Failed State

Prof. Daniel Thürer*

The term Failed State has only recently entered into international legal jargon. It generally refers to the collapse and dissolution of States. These processes have lately become relatively frequent and are symptomatic of today's condition of the community of States and the modern-day system of international law. Examples commonly cited include Somalia, torn apart by civil wars since 1990, Liberia and Sierra Leone, which have both been racked by small-scale conflicts throughout the 1990s, Bosnia-Herzegovina in the early days of its independence, Rwanda at the time of the massacres and genocide, or, more recently, Sudan, a country which has in recent years been devastated by three conflicts. Although the discussion about the Failed State phenomenon has only been lead since the end of the Cold War, there are also cases dating from before that time: 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 been hard to govern since independence was achieved in 1960. The same themes were evident in the chaotic power struggles in China during the 1930s and they can be traced back further still, all the way to the Thirty Year's War in seventeenth-century Europe.

The political and legal 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. A State is usually considered to have failed when the power structures providing political support for law and order have collapsed. This process is 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:

* Dr.iur., Dr.rer.publ.h.c., LL.M. (Cambridge), Chair for Public International Law, European Law, Public Law and Comparative Constitutional Law and Head of the Institute of Public International Law and Comparative Constitutional Law at the University of Zurich, Switzerland

„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."

Hence, three elements can be said to characterize a Failed State from the political 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 is one of an implosion rather than an explosion of the structures of power and authority, of a disintegration and destructuring of States rather than a dismemberment. Secondly, there is the internal aspect, namely the collapse of the political and legal systems. The emphasis here is on the total or near total breakdown of structures guaranteeing law and order 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. Thirdly, there is the external 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 the point of view of international law it can be said that a 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 that there is in fact no body able to commit the State in a legally binding way, for example, by concluding an agreement.

The sociological perspective

Sociologically, the Failed State 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". The police, judiciary and other bodies serving to maintain law and order in the State 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. The monopoly of power as a basic function of the State is destroyed and society reverts to that primal condition of *bellum omnium contra omnes* posited by Hobbes. The case of Bosnia-Herzegovina illustrated this 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 spoke of the whole society – adults, young people, and children alike – falling into the grip of a collective insanity following the breakdown of State institutions. These internal conflicts are characterized by a highly unpredictable and explosive dynamic of their own, as well as by a radicalization of violence, which stand in stark contrast to the politically guided and systematically escalated use of military 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.

Practice of the Security Council

The international order, and especially international law, does not simply leave Failed States to their fate. On the contrary, the 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 no longer functioning. In practice, mainly the organized international community and, above all, the Security Council of the United Nations, reacted to a Failed State situation. In its reactions to 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 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 reference was preceded by Resolution 688 of 5 April 1991 relating to the Kurds

of Iraq, in which the Security Council – referring also to 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 also, the Security Council, in a cautiously worded resolution (Resolution 841 of 16 June 1993), 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 this extended practice of the Security Council, 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 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 units (UNOSOM II), to achieve their objectives, if necessary with the use of force. In these cases the Security Council employed peace-enforcement measures rather than sanctions which the wording of the Charter specifically empowers it to impose. This practice is generally justified by the fact that in the aforesaid cases there is no (actual or potential) aggressor State which could be coerced into behaving in a certain way through sanctions. Thus, as far as Failed States are concerned, the Security Council may 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 consent of the State concerned is not needed, as it could hardly be granted by the State in the absence of any effective and representative government. If, however, one considers the consent of the State as indispensable, it could 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 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 peace-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 Cambodia – 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 economic and social infrastructure to the reform of governmental and constitutional structures. Like Somalia, this was another instance in which the charge of the international community to take over complex administrative and political tasks in Failed States was very much in evidence.

4. Finally, it is to be noted that, in cases such as those of Bosnia-Herzegovina, Somalia, other Failed States, and recently in its resolutions concerning the situation in Sudan, 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 peace-keeping operations, 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 in general

In 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 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 subsidiary nature. They are an extension of prior activity by the State. Hence human rights are asserted primarily against actions by the 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.

International humanitarian law

In the field of international humanitarian law, the situation seems to be more favourable. While this branch of law grew out of old laws of war and is intended primarily for armed conflicts between States, it is increasingly coming to deal with internal armed conflicts. Article 3 common to the four Geneva Conventions of 12. August 1949 provides a minimal humanitarian standard to be observed by all parties to an armed conflicts not of an international character. This provision was developed in detail in 1977 by Protocol II additional to the Geneva Conventions, and relating to the protection of victims of non-international armed conflicts.

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 actors, whether individuals or groups. However, specific difficulties arising from the collapse of the authority of the State impede the implementation of these humanitarian provisions in practice, too. International humanitarian law relies heavily on the hierarchical structures of the State and above all the military order with its chain of command. These, however, usually do not exist in the case of anarchic conflicts 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. In view of such problems it may become necessary to explore alternative mechanisms to implement humanitarian law. One possible way, embraced by the International Committee of the Red Cross, could be to disseminate information about basic humanitarian law principles in territories prone to conflict at an earlier stage (e. g. in school) and via alternative channels (e. g. via radio and television).

Prospects for further development

It now remains to be asked what ways and means could be used at the internal level to re-establish Failed 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 could be used for the reconstruction of 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 systems offers interesting parallels in this connection. 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 could 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 crystallize 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. On the other hand, for reasons of human rights and self-determination, Leviathan is a highly uninviting prospect, even as a stop-gap. Two things are needed: 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.