The "failed State" and international law

by
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> My sister aged 57, who lived in Sarajevo alone, was killed there. If I had caught the man who killed my sister I would have cut his throat on the spot. Don't think I wouldn't have. However, I think differently now that the passions have cooled. But at the moment I don't know what I would have done to him, out of rage.
>
> Civilian in Bosnia-Herzegovina
>
> A war without rules would be a cruel war where nothing would count. Only winning. And winning is not all.
>
> Guerrilla fighter in Colombia

This article discusses the collapse and internal dissolution of States. These are spectacular processes which are symptomatic of the condition of the community of States and the modern-day system of international law and they are of so elemental a nature that they lead us to reflect on what the future may hold in store. In particular, I am thinking of Somalia, ruled by warlords since 1990; of Liberia and Sierra Leone, which have both been racked by small-scale

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conflicts throughout the decade; of Bosnia-Herzegovina in the early days of its independence; and of Rwanda at the time of the massacres and genocide. Less recent cases also spring to mind: the twenty-year conflict between the parties in Cambodia, brought to an end by the Paris Agreement of 1991; the civil war in Lebanon during the 1980s; and various phases in the development of the Congo, a country which has remained virtually ungovernable since independence was achieved in 1960. The same themes were evident in the chaotic power struggles in China during the 1930s and we can trace them back further still, all the way to the Thirty Years' War in seventeenth-century Europe, out of the brutality, turmoil and suffering of which the classical system of international law was to emerge in the Peace of Westphalia. Failing States are invariably the product of a collapse of the power structures providing political support for law and order, a process generally triggered and accompanied by "anarchic" forms of internal violence. The former Secretary-General of the United Nations, Boutros Boutros Ghali, described this situation in the following way:

> "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. Not only are the functions of government suspended, but its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of international reconciliation and the re-establishment of effective government."[1]

States in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map, are now commonly referred to as "failed States" or "*Etats sans gouvernement*". However, neither expression is sufficiently precise. "Failed" is too broad a term, for, going to the opposite extreme, the aggressive, arbitrary, tyrannical

1 See the Concluding statement by the United Nations Secretary-General Boutros Boutros Ghali of the United Nations Congress on Public International Law: Towards the Twenty-First Century: International Law as a Language for International Relations (13-17 March 1995, New York), Documents, p. 9.

or totalitarian State would equally be regarded as having "failed" — at least according to the norms and standards of modern-day international law. On the other hand, "State without government" is too narrow, since, in the type of State discussed in this article, it is not only the central government but all the other functions of the State which have collapsed. For this reason, the term "failed State" as used in the following text should be understood to mean "disintegrated" or "collapsed" State.

The present article attempts to sketch the broad outlines of the problem of the "failed State" from the combined perspective of international law and of constitutional law in general. The discussion will begin with a description and definition of this phenomenon. This is followed by a general analysis based on positive law, in which special emphasis is given to the reactions of the international community (in particular the Security Council), the problem of the effectiveness of human rights and international humanitarian law, as well as issues of State and individual responsibility under international law. The article concludes with some reflections on the current state of international law and the prospects for its future development.

I. Description of the phenomenon

The term "failed" State does not denote a precisely defined and classifiable situation but serves rather as a broad label for a phenomenon which can be interpreted in various ways. We will now consider the concepts associated with this term from a legal, developmental and sociological perspective.

The political and legal approach

Three elements can be said to characterize the phenomenon of the "failed State" from the political and legal point of view.

- Firstly, there is the *geographical and territorial* aspect, namely the fact that "failed States" are essentially associated with internal and endogenous problems, even though these may incidentally have cross-border impacts. The situation confronting us then is one of an implosion rather than an explosion of the structures of power and authority, the disintegration and destructuring of States rather than their dismemberment.
- Secondly, there is the *political* aspect, namely the internal collapse of law and order. The emphasis here is on the total or near total breakdown of

structures guaranteeing law and order[2] rather than the kind of fragmentation of State authority seen in civil wars, where clearly identified military or paramilitary rebels fight either to strengthen their own position within the State or to break away from it.[3]

- Thirdly, there is the *functional* aspect, namely the absence of bodies capable, on the one hand, of representing the State at the international level and, on the other, of being influenced by the outside world. Either no institution exists which has the authority to negotiate, represent and enforce or, if one does, it is wholly unreliable, typically acting as "statesman by day and bandit by night".

From a legal point of view, it could be said that the "failed State" is one which, though retaining legal capacity, has for all practical purposes lost the ability to exercise it. A key element in this respect is the fact that there is no body which can commit the State in an effective and legally binding way, for example, by concluding an agreement.

The historical and developmental context

The "failed States" existing at present are essentially Third World States which have been affected by three geopolitical factors:

- the *end of the Cold War*, during which the two superpowers had often kept shallow-rooted regimes artificially in power, preserving them as potential allies through supplies of arms or through ideology-based power structures which kept the unity of the State intact by force;
- the *heritage of colonial regimes* which had lasted long enough to destroy traditional social structures, but not long enough to replace them with Western constitutional structures and an effective identity as a new State; and lastly
- general *processes of modernization* which encouraged social and geographical mobility but were not counterbalanced by nation-building processes capable of placing the State on a firm foundation.

2 In this respect, we can distinguish between two different situations: on the one hand, cases such as that of the Democratic Republic of Congo where a total or near total collapse of government authority does not result in massive violence; on the other, cases such as Somalia and Liberia where the vacuum left by the disintegration of the State is filled by a chaos of small-scale group-based wars.

3 Examples include Afghanistan, Angola, Colombia and Kosovo.

While it is true that such extreme situations have so far remained the exception in the world as a whole, others might well arise in the area formerly dominated by the Soviet Union — especially the Caucasus and south-eastern Europe. Indeed, more generally, we might ask whether we are not faced with a chronic pathological trend which — if for quite different social and psychological reasons — could come to undermine hitherto solidly based Western constitutional States. Can we not discern even here in the West, within the rational framework of liberal constitutional democracy, the emergence of disintegrating processes of individualization and desolidarization, which could lead to anomy and anarchy under the pressure of economic crises or ecological disasters? Commenting on the autistically destructive excesses of violence in modern cities, one author has spoken of politics having reached "a new state of aggregation".[4] In the newspapers, we read of the Western world sliding down the same slippery slope as Somalia or Lebanon.

The sociological perspective

The problem of the "failed State" can thus be seen as an elemental phenomenon which, though currently acute in only a few countries, remains latent throughout the world. Sociologically, it is characterized by two phenomena:

The first of these is the *collapse of the core of government*, which Max Weber rightly described as "monopoly of power".[5] In such States, the police, judiciary and other bodies serving to maintain law and order have either ceased to exist or are no longer able to operate. In many cases, they are used for purposes other than those for which they were intended. For example, in the Congo militias disintegrated into armed gangs of looters, military commanders set up in business on their own account using army units for their own enrichment, while State-owned economic resources were exploited for the private benefit of those in power. This kind of situation amounts to a *privatization* of the State or indeed to its *criminalization* where "officials" are involved in drug dealing and arms trafficking. Here, the monopoly of power as a basic function of the State is destroyed and

4 Hans Magnus Enzensberger, *Aussichten auf den Bürgerkrieg*, Frankfurt am Main, 1993, p. 12.

5 Max Weber, *Staatssoziologie*, Johannes Winckelmann (ed.), 2nd ed., Berlin, 1996, pp. 27 ff.

society reverts to that primal condition of *bellum omnium contra omnes* posited by Hobbes. The experience of Bosnia-Herzegovina is symptomatic of the collapse of independent and effective State authority: where the police force was under Serb control, the Serbs were safe; where it was under Croatian control, the Croats were safe; and where it was under the control of both, neither group was safe.

The second typical feature of a "failed State" is the *brutality and intensity of the violence used.* Eyewitness reports from Liberia speak of the whole society — adults, young people and children alike — falling into the grip of a collective insanity following the breakdown of State institutions.[6] These internal conflicts are characterized by a highly unpredictable and explosive dynamic of their own, as well as by a radicalization of violence, the irrationality of which stands in stark contrast to the politically guided and systematically escalated use of military force for which the mechanisms and instruments laid down in the UN Charter for the limitation and control of conflicts on the international level were designed.

II. Analysis in terms of positive law

The UN, State sovereignty and the right to self-determination

If we look at the phenomenon of the collapse of States from the global perspective of international order and especially from the point of view of international law, it is interesting to observe that the States concerned are, in practice, not simply left to their fate. On the contrary, the

6 Cf. Arnold Gehlen's incisive reflections on the socio-psychological consequences of the collapse of the State or the social order : "The immediate effect is that the persons concerned become profoundly *insecure*. The moral and spiritual centres are disoriented because, there too, the certainty of the self-evident has foundered. Thus, penetrating to the very core of their being, insecurity forces people to improvise, compelling them to make decisions *à contre cœur* or to plunge blindfold into the realms of uncertainty, perhaps seeking at any price fundamentals to cling to and give them a sense of purpose. In practice, moreover, insecurity is manifested in the form of fear, defiance or volatility. The effect is to place a heavy burden of control and decision-making on those layers of the personality where life should be lived problem-free amidst the self-evident and the given if people are to be capable of dealing with more demanding situations. In other words, the displacement people suffer due to the shattering of their institutions is expressed as primitivization." Quoted in Heiner Keupp, *Lust an der Erkenntnis: Der Mensch als soziales Wesen*, Munich/Zurich, 1995, p. 105 ff. — ICRC translation

collapse of a State anywhere in the world is seen as a matter for the international community, since the international system as a whole is felt to be endangered if one of its members is seen to be no longer functioning.

In such cases, international reactions have not been manifested primarily through the States as such, either individually or together. This is because while the States clearly had the possibility of taking diplomatic or economic counter-measures (e.g. by breaking off diplomatic relations, withdrawing economic assistance, applying an arms embargo, etc.), such actions make little sense in the context of collapsed States. In practice, therefore, the counter-measures have come chiefly from the organized international community and, above all, the United Nations.[7] Basically, these reactions had to cope with the dilemma of choosing between two fundamental principles of legitimacy in international law: on the one hand, the sovereignty and equality of States and, on the other, the right of peoples to self-determination.

At one extreme, there was an invocation of the old-established practice and theory whereby the identity and continuity of the State cannot be called in question through any temporary loss of unified and effective authority. Furthermore it is also, of course, normal practice that the territory of a State which is no longer effectively functioning is, in principle, protected by the prohibition of violence under international law (in marked contrast to the position under traditional international law, where the territory would have been left open to conquest by powerful neighbours or other imperialist powers with expansionist ambitions).

At the opposite extreme, however, the right of peoples to self-determination was invoked as the basis for the intervention of the organized international community. The UN Charter begins with the words, "We, the peoples ..." and the right of self-determination, based on the UN Charter, has emerged as a fundamental principle of modern international law. In an opinion on Namibia, given in 1970 in relation to the illegal presence of South Africa in the territory concerned, the International Court of Justice had already declared that "the injured entity is a people which must look to the international community for as-

7 On this point, see Matthias Herdegen, *Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State"*, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 34, Heidelberg, 1996, p. 68 ff.

sistance".[8] It is interesting to note that, in the case of disintegrating States, the organized international community, or others acting in its name, consider that the invocation of human rights and the right to self-determination authorizes them to intervene in matters of internal affairs — a domain *per se* protected against outside intervention — with the object of restoring the State authority needed for the proper functioning of international law.

Let us now turn to a *pars pro toto* illustration of the very interesting practice of the Security Council in this connection, which we will sketch in greater detail and seek to analyse and evaluate.

Practice of the Security Council

In its reactions to the novel requirements of situations arising out of the collapse of States, the Security Council developed a practice based on a four-tier approach.

1. The most prominent feature of this practice was regular recourse to Chapter VII of the Charter. The landmark development was 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 within the meaning of Article 39 of the Charter. This followed Resolution 688 of 5 April 1991 relating to the Kurds of Iraq, in which the Security Council — referring also to the cross-border effects of internal abuses — held that serious breaches of human rights committed by a State against its own citizens constituted a threat to peace. In the case of Haiti, the Security Council, in a cautiously worded resolution,[9] ruled that a form of government irreconcilable with democratic principles represented a threat to peace under Article 39 of the Charter.

Thus, in line with the latest extended practice of the Security Council, it may be taken as given that the mere fact of serious and systematic breaches of human rights or gross infringements of the principle of internal democracy is sufficient to permit forceful intervention by the Security Council in the internal affairs of a State — at least in the case of a

8 Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971, p. 56.

9 Resolution 841 (1993) of 16 June 1993.

State in which government authority has for all practical purposes broken down.

2. Within the framework of Chapter VII of the Charter, the Security Council, in the cases of Bosnia-Herzegovina, Rwanda and Haiti, authorized the States, and, in the case of Somalia, the already deployed peace-keeping organization (UNOSOM II), to achieve their objectives, if necessary with the use of force.[10] What we see here is the Security Council employing peace-enforcement measures rather than the sanctions which the wording of the Charter specifically empowers it to impose. The reason for this, of course, is that in the aforesaid cases we are not faced with any (actual or potential) aggressor State which could be coerced into behaving in a certain way through sanctions. This means that as far as "failed States" are concerned the Security Council, acting in accordance with its own practice, can intervene to restore internal order, if necessary by military force, as soon as the threshold of a threat to peace under Article 39 of the Charter is reached. In such an eventuality, the Security Council is not obliged to obtain the consent of the State concerned. Such consent could hardly be granted by a "failed State" in the absence of any effective and representative government, but could at most be inferred from the higher interest of the people, by analogy with the civil law concept of *negotiorum gestio* or the criminal law provisions concerning assistance in emergencies.

3. In its most recent practice, the Security Council has interpreted its mandate broadly. Thus, the Council has considered itself competent not simply for maintaining security in the narrow police-keeping sense but also for securing transport infrastructure installations such as airports in order to permit humanitarian operations to be carried out by peace-keeping forces or NGOs, or for preserving safe areas which it has established for the civilian population. In various cases — most notably in Cambodia[11] — the Security Council has moreover taken peace-building action, in the form of far-reaching civil measures ranging from the demobilization of armed forces and steps to develop and consolidate the eco-

10 Resolution 794 (1992) of 3 December 1992, para. 10; Resolution 814 (1993) of 26 March 1993, para. 5; Resolution 837 (1993) of 6 June 1993, para. 5.

11 Cf. Trevor Findlay, *Cambodia — The Legacy and Lessons of UNTAC*, SIPRI Research Report No. 9, Oxford, 1995.

nomic and social infrastructure to the reform of governmental and constitutional structures.[12] Like Somalia, this was another instance in which the ability of the international community to take over complex administrative and political tasks in "failed States" was very much in evidence.[13]

4. Finally, it is interesting to note that, in cases such as those of Bosnia-Herzegovina, Somalia and other "failed States", the Security Council has regularly addressed all relevant parties to the conflict, though without specifically reminding the non-State players of their duty. It would appear, therefore, that — at least in connection with the situation of "failed States" — a door has opened which will allow the measures envisaged in Chapter VI of the Charter for inter-State relations to be used in the internal affairs of States as well.

Overall, it can be seen that the most recent practice of the Security Council with regard to "failed State" situations has not only permitted the States to apply various enforcement measures under a broad mandate but has also created, in the context of its mushrooming peace-keeping operations over recent years, a new normative, institutional and operative regime which far transcends the traditional method and which can be used, at least temporarily, to substitute for a collapsed system of governance without the consent of the State concerned. Thus, following its own understanding and supported by the approval of the community of States, the Security Council has fundamentally transformed the role it was originally intended to play when the UN was established. Having started out as a sort of policeman in the service of international security, the Council now has the subsidiary function of a supranational "government and administration" body supporting the States in performing their internal tasks (Article 2, para. 7, of the Charter).

Protection of human rights

Another significant aspect of the problem of "failed States", seen from the point of view of international and constitutional law, is the

12 Boutros Boutros Ghali, *Building Peace and Development 1994 — Annual Report on the Work of the Organization*, New York, 1994, p. 147 ff., esp. 265 ff.

13 Boutros Boutros Ghali, *op. cit.* (note 12), p. 235 ff.

question of the protection of human rights.[14] The International Conference on Human Rights, held in Teheran in 1968, and — unfortunately not with sufficient clarity — the World Conference on Human Rights, held in Vienna in 1993, both stressed that the fundamental notion of the protection of human dignity without discrimination had found recognition in international law in two sets of regulations which, though separate, *in concreto* overlap and are mutually complementary. These are, on the one hand, the protection of human rights in general and, on the other, international humanitarian law as the law governing armed conflicts.

1. Protection of human rights in general

In failing or failed States, human rights are largely ineffective. Historically, these rights emerged from the traditions of constitutional law and, especially since the Second World War, they have gradually been incorporated into international treaties and customary law. Meanwhile, at the universal and regional levels, a whole host of procedures, mechanisms and institutions have been developed for the protection of human rights. However, the example of "failed States" clearly shows that the protection of human rights provided for in international law is bound up with and dependent on the proper functioning of the State. The so-called "first generation" of human rights was directed essentially against the arbitrary, improper and excessive use of authority by the State. These civil and political rights are designed to protect the individual against State power which, by definition, no longer exists in the "failed State". The second generation of social, economic and cultural rights is, by its own internal logic, a "programmatic law". Thus, they need to be given legislative shape and to be implemented internally, a situation which is inconceivable without the "acceptance" and financial and organizational support of State bodies which are still capable of functioning. As a general rule, the mechanisms to monitor respect for both types of human rights on the international level are simply of a subsidiary nature. They are an extension of prior activity by the State. Hence human rights are asserted primarily against actions by the

14 See Dietrich Schindler, "The Protection of human rights and humanitarian law in case of disintegration of States", *Revue Egyptienne de Droit International*, 1966, p. 1 ff. See also from the same author, "Humanitarian interference and international law", *Essays in Honour of Wang Tieya*, Dordrecht/Boston/London, 1993, p. 689 ff.

State authorities, or serve to remind the authorities of the need to carry out their relevant duty. However, where the State and the administrative infrastructure have collapsed, these rights can offer at best peripheral protection.

2. International humanitarian law

a) Applicable law

In the field of international humanitarian law, the situation is more favourable. While this branch of law grew out of the old laws of war and is intended primarily for armed conflicts between States, it is increasingly coming to deal with internal armed conflicts.[15] Article 3 common to the four Geneva Conventions of August 1949 stipulates as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court,

15 Hans-Peter Gasser, "International humanitarian law", in Hans Haug, *Humanity for All*, Henry Dunant Intitute/Paul Haupt, Berne/Stuttgart/Vienna, 1993, pp. 491 ff., in particular pp. 554 ff.

> affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

This rule was extended in 1977 by Protocol II additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. Its scope is defined in Article 1, para. 1, as follows:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which ... take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

A particular advantage of the rules of international humanitarian law applicable to internal armed conflicts is that — unlike human rights law — they call directly to account not only State organizations but also non-State players, whether individuals or groups. However, it must be pointed out, of course, that the extended protection offered by Additional Protocol II is of no practical consequence in failing or failed States. In such States, hostilities are not directed against the government "armed forces" referred to in the Protocol since, by definition, any such military power has ceased to exist. Moreover, owing to the collapse of government authority, the fighting is of an "anarchic" character rather than being carried on in a sustained and concerted manner by "organized... groups... under responsible command" from a part of the State territory under their control. In this case, therefore, Protocol II can be of little service.

Accordingly, when discussing the possible relevance of international humanitarian law to armed conflicts in "failed States", we are thinking primarily of Article 3 common to the four Geneva Conventions of 1949. Unlike Protocol II, this provision is not exclusively intended for use in civil war situations, where rebel forces are fighting the government in order to seize power for themselves or to secede. Conflicts between groups of the same population also fall within the scope of Article 3. At the same time, it is necessary to bear in mind that, in accordance with the wording of this provision, the fighting must have reached the threshold of an "armed conflict" and that the provision itself is applicable only to the "parties" to such a conflict. However, these requirements are to be understood in a broad sense when it comes to practical application. In general, the international humanitarian law treaties are to be interpreted and handled in such a way as to fulfil their aim and spirit, namely assistance and protection for the victims of armed conflicts.[16] Furthermore, in the case of Nicaragua, the International Court of Justice held that the principles laid down in Article 3, which have a customary and mandatory character, reflect "elementary requirements of humanity" which must be respected under all circumstances.[17] This again implies a much wider frame of reference than that of conventional civil war situations. Moreover, it should not be overlooked that the Security Council has on various occasions recalled the need to respect international humanitarian law with reference to "failed State" situations.[18] Finally, the latest developments in international criminal law show that increasing weight is being given to humanitarian needs in internal armed conflict. For example, in its decision of 2 October 1995 on the Tadic case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ruled as follows: "A State-

16 See Jean Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958, pp. 35 ff., and Y. Sandoz/C. Swinarski/B. Zimmerman (eds.), *Commentary on the Additional Protocols to the Geneva Conventions*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, pp. 1348 ff.

17 Judgment in the Case concerning Military and Paramiltary Activities in and against Nicaragua, I.C.J. Reports 1986, pp. 14, 122 ff.

18 See the following Security Council Resolutions: 788 (1992) of 19 November 1992; 813 (1993) of 26 March 1993; 911 (1994) of 21 April 1994 and further resolutions on Liberia; 794 (1992) of 3 December 1992 and 814 (1993) of 26 March 1993 on Somalia; 1181 (1998) of 13 June 1998 and 1231 (1999) of 11 March 1999 on Sierra Leone.

sovereignty approach has been gradually supplanted by a human being-oriented approach ... It follows that, in the area of armed conflict, the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."[19]

It may be noted, therefore, that the principles laid down in Article 3 common to the Geneva Conventions may also be applied in the case of failing and failed States and that the behaviour of parties to internal armed conflicts are to be measured against this "minimum yardstick".[20]

b) Implementation problems

We now turn to the question of the extent to which these provisions can be *implemented* in practice. Once more, we come up against specific difficulties arising from the collapse of the authority of the State. International humanitarian law relies heavily on the hierarchical structures of the State — and above all the military command — both for dissemination and for implementation. This can be seen already from the wording of Article 1, para. 1, of Protocol II, which refers to "organized groups" which exercise such "control" over a part of the sovereign territory of the State "as to enable them to carry out sustained and concerted military operations and to implement this Protocol". However, respect for this provision and the success of all the arrangements for the implementation of international humanitarian law both depend on the existence of a military chain of command and a compulsion to comply with international law obligations as required by orders and discipline. This does not apply in the case of an anarchic conflict involving loosely organized clans and other "units", which may be parts of a "private army" or perhaps just bands of plundering, pillaging killers, none of them bound by any professional code of discipline or honour. Where group structures have completely broken down and the fighting is atomized, every combatant is his own commander and the traditional mechanisms for the implementation of international humanitarian law are wholly ineffective.

19 International Criminal Tribunal for the former Yugoslavia, Prosecutor *v.* Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, I.L.M., Vol. 35, 1996, p. 54, para. 97, of the decision.

20 The term used by the I.C.J. in the Nicaragua Judgment, *op. cit.* (note 17), p. 114. See also Ulrich Beyerlin, *Die humanitäre Aktion zur Gewährleistung des Mindeststandards in nicht-internationalen Konflikten*, Berlin, 1975.

Is it possible then for us to find alternative candidates to bear the responsibility of disseminating and implementing international humanitarian law, for example among kith and kin? Is it necessary to develop new and simpler forms of communication? The traditional procedure was to familiarize the military and civilian élites with the complex codes of law and then to have these "cascaded" down in simpler form to those below. Is it not our task to look for simplified, expressive and flexible ways of moulding and transmitting the "message" in such a way that individuals can be reached and motivated? Could this not be done without relying solely on assistance from ICRC delegates "in the field" but also — for security reasons — by radio and television or in the classroom? For example, in Russia, the ICRC has attempted to associate the basic principles of international humanitarian law with Russian literary classics, such as Tolstoy's *War and Peace* (the "MINUNI" project for the university level) or "Legends of the Caucasus" ("MINEDUC" for the primary school). In this way, the familiar figures, events and images of the local culture serve to transfer the basic universal "ethos" of international humanitarian law into the diverse everyday life, experience and dealings of peoples, groups and classes.

Responsibility under international law

The fourth question which needs to be raised in our preliminary legal analysis concerns responsibility for breaches of international law committed in the context of "failed State" situations. Two forms of responsibility must be distinguished;[21] the responsibility of the State to other subjects of international law and the criminal responsibility of the individual for his actions under international law.

1. State responsibility under international law

With regard to the first problem — the liability of the State for violations of international law on the international level — it must be assumed that, by definition, the legal capacity of the "failed State" continues to exist. Though the State is for all practical purposes incapable of act-

21 See Rudolf L. Bindschedler, "Völkerrechtliche Verantwortlichkeit als Verbrechen", Bernard Dutoit/Etienne Grisel (eds), *Mélanges Georges Perrin*, Lausanne, 1984, pp. 51 ff.

ing, it continues to have rights and obligations. However, in principle, current international law holds that a State cannot be held liable for any breaches if it no longer has institutions or officials authorized to act on its behalf.[22] In particular, the State cannot be held responsible for not having prevented offences against international law committed by private individuals or for not having called them to account for their conduct.[23] The reason for this is that the State does not have the necessary power to act.[24]

Yet this principle requires three qualifications. Article 8 bis of the draft produced by the International Law Commission on the codification of State responsibility provides that "the conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".[25] Exceptionally, moreover, a State may be held liable for the acts committed by an insurrectional movement if it succeeds in establishing itself as the government of the State or in establishing a new State, i.e.

22 See Jörg Manfred Mössner, "Privatpersonen als Verursacher völkerrechtlicher Delikte", und Joachim Wolf, "Zurechnungsfragen bei Handlungen von Privatpersonen", *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*, 1985, pp. 232 ff.

23 Giuseppe Sperduti, "Responsibility of States for activities of private law persons", Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 10, North-Holland Publishing Company, Amsterdam/New York/Oxford, 1987, pp. 373 ff.; Astrid Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater*, Baden-Baden, 1992, pp. 205 ff.

24 See Christian Tomuschat, "Gegenwartsprobleme der Staatenverantwortlichkeit in der Arbeit der Völkerrechtskommission der Vereinten Nationen", Georg Ress und Torsten Stein (eds.), *Vorträge, Reden und Berichte aus dem Europa-Institut der Universität des Saarlandes*, No. 311, in particular p. 30: "Eine reine objektive Haftung würde allen Traditionen widersprechen. Die Staaten müssen sich in angemessener Weise bemühen, ihre bestehenden Verpflichtungen zu erfüllen und Schaden von fremden Staaten fernzuhalten. Von einer Verletzung kann immer nur die Rede sein, wenn nicht die gebotene Sorgfalt aufgewandt wird." — See also the decision of the I.C.J. in the Corfu Channel case, which showed that the (Albanian) government could have complied with its obligations of care and information and that the State was liable. Corfu Channel Case, I.C.J. Reports 1949, pp. 18 ff.; and Andrea Gattini, *Zufall und* force majeure *im System der Staatenverantwortlichkeit anhand der ILC-Kodifikationsarbeit*, Berlin, 1991, p. 262.

25 Draft articles provisionally adopted by the Drafting Committee of the International Law Commission, A/CN.4/L.569, 4 August 1998.

in the event of continuity of the subject.[26] And, finally, a government is also free to assume express responsibility for the acts of private individuals after it has overcome the emergency situation.[27]

2. Responsibility of individuals under criminal law

Having seen that, in principle, the "failed State" does not in itself appear liable for breaches of international law, we now come to the second question, namely whether individuals can be held criminally liable for such breaches. We are faced here with the relatively new phenomenon of international law itself providing for the punishment of certain kinds of human conduct or calling on the States to prosecute such offences. For these cases, it regularly stipulates a universal jurisdiction. This means that if such crimes against international law are committed in a "failed State" where the judiciary has collapsed, prosecution and punishment may be effected by any third party State (or, where so empowered, an international organization such as the United Nations).[28] Accordingly, in the event of serious offences against peace and human rights, as well as certain crimes of a specifically cross-border nature, criminal jurisdiction is extended to the whole community of States under the principle of universal law (*Weltrechtsprinzip*).

26 Article 15 reads as follows:

"1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of Articles 5 to 10.", *Ibid.* — See also Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part 1, Oxford, 1983, pp. 177 ff., and *Yearbook of the International Law Commission*, 1975/II, pp. 93 ff., 99 ff., 104.

27 Article 15a reads: "Conduct which is not attributable to a State under Articles 5, 7, 8, 8a, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own." *Op. cit.* (note 25).

28 After 24 Pakistani soldiers of the UN force in Mogadishu were lured into an ambush and killed, the Security Council confirmed "that the Secretary-General is authorized under resolution 814 (1993) to take all necessary measures against all those responsible for the armed attacks ..., including against those responsible for publicly inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment." Resolution 837 (1993) of 6 June 1993, para. 5.

In recent years, moreover, international criminal law has been significantly strengthened through the establishment of ad hoc tribunals to prosecute persons responsible for crimes committed in the territory of the former Yugoslavia (1993)[29] and in Rwanda (1994).[30] Then came a milestone in the development of international law when on 17 July 1998 a diplomatic conference in Rome adopted the statute of an *International Criminal Court* (ICC) with universal jurisdiction, the treaty to come into force as soon as it has been ratified by 60 States.[31] These international criminal courts guarantee the independence and impartiality of the proceedings, a situation which may not, as a rule, be expected of a national judge confronted by the adherents of the "friendly" and "enemy" camps.[32] A new and particularly interesting development is that in all three cases — unlike the war crimes tribunals at Nuremberg and Tokyo after the Second World War — international jurisdiction has also been established for internal conflicts. The Rwanda Tribunal is expressly competent to judge serious offences against the minimum standards laid down for internal armed conflicts in the Article 3 common to the Geneva Conventions.[33] As far as the jurisdiction of the Tribunal for the former Yugoslavia is concerned, this competence was stated in the opinion handed down by the Appeals Chamber in the decision of 25 October 1995 in Prosecutor *v.* Dusko Tadic.[34] The Rome Statute expressly provides for the prosecution of

29 Resolution 827 (1993) of 25 May 1993,see I.L.M., Vol. 32, 1993, pp. 1203 ff.

30 Resolution 955 (1994) of 8 November 1994 and Statute of the ICTR,see I.L.M., Vol. 33, 1994, pp. 1600 ff.

31 See Christian Tomuschat, "Das Statut von Rom für den Internationalen Strafgerichtshof", *Die Friedens-Warte*, Vol. 73, 1998, pp. 335 ff.

32 See Daniel Thürer, "Vom Nürnberger Tribunal zum Jugoslawien-Tribunal und weiter zu einem Weltstrafgerichtshof?", *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1993, pp. 491 ff.

33 In accordance with Article 4 of the Statute of the Rwanda Tribunal (*op. cit.*, note 30) — and this is its special innovation — the Tribunal is authorized to prosecute serious offences against Article 3 common to the Geneva Conventions and against Additional Protocol II. In contrast to the Tribunal for the former Yugoslavia, there is in this case a clear extension of the responsibility of the individual under international criminal law into the purely internal domain. For this and interesting parallel developments with regard to the law on chemical and biological-bacteriological weapons or mines, see especially Theodor Meron, "International criminalization of internal atrocities", *AJIL*, Vol. 89, 1995, pp. 554 ff.

34 *Op. cit.* (note 19), para. 89 in connection with para. 137. The Tribunal held, *inter alia*, that civil wars have become more frequent and more cruel and that third party States are also directly or indirectly involved. In addition, greater attention had to be paid to the protection of human rights since the adoption of the Universal Declaration of Human Rights of 1948.

breaches of Article 3 common to the Geneva Conventions,[35] with situations of "internal disturbances and tensions" being specifically excepted.[36] Other serious breaches of the laws and customs of war applicable in internal armed conflicts are also designated as crimes subject to the jurisdiction of the ICC.[37] With regard to violations of Article 3 common to the Geneva Conventions, it is stated that: "Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."[38] The jurisdiction of the ICC is complementary to national criminal jurisdictions.[39] In principle, the competence of the ICC applies only where the State itself is unwilling or unable to carry out the investigation or prosecution.[40] We can see in this the struggle to reach a compromise between State sovereignty and the concern of international law to bring about respect for certain fundamental norms for the protection of human beings. The result is a strengthening of the tendency to take decisive action directly on the internal structures of "failed States" through norms and organizational measures. How effective the ICC will be is going to depend on the number of States which decide to ratify it,[41] as well as on how the provisions are interpreted and applied in specific cases.

In can be seen from the foregoing that, in the field of international criminal law too, further inroads have been made into the internal sphere of competence of the State. In particular, the Tribunals for the former Yugoslavia and for Rwanda have also been created to take the place of a judiciary which has collapsed or is no longer functioning, i.e. to fill a "sovereignty vacuum". This is in contrast to the war crimes tribunals established after the Second World War, which were chiefly intended to counter

35 Article 8.2(c) of the ICC Statute.

36 "... situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Article 8.2(d) of the ICC Statute.

37 Article 8.2(e) of the ICC Statute. Exception is made for "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". Article 8.2(f), first sentence. Application is described as follows: "It applies to armed conflicts that take place in the territory of the State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." Article 8.2(f), second sentence.

38 Article 8.3 of the ICC Statute.

39 *Ibid.*, Article 1.

40 *Ibid.*, Article 17.

41 As at 1 November 1999, the Statute had been ratified by Senegal, Trinidad and Tobago, San Marino and Italy.

the misuse of State sovereignty whereby the representatives of government authority were given immunity against prosecution. Though the deterrent effect of individual criminal liability must not be overestimated, this principle represents one of the most significant powers of international criminal law in the chaotic circumstances of "failed States". It subsists even in the context of States which are no longer capable of functioning and where, as we have seen, the responsibility of the State is essentially ruled out.

III. Catalyst for the present state of international law and prospects for further development

> If a country is attacked from the outside, the people draw closer together. In an internal conflict, the beastly nature of people is revealed. They turn out to be able to kill children.
>
> Elderly woman in Georgia

> I would like to say how important the level of awareness among people is to enforce a law. There are a lot of people who unfortunately do not know about these rules, these laws. They become victims themselves ... when harm is inflicted on them. They think this is normal. They think this is how it should be, that this is life, because they are ignorant.
>
> Woman in Lebanon whose husband is missing

So far, we have been trying to describe and analyse the phenomenon of the "failed State" and to evaluate it in terms of the current framework of international law. The time has now come to conclude this task with a look at the prospects for the future. Has the end of the Cold War — like the end of the First and Second World Wars — brought us up against a change of paradigm in the international order? Do we now stand, as is sometimes asserted, on the threshold of a new epoch or will the emerging developments prove to be of a more gradual evolutionary nature? In this connection, we shall seek to add a number of observations with regard to the phenomenon of the "failed State". In our introduction, we noted that in "borderline situations", like the present one, international law and constitutional law can only be considered as a whole. Returning to this theme, I should like to raise two questions:

1. In the light of the developments discussed, how does international law stand at present and how could it be reinforced to respond more effectively to the challenges set forth in this article?

2. What can be done internally to establish stable and enduring constitutional structures in States where authority has been eroded or has collapsed altogether?

Development trends at the international level

From the international perspective, we will present a number of remarks on the general trends now apparent, focusing on the themes "centrality of the State", "transitional administrations", "human security" and "humanitarian action". Then, *de constitutione ferenda*, we will raise a number of questions with regard to possible reforms within the international system.

1. General trends in practice

a) Despite all the talk of a new world order, the first and main result of our discussion seems to be that the traditional community of States has responded to the "failed State" problem by an attitude of consolidation and stabilization. The centrality of the State as the basic building block of the international order has been confirmed. Even when States have collapsed, their borders and legal personality have not been called in question. Such "fictitious" States have not lost their membership of international organizations and, on the whole, their diplomatic relations have remained intact. Though they are unable to enter into new treaty obligations, the international law treaties they have concluded remain in force. Moreover, there has never been any question of forcible ("humanitarian") intervention by neighbouring or other militarily stronger States.

b) Nevertheless, though the predominant impression is one of stability, there are also signs of dynamic development. Foremost among them is the establishment of various transitional administrations by the UN Security Council. There is nothing new about institutions of this kind. For example, the League of Nations placed various areas, such as the Saarland and Danzig, under international control. Early instances from the UN period were the trusteeship over West Irian and the plans for the internationalization of Jerusalem and Trieste. In recent years, however, such

administrations have not only increased in number but have also gained considerably in quality and scope. In the UN Secretary-General's *Supplement to an Agenda for Peace*, we read:

> "The negotiated settlements involved not only military arrangements but also a wide range of civilian matters. As a result, the United Nations found itself asked to undertake an unprecedented variety of functions: the supervision of cease-fires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of weapons; the design and implementation of de-mining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the design and supervision of constitutional, judicial and electoral reforms; the observation, supervision and even organization and conduct of elections; the coordination of support for economic rehabilitation and reconstruction." [42]

The multifunctional peace-keeping operations hitherto deployed by the UN have met with varying degrees of success: some, such as the UNTAC operation in Cambodia, were by and large successful, at least up to the holding of the elections in 1993; others, such as UNOSOM I and II were more problematic. Even if suitable models should need to be tried out again in future cases, it would seem that this area offers great potential for the development of international law which could, under favourable circumstances, be fulfilled increasingly not only on the universal but also on the regional level.

c) A further shift of emphasis in the most recent practice of the UN and especially the Security Council relates to the question of human security. Here, it seems that the threshold for intervention in the internal affairs of a State under Article 39 and Article 2, para. 7, of the Charter has been lowered. Intervention would now appear to be justified in the view of the international law community if there are systematic human rights violations or a serious disregard of the obligation to make democratic reforms of government. This is the recommendation of the

42 Boutros Boutros Ghali, *Supplement to an Agenda for Peace*, United Nations, New York, 1995, p. 11.

Commission on Global Governance in a recently published book *Our Global Neighbourhood*:

> "Where people are subjected to massive suffering and distress, however, there is a need to weigh a state's right to autonomy against its people's right to security. Recent history shows that extreme circumstances can arise within countries when the security of peoples is so extensively imperilled that external collective action under international law becomes justified. Such action should always be taken as far as possible with the consent of the authorities in the country but this will not always be possible... It is important that any such action should be a genuinely collective undertaking by the world community — that is it should be undertaken by the United Nations or authorized by it and carried out under its control, as the UN so vigorously tried to ensure in the former Yugoslavia."[43]

This might be the case if the Security Council — which has been accorded such exaggerated significance in the post-Cold War euphoria — were to be rendered once again incapable of action and largely supplanted by the General Assembly through a resurrection of the "Uniting for peace" resolution.

d) Another new approach apparent in the latest practice of the UN is the way in which the political organs of the organization or its peace-keeping forces have taken to handling humanitarian operations. Thus, in various cases, the UN has applied mandatory sanctions against a State under Chapter VII of the Charter while at the same time conducting humanitarian operations as a mark of neutrality and impartiality. The resulting difficulty in identifying its true role leads to the UN being seen (at least locally) in an unfavourable light. In quite general terms, it might be asked whether the UN is not creating an unfortunate combination of *jus in bello* with *jus ad bellum* and whether it might not be better in future to seek new arrangements for a "division of powers" with the specifically humanitarian organizations and institutions.

Questions concerning the relationship between humanitarian and political action will arise in future in a far wider and more fundamen-

43 The Commission on Global Governance, *Our Global Neighbourhood*, Oxford, 1995, pp. 71 ff.

tal context. The load of the many humanitarian projects added to the UN's other operations was perhaps heaviest during the period in office of Secretary-General Boutros Boutros Ghali and is demonstrated in particular by the cases mentioned here. In recent years States themselves have increasingly emerged to take over the role of "humanitarian players". Apart from the "minimalists" who are satisfied by merely *not* violating humanitarian law, there are also "maximalists" who are fired by the ambition of actively helping to end the use of force and to settle conflicts at the same time as providing humanitarian aid.

In Kosovo, NATO has even gone so far as to conduct what is sometimes called a "humanitarian war". In this new situation the question arises whether the aims, roles and methods of certain humanitarian players need to be reconsidered. With this in mind, the following remarks could be made:

- The goals of humanitarian players, namely to protect and assist the victims — all victims — of armed conflicts have not changed.
- Even though there is a tendency for States and international organizations to give a more human perspective to political action, care must conversely be taken that the humanitarian operations of institutional organizations specially set up for such work are not politicized. The actual methods used by humanitarian players are "non-political", i.e. politically neutral, and their task is to protect and assist victims of armed conflicts *impartially,* i.e. taking into consideration only the degree of suffering and need.
- In order to carry out their specific tasks convincingly, the humanitarian players require independence. They should not become instruments of States, international organizations or other political powers which would absorb them into their (political and military) spheres of activity.
- In the modern political environment the independence of the humanitarian processes can no longer be secured by "splendid isolation". Nowadays it is far more important that humanitarian players be regarded as autonomous when carrying out their specific mandates in conjunction with the many other players who share the common goal of putting an end to force and creating the conditions required to establish a stable and just order. Today political practice faces a special challenge, both long-term and short-term, to develop mechanisms and procedures which will allow a coordination of political, military,

humanistic and judicial activities and, from a "holistic" point of view, preserve the scope needed to work autonomously.

- Finally, it is important that politics should be aware of its original basic task, namely to prevent and combat the causes of conflict. Humanitarian activism is not a substitute for the primary responsibility of the State to guarantee a peaceful and equitable life together.

2. Proposals for institutional reform

At the horizontal level, the system has thus shown a general strengthening of the trend towards mutual interdependence and, in the vertical dimension, a certain expansion in the responsibilities of the UN. Nevertheless, it might still be asked whether the time has not come for constitutional or structural changes of a more far-reaching nature.

a) One suggestion is that responsibility for States in complete disarray should be transferred under a new mandate to the UN Trusteeship Council, now that the last trust territory has achieved independence (Palau, 1994). This would obviously require an amendment to the Charter. Alternatively, would it not be possible to set up a new institution separate from the tradition of decolonization, with the task of drawing together peoples which are at odds with each other and supporting efforts for the establishment of State structures?[44] Such an institution could take the form of an organ or agency of the UN, an international organization or perhaps even an NGO along the lines of the ICRC. In this case, it would be important to give appropriate representation not only to the African and Asian States but also to the former European colonial powers in view of their specific experience in this field.

b) Should a rapid reaction force be made available to the Security Council — as the Secretary-General has asked — in order to permit timely peace-keeping or peace-enforcement operations to be carried out in emergencies?

44 See Christian Tomuschat, "International crimes by States: An endangered species?", Karel Wellens (ed.), *International Law: Theory and Practice*, Essays in Honour of Eric Suy, The Hague/Boston/London, 1998, pp. 253 ff., 269 f.

Measures for the re-establishment of State institutions

From our survey of present and possible future developments on the international level it is clear that, while there has been a certain evolution, the overall picture is one of efforts to maintain and preserve the State as the central reference point of the international system. However, while the State as such has seen its existence justified, it still remains to be asked what ways and means can be used at the internal level to re-establish failed or failing States. As the causes of the crisis are usually endogenous in nature, it follows that internal forces should be harnessed for the process of recovery. The cases of Japan and Germany after the Second World War cannot be adduced as precedents for modern practice as there is no comparison with the resources and energies then available to these countries for their constitutional, social and economic reconstruction.

Two models may be proposed for the reconstitution of today's "failed States". The first of these is the formula adopted by England after the Civil War in the seventeenth century and by many continental countries after the Thirty Years War: i.e. the establishment of *Leviathan* to overcome and tame the internal powers that be, not as an end in itself but rather to prepare the way for the later establishment of a liberal power-sharing constitutional State. In the forefront of any such enterprise is the need to secure the State monopoly of power, with top priority in time and resources being assigned to the police and judiciary. The history of the development of criminal law in Germany as a means to overcome the old feudal system offers interesting parallels in this connection.[45] The apparatus established by newly stabilized States for the exercise of authority must be gradually extended in order to provide an effective system of public services. To promote the welfare of the people, this system will also permit the resumption of relations formerly maintained with international development and social work organizations.

The second approach would be an attempt of the people to rebuild the State progressively from the ground up through self-established structures within the framework of civil society. In this way, the consciousness of the public and the will of the State could come together and crys-

45 See Eberhard Schmidt, *Einführung in die Geschichte der deutschen Staatsrechtspflege*, 3rd ed., Göttingen, 1983, pp. 47 ff., 87 ff.

tallize around various points, for example in such domains as transport (roads, ports, airports), health (hospitals), education, agriculture, local government or other tasks and institutions of the public and private infrastructure and thus mobilize popular energies in favour of reconstruction. Partial arrangements could give an impetus to the creation of a comprehensive public sector and representative institutions, which — whether on a federal or decentralized basis — would alone permit government to acquire the necessary legitimacy in the long term.

History provides us with examples of both forms of nation-building through a new social contract and legal engineering. However, neither could be realised in a pure form. The ideal of a spontaneous upsurge and coordination of social forces is a rather romantic notion: free and creative forms of social cooperation tend to flourish not so much in the ruins of a "failed State" as in situations where free scope is available within an organized whole. One authority has written: "Civil organizations depend upon the state for the creation of certain basic conditions. This implies that associational life will not automatically spring up where the state's collapse is beyond the control of the political elite. Rather, civil society is most likely to fill institutional gaps where the retreat of the state is intended, planned and graduated."[46]

On the other hand, for reasons of human rights and self-determination, *Leviathan* is a highly uninviting prospect, even as a stop-gap. What we need to find are two things: firstly, combined solutions which permit the creation of gradually civilizing forms of human coexistence and, secondly, the will to achieve political cohesion. Both of these are crucial in bringing about a modern State, driven by principle and based on tolerance and the ability to compromise. At the same time, it is necessary to ensure the promotion of a political culture and a sense of collective identity. As a rule, the external forces of public and private life can provide nothing more than help towards self-help.

The problem of the "failed State" which we have considered in this article may perhaps, with hindsight, come to be seen as nothing more than an isolated episode in the history of international law.

46 Michael Bratton, "Beyond the State: Civil society and associational life in Africa", *Associations Transnationales*, 1991, p. 137.

Nevertheless, this complex phenomenon, which is so difficult to fit into our traditional framework of legal thought, poses fundamental challenges to the order of international and constitutional law. Moreover, we have to ask whether these cases of the collapse of States — however sporadic they may appear on the surface — are not the expression of a much deeper potential threat to our civilization. Faced with the collapse of law and order and political civilization, we are forced to ask whether such autistic aggression is a basic human instinct.

In an essay written in 1930, Freud wrote: "*Homo homini lupus*. Who in the face of all this experience of life and history, will have the courage to dispute this assertion?"[47]

He continued: "The existence of this inclination to aggression, which we can detect in ourselves and justly assume to be present in others, is the factor which disturbs our relations with our neighbour and which forces civilization into such a high expenditure [of energy]. In consequence of this primary mutual hostility of human beings, civilized society is perpetually threatened with disintegration. The interest of work in common would not hold it together; instinctual passions are stronger than reasonable interests."[48]

Freud concludes: "This aggressive instinct is the derivative and the main representative of the death instinct which we have found alongside of Eros and which shares world-dominion with it. And now, I think, the meaning of the evolution of civilization is no longer obscure to us. It must present the struggle between Eros and Death, between the instinct of life and the instinct of destruction, as it works itself out in the human species. This struggle is what all life essentially consists of, and the evolution of civilization may therefore be simply described as the struggle for life of the human species."[49]

Though its fragility is regularly revealed, the State based on the rule of law, thanks to the force of effective authority and the legitimacy thereof, has largely been able to control the destructive instincts of some sections of mankind and to provide support for the blossoming of the constructive "instinct of life". As far as civilization is concerned, its contribu-

47 *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Toronto 1961 (reprinted 1978), Vol. XXI, p. 111

48 *Ibid.*, p. 112.

49 *Ibid*, p. 122.

tion, together with that of international law, has been to bring about objective systems of order separated and distanced from group identities. Our own modern State system has emerged out of the many different sources of power of the mediaeval empire. However, the age which now stands before us will be marked by a steady waning of the old sovereign State[50] and could lead to a new proliferation and fragmentation of socio-political forces. Thus, one of the main challenges will be to transpose the achievements of the constitutional state system to the international level, so that mankind is saved from sliding back into the barbarity of the past and that today's "failed States" remain an isolated phenomenon.

Can we draw any general conclusions from all of this? One interesting point is that the borderline situations we have been dealing with bring back into clear focus the civilizing value of the State as a source of its own internal law and order and as a member of the international community based on the rule of law. Particularly instructive also was the observation that international law is consistently striving to ensure recognition for the statehood of "failed States" and to restore their institutions.

●

Résumé

L'« État déstructuré » et le droit international

par DANIEL THÜRER

L'« État déstructuré » ("failed State") est caractérisé par l'absence de toute structure officielle qui soit capable de garantir l'ordre et la justice. Un « État sans gouvernement » est toujours le résultat de situations de violence non-contrôlée qui empêchent les autorités constituées de fonctionner correctement. Le phénomène n'est certes pas nouveau, mais les quelques exemples actuels d'« États déstructurés » rappellent la fragilité de tout ordre constitué, de l'État du droit. L'auteur examine les problèmes posés par les États sans gouvernement, tant sous l'angle du droit international que sous celui des

50 Christoph Schreuer, "The waning of the sovereign State: Towards a new paradigm for international law?", *European Journal of International Law*, 1993, pp. 447 ff.

principes généraux du droit constitutionnel. Il s'intéresse particulièrement au comportement de la communauté internationale face à ces situations. Est-il concevable que, dans de tels cas, les (autres) États ou les Nations Unies puissent assurer un respect minimal de la dignité et de la sécurité de la personne humaine ? Quelles sont les possibilités pratiques pour mettre en œuvre les garanties accordées par les traités relatifs aux droits de l'homme ou par le droit international humanitaire ? L'auteur arrive à la conclusion que les quelques exemples de "failed States" n'annoncent pas la fin de l'État en tant que tel. Toutefois, beaucoup de questions restent posées, qui demandent une réponse, afin de permettre une évolution des institutions tenant compte des contraintes de notre temps.