure can be attributed *inter alia* to historical factors such as colonialism and also to exclusively internal considerations of the state. This study presents ten broad categories by which state failure is to be defined. These are comprised of the essential structural competency areas. They are: (1) absence of rule of law; (2) political instability and lack of legitimacy; (3) economic and social instability directly contributing to poverty; (4) lack of security and/or the presence internal conflict; (5) authoritarian rule and clan loyalty; (6) impunity and an ineffective justice system; (7) loss of internal territorial control (*de jure* and *de facto* sovereignty); (8) gross and systematic violations of human rights;

(9) loss of social cohesion and development; and (10) corruption and weak institutions. The last factor would include for example a weak or weakening bureaucratic structure. These categories are intended to foster a better understanding of the causes and consequences of state failure.

As noted, there are many terms referenced both within the academic realm and beyond that identify the notion of failing and failed states. It is preferable in the context of this paper to use the two headings of ‘failing’ to refer to weak and fragile states and ‘failed’ to reference fully failed or collapsed states.

Furthermore, failing states should be understood in the context of the absence of core structural competency as defined above, affecting their stability and thereby creating a host of security concerns for the international community. It is understandable that there be broad interest in and concern about failed states given their proliferation since the conclusion of the Second World War, concurrent with the many challenges presented to these troubled emerging states. In order to secure a more comprehensive understanding of the development of state failure, it is necessary to examine structural competency and the prevailing literature associated with the subject.

2.1 Defining State Failure

Among the first analysts to employ the phrase ‘failed states’ were Gerald Helman and Steven Ratner who in 1993 used it to describe the emerging phenomenon of a given state becoming “utterly incapable of sustaining itself as a member of the international community”¹⁶⁶ and, as a result of such circumstances, threatening both its own citizens and the international community through political instability and warfare.

¹⁶⁶ Gerald B. Helman and Steven Ratner, “Saving Failed States,” *Foreign Policy*, No. 89 (Winter 1992/93) at 3

Throughout the 1990s, the concept of weak and failed states was increasingly linked to international insecurity and non-traditional security threats. Helman and Ratner brought attention to this phenomenon and sought to point out the security implications of failed states.¹⁶⁷ After the attacks on 11 September 2001, ‘failed state’ transformed a considerable degree into the prevailing term in academic and national security circles used to describe the phenomenon.¹⁶⁸ The events of 9/11, as it came to be known, created a sense of urgency in respect to addressing the challenges of state failure and the threats failed states pose to the international security.¹⁶⁹

In failed states, human security is constantly threatened with widespread violence, internal conflict and, at the extreme spectrum, civil war and terrorism. These conditions inevitably lead to a loss of territorial control and political instability attributed usually to authoritarian rule that lacks legitimacy among the population, with no separation of powers and with an ineffective justice system. Under such circumstances, there is a provision of impunity to those who commit serious criminal violations of human rights.

Failed states result from temporary or prolonged loss of the structural competency of the state to provide security and basic political goods. Adding to the seemingly overwhelming misery of the situation is widespread poverty, rampant corruption and a loss of social cohesion and development.

The characteristics of state failure are not homogeneous and vary from region to region. Failure is attributed to the structural incompetency of the state and its genesis is to be found in the historical realities of both Cold War politics and

¹⁶⁷ Ibid.

¹⁶⁸ Alexandros Yannis, “State Collapse and its Implications for Peace-Building and Reconstruction,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 64

¹⁶⁹ Ibid. at 65

the effects of colonialism. Leaders who have lost the legitimacy to govern and who provide for no social and economic development, using clan and elite sections of society to maintain power, have also undoubtedly paved the way for state failure.

By way of example of the forgoing, in Zaire (now the Democratic Republic of the Congo), President Mobutu Sese Seko's three decades of authoritarian rule annihilated the infrastructure of the state. This was also the situation in Sierra Leone during President Siaka Stevens rule from 1967 to 1985 as well as in Somalia during the tenure of President Mohamed Siad Barre from 1969 to 1991. Their seemingly insatiable greed and blatant disregard for the security and well being of their people was a preordaining factor in the almost inevitable destruction of their states.¹⁷⁰

According to Stephen Walt of Harvard University, “[w]hen governments collapse, the resulting anarchy often triggers large-scale migration, economic chaos, and mass violence”.¹⁷¹ These humanitarian and national security challenges in states that have failed, such as Sierra Leone, Liberia, Rwanda, Afghanistan and Somalia, create instability, mass migration and terrorism. State failure in these countries not only constitutes an undeniable threat to the lives of the people living within them but also poses a considerable threat to world peace as has been demonstrated by the conflicts that followed 9/11.¹⁷²

¹⁷⁰ Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No.4 (July/August 2002)

¹⁷¹ Stephen M. Walt, “Beyond bin Laden: Reshaping U.S. Foreign Policy,” *International Security*, Vol. 26, No. 3 (Winter 2001/02) at 62

¹⁷² Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No. 4 (July/August 2002)

In order to define state failure, it is essential that one comprehend the pattern of state formation in both a contemporary and historical context as well as the way in which the state is characterized.

Robert Rotberg's book, *When States Fail: Causes and Consequences*,¹⁷³ resulted from a five year project by Harvard University's World Peace Foundation Program on Intrastate Conflict, involving more than forty collaborators. The study sought to address all aspects of state failure in its research. For Rotberg, states exist as a means of delivering political goods:

Political goods are those intangible and hard to quantify claims that citizens once made on sovereigns and now make on states. They encompass indigenous expectations, conceivably obligations, inform the local political culture, and together give content to the social contract between ruler and ruled that is at the core of regime/government and citizenry interactions.¹⁷⁴

Rotberg and his colleagues state that strong states perform well in all levels of competency. They control their territories and provide security as “[c]itizens depend on states and central governments to secure their persons and free them from fear”.¹⁷⁵ Strong states or functioning states provide for political freedom and respect human rights, the rule of law and the delivery political goods. As well, these states create physical and commercial infrastructure, which establishes a set of criteria according to which states may be judged strong, weak, failed and collapsed.¹⁷⁶

¹⁷³ Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004)

¹⁷⁴ Ibid. at 2 – 3 (See also reference for political goods J. Roland Pennock, “Political Development, Political Systems, and Political Goods,” *World Politics*, Vol. XVIII (1966) at 420 – 26, 433

¹⁷⁵ Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 6

¹⁷⁶ Robert I. Rotberg, (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 4

Strong states perform well by international indicators such as the Human Development Index, which is prepared by United Nations Development Programme. The Index (HDI)¹⁷⁷ ranks countries by levels of human development, measuring life expectancy, literacy, education and standards of living. The Index notes that functioning states provide peace and order while failed states are unsuccessful in delivering both.¹⁷⁸ State failure, however, is not necessarily a result of violence or civil war, although such violence certainly constitutes at least a failure in some basic sub-components of state function in the provision of peace and security throughout the state.¹⁷⁹ States fail for a host of reasons, as outlined above, stemming from a failure to meet structural competency levels of a functioning state resulting, *inter alia*, in a loss of security and legitimacy. The inability to provide security and political goods is, according to Rotberg, what leads to failure. Rotberg is seen by many observers as the pre-eminent authority on the subject of state failure, and he expands the meaning of the failed state by establishing a hierarchy of political goods, the most critical of these being the supply of security, particularly human security, that serves:

to prevent cross-border invasions and infiltrations, and any loss of territory; to eliminate domestic threats to or attacks upon the national order and social structure; to prevent crime and any related dangers to domestic human security; and to enable citizens to resolve their differences with the state and with their fellow inhabitants without recourse to arms or other forms of physical coercion.¹⁸⁰

¹⁷⁷ For further information see: HDI-trends 1970-2010, Human Development Report, United Nations Development Programme (2011). Available at:< <http://hdr.undp.org/en/data/trends/hybrid/>> accessed 19 March 2012

¹⁷⁸ Robert I. Rotberg, (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 4

¹⁷⁹ Jonathan Di John, *Conceptualising The Causes And Consequences of Failed States: A Critical Review of the Literature*, London: Crisis States Working Papers Series No. 2, London School of Economics (January 2008) at 10

¹⁸⁰ Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 3

Rotberg enunciates several characteristics of failing states from endemic civil wars, inability to control peripheral regions, increased criminal violence and lawlessness and rampant corruption to dramatically declining economic growth and loss of political legitimacy.¹⁸¹

The performance criteria of the nation state is measured and ranked by Rotberg and his team to encompass the principles of strong, weak, failed or collapsed states which he describes as a rare and extreme version of a failed state.¹⁸² He classifies weak states as those that may be inherently weak due to geographical or economic constraints. It has been generally noted that failed states are predominantly ruled by despots who support various forms of divisiveness, such as on ethnic, linguistic or religious differences.¹⁸³ Many scholars stress the importance of the symptoms of violence, civil war and the growth of terrorist organizations as critical to state failure.¹⁸⁴ Accordingly, Rotberg and his associates incorporate security as the benchmark for state success and failure, observing that failed states are “tense, deeply conflicted, dangerous, and bitterly contested by warring factions. In most failed states, government troops battle armed revolts led by one or more rivals”.¹⁸⁵

Both Rotberg and Erin Jenne note that North Korea with its authoritarian regime, Iraq under Saddam Hussein and even Libya before Resolution 1973

¹⁸¹ Stewart Patrick, “‘Failed’ States and Global Security: Empirical Questions and Policy Dilemmas,” *International Studies Review*, Vol. 9, No. 4 (2007) at 646

¹⁸² Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 9

¹⁸³ Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 4

¹⁸⁴ Jonathan Di John, *Conceptualising The Causes And Consequences of Failed States: A Critical Review of the Literature*, London: Crisis States Working Papers Series No. 2, London School of Economics (January 2008) at 4

¹⁸⁵ Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 5

do not fall readily into any category, given that these states enjoy a monopoly on the use of force and were at least capable of controlling at one point in some cases their territories.¹⁹⁰

In the case of Libya, the analysis provided by Rotberg and Jenne was made prior to the 2011 United Nations Security Council Resolution 1973. The events in Libya during the 2011/2012 civil strife, as well as the human rights abuses, eventually led to instability, popular uprising and loss of territorial control, which would easily classify it as a failed state. However, notwithstanding the failed state categorization that was present during the period of the popular uprising against Gaddafi that eventually contributed to his removal from power, the Libyan National Transitional Council quickly established a number of structural competencies and was given a seat at the United Nations Security Council on 16 September 2011. The General Assembly, as well, adopted a motion to extend to the National Transitional Council, formed seven months earlier in the wake of popular protests, successor rights to represent Libya at the General Assembly with full voting privileges.¹⁸⁶ As evidenced in Libya, these authoritarian states can easily slide from weak to failed but, as has been noted earlier in this paper, the characteristics of failed states can be broad, and some remain in this defined state for a relatively short period.

In Sri Lanka, the internal conflict in the northern and eastern parts of the country endured for 26 years until the defeat of the Liberation Tigers of Tamil Eelam in May 2009. Secretary-General Ban Ki-moon has stressed the need for

¹⁹⁰ Erin K. Jenne, "Sri Lanka: A Fragmented State," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 219

¹⁸⁶ General Assembly seats National Transitional Council of Libya as country's representative at sixty-sixth General Assembly Plenary, GA/11137 (16 September 2011)

a “credible national accountability process”¹⁸⁷ following the conclusion of the strife in Sri Lanka.

A United Nations panel of experts on accountability have found credible reports that both Government forces and the LTTE committed war crimes during the final months of the war.¹⁸⁸ The conflict was due in part to the discriminatory policies of the Sri Lanka government.¹⁸⁹ Jenne prefers to classify Sri Lanka as a fragmented state rather than a failed state given that it provides public services and was able to cope with problems of territorial control.¹⁹⁰ However, not to exhaust the endless adjectives that are used to describe the structural competency of functioning, weak and failed states, a fragmented state (referring to Jenne’s terminology) is in fact a symptom of a weak state. As noted above, there is no single universal definition for weak state or failed state. State weakness has been described as the erosion of the state’s capacity to govern effectively. Taken to the extreme, the result is a complete collapse of state power and function.¹⁹¹

There have been differing references in several works with regard to the fact that that failed states suffer from an “enduring character” of violence, with “disharmonies between communities”¹⁹² and with rulers that “prey on their own constituents”¹⁹³ and also “exhibit flawed institutions ... deteriorating or destroyed infrastructures ... corruption flourishes ... a nation-state also fails

¹⁸⁷ “Sri Lanka: Ban Stresses Need for Accountability Process Over End to Civil War,” U.N. News Service, New York (24 September 2011)

¹⁸⁸ Ibid.

¹⁸⁹ Erin K. Jenne, “Sri Lanka: A Fragmented State,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 221

¹⁹⁰ Ibid. at 222

¹⁹¹ Liana Sun Wyler, “Weak and Failing States: Evolving Security Threats and U.S. Policy,” CRS Report for Congress (28 August 2008) at 4

¹⁹² Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 5

¹⁹³ Ibid. at 6

when it loses legitimacy”¹⁹⁴ and is able to provide only “limited quantities of other essential political goods”.¹⁹⁵

In Rotberg’s description of violence in failed states he maintains that it is not “the absolute intensity of violence that identifies a failed state. Rather, it is the enduring character of that violence”.¹⁹⁶ In places such as Sierra Leone, the Democratic Republic of the Congo, Chad and Sudan, where the state does not have the competency to provide any safety net of security for its people, there is an inevitable loss of legitimacy in the view of their people as “[t]he social contract that binds inhabitants to an overarching polity becomes breached”.¹⁹⁷ Immense profits are often realized by the ruler and a select few in failed states while corruption flourishes and thrives on an unusually destructive scale.¹⁹⁸

In addition, in many cases of state failure legitimacy is lost and individuals turn to clan leaders or warlords for assistance; it is under these circumstances that “terror can breed along with the prevailing anarchy that naturally accompanies state breakdown and failure”.¹⁹⁹

Some scholars have argued that the inability of state leaders to achieve predominant presence in large areas of their countries relates directly to the:

capacity of the state (or incapacity, as the case may be), especially the ability to implement social policies and to mobilize the public, relates to the structure of society. The ineffectiveness of state leaders who have faced impenetrable barriers to state predominance has stemmed from the nature of the societies they have confronted-from the resistance posed by

¹⁹⁴ Ibid. 7-9

¹⁹⁵ Ibid. at 6

¹⁹⁶ Ibid. at 5

¹⁹⁷ Ibid. at 9

¹⁹⁸ Ibid. at 8

¹⁹⁹ Ibid. at 9

chiefs, landlords, bosses, rich peasants, clan leaders.²⁰⁰

Others, such as Michael Ignatieff, have adopted a more narrow understanding of state failure, stating that it occurs when “the central government loses the monopoly of the means of violence”.²⁰¹ Ignatieff, Simon Chesterman and Ramesh Thakur have noted that one of the most important conditions of making states work is the creation of:

apolitical bureaucratic structures (civil service, judiciary, police, army) supported by an ideology that legitimate the role of neutral state authority in maintaining social order through prescribed procedures and the rule of law.²⁰²

Understanding of state social structure is fundamental to the structural competency of the state and the understanding of state capabilities.

Professor Ira William Zartman uses the term ‘state collapse’ in referencing state failure as a “deeper phenomenon than mere rebellion, coup, or riot. It refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new”.²⁰³ Zartman adopts Hobbes’ narrative of the social contract theory, noting that state failure occurs when the basic functions of authority, law and political order have failed and the state no longer performs its requirements.²⁰⁴ Zartman further observes that states fail when:

the basic functions of the state are no longer performed...as the decision-making center ... order is not preserved ... As a territory, it is no longer

²⁰⁰ Joel Migdal, *Strong States and Weak Societies: State-Society Relations in the Third World*, Princeton: Princeton University Press (1988) at 33

²⁰¹ Michael Ignatieff, “Intervention and State Failure,” *Dissent*, Vol. 49, No. 1 (Winter 2002) at 118

²⁰² Simon Chesterman, Michael Ignatieff and Ramesh Thakur (eds.), *Making States Work*, Tokyo: United Nations University Press (2005) at 2-3

²⁰³ William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 1

²⁰⁴ Jonathan Di John, ‘Failed States’ in *Sub-Saharan Africa: A Review of the Literature*, Madrid: Real Instituto Elcano (14 January 2011)

assured security and provisionment by a central sovereign organization. ... it has lost its legitimacy, which is therefore up for grabs, and so has lost its right to command and conduct public affairs.²⁰⁵

Both Zartman and Rotberg approach state formation as the creation of a provider of public goods and make a distinction between the various services they provide, such as security, infrastructure and social services. Several scholars have presented an alternative view to that of Zartman and Rotberg, arguing that these authors define state function and failure in terms that are simply too narrow for utility.

Laura Tedesco, by way of example, views Zartman's and Rotberg's analysis as lacking any historical account and maintains that it merely constitutes a label that encourages cosmetic solutions,²⁰⁶ while others, such as Nelson Kasfir, comment that state failure is used as a means to override sovereignty.²⁰⁷

As previously noted, a failed state that "exhibits a vacuum of authority",²⁰⁸ such as Somalia, Bosnia, Lebanon, Afghanistan, Nigeria and Sierra Leone,²⁰⁹ is noted for sub-state actors seizing control over regions that were once part of the state. Their conduct is generally characterized by the establishment of their own security forces.

Additionally, international relations are characterized by disorder and the presence of criminal enterprises such as arms and drug trafficking that

²⁰⁵ William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 5

²⁰⁶ Laura Tedesco, "The Latin American State: 'failed' or evolving?," *Fundación para las Relaciones Internacionales y el Diálogo Exterior*, Madrid: Working Paper 37 (May 2007) at 2

²⁰⁷ Nelson Kasfir, "Domestic Anarchy, Security Dilemmas, and Violent Predation," in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 57

²⁰⁸ Robert I. Rotberg, (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 9

²⁰⁹ Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 10

operate in conjunction with external terrorist networks.²¹⁰ However, there are scholars who have cautioned that these designations are neither static nor terminal, as exemplified by Lebanon, Nigeria, and Tajikistan, all of which recovered from collapse and are now categorized as weak. Neither weakness nor failure is inevitable, rather it is the structural competency flaws of a weak and failed state and the unfortunate decisions that are made by those in positions of authority that are at the root of the problem.

Even states that inherited weaknesses at the onset of their independence from colonial rule often manage to succeed in spite of the many challenges. The common denominator associated with such success is the presence of political will and exceptional leadership. Botswana presents a suitable example of this phenomenon.²¹¹ In contrast, Zimbabwe is an example of a once strong African state that has as a result of President Robert Mugabe's autocratic rule and abuse of power fallen into failure, with massive poverty, hunger, loss of legitimacy and rampant violence.²¹²

While several scholars have subscribed to the importance of the security paradigm in analysing state failure, others such as Lisa Chauvet and Paul Collier define failed states in economic terms:

[A] failing state is a low-income country in which economic policies, institutions and governance are so poor that growth is highly unlikely. The state is failing its citizens because even if there is peace they are stuck in poverty ... Through various routes the state may become a hazard to its neighbours and conceivably to the world.²¹³

²¹⁰ Ibid. at 10

²¹¹ Robert I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 19

²¹² Ibid. at 15

²¹³ Lisa Chauvet and Paul Collier, "What are the preconditions for turnarounds in failing states?," Centre for the Study of African Economies, Oxford University (January 2007) at Introduction. Available at: <<http://users.ox.ac.uk/~econpco/research/pdfs/WhatPreconditionsForTurnaround.pdf>> accessed March 19, 2012

Chauvet and Collier note the example of Equatorial Guinea which in the application of their criteria is not considered to have failed due to the high income levels enjoyed from oil revenues.²¹⁴ This position is problematic to say the least given that wealth is in no way equitably or evenly distributed and the overwhelming majority of the Equatorial Guinea's residents live in poverty. Equatorial Guinea was ranked 117th among world nations by the UNDP Human Development Index.²¹⁵ In a study regarding corruption, Transparency International, which ranks 180 countries, listed Equatorial Guinea at the bottom of their rankings, in 168th place.²¹⁶

Robert Kaplan presents a number of African states as excellent examples of 'the coming anarchy' and suggests that the path to state failure is to be found within the chaos that emerges in the face of a fading central government and the consequent ascendancy of tribal domains which, due to scarcity, crime, overpopulation, tribalism, and disease, are rapidly destroying the social fabric.²¹⁷ Kaplan provides an overview of the discourse on failed states by issuing a warning to Western governments with respect to the regressive developments in West Africa of "the withering away of central governments, the rise of tribal and regional domains, the unchecked spread of disease, and the growing pervasiveness of war".²¹⁸ He concludes that state failure and collapse are manifested by "disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-

²¹⁴ Ibid. at 13

²¹⁵ HDI-Human Development Index 2010, United Nations Development Programme. Available at: <<http://hdr.undp.org/en/>> accessed March 19, 2012

²¹⁶ Transparency International Corruption Perceptions Index 2009, available at: <http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table > accessed 20 March 2012

²¹⁷ Robert D. Kaplan, "The Coming Anarchy," *The Atlantic Magazine* (February 1994)

²¹⁸ Ibid.

states, irrational borders, and the empowerment of private armies, security firms, and international drug cartels”.²¹⁹

There have been a number studies and task forces charged with examining the issue of state failure, including the 1994 State Failure Task Force that was commissioned by the United States government at the request of Vice President Al Gore.²²⁰ The Task Force established a panel of distinguished academic social scientists, experts in data collection, and consultants in statistical methods. The Task Force was chaired by Ted Robert Gurr, an authority on political instability. It noted that state failure consists of:

sustained military conflicts between insurgents and central governments, aimed at displacing the regime...sustained policies by states or their agents and, in civil wars, by contending authorities that result in the deaths of a substantial portion of members of communal or political groups...major, abrupt shifts in patterns of governance, including state collapse, periods of severe regime instability, and shifts toward authoritarian rule.²²¹

The Task Force also identified 136 instances of state failure between 1995 and 1998 in countries with populations in excess of 500,000 people. It further defined state failure as a “range of severe political conflicts and regime crises”²²² and as categorized by a “total or near-collapse of central political authority”.²²³ Included in the analysis were four types of events that lead to state failure:

²¹⁹ Ibid. at 44

²²⁰ The Task Force used a number of different techniques to generate data and identify factors most closely associated with state failure, including logistic regression analysis, neural network analysis, and expert surveys. Currently referred to as the Political Instability Task Force (PITF)

²²¹ Daniel C. Esty et al, “The State Failure Project: Early Warning Research for U .S. Foreign Policy Planning,” in John L. Davies and Ted Robert Gurr (eds.), *Preventive Measures: Building Risk Assessment and Crisis Early Warning Systems*, Lanham: Rowman and Littlefield (1998) at 27 – 38

²²² Liana Sun Wyler, “Weak and Failing States: Evolving Security Threats and U.S. Policy,” CRS Report for Congress (28 August 2008) at 26

²²³ Ibid.

Revolutionary wars. Episodes of sustained violent conflict between governments and politically organized challengers that seek to overthrow the central government, to replace its leaders, or to seize power in one region. **Ethnic wars.** Episodes of sustained violent conflict in which national, ethnic, religious or other communal minorities challenge governments to seek major changes in status. **Adverse regime changes.** Major, abrupt shifts in patterns of governance, including state collapse, periods of severe elite or regime instability, and shifts away from democracy toward authoritarian rule. **Genocides and politicides.** Sustained policies by states or their agents, or, in civil wars, by either of the contending authorities that result in the deaths of a substantial portion of a communal or political group.²²⁴

Of the four categories that the Task Force identified, adverse regime change emerged as the most prevalent causal factor of state failure, followed by ethnic war, revolutionary war, and then genocide.²²⁵ The Task Force also identified partial democracy, trade closure and poor economic well being as indicated by high infant mortality rates as contributing primary causes of state failure.²²⁶

In addition to this Task Force, the United States government maintains a commission sponsored by the Centre for Global Development that seeks to address issues associated with weak states. The Commission on Weak States recognizes many of the assumptions of failed states enunciated by the previously noted Task Force and defines weak states as those with:

²²⁴ Jack A. Goldstone et al, *State Failure Task Force Report: Phase III Findings*, McLean: Science Applications International Corporation (30 September 2000) at V

²²⁵ *Ibid.* at IV, V, 3-5. The State Failure project was commissioned by the Central Intelligence Agency in 1994 and was carried out by a task force composed of individuals from universities and consulting companies. All of the data presented by the project are unclassified, and the findings of the project are those of the members of the task force, not the U.S. government or any of its agencies. The State Failure Task Force defines "adverse regime change" as "major, abrupt shifts in patterns of governance, including state collapse, periods of severe elite or regime instability, and shifts away from democracy toward authoritarian rule." There were fewer than twenty cases of state failure narrowly defined as the collapse of authority structures for several years. The Task Force consisted of: Jack A. Goldstone; Ted Robert Gurr; Barbara Harff; Marc A. Levy; Monty G. Marshall; Robert H. Bates; David L. Epstein; Colin H. Kahl; Pamela T. Surko; John C. Ulfelder Jr. and Alan N. Unger.

²²⁶ Gary King and Langche Zeng criticize the methodology of the State Failure project even though they find that most of its conclusions, especially the empirical link between high infant mortality and partial democracy, are supported. Gary King and Langehe Zeng, "Improving Forecasts of State Failure," *World Politics*, Vol. 53, No. 4 (July 2001) at 623-658

governments unable to do the things that their own citizens and the international community expect from them: protecting people from internal and external threats, delivering basic health services and education, and providing institutions that respond to the legitimate demands and needs of the population.²²⁷

The Commission's 2004 report also classifies 50 to 60 countries as weak states based on their failure to provide physical security, social welfare, and legitimate institutions.

Each year, the Fund for Peace releases its Failed States Index, which is found in *Foreign Policy* magazine. The 2011 report is very comprehensive, measuring 177 countries across 12 indicators to determine the rating for each state. The 12 indicators include: (1) democratic pressures; (2) refugees and internally displaced persons; (3) group grievance; (4) human flight; (5) uneven development; (6) economic decline; (7) delegitimization of the state; (8) public service; (9) human rights; (10) security apparatus; (11) factionalized elites; and (12) external intervention.²²⁸

The Failed States Index grades states in direct correlation to their susceptibility to political instability and violence, using computer software that scans news articles, United States State Department reports, independent studies and corporate financial filings, noting the number of positive and negative 'hits' for each country.²²⁹ In the Failed States Index, a higher value denotes a higher level of state weakness and failure, while lower values represent a more functional state. Although the Failed States Index precludes the inclusion of significant factors associated with the rule of law along with impunity in regard to structural competency failures of a state, which are in fact major causes of

²²⁷ Liana Sun Wyler, "Weak and Failing States: Evolving Security Threats and U.S. Policy," CRS Report for Congress (28 August 2008) at 26

²²⁸ The Fund for Peace, "Failed States Index 2011," *Foreign Policy* (2011)

²²⁹ Stewart Patrick, "'Failed' States and Global Security: Empirical Questions and Policy Dilemmas," *International Studies Review*, Vol. 9, No. 4 (2007) at 646

state failure, it is still an important undertaking with respect to understanding the causes and impact of failed states.

Meanwhile, the World Bank classifies 25 very poor and troubled developing countries in its *Low Income Countries under Stress* (LICUS) report as determined by low scores on the World Bank's Country Policy and Institutional Assessments (CPIA) organization. However, there are two glaring inadequacies associated with the World Bank's approach.²³⁰ The first relates to the fact that the LICUS designation is restricted to those countries eligible for financial grants from the Bank's International Development Association (IDA) and therefore omits an important number of other weak and failed states. A second issue relates to fact that the CPIA depends significantly upon economic components of governance and consequently ascribes reduced importance to security, political, and social considerations.²³¹

The Organization for Economic Co-Operation and Development/Development Assistance Committee (OECD/DAC) provides a forum for member states to discuss issues surrounding development. According to OECD definition, the fragility or weakness of state formation is attributed to a lack of political will as well as a lack of "capacity to provide the basic functions needed for eliminating poverty, such as, education, development, and a safeguard to the security and human rights of their populations".²³² State weakness therefore results when citizens' expectations of the state and the state's expectations of its citizens fall out of equilibrium with the state's capacity to deliver services. Disequilibrium can be caused by extreme incapacity, elitist behaviour and a loss of legitimacy. It can occur suddenly or result from slow erosion over time

²³⁰ Ibid. at 649

²³¹ Ibid.

²³² "Concepts and Dilemmas of State-building in Fragile Situations From Fragility to Resilience Organisation," OECD/DAC Discussion Paper (2008) at 16

and may be the result of either internal or external factors. If a state does not possess effective political mechanisms, there is a significant threat that it may be unable to manage the consequences of its inability to meet social expectations.²³³

The concept of ‘service entitlements’ is common in the discourse of failed states between scholars, international bodies and national governments focusing on the willingness of a state to provide positive goods to its people.

The United Kingdom’s Department for International Development and the OECD retain complementary definitions of fragile states, which also focus on service entitlements. The Department defines fragile states as places where the government is unwilling or unable to deliver core functions to the majority of its citizens, particularly the poorest of its residents. It is noted that “[t]he most important functions of the state for poverty reduction are territorial control, safety and security, capacity to manage public resources, delivery of basic services, and the ability to protect and support the ways in which the poorest people sustain themselves”.²³⁴ Once again, the definition is premised upon the fundamental structural competency failure of states and is not specifically related to the performance of the functions necessary to subscribe to the basic expectations of statehood. The Centre for Research on Inequality and Social Exclusion also defines fragile states as “failing or at risk of failing, with respect to authority, comprehensive service entitlements or legitimacy”.²³⁵

Recognizing the complexity and the constricted view present when using the term ‘failed states,’ the Crisis States Research Centre at the London School of

²³³ Ibid. at 7

²³⁴ *Why We Need to Work More Effectively in Fragile States*, London: U.K. Department for International Development (January 2005) at 7

²³⁵ Frances Stewart and Graham Brown, “Fragile States,” CRISE Working Paper No. 51 (January 2009) at 3

Economics (LSE) lists three categories of state vulnerability and effectiveness as fragile, crisis and failed. Accordingly, a fragile state is significantly more susceptible with respect to institutional arrangements which embody and preserve the conditions of crisis during the period in which it is under acute stress. In such a situation the reigning institutions must contend with serious contestation and are potentially unable to manage conflict and shocks.

Finally, a failed state, according to LSE Research Centre, is in a condition of state collapse when it can no longer perform its basic security and development functions and has lost control of its territory and borders.²³⁶ It has been suggested that the term ‘failing state’ is a more appropriate categorization than ‘failed state’, as the former is more flexible, allowing for different degrees of failure along a continuum as the state governing capacity weakens.²³⁷ Human rights groups now increasingly favour the much broader terminology of ‘fragility’. The challenge with respect to these approaches is that they nuance the complexity of the situation associated with state failure and delay any possible response that may be required from the international community.

In the post-Cold War era, many researchers have approached the phenomenon of state failure from a ‘Third World’ perspective; this was mainly attributed to the sheer number of weak states in Africa:

Thirty-four years after 1960, the symbolic year of ‘Africa's independence’ many African countries continue to experience serious difficulty in the process of consolidation of their statehood ... Some African nations have in the past few years reduced themselves to a state

²³⁶ Jonathan Di John, *Conceptualising The Causes And Consequences of Failed States: A Critical Review of the Literature*, London: Crisis States Working Papers Series No. 2, London School of Economics (January 2008) at 10

²³⁷ Ibid.

of ‘suspended statehood’ in which there may still be recognised frontiers, but everything inside has become anarchy and lawlessness.²³⁸

There is concern in the capitals of many Western nations that the potential exists ever increasingly that failed states will transform to transnational threats. A 2003 report by the European Security Strategy identifies the “alarming phenomenon” of state failure as one of the main threats to the European Union.²³⁹ The European Security Strategy is the document that is referenced by the European Union to clarify its security strategy and which defines state failure as “[c]ivil conflict and bad governance - corruption, abuse of power, weak institutions and lack of accountability - corrode States from within”.²⁴⁰ The report notes that a failed state leads to a “collapse of state institutions” and “undermines global governance and adds to regional instability”.²⁴¹

Similarly, state failure has been portrayed “as the Achilles’ heel of collective security”.²⁴² United Nations Secretary-General Kofi Annan declared in his 2005 report, *In Larger Freedom*, that “if states are fragile, the peoples of the world will not enjoy the security, development, and justice that are their right”.²⁴³ In 2006, member States of the United Nations endorsed the creation

²³⁸ Alexandros Yanniss, “State Collapse and its Implications for Peace-Building and Reconstruction,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 64

²³⁹ Stewart Patrick, “‘Failed’ States and Global Security: Empirical Questions and Policy Dilemmas,” *International Studies Review*, Vol. 9, No. 4 (2007) at 646. In Great Britain, the Prime Minister’s Strategy Unit (PMSU) has advocated a new, government-wide effort to help prevent failed states from generating pathologies like crime, terrorism, disease, uncontrolled migration, and energy insecurity (PMSU 2005). Similarly, Canada’s International Policy Statement of 2005 (Government of Canada 2005) and Australia’s recent white paper on overseas programs (Australian National Aid Agency 2006) advocate cross-departmental collaboration to forestall state collapse and its associated negative consequences.

²⁴⁰ “A Secure Europe in a Better World,” *European Security Strategy*, Brussels (12 December 2003)

²⁴¹ *Ibid.*

²⁴² Stewart Patrick, “‘Failed’ States and Global Security: Empirical Questions and Policy Dilemmas,” *International Studies Review*, Vol. 9, No. 4 (2007) at 646

²⁴³ *In Larger Freedom, Towards Security, Development and Human Rights for All*, Report of the Secretary-General of the United Nations, for decision by Head of State and Government (September 2005)

agency known as the Peace Building Commission²⁴⁴ to ensure that war-torn states do not collapse once again into failure.²⁴⁵ Further review of conflict prevention and development in the context of the primary challenges they present to peace-building will be undertaken in this study.

The concept that failing and failed states should be broken down into sub-categories, along with the grading of states, can be a useful tool in identifying state failure. Furthermore, the definition and the language employed represent imperatives to the contemporary discourse on state failure in terms of their inclusion. In the post-Cold War period, the terms ‘failed states’ and ‘state collapse’ have commonly and often interchangeably been utilized to describe the failure to meet structural competencies, which is invariably the product of a “collapse of the power structures providing political support for law and order, a process generally triggered and accompanied by “anarchic” forms of internal violence”.²⁴⁶ United Nations Secretary-General Boutros Boutros Ghali described this situation accordingly when he wrote:

A feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, but also its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of international reconciliation and the re-establishment of effective government.²⁴⁷

²⁴⁴ *The Peacebuilding Commission*, Resolution adopted by the General Assembly (A/RES/60/180) (30 December 2005)

²⁴⁵ Stewart Patrick, “‘Failed’ States and Global Security: Empirical Questions and Policy Dilemmas,” *International Studies Review*, Vol. 9, No. 4 (2007) at 646. Also the major donors of the OECD (2005) have pursued a “Fragile States” initiative in partnership with the World Bank (2006) Low Income Countries under Stress (LICUS) program.

²⁴⁶ Daniel Thürer, *The ‘Failed State’ and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

²⁴⁷ Boutros Boutros Ghali, “Towards the Twenty-First Century: International Law as a Language for International Relations,” United Nations Congress on Public International Law (13-17 March 1995) at 9

In March 1995, the United Nations Congress on Public International Law was convened with the theme, “Towards the Twenty-first Century: International Law as a Language for International Relations”. It brought together approximately 600 lawyers from 125 countries who, in their summary paper, maintained that the issue of failed states was a:

significant challenge to the juridical conception of the State is the problem of States that fail to provide minimum social order and are unable to meet the basic needs of their peoples. The challenge posed by so-called failed States arises, inter alia, from the problems of defining the rights and obligations of other States or international organizations in dealing with the breakdown of the social order or with the unmet needs of the people of the failed State.²⁴⁸

When the basic functions of the state are debilitated and there exists a lack of structural competency in respect of the provision of basic political goods, a state is not able to create and enforce laws that provide for social cohesion, nor is it able to assure the security of its territory. As well, its political institutions defer all legitimacy.²⁴⁹

The OECD expresses a similar concept to that of Zartman and Rotberg in its report on state fragility when it asserts that “[s]tates are fragile when governments and state structures lack capacity - or in some cases, political will - to deliver public safety and security, good governance and poverty reduction to their citizens”.²⁵⁰

²⁴⁸ *International Law as a Language for International Relations Report*, The Hague: Kluwer Law International (1996) at 577

²⁴⁹ William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 5

²⁵⁰ Organization of Economic Co-operation and Development (OECD), *Principles for Good International Engagement in Fragile States & Situations* (7 April 2005) at 2

According to United Nations Development Programme - Human Development Index (UNDP/HDI), the preferred terminology is ‘fragile states’ and is defined as:

applying to a country that is failing or at high risk of failing and we differentiate between three dimensions of such fragility: authority failures, service failures, and legitimacy failures. We take a dual-level approach by differentiating between failure and the risk of failure. Both types of differentiation are important because appropriate aid policy is likely to differ according to the dimension of fragility and between countries that are actually failing in one or more dimensions, and those that are at risk of failing. Fragile states are thus to be defined as states that are failing, or at risk of failing, with respect to authority, comprehensive basic service provision, or legitimacy.²⁵¹

As a consequence, a view of state failure must consider the conflicts that have provoked the collapse of the social contract.²⁵² As indicated by several scholars and institutions, state failure has multiple attributes as well as key indicators that address an expansive range of elements of structural competency. From loss of control of territory and security, to erosion of legitimate authority and the inability to provide public goods and services, “states can fail at varying rates through explosion, implosion, erosion, or invasion over different time periods”.²⁵³

Notwithstanding the flaws in measuring state weakness and failure, there is merit in seeking to measure state performance by the delivery of fundamental political goods and by structural competency, as failed states do share several common attributes.

²⁵¹ Frances Stewart and Graham Brown, Fragile states, *CRISE: Centre for Research on Inequality, Human Security and Ethnicity*, No. 3 (June 2010) at 9

²⁵² Laura Tedesco, “The Latin American State: ‘failed’ or evolving?,” *Fundaciun para las Relaciones Internacionales y el Dialogo Exterior*, Madrid: Working Paper 37 (May 2007) at 9

²⁵³ Fund for Peace, Failed States Index: Frequent asked question

Finally, it is important to note that structural indicators as well as designations of state failure are not necessarily terminal, as demonstrated historically by examples of state failure in places such as Colombia, El Salvador, Lebanon and Tajikistan, which, although weak have in fact recovered.

2.2 Causes and Structural Indicators

Each state possesses its own intricate history and was formed with both internal and external power influencing its structure. Taken in the context of both a political and legal perspective, a failed state can be said to possess specific geographical, political, and functional characteristics.²⁵⁴ Geographically, failed states are essentially associated with internal and endogenous challenges, despite incidental cross-border impacts. Politically, failed states must contend with an internal collapse of the rule of law while functionally they lack both the instruments which would afford them the capability to represent themselves at the international level and the capacity to accept external influence.²⁵⁵

A failed state still retains legal capacity but has lost the ability to exercise it as “[t]here is no body which can commit the State in an effective and legally binding way, for example, by concluding an agreement”.²⁵⁶ A failed state has limited control over the use of force by coordinated institutions, an inadequate functional governmental authority, no security for its residents and no control

²⁵⁴ Daniel Thürer, *The ‘Failed State’ and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

²⁵⁵ Ibid.

²⁵⁶ Ibid. at 734

of its borders.²⁵⁷ Functioning states serve as the foundation of the international system, whereas failed states threaten the very structure of international relations.

They are liabilities in virtually every regard; the unbridled criminality, along with humanitarian disasters and domestic conflicts afflict failed states and also affect neighboring states, the surrounding region, and the world as a whole.²⁵⁸ As previously stated, state failure presents considerable challenges to the international community as a result of the deterioration of the said state and the concurrent humanitarian crisis that results specifically from poverty, disease, violence and the creation of refugees. As well, failed states emerge as bases for the activities of terrorist groups which avail themselves of the vacuum that such failure creates.²⁵⁹

These states are characterized by economic inequality, violence and competition for resources. Also, in the absence of effective government control, terrorist groups seek advantage from the resultant anarchy.²⁶⁰ States such as Somalia, Afghanistan, the Democratic Republic of the Congo and Haiti have experienced the results of a lack of central power in terms of a structural vacuum that invariably finds itself filled by a variety of nefarious groups and individuals.

²⁵⁷ Donald W. Potter, *State Responsibility, Sovereignty, and Failed States*, 29 September 2004 (unpublished paper presented to the Australasian Political Studies Association Conference, University of Adelaide).

²⁵⁸ Robert I. Rotberg, "The Failure and Collapse of Nation-States: Breakdown, Prevention and Repair," in Robert I. Rotberg (ed.), *When States Fail: Causes and Consequences*, Princeton: Princeton University Press (2004) at 1, 5–9

²⁵⁹ Rosa Ehrenreich Brooks, "Failed States, or the State as Failure?," *University of Chicago Law Review*, Vol. 72, No. 4 (Fall 2005) at 1159-61

²⁶⁰ *Ibid.*

Also to be considered is the virtually universal international legal practice that equates sovereign power with control of the capital city of a given state.²⁶¹ For example, in the former Belgian colony of Zaire (the Democratic Republic of the Congo) in the mid-1990s, Mobutu Sese Seko was recognized as the ruler of the state even though he eventually exercised control over little more than the capital city of Kinshasa.²⁶²

In many instances it is the army and not the civilian population that controls the levers of power. In cases where fractious violence, extreme poverty and, at times, foreign governmental interference in support of rebel forces exists, these states are precluded from performing positively with respect to the provision of goods such as health, education, security and governance to their inhabitants. The resulting power vacuum creates circumstances where people fall victim to competing factions and criminal conduct. As this occurs, humanitarian disasters result, followed by state failure. The Democratic Republic of the Congo has been described as a place where there has been a catastrophic diminishing of standards of living and as a state where both the abuse of authority and corruption remain prevalent.²⁶³

Much of the African continent is littered with historical structural competency issues that have resulted in weak states becoming failed states. From Sierra Leone and Guinea Bissau to Côte d'Ivoire, these failed states are plagued by ethno-regional violence, influxes of refugees, major environmental disasters, widespread criminal activity and economic hardship.²⁶⁴

²⁶¹ Jeffrey Herbst, "Let them Fail: State Failure in Theory and Practice," in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 302

²⁶² Ibid.

²⁶³ Azzedine Layachi, "Algeria: Reinstating the State or Instating a Civil Society?," in William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner Publishers (1995) at 172

²⁶⁴ René Lemarchand, "The Democratic Republic of the Congo: From Failure to Potential Reconstruction," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 29

The Democratic Republic of the Congo is arguably the most extreme example of a failed state, with rival factions waging wars on behalf of six states and with four semi-autonomous territories, three of which are controlled by rebel groups; “[i]n a sense, statelessness conveys a more realistic picture of the rampant anarchy in many parts of the country”.²⁶⁵

These battlegrounds and proxy wars have caused the country's considerable resources to be needlessly plundered and wasted and have resulted in the destruction of the economy. Repairing the structural competency of the state is made all the more difficult as the chaos has served the interests of the interveners. In 2002, almost half of the Democratic Republic of the Congo was under the control of rebel groups receiving direct military assistance from Rwanda and Uganda, making it the only African nation with half its territory under foreign military occupation.²⁶⁶

According to Amnesty International and the International Rescue Committee, since 1998, the death toll in the Democratic Republic of the Congo may well have reached over 3 million people, while disease, starvation and homelessness have affected roughly one-third of the total population of 50 million.²⁶⁷ As the history of the Democratic Republic of the Congo demonstrates, the failure of one set of institutions is not enough to explain systemic collapse.²⁶⁸

The Leopoldian system and its brutality, along with the horrors of the Mobutu regime, accounts for the failure of the state to a large degree. It is worth considering at this point that it was with the assistance of the Belgian and

²⁶⁵ Ibid.

²⁶⁶ Ibid. at 30

²⁶⁷ Ibid. at 29

²⁶⁸ Ibid. at 32

United States governments that the assassination of Patrice Lumumba took place in 1961. This action facilitated the ascendancy and long reign of Mobutu.²⁶⁹ Furthermore, Mobutu's reign is distinguished from other neo-patrimonial rulers by virtue of his “unparalleled capacity to institutionalize kleptocracy at every level of the social pyramid and his unrivalled talent for transforming personal rule into a cult and political clientelism into cronyism”.²⁷⁰

The failure of the Zairian state system was facilitated by its use of corruption as a means to reward supporters and to “set its own limitations on the capacity of the state to provide political (public) goods, institutionalize civil service norms, and effectively mediate ethno-regional conflicts”.²⁷¹ In deconstructing the causes and structural competency indicators of state failure, there is a need to recognize that not all state systems are equally vulnerable. Zartman poses the question of why states collapse, which he answers by stating that “they can no longer perform the functions for them to pass as states”.²⁷² State failure is therefore often characterized as a downward spiral.²⁷³

State failure is inseparable from failed leadership and represents a risk to neighbouring states; however, even a change in leadership does not always produce political stability. This was eminently evident in the case of the Democratic Republic of the Congo when Laurent Kabila assumed power after overthrowing Mobutu. The threat to surrounding states is clearly evident in the

²⁶⁹ Ibid. at 31

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Harvey F. Kline, “Colombia: Lawlessness, Drug Trafficking, and Carving Up the State,” in William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner Publishers (1995) at 172

²⁷³ William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 9

example of the civil war in Liberia and the subsequent flow of refugees, which facilitated the acceleration of the destruction of Sierra Leone.

As well, the aftermath of the 1994 genocide of the Tutsis in Rwanda led to an explosion of violence and resulted in the exodus of 1.2 million refugees to eastern Democratic Republic of the Congo.²⁷⁴

Failing states result, *inter alia*, from the collapse of political institutions that provide the rule of law and when absent lead to violence and disorder within the state. When states fail, warlords or sub-state actors take control of regions within a nation-state and build their own local security apparatuses, assuming the trappings of a new 'quasi state', such as Somali.²⁷⁵ According to Herbst, state failure in Africa is generally attributed to the inability of these states to effectively control their hinterland given the artificial nature of the state boundaries and the low population density.²⁷⁶ Another cause of the excess of state failure of many countries in the Great Lakes region of Africa is simple greed.

The enormous profits derived from the rich natural resources in these countries are not re-invested into local populations but rather find their way into the personal fortunes of the relative few. This has led to the virtual extinction of social services in places like the Democratic Republic of the Congo. For example, the education system is in utter disrepair, with many schools having

²⁷⁴ René Lemarchand, "The Democratic Republic of the Congo: From Failure to Potential Reconstruction," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 36

²⁷⁵ Robert I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 10

²⁷⁶ René Lemarchand, "The Democratic Republic of the Congo: From Failure to Potential Reconstruction," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 34

closed and enrolment having plummeted.²⁷⁷ The social marginalization of young people and the prevailing sense of hopelessness is the fundamental cause of the proliferation of armed militias collectively referred to as Mai-Mai.²⁷⁸

Sudan, a product of colonialism by Ottoman Egypt, has since independence convulsed in civil war with the state more often than not using terror, torture and ethnic cleansing against its people, including the murder of over 2 million people and the internal displacement of another 4 million inhabitants.

Since its beginning, Sudan has always been either a failed or weak state.²⁷⁹ Adding to the crisis, the Sudanese state is absolutely incapable of providing either security or public order as evidenced by the large number of war casualties and displaced persons as well as the staggering number of women and children who have been abducted and enslaved.²⁸⁷ Sudan is rich in oil and even though the country continues to negotiate with the new nation of South Sudan over oil revenues, it has rarely used the revenues for the benefit of its people. Sudan continues to score low on the UNDP Human Development Index.²⁸⁰

As noted above, states are exceptionally varied and complex and, therefore, the concept of state failure has to be considered within the context of the failure of several if not all of the structural competencies of a state. Notwithstanding some of the limitations associated with definitions, it is possible to identify a

²⁷⁷ Ibid. at 58

²⁷⁸ Ibid.

²⁷⁹ Gérard Prunier and Rachel M. Gisselquist, "The Sudan: A Successfully Failed States," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 123

²⁸⁷ Ibid. at 103

²⁸⁰ Human Development Index, "Sudan: Country profile of human development indicators," United Nations Development Programme (2011)

number of causes that afford explanations as to why some states fail. The following sub-sections will analyze the ten broad categories that are used to define failed states, commencing with an analysis of rule of law. It is important to recognize that state failure is intrinsically political and is characterized by policies pursued by leaders which create instability and structural competency failures.

2.2.1 Absence of Rule of Law

Rule of law is an established principle of international law and a fundamental foundation upon which the good governance of a state can be determined. In order to fully comprehend the spectrum of state failure, the fundamentals of rule of law must be addressed.

In contemporary thought it is reasonably argued that strong institutions with a legal framework are essential to stability, legitimacy in the minds of citizens of a state and economic growth.²⁸¹ Rule of law is not solely a legal principle; however, some legal scholars have proposed a series of features that are common to the concept, including:

- 1) Powers exercised by officials must be based upon authority conferred by law.
- 2) The law itself must conform to certain standards of justice, both substantial and procedural.
- 3) There must be a substantial separation of powers between the executive, the legislature and the judicial function.²⁸²

²⁸¹ Claire Vallings and Magi Moreno-Torres, "Drivers of Fragility: What Makes States Fragile?," London: Department for International Development (2005) at 14

²⁸² Ian Brownlie, *The Rule of Law in International Affairs*, The Hague: Kluwer Law International (1998) at 213

Rule of law is conferred legitimacy when it is based upon justice and respect for human rights. States that exhibit weakness and failure harass civil society as they do not respect rule of law, have no independent judicial system and are frequently ruled by despots.²⁸³ Several of these autocratic rulers control dissent, lack legitimacy and in extreme cases such as in North Korea permit their people to starve. Cambodia under Pol Pot and Iraq under Saddam Hussein also qualify, as do contemporary Belarus, Turkmenistan, and Libya ruled by Gaddafi. Many would argue legitimately that Syria in February 2012 under Bashar al-Assad falls into this category.

In recent times, the list of states that are fundamentally weak but appear to be strong is ever more extensive.²⁸⁴ States that provide predictable and systematic means of resolving disputes and regulating the behaviour and values of a society with an enforceable body of law and an effective judicial system are the antithesis of state failure.²⁸⁵

It is important to take account of failed states that seemingly operate with flawed institutions and broker no democratic debate while maintaining a strong executive along with a judiciary that exists in name only:

The Judiciary is derivative of the executive rather than being independent, and citizens know that they cannot rely on the court system for significant redress or remedy, especially against the state.²⁸⁶

In Haiti, for example, political, economic and social rights, along with the rule of law, are all tenuous and were so long before the earthquake that took place

²⁸³ Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 4

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.* at 3-4

²⁸⁶ *Ibid.* at 6 -7

there in 2010. Along with the tragic loss of over 200,000 people, most of the state infrastructure that did exist was destroyed by the earthquake.

Furthermore, Haiti has yet to ratify the *International Covenant on Economic, Social and Cultural Rights*. According to United Nations independent expert Michel Forst, ratification of the *Covenant* would be a clear signal to Haitians that their government is in fact determined to combat social and economic inequalities, seek international and bilateral technical assistance and make a commitment to co-operation to “provide universal access to education, a viable health-care system, drinking water and sanitation services, adequate housing as well as guaranteed employment income and training”.²⁸⁷

The Forst report outlines six human rights concerns with respect to Haiti including the country’s penitentiary situation and prison overcrowding, violence against women, lynching, human trafficking, deportation and the lack of economic, social and cultural rights.

Forst also expressed concern, in his 2011 report, about the reinstatement of police officers with questionable records of conduct and the restoration of a problematic penal system:

[I]n the midst of the cholera epidemic, latrines in several prisons are no longer emptied, and that the supply of food is almost no longer assured...This is profoundly shocking, not to mention the risk of an explosion of violence that the inaction of the state entails when inmates no longer receive food.²⁸⁸

Haiti has commenced its commitment to confronting appalling levels of violence against women by ratifying important regional and international

²⁸⁷ Michael Forst, “*Technical Assistance and Capacity-Building: Report of the Independent Expert on the Situation of Human Rights in Haiti*,” Geneva: United Nations Human Rights Council (26 March 2009)

²⁸⁸ “Haiti: UN Expert Welcomes Declaration on Rule of Law, Awaits Implementation,” UN News, New York (2 September 2011)

treaties as well as establishing domestic laws to address this issue. Irrespective of this fact, although rape and indecent assault may be dealt with under provisions of the Haitian Criminal Code, there is concern that sexual harassment is in practice tolerated by society in general and the state in particular.

Many victims are dissuaded from reporting such incidents by the perpetrator, the perpetrator's family, or even by their own family members who fear reprisals.²⁸⁹ Many instances of so-called vigilante justice have been reported, often in the form of the murder of those who are accused of committing theft, murder, kidnapping, witchcraft and other criminal acts. The application of extra-judicial punishment originates from the profound lack of confidence in the police force and justice system generally found amongst Haitians.²⁹⁰

Human trafficking is another significant problem, especially in the border regions between Haiti and the Dominican Republic. Children are especially at risk. Many births in the region go unregistered, exacerbating issues such as kidnapping, adoption and forced child labour.²⁹¹

A system of domestic servitude also exists, which the United Nations considers a "modern form of slavery".²⁹² Establishing the rule of law in Haiti is a necessary precursor to improving human security. It is only when this occurs that it will be possible to contemplate the country's sustainable development and in so doing ignite the required reform of the police force and the judiciary.

²⁸⁹Michael Forst, "Technical Assistance and Capacity-Building: Report of the Independent Expert on the Situation of Human Rights in Haiti," Geneva: United Nations Human Rights Council (26 March 2009)

²⁹⁰Ibid.

²⁹¹Ibid.

²⁹²Ibid.

It is essential that reforms in these two areas be implemented equitably and that neither take precedence over the other.²⁹³

Any efforts at precluding state failure will be enormously challenging in the absence of institutional accountability, promotion of the rule of law, security, and provision of the most basic human needs. It should be understood that “[t]he promotion and construction of legality and bureaucracy are the most important tasks in state formation after state failure”.²⁹⁴ The restoration, or indeed creation of the rule of law is critical to state formation after state failure as it represents both a barometer, so to speak, of what can be reasonably expected from the state and an aura of badly needed legitimacy.

It also must be recognized that the development of administrative institutions is a minimum requirement for state formation, as the absence of these is one of the principal contributors to state failure. The rule of law imposes limits on the political regime and indeed upon the state itself.²⁹⁵ It is also to be remembered that the legal systems and their agents within failed states protect neither individual nor property rights; however, the law can represent a commitment to the reduction of violence and exploitation²⁹⁶

²⁹³ Patrick Bellegarde-Smith, *Haiti: The Breached Citadel*, Boulder: Westview Press (1990) and Marlye Gelin-Adams and David M. Malone, “*Haiti: A Case of Endemic Weakness*,” in Robert I. Rotberg (ed.), “*State Failure and State Weakness in a Time of Terror*,” Washington D.C.: Brookings Institution Press (2003) at 289. Security Council Resolution 1840 (2008) states: “Recognizing the interconnected nature of the challenges in Haiti, reaffirming that sustainable progress on security, the rule of law and institutional reform, national reconciliation and development are mutually reinforcing.”

²⁹⁴ Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 156

²⁹⁵ Susan Rose-Ackerman, “Establishing the Rule of Law” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 183

²⁹⁶ *Ibid.* at 209

A lack of the rule of law within failed states, as well as prevailing political instability, often results in armed revolts and/or civil unrest.²⁹⁷ Civil wars that characterize failed states generally originate with inter-communal differences, such as those based on ethnicity, religion or language. However, the failure of states cannot be attributed singularly to such differences, nor can these explain the oppression of minority groups by a given majority, although they may well be an important contributing factor.²⁹⁸ Citizens depend upon the state to insulate them from arbitrary violations of their personal security.

When states neither provide minimum services nor meet the core structural competencies of ensuring the rule of law and security, they fail to fulfil the matrix of a nation state. By way of a practical example of the foregoing, the UNDP's Rule of Law and Security Programme (ROLS) in Somalia notes that “the absence or weakness of the state is at the root of Somalia's endemic conflict”.²⁹⁹ The government is unable to exercise authority, which is made worse as the total “collapse of those structures designed to administer justice, including law enforcement and the protection of human rights, continues to hamper progress towards the establishment of formal mechanisms for the rule of law”.³⁰⁰

²⁹⁷ Robert I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 5

²⁹⁸ Ibid.

²⁹⁹ UNDP Newsroom, *Rule of Law & Security (ROLS)*, UNDP in Somalia (October 2011). The Three ROLS projects provide a development approach to rule of law and security, addressing simultaneously the institutional (top down) and community (bottom up) aspects of rule of law and security:

- Access to justice — The project is not only seeking to train and build the capacity of the legal profession, it also works on providing access to justice for most vulnerable communities, especially those living in areas with no functioning state institutions.
- Law enforcement — UNDP considers police work to be a service to the community.
- Community safety — (DDR/AVR) —Community safety recognizes the role of communities in ensuring their wellbeing and reducing armed violence at the local level, in partnership with local authorities.

³⁰⁰ Ibid.

Walter Clarke and Robert Gosende ponder how it is that Somalia with its strongly cohesive culture, language, and religion could reach the point of collapse. Perhaps “it never constituted a single coherent territory, having been part of the colonial empires of two suzerains, with other Somalis living outside the boundaries of the two colonies”.³⁰¹ Somalia has always had a strong clan system, and it is important to note that a strong central government was never able to mature. Rather, the rulers pandered to the clan and sub-clan system and indeed utilized it to support their power. This conduct inevitably set in motion the failure of the Somali state, as far as it existed.

In states such as Burundi, the majority-minority war has impeded its capacity to perform as a state, and for a decade it has been fatally crippled by majority-backed insurgencies against autocratic minority-led governments.³⁰²

Burundi and Somalia are still experiencing many challenges to the rule of law, with traditional justice systems that predate the colonial era still operating today, regardless of their seeming ineffectiveness. For instance, “[i]n Burundi, the *bashingantahe* system deals mainly with civil matters, whereas in Somalia, the *xeer* system is used to regulate inter-clan relationships”.³⁰³ These types of informal justice systems³⁰⁴ fail to meet international human rights law standards. The Islamic Courts Union, a group of Sharia Courts united as a political group to form a rival administration to the Transitional Federal Government in Somalia, deploy a comparatively harsh interpretation of Sharia

³⁰¹ Robert I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 13

³⁰² Ibid.

³⁰³ Kristina Thorne, “Rule of Law through imperfect bodies? The informal justice systems of Burundi and Somalia,” Peace-Justice Conference report (November 2005) at 3

³⁰⁴ Ibid.

law. All factors have combined alongside the continuing insurgency to create increased alienation from the local population.³⁰⁵

Failed states are beset by weak national institutions that undermine the legitimacy of state.³⁰⁶ In Sri Lanka, the violent civil war was in part due to:

community fragments as one or more identifiable groups no longer recognizes the legitimacy of the central state. A violent struggle ensues in which different groups contest either control of the central state or the right to secede from it. The state fails in the sense that insurrections prevent it from enforcing its authority and laws over a significant proportion of its territory. The central state may, however, remain strong in the regions under its control, which it may continue to administer strenuously. Indeed, in longstanding civil wars, the central state is usually relatively healthy, except for its ability to control some (large) part of the country.³⁰⁷

It is especially troubling that corrupt autocratic regimes operate with neither strong legal norms nor an independent judiciary. The rule of law has two fundamentally different ways of setting legal limits in both the civil and political realms. Although the rule of law is not the only necessary component for stability, it is clear that without the existence of such a paradigm, the state potentially disintegrates rather rapidly.³⁰⁸

States that fail to establish legal limits and that are in essence weak or unable to control violence and destruction, permit those in power to act with impunity. These states rapidly come to realize that such circumstances

³⁰⁵ Jason McLure, "The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?," 3 *CQ Global Researcher* (2009) at 167-68

³⁰⁶ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at 37

³⁰⁷ Nicolas Van De Walle, "The Economic Correlates of State Failure," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 94

³⁰⁸ Susan Rose-Ackerman, "Establishing the Rule of Law," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 182

lead to further violence and create a fragile democratic state that can be undermined by its failure to limit private lawlessness. This can certainly result in state failure. Establishing rule of law will entail either a strengthening of state capacity or a weakening of state power.

The scholar Rotberg argues that there is a hierarchy of political goods. None of these is more critical than the supply of human security in preventing threats to the state, enforcing the rule of law and preventing crime and domestic threats or attacks. This is because they enable the delivery of a range of other desirable political goods.³⁰⁹ In essence then, the rule of law is necessary in order to avoid violence and chaos. It is essential to take note of the fact that weak and failed states and corrupt leaders who ignore the rule of law create political instability which inevitably leads to a loss of legitimacy in the eyes of the people. This will be explored in more detail in the next sub-section.

2.2.2 Political Instability – Lack of Legitimacy

The concept of political legitimacy is an integral condition for governing. Locke has argued that a government is not legitimate unless it governs with the consent of the governed,³¹⁰ while Weber identified the three sources of political legitimacy as charismatic, traditional and rational-legal authority.³¹¹ Legitimacy is not a new element of state formation; however, in the modern construct of the nation state, failure of legitimacy has consequences that lead to significant internal conflict and humanitarian challenges.

³⁰⁹ Robert I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 1-3

³¹⁰ Sterling Power Lamprecht, *Moral and Political Philosophy of John Locke*, New York: Russell & Russell (1962)

³¹¹ Peter Hamilton (ed.), *Max Weber: Critical Assessment*, London: Routledge (1991)

As rulers lose political legitimacy, states descend into chaos and violence, creating political instability that effects not only their own population but also the surrounding region. As an extreme example, the political instability in Somalia is particularly intense as there is no functional government, and this has been the case for quite some time. At the political level, the current Somali government appears to have a working cabinet; however, in reality, the cabinet has no real departmental support and there are no public servants serving in staff positions of any kind.

Of particular significance, this cabinet lacks almost any of the financial resources such a body would require to function.³¹² Additionally, the functional services generally associated with working government departments are entirely absent.³¹³ Subsequently, it is entirely accurate to assert that the defining characteristics of the Somali government, as it operates essentially in name only, are corruption and criminality.

The lack of central governance has also afforded the opportunity for the establishment of small fiefdoms. Inherently unstable, these fiefdoms more often than not undergo rapid and unpredictable transitions in leadership. For example, in the capital city of Mogadishu, multiple groups compete politically and militarily for control of specific neighborhoods and even for dominance over particular streets. The effort to control Mogadishu is heightened by its status as a port, which affords considerable financial opportunities to those who are able to establish dominance over it.

Although the Transitional Federal Government (TFG) was formed in 2004 under President Abdullahi Yusuf, a radical group known as the Islamic Courts

³¹² Jason McLure, "The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?," 3 CQ Global Researcher (2009) at 157

³¹³ Ibid.

Union (ICU) effectively established their control of Mogadishu in June of 2006.³¹⁴ On 28 December 2006, Ethiopian troops, in support of the TFG, helped push the Islamic Courts Union out of Mogadishu. The Transitional Federal Government is now an Islamist regime led by President Sheikh Sharif Sheikh Ahmed,³¹⁵ who was elected by the Somali Parliament in January 2009.³¹⁶ His power, however, nominally extends no farther than the capital city of Mogadishu.

In coordination with the military wing known as al-Shabaab, the Islamic Courts Union assumed control from the TFG over central and southern Somalia.³¹⁷ As a result, the Transitional Federal Government is now completely disconnected from central Somalia.³¹⁸ Irrespective of this control, Somalis living in the central and southern regions do not support al-Shabaab and the Islamic Courts Union. In essence, what exists are fiefdoms, criminal gangs and ineffectual political institutions, all of which are accompanied by ludicrous conflicts over seemingly minute areas of territory or other issues.

Intervention by foreign countries aimed at assisting Somalia in the restoration of a central government and in quelling internal strife has only served to further exacerbate the domestic conflict.³¹⁹ Ethiopia's intervention in 2006 led to more chaos and instability in the country, with humanitarian, political and security conditions further deteriorating across south-central Somalia.³²⁰ As a result, Ethiopia withdrew from Somalia in January 2009.³²¹

314 Ted Dagne, "Somalia: Current Conditions and Prospects for a Lasting Peace," CRS Report for Congress (21 October 2009) at 116

315 Ibid. at 166–67

316 Ibid. at 3

317 Jason McLure, "The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?," 3 CQ Global Researcher (2009) at 167

318 Ted Dagne, "Somalia: Current Conditions and Prospects for a Lasting Peace," CRS Report for Congress (21 October 2009) at 5

319 Jason McLure, "The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?," 3 CQ Global Researcher (2009) at 151, 167

320 Ted Dagne, "Somalia: Current Conditions and Prospects for a Lasting Peace," CRS Report for

Regrettably, in a variety of African countries:

the banning of opposition parties and the end of multiparty politics enabled political elites to adopt and retain economic policies that harmed farmers, even though in many states the rural producers formed a majority of the population. Because politicians competed for the favour of the state house rather than for the backing of citizens, the numerical supremacy of Africa's rural population posed no threat to those in power and so failed to alter their choice of policies.³²²

Too often, in many African countries, members of the political elite discard security and stability in favour of personal enrichment and engage in the predation of their citizens, robbing them of the opportunities presented by an abundance of natural resources.³²³

Political instability is a major concern in the analyses of state weakness and failure. In Haiti, for example, political instability has taken place almost from the beginning of its independence from France. The former colonial structures of control were never replaced following Haiti's independence but were simply maintained under a new domestic force, while rival leaders of the liberation began to fight amongst themselves.³²⁴ The country's new rulers actually became more powerful after determining that some labour and economic discipline had to be restored in order to preserve the plantation economy. Haitians feared that if they failed to generate sufficient income to pay the required indemnity, the former colonial powers would use this as an excuse to reacquire the island.

Congress (21 October 2009) at Summary

³²¹ Ibid.

³²² Robert H. Bates, *When Things Fell Apart State Failure in Late-Century Africa*, New York: Cambridge University Press (2008) at 73

³²³ Ibid. at 124

³²⁴ Marlye G lin-Adams and David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 289-90

By the 1900s, the role of the United States in Haiti had grown steadily, culminating with overt intervention in Haitian affairs between 1911 and 1915.³²⁵ During this period, the United States witnessed great instability in Haiti. Seven Haitian presidents were either assassinated or overthrown during these four years.³²⁶ The *Haitian-American Treaty* of 1915³²⁷ established a US-controlled police force, or gendarmerie, made up of both Americans and Haitians. The *Treaty* gave the United States control over Haiti's finances and provided for direct American intervention on the island whenever the United States saw fit to exercise this power.³²⁸ Haiti's political structure during the US occupation featured a succession of *de facto* regimes that were essentially political instruments of the United States.³²⁹ Election results were clearly manipulated.³³⁰

The entire period of the United States occupation of Haiti was demoralizing to Haitians, especially after having been the first country to achieve independence from a colonial power in the previous century. The years succeeding the withdrawal of the United States in 1934 saw the formation and collapse of no less than eight governments in Haiti. Some were civilian while others were military in nature, but all were doomed to failure. Their demise was largely the result of greed, corruption, oppression and profound self-interest.

³²⁵ Ibid. at 289

³²⁶ Ibid. at 292

³²⁷ Hans Schmidt, *The United States Occupation of Haiti 1915-1934* (2nd ed.), New Brunswick: Rutgers University Press (1995) at 115

³²⁸ United States Department of State, "U.S. Invasion and Occupation of Haiti, 1915-34," available at: <<http://history.state.gov/milestones/1914-1920/Haiti>> accessed 16 August 2012

³²⁹ Marlye Gélin-Adams and David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 293

³³⁰ U.S. Department of State, "U.S. Invasion and Occupation of Haiti, 1915-34," available at: <http://history.state.gov/milestones/1914-1920/Haiti> (last visited August 16, 2012)

In 1957, President François Duvalier (Papa Doc) rose to power. Duvalier used manipulation and oppression much more effectively than his predecessors and was therefore able to quickly consolidate power.³³¹ In 1961, Duvalier won the general election as the only candidate on the ballot, and just prior to his death in 1971, he ensured familial succession by naming his son, Jean-Claude Duvalier (Baby Doc), the next Haitian president for life, even though he was only 19 years old at the time.³³² Baby Doc's tenure was marked by unfulfilled commitments to reform, both domestically and internationally. Opposition leaders were arrested and in some cases killed, which led to even more instability. He eventually escaped to France with his family on 7 February 1986.³³³ He re-emerged in January 2011, following the disastrous earthquake that destroyed most of the capital, and was subsequently charged with corruption.³³⁴ The impact of his return on Haiti remains to be seen, although it is more likely than not that his presence will create greater instability.³³⁵

In Haiti's 1990 general election, Jean-Bertrand Aristide, a former Jesuit priest, was elected president with 67% of the vote.³³⁶ However, in a matter of months Aristide lost the confidence of the Chamber of Deputies and the Haitian Senate, which eventually led to the military launching a coup led by General Raoul Cedras.³³⁷

Thomas Franck noted that the 1991 effort by the Haitian military to overthrow

³³¹ Marlye Gélin-Adams and David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 294

³³² *Ibid.* at 295

³³³ *Ibid.*

³³⁴ Rory Carroll, "'Baby Doc' Duvalier charged with corruption in Haiti," *The Guardian* (18 January 2010)

³³⁵ Randal C. Archibold, "A Former Dictator Reappears in Haiti," *New York Times* (16 January 2011)

³³⁶ Domingo E. Acevedo, "The Haitian Crisis & the OAS Response: A Test of Effectiveness in Protecting Democracy," in Lori Fisler Damrosch (ed.), *Enforcing Restraint: Collective Intervention in International Conflicts*, New York: Council on Foreign Relations Press (1993) at 130

³³⁷ Maureen Taft-Morales, "Haiti: Developments and U.S. Policy Since 1991," CRS Report for Congress (4 May 2006) at 7

the elected President of Haiti, Jean-Bertrand Aristide, was condemned by the international community, which imposed sanctions and continued to recognize the exiled President. Both the Organization of American States and the United Nations General Assembly unanimously “approved a ground-breaking resolution demanding the return of Aristide to office, full application of the Haitian Constitution and full observance of human rights in Haiti”.³³⁸ Franck argues that the recognition by other states of the legitimacy of a government depends on those states having the consent of the people. He proposes the emergence in international law of a right to democratic governance.³³⁹ Franck acknowledges that government legitimacy:

depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.³⁴⁰

Frank does not suppose that the international community has attained this benchmark yet but notes that there are developments in international law and that, as a consequence, the legitimacy of each government “will be measured definitively by international rules and processes ... we can see the outlines of this new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement”.³⁴¹

Although there was much enthusiasm in 1996 when Haitians elected René Préval and again in May 2006 when he began his second five-year term as the President of Haiti as well as at this time noting that he had become the first

³³⁸ United Nations Document A/46/L.8/Rev. 1 (1991)

³³⁹ Thomas M. Franck, “The Emerging Right to Democratic Governance,” *The American Journal of International Law*, Vol. 86, No. 1 (January 1992) at 46

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.* at 50

elected president to have completed a five-year term uninterrupted,³⁴² political instability did not subside. For example, Parliament was dissolved in 1999 and Préval ruled by decree for the remaining twelve months of his presidency. In 2000, Aristide was restored to power with 92% of the vote in an election that was boycotted by all major opposition parties.³⁴³ A multinational peacekeeping force struggled to hold nominal control as a dramatic increase in the number of homicides and kidnappings led to a complete meltdown in the political system.³⁴⁴

Between 2000 and 2004, the political situation deteriorated even further. The president contributed to the problems by making rhetorical speeches and using the militia to intimidate and murder opponents. Armed offensives started to occur throughout the country, and Haiti descended into chaos.³⁴⁵ Aristide was forced to leave the country in 2004 and the newly formed United Nations Stabilization Mission in Haiti (MINUSTAH) was charged with restoring stability to the country.³⁴⁶ In the absence of structural competency in Haiti, weak institutions, political instability, human rights abuse, violence and economic paralysis added to the country's failure to address "rampant rates of poverty, crime, violence, drug trafficking, unemployment, illiteracy, infant mortality, AIDS, deforestation, and overpopulation".³⁴⁷

³⁴² Maureen Taft-Morales, "Haiti: Current Conditions and Congressional Concerns," CRS Report for Congress (17 June 2009) at Summary

³⁴³ "The Impossible Join Nat'l Project: 1804-2004," Peace Operations Monitor. Available at: <<http://pom.peacebuild.ca/haitiConflicts.shtml>> accessed March 20, 2012

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Robert Fatton Jr., "The Fall of Aristide and Haiti's Current Predicament," in Yasmine Shamsie and Andrew S. Thompson (eds.), *Haiti: Hope For a Fragile State*, Waterloo: Centre for International Governance Innovation (2006) at 20

³⁴⁷ Marlye Gelin-Adams and David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 287

The fundamental principle of legitimacy is one of the essential elements of representative democracy and includes the separation of power among branches of government, with state institutions being subordinate to the legally constituted civilian authority.³⁴⁸

Rule of law and legitimacy are the core principles and building blocks of good governance. Although there is not always consensus over what makes a state legitimate, the modern notion of statehood “has entailed a series of different attempts to resolve the question of how states and regimes could be made legitimate in the eyes of the people”.³⁴⁹

Before the United Nations Security Council resolution on Libya, US Secretary of State Hillary Clinton stated at the United Nations Human Rights Council that “Qaddafi has lost the legitimacy to govern, and it is time for him to go without further violence or delay”.³⁵⁰ In March 2011, the General Assembly, in an unprecedented move, suspended Libya from the Human Rights Council. Many of the Member States of the United Nations spoke in favour of the resolution as being in compliance with international law and the protection of human rights. United States Ambassador Susan Rice believes that the unprecedented suspension of Libya from the Human Rights Council was a rebuke by the General Assembly. She stated that the General Assembly “had come together, to speak with one voice to Libya’s unrepentant rulers. When the only way that a leader could cling to power was to violate the human rights of his own people, he had lost all legitimacy to rule”.³⁵¹

³⁴⁸ Political thinkers such as Montesquieu describe a tripartite system that divides political power among an executive, a legislature, and a judiciary.

³⁴⁹ Jennifer Milliken and Keith Krause, “State Failure, State Collapse and State Reconstruction: Concepts, Lessons and Strategies,” in Jennifer Milliken (ed.), *State Failure, Collapse and Reconstruction*, Oxford: Blackwell Publishing (2003) at 5

³⁵⁰ Mark Landler and Thom Shanker, “U.S. Readies Military Options on Libya,” *New York Times* (28 February 2011)

³⁵¹ “General Assembly Suspends Libya from Human Rights Council,” UN News, New York (1 March 2011)

The prospect of state failure always exists in exceedingly regimented states, such as Egypt during the Mubarak regime, Libya under Gaddafi, Iraq throughout Saddam Hussein's rule and North Korea. All have imploded once the regimes were overthrown, with the exception of North Korea, which remains ruled by Kim Jong-un, the son of recently deceased leader Kim Jong-il. Erin Jenne suggests that such states are:

held together entirely by repression and not by performance, an end to or an easing of repression could create destabilizing battles for succession, resulting anarchy, and the rapid rise of non-state actors. In nation-states made secure by punishment and secret intelligence networks, legitimacy is likely to vanish whenever the curtain of control lifts.³⁵²

In December 1999, the democratically elected President of Côte d'Ivoire, Henri Konan Bédié, was overthrown by a military coup headed by General Robert Guéi.³⁵³ After several demonstrations and an election in October 2000, Laurent Koudou Gbagbo was elected President. His mandate was to end in 2005, but he delayed the election several times and refused to give up power after the 2010 election, which he lost.³⁵⁴ As seen in the above examples, political instability is one of the key indicators of state failure. Addressing this issue is critical to the rehabilitation of a failed state.

Political stability and legitimacy are important characteristics of a modern state and depend upon rule of law. In the following subsection, examples will be provided as to how the absence of these attributes can also lead to economic and social instability.

³⁵²Robert I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 16

³⁵³Robert Ištók and Tomáš Koziak, "Ivory Coast - From Stability to Collapse. Failed States in Time of Globalisation," Ostrava: University of Ostrava Czech Republic (2010) at 83

³⁵⁴Pauline Bax, "Ivory Coast president Laurent Gbagbo facing crisis as cash noose tightened," *The Guardian* (3 January 2011)

2.2.3 Economic and Social Instability

State stability is rooted in the distribution of power and resources within society. Failed states are ineffective at delivering essential services and are easily recognized by their loss of control over political and economic spheres.³⁵⁵ Corruption compounds these realities. According to Transparency International's 2010 Corruption Perceptions Index (CPI), which measures the perceived level of public-sector corruption in 180 countries around the world, nearly three quarters of the 178 countries in the Index score below five on a scale from 10 (highly clean) to 0 (highly corrupt). Countries such as Somalia, Myanmar, Afghanistan, Iraq, Uzbekistan, Turkmenistan, Sudan, Chad, the Democratic Republic of the Congo, Haiti and Côte d'Ivoire are perceived to suffer from serious levels of corruption.³⁵⁶

Both economic interests and the recognition of the state as an economic entity are important to the progress of a secure, functioning state. As noted above, it is only as a result of stable and strong structural competency of the state and respect for the rule of law that the fundamental human needs of food, health, education and security be achieved. It is clear that “[j]ust as the company is the most effective form of organization in a competitive economy, the state is the most effective and economical way of organizing the security and well-being of a population”.³⁵⁷

³⁵⁵ William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 9

³⁵⁶ See Transparency International website: Available at:

<http://transparency.org/policy_research/surveys_indices/cpi/2010> accessed 20 March 2012

³⁵⁷ Ashraf Ghani, Clare Lockhart and Michael Carnahan, “Closing the Sovereignty Gap: an Approach to State-Building,” London: Overseas Development Institute (September 2005) at 4

A 2002 study of Côte d'Ivoire by Frances Stewart and Graham Brown concluded that a reason for failure in Côte d'Ivoire is that “socio-economic inequalities and political exclusion forms an extremely explosive socio-political situation”.³⁵⁸ These socio-economic and socio-political conditions provide a “fertile context for violent group mobilisation”.³⁵⁹ As a result of the civil war in 2002, which was spurred by ethnic and regional differences, there has been in excess of 750,000 internally displaced persons and a division of the country into two parts; the south, which is government-controlled, and the north, which is rebel-controlled.

These two themes of poverty and corruption are directly relevant to the contemporary discussion of state failure. Economic growth cannot thrive where there is instability and lack of governance and cannot happen at all without strong institutions.³⁶⁰ Such structural competency failures create dire effects, such as poverty, unemployment, child mortality, illiteracy, and corruption. They also limit the capacity of a state to provide political goods, which is even further compromised by autocratic and corrupt leadership.

Paul Collier has advanced the notion that many governments and members of the international community have neglected to consider the economic dimensions of civil wars and the fact that past and ongoing civil wars have been principally caused by economic factors.³⁶¹ His assertion is based on the premise that poverty and inequality are not the main factors that lead to civil conflicts:

³⁵⁸ Frances Stewart and Graham Brown, *Fragile States*, CRISE Working Paper No. 51 (January 2009) at 70

³⁵⁹ *Ibid.*

³⁶⁰ Claire Vallings and Magi Moreno-Torres, “Drivers of Fragility: What Makes States Fragile?,” London: Department for International Development (2005) at 14

³⁶¹ Paul Collier and Anke Hoeffler, “Economic Causes of Civil Conflicts and Implications for Policy,” Oxford: University of Oxford, Centre for the Study of African Economics (1998) at Introduction

Inequality does not seem to affect the risk of conflict. Rebellion seems not to be the rage of the poor. Indeed, if anything, rebellion seems to be the rage of the rich. One way in which rebel groups can lock in to predation of primary commodity exports is if they can secede with the land on which the primary commodities are produced.³⁶²

These illegal commercial networks thrive in the absence of rule of law and fuel conflicts across the regions.³⁶³ For example, the Revolutionary Armed Forces of Colombia (FARC) earn millions of dollars from drugs and kidnapping. Collier claims that “ninety five percent of global production of hard drugs is from conflict countries”,³⁶⁴ which are prosperous in the absence of rule of law. However, there are also those who argue that what is at the heart of the proliferation of armed militias is youth marginalization, such as in the Democratic Republic of the Congo where younger generations of Congolese join one Mai-Mai faction as their only means of escape from poverty.

The course of state failure is illustrated by the examples of Afghanistan, the Democratic Republic of the Congo, Liberia, Sierra Leone, and Somalia. Once the spiral downward begins, the political cost of statehood may become unacceptably high, as has been the case in many states in Africa. States have been, to a large extent, a cause of much suffering.³⁶⁵ Political violence in Africa has rarely achieved the goals of state creation; more often, it has led to state failure. In Sierra Leone, it was the greed for profits from control of the lucrative illegal diamond trade that became a key factor fuelling the rebellion and, by implication, the progressive undermining of the

³⁶² Ibid. at 11

³⁶³ Edward Newman, “Failed States and International Order: Constructing a Post-Westphalian World,” *Contemporary Security Policy*, Vol.30, No.3 (December 2009) at 430

³⁶⁴ Paul Collier, *The Bottom Billion*, Oxford: Oxford University Press (2007) at 31

³⁶⁵ Martin Doornbos, “State Collapse and Fresh Starts: Some Critical Reflections,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 48

state system.³⁶⁶

States such as Angola, Sierra Leone and others have not simply been “cursed by their abound diamonds but also cursed by their inability to add value to these resources”.³⁶⁷ During the period in which Charles Taylor held power, while his people were living in poverty, he netted millions of dollars as a result of the exploitation of the country’s natural resources and from bringing into being the *Liberian Strategic Commodities Act*, which gave him sole power to negotiate contracts for the exploitation of all natural and mineral resources, as well as cultural and historical items.³⁶⁸

The Democratic Republic of the Congo, which is roughly the same size as Western Europe, has profited enormously from the extraction of natural resources, but none of it has been invested in the local economy, leaving a crumbling infrastructure, from schools to hospitals.³⁶⁹ Additionally, it is estimated that between “1998 and 2007, some 5.4 million Congolese were killed by violence, disease, and malnutrition, while armies, warlords, and assorted gangs pilfered hundreds of millions of dollars in gold, diamonds, and coltan”.³⁷⁰ The collapse of the Democratic Republic of the Congo into a failed state not only affects its population but also destabilizes the entire region and supports criminal and terrorists groups as well as arms traffickers.³⁷¹ In 2011,

³⁶⁶ Ibid. also, Stephen Ellis, “War in West Africa,” *The Fletcher Journal of World Affairs*, Vol. 25, No. 2 (2001) at 33-9 and William Reno, “Shadow States and the Political Economy of Civil Wars” in Mats Berdal and David Malone (eds.), *Greed and Grievance: Economic Agendas in Civil Wars*, Boulder: Lynne Rienner (2000)

³⁶⁷ Neil Cooper, “State Collapse as Business: The Role of Conflict Trade and the Emerging Control Agenda,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 184

³⁶⁸ Ibid. at 186

³⁶⁹ René Lemarchand, “The Democratic Republic of the Congo: From Failure to Potential Reconstruction,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 58, 60

³⁷⁰ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at 82

³⁷¹ Ibid.

Foreign Policy identified the Democratic Republic of the Congo in its ‘*Failed States Index*’ as the fourth most unstable country in the world, after Somalia, Chad and Sudan.³⁷²

The economic issues, including corruption, that lead to poverty and misery overlap. For example, the Democratic Republic of the Congo is one of the poorest countries in the world yet has a wealth of mineral deposits that are being appropriated by local and foreign militia who fight for control of these deposits. In 2010, the Democratic Republic of the Congo was ranked 168th out of the 174 countries on the UNDP's Human Development Index, with life expectancy at 48 years.³⁷³

According to a study by the Danish Institute for International Studies, which uses the World Bank Governance Indicator³⁷⁴ to measure states, weak and failed states rank in the bottom twentieth percentile in the control of corruption. Afghanistan is an example of how corruption, and a burgeoning poppy industry, can threaten the creation and growth of stable institutions.³⁷⁵ Out of the 180 states that Transparency International's Corruption Perception Index measures, Afghanistan ranks 179th (falling 63 places from its position in 2005), faring better only than Somalia, the most corrupt country in the world.³⁷⁶

Political, economic and social stability has been further damaged by the increased cultivation and consumption in Afghanistan of opium poppies. According to a United Nations report:

³⁷² Ibid. at 85

³⁷³ HDI – 2010 Ranking, United Nations Development Programme. Available at: <<http://hdr.undp.org/en/reports/global/hdr2010/>> accessed at March 20, 2012

³⁷⁴ Aslak Orre and Harlad W. Mathisen, *Corruption in Fragile States*, Copenhagen: Danish Institute for International Studies (October 2008)

³⁷⁵ Mark V. Vlasic and Jenae N. Noell, “Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems,” *Yale Journal of International Affairs*, Vol. 5, No. 2 (Spring/Summer 2010)

³⁷⁶ Transparency International Corruption Perceptions Index 2009, available at: <http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table > accessed 20 March 2012

Opium production forms a significant part of the Afghan economy -- production alone makes up nine per cent of the country's gross domestic product (GDP). This does not include manufacturing and trafficking profits, which fuel corruption and funding of insurgent groups.³⁷⁷

Both the production and trafficking of narcotics has led to more insecurity and corruption in Afghanistan.³⁷⁸

In Somalia, greed, corruption and clan loyalty have made it very difficult for any economic progress to take place. These examples, as well as numerous others, suggest that many states in Africa have been candidates for state failure for some time. Some, such as “Chad, arguably began their independent existence as a failed states”.³⁷⁹ In numerous African states:

regimes are odious and fail to do for all what one thinks a state should do. But they may have supporters and provide non-excludable benefits to at least some in society.³⁸⁰

Somalia is one of the few countries in which economic development is reverting to the conditions of the last century. In the last few decades, there has been no:

internationally recognized polity; no national administration exercising real authority; no formal legal system; no banking and insurance services; no telephone and postal system; no public service; no educational and reliable health system; no police and public security services; no electricity or piped water systems; weak officials serving on a voluntary basis surrounded by disruptive, violent bands of armed

³⁷⁷ “UN Backed Survey Shows Increase in Opium Production in Afghanistan,” UN News, New York (11 October 2011)

³⁷⁸ Ibid.

³⁷⁹ William Reno, “Sierra Leone: Warfare in a Post-State Society,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 73

³⁸⁰ Ibid. at 76

youths.³⁸¹

It is of no wonder that Somalia is lowest on the Human Development Index, with life expectancy at 41 years and the mortality rate for children under five exceeding 25 percent. In addition, the drought in 2011 killed thousands of people and displaced many more. Antonio Guterres, head of United Nations High Commissioner for Refugees called it the “worst humanitarian disaster on earth”.³⁸²

Analysis on the impact of economic crises, past or present, and on conflict, fragility and social stability shows that there are various channels and levels through which the economic downturn could affect social stability.

Social stability is an important ingredient in economic growth and in putting an end to conflict and corruption. Violence and civil wars limit the ability of states to tackle issues of high unemployment and poor development, particularly when many of the regimes in failed states prefer to spend their national revenues on weapons rather than on their people. The following subsection examines the issues surrounding lack of internal security as it contributes to state failure.

2.2.4 Lack of Internal Security

The linking of security and development to the notion of failed states has since 9/11 come to establish the overall framework for debate on weak and failed states. It is argued that security is needed in order to reduce poverty and that poverty and conflict in one part of the world will create problems of insecurity

³⁸¹ William Zartman, (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 78

³⁸² “Somalia Drought Is ‘Worst Humanitarian Crisis,’” Huffinton Post (18 August 2011)

and instability in other regions.³⁸³ This overlapping relationship of security and development is often referred to as the ‘security-development nexus’, which:

provides the overall framework for the fragile states debate. It reflects a dual claim, on the one hand, that security is fundamental for reducing poverty; and on the other hand, that a lack of development causes conflict...one cannot be pursued in isolation from the other.³⁸⁴

This has been the predominant view adopted by many NATO countries in order for them to justify their mission in Afghanistan to their respective populations. Many liberal democracies argue that human security also requires democratic reform and support of human rights. Fragile states, as argued by many, have difficulty in fulfilling these values and therefore become failed states. State fragility is caused by bad governance, and integrated approaches are required to deal with both the causes and effects of such fragility.³⁸⁵

Many regimes in African countries fail to provide political goods, although they do have some supporters to whom they provide exclusive benefits.³⁸⁶ Ranging from Sierra Leone to the Democratic Republic of the Congo, all African countries rank low in the UNDP’s Human Development Index, with severe poverty despite vast natural resources. In the Democratic Republic of the Congo, “most of the country was reduced to subsistence living”,³⁸⁷ despite the fact that it has valuable deposits of diamonds, gold, cobalt, coltan, and copper.³⁸⁸ It was, and still is, difficult to have development

³⁸³ Lars Engberg-Pedersen et al, *Fragile States on the International Agenda*, Copenhagen: Danish Institute of International Studies (2008) at 10

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.* at 76

³⁸⁷ James Dobbins et al, *Europe’s Role in Nation-Building: From the Balkans to Congo*, Santa Monica: Rand Corporation (2008) at 102

³⁸⁸ *Ibid.*

without security, given that before “the economy could grow, the conflict had to end and inflation needed to be brought under control”.³⁸⁹

Most weak and failed states:

share bleak socioeconomic indicators—from GDP per capita levels typically half that of low-income countries; child mortality rates twice as high as other low income-countries; mortality rates plummeting by up to thirty years as HIV afflicts over 42 million; and over 200 million lacking access to improved water and sanitation. Fragile states are the main barrier impeding international efforts to meet the United Nations' Millennium Development Goals—which include eradicating hunger, reducing child mortality, and achieving universal primary education-by 2015.³⁹⁰

In Afghanistan, for example, al-Qaeda took advantage of a weak government, finding sanctuary in ungoverned territory; “[t]he lack of institutional mechanisms to deal with crises suggests that the costs of terrorism are greater in fragile states – a conclusion too obvious to debate”.³⁹¹ The lack of internal security provides an explanation of how Afghanistan became a failed state.

Throughout the Cold War period many weak and failed states were propped up in order to maintain their allegiances. However, in the post-Cold War period the need for allegiance vanished as did much of the concern for the less fortunate. Today, Western governments are not to a great extent concerned in putting in place regimes that are potential allies but rather those that can govern well, promote economic development and safeguard human rights within their territory.

The lack of internal security that leads to anarchy renders the state

³⁸⁹ Ibid.

³⁹⁰ Seth D. Kaplan, *Fixing Fragile States: A New Paradigm For Development*, Westport: Praeger Security International (2008) at 4

³⁹¹ Lars Engberg-Pedersen et al, *Fragile States on the International Agenda*, Copenhagen: Danish Institute of International Studies (2008) at 11

incapable of providing security to individuals. These security dilemmas are:

constructed out of units that can act upon the fears of their members....The nature of state failure may produce new and less accepted groups that supplant pre-existing entities, or permit new illegitimate warlords with access to arms to replace culturally sanctioned leaders.³⁹²

Often, these prolonged internal conflicts create economic stagnation, decaying national infrastructure and the erosion of all state institutions and authority. Michael Klare argued that it is possible for an:

effective leader or leadership group to reverse the process and avert full state collapse; even without such leadership, an ailing state can remain in a weakened condition for many years without slipping into total disarray. But a state's capacity to resist failure can decline rapidly when armed militias emerge or the official security forces break up into semi-autonomous bands. Once established, these bands and militias tend to compete with one another for control of territory, population, and resources-thereby subjecting the country to recurring bouts of violence and disorder. Under these circumstances, the transition from failing to failed state is usually irreversible.³⁹³

The state has a duty to protect its population from violence, and when it is unwilling or unable to provide such protection, when it loses its monopoly over the legitimate use of violence, or when its authority is weakened, then failure and decline are to be expected.³⁹⁴ The emergence of semi-autonomous militia in a fragile and divided state only leads to an increase in violence, a considerable decline in state authority and the distribution

³⁹² Nelson Kasfir, "Domestic Anarchy, Security Dilemmas, and Violent Predation," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 71

³⁹³ Michael T. Klare, "The Deadly Connection Paramilitary Bands, Small Arms Diffusion, And State Failure," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 116

³⁹⁴ *Ibid.* at 117

throughout society of small arms and light weapons.³⁹⁵

Once paramilitary groups emerge in a country of this sort and acquire substantial stocks of arms and ammunition, that country is destined to face severe stress and trauma. The government involved may be able to avert total failure, but it is almost certain to lose control of significant areas of the countryside.³⁹⁶ In the Democratic Republic of the Congo, anarchy and violence are rampant, resulting in shocking human loss. According to the International Rescue Committee, the death toll since 1998 could be as high as 3 million.³⁹⁷

From the end of the twentieth century and continuing into the beginning of this century, states such as Côte d'Ivoire, Liberia, Sierra Leone, Somalia, Rwanda, the Democratic Republic of the Congo and Sudan have all endured protracted conflicts. In Sierra Leone, the struggle and brutal violence of the Revolutionary United Front (RUF) wreak terror on a defenceless population. Since the independence of many of these colonial states, problems such as wealth disparities between rich and poor, lack of education, impoverishment, and inadequate security and development have never been properly addressed. In a 2011 meeting with United Nations Secretary-General, President Alassane Ouattara of Côte d'Ivoire discussed the potential of United Nations support in addressing the fragile, ongoing security situation and the cross-border threats from Liberia, as heavily armed militiamen had crossed over and attacked and killed civilians.³⁹⁸

³⁹⁵ Ibid. at 121

³⁹⁶ Ibid. at 125

³⁹⁷ René Lemarchand, "The Democratic Republic of the Congo: From Failure to Potential Reconstruction," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 29

³⁹⁸ "Côte d'Ivoire: UN Has Key Role in Strengthening Democracy, President Says," UN News, New York (22 September 2011)

In the 1990s, Sierra Leone produced 300 to 450 million dollars worth of diamonds annually, almost all of which were smuggled through Liberia and Côte d'Ivoire.³⁹⁹ Sierra Leone's inability to provide for the structural competency in security and the delivery of political goods stems from the fact that "rulers intentionally destroyed state capacity to provide public goods".⁴⁰⁰

The Truth and Reconciliation Commission for Sierra Leone, which was established in 2002 in the aftermath of the conflict, acknowledged the important role that diamonds played in the conflict, as they yielded tremendous revenues that were used to buy weapons and that led to the enslavement of individuals to work in the mines.⁴⁰¹

In the same way in Angola, powerful members of the elite have grown wealthy from diamond trafficking, while in Afghanistan and Colombia it is the profit from illegal drug trafficking by warlords and paramilitary groups that prolongs the conflict and instability. Sierra Leone, one of the poorest countries on earth, has had its economy devastated by the conflict. The gruesome attacks on civilians and the overwhelming destruction of property was accentuated by diamond sales, as the quantity mined was high and rebels had no trouble selling them.⁴⁰²

Charles Taylor, who served from 1997 to 2003 as president of Liberia, is on trial before the Special Court for Sierra Leone for his involvement in crimes committed in backing the Revolutionary United Front reign of terror by

³⁹⁹ John L. Hirsch, *Diamonds and the Struggle for Democracy*, Boulder: Lynne Rienner Publisher (2001) at 25

⁴⁰⁰ William Reno, "Sierra Leone: Warfare in a Post-State Society," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 71

⁴⁰¹ Iryna Marchuk, "Confronting Blood Diamonds in Sierra Leone: The Trial of Charles Taylor," *Yale Journal of International Law*, Vol. 4, No. 2 (Spring Summer 2009) at 88

⁴⁰² James Dobbins et al, *Europe's Role in Nation-Building: From the Balkans to Congo*, Santa Monica: Rand Corporation (2008) at 31

supplying arms in exchange for diamonds.⁴⁰³ External actors and states also play a role in destabilizing the security and development of another state. The lack of security and development was experienced by many youth who viewed themselves as victims of corrupt political elites and who were further victimized by the armed conflict, many being forced to become child soldiers. The social damage of state failure with no alternative vision creates:

a class of unemployed, desperate youth who have been abandoned by elite political classes, who see joining armed gangs as one the few remaining ways to improve their personal situations, and who then become the means of advancing the interests of organizers, who pursue their own objectives.⁴⁰⁴

Secretary General Kofi Annan, in his speech to the Security Council, acknowledged the importance of addressing the issue of child soldiers when he stated that:

The question of children and armed conflict is an integral part of the United Nations' core responsibilities for the maintenance of international peace and security, for the advancement of human rights and for sustainable human development.⁴⁰⁵

There are several legal frameworks that spell out the rights of children in armed conflict and in peacetime. The 1989 *Convention on the Rights of the Child*, the *Optional Protocol to the Convention on the Rights of the Child* was adopted by the General Assembly on 25 May 2000 and clearly sets the minimum age for compulsory recruitment. This objective is clear in Article 1 of the Optional Protocol that “states Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18

⁴⁰³ Iryna Marchuk, “Confronting Blood Diamonds in Sierra Leone: The Trial of Charles Taylor,” *Yale Journal of International Law*, Vol. 4, No. 2 (Spring Summer 2009) at 89

⁴⁰⁴ William Reno, “Sierra Leone: Warfare in a Post-State Society,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 96

⁴⁰⁵ Annan, Kofi A., speech to the Security Council (26 July 2000)

years do not take a direct part in hostilities”.⁴⁰⁶ As well, The 1998 *Rome Statute of the International Criminal Court*, Article 8(2)(b)(xxvi) defines such conscription as the enlistment of children under 15 by national armed forces or armed groups in order to use them to participate in hostilities as a war crime.

In 2006, Thomas Lubanga Dyilo, former leader of a militia group at war in the North Eastern Ituri district of the Democratic Republic of the Congo, was charged by the Prosecutor of the International Criminal Court with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. This was the first time that an individual had been brought before an international court solely on the basis of these crimes.⁴⁰⁷

Failed states are tense, conflicted, and dangerous with shared characteristics such as high levels of criminal and political violence, loss of sovereignty, civil war, the use of terror against their own citizens, high levels of corruption and poverty.⁴⁰⁸ Endemic civil conflicts undermine the “accountability, capacity and legitimacy of the state”,⁴⁰⁹ leading weak states to failure and loss of control over their territory. In Haiti, for example, the government has been associated with deep failures in public security services—failures that are derived in “large part from a traditionally weak Haitian state incapable of effectively addressing the country's needs”.⁴¹⁰ The trafficking of narcotics has been a serious problem in Haiti since the 1980s, with the government either unwilling

⁴⁰⁶ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 (25 May 2000) entry into force 12 February 2002

⁴⁰⁷ “Child soldier charges in the first International Criminal Court case,” ICC Press release (2006)

⁴⁰⁸ Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No. 4 (July/August 2002)

⁴⁰⁹ *The applicability of the Paris Declaration in fragile and conflict-affected situations: Thematic Study*, Oxford: IDL Group (August 2008) at 9

⁴¹⁰ Patrick Bellegarde-Smith, *Haiti: The Breached Citadel*, Boulder: Westview Press (1990) and Marlye Gélín-Adams and David M. Malone, “Haiti: A Case of Endemic Weakness,” in Robert I. Rotberg (ed.) *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 287

or unable to prevent the smuggling of drugs.⁴¹¹ Moreover, the prevailing political turmoil and poor economic conditions have caused an increase in crime and violence, which the police and judiciary have been unable to tackle effectively.⁴¹² Despite over 2 billion US dollars spent on international efforts to develop an independent police force in Haiti, this goal has yet to be achieved.⁴¹³ Haiti's failure in public security has long hampered development. Haiti's weak institutions and political paralysis has resulted in high crime rates, violence, drug trafficking, unemployment and poverty.⁴¹⁴

In Equatorial Guinea, civil conflict led to the deaths of an estimated 80,000 people out of a population of 300,000.⁴¹⁵ The country has experienced several coups, including a 2004 attempt carried out by mercenaries to replace the President.⁴¹⁶ A 2011 United Nations panel report on mercenaries in Equatorial Guinea called for greater regulation of mercenaries and private military groups:

Outsourcing security creates risks for human rights...The report on Equatorial Guinea noted that the 2004 coup attempt was the most widely reported incident clearly involving mercenaries, some of them employees or former employees of private military and security companies from several countries, illustrating 'possible close and disturbing links' between mercenaries and such companies.⁴¹⁷

⁴¹¹ Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004).

⁴¹² Patrick Bellegarde-Smith, *Haiti: The Breached Citadel*, Boulder: Westview Press (1990) and Marlye Gélin-Adams and David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 298

⁴¹³ *Ibid.* at 297

⁴¹⁴ Marlye Gélin-Adams & David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg, (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 287

⁴¹⁵ Kim Sengupta, "Coup plotter faces life in Africa's most notorious jail," *The Independent* (11 May 2007)

⁴¹⁶ *Ibid.*

⁴¹⁷ "Outsourcing to Private Security Contractors Threatens Human Rights, UN Panel Warns," UN News, New York (14 September 2011)

The panel report asked that all mercenaries be held accountable for their actions.

The Security Council has also expressed concerns over the lack of security in the Central African region, particularly in respect to the flow of illicit small arms, border security and the threat posed by Lord's Resistance Army (LRA). The LRA is listed by the United States as a terrorist organization that now operates beyond northern Uganda and is a regional problem, operating in countries such as South Sudan, Central African Republic and the Democratic Republic of the Congo.⁴¹⁸

Without a functioning state, it is impossible to provide for either security or development as such environments are not conducive to the growth of economic opportunity. The achievement of human development, human rights and human security are related by a range of structural competencies of the state. Unfortunately, as shall be noted in the next subsection, most failed states are ruled by autocratic regimes or leaders whose only concern is retaining power.

2.2.5 Authoritarian Rule and Clan Loyalty

Many of the present states that are suffering under authoritarian rule were once products of the colonial period that created an environment of conflict using the fragmentation of society and brute force to control the population. For societies such as Sierra Leone:

colonial rulers used their advantage in power to direct resources and authority and to enforce sanctions in ways that deeply affected how

⁴¹⁸ "LRA: A Regional Strategy Beyond Killing Kony," *Africa Report*, N°157, International Crisis Group (28 April 2010) at I

indigenous forces reconstituted social control. They gave scattered strongmen the wherewithal to build their social control in fragments of the society.⁴¹⁹

During the Cold War, authoritarian rule was often overlooked by the superpowers, which had other geopolitical interests, with each side providing weapons to various factions and further destabilizing the states. In Somalia during the Cold War, the Soviet Union provided weapons to the Siad Barre regime, and the world humanitarian community supplied food in sufficient quantities to serve the needs of the people; however, by the time the Cold War ended the Barre regime had lost all-important foreign and domestic allies.⁴²⁰ The collapse of his regime was seemingly inevitable, and when it collapsed in 1991 and the clans fought to take his place, there were no foreign champions available to assist the people of Somalia in restoring their state.⁴²¹

One of the greatest barriers to resolving the conflicts within the failed state of Somalia is the deeply entrenched and dysfunctional clan system that is often broken down into sub-clan rivalries. A major element of Somalia's internal conflict "has been fuelled in large part by distrust and competition between the country's Byzantine network of clans and sub-clans and by warlords with a vested interest in instability".⁴²² Two of the autonomous regions, Somaliland and Puntland, are based on this clan system and have enjoyed relative peace, while the south of the country has been mired in anarchy since the 1991 ousting of the dictator Mohamed Siad Barre.⁴²³ The situations in Somaliland and Puntland and, indeed, previously under the Barre regime exemplify that

⁴¹⁹ Joel Migdal, *Strong States and Weak Societies: State-Society Relations in the Third World*, Princeton: Princeton University Press (1988) at 140 or 141

⁴²⁰ Walter S. Clarke and Robert Gosende, "Somalia: Can A Collapsed State Reconstitute Itself?," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 130

⁴²¹ Ibid.

⁴²² Jason McLure, "The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?," 3 CQ Global Researcher (2009) at 153

⁴²³ Ibid. at 157-58

stability and peace can be maintained in such circumstances provided there is a functional national government that manages these clan alliances effectively.

In failed states, there is a propensity to feel allegiance to a tribe or clan rather than to a state with which people have few feel a connection:

It is difficult to overestimate the enduring importance of patronage networks in societies that are still largely organized within ethnic communities and along kinship lines...where political offices can no longer be farmed out, the political class may simply choose to do without the state and to profit from a war economy instead⁴²⁴

In Somalia, as in many other failed states, different clans compete for state control and use the formal institutions of the state for their own self-interest.⁴²⁵

However, those who are not in power perceive the state as:

illegitimate and seek to bypass it. ... cliques of various backgrounds compete to take advantage of the general lawlessness in society to siphon off money ...In such cases, identity divisions may be manipulated for short-term personal or political gain, widening the gulf between groups.⁴²⁶

Siad Barre concentrated power in the hands of his clan; eventually, the other Somali clans organized themselves in resistance to this structure and he was overthrown in 1991.

In Zaire (the Democratic Republic of the Congo) during the Mobutu years, the Forces Armées Zairoise were used as a place to install the members of his family, incur ethnic favouritism for the purpose of corruption and elicit the

⁴²⁴ James Mayall, "The Legacy of Colonialism," in Simon Chesterman, Michael Ignatieff and Ramesh Thakur (eds.), *Making States Work*, Tokyo: United Nations University Press (2005) at 47

⁴²⁵ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at 41

⁴²⁶ *Ibid.* at 42

growth of personal wealth. In the Army the highest ranks were divided among members of his family as well as members of his tribe:

Kinship played a key role in strengthening loyalty, and merit and competence were of secondary importance to personal devotion to Mobutu. In return for their political loyalty, the army high command was given a free hand to engage in lucrative commercial activities. While some were involved in smuggling operations, others sold military equipment, spare parts, and military fuel on the black market. Embezzling salaries intended for the troops was a standard practice among officers, a fact that goes a long way toward explaining the exactions and indiscipline of the troops.⁴²⁷

As Rotberg observed, Mobutu's "kleptocratic rule extracted the marrow of Zaire and left nothing for the mass of his national dependents".⁴²⁸

Many of these authoritarian dictators, including Mobutu, came to power with the assistance of the same Western governments that constantly speak of the principles of human rights and democracy.⁴²⁹ In many African nations, strongmen have also contributed to state failure. In Sudan, political parties identify with their various clans and religious groups, the north with its predominant Muslim population and the south with its Christian residents. These strong identities led to a civil war and eventually to the division of the country into two states. Gissel Quist, however, argues that Sudan's situation is unique because the "differences between its various components are not simply tribal. They are civilizational". He also does not believe that the perception of Sudan being torn between Christians and Muslims is true:

⁴²⁷ René Lemarchand, "The Democratic Republic of the Congo: From Failure to Potential Reconstruction," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 40

⁴²⁸ Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 22

⁴²⁹ René Lemarchand, "The Democratic Republic of the Congo: From Failure to Potential Reconstruction," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 31

The real conflict in the Sudan today is not between a Muslim north and a Christian and animist south, but between the approximately 30 percent of the population who are Arab-identified and everyone else.⁴³⁰

It is still much too early to judge whether the partition of the state of Sudan will lead to a lasting peace. Since Sudan's independence in 1956, the Sudanese state has been weakened by a civil war over ethnic identity and natural resources such as oil, which has enabled the government to double its military instead of investing in its people.⁴³¹

Robert Mugabe's struggle against white minority rule, which eventually led to Zimbabwe's independence, made him a hero throughout the country and the African continent. But once in office he concentrated power around him and tried to build a cult of personality. Mugabe led "Zimbabwe from strength to the precipice of failure, his high-handed and seriously corrupt rule having bled the resources of the state into his own pockets, squandered foreign exchange, discouraged domestic and international investment, subverted the courts and driven his country to the very brink of starvation".⁴³²

Failing states are often ruled by despots who, elected or not, harass civil society and in the examples provided by Zimbabwe and North Korea allow their people to suffer terrible deprivations.⁴³³ As those in power oppress the majority while affording privilege to a minority group, "[t]he typical weak state plunges toward failure when this kind of ruler-led oppression provokes a countervailing reaction on the part of resentful groups or newly emerged

⁴³⁰ Gérard Prunier and Rachel M. Gisselquist, "The Sudan: A Successfully Failed States," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 110

⁴³¹ *Ibid.* at 104, 107

⁴³² Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 23

⁴³³ Robert I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 4

rebels”.⁴³⁴

Jennifer Gandhi and Adam Przeworski note that “although democratic leaders have properly constituted institutions and rules by which they form coalitions, the channels through which autocrats consolidate support remain opaque”.⁴³⁵ To better understand authoritarian rule, it is helpful to look at the manner in which autocrats remain in power and the challenges with which they contend. According to Gandhi and Przeworski:

Autocrats face two types of threats to their rule: those that emerge from within the ruling elite and those that come from outsiders within society. Authoritarian rulers often establish narrow institutions, such as consultative councils, juntas, and political bureaus, as a first institutional trench against threats from rivals within the ruling elite.⁴³⁶

There are a number of these institutional trenches used to eliminate or reduce threats to authoritarian rule, which Gandhi and Przeworski detail in their study. One of the forms they can take includes:

a legislature that encapsulates some opposition, a party that mobilizes popular support for the dictatorship, or even multiple parties. Hence, whenever they need to, autocrats govern with political institutions. The decision to institutionalize is an important one for rulers in non-democracies. They must accurately perceive the strength of the threat and respond with a sufficient degree of institutionalization. If they err—as a result of misinformation, idiosyncratic beliefs, or hubris—and under institutionalize, their tenure is drastically curtailed. When autocrats evaluate their conditions and institutionalize correctly, they defend themselves regardless of the intensity of the threat. And if these institutions do matter for their survival in power, they must entail policy compromises and thus have consequences for other outcomes. Hence, there is a reason to think that institutions do matter under authoritarian regimes.⁴³⁷

⁴³⁴ Ibid. at 6

⁴³⁵ Jennifer Gandhi and Adam Przeworski, “Authoritarian Institutions and the Survival of Autocrats,” *Comparative Political Studies*, Vol. 40, No. 11 (November 2007) at 1280

⁴³⁶ Ibid.

⁴³⁷ Ibid. at 1293

As noted above, failed states are ruled by authoritarian rulers,⁴³⁸ with many coming to power with the support of Western governments, although today China is also supporting many autocratic regimes in Africa in exchange for access to natural resources. As will be examined in the following subsection, impunity is also rampant in failed states, with authoritarian regimes rarely challenged by ineffective justice systems.

2.2.6 Impunity and Ineffective Justice Systems

Failed states demonstrate flawed institutions with almost no safety nets for their people and are either unwilling or unable to perform the essential functions of a nation-state. The legislative and judicial branches of government have no independence from the executive, and while the armed forces may not be as dysfunctional, they are often highly politicized.⁴³⁹ In extreme cases, failed states are characterized by a vacuum of authority, such as in Somalia.

The preamble of the *Rome Statute of the International Criminal Court*, establishes that State Parties to this Statute affirm:

that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.⁴⁴⁰

⁴³⁸ Stewart Patrick, "'Failed' States and Global Security: Empirical Questions and Policy Dilemmas," *International Studies Review*, Vol. 9, No. 4 (2007) at 651

⁴³⁹ Robert I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 6

⁴⁴⁰ *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, entered into force on 1 July 2002

Bringing to trial those who have committed serious crimes is an important endeavour, essential to the re-establishment of the rule of law and the facilitation of national reconciliation in a post-reconstruction failed state. However, the road to reconciliation and justice is complicated, even more so for those who are attempting to restore a sense of normalcy to the failed state. As Adama Dieng, Registrar of the International Criminal Tribunal for Rwanda, stated:

Impunity has political, juridical and moral aspects when the offences committed are of a serious nature. It prevents peaceful co-existence between national communities, and constitutes a major obstacle to the evolution of democracy. Gone are the days when people believed in wiping the slate and starting anew.⁴⁴¹

The establishment of the International Criminal Court in 2002 has allowed, for the first time in history, a permanent court to have universal jurisdiction over instances of leadership criminality in failed states. Consequently, leaders who commit genocide, crimes against humanity, war crimes, and crimes of aggression are now actually being prosecuted for their crimes. United Nations Secretary-General Kofi Annan articulates the significant historical and monumental role the establishment of the International Criminal Court can play in “the promise of universal justice”.⁴⁴²

The Nuremberg and Tokyo trials, the *Convention on the Prevention and Punishment of the Crime of Genocide* and the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) have all helped in fundamentally advancing the pursuit of international criminal justice, the forming of extemporized tribunals, and the creation of an accountability paradigm and *the Rome Statute for the International Criminal Court*. The

⁴⁴¹ Adama Dieng, *Clarification of concepts: Justice, reconciliation, and impunity*. Arusha: United Nations International Criminal Tribunal for Rwanda (24 May 2002) at 1-2

⁴⁴² The International Criminal Court, CBC News Online (9 July 2004)

ICTY has become a fundamental component of post-conflict peace-building in the former Yugoslavia.

There have been several detentions to date of individuals who were implicated in the atrocities of several failed states, the most notable being Thomas Lubanga, Germain Katanga, Mathieu Ngudjolo Chui, Jean-Pierre Bemba, Callixte Mbarushimana and Liberian President Charles Taylor, who has been tried the International Criminal Court. In addition to the International Criminal Court, there has also been the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

Many legal scholars have been critical of involving senior officials who committed crimes against their people in the process of implementation of a peace accord.⁴⁴³ The focus on reconciliation with too weak an effort in prosecuting those who have committed such crimes has been criticized. This criticism was especially evident after the signing of the *Comprehensive Peace Accord* (CPA) in Liberia when it appeared that the perpetrators of these crimes were not going to be held accountable:

Liberia's present CPA does precisely that; it focuses exclusively on reconciliation. Ultimately, positive change is far more likely in Liberia through the use of judicially punitive mechanisms such as prosecution in a hybrid Special Court of law.⁴⁴⁴

However, as of late, the situation in Liberia has improved, especially after the election in Liberia of the first female president on the African continent, Ellen

⁴⁴³ Rena L. Scott, "Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges," *International Journal of Legal Information*, Vol. 33 (Winter 2005) at 363

⁴⁴⁴ *Ibid.* at 417

Johnson Sirleaf,⁴⁴⁵ and the indictment of Taylor in 2003 by the Special Court for Sierra Leone prosecution on eleven counts for war crimes and crimes against humanity committed during the conflict in Sierra Leone.

Holding those who commit crimes against their people responsible is necessary for any effort to put to an end the culture of impunity. Rwanda's 'culture of impunity' has been cited for years as one of the central causes of the 1994 genocide. The International Criminal Tribunal for Rwanda (ICTR) mentioned the 'culture of impunity' as one of the causes of genocide:

African countries must absorb the lessons of the Rwanda genocide in order to avoid a repetition of the ultimate crime" on the continent. Weak institutions in many African countries have given rise to a culture of impunity, especially under dictatorships that will do anything to cling to power.⁴⁴⁶

The International Criminal Tribunal for Rwanda also has defined impunity as "the failure to punish violations of established norms".⁴⁴⁷

Rwanda's Prosecutor General Gerald Gahima stated in an interview that:

genocide was possible in part because of a culture of impunity that had taken root in our society since 1959, so after the genocide in 1994, by and large our society felt that there had to be accountability for the genocide if we [wanted] to end this culture of impunity, [but] you could not have accountability oblivious to this involvement of large numbers of members of our society. So we started, back then in 1995, thinking about this problem: how to have accountability, but at the same time, in a manner that would help to bring about stability and reconciliation and

⁴⁴⁵ Ellen Johnson Sirleaf won the Nobel Peace Prize on the 7th of October 2011 and was re-elected as President of Liberia on January 16, 2012

⁴⁴⁶ International Criminal Tribunal for Rwanda, General Information. Available at ICTR website: <<http://unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>> accessed March 20, 2012

⁴⁴⁷ Adama Dieng, *Clarification of concepts: Justice, reconciliation, and impunity*. Arusha, Tanzania: United Nations International Criminal Tribunal for Rwanda (24 May 2002) at 4

peace. Because if you dealt with it strictly as a legal matter, you'd create more instability, more conflict.⁴⁴⁸

Despite the challenges associated with ending impunity, on 29 September 2011 the appeals chamber of the United Nations International Criminal Tribunal for Rwanda (ICTR) upheld 25-year jail terms imposed on Lieutenant Colonel Ephrem Setako and Yussuf Munyakazi for crimes of genocide.

Opposition to the culture of impunity necessitates strong determination from the international community and the reinforcement of judicial instruments. In Haiti, one of the unfavourable circumstances leading to impunity is that the judicial branch remains inaccessible to large segments of the population and is lacking in resources, credibility, and competence, as judges who are often threatened with assassination in many cases elect to protect themselves rather than uphold the law.⁴⁴⁹ The incapacity of the legal system to tackle crime and provide legal redress has often led to mob justice and increased cycles of violence, testing the inability of an already weak state.⁴⁵⁰

Judicial and penitentiary reforms are required. At present, both lawyers and judges abuse the use of pre-trial detention, the average length of which is about two years for felonies. In Haiti, prisoners held in pre-trial detention constitute 80% of the prison population.⁴⁵¹ The prisons lack hygiene and health care and are generally dangerous. Many prisons lack medicine and food as well. Moreover, because many Haitian prisons have been destroyed as a result of

⁴⁴⁸ Catherine Honeyman et al, "Establishing Collective Norms: Potentials for Participatory Justice in Rwanda," *Peace and Conflict: Journal of Peace Psychology*, Vol. 10, No.1 (2004) at 4

⁴⁴⁹ Marlye Gélin-Adams and David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg, (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 299

⁴⁵⁰ *Ibid.*

⁴⁵¹ Michael Forst, "Technical Assistance and Capacity-Building: Report of the Independent Expert on the Situation of Human Rights in Haiti," Geneva: United Nations Human Rights Council (26 March 2009)

political and environmental crises, there has been an increase in prisoners detained at police stations that are ill-equipped for this task.⁴⁵²

Young offenders are especially vulnerable. In some cases, juveniles have been remanded in custody for up to two years due to the lack of children's magistrates in certain districts. Juveniles are also required to share accommodations with adult prisoners. According to Forst, Haiti needs to establish alternative measures for juveniles, such as rehabilitation and reintegration programs.⁴⁵³ A complete judicial overhaul is long overdue.

In Pakistan, blasphemy laws relating to the desecration or denigration of holy personages, items and places of the Islamic faith have widely been misused to harass and victimize minorities. Attempts to reform or repeal the blasphemy laws have been met by repression and, in extreme cases, murder, such as the assassination of Punjab Governor Salmaan Taseer. The perpetrators of these offences, particularly Mumtaz Qadri, who was employed as a bodyguard for Governor Taseer when he committed the assassination, have been greeted with adulation instead of condemnation.

In fact, during Qadri's court appearance, there were loud cheers and rose petals thrown at him.⁴⁵⁴ As well, when Member of Parliament Sherry Rehman attempted to put forward a motion at the National Assembly to repeal the blasphemy law, she was forced to withdraw it after being harassed and having her life threatened.⁴⁵⁵ Others, such as Shahbaz Bhatti, Pakistan's first Federal Minister for Minorities, were highly critical of Pakistan's blasphemy law; he was assassinated on 2 March 2011.

⁴⁵² Ibid.

⁴⁵³ Ibid.

⁴⁵⁴ Babar Dogar, "Muslim scholars praise killer of Pakistan governor," *Associated Press* (5 January 2011)

⁴⁵⁵ Declan Wash, "Pakistan MP Sherry Rehman drops effort to reform blasphemy laws," *The Guardian* (3 February 2011)

Pakistan's blasphemy law prohibits and punishes anyone who speaks against Islam, with sentences ranging from prison terms to the death penalty. Thousands of Christians, Ahmadi Muslims and other religious minorities remain in custody, charged with violations of the blasphemy laws. More than one thousand religious minorities have been charged under blasphemy laws between 1986 and 2011, and 32 have been killed extra-judicially by angry mobs and individuals.⁴⁵⁶ Although religious minorities represent only a small fraction of Pakistan's population, they account for more than 50 percent of prosecutions under blasphemy laws.⁴⁵⁷

The culture of impunity in Pakistan has been seriously condemned by several leading human rights organization; the Jinnah Institute, for example, has asked that Pakistan:

[r]emove impunity in a systematic manner for prayer leaders in mosques, particularly those controlled by the state and under the respective provincial and federal Auqaf departments, for incitement to hatred on the basis of religious affiliation.⁴⁵⁸

In addition, the Institute has asked for parliamentarians to create a consensus for "regulating madrassas and mosques to prevent their use for the promotion and propagation of anti-minority propaganda and hate speech against non-Muslims".⁴⁵⁹

Leading organizations such as the Asian Human Rights Commission (AHRC) have also expressed their concern about the endemic nature of human rights

⁴⁵⁶ *A Question of Faith: A Report on the Status of Religious Minorities in Pakistan*, Karachi: Jinnah Institute (2011) at 40

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.* at 8

⁴⁵⁹ *Ibid.*

violations in Pakistan.⁴⁶⁰ The AHRC refers to the reports of thousands of people being tortured and suffering forced disappearance by law enforcement agencies. In the Balochistan province between 2002 and 2005 more than 4000 people have been detained, yet less than 200 have been presented before the courts, with the remaining detainees held incommunicado.⁴⁶¹ As well, honour killing is still prevalent, with reports of up to 500 women being killed per year, as many as 20 percent of whom were minors.⁴⁶²

Other states have been embroiled in a bitter and destructive civil war. The civil war in Sri Lanka, between the majority Sinhala government and the Tamil minority, eventually led to the killing of the rebel leader of the Liberation Tigers of Tamil Eelam (LTTE). The world is still waiting to see how this state will deal with post-conflict reconstruction. Several reports by various human rights organizations, including the Office of the High Commissioner for Human Rights, have been critical of the lack of judicial independence in Sri Lanka.⁴⁶³ Impunity for those who committed gross and systematic violations of human rights will make it impossible to achieve the reconciliation that is needed between the Sinhalese and the Tamil communities.

Sovereignty implies legal autonomy and constitutional independence, and when states fail in their ability to control their territory, it certainly poses a challenge to the effective pursuit of justice. The next subsection examines the concept of state sovereignty, recognized as a legal principle which is codified by the United Nations Charter.

⁴⁶⁰ *Pakistan: The Human Rights Situation in 2006 An overview*, Hong Kong: Asian Human Rights Commission (2006)

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ Kishali Pinto-Jayawardena, "The Rule of Law in Decline, Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka," Copenhagen: The Rehabilitation and Research Centre for Torture Victims (2009) at 81

2.2.7 Lack Territorial Control – *de jure* and *de facto* Sovereignty Gap

States require both *de jure* and *de facto* sovereignty in order to enforce and maintain authority and achieve the structural competency of a functioning state. Sovereignty as understood by Westphalian model signifies the “legal identity of a state in international law”.⁴⁶⁴ It is this notion, as suggested by the International Commission on Intervention and State Sovereignty, that provides, “order, stability and predictability in international relations”.⁴⁶⁵ Closing the gap between the two is essential to meeting security needs and creating legitimacy. Although *de jure* sovereignty grants a state the right to exclusive power over its territory, when a state suffers from instability, illegitimacy, and loss of rule of law and is unable to fulfil the attributes of central government to effectively exert control over its own territory, *de facto* sovereignty remains absent, greatly hindering progress.⁴⁶⁶

In failed states the physical control of the territory is compromised, generally through civil conflicts, terrorism and high levels of violence. State failure suggests that when states lose territorial control, various factions vie for power and institutions begin to lose legitimacy.⁴⁶⁷

In order to deal with this breach of territorial sovereignty, scholars have suggested that a paradigm shift is needed to address the critical gap between *de jure* and *de facto* sovereignty. Accordingly, this new paradigm implies the need

⁴⁶⁴ *The Responsibility to Protect* at 2.7

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Ashraf Ghani, Clare Lockhart and Michael Carnahan, “Closing the Sovereignty Gap: an Approach to State-Building,” London: Overseas Development Institute (September 2005) at 4

⁴⁶⁷ *Ibid.* at 163

for the integration of various types of international assistance in order to focus on closing the sovereignty gap by harnessing “the international system behind the goal of enhancing the sovereignty of states – that is, to enhance the capacity of these states to perform the functions that define them as states. Long-term partnerships must be created to prepare and then implement strategies to close this sovereignty gap”.⁴⁶⁸

It has been argued that the concept of sovereignty as a capacity rather than as a legal right forms a hierarchy of sovereignty in which some states are deemed to be more sovereign than others. As previously mentioned in reference to state formation, the approach of a hierarchy of sovereignty was expanded by Robert Jackson, who characterized post-colonial states as ‘quasi-states’ since many of these new states lacked the structural competency to regulate and develop their societies. In Jackson's view, these states possessed the international legal right of *de jure* sovereignty but lacked the domestic capacity to administrate and therefore create *de facto* sovereignty. For Jackson, this ‘negative sovereignty’ ensuing from this gap between the *de jure* and *de facto* nature of many states is defined as follows:

negative sovereignty: a normative framework which uphold the *de jure* legal sovereignty of states in the developing world (in contrast to ‘positive sovereignty’ in Europe which had emerged after states were consolidated). Such states, in theory, enjoy legal freedom from outside interference but they lack the ability to meaningfully function or provide public services, including order.⁴⁶⁹

⁴⁶⁸ Ibid. at 4

⁴⁶⁹ Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge: University Press (1990) at 5

Jackson described these weak ‘quasi-states’ as having been incorporated into the international community even though they were “juridical more than empirical entities”,⁴⁷⁰

The following subsection concerning human rights suggests, as noted by the International Commission on Intervention and State Sovereignty, that “[s]tate sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself”.⁴⁷¹

2.2.8 Gross and Systematic Violations of Human Rights

Some human rights advocates argue that the state is the problem. Notwithstanding this argument, this study maintains that it is the state which is the principal defender of human rights and that failed states pose a threat to this responsibility. One of enduring attributes of failed states is the level of gross and systematic violence committed by both state and non-state actors, including sexual violence, murder, extra-judicial killing and, in extreme cases, war crimes, crimes against humanity and other breaches of international humanitarian and human rights law. William Schabas has maintained that, in the hierarchy of crimes, genocide “belongs at the apex of the pyramid.”⁴⁷² These violations of human rights inevitably lead to the internal displacement of people and entire communities as well as refugee flows to neighbouring states. Professor Payam Akhavan views with merit Schabas’ observation and goes on to address in his book the simple but overlooked question of whether genocide is in fact the ‘ultimate crime’, pointing to “the ongoing debate over whether

⁴⁷⁰ Ibid. at 5

⁴⁷¹ The Responsibility to Protect at Synopsis

⁴⁷² William Schabas, *Genocide in International law, The Crime of Crimes (2nd ed.)*, Cambridge: Cambridge University press, 2009) at 10-11

atrocities committed by the Sudanese government in Sudan constitute genocide,”⁴⁷³ in order to illustrate the relevance of such a question.

It has also been noted that sexual violence continues to be a problem in several of the world’s major conflicts, presenting a challenge for international efforts to eradicate it. Just over ten years ago, the Security Council of the United Nations adopted what was meant to be a landmark Resolution 1325 requiring parties in conflict situations to respect women's rights and to participate in peace negotiations.⁴⁷⁴ In 2008, the Security Council adopted Resolution 1820, which recognized sexual violence as a tactic of war and stated its intent to consider sanctions against responsible parties. The Security Council Resolution notes that:

civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities; Recalling its condemnation in the strongest terms of all sexual and other forms of violence committed against civilians in armed conflict, in particular women and children.⁴⁷⁵

The Security Council demanded the “immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians”⁴⁷⁶ and expressed “its deep concern that, despite repeated condemnation, violence and sexual abuse of women and children trapped in war zones was not only

⁴⁷³ Payam Akhavan, *Reducing Genocide to Law*, Cambridge: Cambridge University Press (2012) at 135

⁴⁷⁴ Security Council Resolution 1325, adopted unanimously on October 31, 2000. The Security Council resolution also called for the adoption of a gender perspective that included the special needs of women and girls during repatriation and resettlement, rehabilitation, reintegration and post-conflict reconstruction.

⁴⁷⁵ Security Council Resolution 1820, SC/9364 (19 June 2008)

⁴⁷⁶ “Security Council Demands Immediate and Complete Halt to Acts of Sexual Violence Against Civilians in Conflict Zones, Unanimously Adopting Resolution 1820 (2008),” UN News, New York (19 June 2008)

continuing, but, in some cases, had become so widespread and systematic as to reach appalling levels of brutality”.⁴⁷⁷ In 2009, the Security Council expanded its scope of influence regarding children in armed conflict to include the killing, maiming or raping of children.⁴⁷⁸

Earlier that year, another resolution called for substantive action by the Secretary-General, including the establishment of a Special Representative on Sexual Violence in Conflict and the creation of a team of rule of law experts that could be sent to assist weak states in combating sexual violence. The Council requested the Secretary-General to provide detailed reports on parties suspected of committing acts of sexual violence against which the Council could then impose sanction.⁴⁷⁹

Eleven years after its adoption, Landmark Security Council Resolution 1320 has yielded very little results for women and children in many failed states. It is known that in Sudan “rape has long been identified as a weapon of war in Darfur”⁴⁸⁰ and, although the Darfur peace negotiations contributed to a decrease in violence, “clashes that did continue between the government and various rebel factions have been accompanied by cases of rape, gang rape and other physical assaults thought to be carried out by all sides”.⁴⁸¹

Additionally, in the last couple of months, in light of South Sudan’s independence, there has been an upshot in violence in Darfur. Adding to this:

⁴⁷⁷ Ibid.

⁴⁷⁸ Security Council, Resolution 1882 (4 August 2009)

⁴⁷⁹ Security Council Resolution 1861 (14 January 2009)

⁴⁸⁰ “Darfur: Rape as a weapon of War, Sexual Violence and its consequences,” Amnesty International (17 July 2004) also in Jennifer Leaning et al, “Nowhere to turn: Failure to protect, support and assure justice for Darfuri Women,” Cambridge: Physicians for Human Rights & Harvard Humanitarian Initiative (1 June 2009) at 52

⁴⁸¹ “Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur,” New York, S/2010/213 (28 April 2010) at 11 and S/2010/382 (14 July 2010) at 11

Humanitarian agencies have been denied access to areas between North and South Darfur, and IDP populations – especially women and children – are thought to be particularly vulnerable.⁴⁸² The situation in Sudan is aggravated by the systematic denial of the government of the extent, or even of the existence of widespread sexual violence. The government is prone to accuse international NGOs of fabricating a problem that they then use to obtain funding from their western donors for whom this is a popular cause.⁴⁸³

Louise Arbour, President of the International Crisis Group, noted in her presentation to the Canadian House of Commons in 2011 that, notwithstanding the Comprehensive Peace Agreement between the North and South, one recent study has suggested “that women continue to suffer rape and other forms of gender-based violence. Sexual violence is carried out with impunity by the police and armed forces since soldiers feel a sense of entitlement as liberators above the law”.⁴⁸⁴ Specifically, in the towns of Juba and Torit, a number of females in the marketplaces are victims of rape and sexual assault at the hands of security forces.⁴⁸⁵ Furthermore, the deadly attacks in Jonglei in March and April of 2009 are evidenced to have been specifically intended to harm women and children.⁴⁸⁶

Gender equality and gender rights must be viewed as more critical in order to prevent such human rights abuses. The government of Afghanistan, along with its international supporters, is unable to secure and protect the equal rights of women (and girls) as outlined in the Afghan constitution. Their inability to do

⁴⁸² “Sudan: New Attacks on Civilians in Darfur,” Human Rights Watch report (28 January 2011) at Executive Summary. For reference to vulnerable IDP populations see “2011 UNHCR country operations profile – Sudan” at 2 and on government camp raids see *CrisisWatch* Sudan (north) entry (1 February 2011)

⁴⁸³ “Gender-Based Violence in Southern Sudan: Justice for Women long overdue,” New Haven: Allard K. Lowenstein International Human Rights Clinic at Yale Law School, (25 January 2011) at 10-15

⁴⁸⁴ Louise Arbour, President & CEO International Crisis Group, “Study on Sexual Violence in Conflict States,” Canadian House of Commons Subcommittee on International Human Rights (10 February 2011)

⁴⁸⁵ “There is no protection: Insecurity and Human Rights in Southern Sudan,” Human Rights Watch (2009) at 30

⁴⁸⁶ “Gender-Based Violence in Southern Sudan: Justice for Women long overdue,” New Haven: Allard K. Lowenstein International Human Rights Clinic at Yale Law School, (25 January 2011) at 14 and also in at 1

so must be viewed critically, as “[t]hese shortfalls can’t be scrubbed away by reference to Afghan cultural norms. They should be seen in the context of an American-led international intervention in which justice and meaningful efforts to build rule of law institutions have been largely absent”.⁴⁸⁷ Similar circumstances can be found:

In Haiti, Sudan and Afghanistan, as well as in the eastern provinces of the Democratic Republic of Congo, entrenched patterns of abuse against women intersect with newer trends emerging from social breakdown associated with armed conflict.⁴⁸⁸

It is very important to consider that work concerning sexual violence is often subcontracted to civil society or humanitarian organizations, and while this is often times perceived as necessary, either because the state refuses to take part in resolving such concerns or is itself implicated in such crimes, “law enforcement and justice are basic public goods and, therefore, the preserve of state actors. The extent to which they can be contracted out to civil society groups is limited. NGOs can open clinics but not courts”.⁴⁸⁹ It is necessary to take into account that:

[w]hile civil society groups – or peacekeepers – may be able to provide short term protection and assistance to victims, their work must be complemented by longer term development of state capacity to prevent sexual violence and punish perpetrators. And this is of course part and parcel of a larger effort at building state institutions in the justice sector, broadly defined.⁴⁹⁰

In Haiti, for example, sexual violence was pervasive:

even before the earthquake and the subsequent humanitarian disaster, as the rule of law was weak and years of development efforts had failed to

⁴⁸⁷ Louise Arbour, President & CEO International Crisis Group, “Study on Sexual Violence in Conflict States,” Canadian House of Commons Subcommittee on International Human Rights (10 February 2011)

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

construct a functioning criminal justice system. The crisis has further increased the vulnerability of many women and girls. Data is unreliable, but widespread abuse and rape has been reported in the 1,200–1,300 IDP camps in the capital which house over one million residents.⁴⁹¹

A United Nations report on South Sudan alleges that violations of international law, crimes against humanity and war crimes are being committed in the Kordofan state and attributes this to Sudanese Armed Forces (SAF). The reported alleges violations included:

extrajudicial killings, arbitrary arrests and illegal detention, enforced disappearances, attacks against civilians, looting of civilian homes and destruction of property...a series of extrajudicial killings targeted at people who were affiliated with the SPLA-N and SPLM, most of whom allegedly were from the Nuba communities.⁴⁹²

As noted above, failed states create instability for the international community as people become displaced or become refugees as a result of gross and systematic human rights violations. Individuals become victims of state oppression when international treaties are not respected. In Sudan, human rights agencies have charged that the government supports and participates in slavery as well as in attacks against its own people.⁴⁹³

A report published in 2011 by a coalition of human rights groups warned of rising levels of violence in Darfur. The conflict has been going on for a number of years. In 2006, the Darfur Peace Agreement was signed by the Sudan Liberation Movement and the Government, which called for the disarmament and demobilization of the Janjaweed militia. The Agreement has since been supplanted by the Doha Agreement of 2011. The coalition, which included

⁴⁹¹ Ibid.

⁴⁹² “UN Urges Inquiry Into Alleged War Crimes in Sudan’s Southern Kordofan State,” UN News, New York (15 August 2011)

⁴⁹³ Gérard Prunier and Rachel M. Gisselquist, “The Sudan: A Successfully Failed States,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 106

Human Rights Watch, African Centre for Peace and Justice Studies, and The Enough Project, insists that the situation is getting worse and has urged the United Nations Security Council to “insist on regular public reports on the humanitarian and human rights situation in Darfur and throughout Sudan in order to monitor the situation on the ground adequately”.⁴⁹⁴

In Sierra Leone, state failure has led to the establishment of a class of downtrodden youths who see joining armed gangs as one of the only ways to improve their own lives.⁴⁹⁵ In Chad, rebel forces are destabilizing the country, creating hundreds of thousands refugees and internally displaced persons (IDP).⁴⁹⁶ The list of human rights violations in failed states is too excessive to be fully and effectively analyzed in this thesis.

Violations of human rights occur when any state or non-state actor breaches any of the treaties that exist in international human rights and humanitarian law. The violations of human rights and security in failed states inevitably lead, as will be examined in the next subsection, to the loss of social cohesion and development.

2.2.9 Loss of Social Cohesion and Lack of Development

Failed states are characterized, *inter alia*, by lack of development, which leads to poverty and loss of social cohesion. Failure is often aggregated by a decline in per capita income, with economic growth remaining impossible until state

⁴⁹⁴ *Sudan: Deteriorating Situation in Darfur*, Human Rights Watch Report (8 January 2011) and William Reno, “Sierra Leone: Warfare in a Post-State Society,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 96

⁴⁹⁶ Chad country profile, Fund For Peace (October 2011). Available at: <<http://www.fundforpeace.org/global/states/ccppr11td-countryprofile-chad-10u.pdf>> accessed 15 March 2012

functioning is reinstated. This was the case in Angola where the economy was ruined by both the colonial wars and the civil war that came after independence, notwithstanding the fact that Angola is rich in natural resources such as petroleum and diamonds.

In many African countries, due to corrupt and autocratic rulers, the state, instead of being an instrument that provides benefits to the population, has provided benefits to only the ruling few. Poor governance in many African states that “destroyed or at least badly undermined the basis for any kind of government at all”⁴⁹⁷ is a root cause of loss of social cohesion and development. Lack of social cohesion often results in conflict and poor development. Often, the loss of social cohesion and conflicts are internal, although it has been noted that external pressures can also be a source of such problems.

In a functioning state, people “tend to obey the rules not because they are worried about cops but because they have obligations to other people”.⁴⁹⁸ Accordingly, some scholars have indicated that these formal and informal procedures do not exist in failed states, and as noted by Robert Putman, “defection, distrust, shirking, exploitation, isolation, disorder, and stagnation intensify one another”.⁴⁹⁹ Once such dysfunction occurs, social cohesion disappears, creating a vacuum for those who have a stake in the instability and structural incompetency of a state.⁵⁰⁰

⁴⁹⁷ Christopher Clapham, “The Global-Local Politics of State Decay,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 90

⁴⁹⁸ Robert Putman is quoted in Shanker Vedantam, “One Thing We Can’t build Alone in Iraq,” *Washington Post* (29 October 2007) and also in Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at 40

⁴⁹⁹ Robert Putman, *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton: Princeton University Press (1993) at 177

⁵⁰⁰ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at 40. Kaplan quotes Douglass North, *Institutions and Development: A Critical Review, Working Paper No. 210*, OECD Development Centre (July 2003) at 30

When the state is unable or unwilling to provide security and development, individuals often look for non-state actors. The manner in which the state addresses the frailties of their development and security affects their propensity for failure,⁵⁰¹ thus often strengthening the likelihood that the security dilemmas within the state will escalate into war.⁵⁰² Some security situations, such as the ones present in Sierra Leone and the Democratic Republic of the Congo, allow non-state actors to emerge and thrive in the absence of rule of law and social cohesion. The tendency becomes a reality when:

nonstate leaders recruit followers and supply them with arms, the arms having been procured from smugglers, on a black market, or by theft or purchase from soldiers or official armories. Until this decisive moment, weak states may appear to be failing. But insurgent attacks, fuelled by newly obtain arms or provoked by governmental errors or refusals to act (as in Côte d'Ivoire), plunge a failing state into a crisis from which it may depending on the official response - never recover.⁵⁰³

As indicated above, lack of social cohesion within and between states frequently results in conflict and poor development. The final subsection on the structural incompetency of failed states suggests that state failure is also the result of corrupt and weak institutions.

2.2.10 Corruption and Weak Institutions

The capacity of the state to mobilize its resources in order to provide for the basic needs of its people is compromised by high levels of corruption and weak

⁵⁰¹ Robert I. Rotberg, "The Failure and Collapse of Nation-States, Breakdown, Prevention and Repair," in Robert I. Rotberg (ed.), *When States Fail: Causes and Consequences*, Princeton: Princeton University Press (2004) at 28

⁵⁰² Ibid.

⁵⁰³ Ibid. at 30

institutions. In Vienna, at the January 2003 United Nations General Assembly Ad Hoc Committee for the Negotiation of a Convention against Corruption, it was widely recognized that the impact of corruption is a “threat to the stability of societies, the establishment and maintenance of the rule of law and economic and political progress”.⁵⁰⁴

The Committee concluded that in order to solve the problem of abhorrent behaviour, the assets derived from corruption must be recovered, thereby sending a message that such corruption will not be tolerated.⁵⁰⁵

Corruption, ever the enemy of stability, remains one of the most important challenges facing weak and failed states, threatening the integrity of state systems, eroding rule of law and leading to criminal entrepreneurs who take advantage of weak law enforcement, economic stagnation and poverty. It is not unforeseen that many of the world’s most unstable and least governed states are also those with the highest levels of corruption.⁵⁰⁶

Benefiting from weak law enforcement and legal infrastructure, a culture of impunity is produced, creating criminal enterprises that engage in drug trafficking, human trafficking, and terrorist activities, which are among the most threatening activities plaguing failed states. An example of this can be seen in West Africa where the security institutions of states like Côte d’Ivoire, Guinea Bissau, and Sierra Leone are hampered by corruption, making their borders easily penetrable by cocaine traffickers who threaten the security of the entire region.⁵⁰⁷

⁵⁰⁴*Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived From Acts of Corruption*, report presented to the Ad Hoc Committee for the Negotiation of a Convention Against Corruption (13-24 January 2003) at 3

⁵⁰⁵ Ibid.

⁵⁰⁶ Christian Strohmann, “More Cocaine Smuggled From Americas to Europe via Fragile States,” Vancouver, Suite101 (31 May 2009)

⁵⁰⁷ Ibid.

The nexus between corruption and weak institutions is not only present in failed states. Generally speaking, both weak and failed states exhibit high degrees of corruption. This manifestation is challenged by the absence of a functioning bureaucracy and political will, which can significantly affect the pace of challenging corruption. A 2002 United States National Security Strategy report noted that “[p]overty does not make people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels”.⁵⁰⁸ Weak and failed states restrict people to enduring miserable lives.⁵⁰⁹

Many of the pre-eminent flaws of failed states are directly connected to the plethora of self-serving leaders and members of the elite who have taken charge of the state for the sole purpose of creating state institutions that benefit only themselves, breaching the social contract between the state and its citizens. The state “does not deliver to its people and the people accordingly have to turn to non-state communities (ethnic groups, clans, tribes, religion) for the satisfaction of their material and non-material needs”.⁵¹⁰

When the downward spiral of state failure commences:

corrupt autocrats and their equally corrupt associates usually have few incentives to arrest their state's slide since they themselves find clever ways to benefit from impoverishment and misery. As foreign and domestic investment dries up, jobs vanish, and per capita incomes fall, the mass of citizens in an imperilled state see their health, educational, and logistical entitlements melt away. Food and fuel shortages occur. Privation and hunger follow, especially if a climatic catastrophe

⁵⁰⁸ *National Security of the United States of America*, Washington D.C.: The White House (September 2002)

⁵⁰⁹ See Paul Collier, *The Bottom Billion*, Oxford: Oxford University Press (Collier notes that more than one billion people who live in poverty, surviving on less than one dollar a day)

⁵¹⁰ Lars Engberg-Pedersen et al, *Fragile States on the International Agenda*, Copenhagen: Danish Institute of International Studies (2008) at 11

intervenes.⁵¹¹

State failure covers several modes of political and economic decay that lead to corruption and poverty. Lebanon from 1972 to 1979, Nigeria between 1993 and 1999 and Zimbabwe from 2001 to 2002 provide clear examples of how corruption, violence and economic neglect can reduce the standard of living and lead to failure. In some states, primarily in sub-Saharan Africa, there are areas that lack state presence, with no administrative institutions; as a result, the state is unable to project its authority, leaving these states, as some have stated, in danger of “being hollowed out”.⁵¹²

Most of these failed states expend a considerably large amount of revenue on their militaries, disproportionate to the very little spent on capacity-building and the provision of positive services to their populations. When drought and famine are added to the equation, the state is rendered incapable of assisting its population, leaving the international community to provide assistance.

In Haiti, for example, combating corruption, especially that of the police, is urgently required. Although slow, President Préval made a political commitment to making the fight against corruption a strategic objective; however, the proposed reform never materialized. Haiti was ranked 146th out of 176 countries surveyed in Transparency International’s 2011 Corruption Perceptions Index.⁵¹³ The relationship between the Haitian people and the National Police “...is still characterized by suspicion, accusations of brutality,

⁵¹¹ Robert I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 21

⁵¹² Nicolas Van De Walle, “The Economic Correlates of State Failure,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 95

⁵¹³ Corruption Perceptions Index, available at:

<http://old.freedomhouse.org/template.cfm?page=22&country=8051&year=2011> accessed March 22, 2012

human rights violations and complicity with criminal and corrupt elements”, including “allegations of brutality, violence and rape by uniformed officers”.⁵¹⁴

As indicated above, the failure of one structural competency issue does not necessarily lead to state instability and failure, but taken collectively these broad structural categories inevitably lead already weak states to failure. Adding to these challenges are the historical legacies of colonialism and terrorism.

2.3 Legacy of Colonialism

The establishment and maintenance of colonialism in any territory has almost always been primarily motivated by the desire to secure resources. This was clearly the case in Africa, and it has therefore been noted that “any rudimentary institutions that were built in colonial states were either incidental to this central objective or designed to facilitate pacification and resource exploitation. In these extraction colonies, coercive security was the central focus of institution building”.⁵¹⁵

A fruitful discussion of the reasons why so many African states have failed can be understood, in addition to the previously noted causes, within the context of the manner in which they emerged as nations. Most faced the burdens and challenges of building states based on the arbitrarily drawn borders of their former colonial rulers. For the most part, African states were products of European colonialism, with the exception of Sudan that was in part a product

⁵¹⁴ Robert Fatton Jr., “The Fall of Aristide and Haiti’s Current Predicament,” in Yasmine Shamsie and Andrew S. Thompson (eds.), *Haiti: Hope For a Fragile State*, Waterloo: Centre for International Governance Innovation (2006) at 20

⁵¹⁵ Abdel-Fatau Musah, “Privatization of Security, Arms Proliferation and the Process of State Collapse in Africa,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 160

of colonialism by Ottoman Egypt.⁵¹⁶ Sudan's colonial borders were always imprecise, and this would later affect the nature of Sudan's fragmentation.⁵¹⁷ However, once the colonial borders were established, it was exceedingly difficult to redraw them:

Once it was clear that the European nation-state would serve as the organizing principle for African politics, it was probably inevitable that African leaders would decide to retain the boundaries as created by the colonialists. ...The African nationalists did not advocate returning to precolonial practices because they knew that precolonial practices had nothing to offer them when thinking of how to rearrange 'Kenya' or 'Guinea.'⁵¹⁸

The colonial pattern established by Belgian King Leopold, the sole ruler of the Congo Free State, was brutal, and thousands died as a result of forced labour.⁵¹⁹ The Belgian administration prevented Africans from assuming any managerial positions and just before Zaire (the Democratic Republic of the Congo) became independent in 1960, there were only "three African civil servants among the country's 4,600 top officials and no African doctors, dentists, pharmacists, professional lawyers, engineers, or even veterinarians. In all, only seventeen Congolese had earned a university degree before independence".⁵²⁰ This left the new state with a very limited capacity to deliver any positive goods to its people.

Many African states began their independence under these extremely difficult conditions. From Guinea Bissau, Burundi, the Democratic Republic of the Congo, Somalia and Sudan to Sierra Leone, Guinea and Côte d'Ivoire:

⁵¹⁶Gérard Prunier and Rachel M. Gisselquist, "The Sudan: A Successfully Failed States," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 101

⁵¹⁷ Ibid. at 108

⁵¹⁸ Jeffrey Herbst, *States and power in Africa*, Princeton: Princeton University Press (2000) at 103

⁵¹⁹ Adam Hochschild, *King Leopold's ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, New York: Houghton Mifflin Company (1999)

⁵²⁰ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at 84

failed or failing states confront us with an all too familiar litany of scourges--civil societies shot to bits by ethno--regional violence, massive flows of hapless refugees across national boundaries, widespread environmental disasters, rising rates of criminality, and the utter bankruptcy of national economies.⁵²¹

In Africa, many “quasi-states”⁵²² were artificial creations of the European colonial system, and their abrupt decolonization following the Second World War caused them to experience extreme weakness in their infancy, which was later worsened by the realities of the Cold War:

The ready assumption of the Cold War period that each superpower needed to sustain its allies, often by military means, helped to foster a level of militarization that, far from sustaining states, ultimately helped to undermine them. Weapons escaped from the control of the governments to which they were supplied-by capture from government forces by insurgents within the state concerned, or as a result of the support given by states to opposition movements across their frontiers-and were used against states, rather than for them.⁵²³

Charles Alao argues that Africa’s weak states and subsequent failures were a result of the way African states were created by the colonial powers. These new states were created by bringing an assembly of people from diverse ethnic, political and religious affiliations together in order to forge a common sense of citizenship.⁵²⁴ Jeffrey Herbst argues a similar point in regards to the decolonization of Africa as coming from the formal colonization of Africa and

⁵²¹ René Lemarchand, “The Democratic Republic of the Congo: From Failure to Potential Reconstruction,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 29

⁵²² Stewart Patrick, “‘Failed’ States and Global Security: Empirical Questions and Policy Dilemmas,” *International Studies Review*, Vol. 9, No. 4 (2007) at 646 and Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge: University Press (1990)

⁵²³ Christopher Clapham, “The Global-Local Politics of State Decay,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 91

⁵²⁴ Charles Alao, “The Problem of the Failed States in Africa,” in Muthiah Alagappa and Takashi Inoguchi (eds.), *International security management and the United Nations*, Tokyo: United Nations University Press (1999) at 83-102

then being substituted with an artificial state system.⁵²⁵ For Herbst, state failure in many African states was due in part to the inflexibility imposed by the Cold World and the rules of sovereignty expanded by the United Nations causes.⁵²⁶

Although the founding of the United Nations began with the *Universal Declaration of Human Rights*, many of the founding members were colonial powers who at first prevented the Security Council from expanding its role in colonial matters. However, this tendency was modified over time, and today the United Nations plays a fundamental role in the process of decolonization. In 1961, the United Nations established the Special Committee on the Situation with regard to the Implementation of the *Declaration on the Granting of Independence of Colonial Countries and Peoples*, also referred to as Committee 24,⁵²⁷ to exclusively focus on monitoring the implementation of the *Declaration* and providing information on the 16 Non-Self-Governing Territories (NSGTs).⁵²⁸ As well, in 1990, the General Assembly proclaimed the first International Decade for the Eradication of Colonialism.

As noted above, the history of colonialism has a tremendous impact on the formation and failure of post-colonial states. In the following subsection, the nexus between terrorism and failed states will be explored. It is not that terrorism only occurs in failed states but rather that these states provide an environment in which terrorist groups are able to operate and expand.

⁵²⁵ Jeffrey Herbst, "Responding to state failure in Africa," *International Security*, Vol. 21, No. 3 (1996/97) at 120-144

⁵²⁶ Jeffrey Herbst, "Let Them Fail: State Failure in Theory and Practice: Implications for Policy," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 316

⁵²⁷ General Assembly Resolution 1514 (XV) of 14 December 1960 and created the Special Committee in 1961

⁵²⁸ These territories include: Gibraltar, New Caledonia, Western Sahara, American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Guam, Montserrat, Pitcairn, Saint Helena, Turks and Caicos Islands, United States Virgin Islands, Tokelau, and the Falkland Islands (Malvinas)

2.4 Terrorism

Many researchers maintain that while not all weak or failed states are afflicted with terrorism, be it national or transnational, it is still a sound assertion that weak or failed states represent a national and international security concern.

Threats of terrorism emanate from these states as they provide safe havens for terrorists and create regional instability, threatening the rule of law, good governance and stability.⁵²⁹ Furthermore, terrorism can prolong state weakness and failure, making it more difficult for countries to recover. Francis Fukuyama has noted that “[s]ince the end of the Cold War, weak and failing states have arguably become the single-most important problem for international order”.⁵³⁰ Terrorists groups, according to several analyses, base their operations in weak and failing states, where they can benefit from an absence of law which allows for the use of illicit economic activities to finance their operations and facilitates their access to weapons and territory for training purposes.⁵³¹ In 2002, following the Sept. 11, 2001 terrorist attacks on the United States, The White House National Security Strategy declared that:

weak states, like Afghanistan, can pose as great a danger to our national interests as strong states...poverty may not turn people into terrorists, but poverty, weak institutions and corruption can make weak states vulnerable to terrorist networks and drug cartels.⁵³²

⁵²⁹ Liana Sun Wyler, “Weak and Failing States: Evolving Security Threats and U.S. Policy,” CRS Report for Congress (2008) at 6

⁵³⁰ Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century*, Ithaca: Cornell University Press (2004) at 92

⁵³¹ L. S. Wyle at 6

⁵³² The White House, *The National Security Strategy of the United States*, Washington D.C. (September 2002) at 4

The reconstruction of rule of law, security and development in states such as Afghanistan has been complicated by the various terrorist activities still taking place after the fall of the Taliban.⁵³³ Transnational terrorist organizations, such as al-Qaeda, for example, benefit from state failure in Afghanistan and Sudan which enables them to recruit members and build training camps for their terrorist activities as well as provides them with a safe haven.⁵³⁴ A United States Congressional report notes that there is a link between transnational crime and terrorist groups:

[T]he international community has seen a surge in the number of transnational crime groups emerging in safe havens of weak, conflict prone states... Criminal groups can thrive off the illicit needs of failing states...rebel groups have been known to solicit the services of vast illicit arms trafficking networks to fuel deadly conflicts embers of the international community.⁵³⁵

According to a World Bank report, the number of states that could provide a breeding ground for terrorism jumped from seventeen in 2003 to 26 in 2006.⁵³⁶ It is clear that when states do not provide for the basic social needs of their populations, they present a ripe breeding ground for terrorist organizations to recruit and radicalize disadvantaged youth.⁵³⁷

With renewed focus on terrorism after 9/11, failed states such as Afghanistan, Somalia and Sudan, to name but a few, have gained international attention. In Sudan, the United States “strongly pressured the government to co-operate

⁵³³ Stewart Patrick, “Weak States and Global Threats: Fact or Fiction?,” *The Washington Quarterly*, Vol. 29, No. 2 (Spring 2006) at 37

⁵³⁴ *Ibid.*

⁵³⁵ Liana Sun Wyler, “Weak and Failing States: Evolving Security Threats and U.S. Policy,” CRS Report for Congress (28 August 2008) at 7

⁵³⁶ Karen DeYoung, “World Bank Lists Failing Nations That Can Breed Global Terrorism,” *Washington Post* (15 September 2002) at 13

⁵³⁷ Stewart Patrick, “Weak States and Global Threats: Fact or Fiction?,” *The Washington Quarterly*, Vol. 29, No. 2 (Spring 2006) at 36

against terrorism and, at the same time, became more involved in the peace process”.⁵³⁸

A prevailing fear within the world community is the failure of a state which possesses nuclear weapons.⁵³⁹ Several US national security advisors worry that global terrorists are aggressively on the lookout for nuclear weapons.⁵⁴⁰ Pakistan’s porous borders, as well as the terrorist bombings in several major centres, have left many to question the safety guarantees of the country regarding nuclear weapons.⁵⁴¹ Adding to the problem is constant political instability and Taliban advancement in Pakistan and near the Pakistan - Afghan border. The militant group known as the Pakistan Taliban have links to al-Qaeda and have attacked several military installations.⁵⁴²

In her address to the United Nations General Assembly on 27 September 2011, Pakistan Foreign Minister Hina Rabbani Khar expressed her country’s anxiety concerning terrorism:

Our streets are filled with armed police posts. We cannot enter our parks or shopping centres or churches or mosques without being searched and frisked. Terrorists have attacked our military installations, attacked the gravesites of our spiritual leaders, attacked our minorities, and attacked the very idea of Pakistan.⁵⁴³

In Pakistan, the ever-increasing militant insurgency of the tribal rebellion in the Swat Valley, predominantly characterized in western media as actions of the

⁵³⁸ Gérard Prunier and Rachel M. Gisselquist, “The Sudan: A Successfully Failed States,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 107

⁵³⁹ Kapil Komireddik, “Take Pakistan’s Nuke, Please,” *Foreign Policy* (24 May 2011)

⁵⁴⁰ Rolf Mowatt-Larssen, *Nuclear Security in Pakistan: Reducing the Risks of Nuclear Terrorism*, Arms Control Today (July/August 2009)

⁵⁴¹ Liana Sun Wylar, “Weak and Failing States: Evolving Security Threats and U.S. Policy,” CRS Report for Congress (28 August 2008) at 8

⁵⁴² Robert Birsell, “Pakistan’s Taliban: who are they what can they do?,” *Reuters* (13 May 2011)

⁵⁴³ Speech by Pakistan Foreign Minister Hina Rabbani Khar at UN General Assembly (27 September 2011)

Taliban occurring in the post-President Pervez Musharraf era, has undermined the initial sense of optimism that briefly emerged following the election of Asif Ali Zardari in September 2008. Since coming to power, the Zardari presidency has been marked with increased instability both domestically and regionally.⁵⁴⁴ This has occurred in the context of the erosion of human rights, rampant corruption, tribal unrest, loss of control over many parts of its territory, and its land being used by terrorists to launch attacks against its civilians as well as neighbouring nations such as Afghanistan and India.⁵⁴⁵ Much of these fights take place in tribal areas and reflect the fact that most of their allegiances cross seemingly invisible international boundaries, particularly between Pakistan and Afghanistan.

It appears that Pakistan's greatest internal threats stem from the dangerously autonomous regions of the Swat Valley and Southern Waziristan, where terrorist groups exploit instability and porous borders. Pakistan's failure to effectively control its territory provides a safe haven for insurgency groups from both Afghanistan and Pakistan.⁵⁴⁶ According to Anita Demkiv:

There are a myriad of political and military calamities throughout the country that contribute to its near failed state status. Currently, Pakistan is one of the least stable countries possessing nuclear weapons; the economy is crippled; Kashmir remains contentious; the northwest region, known as the Federally Administered Tribal Areas (FATA) harbours exiled Taliban leaders and al Qaeda's leadership; and there is an ongoing radicalization throughout the country—not limited to the FATA. As seen in the December 2008 attacks on Mumbai, the security

⁵⁴⁴ Anita Demkiv, "Pakistan's FATA, Transnational Terrorism and the Global Development Mode," *Journal of Global Change and Governance*, Vol. II, No. 1 (Winter/Spring 2009) at 2

⁵⁴⁵ Hilary Synnott, "What is Happening in Pakistan?," *Survival: Global Politics and Strategy*, 1468-2699, Vol. 51, No. 1 (2009) at 65

⁵⁴⁶ Liana Sun Wyler, "Weak and Failing States: Evolving Security Threats and U.S. Policy," CRS Report for Congress (28 August 2008) at 4

of countries near and far could be gravely affected by Pakistan's inability to reign in terrorist elements.⁵⁴⁷

Despite numerous denials by Pakistani government officials that Osama bin Laden was in Pakistan, the Government of this country was profoundly embarrassed when on 2 May 2011 the terrorist leader was shot and killed inside a private residential compound in Abbottabad, Pakistan. Some officials have accused Pakistan's security establishment of protecting bin Laden.⁵⁴⁸ The actions seriously undermine the Pakistani government's claim that it is serious in its efforts to tackle the Taliban. Doubts also remain over the army's willingness to fight those Taliban members involved in cross-border attacks in Afghanistan.⁵⁴⁹ Pakistan ranks high in *Foreign Policy's* Failed States Index due to its security concerns and loss of territorial sovereignty.⁵⁵⁰

In September 2011, United States Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, blamed the Inter-Services Intelligence (ISI) of Pakistan for involvement in support of the insurgents that attacked the American Embassy in Kabul and for supporting the Quetta Shura and the Haqqani Network based in tribal areas of Pakistan. According to Mullen, these networks:

operate from Pakistan with impunity. Extremist organizations serving as proxies of the government of Pakistan are attacking Afghan troops and civilians as well as U.S. soldiers. For example, we believe the Haqqani Network—which has long enjoyed the support and protection of the Pakistani government and is, in many ways, a strategic arm of Pakistan's Inter-Services Intelligence Agency—is responsible for the September 13th attacks against the U.S. Embassy in Kabul. There is ample evidence confirming that the Haqqanis were behind the June 28th attack against

⁵⁴⁷ Anita Demkiv, "Pakistan's FATA, Transnational Terrorism and the Global Development Mode," *Journal of Global Change and Governance*, Vol. II, No. 1 (Winter/Spring 2009) at 2

⁵⁴⁸ Nahal Toose and Zarar Khan, "Bin Laden Was Living in Pakistani Compound Built in 2005," Associated Press (2 May 2011)

⁵⁴⁹ Afsir Karim, *Counter Terrorism: The Pakistan Factor*, New Delhi: South Asian Books (1992) at 34

⁵⁵⁰ The Fund for Peace, "The Failed States Index," *Foreign Policy* (2011)

the Inter-Continental Hotel in Kabul and the September 10th truck bomb attack that killed five Afghans and injured another 96 individuals, 77 of whom were U.S. soldiers.⁵⁵¹

Terrorism is both a regional and international threat, with terrorist networks operating in several failed states. In January 2009, al-Qaeda in the Arabian Peninsula (AQAP) was formed by a merger between two regional Islamist militants operating in Yemen and Saudi Arabia.⁵⁵² AQAP has taken advantage of the state failure in Yemen which was a result of the 2011 uprising against the government.⁵⁵³

As noted above, since 9/11, the discourse regarding state failure has focused on the security threats that it poses to the regional and international community, and it is against this backdrop that terrorism has garnered considerable interest. How state failure is evaluated and measured is also important to such discourse, as will be enunciated in the following section.

2.5 Limitations in Measuring State Failure

Assessing and measuring the causes of failed states will always be an imperfect practice. Although the concept of failed states is not new, it has suffered from several analytical shortcomings and lack of agreement among both policymakers and scholars over the particular characteristics that warrant such designation.⁵⁵⁴ There has also been criticism that it lacks clear criteria to define failure, a tendency to apply the term to very different countries, and a failure to

⁵⁵¹ Statement of Admiral Michael Mullen, U.S. Navy Chairman Joint Chiefs of Staff before the Senate Armed Services Committee on Afghanistan and Iraq (22 September 2011)

⁵⁵² "Al-Qaeda in the Arabian Peninsula," BBC online profile, updated 14 June 2011

⁵⁵³ Aaron Ng, "Al Qaeda in the Arabian Peninsula (AQAP) and the Yemen Uprisings," *CTTA: Terrorist Trends and Analysis*, Vol. 3, No. 6 (June 2011) at 1

⁵⁵⁴ Stewart Patrick, "'Failed' States and Global Security: Empirical Questions and Policy Dilemmas," *International Studies Review*, Vol. 9, No. 4 (2007) at 646

take into account the particular circumstances in such countries. As Charles Call pointedly observed in 2006, the indicators scholars have proposed for state failure often lean towards the idiosyncratic.⁵⁵⁵ Jonathan Di John argues that the central problem with ranking states according to a failure index is that it is open-ended, pigeon-holes states, and is constantly being challenged.⁵⁵⁶

However, it can be useful to index, measure and break state failure down into sub-categories. As state failure is not accidental, analysing the structural competency of a state offers an indication of whether that state is heading towards weakness or failure. Taken together with a judicious assessment of several structural competency issues, it can present qualitative warning signs. At present, there exists no quantitative research that can be used to identify the precise tipping points which transform a weak state into a failed state. While institutional and structural flaws contribute to failure, these problems are noted by several scholars as usually flowing from leadership errors.⁵⁵⁷

Several policymakers and scholars have attempted to index state failure. For example, Susan Rice, formerly of the Brookings Institution and appointed in 2009 as the United States ambassador to the United Nations, has indexed state weakness in the developing world. Rice measures 141 developing nations according to their relative performance in four critical spheres: economic, political, security and social welfare. She has found that, in general, “state weakness is strongly associated with poverty (which explains some 50% of

⁵⁵⁵ Ibid.

⁵⁵⁶ Jonathan Di John, *Failed States in Sub-Saharan Africa: A Review of the Literature*, Madrid: Real Instituto Elcano (14 January 2011)

⁵⁵⁷ Robert I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 22

variation in country scores) as well as government effectiveness, child mortality, and recent conflict”.⁵⁵⁸

Jean-Germain Gros differentiates five scenarios for failed states: chaotic, phantom, anaemic, captured and aborted,⁵⁵⁹ which, in addition to the loss of structural competency of the state, are the results of a variety of sources both internal and external. Early warning theorists on the topic of state failure prefer to monitor and focus attention on high-risk conditions for a predictable model. There are a variety of predictable models which Dipak Gupta prefers to classify as either data-based (time and effort intensive) or judgment based (captures a broader qualitative significance) procedures.⁵⁶⁰ Each model has its own usefulness and in many instances overlaps with the work of other scholars.

State failure can occur in many forms, and cumulative indicators do not always present information about the disparity of state competency across functions. As outlined in the failure to meet the structural competency of statehood, states descend towards failure when they lose legitimacy, are unable and unwilling to deliver positive political goods to their people and are beset by internal violence. In the contemporary global environment, where states represent the foundation of world order, stability and predictability are difficult to achieve due to the large number of states that are failing.⁵⁶¹

Other examples have been noted above and all have limitations in their measure of state failure. However, as illustrated in this study, one possible

⁵⁵⁸ Stewart Patrick, “‘Failed’ States and Global Security: Empirical Questions and Policy Dilemmas,” *International Studies Review*, Vol. 9, No. 4 (2007) at 649

⁵⁵⁹ Jean-Germain Gros, “Towards a taxonomy of failed states in the New World Order: decaying Somalia, Liberia, Rwanda and Haiti,” *Third World Quarterly*, Vol.17, No. 3 (1996) at 455-471

⁵⁶⁰ Dipak Gupta, “Early Warning About Forecasts: Oracle to Academics,” Toronto: Schmeidel & Alderman: Synergy in Early Warning Conference Proceedings (15-18 March 1997) at 375-396

⁵⁶¹ Robert I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 1-3

solution is to broaden the criteria to encompass as many indicators as possible, as suggested in the examples that were outlined in the measurement of the structural competency of a state. This would allow policy makers, both in national government and the international community, an opportunity to better understand the structural problems affecting such states. As well, it will afford them the opportunity to examine more thoroughly those states that are failing their populations.

Part II

International Human Rights Law and Security

Chapter 3: International Human Rights Law

Predating the founding of the United Nations and the *Universal Declaration of Human Rights* with its various human rights instruments, human rights were regarded by states to be within their exclusive sphere and not subject to international law. Notwithstanding this fact, there were already International Humanitarian Law conventions in place as well as several decisions by the Permanent Court of International Justice, including the 1927 judgement of the *Case of the S.S. Lotus (France v. Turkey)*⁵⁶² and the 1923 Advisory Opinion on the *Nationality Decrees Issued in Tunis and Morocco (French Zone)*⁵⁶³ regarding state jurisdiction being subject to international law. Since then, there has been an evolution in the codification of human rights law as a *jus cogens* norm which binds states.

Following the horrors of the Second World War, several treaties came into force designed to protect human rights. These treaties and other international human rights instruments have contributed significantly to the understanding and development of international human rights law and have imposed certain obligations on states.

Human rights law has increasingly been integrated into treaties and customary law both at the international and regional level. In spite of the great importance that is attributed to the development of human rights law, a functioning state is

⁵⁶² The Lotus was the result of the 2 August 1926 collision between S.S. Lotus, a French steamship and the S.S. Boz-Kourt, a Turkish steamer, in a region just north of Mytilene. As a result of the accident, eight Turkish nationals drowned. Lotus principle is considered a foundation of international law, noting that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition. This principle was later modified by article 11[1] of the 1958 High Seas Convention.

⁵⁶³ “The Court held that nationality is generally within the domain reserved to states, as far as international law is concerned. As to whether international law considers that a matter is within the domain reserved to state jurisdiction the Court held that this is fluid, and a function of international relations.” Quote from Robert Jennings and Arthur Watts (eds.), *Oppenheim’s International Law*. Vol. 1, Oxford: Oxford University Press (2008) at 852

still needed in order to defend these rights. What is required is state legislation and administrative infrastructure for its implementation and to provide it form.⁵⁶⁴ As noted in Chapter 2, state failure is a result of the collapse of several key structural competency indicators, and although failed states do not have to perpetrate human rights violations to be classified as failed states, most do and are unable to protect even the most basic of those rights.

Enforcement of international human rights law is challenged in failed states, with many regimes ignoring treaty laws and conventions. However, states have a duty to respect international law, and individuals can be held accountable, as shall be noted in the following subsection on human rights instruments.

3.1 Human Rights Instruments

Since the Second World War, the affirmation of the *Universal Declaration of Human Rights* (UDHR), although not a treaty, has become the principal and fundamental international instrument elaborating on the United Nations Charter. The Preamble of the *Declaration* proclaims the “...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.⁵⁶⁵

International human rights law places obligations which states are bound to respect. The United Nations *Universal Declaration of Human Rights*, for example, declares in the preamble that Member States of the United Nations:

have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms... a common understanding of these

⁵⁶⁴ Daniel Thürer, “An Internal Challenge: Partnerships in Fixing Failed States,” *Harvard International Review*, Vol. 29, No. 4 (Winter 2008)

⁵⁶⁵ Universal Declaration of Human Rights (10 December 1948) at Preamble

rights and freedoms is of the greatest importance for the full realization of this pledge⁵⁶⁶

As well, there are two multilateral treaties that further codify international human rights norms: the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁵⁶⁷ and the *International Covenant on Civil and Political Rights (ICCPR)*.⁵⁶⁸ These two Covenants commit Member Nations to respect individual civil and political rights. Article 1(1) of ICCPR notes that “[a]ll peoples have the right of self-determination”⁵⁶⁹ and Article 6 states that “[e]very human being has the inherent right to life. This right shall be protected by law”.⁵⁷⁰ As well, Article 7 asserts that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.⁵⁷¹ In addition, the United Nations Human Rights Council (UNHRC) has a *Universal Periodic Review* that assesses the human rights situations in all 193 United Nations Member States.

The adoption of these standard principles of state conduct and protection of human rights has been one of the great achievements of the twentieth century. Article 1(3) of the Charter commits Member States of the United Nations to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.⁵⁷²

In 1984, the General Assembly adopted the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,

⁵⁶⁶ United Nations Charter, signed in San Francisco (26 June 1945) at Preamble

⁵⁶⁷ The International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on 16 December 1966, and in force from 3 January 1976

⁵⁶⁸ International Covenant on Civil and Political Rights, adopted by the UN General Assembly on December 16, 1966, and came into force on 23 March 23 1976 and 167 states are parties as of August 9, 2011

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid. at Article 6

⁵⁷¹ Ibid. at Article 7

⁵⁷² United Nations Charter, Article 1.3

requiring states to take measures to prevent torture. It is asserted under Article 3(1) that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.⁵⁷³ The *Convention* strictly prohibits states from deporting or extraditing individuals where there are substantial grounds for believing they will be tortured.⁵⁷⁴ This is especially important given that people constantly flee areas of conflict in order to seek shelter in neighbouring states. The African Union has also adopted the *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Kampala Convention)⁵⁷⁵ with the objective to prevent causes of internal displacement and establish a “legal framework for solidarity, cooperation, promotion of durable solutions and mutual support between the States Parties in order to combat displacement and address its consequences”.⁵⁷⁶

The preamble to the *Convention* also states that African Union Member States are “CONSCIOUS of the gravity of the situation of internally displaced persons as a source of continuing instability and tension for African states”.⁵⁷⁷ The significance of the *Convention*, given the lack of security and instability in many African states, was certainly evident in Uganda during its several-decades-long conflict which forced “2 million people to flee their homes ... resulted in more than 100,000 deaths, and [in which] 25,000 children have been abducted and forced into military service”.⁵⁷⁸ Even after the signing of the *Cessation of Hostilities Agreement between the Government of Uganda and*

⁵⁷³ *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the United Nations General Assembly on 10 December 1984 and came into force on 26 June 1987 at Article 3. June 26 is now recognised as the International Day in Support of Torture Victims and as of September 2010, the Convention had 147 parties.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* was adopted by a Special Summit of the African Union, held in Kampala, Uganda on 22 October 2009.

⁵⁷⁶ *Ibid.* at Article 2c

⁵⁷⁷ *Ibid.* at Preamble

⁵⁷⁸ “Annan welcomes cessation of hostilities agreement between Uganda and rebels,” UN News, New York (29 August 2006)

the Lord's Resistance Army on 29 August 2006, most of the 2 million internally displaced persons have returned to the areas they had fled; however, years later, nearly 200,000 people remain in camps or transit sites.⁵⁷⁹

Other regional treaties, such as the *Inter-American Convention on The Forces Disappearance of Persons*⁵⁸⁰ of the Organisation of American States, are intended to combat the forced disappearance of people within the state. This was an important treaty, particularly given the various recorded accounts of forced disappearance during the reign of several dictatorships in Latin America. Another internal legal instrument in combating forced disappearance was the adoption of Resolution 47/133⁵⁸¹ by the United Nations General Assembly in 1992.

In the Responsibility to Protect report, the International Commission on Intervention and State Sovereignty notes that:

Together the Universal Declaration and the two Covenants mapped out the international human rights agenda, established the benchmark for state conduct, inspired provisions in many national laws and international conventions, and led to the creation of long-term national infrastructures for the protection and promotion of human rights. They are important milestones in the transition from a culture of violence to a more enlightened culture of peace.⁵⁸²

Another significant milestone took place in Vienna on 25 June 1993 when representatives of 171 States renewed their efforts to strengthen and implement the body of existing international human rights instruments by adopting the

⁵⁷⁹ "Uganda: Difficulties continue for returnees and remaining IDPs as development phase begins," *Country Profile Report*, Geneva: Internal Displacement Monitoring Centre (December 2010)

⁵⁸⁰ *Inter-American Convention on The Forces Disappearance of Persons*, adopted by the Organization of American States on 9 June 1994

⁵⁸¹ *Declaration on the Protection of all persons from Enforced Disappearance*, General Assembly, Resolution 47/133 (18 December 1992)

⁵⁸² *The Responsibility to Protect* at 2.17

Vienna Declaration and Programme of Action of the World Conference on Human Rights. The *Vienna Declaration* states that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁵⁸³

The *Vienna Declaration* reflects the importance of human rights as a universal standard and also the connection to democracy in that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing”.⁵⁸⁴

Treaties, according to the 1969 *Vienna Convention on the Law of Treaties*, are to be interpreted in good faith, *pacta sunt servanda*. According to Article 31(1), “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁵⁸⁵ However, as indicated above, the protection of human rights as stipulated in international law is linked to a suitable implementation by the State. The protection of human rights, since the introduction of the *Universal Declaration of Human Rights* and the two Covenants that were designed to protect individuals against state power, has always required legislative implementation which in a failed state is not always possible.

⁵⁸³ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 at para 5

⁵⁸⁴ Ibid. at para 8

⁵⁸⁵ Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969 and entered into force on 27 January 1980

The *United Nations Universal Declaration of Human Rights* initiated the state's objective in the process of civil and political rights as well as social, economic and cultural rights. It has been suggested that the United Nations “canonized a paradoxical view of change in the contemporary world... States were to be the building blocks of the United Nations, while the United Nations, in turn, would attempt to safeguard them from aggression”.⁵⁸⁶

3.1.2 Regional Treaties

As noted above, states have a duty to protect their citizens from human rights violations; elaborating this duty is a rich body of legal obligations that are binding on states. In addition to international treaties, there exist other human rights instruments in various regions to which states are signatories. In the Americas, the *American Declaration of the Rights and Duties of Man* (1948) predates the *Universal Declaration of Human Rights*.⁵⁸⁷ As well, in 1969, the Organization of American States adopted the *American Convention on Human Rights*.⁵⁸⁸ In addition to the *Convention* are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which are responsible for overseeing compliance. The preamble of the *American Convention on Human Rights* affirms the obligations of states signatory to the *Convention*:

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

⁵⁸⁶ Joel Migdal, *Strong States and Weak Societies State-Society Relations in the Third World*, Princeton: Princeton University Press (1988) at 13

⁵⁸⁷ The Declaration was adopted in Bogotá in April 1948 and at the same meeting adopted the Charter of the Organization of American States.

⁵⁸⁸ *American Convention on Human Rights* was adopted in San José, Costa Rica, on 22 November 1969 and came into force on 18 July 1978

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.⁵⁸⁹

States have an obligation to uphold the rights set forth in the *Convention*.

The most recent regional human rights system is that set out in the *African Charter on Human and People's Rights*⁵⁹⁰ with its emphasis on collective rights. The African Charter also established the African Court of Justice and Human Rights. However, the system has been slow and thus far ineffective.

The *European Convention on Human Rights* (ECHR) is by far the most active international treaty protecting human rights in Europe. The *Convention* also established the European Court of Human Rights; any individual can have their case handled by the Court whose decisions are binding on the States. Asia is one continent that has yet to have a regional human rights mechanism, although the adoption of the *Charter of the Association of Southeast Asian Nations* (ASEAN)⁵⁹¹ in 2007 and also the establishment of an Intergovernmental Commission on Human Rights on 23 October 2009 is a positive development in that direction.

3.1.3 Humanitarian Law

When states fail, human rights laws offer only marginal protection as most of the armed conflicts taking place around the world are internal armed conflicts. Humanitarian law has, however, established rules to address the cruelties of

⁵⁸⁹ Ibid. at Preamble

⁵⁹⁰ African Charter on Human and People's Rights, Adopted 27 June 1981, entered into force 21 October 1986

⁵⁹¹ The ASEAN Charter entered into force on 15 December 2008 at a gathering of the 10 ASEAN Foreign Ministers in Jakarta

war and civil conflicts and “aims to maintain a minimum of protection when war sets aside most other laws”.⁵⁹² Humanitarian law calls for accountability of non-state actors, whether individuals or groups; however, as noted by Daniel Thurer, this can be impeded when a state fails, as it:

relies heavily on the hierarchical structures of the state and above all, on the military order with its chain of command. These do not usually exist in the case of anarchic conflicts involving loosely organized clans or other units. Where every combatant is his own commander, the traditional mechanisms for the implementation of international humanitarian law are wholly ineffective.⁵⁹³

This impediment creates a host of humanitarian problems which become a burden that must be addressed by the international community.

Since the Nuremberg Tribunal, which contributed greatly to the changes in international human rights law, there has been an examination of international humanitarian law as it is increasingly coming to be concerned with the internal armed conflicts of failed states. As many of the world’s conflicts take place within states, it is important to note how individuals are protected within failed states.

Article 3, common to the four *Geneva Conventions* of August 1949 stipulates, as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all

⁵⁹² Daniel Thürer, “An internal challenge: partnerships in fixing failed states,” *Harvard International Review*, Vol. 29, No.4 (Winter 2008)

⁵⁹³ *Ibid.*

circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.⁵⁹⁴

Article 3 provides a minimal humanitarian standard to be observed by all parties in armed conflicts. This provision was elaborated by *Protocol II*, in addition to the *Geneva Conventions* in 1977, which relates to the protection of victims of non-international armed conflicts.

In the 1986 *Nicaragua v United States of America*, the International Court of Justice called the precepts contained in Article 3 of the *Geneva Conventions* a “mini-convention”,⁵⁹⁵ applicable in all situations of armed conflict and likewise qualified as principles of international humanitarian law. As a result, common Article 3 “serves as a ‘minimum yardstick’ of protection in all

⁵⁹⁴ This rule was extended in 1977 by Protocol II additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. Its scope is defined in Article 1, para. 1, as follows:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which ... take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

⁵⁹⁵ Tony Pfanner, “Scope of Application, Perpetrators of Terror, and International Humanitarian Law “ in Pablo Antonio Fernandez Sanchez (ed.) *International Legal Dimension of Terrorism*, Leiden: Martinus Nijhoff Publishers (2009) at 285

conflicts, not just internal armed conflicts”.⁵⁹⁶ Consequently, the principles of Article 3 may “also be applied in the case of failing and failed States and that the behaviour of parties to internal armed conflicts are to be measured against this ‘minimum yardstick’”.⁵⁹⁷

The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its 1998 judgment of *Prosecutor v. Anto Furundija*, stated that:

[T]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law⁵⁹⁸

Clearly, in order to protect human rights, law is a tool of significant importance.

3.2 Human Security – The concept

Since the ratification of the United Nations Charter, it has been clear that the importance of human security has become much broader. The International Commission on Intervention and State Sovereignty has defined human security to mean:

the security of people - their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms. The growing recognition worldwide that concepts of security must include people as

⁵⁹⁶ International Court of Justice, *Nicaragua v. United States* (1986), Merits, para. 218

⁵⁹⁷ Daniel Thürer, *The ‘Failed State’ and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999).

⁵⁹⁸ *Prosecutor v. Anto Furundija*, IT-95-17/1-T, Judgment (10 December 1998) at para. 183

well as states has marked an important shift in international thinking during the past decade.⁵⁹⁹

In the post-Cold War era, the emerging model for states has been one that focuses on human security as the reference for regional and international stability and prevention of state failure. The concept is intertwined with human rights, development and security and came into prominence when the United Nations Development Programme first brought global attention to the concept in its 1994 *Human Development Report*. According to Sabina Alkire, Director of the Oxford Poverty and Human Development Initiative, human security's theoretical origins responded to:

long-term threats of violence. Hence human security explicitly includes responses to violence and often studies how poverty causes violence and how violence contributes to poverty. It explores tradeoffs between investments in military capabilities and investments in people's survival, livelihood and dignity.⁶⁰⁰

The report's broad definition of human security encompasses several areas of development.

Notwithstanding the extensive definition of the concept, it has gained special attention since the Sept. 11, 2001 attacks on the United States. The argument made by some scholars is that there has been excessive focus on the state, often at the expense of human rights. The concern by some scholars is that "state-centric analysis to security gives emphasis to the need for a stable regime and may lead to propping up repressive regimes".⁶⁰¹

⁵⁹⁹ *The Responsibility to Protect* at 2.21

⁶⁰⁰ Sabina Alkire, *Human Development: Definitions, Critiques, and Related Concepts*, United Nations Development Program Report (June 2010) at 61

⁶⁰¹ Lars Engberg-Pedersen et al, *Fragile States on the International Agenda*, Copenhagen: Danish Institute of International Studies (2008) at 17

International instruments of human rights law are designed to make each state responsible for the protection of its own population. Chapter 4 will explore further some of the contemporary debates of what happens when states violate these obligations and what the duties of the international community are in protecting the populations of failed states.

Chapter 4: State Responsibility - General Principles of Peremptory Norms

State responsibility is a fundamental principle of international law, whereby a state, as defined in Boleslaw A. Boczek's book, *International Law: A Dictionary*:

either by an act or omission, has breached an international obligation in force and incurs, in the absence of circumstances precluding wrongfulness of its conduct, certain legal consequences for the internationally wrongful act of attributable to it, including the obligation to cease the wrongful conduct and make such full reparation of any material and moral damage to the injured state or states as is reasonably adequate depending on the merits of the case in question.⁶⁰²

In the context of failed states, the question that needs to be raised concerns transgressions committed by the state and its agents and the breaches of international law.

The International Law Commission (ILC) drafted articles in the *Responsibility of States in Internationally Wrongful Acts*, which was submitted to the General Assembly in 2001, noting that under Article 1 of the International Law Commission draft, "[e]very internationally wrongful act of a State entails the international responsibility of that State".⁶⁰³ Under attribution of the conduct of a State, in Article 4(1) and 4(2), any state organ:

shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

⁶⁰² Boleslaw A. Boczek, *International Law A Dictionary*, Lanham: The Scarecrow Press (2005) at 121

⁶⁰³ *Responsibility of States for Internationally Wrongful Acts 2001*, International Law Commission. Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.

An organ includes any person or entity which has that status in accordance with the internal law of the State.⁶⁰⁴

States are liable for violations of international law and are responsible for restitution, as outlined in International Law Commission Draft Article 35:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.⁶⁰⁵

Under Article 2, the International Law Commission defines an internationally wrongful act of a state as existing when:

conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.⁶⁰⁶

The international community thus recognizes that states have an obligation to safeguard fundamental peremptory norms of human rights and humanitarian law.

4.1.1 Obligations to Prosecute – Principle of aut dedere aut judicare

Individuals who commit crimes of genocide, crimes against humanity, war crimes, and crimes of aggression are held criminally liable under universal jurisdiction for breaches of international law. In the case of state failure, several criteria and precedents have been established by the war crimes

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid.

tribunals at Nuremberg and strengthened through the establishment of ad hoc tribunals, such as the Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. For failed states, one of the most significant aspects of international criminal law is the deterrent effect on imposing criminality.⁶⁰⁷

Individual criminal responsibility must be distinguished from state responsibility. Individuals who commit gross and systematic human rights violations, whether acting on behalf of the state or as a private individual, must be prosecuted and punished by a domestic or international criminal tribunal functioning in the interest of the international community.⁶⁰⁸

The expression '*aut dedere aut judicare*' (extradite or prosecute) is used to designate the obligation of states to prosecute those guilty of violations set out in a number of treaties aimed at international co-operation in the suppression of certain kinds of criminal behaviour. The term is the modern adaptation of the phrase, coined by Grotius, '*aut dedere aut punire*' (either extradite or punish).⁶⁰⁹

There are a number of treaties and conventions that explicitly prohibit offences such as aggression, genocide and serious breaches of intentional humanitarian law, which constitute the rules of *jus cogens*.⁶¹⁰ Some legal scholars have asserted that the principle of *aut dedere aut judicare* also represents a *jus cogens* norm.⁶¹¹

⁶⁰⁷ Daniel Thürer, *The 'Failed State' and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

⁶⁰⁸ Boleslaw A. Boczek, *International Law A Dictionary*, Lanham: The Scarecrow Press (2005) at 122

⁶⁰⁹ M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Leiden: Martinus Nijhoff Publication(1995) at 3-4

⁶¹⁰ *Ibid.* at 52

⁶¹¹ *Ibid.*

This principle has been defined in the 1996 *Draft Code of Crimes against Peace and Security of Mankind* as:

The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted wither by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition...⁶¹²

Under International Law Commission Draft Article 8, an act carried out by an individual or group whose conduct is directed or controlled by a state shall:

be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.⁶¹³

Some positive developments to date include the 1997 arrest in Nairobi of Jean Kambanda and his transfer to the International Criminal Tribunal for Rwanda (ICTR). In May of 1998, Kambanda became the first head of government to plead guilty to genocide in an international tribunal. Kambanda pleaded guilty to all counts of indictment brought against him relating to crimes committed during his time as Prime Minister of the Interim Government of the Republic of Rwanda; these included “crimes of genocide, conspiracy to commit genocide, direct ad public incitement to commit genocide, complicity in genocide, and crimes against humanity”.⁶¹⁴

⁶¹² See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), chap. II, 1996 Draft Code of Crimes, commentary on Article 9, para. 3.

⁶¹³ *Responsibility of States for Internationally Wrongful Acts 2001*, International Law Commission. Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session.

⁶¹⁴ Report of the International Criminal Tribunal for the Prosecution of Person for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, General Assembly 54th Session (7 September 1999) at 6

Another Rwandan politician, Jean Paul Akayesu, was also handed over to the ICTR where he was found guilty of nine of the 15 counts proffered against him, including “genocide, direct and public incitement to commit genocide and crimes against humanity (extermination, murder, torture, rape and other inhumane acts)”.⁶¹⁵ The verdict issued on 2 September 1998 was also important in that it led The Trial Chamber of the International Criminal Tribunal for Rwanda to assert that rape and sexual assault:

constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group... sexual assault formed an integral part of the process of destroying the Tutsi ethnic group and that the rape was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide.⁶¹⁶

The Trial Chamber defined rape as “a physical invasion of a sexual nature committed on a person under circumstances which are coercive”.⁶¹⁷ Witness statements constituted the main evidence that was gathered by the Prosecutor in relation to these sexual crimes.

4.1.2 Principle of Universal Jurisdiction

The principle of universal jurisdiction is a principle whereby states assert jurisdiction over persons who have been alleged to commit crimes outside the boundaries of the prosecuting state; this has been a trend with the emergence of many failed states. As the Secretary-General noted:

Universal jurisdiction involved a criterion for the attribution of jurisdiction, whereas the obligation to extradite or prosecute was an obligation that was discharged once the accused was extradited or once

⁶¹⁵ Ibid. at 6

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

the state decided to prosecute an accused based on any of the existing bases of jurisdiction.⁶¹⁸

According to Roger O’Keefe, universal jurisdiction can be defined as:

prescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.⁶¹⁹

As noted above, according to international law, individuals and even heads of state are responsible for perpetrating serious violations of human rights.

4.2 Humanitarian Intervention

As noted previously, the *Vienna Declaration*, proclaiming the universal, indivisible, interdependent and interrelated character of human rights, was unanimously adopted by all United Nations Member States that were present, along with the recognition that the gap between rhetoric and reality needs to be bridged. This challenge is complicated by the daily litany of violations of human rights by several states. The predicament has led policymakers and legal scholars to advocate for humanitarian intervention in order to prevent gross and systematic violations of human rights. The use of force in international law in order to stop a humanitarian catastrophe is multifaceted in its characterization and implementation and is highly controversial when carried out without Security Council Chapter VII approval.

Humanitarian intervention has no common legal definition; however, most scholars would argue that some of the essential characteristics include: (a) the

⁶¹⁸ Secretary-General of the United Nations, *The scope and application of the principle of universal jurisdiction – Report of the Secretary-General prepared on the basis of comments and observations of Governments*, UNGAOR, 65th Session, UN Doc A/65/181 (29 July 2010) at para 19

⁶¹⁹ Roger O’Keefe, “Universal Jurisdiction, Clarifying the Basic Concept,” *Journal of International Criminal Law*, Vol. 2, No. 3(2004) at 745

use of military force, (b) the absence of target state's permission, (c) the aim to help non-nationals and (d) acting either with or without United Nations authorization.⁶²⁰ The classical definition is shared by a number of scholars, including Jeff Holzgrefe who defines it as the:

threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.⁶⁷³

His criticism of humanitarian intervention is shared by many other legal scholars. In a legal sense, according to Wil D. Verwey, humanitarian intervention refers:

only to coercive action taken by states, at their initiative, and involving the use of armed force, for the purpose of preventing or putting a halt to serious and wide-scale violations of fundamental human rights, in particular the right to life, inside the territory of another state⁶²¹

However, others note that performing the duty of humanitarian intervention is just, especially when, as according to Michael Walzer, it is in response to acts "that shock the moral conscience of mankind".⁶²² However, it is worth noting that the international community acts not only when there is domestic pressure but also, more often than not, when there are strategic national and international interests involved, hence the reason why they engage in efforts in some countries and abandon others.

⁶²⁰ Şaban Karda, "Humanitarian Intervention: The Evolution of the Idea and Practice," *Journal of International Affairs*, Vol. VI (2) (June-July 2001)

⁶⁷³ J.L. Holzgrefe, "The humanitarian intervention debate," in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 18

⁶²¹ Wil D. Verwey, "Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective," in Jan Nederveen Pieterse (ed.), *World Orders in the Making*, London: Macmillan Press Ltd. (1998) at 180

⁶²² Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd Ed., New York: Basic Books (2000) at 107

Humanitarian intervention has generated much discussion as a consequence of both the post-Cold War era debate surrounding human rights at the international level and the growing understanding of the relationship between international security and violations of human rights. The international legal scholar Fernando Teson puts forward the liberal argument of humanitarian intervention as the:

proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect.⁶²³

The doctrine of double effect has its origins in the works of Saint Thomas Aquinas regarding ethical and moral criteria for evaluating the permissibility of certain acts:

the nature of the act is itself good, or at least morally neutral; the agent intends the good effect and not the bad either as a means to the good or as an end itself; the good effect outweighs the bad effect in circumstances sufficiently grave to justify causing the bad effect and the agent exercises due diligence to minimize the harm.⁶²⁴

For Teson, human rights must prevail, and the international legal system should be changed to implement values of human rights; however, “[i]f states override conventional international law but effectively protect human rights, more power to them”.⁶²⁵

⁶²³ Fernando R. Teson, “The liberal case for humanitarian intervention,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 94

⁶²⁴ T. A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil*, Oxford: Oxford University Press (2006) at 36

⁶²⁵ Robert O. Keohane, “Introduction,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 5

Daniel Joyner and other legal scholars reject this argument, noting that if a law “can be circumvented at will then it is not law but rather a mere collection of recommendations”.⁶²⁶ Joyner forcefully argues against humanitarian intervention even in cases where customary international legal rules of humanitarian intervention are clearly established, as he claims nothing justifies the abrogation of the obligations of United Nations Charter Members and threats of actions against the territorial integrity or political independence of any state.⁶²⁷ He argues that intervention by Member States of the United Nations without the approval of the Security Council “is and should be a violation of international law”.⁶²⁸ Furthermore, according to Joyner, the Security Council is not in fact paralyzed, as some would argue, but is fulfilling its role as discretionary, governing a body of nations. He further notes that “[i]t should not be bypassed simply because its procedures lead to result in some cases unpalatable to a portion of its members”.⁶²⁹

Joyner rejects the notion that failure by the international community to act in order to stop evil acts makes the international community complicit in these acts, for the international community is:

far from being complicit in violence and terror, seeking to assure that those maladies do not afflict the international community on a far greater level and scope and that a system of law is in place to keep this greater catastrophe from being realized as it has in the past.⁶³⁰

He concludes that the United Nations system:

represents the legal and most prudential system for the governance of the entire area of internal use-of-force law, and that its obligations and

⁶²⁶ Daniel Joyner, “The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm,” *European Journal of International Law*, Vol. 13. No. 3 (2002) at 609

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid.* at 598

⁶²⁹ *Ibid.* at 608

⁶³⁰ *Ibid.* at 617

strictures in this area should not be blithely circumvented in the hope of furthering the cause of humanitarian intervention in the short term.⁶³¹

The General Assembly has also issued a declaration that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, or cultural elements, are in violation of international law.⁶³²

Michael Byers and Simon Chesterman recast the debate on humanitarian intervention by referencing the United Nations Charter, which prevails over all other treaties, particularly Article 2(4) of the Charter, which explicitly states that force across borders is not permitted. For Byers and Chesterman, the central argument is that international law cannot be changed by states who want to act to prevent human rights in part because of their own national interests:

These ends are not served by distorting the international legal regime to validate retrospectively actions by one state or group of states, particularly when the cost of doing so may include the integrity of the legal order itself...the greatest threat to an international rule of law lies not in the occasional breach of that law – laws are frequently broken in all legal systems, sometimes for the best of reasons – but in attempts to mould that law to accommodate the shifting practices of the powerful.⁶³³

However, it is worth noting that Article 1 of the United Nations Charter emphasizes promoting respect for human rights and justice as one of the

⁶³¹ Ibid. at 618

⁶³² Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625, XXV (24 October 1970)

⁶³³ Robert O. Keohane, "Introduction," in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 5-

fundamental missions of the organization. As well, Article 1(3) calls attention to the importance of respect for human rights and justice:

[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion⁶³⁴

Byers and Chesterman, pointing to Article 2(4), claim that all Member States of the United Nations who “refrain from the threat or use of force” fail to take note of the importance of Article 1(3), “promoting and encouraging respect for human rights”, which needs to be balanced with the ensuing article.

4.2.1 Responsibility to Protect Doctrine

The central question from which has arisen much debate is what the response of the world community should be when human rights are consistently violated and where sovereign states are unwilling or unable to prevent mass murder.

Does the international community have a responsibility to act? In failed states where administrative institutions have collapsed, provisions for human rights are largely ineffective, with the state offering no more than peripheral protection.⁶³⁵

As a direct result of the North Atlantic Treaty Organization intervention in Kosovo and the various opinions on the legality of NATO’s actions and the

⁶³⁴ Charter of the United Nations, signed on 26 June 1945 in San Francisco

⁶³⁵ Daniel Thürer, *The ‘Failed State’ and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

failure of the Security Council to act, Canadian Minister of Foreign Affairs Lloyd Axworthy played a leading role in the establishing the International Commission on Intervention and State Sovereignty (ICISS)⁶³⁶ in December of 2001 in order to clarify some of these issues. The report was entitled Responsibility to Protect and the concept was endorsed by world leaders at the United Nations in the fall of 2005. The report set out four core principles for military intervention to adhere to when states fail to protect their own people,⁶³⁷ leading some scholars to argue that the norm of the Responsibility to Protect has weakened the Westphalian system of absolute state sovereignty and, given that it was endorsed by the United Nations General Assembly, has come to represent a new doctrine of international law. It should, however, be noted that the specific recommendations of the report were never endorsed.

The International Commission on Intervention and State Sovereignty was chaired by Gareth Evans and Mohamed Sahnoun and examined the central question, a serious dilemma, posed by the Secretary-General Kofi Annan:

[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that affect every precept of our common humanity?⁶³⁸

Annan's appeal to the international community was to try and find, once and for all, a "new consensus on how to approach these issues, to 'forge unity' around the basic questions of principle and process involved".⁶³⁹ The Commission consulted broadly for opinions around the world and reported back to Annan. The title of the report, 'Responsibility to Protect', reflects the

⁶³⁶ *The Responsibility To Protect*, International Commission on Intervention and State Sovereignty (December 2001)

⁶³⁷ Many of the ideas in the *Responsibility to Protect* were advanced in the 5th century by Saint Augustine - *Bellum iustum*

⁶³⁸ *The Responsibility To Protect* at VII

⁶³⁹ *Ibid.*

notion that sovereign states have an obligation to offer protection to their citizens:

from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.⁶⁴⁰

The report was commissioned in the aftermath of events in Somalia, Bosnia, Kosovo and Rwanda. NATO's intervention in Kosovo in 1999 brought the debate to the centre of attention of a divided Security Council. As well, during the genocide in Rwanda wherein three short months as many as 800,000 Tutsis were shot, burned, starved, tortured, stabbed, or hacked to death, the international community, especially the Security Council, did little if anything to stop the atrocities.⁶⁴¹

The International Commission on Intervention and State Sovereignty, in its Responsibility to Protect report, advanced the notion of “sovereignty as responsibility”. This notion was first introduced by Francis Deng, at the Brookings Institution in 1996 and challenged the established principle of absolute state sovereignty which recognized the sovereignty of a state regardless of whether that state committed serious human rights abuses against its own citizens.⁶⁴² The Commission’s report also notes that:

responsibility to protect resides first and foremost with the state whose people are directly affected. This fact reflects not only international law and the modern state system, also the practical realities of who is best placed to make a positive difference. The domestic authority is best placed to take action to prevent problems from turning into potential

⁶⁴⁰ Ibid. at VIII

⁶⁴¹ J.L. Holzgrefe, “The humanitarian intervention debate,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 17

⁶⁴² *W2I Mobilizing the Will to Intervene*, Montreal Institute for Genocide and Human Rights Studies, Concordia University (2010) at 3. Deng was appointed in 2012 as UN Special Adviser for the Prevention of Genocide.

conflicts. When problems arise the domestic authority is also best placed to understand them and to deal with them. When solutions are needed, it is the citizens of a particular state who have the greatest interest and the largest stake in the success of those solutions, in ensuring that the domestic authorities are fully accountable for their actions or inactions in addressing these problems, and in helping to ensure that past problems are not allowed to recur.⁶⁴³

The Commission further added to the debate over what should be done if a state fails and is unable or unwilling to stop gross and systematic violations of human rights by noting that:

...if states do not live up to their responsibilities, it is the task of the more responsible members of the international community to intervene – for the sake not only of the beleaguered citizens, but also of wider international peace and security.⁶⁴⁴

Both Fernando Teson and Allen Buchanan are strong supporters of what is referred to by some as the Responsibility to Protect doctrine. Teson and Buchanan advocate a paradigm shift in the notion of state sovereignty and the role of the United Nations as “[t]he perception is growing that the requirement of Security Council authorization is an obstacle to the protection of basic human rights in international conflicts”.⁶⁴⁵

Other scholars observe that the drafters of the United Nations Charter did so in a post-Second World War context, likely envisioning situations where action would be required as a result of conflict between countries and not within states themselves. Ove Bring of Stockholm University argues in favour of a doctrine of humanitarian intervention formulated and built upon emerging international norms that give precedence to the protection of human rights over

⁶⁴³ *The Responsibility To Protect* at 2.30

⁶⁴⁴ Lars Engberg-Pedersen et al, *Fragile States on the International Agenda*, Copenhagen: Danish Institute of International Studies (2008) at 7

⁶⁴⁵ Allen Buchanan, “Reforming the international law of humanitarian intervention,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 131

sovereignty in certain circumstances⁶⁴⁶ For example, Bring and others argue that NATO's action in Kosovo has come to be accepted as reflective of the will of the international community. Given that there were serious human rights violations perpetrated against the citizens of Kosovo, international intervention was required. Bring further argues that regional organizations intervening in order to protect human rights in failed states should be included as part of international law.⁶⁴⁷

The intervention in Kosovo has been justified on the basis of the emerging doctrine of the Responsibility to Protect. As noted above, in many ways the International Commission on Intervention and State Sovereignty report was a response to both the international community's humanitarian intervention in Kosovo without Security Council approval and the United Nations lack of action in places like Rwanda; however, the report, while addressing the issue of humanitarian intervention, has left many other issues unresolved. It is legal fact that the United Nations Charter prohibits nations from attacking other states, as it violates Article 2(4). However, it should also be noted that Article 51 states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations". Also, the Security Council may authorize the use of force under Chapter VII in order to maintain or restore international peace and security.

The United Nations realized the gravity of the situation in Kosovo when the Security Council established The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more

⁶⁴⁶ Ove Bring, "Should NATO take the lead in formulating a doctrine on humanitarian intervention?," *NATO Review*, No.3 (Autumn 1999) at 24

⁶⁴⁷ *Ibid.* at 26

commonly referred to as the International Criminal Tribunal for the former Yugoslavia (ICTY), to prosecute war crimes in the former Yugoslavia.

With respect to Kosovo, the Russian veto meant that no United Nations Security Council Resolution could succeed in authorizing the use of force to prevent ethnic cleansing. The Canadian Ambassador to the United Nations, Paul Heinbecker, pointed out that this intervention did in fact accurately represent the will of the international community. As well, international legal scholars such as Thomas Franck pointed out to the Canadian House of Commons Standing Committee on Foreign Affairs and International Trade in February of 2003 that a failed Russian attempt to condemn NATO's action amounted to a retrospective legal ratification for the intervention. According to Professor Franck:

...Russia took the ill-advised step of calling for a vote on the illegality of NATO recourse to force in the humanitarian intervention in Kosovo, and it lost that vote by, I think, 12 votes to 3, and ever since it's been firmly asserted by international lawyers, including myself, that that negative vote on the censure motion was the closest thing you needed to have to ratifying the recourse to force, even in the absence of an affirmative Security Council resolution.⁶⁴⁸

Those states that supported the North Atlantic Treaty Organization's action maintain that a resolution tabled by Russia condemning the air campaign in Kosovo was defeated by the Security Council and, therefore, indirect support for the intervention was in fact given. Professor Thomas Franck argues that this development was the closest thing to ratification in the absence of an actual successful Security Council resolution for intervention.⁶⁴⁹ Nicholas Wheeler also maintains that although the failure of the Russian veto did not constitute a retroactive authorization, it did add credence to the belief that there was a

⁶⁴⁸ Canadian House of Commons Standing Committee on Foreign Affairs and International Trade, *Minutes of Proceedings and Evidence*, Meeting No. 22 (27 February 2003)

⁶⁴⁹ *Ibid.*

moral consensus among liberal states and some others about the right to intervention in extreme humanitarian emergencies.⁶⁵⁰

However, as noted above, many legal scholars, including Professor Michael Reisman of Yale Law School have made the argument that states cannot be expected to remain idle while a great number of people die; the Charter was not a suicide pact.⁶⁵¹ It is worth noting that in the case of Libya, the Security Council did act promptly and, in addition, members of the Security Council used the language of the doctrine of the Responsibility to Protect although they did not refer to it in their final resolution. On 17 March 2011, the United Nations Security Council, acting under the authority of Chapter VII, adopted the milestone Resolution 1973, calling for Member States to take “all necessary measures...to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi”.⁶⁵² The Resolution is a significant step forward in support of the legality of the use of force in humanitarian intervention.

Protecting human rights and respecting the emerging norms of humanitarian intervention requires concrete definitions, thus some legal scholars have looked to the criteria set out in the doctrine of the Responsibility to Protect for humanitarian intervention to provide answers to unresolved questions. For example, the Responsibility to Protect declares that there is no “better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes”.⁶⁵³ However, if the Security Council fails to act, the doctrine advances the notion that alternative

⁶⁵⁰ Nicholas Wheeler, “The Legality of NATO intervention in Kosovo,” in Ken Booth (ed.) *The Kosovo Tragedy: The Human Rights Dimensions*, Portland: Frank Cass (2001) at 156

⁶⁵¹ Michael Reisman, “The Constitutional Crisis in the United Nations,” *American Journal of International Law*, Vol. 87, No.1 (1993) at 89. Reisman borrows the term from American Jurist Oliver Wendell Holmes’ argument about the United States Constitution.

⁶⁵² Security Council Resolution 1973 (17 March 2011)

⁶⁵³ *The Responsibility To Protect* at 3(A)

options must be considered, including the referring of a matter to the General Assembly in an “Emergency Special Session under the ‘Uniting for Peace’ procedure”⁶⁵⁴ and even the appeal to regional bodies to take action.

It has been argued that ‘Uniting for Peace’ Resolution 377 of the General Assembly⁶⁵⁵ is now part of customary international law. However, the veto power of the Security Council has never yet been rendered irrelevant and these measures by the General Assembly have been, to an extent, more symbolic than authoritative.⁶⁵⁶ This is notwithstanding the fact that the five permanent Members of the Security Council have disproportionate influence in decision making and influencing peremptory norms of customary international law.

Michael Ignatieff, who was one of the authors of the Responsibility to Protect report, sees interventions as often hindered by the desire of interveners to remain neutral between competing factions. He argues that the situation in Bosnia demonstrated the disastrous results of seeking to remain neutral between oppressor and victim. To Ignatieff, neutral intervention can also aid the aggressor, as we have seen in Afghanistan, and strengthen the various warlords, enabling them to fight for longer periods. Hence, Ignatieff argues for more vigorous and sustained intervention, as “the idea of a responsibility to protect also implies a responsibility to prevent and a responsibility to follow through”.⁶⁵⁷

Failed states inevitably pose a lethal threat to regional stability and international security. As the contemporary history of both Somalia and

⁶⁵⁴ Ibid. at 3(E.I)

⁶⁵⁵ A/RES/377 General Assembly (3 November 1950)

⁶⁵⁶ Brendan I. Koerner, “Can You Bypass a U.N. Security Council Veto?,” New York: *Slate* (12 March 2003)

⁶⁵⁷ Michael Ignatieff, “State failure and nation-building,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 320

Afghanistan demonstrates, failed states generate grave international security and humanitarian costs.⁶⁵⁸ The emergence of piracy off the coast of Somalia is a good example of the disruptive effects of failed states. The International Maritime Organization reported that global piracy increased by 200 percent in 2008 compared to the previous year.⁶⁵⁹ Gareth Evans has argued that states unwilling or unable to end atrocities within their own borders will be just as ineffective in stopping terrorism; the trafficking of arms, drugs and people; the circulation of health pandemics; and other global disasters.⁶⁶⁰

The Responsibility to Protect, as noted, advances the notion that state sovereignty is a privilege and not a right and is derived from a reciprocal relationship of respect between the state and its citizens.⁶⁶¹ At the 2005 World Summit, the United Nations General Assembly agreed that if a state is unwilling or unable to protect its own citizens against gross and systematic violations of internationally recognized human rights, the international community must assume the responsibility to protect them. Under such circumstances, the international community has a duty to launch preventative, reactive and rebuilding measures that are aimed at protecting defenceless civilians from abuse by their own governments. The United Nations General Assembly World Summit Outcome Document singled out prevention as the most important element of the Responsibility to Protect. In addition, there is growing belief in sovereignty as an evolving principle, intrinsically linked to the security and protection of civilians.⁶⁶²

⁶⁵⁸ *W2I Mobilizing the Will to Intervene*, Montreal Institute for Genocide and Human Rights Studies, Concordia University (2010) at 9

⁶⁵⁹ *Ibid.* at 9

⁶⁶⁰ Gareth Evans, "Towards a More Bound –Together World," Brussels: International Crisis Group (27 March 2009)

⁶⁶¹ *W2I Mobilizing the Will to Intervene*, Montreal Institute for Genocide and Human Rights Studies, Concordia University (2010) at 3

⁶⁶² *Ibid.* at 3

Notwithstanding the need for a paradigm shift that will persuade states to adopt the concept of state failure prevention as outlined previously, the reality is simply that the arguments in favour of the doctrine of Responsibility to Protect have been used by some states inconsistently. The advancing notion is that ignoring weak and failed states invariably leads to serious atrocities and civil conflict and poses both national and international threats. The Responsibility to Protect doctrine is just one tool that can be used by states and the international community in dealing with failed states. However, dealing with failed states will of course require a broad spectrum of tools, including soft and hard power and, essentially, the political will of the international community.

United Nations Secretary-General Ban Ki-moon, speaking in October 2011, provided the examples of Côte d'Ivoire, when the incumbent president refused to stand down and began committing violence against his own people, and Libya, where the people of the country were being massacred, to illustrate that:

The United Nations stood up for the will of the people – and for the ‘responsibility to protect.’ That new doctrine aims to ensure that people facing mass atrocity crimes are not alone when their own country cannot or will not protect them.⁶⁶³

The Charter gives the Security Council authority to act; however, the debate surrounding the legality of intervention when it takes place outside of a United Nations mandate is much more complicated.

4.2.2 Emergence of new jus cogens norms

The legality of humanitarian intervention depends in great part upon who is interpreting the conventions. Legal realists endeavour to justify humanitarian intervention through a liberal understanding of Chapter VII: *Action with*

⁶⁶³ “Ban Urges Students to Help Build Rule of Law Institutions in Emerging Democracies,” UN News, New York (4 October 2011)

Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39, which states that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁶⁶⁴

Legal realists argue that Article 39 gives the Security Council “jurisdiction over any ‘threat to the peace,’ rather than over any threat to international peace, therefore permitting it to intervene in order to end human rights violations that lack trans-boundary effects”.⁶⁶⁵

Notwithstanding the legal obligations of the Security Council to act when there is a threat to the peace, actions have had, to date, mixed success. During the civil war in the early 1990s in Somalia, the international community became alarmed by the spiral of violence and state failure. On 3 December 1992, the Security Council unanimously adopted Resolution 794, which “strongly condemned the violations of international law and demanded the cessation of all hostilities from all parties involved”.⁶⁶⁶ The Security Council further determined that the civil war was a threat to international peace and security, which was “further exacerbated by the obstacles being created to the distribution of humanitarian assistance”.⁶⁶⁷ Resolution 794 also authorized the creation of the Unified Task Force (UNITAF) for “establishing a secure environment for humanitarian relief operations”.⁶⁶⁸ It further authorized action under Chapter VII entailing the “deployment of the 3,500 personnel of the

⁶⁶⁴ Charter of the United Nations, signed on 26 June 1945 in San Francisco

⁶⁶⁵ J.L. Holzgrefe, “The humanitarian intervention debate,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 40

⁶⁶⁶ Security Council Resolution 794 (3 December 1992)

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

United Nations Operation in Somalia (UNOSOM)”⁶⁶⁹ to aid in achieving the above objective. The Security Council approved several resolutions that attempted to deal with the situation in Somalia, but the killing of peacekeepers by Somali militia forces eventually led many states to withdraw their forces by the mid-1990s.

On 4 November 1994, the Security Council adopted Resolution 954, recognizing:

that the lack of progress in the Somali peace process and in national reconciliation, in particular the lack of sufficient cooperation from the Somali parties over security issues, has fundamentally undermined the United Nations objectives in Somalia and, in these circumstances, continuation of UNOSOM II beyond March 1995 cannot be justified.⁶⁷⁰

A secure environment has yet to be established despite the many human and financial resources that have been exhausted in Somalia by Member States of the United Nations.

In the case of Rwanda, the Security Council adopted Resolution 935 on 1 July 1994 concerning “continuing reports indicating that systematic, widespread and flagrant violations of international humanitarian law, including acts of genocide, have been committed in Rwanda”.⁶⁷¹ Yet, despite the massacre of hundreds of thousands of Tutsis in a short period of time,⁶⁷² the Security Council did not express in its resolution that the reported genocide also constituted a threat to peace and security. Only on 8 November 1994 did the Security Council adopt Resolution 955, which called the reported acts of genocide and violations of humanitarian law “a threat to international peace

⁶⁶⁹ Ibid.

⁶⁷⁰ Security Council Resolution 954 (4 November 1994)

⁶⁷¹ Security Council Resolution 935 (1 July 1994)

⁶⁷² “Rwanda: How the genocide happened,” BBC News Africa (17 May 2011)

and security” and set out “to take effective measures to bring to justice the persons who are responsible for them”.⁶⁷³

The failure of the Security Council to act quickly led Kofi Annan to state that “[t]he genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder”⁶⁷⁴ Also, in his well-known address to the Commission on Human Rights in 1999, Kofi Annan stated that “[a] United Nations that will not stand up for human rights is a United Nations that cannot stand up for itself”.⁶⁷⁵ He further remarked that:

Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty. It is a principle that protects minorities – and majorities – from gross violations... no government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples... This developing international norm will pose fundamental challenges to the United Nations⁶⁷⁶

The focal point of Annan’s address was that the purpose of the international community is not to stand still, a point which is made clear by his statement that the:

tragedy of East Timor, coming so soon after that of Kosovo, has focused attention once again on the need for timely intervention by the international community when death and suffering are being inflicted on large numbers of people, and when the state nominally in charge is unable or unwilling to stop it.⁶⁷⁷

Annan, acutely aware of the problems of inaction, is equally attentive to the

⁶⁷³ Security Council Resolution 955 (8 November 1994)

⁶⁷⁴ Kofi A. Annan, “Two concepts of sovereignty,” *The Economist* (18 September 1999)

⁶⁷⁵ “Secretary-General calls for renewed commitment in new century to protect rights of man, woman, child – regardless of ethnic, national belonging,” UN News, New York (7 April 1999)

⁶⁷⁶ *Ibid.*

⁶⁷⁷ Kofi A. Annan, “Two concepts of sovereignty,” *The Economist* (18 September 1999)

important questions regarding the consequences of action without international consensus and clear legal authority, as well as the inability of the international community to reconcile these two compelling interests.⁶⁷⁸

It has been argued by several legal scholars that the *Genocide Convention*, by enjoining its signatories to “prevent and punish” the “crime of genocide”, may have made genocide the exceptional circumstance that warrants intervention. Many states are signatories to international treaties that recognize the fundamental respect for human rights, and most legal scholars would argue that the prohibitions on genocide and crimes against humanity have achieved the status of *jus cogens* and arguably of “peremptory norms from which in theory at least, no derogation is permitted”.⁶⁷⁹

However, in the *Genocide Convention*, Article 8 declares that contracting parties may legally prevent acts of genocide by calling upon “the competent organs of the United Nations to take such action ... as they consider appropriate”.⁶⁸⁰ Arguably, this does not establish a right of unauthorized humanitarian intervention. It is a topic of great debate whether the source of international law and its conventions permit unauthorized humanitarian interventions.

NATO's intervention in Kosovo was not authorized by the Security Council; however, it received sympathy from most of the Member States of the United Nations, including Secretary-General Kofi Annan,⁶⁸¹ even though it was inconsistent with international legal principles of “the sovereign equality of all

⁶⁷⁸ Ibid.

⁶⁷⁹ Bartram S. Brown, “Humanitarian Intervention at a Crossroads,” *William and Mary Law Review*, Vol. 41 (2000) at 1698

⁶⁸⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, General Assembly Resolution 260 (III) (9 December 1948)

⁶⁸¹ Annan, Kofi A., “Speech to the General Assembly “ (20 September 1999)

its Members”⁶⁸² and Article 2(4), which requires that all Members shall “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any states”.⁶⁸³

The notion of use of force that violates the territorial integrity or political independence of a state for the purpose of humanitarian intervention is in the early stages of debate and may, over time, come to be considered as a customary norm supported by the majority of states. It should also be noted that the development of customary international law has long been a matter of debate and disagreement among legal scholars and states, especially the notion concerning state practice.⁶⁸⁴ Scholars such as Anthony D’ Amato, Mark Weisburd, and Karol Wolfke, have maintained that:

only physical acts count as state practice, which means that any state wishing to support or oppose the development or change of a rule must engage in some sort of act, and that statements or claims do not suffice.⁶⁸⁵

They would also be of the opinion that under a traditional understanding of international law, the only way that humanitarian intervention, as in the case of Kosovo, could be legal was if a right of unilateral humanitarian intervention had somehow achieved the status of *jus cogens*, thus overriding conflicting treaty provisions.

Allen Buchanan notes that there has not yet been a shift towards recognition of humanitarian intervention as a peremptory norm. He is equally critical of the different justifications for illegal interventions for the protection of human

⁶⁸² United Nations Charter at Article 2.1

⁶⁸³ Ibid. at Article 2.4

⁶⁸⁴ Michael Byers and Simon Chesterman, “Changing the rules about rules? Unilateral humanitarian intervention and the future of international law,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 188

⁶⁸⁵ Ibid.

rights that are used by states. Buchanan lists three justifications used by states: First, there is the ‘moral principle justification’; second, there is the ‘illegal but necessary justification’; and third, there is the ‘illegal-legal reform justification’, which is used when humanitarian intervention is taken not only in response to human rights violations, but also in order to create a new norm of international law.⁶⁸⁶

Buchanan observes that there is no newly formed norm of humanitarian intervention:

[A] new customary rule does not emerge by officially registering that they do not regard their behaviour as legally required thus thwarting satisfaction of the *opinio juris* condition... new customary norms do not emerge from a single action or even from a persistent pattern of action by one state or a group of states. Thus the initial effort to create a new customary norm is a gamble. A new norm is created only when the initial behaviour is repeated consistently by a preponderance of states over a considerable period of time and only when there is a shift in the legal consciousness of all or most states as to the juridical status of the behaviour.⁶⁸⁷

The issue remains at the centre of considerable debate, with many legal scholars disagreeing with Buchanan over whether a new norm of humanitarian intervention has been established and pointing instead to the example of the resolutions of the General Assembly on the matter of humanitarian assistance, including those adopted during the Kosovo War, as having contributed to customary international law and the role of humanitarian intervention.

The view that a right of unauthorized humanitarian intervention possesses *opinio juris sive necessitatis* is complicated by the extensive list of United

⁶⁸⁶ Allen Buchanan, “Reforming the international law of humanitarian intervention,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 131-132

⁶⁸⁷ *Ibid.* at 143

Nations General Assembly resolutions rejecting such a right.⁶⁸⁸ Ultimately, as Scott Fairley emphasizes, “the use of force for humanitarian ends more often than not has become self-defeating, increasing the human misery and loss of life it was intended originally to relieve”.⁶⁸⁹ Fairley reasons that if humanitarian intervention were legal, “powerful states would receive an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or the goal of selfdetermination”.⁶⁹⁰ However, given that most violations are within states rather than between states, there is reasonable debate concerning the need for re-evaluating the role of the Charter in dealing with humanitarian intervention in an ever-evolving world.

The debate surrounding the legal regulations of humanitarian intervention has been reignited by the actions of states, Security Council resolutions, and decisions of the International Court of Justice relating to United Nations resolutions. In the 1986 *Nicaragua v United States of America*, the International Court of Justice accepted that a series of General Assembly resolutions played a role in the development of customary rules prohibiting intervention and aggression.⁶⁹¹

In order for a legal principle to obtain the status of customary international law, *opinio juris*, it is required that there is a consistent practice that is also obligatory. The decision of the International Court of Justice in the *Nicaragua v United States of America* case noted that evidence of *opinio juris* may be gathered from treaties and non-binding instruments such as declarations and

⁶⁸⁸ J.L. Holzgrefe and Robert O. Keohane, *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 47

⁶⁸⁹ Scott H. Fairley, “State Actors, Humanitarian Intervention and International Law: Reopening Pandora’s Box,” *Georgia Journal of International and Comparative Law*, Vol. 10, No. 1 (1980) at 63

⁶⁹⁰ Oscar Schachter, “The Legality of Pro-democratic Invasion,” *American Journal of International Law* Vol. 78 (1984) at 649

⁶⁹¹ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Summary of the Judgment (27 June 1986)

General Assembly resolutions.⁶⁹² As well, the International Court of Justice established that “the effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution”.⁶⁹³ Evidently, the decision of the International Court of Justice in *Nicaragua v United States of America* has, *inter alia*, added to the debate over the acceptance of General Assembly resolutions as *opinio juris* and of the existence of a new rule of customary international law.

Nevertheless, one of the most powerful members of the Security Council, the United States, has resisted any effort to recognize resolutions by the General Assembly as state practice, noting that NATO's 1999 intervention in Kosovo does not mention any relevant General Assembly resolutions, including the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*.

Article 103 of The United Nations Charter states explicitly that it prevails over all other treaties:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.⁶⁹⁴

Article 103 of the Charter is comprehensive and binds all Member States of the United Nations. In 1992, the International Court of Justice decided in the Lockerbie case (*Libya v United Kingdom*)⁶⁹⁵ on the crucial issue of whether the obligations of Member States of the United Nations under Resolution 748

⁶⁹² Ibid. at para. 188

⁶⁹³ Ibid.

⁶⁹⁴ United Nations Charter at Article 103

⁶⁹⁵ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, International Court of Justice, *Libyan Arab Jamahiriya v. United Kingdom* (27 February 1998) Preliminary Objections – Judgment – General List No. 88

(1992) and other Chapter VII resolutions prevailed over Members' obligations under the 1971 *Montreal Convention on Aircraft Sabotage*.⁶⁹⁶ In 1992, the Court decided that in:

[a]ccordance with Article 103, the obligations to carry out decisions of the Security Council prevail over obligations of any other treaty, including the Montreal Convention, and therefore that the prima facie the Charter obligations extend to Resolution 748.⁶⁹⁷

Given the primacy of the United Nations Charter, it is important to consider, as noted above, that it makes clear that "Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,"⁶⁹⁸ and obligates Member States of the United Nations to act to fulfil these rights, as "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge".⁶⁹⁹

There is no consensus among international legal scholars as to whether the NATO intervention in the Federal Republic of Yugoslavia (FRY) constituted a violation of customary international law. However, it could be argued that a new and evolving international practice has developed that recognizes that in certain circumstances a humanitarian crisis is so grave that a moral justification for intervention exists. Several legal scholars, such as Thomas Franck, note that international law "has begun gingerly to develop ways to bridge the gap between what is requisite in strict legality and what is generally regarded as

⁶⁹⁶ Anthony Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press (2002) at 219

⁶⁹⁷ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, International Court of Justice, *Libyan Arab Jamahiriya v. United Kingdom* (27 February 1998) Preliminary Objections – Judgment – General List No. 88

⁶⁹⁸ United Nations Charter at Preamble

⁶⁹⁹ *Ibid.*

just and moral.”⁷⁰⁰ Franck points to the Independent International Commission on Kosovo (Goldstone Commission on Kosovo), which concluded that NATO’s action, “while not strictly legal, was legitimate”.⁷⁰¹ The Commission concluded that international legal interpretation should be more compatible with “an international moral consensus”.⁷⁰²

India’s intervention in East Pakistan in 1971 in reaction to Pakistan’s immense human right violations, the Tanzanian 1979 intervention in Uganda which led to the overthrow of the dictatorial and murderous regime of Idi Amin, and the Vietnamese intervention in 1978 against Pol Pot’s genocidal regime in Cambodia have all been alluded to as humanitarian interventions in response to human rights violations, yet all were all without United Nations Security Council approval.⁷⁰³

In this regard, the linkage between violations of human rights and international armed conflicts which pose a threat to international peace and security could provide a space in which humanitarian intervention would be possible. Serious violations of human rights in failed states create inroads in the traditional perceptions of state sovereignty,⁷⁰⁴ leading some scholars, such as Alexandros Yannis, to suggest that there has been a shift away from state-centred consideration and towards the individual.⁷⁰⁵ However, even states that have intervened in order to end dreadful human rights abuses have been reluctant to

⁷⁰⁰ Thomas Franck, “Interpretation and change in the law of humanitarian intervention,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 214

⁷⁰¹ Ibid. at 215

⁷⁰² Ibid. at 215-216 and Independent International commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford: Oxford University Press (2000) at 4 and 163

⁷⁰³ Allen Buchanan, “Reforming the international law of humanitarian intervention,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 130

⁷⁰⁴ Alexandros Yannis, “State Collapse and its Implications for Peace-Building and Reconstruction,” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 69

⁷⁰⁵ Ibid. at 69-70

invoke a customary right of unauthorized humanitarian intervention to defend their actions. India's justification of its invasion of East Pakistan was self-defence, Vietnam argued that it was reacting to an aggressive war, and Tanzania defended its actions as a response to Uganda's invasion of Kagera.⁷⁰⁶

NATO defended the 1999 air bombing of the former Yugoslavia as justified and consistent with Security Council resolutions 1160, 1199, and 1203.⁷⁰⁷ With the exception of Belgium, the other members of NATO did not "appeal to a right of unauthorized humanitarian intervention to legitimate their actions".⁷⁰⁸

The examination of international law by legal scholars such as Franck is:

part of an evolving discourse similar to how states that have a tradition of common law and that each organ of the United Nations is authorized to interpret the Charter's mandate for itself, and must do so to prevent the emergence of a large gap between law and a 'common sense of values.'⁷⁰⁹

Such a gap would threaten the legitimacy of international law and international organizations.

The 1949 Corfu Channel Case (*United Kingdom of Great Britain and Northern Ireland v. Albania*) was the first major International Court of Justice decision on self-defence under the newly created United Nations Charter. The United Kingdom argued that the unilateral minesweeping did not violate Albania's territorial integrity and political independence and that it was justified given that "nobody else was prepared to deal with the threat, mines planted in an

⁷⁰⁶ J.L. Holzgrefe, "The humanitarian intervention debate," in J.L. Holzgrefe and Robert O. Keohane, *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 48-49

⁷⁰⁷ *Ibid.* at 48

⁷⁰⁸ *Ibid.* at 49

⁷⁰⁹ *Ibid.* at 6

international strait”.⁷¹⁰ The United Kingdom argued that it acted for reasons of self-defence to safeguard evidence, the *corpora delicti*. The International Court of Justice rejected these arguments. As well, the Court rejected the notion of ‘self-help’ in gathering evidence located in another state's territory, considering it a violation of international law:

The Court cannot accept this line of defence. The Court can only regard the alleged right of intervention as a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. As regards the notion of self-help, the Court is also unable to accept it: between independent States the respect for territorial sovereignty is an essential foundation for international relations.⁷¹¹

In its decision, the International Court of Justice adopted “an expansive view of the prohibited uses of force under the United Nations Charter, and a broad principle of non-intervention”.⁷¹²

There is an emerging practice based on the responsibility of human protection. A vision of this is contained in the International Commission on Intervention and State Sovereignty report, which contains the following:

The debate on military intervention for human protection purposes was ignited in the international community essentially because of the critical gap between, on the one hand, the needs and distress being felt, and seen to be felt, in the real world, and on the other hand the codified instruments and modalities for managing world order. There has been a parallel gap, no less critical, between the codified best practice of international behaviour as articulated in the UN Charter and actual state practice as it has evolved in the 56 years since the Charter was signed.

⁷¹⁰ Michael Byers and Simon Chesterman, “Changing the rules about rules? Unilateral humanitarian intervention and the future of international law,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 182

⁷¹¹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* International Court of Justice (9 April 1949) Merits, Judgment

⁷¹² Max Planck, *Institute for Comparative Public Law and International Law*, Oxford: Oxford University Press (2001) at 4

While there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organization practice as well as Security Council precedent suggest an emerging guiding principle - which in the Commission's view could properly be termed 'the responsibility to protect.'⁷¹³

This principle is demonstrated by the fact that:

The Security Council itself has been increasingly prepared in recent years to act on this basis, most obviously in Somalia, defining what was essentially an internal situation as constituting a threat to international peace and security such as to justify enforcement action under Chapter VII of the UN Charter. This is also the basis on which the interventions by the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone were essentially justified by the interveners, as was the intervention mounted without Security Council authorization by NATO allies in Kosovo.⁷¹⁴

A number of legal sources provide a framework for the emerging principle, which favours military intervention in situations where human protection is required. These sources:

exist independently of any duties, responsibilities or authority that may be derived from Chapter VII of the UN Charter. These legal foundations include fundamental natural law principles; the human rights provisions of the UN Charter; the Universal Declaration of Human Rights together with the Genocide Convention; the Geneva Conventions and Additional Protocols on international humanitarian law; the statute of the International Criminal Court; and a number of other international human rights and human protection agreements and covenants.⁷¹⁵

The International Commission on Intervention and State Sovereignty argues that there should be increased flexibility when considering military

⁷¹³ *The Responsibility to Protect* at 2.24

⁷¹⁴ *Ibid.* at 2.25

⁷¹⁵ *Ibid.* at 2.26

intervention, in spite of the Charter's predisposition against such action. It states that:

The degree of legitimacy accorded to intervention will usually turn on the answers to such questions as the purpose, the means, the exhaustion of other avenues of redress against grievances, the proportionality of the riposte to the initiating provocation, and the agency of authorization. These are all questions that will recur: for present purposes the point is simply that there is a large and accumulating body of law and practice which supports the notion that, whatever form the exercise of that responsibility may properly take, members of the broad community of states do have a responsibility to protect both their own citizens and those of other states as well.⁷¹⁶

Several world leaders who spoke at the United Nations General Assembly in September 2011 spoke in favour of the doctrine of the Responsibility to Protect, including Belgium's Deputy Prime Minister Steven Vanackere who stated that sovereignty cannot stop intervention that aims to put an end to human rights abuse:

Belgium will not stand idly by when people claim a future free of coercion and terror ... Instead of non-interference, Belgium believes in non-indifference. Sovereignty is no longer a wall leaders can use as an excuse to violate the rights of their citizens.⁷¹⁷

Italian Foreign Minister Franco Frattini expressed a similar view at the General Assembly and gave the example of Libya, suggesting that the only way to prevent a massacre of the Libyan people was to invoke the principle of the Responsibility to Protect:

By helping to implement this decision in military, diplomatic and, and humanitarian terms, we shifted from a culture of sovereign impunity to

⁷¹⁶ Ibid. at 2.27

⁷¹⁷ "Belgium's Deputy Prime Minister Steven Vanackere address to the General Assembly," UN News, New York (26 September 2011)

one of responsible sovereignty, rooted in national and international accountability for the most serious violations of human rights.⁷¹⁸

Secretary-General Ban Ki-moon also stressed the importance of the principle of the Responsibility to Protect in his address:

This is a critical moment in the life of the Responsibility to Protect. In the six short years since its endorsement by the World Summit, this doctrine has gone from crawling to walking to running...Let us do our utmost to ensure that this umbrella of protection covers all who need it.⁷¹⁹

The Secretary-General noted the onset of the principle in the international community's collective actions in Côte d'Ivoire and Libya as well as in its diplomatic efforts. He further pointed out that:

Our challenge now is to keep all [UN] Charter-based options open, and all of our collective tools sharp...We need to strengthen ties with our regional, sub-regional and civil society partners...We need to share information and assessments about States under stress. Effective prevention requires early, active and sustained engagement...No government questions the principle. Tactics, however, will – and should – be the subject of continuing scrutiny.⁷²⁰

Statements by various governments and the Secretary-General at the General Assembly in 2011 demonstrate the importance of humanitarian intervention in failed states by the United Nations.

4.3 Practice of the Security Council – opinio juris

Although not always consistently, the Security Council has acted under the Chapter VII mandate and developed several approaches to various situations

⁷¹⁸ “Italy’s Foreign Minister Franco Frattini address to the General Assembly,” UN News, New York (26 September 2011)

⁷¹⁹ “Responsibility to Protect Principle Must Cover All Who Need It,” UN News, New York (23 September 2011)

⁷²⁰ Ibid.

arising out of serious violations of human rights in failed states.⁷²¹ Under Chapter VII, Article 39:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁷²²

As well, under Article 42, the Security Council may take action:

by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.⁷²³

In the case of Somalia, the Security Council adopted Resolution 794, a milestone resolution under Chapter VII, which held that “the magnitude of the human tragedy caused by the conflict” was sufficient in itself to constitute a threat to peace within the meaning of Article 39 of the Charter.⁷²³

In late 1992, the United States led a coalition of states in Operation Restore Hope in Somalia with 36,000 peacekeeping forces. It was later replaced by the United Nations Operations Mission in Somalia (UNOSOM II) established under Security Council Resolution 814 of 26 March 1993. On 3 October 1993, there came a turning point in United States involvement when eighteen soldiers lost their lives and 75 were wounded and subjected to humiliating treatment.⁷²⁴

⁷²¹ Daniel Thürer, “An internal challenge: partnerships in fixing failed states,” *Harvard International Review*, Vol. 29, No.4 (Winter 2008)

⁷²² UN Charter

⁷²³ *Ibid.*

⁷²³ Daniel Thürer, *The ‘Failed State’ and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

⁷²⁴ William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 228

Soon afterwards, the United States announced its intention to withdraw.⁷²⁵

United Nations Secretary-General Boutros Boutros-Ghali has suggested that international intervention in failed states should include attempts at reconciliation and the re-establishment of effective government, given that the effects of such internal conflicts are usually much more devastating and far-reaching than in the case of inter-state conflicts.⁷²⁶ The General Assembly has also taken action through the ‘Uniting for Peace’ resolution; however, the Security Council does not want to be rendered incapable of action and supplanted by the General Assembly.

In concern to Haiti, the Security Council decided in February 2004 that the armed rebellion that overthrew President Aristide of Haiti represented a threat to peace under Article 39 of the Charter.⁷²⁷ In the case of Libya, the Security Council did act militarily to prevent breaches of human rights when state authority had broken down. The Security Council is empowered to intervene to restore order in failed states where there has been a threat to peace as defined in Article 39 of the Charter. In such circumstances, the Security Council does not require the state’s consent.⁷²⁸ In cases such as those of Bosnia-Herzegovina, Somalia and other failed states the Security Council has acted accordingly.⁷²⁹

On 17 March 2011, the Security Council demanded an immediate ceasefire in Libya and imposed a no-fly zone upon adopting Resolution 1973.⁷³⁰ The

⁷²⁵ Ibid. at 229

⁷²⁶ Boutros Boutros Ghali, “Towards the Twenty-First Century: International Law as a Language for International Relations,” United Nations Congress on Public International Law (13-17 March 1995) at 9

⁷²⁷ Daniel Thürer, *The ‘Failed State’ and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

⁷²⁸ Ibid.

⁷²⁹ Ibid.

⁷³⁰ “Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians,” UN News, New York (17 March 2011)

resolution, which called on Member States to take “all necessary measures” to protect the people of Libya from the Gaddafi regime, was adopted with the support of the five permanent members of the Security Council, while in the case of Kosovo NATO’s military intervention was undertaken without the sanction of a United Nations Security Council resolution, mainly due to the inability of all five permanent veto members to agree on a resolution.

The Security Council has interpreted its mandate broadly:

In various cases—most notably Cambodia—the Security Council has taken peace-building action in the form of far-reaching civil measures that range from the demobilization of armed forces to the reform of governmental and constitutional structures. Like Somalia, Cambodia was an instance in which the charge of the international community to take over complex administrative and political tasks in failed states was clearly evident. It would appear that at least in connection with the situation of failed states, a door has opened allowing the measures envisaged in Chapter VI of the Charter for inter-state relations to be used in the internal affairs of states as well.⁷³¹

In the *Prosecutor v Duško Tadić* decision on 2 October 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated in their decision on the defence motion for interlocutory appeal on jurisdiction that:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.⁷³²

⁷³¹ Daniel Thürer, *The ‘Failed State’ and International Law*, Geneva: International Review of the Red Cross, No. 836 (31 December 1999)

⁷³² *Prosecutor v. Duško Tadić*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (2 October 1995) at para 58

The International Criminal Tribunal for the Former Yugoslavia looked at the practice of the Security Council when it classified under Chapter VII ‘internal armed conflict’ as constituting a ‘threat to the peace.’ The ICTY noted that:

it can thus be said that there is a common understanding, manifested by the ‘subsequent practice’ of the membership of the United Nations at large, that the ‘threat to the peace’ of Article 39 may include, as one of its species, internal armed conflicts.⁷³³

The International Criminal Tribunal for the Former Yugoslavia looked at the range of measures under Chapter VII and noted that:

Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action... it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI (‘Pacific Settlement of Disputes’) or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then ‘decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’⁷³⁴

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 has greatly contributed to the jurisprudence of humanitarian intervention.

The Security Council has also engaged in various multifaceted operations in various failed states, and “[i]t would appear that at least in connection with the situation of failed states, a door has opened allowing the measures envisaged in

⁷³³ Ibid. at para. 30

⁷³⁴ Ibid. at para. 31

Chapter VI of the Charter for inter-state relations to be used in the internal affairs of states as well”.⁷⁹⁰

As indicated above, there has been a movement in favour of the emerging doctrine of the Responsibility to Protect given the serious human rights and security consequences that have emerged as a result of state failure. Adding to this responsibility is the role that the international community is playing in the reconstruction efforts, assisting failed states to strengthen their structural competencies, as will be examined in Chapter 5.

⁷⁹⁰ Daniel Thürer, “An internal challenge: partnerships in fixing failed states,” *Harvard International Review*, Vol. 29, No.4 (Winter 2008) at 42

Part II

Reconstruction and the International Community

Chapter 5: Prevention – Strengthening States Against Failure

Understanding the causes and consequences of state failure is an important process in actually preventing weak states from becoming failed states and ensuring the structural competency of a functioning state. Prevention entails a deep analysis of the problems and the usage of various available tools for assessing state failure, although some scholars have suggested that it is not always possible to predict when state failure will occur.

Notwithstanding certain limitations respecting the measurement and definition of state failure, there are several agencies and non-governmental organizations that are working on risk assessment and early warning signals for prevention. NGOs such as FEWER (Forum on Early Warning and Early Response) International bring together a global coalition of governmental and non-governmental agencies as well as academic institutions to work together to coordinate responses to violent conflict. According to FEWER, prevention and early warning signals include “the communication of information on a crisis area, analysis of that information and development of potential of early warning is not only to identify potential problems but also to create the necessary political will for preventive action to be taken”.⁷³⁵ Consequently it can be argued that prevention also entails the need to better equip government institutions, NGOs and policymakers that are dealing with the issue in order to enable a more effective response to the crisis.

Prevention and reconstruction of failed states are relatively new approaches taken by the international community, with the results in places such as Afghanistan, Timor-Leste, Sierra Leone, Liberia, Kosovo and Iraq, having thus

⁷³⁵ Forum on Warning Process and Early Response (FEWER) at www.fewer-international.org

far been mixed. There is also the case of Somalia, the outcome of which has not yet yielded substantively measurable results. The challenges facing the international community in preventing state failure tend to focus on domestic security reform as a means to restore state capacity. This has been given heightened significance in the aftermath of 9/11.

Ten years after 9/11, the Security Council continues to be alarmed by the various security and terrorist concerns afflicting many failed states. In 2011, the Security Council asked the African Union to urgently increase the strength of its peacekeeping force in Somalia in order to better carry out its United Nations-authorized mandate and prevent further deterioration in the human crisis that is taking place due to drought. The United Nations asked member states to provide funding, equipment and assistance and ordered:

the transitional authorities based in Mogadishu to increase their transparency and combat corruption to increase their legitimacy and credibility, and voiced grave concern at ‘the dire and worsening humanitarian situation’ due to the drought and famine, which has already killed tens of thousands of people, threatened the lives of 750,000 others and put over 3.2 million more on the brink of starvation.⁷³⁶

Too often, states fail to recognize the warning signs that lead to state failure. This is, more often than not, the result of indifference to certain predicaments rather than of the practical and technical restrictions in translating complex international information into meaningful warning signs.⁷³⁷ As illustrated in the above example of Somalia, mobilization of the international community requires political will, funding and resources. These challenges are further complicated by an analytical gap between

⁷³⁶ “Security Council Calls for Increase in African Peace Force in Somalia to 12,000,” UN News, New York (30 September 2011)

⁷³⁷ David Carment, “Preventing State Failure” in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 136

policy analysis and public policymakers in developing early warning signs. As noted by David Carment:

...anticipating state failure is like peeling an onion; each analytical layer reveals progressively longer time lines: long-term fundamental dynamics relating to macrolevel preconditions and consequences, mid-term intermediate behavioural patterns, and immediate micro level events such as political crises and ethnic cleansing.⁷³⁸

Early warning signs, which include core structural competency indicators, are important in identifying the shifts from state stability to state instability that can lead to violence and failure. Thus, it is important for public policymakers to explain and ultimately focus on a constructive model of conflict prevention and state failure. This paradigm shift would require that policymakers become “better equipped to do their own in-field analyses”.⁷³⁹ In addition, it has been suggested that actions by The World Bank and the International Monetary Fund, such as the creation of structural adjustment programs in weak and failed states, should neither further destabilize nor contribute to the breakdown of the political and economic bases of state stability.⁷⁴⁰

Others, such as Secretary-General Kofi Annan, have outlined lessons for the responsibility of the ‘community of nations’ in the prevention of failed states:

First, in today’s world we are all responsible for each other’s security. Second, we are also responsible for each other’s welfare. Third, both security and prosperity depend on respect for human rights and the rule of law. Fourth lesson, therefore, is that governments must be accountable for their actions, in the international as well as the domestic arena. Fifth lesson is that those institutions must be organized in a fair and democratic way, giving the poor and the weak some influence over the actions of the rich and the strong.⁷⁴¹

⁷³⁸ Ibid. at 138

⁷³⁹ Ibid. at 141

⁷⁴⁰ Ibid. at 145

⁷⁴¹ Kofi A. Annan, “What I’ve Learned,” *The Washington Post* (11 December 2006)

Preventing State failure to an extent also depends on both national and international political will, with more active response and engagement.

It has been suggested that the international community needs to ostracize those leaders that bring destruction to their people:

[M]isbehaving nations should be suspended from international organizations. In retrospect, if the international community had more effectively shunned Siad Barre, Mobutu, Idi Amin of Uganda, or Sani Abacha of Nigeria, it might have helped to minimize the destruction of their states. Ostracizing such strongmen and publicly criticizing their rogue states would also reduce the necessity for any subsequent UN peacekeeping and relief missions.⁷⁴²

Rotberg, for example, notes that notwithstanding the economic and political destruction of Zimbabwe, with a central government that has lost legitimacy, no longer provides fundamental political goods such as a security, and is responsible for the harassment and killing of supporters of the opposition, Robert Mugabe continues to have the support of many African state leaders who refrain from criticizing him publicly.⁷⁴³ As Rotberg states, “[n]o one in the West or in Africa effectively warned Mugabe that attacking one’s own people, destroying a state, and stealing an election were impermissible”.⁷⁴⁴ Another example is that of Sudanese President Omar Hassan al-Bashir, who continues to defy the International Criminal Court, with African countries continually providing him with assistance. During a visit to Malawi in October 2011, Malawi failed to arrest him and surrender him to the International Criminal Court, even though he is wanted on charges of crimes against humanity, war crimes and genocide. Malawi is a signatory to the Rome Statute; it is under this

⁷⁴² Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No.4 (July/August 2002)

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

treaty that states that fail to comply may be referred to the Assembly of States Parties or to the Security Council.⁷⁴⁵

There is a need for the international community to develop holistic and comprehensive strategies that integrate security and development in order to become more effective in prevention and reconstruction; this will work by strengthening the internal mechanisms both at the institutional and individual level. In failed states, although some institutions do exist, they may lack the capacity to deal with key issues in state structural competency, such as in respect to rule of law, judicial reform, transitional justice and economic development, subjects which shall be discussed further in the following subsections on state-building and reconstruction

5.1 State-Building and Reconstruction

As indicated above, failed states raise several questions for the international community regarding challenges of prevention, state-building and reconstruction. As well, just as there is no consensus on the concept of state failure, there too is no general agreement on the best approach to state-building, nor is there a common definition. Nevertheless, state-building has emerged as the favoured solution to state failure.

Neither public policy advisors nor academics have presented an authoritative definition, and additionally, the international community lacks clear guidelines as to the role it occupies and the nature of the state to be built. Generally the

⁷⁴⁵ “ICC Asks Malawi to Explain Failure to Arrest Sudan’s President on Visit,” UN News, New York (19 October 2011)

term is used with primary reference to “external interventions aimed at constructing or reconstructing governance arrangements that can provide citizens with economic and physical security”.⁷⁴⁶ In addition, it has been suggested by some scholars and policymakers that state-building can also be defined as “the use of armed force in the aftermath of a conflict to promote a durable peace and representative government”.⁷⁴⁷ However, the use of force in peace operations is still a topic of debate, with some policymakers suggesting that this approach is not always desirable; they point to past European Union experiences in mounting non-military interventions in support of conflict resolution.⁷⁴⁸

State-building essentially assumes that a modern state has a certain set of obligations that must be met, such as respect for the rule of law, accountability, security and welfare. This study, for example, argues in favour of state compliance with international law and the meeting of the core structural competencies of a functioning state. However, there are scholars who suggest that there is no straightforward answer or agreement as to whether “...some state functions are more basic than others [and] ... whether the state should provide the public goods itself, or merely enable their provision”.⁷⁴⁹ One of the fundamental questions stemming from these divergences of opinions on state-building is “...should it be a minimalist ‘night-watch’ state, whose primary concern is to maintain security; or should it rather be a welfare state that provides for its citizens from cradle to grave?”⁷⁵⁰

⁷⁴⁶ Simon Chesterman, *You, the People: The United Nations, Transitional Administration and State-Building*, Oxford: Oxford University Press(2004) at 5 quoted in Lars Engberg-Pedersen et al, *Fragile Situations Background Papers*, Copenhagen: Danish Institute for International Studies (2008) at 13

⁷⁴⁷ James Dobbins et al, *Europe’s Role in Nation-Building: From the Balkans to Congo*, Santa Monica: Rand Corporation (2008)

⁷⁴⁸ *Ibid.* at XV.

⁷⁴⁹ Lars Engberg-Pedersen et al, *Fragile Situations Background Papers*, Copenhagen: Danish Institute for International Studies (2008) at 14

⁷⁵⁰ *Ibid.*

Africa is frequently viewed with concern due to various conflicts and failures to meet the requirements of structural competency of a functioning state; it is therefore not surprising that it is in this vast continent which we find most examples of state-building.

Pierre Engelbert and Denis M. Tull argue that reconstruction failures in Africa are accentuated by three faulty hypotheses. First is the inherent supposition that Western state institutions can be effectively transferred to Africa. The second faulty assumption presumes a shared understanding of state failure and reconstruction that entails a logic of co-operation between donors and African leaders, although many of these leaders share neither the analysis of failure nor the objectives set out for reconstruction policies. Instead, they “seek to maximize the benefits accruing to them from these policies, as well as from ongoing political instability”.⁷⁵¹ The third flawed assumption is that donors will have the political will to sustain the costly long-term efforts required to meet the goals set out for reconstruction.⁷⁵² The debate surrounding the security-development nexus is indicative of the central compact that is needed for the reconstruction of failed states, as “a world where some live in comfort and plenty while half of the human race lives on less than \$2 a day, is neither just nor stable.”⁷⁵³

The phenomenon of state failure cannot be viewed in absolute terms, as stated above, as states can move from functioning to weak, from weak to failed, from failed back to weak and, with sufficient resources and national and international political will, can once again become functioning states.

⁷⁵¹ Pierre Engelbert and Denis M. Tull, “Post-conflict Reconstruction in Africa: Flawed ideas and Failed States,” *International Security*, Vol. 32, No. 4 (Spring 2008) at 110

⁷⁵² Ibid.

⁷⁵³ Lars Engberg-Pedersen et al, *Fragile States on the International Agenda*, Copenhagen: Danish Institute of International Studies (2008) at 17

El Salvador and Colombia, for example, have managed to go through internal reconstruction with a certain level of success. Both the civil war in El Salvador that persisted from 1980 to 1992 and Colombia's long-standing armed conflict with Revolutionary Armed Forces of Colombia (FARC) have had a significantly negative impact on the lives of their respective peoples. State-building and reconstruction in both places required the national governments to provide security and rebuild trust within all sectors of society.

There are tangible actions that the international community can take to assist in reconstruction; an example would be curtailing and interrupting arms trafficking so that state failure does not spread across borders.⁷⁵⁴ As Lemarchand writes, “[t]he risks of disintegration are significantly greater when the proximity of a collapsing state threatens to contaminate its neighbour”.⁷⁵⁵ State-building can also involve the construction of basic infrastructure, such as roads for transportation. This is an important endeavour given that, as has been demonstrated by several scholars with respect to Africa, the “government’s inability to broadcast power into peripheral regions of state territory lies at the heart of state failure and collapse”.⁷⁵⁶ However, notwithstanding the reconstruction challenges in Uganda, Ethiopia and Eritrea, efforts at reform, although not perfect, have been moderately successful.⁷⁵⁷

It is important that regional entities play a role in supporting the

⁷⁵⁴ Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 160

⁷⁵⁵ *Ibid.* at 161

⁷⁵⁶ *Ibid.* at 161

⁷⁵⁷ Marina Ottaway, “Rebuilding State Institutions in Collapsed States,” in Jennifer Milliken (ed.), *State Failure, Collapse and Reconstruction*, Oxford: Blackwell Publishing (2003) at 256

reconstruction of failed states. For example, the European Union, the Organization of American States and the African Union must become more active in state-building given that reconstruction is costly and requires various resources. For instance, the operation in Macedonia began as a NATO operation and was then taken over by the European Union. Bosnia began as a United Nations led mission and later transitioned to NATO and European Union command.⁷⁵⁸

Despite the difficulties, to be reviewed in the following subsection of state-building and reconstruction, it is a crucial undertaking in order to prevent private criminal entities from exploiting any power vacuum associated with state failure.

Reconstruction and state-building are daunting tasks even in the most positive circumstances. The international operation to end the conflict and begin nation-building in the Solomon Islands, for example, was a daunting task for such a small society.⁷⁵⁹ Many states that have the capacity to contribute to state-building operations are reluctant to deploy military forces. Australia did in fact deploy soldiers to the Solomon Islands due to its perceived regional interest.

The international community has taken steps to address immediate humanitarian crises by means ranging from the deployment of peacekeeping/peacemaking forces and food aid to the rehabilitation of failed states and rebuilding of state structures, including political parties, the judiciary, armed forces, and police.⁷⁶⁰ The anticipation is that failed states can

⁷⁵⁸ James Dobbins et al, *Europe's Role in Nation-Building: From the Balkans to Congo*, Santa Monica: Rand Corporation (2008) at XVII

⁷⁵⁹ Ibid. at Introduction

⁷⁶⁰ Rosa Ehrenreich Brooks, "Failed States, or the State as Failure?," *University of Chicago Law Review*, Vol. 72, No. 4 (Fall 2005) at 1159

become functioning states, and weak states can be prevented from becoming failed states.

However, despite a host of target objectives, the international community has not yet decreased or prevented state failure and has not succeeded in the reconstitution of failed states. The number of failed states is an indication of the continuing phenomenon of state failure, and the unstable status of once failed states implies that rebuilding state structures is very difficult.⁷⁶¹ As well, the cost of late responses can be enormous. In the instance of a civil war in a weak or failed state, estimates run to approximately 54 billion US dollars.⁷⁶²

The challenge of reconstruction and the manner in which to best develop mechanisms that will sustain peace requires the creation of “an environment where fear is diminished and confidence established in a peace process that will reconstitute a state capable of delivering security”.⁷⁶³

Furthermore, it may not always be possible to have an overarching authority that can undertake security and, therefore, it has been suggested that a new mechanism created and supported by the international community needs to take root.⁷⁶⁴ If state formation, as suggested by Jens Meierhenrich, does not occur absent human suffering, as “[t]he birth of states is an inherently contentious”,⁷⁶⁵ one, then the reconstruction of a failed state will be even more arduous.

⁷⁶¹ Ibid. at 1162-1163.

⁷⁶² *Why We Need to Work More Effectively in Fragile States*, London: U.K. Department for International Development (January 2005) at 12

⁷⁶³ Terence Lyons, “Transforming the Institutions of War: Post Conflict Elections and the Reconstruction of Failed States,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 269

⁷⁶⁴ Ibid.

⁷⁶⁵ Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 165

As indicated, prevention and reconstruction are certainly two of the most important challenges facing the international system that undoubtedly require great political will and resources in order to establish the structural competencies of a functioning state, including, as noted in the following subsections, building rule of law; establishing accountability and ending impunity; establishing security; disarmament, especially in post-conflict states; economic and social reconstruction; involvement of civil society, especially by bringing women and minority groups into the process; and reconstructing political structures that have legitimacy. Also, there may be a need in post-conflict areas for reconciliation and transitional justice.

5.2 Building Rule of Law

The changes needed for state formation and reconstruction after state failure are many; law reform, for example, is needed to ensure that a government is accountable to its citizens and legitimacy is necessary in order for peace to endure in the aftermath of a conflict. These changes, along with a process by which to encourage civil society, are key factors in state-building.⁷⁶⁶

Rebuilding rule of law is an essential ingredient in the reconstruction of any failed state. As noted in Part I, failed states have dysfunctional legal systems that provide hardly any safeguards for human rights. Restoring the rule of law in post-conflict failed states is fundamental to the process of peace and security and to re-establishing trust within the wider population. Transparency and judicial independence are critical, and mechanisms must

⁷⁶⁶ Marlye Gélin-Adams and David M. Malone, "Haiti: A Case of Endemic Weakness," in Robert I. Rotberg, (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 301

be installed that prevent the loss of control of these two key elements.⁷⁶⁷ Peace, security and enforceable laws are also indispensable precursors to state-building.⁷⁶⁸ As well, a post-conflict police force cannot function lacking a set of certain rules.⁷⁶⁹

Susan Rose-Ackerman's examination of how the rule of law might best be restored in a post-conflict setting starts by breaking it into essential components such as criminal law, the police force, criminal process and punishment, economic law, property law, contracts, torts, public law and administrative law, amongst others. She examines not only the formal rules but also the means by which those rules are entrenched in institutions that value compliance. Reintroducing these basic areas of law provides an effective means of conveying the state's new regulatory framework: "Refashioning the criminal code provides a useful post-conflict means of differentiating the old regime from the new as was done in South Africa".⁷⁷⁰ In Liberia, President Sirleaf has made several attempts to "improve governance and the rule of law, including decentralizing power from the historically powerful presidency".⁷⁷¹

It has also been suggested that there is a need for prosecution of corrupt officials from an old regime, so as to set an instructive example for the new era.⁷⁷² However, this is not an easy process, as a strong and fair criminal justice system with the ability to enforce the laws requires funds

⁷⁶⁷ Robert I. Rotberg, "The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 36-37

⁷⁶⁸ *Ibid.* at 36

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid.*

⁷⁷¹ Jimmy Carter, "Reconstructing Rule of Law: Post-Conflict Liberia," *Harvard International Review* Vol. 30, No. 3 (Fall 2008)

⁷⁷² Robert I. Rotberg, "The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair," in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 36

and other resources in order to be constructed and maintained. In addition, state failure reduces capacity and human resource skills. Building the capacity for and ensuring the necessary means of strengthening the local communities' claims of governance requires the independence of such institutions as the judiciary and security services as "[s]uch measures, ultimately, would constitute the precondition for achieving disarmament, sustainable security, and development".⁷⁷³

In Afghanistan, it has been noted that rule of law has never been strong and efforts to re-establish it have been slow and elusive. In the 2004 *Afghanistan Human Development Report*, President of Afghanistan Hamid Karzai stated that there were many challenges facing his country, including confronting terrorism, countering narcotics and combating corruption as well as building the capacities for good governance and rule of law.⁷⁷⁴ The report links the importance of rule of law with human development by stating that "[w]hen the level of human development increases, efforts of key state and non-state rule of law institutions to promote justice are reinforced and enhanced".⁷⁷⁵

However, women especially face obstacles in their access to courts and justice, as many Afghans still attach religious parameters to the judicial process.⁷⁷⁶ Ending the culture of impunity is an important step towards reconstruction. Dr. Sima Simar, who heads Afghanistan Independent Human Rights Commission, has indicated the importance of ending the culture of impunity that targets women and therefore makes reconstruction an impossible

⁷⁷³ Abdel-Fatau Musah, "Privatization of Security, Arms Proliferation and the Process of State Collapse in Africa," in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 177

⁷⁷⁴ *Afghanistan Human Development Report 2007*, Kabul: Centre for Policy and Human Development (2007) at Forward

⁷⁷⁵ *Ibid.* at 6

⁷⁷⁶ *Ibid.* at 37

task. She notes that:

A culture of impunity exists for sexual violence in the country. It is always seen as private matter of the family. State institutions refuse to intervene in some cases. In other cases, they promote the ownership of females in the family by men.⁷⁷⁷

Several human rights supporters protested the introduction in 2009 of the Afghan Shia Personal Status Law, which has severe discriminatory provisions against women, including:

marital rape... a woman has to fulfill 'her sharia and legal conjugal obligations, otherwise, she shall not be entitled to maintenance' (Article. 165). 'Maintenance shall cover all of the common necessities for life, such as food, clothes, shelter, medical treatment, and so on.' (Article. 161)⁷⁷⁸

Notwithstanding that some changes were made due to the international outrage, the existing legislation, according to the Afghan Women's Network, is vague and lacks clarity. Many advocates claim that it would allow marital rape and thereby harm the process of "reconstruction and rehabilitation of Afghanistan and the Afghan people will lose the momentum created through the strong support of the international community to Afghanistan".⁷⁷⁹ In a 2006 speech at the Davos World Economic Forum, Secretary-General Kofi Annan noted in reference to human rights and the rule of law that "[w]ithout these, any society, however well-armed, will remain insecure; and its development, however dynamic, will remain precarious".⁷⁸⁰

⁷⁷⁷ Dr. Sima Samar, the Chairperson of the Afghanistan Independent Human Rights Commission, United States Senate Foreign Relations Committee (23 February 2010)

⁷⁷⁸ *Gender Base Violence in Afghanistan*, Kabul: An Annual Report by the Afghan Women's Network (2009)

⁷⁷⁹ *Ibid.*

⁷⁸⁰ "The United Nations Cannot Stand Still, Because the Threats to Humanity do not Stand," UN News, New York (26 January 2006)

Lessons learned from Afghanistan and indeed Iraq on the importance of respect for human rights, gender equality and rule of law will be of critical importance to the reconstruction of newly emerged post-conflict states such as Libya. The new transitional government must make the establishment of rule of law their top priority, along with the disarmament of the various militias that were involved in overthrowing the Gaddafi regime. Under Article 4(m) of the *Constitutive Act of the African Union*, the “respect for democratic principles, human rights, the rule of law and good governance”⁷⁸¹ is enshrined. A central pillar for the reconstruction of Libya should be the adherence to Article 4(m).

In an address to the General Assembly Committee, also known as the Sixth Committee, which deals with legal matters, Deputy Secretary-General Asha-Rose Migiro stressed the importance of advancing rule of law for newly constituted governments that are forming as a result of the ‘Arab Spring’ that is taking place in the Middle East and North Africa:

People are making increasing claims on their governments for greater transparency, justice and human rights under the banner of the rule of law ... Newly constituted governments are looking to the United Nations for assistance in drafting constitutions, reforming justice and security institutions and dealing with legacies of past atrocities.⁷⁸²

Rotberg has also indicated that reconstruction of rule of law “can be done in stages, over time, but citizens will not support reconstruction efforts until they are certain that legal redress will be available”. Therefore, in order for the state to regain legitimacy in the eyes of its citizens, “[a] functioning court system should be among the first political institutions to be reborn. A police force, a

⁷⁸¹ *African Union Constitutive Act*, signed on the 11 of July 2000 at Lome, Tongo

⁷⁸² “Migiro Stresses Importance of UN’s Work to Advance Rule of Law Worldwide,” UN News, New York (5 October 2011)

central bank, and the repair of roads and telephone networks are also essential”.⁷⁸³ Rotberg further outlines certain tasks that must be allocated to this purpose, including the retraining of police, judges, bureaucrats and parliamentarians.⁷⁸⁴ The International Commission on Intervention and State Sovereignty has also affirmed that “the key to the effective observance of human rights remains, as it always has been, national law and practice: the frontline defence of the rule of law is best conducted by the judicial systems of sovereign states, which should be independent, professional and properly resourced”.⁷⁸⁵ This may require that transitional arrangements for justice are undertaken during United Nations operations, given that if there is no “functioning system to bring violators to justice, then not only is the force's mandate to that extent unachievable, but its whole operation is likely to have diminished credibility both locally and internationally”.⁷⁸⁶

As noted above, there is a need for a new development paradigm based on the structural competency processes of rule of law in order to foster social cohesion, with shared institutions that are legitimate in the eyes of their constituents. This opinion is shared by Seth Kaplan, who advocates for a need to redesign governing bodies to enhance local conditions that link the state with its adjoining society in order to foster legitimacy, develop competency, and encourage investment, rule of law and other elements essential to the promotion of a self-sustaining, internally determined method that will guide development.⁷⁸⁷

In 2003, the Office of the United Nations High Commissioner for Human

⁷⁸³ Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No. 4 (July/August 2002)

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *The Responsibility to Protect* at 2.20

⁷⁸⁶ *Ibid.* at 5.13

⁷⁸⁷ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at 8-9

Rights published a report on the development of rule-of-law tools for the purpose of long-term institutional capacity within United Nations missions and transitional administrations.⁷⁸⁸ The report incorporated many of the principal tools which were garnered through lessons learned from many of the United Nations reconstruction missions. Understanding that rule of law reform requires political support and political reform also means that:

Some people stand to lose if reform occurs. Power relations will change. Those used to controlling the police and using it to enforce their will, control the population or steal property will see reform as a threat. So will those who have used the courts to ensure their economic or political dominance.⁷⁸⁹

Each case of state failure provides a unique set of challenges as well as new lessons for restoring rule of law, such as in dealing with internal issues of racism and gender inequality, re-establishing destroyed judicial infrastructures, reforming and developing rule of law, building democracy infrastructures, and assisting with elections and the development of a new constitution. A holistic approach is what many scholars and practitioners of rule of law are advocating.⁷⁹⁰ The lessons learned will hopefully shape the international community's future action in reconstruction efforts. Establishing rule of law cannot be done in a vacuum; success hinges on the establishment of accountability and the fight against impunity, as shall be noted in the next subsection.

⁷⁸⁸ *Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector*, report of the Office of the United Nations Commission for Human Rights (2006)

⁷⁸⁹ *Ibid.* at 3

⁷⁹⁰ Louis Aucoin, "Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict," *The Whitehead Journal of Diplomacy and International Relations*, Vol. 8, No. 1 (Winter/Spring 2007) at 33

5.3 Establishing Accountability – Ending impunity

Strengthening institutions that provide greater transparency and deliver public goods, security, rule of law and judicial independence is imperative to regaining the trust of the people and restoring the accountability of the state. Accountability is indispensable and “means working to limit corruption, especially by making it easy for private parties to complain against officials”.⁷⁹¹ The absence of accountability, the failure of state institutions to put an end to the culture of impunity, and the burden of visionless leaders have all contributed to weak and failed governance.

Haiti is a perfect example,⁷⁹² having several structural competency failures and a lack of national minded leadership; as a result, “it has remained perpetually weak, often teetering on the brink of failure. If Haiti is to become stronger it needs better leadership as well as long-term foreign assistance”.⁷⁹³ Notwithstanding the reconstruction needs of Haiti following the disastrous earthquake of January 2010, the Haitian parliament has created a stalemate by rejecting newly elected President Michel Martelly's two nominees for the post of Prime Minister, impeding the ability of the new government to function since the May 2011 election. His third choice, Garry Conille, was eventually elected by the Senate as Prime Minister on 4 October 2011, but he resigned in February 2012, creating even further uncertainty in the troubled country.⁷⁹⁴

⁷⁹¹ René Lemarchand, “The Democratic Republic of the Congo: From Failure to Potential Reconstruction,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 35

⁷⁹² M. Gélín-Adams and D. Malone, “Haiti: A Case of Endemic Weakness,” in Robert I. Rotberg, (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 299

⁷⁹³ Ibid. at 301

⁷⁹⁴ “Haiti senate approves president’s 3rd pick for prime minister, ends stalemate,” *Washington Post* (October 5, 2011)

Adama Dieng, United Nations Under-Secretary-General and Registrar of the International Criminal Tribunal for Rwanda, defines impunity as “the act of not being punished, hiding from or escaping punishment either due to circumstances or to the law”.⁷⁹⁵ He notes that the question that is most often asked is “how to punish those who commit serious violations at a time when a State sets out to democratize public life”.⁷⁹⁶ He indicates that it is important to ask, in considering reconciliation in a nation with a history of political violence, “[w]hat should be done with those responsible for serious violations of human rights?”⁷⁹⁷ In discussing this critical concern, Dieng points out that:

The human rights map shows that the African political environment is characterised by violence at the top most level. The states which have achieved a degree of political stability are crumbling, conventional armies have been replaced by militias and guerrilla groups that specialize in looting and political assassinations, warlords enlist children in their armies for some of the most horrendous tasks, and the despots who torment their people enrich themselves by pillaging their meagre resources. Impunity stifles and criminalizes public life.⁷⁹⁸

To credibly fight impunity, he notes, it is not only punishment that is important, but also a proper identification of the perpetrators of the crime and an investigation that is detailed and unbiased. To Dieng, this:

[c]asts doubt as to States’ international commitment to respect fundamental rights and to punish those responsible for violating them, and is an issue in several African States where security forces have overthrown legally constituted governments or refuse to submit to the civilian authorities. For a long time, crimes were committed under the aegis of government and, in many cases, those responsible for such crimes were not prosecuted and the crimes generally fell into official oblivion.⁷⁹⁹

⁷⁹⁵ Adama Dieng, Registrar of the International Criminal Tribunal for Rwanda, “Clarification on the Concepts: Justice, Reconciliation and Impunity,” ICTR (24 May 2002) at 4

⁷⁹⁶ Ibid.

⁷⁹⁷ Ibid.

⁷⁹⁸ Ibid.

⁷⁹⁹ Ibid.

The lack of accountable institutions and regimes that for political reasons refuse to investigate and punish, is major obstacle, according to Dieng, to achieving peace in post conflict Africa.⁸⁰⁰

Owing to several of these reasons, leaders who are guilty of committing crimes against their people are evasive players in international efforts towards peace. The true weight of such serious human rights violations is diminished when governments are not engaged in ending impunity. State reconstruction is further encumbered when criminal impunity increases; inevitably, this leads to more violence, and, as suggested by Dieng, this blatant reality in Africa leads to a rise in corruption, economic inequality and plundering of national resources by elites as well as widening the disparity between rich and poor.⁸⁰¹

Dieng argues that such conduct should be:

characterized as a crime against humanity. The danger in the link between corruption and organized crime in Africa is the institution of all-encompassing corruption. The negative aspects of corruption and criminal impunity are two issues that cannot be reconciled with democratic principles. It is necessary to find efficient methods of prevention, suppression and prosecution, both internationally and internally. The two phenomena are closely connected.⁸⁰²

Impunity should not be addressed in vague terms as this inevitably leads to the refusal to address the problem openly. Dieng suggests that in reconstruction efforts, it is not possible to rely solely on the local judicial system as it is too often deeply infected with the virus of impunity. He notes that “African judges, in the main, can only enjoy relative independence with some chinks of apparent impartiality”.⁸⁰³ While in Iraq, as noted above, the chosen model was

⁸⁰⁰ Ibid. at 5

⁸⁰¹ Ibid.

⁸⁰² Ibid.

⁸⁰³ Ibid. at 6

the establishment of a national court to deal with past incidents of gross and systematic violations of human rights, Dieng has advocated for an international tribunal to address the concerns of impunity in Africa. Dieng points to the example of Sierra Leone, noting that in response to an initial agreement with the Revolutionary United Front rebels:

the Special Representative of the United Nations Secretary General expressed very specific reservations in respect of the impunity guaranteed to the rebels in the agreement. The battle against impunity is in essence a dynamic process inasmuch as criminals are forever seeking new strategies to discreetly pursue their activities.⁸⁰⁴

The United Nations has, as part of its reconstruction objectives for post-conflict failed states, assisted several states with efforts to hold accountable those who are guilty of past violations of human rights. The United Nations, for example, has backed the tribunal in Cambodia that deals with mass killings and other crimes committed between April 1975 and January 1979 under the Khmer Rouge. It is reported that over 1.7 million people were killed during this time.⁸⁰⁵ However, the process of bringing those responsible to trial is slow, with the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC) only being set up in 2006. The international community provides support through the United Nations Assistance to the Khmer Rouge Trials (UNAKRT).⁸⁰⁶ The tribunal is made up of both Cambodian and foreign judges, who have raised several concerns of interference by the Government of Cambodia.⁸⁰⁷ Thus far, only one of the five people indicted by the Court for

⁸⁰⁴ Ibid. at 6

⁸⁰⁵ "UN-Backed Cambodia Genocide Tribunal Begins Fitness Hearing for Accused," UN News, New York (29 August 2011)

⁸⁰⁶ Ibid.

⁸⁰⁷ "In Cambodia, UN Legal Chief Warns on Interference in Work of Genocide Tribunal," UN News, New York (20 October 2011)

genocide, crimes against humanity and war crimes has been convicted, and his sentence is now under appeal.⁸⁰⁸

With respect to Africa, in reference to the International Criminal Tribunal for Rwanda:

The Judgements pronounced by the Tribunal have had an important impact on the entire Continent, characterized as it was for several decades by a culture of impunity. Indeed, the 1999 Lusaka Accords, regarding the conflict in the Democratic Republic of Congo, went as far as to provide for the surrender for trial before the Arusha Tribunal, of belligerents suspected of having taken part in the genocide.⁸⁰⁹

The establishment of the International Criminal Court (ICC), which is governed by *the Rome Statute*, has been an important step towards helping to eliminate impunity for those committing crimes and gross and systematic human rights violations. There exists an integral link between security and legitimacy that must be taken into account when considering the elements necessary to nation-building:

Building a legitimate and functioning state is central to maintaining peace and stability and to achieving development outcomes in post-conflict and transitional situations. Establishing human security is essential to strengthening state legitimacy. A government's legitimacy is eroded when significant areas of a county or social groups continue to challenge the state's authority (e.g. Côte d'Ivoire) or when state security forces act with impunity against their own citizens (e.g. Nepal). In periods of transition, a key role for development partners may therefore be to monitor and reinforce the peace and to provide a security guarantee for the transition process (e.g. peace keeping operations Kosovo, Liberia, Sierra Leone and Timor-Leste). Over time, however, the state's own

⁸⁰⁸ Composite Chronology of the Evolution and Operation of the Extraordinary Chambers in the Courts of Cambodia, available at www.cambodiatribunal.org

⁸⁰⁹ Adama Dieng, Registrar of the International Criminal Tribunal for Rwanda, "Clarification on the Concepts: Justice, Reconciliation and Impunity," ICTR (24 May 2002) at 6

security forces, police and justice system must be able to gain control of, if not a monopoly of the use of force.⁸¹⁰

The gradual transition from sovereign impunity to accountability, both national and international, has seen many successes, resulting from efforts by both the United Nations and NGOs. It is these international norms and instruments, such as the International Criminal Court and the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (Ottawa Convention), which have advanced the importance of state conduct in respect to violations of human rights and accountability.⁸¹¹

The Responsibility to Protect report notes that “[j]ust as the substance of human rights law is coming increasingly closer to realizing the notion of universal justice - justice without borders - so too is the process”.⁸¹² Given that the history of failed states is noticeably afflicted by the absence of rule of law, lack of accountability, and impunity, it is important that reconstruction efforts do not fail to address these issues. In the following subsection, the issue of the establishment of security as an important component in the reinforcement of reconstruction efforts will be analysed.

5.4 Establishing Security

Security is a key prerequisite to stabilizing and rebuilding a state. A main component in state-building is the restoration of national security not just in the capital city but also throughout the state; this inevitably requires the support of the international community in order to combat issues that may be present, such as trafficking in drugs and arms. This new challenge to international

⁸¹⁰ *The applicability of the Paris Declaration in fragile and conflict-affected situations: Thematic Study*, Oxford: IDL Group (August 2008) at 33

⁸¹¹ *The Responsibility to Protect* at 2.18

⁸¹² *Ibid.* at 2.18

collective security must be confronted with efforts to disarm groups, facilitate humanitarian operations, and protect civilians, with the aim of bringing about stability and security.⁸¹³

Establishing security can be at times more complicated than ending conflicts⁸¹⁴ as:

[a]lmost half of all post-conflict states fall back into violent conflict within a decade. Yet this is not unavoidable: experience shows that there are ways to rebuild the fabric of society and create institutions that enhance sustainable peace.⁸¹⁵

In establishing security, there exists the need to work with the police force and the military as well as with paramilitary units. This requires civilian oversight as “[u]naccountable, corrupt and/or subversive security forces are major barriers to state legitimacy, impede the restoration of basic services and often contribute to reigniting conflict”.⁸¹⁶

The various civil wars in Central America fundamentally affected every institution of the state, with massive human rights violations, ruined infrastructure and collapsed economies. However, since the end of the civil war in Guatemala in 1996 and the signing of the Peace Accords, the transition to demilitarization has gone relatively well. Both sides made concessions, and the guerrillas received land in exchange for arms. The signing of the Peace Accords for El Salvador in 1992 also helped to establish conditions for peace and security in that country. Civil war in

⁸¹³ Stephen K. Pichat, “Peacekeeping, Disarmament and International Force: A Circular Proposition,” *Disarmament Forum* (2000) at 13

⁸¹⁴ Derick W. Brinkerhoff, “Rebuilding Governance in Failed States and Post-Conflict,” *Public Administration and Development*, Vol. 25, No. 1 (2005) at 6

⁸¹⁵ Simon Mason, “Failed States, Post-Conflict States and Reconstruction,” Zurich: Center for Security Studies (April 2007) at 102

⁸¹⁶ Derick W. Brinkerhoff, “Rebuilding Governance in Failed States and Post-Conflict,” *Public Administration and Development*, Vol. 25, No. 1 (2005) at 6

Nicaragua ended in a compromise, with the electoral defeat of the Sandinista government in 1990.⁸¹⁷ Daniel Ortega was eventually returned to power by democratic means, and the transition has been relatively peaceful.

The security situation for the newest member of the United Nations has also been complicated, with reports of increased violence in parts of the country. The head of the United Nations Mission in South Sudan (UNMISS), Hilde Johnson, expressed, at a news conference in Juba, her concerns regarding security and violence in the country. Two months following the birth of the new state in 2011, more than 600 people have been killed in ethnic clashes. UNMISS was deployed to assist in defusing tensions and, according to the United Nations envoy, bringing about “stop-gap measures and trying to get processes in place that can help resolve the issues over time”.⁸¹⁸ Neither Sudan nor South Sudan have met their obligations and commitment to withdraw their forces from the disputed area of Abyei, creating a “serious deterioration in tensions between migrating herders and displaced farmers returning to plant their crops ... The withdrawal is essential to facilitate the return of the displaced, create conditions for a peaceful Misseriya migration and build confidence among the parties”.⁸¹⁹ Without a doubt, there is a need for further resources and police training by the United Nations; however, there are challenges in training a police force in human rights standards when 80 percent of police force is illiterate.⁸²⁰

⁸¹⁷ Jack Spence, *War and Peace in Central America*, Brookline: Hemisphere Initiatives (November 2004) at Summary

⁸¹⁸ “World is Watching How South Sudan Builds New Nations, Says UN Envoy,” UN News, New York (28 September 2011)

⁸¹⁹ “UN Warns of Further Tension as Sudan and South Sudan Maintain Troops in Disputed Area,” UN News, New York (6 October 2011)

⁸²⁰ “World is Watching How South Sudan Builds New Nations, Says UN Envoy,” UN News, New York (28 September 2011)

In order for the state to meet human security needs, there are certain tasks which need to be performed and understood. The tendency of development partners is to primarily assist in the areas of security, including disarmament and demobilisation and issues surrounding justice reform. This is understandable given that without security it is impossible to assist failed states in tackling the issues surrounding structural competency failures and assisting in their transition to a functioning state. However, there is a need to work across all levels, tackling not just security but also the social and economic needs of the local population. In the reconstruction of Afghanistan and Iraq, for example, billions of dollars have been disproportionately spent on military, while minimal attention has been given to the infrastructure and social needs of the population.

Another prime example is Liberia, in which unresolved security issues contributed to the re-emergence of conflict and a dramatic 80 percent downturn in its economy. Under-Secretary-General for Peacekeeping Operations Hervé Ladsous noted that “[i]neffective and poorly governed security sectors can become decisive obstacles to stability, poverty reduction, sustainable development and peacebuilding”. He emphasized that security is necessary for “early recovery from conflict, economic development and sustainable peacebuilding, as well as regional stability and international peacekeeping”.⁸²¹ The United Nations has also undertaken several security and development initiatives, from Burundi, Liberia, Somalia and Côte d’Ivoire to the Democratic Republic of the Congo and Guinea-Bissau, to name a few.⁸²² As well, given the ongoing conflict in parts of Africa, the Security Council “reiterates the link

⁸²¹“Security Sector Reform in African Countries Emerging From Conflict Vital, UN Says,” UN News, New York (12 October 2011)

⁸²² Ibid.

between security sector reform and socio-economic development, and underlines that such reform efforts should be situated within the broader and more comprehensive spectrum of peacebuilding”.⁸²³ It has also asked for local participation in establishing security.

Although establishing security is an important undertaking, it has been suggested that it should not be done at the expense of other commitments, such as to rule of law, education and health. Clearly, there is a need to address these various structural competencies in order to rebuild a state. Post-conflict failed states also present the need for disarmament, as will be discussed in the next subsection.

5.5 Disarmament and Demobilization

In the post Cold War era, the challenges of reconstruction and global disarmament have begun to focus less on the need to have an international force for the disarmament of states and more on the disarmament of various militia groups within certain states.

Many African countries involved in conflicts throughout the Cold War period were armed by allies of either the former Soviet Union or the United States, and many of these weapons are still in use today. Somalia, for example, “was armed in the Cold War in quantities not witnessed in other African crisis areas ... often at prices cheaper than food”.⁸²⁴ Post-conflict reconstruction necessitates that various political factions disarm and give up their arms—

⁸²³ Ibid.

⁸²⁴ Hussein M. Adam, “Somalia: A Terrible Beauty Being Born?,” in William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 79

especially heavy arms.⁸²⁵ Curtailing arms trafficking and disarming former rebel movements are part of an important approach that can be taken by the international community in order to give support to post-conflict states. It is also believed that, notwithstanding the arming of rebels during the Cold War, the international business of light and small arms has increased and has “contributed greatly to”⁸²⁶ the strife in weak and failed states. Jennifer Widner notes that “officials in West African countries issue false import documents and permit illicit transfer of weapons to other places, fuelling war well beyond [their] own borders”.⁸²⁷

War affects the capabilities of the state and alters the priorities of social services.⁸²⁸ But conflict also affects the international community’s willingness to assist. Political will can be strengthened by various images and reports that are broad in nature, although this can also lead participating states to turn their backs if the images and reports are overly negative. In reference to Somalia, for example, the Turkish General Cevic Bir made it clear that the:

failure to disarm the factions was due not only to the lack of troops and equipment, but also to the lack of willingness of some of the contributing countries to accept the level of violence and the losses in terms of human lives in a conflict where they have no direct interest.⁸²⁹

The deaths of American soldiers on 3 October 1993 eventually led to the American withdrawal from Somalia as it appeared at this time that “[a]ll attempts to reconcile the Somali factions had proven futile, and the

⁸²⁵ Ibid.

⁸²⁶ Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 160

⁸²⁷ Jennifer Widner, “Building Effective Trust in the Aftermath of Severe Conflict,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 161

⁸²⁸ William Reno, “Sierra Leone: Warfare in a Post-State Society,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 77

⁸²⁹ “Somalie. Un constat sévère de l’ancien Commandant des troupes de l.O.N.U.,” *Le Monde* (20 Janvier 1994) at 5

international community gradually lost its patience with the total lack of political results”.⁸³⁰ In the same way, the loss of Belgian soldiers led to the departure of the Belgian contingent from Rwanda. As noted above, the failure to disarm and demobilize combatants in Somalia is a major reason for the continuing meltdown. Mozambique, on the other hand, has accomplished the destruction of weapons of ex-combatants, which was critical to the prospects of peace.⁸³¹

There needs to be political will by the international community to work collaboratively with the United Nations and local partners in order to facilitate military demobilization because, as noted:

Without demilitarization, the prospects for successful state formation after state failure are dim. The proliferation of small arms also has wider implications. If the flow of weapons cannot be interrupted, the causes of state failure may spread across borders ... International action toward the curtailment of weapons proliferation is an important, necessary strategy to make state formation after state failure possible and sustainable.⁸³²

The United Nations has to date had both successes and failures. In Angola, the United Nations Verification Mission III and United Nations Observer Mission in Angola (MONUA) spent 1.5 billion US dollars⁸³³ on disarmament as was called for in the Lusaka Protocol; however, the United Nations was ineffective in its efforts during 1995 and 1996 in the administration and implementation of the Lusaka Protocol which prohibited UNITA from buying foreign arms. This effort was further undermined by several United Nations Member Countries,

⁸³⁰ Richard W. Stewart, *The United States Army in Somalia, 1992–1994*, Washington D.C.: CMH Publication (24 February 2006) at 25

⁸³¹ Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No.4 (July/August 2002)

⁸³² Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 161

⁸³³ Alex Vines “Angola unravels: the rise and fall of the Lusaka peace process,” *Human Rights Watch* (1999) at 1

including two permanent members of the Security Council (China and Russia), with no country informing the United Nations Register on Conventional Weapons, as is required.⁸³⁴ As well, in Afghanistan, the Taliban is still active in many regions of the country.

As noted above, the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* is an important international agreement, which to date has been ratified by over 157 states.⁸³⁵ In 1994, the General Assembly also adopted a resolution on a moratorium on the export of anti-personnel land mines. There have been estimates that, even with current technology, it will take nearly a thousand years to clear all the mines in the world. The legacy of state failure casts a long shadow long after peace accords are signed between warring factions. Disarmament of various militias is an important undertaking, but it also important to clear all of the anti-personnel land mines that are left behind. In Angola, the estimated number of mines is in the millions, with victims of anti-personnel mines in the tens of thousands, those who survive living with serious disabilities.⁸³⁶ In October 2011, 20 people died when a bus travelling in South Sudan ran over a landmine.⁸³⁷

In the 1990s, the Security Council expanded the role of peacekeeping by also engaging in the disarmament, demobilisation and reintegration (DDR) of failed states. The objective as defined by the United Nations is to:

contribute to security and stability in post-conflict environments so that recovery and development can begin...Through a process of removing weapons from the hands of combatants, taking the combatants out of

⁸³⁴ Ibid. at 5

⁸³⁵ See International Campaign to Ban Landmines at www.icbl.org

⁸³⁶ Adam Mynott, "Angola's Landmine Legacy," BBC News (29 November 2004)

⁸³⁷ "UN May Step Up Mine Clearance Efforts in South Sudan After Deadly Blast," UN News, New York (12 October 2011)

military structures and helping them to integrate socially and economically into society.⁸³⁸

In this regard, this process lays the groundwork for a secure environment and economic development. As will be examined in the following subsection, restoring economic and social development is another important step towards state reconstruction after failure.

5.6 Economic and Social Reconstruction

The idea of post-conflict economic and social reconstruction is especially relevant given the efforts underway in several countries that have experienced state failure. Afghanistan provided the first major test of reconstruction since the Sept. 11, 2001 terrorist attacks. The reconstruction of the economic and social life of a post-conflict state is always going to be a complicated undertaking due to destroyed infrastructure, high unemployment, poverty and fractured social networks. As Rotberg has observed, once security and rule of law are reintroduced to these failed states, economic investment becomes uncomplicated:

Restoring the people's trust in the state provides an essential platform for the reconstruction of failed and collapsed states ... state building requires time, massive capacity building, large sums from outside, debt relief...rich nations must promised not to abandon state rebuilding efforts before the tough work is finished – before a failed or collapsed state has functioned well for several years and has had its political, economic, and social health restored. The worst enemy

⁸³⁸ United Nations Disarmament, Demobilisation and Reintegration Resource Centre, available at www.unddr.org

of reconstruction is a premature exit by international organizations and donors, as in Haiti and Somalia.⁸³⁹

State formation, as indicated, also involves the construction of basic infrastructure, such as transportation, for example, as without it many African governments are unable to deliver services and provide security to all the peripheral regions and territories.⁸⁴⁰

In his first country address to the General Assembly, South Sudan President Salva Kiir expressed to the international community the many challenges facing his new nation:

In most post-conflict situations, nations would normally expect to rebuild. This is not the case for us. Even before the ravages of war could set in, our country never had anything worth rebuilding. Hence we characterize our post-conflict mission as one of construction rather than reconstruction...Our march out of the abyss of poverty and deprivation into the realm of progress and prosperity is going to be a long one.⁸⁴¹

President Kiir notes that despite the oil and natural resources, South Sudan “hardly produce[s] anything”.⁸⁴² South Sudan is still in negotiations with Sudan over oil arrangements.

It has been suggested that economic and social reconstruction needs to focus on transforming rural economies and create greater productivity:

Failed states need to create broad-based enterprises that add value to support the market chain without crippling the producers who need incentives to maximize their investment in productivity. Increased

⁸³⁹ Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 33-34

⁸⁴⁰ Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 161

⁸⁴¹ “President Salva Kiir address to the General Assembly,” UN News, New York (23 September 2011)

⁸⁴² *Ibid.*

productivity is the only way that enduring growth occurs and producers must believe that the market is remunerative and stable.⁸⁴³

States need stable economic engines dependent on the existence of an environment that is conducive to and that rewards investment. Some scholars have noted that in many places in West Africa, and elsewhere in the developing world, markets are so small and organizational capacities so feeble that it is doubtful that they will be able to generate enough investment and competition to jumpstart growth.⁸⁴⁴

Every reconstruction effort is going to be different, with some states requiring, in order to facilitate economic growth, electrification, especially in rural areas where it is necessary for people to gain a ‘connectedness’ and share in the same benefits as the rest of the state.⁸⁴⁵ Electrification is also extremely important for the establishment of medical clinics and schools. Other measures may include assisting farms in finding alternative crops in order to reduce drug production. This is especially important in places such as Colombia and Afghanistan. In September 2011, Yury Fedotov, Executive Director of the United Nations Office on Drugs and Crime (UNODC), in his official visit to Colombia in September 2011, thanked President Juan Manuel Santos for his government’s efforts to reduce drug production and support of UNODC efforts to assist farmers cultivate alternative crops. Fedotov emphasized the principle of shared responsibility in nation building, which, he added, Colombia had embraced:

⁸⁴³ Ted Weihe, “Cooperatives in Conflict and Failed States,” Falls Church: U.S. Overseas Cooperative Development Council (2 June 2004) at 3

⁸⁴⁴ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) Introduction at 8-9

⁸⁴⁵ Ted Weihe, “Cooperatives in Conflict and Failed States,” Falls Church: U.S. Overseas Cooperative Development Council (2 June 2004) at 12

Consumer countries must do their part too and reduce the demand that drives the drugs trade, trafficking and violent crime...This is a matter for all of us. I urge the international community to keep up support for Colombia, which has shouldered so much of the burden of drug-related crime and terrorism in the past.⁸⁴⁶

Seth Kaplan suggests that in order to transform failed states, the international community needs to embrace a new way of thinking about development by focusing on group identities, state capacities and business conditions and examining the underlying foundations of institutional potency.⁸⁴⁷ In essence, his argument is that inappropriate institutions contribute to failing states and that only by reshaping those institutions can dysfunctional places construct the commercial environments necessary to attract investment—without which no development can occur or be sustained—and jumpstart a self-sustaining cycle of growth. The new development paradigm that Kaplan argues for would generate the positive enticements that stimulate economic growth and international corporate investment, empower heterogeneous populations, and make the most of limited governing capacities in struggling regions.⁸⁴⁸ For Kaplan, the key to reconstructing the economies of weak and failed states is good governance, which he links to good institutions.⁸⁴⁹

State-building and post-conflict reconstruction also entail the need for political will both domestically and internationally. Some scholars have suggested that the difficulties associated with international political will have to do with the fact that, at the international level, “[n]ot all failed states are created equal ... Not all will be equally important to the United States and the international

⁸⁴⁶ “UNODC head tells President Santos that Colombia plays vital role in fighting drugs and crime,” UNODC Press Release (27 September 2011)

⁸⁴⁷ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) Introduction at 1-6

⁸⁴⁸ *Ibid.*

⁸⁴⁹ *Ibid.* at 22

community”.⁸⁵⁰ Notwithstanding the challenges presenting themselves in the Middle East, North Africa and in Asian countries such as Pakistan where terrorist groups exploit instability, many of these states are also rich in natural resources and can profit from these resources once stability and security is restored.

In 2002, United Nations Secretary-General Kofi Annan indicated that in order to succeed, post-conflict reconstruction would need to be integrated:

All these tasks—humanitarian, military, political, social, and economic—are interconnected, and the people engaged in them need to work closely together. We cannot expect lasting success in any of them unless we pursue all of them at once as part of a single coherent strategy. If the resources are lacking for any one of them, all the others may turn out to have been pursued in vain.⁸⁵¹

A coherent strategy is important in building responsibility and creating leadership roles that involve the people of the country. However, it is not possible for this to be done in isolation; therefore, the international community needs to play a major role by addressing not only the security needs but also the political, economic and social needs of the individual state. Although there are common threads that link these situations to one another, the approach must be tailored to each case.⁸⁵² States can indeed be brought back from failure, such as was the case for several countries in the Americas and in places in the Middle East, such as Lebanon.⁸⁵³

5.7 Role of Civil Society – Women and Minorities

⁸⁵⁰ John J. Hamre and Gordon R. Sullivan, “Toward Postconflict Reconstruction,” *The Washington Quarterly*, Vol. 25, No. 4 (Autumn 2002) at 86

⁸⁵¹ Annan, Kofi A., Secretary General speech to the UN General Assembly, New York (February 2002)

⁸⁵² John J. Hamre and Gordon R. Sullivan, “Toward Postconflict Reconstruction,” *The Washington Quarterly*, Vol. 25, No. 4 (Autumn 2002) at 86

⁸⁵³ Oren Barak, “Lebanon: Failure, Collapse, and Resuscitation,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 305

State-building is a difficult process dependent on several factors, including strong support from civil society; however, civil society requires a functioning state that can provide basic public order and security.⁸⁵⁴ Michael Bratton borrows Alexis de Tocqueville's theory of associational life, which stresses volunteerism and community spirit as a counterbalance which helps to keep the state accountable and effective, but argues that this cannot flourish "amid political disorder; lawlessness, an inadequate physical infrastructure or intermittent essential services"⁸⁵⁵ given that "civic organizations depend upon the state for the creation of certain basic conditions existence".⁸⁵⁶ Civil society is difficult to build even in the best conditions, and in the reconstruction of failed states, it becomes even more complex.

In most states, civil society plays a major role in advocacy, but in the context of a failed state, the role of advocacy is less relevant than the need to provide many of the functions generally associated with the state, such as education and public health.

The general pattern has thus far been a transplanted civil society made up of foreign NGOs that depend on foreign donations to operate.⁸⁵⁷ Clearly, this is not a sustainable solution; as has been suggested, it can create its own set of problems as when states become reliant on outside support, there is a propensity for them to collapse as soon as that support ends. The problem is further compounded by the reality that in many failed states the very resources that are needed to support civil society are often used

⁸⁵⁴ Daniel N. Posner, "Civil Society and the Reconstruction of Failed States," in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 247

⁸⁵⁵ Michael Bratton, "Beyond the State: Civil Society and Associational Life in Africa," *World Politics*, Vol. 41, No. 3 (1989) at 427-428

⁸⁵⁶ *Ibid.*

⁸⁵⁷ Zie Gariyo, "NGOs and Development in East Africa: A view from Below," in Michael Edwards and David Hulme (eds.), *Developing Uganda*, Oxford: James Currey (1998) at 156-65

by the state to stifle and undermine such work.⁸⁵⁸ Organizations administered by civil society need the state to provide the basic conditions upon which their very existence depends.⁸⁵⁹ This is not to say that civil society groups can never materialize in a context of state failure, but, as Daniel Posner has noted, “they will have the cards stacked against them”.⁸⁶⁰ The damage to civil society caused by state failure is not easily repaired, and therefore restoring public trust and confidence is a slow and difficult process, even after public order and security have been achieved.⁸⁶¹ The suggested approach is to rebuild the state “progressively from the bottom up through self-established structures within the framework of civil society”.⁸⁶² By mobilizing efforts in support of reconstruction in this manner, “the consciousness of the public and the will of the state can come together and crystallize around various points such as the domains of transport, health, education, agriculture, and local government”.⁸⁶³

State-building also entails the strengthening of human rights instruments and a greater promotion of gender equality in order to prevent further inequalities. In Sierra Leone, for example, women suffered much gender-based violence during the war.⁸⁶⁴ Sierra Leone is but one illustration of several other failed states where rape and other acts of gender-based violence are used as weapons

⁸⁵⁸ Daniel N. Posner, “Civil Society and the Reconstruction of Failed States,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 244

⁸⁵⁹ Michael Bratton, “Beyond the State: civil Society and Associational Life in Africa,” *World Politics*, Vol. 41, No. 3 (1989) at 427-428

⁸⁶⁰ Daniel N. Posner, “Civil Society and the Reconstruction of Failed States,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 247

⁸⁶¹ René Lemarchand, “The Democratic Republic of the Congo: From Failure to Potential Reconstruction,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 35

⁸⁶² Daniel Thürer, “An internal challenge: partnerships in fixing failed states,” *Harvard International Review*, Vol. 29, No.4 (Winter 2008)

⁸⁶³ *Ibid.*

⁸⁶⁴ *The applicability of the Paris Declaration in fragile and conflict-affected situations: Thematic Study*, Oxford: IDL Group (August 2008) at 36

of war. A United Nations General Assembly report of the Ad Hoc Committee of the Whole of the Twenty-third Special Session notes that:

Peace is inextricably linked to equality between women and men in development. Armed and other types of conflicts, wars of aggression, foreign occupation, and colonial or other alien domination, as well as terrorism, continue to cause serious obstacles to the advancement of women.⁸⁶⁵

The Security Council has also taken important steps to promote gender equality in post-conflict reconstruction. In October 2000, the Security Council unanimously adopted Resolution 1325 on women, peace and security, which stresses the need to address “gender issues in all peacebuilding and peacekeeping efforts and to include women in the key institutions and decision-making bodies committed to the building and maintenance of peace”.⁸⁶⁶

Secretary-General Kofi Annan, taking note of the Security Council actions, remarked that:

In war-torn societies, women often keep societies going. They maintain the social fabric. They replace destroyed social services and tend to the sick and wounded. As a result, women are the prime advocates of peace.⁸⁶⁷

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), which was adopted by the General Assembly in 1979, has rarely been implemented in failed states. State-building will always be a daunting task without both the full participation of women and greater gender equality in society.

⁸⁶⁵ *Gender Approaches in Conflict and Post-Conflict Situations Report*, United Nations Development Programme (2-6 April 2001) at 1

⁸⁶⁶ Security Council Resolution 1325 (31 October 2000)

⁸⁶⁷ *Gender Approaches in Conflict and Post-Conflict Situations Report*, United Nations Development Programme (2-6 April 2001) at 2

In Afghanistan, some of the earlier gains for women following the removal of the repressive Taliban government have been sidestepped as of late. Concern over this is shared by Dr. Massouda Jalal who was the first female candidate for presidency in Afghanistan and is the former Minister of Women's Affairs; she suggested, in her presentation before the Canadian House of Commons Subcommittee on International Human Rights, that donor nations such as Canada request a gender audit, given that money rarely reaches women's organizations or helps improve their lives.⁸⁶⁸ As noted above, the Afghan Shia Personal Status Law severely limits women's rights in both the private and public spheres. The law was originally intended to recognize the minority rights of the Shia community in Afghanistan. However, addressing minority concerns in the reconstruction of a state should not be at the expense of women's rights. Reconstruction in Bosnia and Herzegovina, for example, not only included institutional reform to rule of law as stipulated by the Dayton Peace Accords of 1995 but also legislation that protects minority rights through adoption of power-sharing arrangements and reform of the judiciary to include a multi-ethnic character.⁸⁶⁹

The challenges present in the reconstruction of failed states are multifaceted and complex. Additionally, the approaches that are needed to address these challenges and support recovery are also diverse. Although many of the approaches have been discussed in relation to the issues of reconstruction, also included is, as shall be discussed in the following subsection, the reconstruction of political structure and legitimacy.

⁸⁶⁸ Canadian House of Commons, Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, 40th Parliament, 3rd Session (8 June 2010)

⁸⁶⁹ Governance Strategies for Post Conflict Reconstruction, Sustainable Peace and Development, UN DESA Discussion Paper (November 2007) at 31-2

5.8 Reconstituting Political Structure and Legitimacy

During reconstruction efforts in failed states, the co-operation of different political factions is needed to promote stability and peace as most of these states are prone to having power consolidated in the hands of a few individuals or groups. It has also been seen that some of these groups, such as in Sierra Leone and Liberia for example, have a stake in the conflict because war has often allowed them to profit either economically or politically. In pursuing state reconstruction and avoiding state failure caused by civil war, the importance of governance in establishing peace in order to avoid conflict in the first place is highlighted. The challenges to institution-building are particularly pressing in failed states, where there is a critical need to construct new institutions and reconstruct weakened or collapsed ones.

Legitimacy is extremely important as the loss of legitimacy is a key factor in state failure. Reconstituting legitimacy should involve expanding participation, re-establishing rule of law, and holding free and fair elections. In almost all recent cases of state failure, political reconstruction and renewal has involved elections. These post-conflict elections carry a tremendous burden, as they are organized under difficult circumstances and with lack of security. In spite of these problems, in the context of a failed state, elections serve as important opportunities for rebuilding institutions and transitioning to democracy. These are long-term processes that are not simply about one particular election. What needs to be built is a “political system that encourages government, political, business and civic leaders to articulate and pursue objectives that are centered around people and a system that promotes public

consensus on these objectives”.⁸⁷⁰ In order to build a national consensus, objectives that have legitimacy in the eyes of the people are required.

One of the other solutions that has been presented is the proposal for temporary power-sharing arrangements between different factions. For example, in Angola, where the society was strongly divided, many concluded that power-sharing was necessary in creating peace and stability.⁸⁷¹ Lebanon is another state that included a host of power-sharing arrangements in their reconstruction efforts; these arrangements were outlined in the *Charter of Lebanese National Reconciliation* (Ta’if Accord), which was adopted in 1989 after the fifteen-year-long civil war came to an end.⁸⁷² In the early days of independence, a political compromise of power-sharing was reached between two prominent Lebanese leaders, a Maronite Christian and a Sunni Muslim.⁸⁷³ This power-sharing agreement is strongly entrenched in the political system; attempts to change it have been unsuccessful. A power-sharing arrangement is an option that is often considered following a signing of a peace deal; however, it has been suggested that there are long-term negative effects on democratization as a result of minority groups demanding more power from the deal.⁸⁷⁴ The United Nations also provided assistance in Lebanon through the United Nations Interim Force in Lebanon (UNIFIL) that was created by Security Council Resolutions 425 and 426 in 1978. However, with the various civil wars that followed, its mandate had to be adjusted several times.⁸⁷⁵

⁸⁷⁰ “Governance for sustainable human development, Good governance - and sustainable human development,” United Nations Development Programme, policy document (1996)

⁸⁷¹ Marina Ottaway, “Democratization in Collapsed States,” in William Zartman (ed.), *Collapsed States: The Disintegration and Reinstitution of Legitimate Authority*, Boulder: Lynne Rienner (1995) at 248

⁸⁷² Anna Jarstad, “The logic of power sharing after civil war,” Oslo: Center for the Study of Civil War (2006) at 1

⁸⁷³ Oren Barak, “Lebanon: Failure, Collapse, and Resuscitation,” in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C.: Brookings Institution Press (2003) at 305

⁸⁷⁴ Anna Jarstad, “The logic of power sharing after civil war,” Oslo: Center for the Study of Civil War (2006) at 1

⁸⁷⁵ Security Council Resolutions 425 and 426 (19 March 1978)

As noted above, as institution-building is critical to bringing about stability, post-conflict elections are an important step in the process of state reconstruction. Awareness of this is particularly pertinent with regard to a number of African states where state failure is associated with authoritarian rule, disregard for rule of law and a culture of impunity. Nonetheless, reconstruction efforts in those states were impeded by power-sharing arrangements that included bringing violent actors who, as some have suggested, “have already demonstrated failed leadership” into the process.⁸⁷⁶

It has been noted that most African states have never had effective institutions and have instead relied on the personalized networks of patronage; however, “[t]hey have never generated sustainable growth. Factionalism has always been politically prevalent, and states have more often been instruments of predation and extraction than tools for the pursuit of public goods”. As a consequence, state failure in Africa has been described as a “permanent mode of political operation”.⁸⁷⁷ Both participation and governance require a free and fair election process that gives a voice to the disenfranchised population. But unfortunately, as noted by scholars, the election process has its limits as many governments in Africa are hardly democratic and it is doubtful that they would bring in the necessary fundamentals of governance.⁸⁷⁸

Reconstituting legitimacy entails “expanding participation and inclusiveness, reducing inequities, creating accountability, combating corruption and

⁸⁷⁶Pierre Engelbert and Denis M. Tull, “Post-conflict Reconstruction in Africa: Flawed ideas and Failed States,” *International Security*, Vol. 32, No. 4 (Spring 2008) at 109-110

⁸⁷⁷ *Ibid.* at 110

⁸⁷⁸ Abdel-Fatau Musah, “Privatization of Security, Arms Proliferation and the Process of State Collapse in Africa” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Oxford: Blackwell Publishing (2003) at 177

introducing contestability (elections)”.⁸⁷⁹ According to the 2001 UNDP report, democracy is the governing system with the strongest legitimacy:

Democracy has proven to be the system of governance most capable of mediating and preventing conflict and of securing and sustaining well-being. By expanding people's choices about how and by whom they are governed, democracy brings principles of participation and accountability to the process of human development.⁸⁸⁰

The report further argues that for “politics and political institutions to promote human development and safeguard the freedom and dignity of all people, democracy must widen and deepen”.⁸⁸¹

The international community recognizes, through several declarations, that democracy is the pre-eminent system of governance; nevertheless, in various states, “the path to democratisation has proven tortuous; traditional and informal sources of power and authority vie for legitimacy, sometimes constituting an alternate ‘state’ within a state”.⁸⁸² In post-reconstruction Afghanistan, for example, regional warlords have sought legitimization through the assumption of the trappings of democracy.⁸⁸³ Both Iraq and Afghanistan are illustrations of attempts at state-building in which success has been elusive, which, as has been suggested, is perhaps attributable to the realities on the ground in these countries. This has led policymakers to note that “[d]emocracy may be a good thing in itself, but it can only work where there is a functioning state to democratize”.⁸⁸⁴ Beyond elections and the need

⁸⁷⁹ Derick W. Brinkerhoff, “Rebuilding Governance in Failed States and Post-Conflict,” *Public Administration and Development*, Vol. 25, No. 1 (2005) at 5

⁸⁸⁰ *Human Development Report 2002: Deepening Democracy in a Fragmented World*, Oxford: Oxford University Press (2002) at 2

⁸⁸¹ *Ibid.* at 1

⁸⁸² Derick W. Brinkerhoff, “Rebuilding Governance in Failed States and Post-Conflict,” *Public Administration and Development*, Vol. 25, No. 1 (2005) at 5

⁸⁸³ *Ibid.*

⁸⁸⁴ Lars Engberg-Pedersen et al, *Fragile Situations Background Papers*, Copenhagen: Danish Institute for International Studies (2008) at 14-15

for political reform, the difficult transition to stability, as shall be discussed in the next subsection, may also require addressing issues of reconciliation and the possible need for a transitional justice mechanism.

5.9 Reconciliation – Transitional Justice

Reconciliation efforts in many post-conflict failed states are complicated by the difficulties associated with perpetrators and victims often resettling together in the same community. Although the definitions of reconciliation may vary, it has been suggested that it can mean “co-existence or it can mean dialogue, remorse, apology, forgiveness and healing.”⁸⁸⁵ Transitional justice is often referred to as “short-term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a society’s transition away from conflict or authoritarian rule”.⁸⁸⁶ Both approaches have generated interest in both political and legal discussions of reconstruction after state failure. No specific model exists in rebuilding social trust and cohesion; since the Nuremberg Trials, states have been exploring both legal and extralegal means by which to take action in relation to mass violations of human rights.

In Nepal, the decade-long civil war which eventually led to the abdication of the monarch in 2008 created deep divisions within society. The new government has commenced the process of establishing transitional justice mechanisms to address the abuses of the civil war which killed 13,000 people

⁸⁸⁵ Sanam N. Anderlini, Camille P. Conaway and Lisa Kays, *Transitional Justice and Reconciliation*, Cambridge: Hunt Alternative Fund (2006) at 2

⁸⁸⁶ *Ibid.*

and accounted for countless cases of forced disappearance and torture.⁸⁸⁷ However, Robert Piper, the United Nations Resident and Humanitarian Coordinator, has raised concerns regarding this process and has recently urged the international community to heed warnings of impunity and requests for amnesty, indicating that this:

would deny victims justice at a time when the rule of law should be the foundation of the transitional justice process and of the new constitutional order that is being built...The laws must emphasize the impermissibility of any measures that could provide amnesty for the perpetrators of serious human rights violations and war crimes, including rape, enforced disappearances, torture and summary executions.⁸⁸⁸

Adama Dieng has also noted that impunity is one of the major obstacles to national reconciliation efforts. He asserts that, in addition to legal courses of action, reconciliation requires, first, a level of trust, followed by justice and the consideration of forgiveness that he says “helps drive away the demons of vengeance or private justice”.⁸⁸⁹ In the case of South Africa, the Truth and Reconciliation Commission as well as special courts have contributed to state stability. Adama Dieng notes that reconciliation should be based on truth, as it:

remains a perilous, uncertain undertaking when aimed at simply eliminating the traces of disgraceful, inhuman acts. In many chaotic political situations, taking the road to reconciliation simply means obliterating the past...The various perpetrators of violations consider that whatever is past is past and must no longer impinge on the present or the future. Victims must forgive and forget.⁸⁹⁰

However, Dieng has also indicated that in South Africa, after the elections resulted in an African National Congress win, “[c]ertain people who were

⁸⁸⁷ “Nepal: UN Calls for no Pardons or Impunity in Cases of Human Rights Abuses,” UN News, New York (13 September 2011)

⁸⁸⁸ Ibid.

⁸⁸⁹ Adama Dieng, Registrar of the International Criminal Tribunal for Rwanda, “Clarification on the Concepts: Justice, Reconciliation and Impunity,” ICTR (24 May 2002) at 4

⁸⁹⁰ Ibid. at 3

bruised and frustrated by the apartheid regime called for the Whites to be thrown into the sea”.⁸⁹¹ This illustrates that, although the Truth and Reconciliation Commission removed some of the political and social tension, it is not a model that can be applied without discrepancy.⁸⁹²

The South African model of reconciliation after the apartheid regime placed understanding:

over vengeance, reparation has primacy over retaliation, and the human spirit has primacy over retribution. In order to move forward on the road to reconciliation and reconstruction, amnesty was granted to those who committed serious acts in the past. One of the main purposes of the Commission was to facilitate the granting of amnesty to persons who made full public revelations regarding politically-motivated acts.⁸⁹³

Although it was suggested that perpetrators of violence be granted amnesty in order not to fuel anger and hatred, “[t]he international community had declared the apartheid political system to be a crime against humanity, and rightfully so, and all those who participated in the odious apartheid system should have been prosecuted”.⁸⁹⁴ In contrast to the view of the international community, the new African National Congress government led by President Nelson Mandela believed that prosecution would further worsen the political situation. It has been noted by Adama Dieng that it was more “akin to collective therapy” as “[t]he tormentors were able to externalize their guilty conscience and thus feel as if they were given a new lease on life”.⁸⁹⁵

Dieng has suggested that African states would benefit immensely if they were to incorporate the principle of universal jurisdiction. States can officially legislate the principle of universal jurisdiction, a principle that globalizes

⁸⁹¹ Ibid.

⁸⁹² Ibid.

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid.

justice and plays an important part in promoting criminal responsibility and preventing impunity. However, many of these states face several challenges to prosecuting their own criminals, let alone those of other states.

Amnesty has also been employed by various governments in the transition from state failure or as a political tool of compromise following civil war. Amnesty dates back to ancient time and is generally granted to a group of people who have committed crimes against the state. Amnesty may be understood as follows:

Amnesty is meant to defuse tensions, rather than to seek miracle solutions that would end political violence. Its ultimate objective is to bring the main parties in the political chaos to the negotiating table to find together how to turn the page and, in the absence of honourable surrender, identify ways to defuse tension.⁸⁹⁶

However, there are drawbacks as illustrated during the Angolan civil war when the 1992 handshake between Jonas Savimbi of UNITA and President Dos Santos of MPLA did not result in an end to the fighting. As well, in Rwanda, the Commission on National Unity and National Reconciliation existed but was unable to prevent the genocide. It may be recalled that the Commission had been established by the 1993 Arusha Accords and was tasked with creating the necessary conditions for peace and reconciliation.⁸⁹⁷ Dieng has suggested that the concepts of justice, reconciliation and impunity are “fraught with shortfalls”.⁸⁹⁸ Often, it is the case that these undertakings involve negotiations with perpetrators of unspeakable human rights abuses who “demand and often obtain legal absolution for their crimes as the price of their surrender or of reconciliation”.⁸⁹⁹

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid. at 2

⁸⁹⁹ Ibid.

In the aftermath of the 1994 genocide, the new Rwandan government was confronted not only by the need to deliver justice, but also by the need to create unity by adopting a law that instituted the Commission for National Unity and Reconciliation.⁹⁰⁰ The government also created other methods of transitional justice such as the Gacaca courts “whose ambitions are several: not only to bring forth the truth, but also to bring justice closer to the public at large by relying on traditional values that can contribute to promoting reconciliation”.⁹⁰¹ This was in large part due to the fact that the courts were unable to deal with all the cases of genocide brought before the court. Seven years after the genocide only a small number of the thousands suspected of taking part have been brought to trial, and the government estimated that to try all those accused would take the court 200 years.⁹⁰² A report that examines the effects that this newly integrated system of courts has on the process of reconstruction of the Rwandan State recognizes the need for innovation in creating new systems of justice, as within each context exists various differentiating factors. The report finds that:

Rwanda’s decision to create the Inkiko-Gacaca system is situated within both the particularities of Rwanda’s unique historical circumstances and the broader context of worldwide attempts to respond to mass atrocities.⁹⁰³

Despite government efforts of unity, there is still great mistrust between the Hutu majority and the Tutsi minority.

⁹⁰⁰ Rwanda Law No. 3.99, Commission for National Unity and Reconciliation (12 March 1999)

⁹⁰¹ Adama Dieng, Registrar of the International Criminal Tribunal for Rwanda, “Clarification on the Concepts: Justice, Reconciliation and Impunity,” ICTR (24 May 2002) at 4

⁹⁰² Catherine Honeyman et al, “Establishing Collective Norms: Potentials for Participatory Justice in Rwanda,” *Peace and Conflict: Journal of Peace Psychology*, Vol. 10, No.1 (2004) at 2

⁹⁰³ *Ibid.*

The United Nations has noted the need for transitional justice mechanisms in places such as Libya, Côte d'Ivoire and Syria. While some United Nations initiatives have been successful, others, such as those in Togo, the Democratic Republic of the Congo, Côte d'Ivoire and Sierra Leone, have met with mixed results.⁹⁰⁴ However, in recent years, it has been suggested that the focus has started to shift from transitional justice processes towards questions of outcomes given that many of the processes lack adequate implementation:

The lack of coherence between the peace consolidation process as a medium term action on the one hand, short-term peacekeeping actions and long-term development efforts on the other, may further destabilize efforts to achieve sustainable peace and development.

In order for international intervention efforts as an emerging practice to gain legitimacy, they need to be integrated into a larger and more enduring solution that includes reconstruction of several structural competencies, as listed above. Preventative measures that are sustainable, accountable and have support from the local community are also necessary. As will be noted in the next subsection, these are some of the lessons learned from past attempts at reconstruction of failed states.

5.10 Lessons Learned

The challenges of reconstruction are complex, multifaceted and are burdened at times by history, geography and lack of international and domestic political will. The strategies to address state failure are equally diverse; however, as noted above, there are common shared principles of *conditio sine qua non* for

⁹⁰⁴ Adama Dieng, Registrar of the International Criminal Tribunal for Rwanda, "Clarification on the Concepts: Justice, Reconciliation and Impunity," ICTR (24 May 2002) at 4

reconstruction of the structural competencies of the state, including establishing transparent and accountable rule of law procedures, ending impunity, creating security, rebuilding the economy, providing a greater role for women and minorities, establishing legitimate political structures, and ensuring the conditions necessary for reconciliation within society. These approaches will inevitably require some compromise. Assistance from the international community will also prove necessary in providing the necessary tools and mechanisms to restore efforts for a sustainable peace.

The Paris Declaration on Aid Effectiveness of February 2005 was endorsed by more than 100 signatories—from donors and governments of developing-country multilateral donor agencies, international organizations and regional development banks. The Declaration went further than previous agreements in that it broadened the consensus in the international community on how to deliver aid more effectively to weak and fragile states. The Declaration was a result of the international community coming together at the Paris High Level Forum on Aid Effectiveness. The event was hosted by the French government and organised by the Organisation for Economic Co-operation and Development. The Declaration developed the Fragile States Principles, which created a model that holds countries receiving international aid to standards of accountability based on the five principles of “ownership, alignment, harmonisation, managing for results and mutual accountability”.⁹⁰⁵ However, Michailof has suggested that the principles of the Paris 2005 and Accra 2008 conferences on aid effectiveness have been largely inoperative.⁹⁰⁶

⁹⁰⁵ *The applicability of the Paris Declaration in fragile and conflict-affected situations: Thematic Study*, Oxford: IDL Group (August 2008) at Preface

⁹⁰⁶ Serge Michailof, “The Challenge of Reconstructing ‘Failed’ States What lessons can be learned from the mistakes made by the international aid community in Afghanistan?,” *Journal of Field Action: Field Actions Science Reports* (1 October 2010) at 52

Part of the difficulty in delivering assistance is that there is no structure in place to ensure that aid is managed adequately and no way to guarantee that all those involved will set or respect mutually agreed-upon priorities. Furthermore, there is no named manager who can be given the responsibility of being in charge of the operations; “[a]lthough the United Nations may have the legitimacy to do so, and UNDP always attempts to take the lead, neither the United Nations nor its UNDP arm have the technical capacity and the political clout to do so”.⁹⁰⁷ Also, aid delivery is ineffective and at times uncoordinated. Some failed states cannot meet donor conditions, and there are frequently ineffective mechanisms in place for setting national priorities, further limiting the capacity for reform.⁹⁰⁸ A 2011 Oxfam report was critical of the lack of reconstruction progress in Haiti by the Interim Haiti Recovery Commission (IHRC), which was created to coordinate projects and avoid duplication.⁹⁰⁹

Prevailing also is a lack of donor interest in remaining to administer government and state functions exceeding an initially set timeline. It has been suggested that a successful policy of reconstruction cannot rest solely on the shoulders of international donors or NGOs without integration into a national program. Aid agencies, governments and academics tend to focus on ‘one-size-fits-all’ solutions, which are believed to be one of the reasons that international efforts to repair failed states have yielded so little positive results. As the Director for the Centre for Global Development, Stewart Patrick, has noted, there is a tendency to assume a link between weak governance and transnational threats, without distinguishing between the different categories of

⁹⁰⁷ Ibid. at 11

⁹⁰⁸ *Why We Need to Work More Effectively in Fragile States*, London: U.K. Department for International Development (January 2005) at 15

⁹⁰⁹ Sal Gentile, “Report criticizes Haiti recovery commission led by Bill Clinton,” *PBS International* (7 January 2011)

weak and failing states and considering how certain categories of countries may be associated with particular threats.⁹¹⁰

The World Bank's Independent Evaluation Group has also concluded that past international commitments have failed to realize any significant developments and that donors and others continue to struggle with how best to assist.⁹¹¹ However, this raises the question not of how better to assist but whether there is sufficient commitment to actually take ownership—are international states prepared to invest the time, energy and money required to repair a failed state if it is not in their interest? This may explain why some states are involved in Afghanistan and not in Somalia.

Robert Rotberg argues that prevention and reconstruction of failed states requires “getting nation building right”, which “is possible if there is sufficient political will and targeted external assistance”.⁹¹² Other scholars, such as Francis Fukuyama, suggest that the need to strengthen ‘stateness’ can be met through improving government administrative capacities. James Mayall has focused on matters associated with state legitimacy, the role of identities, and the need to gear development “to the way the society is structured and functions economically”⁹¹³ as lessons learned from past mistakes in reconstruction have also demonstrated.

Some positives steps that have taken place at the international level include the

⁹¹⁰ Stewart Patrick, Weak States and Global Threats: Fact or Fiction?, *The Washington Quarterly*, Vol. 29, No. 2 (Spring 2006) at 28 and 29

⁹¹¹ Seth D. Kaplan, *Fixing Fragile States A New Paradigm For Development*, Westport: Praeger Security International (2008) at Introduction 6-7

⁹¹² Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No.4 (July/August 2002) at 127-140

⁹¹³ James Mayall, “The Legacy of Colonialism,” in Simon Chesterman, Michael Ignatieff and Ramesh Thakur (eds.), *Making States Work*, Tokyo: United Nations University Press (2005) at 57

actions taken by the Security Council following the electoral crisis in Côte d'Ivoire that was created when President Laurent Gbagbo refused to step down after being defeated by Alassane Ouattara. Following the 2010 Presidential election and the ensuing political crisis, the Security Council took several steps to demand that Gbagbo step down and also provided assistance to the United Nations Operation in Côte d'Ivoire (UNOCI)⁹¹⁴ to help the newly elected Ivorian Government transition to reconciliation and democracy by supporting the state in the preparation of legislative elections.⁹¹⁵ In September 2011, Côte d'Ivoire took further measures at reconciliation by creating the Truth, Reconciliation and Dialogue Commission to deal with violence during the civil war that killed over 3,000 and displaced over 5,000 people.⁹¹⁶ It is still relatively early to judge how the work of the Commission will affect Ivorian society, but it is hoped that it will be a positive step forward in the reconstruction of the state.

The examples of Tajikistan and Lebanon as well as places which had United Nations transitional administrations such as Cambodia, Kosovo and Timor-Leste all suggest that with political will and targeted international assistance failed states can indeed recover.⁹¹⁷ Rotberg points to what is required of transitional administrations in order for them to become more effective and notes that while the international administrations in the above three examples were able to provide basic security, rebuild the police forces, train national government administrators, promote the rule of law, revitalize economies and

⁹¹⁴ In 2002 a civil war split into a Government-run south and a rebel-held north. The Security Council having determined that the situation in Côte d'Ivoire poses a threat to international peace and security in the region and acting under Chapter VII adopted Resolution 1528 and established the United Nations Operation in Côte d'Ivoire (UNOCI). UNOCI replaced the United Nations Mission in Côte d'Ivoire (MINUCI).

⁹¹⁵ "Côte d'Ivoire: UN Has Key Role in Strengthening Democracy, President Says," UN News, New York (22 September 2011)

⁹¹⁶ "Ivory Coast gets truth and reconciliation commission," BBC News Africa (28 September 2011)

⁹¹⁷ Robert I. Rotberg, "Failed States in a World of Terror," *Foreign Affairs*, Vol. 81, No.4 (July/August 2002)

even register voters, they left shortly after. He discusses the problems that arise from short-term fixes and advocates for more commitment:

[S]ustainable nation building demands more than a quick fix. It requires a long-term commitment by outsiders to building capacities, strengthening security, and developing human resources. The uncomfortable but necessary lesson of these partially effective attempts is that the revival of failed states will prove more successful if a regional or international organization takes charge and only very gradually relinquishes authority to an indigenous transitional administration.⁹¹⁸

The notion of robust engagement in failed state reconstruction is consistent with the notion of shared sovereignty, which will be discussed further in Chapter 6.

Jeffrey Herbst and Greg Mills have argued that there is a need to prevent the development of a “constituency of losers”.⁹¹⁹ As noted above, fixing the structural competency of state failure is necessary for state-building and reconstruction. This means improvement of accountability, rule of law reform *as a sine qua non* for good governance and development, and preventing what Herbst and Mills refer to as a ‘fault-line.’⁹²⁰ Donors have a tendency not to deliver significant aid to failing states until there is a crisis, and states, over time, tend to reduce their efforts to the point that makes it difficult for the failing state to succeed.⁹²¹

Several scholars and policymakers have suggested that it is of crucial importance to state-rebuilding efforts that the support offered to the state continues beyond the initial stages of rebuilding:

⁹¹⁸ Ibid.

⁹¹⁹ Jeffrey Herbst and Greg Mills, “The Fault Lines of Failed State,” *Foreign Policy* (15 August 2011)

⁹²⁰ Ibid.

⁹²¹ *Why We Need to Work More Effectively in Fragile States*, London: U.K. Department for International development (January 2005) at 12

When a state fails or collapses, it destroys trust and mutilates its institutions. That is why sustained state rebuilding requires time and enduring economic and technical commitments. Rich nations must promise not to abandon state rebuilding before the tough work is finished -- before a failed state has functioned well for several years and has had its political, economic, and social health restored. The worst enemy of reconstruction is a premature exit by donors, international agencies, and countries backing reconstruction initiatives.⁹²²

Another equally important reconstruction measure is the necessity for security to be distributed throughout entire regions, not only major ports or cities. In order for any progress to be made, security must be made available to people in all areas of the state and the ability to safely travel and to engage in commercial activity must be ensured.

Reconstruction efforts need development assistance in order to help strengthen the capacity of the state to support the positive obligations to the people, including the capacity to include the many diverging voices that are needed to take part in “the role of non-partisan, independent watchdog in the fight against bad governance and corruption. This means building the capacity and ensuring the independence of such institutions as the judiciary, the security services and the media”.⁹²³ These challenges are significant and it is hoped that with the lessons learned from previous international operations more effective strategies can be developed. However, as noted above, this is only possible when there is national and international political will.

⁹²² Robert I. Rotberg, “Failed States in a World of Terror,” *Foreign Affairs*, Vol. 81, No.4 (July/August 2002)

⁹²³ Abdel-Fatau Musah, “Privatization of Security, Arms Proliferation and the Process of State Collapse in Africa” in Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction*, Blackwell Publishing (2003) at 5-7

Chapter 6: Challenges for the International Community

State failure creates several humanitarian and legal challenges for the international system, including poverty, mass refugee flow and lack of security. As well, it has been suggested that in the absence of effective governmental control, violence and criminal economic activity thrive; terrorists benefit from the prevailing anarchy. For these reasons failed states have increasingly been perceived as a source for concern by the international community, and, as noted above, a variety of international responses have been attempted and proposed.

However, the international community is not always adequately organized to deal with state failure, nor do they have the tools necessary to prevent conflict and manage the aftermath. The difficult choices that must be made in conflict prevention and reconstruction of failed states usually entail peacekeeping measures by the United Nations. Inevitably, long-term investments and commitments by member states are required. The following subsections analyse the important role the United Nations plays in peacekeeping and in providing humanitarian assistance. In addition, there is a growing body of literature that notes that short-term measures alone cannot deal with state failure and that possible alternatives, such as trusteeship, should be considered.

6.1 Role of United Nations

In January 1992, in his report to the Security Council, United Nations Secretary-General Boutros-Boutros Ghali requested that the international

community put together new peace-building architecture in order to assist states in transition from conflict to peace, with the emerging of the United Nations as a “central instrument for the prevention and resolution of conflicts and for the preservation of peace”.⁹²⁴ Indicating that where conflict begins to explode, there is a duty to resolve the issues that led to conflict by engaging in peacemaking:

to work to preserve peace, however fragile, where fighting has been halted and to assist in implementing agreements achieved by the peacemakers; To stand ready to assist in peace-building in its differing contexts: rebuilding the institutions and infrastructures of nations torn by civil war and strife; and building bonds of peaceful mutual benefit among nations formerly at war.⁹²⁵

Notwithstanding his remarks, it has been suggested that the post-Cold War period has not been one of the United Nations finest moments, especially after the failures in Srebrenica, Somalia and Rwanda, which were all stark reminders that the end of the Cold War did not usher in an era of peace and stability, but rather that the nature of conflicts changed, with a number of largely intra-state conflicts finding the space to erupt.

The International Court of Justice has also played a significant role in the adjudicating of disputes. Under United Nations Chapter XIV, Article 92: “The International Court of Justice shall be the principal judicial organ of the United Nations”.⁹²⁶ The International Court of Justice plays two main roles in state affairs, which are “to settle in accordance with international law the legal disputes submitted to it by States” and “to give advisory opinions on legal questions referred to it by duly authorized international organs and

⁹²⁴ *An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, New York: Report of the Secretary-General (17 June 1992)

⁹²⁵ *Ibid.*

⁹²⁶ United Nations Charter signed at San Francisco on 26 June 1945 at XIV(92)

agencies”.⁹²⁷ The Secretary-General noted the importance of the contribution of the Court to peacemaking when he asked that the Security Council take action under Articles 36 and 37 of the Charter and recommended that Member States submit disputes to the International Court of Justice and establish a Trust Fund to assist those countries that are unable to afford the cost of submitting disputes:

(a) All Member States should accept the general jurisdiction of the International Court under Article 36 of its Statute, without any reservation, before the end of the United Nations Decade of International Law in the year 2000. In instances where domestic structures prevent this, States should agree bilaterally or multilaterally to a comprehensive list of matters they are willing to submit to the Court and should withdraw their reservations to its jurisdiction in the dispute settlement clauses of multilateral treaties; (b) When submission of a dispute to the full Court is not practical, the Chambers jurisdiction should be used; (c) States should support the Trust Fund established to assist countries unable to afford the cost involved in bringing a dispute to the Court, and such countries should take full advantage of the Fund in order to resolve their disputes.⁹²⁸

The Court is the primary judicial organ of the United Nations; however, it remains a resource underused.⁹²⁹ Constraining the significance of a ruling of the court is the absence of enforcement abilities.⁹³⁰ Justice Ajibola of the International Court of Justice has stated that “it is not generally the business of the Court to ensure compliance with its judgments”.⁹³¹ Additionally, he notes that the court has “nothing to do with the execution or enforceability of that

⁹²⁷ Statute of the International Court of Justice, art. 34, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, reprinted in *Yale Law Journal* (1946) at 1318, 1324-25

⁹²⁸ *An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, New York: Report of the Secretary-General (17 June 1992)

⁹²⁹ *Ibid.* at para 39

⁹³⁰ Jonathan E. Hendrix, “Law Without State: The Collapsed State Challenge to Traditional International Enforcement,” *Wisconsin International Law Journal*, Vol. 24, No. 2 (2006) at 597

⁹³¹ *Ibid.*

judgment”.⁹³² Instead, the court relies on the moral obligation of Member States of the United Nations to comply with its directives.⁹³³ Failing that, the Security Council can take action.

There are various ad hoc international courts established by the United Nations to deal with gross and systematic human rights violations during state failure and that have contributed greatly to the jurisprudence of international law. As noted above, although the International Criminal Court is not part of the United Nations system, United Nations Member States are asked to co-operate with the Court. Additionally, the Security Council does refer cases to the Court. Over the years, the ICC as an independent international organization has taken a more active role in ending impunity and in prosecuting those who are alleged to have committed serious crimes in several failed states.

The Security Council and, to a lesser degree, the General Assembly⁹³⁴ have put forth comprehensive resolutions of conflict prevention and peacekeeping, notwithstanding the fact that there is not always political will throughout the international community to commit to peacekeeping operations and humanitarian assistance.⁹³⁵

⁹³² Ibid.

⁹³³ E.K. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, Leiden: A.W.Sijthoff (1966) at 65-6

⁹³⁴ The General Assembly has put forward several declarations, including the *Manila Declaration on the Peaceful Settlement of International Disputes*, New York (15 November 1982) and the *Declaration on the Prevention and Removal of Disputes and Situation Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*, 68th plenary meeting A/RES/43/51 (5 December 1998)

⁹³⁵ *An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, New York: Report of the Secretary-General (17 June 1992)

6.1.1 Humanitarian Assistance

The United Nations works with a range of partners both governmental and non-governmental to provide humanitarian and development assistance in various international crises and complex emergencies. Since the adoption in 1991 of Resolution 46/182⁹³⁶ by the General Assembly, the basic framework for humanitarian assistance has expanded considerably, reflecting both the broadening of the humanitarian effort not just in responding to natural disasters, but also in the shifting environment in which assistance is offered in many failed states. The Security Council has stressed that states must respect the principles of international humanitarian law and co-operate during humanitarian operations as this is complicated in areas of conflict. The General Assembly adopted Resolution 46/182 in order to address the issue of humanitarian assistance and provide guidelines based on three core principles of humanity, neutrality and impartiality:

Humanity: Human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly. The dignity and rights of all victims must be respected and protected. Neutrality: Humanitarian assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature. Impartiality: Humanitarian assistance must be provided without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress.⁹³⁷

⁹³⁶ General Assembly Resolution 46/182 (19 December 1991)

⁹³⁷ *Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies*, document developed with the collaboration of a broad representation of the international humanitarian community, through a Drafting Committee consisting of representatives of Austria, Czech Republic, France, Germany, Italy, Sudan, Switzerland, UK, USA, DPKO, SCHR, UNHCR, UNICEF and WFP, as well as a Review Committee consisting of representatives of Australia, Canada, China, Costa Rica, Denmark, Ecuador, Egypt, Estonia, Finland, Ghana, Greece, India, Japan,

As well, Resolution 46/182 also emphasizes the importance of the sovereignty of States:

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.⁹³⁸

Political will is imperative as too often the Security Council and the international community have failed to deliver according to expectations.

Attempts by the United Nations to mobilize the international community to address various humanitarian disasters have not been easy given what Anthony Lake, the UNICEF Executive Director, has labelled “disaster fatigue”.⁹³⁹ This is clearly becoming the case in the Horn of Africa, where the drought situation in Somalia is turning from a human disaster into a human catastrophe.⁹⁴⁰

A recent example of the exceedingly high costs of new nation-state construction is South Sudan. There are several major challenges for the latest member of the United Nations and for the international community. According to Lise Grande, the United Nations Deputy Humanitarian Coordinator in South Sudan, only half of this overwhelmingly young and rural population, estimated at 9 million, have access to safe drinking water, with only one in five having access to healthcare and only ten percent of

Libyan Arab Jamahiriya, Madagascar, Mauritius, Mexico, Netherlands, Norway, Poland, Russian Federation, Sweden, Turkey, Yugoslavia, COE, ECHO, EC, EUMS, ICDO, ICRC, ICVA, INTERACTION, IOM, NATO, OCHA, THW and WHO (March 2003) at 8

⁹³⁸ Ibid. at 8

⁹³⁹ “Somalia: ‘Disaster Fatigue’ Must Not Dull Compassion For Starving Children – UN Official,” UN News, New York (19 August 2011)

⁹⁴⁰ Ibid.

children finishing primary school.⁹⁴¹

In Somalia, fighting is deepening the humanitarian crisis and creating further regional instability with a massive refugee flow:

Fighting has choked aid deliveries and blocked civilians trying to escape across the border into Kenya ... The United Nations estimates that 3.7 million Somalis -- around one-third of the population -- are on the brink of starvation and tens of thousands have already died in a country that has lacked effective government for two decades.⁹⁴²

As noted in the next subsection, United Nations peacekeeping operations play a critical role in providing security for the peace process and ensuring that humanitarian and development partners are able to work in a safe environment.

6.1.2 Peacekeeping - Conflict Prevention

Peacekeeping by the United Nations has evolved over the years and with regard to the reconstruction of failed states is an expensive undertaking. The Security Council has the legal and primary responsibility under the United Nations Charter to take collective action to maintain international peace and security and to sanction peacekeeping operations. As noted above, the United Nations peacekeeping missions in post-conflict failed states have been called upon to perform several tasks; their mandate as indicated by the United Nations is to:

⁹⁴¹ "UN outlines extent of development challenges facing South Sudan after independence," UN News, New York (19 July 2011)

⁹⁴² Peter Martell, "Somali fighting worsens humanitarian crisis," *Agence France-Presse* (26 October 2011)

maintain peace and security... facilitate the political process, protect civilians, assist in the disarmament, demobilization and reintegration of former combatants; support the organization of elections, protect and promote human rights and assist in restoring the rule of law.⁹⁴³

Notwithstanding the importance of peacekeeping, the term is hard to define and is not found in the United Nations Charter, although the authorization is generally considered to fall between Chapter VI and Chapter VII. Dag Hammarskjöld, the second United Nations Secretary-General, defines the term within the framework of the Charter by stating that peacekeeping falls under “‘Chapter VI and a half’ of the Charter, somewhere between traditional methods of resolving disputes peacefully (outlined in Chapter VI), on the one hand, and more forceful, less ‘consent-based’ action (Chapter VII)”.⁹⁴⁴

The concept of United Nations peacekeeping was a result of Canadian Minister of External Affairs Lester Pearson’s response to the Suez Crisis in the 1950s for which he won the Nobel Prize. Peacekeeping is designed to preserve the peace where fighting has been halted; it rests on three principles: consent of parties, impartiality and non-use of force except in self-defence, and defence of the mandate.⁹⁴⁵ Peacekeeping by the United Nations is one among a range of measures undertaken to maintain international peace and security. Traditional peacekeeping measures are generally military in character and may involve “observation, monitoring and reporting”.⁹⁴⁶ These measures are related to but differ from peacemaking, peacebuilding and conflict prevention. Peacemaking generally involves diplomatic action and is facilitated by envoys and other actors to create conditions of a lasting settlement, while peacebuilding

⁹⁴³ United Nation Peacekeeping website, available at: <<http://www.un.org/en/peacekeeping/>> accessed 10 September 10 2011

⁹⁴⁴ Ibid.

⁹⁴⁵ *United Nations Peacekeeping Operations, Principles and Guidelines*, New York: Department of Peacekeeping Operations (2010) at 31

⁹⁴⁶ Ibid. at 21

measures are intended to reduce the danger of relapsing into conflict by “strengthening national capacities for conflict management”.⁹⁴⁷ Conflict prevention usually involves the application of “structural or diplomatic measures to keep intra-state or inter-state tensions and disputes from escalating into violent conflict”.⁹⁴⁸ These structures should ideally be applied as early as warning signals appear in order to reduce the risk of state failure.

The traditional peacekeeping operations of the 1950s have been replaced with more robust mandates that include disarming combatants, resettling refugees, monitoring elections and rehabilitating and developing the failed state. For example, the function of the 1989-1990 United Nations Transitional Assistance Group (UNTAG) in Namibia was to “ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations”.⁹⁴⁹ As well, the United Nations Observer Mission in El Salvador (ONUSAL) from 1991 to 1994, which helped bring about an end to 12 years of civil war, was noted by United Nations Secretary-General Boutros Boutros-Ghali as “a pioneering experience the first in a new generation of United Nations operations whose purpose is post-conflict peacebuilding”.⁹⁵⁰ In Angola, the United Nations Angola Verification Mission III (UNAVEM III) was established on 8 February 1995 to assist the Government of Angola and the *União Nacional para a Independência Total de Angola* (UNITA) in restoring peace and achieving national reconciliation.⁹⁵¹ In Cambodia, the United Nations established United Nations Transitional Authority in Cambodia (UNTAC) on 28 February 1992, with the mandate to ensure the

⁹⁴⁷ Ibid. at 25

⁹⁴⁸ Ibid. at 94

⁹⁴⁹ United Nations Transition Assistance Group, established pursuant to Security Council Resolution 435 (1978) and 629 (1989) to implement the settlement plan for the independence of Namibia from South Africa, through free elections under the supervision and control of the United Nations. UNTAG was terminated with the accession of Namibia to independence on 21 March 1990

⁹⁵⁰ Alex J. Bellamy, Paul Williams and Stuart Griffin, *Understanding peacekeeping*, Hoboken: Wiley-Blackwell (2004) at 118

⁹⁵¹ UN Peacekeeping Missions, *Repertoire of the Practice of the Security Council* at www.un.org

implementation of the *Paris Peace Agreement* of 23 October 1991 and to assist in the conduct of elections in Cambodia.⁹⁵² In the past two decades, the United Nations has also established a series of peacekeeping operations in places ranging from Timor-Leste, Kosovo and Sierra Leone to more recent missions in Afghanistan, Burundi, Haiti, Côte d'Ivoire, the Democratic Republic of the Congo, Liberia and the Sudan, following the agreement with South Sudan.⁹⁵³ In recent years, the United Nations has undertaken an unprecedented variety of functions, from the supervision of cease-fires to the provision of humanitarian assistance and from judicial and electoral reforms to economic rehabilitation and reconstruction. While some United Nations peacekeeping operations, such as the UNTAC operation in Cambodia, were by most standards successful, others, such as the Somalian UNOSOM I and II, were problematic.

The United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS) was set up in 2010 as a successor to the United Nations Peacebuilding Support Office in Guinea-Bissau (UNOGBIS)⁹⁵⁴ which was established in 1999 as part of an international effort to assist the state in recovering from a civil war which killed and displaced thousands. In addition to this, Guinea-Bissau was plagued by a coup in 2009 and the assassination of then president João Bernardo Vieira. UNIOGBIS also has a mandate to assist in the implementation of a peacebuilding plan and social and political reforms in Guinea-Bissau.⁹⁵⁵

⁹⁵² Ibid.

⁹⁵³ United Nations peacekeeping missions are active in states such as: Timor-Leste (United Nations Transitional Administration in East Timor - UNTAET); Kosovo (United Nations Interim Administration Mission in Kosovo - UNMIK); Sierra Leone (United Nations Mission in Sierra Leone - UNAMSIL); Afghanistan (United Nations Assistance Mission in Afghanistan - UNAMA); Burundi (United Nations Operation in Burundi - ONUB); Haiti (United Nations Stabilisation Mission in Haiti - MINUSTAH); Côte d'Ivoire (United Nations Operation in Côte d'Ivoire - UNOCI); the Democratic Republic of the Congo (United Nations Organization Stabilization Mission in the Democratic Republic of the Congo - MONUC); Liberia (United Nations Mission in Liberia - UNMIL) and the Sudan (United Nations Mission in the Sudan - UNMIS) following the agreement with South Sudan.

⁹⁵⁴ "Guinea-Bissau :UN Peace-building Office Established," UN News, New York (30 April 1999)

⁹⁵⁵ "Peace Building Efforts Dominate Talks Between Ban and Guinea-Bissau's Premier," UN News, New York (29 September 2011)

Over the years, the United Nations has attempted several reforms by shifting away from the classical definition of peacekeeping, which includes disarmament, to a second generation of peacekeeping, which:

encompasses far more various and complex challenges and activities. Normally, in the context of a failed state or intrastate crisis. Disarmament, once at the forefront of United Nations negotiations, has been overshadowed by issues such as development, the environment and human rights.⁹⁵⁶

Other reforms have come about in the field of Conduct and Discipline. Following allegations of human rights abuses in several failed states by United Nations peacekeepers, Secretary-General Ban Ki-moon has declared a zero tolerance policy for any violation of United Nations rules.⁹⁵⁷

The United Nations Mission in Sierra Leone (UNAMSIL),⁹⁵⁸ created by Security Council Resolution 1270 to end the civil war in 1999, concluded its mandate in 2005. The UNAMSIL mandate was to monitor the implementation of the *Lomé Peace Accord* and to establish rule of law. But, like earlier United Nations missions in places such as Somalia and Rwanda, the expanded mandates and the limited resources created challenges that undermined its effectiveness. For example, the troops sent to Sierra Leone by Member States were predominantly from developing African countries and were inadequately trained and ill-equipped.⁹⁵⁹

⁹⁵⁶ Stephen Kinloch Pichat, "Peacekeeping, Disarmament and International Force: A Circular Proposition," *Disarmament Forum* (2000) at 1

⁹⁵⁷ United Nation Peacekeeping website, available at: <http://www.un.org/en/peacekeeping/> (last visited September 2011)

⁹⁵⁸ The United Nations Mission in Sierra Leone (UNAMSIL) created by the United Nations Security Council in October 1999 to help with the implementation of the Lomé Peace Accord to end the Sierra Leonean civil war and concluded its mandate in 2005.

⁹⁵⁹ Mirna Galic, "Into the Breach: An Analysis of the United Nations Mission in Sierra Leone," *Stanford Journal of International Relations*, Vol. 3 (Spring 2001)

The International Commission on Intervention and State Sovereignty's report notes that peacebuilding under the Responsibility to Protect design implies "the responsibility not just to prevent and react, but to follow through and rebuild".⁹⁶⁰ As well as adequate funds and resources,⁹⁶¹ the need for reconciliation in reconstruction requires that:

True and lasting reconciliation occurs with sustained daily efforts at repairing infrastructure, at rebuilding housing, at planting and harvesting, and cooperating in other productive activities. Peace building may involve the creation or strengthening of national institutions, monitoring elections, promoting human rights, providing for reintegration and rehabilitation programmes, as well as creating conditions for resumed development.⁹⁶²

Peacekeeping missions are noted by the Secretary-General as requiring ongoing funding and commitment, and although every failed state situation requiring peacekeeping has its own challenges, invariably, sustainable peace necessitates providing security, strengthening rule of law, respecting human rights, creating political legitimacy and promoting social and economic development.⁹⁶³ The 2005 report of the Secretary-General, *In Larger Freedom*, notes that:

Deploying peace enforcement and peacekeeping forces may be essential in terminating conflicts but are not sufficient for long-term recovery. Serious attention to the longer-term process of peacebuilding in all its multiple dimensions is critical; failure to invest adequately in peacebuilding increases the odds that a country will relapse into conflict.⁹⁶⁴

⁹⁶⁰ *The Responsibility To Protect* at 5.1

⁹⁶¹ *Ibid.* at 5.2

⁹⁶² *Ibid.* at 5.5

⁹⁶³ "United Nations Peacekeeping Operations: Principles and Guidelines," Department of Peacekeeping Operations, New York (18 January 2008) at 25

⁹⁶⁴ *Ibid.*

As noted above, women must be given a critical role to play in post-conflict reconstruction and nation-building. There have been United Nations peacekeeping endeavours and other missions, which have established ‘gender units’ with the potential to support women’s rights. This is accomplished both within the populations and at mission level. In her presentation before the Canadian House of Commons Subcommittee on International Human Rights, Louise Arbour noted that the United Nations peacekeeping and peacebuilding missions need “to integrate gender perspectives in all mission planning and to increase the presence of women civilian, police and military personnel”.⁹⁶⁵

It has been suggested that embedded in nearly every conflict is the struggle for power; it is essential that the way in which power is controlled and distributed be taken into consideration. In taking into account the role power plays in ensuring protection, Arbour notes that:

It’s not an unreasonable assumption that if we were to put as much money directly into the hands of women in war zones – not just micro credits, but the kinds of resources that flow freely to the military, that would help secure for women a real seat at the table in peace talks, and ensure that they became powerful enough to protect themselves and their children.⁹⁶⁶

Understanding these challenges and the critical role the full participation of women plays is essential for the reconstruction of the structural competency of the state.

In 2011, the Security Council unanimously adopted a resolution to create the United Nations Support Mission in Libya (UNSMIL) and tasks the new mission with, *inter alia*:

⁹⁶⁵ Louise Arbour, President & CEO International Crisis Group, “Study on Sexual Violence in Conflict States,” Canadian House of Commons Subcommittee on International Human Rights (10 February 2011)

⁹⁶⁶ Ibid.

restoring public security and the rule of law, promoting inclusive political dialogue and national reconciliation, and helping the National Transitional Council (NTC) embark on the constitution-making process and lay the foundation for an electoral process.⁹⁶⁷

Once again, the international community is looking at United Nations peacekeepers to play a more active role in not only security but also reconstruction and the social, economic and rule of law reform of the country. Peacekeeping, although important, has had several setbacks in Sierra Leone. Even with 12,500 peacekeepers of the United Nations Mission in Sierra Leone (UNAMSSIL) and the billions of dollars spent on security, control over all of the territory has still yet to be gained, confirming their place in popular imagination as a failed state.⁹⁶⁸

International humanitarian law is relevant to United Nations peacekeeping missions given that they are often deployed in post-conflict situations or in violent situations where conflict could resume. In failed states, there is often a substantial number of the civilian population that has been targeted by various warring factions, as well as prisoners of war and other vulnerable groups to whom international humanitarian law and the *Geneva Conventions* would apply.⁹⁶⁹ Hervé Ladsous, Under-Secretary-General for Peacekeeping Operations, has noted that the killing of peacekeepers serving Darfur:

highlights the difficult and hostile environments in which the world body has to operate. United Nations personnel continue to face risks in carrying out their duties, as evidenced by the fact that 86 peacekeepers have lost their lives so far this year, 29 of them civilians.⁹⁷⁰

⁹⁶⁷ Security Council Resolution 2009 (16 September 2011)

⁹⁶⁸ William Reno, "Sierra Leone: Warfare in a Post-State Society," in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D. C.: Brookings Institution Press (2003) at 72

⁹⁶⁹ "United Nations Peacekeeping Operations, Principles and Guidelines," New York: Department of Peacekeeping Operations (2010) at 15

⁹⁷⁰ "Blue Helmets Deserve Best Security Possible, Says New UN Peacekeeping Chief," UN News, New York (13 October 2011)

Both peacemaking and peacekeeping are required in order to halt conflicts in failed states, maintain peace once it is reached and prevent the return of violence.⁹⁷¹ Peacekeeping missions perform such a major role internationally that states are consistently asking for prolonged mandates of the missions.

The final subsection analyses the various questions, including those concerning limited sovereignty, that are presently being considered in relation to state failure.

6.2 Institutional Reform, Trusteeship – Limited Sovereignty

The question of failed states transferring control to the United Nations Trusteeship Council requires a great deal of debate and a clear consensus among Member States of the United Nations so as to prevent it from being equated with any form of colonial takeover. The Trusteeship system is the successor of the League of Nations' mandate system and was principally established to help territories that did not have any form of self-government and that were former mandates of the League of Nations become independent countries. In 1994, with the newly independent Palau joining the United Nations, the Trusteeship Council was suspended.

Issues of state sovereignty and self-determination remain, as in the times of the mandate system, legal challenges to prospective trusteeships, although the nature of the problems is currently somewhat different. At the time the League of Nations was formed:

⁹⁷¹ *An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, New York: Report of the Secretary-General (17 June 1992) at para. 21

sovereignty was an issue of concern, both because a Eurocentric understanding of international law aimed at the exclusion of ‘uncivilized’ nations from the definition of a sovereign state and because it was unclear who held sovereignty over a mandated territory.⁹⁷²

The issue of trusteeship is today both complicated and political. Under the United Nations Trusteeship System, no member can be put under trusteeship due to the international legal principle of state sovereignty. Both the Security Council and the International Court of Justice have shown flexibility in their interpretation of the Charter, and the Security Council could authorize some form of shared sovereignty for assisting failed states rebuild and become self-determining states. Nele Matz points out that:

Even the UN Trusteeship System did not seem to find a conflict between self-determination and governance by an Administering Authority, since it appears that in accordance with Article 76 lit. b. of the Charter a right to self-determination is held in suspension until the Administering Authority has created circumstances that allow for its exercise. In contrast thereto, however, one might understand the right to self-determination to be an obstacle to political trusteeship, at least if the relevant people do not chose a political status that allows for assistance in a transitional period.⁹⁷³

The United Nations Charter must set out specific conventions if it is to ever move forward towards some form of shared sovereignty after state failure. A partnership needs to be encouraged between the United Nations and the Member State, and trust needs to be developed at the local level to avoid any resentment by the population.

Under Chapter XII of the United Nations Charter, Articles 75-91 outlines the authority of International Trusteeship System. Under Article 75, for example:

⁹⁷² Nele Matz, “Civilization and the Mandate System under the League of Nations as Origin of Trusteeship,” *Yearbook of United Nations Law*, Vol. 9 (2005) at 90

⁹⁷³ *Ibid.* at 91-2

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed there under by subsequent individual agreements. These territories are hereinafter referred to as trust territories.⁹⁷⁴

Chapter XII also outlines the terms for administration and designates authority as well as the procedures necessary for the establishment of the Trusteeship Council. It has been suggested that the notion of sovereign equality was unquestionably important to the architecture of the Charter following the devastation of the Second World War; however, at the time of signing there were only 51 Member States of the United Nations, with only three being from Africa - Ethiopia, Liberia and the Union of South Africa—as the rest were still under colonial rule.

On the question of failed States becoming part of a trusteeship, the Secretary-General replied that this is something that Member States of the United Nations will have to discuss.⁹⁷⁵ The United Nations Charter would preclude the kind of trusteeship indicated above, as the International Trusteeship system applies only to former League mandates, territories captured during the Second World War, and other areas placed under trusteeship by their administering states. However, as stated in Article 78, “[t]he trusteeship system shall not apply to territories which have become Members of the United Nations”.⁹⁷⁶ This limitation reflects the colonial situation and the priorities of Member States of the United Nations at the close of the Second World War. The creation of a trusteeship in 1945 over a Member State would have been viewed as inconsistent with the premise that the United Nations was to be based upon

⁹⁷⁴ UN Charter, Article 75

⁹⁷⁵ United Nations Transcript of Press Conference by Secretary General Kofi Annan at the United Nations Headquarters (8 September 2003)

⁹⁷⁶ UN Charter, Article 78

“the principle of the sovereign equality of all Members”⁹⁷⁷ and that it would not interfere with their internal affairs. However, states could voluntarily relinquish control over their internal and external affairs for a defined period of time. The trusteeship plan could, however, go further than the Cambodia model, with the United Nations and the affected state becoming parties to a trusteeship agreement, and either the United Nations or a group of states serving as the administering authority.⁹⁷⁸

Obtaining political consensus is a difficult undertaking at the United Nations, and changing the Charter would be even more challenging as many states would bring objections that such an action would undermine Article 2(1) or the ‘sovereign equality’ provision. But, as noted by several scholars, most failed states hardly govern themselves and thus the notion of sovereignty is changing. The United Nations would necessitate developing clear criteria of responsibility and the power to commence and conclude. However, United Nations resources are always an issue as the Cambodia operation, the closest case to United Nations management of a sovereign state, perfectly exemplifies, with a cost exceeding 1.6 billion US dollars during its two-year duration in a country of only 8 million people.⁹⁷⁹ But, as illustrated above, the failure to act also has a high price, and the United Nations has the legal authority to act.

United Nations actions in Bosnia and the Democratic Republic of Timor-Leste required some level of compromised sovereignty of both emerging states. Bosnia had strong European support, while in the case of Timor-Leste, Australia took the leading role. Although the traditional fundamental principles of legitimacy of the Westphalia system rest on the notion of state

⁹⁷⁷ UN Charter, Chapter I: Purposes and Principles, Article 2.1: “The Organization is based on the principle of the sovereign equality of all its Members.”

⁹⁷⁸Gerald B. Helman and Steven R. Ratner, “Saving Failed States,” *Foreign Policy*, No. 89 (Winter 1992/93)

⁹⁷⁹ *Ibid.*

sovereignty, both Christopher Clapham and Jeffrey Herbst contemplate that the concept of state failure reflects, “misplaced forms of sovereignty”.⁹⁸⁰ According to Clapham, state failure is the “result of the inability of many states and societies at the local level to meet the onerous demands that state maintenance makes of them”.⁹⁸¹ Herbst advocates a “less dogmatic approach to sovereignty”.⁹⁸² There is even a recommendation that “states that cease to exercise formal control over parts of their nominal territories should lose their sovereignty, that is, be decertified”.⁹⁸³ Decertification could also lead to new states being formed, meaning that “[t]he Somalilands of the world would, under such a new dispensation, be candidates for recognition rather than dismay”.⁹⁸⁴ Herbst and others have made the case that the Westphalian sovereignty model “should never have been accorded to fragile post-colonial entities with no history and experience of performing as or organizing a state”.⁹⁸⁵ In addition, they note that state failure “has been accelerated by the imposition of levels of state control upon indigenous societies unable to bear state-centred norms and such degrees of authority”.⁹⁸⁶

Although Germany was not under a formal Trusteeship as outlined above it is worthwhile to note that following the Second World War, Germany had limited sovereignty administered by control councils. The Federal Republic of

⁹⁸⁰ Robert I. Rotberg, “The Failure and Collapse of Nation-States. Breakdown, Prevention, and Repair” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 27

⁹⁸¹ Christopher Clapham, “The Global-Local Politics of State Decay,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 77

⁹⁸² Jeffrey Herbst, “Let Them Fail: State Failure in Theory and Practice: Implications for Policy,” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 316

⁹⁸³ Robert I. Rotberg, “The Failure and Collapse of Nation-States. Breakdown, Prevention, and Repair” in Robert I. Rotberg (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 41

⁹⁸⁴ *Ibid.*

⁹⁸⁵ *Ibid.* at 27

⁹⁸⁶ *Ibid.*

Germany and German Democratic Republic only joined the United Nations in 1973. In the case of West Germany, the notion of a shared sovereignty arrangement for security lasted until the 1990 Treaty on the Final Settlement with Respect to Germany terminated the Bonn agreements.⁹⁸⁷ Under the terms of the *Treaty*, the Four Powers (Soviet Union, the United States, United Kingdom and France) renounced all the rights they formerly held in Germany and paved the way to reunification as a fully sovereign state on 5 March 1991.⁹⁸⁸

The debate as to the best possible means of reconstructing a failed state is an ongoing one and the proposal that sovereignty can be breached by outsiders in order to build the states can, for some, evoke disturbing images of colonialism. However, as noted above, there is a growing body of literature arguing that “international engagement must be more robust”.⁹⁸⁹ Nonetheless, the “idea that it might become a permanent or recurrent feature of international life is instinctively felt to be dangerous, since it undermines the principle of sovereign equality on which the current international order is based”,⁹⁹⁰ although, as noted in Chapters 3 and 4, restrictions on sovereignty have been justified in extreme cases. Scholars have also suggested that “[w]ithout outside intervention, the formation of a state after failure is likely to be in vain”.⁹⁹¹

An imposed solution for reconstruction is not the preferred option. There is need for an engaged indigenous process in order for reconstruction to be

⁹⁸⁷ The Bonn–Paris conventions were signed in May 1952 and ratified in 1955 ratification. The conventions put an end to the Allied occupation of West Germany. British Prime Minister Antony Eden also proposed that West Germany become a member of NATO.

⁹⁸⁸ Stephen D. Krasner, “Sharing Sovereignty: New Institutions for Collapsed and Failing States,” *International Security*, Vol. 29, No. 2 (Fall 2004) at 111

⁹⁸⁹ Lars Engberg-Pedersen et al, *Fragile States on the International Agenda*, Copenhagen: Danish Institute of International Studies (2008) at 15

⁹⁹⁰ *Ibid.* at 16

⁹⁹¹ Jens Meierhenrich, “Forming States after Failure,” in Robert I. Rotberg, (ed.), *When States Fail Causes and Consequences*, Princeton: Princeton University Press (2004) at 162

successful and to be maintained once foreign assistance is withdrawn. Some scholars have indicated that this is not always attainable but have maintained that “[a] certain degree of international control and imposition is necessary in order to bring about a well functioning state in which the ruling elite are accountable to the people”.⁹⁹² In the context of failed states, the need to reintroduce a formal trusteeship that can ensure both accountability to agreements and delivery is seriously being debated.⁹⁹³

Michael Ignatieff argues that to fix failed states, sovereignty and the concept and practice of neutrality need to be rethought.⁹⁹⁴ State failure in many parts of the world has its roots in weak state capacity. Ignatieff and other members of the International Commission on Intervention and State Sovereignty argued that the issues that arise when sovereignty is suspended during the period of intervention cannot be restored “unless the intervener has authority over a territory. But the suspension of the exercise of sovereignty is only *de facto* for the period of the intervention and follow-up, and not *de jure*”.⁹⁹⁵ For example, the *Paris Accords* of 23 October 1991 on Cambodia allowed for a comprehensive settlement, giving the United Nations effective authority to supervise a ceasefire, disarm the factional armies, and prepare the country for general elections. The objective of the *Paris Accords* was implemented through a ‘Supreme National Council’ with representatives of the four competing factions and with shared sovereignty with the United Nations. It has been suggested that, similarly, Yugoslavia had “temporarily had its sovereignty over Kosovo suspended, though it has not lost it *de jure*”.⁹⁹⁶

⁹⁹² Lars Engberg-Pedersen et al, *Fragile Situations Background Papers*, Copenhagen: Danish Institute for International Studies (2008) at 15-16

⁹⁹³ *Ibid.* at 16

⁹⁹⁴ Michael Ignatieff, “State failure and nation-building,” in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention. Ethical, legal, and Political Dilemmas*, Cambridge: Cambridge University Press (2003) at 320

⁹⁹⁵ *The Responsibility To Protect* at 5.26

⁹⁹⁶ *Ibid.*

The settlement negotiation of Namibia provides a good example of United Nations trusteeship in the period of transition that led to its independence, with several legal classifications and compromises, in fact *sui generis*, of the United Nations operation:

[T]he *de facto* but illegal occupying Power, South Africa, and the United Nations, in which *de jure* authority reposed but which had not previously been able to establish effective administration in Namibia, were to work together to enable the Namibian people to exercise their right of self-determination.⁹⁹⁷

The United Nations had a supervisory central objective, which was to hold free and fair elections for a Constituent Assembly that would draft a Constitution leading to the independence of Namibia.⁹⁹⁸ Some scholars have commented that the United Nations Trusteeship System “is to some extent a victim of its own success”.⁹⁹⁹

Other notable scholars, such as Helman and Ratner, have argued for a return of the trusteeship model as a solution to failing states and recommend:

direct U.N. trusteeship when there is a total breakdown of governmental authority...the theoretical basis for conservatorship in the domestic analogue of the polity helping those who are utterly incapable of functioning on their own, thereby necessitating a legal regime where the community itself manages the affairs of the victim.¹⁰⁰⁰

Helman and Ratner recommend conservatorship as the theoretical paradigm for

⁹⁹⁷ The United Nations Transition Assistance Group (UNTAG), peacekeeping mandate from April 1989 to March 1990 in Namibia to monitor the peace process and elections there.

⁹⁹⁸ *Ibid.*

⁹⁹⁹ Nele Matz, “Civilization and the Mandate System under the League of Nations as Origin of Trusteeship,” *Yearbook of United Nations Law*, Vol. 9 (2005) at 48

¹⁰⁰⁰ Gerald B. Helman and Steven R. Ratner, “Saving Failed States,” *Foreign Policy*, No. 89 (Winter 1992/93) at 12

assistance of the United Nations in dealing with failed states. Helman and Ratner as well as Richard Caplan argued that it might be necessary to establish a trusteeship under the United Nations in extreme cases of state failure.¹⁰⁰¹ These scholars would propose that the states in question “would voluntarily relinquish control”.¹⁰⁰² This is a difficult but not impossible task if there is political will on all sides. Stephen Krasner notes that to improve the well being of the domestic population and decrease the threat to the international community, alternative options such as *de facto* trusteeships should be considered.¹⁰⁰³ Krasner advances the notion of shared sovereignty involving the participation of external actors to assist with failed sated reconstruction.¹⁰⁰⁴ James Fearon and David Laitin¹⁰⁰⁵ have argued for the establishment of neutrusteeship over divided postwar failed states. This arrangement or partnership would be voluntary and could be established by a treaty for a limited period of time.¹⁰⁰⁶ They also note that failed states have limited structural competency and are often unable to assist themselves.¹⁰⁰⁷

There are also numerous examples in which the reconstruction of states uses international administrations or external actors to assist them in running certain bureaucracies and programmes, such as is the case in Bosnia under the terms of the Dayton Accords, Timor-Leste under the United Nations Transitional Administration and Kosovo under the United Nations Interim

¹⁰⁰¹ Ibid. at 3-21

¹⁰⁰² Ruth Gordon, “Saving Failed States: Sometimes A Neocolonialist Notion,” *American University Journal of International Law and Policy*, Vol. 12, No.6 (1997) at 923

¹⁰⁰³ Stephen D. Krasner, “Sharing Sovereignty: New Institutions for Collapsed and Failing States,” *International Security*, Vol. 29, No. 2 (Fall 2004) at 86 and 106

¹⁰⁰⁴ Ibid. at 85-120

¹⁰⁰⁵ James D. Fearon and David D. Laitin, “Neotrusteeship and the Problem of Weak States,” *International Security*, Vol. 28, No.4 (2004) at 5, 36-43

¹⁰⁰⁶ Stephen D. Krasner, “Sharing Sovereignty: New Institutions for Collapsed and Failing States,” *International Security*, Vol. 29, No. 2 (Fall 2004) at 108

¹⁰⁰⁷ James D. Fearon and David D. Laitin, “Neotrusteeship and the Problem of Weak States,” *International Security*, Vol. 28, No.4 (2004) at 36-7

Administration.¹⁰⁰⁸ In the case of Afghanistan and Iraq, security has been provided in large part by foreign forces.¹⁰⁰⁹ *De facto* trusteeship or shared sovereignty, although not the panacea to resolving the issue of reconstruction of failed states, should be considered by local governments and the international community as a possible means by which to assist them in building a functional state.

Much of the debate is surrounded by legal, moral and practical implications of such large state-building mechanisms. Trusteeship reflects both the severity of the predicament and the challenge confronting policymakers and scholars regarding failed states. It may be for these reasons that scholars today are looking at trusteeship as a possible solution that is more comprehensive and more durable.

¹⁰⁰⁸ Richard Caplan, *A New Trusteeship? The International Administration of War-torn Territories: Adelphi Paper No. 341*, Oxford: Oxford University Press (2002) at 8-9,50-51

¹⁰⁰⁹ Stephen D. Krasner, "Sharing Sovereignty: New Institutions for Collapsed and Failing States," *International Security*, Vol. 29, No. 2 (Fall 2004) at 115

General Conclusion

State failure presents a multitude of challenges for the international community and has been linked not only to civil wars and other serious conflicts, but also to poverty, famine and other social disasters. This study has demonstrated that failed states share many similar characteristic weaknesses in structural competency, including the inability to provide positive services to their populations, loss of territorial control and high levels of corruption, all of which hold significant geopolitical consequences.

State failure differs in each instance but, as illustrated above, there are certain general characteristics that are common to state failure, such as a breakdown in the rule of law, political instability, the transfer of allegiances to clans or other groups and away from central authority, loss of social cohesion, gross and systematic violations of human rights, and lack of security.

Failed states are rarely isolated phenomena and have often been referred to as Petri dishes¹⁰¹⁰ for transnational criminal activity, arms smuggling, human trafficking and terrorism in places such as in Afghanistan and Pakistan, bases for piracy in places such as Somalia, and sources of drug production in Afghanistan.

Part I of this study described the legal impact of the state on international law, focusing on the principles of sovereignty, self-determination and state formation in addition to the failures in structural competency that lead to failure. Part II endeavoured to outline the various approaches and debates in international law circles regarding the issues of human rights, human security,

¹⁰¹⁰ Elsina Wainwright, "Responding to state failure—the case of Australia and Solomon Islands," *Australian Journal of International Affairs*, Vol. 57, No. 3 (November 2003) at 486

and humanitarian intervention as well as the evolving norms regarding customary international law. The emerging concept of human security was also examined in the context of human rights and humanitarian law. Part III analysed the role of the international community in state-building and reconstruction efforts as well as the challenges faced by the international community in relation to fixing failed states. It also touched upon the debates surrounding the notion of shared or limited sovereignty in dealing with the various crises of state failure.

By shedding light upon the fundamental issues that cause state failure, it is recognized that state failure in the modern context represents a regional and potentially global threat in today's increasingly interconnected world. It has been argued that the international community may not be adequately organized to effectively address the issues of state failure, a fact that demonstrates why it is essential that the United Nations develop the tools to prevent conflict and breakdown of the state and provide management in the aftermath of failure and throughout reconstruction. These efforts, in order to promote sustainable peace and stability, will inevitably entail not just peacekeeping measures but also the means to influence the choices that failed states make regarding their political systems, issues of rule of law, internal security and economic and social development.

Much has changed since the days of the Westphalian concept of statehood. The current era is one of globalization, which has led to a debate over the implications of state sovereignty and the Westphalian system. Today, there is a fully interconnected global order where what happens in one state has an impact on another. Also, with the emergence of regional and international law, especially human rights law, the notion of state sovereignty has been challenged. States have a responsibility to protect their citizens and ensure that

human rights law is adhered to. Various international law treaties undoubtedly chart the important responsibilities states have in respecting international law conventions and in providing security for their constituents. As noted above, there is also an emerging doctrine, as outlined in the Responsibility to Protect report, which challenges the Westphalian notion of sovereignty.

The complex nature of failed states as well as the instabilities present in security and development has led to common characteristics of disastrous structural competency failures and has contributed to the process of state failure. This is further complicated by a lack of consensus among policymakers concerning the character of the required strategy for reconstruction. It has been suggested, both by scholars and in this study, that in certain instances of state failure, it may be in the best interest of those states to have the international community retain some role in shared sovereignty in order to address the prevailing number of issues affecting structural competency which caused the state to fail in the first place.

States are not by nature failures or even doomed to fail. It is important to recognize that state formation requires a belief in the state. There is an increasingly urgent need to build effective, capable, stable and sustainable states in order to create social order and reduce poverty as well as to tackle the issues of security and wealth creation. The best approach will require effective policies that integrate state-building and resources aimed at bridging the structural competency gaps in order to assist failed states. For this to happen, a clearer understanding of the challenges illustrated above is necessary. Unwillingness of the national and international community to address these structural competency challenges will only make the situation worse. Given that there is no easily implemented solution, tailoring assistance to the specific vulnerabilities of individual failing states requires active and unprecedented

cooperation among leading states to help deal with security, development and political institutions.

An important element in understanding state failure is recognizing that security dilemmas, sustained violence and the various chain reactions which cause breakdown and violence are addressed. This study does not suggest that any one of these structural factors alone leads to failure, nor does it suggest that assisting failed states in restoring structural competencies is pointless. What may be gained from this study is the understanding that state failure does not happen by chance, as there are indeed historical and geographical circumstances, but is by and large the result of autocratic, undemocratic groups or leaders who contribute to and aggravate state failure.

If there is hope that states can be rescued from these situations, efforts to do so will require more international assistance, added political will, further research, and a pursuit for comprehensive approaches. The United Nations, with all its faults, is still the best hope to advance the cause of peace and security, to stop the flow of arms in areas of conflict, to bring about order and stability, and to protect and advance human rights.

In order to effectively address these challenges, sound approaches are required, including policy options for prevention and early warning mechanisms, which will be needed to bring in stakeholders, especially women and minority groups, to build the local capacity to confront the multitude of complex issues present in state failure and reconstruction. State-building also entails assisting new states, especially South Sudan, the latest member of the United Nations, which continues to be a work in progress.

As indicated above, state formation after failure is never easy; nonetheless, establishing infrastructure, building a functioning bureaucracy, providing training for police, establishing a proper court system, achieving judicial reform, and revitalizing civil society are all critical elements in the construction of a functioning state. The most important lesson to be learned is that progress takes both time and political will. Peace processes present opportunities as well as challenges in national and international reconstruction efforts to bring about security, development and stability. The examples provided in this thesis, including the Democratic Republic of the Congo, Sudan, Sierra Leone and Rwanda, have shown that hatreds between various factions do not disappear overnight and that peacekeeping missions, such as those in Somalia, test the limits of national reconciliation and success.

The issues that have framed this study have only just begun to be addressed and, thus, it is hoped that this contribution made to the examination of the phenomenon of state failure, including recent situations and debates, will stimulate further debate and research on this critical topic.

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