

STATE FAILURE, SOVEREIGN EQUALITY AND NON-INTERVENTION: ASSESSING CLAIMED RIGHTS TO INTERVENE IN FAILED STATES

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INTRODUCTION

While there have always been states whose governments have had difficulty exercising effective control over the entirety of their territories, it is claimed that a relatively new phenomenon in international society is the *failed state*. A failed state is a territorial entity that has achieved statehood, but whose government has only a minimal degree of effectiveness, if any, over the state’s territory. Somalia, which has persisted without an effective central government for almost two decades, and has two putative states within its recognized boundaries, is commonly cited as the quintessential failed state.¹ Similarly, Sudan has in recent years been labeled “the state most at risk of failure” in the world.² Sudan has long suffered widespread violence due to ethnic and sectarian divisions, which has also led to vast numbers of refugees and

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¹ See *infra* Part IIIA.

² *Failed State Index 2007*, FOREIGN POL’Y, Aug. 2007, at 54, 56.

internally displaced people.³ In addition, there has been a complete absence of governmental control over South Sudan, leading to its secession in 2011.⁴ International law, itself lacking a central authority, operates on the presumption that every independent state will have a government capable of fulfilling the state's role in creating and enforcing international law. Therefore, the existence of states without effective government challenges fundamental presumptions about the international legal system.

The alleged proliferation of failed states has been accompanied by assertions that these states are not equal in law to states that are effectively governed. Furthermore, some scholars and international actors claim that in order for international society to function properly, failed states must be subjected to various forms of intervention, including the administration of government by a foreign authority, or the use of force to quell threats to international security. These claims are a direct challenge to the principle of the equality of states, conditioning a state's benefit of the international prohibitions against intervention and the use of force on its possession of a government that is able to exercise effective control of its territory.

This paper will proceed in three parts. Part I will outline the traditional position consonant with the principle of the equality of states, according to which all states possess an identical legal status. Part II will discuss the emergence of the *failed state thesis*, challenging the traditional position, and the various definitions put forward for the concept of state failure. Part III will assess the asserted legal consequences of State failure in relation to recent practice. Perhaps apart from two exceptions, international practice does not support the claims of failed states' legal inequality. Rather, states and international organizations have generally acted to reaffirm failed states' rights to territorial integrity and political independence, and their continued protection from intervention and the use of force under international law.

³ See *id.*

⁴ See *Sudan Profile*, BBC, (June 5, 2014), <http://www.bbc.com/news/world-africa-14094995>.

I. SOVEREIGN EQUALITY OF STATES AND THE PRESUMPTION OF CONTINUITY OF STATEHOOD

Contemporary international law is based on the foundation of the sovereign equality of states,⁵ thus the right of all states to freedom from intervention in their domestic affairs is essential to this foundation.⁶ This principle denotes that all states possess the rights and duties of sovereignty, regardless of their internal character.⁷ Two of these rights are the right to territorial integrity and political independence, and the concomitant prohibitions of the use of force and intervention in the domestic jurisdiction of the state, enshrined in articles 2(4) and 2(7) of the UN Charter (UNC) respectively.⁸ Thus, once statehood has been achieved, the territorial integrity and political independence of the state are inviolable.

It is generally accepted that the acquisition of statehood depends on the satisfaction of the criteria listed in article 1 of the Montevideo Convention on the Rights and Duties of States (1933), one of which is effective government.⁹ For our purposes, however, the question is not the acquisition of statehood, but what happens if one of the criteria is absent after statehood is achieved. In particular, what are the consequences of an absence of effective government in an existing state? There exists in international law a presumption in favor of the continuity of the state,¹⁰ one aspect of which is that once statehood is achieved, the criterion of effective government is applied in a less stringent manner than when assessing new candidates for statehood.¹¹ For instance, in *Republic of*

⁵ See U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

⁶ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 106 (June 27).

⁷ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

⁸ See Lori F Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 8 (1989) (arguing the U.N. Charter implicitly prohibits intervention by states, in addition to intervention by U.N. organs, in the domestic affairs of other states in several articles: Articles 1(2) and 55, confirming the principle of equal rights and self-determination of peoples; Article 2(1); and Article 2(4)).

⁹ See JAMES R CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2d ed. 2006), at 55.

¹⁰ See KRYSZYNA MAREK, *THE IDENTITY AND CONTINUITY OF THE LAW IN INTERNATIONAL LAW* (2d ed. 1968), Chapter 1.

¹¹ Crawford, *supra* note 9, at 59. Yoram Dinstein, *Sovereignty, The Security Council and the Use of Force*, in *REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR* 112 (Michael

Somalia v Woodhouse Drake & Carey,¹² the British High Court held that there was no authoritative government that could act on behalf of Somalia, as there was no single body in effective control of the territory. Nonetheless, the court did not question the continuing identity of the State.¹³ Therefore, “we may conclude that, once in the club, the rules by which admission was tested—and that always with a degree of flexibility—become less important.”¹⁴ Similarly, Brierly concluded, “the identity of a state is not affected . . . by temporary anarchy.”¹⁵

Therefore, at least traditionally, a failure of government to assert control over the state’s territory is just that—a failure of government, and not a failure of the state.¹⁶ This may result in the particular government being unauthorized to act on behalf of the state in the international sphere,¹⁷ which would greatly impact the ability of the state to exercise its rights, but does not affect the state’s possession of those rights, let alone its existence. If the identity of the state continues despite the absence of effective government, the principle of the equality of states guarantees the state’s equal possession of sovereign rights. Therefore, a state that lacks an effective government continues to possess the sovereign rights to territorial integrity and political independence, and to benefit from the prohibitions of intervention and the use of force in international law, as long as its statehood continues.

Bothe et al. eds., 2005) (referring to this practice as a “double standard” in the application of the criterion of effective government).

¹² Republic of Somalia v. Woodhouse Drake & Carey (Suisse) S.A. and Others, [1993] Q.B. 54 at 68 (Eng.).

¹³ *Id.* at 66-68.

¹⁴ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 41 (1994).

¹⁵ JAMES L BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 137 (5th ed. 1955); see also Dinstein, *supra* note 11, at 113.

¹⁶ See Daniel Thürer, *The ‘Failed State’ and International Law*, 81 INT’L REV. RED CROSS 731 (1999); See also Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT’L L. 7 (1997); VAUGHAN LOWE, INTERNATIONAL LAW 165-66 (2007); Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 16 B.I.L.C. INT’L REL. 155, 157 (2002); Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 J. CONFLICT & SEC. L. 289 (2005); JOHN R. DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 109-10 (3d ed. 2005).

¹⁷ *E.g.*, in *Republic of Somalia*, *supra* note 12, at 68. See also STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE (2001) (arguing loss of effectiveness does not always lead to loss of authority to act on behalf of the State, for instance, in the case of governments in exile).

II. THE FAILED STATE THESIS

A. EMERGENCE OF THE FAILED STATE THESIS

Contrary to the traditional position set out above, a small number of late nineteenth- and early twentieth-century authorities, including Lorimer,¹⁸ Hall,¹⁹ and Baty,²⁰ asserted that the absence of government negated previously acquired statehood, allowing the use of force against a territory. According to Baty, intervention by foreign powers was lawful as “it is unreasonable to expect foreign countries to stand by and watch with folded hands the development of anarchy.”²¹ Similarly, the Roosevelt Corollary to the Monroe Doctrine asserted the legality of US forcible intervention in “impotent” Latin American States.²² Nonetheless, this approach was not accepted widely in doctrine or in practice, and, by 1930, the US government explicitly abandoned the Roosevelt Corollary.²³

Echoing (though not explicitly referring to) the earlier writers, arguments began to emerge in the early 1990s that the absence of effective government in an established state did indeed challenge the state’s sovereign status. Helman and Ratner appear to have coined the term “failed state” in 1992.²⁴ The failed state thesis was a response to a perceived rise in the number of states, especially post-colonial African states, whose governments could not assert control over their territory.²⁵ Initially, failed states were seen as a concern mainly for the domestic population, with possible ramifications for regional security due to ‘spill-over threats,’ such as refugee flows and expansion of armed conflicts

¹⁸ I JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS*, 132-33 (Edinburgh & London, William Blackwood & Sons 1883).

¹⁹ WILLIAM E HALL, *A TREATISE ON INTERNATIONAL LAW* 21-22 (Oxford, Clarendon Press 3d ed.1890).

²⁰ Thomas Baty, *Can Anarchy be a State?*, 28 AM. J. INT’L L. 444, 444-45 (1934).

²¹ Baty, *supra* note 20, at 455.

²² Theodore Roosevelt, U.S. President, Fourth Annual Message Before Congress (Dec. 6, 1904), available at <http://www.presidency.ucsb.edu/ws/?pid=29545>.

²³ Memorandum of Undersecretary of State Clark, Memorandum on the Monroe Doctrine (December 17, 1928) and President Roosevelt, Speech to the Woodrow Wilson Foundation (Dec. 28, 1933), in HEIKO MEIERTÖNS, *THE DOCTRINES OF US SECURITY POLICY: AN EVALUATION UNDER INTERNATIONAL LAW* 34, 36 (2010).

²⁴ Gerald B. Helman & Stephen R. Ratner, *Saving Failed States*, FOREIGN POL’Y, Winter 1992-93, at 3 *passim*.

²⁵ See Michael Ignatieff, *State Failure and Nation Building*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

over national borders. More recently, interest in failed states has surged as a result of the alleged link between failed states and global security threats.

After the terrorist attacks of September 11, 2001, (“9/11”), this focus shifted from humanitarian to security-related concerns. Governments now commonly claim that failed states constitute a threat to national and international security, as the absence of effective government makes them vulnerable to use as havens for terrorist or other criminal organizations. This was evident during the UN Security Council (SC) debate on Somalia in October 2001. The Singaporean representative, for instance, argued that the Council must renew its efforts in Somalia “in the light of the events of 11 September” and continued:

It is now clearly in the interests of the entire international community to encourage the establishment of stable Governments all around the world. Otherwise, as has already been shown, terrorists and other extremist elements can easily exploit pockets of instability to set up their operations.²⁶

This concern has resulted in certain states and commentators asserting varying interpretations of the failed state thesis. They argue that otherwise unlawful intervention, whether forcible or non-forcible, is lawful if undertaken in a state that does not possess a government able to assert effective control of the territory. The interventions, from international administration of the state, to the use of force against state territory, or the wholesale denial of statehood, are said to be justified on the basis that a state without effective government does not benefit from the protection for the territorial integrity and political independence of states normally accorded by international law.

B. DEFINITION OF STATE FAILURE

The absence of effective government is the essence of the concept of state failure. There is, however, no more precise definition or list of criteria agreed upon to characterize a failed state. The concept of state failure is not a “precisely defined and classifiable situation,” but rather a “broad label for a phenomenon which can be interpreted in

²⁶ U.N. SCOR, 56th Sess., 4392d mtg., at 9, U.N. Doc. S/PV.4392 (Oct. 19, 2001).

various ways.”²⁷ Helman and Ratner, for instance, give only a quite general definition, speaking of a state that is “utterly incapable of sustaining itself as a member of the international community,” because its “governmental structures have been overwhelmed by circumstances.”²⁸

The many state actors that identify state failure as a threat to national and international security use a wide range of definitions and terminology to describe this concept. Such terminology includes *failed*, *failing*, *collapsed*, *weak*, and *fragile states*, and more recently *ungoverned* or *poorly governed spaces*. These terms are largely used interchangeably, or to indicate different points on a spectrum of state failure. Often, different government departments of the same country will employ different definitions and terms to describe state failure, especially in the United States. The definitions can roughly be divided into those that focus on the absence of effective governmental control over state territory,²⁹ some requiring total absence of central government in the state,³⁰ and those that view the failure to satisfy certain (often unspecified) obligations (either to citizens or to other states) as equally important as the maintaining control of territory.³¹ Many simply leave the concept undefined.

There is no consensus as to whether a definition of state failure that focuses on the absence of territorial control or the failure to fulfill the supposed social contract is authoritative. A fortiori, there is no precise threshold that determines how ineffective a state’s government must be, nor for what period of time, before a state can be classified as ‘failed.’ This results in different lists of failed states, according to the

²⁷ Thürer, *supra* note 16, at 733; see also Robin Geiss, *Failed States – Legal Aspects and Security Implications*, 47 GER. YEARBOOK INT’L L. 457, 458 (2004) (noting how the “Babylonian diversity of terminology” used to describe failed states “enhances the legal uncertainty” of the concept).

²⁸ Helman & Ratner, *supra* note 25, at 3, 5.

²⁹ E.g., NAT’L INTELLIGENCE COUNSEL, MAPPING THE GLOBAL FUTURE: REPORT OF THE NATIONAL INTELLIGENCE COUNCIL’S 2020 PROJECT BASED ON CONSULTATIONS WITH NONGOVERNMENTAL EXPERTS AROUND THE WORLD 14 (2004) (defining “failing or failed states” as those with “expanses of territory and populations devoid of effective governmental control,” as a result of internal conflict).

³⁰ U.N., DEP’T OF PUB. INFO., THE UNITED NATIONS AND SOMALIA, 1992-1996, 87 (1996) (defining a failed state as one that “loses its [g]overnment”).

³¹ See e.g., CABINET OFFICE, THE NATIONAL SECURITY STRATEGY OF THE UNITED KINGDOM: SECURITY IN AN INTERDEPENDENT WORLD 14 (Mar. 2008), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228539/7291.pdf (“A failed state is one whose government is not effective or legitimate enough to maintain the rule of law, protect itself, its citizens and its borders, or provide the most basic services.”)

definition being employed. The CIA State Failure Task Force's report is illustrative³²—after employing a narrow definition³³ of state failure resulted in a statistically insignificant number of failed states,³⁴ the Task Force had to adopt a wider definition.³⁵ This resulted in a finding of 136 cases of state failure from 1955 to 1998. The lack of a precise definition of state failure makes it difficult to assert that it is a legal category with legal consequences, qualifying the sovereign status of the state in question.

The better approach is to use a narrow definition of state failure, limited to the absence or near-total ineffectiveness of central government. This criterion is common to all definitions of state failure, while other proposed elements are highly contested. Given the frequency of governments losing control of some parts of their territory or inability to deliver a “full” range of government services, only the more demanding definition of state failure is discriminating enough to be of use for international legal purposes.³⁶ This factor poses the central challenge of state failure for international society, that is, the inability to implement international legal obligations in state territory, and to prevent the development of security threats. Furthermore, as the failed state thesis demonstrates, states and commentators rely upon this element when seeking to draw legal consequences from a diagnosis of state failure. Therefore, any legal concept of state failure must be limited to this definition.

Even if the international community agreed upon a consistent definition of state failure, there would then be the problem of how to decide when a state has failed.³⁷ More importantly, who would be entitled to make this decision? Is this a decision that a state can make unilaterally, as advocated by US Ambassador Haass³⁸ and Yoo,³⁹ or only

³² *State Failure Task Force Report: Phase III Findings*, ST. FAILURE TASK FORCE (Sept. 30, 2000), <http://www.cidcm.umd.edu/publications/papers/SFTF%20Phase%20III%20Report%20Final.pdf>. (State Failure Task Force is now known as the Political Instability Task Force).

³³ *Id.* at 3 (describing “[I]nstances in which central state authority collapses for several years”).

³⁴ *Id.* (reporting less than 20 instances from 1955-1998).

³⁵ *Id.* (identifying instances of revolutionary war, ethnic war, “adverse regime change,” including “shifts from democratic to authoritarian rule,” genocide and politicide as events of total or partial state failure).

³⁶ See Robin Geiss, *Armed Violence in Fragile States: Low Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91 INT’L REV. RED CROSS 127, 129–30 (2009).

³⁷ See generally Byers, *supra* note 16, at 157.

³⁸ See generally Richard N. Haass, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University: Sovereignty: Existing Rights, Evolving

by the Security Council, as Dunlap has argued?⁴⁰ Without a clear answer to these key issues, it is very difficult to establish the existence of rights of intervention in international law on the basis of state failure.⁴¹

As noted earlier, Somalia is often used as the paradigmatic example of the failed state in international discourse.⁴² Other States that have been routinely labeled as ‘failed’ include Sudan,⁴³ Afghanistan,⁴⁴ Cambodia,⁴⁵ Liberia,⁴⁶ Yemen,⁴⁷ the DRC,⁴⁸ the Solomon Islands,⁴⁹ Sierra Leone,⁵⁰ and, most recently, the Central African Republic (CAR).⁵¹

Responsibilities (Jan. 14, 2003), available at <http://2001-2009.state.gov/s/p/rem/2003/16648.htm>.

³⁹ See John Yoo, *Fixing Failed States* 4 (U.C. Berkeley Pub. Law Research Paper No. 1552395), available at <http://ssrn.com/abstract=1552395>; see also John Yoo, American Enterprise Institute Bradley Lecture Series: Fighting New Terrorism (June 6, 2005), available at <http://www.aei.org/speech/22633>.

⁴⁰ Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT’L & COMP. L. REV. 453, 470–72 (2004).

⁴¹ See Justin Logan & Christopher Preble, *Failed States and Flawed Logic: The Case Against a Standing Nation-Building Office*, POL’Y ANALYSIS, Jan. 11, 2006, at 1, 13, available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa560.pdf>.

⁴² E.g., U.N. SCOR, 51st Sess., 3641 mtg. *passim* U.N. Doc. S/PV.3641 (Mar. 15, 1996) (calling Somalia a failed state because of its continued absence of government); U.N. SCOR, 55th Sess., 4166 mtg. at 9 U.N. Doc. S/PV.4166 (June 29, 2000); Barack Obama, President of the U.S., Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

⁴³ *Failed State Index 2007*, *supra* note 2; See also GOV’T OF CAN., CANADA’S INTERNATIONAL POLICY STATEMENT: A ROLE OF PRIDE AND INFLUENCE IN THE WORLD (DEFENCE) 5 (2005), available at <http://publications.gc.ca/collections/Collection/D2-168-2005E.pdf>; Susan E. Rice, *The New National Security Strategy: Focus on Failed States*, BROOKINGS INST. POL’Y BRIEF, Feb. 2003, at 1, 2, available at <http://www.brookings.edu/research/papers/2003/02/terrorism-ice>.

⁴⁴ OFFICES OF THE INSPECTORS GENERAL, U.S. DEP’T OF STATE AND U.S. DEP’T OF DEF., INTERAGENCY ASSESSMENT OF AFGHANISTAN POLICE TRAINING AND READINESS 61 (Nov. 2006), available at <http://oig.state.gov/documents/organization/761103.pdf>; FOREIGN AFFAIRS, TRADE AND DEVELOPMENT CANADA, REVIEW OF THE AFGHANISTAN PROGRAM (2010), available at <http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/NIC-65152224-QQK>.

⁴⁵ See Daniel P.L. Chong, *UNTAC in Cambodia: A New Model for Humanitarian Aid in Failed States?*, 33 DEV. & CHANGE 957 (2002).

⁴⁶ Abdullah Dukuly, IPS NEWS, *UN Seeks to Transform Liberia from Failed State to Nation at Peace* (Oct. 6 2003), <http://www.ipsnews.net/2003/10/politics-un-seeks-to-transform-liberia-from-failed-state-to-nation-at-peace/> (quoting Jacques Paul Klein, U.N. Secretary General Kofi Annan’s special representative to Liberia, who said there was general consensus in the Security Council that Liberia was a “failed state where 85 percent of the country’s population is unemployed, 70 percent of the belligerents are children, the treasury has been looted by criminals and now we have to rebuild Liberia”).

⁴⁷ Leon E. Panetta, Director of the C.I.A., Media Roundtable with CIA Director Leon E. Panetta (Feb 25, 2009), quoted in JEREMY M. SHARP, CONGRESSIONAL RESEARCH SERVICE, YEMEN: BACKGROUND AND U.S. RELATIONS (July 7, 2009), available at <http://ipc.state.gov/documents/organization/128389.pdf> (stating that the United States was “particularly concerned with Somalia and Yemen . . . Somalia is virtually a failed State. Yemen

III. ASSERTED LEGAL CONSEQUENCES OF STATE FAILURE

The assertions of states and commentators challenging the failed state's benefit of the protections for its territorial integrity and political independence can be divided into three general claims: that it is lawful to impose international administration on failed states; there are expanded rights to use force when the target state is a failed state; and that the failed state's sovereign status is wholly denied.

A. INTERNATIONAL ADMINISTRATION OF FAILED STATES – RECENT PRACTICE

Recent practice related to states without effective government does not support the claim that such states can be subjected to foreign administration, whether by the UN or another entity, without the state's consent or SC authorization. In Somalia, inter-clan fighting has prevented the installation of an effective government since 1991, despite the creation of a succession of transitional governments.⁵² The Transitional Federal Institutions, composed of the Transitional Federal Government (TFG) and the Transitional Federal Parliament (TFP), were

is almost there"); *Failed State Index 2009*, FOREIGN POL'Y, July-Aug. 2009, at 81 (arguing a "perfect storm of state failure is . . . brewing" in Yemen: "a global problem wrapped in a failed state").

⁴⁸ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 307 (Dec. 19) (separate opinion of Judge Kooijmans); *id.* at 337 (separate opinion of Judge Simma).

⁴⁹ *AM: Australian Foreign Minister Downer Interview by Matt Brown* (ABC radio broadcast Sept. 21, 2004), available at <http://www.abc.net.au/am/content/2004/s1203561.htm>; ELSINA WAINWRIGHT, AUSTRAL. STRATEGIC POLICY INST., OUR FAILING NEIGHBOUR: AUSTRALIA AND THE FUTURE OF THE SOLOMON ISLANDS (June 2003), available at <https://www.aspi.org.au/publications/our-failing-neighbour-australia-and-the-future-of-solomon-islands>.

⁵⁰ Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFF., July–Aug., 2002, at 133 (arguing the absence of governmental control was so severe as to qualify Sierra Leone as a collapsed state from the late 1990s until 2000).

⁵¹ See, e.g., U.N. SCOR, 68th Sess., 7069th mtg. at 5, U.N. Doc. S/PV.7069 (Nov. 25, 2013); U.N. SCOR, 68th Sess., 7042d mtg. at 2, U.N. Doc. S/PV.7042 (Oct. 10, 2013); Alyssa Rickard, *Central African Republic: A Failed State*, FREEDOM HOUSE (Dec. 20, 2013), <http://www.freedomhouse.org/blog/central-african-republic-failed-state#.UxGu05i0dME>; See also U.N. SCOR, 68th Sess., 7017th mtg. at 5, U.N. Doc. S/PV.7017 (Aug. 14, 2013) (Valerie Amos, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, stating that the Central African Republic "is not yet a failed State, but has the potential to become one if swift action is not taken").

⁵² See *Freedom in the World: Somalia*, FREEDOM HOUSE (2013), <http://freedomhouse.org/report/freedom-world/2013/somalia#.VCEv1BZjNbl>.

created in 2004 under the Transitional Federal Charter, by agreement of the leading Somali clans at the Somali National Reconciliation Conference.⁵³ Despite its inability to assert effective control throughout Somalia, the Transitional Federal Institutions has received international recognition as the government of Somalia. By May 2006, the TFG was allowed to take Somalia's seat in all major international organizations, including the UN,⁵⁴ African Union (AU), the Intergovernmental Authority on Development (IGAD), and the Arab League.⁵⁵ Throughout the longest and most serious example of a state lacking effective government, Somalia's rights to territorial integrity and political independence remained unchallenged by states and international organizations. There was no attempt to impose a trusteeship on the State,⁵⁶ with or without Somali consent or SC authorization.

Whenever a failed state has been the subject of international administration, it has consistently been established on the basis of state consent. For instance, the UN Transitional Authority in Cambodia (UNTAC), established in 1991, had "direct control" over a wide range of Cambodian government activity.⁵⁷ This unprecedented set-up prompted Ratner to argue: "for the first time, the international community has empowered the United Nations to undertake key aspects of the civil administration of a member state."⁵⁸ However, the power to do so came not from the international community, but from Cambodian consent. Consent was given by the Supreme National Council (SNC), a "unique . . . source of authority" created in lieu of a government by agreement of the four major Cambodian factions on September 10, 1990,⁵⁹ endorsed by SC Resolution 668 (1990).⁶⁰ The SNC then delegated the necessary authority to UNTAC to enable UN

⁵³ See U.N. SCOR, 59th sess., 5083d mtg., at 5, U.N. Doc. S/PV.5083 (Nov. 19, 2004).

⁵⁴ See Rep. of the Credentials Comm., U.N. Doc. A/59/602; GAOR, 59th Sess. (Dec. 10, 2004).

⁵⁵ *Supra* note 42.

⁵⁶ Jeffery Herbst, *Responding to State Failure in Africa*, INT'L. SEC., Winter 1996/97 at 125 ("[E]ven though it was obvious that Somalia had collapsed by December 1992, when the US-UN intervention force was being planned, no one seriously considered trusteeship or any other legal concept other than continuing the fiction that Somalia was still a sovereign nation-state").

⁵⁷ See Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, art. 6, Annex 1, Oct. 23, 1991, 1663 U.N.T.S. 27 [hereinafter *CPSCC*].

⁵⁸ Stephen R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 12 (1993).

⁵⁹ Permanent Rep. of France and Indonesia to the U.N., Letter dated Sept. 11, 1990 from the Permanent Representatives of France and Indonesia to the United Nations addressed to the Secretary General, annex, U.N. Doc. S/21732 (Sept. 11, 1990).

⁶⁰ S.C. Res. 668, ¶ 1, U.N. Doc. S/RES/668 (Sept. 20, 1990).

administration.⁶¹ SC Resolution 718 (1991) established UNTAC, but only on the authority of delegation of authority by the SNC. Thus, the authority for both the SNC and UNTAC was based on Cambodian consent, constituting an exercise of Cambodian sovereignty. Many have noted that since the SNC was fabricated by international actors, it could not be said to truly embody the country's sovereignty.⁶² However, this fabrication in fact illustrates Cambodia's possession of the rights to territorial integrity and freedom from intervention. States and international organizations evidently considered that Cambodian consent had to be obtained in order to give UNTAC administrative authority, even though there was no body able to exercise effective government over the territory of Cambodia at the time. Thus, the novel solution of the SNC was devised.

The same pattern is evident in the international administration of Afghanistan after the 2001 US-led invasion.⁶³ The invasion led to the collapse of the de facto Taliban government, and the establishment of the UN Assistance Mission in Afghanistan (UNAMA), through which the UN performed important governmental tasks. Again, however, the authority for the UNAMA did not come from the restriction of Afghanistan's right to political independence due to the absence of effective government, but from Afghan consent. Like the SNC, the Afghan Interim Authority (AIA) was formed by consent of the major domestic factions,⁶⁴ including the internationally recognized Rabbani government, which then delegated the necessary authority to the UN to enable UNAMA's administration,⁶⁵ endorsed in SC Resolution 1401 (2002).

Similarly, after the breakdown of governmental control in the Solomon Islands, an Australian-led mission, the Regional Assistance Mission for Solomon Islands (RAMSI), was established in July 2003 with broad administrative authority over various aspects of the government of the Solomon Islands. Though this was characterized as a

⁶¹ CPSCC, *supra* note 58, at art. 6.

⁶² Ratner, *supra* note 59, at 7,10, 23-24.

⁶³ See *infra* Part III.B (assessing the use of force).

⁶⁴ U.N. Secretary-General, Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions in letter dated Dec. 5, 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement].

⁶⁵ *Id.* at 2.

failed state intervention by the Australian government,⁶⁶ once again, RAMSI's administration was based on the invitation and consent of the government of the Solomon Islands.⁶⁷ This pattern of practice confirms that failed states possess the right to political independence and the authority to exercise that right, despite the absence of effective government control.

It has been argued by Schachter, however, that the magnitude of the transfer of authority to UNTAC led to a suspension of Cambodian sovereignty.⁶⁸ If so, UN member states that consent to international administration would have the same status as territories under trusteeship. This argument is echoed in Wilde's view that, regardless of consent, this practice is properly regarded as an international trusteeship imposed by the international community.⁶⁹ This does not seem convincing. While the outcome may appear identical to trusteeship, international administration by consent is, in international legal terms, a wholly different situation, conceiving of international administration as giving legal effect to the state's exercise of its sovereign rights, rather than a denial of those rights altogether. Though the initiative for international administration of failed states has often come from sources other than the state itself, the requirement of consent, even if in some ways fictitious, serves as a bulwark against a hierarchically-ordered legal system. The equation of these states' status with trust territories, which are not considered to be entitled to represent themselves internationally, seems to ignore the legal consequences of state consent, a fundamental precept of the international legal system.

Recent practice also illustrates the continuing authority of the governments of failed states to exercise the state's capacity to assume new international obligations, even when their control over territory is

⁶⁶ See *infra* notes 96-97.

⁶⁷ The Facilitation of International Assistance Act (2003), Solom. Is., (July 17, 2003), available at http://www.paclii.org/sb/legis/num_act/foiaa2003386; Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga Concerning the Operations and Status of the Police and Armed Forces and Other Personnel Deployed to Solomon Islands to Assist in the Restoration of Law and Order and Security, July 24, [2003] A.T.S. 17, available at <http://www.ramsi.org/wp-content/uploads/2014/07/RAMSI-Treaty.pdf>.

⁶⁸ Oscar Schachter, *Sovereignty-Then and Now*, in ESSAYS IN HONOUR OF WANG TIEYA 671, 685-86 (Ronald St. J. Macdonald ed., 1994); See also Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and its Implications in International Politics*, 13 EUR.J. INT'L L. 1037 (2002); Edward Newman, *Failed States and International Order: Constructing a Post-Westphalian World*, 30 CONTEMP. SEC'TY POL'Y 421, 436 (2009).

⁶⁹ See RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND ITS CIVILISING MISSION NEVER WENT AWAY, 402-30 (2008).

wholly ineffective. This can be seen in all the instances above where reliance on the consent of the government was the legal basis for international administration. This is also confirmed by Somalia's ratification of the AU Constitutive Act in 2009, as the TFG continues to struggle to maintain control over a few blocks in Mogadishu.⁷⁰ There is evidently a complete jettisoning of the effective control standard for the identification of governmental authority in failed states. This applies not only to governments that have lost control, but also to governments that were never in control, such as the TFG, the SNC, and the AIA. In the case of all three, authoritative sources had identified the new body as the government of the state even before they were established. An SC Presidential Statement urged the international community to engage with the TFG as the Somali government before its formation.⁷¹ Similarly, in the case of both the SNC⁷² and the AIA,⁷³ the agreements that effected their creation also pre-determined that they were to be their respective states' international representatives, and this status was recognized in the SC Resolutions endorsing the agreements. In the case of these new governments, it appears that, in the absence of *any* body able to assert control, a body that emerges from a national reconciliation process with UN-backing will be identified as the authoritative government of the state even before it is established, with full capacity to exercise the state's rights under international law. Thus, governments of failed states may possess the authority to enter into international obligations under conditions that would otherwise be insufficient to establish the body as an authoritative representative in states that had not failed.

Recent practice does not support claims of the failed state thesis regarding international administration. Rather, practice demonstrates that failed states continue to possess the right to political independence and benefit from the prohibition against intervention in international law.

⁷⁰ U.N. SCOR, 64th Sess., 6095th mtg., U.N. Doc. S/PV.6095 (Mar. 20, 2009) (quoting the Secretary-General's Special Representative, "the State legitimacy is established and the legality of the new institutions is recognized [sic] regionally, internationally and, indeed, by the vast majority of Somalis," citing the widespread "anarchy").

⁷¹ S.C. Pres. Statement 2004/43, U.N. Doc. S/PRST/2004/43 (Nov. 19, 2004) ("The Security Council encourages and urges donor countries, regional and subregional organizations to provide support for the future Somali government's and institutions' efforts to ensure their ability to function inside Somalia, and to assist in the reconstruction of Somalia").

⁷² Permanent Rep. of France to the U.N. & Permanent Rep. of Indonesia to the U.N., Joint Statement of the Informal Meeting on Cambodia, issued at Jakarta on 10 September 1990, U.N. Doc. A/45/490-S/21732 (Sept. 10, 1990); *See also* S.C. Res. 668, para. 5, U.N. Doc. S/RES/668 (Sept. 20, 1990).

⁷³ Bonn Agreement, *endorsed in* SC Resolution 1383 (2001), U.N. Doc S/RES/1383 (2001).

Likewise, practice confirms the authority of the government to exercise the state's sovereign rights, regardless of a total absence of control over state territory. Therefore, it confirms the legal equality of failed states under international law.

B. EXPANDED RIGHT TO USE FORCE AGAINST FAILED STATES – RECENT PRACTICE

As with the practice related to the international administration of failed states, the most extreme claim of the failed state thesis relating to the use of force can be immediately rejected; that is, that failed states do not benefit from article 2(4) of the UN Charter. No state has justified a use of force in this way. Instead, the traditional justifications of Chapter VII authorization,⁷⁴ state consent,⁷⁵ or self-defense⁷⁶ have been relied on.

Many multinational forcible interventions in states identified as 'failed' by other states and international organizations have taken place with Chapter VII authorization, including UNITAF, succeeded by UNOSOM II (1992),⁷⁷ and by AMISOM (2007),⁷⁸ and anti-piracy operations in Somalia (2009);⁷⁹ ECOMIL and UNMIL in Liberia (established 2003);⁸⁰ ISAF in Afghanistan (established 2001);⁸¹ UNAMSIL in Sierra Leone (established 1999);⁸² and UNAMID in Sudan (established 2007).⁸³ While many of these are portrayed as precedents for the failed state thesis, they illustrate the continuing benefit of Article 2(4) to failed states, and their right to territorial integrity. This is done in two ways. First, many of the SC Resolutions on the above Chapter VII interventions explicitly reaffirm the state's rights to sovereignty, territorial integrity, and political independence, often simultaneously explicitly recognizing the absence of effective government in the territory. For instance, SC Resolution 897 (1994) on UNOSOMII

⁷⁴ U.N. Charter ch. VII.

⁷⁵ U.N. Charter art. 2 para. 7.

⁷⁶ U.N. Charter art. 51.

⁷⁷ S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

⁷⁸ S.C. Res. 1744, U.N. Doc. S/RES/1744 (Feb. 20, 2007).

⁷⁹ S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

⁸⁰ S.C. Res. 1509, U.N. Doc. S/RES/1509 (Sept. 19, 2003).

⁸¹ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁸² S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999).

⁸³ See S.C. Res. 1679, U.N. Doc. S/RES/1679 (May 16, 2006).

reaffirmed the SC's "respect for the sovereignty and territorial integrity of Somalia in accordance with the Charter of the United Nations" despite also recognizing the "absence of a government in Somalia" as part of its Article 39 determination.⁸⁴ Thus, the state's possession of sovereign rights is confirmed, despite its absence of effective government. Second, it is also arguable that the use of Chapter VII itself confirms these states' continuing statehood, and the concomitant benefits of arts. 2(4) and 2(7) of the UNC. Had this not been the opinion of the Council, the use of Chapter VII to circumvent arts. 2(4) and 2(7) would not have been necessary.

In a number of the SC-authorized forcible interventions listed above, the consent of the government was obtained in addition to Chapter VII authorization, for instance, in relation to the anti-piracy operations in Somalia and UNAMID. Some assert that the use of Chapter VII authorization in such instances supports the failed state thesis, demonstrating that the consent of the government was somehow insufficient to authorize foreign military intervention, thus calling into question the authority of the government to exercise the state's sovereign rights, and perhaps even the possession of those rights. Giorgetti argues that the anti-piracy operations in Somalia were "exceptional," since although they were premised on Somali consent, "it is the SC, acting under Chapter VII of the Charter, which allows Member States to enter [Somalia's] territorial sovereign waters."⁸⁵ Mexico's statement, arguing that the legal authority rests on Chapter VII authorization only, rather than Somali consent, may support this position.⁸⁶ This argument, however, seems to ignore the legal bases on which action in Somalia was taken.

First, SC Resolution 1814 (2008), pre-dating the Chapter VII authorization, welcomed anti-piracy operations that were based solely on the consent of the TFG, thus clearly confirming the TFG's authority to invite foreign military intervention in Somali territory. Further, the relevant Chapter VII Resolutions explicitly require the TFG to give consent to each state using anti-piracy force in Somali territory, and the SC debates show a clear consensus among member states that it is the authority of the TFG that is the legal basis of the use of force. In the SC

⁸⁴ See S.C. Res. 2121, U.N. Doc. S/RES/2121 (Oct. 10, 2013); S.C. Res. 2134, U.N. Doc. S/RES/2134 (Jan. 28, 2014).

⁸⁵ CHIARA GIORGETTI, A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL COMMUNITY ACTIONS IN EMERGENCY SITUATIONS 34 (2010).

⁸⁶ U.N. SCOR, 64th Sess., 6095th mtg. at 11, U.N. Doc. S/PV.6095 (Mar. 20, 2009).

debate on Resolution 1851 (2008),⁸⁷ for instance, many, including the UK, China, Russia, and Germany, highlighted Somali sovereignty and the resulting requirement of TFG consent to foreign anti-piracy operations in Somali territory. Several of these states also specifically described Somalia as having no government able to exert effective control, and explicitly characterized the piratical activity as a threat to international peace and security. Given these two factors, repeated emphasis on continuing Somali sovereignty and need for consent in addition to Chapter VII authorization is strong evidence of Somalia's continued benefit of protections laid out in articles 2(4) and 2(7) of the UNC. As such, this practice confirms the continuing legal equality of failed states.

Similarly, despite being authorized by Chapter VII in SC Resolution 1679 (2006), UNAMID was only deployed in June 2007, after finally obtaining consent of the Government of Sudan.⁸⁸ Resolution 1706 (2006), like 1679 (2006), "reaffirm[s] its strong commitment to the sovereignty, unity, independence, and territorial integrity of the Sudan, which would be unaffected by transition to a United Nations operation," and overtly recognizes the need for Sudanese consent; it "invites the consent of the Government of National Unity for this deployment." As put by the United Kingdom in the SC debate on 1706 (2006):

The resolution gives the United Nations force in Darfur a clear Ch.VII mandate to use all necessary means to protect civilians That does not mean that we do not attach importance to the consent and agreement of the Government of Sudan. It remains the case that the United Nations cannot deploy in Darfur until we have that agreement.⁸⁹

Therefore, as with the anti-piracy force in Somalia, the practice concerning UNAMID shows that it was the Chapter VII authorization, and not the government's consent, that was insufficient to allow the forcible intervention. Thus, even in the world's "most failed state," the State's right to territorial integrity, prohibition of the use of force, and authority of the government to exercise the State's sovereign rights, is confirmed.⁹⁰

⁸⁷ See U.N. SCOR, 63d Sess., 6046th mtg., U.N. Doc. S/PV.6046 (Dec. 16, 2008).

⁸⁸ Communiqué of the 79th Meeting of the Peace and Security Council of the African Union on the Situation in Darfur, A.U. Doc. PSC/PR/Comm/LXXIX (June 22, 2007).

⁸⁹ See U.N. SCOR, 61st Sess., 5519th mtg. at 3, U.N. Doc. S/PV.5519 (Aug. 31, 2006) (statements of China, Russia, and France).

⁹⁰ See also Res. on ISAF, *infra* note 114.

A number of other forcible interventions confirm the authority of a failed state's government to invite foreign military assistance, despite the absence of effective control, relying squarely on the consent of the government without Chapter VII authorization. For instance, the RAMSI operation in the Solomon Islands, noted above, also contained a military element.⁹¹ After clan-based fighting toppled the government of Prime Minister Ulufa'alu, the newly elected Prime Minister Manasseh Sogavare requested policing assistance from Australia and New Zealand to counter the continuing conflict.⁹² Initially, Australia rejected intervention, "Australia is not a neo-colonial power. The [Pacific] island countries are independent sovereign states."⁹³ Nonetheless, within six months, Australian forces were deployed as part of RAMSI, with the Australian government saying that the civil unrest there had forced Australia to implement a new Pacific policy that would carry out "cooperative intervention"⁹⁴ Australian Foreign Minister Downer argued in the General Assembly (GA) in September 2003, "it is no longer open to us to ignore the failed states Old shibboleths—such as the excessive homage to sovereignty even at the expense of the preservation of humanity and human values—should not constrain us."⁹⁵ After the intervention was undertaken, he argued:

Imagine a situation, it's not likely to be Indonesia or a country which has a strong counter-terrorism capability, but a failed state in the South Pacific, as the Solomons once was and is not now, and a situation where a terrorist was about to attack and the country involved either didn't want to or in their case couldn't do anything to stop it, we would have to go and do it ourselves.⁹⁶

⁹¹ See *Solomon Islands*, AUSTRALIAN DEPARTMENT OF DEFENCE, <http://www.defence.gov.au/operations/SolomonIslands/> (last visited Dec. 8, 2014).

⁹² See Tarcisius T. Kabutaulaka, *'Failed State' and the War on Terror: Intervention in Solomon Islands*, 72 ASIAPAC. ISSUES, Mar. 2004, at 1, 2-3.

⁹³ AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, ADVANCING THE NATIONAL INTEREST: AUSTRALIA'S FOREIGN AND TRADE POLICY WHITE PAPER, at 93 (2003).

⁹⁴ Alexander Downer, Speech to Australian Strategic Policy Institute, June 10, 2003, available at http://www.foreignminister.gov.au/speeches/2003/030610_solomonislands.html. See also Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga Concerning the Operations and Status of the Police and Armed Forces and Other Personnel Deployed to Solomon Islands to Assist in the Restoration of Law and Order and Security, [2003] ATS 17, available at <http://www.austlii.edu.au/cgibin/sinodisp/au/other/dfat/treaties/ATS/2003/17.html> [hereinafter *Solomon Islands Agreement*].

⁹⁵ Minh Nguyen, *The Question of 'Failed States': Australia and the Notion of State Failure*, UNIYA VIEW ON ASIA BRIEFING SERIES, Mar. 2005, at 1, 10, available at http://www.uniya.org/research/state_failure.

⁹⁶ *Id.*

The Australian government seems to be putting forward an argument justifying the intervention on the basis of the failed status of the Solomon Islands, and the expanded right to use force and intervene in a failed state because of the risk of exploitation of that state by a terrorist group. Commentators have indeed argued that the Solomon Islands' status as a failed state was central to the legal basis of RAMSI.⁹⁷

Despite this rhetoric, the RAMSI intervention does not support the failed state thesis. As noted above,⁹⁸ the use of force and administration of aspects of the government of the Solomon Islands was undertaken at the invitation of the government, and therefore does not challenge the Solomon Islands' benefit of the prohibitions against intervention or the use of force. Furthermore, the conclusion of a treaty by Australia and other regional states with the government of the Solomon Islands, at a time when it was considered to be a failed state because of the absence of effective government, indicates these states considered treaty-making capacity to persist despite this 'failure,' alongside the government's authority to exercise this power.

There are, however, two ways in which the practice of the use of force in failed states may support lesser protection for the failed state's territorial integrity and benefit of Article 2(4). First, SC Resolutions on Somalia, particularly those of 1993-1994 on UNOSOM II, provide strong support for the position that the SC has conceived of state failure, defined as the absence of government, as constituting a threat to international peace and security. In the debate on SC Resolution 814 (1993), the USA, France, and Brazil largely justified UNOSOM II on the absence of Somali government. Most strongly, the Brazilian representative stated, "the fundamental reason why the United Nations is being called to play a more robust role in Somalia is the temporary non-existence of a government in that Member State, as national and regional Somali institutions and civil administration have virtually collapsed."⁹⁹ In addition, two of Somalia's neighbors, Djibouti and Ethiopia, both alleged that the Somali state no longer existed as a result of its absence of government.¹⁰⁰

⁹⁷ See *id.*; Kabutaulaka, *supra* note 93, at 7.

⁹⁸ See *supra* note 59.

⁹⁹ S.C. debate on SC Resolution 814, U.N. SCOR, 3188th mtg. at 28, U.N. Doc. S/PV.3188 (Mar. 26, 1993).

¹⁰⁰ *Id.* at 8; See also Ethiopia's statement in the S.C. debate on S.C. Res. 886 U.N. SCOR, 47th Year, at 17, U.N. Doc. S/PV.3317 (Mar. 26, 1993).

Perhaps most notably, the Article 39 determination in SC Resolution 897 (1994) expressly relies on the absence of government, “determining that the situation in Somalia continues to threaten peace and security and having regard to the exceptional circumstances, including in particular absence of a government in Somalia, and acting under Chapter VII of the Charter of the UN”¹⁰¹ This is repeated in Resolutions 923 (1994)¹⁰² and 954 (1994).¹⁰³ Several UN member states emphasized the absence of government as necessitating Chapter VII action in the SC debates. Brazil “welcome[d] the fact that the text of the resolution makes it clear that it is only in the light of the very exceptional circumstances prevailing in Somalia, including in particular the absence of a national government, that the SC is acting under Chapter VII of the United Nations Charter.”¹⁰⁴

Most recently, in relation to the situation in the CAR, the absence of effective government in the state was again crucial to the determination of the existence of a threat to international peace and security. The Preamble to the Security Council Resolutions that invoked Chapter VII first to establish BINUCA and later to grant it the authorization to use force, as well as impose sanctions against those fuelling the conflict in the CAR, all explicitly relied on the “total breakdown in law and order” and “the absence of the rule of law” in their justification of an Article 39 determination.¹⁰⁵ In the meeting of the SC in which Resolution 2121 (2013) was unanimously adopted, the representative of the CAR had welcome the Resolution, and offered his “heartfelt thanks” as “Ambassador of a failed State.”¹⁰⁶

Nonetheless, even in these Resolutions, the regional impact of the crisis is also significant. SC Resolution 954 (1994) itself, though not in the Article 39 determination, “recogniz[ed] . . . the impact that the situation in Somalia has had on neighbouring countries, including, in particular, flows of refugees.”¹⁰⁷ Statements of China and New Zealand

¹⁰¹ S.C. Res. 897, U.N. Doc. S/RES/897 (Feb. 4, 1994).

¹⁰² S.C. Res. 923, U.N. Doc. S/RES/923 (May 31, 1994).

¹⁰³ S.C. Res. 954, U.N. Doc. S/RES/954 (Nov. 4, 1994).

¹⁰⁴ S.C. debate on S.C. Res. 897, U.N. SCOR, 46th Year, at 2, U.N. Doc. S/RES/897 (Feb. 4, 1994); *See also id.* at 38 (statement of Argentina).

¹⁰⁵ S.C. Res. 2121, U.N. Doc. S/RES/2121 (Oct. 10, 2013); S.C. Res. 2127, U.N. Doc. S/RES/2127 (Dec. 5, 2013); S.C. Res. 2134, U.N. Doc. S/RES/2134 (Jan. 28, 2014).

¹⁰⁶ U.N. SCOR, 68th Sess., 7042d mtg. at 2, U.N. Doc. S/PV.7042 (Oct. 10, 2013).

¹⁰⁷ S.C. Res. 954, U.N. Doc. S/RES/954 (Nov. 4, 1994).

explicitly tied this regional instability to the invocation of Chapter VII.¹⁰⁸ Similarly, in relation to the Chapter VII Resolutions on the CAR, the Security Council stated that a swift response from the international community was needed because of its “grave concern about the consequences of instability in the CAR, on the central African region and beyond.”¹⁰⁹ It also expressed its “alarm” that the internal violence in the CAR had the “potential to spiral into an uncontrollable situation, including serious crimes under international law in particular war crimes and crimes against humanity, with serious regional implications.”¹¹⁰ The best appraisal of this practice, then, seems to be that a total absence of government can be construed as a threat to international peace and security when it involves even minimal or potential impact on surrounding states, for instance, through an increase in refugee movement. As it is almost inevitable that regional states will suffer some impact as a result of the absence of government in a neighboring state, this does not create a significant limitation for the SC. In relation to UNOSOM II, it is clear that the absence of government was at least the primary factor in justifying the use of Chapter VII. At the same time, this practice again indicates that Chapter VII authorization is required to allow forcible intervention in a state, even when the government does not exist. Other Chapter VII Resolutions authorizing failed state interventions rely not on the absence of government, but on other threats to international security, such as grave regional destabilization,¹¹¹ conflict between the troops of more than one state,¹¹² international terrorist attacks,¹¹³ or global destabilization caused by piracy.¹¹⁴

The second way in which practice may support the failed state thesis relates to the use of force in self-defense by other states against terrorist targets in the territory of failed states. As noted above, Judges Kooijmans and Simma interpret the US-led multinational forcible intervention in Afghanistan, Operation Enduring Freedom (OEF), as

¹⁰⁸ S.C. debate on S.C. Res. 814 (1993), U.N. SCOR, 3188th mtg. at 22, U.N. Doc. S/PV.3188 (Mar. 26, 1993) (statements of China); *See also id.* at 26 (statements of Spain); *id.* at 11 (statements of Cape Verde; U.N. SCOR, 49th Sess., 34472th mtg. at 3, U.N. Doc. S/PV.3447 (Nov. 4, 1994) (statements of New Zealand).

¹⁰⁹ S.C. Res. 2134, U.N. Doc. S/RES/2134 (Jan. 28, 2014).

¹¹⁰ *Id.*

¹¹¹ *E.g.*, S.C. Res. 1497, para. 1, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

¹¹² *E.g.*, S.C. Res. 1744, U.N. Doc. S/RES/1744, at 1 (Feb. 21, 2007).

¹¹³ *E.g.*, S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (identifying international terrorist attacks as the relevant threat to international security).

¹¹⁴ *See E.g.*, S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

indicating widespread acceptance of a right to use force against the territory of failed states from which terrorist attacks have been launched. Furthermore, the United States has arguably justified strikes by Unarmed Aerial Vehicles (UAV or drones) against terrorist targets in foreign states by relying on, as one relevant factor, a wider right of self-defense against states unable to suppress terrorist activity, that is, failed states.¹¹⁵ It is questionable, however, whether the use of force in Afghanistan, and the strikes against alleged Al-Qaeda targets in Yemen,¹¹⁶ Somalia,¹¹⁷ and Pakistan,¹¹⁸ do indeed support these justifications.

In relation to OEF, the US and UK justifications relied on the right of self-defense against both Al-Qaeda and the Taliban, citing the Taliban's active support of Al-Qaeda, rather than the Taliban's inability to control terrorist activity. In its letter to the SC, the United States emphasized the role that the Taliban played in enabling the terrorist attacks.¹¹⁹ The United Kingdom asserted that the close relationship between the Taliban and Al-Qaeda amounted to "mutual dependence,"¹²⁰ and pointed to the earlier SC Resolutions obligating the Taliban to cease its support and sheltering of Al-Qaeda.¹²¹ Therefore, there was a clear effort to establish a relationship between the Taliban and Al-Qaeda, akin to that of a *de facto* organ of state, rather than to assert the right to use

¹¹⁵ Harold H. Koh, Legal Advisor to U.S. Dep't of State, The Obama Administration and International Law, Speech to the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

¹¹⁶ E.g., Tony Karon, *Yemen Strike Opens New Chapter in War on Terror*, TIME (Nov. 5, 2002), <http://www.time.com/time/world/article/0,8599,387571,00.html>.

¹¹⁷ E.g., David S. Cloud, *US Airstrike Aims at Qaeda Cell in Somalia*, N. Y. TIMES (Jan. 8, 2007), <http://www.nytimes.com/2007/01/09/world/africa/09somalia.html>; Jeffrey Gettleman & Eric Schmitt, *US Forces Fire Missiles into Somalia at a Kenyan*, N. Y. TIMES (March 4, 2008), <http://www.nytimes.com/2008/03/04/world/africa/04somalia.html?ref=Somalia>; Jeffrey Gettleman & Eric Schmitt, *US Kills Top Al Qaeda Militant in Southern Somalia*, N. Y. TIMES (Sept. 14, 2009), <http://www.nytimes.com/2009/09/15/world/africa/15raid.html>.

¹¹⁸ Kenneth Anderson, *Predators Over Pakistan*, 15(24) WKLY. STANDARD (Mar. 8, 2010), <http://www.weeklystandard.com/articles/predators-over-pakistan> (noting twelve strikes by US drones took place in January 2010 alone, in the Waziristan region of Pakistan).

¹¹⁹ U.N. President of the S. C., Letter dated Oct. 7, 2001, from Permanent Representative of the U.S. to U.N., addressed to President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (accepting the following justification: "The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation . . .")

¹²⁰ Office of British Prime Minister Tony Blair, *September 11, 2001: Attack on America UK Documents Case Against Bin Laden*, (Oct. 4, 2001) http://avalon.law.yale.edu/sept11/uk_005.asp ("[The Taleban and Al Qaida] are 'two sides of the same coin: Usama cannot exist in Afghanistan without the Taleban and the Taleban cannot exist without Usama.'").

¹²¹ *Id.*

force against a state that was unable to suppress terrorist groups within its territory. The relevant SC Resolutions also relied on the Taliban's willing participation with Al-Qaeda, rather than its inability to control the terrorist group.¹²² These arguments, therefore, may support a wider attribution standard encompassing states that harbor terrorist organizations, but do not support the interpretation establishing a wider right to use force in the territory of failed states.

Similarly, the individual UAV strikes do not seem to have been carried out under the state failure justification advanced by Koh,¹²³ but rather on the consent of the states in question, or by asserting a close relationship between the state government and the terrorists. In both Yemen and Somalia, it is reported that the governments consented to the UAV strikes. Recently released diplomatic cables confirm that in September 2009, Yemeni President Saleh gave the United States an "open door on terrorism."¹²⁴ In Somalia, the United States has claimed to be acting with the TFG's consent. For instance, in relation to the June 2007 strikes against Al-Qaeda, the US Department of Defense stated, "the very nature of some of our operations, as well as the success of those operations, is often predicated on our ability to work quietly with our partners and allies."¹²⁵ Notwithstanding Dunlap's view that such strikes support a wider right of self-defense against terrorists in failed states,¹²⁶ this practice supports the authority of governments to consent to foreign military intervention, rather than the failed state thesis.

In Pakistan, where there is the heaviest use of UAV strikes, the position is more ambiguous. The United States has claimed in the past to be operating with Pakistani consent,¹²⁷ supported by recently released

¹²² E.g., S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001) ("[Condemning] the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the al-Qaeda network and other terrorist groups.").

¹²³ Koh, *supra* note 116.

¹²⁴ *US Embassy Cables: Bomb al-Qaida Where You Want, Yemen Tells US, But Don't Blame Us If They Strike Again*, THE GUARDIAN (Dec. 3, 2010), <http://www.guardian.co.uk/world/us-embassycables-documents/225085>.

¹²⁵ Jeffrey Gettleman, *US Strikes Inside Somalia, Bombing Suspected Militant Hide-Out*, N.Y. TIMES (June 3, 2007), <http://www.nytimes.com/2007/06/03/world/africa/03somalia.html?ref=somalia>.

¹²⁶ See Dunlap, *supra* note 41, *passim*.

¹²⁷ Alex Rodriguez & David Zucchino, *U.S. drone attacks in Pakistan get mixed response*, L.A. TIMES (May 2, 2010), <http://articles.latimes.com/2010/may/02/world/la-fg-drones-civilians-20100502/2>.

diplomatic cables,¹²⁸ but the Pakistani government has publicly condemned the strikes, calling them a violation of Pakistani sovereignty.¹²⁹ Even without consent, it does not appear that these strikes can support the failed state thesis. The US government has made it clear that it does not consider Pakistan to be a failed state, despite the limited effectiveness of its government. In October 2010, Secretary of State Clinton explicitly rejected the classification of Pakistan as a failed state.¹³⁰ Furthermore, the US government seems to have concluded that the Pakistani government is unwilling to control the activities of terrorists operating in the Federally Administered Tribal Area (FATA) regions, rather than unable to do so. A White House report to the US Congress concluded, “the Pakistan military continued to avoid military engagements that would put it in direct conflict with Afghan Taliban or al Qaeda forces in North Waziristan . . . This is as much a political choice as it is a reflection of an under-resourced military prioritizing its targets.”¹³¹ This assessment was echoed by UK Prime Minister David Cameron, claiming the Pakistani government was “promot[ing] the export of terror.”¹³² Therefore, if the UAV attacks are not being carried out with the consent of the government of Pakistan, the practice might support the right to use force against terrorist groups in the territory of states that are harboring such groups, but would not support the failed state thesis.

IV. CONCLUSION

As this article has demonstrated, there is no international consensus among states, international organizations, and commentators on the definition or legal consequences of state failure. As the principle of equality of states requires the full protection for failed states’

¹²⁸ *US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas*, THE GUARDIAN (Nov. 30, 2010), <http://www.guardian.co.uk/world/usembassy-cables-documents/167125>.

¹²⁹ Secretary of State Hilary R. Clinton, *Remarks on Innovation and American Leadership to the Commonwealth Club* (Oct. 15, 2010), <http://www.state.gov/secretary/20092013clinton/rm/2010/10/149542.htm>.

¹³⁰ *Id.*

¹³¹ Adam Entous & Siobhan Gorman, *U.S. Slams Pakistani Effort on Militants*, WALL ST. J. (Oct. 6, 2010), <http://online.wsj.com/news/articles/SB10001424052748703298504575534491793923282>.

¹³² David Cameron, British Prime Minister, Speech at Infosys in Bangalore, India (July 28, 2010), available at <https://www.gov.uk/government/news/britishprime-minister-david-camerons-speech-at-infosysin-india>.

territorial integrity and political independence, the burden is on those that assert a different position to show the consistency of opinion and practice supporting their arguments. Given the heavy onus for displacing such fundamental rules of international law, this absence of consensus is highly problematic for the validity of the failed state thesis. Furthermore, the development of the law to recognize failed states as a legal category with lesser international status is undesirable, as it would create uncontrollable rights of intervention in weak states and signal a rejection of the fundamental principle of sovereign equality.

Recent practice shows that even when there is no government in a state, or only a very weak government, the legal capacity of the state continues, which includes benefiting from the prohibitions against intervention and the use of force. The most extreme claims of the failed state thesis, wholly denying the sovereign rights of political independence and territorial integrity, and rejecting failed states' entitlement to benefit from international legal prohibitions on the use of force and intervention are clearly negated in practice. This means that the failed state thesis alone does not justify the imposition of international administration on failed states, nor a general right to use force against failed states. Recent practice also illustrates the continuing authority of the governments of failed states to exercise the state's capacity to assume new international obligations. In addition, practice shows that, in the context of a state with no governmental body able to exercise effective control, there is a willingness to accept a new body that emerges from a UN-endorsed national reconciliation process as the lawful government of the state, despite its unproven ability to exercise effective control over the state's territory.

The recent practice discussed above could, however, indicate lesser protection for the territorial integrity of failed states in international law in two respects. First, the SC has considered state failure of itself to justify an Article 39 determination, enabling the use of Chapter VII to authorize the use of force and intervention in the otherwise exclusively domestic jurisdiction of the failed state. Such determinations have been made in response to situations in failed states creating only minor cross-border effects, which would not be qualified as a threat to international security in relation to a state with an effective government. Thus far, however, this has only occurred in the case of complete absence of a government, rather than merely a weak or ineffective government. Second, the practice above may indicate a right to use force against the territory of a state that is unable to control the use

of its territory by terrorist groups in response to an actual or imminent armed attack by those groups. However, such a right remains uncertain in light of the ambiguity of the legal justifications relied on by states in actual instances of state practice. Without clear contrary evidence in state practice and *opinio juris*, the fundamental international legal protection for the state's territorial integrity must be assumed to continue to be fully protected under international law.

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