FAILED STATES: THE NEW CHALLENGE TO INTERNATIONAL LAW

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Introduction

The failure of states to function as 'states', as defined by the traditional criteria for statehood as described by the Montevideo Convention of 1933, has become a major problem. So-called 'failed states' impact on the international, regional, and local levels because of the repercussions resulting from the collapse of social, political and legal institutions. The citizens of individual nations are affected and the concomitant disorder permeates into neighbouring territories. This, in most instances, leads to humanitarian catastrophes, armed violence, chaos, anarchy, and sows the seeds of civil war. The resulting breakdown of the rule of law creates a legal vacuum, which provides fertile soil for terrorist activities and extremism both internally and externally. Non-state actors such as al-Qaeda, al-Shabaab, Hezbollah, Harkat-ul-Muyadiheen, the Taliban, and Boko Haram all find fertile ground and either contribute to the failure of states or exploit the failing or failed state.[1]

The categorisation of 'failed state'[2] is challenging. Various definitions exist depending on whether the issue is approached from a political, constitutional law, or international law viewpoint. The concept of a failed state varies because the extent of the failure differs in scale and dimension, with much depending on the scale of the structural constitutional collapse in the state and the consequences thereof for the international community. In most instances the failed or failing state, when confronted with the facts, presents a 'defence' based on the principle of *state sovereignty* and its leaders consequently claim

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1 D Thürer 'The "failed state" in international law' (1999) 81(836) *International Review of the Red Cross* 731; TW Bennett & J Strug *Introduction to International Law (*2013) 69; FF Martin et al *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (2006) 528.

2 G Kreijen *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (2004) viii; J Milliken & K Krause 'State failure, state collapse, and state reconstruction: Concepts, lessons and strategies' (2002) 33 *Development and Change* 753; M Doornbos 'State collapse and fresh starts: Some critical reflections' (2002) 33 *Development and Change* 797; M Silva *State Legitimacy and Failure in International Law* (2014) 45.

immunity for their actions.[3] The modern phenomenon of failed or failing states poses pertinent questions for the international legal system.

Has the principle of state sovereignty perhaps become outmoded when cognisance is taken of contemporary developments? Can leaders of states continue to appeal to state sovereignty when accused of trampling on the human rights of their citizens and destroying the state's constitutional infrastructure to the detriment of the state's citizens? Does the contemporary understanding and application of human rights not demand state accountability which may imply effective redress through an effective form of international intervention? Should the interpretation of Chapter VII of the United Nations Charter, encompassing humanitarian intervention, not be more broadly interpreted to allow for the breaching of state sovereignty? Is there not a responsibility of states to intervene when there are egregious violations of human rights? These questions all come pertinently to the fore when the issue of failed states arises.

A further question that arises is one relating to statehood and the hitherto accepted criteria laid down by international law for recognition of a 'state'. Questions may be asked as to the initial recognition of many states which arose after the cessation of colonialism and at the end of the Cold War. Both decolonisation and the Cold War gave rise to several states with weak and inappropriate institutions. The future failure of these states was 'built-in', from the beginning as it were. Examples which could be referred to are Afghanistan, the Democratic Republic of the Congo, Haiti, Iraq, Liberia, Rwanda, Sierra Leone, Syria and Somalia. Effective, capable and appropriate institutions have always eluded these states. The question that can be asked is whether the criteria laid down by international law for statehood should not be more stringently applied? Perhaps a total redefinition of state sovereignty should be undertaken.

In seeking answers to these questions, those weaknesses which lead to state failure need to be identified. From this, it may then be possible to identify the causes and characteristics of failed states which, in turn, may affect the recognition of states as subjects of international law. It may emerge that the accepted four criteria, namely a permanent population, a defined territory, a government, and a capacity to enter into relations with other states, may not be the alpha and omega for state recognition, with other criteria gaining importance as preconditions for statehood, such as continued respect for human rights. Should an outrageous human rights record constitute a basis for withdrawing the recognition of a state? Should the state not meet the standards and expectations of the international community should its recognition not similarly be withdrawn or withheld? The history of the failed 'Bantustan' states of

3 H Kingsley *Sovereignty* (1986) 225.

South Africa, and their lack of recognition by the international community due to the disregard for human rights and the right to self-determination, is an example of a lack of compliance with these international norms.[4]

It is not the purpose of this paper to discuss in detail what constitutes a state, recognition of states, and the role played by human rights in international law. These are concepts which many authoritative writers have expounded on. The focus will rather be on analysing what leads to the failure of states; the legality of humanitarian intervention, and the 'responsibility to protect' doctrine; a possible new approach to the principle of state sovereignty and what tools can be utilised by the international community to address state failure. It would not be inopportune, however, as a background to what follows to give a brief overview of what constitutes a state, the recognition of states, and the role played by human rights in the international legal system as far as it relates to the topic under discussion.

What constitutes a state?

Traditionally the criteria for statehood are described in the Montevideo Convention[5] which provides for a permanent population, defined territory, an effective government, and the capacity to enter into relations with other states. Due to the importance of human rights it is strongly suggested that for a new entity to become a state in modern times, the standards laid down by the international community in this regard must be met. In 1991, for example, the European Community[6] sought to make

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4 J Dugard *International Law: A South African Perspective* 4 ed (2011) 82; MT Kamminga & M Scheinin *The Impact of Human Rights Law on General International Law* (2009); T Buergenthal 'The evolving international human rights system' (2006) 100 *American Journal of International Law* 783.

5 165 *League of Nations Treaty Series* 19. More recently the Badinter Commission defined a state as a community which consists of a territory and a population subject to an organised political authority and is characterised by sovereignty. See (1991) 92 *International Law Reports* 162. Much has been written on what constitutes a state. The different approaches are illustrated by T Baty 'Can an anarchy be a state?' (1934) 28 *American Journal of International Law* 444; H Kelsen *General Theory of Law and State* (1945) 220; M Koskenniemi 'The future of statehood' (1991) 32 *Harvard International Law Journa*l 397 407.

6 'EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991' published in G Marston (ed) 'United Kingdom Materials on International Law' (1991) 62 *British Yearbook of International Law* 559; AV Lowe & C Warbrick 'Current developments: Public international law' (1992) 41 *International and Comparative Law Quarterly* 473 477; M Weller 'The international response to the dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *American Journal of International Law* 569; SD Murphy 'Democratic legitimacy and the recognition of states and governments' (1999)

recognition of states dependent on compliance with international norms relating to respect for human rights including protection of minorities. In today's world there appears to be strong support for the proposition that democratic entitlement and respect for human rights should be a prerequisite for statehood.[7] This approach, however, does have its critics and state practice does not always bear this out.[8]

Recognition

Recognition remains one of the most divisive topics in international law.[9] It is a mixture of politics, international law, and municipal law. The legal and political elements cannot, however, be disengaged from one another. It would appear that, in practice, when giving or withholding recognition, political considerations play a greater role than legal considerations.

This is not the forum to enter into a discussion regarding the different views relating to the purposes or the consequences of recognition. Suffice it to say that two viewpoints prevail. According to the *constitutive* school, recognition of an entity claiming to be a state constitutes the state. According to the *declaratory* school, an entity becomes a state on meeting the factual requirements of statehood. With the constitutive theory, it is the *act of recognition* alone which clothes a new government with authority or status in the international sphere. With the declaratory (or evidentiary) theory, statehood or the authority of the new government *exists as such prior to* and independently of recognition. The act of recognition is thus a formal acknowledgement of an established fact.[10]

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48 *International and Comparative Law Quarterly* 545; S Talmon 'Recognition of governments: An analysis of the new British policy and practice' (1992) 63 *British Yearbook of International Law* 231.

7 J Crawford 'Democracy and international law' (1993) 64 *British Yearbook of International law* 113; Murphy (note 6 above) 545; CN Okeke *Controversial Subjects of Contemporary International Law* (1974) 88; DJ Devine 'The requirements of statehood re-examined' (1971) 34 *Modern Law Review* 410.

8 Dugard (note 4 above) 88.

9 A leading treatise on recognition is H Lauterpacht *Recognition in International Law* (1947). A more modern treatise is TD Grant *The Recognition of States: Law and Practice in Debate and Evolution* (1999). An excellent bibliography on the subject is to be found in S Talmon *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998).

10 AJGM Sanders 'Die erkenning van state en regerings' (1970) 33 *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg* 259; M Dixon & R McCorquodale *Cases and Materials on International Law* (1995) 168; I Brownlie 'Recognition in theory and practice' (1982) 53 *British Yearbook of International* Law 197.

As noted by Shearer,[11] the truth probably lies somewhere between these two schools of thought. The answer to the question as to which of the two theories will be applicable will depend on the factual situation. The preponderance of international practice supports the declaratory theory.[12] According to Evans,[13] a state is a state simply because it exists and international law merely has a role in acknowledging the reality of something which has already been put into place. Crawford[14] embellishes on this by saying that international law itself did not create states by way of some legislative fiat and because the entity bears the marks of statehood a duty to recognise exists. To enter into diplomatic relations, however, remains a discretionary act.

Human rights in the international legal system

It is generally accepted that fundamental principles of human rights have become part of customary international law.[15] There may be differences as to the precise contents of these fundamental principles but the role played by the customary international law of human rights is accepted.

In 1970 the International Court of Justice (ICJ), in the *Barcelona Traction*[16] case, regarded the basic rights of the individual person and the protection from slavery and racial discrimination as obligations *erga omnes.* In the 2004 *Wall Opinion*,[17] the ICJ referred to customary international law in addressing the substance of international humanitarian law and the application of the two 1966 Human Rights

11 IA Shearer *Starke's International Law* 11 ed (1994) 120.

12 MM Whiteman *Digest of International Law* (1962) vol 2, 72.

13 M Evans (ed) *International Law* 3 ed (2010) 240.

14 J Crawford *Brownlie's Principles of Public International Law* 7 ed (2008) 240.

15 HJ Steiner, P Alston & R Goodman *International Human Rights in Context: Law, Politics and Morals* 3 ed (2008); M Mutua *Human Rights: A Political and Cultural Critique* (2002); M Koskenniemi *From Apology to Utopia: The Structure of the International Legal Argument* (2005).

16 *Barcelona Traction Light and Power Company Ltd (Belgium v Spain)* (1970) ICJ Rep 3 32.

17 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 136 172–177. See GN Barrie 'The neglected aspects of the International Court of Justice's *Wall Opinion* on the consequences of internationally wrongful acts' (2014) 67 *Comparative and International Law Journal of Southern Africa* 120; AMB Mangu 'Legal consequences of the construction by Israel of a wall in the occupied Palestinian Territory: South Africa's contribution to the advisory opinion of the International Court of Justice' (2005) 20 *SA Public Law* 86. This *Wall Opinion* of the ICJ was confirmed by the ICJ in *Armed Activities on the Territory of the Congo (DRC v Uganda)* (2005) ICJ Rep 168.

Covenants[18] to individuals inside and outside Israel's territory. It can be argued that a 'common core' of human rights is to be found at universal and regional levels in core instruments such as the ICCPR, the ICESCR, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[19] the American Convention on Human Rights (ACHR)[20] and the African Charter on Human and Peoples' Rights (African Charter).[21] These instruments testify to the fact that human rights are a matter of legitimate concern and are appropriately part of the international legal system. To these treaties can be added the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[22] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[23] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[24] the Convention on the Prevention and Punishment of the Crime of Genocide,[25] the Convention relating to the Status of Refugees[26] and the Convention on the Rights of the Child (CRC).[27] Human rights clearly cover a broad spectrum and not only expand the scope of international law but are part and parcel of the system of international law.[28] The corpus of international human rights standards can be gleaned from an overview of multilateral standard-setting treaties.

It is important to note that the initial strict dualism which saw international law and humanitarian law as mutually exclusive is no longer observed. The two regimes are now understood to be complementary.[29] Human rights standards must now also be applied during armed conflict. In the 1949 *Corfu Channel* case,[30] the ICJ described the basic standards

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18 ICCPR (International Covenant on Civil and Political Rights) (1967) 6 *ILM* 368; ICESCR (International Covenant on Economic, Social and Cultural Rights) (1967) 6 *ILM* 360.

19 213 *UNTS* 221.

20 (1970) 9 *ILM* 673.

21 (1982) 21 *ILM* 58.

22 (1980) 19 *ILM* 33.

23 (1966) 5 *ILM* 352.

24 (1985) 24 *ILM* 535.

25 78 *UNTS* 277.

26 189 *UNTS* 137.

27 (1989) 28 *ILM* 1448.

28 For the texts of above and related treaties see PN Mtshaulana, J Dugard & NJ Botha *Documents on International Law* (1996).

29 R Provost *International Human Rights and Humanitarian Law* (2002); G Waschefort 'The pseudo legal personality of non-state armed groups in international law: Notes and comments' (2011) 36 *South African Yearbook of International Law* 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 136 paras 102–113.

30 *Corfu Channel (Merits)* (1949) ICJ Rep 4.

of humanitarian law as elementary standards of humanity which are more exacting in war than in peace. In the 1986 *Nicaragua* case[31] the ICJ regarded Common Article 4 of the Geneva Conventions of 12 August 1949 as the minimum yardstick to be followed in international and non-international armed conflicts. In 1996 the ICJ, in the *Nuclear Weapons* advisory opinion,[32] stated that principal human rights obligations do not cease in times of armed conflict.

Of importance in this area is the debate around the classification of the so-called 'war on terror' as an 'armed conflict' for purposes of the 1949 Geneva Conventions. Questions have been raised as to whether the campaign against al-Qaeda meets the threshold *humanitarian law* test for the existence of a 'state of armed conflict', particularly when looking at actions which have been carried out by foreign forces beyond the combat zones of Iraq and Afghanistan.[33] Both Iraq and Afghanistan are seen as failed states. Suffice it to say that, after the Afghanistan invasion in 2001, the Security Council in resolution 1386 identified terrorism as a threat to peace under article 39 of the UN Charter. Security Council resolution 1373 of 2001 directed states to take the necessary steps to prevent the commission of terrorism threats.

In failed or failing states, where there is an absolute lack of government authority in the whole or part of a territory of a state, armed attacks by non-state actor irregular forces can take place from such a state into a neighbouring territory. It would be unreasonable to deny the attacked state the right to self-defence merely because there is no attacker *state.* Although the Security Council is not empowered, in terms of Chapter VII and article 25 of the Charter, to adopt legally binding decisions where in its view there is a threat to international peace, the two resolutions above have all the appearances of legislation. They are general and apply to an indefinite number of cases. The question is then, by adopting such normative resolutions which are legally binding on all United Nations members, has the Security Council not taken on the role of international law-maker?

Article 51 of the UN Charter does not state that an 'armed attack' that gives rise to self-defence must emanate from a *state*. The developments

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31 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (1986) ICJ Rep 14.

32 *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226. See GN Barrie & KN Reddy 'The International Court of Justice's advisory opinion on the legality of the threat or use of nuclear weapons' (1998) 115 *South African Law Journal* 457; RA Falk 'Nuclear weapons, international law and the world court: An historic encounter' (1997) 91 *American Journal of International Law* 64.

33 See the discussion in Crawford (note 14 above) 118, 552, 771 and bibliography referred to by the author.

regarding terrorism lead to a new interpretation of article 51 which could allow an 'armed attack' to be attributed to a *non-state actor.* Security Council resolutions 1368 (2001) and 1373 (2001) must be seen to be affirmations of the view that large-scale attacks by non-state actors may qualify as 'armed attacks' within the meaning of article 51.

Characteristics of failed states

The characteristics of state failure are multi-faceted.[34] Briefly put, the common characteristics of failed states are a combination of absence of the rule of law; loss of social cohesion; corruption; a weak and ineffective bureaucracy; social and political instability; lack of legitimacy; an ineffective justice system leading to impunity; loss of internal territorial control; systematic gross human rights violations; internal conflicts due to lack of security and dictatorial rule; lack of development and weak institutions.

A five-year project by Harvard University's World Peace Program on Intrastate Conflict addressed all aspects of state failure.[35] Rotberg, viewed by many as the pre-eminent authority on the subject of state failure, sees the most critical function of the state as one related to human security. He views human security as a function that prevents invasions, infiltrations, and a loss of territory; the elimination of domestic threats to the national order and social structure; the prevention of crime and related dangers to domestic security; and the enablement of citizens to resolve differences with the state and fellow citizens without recourse to arms or violence.[36] Rotberg's findings are borne out by all related studies. The United Nations Development Programme's Human Development Index, for example, defines a failed state (which it prefers to refer to as a 'fragile state') as a state which is failing with respect to authority, comprehensive basic service provisions, and legitimacy.[37]

Failed states thus find themselves with massive problems. Unbridled criminality, domestic conflicts and humanitarian disasters afflict the failed state and affect neighbouring states and the larger surrounding region. State failure also presents major challenges to the international community due to the deterioration of the specific state and the concurrent humanitarian crisis that develops together with poverty, disease, violence, and the resultant refugee exodus to neighbouring

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34 RI Rotberg 'Failed states in a world of terror' (2002) 81 *Foreign Affairs* 1; GB Helman & SR Ratner 'Saving failed states' (1992/93) 89 *Foreign Policy* 3; Silva (note 2 above) 45.

35 RI Rotberg (ed) *When States Fail: Causes and Consequences* (2004).

36 Id 3.

37 F Stewart & G Brown 'Fragile states' (2010) *CRISE Overview 3* 9.

states. Failed states also emerge as fertile bases for terrorist groups who seek advantage from the ensuing anarchy. In many instances it is the army that controls the levels of power.[38]

Reason for states failing

The reasons for states failing are in many instances common to all of them and in some instances unique to a specific state. The latter is a consequence of the fact that each state possesses its own intricate history which was developed by various external and internal factors ranging from the geographical to the political to the functional.

The African continent is an example of historical factors resulting in weak states becoming failed states. Looking back, the Democratic Republic of the Congo (DRC) provides an example with rival factions waging wars on behalf of six other states and four semi-autonomous territories, three of which are controlled by rebel groups.[39] In 2002 half of the DRC was controlled by rebel groups receiving direct military assistance from Rwanda and Uganda, which made it a state with half of its territory under foreign military occupation.[40] The DRC's classic failed state status can be directly linked with the colonial pattern established by King Leopold of Belgium who was the sole ruler of the Congo Free State. His rule was brutal and prevented any indigenous peoples from assuming managerial positions.[41] At independence the DRC administration had little capacity to deliver anything positive to its people.[42]

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38 RE Brooks 'Failed states, or the state as failure?' (2005) 72 *University of Chicago Law Review* 1159; A Hilton 'Persecution on account of membership in a social group as a basis for refugee status' (1983) 15 *Columbia Human Rights Law Review* 39; *Abankwa v INS* (1999) 38 *ILM* 1267; GS Goodwin-Gill & J McAdam *The Refugee in International Law* 2 ed (1996) 3; P Kourala *Broadening the Edges* (1997) 4.

39 M Meredith *The State of Africa: A History of the Continent since Independence* (2006) 542; K Dunn *Imagining the Congo: The International Relations of Identity* (2003); J Tayler *Facing the Congo: A Modern-Day Journey into the Heart of Darkness* (2001).

40 M Wrong *In the Footsteps of Mr. Kurtz: Living on the Brink of Disaster in Mobutu's Congo* (2000); M Wrong *I Didn't Do it for You: How the World Betrayed a Small African Nation* (2005); J Clarke (ed) *The African Stakes of the Congo War* (2002); AMB Mangu 'Conflict in the Democratic Republic of Congo: An international legal perspective' (2003) 28 *South African Yearbook of International Law* 82.

41 A Hochschild *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (1999).

42 R Lemarchand 'The Democratic Republic of the Congo: From failure to potential reconstruction' in RI Rotberg (ed) *State Failure and State Weakness in a Time of Terror* (2003) 29.

A similar pattern repeated itself in Guinea Bissau, Burundi, Somalia, Sudan, Sierra Leone, Guinea, and Côte d'Ivoire. As a result many of these states, which abruptly came into being following the decolonisation process after the Second World War, were *ab initio* nothing more than 'quasi-states' and artificial creations of the European colonial system. The inherent weakness of such states at their independence was exacerbated by the Cold War which saw each superpower sustaining its allies by military means. This, in turn, fostered a level of militarisation which, far from sustaining states, undermined them. Weapons went missing from government control after the capture of government forces by insurgents and were channeled to opposition forces internally or across frontiers.[43]

It can thus be submitted that Africa's failed and failing states are, inter alia, a result of the way these states were created and managed by the various colonial powers. In many instances peoples from diverse ethnic, political and religious affiliations were forced into a common nationality. Colonisation, it can be argued, created artificial states in Africa due to the inflexible attitudes of the colonial powers.[44]

Terrorism has also played a role in state failure on the African continent. In Mali, the Tuareg rebels, MNLA (Liberation Army of Azawad), were defeated by the Islamist group Ansar Dine (Defenders of the Faith) who have links with al-Qaeda.[45] Ansar Dine is being assisted by terrorist groups from other parts of Africa. Boko Haram, who also have links with al-Qaeda, are active in Nigeria and have attacked various Christian churches in Nigeria killing hundreds and kidnapping large numbers of young women.[46]

Further afield, terrorism continues to play a role. After the fall of the Taliban, transnational terrorist organisations such as al-Qaeda, for example, contributed in a large way to state failure in Afghanistan.[47] Military insurgency in the Swat Valley and Southern Waziristan and Pakistan's failure to effectively control its territory has led many

43 C Clapham 'The global-local politics of state decay' in Rotberg (note 42 above) 91.

44 T Pakenham *The Scramble for Africa: White Man's Conquest of the Dark Continent from 1876 to 1912* (1991); R Olivier & JD Fage *A Short History of Africa* (1988).

45 G Zyberi (ed) *An Institutional Approach to the Responsibility to Protect* (2013) 489, 491.

46 C Eboe-Osuji (ed) *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (2010) 101.

47 M Byers 'Terrorism, the use of force and international law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401; GH Aldrich 'The Taliban, Al Qaeda, and the determination of illegal combatants' 2002 (96) *American Journal of International Law* 891.

commentators[48] to rank Pakistan high on the index of failed states. Terrorism is also put forward as a reason for the Yemen's classification as a failed state due to the role played by AQAP (al-Qaeda in the Arabian Peninsula).[49]

If a combination of the above common factors is present there is something seriously lacking in the normal basic constitutional structure of a 'state'. The latter then ceases to be a 'stable political community supporting a legal order to the exclusion of others in a given area', to use the definition of Crawford.[50]

A superficial overview of states, generally accepted to have 'failed', may illustrate certain of these common factors. The Sudan has always been seen to be a failed or failing state, with the Sudanese state incapable of providing public order and rarely using its oil revenues to benefit its people.[51]

Haiti's approach to the rule of law has always been tenuous, even before the destabilising 2010 earthquake.[52] In 1993 the Security Council's resolutions 841, 873 and 875 imposed economic sanctions on Haiti after the military overthrew the democratically elected government. Another factor supporting the argument that Haiti is a failed state is the fact that it still has to ratify the ICESCR. On the ground, vigilante justice is rife as is extra-judicial punishment. Both human trafficking and domestic servitude are major problems.[53]

In Somalia the government is unable to exercise authority and there is a total collapse of all structures designed to administer justice, law enforcement, and protect human rights. The strong clan system prevents the development of a mature/functioning central government. As Somalia was part of the colonial empires of two suzerains a coherent territory was never constituted. The justice system is informal and the Islamic Courts Union (made up of Sharia Courts) rival the administration of the federal government.[54]

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48 Silva (note 2 above) 123.

49 A Ng 'Al Qaeda in the Arabian Peninsula (AQAP) and the Yemen uprisings' (2011) 6 *CTTA: Counter Terrorist Trends and Analysis* 1.

50 Crawford (note 14 above) 129.

51 G Prunier & RM Gisselquist 'The Sudan: A successfully failed state' in Rotberg (note 42 above) 103.

52 *Technical Assistance and Capacity-Building: Report of the Independent Expert on the Situation of Human Rights in Haiti* UN Human Rights Council (26 March 2009).

53 See Bennett & Strug (note 1 above) 382 on human trafficking in general.

54 S Peterson *Me Against My Brother: At War in Somalia, Sudan and Rwanda* (2001); IM Lewis *A Modern History of the Somali: Nation and State in the Horn of Africa* 4 ed (2002).

In Burundi, the majority versus minority wars have prevented its capacity to adequately perform as a state and majority-backed insurgencies fighting against authoritarian minority-led governments have prevented stable government.[55]

In strongly regimented societies such as Libya under Gaddafi; Iraq under Saddam Hussein and Egypt under Mubarak the prospect for state failure always existed — as was borne out by recent history. The problem in all these instances was rule of law and legitimacy. In March 2001 Libya was unprecedentedly suspended from the UN General Assembly. This supported a growing view that a leader could only remain in power if they did not violate the human rights of their people. If they violated their human rights they lost the legitimacy to rule.[56]

Political instability, however, is a key factor leading to state failure, with an example being the military coup against Bedié, the democratically elected president of Côte d'Ivoire, in 1999. The coup was followed by a decade of political instability, massive corruption, and socio-economic irregularities. These factors created fertile ground for a civil war which was spurred by ethnic and regional differences.

Afghanistan is an example of how corruption and a burgeoning poppy industry threaten the creation of stable institutions.[57] Afghanistan ranks 179th out of 180 states in Transparency International's Corrupt Perception Index, only just above Somalia.

The role played by the lack of internal security in leading to state failure is illustrated by Liberia where, in 2012, Charles Taylor was sentenced by the Special Court for Sierra Leone (SCSL) for his involvement in crimes in backing the Revolutionary United Front's reign of terror and supplying arms in exchange for diamonds. This led to a ten-year civil war and the deaths of 120 000 people.[58]

The threat posed by the Lord's Resistance Army (LRA) created a destabilising environment which prevented stable government in various

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55 F Keane *Season of Blood: A Rwandan Journey* (1995); P Gourevitch *We Wish to Inform You that Tomorrow We will be Killed with Our Families: Stories from Rwanda* (2000).

56 'General Assembly suspends Libya from Human Rights Council' *UN News* (1 March 2011).

57 MV Vlasic & JN Noell 'Fighting corruption to improve global security: An analysis of international asset recovery systems' (2010) 5 *Yale Journal of International Affairs* 106.

58 I Marchuk 'Confronting blood diamonds in Sierra Leone: The trial of Charles Taylor' (2009) 4 *Yale Journal of International Affairs* 87 89. This was the first judgment lodged against a national leader since the Nuremberg Trials in 1946 where Admiral Doenitz, who succeeded Hitler as head of state of the Third Reich, was convicted. See CC Jalloh (ed) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (2014).

African countries such as the Central African Republic, South Sudan, Uganda and the DRC.

There is no reliable quantitative research that can be used to identify the precise moment when a failing state becomes a failed state. Weak leadership is generally accepted as being a prime institutional and structural flaw.[59] Various models exist to determine state failure. Rice, previous United States ambassador to the United Nations for example, measured states according to political security; economic and social welfare; government effectiveness; poverty; conflict and child mortality.[60] Each model has its own usefulness and many indicators overlap such as a loss of structural competency of statehood, loss of legitimacy, inability to deliver positive political benefits to the people, and constant internal violence.

In the modern global environment where states are supposed to be foundations of world order and international stability, it is a concern that so many states are perceived to be failed states.[61] With hindsight it can be submitted that failed states exhibit the following characteristics: demographic pressures, refugees and internally displaced persons, human flight, uneven development, economic decline, group grievances, no legitimacy, collapse of public services, collapse of the security apparatus, external intervention, elite favouritism, and the abuse of human rights. The latter usually develops into serious breaches of human rights, including the commission of crimes against humanity.

Failed states pose a threat to regional and international security and have immense humanitarian consequences. If states cannot end atrocities in their territory, they are then also ineffective in preventing terrorism; arms, people and drugs trafficking; the non-prevention of health pandemics and similar global disasters. All these issues concern the broader international community.

Facing the dilemma

In most, if not all, cases of state failure, gross violations of human rights are taking place. In failed states all provisions for human rights, if any, are ineffective. Mass murder, rape and starvation in many countries become the order of the day. Reference can be made to Kosovo, Somalia,

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59 Rotberg (note 42 above) 22.

60 S Patrick '"Failed" states and global security: Empirical questions and policy dilemmas' (2007) 9 *International Studies Review* 644 649.

61 R Geiss 'Failed states — legal aspects and security implications' (2004) 47 *German Yearbook of International Law* 457. A Failed State Index (FSI) has been jointly created and electronically published since 2005 by Foreign Policy and the Fund for Peace on the website http://www.foreignpolicy.com/failed states.

Bosnia and Rwanda. During the genocide in Rwanda, over a period of three months 800 000 Tutsis were either shot, burned, stoned, tortured, stabbed or hacked to death. The international community and the UN Security Council did virtually nothing to stop the atrocities.[62]

From the days of the Peace of Westphalia in 1648, which made the sovereign and independent state an indivisible and sole unit which conducts its own foreign relations, the *government* and *independence* and *sovereignty* have been seen as interlinked terms.[63] To this end the government must be *effective* and independent from other states, otherwise it cannot be sovereign. In the *Island of Palmas Case* Max Huber held that 'sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state'.[64]

Clearly *effectiveness* is a basic characteristic of statehood.[65] An *effective government* is a main criterion of statehood. Former UN Secretary-General, Boutros Boutros-Ghali, was forthright when he stated, with reference to Somalia, that

> [a] state that loses its Government loses its place as a member of the international community. The Charter of the United Nations provides for the admission to the international community of a country which gains the attributes of sovereignty ... It does not, however, provide for any mechanism through which the international community can respond when a sovereign loses one of the attributes of statehood ... Further reflection by the international community is required on this issue.[66]

How does the international community respond when a sovereign loses all (or one) of the attributes of statehood? This in modern times is not a theoretical question. It is presently a fact that, for all practical purposes, certain states do not exist as 'states'. Somalia is only one example. Once a state's government is extinguished a territory and population remain.

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62 JL Holzgrefe 'The humanitarian intervention debate' in JL Holzgrefe & RO Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 17; Silva (note 2 above) 147.

63 FH Hinsley *Sovereignty* 2 ed (1986) 222; P Allott *Eunomia: New Order for a New World* (1990) 329; Shearer (note 11 above); DG Devine 'The status of Rhodesia in international law' 1974 *Acta Juridica* 109 115.

64 *Island of Palmas Case (United States v Netherlands)* (1928) 2 *Reports of International Arbitral Awards* 829 838.

65 M Aznar-Gómez 'The extinction of states' in E Rieter & H de Waele (eds) *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (2012) 30.

66 *The United Nations and Somalia, 1992–1996* (1996) vol VIII United Nations Blue Book Series. See also IM Lewis & J Myall 'Somalia' in J Myall (ed) *The New Interventionism 1991–1994* (1996) 44.

Prior to modern international law the territory of the 'extinct' state could have changed its legal status through occupation, conquest, cession, *derelictio,* merger or prescription.[67] These possibilities nowadays are totally unsuitable.

With a failed state, the injured entity is the people of the failed state. They can only look to the international community for assistance. How must the international community in the context of the international legal system react? This is the dilemma.

It is accepted that human rights have become entrenched into the international rule of law.[68] There is a growing awareness in the international community of the primacy of human rights. Former Secretary-General Pérez de Cuéllar stated that the fundamental freedom of each individual, as enshrined in the UN Charter and subsequent relevant international treaties,[69] has been enhanced by the spreading consciousness of individual rights. The UN Charter has as its *aim* the protection of *individual human being*s, and not the protection of those who abuse them.[70]

Kofi Annan's sentiments echo the 1966 dissenting judgments in the *South West Africa Case*[71] where the International Court held, by a majority of eight to seven (with the president's casting vote), that the governments of Ethiopia and Liberia had no standing to complain about the discriminatory manner in which South Africa was exercising its mandatory duties over the residents of the mandatory territory of South-West Africa. Judge Tanaka, dissenting however, held that each member of a human society — whether domestic or international — is interested in the realisation of social justice and humanitarian ideas.[72] Following this, in 1970 the ICJ in the *Barcelona Traction Case*[73] specifically recognised the interest of other states in respect of fundamental values, such as those relating to the protection of individuals. This trend is also discerned in the comments of the UN Human Rights Committee on the ICCPR and other general human rights treaties. The Human Rights

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67 Dugard (note 4 above) 131; Crawford (note 14 above) 201; *Western Sahara (Advisory Opinion)* (1975) ICJ Rep para 94.

68 T Meron *The Humanization of International Law* (2006); Steiner (note 15 above); Kamminga & Scheinin (note 4 above); Buergenthal (note 4 above).

69 GN Barrie 'International human rights conventions' in YN Mogadime & P Tlakula *Human Rights Compendium* (2016) Issue 31, 1B7–1B25.

70 'Two concepts of sovereignty' *The Economist* (18 September 1999); H Owada 'Human security and international law' in U Fastenrath et al (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 515.

71 *South West Africa, Second Phase (Judgment)* (1966) ICJ Rep 6.

72 Id 250.

73 Note 16 above para 33.

Committee sees human rights treaties as being concerned with the endowment of *individuals* with rights.[74] The same trend is followed by the ICJ in the *La Grand* case[75] which concerned the Vienna Convention on Consular Relations. The question before the ICJ was whether certain rights pertaining to individuals under paragraph 1(b) of article 36 were indeed rights of those *individuals* or rights belonging to *states* in their interstate relationships. The ICJ held that paragraph 1 of article 36 created *individual* rights.

These examples indicate that the traditional notion of the international community consisting of nation states having total sovereignty is at an evolutionary stage. The recognition of the *individual* at the *nucleus* of the international legal order is becoming increasingly prominent.[76] As put by Oberleitner, the individual is becoming the *ultimate beneficiary* of international law.[77] There is thus a paradigm shift between the notion of the international community as a society of *sovereign states* to the notion of the international community as a society having *individuals* as its essential components.

Humanitarian intervention

An individual-centered approach brings the issue of humanitarian intervention[78] to the fore. The genocide in Rwanda and so-called ethnic cleansing in the Balkans reminded the world of the issue of ethnic cleansing and provided the international community with a major dilemma. The costs to human life and human rights were too great for the international community to idly stand by in the face of the mass atrocities being committed. The intolerable dilatoriness, inexcusable interaction, and protracted and sometimes inexplicable reluctance of the UN Society Council to get involved, raised concerns regarding the capacity and political will of the UN Security Council in this regard.

Article 2(4) states that states shall refrain from the threat or use of force against the territorial integrity and political independence of any

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74 UN doc CCPR/C/221/Rev.1/Add.6 General Comment No 24.

75 *La Grand Case (Federal Republic of Germany v United States of America Judgment)* (2001) ICJ Rep 466 para 77.

76 Owada (note 70 above) 517.

77 G Oberleitner 'Human security: A challenge to international law?' (2005) 11 *Global Governance* 185 198.

78 R Goodman 'Humanitarian intervention and pretexts for war' (2006) 100 *American Journal of International Law* 107; S Chesterman *Just War or Just Peace: Humanitarian Intervention and International Law* (2001); NJ Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2000); GN Barrie 'Humanitarian intervention in the post-cold war era' (2001) 118 *South African Law Journal* 155.

state inconsistent with the purpose of the United Nations. This injunction is reiterated by article 2(7) which prohibits the UN from intervening in matters essentially within the domestic jurisdiction of any state. There are two exceptions to the above prohibitions. Firstly, pursuant to article 39, the Security Council may make recommendations as to what measures, including force, should be taken to address an identified threat to international peace and security or to any acts of aggression. Secondly, pursuant to article 51, member states of the UN may take measures, individually or collectively in pursuit of their inherent right to self-defence should they be subject to armed attack.

The approach espoused in the above two articles of the UN Charter does not readily support humanitarian intervention. The principle of non-intervention stands tall and the contents of the articles are heavily supported by articles of the 1970 UN Declaration on Friendly Relations.[79] However, it all boils down to interpretation. Could it not be argued that despite the wording of articles 2(4), 2(7), 39 and 51 of the UN Charter, humanitarian intervention can be *insinuated*? If article 2(4) prohibits the use of force against 'territorial integrity or political independence of a state', can force not be used in the pursuance of *another objective consistent with the objects of the UN Charter*? Such intervention can be carried out to prevent further commission of atrocities with a view to restoring stability in a state and does not threaten the territorial integrity or political autonomy of the state.[80] It can also be submitted that, if the objective of the intervention is to prevent gross violations of human rights, the use of force is permitted because it is not being used 'in any manner inconsistent with the purposes of the United Nations'.[81]

The last two-and-a-half decades have seen conflicting signals being sent out with interventions taking place *with* and *without* Security Council authorisation. Examples of the former are the international interventions in Somalia, Rwanda, Bosnia and Herzegovina. Examples of the latter are the international interventions in Northern Iraq and Kosovo. The Somalia intervention was justified on the basis that, the obstacles that were being placed in the way of urgently required humanitarian assistance

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79 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations GA Res 2625 (XXV) UN doc A/Res/25/2625 (24 October 1970).

80 RB Lillich 'Forcible self-help by states to protect human rights' (1967-68) 53 *Iowa Law Review* 325; M Akehurst 'The use of force to protect nationals abroad' (1977) 5 *International Relations* 3; I Brownlie 'Humanitarian intervention' in JN Moore (ed) *Law and Civil War in the Modern World* (1994) 189; Bennett & Strug (note 1 above) 338.

81 These questions are addressed by various authors in Holzgrefe & Keohane (note 62 above).

for the country's population, constituted a threat to international peace and security. The French intervention in Rwanda, albeit belatedly authorised, was to prevent further mass atrocities and to create safe havens for those fleeing the genocide. The Rwandan genocide was also seen as a threat to international peace and security. Although the many resolutions[82] relating to Bosnia and Herzegovina were primarily aimed at ending the civil conflict upon the dissolution of the former Yugoslavia, the humanitarian objective was not insignificant. The various resolutions mentioned above followed on the initial determination that the conflict constituted a threat to international peace and security. In all these cases a potential humanitarian catastrophe was identified and a threat to international peace and security was determined by the Security Council. [83]

Examples of interventions *without* Security Council authorisation are Northern Iraq and Kosovo. Security Council Resolution 688 of 5 April 1991, despite its strong language condemning Iraq for the repression of the Iraqi population and insisting that Iraq allow international humanitarian organisations immediate access to all those in need of assistance, did *not* contain any express authorisation for military action pursuant to Chapter VII. On the same day, the United States announced that it would commence dropping food and other material aid over Northern Iraq in partnership with the United Kingdom and France. Eleven days later President Bush unilaterally announced that he would enter Northern Iraq so as to establish safe havens. Upon being challenged by Iraq in the Security Council it was contended, by the United States, France and the United Kingdom, that their actions were justified on purely *humanitarian* grounds.[84] They contended further that Resolution 688 implicitly authorised their humanitarian intervention and in that way established *legal authorisation* for them.[85] The legality of humanitarian intervention arose again in 1999 with NATO's intervention in Kosovo in defence of the ethnic Albanian people of Kosovo. To protect Kosovar Albanians from ethnic cleansing at the hands of the Serbian forces, NATO conducted thousands of bombing raids over Kosovo and surrounding areas. Three Security Council resolutions were adopted prior to those bombings.[86] All three concerned the deteriorating *humanitarian* and

82 UN docs S/Res/770 (13 August 1992); S/Res 814 (26 March 1993); S/Res 816 (31 March 1993); S/Res 844 (19 June 1993) and S/Res 871 (2 October 1993).

83 T Gazzini *The Changing Rules on the Use of Force in International Law* (2005) 174.

84 TM Franck *Recourse to Force: State Action Against Threats and Armed Attacks* (2002).

85 Id 152.

86 B Simma 'Nato, the UN and the use of force: Legal aspects' (1999) 10 *European Journal of International Law* 1; Dugard (note 4 above) 509.

military situation. Security Council Resolution 1160 of 31 March 1998 condemned the use of excessive force by the Serbian police and called for a political solution. Security Council Resolution 1199 of 23 September 1998 specifically referred to the deteriorating humanitarian situation and saw the situation as constituting a threat to international peace and security and under Chapter VII demanded a ceasefire to improve the humanitarian situation. Security Council Resolution 1203 of 24 October 1998 decided if concrete measures were not taken, if Serbia did not end hostilities in terms of an agreement reached between NATO and the Organization for Security and Co-operation in Europe (OSCE), then it would consider additional measures to restore peace in the region. *None* of these resolutions authorised any international military action to achieve these aims. NATO took it upon *itself* to pursue the aims of the resolutions with *no reference* to the Security Council.

It could be argued that NATO's intervention was *implicitly* justified as it enforced the Security Council resolutions. The fact is the idea, that a state or group of states could act unilaterally to enforce Security Council resolutions without subsequent Council involvement, does raise more questions than answers. One such question raised is that if non-derogable human rights have achieved the status of *ius cogens,* which obliges the UN to protect them, does it follow that unilateral employment of military force outside the UN, has also become part of customary international law?[87]

The answer to this question remains controversial. The legal basis for the use of military force to defend human rights needs clarification as does the extent of the ensuing rules of engagement. This was also the conclusion of the Independent International Commission on Kosovo which found that the NATO campaign was illegal, yet legitimate. It found that the idea of a 'right' of humanitarian intervention is not, in a strictly legal sense, consistent with the UN Charter but that it may, depending on the context, nevertheless, reflect the spirit of the Charter, as it relates to the overall protection of people against gross abuse.[88]

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87 P Alston & E MacDonald 'Sovereignty, human rights and security: Armed intervention and the foundational problems of international law' in P Alston & E MacDonald (eds) *Human Rights, Intervention and the Use of Force* (2008) 1. These issues are discussed in more detail by S Zifcak in Evans (note 13 above) 504–510.

88 Independent International Commission on Kosovo *The Kosovo Report* (2000) 186. Much has been written on NATO's involvement in Kosovo. See Simma (note 86 above); D Kritsiotis 'The Kosovo crisis and NATO's application of armed force against the Federal Republic of Yugoslavia' (2000) 49 *International and Comparative Law Quarterly* 330; A Casesse 'Ex iniuria ius oritus: Are we moving

Dugard's reaction to this 'illegal yet legitimate' conclusion of the Kosovo Commission is that it likens humanitarian intervention to euthanasia in that 'it remains unlawful but is tolerated in genuine cases'.[89] The ICJ, when confronted with proceedings brought against NATO by member states of Yugoslavia, avoided pronouncing on the issue on the grounds that it lacked jurisdiction.[90]

From the African perspective, article 4(h) of the Constitutive Act of the African Union[91] recognises the right of the African Union to 'intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crime against humanity'. No reference is made to article 2(4) of the UN Charter or to the need for UN Security Council authorisation for regional action involving the use of force. To date, despite grave human rights violations by various member states of the African Union, there has been no attempt to invoke article 4(h) and this article can for all practical purposes be regarded as being *pro non scripto.*

The prohibition of the use of force according to article 2(4) of the UN Charter has worked quite well up to a point. International wars have diminished but, at the same time, internal armed conflicts and massive internal violations of human rights have escalated. The problem confronting international law is balancing of the traditional concept of *state sovereignty* on the one side of the scale with the use of military power to rescue a *threatened population* on the other side.[92] The latter choice arguably jettisons the UN model. A new approach may thus be necessary to bring relief to those who sorely need it in a way that would not only be *effective* but also be *compliant* with the UN Charter. It is a question of peace preservation versus the protection of human rights. If it can be argued that the maintenance of peace is a predominant role of the UN, can the status of human rights be far behind?[93] According to

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towards international legitimation of forcible humanitarian countermeasures in the world community?' (1999) 10 *European Journal of International Law* 23.

89 Dugard (note 4 above) 510.

90 *Case concerning the Legality of the Use of Force (Serbia and Montenegro v Belgium et al)* (2005) 44 *ILM* 299.

91 See OAU doc AHG/Dec 143 (XXXVI); M Cowling 'The African Union — an evaluation' (2002) 27 *South African Yearbook of International Law* 193; KD Magliveras & GJ Naldi 'The African Union — a new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415.

92 The Security Council authorised forcible intervention in Libya for the protection of civilians with SC Res 1973 (2011). See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America (Merits)* (Judgment) (1986) ICJ Rep 1 para 263 on state sovereignty in general.

93 UN Secretary-General *Millennium Report of the Secretary General of the United Nations 'We the Peoples': The Role of the United Nations in the 21st Century* UN

the Vienna Declaration and Programme of Action (1993) the promotion and protection of all human rights and fundamental freedoms must be considered a priority objective of the United Nations.[94]

Following Kosovo there have been no significant instances of humanitarian military intervention which have involved the *international community*. There is thus not much on state practice to give guidance on any developments on the modern application of humanitarian intervention. Mass atrocities have, however, not ceased and a new acceptable international concept on intervention needs to be developed. This has become imperative as it has been shown time and time again that the repercussions from failed states (e.g. Somalia and Afghanistan) have great international and security consequences. States that are unwilling or unable to end atrocities within their own boundaries will be, as stated above, as ineffective in controlling health pandemics; preventing terrorism; the trafficking of arms, drugs and people and the results of other global disasters. Failed states thus pose a major threat to both regional stability and international security.[95]

In 2011 UN Secretary-General Ban Ki-Moon, in referring to the situation in the Ivory Coast (where the president refused to stand down and started committing violence against his own populace) and Libya (where the people were being massacred), said

> 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*.[96]

These words resonate strongly with what was said by UN Secretary-General Kofi Annan, twelve years earlier in 1999, referring to Rwanda

> To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council mandate, one might ask … in the context of Rwanda, if in those dark days and hours leading up to the genocide a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Security Council authorisation, should such a coalition have stood aside and allowed the horror to unfold.[97]

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doc A/54/20 (2000) 48.

94 UN doc A/Conf.157/23 (12 July 1993) art 4.

95 Silva (note 2 above) 151.

96 'Ban urges students to help build rule of law institutions in emerging democracies' *UN News* (4 October 2011). Emphasis added.

97 Address by Kofi Annan to the 54th Session of the UN General Assembly, Annual

This call to action, as it were, by Annan was met with a mixed and, in some quarters, hostile response in the General Assembly. It did, however, have one singular positive outcome. It prompted the Canadian government to form an international panel of experts, the International Commission on Intervention and State Sovereignty (ICISS) to address the problem. The ICISS presented its report in 2001 with the title *Responsibility to Protect.* (This is more commonly known as the 'R2P report' and the responsibility to protect concept is more commonly referred to as R2P.)[98] Thus far R2P has had a major impact and it would be safe to state that it is here to stay.

The R2P concept

The ICISS's R2P report uses established concepts accepted in international law and sets these concepts in a new context. In a nutshell, the R2P report declares that state *sovereignty* must no longer be interpreted in the traditional Westphalian sense as the supreme authority within a territory but as a concept based on human security and implied responsibilities.[99] State *responsibility* means respect for the sovereignty of other states, respect for the dignity and basic rights of everyone *within* the state itself, and the *accountability* of the state for its actions.[100]

Report to the General Assembly, Press Release SG/SM/7136 GA/9596 (20 September 1999).

98 G Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2008); RH Cooper & JV Kohler (eds) *Responsibility to Protect: The Global Moral Compact for the 21st Century* (2009); T Stoll 'Responsibility, sovereignty and cooperation — reflections on the responsibility to protect' in D König et al (ed) *International Law Today: New Challenges and the Need for Reform?* (2007) 8; TG Weiss & DA Korn *Internal Displacement: Conceptualization and its Consequences* (2006); C Burke 'Replacing the responsibility to protect: The equitable theory of humanitarian intervention' (2009) 1 *Amsterdam Law Forum* 61: AJ Bellamy 'Conflict prevention and the responsibility to protect' (2008) 14 *Global Governance* 135; A Zimmerman 'The obligation to prevent genocide: Towards a general responsibility to protect?' in Fastenrath et al (note 70 above) 629. Zimmerman conceptualises the responsibility of the UN Security Council to prevent genocide, crimes against humanity and war crimes.

99 For state responsibility in general see NHB Jorgensen *The Responsibility of States for International Crimes* (2003); P Weil 'Towards relative normality in international law' (1983) 77 *American Journal of International Law* 413 and the *Report of the International Law Commission* GAOR 56th Session, Supplement No 10 UN doc A/56/10 (2001) 29; J Crawford, A Pellet & S Olleson (eds) *The Law of International Responsibility* (2010); M Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005).

100 Examples are the *Rainbow Warrior Case* (1987) 26 *ILM* 1346*; United States Diplomatic and Consular Staff in Tehran (Hostages Case)* (1980) ICJ Rep 3; *Case*

If the state fails to live up to these responsibilities, it becomes an *international humanitarian issue.* According to Tladi,[101] under the new value-laden vision of international law, the treatment of persons by a state is no longer the domain of internal affairs. The 'new' international law gives prominence to concepts such as R2P. This allows the international community *to act* to protect people against atrocities in cases where the state has failed to do so — with or without the consent of the state. This latter responsibility could be attributed to the Security Council or the General Assembly. Although the R2P report is not specific on the issue, it can be submitted that if the UN remains inactive, multilateral intervention is a possibility. Additional to the above, the R2P report embraces three more international responsibilities: the responsibility to *prevent*, the responsibility to *react* and the responsibility to *rebuild*.[102]

Practically speaking, R2P means that state sovereignty implies responsibility and the primary responsibility for protecting its people lies with the state itself. Where a population is suffering serious harm due to repression, insurgency or state failure, and the state itself is unwilling or unable to halt it, the principle of non-intervention *yields* to R2P. Should there be state failure the responsibility to react and the responsibility to rebuild by the international community become particularly applicable.[103]

The responsibility to react or to intervene is based on the 'just cause' concept, which in practice implies halting or averting a failed state situation. The responsibility to rebuild harks back to the basic principles of the UN trusteeship system[104] set out in Chapter XII of the UN Charter. The trusteeship system fell into disfavour with the UN General Assembly and Secretary-General in 2005,[105] and a substitute peace-building commission was established.[106] The result is that, theoretically, any effective form of international administration of territories could be

Concerning Avena and Other Mexican Nationals (2004) ICJ Rep 10; *Military and Paramilitary Activities in and against Nicaragua* (1986) ICJ Rep 14.

101 D Tladi 'Security Council, the use of force and regime change: Libya and Cote d'Ivoire' (2012) 37 *South African Yearbook of International Law* 22 29.

102 For a more comprehensive exposition of R2P see P Hilpold 'From humanitarian intervention to responsibility to protect' in Fastenrath et al (note 70 above) 462.

103 MJ Aznar-Gómez (note 65 above) 45.

104 See art 5.22–5.24 of the R2P report. For an exposition of the UN Trusteeship system see Shearer (note 11 above) 106.

105 United Nations GA Res 60/1 UN doc A/Res/60/1 (24 October 2005) para 176.

106 Id para 97 and United Nations SC Res 1645 (20 December 2005). This commission dealt with peace-building in Burundi, Sierra Leone, Guinea-Bissau and the Central African Republic.

utilised.[107] It has been suggested[108] that the Security Council acting under Chapter VII of the UN Charter, acting in close collaboration with the Peacebuilding Commission, and in close contact with regional organisations, should be entrusted with the mission of deciding on, and monitoring, an international administration of a territory. Such an administration must be democratic and have human rights as one of its foundations.

In 2005 the UN Secretary-General endorsed the R2P concept by personally accepting the High-Level Panel on Threats and Change's report.[109] This report endorsed the emerging norm that there is a *collective international responsibility to protect, exercisable by the Security Council authorising intervention as a last resort*. This responsibility is to be exercised in the event of genocide and other large-scale killings, ethnic cleansing and serious violations of international humanitarian law, which sovereign governments have been unwilling or powerless to prevent. The UN Secretary-General recommended that the World Leaders Summit of 2005 adopt the R2P concept in its World Summit resolution. To the surprise of many, general consensus was achieved at the Summit regarding the acceptance of the R2P concept. The Western European group supported the concept. The United States had reservations. The Non-Aligned Movement opposed the concept or sought amendments. Some Latin-American states expressed their disquiet. African nations strongly supported the R2P concept.[110] The fact that the concept had in principle been agreed to in the 2005 World Summit Outcome[111] was a major success.

R2P in practice

The question is now how the acceptance of the R2P has played out in practice? In Security Council Resolution 1674 of 28 April 2006, the Security Council expressly acknowledged that this role may extend, not just to the prevention of threats to international peace and security, but

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107 See GH Fox *Humanitarian Occupation* (2008); B Knoll *The Legal Status of Territories Subject to Administration by International Organisations* (2008); C Stahn *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (2008); R Wilde *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008).

108 Aznar-Gómez (note 65 above) 50.

109 UN doc A/59/565 para 203; P Hilpold 'Reforming the United Nations: New proposals in a longlasting endeavour' (2005) 52 *Netherlands International Law Review* 389.

110 These views were expressed at the first Summit of the Great Lakes held in Dar-es-Salaam, November 2004.

111 *2005 World Summit Outcome* UN doc A/60/L.1.

also to the cessation of mass atrocities taking place within state borders. In Security Council Resolution 1704 of 25 August 2006 the Security Council resolved to deploy a UN peacekeeping force in Darfur and sought the consent of the Sudanese government to do so. In the Report of the Secretary-General entitled *Implementing the Responsibility to Protect*[112] of 2009, a comprehensive exposition of the concept was set out. This Security Council-sanctioned report saw military intervention as a measure of last resort. Prior to military intervention a three-pillared approach had to be followed. The *first* pillar could include diplomacy, adoption of anti-corruption measures, prosecutions of those engaged in violent activities, the promotion of human rights, and the establishment of more effective government. The *second* pillar involves calibrated actions by the international community such as development aid, technical assistance, foreign investment, and capacity building. The *third* pillar involves 'soft' coercion such as international fact-finding, deployment of peace-keepers, imposition of arms embargoes, diplomatic and economic sanctions, and the creation of safe havens and no-fly zones.

The Secretary-General in his *Implementing the Responsibility to Protect Report* of 2009 made it clear that the R2P applies *only* to cases of genocide, war crimes, crimes against humanity. The report did not detract from existing international obligations under international humanitarian law, human rights law, or the law relating to refugees. It was also made clear that collective action in the use of force had to be undertaken with Security Council authorisation under Chapter VII of the UN Charter. There is thus no support for unilateral military interventions.

The *Implementing the Responsibility to Protect Report* of 2009 came before the UN General Assembly to consider and endorse. Despite extremely negative sentiments expressed by the president of the General Assembly regarding the binding nature of the report in international law and that there was no general agreement as to its terms, 180 member states of the General Assembly *supported* both the report and the World Summit Outcome report of 2005, and backed the above three-pillared approach. Brazil, Chile, India,[113] Egypt, Algeria and South Africa moderated their previously sceptical positions. The only dissentions were Venezuela, Cuba, Sudan and Nicaragua.

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[112] UN doc A/63/677.

[113] Statement by Permanent Representative of India to the UN General Assembly at the Plenary Meeting on Implementing Responsibility to Protect (24 July 2009) referred to by Zifcak (note 87 above) 518.

What is the status of the R2P doctrine in international law today? To answer this question the World Summit Outcome report of 2005[114] and the *Implementing the Responsibility to Protect Report*[115] and its virtual overwhelming endorsement by the General Assembly must be taken into account. Zifcak[116] emphasises the following elements of the R2P doctrine that appear to have the support of most of the member states of the UN

(1) The primary responsibility for protection of its peoples from mass atrocities rests with the sovereign nations.
(2) Mass atrocity crimes are genocide, war crimes, crimes against humanity and ethnic cleansing.
(3) The responsibility of the international community to prevent and protect against such crimes is only engaged when the sovereign nation concerned cannot prevent such crimes being committed due to the escalation of civil strife.
(4) In the latter instance the international community's primary responsibility is to prevent, aid and assist with expertise and resources to assist the affected nation to deal with the impending humanitarian crisis.
(5) Where it is apparent that a state has failed to exercise its sovereign obligations, and where the assistance of the international community is ineffective, the primary responsibility to prevent and protect against the commission of international crimes shifts from the state to the international community.
(6) To maintain peace and security the international community may, due to the circumstances, take coercive measures including internationally mandated military intervention.
(7) Such coercive measures may be authorised only by the UN Security Council acting under Chapters VI and VII of the UN Charter.
(8) Where the international community has intervened in the domestic affairs of a state, whether militarily or in some other coercive manner, it becomes responsible upon the restoration of peace and security to facilitate and assist in peacekeeping, peacebuilding and national reconstruction.

It remains a moot point whether the R2P has become part of international law. R2P is not embodied in any treaty although it is closely

[114] Note 111 above.
[115] Note 112 above.
[116] In Evans (note 13 above) 527.

related to the Genocide Convention,[117] the Geneva War Conventions[118] and the Rome Statute of the International Criminal Court.[119] To be part of customary international law it must be part of state practice, widely observed and there must be the necessary *opinio iuris.*[120] State practice in conformity with the R2P is basically non-existent. As R2P was only conceived in 2002, no state or international organisation as yet has claimed to have acted in accordance with its terms. At this stage there also still appear to be clear distinctions between the R2P and humanitarian intervention as the latter is understood. At best it can be submitted that the R2P is a *fledgling* rule of customary international law before being adopted in practice and obtaining the requisite international acceptance to be considered a rule of international law.

The fact is, however, that the R2P has been confirmed by the UN in the *Implementing the Responsibility to Protect Report*[121] and in a Security Council resolution on the protection of civilians in armed conflict in 2006 where it reaffirmed paragraphs 138 and 139 of the World Summit report.[122] This in itself is an achievement for the supporters of the R2P concept. It must also be kept in mind that virtually all states wish to prevent repeats of Cambodia, Rwanda, and Srebrenica. The East-West divide is no longer so divisive as in the past. In Africa, following on Rwanda, many states will be more open to the R2P concept. The question can be posed whether R2P should be confined only to genocide, war crimes, ethnic cleansing, and crimes against humanity? Should it not include actions generating dangerous climate change and natural disasters affecting other states?[123]

In the past two decades the Security Council has acted where a humanitarian disaster has had more of an internal than a cross-border consequence. Somalia, Bosnia-Herzegovina and Rwanda are examples. Seeing that there is no judicial review of Security Council decision-making, it can act in a flexible manner when threats to the international peace and security are present even where a humanitarian crisis is confined entirely within one state. Should this practice become recurrent and be recognised by the international community as necessary and appropriate, R2P could eventually crystallise as being part of customary international law.[124] This would allow an exception to article 2(4) of the

117 78 *UNTS* 277.
118 75 *UNTS* 287.
119 1998 *ILM* 1979.
120 *North Sea Continental Shelf (Judgment)* (1969) ICJ Rep 3 para 77.
121 Note 112 above.
122 Ibid.
123 Hilpold (note 102 above) 475.
124 Zifcak (note 87 above) 524.

UN Charter by allowing intervention by the international community to prevent a humanitarian disaster *entirely within a state,* pursuant to a determination by the Security Council under article 39[125] of a threat to international peace and security, and secondly by authorised international intervention in accordance with articles 41[126] and 42.[127] As the international community is increasingly interconnected and interdependent today, few catastrophes remain entirely localised.[128]

Conclusion

It is thus submitted that the issue of state sovereignty be re-evaluated. As stated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia 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'.[129] When taking the various multifaceted operations of the Security Council in failed states in account in recent history it would appear that the door has opened allowing measures envisaged in Chapter VII of the UN Charter for interstate relations, also to be used in the *internal* affairs of states.[130]

As pointed out by Michael Reisman,[131] states cannot be expected to remain idle while a great number of people die. In the case of Libya, the Security Council acted promptly and although not referring specifically [132] to the R2P, the resolution *contained R2P language*, calling on member states of the UN to take 'all necessary measures ... to protect civilians and civilian population areas under threat of attack' in Libya. This resolution is a significant step in support of the legality of the R2P concept in using force for humanitarian purposes.

The R2P advances the notion that state sovereignty is a privilege and not a right, and is derived from a reciprocal arrangement in

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125 '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 Arts 41 and 42, to maintain or restore international peace and security'.

126 Art 41 refers to measures not involving the use of armed forces.

127 Art 42 refers to measures which can be taken to restore international peace and security if the measures provided for in art 41 have proved to be inadequate.

128 O Corten 'Human rights and collective security: Is there an emerging right to humanitarian intervention?' in Alston & MacDonald (note 87 above) 87.

129 *Prosecutor v Dusko Tadic* IT-94-1-A (1995) para 58.

130 D Thürer 'An internal challenge: Partnerships in fixing failed states' (2008) 29 *Harvard International Review* 42.

131 WM Reisman 'The constitutional crisis in the United Nations' (1993) 87 *American Journal of International Law* 83 89.

132 UN doc S/Res 1973 (17 March 2011).

respect of the state and its citizens. If the state is unable to protect its own citizens against gross and systematic violations of internationally recognised human rights, the international community must assume the responsibility to protect such citizens. This responsibility consists of launching preventative, reactive, and rebuilding measures aimed at protecting the defenceless from abuse from their own governments.[133] That is the essence of R2P.

It is a moot question to ask what possible legacy R2P will leave on current and future international law. R2P could conceivably be the biggest moral and legal advance since the International Military Tribunal at Nuremberg. This will depend on its influence on the international community's reactions to failed states. It may be premature to identify the possible legacy of R2P. It is also true that it is never too early to commence observing what its long-term impact will be.

[133] Silva (note 2 above) 152.