

## **FAILED STATE DISCOURSE UNDER INTERNATIONAL LAW: THE PLACE, ATTRIBUTES AND IMPLICATIONS**

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### **ABSTRACT**

This paper laments the failure by international instruments including the Geneva Conventions to define a failed State. It thus seeks to provide a comprehensive definition of what constitutes a failed State under International law. In so doing, the article brings to light the attributes and features of a failed State from different dimensions, ranging from political, historical, and developmental to sociological perspectives. Intrinsically, the paper is an endeavor to answer the following questions; what is a failed State and who decides that a State has failed? What are the effects of the failed State discourse on international law? What is the place or legal status of a failed State on the international plane? The article also seeks to demonstrate how the very existence of a failed State discourse can affect state representation in international organizations, diplomatic law, judicial competence, treaty-making powers, international security, compliance with international obligations and issues of state responsibility in the promotion of human security under international law. As a final point, the paper will furnish the international community with a solid analytical base from which to generate high-quality response strategies to foster international peace, security and development. The understanding of a failed State discourse and efforts for preventing states from failing, and resuscitating those that have failed all strategic and moral imperatives for fostering global peace and development on earth.

### **INTRODUCTION**

The fact that state failures serve as the breeding ground for many extremist groups is indisputable in international relations. Indeed, it has been suggested that since ‘the end of the Cold War, weak and failing states have arguably become the single-most important problem

for international order'(Fukuyama 2004) through harbouring terrorist networks. This is however, somewhat a shallow assessment of the effects of failed states under international law as they pose wider implications on humanity, beyond the international peace and security sermon. Notwithstanding these rampant effects, the international community's track record in acknowledging and reacting to these eclectic impacts is not persuasive. Regrettably, there is no statute, convention or treaty defining a "failed State." Neither is there a positive international instrument that defines a "failed State" under international relations. Even with the much taunted reference to international law, the Geneva Conventions have not defined what a failed State is. All they did was to lay down the criteria for the qualification of a failed State, which criteria is even vague as it only provides that a State becomes a failed one when the level of conflict has reached a certain threshold. In a very real sense, what boggles the mind is the question of what constitutes 'a certain threshold.' To this end, the term "Failed State", is only defined by scholars and other international bodies through their articles and reports which sought to specifically suit their interests in the international system. The definition is mainly related to a State condition, *vis a vis* the refugee movement, economic development, history of violence, delegitimation of the State, non-provision of public services, little practical control of government over its territory, widespread corruption and criminality amongst many other indicators. Such definitions have viewed failed States as invariably the product of a total collapse of the power and political structures providing support for law and order, a process which is generally characterized by rampant internal forms of structural and direct violence. Such a status quo leaves the State to subsist in a ghost presence on the world map, practically without systems of governance. Newman (1997) noted the absence of the system of governance in failed States to making them a breeding ground for terrorism, corruption, more civil unrests, rampant human rights abuses and many other problems in the international law discourse.

In this vein, a failed State is categorized in terms of the availability of the above mentioned indicators. It follows then that a State bearing many attributes of indicators is ranked as the most failed State and on the other hand a State with fewer indicators is regarded as a failing State. Thus the process of classifying a State as a failed one entails a subjective analysis of how a particular State is performing. However, the aforesaid attributes and common indicators of State performance, qualifying a State as a failed one poses a lot of danger, as it

is linked to a case study by a body, whose objective is primarily to try and investigate a State's performance against the stipulated goals of the institution so investigating, which may be social, economic and political, rather than purely legal. In light of this, to then classify a State as a "failed State", poses a serious challenge in the legal sense, especially when it comes to trying to fit International Law into it. Further, it is a mammoth task, trying to marry the status of that country with its rights and obligations under International Law.

### **Historical trajectory of a failed State discourse**

The failed state phenomenon can be traced from time immemorial. According to Fraenkel (2004), what is now known as 'failed states', has been part of the political reality for as long as the international system of states has existed. It is therefore, germane to trace the notion of a failed State from the national states epoch, when Europeans tousel for colonies in less developed continents of Africa and Asia, in the ruse of philanthropic reasons. Colonialists especially the British justified their colonisation as the 'Whiteman's burden' to rule and bring an end to 'savage' and 'barbarous' rule in the African colonies. Even to this day, superpowers often intervene in developing countries, weaker states to stem social disorder that potentially threatens their security and trade interests (Dorff 2000). Resultantly, failed States have provided avenues for superpowers to advance their imperial motives under the auspices of the responsibility to protect civilians and deal with terrorists harboured in failed states. What comes in mind in this regard are the operations of the United States (US) after the September 11 attacks, which led to heightened academic and foreign policy interests in conceptualising the notion of 'failed' states. Specifically, US interventions in Somalia, Haiti and Iraq, and Afghanistan are linked to state failure idea in one way or the other.

Consequently, the concept of failed States has become relevant and perturbing than ever before in the 21<sup>st</sup> century. In Australia, the failed State notion was mooted in 2003 to popular acclaim with the release of the government- funded Australian Strategic Policy Institute (ASPI) 2003 policy report, *Our Failing Neighbour: Australia and the future of Solomon Islands*, (Wainright 2003) which argued the case for intervening in the troubled Solomon Islands, during the Government's deliberations over the issue. The generated interests to state failure saw European Union's 2003 *European Security Strategy* labelling state failure "an alarming phenomenon" (ESSUS 2003). The era has also seen the foreign policy of the US

being shaped in curbing potential threat of so-called ‘failed states’. Accordingly, the 2002 *National Security Strategy of the United States* maintains that weak and failing states “pose as great a danger to our national interests as strong states” (NSSUS 2002).

Regrettably, these improved talks about ‘no law zones’ phenomenon are not followed with even a working definition of a failed state and irrefutable efforts to deal with the problem that has threatened international peace and development. Few scholars have addressed state failure primarily in the contexts of humanitarian intervention, state-building and (neo) colonialism (Richardson 1996). Also, certain central legal questions arising from the phenomenon, such as, its impact on the statehood and sovereignty of failed states, as well as international human rights and humanitarian law concerns, have received attention (Thurer 1996). Through literature review, this paper seeks to come up with a holistic definition of failed States, their implications in international law namely; representation in international organizations, diplomatic law, judicial competence, treaty-making powers, state property abroad, compliance with international obligations and issues of state responsibility. It will prescribe the strategies to contain multi-dimensional problems arising from failed States.

### **FAILED STATE: THE SEARCH FOR A WORKING DEFINITION**

Although various international conventions dealing with international law have avoided defining a failed State, various definitions have been proffered by different schools of thought. Basically, a failed state has been defined in many dimensions: ranging from political, sociological perspectives as well as general State practices, historical and developmental context, as will more fully appear in the discussion to follow.

#### **Failed state from a political perspective**

In view of political perspective, a “failed State” is a State where there is implosion of the structures of power and authority and disintegration of the State. In this scenario, there is also a collapse of law and order. The emphasis is on the total or the proximity to breakdown of structures guaranteeing law and order. It also entails the absence of bodies capable of representing the State at international level and, in this case, it is either that no institution exists which has authority to negotiate, respect and enforce law and order or if one exists, it is wholly unreliable. This situation usually arises where there is anarchy within the State and

the statesmen therein are bandits in that they do not act according to the law (Gottingen 1994:47).

Accordingly, a failed State is a State with legal capacity, but which has for all practical purposes lost the ability to exercise it. In this case, there is no one who can guarantee other State actors in an effective and legally binding way, in concluding any agreement or making any undertakings. This position is clear in a State which is ruled by various warlords, who have no structural commands, and as a result, becomes ungovernable. This emanates from the fact that there is no recognized structure of authority which can make reliable commitments as regards the fulfillment of legal obligations, for example, Somalia has been ruled by warlords since 1990, and there was no individual who could stand and commit on behalf of the State or attend to international forums on the State's behalf. If one does exist, it is somewhat wholly unreliable and typically acting as a statesman by day and a bandit by night.

#### **Failed States from a Historical Perspective**

In the historical and developmental context, there has been emergence of a disintegrating process of individualization and desolidarisation of a State during the cold war, colonial and post-colonial eras, which has led to anomie and anarchy. The pressures of chaos, economic crisis and/or ecological disasters resulting in destructive excesses of violence are indicators of a failed State. In these cases, there will be serious arbitrariness and widespread human rights violations.

#### **Failed State from a Sociological Perspective**

The sociological perspective relates to the collapse of the core of the government structure, which is described by Max Weber as “Monopoly of power” (Weber 1996:27). Thus, the existing State machinery would have failed to hold the State together. The Police, the Judiciary, Prosecution and all the other legal systems would have failed or would be used for purposes, other than those for which they were originally intended. In this case there is privatization of the State or the criminalization of the State structures and security apparatus to operate for private benefit. This is a clear indication of what happened in Bosnia-Herzegovina in the 1990s, in which the police force was under Serbian control, the Serbs were safe, and when it was under Croatian control, Croats were safe however, when the force

was under the control of both Serbia and Croatia, none was safe, and thus the armed conflict was contrary to International Law.

The presence of intensive brutality and violence within the State reflects a failed State. With such attributes, Zimbabwe did suit in the category as the first decade of the new millennium epoch was characterized with rampant abuse of human rights at the hands of war veterans, youth militia and uniformed forces. A situation clearly described by C.F Anold Gehlen, in his reflection of socio-psychological consequences of the collapse of the State or social order (Keupp1995:105). He explains protracted insecurity, the forcing of people to move and make decisions out of fear and the presence of wide displacement. In this situation, there is mounting demographic pressure, severe humanitarian emergencies and chronic and sustained human flight. This internal conflict is highly intractable, unpredictable, explosive and irrational, contrary to politically guided and systematic use of military force, whose mechanisms and instruments are laid down in the United Nations Charter for Limitation and Control of Conflicts (Geneva Conventions). This situation explains the Somalian situation as well as the Liberian and Sierra Leone situation during the civil wars.

More significantly, Daniel Thurer, describes a failed State as, “*the general collapse and internal dissolution of a State.*” (Red Cross 1999). In this definition, the emphasis is on the collapse of power structures providing support for law and order. Thus, a failed State can be described as a State which has all its power fabrics, law and order collapsed, and anarchy has taken centre stage. If a State’s legal and political structures have collapsed, it is regarded as a failed State. In this regard, a State is viewed as one which has a recognizable and effective government as highlighted by the 1933 Montevideo Conventions on the Duties and Rights of a State. A State should among other things, have an effective government. It therefore entails that where a State’s government is in shambles that State has failed. This version is buttressed by the former United Nations Secretary General, Boutros Ghali who aptly noted that they are in most cases as a result of instability and conflicts within the State. He described the scenario as follows “*A feature of such conflicts is the collapse of State institutions, especially the Police and Judiciary, with resulting paralysis of governance, a breakdown of Law and order and general banditry and chaos...*” (Red Cross 1999). States in which institutions of law and order have totally or partially collapsed under the pressure and almost the confusion

of erupting violence are the ones that are referred to as failed States. A failed State is, thus, understood to mean a disintegrated or collapsed State. Not only are functions of government suspended, but its asset base is destroyed and looted by conflicting entrepreneurs. Failed states thus are recipients of a multi-faceted international intervention beyond military and humanitarian tasks including peace building.

### **The Functional Approach to failed state definition**

The sociological, historical and political perspectives of determining state failure are important though they have weaknesses if applied differently, for each approach means different types or phases of state failure. Generally, the approaches tend to characterize weakness using more extreme cases of failed or collapsed states, while underemphasizing many states that exhibit various forms of weakness short of outright failure; concentrate on one or two of the core functions of statehood—security and political legitimacy, for instance—without fully capturing other areas of state responsibility; use metrics that lack full transparency to rank weak states, hindering replicability; and focus primarily on the present, failing to capture recent historical trends (Rice & Patrick 2008). This article advocates for a functional approach that guarantees human development as an end result. Consequently, the paper addresses the aforementioned shortcomings and provides international policymakers with a new, comprehensive working definition for a failed state. This can be sought generally in the belief that failed or failing countries lack the capacity and/or will to perform core functions of statehood effectively (Rice & Patrick 2008). In other words, weak states are unable or unwilling to provide essential public services, which include fostering equitable and sustainable economic growth, governing legitimately, ensuring physical security, and delivering basic services (Rice & Patrick 2008). When state capacity is questionable in each core area of state responsibility, a host of adjectives like “weak,” “fragile,” “failing,” “failed,” and even “collapsed” may be used to label these countries suffering from capacity gaps. As the thinking of functionalists, a State’s weakness or strength is merely a function of its effectiveness, responsiveness, and legitimacy across a range of government activities rather than few aspects. It is this holistic definition of a failed state that invokes proactive response by UN and international community beyond humanitarian aid and peace building, but through encompassing the prevention mechanisms.

### **Who Determines A State Has Failed?**

The decision to pronounce a State is a failed State or not, is a very difficult one under the international law. Practical decision is normally made by responsible institutions in relation to the various core indicators. Social and economic institutions can categorize and pronounce failed States, based on socio-economic indicators and political institutions can also do the same using political indicators. As such, a failed State is recognized through metric indicators, and not through a legal definition (Red Cross 1999). Prevailing contributions to the identification of failed states focuses mainly on conceptual analyses of failed or weak states; and quantitative efforts that rank countries according to weakness criteria and indicators. Generally, failed states are qualified through some index in foreign policy documents of States for example the United States of America Fund for Peace and Foreign Policy Magazines, have used some factors to determine the rating of each nation, including security threats, economic implosion, human rights violations and refugee flows and used it to guide the United States of America's policy in relation to the States so mentioned. In the list of the United States Index (2011) referred to above, Somalia is ranked number 1, Chad number 2, Sudan number 3, Democratic Republic of Congo number 4 and Haiti number 5. Since all these States have had devastating conflicts and violence, it therefore shows that more often than not, failed States are a creation of political turmoil. Rice & Patrick (2008) noted that more than 85 percent of the critically weak states have experienced conflict in the past 15 years.

The practice of the United Nations (UN) Security Council also helps us to understand the concept of a "failed State". This is usually through a regular recourse to Chapter VII of the Charter, which is clearly enunciated in Resolution 794 of 3 December 1992 on Somalia, in which the Security Council held that, the magnitude of the human tragedy caused by the conflict was sufficient in itself to constitute a threat to peace, taking into account the cross border effects of the internal abuses. Also in the case of Haiti, the Security Council ruled that a form of government irreconcilable with international practice entitles the international community to intervene (UN 1993). From this point of view, systematic, widespread and serious breach of human rights or gross infringements of internal democracy is sufficient to permit forceful intervention by the UN Security Council in internal affairs of a State, where



government authority has for all practical purposes broken down. In this case, the Security Council has performed far reaching civil measures ranging from demobilization of armed forces, steps to consolidate the economic and social infrastructure to reform governmental and constitutional structures and take complex administrative and political tasks in failed States. Furthermore, the Security Council takes functions of supranational government and administrative body in support of States in performing their internal tasks.

Even though the Former UN Secretary General, Kofi Annan encapsulated failed states in his 2005 report *In Larger Freedom*, which declares: “If states are fragile, the peoples of the world will not enjoy the security, development, and justice that are their right.”(UN 2005), the UN has been avoiding the use of such terms. It is not therefore, absurd to note that the UN has failed to prevent the slow collapse of states in Central and West Africa, despite a clear understanding of when and where such events would occur and the availability of forecasts predicting and explaining their causes and manifestations (as in the Congo, Guinea, Liberia and Sierra Leone).

Equally important in determining failed and weak States are scholars and non-states actors like the Centre for Global Development’s (2004) “Commission on Weak States and U.S. National Security” which identified some 50 to 60 weak states, based on three sets of gaps: “capacity,” “legitimacy,” and “security.” The Political Instability Task Force (formerly State Failure Task Force), commissioned and funded by the Central Intelligence Agency’s Directorate of Intelligence, uses extensive open source data to isolate independent variables generally associated with the onset of “severe internal political crisis,” including revolutionary and ethnic wars, “politic ides,” and genocides (Global Policy 2006). Robert Rotberg, director of the Belfer Center’s Program on Intrastate Conflict, Conflict Prevention, and Conflict Resolution at Harvard University, published the results of his five-year research in a 2004 book titled *When States Fail* (Rotberg 2004). Rotberg uses a broad set of economic, political, and security indicators and distinguishes among three categories of weak states: “collapsed,” “failed,” and “weak.” His study defines state weakness as principally a function of conflict and human insecurity but does not rank states according to their level of weakness. Among major donor countries, only the United Kingdom’s Department for International Development (DFID) has taken the bold step of producing a proxy list of fragile

states, including 46 countries (DFID 2005). The World Bank's Fragile and Conflict-Affected Countries Group (formerly the Low Income Countries Under Stress Initiative, or LICUS) identifies roughly 30 extremely impoverished countries "experiencing difficulties arising either from conflict or weak institutions and capacity" (World Bank 2007). George Mason University recently published a "State Fragility Index" (Goldstone et al 2007:3). Evidently, US and non-state actors have taken a lead in determining and intervening in failed state trajectory than the United Nations itself with widespread effects. This involvement of superpowers has had effects, which the UN is failing to note or willingly ignoring them. Evidently, the UN has noted the ramifications of the US biased involvement which accelerated conflict between combatants in Kosovo, Somalia, and Bosnia. In Libya, the UN religiously gave the western allied NATO powers to intervene in Libya through Resolution 1973 of 2011 which saw the Libyan state transgressing to a failed state.

Identification of a failed State has not been without effects to the state in question. There is no legal framework to determine a failed State and recourse is placed on the foreign policy of a particular nation to determine whether in its relation to a particular State, it regards that State as a failed State or not. For example, in its ranking of 2011, the United States of America (USA) Foreign Policy magazine ranked Zimbabwe number 6 on the list of failed States and the Ivory Coast number 10 and Madagascar 58. With all due respect, the basis for this index is unconvincing and very misleading, in the sense that, during the period under review, Zimbabwe had a stable and effective government. Further, it had an effective and visible judiciary and police force and there was no law and order in Madagascar, there was a very high security risk and all the systems had almost collapsed and the country had no recognizable government. It is against such kind of classification that countries like Zimbabwe have been shunned by foreign direct investments and tourists, hence losing out in development since no investor or country would want to invest in failed States. Evidently, in 2011 Zimbabwe attracted US\$250 million of the US\$55 billion that went into African economies in Foreign Direct Investment (CISOMM 2013:24). Thus to say being identified as a failed state means a lot, as it sends a negative message to the investors and the world financial markets about the state of governance in a country.

## **WHAT ARE THE IMPLICATIONS OF A FAILED STATE?**

Failed States can result in serious international relations scandals as they forfeit or lose their capacity to enter into binding international legal relations and to fulfill its obligations. Consequently, diplomatic law, State representation in international forums, judicial competence, treaty making powers, State property abroad, compliance with international obligations and attribution are put into serious threat by failed State discourse. There is, therefore, a complicated question on whether the rules of International law will still be applicable in the failed State. When State institutions collapse totally, the concerned State cannot comply with its international obligations and the longer the failure or the more prolonged the collapse, the more absolute the impossibility to comply with international obligations ranging from treaties in general and or any other obligations that the State is expected to honor. State failure may also generate permanent disappearance of the object of a treaty. Good examples are the failed States of Somalia and Liberia, where government institutions ceased to function. In some instances, States may totally disappear for a prolonged period of time and hence cannot fulfill a variety of their international obligations and treaties (Yannis 1997).

On treaty making, a failed State loses its capacity as there is no State agent that can be regarded as authorized to represent the State for purposes of concluding the treaty. In this vein, Somalia was not able to ratify the Lome Convention and could not benefit from the developmental framework provided under this treaty (Jorgensen 1997:78). Moreover, Somalia lost on World Bank programmes, which required that agreements be concluded with the competent authorities of the country (UN 1999). Arguably though, this does not reflect in the index as some countries ranked in the top ten (10) failed States in the USA index never at any one time failed to have the government system effective and capable of acting at international level and as such, the question of identification of a failed State is potentially dangerous as it does not have a uniform and definite standard, and is dependent upon individual States' foreign policy.

The decision of the International Court of Justice (ICJ), emphasized that States can only act by or through their agents and representative (Poland Advisory Opinion 1923). In a failed State's scenario, because of the absence of a government there is also a serious problem of State representation and this may result in total exclusion of the State and loss of representation. In terms of judicial proceedings concerning a failed State, if it is established that when there is a failed State, no one is regarded as having the authority to represent the country as there is no instructing authority. This is followed by government to government connection disruption and diplomatic missions are put to doubt, as the diplomatic or consular missions of that State lose their representative powers, there is a danger of continued existence of uncontrolled representative powers, for an unlimited time and this may lead to difficult situations, where several entities claim authority for the failed State. In the Somalia case, the missions and their individual staff members ceased to represent the collapsed government or any other government, due to lack of credentials (British High Court 1992). However, since diplomatic relations depend on mutual consent of States, State failure in Somalia led to some closure of embassies at the request of the receiving States and the loss of representativeness resulted in practical difficulties for Somalis, as they could not renew their visas or passport abroad.

In terms of representation in inter-State forums, the United Nations system gives every member-State a right to participate and be represented in some forums. Where no delegation is allowed to take the seat of the failed state, "an empty chair policy" will be resorted to. This is however difficult to do, in relation to the United Nations Charter, where a member state arguably has a right of delegation, consequently in the General Assembly and the institution is obliged to decide a legitimate authority in the circumstances. For instance, in the representation of Somalia from 1991 up to 2000, in the 46<sup>th</sup> Session of the General Assembly in 1991, the permanent mission of Somalia to the United Nations, delegation headed by the *charge de affaires* was allowed to represent the failed State. Conversely, in all post 1991 sessions, Somalia as a member State had a name plate in the General Assembly but nobody was authorized to sit behind it between 1992 and 2000. Yet, Human rights bodies continued to invite Somalia to their meetings and to submit their periodic reports throughout the period of collapse and Somalia was even able to finish its term as a member of the commission on Human rights that lasted until the end of 1992.

Failed States also result in intractable wars due to the proliferation of small arms, trafficking and smuggling at the borders. Newman (1997) highlighted that weak and failing States are more vulnerable to all forms of smuggling, including trafficking of small arms and light weapons through porous borders, and this is also a demonstrable source of regional insecurity. In 1990s weapons were claimed to have flowed across borders in the Balkans, between Afghanistan and Pakistan for years. Such porous borders have fuelled and facilitated insurgency and escalation of violence against innocent civilians. This is also made worse by war economies harbored by failed States, as ninety percent of global production of hard drugs is from conflict countries (Collier 2005). Evidently, in Colombia ranked (number 34) and Afghanistan (number 2) an overwhelming proportion of cocaine and heroin is said to be originating, and that are classified as failing states by the Index of State Weakness in the Developing World at (number 34) and (number 2) respectively. The production is arguably facilitated by the absence of government control in the vast areas of these countries. More so, the problem of piracy comes in as a result of failed States, as pirates take advantage of the failed state to prey on international business. To add on, lawless Somalia provides a common case, where pirates are attacking European ships in the Indian Ocean, thereby bringing international business to disruption.

The absence of legal capacity of a failed state to prosecute abuses of human rights is also worth noting. This affects international law as a failed State has a least effective government, which is one of the conditions for legal existence and recognition of a State and the question to be answered by International law will be; whether a failed State continues to qualify as a State or legal entity? Will there be any meaningful existence of State to enforce protection of human rights, especially the Civil and Political rights of individuals within a state?

However, in the practice of the United Nations Security Council, State failure has been read not to mean State extinction and the Council has persistently referred to the continued existence of statehood, protected by perceived sovereignty (Hutaninson 1993:624-640). Though it exists, there is however need to note that under International Law the failed State cannot be held liable for any breaches if it no longer has institutions or officials allowed to act on their behalf. More so, it cannot be held liable for not having prevented offenses against

international law committed by private individuals or for not punishing them for those breaches. This is simply because a failed State has no capacity to act and prevent gruesome abuses from happening. As such many failed states like Somalia and Sudan are home to rampant crimes against humanity and international interventions. Evidently, the UN and African Union has intervened militarily in many failed and critically weak states; deploying peacekeepers or observers to half of the failed or critically weak states, while the United States has deployed forces to five: Afghanistan (ranked number2), Haiti (number12), Iraq (number 4), Liberia (number 9), and Somalia (number 1) (UN 2010). France and the EU have also deployed forces to Côte d'Ivoire (number 10) and Democratic Republic of the Congo DRC (number 3), respectively, and the UK sent troops to Sierra Leone (number 13) (Rice & Patrick 2008) to stop gruesome human rights abuses.

The State of affairs in failed States, characterized by the absence of political, law institutions and accountable governance creates a conducive environment for the “recalcitrant or aggressive” government coming into power to cause mayhem to other governments and regional peace and security. In Liberia, Charles Taylor rose to the position of President of Liberia in the context of that country’s protracted conflict and collapse to abuse the privileges of sovereign statehood and pose a threat to regional security (Newman 1997:10). Charles Taylor’s notorious regime fuelled conflict in Liberia and neighboring States at large, with Sierra Leone suffering heavy losses in terms of social and economic development. As failed States stand as “no law zones” they have become a habitation for international terrorism such as those in Afghanistan and Somalia (Newman 1997). Al Qaeda and other terrorist groups grow in and thrive in failed States, using them as havens in which they can recruit and train their followers. The Boko Haram in Nigeria and the Tuareg in Mali have caused human sufferings through their extremist’s bombings which have claimed lives of Christians and civilians. On 21 September 2013, suspected terrorists stormed a shopping mall killing at least 15 people in Kenyan market square (Reuters 2013). This was not the first time Kenya has been subjected to attacks, as the major al-Qaida attacks against US embassies in 1998 took place in Kenya and Tanzania. As such, these extremists are allegedly to have hailed from failing States in the form of Sudan and an almost entirely collapsed state in the shape of Somalia. Based on the foregoing, it is therefore hardly surprising that in the years to come,

the existence of failed States will see that the world's quest for sustainable peace remain an illusion.

### **Challenges posed by a Failed State discourse**

The use of the term “Failed State” in itself gives rise to many questions and reservations in International Law and Relations as to whether or not a failed State is synonymous to a “collapsed or disintegrated” State. This is so, in light of the fact that a “failed State” is a State undergoing economic, political and social problems, and this does not amount to “state collapse”. This stance of describing a failed State carries with it a suggestive power, which can be used for intervention purposes by superpowers and this ushers in a serious challenge to the concept of sovereignty and non-intervention in States internal affairs and prohibition of the use of force. If a member state intervenes in a failed State, there may be no appropriate representative of the particular State to lodge a complaint or objection on behalf of the state and this can result in serious aggression on weaker states on the basis of them being “failed States”. The major powers would abuse this position by merely asserting the duty to protect and intervene to prevent human catastrophe (NILR 2000:59).

Independence of diplomats from failed states is compromised in the international system. Failed State cannot pay salaries to its diplomats, receiving States may provide financial assistance under urgent distress in accordance with its legislation but this compromises the proper fulfillment of diplomatic functions. For example a Somali diplomat from the Embassy of Somalia in Bonn, who had applied for social security assistance from German authorities, after Somalia had suspended all payments to its diplomats in September 1990 (NILR 2000:59). However, this brings a serious challenge to the independence of the diplomats in relation to the receiving State and it cannot properly represent the interest of a failed State, which had failed to pay its salary at the expense of a host nation who is looking after them. So, State failure generates other legal problems with regard to its diplomatic agents and missions, who can cease to have legal regulations. Similarly, in terms of the Vienna Convention (NILR 2000:59), a diplomat is immune to prosecution in the receiving State. Ironically, since there is no functioning judiciary and police system in the sending State and also there are collapsed diplomatic channels, a failed State has no capacity to prosecute its diplomats abroad and eventually they escape all jurisdictions.

Another question that arises relates to the fate of the diplomats from sending States that might also as a result of the State collapse, require to be rescued. The sending State could then need at times to send military personnel to rescue its diplomats from the failed State and this may result in invasions and unauthorized use of force as it is not possible for that State to wait for a United Nations Resolution to be authorized to go and rescue its nationals who are at serious risk in the failed State. Usually there are a lot of hostages in failed State, and foreign nationals are taken hostages. Foreign nationals are taken as objects of crime and International humanitarian agency may be called to assist and, if that fails, the unpredictable invasions may follow which may also result in violation of International Law.

Socially, Loescher et al (2008) noted that forced migration flows and outbreak of diseases which are rampant in failed States can lead to the spread of insurgents, threatening regional stability on an ongoing basis and sometimes causing conflicts in neighboring States. In fact, forced displacements of Rwandans in Uganda formed the basis for which the Rwandan Patriotic Front fought an ongoing armed struggle with the government in the 1980s and 1990s. Also, after the 1994 Genocide, militarized and displaced groups in Democratic Republic of Congo (DRC) formed a major force in that country launching attacks across the border in Rwanda. This also happened in Afghanistan, where destabilization led to migration in 1990, which fueled militarization of the so-called Talibans in Pakistan, which eventually seized control of the State (Loescher et al 2008). As people migrate, they transmit diseases from one place to another. Many a times, we have heard emergency disasters being declared in failed States under bad governance or where there is a conflict such as in Democratic Republic of Congo, Somalia and many other States. Consequently, weak and failed States are a recipe for disaster in the spread of diseases and humanitarian crisis, which they have no capacity to control. The capacity of these States to solve health problems is weak since infrastructures such as hospitals and clinics would have been destroyed during the conflict whilst most of its funds are channeled towards purchase of military hardware. Infectious diseases including HIV/AIDS, malaria, tuberculosis, hepatitis B, Ebola, measles, and the West Nile virus spread rapidly in conflict situations since there will be no strategies and efforts to combat it. From a more global, though less verifiable, perspective it has been



claimed that AIDS probably spread through African civil wars. Thus showing the negative impact failed States has on the spread of diseases.

Failed States have had some ramifications on the sustainable use of the environment. The state of affairs in failed States connotes incapability to or reluctance to curb the environmental problems arising therein. There will be no departments or institutions to regulate the utilization of the natural environment in a sustainable manner. In instances where they are present they will be under capacitated to do so effectively. The conflict in Sudan serves as an example, which has been described as the first climate change conflict (Newman 1997). The government under Al Bashir has not been able to control environmental depletion, which was a result of the competition for resources in the Darfur region. This was also exacerbated by desertification and the decline of habitable and agricultural land (Newman 1997). More so, conflict ridden failed States have witnessed the unsustainable extraction of precious minerals and oil for personal enrichment, posing dangers to the environment, such as blood diamonds in Sierra- Leone and Liberia.

The emergence of failed States has had positive effect also, as it has resulted in a general strength of the trend towards mutual dimensions, in the form of expansion of the United Nations responsibility. The existence of a State without a government was not foreseen in many aspects of international law and relations. A failed State ceases to be an active legal subject of international law and State institutions as the basis of international systems is put in serious doubt. This has resulted in the international community responding to this with humanitarian intervention and reconstruction of the State and establishment of international accountability mechanisms.

The significance of the failed State discourse in International law has helped to shape various areas of the law. Subsequently, the aspect of a Failed State has helped in the development of International Criminal Law (ICL), as a legal system because primarily a Failed State cannot account for and be prosecuted or prosecute offenders since it lacks the legal capacity and institutional framework to do so. A “failed State” does not in itself appear liable for breaches of international law. Many international criminal offences are committed in failed States, where the judiciary has collapsed, prosecution and punishment may be effected by any third

party, or international institutions. International Criminal Law has been significantly strengthened through the establishment of the International Criminal Court (ICC) and ad hoc Tribunals such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) to prosecute persons responsible for crimes against humanity committed in failed States. Such courts have been established to fill in the gap that is in existence in the “failed States” legal system. The development of ICL is the most significant reaction to heinous crimes against humanity in failed states. Specifically, the coming up of the Rome Statute that gave birth to the ICC have resulted in the strengthening of universal jurisdiction and individual criminal accountability and more fundamental systems centered on human beings rather than States (Rome Statute 1998). It is now upon the UN to coerce member states to ratify the Rome Statute of the ICC and cooperate with court to end impunity, mostly in failed States.

### **CONFRONTING THE CHALLENGES**

The classification of failed States helps to identify trends of weakening states and additional countries that merit close monitoring in the international system. Even if the UN and international community have an insight of the impacts of failed States especially the incubation of transitional terrorists, to date they have not crafted effective strategies to strengthen such states. Building effective States in the developing world, focusing both on their will and capacity to deliver essential public services to their citizens, must become a significant component of UN, U.S. and international community security policy (Rice et al 2006).

Efforts to strengthen failed States are not stand alone endeavours, for no one actor can succeed alone, be it UN, U.S. or national governments. Augmented and coordinated endeavours should start coming up with a working definition for failed states under International law. The inputs of other partners, institutions, scholars and, most importantly, concerned countries should be of importance so as to encompass a holistic approach. This paper sees it prudent for the UN to coerce world leaders to come up with a Declaration for helping weak states specifically, as they have done with other issues detrimental to the wellbeing of humans.

Priority should be on poverty reduction policies since poorer countries exemplify very weaker states. The Index of State Weakness in the Developing World has shown a strong relationship between inequality and state weaknesses. Poverty fuels and perpetuates civil conflict, which swiftly and dramatically reduces state capacity (Rice 2006). Yet, still lacking from UN, US and international actors are any comprehensive strategies to address poverty in the world's most challenging institutional environments, including not only development aid but also other critical instruments like democracy promotion, support for peacekeeping, trade concessions, and investment promotion. In 2000 world leaders came up with Millennium Declaration which identified 8 Millennium Development Goals meant to have reduced poverty and development challenges by 2015, an effort worth lauding as commitment to poverty alleviation. In 2007, the Bush administration belatedly added poverty alleviation as an explicit, central goal of U.S. foreign assistance policy (SFFA 2007). As Randall Tobias, the former U.S. director of foreign assistance, explained, "The time is ripe for a New Deal on poverty reduction (Tobias 2007). Nevertheless, there is need to translate this rhetoric into effective action, as many donors like UK and US have failed to meet the aid targets they set at the millennium declaration.

In 2004, a Group of Eight industrialized countries (G8) summit saw leaders under the Global Peace Operations Initiative pledging to support the training of some 40,000 African peace-keepers (out of a world-wide total of 75,000) to help make the much vaunted African Standby Force a reality by 2010 (Williams 2006). Yet, in the USA at least, this laudable programme has been underfunded. In addition to training and helping to equip African peace-keepers, Western states have also deployed small numbers of their own soldiers to so-called 'hybrid' peace operations in some of Africa's failing states, including the United Kingdom in Sierra Leone, France in Co<sup>^</sup>te d'Ivoire, two EU-led operations in the DRC, and the USA in Liberia (Williams 2006). There is also need for a strategy to tailor international assistance, as well as other policy tools, to the unique needs of poorly performing states in the world.

In addition to the need to provide sufficient and evenly distributed resources to failing states and the targeting of all drivers of state weakness, international community efforts should not be one size fits all initiatives, but country specific for weak nations' problems are not

homogeneous. Conversely, US assistance policy toward the world's weakest states remains inadequate and haphazard, reflecting neither specific country characteristics nor the strategic importance of state weakness to U.S. and international security (Patrick & Brown 2006). According to Rice & Patrick (2008), the 2008 George W. Bush administration's Financial Year 2008 budget request to the Congress of \$16.7 billion for international assistance saw only about half (\$7.9 billion) being targeted at the two failed countries in the weak states index. Also, nearly 80 percent of this amount was focused on just nine countries, including three critical countries in the global war on terror (Afghanistan, Iraq, and Pakistan), one key partner in the war on drugs (Colombia), and five beneficiaries of HIV/AIDS spending (Ethiopia, Nigeria, Uganda, Tanzania, and Zambia) (Rice & Patrick 2008). This was despite the fact that many countries in Africa had problems of the same magnitude or worse off than those given aid in Africa and the world over. This paper challenges Western responses to failed states to be not selective and intermittent to failing states which are perceived to pose the greatest threats to Western security concerns alone. It would be much better if multi-holistic approaches target regions with the highest numbers of weak and failed states specific. More importantly, the UN should not watch events unfolding but should come up with a sustainable on-going solution through supporting the efforts of national governments with resources where necessary.

## **CONCLUSION**

This paper sought to give a comprehensive definition of what a failed State is all about. It has explained the attributes, place, challenges as well as the effect of a failed State discourse in international law. Though difficult, the recognition of, and identification of failed States remains very important in the system of international law and the responsibility of States towards one another, in order to preserve the human race from self-destruction. When a state has failed or is failing it falls prey to and spawns a host of transnational security threats, comprising weapons proliferation, terrorism, organized crime, infectious disease, environmental degradation, and civil conflicts that spill over borders. Regardless of this, the paper has aptly demonstrated how State failure affects the whole body system of international law, since all the laws, for example international human rights law, international humanitarian law, international criminal law and many others. In other words, the State has remained the significant guarantor to the international legal systems in terms of establishment

and fulfillment of international law. The State in many respects is the very reason for the establishment of international law. Although international law continues to exist even in a failed State, it is better and more effective when complemented by a fully functional State as a guarantor. In this vein, the response from the international community should go beyond the mere forwarding of humanitarian intervention, but towards reconstruction of the failed institutions of the State for sustainable peace and human development. In the absence of a fully functioning State, there remains a difficult, costly and uncertain system of International Law, which is detrimental to peace and development. The highlighted indicators on failed States are challenging to human existence and their identification should assist the international community to come up with suitable solutions to the various human threats that come with a failed State. To this effect, the passing of a Convention on failed states is recommended, so as to give an all-inclusive definition of failed states.

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