Fulfilling International Obligations by International Organizations in the Absence of State Control

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Modern sovereignty is characterized by an increasing interdependence between states. In fact, states engage in highly complex exchanges and interconnected relations, not only in the most apparent domain of commercial transactions, but in almost all spheres of their daily activities. Noticeably, the international system has come to rely on the mutual fulfillment of international obligations by states. As the community of states becomes more and more interconnected, certain obligations must be performed to guarantee certainty and security in other states. This concerns both international and national obligations.

On one side, on the internal dimension, states actions are rarely confined to national borders: acts performed by one country -even if directed at managing purely internal affairs - have consequences for the affairs of other states. For example, a health policy decision that decreases the availability of vaccinations to a certain population in Country A may result in the increase of the disease in Country A's neighbouring countries.

On the other side, focusing on the external dimensions, states need the execution of internal and external acts by other states to perform their functions, maintain safety and eventually even for their existence. This situation can again be exemplified with a health policy example. In fact, campaigns to eradicate certain diseases – like the recent campaign to eradicate polio - can be successful only if all countries implement common and coordinated policies directed at the eradication of the disease.

Similarly, regardless of their primary purpose, many internal acts also fulfill international obligations and are performed also for the benefit of other states and international organizations. They include, amongst others, guaranteeing international safety, the management of airspace and territorial waters, border patrolling, guaranteeing standards of human and animal health, ensuring minimum financial and banking standards.

The minimum performance of these functions for other members of the international community was in the past a matter of convenience and comity. It has now become critical and indispensable for other members of the international community. This situation cannot simply be seen as a matter of treaty violation, and the question therefore becomes what can be done to correct the situation when states cannot fulfill their obligations.

However, although the ability to fulfill international obligations is one of the constitutive requirements of a state,[1] the question of what happens in the event of the inability of a state to discharge international obligations has not been explored by the international legal system. This situation is particularly apparent in the cases of failed states, but it is not limited to them. The UN

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[1] The Montevideo Convention on the Rights and Duties of States defines states as entities possessing four sufficient and necessary characters. The principle states that "(t)he State as a person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) Government; and (d) capacity to enter into relations with other States." Montevideo Convention on the Rights and Duties of States of 26 December 1933, LEAGUE OF NATIONS TREATY SERIES, Vol. 165, p.19.

Charter does not contain specific provisions on the matter, and there are no subsequent international agreements that properly address this subject.

In this presentation, I focus on these questions and briefly assess how the United Nations has addressed and resolved them.

Thus far, the international community has discharged external obligations in the absence of national ability to do so by taking control in various degrees of several state functions. In a continuum, this is first exemplified by development and cooperation projects, and then attained in the nation rebuilding exercises that the United Nations is implementing in East Timor and Kosovo. I have identified four possible mechanisms: full administration by the United Nations; humanitarian interventions; 'common goods' situations; and development projects. Each of these mechanisms presents some interesting and specific features, but none is entirely satisfactory.

Because of time constraints, I can only briefly mention some interesting examples and assess them. This is part of a work-in-progress, at the end of which I plan to develop a framework of legal criteria to create the possibility of intervention by the United Nations to fulfill necessary international obligations.

1. Humanitarian Interventions: The Case of the Airspace of Somalia

The international community, represented by the United Nations, has developed a framework to deal with some external and internal obligations that involve mainly failed states by using development and humanitarian projects.[2]

Humanitarian interventions are now characterized as situations that are threatening peace and security, and as such, they are also constructed to defend and protect human rights. Although humanitarian interventions principally target the inability or unwillingness of a Government to fulfill its obligations, mainly relating to human rights obligations, towards its nationals, they also take measures to address the non- performance of external obligations.

Under the authority of a Chapter VII measure, United Nation humanitarian interventions become more and more comprehensive,[3] and their mandate is approaching a government rebuilding exercise.[4] In fact, new programmes and projects call for 'nation building' in instances of absence of central authorities, as was the case in East Timor.

However, while the international community is increasingly prepared to openly intervene in some specific internal affairs of states on the ground of human rights protection and humanitarian assistance, it is still reluctant to openly engage in discharging other international and external obligations without a precise mandate.

The mandate of the UN intervention in Somalia is an interesting example. Somalia has been without a central national authority since 1991 and it is a paradigmatic example of a state that is unable to perform international obligations.

Security Council resolution 814 of March 1993 contained language recognizing specific, albeit limited mandate to 'assume responsibility for the consolidation, expansion and

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[2] For a historical perspective and a critical appraisal of the tensions between non-intervention and sovereignty, see Charles W. Kegley, Jr., Gregory A. Raymond And Margaret G. Hermann, *Issues & Policy: The Rise And Fall Of The Nonintervention Norm: Some Correlates And Potential Consequences*, 22 Fletcher F. World Aff. 81

[3] See, L.W. Reed and C. Kaysen (eds.), *Emerging Norms of Justified Intervention* (1993)

[4] F.M. Deng, 'State Collapse: The Humanitarian Challenge to the United Nations', in *Collapsed States, The Disintegration and restoration of legitimate authority*, (I. W. Zartman Ed., 1995),

maintenance of a secure environment'. For the international community, the implementation of such measures also comported the reassurance of safer borders, decreasing of refugees and displaced and the reduction of illegal trafficking.

With the end of the peacekeeping mission, the mandate was also revised, and still retained extensive powers. In resolution 954 of November 1994, the Security Council mandated UN agencies to 'provide rehabilitation and reconstruction assistance, including assistance to police and judiciary to the extent that the situation in Somalia develops in such a way as to make that practical.'[5] The international community is still very implicated in Somalia. Presently, it is involved in, among other things, ports and roads rehabilitation, judicial and legal restructuring, health service delivery and vaccination, and education - including choice of curriculum and of the language of instruction.[6]

The instance of Somalia's airspace is of particular interest. The airspace is not limited to the space directly above the territory of the State of Somalia, but it covers an extensive zone above the sea and extends up to the territory of the Seychelles: many transatlantic flights cross it on their way to and from Europe, Asia and Africa.

In general, states have a mutual responsibility to guarantee the safety of their airspace. This obligation derives from the 1944 Chicago Convention on the International Civil Aviation and it is fundamental for the safety and reliability of civilian air traffic.[7]

During its 1992-1995 humanitarian intervention, the United Nations Operation in Somalia (UNOSOM) had taken over the management of the airports and the Somali airspace as Force Commander had interpreted UNSOM mandate as including the control of the airspace of Somalia.[8] Such authority was derived from Res. 814 and 837 (1993), which mandated UNOSOM to secure all ports and airports for the delivery of humanitarian assistance.

To implement this mandate, in March 1993, UNOSOM concluded an agreement with the International Civil Aviation Authority Organization (ICAO) to provide civil aviation functions from a control tower located in Mogadishu. The operation was concluded in 1995 and UN/ICAO agreement expired at the end of the peacekeeping mission, but the situation in Somalia had not improved and there was no national authority that could take over and run the Aviation Authority. Therefore, the office of the United Nations Development Programme (UNDP) in Somalia took over the role of UNOSOM and agreed to implement a development project to be executed by the ICAO, on behalf of the Secretary General.

As the situation of Somalia does not ameliorate, there seems to be no plan to end the project in the near future. What is more, the UN Secretary General recently suggested the transposition of this arrangement to other similar situations to protect offshore natural resources.[9] The necessity of such measures is unquestionable, their legality however remains ill-defined.

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[5] S/RES/954 of 4 November 1994, extending the mission for a final period to 31 March 1995.

[6] In the absence of the required authority able to sign the project documents, the UNDP developed a special framework by which authority to implement a development project is given on a case-by-case level by the UNDP Administer.

[7] Convention on International Civil Aviation, Dep't of State Publication 2816, Treaties and Other International Acts Series 1591. Also available at www.yale.edu/lawweb/avalon/decade/decad048.htm

[8] The Trust Fund Agreement, which encapsulates the essential elements, reads "the force commander UNOSOM II is the airspace authority for Somalia airspace".

[9] S/1999/882 of 16 August 1999, where the Secretary General considers 'whether, in advance of political agreements on the formation of a national government, actions could be taken by the

In this specific case, the United Nations has assumed the role of caretaker of a specific internal matter of a state and thus acted as a proxy for the government of Somalia. The absence of such arrangement would have had severe consequences for safety in air space and would significantly disrupt air traffic. This solution, however, is not unproblematic. First of all, where does the authority of the Secretary General to dispose of the airspace of Somalia come from? The Secretary General found the authority to approve such a mechanism in the mandate given by the Security Council to ensure safety in airports. This arrangement is, however, completely unique to the situation in Somalia, where there is no national authority. Although UNSOM was executed under Chapter VII of the United Nations Charter, [10] the Secretary General only has the powers that are delegated to him from the Security Council. It was rightly noted that in its intervention in Somalia the Security Council acted on 'the basis of a robust and realistic appreciation of what might constitute a threat to the peace.'[11] The mission had a limited mandate and did not include a general delegation to administer the territory. Moreover, the mission terminated in 1995.

2. Solutions for Obligations to Deliver 'Common Goods'

A further instance in which international actors addressed a state's incapability to discharge its international obligations by performing the required obligation referred to 'international goods'. This situation is atypical because it is directed at protecting the general community, and not one specific country. This is also the most apparent example of the United Nations performing international obligations.

The analogy of 'common goods' provides an interesting way to clarify the generally needed goods like safety, health, and the environment. These 'goods' may be owned by one state, but because of their central importance in the international community, other states have an interest over them. A topical example is environmental protection. Actions to curb emissions of CO2, for example, are required from each state for the benefit of the general public. A similar conclusion can be reached for ozone emissions, nuclear energy or, in matters of health, in cases of epidemics.

An interesting illustration of these cases is found in how the United Nations reacted to the inability of a national authority to control the spreading of a disease. UNICEF worldwide initiative to eradicate polio is a case in point. In general, National Polio Immunizations Days (NIDs) are conducted around the world, a few times a year and are coordinated through an Interagency Coordinating Committee, which includes representatives of national health

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international community to assist Somalia to recover its sovereignty in certain limited fields, for example the protection of offshore natural resources', para. 71.

[10] In the instant case, the legal authority to act can derive from a reading of articles 39 and 41 of the UN Charter. Article 39 authorizes the Security Council to determine whether a "threat to the peace, breach of the peace, or act of aggression" exists and art. 41 provides no limitation to the kinds of decisions that the Security Council can take once the threat to the peace and security has been identified, so it could include specific mandates to the Secretary General for similar situations.

[11] Michael J. Matheson, 'United Nations Governance of Postconflict Society'*, 95 AJIL 76 (2001)*, at 83

authorities, international organizations, donors, and, often, of civil society.[12] For such an initiative to work '(i)t is crucial that [UNICEF] immunize(s) every last child, because the polio virus can spread rapidly across regions and borders. As long as any child is infected, all are at risk.'[13] In some situations where national authorities are not able to assist in the initiative the intervention can be difficult. UNICEF identified some priority countries[14] were the polio virus is still present and where, therefore, the situation needs urgent attention. Five of these countries are affected by conflict and 'implementation of vaccination and surveillance activities is particularly challenging.'[15] These are Afghanistan, Angola, the Democratic Republic of Congo (DRC), Somalia and Sudan. In these cases the international community adopted *ad hoc* responses: national authorities were ostensibly bypassed and negotiations for access occurred at the sub-national levels. In DRC until 1999, for example, UNICEF organized Sub-National Immunization Days (SNIDs) in five of the eleven provinces, and negotiated access directly with local leaders. Since 1999, the international community has participated in the negotiation of ceasefires named 'Days of Tranquility', during which NIDs could be implemented.[16] Similarly, in Somalia, UNICEF organized National Immunization Days (NIDs) with the assistance of local communities.

Paradoxically, it is interesting to compare this practice with the recent difficulties of implementing vaccination programmes in Nigeria, which show the limitations still faced by international organization in relation to fully sovereign states. In fact, as a result of concerns by traditional and religious leaders over the safety of the oral polio vaccine, Kano, a province of Nigeria, suspended vaccination for a year. This resulted in a five-fold increase of polio cases in 2004 over the same period in 2003 in Sub-Saharan Africa, including in previously polio-free regions.[17] It is estimated that the entire eradication programme has been delayed by at least a couple of years, with ensuing human sufferings.

In the case of 'common goods' the solution is provided by a general, often worldwide, intervention and guidelines implemented by one of the UN agencies. However, this is an *ad hoc* solution that cannot always be implemented. This in fact highlights the need to find a general common policy to consistently address this problem.

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[12] UNICEF, Communication for Routine Immunizations and Polio Eradication: A Synopsis of five sub-Saharan Country Case Studies, June 2000, p. 7. http://www.unicef.org/programme/gpp/docu/polio.PDF

[13] http://www.unicef.org/polio/index.html

[14] Five are poliovirus reservoirs where transmission is particularly intense. They are Bangladesh, Ethiopia, India, Nigeria and Pakistan. The other five are countries affected by conflict where implementation of vaccination and surveillance activities is particularly challenging. They are Afghanistan, Angola, the Democratic Republic of Congo, Somalia and Sudan. In http://www.unicef.org/polio/factsfigures.htm

[15] *Ibid*.

[16] UNICEF, Communication for Routine Immunizations and Polio Eradication: A Synopsis of five sub-Saharan Country Case Studies, June 2000, p. 5. http://www.unicef.org/programme/gpp/docu/polio.PDF

[16] http://www.unicef.org/polio/index.html

[17] Statement by the Global Polio Eradication Initiative/4, of 3 August 2004, in www.polioeradication.org/content/pressrelease/20040803_pressp

3. Conclusions

Most of the solutions so far implemented by the United Nations target failed or failing states. Alternatively, UN agencies have implemented development projects that also have had the effect of indirectly fostering the implementation of international obligations.

The question of external fulfillment of national international obligations has to be addressed together with the question of consent of the state whose obligations need to be fulfilled, and to the duty of non-intervention in internal affairs.[18]

There is a potential tension between the duty of non intervention identified in Art. 2 of the UN Charter,[19] and the necessity to fulfill international obligations. This potential tension, however, does not need to surface if the meaning of intervention is rightly considered.

The prohibition of intervention in internal affairs of a state ex art. 2 of the Charter is a corollary to the principle of sovereignty and of the independence of nations. Article 3 of the Draft Declaration on Rights and Duties of States of the International Law Commission restated this principle and provides that 'every State has the duty to refrain from intervention in the internal or external affairs of any other State.'[20] This obligation, however, needs to be qualified: as stated in Oppenheim's International Law '(a)lthough states often use the term "intervention" loosely to concern such matters as criticism of another state's conduct, in international law it has a stricter meaning, according to which intervention is forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state.'[21]

Interference that is sufficiently coercive to become an unlawful intervention can take several different forms: it may include the use of armed forces or support given to opposition activities in another state. The key to distinguish intervention from other circumstances is its coercive character, thus some other economic and political actions could also be deemed to be interference in internal affairs if perpetuated contrary to the will of a national government.[22] Along this line, the International Court of Justice found in the *Military and Paramilitary Activities Case* that the United States violated the principle of non-intervention by supporting opposition groups in Nicaragua.[23]

However, a distinction should be drawn for collective intervention in the general interest of the international community. In fact,

> the notion and the prohibition of intervention cannot accurately extend to collective action undertaken in the general interest of states or for the collective enforcement of international law. This means that while prohibition of intervention is a limitation upon states acting in their individual capacity, it does not properly apply to remedial or preventive action undertaken by or on behalf of the organs of international society.[24]

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[18] Christine Chinkin, *Third Parties in International Law*, 1993

[19] Which states that "nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

[20] YBILC (1949), p. 286, reported in *Oppenheim's International Law*, p. 429

[21] Ibid. 430

[22] Ibid. p. 434.

[23] *Military and Paramilitary Activities Case,* Judgment of 27 June 1986, ICJ Report 1986.

[24] Ibid. p. 447

Interventions to fulfill international obligations of third states must be included in this exception.

Traditionally, states have consented to varying degrees of interference by other states and the international community in general.[25] International community actors participated in fulfilling obligations relating to internal affairs of states in several different ways. For example, in many cases where a state is not fully capable of providing for the essential rights and needs of its people, many states have established development assistance programmes. In these situations, international organizations and foreign states often provide substantial budgetary and technical support to essential governmental activities.

In fact, the definition of what are matters that are essentially domestic has changed so that interventions in support of certain serious conditions of the internal population have become accepted practice.[26] Levitt notes that there has been a progressive shift "from traditional prohibition against forcible intervention in the internal affairs of states, towards the recognition of a right to humanitarian intervention by groups of states and regional actors in internal conflict."[27] This has led to a developing practice of intervention of external actors to defend and uphold human rights.[28] As Kirgs acknowledges '(u)nquestionably, a great many governmental policies and courses of conduct that were widely thought to be within the "domestic jurisdiction" of states in 1945 are no longer so regarded. The primary examples are found in the category of human rights.'[29]

I would like to conclude by emphasizing that the fulfillment of international obligations complements, rather than undermines, sovereignty, as it strengthens the rule of law and world order, and enhances the duty of cooperation among states.

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[25] See M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law'*, 84 A.J.I.L. 866*, 869

[26] See for example, A. Tanca*, Foreign Armed Intervention in Internal Conflict* (1993)

[27] Jeremy Levitt, *Humanitarian intervention by regional actors in internal conflicts: and the cases of ECOWAS in Liberia and Sierra Leone*, in 12 Temp. Int'l & Comp. L.J. 333, 333

[28] Professor Reisman notes that "(t)he United Nations Charter, replicated the "domestic jurisdiction-international concern" dichotomy, but no serious scholar still supports the contention that internal human rights are "essentially within the domestic jurisdiction of any state" and hence insulated from international law". See M. Reisman, *Sovereignty and Human Rights in Contemporary International Law,* 84 A.J.I.L. 866, 869

[29] Frederic L. Kirgis, Editorial Comment, Security Council Governance of Post-conflict societies: a Plea for Good Faith and Informed Decision Making, 95 ASIL 579 (2001), at 579