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Why should international law be concerned about state failure?

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WHY SHOULD INTERNATIONAL LAW BE CONCERNED ABOUT STATE FAILURE?

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I. INTRODUCTION: FRAMING THE ISSUE

In the last fifty years, the international community has undergone a transformation, as social, economic, and political dynamics have been altered. In fact, the international power structure has shifted towards a more complex structure, economies have been largely liberalized, new powerful international actors have emerged, and security threats have altered significantly.

These transformations impacted all nation States. Indeed, a new standard of governance emerged that resulted in increased responsibility to each State's nationals. Similarly, States have become increasingly inter-independent and have additional (both in numbers and substance) obligations towards each other and the international community in general.

Certain States, however, are unable to operate in this new system of increased responsibility, in terms of obligations towards other States, the international community, and their citizens. These States—often referred to as fragile, failing, or failed States—become ineffective actors in the international stage. This poses multiple problems for the international community as certain necessary obligations (including, for example, border patrols, air traffic control, and health and environmental monitoring) and required acts failed to be performed, making the entire system weaker.

This article examines why it is important for international law to recognize the phenomena of State fragility and State failure and to be able to adequately respond to it.

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II. AN EMERGING PROBLEM IN INTERNATIONAL LAW

Contemporary society is based on the premise that each person has multiple rights and obligations that arise from being a national of a certain State and a member of the international community. Individual rights include civil, political, economic, social, and cultural rights and range from the right to life, to the rights of free movement, ownership, and vote.[1] These rights can derive from both domestic and international provisions.[2] In general, the parallel obligation that allows for the right to be enjoyed is primarily imposed upon the State as a sovereign.

Obligations to confer rights to individuals are enumerated by international binding agreements, principally concluded under the aegis of the United Nations, since its creation in 1945. Further, the United Nations Charter itself, which is almost universally ratified, provides for the fulfillment of personal rights of individuals by promoting "higher standards of living, full employment, and conditions of economic and social progress and development,"[3] as well as "solutions of international economic, social, health, and related problems; and international cultural and educational cooperation,"[4] and "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[5] These obligations fall on each Member State. In fact, each member of the organization also pledged to take actions to achieve these goals.[6] As such, an entire organizational structure made up of

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1. These rights are principally enumerated in several international conventions that enjoy widespread ratification, including the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); The International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95–20, 999 U.N.T.S. 171; and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95–19, 993 U.N.T.S. 3. CHIARA GIORGETTI, A PRINCIPLED APPROACH TO STATE FAILURE, INTERNATIONAL COMMUNITY ACTIONS IN EMERGENCY SITUATIONS 1–6 (2010) [hereinafter GIORGETTI].

2. In general, national constitutions include specific references to several individual rights, which are broadly similar to ones that originate from international treaties, although in certain cases more numerous and detailed. These rights include, for example, the right to self-determination, right to life, the right to health, the right to liberty and security of the person, the right to dignity and equality, the right to fair trial, freedom of expression, freedom of religion, the right to marry and have a family, the right to participate in the political process, the right to fair wages and safe and healthy working conditions, the right to equal opportunities, the right to participate in the economic process, the right to form trade unions and organize, the right to education, the right to participate in cultural activities, and the right to the benefit of scientific progress and its applications.

3. U.N. Charter art. 55, para. 1(a).

4. U.N. Charter art. 55, para. 1(b).

5. U.N. Charter art. 55, para. 1(c).

6. U.N. Charter art. 56.

agencies and programs is created and organized by the United Nations to monitor the development and implementation of these rights by each State.[7]

At the same time, regional organizations—including the European Union,[8] the African Union,[9] and the Organization of American States[10]—have been created in practically every region of the world. These organizations also impose multiple obligations to each of their members. These include numerous individual civil and political rights, as well as economic and social rights, and rights of minorities to be protected.

However, some States, which have only recently become independent or viable, lack political and administrative institutions that are capable of affording and organizing the enjoyment of these rights. Further, even if such institutions exist, they may not be strong enough to permit the enjoyment of a growing number of entitlements, as well as a more vocal and united population. Further, since the end of the Cold War, a new ("third") wave of human rights have surged, which include the right to development, the right to a clean environment, and the right to democratic governance.[11]

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7. U.N. Charter art. 57.

> The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

U.N. Charter art. 58. "The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies."

8. The European Union now has twenty-seven member states both from Western and Easter Europe. *EUROPA*, http://europa.eu/about-eu/27-member-countries/index_en.htm (last visited Feb. 22, 2010).

9. Membership to the African Union now includes fifty-three states. (Morocco is the only African State that is not a member. It withdrew from the organization in 1984.) African Union, http://www.africa-union.org/root/au/memberstates/map.htm (last visited Feb. 22, 2010).

10. The Organization of American States is the oldest regional organization, and includes thirty-five American States. *Organization of American States*, http://www.oas.org/en/states/member_states.asp (last visited Feb. 22, 2010).

11. The right to democratic governance entails that the running of the State must be decided through periodical, free elections that are open to the entire adult population. Moreover, it also requires the State to act upon its obligations to grant internationally recognized human rights and provide a minimum standard of living and freedom that allows all of its citizens to enjoy a productive, free and dignified life. *See generally* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

This results in the obligation of each State to provide numerous goods and services, including protection, a functioning legal system, a working judiciary, an effective education system, healthcare, an efficient administration able to deliver goods and services, infrastructures, and the possibility to participate in the global economy. Moreover, the modern economic system also requires each State to provide trade facilities, a financial market, communication systems, a road network, air connections, port access, and security. Further, any functioning contemporary State also needs large infrastructures to provide for the health and education of its citizens, as well as for terrestrial and aerial transport of people and goods. It also needs to be able to support complicated financial and banking transactions, and also must be able to support a functioning legal system.

The burden placed on States' structures by the new economic order and democratic governance is substantial. Yet, many States are just not able to fully perform in this system. Their institutions are not sufficiently established and funding is often problematic. Several of these States drag behind as their inability to perform their obligations enters a vicious circle which generates more failure to perform.

The situation is similar for a State's obligations towards other States and the international community.

The number of independent States has increased steadily since the end of World War II. Immediately following the end of the war, several colonized States gained or regained their independence. Similarly, the dissolution of the Union of Soviet Socialist Republics and of the Warsaw Pact reshaped the European landscape and many new States came into existence then.

At the same time, the world has become more inter-independent. The development of communication and the ease of travel have made it possible to create a world society in which values, expectations, and political and economic views are broadly shared. Moreover, what happens in one part of the world can have immediate repercussions in other parts of the world and in a variety of domains, including financial transactions, environmental emergencies, health crises, and security risks. This is demonstrated, for example, by the substantially increased number of international conventions and bilateral and multilateral treaties.[12]

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12. For example, the collection of the United Nations Treaty Series, a publication of the United Nations that collects treaties and international agreements registered or filed and recorded with and published by the Secretariat since 1946, pursuant to Article 102 of the Charter, currently contains over 158,000 bilateral and multilateral treaties deposited between 1946 and 2006. *See* United Nations, http://treaties.un.org/Pages/Overview.aspx?path=overview/overview/page1_en.xml (last visited Feb. 1, 2010).

Generally, State authorities perform a myriad of actions daily. These actions are required to satisfy both domestic and international constituencies. Further, these actions have both internal and international components.

The increased inter-independence of States and the augmenting normative structure of the international community place obligations upon each State, as it must perform numerous actions in favor of other States and the international community. This is not just a legal requirement; it is a necessity of the international community. When a State does not perform the actions that each State has come to expect, the entire system becomes unstable.

However certain—failing, failed or fragile—States are unable to fully perform their obligations towards their citizens and the international community.

State failure and fragility is only a relatively new phenomenon and are not rare occurrences. However, they have not been conceptualized fully. The lack of definition, and thus understanding, has important consequences on how other States and the international community, in general, has reacted to State failure.

III. WHAT IS STATE FAILURE?

State failure is best defined as the incapacity of a State to perform its obligations towards its citizens and towards the international community in general.[13] Failed States are characterized by an implosion of States' structures, which results in the incapability of governmental authorities to perform their functions, including providing security, respecting the rule of law, exercising control, supplying education and health services, and maintaining economic and structural infrastructures. In fact, State failure can be seen as a condition in which the State is unable to provide political goods to its citizens and to the international community. These goods include security, border control, a political structure, physical infrastructures, a judicial system, education and health care, and commercial and banking systems.

State failure is multi-formed and can be depicted as a continuum, as the State becomes progressively less capable of performing its functions and becomes more and more "failed." Complete State collapse is the ultimate, and rare, result, while different stages of State failure can be encountered along the continuum. State failure is not uncommon and examples exist in today's world, including Somalia, which has been without a government for more than a decade, the Democratic Republic of Congo—

13. GIORGETTI, *supra* note 1, at 43–53.

itself shattered by intestine rivalries and the presence of regional troops fighting for its mineral resources, Sudan and Afghanistan, whose governments only control parts of their territory.

State failure implies the possibility that a State cannot—rather than does not—perform its functions, even after its statehood is recognized. Moreover, State failure implies a gradation of sovereign capacity, while for international lawyers sovereignty either exists or it does not. If at all, international law views failed States as States with ineffective governments.[14] However, failed States are not just failed governments. Their failure is normally long-lasting and it encompasses several to all the functions of the State, not solely their governmental functions. State failure includes not only an ineffective government, but affects the bases and entire structure of the State, including its population, territory, and capacity to perform international and internal obligations.

Historically, State collapse is the product of several key events. Although it is not possible to single out one cause of State failure, several interlinked causes exist, both endogenous and exogenous to the State. Endogenous causes include corruption, structural weaknesses, and misadministration. Exogenous causes include macroeconomic and political policies, foreign interventions, either in support of those in power or opposition groups, the decline of foreign financial and political support, and—in general—the process of modernization "which encourage[s] social and geographical mobility but [is] not counterbalanced by nation-building processes capable of placing the State on a firm foundation."[15] Further, three conditions are also generally associated with State failure: the end of the Cold War, ethnic unbalances, and the heritage of the colonial regimes.[16]

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14. For example, Ralph Wilde affirms that failed states denote situations in which "the governmental infrastructure in a state has broken down to a considerable degree." Ralph Wilde, *The Skewed Responsibility Narrative of the Failed States Concept*, 9 ILSA J. INT'L & COMP. L. 425, 425 (2003).

15. Daniel Thürer, *The "Failed State" and International Law*, 836 INT'L REV. OF THE RED CROSS 731, 731–61 (1999), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ6U (last visited Feb. 22, 2010) [hereinafter Thürer].

16. *See generally* Jeffrey Herbst, States and Power in Africa, Comparative Lessons in Authority and Control (2000); William Reno, Warlord Politics and African States (1998); MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNANCE (Simon Chesterman et al. eds., 2005); William Reno, *Shadow States and the Political Economy of Civil Wars, in* Greed and Grievance, Economic Agendas in Civil Wars 43 (Mats Berdal & David M. Malone eds., 2000); Charles Tilly, *Where Do Rights Come From?, in* Democracy, Revolution and History 55 (Theda Skocpol ed., 1998); I. William Zartman, *Introduction: Posing the Problem of State Collapse, in* Collapsed States, The Disintegration and Restoration of Legitimate Authority 1 (I.William Zartman ed., 1995) [hereinafter Zartman]; Jeffrey Herbst, *Responding to State Failure in Africa*, 21 INT'L SECURITY 120 (1996); Christopher Clapham, *Failed States and Non-States in the Modern International Order*,

Political theory often defines the State as the embodiment of a social contract.[17] In essence, the theory suggests that the existence of States is founded on a tacit, mutually beneficial 'contract' between the rulers and the ruled, based on rights and obligations that each party to the contract agreed to perform. Thus, while the ruled parties agreed to be ruled, pay taxes and obey the law, the rulers provide in exchange several political goods, including security, education and health care systems, and physical infrastructures.

Transposed to State failure, this theory suggests that State collapse means that the State cannot perform its side of the contract and thus State's functions are no longer performed.[18] In particular, in failed States:

> [A]s the decision-making center of the government, the State is paralyzed and inoperative: laws are not made, order is not preserved, and societal cohesion is not enhanced. As a symbol of identity, it has lost its power of conferring a name on its people and a meaning to their social action. As a territory, it no longer assures security and provisionment by a central sovereign organization. As the authoritative political institution, it has lost its legitimacy, which is therefore up for grabs, and so has lost its right to command and conduct public affairs. As a system of socioeconomic organization, its functional balance of inputs and outputs is destroyed; it no longer receives supports from, nor exercise controls over its people, and it no longer is even the target of demands, because its people know that it is incapable of providing supplies. No longer functioning, with neither traditional nor charismatic nor institutional sources of legitimacy, it has lost the right to rule.[19]

As such, in failed States it is not only governmental functions that are at bay, societal infrastructures also broke down, and the very foundations of

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http://www.comm.ucsb.edu/reasearch/mstohl/failed_states/2000/papers/clapham.html (last visited Jan. 21, 2010).

17. The theory of the state as social contract was developed by Thomas Hobbes, John Locke and Jean-Jacques Rousseau. *See generally* THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., Collier Books 1962) (1851); JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., Hackett Publ'g Co., Inc. 1983) (1699); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2nd ed. 1967) (1698); JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL (Charles M. Sherover, ed., 1984) (1762).

18. Zartman, *supra* note 15, at 1.

19. *Id.* at 5 (citations omitted).

society have collapsed.[20] In fact, the State becomes utterly unable to deliver any political goods to its people.[21]

State failure, therefore, is not univocal. Rather, it is a long and multi-shaped process, in which States may go through different stages of "failure" and which can encompass diverse public functions, can take more or less time and may cover parts or the entirety of a State territory.

State failure is not a static phenomenon, in a continuum from strong to weak States, it is possible to identify weak States, failing States, failed States, and finally the extreme version: collapsed States. Collapsed States present a total vacuum of authority.[22] Thus, although nation States exist to deliver political goods to their citizens—including security, education, health services, environmental protection infrastructures, and administration systems—failed States are "no longer able or willing to perform the job of a nation-State in the modern world."[23]

State failure occurs "when violence cascades into all-out internal war, when standards of living massively deteriorate, when the infrastructure of ordinary life decays, and when the greed of rulers overwhelms their responsibilities to better their people and their surroundings."[24]

The inability of the State to provide goods to its citizenry may be translated into a specific hierarchy of political goods that a failed State cannot deliver. The failure to provide specific goods can also be used to assess a modern State as being strong, weak or failed. The principle function of a State is to provide the good of internal security, and to eliminate external and domestic threats, to prevent crime, and ensure stability. Other specific political goods that failed States cannot deliver include a functioning justice and dispute resolution system, access to a free and open political process, a system of health care and education, physical infrastructure, and functioning commercial, financial and banking systems.[25]

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20. Zartman argues that State collapse is also characterized by a loss of control over both political and economic spaces. Hence, the informal economy grows at the expense of the formal economic system, while the peripheral regions of the State strengthen their economic links to neighboring countries. Similarly, the political space is also taken over by neighboring states, which become more and more involved in the state's affairs. *Id.* at 1–9.

21. Robert I. Rotberg, *The New Nature of Nation-State Failure*, 25 THE WASHINGTON QUARTERLY 85, 85 (Summer 2002) [hereinafter Rotberg *New*].

22. *Id.* at 90.

23. *Id.* at 87.

24. *Id.* at 86.

25. Robert I. Rotberg, *Failed States, Collapsed States, Weak-States: Causes and Indicators, in* STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 3 (Robert I. Rotberg ed., 2003) [hereinafter Rotberg *Failed*].

As a consequence of the inability to provide political goods, failed and collapsed States are distinguished by a series of unique elements, including disharmony between communities, incapability of controlling borders and territories, ethnic and other inter-communal hostility, predatory behavior by ruling classes, growth of criminal violence, flawed institutions, absence of democratic debate, deterioration of infrastructures, privatization of health and schooling systems, rise in corruption, and decline in income levels. Another important distinguishing feature of State failure is the enduring character of violence that is peculiar to them.[26]

Based on the criteria identified above, the more poorly States perform in each of the criterion, the closer they get to failure.[27]

State collapse is an extreme case of State failure and occurs when:

> [a] regime—which is often ruled by the independence generation of civilians—after being in power for a long time wears out its ability to satisfy the demands of the various groups in society. Resources dry up, either for exogenous reasons or through internal waste and corruption (selective misallocation). Social and ethnic groups feel neglected and alienated, causing an atmosphere of dissatisfaction and opposition which in turn draws increased repression and use of the police and military to keep order.[28]

In today's world, only Somalia can be defined as a completely collapsed State and political goods are only available at the private or *ad hoc* level.[29]

Failed States are characterized by their inability to fulfill their social contract with their citizens and the international community. As the social contract forms the basis of their legitimacy to rule, the impossibility to fulfill the contract undermines their power and authority. Failing States can be more or less failed: they can be incapable of providing all political goods or only some of them. Similarly, there is a continuum between failed and collapsed States: States that cannot provide any of the political goods for a long period of time become collapsed. The definition of State failure

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26. Rotberg *New, supra* note 20, at 85–87. *See also* Robert *Failed, supra* note 24, at 4.

27. By most accounts, it is possible to identify seven failed States in the last twenty years alone: Afghanistan, Angola, Burundi, the DRC, Liberia, Sierra Leone and the Sudan. These States are still mostly all weak or failed, with the possible exceptions of Angola and Burundi, which are on their way to recovery. Rotberg *Failed, supra* note 24, at 10.

28. Zartman, *supra* note 15, at 8.

29. Rotberg *Failed, supra* note 24, at 10.

also includes a temporal connotation. State failure can be a temporary or a prolonged situation.

Further, the theory of State failure as a consequence of the disintegration of the social contract must include the failure to provide international political goods as well. The fading of the exercise of sovereignty often has drastic consequences for a State population and the international community in general.

First, rights of domestic populations are eroded. Health and other basic rights cannot be assured. As the failing of State sovereignty continues, the lack of performance of basic rights worsens. This often gives rise to humanitarian crises. Further, State structures become unable to provide most rights to their populations, particularly those situated outside the capital city. State structures are also typically unable to confront emergencies. Too often, the inability of the State to provide for its citizens is coupled with the commission of human rights abuses towards the population, by either State forces or rebel groups.

Second, State failure also has consequences on the international community.[30] Failing and failed States are unable to perform their obligations towards the international community, for example, because they are unable to guarantee protection of their borders or airspace or are unable to address health emergencies.[31]

Curiously, however, a rigorous analysis of the legal implications, significance, and consequences of State failure is missing. In fact, because

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30. The term "international community" is not clear and its usage in this thesis needs clarification. It encompasses many actors, including states, individual and international organizations as supra-national structures organized by States. The international community cannot be equated as a single interest, though a common understanding of international community is developing. For the purpose of this study, the term "international community" includes States, the international organizations and a supra-national community with similar interests in their relationship to State failure. On the developing concept of international community see S. VILLALPANDO, L'EMERGENCE DE LA COMMUNAUTE INTERNATIONALE DANS LA RESPONSABILITE DES ETAS (2005). *See also* INTERNATIONAL RESPONSABILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER (Maurizio Ragazzi ed., 2005).

31. *See* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 915 (1997). Similarly, James Crawford argues

> In the post-decolonization period, a number of related strands in thinking about the State have arisen. For example, there is the idea that very many of these States, and especially the new States that have emerged since 1945, are not real but are "quasi-States" and that their statehood should in some way be discounted. Then there is a body of literature on the so-called "failed States". On closer examination this is more properly a debate about intervention, security and development . . . .

JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 719 (2nd ed., 2006) (1979). The inability to exercise sovereignty has often been framed as a "developing country" issue, opposing the (usual) ability of developed countries to perform certain obligations to the (usual) inability of developing countries to do the same. This is, however, beside the point.

definitions of what constitute a 'failed State' are, in general, informed by the analysts' definition of the State and of their own view over the functions and role of the State, international law has not recognized and named the phenomenon of State failure. This is because international law focuses on the creation and dissolution of a State, but has not focused on the evolution, changes or temporary failures that may occur after a State is created.

IV. THE LIMITS OF INTERNATIONAL LAW

Legally, State failure epitomizes a fallacy in international law, as failed and failing States continue to be considered fully fledged sovereigns and are required to fulfill their many obligations towards other States and the international community in general. In fact, while international law carefully considers the creation and dissolution of States, it has not recognized their evolution while in existence.

In the paragraphs below, I will discuss the legal conundrum found in the notion that States can gain statehood easily, whereas there is no method to assess changes in the constitutive elements of a State, and thus adjust the standing and responsibilities of States when they start to fail. Failed States are not dissolved because of their failure, and their status in international law is not altered. In fact "once in the club [of States], the rules by which admission was tested—and that always with a degree of flexibility—become less important."[32]

States are commonly defined under the 1933 Montevideo Convention on the Rights and Duties of States "as a person in international law" that possess the following qualifications

> (a) a permanent population;
> (b) a defined territory;
> (c) government; and
> (d) capacity to enter into relations with other States.[33]

The definition is widely accepted today.[34]

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32. Rosalyn Higgins, Problems and Process, International Law and How We Use It 41 (1994) [hereinafter Higgins]. In fact, as Henkin concludes "the system knows a State when it sees one." Louis Henkin, International Law: Politics, Values and Functions, General Course on Public International Law 29 (1989).

33. Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (Montevideo Convention).

34. President of the International Court of Justice, Rosalyn Higgins, confirms that in a rapidly changing world "the definition of 'a State' has remained virtually unchanged and continues to be well described by the traditional provisions of the Montevideo Convention on the Rights and Duties of States[.]" HIGGINS, *supra* note 31, at 39. Similarly, Professor Malcolm Shaw also concludes that this

However, even when one—or more than one—of the Montevideo's elements of statehood is undermined, the standing of a State in the international legal system is not questioned. Professor James Crawford concludes that "a State is not necessarily extinguished by substantial changes in territory, population, or government, or even, in some cases, by a combination of all three."[35]

Once statehood has been recognized, changes in the elements upon which such recognition was granted do not alter the status of the State. Failed States continue to be considered unaltered States in international law. In practice, this means that the status of failed States cannot be properly addressed.

This conclusion is unsatisfactory because it demonstrates that the defining elements of statehood, the pillar of international law, provide only a very limited elucidation of what constitutes a State. The definitions of a 'permanent population' and of a 'determined territory' are limited to the existence of a community living in a territory, even if the borders are not defined and population not fixed. Similarly, the requirement of a 'government' seems to continue to exist even when the effectiveness of such government is disrupted by civil war. Finally, the requisite of 'capability of engaging in international obligations' has been useful only as a definition of independence. This conclusion is all the more surprising as the 'State' is the fundamental keystone over which international law is built. The anomaly derives from the fact that the Montevideo definition of State looks at the elements needed to create a State, rather than to the elements needed for the maintenance of statehood. Therefore, it does not provide effective guidance when the elements required for the establishment of statehood are changed or lost once statehood is recognized.[36]

This conclusion is also problematic. At present, State failure is not acknowledged in the framework of international law. Failed States continue to be considered fully equal and capable States under international

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definition is the "most widely accepted formulation of the criteria of statehood." MALCOLM N. SHAW, INTERNATIONAL LAW 178 (5th ed., 2003). Moreover, the validity of the Montevideo criteria have been confirmed and restated most recently by the Arbitration Commission of the Conference of Yugoslavia, which concluded in its First Opinion that "the State is commonly defined 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[.]" *See* Conference of Yugoslavia Arbitration Commission Opinion No. 1, Nov. 29, 1991, 31 I.L.M. 1494.

35. Similarly Professor Crawford also states that there is "presumption—in a practice a strong one—is in favour of the continuance, and against the extinction, of an established State. Extinction is thus, within broad limits, not affected by more or less anarchy with the State . . . ." JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 417 (1st ed. 1979).

36. GIORGETTI, *supra* note 1, at 53–65.

law, as international law does not react to the weakness and failure of the State as an organic structure. State failure often implies severe migration and populations displacements. It infringes on the certitude of a State territory, as borders become porous, rebel groups control important sections of the territory and neighboring countries often secure their borders by patrolling into foreign territory. In addition, governments are not effective and the capacity to enter into relations with other States is lacking.

However, international law does not contemplate the case of a State that ceases to be able to deliver political goods, and has created no mechanisms for the recreation or substitution of State power when it is no longer capable of performing its duties. There is no space for a power vacuum, even temporarily. In the most serious case of State failure, States continue to exist on the map—like in the case of Somalia—and maintain their former border and population, but there is little more beyond that.[37]

Although States are the building blocks of international law, the definition of their constitutive elements remains general, and failed and fragile States continue to be required to behave like States and fulfill the many obligations incumbent upon them: international obligations continue to exist, although in most cases no power can actually perform them.[38] However, when States fail or become fragile, their international obligations (including maritime and terrestrial border control, air traffic control, safety, and health and environmental monitoring) are not performed. This causes severe disruption in the international system. What can be done, for example, when health emergencies occur in a fragile State? And what of an environmental disaster?

To remain significant, any juridical definition of State must confront reality and must be elaborated so as to respond to changes in international

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37. The phenomenon of failed States is broad and complex, as failed States are "the product of a collapse of the power structures providing political support for law and order." Thürer, *supra* note 14. However, "[t]he international community has not previously faced the total breakdown of a State unaccompanied by some other centralized entity claiming statehood[.]" and has been slow to appraise State failure. *See* Ruth Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 338 (1995).

38. Thomas Weiss and Jarat Chopra remark that while under international law, there is no degree of sovereignty, in the sense that it either exists or it does not,

> In contrast, political scientists and international relations theorists have formulated a corruption of sovereignty, which they perceive in terms of degrees. . . . For these scholars it is possible to be *more* sovereign or *less* sovereign. *Sovereignty* becomes an elastic term that refers to a category of social and political organization that is linked geographically to delimited territory.

Thomas Weiss & Jarat Chopra, *Sovereignty under Siege: From Intervention to Humanitarian Space*, *in* BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTIONS 87, 100 (Gene Lyons & Michael Mastanduno eds., 1995).

law and politics. It needs to evolve and take into consideration the reality of statehood, and namely failed and failing States.

Failed and failing States vary a great deal, and there is a lot of gradation in how capable they are of fulfilling their obligations and whether their incapacity is transitory or protracted. For example, the control of air space may be performed in conjunction with the United Nations, similarly, the World Health Organization may assist in monitoring and responding to health emergencies. Introducing a concept by which international obligations are—temporarily and for limited areas—performed by other actors would take into consideration this reality. This will ensure that the obligations that need to be performed are indeed preformed, while at the same time preserving failed States' sovereignty. Failed States remain independent, equal to other States, and the sole sovereign of their territory. Once their ability to perform their obligations is restored, they will again be required to perform all obligations owed to other States or other subjects of the international community.

Failed and failing States must be assessed keeping in mind the political and legal changes that resulted in State failure. Failed States have factually lost the ability to deliver the goods that they agreed to deliver. Thus, while it is necessary to recognize that a State does not cease to exist because certain characteristics that made its existence possible are no longer present,[39] it is also important to acknowledge that these transformations have altered the ability of the State to perform its obligations.[40]

V. A SIMPLE PROPOSAL: A PRINCIPLED APPROACH TO STATE FAILURE

State failure is a common phenomenon of contemporary international society. It is the prolonged implosion of governmental structures and the

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39. As Oppenheim concludes

> Once it is appreciated that it is not so much the possession of sovereignty which determined the possession of international personality but rather the possession of rights, duties and powers in international law, it is apparent that a state which possesses some, but not all, of those rights, duties and powers is nevertheless an international person.

L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 123 (Robert Jennings & Arthur Watts eds., 9th ed. 2002) [hereinafter OPPENHEIM].

40. State inability or failure is not an accepted circumstance that precludes wrongfulness in international law. However, if there are no institutions that are authorized to act on behalf of the State, the State cannot be held responsible. Recently, however, the international community has more frequently intervened to restore the protection of fundamental human rights when a state has been unable or unwilling to do. Examples include Somalia and Kosovo. This has not been without a lot controversy. *See* James Crawford, *Responsibility of a States for Internationally Wrongful Acts, in* THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 77 (James Crawford ed., 2002); Thürer, *supra* note 14.

ensuing incapacity of the government to provide political goods to its internal and external constituencies. At the same time, State failure is better described as a phenomenon in evolution, which, in a graphical representation, is better visualized as a line, not a point. Thus, while complete State collapse is the final stage of the phenomenon, there are several stages that link complete failure to a fully functioning State, depending on the residual capacity of a State to fulfill its obligations. Any approach to address crisis situations of State failure and fragility must take into consideration these differences.

The adoption of a set of recognized principles could be useful in guiding actions by the international community in situations of State failure and fragility. These principles would ensure the lawfulness of planned interventions to replace State actions. These principles should be based on the assessment of the risks that the international community would suffer in case of inaction. Risks should be valued in terms of lower and higher threats to the security of the international community, urgency to act in terms of the immediacy of the threat, availability of alternative responses, and in terms of the consequences at home and abroad for action and inaction.

Assistance by the international community in situations of State failure and fragility should be guided by, on one hand, the particular condition of fragility in which a State is found and, on the other, the risk and danger to the international community that would result from lack of action. Competent agencies of the United Nations or non-governmental organizations in the field may be mandated with routine and low-impact actions, such as monitoring and reporting. For example, specific international actors *in loco* could be mandated to perform specific actions. In the case of Somalia, United Nation bodies, like the Food and Agriculture Organization or the World Health Organization could be given the power to certify public health requirements or monitor and report health emergencies. More complex situations would require a higher level of threat. Thus, more complex actions, including the maintenance of air space and boundary security, would also require a higher level of consent and decision-making ability. For example, the United Nations Development Program and the International Civil Aviation Organization have been tasked to manage the airspace of Somalia.[41]

Understanding and interpreting State failure in terms of risks and threats to the international community means that the legal authority to act

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41. United Nations Political Office for Somalia, *Civil Aviation Caretaker Authority for Somalia*, http://www.un-somalia.org/Country_Team/cacas.asp (last visited Feb. 7, 2010). *See* GIORGETTI, *supra* note 1, at 30–32.

may derive from Chapter VII of the United Nations Charter.[42] For example, in a rare application of this principle, the Security Council acting under Chapter VII of the United Nations Charter, decided to allow foreign military ships to enter Somali waters to repress, under specific conditions, piracy.[43] The Security Council has also used its Chapter VII function for conflict or humanitarian crises and could apply it for interventions that are directed at fulfilling the general interests of the international community.[44] Importantly, Articles 25 and 48 further ensure that once the Security Council has determined the existence of a threat or a breach of the peace, Member States are compelled to comply with this decision.

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42. In Chapter VII, Article 39 of the Charter of the United Nations allows the Security Council to determine whether a "threat to the peace, breach of the peace, or act of aggression" exists. U.N. Charter art. 39. Further, Article 41 of the Charter of the United Nations does not limit the kinds of decisions that the Security Council can take in cases of threat to the peace and security. The article states that the Council may decide what actions to take to delimit the threat, some of the possible actions are listed, but the list is exemplary and not exclusive. Article 41 states that:

> The Security Council may decide what measures not involving the use of armed forces are to employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These *may include* complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

U.N. Charter art. 41 (emphasis added). For example, the establishment of judicial bodies—like the ICTY and ICTR—are not specifically listed in art. 41, but the Security Council created them under article 41. Their legality have been recently confirmed by the ICTY Appeal Chambers, which claimed that even if "[t]he establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42. . . . It is evident that the measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures." Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 32–38 (Oct. 2, 1995), *reprinted in* 35 I.L.M 32 (1996).

43. S.C. Res. 1816, ¶ 7(a)-(b), U.N. Doc. S/Res/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/Res/1838 (Oct. 7, 2008).

44. Franck also concludes that

> Substantively, "enforcement measures" may be taken whenever the requisite [Security] Council majority is convinced that there exists "any threat to the peace, breach of the peace, or act of aggression." [sic] for which such remedies are appropriate. It is apparent that the Council has broad discretion, but that it is to be exercised *bona fide* and *intra vires*, in accordance with [the] specific procedural and substantive standards spelled out in the Charter. The substantive standard is particularly important because it legitimates what would otherwise be an open-ended, indeed wholly arbitrary, vitiation of the central purpose of Article 2(7), namely the protection of members states' sovereignty from interference in essentially internal matters at the whim of the Organization's majority.

THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 220 (1995).

Following the explanations above, the draft guiding principles for action to maintain international public order in situation of State failure could read:

> Principle 1: States have a duty to cooperate and protect one another in the various spheres of international relations in order to maintain international peace and security.
>
> Principle 2: Every State has a duty to notify other States of any emergency occurring in its territory which could have transboundary effects. Notification must be done as soon as possible after the discovery of the emergency and should indicate the location of the threat, the nature of the threat, and its possible effects.
>
> Principle 3: International organizations and other organizations present on the ground may bring to the attention of the international community any emergency situation that threatens peace and security and may have a transboundary effect, in the absence of State's notice.
>
> Principle 4: Every State has the duty to provide assistance on demand to States that request such assistance to address emergency situations which may have a transboundary impact that poses a risk to international peace and security. All States involved in the provision of assistance must cooperate in the management of the operations. The United Nations may provide assistance and guidance as required.
>
> Principle 5: The Secretary General and other competent actors may request assistance to deal with an international threat to peace and security in the absence of a State request for assistance. In such a case, every effort should be made to consult with national authorities before any action is taken.
>
> Principle 6: As a last resort, and if the risk is imminent, the authority to address the emergency situation in a State that is incapable of action may be given by the Secretary General or Security Council directly to specific International Organizations and State Members.
>
> Principle 7: Any action taken without the express request of a Member State must be limited, as much as possible, to addressing the international consequences of the emergency as threats to its security. Every effort should be made to consult local authorities.
>
> Principle 8: Whether a State is incapable of taking action in an emergency may be assessed by the Secretary General of the United Nations in consultation with the Security Council, General Assembly or a purposely created Committee. Such assessment shall be limited to the specific emergency and shall

> bear no consequence to the sovereignty and existence of the State.

These principles would not violate national sovereignty. In fact, the tension between the duty of non-intervention identified in Article 2 of the United Nations Charter[45] and the necessity to fulfill international obligations is only potential. It does not need to surface if the meaning of intervention is rightly considered.

The prohibition of intervention in internal affairs of a State in the letter of Article 2 of the Charter is a corollary to the principle of sovereignty and of the independence of nations. Article 3 of the Draft Declaration on Rights and Duties of States of the International Law Commission restated this principle and provides that "every State has the duty to refrain from intervention in the internal or external affairs of any other State."[46] This obligation, however, needs to be qualified. As stated by Jennings and Watts in Oppenheim's International Law:

> Although states often use the term "intervention" loosely to concern such matters as criticism of another's state's conduct, in international law it has a stricter meaning, according to which intervention is forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state.[47]

The issue of illegal intervention in a territory of a State that is unable to perform international obligation must be assessed within the interests of other States in reducing threats to security. The principle of non-intervention in internal affairs is of limited applicability in this context because it needs to be balanced with the general interest of States in upholding peace and security and enforcing international law. Moreover, it also needs to be qualified by the existing duty of cooperation and right of interaction that exists in the international community. Thus, any activity to fulfill international obligations in fragile and failed States should be framed as included in this exception.[48]

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45. Which states that "nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." U.N. Charter art. 2, para. 7.

46. OPPENHEIM, *supra* note 38, at 429.

47. *Id.* at 430.

48. As stated by Jennings and Watts in Oppenheim's International Law

> [T]he notion and the prohibition of intervention cannot accurately extend to collective action undertaken in the general interest of states or for the collective enforcement of international law. This means that while prohibition of

> intervention is a limitation upon states acting in their individual capacity, it does not properly apply to remedial or preventive action undertaken by or on behalf of the organs of international society.

OPPENHEIM, *supra* note 38, at 447. As Kirgs acknowledges "(u)nquestionably, a great many governmental policies and courses of conduct that were widely thought to be within the 'domestic jurisdiction' of states in 1945 are no longer so regarded. The primary examples are found in the category of human rights . . . ." Frederic L. Kirgis, Editorial Comment, *Security Council Governance of Post-conflict societies: a Plea for Good Faith and Informed Decision Making*, 95 AM. J. INT'L L. 579, 579 (2001). *See also* GIORGETTI, *supra* note 1, at 179–188.