

# LAW WITHOUT STATE: THE COLLAPSED STATE CHALLENGE TO TRADITIONAL INTERNATIONAL ENFORCEMENT

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## I. INTRODUCTION: THE SOMALIA EXAMPLE

Collapsed states are generally not places to do business. State collapse is “where the structure, authority (legitimate power), law, and political order have fallen apart,” and a more severe condition than that of a normal “failed state.”<sup>1</sup> The best example of a collapsed state, Somalia, has lacked a functioning central government since civil war broke out in the early 1990s.<sup>2</sup>

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<sup>1</sup> I. William Zartman, *Introduction: Posing the Problem of State Collapse*, in *COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY* 1, 1 (I. William Zartman ed., 1995). Zartman defines a collapsed state as:

[A] deeper phenomenon than mere rebellion, coup, or riot. It refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new. On the other hand, it is not necessarily anarchy. Nor is it simply a byproduct of the rise of ethnic nationalism: it is the collapse of old orders, notably the state, that brings about the retreat to ethnic nationalism as the residual, viable identity.

*Id.* The term “collapsed state” can be seen as a subset of the larger category of “failed states,” such that “a *collapsed* state is a rare and extreme version of a failed state.” ROBERT I. ROTBERG, *WHEN STATES FAIL: CAUSES AND CONSEQUENCES* 9 (2005) (emphasis in original). Nor is this necessarily a steady condition, as “[f]ailure is a fluid halting place, with movement back to weakness and forward into collapse always possible.” *Id.* at 10. For more discussion on these terms see *id.* at 42 n.8, 43 n.9.

<sup>2</sup> See generally Hussein M. Adam, *Somalia: A Terrible Beauty Being Born?*, in *COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY*, *supra* note 1, at 69. Recent developments give hope that the current transitional government of Abdullahi Yusuf Ahmed will be able to reach an agreement with the Islamic Courts factions which now control Mogadishu. See, e.g., *Profile: Somalia’s Islamic Courts*, BBC News, June 6, 2006, available at <http://news.bbc.co.uk/2/hi/africa/5051588.stm>. This paper focuses on the period before

Various areas of the country have since declared their independence, and the capital of Mogadishu was divided among various warlords and an Islamic court system. Yet, in 2004, Coca-Cola signed a franchise agreement with the United Bottling Company (UBC), a Somali company, to begin bottling Coke near Mogadishu.<sup>3</sup> The UBC is owned by almost four hundred shareholders spread among all of Somalia's clans.<sup>4</sup> The announcement of the franchise agreement, however, marks only the latest development in Somalia's increasing capitalism. Radio, television stations, and satellite television all function within the city of Mogadishu, where factionalism is so rampant that both the airport and the seaport are unusable.<sup>5</sup> While advanced enterprises function in Somalia, there exists a serious issue as to how these businesses could enforce their agreements with others.

Normally, parties dealing with capitalist endeavors like the UBC deal might expect that any contractual disputes between the parties, both outside and inside the country, could be resolved through adjudication by a national-level court. However, the same disorder that has rendered much of the country's infrastructure unusable has also affected Somalia's court system. In a collapsed state, an additional degree of risk may attach to business transactions, as corporations and individuals must look to either local or international systems of justice for enforcement of rights and judgments.

The justice system in Somalia is only functional at local levels or within the traditional clan system. The country is divided into several local domains controlled by warlords or clans. Islamic Shar'ia courts or courts of tribal justice provide adjudication. In other words, these courts operate under the authority of

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the current transitional government: an era of repeated failures to establish a national Somali government.

<sup>3</sup> Grant Ferrett, *Coca-Cola Makes Somalia Return*, BBC NEWS, July 6, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/3865595.stm>; Press Release, Coca-Cola, Coca-Cola Resumes Production in Somalia after 15 year Absence (July 5, 2004), available at <http://www.africa.coca-cola.com/ccacms/cca/ourBusiness/viewOurBusiness6Frame2.jsp?pageId=2319> [hereinafter Press Release].

<sup>4</sup> Press Release, *supra* note 3.

<sup>5</sup> Stephane Mayoux, *Somalia: The Land of Opportunity*, BBC NEWS, Nov. 15, 2001, available at <http://news.bbc.co.uk/1/hi/world/africa/1615258.stm>.

the same tribal leaders or warlords that have prevented the establishment of a single, central government.<sup>6</sup> In response, Mogadishu businessmen have established a system of Islamic courts, whose forces have recently wrested the city away from warlords. While justice is localized within those areas,<sup>7</sup> international organizations governed by international law provide many of the prototypical central government services. Because in some spheres the web of international organizations functions as a de facto government, injured parties in private transactions may look to international law for enforcement solutions.

Yet traditional international law forums are ill-equipped to enforce contracts in countries without functioning central governments. These forums either rely on or presuppose the existence of a central government to enforce verdicts and undertake negotiations. Without this national-government link between the international entity and the individual parties involved, the enforcement of rights, either contractual or fundamental, becomes difficult.<sup>8</sup> In the case of Somalia, businesses do function in the country,<sup>9</sup> yet international law provides few opportunities for enforcement. Doing business with and within Somalia is therefore a risky and expensive proposition.

This Note will discuss the problems of enforcement of rights and judgments in countries lacking national governments. Part II of this Note examines traditional state succession doctrine and its lack of engagement with the peculiarities of the collapsed state. International law on state succession assumes that one government generally follows another, and the doctrine runs into difficulties when no new government assumes power. Part III considers existing enforcement mechanisms within international law, regional agreements, and the United States. The problems of enforcement using existing methods are twofold. First, parties

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<sup>6</sup> See THE WORLD BANK & THE UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], SOCIO-ECONOMIC SURVEY 2002: SOMALIA 106-07 (2003), available at <http://www.so.undp.org/SoconRpt.htm>; Yemi Osinbajo, *Legality in a Collapsed State: The Somali Experience*, 45 INT'L & COMP. L.Q. 910, 922 (1996).

<sup>7</sup> See Mayoux, *supra* note 5.

<sup>8</sup> This Note focuses primarily on the adjudication and enforcement of contractual rights, such as business agreements or international governmental agreements. However, much of the same reasoning could apply to the difficulties enforcing a collapsed state's inhabitants' fundamental rights.

<sup>9</sup> See Mayoux, *supra* note 5 (using examples of Nationlink and Barakaat).

outside the collapsed state find enforcement of judgments virtually impossible when their adversary is within the collapsed state; furthermore, if all the disputing parties are from within the collapsed state other forums such as the International Court of Justice or American courts are closed to them, and travel abroad to the United States for those seeking redress against a foreign company may be particularly difficult for parties within a collapsed state. Second, although international law is in force within collapsed states, enforcement is problematic against actors within these states, such as NGOs, without a local government.

Part IV discusses the potential for virtual online worlds to provide solutions to enforcement problems within communities of people without a central government. Online worlds offer an opportunity to study enforcement of agreements among large numbers of people where no central authority exists. Thus, these systems' participants could develop alternative solutions to rights-enforcement problems. However, these communities have not confronted, and may never encounter, enforcement issues with the degree of complexity found in commercial transactions within a collapsed state.<sup>10</sup> Few solutions to this problem exist under current structures.

Part V discusses results of collapse in the Somali context, where international and local actors have taken over policy-making endeavors. Part VI proposes possible solutions to the collapsed state challenge, suggesting that enforcement against Somali businesses could be established through a special tribunal operating under the power of the United Nations or the African Union. This tribunal could also be set up to hold international actors accountable for their behavior within a collapsed state such as Somalia; however, all parties would have to agree to resolve their disputes in this international forum, and any future government would need to be persuaded to enforce the forum's judgments. Short of dissolving Somalia into smaller countries, there appears to be no easy solution. Part VII concludes the Note, summarizing the discussions and possible solutions.

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<sup>10</sup> As previously noted, *supra* note 8, this Note does not address the issue of fundamental rights enforcement, which are hard to analogize in an online context, where they are more an issue of programming than anything else.

## II. TRADITIONAL STATE SUCCESSION DOCTRINE AND THE PROBLEM OF COLLAPSE

Generally speaking, state succession is an international law doctrine which determines a new state's relationship with the previous state's laws, responsibilities, and agreements. Collapsed states present a unique challenge for traditional state succession doctrine. After first addressing traditional state succession doctrine as it is usually defined, and highlighting some of the ambiguities it contains, the discussion below will examine the doctrine's application to the collapsed state.

The international law doctrine of state succession is well established. As explained by D.P. O'Connell in his seminal study, *State Succession in Municipal Law and International Law*, the nature of state succession is that "one State ceases to rule in a territory, while another takes its place."<sup>11</sup> When a new state comes into existence, it becomes responsible for the consequences of its predecessors' acts, but the rights and duties of the previous sovereign do not necessarily transfer to the new state.<sup>12</sup> Succession is therefore divided into "partial" and "total" succession, depending on the extent of the powers the new state can assume.<sup>13</sup>

There are several theories as to how to carry over laws and mechanisms from one state to the next.<sup>14</sup> Laws that are political in nature, or public laws, are presumed to transfer from one state to the next, unless they are inconsistent with the new state's laws.<sup>15</sup> If a state loses sovereignty over an area, the jurisdiction of courts established under the public law disappears from the area along with the public law itself.<sup>16</sup> In a dependent territory with its own legal order, there is no impact on the local courts.<sup>17</sup>

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<sup>11</sup> 1 D.P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 3 (1967) [hereinafter O'CONNELL I].

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 3-4.

<sup>14</sup> *See id.* at 9-24 for a survey of these theories, and 24-30 for criticism.

<sup>15</sup> *See id.* at 101, 107.

<sup>16</sup> In other words, the jurisdiction of courts established under the public law disappears with the public law itself. *See id.* at 142; KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 7 (1968) (explaining that a state becomes extinct when it loses legal order).

<sup>17</sup> O'CONNELL I, *supra* note 11, at 142.

While the state succession process may be well established, it has many inconsistencies of logic. For example, concerning an individual's rights, a judgment for a foreign national creditor granted by the previous state must be given effect by a new state's courts. Yet, the new state's courts treat this judgment as foreign, not as their own product.<sup>18</sup> Additionally, foreign nationals' acquired rights are subject to international law,<sup>19</sup> not the laws of the successor state.<sup>20</sup> There are also differences regarding rights against the former government. When one government is extinguished, so is its relationship with its creditors, leaving only an "equitable interest in the money advanced."<sup>21</sup> The old state's rights may be invoked to bring about the "just, useful or politically desirable" outcome, but they have no legal power.<sup>22</sup> States, rather than governments, are held to international treaties and agreements for a variety of legal reasons, and the applicable reason may be hard to distinguish in a given situation.<sup>23</sup> Thus, international law uses a flexible approach to treaties to allow their continuance under new governments.<sup>24</sup> This flexibility can be seen in the disagreement over the definition of "law-making" multilateral agreements which "are passed on to the next state."<sup>25</sup> Thus, state succession doctrine is inconsistent.

State succession doctrine recognizes that sometimes a disconnect occurs between states and governments. In the past, nations have established "fake revolutions" in other countries that result in "fake governments" merely for the purposes of intervention.<sup>26</sup> In this situation, the outside nation is interfering with

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<sup>18</sup> *Id.* at 152-53.

<sup>19</sup> Acquired rights are defined in international law as "any rights, corporeal or incorporeal, properly vested in a natural or juristic person, and of an assessable monetary value." *Id.* at 245.

<sup>20</sup> *Id.* at 237.

<sup>21</sup> *Id.* at 373.

<sup>22</sup> MAREK, *supra* note 16, at 6.

<sup>23</sup> 2 D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 3-4 (1967) [hereinafter O'CONNELL II].

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *See id.* at 212.

<sup>26</sup> *See generally* MAREK *supra* note 16, at 64-71.

the state, and the former identity is not transferred to any resulting puppet government.<sup>27</sup> A transitional government formed outside of the state occupies a questionable position in international law as well. It is not considered a government-in-exile, which is defined as a government formed within the country that later transferred abroad.<sup>28</sup> It is not considered the state, and therefore has no sovereignty.<sup>29</sup> Thus, international agreements made by a government-in-exile or a transitional government have dubious value.<sup>30</sup> It is not clear whether international agreements made by a previous government are binding at all on such a government.

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<sup>27</sup> *Id.* at 65, 71. Marek uses the example of the “Finnish People’s Government” which appeared during World War II, when the USSR attacked Finland. *Id.* at 66-67. This “government” was “supposed to represent a Finnish revolution directed against the Helsinki government” but was a very obvious USSR puppet. *See id.* at 66-68. The result was the USSR’s expulsion from the League of Nations. *Id.* at 68.

<sup>28</sup> *Id.* at 99. Marek concludes that states in exile are “regular surviving organs of regularly constituted surviving States, based organically on the surviving legal order of those States and conducting an activity bearing on those States and engaging their international responsibility.” *Id.* at 97. This usually is a result of a foreign power occupying the state’s territory, forcing the government to flee. *See id.* at 86-87. Even separated from its natural territory, “the legal order of the occupied state not only persists, but can continue to develop and even to expand from abroad into the occupied territory.” *Id.* at 84. Marek distinguishes “continuing exiled governments which merely transferred their seat abroad, and the governments newly formed in exile after a period of complete break in governmental continuity.” *Id.* at 99.

<sup>29</sup> *See id.* at 89 (distinguishing State deprived of its organs from organs deprived of their state), 89 n.1. *But see id.* at 311-30 (discussing formation of recognized Czechoslovakian government abroad during World War II).

<sup>30</sup> This problem is especially acute in Somalia’s case. Somalia is a signatory to the African Union, but only through one of the many Transitional Governments which have never taken power in the country. Now, yet another Transitional Government is asking the AU to help put it into power. Thus, a government that has yet to take power is asking an international group a previous, never implemented, government joined to put it into power. *Cf. id.* at 311-30 (formation of recognized Czechoslovakian government abroad during World War II). A “transitional government” is a nebulous term referring to an interim government which is established as a direct precursor to a regular government. *See* PUBLIC INT’L LAW & POLICY GROUP, MECHANISMS AND PROVISIONS FOR TRANSITIONAL GOVERNMENTS 1, [http://www.publicinternationallaw.org/programs/peace/drafters/Political/Transitional\\_Government\\_Template.pdf](http://www.publicinternationallaw.org/programs/peace/drafters/Political/Transitional_Government_Template.pdf) (“a transitional government stabilizes the country and prepares it for elections.”). Usually they are formed among all the disputing groups in an area. *See generally id.* Recent examples include Afghanistan and Liberia. *See id.* at 8.

Under the doctrine of state succession, a country without a national government is in an odd position; in fact, the traditional state succession model fails when states collapse. Essentially, state collapse means that the state no longer performs its basic functions.<sup>31</sup> A primary cause for collapse is that “territory and population are expected to be divided into political jurisdictions that determine, however unevenly, the identity, order, and authority within their confines.”<sup>32</sup> Since formal states are typically the norm, international law presumes that one government will closely follow another.<sup>33</sup> Any gap between the two is negligible. With a completely failed state, the gap is substantial.<sup>34</sup>

Krystyna Marek finds that “there is a State in the international law sense when there is an independent legal order, effectively valid throughout a defined territory with regard to a defined population.”<sup>35</sup> She describes Finland, in post World War I when it was not a state, eerily similar to Somalia as an example.<sup>36</sup> Under her formulation, states cannot be created from outside, normally meaning that a foreign entity cannot induce the formation of a new state through external intervention.<sup>37</sup> When the legal order becomes displaced and there has been “an internal breakdown of the territorial and personal [boundaries],” then the state is extinguished.<sup>38</sup>

In the example of Somalia, various peace conferences attempted to form some sort of national government to act as a

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<sup>31</sup> *Id.* at 5.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> O’CONNELL I, *supra* note 11, at 101-04.

<sup>34</sup> See Joseph Winter, *Can Somalia Ever be Normal?*, BBC NEWS, Dec. 7, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/4063631.stm> (reporting that there were thirteen previous attempts to form a government).

<sup>35</sup> See MAREK, *supra* note 16, at 162.

<sup>36</sup> *Id.* at 164. The Committee of Jurists established by the League of Nations found that for a period of time the requirements for a State did not exist. “It went on to recall the conditions of revolution and anarchy which prevailed at the time, the disorganisation of social and political life, the non-effectiveness of authorities, civil war with the participation of foreign troops. . . .” *Id.*

<sup>37</sup> *Id.* at 167.

<sup>38</sup> *Id.* at 188-89.



“repository of Somali [s]overeignty.”<sup>39</sup> Until the most recent attempt, none of these governments had become operational, implying that the Somali political leadership had “abdicated authority in Somalia or at least shifted the responsibility to [the U.N.].”<sup>40</sup>

The doctrine of state succession does not engage other foreseeable problems created by state collapse. In fact, some scholars have noted a lack of substantive rules.<sup>41</sup> For example Hélène Ruiz Fabri has commented that “the substance of the law of State succession . . . seems to come down to an obligation to negotiate.”<sup>42</sup> Realistically, bartering takes place, and, in her view, the agreements reached are equitable to the parties.<sup>43</sup> This approach was used during the formation and division of Eastern European states during the early 1990s,<sup>44</sup> and is a possible solution to dealing with Iraq’s delictual liabilities resulting from Saddam Hussein’s rule.<sup>45</sup>

As the foregoing analysis suggests, state succession law provides several broad principles and several consistent standards for circumstances in which a state exists, but provides little guidance for other scenarios. Even if state succession is viewed as a murky doctrine only requiring an “obligation to negotiate”<sup>46</sup> between the new government and external interests, collapsed states do not fit under the existing rubric because there is no recognized authority with which to negotiate. The doctrine does not anticipate collapsed states, but rather presupposes either a seamless transition from one state to the next or the extinguishment of the state when a complete breakdown has occurred.

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<sup>39</sup> Osinbajo, *supra* note 6, at 919 (discussing Addis Ababa agreement).

<sup>40</sup> *Id.*

<sup>41</sup> Hélène Ruiz Fabri, *The Place of Law and Legal Documents in Regulating the Pan-European Situation*, in DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE 171, 177 (Brigitte Stern ed., 1998).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 178.

<sup>44</sup> See generally *id.* at 177-78.

<sup>45</sup> Volinka Reina, Comment, *Iraq’s Delictual and Contractual Liabilities: Would Politics or International Law Provide for Better Resolution of Successor State Responsibility?*, 22 BERKELEY J. INT’L L. 583, 614 (2004).

<sup>46</sup> See Ruiz Fabri, *supra* note 41, at 177.

### III. ENFORCEMENT

#### A. INTRODUCTION

Various mechanisms to deal with the problem of failed states have been proposed, including United Nations involvement,<sup>47</sup> democratization,<sup>48</sup> and updated versions of the older models of conservatorship<sup>49</sup> and trusteeship.<sup>50</sup> Unfortunately, these potential approaches do not discuss the administration of justice in the interregnum, probably due to the infrequency of such an occurrence.<sup>51</sup> The underlying problem is that if “[i]nternational law is a consensual system, and the jurisdiction of international tribunals rests on consent” then in a fully collapsed state there is no state to consent.<sup>52</sup>

#### B. UNITED NATIONS

The International Court of Justice (ICJ) is a principal component of the United Nations. The court has two main roles: “to

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<sup>47</sup> See generally Francis Mading Deng, *State Collapse: The Humanitarian Challenge to the United Nations*, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY, *supra* note 1, at 207 (urging a uniform international approach to solving collapsed states).

<sup>48</sup> This solution aims to “give a much larger segment of the population a stake in the system.” Marina Ottaway, *Democratization in Collapsed States*, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY, *supra* note 1, at 235, 235.

<sup>49</sup> Conservatorship is akin to a guardianship in family law. See generally Henry J. Richardson III, “Failed States,” *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT’L & COMP. L.J. 1, 3 (1996).

<sup>50</sup> The trusteeship system appoints a nation to run a nation for a limited period of time. See MILTON KATZ, THE RELEVANCE OF INTERNATIONAL ADJUDICATION 45-46, 69-102 (1968) (discussion of the UN system and long examination on the struggles over South Africa’s trusteeship over South-West Africa); see also Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903, 946-53 (1996-97).

<sup>51</sup> See Osinbajo, *supra* note 6, at 921 (calling UN involvement in Somalia during the 1990s a “quasi-trusteeship” as other terms did not apply). Zartman distinguishes Somalia as lying on the extreme end of collapsed states, as opposed to Liberia where the capital never fell. See Zartman, *supra* note 1, at 3; Adam, *supra* note 2, at 78.

<sup>52</sup> KATZ, *supra* note 50, at 151; see also E.K. NANTWI, THE ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND ARBITRAL AWARDS IN PUBLIC INTERNATIONAL LAW 23-33 (1966).

settle in accordance with international law the legal disputes submitted to it by States,” and “to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.”<sup>53</sup> As a judicial body, however, it is ill-equipped to deal with judgments involving a collapsed state. The court allows only states to appear before it, and therefore sub-state leaders in a collapsed state cannot have their issues adjudicated.<sup>54</sup> For example, a neighboring state could divert a river away from, or invoke a border dispute with, a collapsed state; the inhabitants of the collapsed state would have no national government to represent them at the ICJ, and their claims would go unadjudicated.

Furthermore, the ICJ lacks an internal enforcement mechanism, meaning that even if a claim were successfully heard, its enforcement would be impossible.<sup>55</sup> Justice Ajibola of the ICJ has stated that “it is not generally the business of the Court to ensure compliance with its judgments.”<sup>56</sup> The court has “nothing to do with the execution or enforceability of that judgment.”<sup>57</sup> Instead the court relies on the “moral obligation” of member countries of the U.N. to obey its directives.<sup>58</sup>

Failing that, the Security Council can take action, but to do so raises a recognized problem: the winning party cannot take action against the loser, except in self-defense.<sup>59</sup> Instead, it is suggested that economic measures may compel enforcement,<sup>60</sup> but even this enforcement mechanism can fail. Two examples of

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<sup>53</sup> International Court of Justice, General Information – The Court at a Glance, <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last visited Feb. 15, 2005).

<sup>54</sup> Statute of the International Court of Justice, art. 34, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, reprinted in 55 YALE L.J. 1318., 1324-25 (1946).

<sup>55</sup> B.A. Ajibola, *Compliance with Judgments of the International Court of Justice*, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 9, 11-12 (M.K. Bulterman & M. Kuijer eds., 1996).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 12.

<sup>58</sup> *Id.*; see also NANTWI, *supra* note 52, at 65-66.

<sup>59</sup> Ajibola, *supra* note 55, at 19; see also U.N. CHARTER art. 2, para. 4.

<sup>60</sup> Ajibola, *supra* note 55, at 20.

such failures are the United States' use of veto power in the Security Council to prevent enforcement actions against it,<sup>61</sup> and the Iranian refusal to enforce the court's decisions.<sup>62</sup>

Realistically, the existing enforcement mechanisms may not work in a territory that lacks a unified central government. There is no ambassador to rebuke in the General Assembly, no head of state to be reminded of "moral obligations." Additionally, the Security Council may face substantial enforcement difficulties, and in some cases the attempt may not be worth the effort.<sup>63</sup> The effect of the court's decision would be the same as a U.S. court action brought by Coca-Cola against the Somali United Bottling Company – a judgment without any means of enforcement.

The United Nations' conventions on state succession also presume the existence of national governments. The United-Nations-authored Vienna Convention on Succession of States in Respect of Treaties ("Vienna Convention") presents a uniform set of rules regarding treaties during state succession.<sup>64</sup> Although it was finalized in 1978, the Vienna Convention did not come into force until November 6, 1996. Despite a lack of actual application, both the convention and its counterpart on state property, archives, and debts, discussed *infra*, have influenced the international law on state succession in practice since their development.<sup>65</sup>

On its face, the convention's text does not bar its application to a collapsed state. The document governs how treaties are to be dealt with in various scenarios on the "date of the succession

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<sup>61</sup> See S.M. Schwebel, *Commentary*, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS, *supra* note 55, at 39, 41.

<sup>62</sup> Ajibola, *supra* note 55, at 20-21. For other examples, see NANTWI, *supra* note 52, at 119.

<sup>63</sup> One should remember the difficulties the UN faced with a *diplomatic and humanitarian* mission in Somalia in the early 1990s; in enforcing a judgment against a warlord, the UN would likely face similar problems. See Adam, *supra* note 2, at 84-86.

<sup>64</sup> Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 4 [hereinafter *Treaties Convention*].

<sup>65</sup> Wladyslaw Czaplinkski, *Equity and Equitable Principles in the Law of State Succession*, in SUCCESSION OF STATES 61, 61 (Mojmir Mrak ed., 1999).

of States.”<sup>66</sup> The convention defines “date of the succession of States” as “the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.”<sup>67</sup> It is not assumed that there is an instantaneous transfer from a “predecessor state” to a “successor state.”<sup>68</sup>

However, the scope of the Vienna Convention’s application is ambiguous. Article 6 states that “[t]he present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.”<sup>69</sup> Given that state succession is a murky body of law,<sup>70</sup> it is unclear how a succession could *not* be in conformity with it. Additionally, the charter is divided into three main areas of application: “Succession in respect of Part of Territory,”<sup>71</sup> “New Independent States,”<sup>72</sup> and “Uniting and Separation of States.”<sup>73</sup> A collapsed state fits into none of these categories, rendering the convention inapplicable.

The Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (“SPAD Convention”), if put into force, would apply but have limited effect in situations where a state has failed.<sup>74</sup> The convention attempts to

<sup>66</sup> *E.g.*, Treaties Convention, *supra* note 64, art. 15 (“[T]reaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States.”).

<sup>67</sup> *Id.* art. 2.

<sup>68</sup> “[P]redecessor State’ means the State which has been replaced by another State on the occurrence of a succession of States.” *Id.* art. 2.1.(c). “‘Successor State’ means the State which has replaces another State on the occurrence of a succession of States.” *Id.* art. 2.1.(d).

<sup>69</sup> *Id.* art. 6.

<sup>70</sup> See O’CONNELL I, *supra* note 11, at 33-35.

<sup>71</sup> Treaties Convention, *supra* note 64, art. 15.

<sup>72</sup> *Id.* art. 16. The Convention’s definition of “newly independent State” is where the traditional view of state succession appears. “[N]ewly independent State’ means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.” *Id.* art. 2.1.(f).

<sup>73</sup> *Id.* arts. 31-38.

<sup>74</sup> Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, U.N. Doc. A/CONF.117/14 (Mar. 1-Apr. 8, 1983) [hereinafter SPAD Convention]. The Convention is not in force.

dictate how the property of the “predecessor state” should be transferred to the new one using the same definitions as the earlier convention on state succession,<sup>75</sup> and the same ambiguous definition of scope.<sup>76</sup> However, the document does not contemplate a long-term state absence. State properties that are to be transferred are “property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.”<sup>77</sup> The transfer occurs when the new state takes power.<sup>78</sup> Substantially similar language is used to govern the transfers of state archives<sup>79</sup> and debts.<sup>80</sup> When the state has been absent for a long period of time, the ownership records and state archives could be destroyed, or government facilities abandoned or used for other purposes.

Present-day Somalia provides an example of how the SPAD Convention would be ineffective with a collapsed state. In Mogadishu, many former schools and government buildings are now used as housing.<sup>81</sup> If the convention were in force and applicable, a new government might inherit only debts. Thus, while not inapplicable to the failed-state scenario, the SPAD Convention has limited use, because there are likely to be few assets left to divide.

### C. REGIONAL BODIES

Another potential solution would be to allow parties to bring claims to regional bodies such as the African Union or the European Union. Unfortunately, problems similar to those of the United Nations hinder the African Union model of dispute

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<sup>75</sup> Compare *id.* art. 2.1.(b), with Treaties Convention, *supra* note 64, art. 2.

<sup>76</sup> Compare SPAD Convention, *supra* note 74, art. 3, with Treaties Convention, *supra* note 64, art. 6.

<sup>77</sup> SPAD Convention, *supra* note 74, art. 8.

<sup>78</sup> *Id.* art. 10.

<sup>79</sup> *Id.* arts. 21-22.

<sup>80</sup> *Id.* arts. 34-35.

<sup>81</sup> See Winter, *supra* note 34 (“Government buildings, such as ministries, schools and colleges, have become refugee camps for people forced from their homes by years of fighting.”); *Living in Somalia’s Anarchy*, BBC NEWS, Nov. 18, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/4017147.stm>. (Mogadishu government buildings used as refugee camps).

resolution. Somalia is a signatory to the Constitutive Act of the African Union, which creates several opportunities to redress wrongs in member states.<sup>82</sup> While it provides for direct intervention in some circumstances,<sup>83</sup> it requires member states to request intervention in others,<sup>84</sup> and it prohibits other nations from interfering with the internal affairs of another state.<sup>85</sup> Similar to the ICJ, the African Union's Court of Justice<sup>86</sup> suffers from over-reliance on the traditional model of states as the appropriate parties to bring suit. The African Union and member states can bring cases directly before the court, but third parties are allowed only "under conditions to be determined by the Assembly and with the consent of the State Party concerned."<sup>87</sup> A collapsed state such as Somalia has no party to give consent.

The African Union has planned additional forums for dispute resolution. The member states have agreed to establish an African Court on Human and Peoples' Rights.<sup>88</sup> The protocol establishing this court grants the African Commission on Human and Peoples' Rights, member states, and some African intergovernmental organizations access to this court.<sup>89</sup>

Enforcement of these courts' decisions under the Constitutive Act of the African Union is, however, problematic. The act states that member states may be subject to sanctions "such as the denial of transport and communications links with other

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<sup>82</sup> See CONSTITUTIVE ACT OF THE AFRICAN UNION, July 11, 2000, 2158 U.N.T.S. 3 [hereinafter AU CONST.].

<sup>83</sup> One of the principles of the Constitutive Act is "[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." *Id.* art. 4(h).

<sup>84</sup> *Id.* art. 4(j).

<sup>85</sup> *Id.* art. 4(g).

<sup>86</sup> *Id.* art. 18.

<sup>87</sup> Protocol of the Court of Justice of the African Union, July 11, 2003, available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (follow "Protocol of the Court of Justice of the African Union" hyperlink).

<sup>88</sup> See African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, reprinted in 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986). The right to property is guaranteed in art. 14. The right to economic development is in art. 22.

<sup>89</sup> Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights art. 5, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

Member States, and other measures of a political and economic nature to be determined by the Assembly.”<sup>90</sup> Where there is no member “state” *per se*, these sanctions may be ineffective. Similar to the United Nations model, the African Union’s system does not function smoothly without a national government with which to negotiate.

Other regional agreements may allow individuals to make claims, regardless of citizenship. For example, the European Convention on Human Rights (ECHR) guarantees rights “to everyone within [the member nations’] jurisdiction.”<sup>91</sup> The European Court of Human Rights has expanded the traditional notion of “territoriality” to encompass some situations where ECHR members have “effective control” of a territory.<sup>92</sup> Thus, if an ECHR member effectively controlled part of an area which had no official government, an individual could file a claim with the relevant court under the ECHR. Thus, in theory, a regional agreement could govern the rights of individuals in a collapsed or absent state, although this coverage would be limited to the extent of another country’s control or participation in that area. These protections are restricted to those rights found in the ECHR, and not to any commercial or other proceedings.

As the previous discussion demonstrates, existing international structures are not designed to deal with problems concerning collapsed states. Where there has been an abdication of authority, there is no state system of enforcement. International arbitration bodies cannot handle matters of enforcement without a clearly identifiable party to hold accountable or a recognized government against whom to levy sanctions.

#### D. THE UNITED STATES

While enforcing international law within a collapsed state is nearly impossible under current structures, those within the collapsed state seeking justice in the United States would also face

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<sup>90</sup> AU CONST., *supra* note 82, art. 23.2.

<sup>91</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, 224; *see* Joanne Williams, Al Skeini: *A Flawed Interpretation of Banković*, 23 WIS. INT’L L.J. 687 (2005).

<sup>92</sup> Williams, *supra* note 91, at 694 (discussing extraterritoriality exceptions to the ECHR, and quoting *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 355).



problems. If a Somali corporation such as the United Bottling Company wished to sue Coca-Cola in the United States, it would face substantial obstacles, even if preliminary issues like minimum contacts were satisfied. According to the Restatement on the Foreign Relations Law of the United States, “[f]or purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.”<sup>93</sup> If it were managed from some locale outside Somalia,<sup>94</sup> or if it were incorporated in multiple states,<sup>95</sup> it could acquire another nationality. It is unclear what laws, if any, govern Somali corporations.<sup>96</sup>

One possibility would be to try and work claims through the Alien Tort Claims Act.<sup>97</sup> This act allows for parties to bring suits in United States federal district courts against “an alien for a tort only.”<sup>98</sup> Taken at face value, this statute would appear to allow individuals within a collapsed state to use the United States’ court system when there is no local one. While the scholarship concerning this law has been extensive and theoretical,<sup>99</sup> it is clear that without any means of enforcement, an American verdict against a Somali resident, for example, would be worthless. However, in theory, a claim against an American company such as Coca-Cola would have a greater chance of success.<sup>100</sup> Therefore, ATCA appears to allow the resident of a collapsed state the

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<sup>93</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1987).

<sup>94</sup> *Id.* § 213 cmt. c.

<sup>95</sup> *Id.* § 213 Reporter’s Note 9.

<sup>96</sup> See MAREK, *supra* note 16, at 2 (discussing municipal norms).

<sup>97</sup> 28 U.S.C. § 1350 (2005).

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., James Boeving, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT’L ENVTL. L. REV. 109 (2005); Christiana Ochoa, *Access to U.S. Federal Courts as a Forum for Human Rights Disputes Pluralism and the Alien Tort Claims Act*, 12 IND. J. GLOBAL LEGAL STUD. 631 (2005); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC’Y REV. 635 (2004).

<sup>100</sup> But see Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT’L L. & BUS. 43, 44 (2006) (stating that “ATCA does not necessarily have jurisdiction over corporations” and then offering other methods to cover that gap).

opportunity to use the American justice system, despite enormous barriers.

Nor is it clear that an American party would succeed in suing a transitional government. Generally a state is responsible for its government's and its officials' actions, but the Restatement does not consider a collapsed state to be a state. A state is assumed to have "lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there."<sup>101</sup> Assuming that a transitional government has this authority, "a state is responsible for the conduct of its effective government, whether or not that government was recognized by other states."<sup>102</sup> Nevertheless, a transitional government is generally ineffective until it assumes power, if it formed externally. Therefore it may be likened to a successful revolutionary regime that becomes responsible for the state.<sup>103</sup> A state is responsible for the "conduct of any revolutionary regime that has control over part of the state's territory as regards ordinary domestic legislation, administrative acts, or judicial decisions" but not acts designed to further or maintain that regime's control.<sup>104</sup>

The Restatement, perhaps mistakenly, may place autonomous regions within a collapsed state under the category of "revolutionary regime." If the two autonomous yet internationally unrecognized bodies of Somaliland and Puntland successfully gained control over the rest of the country, they might be considered revolutionary regimes under the Restatement. However, the Restatement's reasoning may be misplaced in suggesting that determination; even if the autonomous regions had a desire to control Somalia in its entirety, they arguably would not be revolutionary regimes.<sup>105</sup> Unlike the envisioned revolutionary regime situation, Somalia has no central government against which to

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<sup>101</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 cmt. b.

<sup>102</sup> *Id.* § 207 cmt. b.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *Country Profile: Somalia*, BBC NEWS, Feb. 26, 2005, available at [http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/1072592.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1072592.stm). Indeed, Abdullahi Yusuf Ahmed, Somalia's Transitional President was a former leader of Puntland. *Id.*

rebel. In addition, the autonomous regions maintain some semblance of law and order within their territories, a circumstance not anticipated by the Restatement's view of revolutionary regimes.<sup>106</sup>

The Restatement's treatment of revolutionary regimes has some odd consequences in Somalia's situation. Because the autonomous regions could be viewed as revolutionary under the wording of the text, however, the Restatement's revolutionary-regime approach would result in contracts or agreements with autonomous regions only being enforceable in the United States if these smaller territories were to take control over the remainder of Somalia. But if a new Somali government were established outside the country and took power nationwide, as was attempted with several peace conferences, the contracts or agreements with regional governments would be unenforceable. Thus, a small autonomous region, such as Somaliland, would face a penalty for seizing control of all of Somalia since the region, as the new government, could be held responsible for its own contracts made in the interim period between national governments, as well as for the former national government's debts. It would be better for all of the territory within Somalia to become autonomous with no central government, and thereby avoid responsibility for Somalia's debts.<sup>107</sup>

Dealing with contracts between the former Somali government and an American party would also be troublesome. The Restatement maintains that, subject to any agreement between the governments, "responsibility for the public debt of the predecessor, and rights and obligations under its contracts, remain with

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<sup>106</sup> For example, Somaliland has declared itself an independent country, along the borders of the former country of the same name which united with Somalia in 1960. Although no nation has recognized the region as a country, it has established a series of laws, and a constitution. For a non-official translation into English, see Somaliland Forum, Somaliland Constitution, [http://www.somalilandforum.com/somaliland/constitution/revised\\_constitution.htm](http://www.somalilandforum.com/somaliland/constitution/revised_constitution.htm) (last visited Feb. 6, 2006).

<sup>107</sup> An imperfect comparison would be any federation where the federal level is inoperative. For example, if the United States federal government were dissolved or somehow vacant, the states and other federally recognized bodies would govern substantially the entire territory of the United States, but none would achieve the federal mantle.

the predecessor state.”<sup>108</sup> The Restatement lists a few exceptions, including when part of the state’s territory is lost to another state,<sup>109</sup> when part becomes a new state,<sup>110</sup> and when “a state is absorbed by another state.”<sup>111</sup> The latter seems to be most applicable to Somalia, yet a transitional government does not truly “absorb” territory if it takes power. The same underlying concern exists that “no source of payment would be available to creditors.”<sup>112</sup> Thus collapsed states and their corporations would find little place in the American legal system.

### E. THEORY VS. REALITY

Most of the previous discussion has focused on the theoretical rights of people within a collapsed state. However, in reality, individuals may neither be aware of these rights, nor have the ability to exercise or defend them, rendering them useless. Another way of explaining this would be to say that rights on paper do not enter into the “legal consciousness.” This term “can be understood either in terms of legal aptitude or competence or in terms of perceptions and images of the law.”<sup>113</sup> In the case of a collapsed state, people may lack access to international agreements which grant or protect rights, or they may not have means of transport or representation.<sup>114</sup> Thus, individuals within a collapsed state may not have either the “legal aptitude or competence” to pursue their claims in a distant, non-intuitive forum. The relative inaccessibility of an adjudicative authority may also prevent parties from negotiating terms or settling disputes “in the

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<sup>108</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 209(2).

<sup>109</sup> *Id.* § 209(2)(a).

<sup>110</sup> *Id.* § 209(2)(c).

<sup>111</sup> *Id.* § 209(2)(b).

<sup>112</sup> *Id.* § 209 cmt. c.

<sup>113</sup> David M. Engel, *How Does Law Matter in the Constitution of Legal Consciousness?*, in *HOW DOES LAW MATTER?* 109, 139 (Bryant G. Garth & Austin Sarat eds., 1998).

<sup>114</sup> But as discussed *infra*, in the Somali case people have internet access in urban areas. Joseph Winter, *Telecoms Thriving in Lawless Somalia*, BBC NEWS, Nov. 19, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/4020259.stm>. One author also describes the rapid transmission of livestock information using hand radios. PETER D. LITTLE, *SOMALIA: ECONOMY WITHOUT STATE* 107 (2003).

shadow of the law.”<sup>115</sup> Thus, despite theoretical rights under various international agreements, individuals within a collapsed state may not be able to exercise these rights in practice, even if they are aware of them.

In summary, collapsed states pose a real challenge to existing methods of adjudication and enforcement. Both the United Nations and the African Union assume a quick transition between governments will occur, and they make no provision for situations of long-term vacant national sovereigns. Attempts to use the United States’ court system would also be hampered by the phenomena of collapsed states. Yet, even if inhabitants of a collapsed state were eligible to use these external forums, it would be highly unlikely that they would have knowledge of or practical access to these foreign or international options.

#### IV. CYBERSPACE: A COMPARATIVE EXAMPLE

##### A. ONLINE DISPUTE RESOLUTION

While adjudication and enforcement problems concerning online commercial transactions rarely reach the same levels of complexity as those situations within entirely collapsed states such as Somalia, they provide a useful analogy. Similar to firms transacting business within a collapsed state, those engaging in commerce using the Internet face substantial hurdles with enforcement. Cyberspace “has no uniform laws and unified court system,” and consumers face significant risks.<sup>116</sup> There is little recourse to online dispute resolution (“ODR”) mechanisms, similar to a lack of available judicial enforcement within a collapsed state, and this lack of online options hurts consumer confidence in the marketplace.<sup>117</sup> In both cases, there is an urgent need to protect both parties in transactions.<sup>118</sup>

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<sup>115</sup> E.g., Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979), reprinted in LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 111 (Stewart Macaulay et al. eds., 1995).

<sup>116</sup> Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH 441, 441-42 (2002).

<sup>117</sup> See *id.* at 461.

<sup>118</sup> *Id.* at 446.

Businesses can develop ODR programs, but while the Internet is a worldwide system, the long-term proposals for ODR programs are a mixture of governmental and self-regulation.<sup>119</sup> Any users of an ODR program will run into difficulties determining the quality of an ODR program.<sup>120</sup> Similar to traditional arbitration procedures, support is dependent on timely enforcement.<sup>121</sup>

In studying ODR programs, Lucille Ponte notes that “international cooperation and collaboration is key to the ready enforcement of ODR awards without any need to involve traditional courts.”<sup>122</sup> She proposes an international governmental institution that would develop an international convention.<sup>123</sup> Through this convention, nations would agree to enforce ODR decisions or settlement agreements, with some reservations.<sup>124</sup> Enforcement could then be handled through this international body, which could also help consumers recover money.<sup>125</sup>

While there are many parallels with existing methods for resolving disputes with international law, Ponte’s proposed international ODR system highlights many of the problems with enforcement where there is no national government. First, there is a reliance on either national or international bodies to do the actual enforcement when things go awry.<sup>126</sup> The ODR system is to build on top of, or in conjunction with, existing government systems.<sup>127</sup> The international body’s power would consist of refunding money through credit card systems.<sup>128</sup> All in all, this proposed system is similar to the United Nations’ efforts and conventions dealing with state succession, and displays the same flaws. Both assume and rely on national actors to do the actual enforcement while the international body issues the judgment.

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<sup>119</sup> *Id.* at 472.

<sup>120</sup> *Id.* at 476-77.

<sup>121</sup> *Id.* at 490.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 490-91.

<sup>126</sup> *Id.* at 490.

<sup>127</sup> *See id.*

<sup>128</sup> *Id.* at 490-91.

But while the Internet's commercial aspects raise similar problems, smaller online communities provide an opportunity to study dispute resolution in the absence of top-down laws and enforcement mechanisms.

## B. VIRTUAL WORLDS

Territories without governments may be rare in the world, but they are prevalent in virtual online worlds. While such communities may not appear to be relevant, there is "an ever-increasing population of participants who believe that the social interactions that occur within these environments are important."<sup>129</sup> They also believe that the economic boundaries between the real and the virtual world have become blurred, and that these worlds present "a parallel alternative to existing legal systems, where new forms of social regulation can be explored."<sup>130</sup> It is this final point that is most relevant.<sup>131</sup> There is limited or no governmental control inside these worlds. Instead, users interact with each other, forming communities and engaging in transactions. Within these worlds there are two types of laws – the underlying code giving rise to the virtual environment, akin to laws of science and perception within the physical world,<sup>132</sup> and those created by the society of users themselves. The most common disputes are property related, likely to be the starting point for developing virtual-world law.<sup>133</sup> These are not entirely lawless states, but there are few or no formal enforcement mechanisms available to the user.

In this absence of control, "[c]ommunity self-policing of rights and legal expectations within virtual worlds has . . . arisen spontaneously."<sup>134</sup> Individual users form guilds, social groups

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<sup>129</sup> F. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CAL. L. REV. 1, 8 (2004).

<sup>130</sup> *Id.* at 11.

<sup>131</sup> See James Grimmelman, *Virtual Worlds as Comparative Law*, 49 N.Y.L. SCH. L. REV. 147, 147 (2004-05) (suggesting online worlds' laws as source of comparative law).

<sup>132</sup> See Lastowka & Hunter, *supra* note 129, at 12 (discussing Lawrence Lessig's proposition that within these worlds "code is law"); Grimmelman, *supra* note 131, at 150.

<sup>133</sup> Lastowka & Hunter, *supra* note 129, at 72.

<sup>134</sup> *Id.* at 70.

without the history and tradition of real life, to determine these connections for them.<sup>135</sup> In a study of online environments, James Grimmelman characterizes these groups as quasi-feudal, or “allegiance hierarchies which start to become powerful entities in their own right.”<sup>136</sup> It is through these groups that users take actions against each other, much as warlords and tribal leaders can direct action in a system with government.

Essentially, both a collapsed state and a virtual environment develop factionalism.<sup>137</sup> Within a virtual world, there are community meetings and coded regulations enforced by mechanical inter-game devices.<sup>138</sup> For example, an item may be programmed to only respond to a certain category of users, or government buildings may be coded to be impervious to vandalism. However, enforcement sometimes ventures outside these games, and cases have been filed in actual courts regarding inter-game disputes.<sup>139</sup> Much like the international company doing business with a Somali organization, however, a user may not obtain enforcement from a physical court on an inter-game dispute. Changes a game’s operating code can fix some problems, but courts would have a hard time gathering facts, determining if events occurred on in an online world, and measuring the costs associated with the disputed action.

Despite the similarities between online communities and collapsed states, there are some notable differences. First, the online system makes contracts hard to express.<sup>140</sup> For example, within games, bargaining with the underlying code is impossible.<sup>141</sup> Despite the advanced nature of game property rights, there is little corresponding increase in discretion by decision makers.<sup>142</sup> Another difference is that the code which underlies

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<sup>135</sup> But see Grimmelman, *supra* note 131, at 171 (relaying that guilds are “often formed by people who know each other in real life”).

<sup>136</sup> *Id.* at 173.

<sup>137</sup> Compare *id.* at 173, with Adam, *supra* note 2, at 76-78.

<sup>138</sup> Lastowka & Hunter, *supra* note 129, at 70.

<sup>139</sup> See Grimmelman, *supra* note 131, at 149 (Chinese court ordering restitution for in-game action); see generally Lastowka & Hunter, *supra* note 129, at 29.

<sup>140</sup> Grimmelman, *supra* note 131, at 158-59.

<sup>141</sup> *Id.* at 150.

<sup>142</sup> *Id.* at 150-53; see generally Lastowka & Hunter, *supra* note 129, at 30-51 (providing background information on virtual property).



online communities is automatically executed while the law relies on humans for enforcement.<sup>143</sup>

Yet rules evolve among players of the game.<sup>144</sup> Similar to Somalia, “extensive economies flourish without the promissory protections that we think of as being central to contract law.”<sup>145</sup> Furthermore, the underlying motivations for contracts or agreements in the real world differ from those present in online environments.<sup>146</sup> The disputes are generally solved with “[s]elf-help and ongoing negotiation” rather than enforceable agreements.<sup>147</sup> Indeed, one fundamental difference is that online communities are more focused on status than wealth.<sup>148</sup> Even enforcing some sort of criminal law within a game world is a problem, as the only available tactics are those used by the troublemakers themselves.<sup>149</sup>

Despite vast similarities such as lack of governmental controls and factionalism, the limited role that contracts currently play within such systems relegates enforcement issues to intellectual speculation. Until online communities use more elaborate contracts that rely on human behavior and not simple program code, they will not have the depth and richness of experience to make a lack of enforcement more than a trivial issue. As these worlds become more complex, however, they may eventually develop forms of arbitration or courts to solve disputes.

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<sup>143</sup> Grimmelmann, *supra* note 131, at 153.

<sup>144</sup> *See id.* at 155.

<sup>145</sup> *Id.* at 158.

<sup>146</sup> *Id.* at 160. Grimmelman elaborates that “[t]here is comparatively little practical use to contracts for sales at some later time[,] . . . large institutional contacts [or] family-relations contracts” because of the way online worlds are constructed. *Id.* at 160-61. Instead, “[s]elf-help and ongoing negotiation are more the order of the day than enforceable agreements.” *Id.* at 162.

<sup>147</sup> *Id.* at 162.

<sup>148</sup> *See* Grimmelmann, *supra* note 131, at 162-67.

<sup>149</sup> *Id.* at 168.

## V. THE RESULT: INTERNATIONAL LAW REPLACES NATIONAL LAW

### A. INTERNATIONAL ACTORS SET POLICY

The international community does not recognize self-governing territories that have proclaimed themselves independent from the traditional government.<sup>150</sup> Though autonomous regions have developed within the borders of Somalia,<sup>151</sup> the country is unique in having no official government. Because of the international community's refusal to carve up the state, as was done with the former Yugoslavia,<sup>152</sup> there is no recognized national law. Instead, the applicable law is local law, applied within the area, and international law in the area's external dealings.

Somalia's situation is akin to that of nations small enough that national law is essentially local law. In such states the traditional roles of government are performed by local private sector<sup>153</sup> and international organizations.<sup>154</sup> Some examples of this are schooling,<sup>155</sup> the postal system,<sup>156</sup> and health care.<sup>157</sup> The private sector's activities are mainly limited to urban areas and are out of the price range of many individuals.<sup>158</sup>

Paradoxically, Mogadishu is the epitome of a globalized city in that only international and local law apply, and then only

<sup>150</sup> Current examples include the Turkish Republic of Northern Cyprus, Transnistria, and several in the Caucasus.

<sup>151</sup> They are known as Puntland and Somaliland. The author takes no stance on the legitimacy or sovereignty of either Somaliland or Puntland. See discussion of Somaliland, *supra* note 106.

<sup>152</sup> See generally Mirjam Škrk, *Recognition of States and Its (Non-) Implication on State Succession: The Case of Successor States to the Former Yugoslavia*, in SUCCESSION OF STATES, *supra* note 65, at 1.

<sup>153</sup> THE WORLD BANK & UNDP, *supra* note 6, at 54. Warlords may be the ones driving whatever limited organization exists. See Zartman, *supra* note 1, at 8.

<sup>154</sup> See, e.g., *Organisation Amid Chaos in Somalia*, BBC NEWS, Nov. 25, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/536634.stm>; cf. Martin Lowenkopf, *Liberia: Putting the State Back Together*, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY, *supra* note 1, at 91, 102, 106-07.

<sup>155</sup> THE WORLD BANK & UNDP, *supra* note 6, at 28.

<sup>156</sup> *Id.* at 54.

<sup>157</sup> See Joseph Winter, *Somalia's Angels of Mercy*, BBC NEWS, Dec. 1, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/4055761.stm>.

<sup>158</sup> THE WORLD BANK & UNDP, *supra* note 6, at 54.

sparsely.<sup>159</sup> Jessop writes that in states which have moved into a “post-Fordist” globalized structure, the national government becomes increasingly irrelevant.<sup>160</sup> International organizations, such as multi-national corporations and the United Nations, and local actors such as cities and regional organizations make policy and law.<sup>161</sup> The result is a “hollowed out” national government which retains its official role, but finds its internal power increasingly weakened the “shift towards” globalization and “internationalized, flexible . . . production systems.”<sup>162</sup> This fuels the “need for supranational coordination and the space for subnational resurgence.”<sup>163</sup> The state functions are given over to multinational bodies,<sup>164</sup> devolved down to local governments,<sup>165</sup> or taken over by horizontal bodies connecting localities or regions transnationally.<sup>166</sup>

One view of this “hollowed out” state considers “state failures” in dealing with the accumulation of wealth and social regulation.<sup>167</sup> Instead, these functions are left to others.<sup>168</sup> Nonetheless, the national government has a vital role to play in “managing the political linkages across different territorial scales,” and is best placed to deal with “social conflict and redistributive policies.”<sup>169</sup>

A collapsed state such as Somalia approaches the lack of meaningful national government and local international policymaking from the opposite end. Instead of regionally flexible production undermining the national government, the government itself collapsed, forcing development onto local actors. International actors have taken control of some policy functions,

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<sup>159</sup> Bob Jessop, *Post-Fordism and the State*, in POST-FORDISM 251, 264 (Ash Amin ed., 1994).

<sup>160</sup> *Id.*

<sup>161</sup> *See id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 270-71.

<sup>165</sup> *Id.* at 271-73.

<sup>166</sup> *Id.* at 273-74.

<sup>167</sup> *Id.* at 265.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 274.

and some regional groups have organized into self-functioning units, such as Somaliland and Puntland.<sup>170</sup> There is no coordination, however, among the various groups.

In the absence of a central government, international institutions have attempted to become the national policymakers for Somalia. The failures of the World Bank's approach demonstrate the need for flexibility in approaching the collapsed state. Regular investment through the World Bank is impossible because it would require a central government.<sup>171</sup> The International Monetary Fund only has relations with official state agencies.<sup>172</sup> However, the absence of formal state institutions may cause growth of Somalia's financial and other sectors that is hard to measure.<sup>173</sup> In order to work around this situation, the World Bank and the United Nations' Development Programme (UNDP) have developed a "Country Re-Engagement Note for Somalia."<sup>174</sup> The purpose of this program is to "contribute to the provision of basic public goods, accelerate socio-economic recovery, and create an enabling environment for long-term institutional and policy change."<sup>175</sup> One of the first steps taken under this policy was a compilation of statistics, known as the Socio-Economic Study, in lieu of a national government program to do the same.<sup>176</sup>

The Socio-Economic Study was designed to "build up the socio-economic database addressing the data needs and gaps felt by the Somali and international community."<sup>177</sup> The purpose of this data is to allow planning by international non-governmental

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<sup>170</sup> See discussion *supra* note 106.

<sup>171</sup> UNDP/WORLD BANK, COUNTRY RE-ENGAGEMENT NOTE: SOMALIA, Doc. No. 28276, 4 (2003); see generally Ibrahim F.I. Shihata, *Matters of State Succession in the World Bank's Practice*, in SUCCESSION OF STATES, *supra* note 65, at 75.

<sup>172</sup> IMF AGREEMENT art. V, § 1 ("Each member shall deal with the Fund only through its Treasury, central bank, stabilization fund, or other similar fiscal agency, and the Fund shall deal only with or through the same agencies.").

<sup>173</sup> See Mohammed El Qorchi at al., *Informal Funds Transfer Systems: An Analysis of the Informal Hawala System* 20-21 (IMF Occasional Paper No. 222, 2003).

<sup>174</sup> UNDP/WORLD BANK, *supra* note 171, at 1. The document is the "articulation of a joint UNDP/Bank strategy for operationalizing the [Bank's Low-Income Countries Under Stress] approach in Somalia." *Id.*

<sup>175</sup> *Id.* at i.

<sup>176</sup> See THE WORLD BANK & UNDP, *supra* note 6.

<sup>177</sup> *Id.* at x-xi.

organizations (NGOs) under the re-engagement note for Somalia.<sup>178</sup> Following this, the joint project intends to focus on stabilizing the livestock and meat industry, addressing the HIV/AIDS problem, and building training centers.<sup>179</sup> Considering the special case of Somalia, international agencies recognize that traditional rules are ineffective and have created specialized programs to circumvent them.

## B. ENFORCING INTERNATIONAL LAW AND THE ROLE OF NGOS

National laws govern policy-making NGOs, but their legal status under international law is ambiguous.<sup>180</sup> These organizations play a large role in setting international policy agendas and changing international legal systems.<sup>181</sup> Where the “authorities” do not exist, NGOs are accountable only to themselves. The standard system of enforcement against NGOs is “decentralized enforcement through individual states,” where, using the concept of universal jurisdiction, non-state actors can be held responsible for some international crimes.<sup>182</sup> In Somalia, for example, NGOs are coordinated through the Somalia Aid Coordination Body (SACB).<sup>183</sup> The SACB’s Guiding Principles of Operation specifically recognize various international agreements, such as the Geneva Convention and the Universal Declaration of Human

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<sup>178</sup> *Id.* The data is essential to make “informed policy formulation to best meet the Somali needs.” *Id.* at xi.

<sup>179</sup> UNDP/WORLD BANK, *supra* note 171, at 5-6, 8-11.

<sup>180</sup> Hobe states that “NGOs are not generally regarded as subjects of international law.” Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 *IND. J. GLOBAL LEGAL STUD.* 191, 199 (1997-98). Ironically, some NGOs help enforce international law. *See id.* at 205-07.

<sup>181</sup> Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 *IND. J. GLOBAL LEGAL STUD.* 579, 579-80 (1999).

<sup>182</sup> *Id.* at 637.

<sup>183</sup> *See* UNDP, Somalia Aid Coordination Body Secretariat, <http://www.so.undp.org/Themes/CSI/SACB.htm> (last visited Mar. 14, 2005) (describing role of SACB).

Rights.<sup>184</sup> This group makes a multitude of policy decisions, varying from civil society promotion<sup>185</sup> to flood control.<sup>186</sup> Yet with Somalia's lack of representation in international policy circles, the effectiveness of local actors is the only limitation on these agencies.

The lack of a national Somali government allows these NGOs to operate with some degree of impunity. On a local level, direct action can be taken against aid offices and workers, but international enforcement is very problematic.<sup>187</sup> The SACB has dispute resolution mechanisms in place, but they are both vague and unhelpful.<sup>188</sup> The system covers "disputes between the authority and the International Aid Community,"<sup>189</sup> but does not define what an "authority" is. If negotiations fail, either side can request arbitration, and the arbitral award "shall be accepted by the Parties as the final adjudication of the dispute."<sup>190</sup> The definition of "the authorities" as "the local and national authorities of Somalia"<sup>191</sup> is ambiguous for Somalia's political situation. While various parts of Somalia have regional authorities, the local warlord and other leaders may not be tied to geographical boundaries, or there may simply be no authorities.

Additionally, the enforcement of the arbitral award is problematic. The SACB has expectations that "responsible Somali authorities will assume their proper role to ensure that conditions exist for the effective implementation of aid activities."<sup>192</sup> If they do not, then the SACB and the NGO will take appropriate

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<sup>184</sup> UNDP, *SOMALIA AID COORDINATION HANDBOOK* 18 (2004) [hereinafter *SACB HANDBOOK*].

<sup>185</sup> *Id.* at 58-59.

<sup>186</sup> *Id.* at 50-51.

<sup>187</sup> Cf. Andrew North, *Kabul Killing Unnerves Foreigners*, BBC NEWS, Mar. 9, 2005, available at [http://news.bbc.co.uk/1/hi/world/south\\_asia/4333321.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4333321.stm) (describing NGO wariness and security precautions after killing); *DR Congo Aid Workers Under Attack*, BBC NEWS, Jan. 20, 2005, available at <http://news.bbc.co.uk/1/hi/world/africa/4192499.stm> (describing international aid workers being targeted by local militias).

<sup>188</sup> See *SACB HANDBOOK*, *supra* note 184, at 23.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 24.

<sup>191</sup> *Id.* at 25.

<sup>192</sup> *Id.* at 11.

action, “including suspension of activities.”<sup>193</sup> The assumption that NGOs will provide restitution may not always be correct, nor does having the NGO leave solve the problem.

A potential solution is the implementation of a self-regulatory system, in which NGOs that violate international legal standards could face penalties from an “umbrella organization.”<sup>194</sup> This is similar to the approach used by the SACB, which acts as an “umbrella organization” for Somalia.<sup>195</sup> The SACB provides that “aid agencies shall hold themselves accountable to both the beneficiary communities (that their needs are met) and the donors (that assistance is provided for the proposed purpose).”<sup>196</sup> Assuming a problem with an NGO did arise, there would seem to be no way of resolving the dispute without turning to an authority leader who may not exist. The international aid bodies may proclaim to “hold themselves accountable to the highest professional and international standards,”<sup>197</sup> but that may not always be enough. Nor is it clear what would happen if an NGO refused to pay compensation. Aside from local self-help measures against the agency, restitution may be impossible.

This scenario has real-life examples. Recognized NGOs already break the law in pursuit of their goals, such as Greenpeace does in protesting against nuclear weapons testing.<sup>198</sup> Further, Greenpeace’s maritime strategy involves “[breaking] the law in order to compel governments and transnational corporations” to accomplish its goals.<sup>199</sup> With the growing number of NGOs, it may only be a matter of time before a “black sheep” which breaks laws and violates with even greater frequency appears.<sup>200</sup> Even the U.N. may not be free from such behavior. Allegedly, during the United Nations Operation in Somalia, many foreign

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<sup>193</sup> *Id.* at 12.

<sup>194</sup> Nowrot, *supra* note 181, at 640-41.

<sup>195</sup> See UNDP, *supra* note 183.

<sup>196</sup> SACB HANDBOOK, *supra* note 184, at 26.

<sup>197</sup> *Id.* at 27.

<sup>198</sup> Nowrot, *supra* note 181, at 618 (stating that Greenpeace sometimes intentionally breaks laws).

<sup>199</sup> Hobe, *supra* note 180, at 194.

<sup>200</sup> Nowrot, *supra* note 181, at 639.

soldiers engaged in human rights abuses.<sup>201</sup> Even though NGOs operate under international law, there is little to check their activities in a collapsed state. There is no clear response to this problem of guaranteeing conformity with international law, and it merits further study.

### C. THE PRIVATE SECTOR

While only international law and local law are in force within Somalia, and then perhaps only in theory, the private sector is functioning with an unexpected degree of complexity.<sup>202</sup> The unusual result of this system is a private sector that is unencumbered by national regulation. A World Bank study noted that large parts of the country are on the path to reconstruction and development, spurred on by local private sector initiatives.<sup>203</sup> The strength of these businesses is demonstrated by their ability to help in internal reconstruction, with some businesses constructing basic utilities such as piped water and electricity in some areas of Mogadishu.<sup>204</sup> In areas where the old government had little impact or control, life and trade continue much as before.<sup>205</sup>

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<sup>201</sup> See Rakiya Omaar & Alex de Waal, *Somalia: Human Rights Abuse by the United Nations Forces*, in CRISIS MANAGEMENT AND THE POLITICS OF RECONCILIATION IN SOMALIA: STATEMENTS FROM THE UPPSALA FORUM, 17-19 JANUARY 1994, at 124 (M.A. Mohamed Salih & Lennart Wohlgemuth eds., 1994).

<sup>202</sup> UNDP/WORLD BANK, *supra* note 171, at 2; Adam, *supra* note 2, at 80.

<sup>203</sup> THE WORLD BANK & UNDP, *supra* note 6, at 26. Zartman warns against this, underlying the need for a central state. I. William Zartman, *Putting Things Back Together*, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY, *supra* note 1, at 267, 267.

<sup>204</sup> THE WORLD BANK & UNDP, *supra* note 6, at 26.

<sup>205</sup> In the Somali borderlands administrators were concentrated in a few towns like Kismayo. . . . Not surprisingly, local systems of governance took precedence over arbitrary and incomplete foreign rule. When political independence was achieved in 1961, there was a slight increase in administrative presence in the rural areas, but large parts of the border region remained with few government administrators, and communities continued to rely on themselves. The state was an entity that extracted some local resources and was punitive at times, but could not be counted on the govern daily affairs.

. . .

. . . [In rural areas] [t]he government was perceived as little more than a personal patronage machine that benefited certain clans and urban centers, while distributing few resources to the local population.



Some Somali businesses have international elements as well. For example, Somalia's financial industry is an outgrowth of the *hawala* system, an international method of transmitting money with little government involvement, similar to wire transfers.<sup>206</sup> This system relies on an informal network of *hawaladars*, who pay out money or authorize payment upon receiving payment.<sup>207</sup> Despite the absence of any legitimate government authority in Somalia, *hawaladars* outside of Somalia manage to settle their accounts with Somalia's *hawaladars* within this system.<sup>208</sup> In 2004, an estimated US\$700 million was being sent to Somalia every year, with transactions taking only twenty-four hours to process.<sup>209</sup> With no central government and sparse local administration, these companies are perhaps among the first international businesses that are subject almost solely to international law.

In comparison to the few restrictions on Somali businesses and currency printing, international law restricts the interactions of the International Monetary Fund (IMF) with foreign governments. A member country must first approach the fund and then negotiate a program.<sup>210</sup> Typically, an IMF program will have two or three preconditions and several performance criteria.<sup>211</sup> With the IMF out of the picture, and no official government control, the Somali shilling declined to a value of seven American cents per thousand shillings by 2004.<sup>212</sup> State succession doctrine holds that a state has a sovereign right to issue currency, which is never

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LITTLE, *supra* note 114, at 16. Little's book mainly focuses on the livestock trade in rural Somalia, which involves technically illegal trade with Kenya. He found that the traditional pastoralism still functions, and the collapse of the government was even beneficial in rural areas.

<sup>206</sup> Joseph Winter, *Somalia's Diaspora Offers Financial Lifeline*, BBC NEWS, Nov. 24, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/4038799.stm>.

<sup>207</sup> See El Qorchi et al., *supra* note 173, at 6-9.

<sup>208</sup> See Winter, *supra* note 206; El Qorchi et al., *supra* note 173, at 14-18 (discussing settlement systems).

<sup>209</sup> Winter, *supra* note 206.

<sup>210</sup> GRAHAM BIRD, *THE IMF AND THE FUTURE: ISSUES AND OPTIONS FACING THE FUND* 45 (2003).

<sup>211</sup> *Id.* at 93.

<sup>212</sup> *Living in Somalia's Anarchy*, *supra* note 81.

transmitted to a new state.<sup>213</sup> With a normal state succession, the monetary powers of the old government are extinguished, and the new government can start issuing its own currency.<sup>214</sup> Because no new Somali government took power, Somalia's autonomous regions and local businessmen have started making their own Somali shillings.<sup>215</sup>

#### D. THE "RULE OF LAW"

While at first blush it may appear that a collapsed state is without the "rule of law," this is not necessarily true.<sup>216</sup> The lack of an official or internationally recognized government does not preclude behavior organized in accordance with a "rule of law." For example, within Somalia, the available justice providers are predominantly clan/community elders, councils of elders, and Islamic Shar'ia courts.<sup>217</sup> Only 28.7 percent of respondents to the World Bank and United Nations' Socio-Economic Survey had access to a formal judiciary.<sup>218</sup> Local warlords or militias may control both the courts established by the U.N. during the UNOSOM era and the Shar'ia courts.<sup>219</sup> Proponents of the rule-of-law approach may object to the presence and power of these courts, but the courts' functions could be consistent with the ideas of "rule of law" because they follow an established set of

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<sup>213</sup> Geneviève Burdeau, *Money and State Succession in Eastern Europe*, in DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE, *supra* note 41, at 35, 36.

<sup>214</sup> *Id.* at 37.

<sup>215</sup> *Living in Somalia's Anarchy*, *supra* note 81.

<sup>216</sup> See generally John K.M. Ohnesorge, *État de Droit (Rule of Law) et Développement Economique*, CRITIQUE INTERNATIONALE, Jan. 2003, at 46, translated as *On Rule of Law Rhetoric, Economic Development, and Northeast Asia*, available at <http://www.law.wisc.edu/facstaff/download.php?iID=73>.

<sup>217</sup> THE WORLD BANK & UNDP, *supra* note 6, at 51, 106; see, e.g., Mayoux, *supra* note 5.

<sup>218</sup> THE WORLD BANK & UNDP, *supra* note 6, at 106.

<sup>219</sup> Osinbajo, *supra* note 6, at 922. However, at least in Mogadishu it appears that businessmen established the Islamic courts. *Profile: Somalia's Islamic Courts*, *supra* note 2 (explaining that Mogadishu originally established the Islamic Court system).

rules and were designed to be reliable in settling business disputes.<sup>220</sup> The resulting clash between clan-based warlords and others with the Islamic courts could thus be seen as a battle over whose rule of law operates within Somalia. The Islamic courts have substantial power within Mogadishu, such that they have battled with warlords' forces.<sup>221</sup> If these Islamic courts have strength to fight warlords' forces, it seems clear they would have enough power to enforce judgments if they chose to do so.<sup>222</sup> Therefore, in Somalia, there are multiple rules of law in conflict: the laws of clans, of warlords, of Islam, and of international precedent. Due to this conflict, as previously discussed, Somalis may have a hard time getting their rights adjudicated or contracts enforced.

## VI. POSSIBLE SOLUTIONS

However improbable, businesses and foreign parties can use contracts successfully within a collapsed state. In Somalia, successful businesses may not require a national enforcement system because they either unite or benefit more than one specific group, trying to guarantee through politics what cannot be ensured by law. The warlords leave telecommunications firms alone because they respect the great demand for phone service and do not want to jeopardize its provision.<sup>223</sup> While ensuring that all clans have an interest in the United Bottling Company is likely necessary for its survival, it also means The Coca-Cola Company would face a unified opposition if it tried to enforce its contract or a judgment against the Somali company.<sup>224</sup>

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<sup>220</sup> Ohnesorge, *supra* note 216, at 2 ("The overall emphasis is on form and procedure, rather than demanding any particular set of substantive rights or norms . . ."). This is not to say that the local Somali courts have set form and procedure, but simply to suggest they might.

<sup>221</sup> E.g., *Somali Deaths in Fierce Clashes*, BBC NEWS, Mar. 24, 2006, available at <http://news.bbc.co.uk/1/hi/world/africa/4839726.stm>; *Profile: Somalia's Islamic Courts*, *supra* note 2.

<sup>222</sup> Thus, when an Italian graveyard was taken over in Mogadishu, Islamic courts denied involvement and acknowledged that Italy was the owner. There has been no report of any action taken against the desecration. *Italy to Act on Somalia Graves*, BBC NEWS, Jan. 27, 2005, available at <http://news.bbc.co.uk/1/hi/world/africa/4213285.stm>.

<sup>223</sup> Winter, *supra* note 114.

<sup>224</sup> See Ferrett, *supra* note 3.

The most obvious solutions to private rights enforcement problems depend on the principle of good faith<sup>225</sup> and are preventative in nature. They take the form of “cash and carry” contracts and/or neutral dispute resolution such as arbitration. For example, the foreign party could require the party in the collapsed state to make a security deposit. This deposit would have to be large enough to both ensure compliance and cover the other party’s potential damages. This may be the approach that the *hawala* system uses in international financial transactions.<sup>226</sup> Yet parties from countries like Somalia are probably less likely to have the necessary amount of money available to put into escrow, limiting large-scale transfers.

Foreign parties would also find local courts in the collapsed state to be unhelpful. The local business would wield significant clout with the local court officials. Nor would waiting for a new central government ensure an enforceable judgment under current doctrine.<sup>227</sup> As previously discussed, many of the forums for settling international disputes require or rely on the existence of a centralized state.

Though many commentators have offered methods to repair failed and collapsed states,<sup>228</sup> few have discussed how to enforce international law within those territories. One solution may be to divide up the old state into new internationally recognized states, which can represent themselves in international forums and be held accountable.<sup>229</sup> Yet the international community is reluctant to give up on Somalia as a unified state, perhaps due to the problems surrounding the dissolution of Yugoslavia in the 1990s.<sup>230</sup>

The use of multiple courts with different jurisdictions is another potential solution. State succession law could be used to

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<sup>225</sup> Nantwi discusses the principle of good faith in relation to recognizing the judgments of international tribunals. *Cf.* NANTWI, *supra* note 52, at 75-76.

<sup>226</sup> See El Qorchi et al., *supra* note 173, at 14-18 (explaining the international settlement procedures used by *hawala* system); Winter, *supra* note 206 (describing bags of cash used in system).

<sup>227</sup> See O’CONNELL I, *supra* note 11, at 152-53.

<sup>228</sup> See discussions *supra* notes 47-50.

<sup>229</sup> See generally Škrk, *supra* note 152 (using the example of Yugoslavia).

<sup>230</sup> See *id.*

legitimize the existing clan-based structures through a capitulation system. This virtually obsolete doctrine gives foreign powers dominion over subjects of a specific category, usually religion or ethnicity.<sup>231</sup> Such agreements occurred between European governments and the Ottoman Empire to protect Orthodox Christians in mid nineteenth-century Greece.<sup>232</sup> This system would permit parallel systems of authority for each clan, and enforcement could be sought at the appropriate forum, such as an Islamic Shar'ia court. Another approach would be to legitimize the existing religious and secular courts. Historically, ecclesiastical and secular courts have existed concurrently in the Western world, even with overlapping jurisdictions.<sup>233</sup>

The downsides to such an approach are obvious. Without a clear authority above the various clan groups, jurisdictions tend to overlap, creating more conflict. Organizations that are deliberately non-clan, such as many businesses, face issues of forum selection. Also, the promotion of clan differences is counter-productive to any future attempts at national unity in an ethnically homogeneous nation.<sup>234</sup> At the same time, the establishment of an oversight body for these tribunals could promote national standards and serve as a catalyst for unification.

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<sup>231</sup> O'CONNELL II, *supra* note 23, at 292.

<sup>232</sup> *Id.* at 292-93.

<sup>233</sup> *E.g.*, HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983), *reprinted in* THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 298, 298-99 (John Henry Merryman et al. eds., 1994) (discussing the Catholic Church's "personal jurisdiction" over certain groups, as well as the ability for anyone to bring a case to an ecclesiastical court through prorogation or remove it to the court "on the ground of 'default of secular justice.'"). The split or conflicting jurisdictions of the ecclesiastical and secular courts continued in England even after the Reformation. *See generally*, *e.g.*, Richard H. Helmholz, *Canon Law in Post-Reformation England*, in *CANON LAW IN PROTESTANT LANDS* 203 (Richard H. Helmholz ed., 1992). This has happened fairly recently as well, when the Church of Latter Day Saints established their own court system, preferring it to the federal courts in the Utah Territory. *See generally* EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1900* (2001).

<sup>234</sup> Ironically, this was recognized by former Somali dictator Siad Barre during his "scientific socialism" phase in a discussion of justice administration. *See* Siad Barre, Speech at the National Theater (July 7, 1972), in *MY COUNTRY AND MY PEOPLE: SELECTED SPEECHES OF JAALLE MAJOR-GENERAL MOHAMED SIYAD BARRE, PRESIDENT OF THE SUPREME REVOLUTIONARY COUNCIL, 1969-1974*, at 199, 200-01 (Ministry of Info. and Nat'l Guidance, 1974).

On the whole, a system of multiple overlapping jurisdictions would be a cumbersome and unsatisfactory system.

A more workable solution may lie with an international tribunal capable of resolving private rights enforcement problems, thus avoiding previous tribunals' failures. For example, the Iran-United States Claims Tribunal formed as direct result of Iran's refusal to implement an ICJ judgment.<sup>235</sup> With so many NGOs and the U.N. already operating in Somalia, a tribunal could provide a trustworthy forum in which Somali business could settle disputes of international law that may not be appropriate for local courts. This tribunal could operate under the auspices of the U.N. or the A.U., though this would depend on its ability to gain the assent of all the major power dealers in the country. The other danger is that, under current state succession doctrine, a new Somali government would not have to accept the tribunal's judgments.<sup>236</sup> Although it may not be necessary for Somalia,<sup>237</sup> in the future such a court could be part of a peace process after collapse or internal conflict, with the understanding that future governments accept the tribunal's rulings.

Economic factors could also play an important role. Currently, Somali companies' growth prospects are limited because their role in international affairs is usually limited to "cash and carry."<sup>238</sup> It is in the companies' best interests to make themselves more presentable through the establishment of some sort of enforcement system on the ground. Given that state functions are already being performed by a hybrid of international agencies and local businesses, a tribunal that benefits both would likely be welcome.

Similarly, a tribunal system could achieve enforcement against international policymakers. Some have called for identification of NGOs as subjects under international law, and clearly defined enforcement procedures against them, due to their increasing roles in creating policy and providing humanitarian aid<sup>239</sup>

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<sup>235</sup> See generally CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1998).

<sup>236</sup> See O'CONNELL I, *supra* note 11, at 152-53.

<sup>237</sup> Somalia has recently taken substantial steps towards implementing a national government. See Winter, *supra* note 34.

<sup>238</sup> Cf. Mayoux, *supra* note 5.

<sup>239</sup> Nowrot, *supra* note 181, at 601.

Many enforcement schemes rely on states for execution, and self-regulatory systems may attempt to exclude offending NGOs from future projects<sup>240</sup> while requiring restitution to injured parties. One suggested solution is to have the U.N. supervise NGO conduct,<sup>241</sup> but its reliance on a state-based paradigm would exclude collapsed states.

A more specific mechanism would be to have the local power brokers agree to a tribunal for claims against the international community following international law, and to allow anyone, not just “authorities,” to bring claims. The International Court of Justice or another U.N. body could operate it and use the judicial systems of the U.N.’s member states for enforcement. Upon the establishment of a new government in the collapsed state, the tribunal would be dissolved, with remaining cases transferred to the new government’s jurisdiction. Although conceptually difficult, a successful enforcement mechanism for international law would have to benefit all the parties involved.

## VII. CONCLUSION

The traditional international law doctrine of state succession functions poorly when there is no central state. While a combination of local law and international law is likely in force throughout the territory, current international practices rely on nations to go the last mile and enforce international judgments, and local adjudicators are probably biased towards local interests. Inhabitants of collapsed states face a gap in the current system, and cannot enforce their rights through most existing fora. Online communities and commercial transactions have many similarities, such as large groups of parties and no central oversight, yet they present no viable methods for enforcement outside of self-help and self-regulation matters difficult to use in a complex real-world environment.

Significantly, attention to the issue of how to manage rights while in the midst of collapse has been lacking. Most commentators discuss how to cure collapsed states, not the establishment of an interim legal order after collapse. As the Somalia example demonstrates, collapsed states can last for months or years; state

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<sup>240</sup> *Id.* at 640-41.

<sup>241</sup> *Id.* at 640.

succession doctrine and policy fixes for new states are of little help. While Somalia's current government may pull the country out of legal myopia, the international community needs to have a plan to adjudicate and enforce the rights of both inhabitants of a collapsed state and foreign parties, both to allow stability in commerce and infrastructure development and to protect fundamental rights of vulnerable individuals. This admits no clear answer, short of recognizing the old country's component areas as new states or convincing all relevant parties that an internationally operated tribunal is in their best interests. Thus, parties within collapsed states find themselves dealing with local and international law, with the former being locally biased and the latter not prepared for a national state's absence. The international community must forsake the use of national governments for enforcement, and instead create new models of adjudication and enforcement in collapsed states.