7

Arguments from Failure in International Law

7.1 Introduction

Korea had only barely emerged from Japanese occupation during the Second World War when tensions between the newly independent Northern and Southern states began to rise. In 1950, Northern military forces crossed into the Southern area. Notified of the invasion, the UN Security Council acted promptly, quickly passing several resolutions that called on Member States to assist the (Southern) Republic of Korea to resist the invasion and establish a unified command under US leadership.[1] This decisive action was possible only because Russia had been boycotting the Security Council to protest the representation of China in the United Nations by the previous and now deposed Chinese Republican leaders. Jacov Malik, Russia's representative, nevertheless, quickly realized the mistake of the boycott and returned to the Council, subsequently vetoing further actions. In this context, representatives of key powers, such as US Secretary of State Dean Acheson, sought to circumvent the Security Council by going through the General Assembly instead.

The result was the famous Uniting for Peace Resolution, adopted 52–5 on 3 November 1950. The Resolution represented not the first,[2] but the most explicit, invocation of a reserve competence by the Assembly. After affirming the Security Council's primary responsibility to deal with issues

[1] UNSC Res. 82 (1950) UN Doc. S/RES/82; UNSC Res. 83 (1950) UN Doc. S/RES/83; UNSC Res. 84 (1950) UN Doc. S/RES/84; UNSC Res. 85 (1950) UN Doc. S/RES/85. Whether the Security Council could actually legally pass these Resolutions given the absence of a permanent member is debatable and has been challenged given Art. 27(3) UN Charter, see C. Tomuschat, '"Uniting for Peace" – ein Rückblick nach 50 Jahren' (2001) 76:2/3 *Die Friedens-Warte* 289 at 290.

[2] Thus, UNSCOB (the UN Special Commission on the Balkans) was a precedent to Uniting for Peace, deployed in 1947 under the authority of the General Assembly, not the Security Council; see T. M. Franck, 'U.S. Foreign Policy and the U.N.' (1986) 14 *Denver Journal of International Law & Policy* 159.

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of international peace and security, it set out an argument for why the General Assembly might address with issues ordinarily reserved to the Security Council in cases where the Security Council failed to fulfil its responsibility under the Charter due to a lack of unanimity.[3] Notably, the Assembly claimed for itself the authority to recommend measures to Member States, which would – unlike a Security Council Resolution – not be legally binding on them, but merely support and encourage intervention in line with the purpose laid out.

In doing so, the General Assembly in essence put forward an argument from failure – which was, however, blurred with emergency arguments as well as arguments about implied powers. Thus, the Peruvian representative in the Assembly debate argued in terms of emergency powers: 'The Assembly's jurisdiction is thus clearly defined; it constitutes what may be called the legal foundation for any proposal for convening the Assembly in case of *emergency* to deal with the exigencies of peace when the Council is paralysed.'[4] These early emergency arguments were often couched in moral terms, with failure resulting from an 'abuse' of the right of veto,[5] as the Brazilian delegate De Freitas Valle phrased it, involving ultimately a question of 'light or darkness'.[6] Such moralistic arguments were, however, backed up by what were understood to be more 'legal' constitutionalist arguments, both in the debate itself and in the later scholarly literature. The then-US ambassador to the United Nations, Cohen, invoked domestic law analogies to argue for a competence of the General Assembly, drawing in particular on the doctrine of 'implied powers', as elaborated in the canonical US Supreme Court decision in *McCulloch v. Maryland*.[7] Notably, all this happened in a context where previous efforts to get rid of the veto power of permanent members had failed, though the practice of not treating abstentions as a veto had already been established.[8] The Resolution was thus part of

[3] UNGA Res. 377 V (1950) UN Doc. A/377V.

[4] Official records of the UNGA Fifth Session, 279th Plenary Meeting, 20 September 1950, para. 156.

[5] See ibid. the Brazilian representative ambassador De Freitas Valle, para. 4.

[6] Ibid.

[7] *McCulloch v. Maryland*, 17 US 316 (1819).

[8] T. M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press, 2002), p. 33, with reference to B. V. Cohen, *The United Nations, Constitutional Developments, Growths, and Possibilities* (Harvard University Press, 1961), pp. 18–9.

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broader efforts by the UN General Assembly to take on a more active role in light of the Security Council's failure to do so.[9]

7.2 Failure in International Law

The Uniting for Peace Resolution provides a straightforward example of an argument from failure in international law. But this is not the only international setting where we encounter arguments from failure, often combined with emergency arguments or arguments about implied powers and effective realization.

This is not surprising. Authority in international law, Nico Krisch argues, is best understood as a 'liquid' concept. International relations are shaped by a range of more informal institutions and soft law, leading to a range of different sites of governance and, frequently, a high degree of legal fragmentation.[10] Building on the deference model developed by international relations scholars, according to which authority constitutes 'the ability to induce deference in others',[11] Krisch explains that the key feature of liquid authority is its dynamic character: 'The more liquid an authority structure is, the more its elements are in motion and the more difficult it is to pinpoint a site of authoritative decision making.'[12]

This environment is unsurprisingly receptive to arguments from failure, which should in turn be understood as one important rhetorical mechanism and legal concept for shifting authority.

Add to this that the origins and legitimacy of many international institutions can be traced to their ability to fulfil certain tasks that states cannot realistically perform on their own. By shifting authority to the international level, Member States seek to coordinate their behaviour – and potentially that of other actors – to (better) achieve certain goals, including the avoidance and resolution of conflicts.[13] Even more than at

[9] G. F. Sinclair, *To Reform the World* (Oxford University Press, 2017), p. 131–32.

[10] N. Krisch, 'Liquid Authority in Global Governance' (2017) 9:2 *International Theory* 237.

[11] D. D. Avant, M. Finnemore, and S. Sell, 'Who Governs the Globe?', in id. (eds.), *Who Governs the Globe?* (Cambridge University Press, 2010), pp. 1, 9. I owe the reference to this useful definition to Krisch.

[12] Krisch, 'Liquid Authority'.

[13] A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', in J. Babic and P. Bojanic (eds.), *World Governance: Do We Need It, Is It Possible, What Could It (All) Mean?* (Cambridge Scholar Publishing, 2010), pp. 214, 216. This is not to say that international law will always improve outputs and can never improve input. There may be cases when actions of one state affect people(s) outside of its national territory and who can therefore not participate in the decisions in question, but which

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the national level, effectiveness arguments are therefore hardwired into the DNA of international law. Indeed, the expansion of the powers of international organizations underwrote in many ways the 'forming and reforming of modern states' as 'rational' and efficient instruments of territorial governance.[14] This project of reforming domestic states with the help of international organizations could tap into a discourse of efficiency and rationalist reform particularly prevalent in the years after the First World War among American progressives, but also in many European circles.[15] To justify the necessary expansion of international organizations' authority, a host of legal arguments were deployed. These included arguments about the need for flexible and purposive interpretation of relevant treaties, often rooted in a constitutionalist language, more specific arguments about implied powers, arguments about the need to contain crises and emergencies and, not least, arguments from failure.[16]

7.2.1 *Arguments from State Failure*

One of the most famous examples for the role of failure as a trope in international relations is the discourse on 'state failure'. This began with a now-famous article by Helman and Ratner in *Foreign Policy* in the Winter issue of 1992–1993, though it was based on much earlier practices and ideas. Helman and Ratner wrote: 'From Haiti in the Western Hemisphere to the remnants of Yugoslavia in Europe, from Somalia, Sudan, and Liberia in Africa to Cambodia in Southeast Asia, a disturbing new phenomenon is emerging: the failed nation-state, utterly incapable of sustaining itself as a member of the international community.'[17]

Originally a category of political science and political economy rather than law, state failure – and the related concept of an 'unwilling or unable state'[18] – was never fully recognized as a legal concept in mainstream

may participate in those decisions, albeit mediated through governments or organizations, if they are taken on an international level. But whether such arguments are convincing or not, they constitute at best a secondary and supplementary source of the legitimacy of international law. For a critical discussion, see, e.g., A. Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014), part III.

[14] Sinclair, *To Reform the World*, Introduction (and throughout).

[15] Ibid., pp. 55 ff.

[16] Ibid., see especially chapter 4, pp. 160 ff. On emergency arguments, see especially C. Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford University Press, 2019), chapters 4–6 (part II).

[17] G. B. Helman and S. R. Ratner, 'Saving Failed States' (1992–1993) 89 *Foreign Policy* 3.

[18] P. Starski, 'The "Unwilling or Unable" State as a Challenge to International Law', Habilitation Thesis, Bucerius Law School (2020).

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international law. Yet, it played an important role both in political and legal practice as a rhetorical device to strengthen the powers of international organizations as well as empower other states to act in ways otherwise not considered legal. No discussion of failure in international law would be complete without mentioning this line of argument. But what was meant by a 'failed state'? Jones argues that 'a "failed state" is one which is unable to perform a set of functions taken to be characteristic and definitive of what constitutes a properly functioning state: to maintain secure boundaries, ensure the protection and security of all of the population, provide public goods and effective governance, maintain law and order throughout the territory'.[19]

Earlier uses of the idea of state failure in international law primarily occurred in the context of expanding the mandate of the United Nations to act. The concept also played an important role in granting the Security Council the authority to take actions under Chapter VII with regard to internal situations in the 1990s.[20] Intervention in such internal affairs had originally been considered outside the scope of the UN's authority. Art. 39 of the UN Charter contemplates action only in cases of a 'threat to the peace, breach of the peace, or act of aggression', thus apparently envisaging situations involving at least two states. In a series of resolutions dealing with Somalia, Rwanda and, not least, Yugoslavia, the Security Council began to expand its authority to intervene. The first step in this regard addressed situations that, while internal, had effects on other states, such as refugee flows.[21] In later Resolutions, such as when dealing with the Somalian Civil War and ensuing mass starvation,[22] internal situations increasingly came to be accepted as a basis for intervention under certain circumstances.[23] Thus, in Resolution 794 (1992) dealing with Somalia, which was considered the paradigm for a failed state in the literature,[24] the Security Council spoke of 'the unique

[19] B. Gruffydd Jones, 'The Global Political Economy of Social Crisis: Towards a Critique of the "Failed State" Ideology' (2008) 15:2 *Review of International Political Economy* 180 at 180.

[20] D. Thürer, 'The "Failed State" and International Law' (1999) 81:836 *International Review of the Red Cross* 731, at 738 ff.

[21] Gruffydd Jones, 'The Global Political Economy'.

[22] UNSC Res. 794 (1992) UN Doc. S/RES/794.

[23] See also UNSC Res. 918 (1994) UN Doc. S/RES/918 and UNSC Res. 929 (1994) UN Doc. S/RES/929; UNSC Res. 940 (1994) UN Doc. S/RES/940; UNSC Res. 1132 (1997) UN Doc. S/RES/1132 with the resolutions against Haiti and Sierra Leone dealing with military coups.

[24] E.g. Helman and Ratner, 'Saving Failed States'.

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character of the present situation in Somalia'. Being 'mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response', it argued that 'the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance' amounted to a threat to international peace and security and thus, according to the Security Council, justified Chapter VII measures. In the context of the law on the use of force, ideas of state failure thus served to justify interventions where explicit state consent was lacking or considered irrelevant since the government had essentially become one of many parties to an ongoing civil war and no longer exercised meaningful authority over its territory. The precise requirements for when such interventions would legally be justified remained, however, contested, as did the concept of state failure or failed states itself.[25]

The most problematic use of the concept of state failure occurred in the context of the so-called unwilling or unable doctrine under Art. 51 of the UN Charter. It concerns the right of states to defend themselves against external aggression,[26] arising in response to the attacks of 11 September 2001.[27] The attacks had been planned by Al Qaeda, who were private actors on Afghan territory, without a legally relevant involvement of the Afghan government. The United States therefore found it hard to justify military intervention in Afghanistan on the basis of a right to self-defence under Art. 51 of the UN Charter as a matter of existing international law. US representatives argued that this situation was not acceptable and that a right of self-defence existed if 'the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks'.[28] State failure based on unwillingness or inability would thus trigger a right to self-defence. This

[25] E.g. Thürer, 'The "Failed State" and International Law'; id., 'Failing States' *Max Planck Encyclopedias of International Law [MPIL]* (online source); R. Geiss, '*Failed States': Die normative Erfassung gescheiterter Staaten* (Duncker & Humblot, 2005); C. T. Call, 'The Fallacy of the "Failed State"' (2008) 29:8 *Third World Quarterly* 1491.

[26] See more in Starski, 'The "Unwilling or Unable" State'. See also N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020) and N. Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2015) 109 *American Journal of International Law* 266.

[27] Call, 'The Fallacy' at 1493 ff.

[28] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations, UN Doc S/2014/695, cited acc to Starski, 'The "Unwilling or Unable" State', p. 1.

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claim has been severely contested in the legal literature,[29] but the Security Council in Resolutions 1368 and 1373 reaffirmed the existence of the right to self-defence in the context of terrorist attacks shortly after the attacks, providing in the latter Resolution for a broad, if vague, mandate to 'take steps' in response.[30] In the subsequent 'war on terror', state failure became a standard reference point for US foreign policy, as failed states were seen as safe havens for terrorist organizations.[31]

Finally, arguments about state failure and dysfunctionality also played a role outside of the law on the use of force, in particular in the domain of development economics. The turn from modernization theory to a governance framework in the World Bank emerged partly amidst a widespread perception of governance failures in the late 1980s and 1990s, in the context of fragile or failed states.[32] Thus, 'internal deficits' such as corruption or inefficient domestic administrations were seen as obstacles that needed to be addressed in order for financial support to be provided.[33] So-called structural adjustment programmes, often pursuing neo-liberal policies, were meant to help with this task. This drove an expansion of the World Bank's mandate beyond monetary politics to questions of the rule of law and related issues.[34]

'A root cause of weak economic performance in the past has been the failure of public institutions. Private sector initiative and market mechanisms are important, but they must go hand-in-hand with good governance – a public service that is efficient, a judicial system that is reliable, and an administration that is accountable to its public', a World

[29] E.g., D. Murray, 'Flawed and Unnecessary: The "Unwilling or Unable" Doctrine Pertaining to States' Use of Force in Self-Defence against Non-State Actors' (2017) 30 *Hague Yearbook of International Law* 59; I. Couzigou, 'The Right to Self-Defence against Non-State Actors: Criteria of the "Unwilling or Unable" Test' (2017) 77 *Heidelberg Journal of International Law* 53.

[30] UNSC Res. 1373 (2001) UN Doc S/RES/1373.

[31] Call, 'The Fallacy'.

[32] Sinclair, *To Reform the World*, part III. For a thorough discussion of the different intellectual paradigms, see P. Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, 2013), chapter 2.

[33] Dann, ibid., chapter 2, pp. 90 ff.

[34] Sinclair, *To Reform the World*, pp. 251 ff.; Dann, *The Law of Development Cooperation*, pp. 260 ff. Both Sinclair and Dann stress, however, that there was not a straightforward neo-liberal paradigm at work, but that the real story of these developments is more complex, with different motivations involved.

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Bank Report argued, mainly with respect to African states.[35] As Sinclair shows, Ibrahim Shihata, the Bank's vice president, and top lawyers assumed a key role in this regard. It is also in this context that we see a more constitutionalist framing of the argument emerging. It included references to the doctrine of implied powers and a broad purposive approach to the Bank's mandate, according to which the expansion of the Bank's role constituted a natural response to the frequent dysfunction, emergencies and, ultimately, failures of state institutions.[36] Dealing with questions of international development assistance, the idea of fragile statehood emerged as a new category, sometimes substituting for state failure. It still plays an important role today in grouping together certain states or situations for international policy-making in the interest of increasing efficiency.[37]

7.2.2 *Failure, Crisis and International Authority*

This broader language of failure was part of a functionalist understanding of law within the United Nations, as sketched out in the academic literature by Sinclair, Orford and others. Anne Orford in particular has argued that we should understand the expansion of the powers of the United Nations in terms of its function to guarantee freedom and security, thus continuing the intellectual tradition associated with Hobbes and others.[38] International organizations, Orford argues, step into the shoes of nation states, and we should therefore understand the modern concept of the Responsibility to Protect not as a new thing, but rather as a ratification of existing UN practices as they emerged after the Second World War.[39]

Orford's emphasis on security as key to understanding the legitimacy of both modern nation states and the United Nations connects to Saptarishi Bandopadhyay's recent work on the importance of disaster

[35] B. B. Conable, 'Foreword', in World Bank (ed.), *Sub-Saharan Africa: From Crisis to Sustainable Growth* (World Bank, 1989), p. xi.
[36] Sinclair, *To Reform the World*, pp. 260, 279.
[37] M. von Engelhardt, 'Dealing with Fragile States: The Law and Practice of International Development Organizations', PhD Dissertation, Humboldt University, Berlin (2015), p. 25.
[38] A. Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011), Introduction (and throughout).
[39] Ibid.

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management to the formation of modern states.[40] As Orford and Sinclair show, modern nation states were not unique in building their legitimacy on their ability to grapple with disasters and emergencies. A similar story can be told in the international realm about institutions such as the United Nations or the World Bank. Arguments about protection – sometimes framed in terms of arguments from failure – were part of broader efforts of these institutions to frame their own authority in constitutional terms. This authority in turn was entangled with their efforts to define and assist the creation of modern, efficient states. Not accidentally, modernization theory and later theories of governance would play an important part in framing proposals for an expanded role for the United Nations and its different bodies. In many cases, this kind of expansion was justified in relatively traditional legal categories, in particular on the basis of a broadly purposive interpretive approach to the United Nations' powers, often coupled with constitutionalist imagery.[41] In other cases, actors invoked the more dramatic language of exception and of emergencies.[42] Thus, the General Assembly's creation of UNEF in the Suez crisis, building on the Uniting for Peace rationale, was seen as an extreme and thus exceptional situation by Secretary General Dag Hammerskjold.[43] When the United Nations intervened in Congo, emergency rhetoric again surfaced, for example when Hammerskjold suggested to Cordier (. . .) that 'At any time, you may face the situation of complex disintegration of authority that would put you in a situation of emergency which in my view would entitle you to greater freedom of action in protection of law and order. The degree of disintegration thus widening your rights is a question of judgment.'[44]

Critical legal scholars have pointed to the neo-colonial language and ambitions of those wielding the language of state failure. Indeed, a contemporary reading of Helman and Ratner's *Foreign Policy* essay, with its uncritical take on the post-war UN trusteeship system, combined with

[40] S. Bandopadhyay, *All Is Well: Catastrophe and the Making of the Normal State* (Oxford University Press, 2022), p. 173.
[41] See Sinclair, *To Reform the World*, pp. 176–81.
[42] See also Kreuder-Sonnen, *Emergency Powers*, chapter 4.
[43] D. Hammarskjöld, 'Do We Need the United Nations?', Address Before the Students Association, 2 May 1959, 4 *Public Papers of the Secretaries-General of The United Nations 1958-1960* at 368.
[44] B. Urquhart, *Hammarskjold* (Knopf, 1972), p. 444. I am referred here by Sinclair.

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its call for more involvement in Africa by the great powers, will see it tapping into a now familiar broader discourse of efficiency and modernization with distinctly neo-colonial undertones. The very idea of a failed state is clearly modelled on a Western-centric concept of statehood that treats Western European states as paradigm cases for successful statehood, leaving relatively little room for different conceptions and forms of organizing public authority.[45] Moreover, critical scholars argue that even where the idea of state failure arguably corresponds to the facts on the ground, as in Somalia in the 1990s, the concept holds limited explanatory power and distracts from understanding the context and origins of that 'failure' rooted in colonial and neo-colonial policies.[46]

7.3 Evaluating Arguments from Failure in International Law

What then should we make of arguments from failure in the international realm?

Our examples here speak again to the close relationship of failure arguments to emergency arguments, on the one hand, and to arguments about implied powers and efficiency, on the other. They demonstrate how the different concepts are tied together via the shared underlying logic of output-legitimacy, so prevalent in international law. And the more the exceptional character of the problem is emphasized, the less there is a need for implied powers arguments. The same applies in reverse: The stronger the argument for a broad reading of the rights or competences in question, the less there is a need to invoke an emergency/exception template. As we see here, arguments from failure incorporate elements of both. On the one hand, they are concerned with inter-institutional relationships and thus build on collaborative ideas of working together to achieve a shared purpose. On the other, they operate with a norm/exception distinction. All of this suggests that the framework developed in Part I remains relevant here, too. That said, in the international setting, arguments from failure encounter some specific challenges.

[45] Gruffydd Jones, 'The Global Political Economy'; P. Bilgin and A. D. Morton, 'Historicising Representations of "Failed States": Beyond the Cold-War Annexation of the Social Sciences?' (2002) 23:1 *Third World Quarterly* 55; also S. Sundstøl Eriksen, '"State Failure" in Theory and Practice: The Idea of the State and the Contradictions of State Formation' (2011) 37:1 *Review of International Studies* 229.

[46] Gruffydd Jones, 'The Global Political Economy', at 197.

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7.3.1 Separation of Powers

Because international organizations are not constitutional democracies, central elements of constitutional democracy, such as the separation of powers, have no clear equivalent here. This raises the question what happens when we encounter shifts of authority between different organs of one institution or among several institutions. Broadly speaking, the consensus is that the concept of separation of powers does not fit international relations or indeed even more constitutionalized international and regional organizations without significant adaptations.[47] Though international organizations may have courts, access is often not straightforward. Most importantly, there are no global legislatures comparable to national ones. The UN General Assembly is the closest analogue in this regard, but its powers, nevertheless, differ significantly from those of national parliaments. This also means that it is much more questionable whether the expectations and principles of mutual support and collaboration that we usually encounter in domestic constitutions exist here.

Yet, this is not to say that international law is free of conceptions of functional differentiation and mutual checks. Drawing on Christoph Möllers' work,[48] Joana Mendes and Ingo Venzke have put forward a concept of relative authority to address legitimacy questions in international relations. Mendes and Venzke argue in essence that different actors and institutions can claim different forms of authority that need to be understood and conceptualized in relationship to each other, similar to the separation of powers in domestic states:

> Different actors make different legitimacy claims with which they justify their authority. Authority is relative in this sense even on any single level of governance. In basic terms, the ideal type of judicial adjudication gains its legitimacy from the law that it applies, from party consent, independence, and impartiality. Its legitimacy bases are different from those assets that underlie the idea of legislation (representativeness, inclusion) or the idea of administration(competence, expertise). Specific actors feed different legitimacy assets into global governance.[49]

[47] I. Venzke and J. Mendes, 'The Idea of Relative Authority in European and International Law' (2018) 16:1 *International Journal of Constitutional Law* 75 at 95-6.

[48] C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013), chapter 4.

[49] Venzke and Mendes, 'The Idea of Relative Authority' at 90.

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Without fully importing the idea of the separation of powers, Mendes and Venzke suggest that three key forms of legitimacy are particularly important as a basis for allocating authority: the actor's inclusiveness, its functional specialization and its capacity to protect rights.[50] The challenge, as Mendes and Venzke formulate it, is to determine which mix of these three sources of legitimacy is normatively required in any given instance of exercising public authority.

All of this suggests, on the one hand, that the normative stakes of arguments from failure may be somewhat lower in the international context, absent a clear expectation that particular institutions fulfil one particular function. But it shows also that considerations of legitimacy along the lines sketched above must play a central role. This suggests that our framework developed in Chapter 2 can still provide useful assistance in dealing with such arguments, though more needs to be said about its applicability, as I argue below.

7.3.2 Quasi-Constitutional Framework

More precisely, arguments from failure can only be deployed in a context where expectations of collaboration and mutual support and control have a place, similar to domestic constitutional systems. For shorthand, I call this a quasi-constitutional framework, but I am not tied to the term 'constitutional' as such.[51] What I mean is that the organization in question must be able to lay a credible claim to regulating a broader area of international law in a broadly comprehensive manner. It must, for that purpose, be equipped with institutions that are expected to work together towards their shared goal, albeit that they may each fulfil separate functions. In other words: There needs to be a sense of joint responsibility for a broader political project. Where such a framework is lacking, not only is standing in for others hard to justify, but it also increases risks of abuse when arguments from failure are deployed without being controlled by other institutional checks or by the expectation of longer-term collaboration. The central example of an international organization that fits such an understanding is, of course, the United Nations, given its scope and self-understanding as the core international forum, independently of whether it makes sense to understand the Charter as such as a

[50] Ibid. at 80.

[51] In other words: I do not want to open the debate here if constitutionalism is a concept that can be applied outside a nation state context.

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world constitution.[52] For other international organizations, however, this will often be harder to argue.

How much and what do we really need in terms of a shared framework? In particular, we may wonder if we should assume there to be room for arguments from failure whenever the failure in question is closely tied to an international organization's core mission. However, not just any functional orientation should be considered sufficient to generate mutual responsibilities for a shared political project. Absent a broader legal framework in terms of which it makes sense to assume that a range of different actors are ultimately pursuing a broader shared project, we should not assume that there is room for arguments from failure. Actors are not necessarily left without resources in this situation; in particular, they may draw implied powers doctrines if there are clear functional imperatives.

It follows that where states invoke arguments from failure to expand their powers as against other states, such as the 'unwilling or unable' doctrine employed in the so-called war on terror or in the context of humanitarian interventions without UN approval, this cannot be justified in terms of our framework.[53] There simply is no shared institutional framework in this case, in which we may identify gaps, in terms of which states may justify expanding their powers in the light of certain failures of others.

In addition, there are high risks of abuse if we allow interventions outside such a framework, as Paulina Starski shows by pointing to continuities with colonial legal arguments that establish hierarchies between states on the basis of functionalist considerations.[54] Ntina Tzouvala pushes this line of argument further, describing the 'unwilling or unable' doctrine as rooted in a broader international law discourse on the 'standard of civilisation'.[55] This discourse, Tzouvala argues, oscillates

[52] B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529; N. D. White, 'The United Nations System: Conference, Contract or Constitutional Order' (2000) 4 *Singapore Journal of International & Comparative Law* 281; P. Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 25:1 *Max Planck Yearbook of United Nations Law Online* 89; for a critique, see, e.g., G. Teubner, 'Constitutionalising Polycontexturality' (2011) 20 *Social and Legal Studies* 210, focusing on the embeddedness of constitutionalism in a nation state context, which is not central to my understanding here.

[53] See also Starski, 'The "Unwilling or Unable" State', pp. 640 ff.

[54] Ibid., pp. 644 ff.

[55] Tzouvala, *Capitalism*, chapter 1 (and throughout).

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between an ultimately racist 'logic of biology', which denies equality to some actors with a 'logic of improvement' towards an ultimately pro-capitalist/(neo)liberal state.[56] Whether we share Tzouvala's critical approach or not, her analysis and that of Starski certainly speak to the risks of employing arguments from failure in a political and historical context where entrenched hegemonic structures shape the discourse. Insofar as arguments for intervention are put forward here, they therefore have to be justified in terms of the international law on self-defence, but without drawing on the unwilling or unable doctrine. Similar arguments apply with regard to humanitarian interventions by individual states or groups of states. In particular, the fact that a state may have signed a human rights treaty and is nevertheless violating human rights on a massive scale, potentially in the context of a civil war, does not provide enough of a shared institutional framework for individual states to justify intervening militarily.

Even where we do encounter a broader constitutional framework in the international realm, we also need to consider which entities are putting forward an argument from failure – a state or a body within another organization – in order to determine if they can indeed legitimately act for others in our broader analysis. To a degree, we might find horizontal power shifts on the international level to be less normatively problematic insofar as they do not conflict with a strict conception of functional integrity of the different branches as they might in the national realm. At the same time, they still raise the kind of issues that Mendes and Venzke draw attention to, prompting some modifications to our framework. As international bodies are, for example, typically not directly democratically legitimated, inclusiveness – understood in a broad way to encourage both broad representation and participation rights for stakeholders and civil society organizations – will have to serve as a proxy.

It is less clear whether and how this applies if arguments from failure are invoked in a vertical context. While laying out a more comprehensive framework for arguments from failure, Chapter 2 operated mostly on the basis of theories and examples developed for horizontal power shifts. In the international realm, however, such arguments are often deployed vertically, as we will also see in Chapter 8, dealing with the European Union.

At the bottom line, this also means, however, that where the hurdle of a 'constitutional' context can be overcome, the situation at the

[56] Ibid.; for a summary, see pp. 210–1.

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international level is not fundamentally different to domestic constellations. Though the normative stakes shift somewhat, our framework in Part I can still usefully inform our discussions.

7.3.3 *The Uniting for Peace Resolution Revisited*

With the above qualifications, let's return to the Uniting for Peace Resolution and its argument for a subsidiary competence of the General Assembly. Its legality and scope remain contested today. While it has been invoked in a number of Security Council Resolutions[57] and General Assembly Resolutions,[58] and played a role in other contexts, scholars differ on whether it actually formed the legal basis for any concrete actions.[59] Though the better arguments suggest that the Resolution was legally important, at least for the establishment of the UNEF peace mission in the wake of the Suez crisis in 1956,[60] it only ever served as a basis for recommending military action in the Korean case.[61] At the same time, it has been cited to justify other actions by the General Assembly.

Towards the end of the Cold War, the Security Council was for a while back in the driver's seat again, decreasing the need for General Assembly intervention, until the newfound consensus began again to falter. Since then, the Uniting for Peace Resolution has made a partial comeback.[62] More recently, it has been invoked to defend a bigger role for the General Assembly to combat grave human rights abuses in Syria.[63] It has also been referred to in calls on Russia to cease its unlawful aggression against Ukraine, which cite the Resolution and the fact that 'the lack of

[57] See, e.g., UN Security Council Resolutions 119 (1956), 120 (1956), 129 (1958), 157 (1960), 303 (1971), 462 (1980), 500 (1982).

[58] E.g., UNGA Resolutions USSR (A/6717), Senegal (A/ES-7/1), Zimbabwe (A/ES-8/1), Qatar (A/ES/10/1).

[59] C. Binder, 'Uniting for Peace Resolution (1950)', in A. Peters and R. Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2017), p. 10.

[60] UNGA Res. 1000 (ES-I) (1956) UN Doc. A/3354.

[61] A. J. Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18:3 *Journal of Conflict and Security Law* 453 at 459.

[62] On this, arguing for the continuing utility of the Resolution M. Ramsden, 'Uniting for Peace and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly' (2016) 25:2 *Washington International Law Journal* 267.

[63] G. Melling and A Dennett, 'The Security Council veto and Syria: responding to mass atrocities through the "Uniting for Peace" resolution' (2017) 57 *Indian Journal of International Law* 285.

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unanimity of the permanent members of the Security Council at its 8979th meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security'.[64] And unsurprisingly, some commentators have suggested that the General Assembly should rely on the Resolution to justify some form of intervention in Gaza, given the blockage of Security Council action by the United States.[65]

In the original debate about the Resolution, two questions were central: first, whether the competence of the Security Council to take 'action' in cases of a breach of peace was exclusive; and second, what the Security Council's precise obligations were and thus what might constitute failure in terms of the Resolution, focusing primarily on Arts. 10, 11, 12, 14 and 24 as well as 41 and 42 of the UN Charter.[66] The debate was thus framed mainly in terms of implied powers. Nevertheless, it frequently verged into broader arguments about necessity and ultimately proportionality, thus reflecting in many respects the framework developed in this book.

The text of the Charter makes clear that the Security Council indeed has primary responsibility to discuss disputes or functions assigned to it (Arts. 24 and 12 of the UN Charter), and this suggests that the General Assembly may at least have a subsidiary or secondary competence,[67] as the International Court of Justice also explicitly accepted in its *Certain Expenses* Advisory Opinion.[68] This argument seems largely accepted today, but it is less clear what precisely this entails and when the Assembly's secondary competence is activated.

As many diplomats and lawyers have pointed out, the Security Council is tasked to 'ensure prompt and effective action by the United Nations' and to 'act in accordance with the Purposes and Principles of the United Nations' according to Art. 24. If the Security Council thus fails to act, this arguably contravenes the purpose of the United Nations and triggers the subsidiary competence of the General Assembly, or so some argue.[69] This

[64] UNSC Res. 2623 (2022) UN Doc. S/RES/2623.

[65] E.g., Maziar Motamedi, 'What's UN Resolution 377A, Can It Help in Efforts to Stop Israel-Gaza War?', *Al Jazeera*, 11 Dec. 2023, https://tinyurl.com/3chch8ww.

[66] J. Andrassy, 'Uniting for Peace' (1956) 50:3 *The American Journal of International Law* 563. See also for a discussion of its later uses H. Reicher, 'The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage' (1981) 20:1 *Columbia Journal of Transnational Law* 1 at 10; more sceptical Tomuschat, 'Uniting for Peace', 296.

[67] Andrassy, 'Uniting for Peace', 564.

[68] *Certain Expenses*, ICJ Rep. (1962), p. 151.

[69] Ibid. at 565.

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entails a more straightforward argument from failure. Yet, the questions what constitutes failure and who gets to decide it loom large, given that the exercise of veto powers is explicitly envisaged by the Charter and does not, as such, constitute an abuse of powers. Moreover, some interventions may cause further harm rather than help. We might also ask whether only complete inaction constitutes a failure or whether failure is possible if the Council merely doesn't do enough.[70] The wording of Arts. 41 and 42 suggests that the Security Council has discretion ('may decide. . .', 'may take such action. . .') how to respond once it has established the existence of any threat to the peace, breach of the peace or act of aggression (Art. 39). Some scholars have suggested that one should therefore require a referral by the Security Council itself, which counts as a procedural decision and so is not subject to the veto.[71]

Finally, there is the question of what exactly the General Assembly might do. May it recommend (in a non-binding manner) military action that would otherwise violate Art. 2 (4) of the UN Charter? Can it make binding recommendations to Member States in that regard? Do either or both of these suggestions go too far? Here, too, scholars disagree, but it bears noting that the practice of the General Assembly has been very restrained in this regard in the past.

Treating the Uniting for Peace Resolution as a justification for the General Assembly to expand its power to deal with the fallout from Security Council vetoes, and thus as an argument from failure, would not fundamentally change the terms of the discussion. However, it might help to sharpen and emphasize some points. It would mainly highlight that the situation envisaged by the Resolution is not an everyday or routine case, and thus that the expansion of powers entails a divergence from standard practice and the rules rather than simply serving to increase the effectiveness of the United Nations. Clearly, the existing frameworks are not comprehensive in the sense that the General Assembly may never take action when it comes to Chapter VII of the Charter. It would also highlight a few additional aspects that play no, or a more marginal, role in current discussions. For example, it matters that the General Assembly is the closest analogue to a parliament we have on the international level. It can boast an inclusivity not shared by the Security Council, whose composition and processes are still shaped by the political constellations relevant in the mid-twentieth century and

[70] Reicher, 'The Uniting for Peace Resolution', 10.
[71] Art. 27 (2) UN Charter. See Carswell, 'Unblocking the UN Security Council', 466.

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whose legitimacy is more shaky accordingly. That said, this argument is predicated on the idea that a large majority of states in the General Assembly are democratic states rather than authoritarian regimes.

Nevertheless, understanding the Security Council's inaction in terms of a breach of law remains challenging, given the wide discretion it enjoys when it comes to acting under its framework. To put forward an argument from failure, we thus need something more concrete. Art. 39 of the UN Charter provides an entry point to such arguments, albeit letting the Security Council itself determine the existence of any threat to the peace, breach of the peace or act of aggression. Yet, the terms in question are legal terms, and while the Security Council has adopted an increasingly broad reading of Art. 39 since the end of the Cold War, this does not mean that it has no legal content. Scholars have moreover drawn on the emerging responsibility-to-protect (R2P) doctrine,[72] the better to come to grips with the Security Council's obligations. This might be complemented by the Code of Conduct for the Security Council,[73] as Rebecca Barber has suggested.[74] R2P stipulates several conditions for triggering the UN's responsibility, including just cause (in the form of serious and massive human rights violations, i.e. quality and quantity), reasonable prospects of improving the situation (capacity/functionality), last resort and proportionality. These closely overlap with the kind of arguments we would be interested in under a proportionality framework as applied to arguments from failure.

Would this be sufficient to differentiate cases of failure from mere disagreement? An explicit referral by the Security Council to the General Assembly would certainly bolster arguments that we are dealing not with a disagreement but a breach of obligations and ultimately failure. To draw this distinction, we might also consider the majorities in the Security Council. If action is blocked on the basis of just one permanent member's veto, the case for treating this as a failure is stronger than if the

[72] UNGA Res. 60/1 (2005) UN Doc. A/RES/60/1; see also General Assembly Fifty-Ninth Session: Report of the Secretary-General, 21 March 2005 at 135.

[73] Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes, Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc. A/70-621-S/2015/978 (14 December 2015).

[74] R. Barber, 'Accountability for Crimes Against the Rohingya: Possibilities for the General Assembly Where the Security Council Fails' (2019) 17:3 *Journal of International Criminal Justice* 557.

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issue is a truly contested one in the Security Council. Scholarly opinions might also help to clarify the issue since scholarly commentary is today much more readily and often immediately available on blogs and other fora, albeit we would have to consider a strong Global North bias in that context. Not least, we might also consider the majorities within the General Assembly itself.

All things considered then, there are good a priori reasons to assume that credible arguments from failure can be put forward in some cases to justify the General Assembly stepping in. However, the key question still remains as to what this implies in the next step and what and how much the General Assembly might do. And this is where an argument from failure would open the doors more widely than if we are relying on an implied powers justification. If we indeed encounter, for example, a situation involving massive violations of *ius cogens* norms and where there is no credible argument for non-intervention, as demonstrated by a referral and strong majorities in the Security Council and General Assembly, etc., and intervention would likely seem to be the only way to put an end to such a situation, under our framework the General Assembly would be able to exercise fairly robust powers, including recommending military action.

The real question in such cases is, of course, a political one. Where any of the major powers with a veto in the Security Council are themselves involved in breaches of international law, whether directly, as in the case of Russia's war on Ukraine, or in a supporting role, as in the United States, when it comes to Gaza, the reason for eschewing stronger forms of international intervention is not legal but political.

From a normative perspective, however, it bears emphasizing that the alternatives to General Assembly intervention are hardly more appealing. We have seen military alliances such as NATO acting without a UN mandate but relying on the concept of humanitarian intervention.[75] And both in this context and in others, arguments from failure have regularly surfaced in cases where the Security Council is seen to be failing, as, for example, in the Syrian civil war.[76] Yet, while the General Assembly has repeatedly criticized the Security Council's 'failure' to take action on

[75] On the latter, see Starski, 'The "Unwilling or Unable" State', pp. 264 ff.

[76] Y. Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria Through Uniting for Peace' (2019) 24:1 *Journal of Conflict and Security Law* 111; see also Carswell, 'Unblocking the UN Security Council'.

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Syria,[77] it ultimately did not rely on the Uniting for Peace Resolution mechanism in doing so.[78] However, from a normative perspective, intervention sanctioned by the United Nations and ideally within a UN framework is clearly preferable to individual powerful states acting in such cases. That said, it bears emphasizing that in an African context, intervention through the African Union, as provided for by Art. 4 (h) of its Constitutive Act, may provide a more appropriate alternative.[79]

7.4 Conclusion

The liquid character of many authority structures in international law and their output orientation make failure arguments a recurring feature of public international law, often embedded in broader theories of modernization and sometimes with neo-colonial undertones. Yet, arguments from failure are problematic here, because the idea of taking over for others (while expanding one's own powers) implies a context where expectations of cooperation and support are legally entrenched. This condition is not always met at the international level, particularly in inter-state relationships. And even where it is, the stakes of arguments from failure in international law can be very high and the discussion around them strongly ideologically shaped, as the various discourses of state failure demonstrate. One important conclusion to draw from this is thus that it matters who puts forward an argument from failure, as a matter of the power relationships involved. Given just how broad and hard to define arguments from failure are, we should be more careful and restrained with such arguments the more their proponents are speaking from a position of power. If those who dominate the discourse about expectations are the same as those who draw on failure to claim new rights, risks of abuse run particularly high.

[77] UNGA Res. 66/253B (2012) UN Doc. A/RES/66/253B Preamble; UNGA Res. 68/182 (2014) UN Doc. A/RES/68/182 para. 12; see also UNGA Res. 71/130 (2016) UN Doc. A/RES/71/130 Preamble.

[78] See Nahlawi, 'Overcoming Russian and Chinese Vetoes' for a detailed discussion.

[79] D. Kuwali, 'The End of Humanitarian Intervention: Evaluation of the African Union's Right of Intervention' (2009) 9 *African Journal on Conflict Resolution* 41.

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