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Understanding the relationship between human rights abuse, state dysfunction and postcolonial sovereignty in Africa

Abstract

This article explores the interrelationship between the phenomena of state dysfunction, human rights abuse and postcolonial states in the African context. The incidence and extent of state dysfunction and human rights abuse are evaluated empirically, which reveals that dysfunctional states in Africa are generally guilty of neglecting and violating human rights. In attempting to understand this apparent correlation, the politico-juridical construct of negative sovereignty, as formulated by Robert Jackson, is analysed with specific reference to postcolonial African states. The analysis suggests, paradoxically, that dysfunctional states may utilise the same normative precepts that served as justifications for decolonisation (such as self-determination and non-intervention) to obfuscate or obstruct the scrutiny of human rights domestically. From these insights it is posited that functional states, both in institutional and political terms, may serve as the most effective bulwark of human rights in Africa, and that the phenomenon of state dysfunction as it relates to domestic human rights violations warrants more consideration.

Keywords: *Africa; Human rights; Negative sovereignty; Postcolonial sovereignty; Quasi-states; State dysfunction.*

Opsomming

In hierdie artikel word die verhouding tussen staatsverval en menseregteskendings in post-koloniale Afrika verken. Die voorkoms en omvang van beide fenomene word empiries geëvalueer, waarna die gevolgtrekking gemaak word dat swak- en disfunksionele state in die algemeen skuldig is aan menseregteskendings. Ten einde hierdie korrelasie te verstaan, word Robert Jackson se polities-juridiese konstruk van 'negatiewe soewereiniteit' ingespan met spesifieke verwysing na post-koloniale Afrikastate. Die uitkoms van hierdie analise dui op ŉ paradoks deurdat disfunksionele state dikwels gebruik maak van dieselfde normatiewe voorskrifte wat dekolonisering destyds gemotiveer het in hul pogings om kontemporêre menseregteskendings op eie bodem te verdoesel of te verdedig. Vanuit hierdie standpunt word daar aangevoer dat funksionele state, in beide politieke en institusionele terme, die mees doeltreffende teenvoeter vir menseregteskendings in Afrika mag wees en dat die problematiek van staatsverval ook spesifiek beskou moet word vanuit ŉ menseregteperspektief.

Sleutelterme: *Afrika; menseregte; negative soewereiniteit; post-koloniale soewereiniteit; kwasi-state; stat-disfunksie.*

1. Introduction and points of departure

In one of the first and most influential pieces of writing on the (then) emerging phenomenon of failed states, Gerald Helman and Steven Ratner (1992:3) dolefully noted that:

> 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… As those states descend into violence and anarchy – imperilling their own citizens and threatening their neighbours through refugee flows, political instability, and random warfare – it is becoming clear that something must be done. The massive abuses of human rights – including that most basic of rights, the right to life – are distressing enough, but the need to help those states is made more critical by the evidence that their problems tend to spread.

More than two decades after the appearance of this seminal article, the dilemma of dysfunctional states in the developing world, and in Africa in particular, has grown more acute – along with the human rights abuses that are perpetrated in such places.

The purpose of this article is to explore and understand the interrelationship between three variables: (i) state dysfunction, (ii) postcolonial states and (iii) human rights. Furthermore, this article will consider these variables specifically in the African context. This will be achieved through a theory-driven qualitative analysis of sovereignty as it manifests in dysfunctional and postcolonial states in Africa, applying the construct of 'negative sovereignty' devised by the legal scholar Robert Jackson. Contemporary data on state dysfunction and human rights abuses in Africa are utilised as a means of empirical verification. As a point of departure, certain key concepts that are integral to this article are delineated below.

1.1 Sovereignty

International legal sovereignty denotes the status of a political entity in the international system. Recognition of such sovereignty implies that a state has juridical equality, that its diplomats are entitled to immunity, and that its embassies and consulates have extraterritorial status, and that it has the ability to enter into agreements with other sovereignty entities (Krasner, 2001:9). A general understanding of the concept in contemporary international law is that:

> Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law (Steinberger, 1987:414).

These notions of sovereignty in international law speak to the juridical nature of the concept as a signifier of *independence*. However, authentic sovereignty should be complemented by the *de facto* attribute of *supremacy* – in other words, that the state possesses an authority that is supreme in relation to all other authorities in the same territorial jurisdiction (Jackson, 2007:10). The requirement of domestic supremacy speaks to sovereignty as an empirical quality, one that is not merely a conferrable status (such as juridical independence) but an empirical attribute. In relation to this, Jackson refers to sovereignty's 'Janus-faced' nature – simultaneously facing inward towards the citizens of a given state, and outward at other states in the international community (Jackson, 2007:11). Accounting for the dualist nature of sovereignty is pivotal to evaluating and understanding the predicament of dysfunctional states in the developing world, as will be demonstrated subsequently.

1.2 Dysfunctional states

The most widely adopted contemporary conceptualisation of the state is that of Max Weber's, which holds that a polity may be considered a state if it possesses an administration of which the different parts are coordinated; if it acts as a compulsory association that can claim binding authority over all that occurs within its demarcated territory; being able to do so through means of a monopoly on the legitimate use of force (Weber & Parsons, 1947:156). Proceeding from this definition, a dysfunctional state is conceptualised as a fundamental deviation from the ideal-typical Weberian conception of state (of which the dysfunctional attributes manifest in the societal, institutional and international domains) that:

- may be represented according to a typology of dysfunction, incorporating differentiated graduations;
- is often encountered as a postcolonial phenomenon;
- is essentially characterised by a deficiency in the capability to predominate as an autonomous, legitimate and authoritative political institution
- is therefore not authentically (positively) sovereign in either domestic or international spheres; and
- as a result is incapable and/or unwilling to fulfil the functions of state in the public interest and for the public good (Greffrath, 2015:27).

This conceptualisation of the dysfunctional state will serve as point of departure in the analysis of the phenomena of state dysfunction and human rights, conducted subsequently.

1.3 Human rights

In accordance with the Universal Declaration on Human Rights (UDHR), 'human rights' is conceptualised as being subjective rights to which individuals are entitled by virtue of being human (UN, 1948). These rights are stipulated in the UDHR and other treaties, including the International Covenant on Economic, Social and Cultural Rights (CESCR), and the International Covenant on Civil and Political Rights (CCPR). Additionally, UN General Assembly Resolution 1514 (Declaration on the Granting of Independence to Colonial Countries and Peoples) is also of relevance for this article, insofar as it represented the extension and application of the international human rights regime towards the end of terminating the practice of colonialism.

2. State dysfunction and human rights: Occurrence and correspondence

Non-governmental organisations have, for some time, monitored the status of the abovementioned aspects in the international arena and their findings have proven to be valuable, particularly in instances where states themselves have not shouldered the burden in providing adequate reporting and accountability on human rights issues. The problematic nature of the interface between dysfunctional states and human rights has been corroborated by international NGOs, and a cursory evaluation of their insights into contemporary dysfunctional states reveals a correlation with deficits in the values which buttress human rights, such as the rule of law, political and civil liberties and human freedom.

Table 1 - Comparison of Fragile States Index and Freedom in the World data (high and very high alert states)

	Fragile States Index [2015]	Human Rights and Rule of Law	Freedom in the World [2015]	Political Rights	Civil Liberties
1	South Sudan	10	Not Free	7	6
2	Somalia	10	Not Free	7	7
3	Central African Republic	10	Not Free	7	7
4	Sudan	9.6	Not Free	7	7
5	D.R. of Congo	10	Not Free	6	6
6	Chad	9.4	Not Free	7	6
7	Yemen	9.1	Not Free	6	6
8	Syria	10	Not Free	7	7
9	Afghanistan	8.6	Not Free	6	6
10	Guinea	8.4	Partly Free	5	5
11	Haiti	7.4	Partly Free	5	6
12	Iraq	8.9	Not Free	6	6
13	Pakistan	8.4	Partly Free	4	5
14	Nigeria	8.8	Partly Free	4	5
15	Cote d'Ivoire	7.9	Partly Free	4	5
16	Zimbabwe	7.3	Not Free	5	6

The table above combines selected content of two separate reports, namely the 2015 Fragile States Index (FSI), compiled by the Fund for Peace, and the 2015 Freedom in the World (FIW) report, published by Freedom House. Both these sources are regarded as authoritative international barometers of their respective domains of inquiry. The 16 tabulated states are those that that have been designated by the FSI as being on High Alert (states 6-16, above) and Very High Alert (states 1-5, above). According to the FSI methodology, these states 'display features that make significant parts of their societies and institutions vulnerable to failure' (Fund for Peace, 2015). One of the 12 primary indicators employed by the FSI (amongst others such as state legitimacy, public services, factionalised elites and the state security apparatus) is that of human rights and the rule of law, regarding which the FSI argues that 'when human rights are violated or unevenly protected, the state is failing in its *ultimate responsibility*' (own emphasis) and incorporates pressures and dynamics related to press freedom, civil liberties, political freedoms, human trafficking, political prisoners, incarceration, religious persecution, torture and executions (Fund for Peace, 2015). Similarly, the Freedom in the World report utilises two categories to provide a hybrid picture of states, relating to both their functionality and the status of human rights within their borders. Political rights concerns aspects such as the integrity of the electoral process, political pluralism and participation, and the functioning of government, whilst civil liberties are evaluated in terms of the freedom of expression and belief, associational and organisational rights, the rule of law, and personal autonomy and individual rights (Freedom House, 2016). When combined, the complementary perspectives of the FSI and FIW report provide a comprehensive evaluation of the status of human rights in the dysfunctional states of the world.

When the aforementioned sixteen fragile or dysfunctional states and their respective human rights credentials are compared to the states classified as 'very sustainable' and 'sustainable' by the Fragile States Index, a clear relationship is demonstrated between the variables of state functionality/integrity and human rights:

Table 2 - Comparison of Fragile States Index and Freedom in the World data (sustainable and very sustainable states)

	Fragile States Index [2015]	Human Rights and Rule of Law	Freedom in the World [2015]	Political Rights	Civil Liberties
178	Finland	0.9	Free	1	1
177	Sweden	1.0	Free	1	1
176	Norway	1.3	Free	1	1
175	Denmark	1.3	Free	1	1
174	Luxembourg	1.0	Free	1	1
173	Switzerland	1.8	Free	1	1
172	New Zealand	1.0	Free	1	1
171	Iceland	1.1	Free	1	1
170	Australia	2.4	Free	1	1
169	Ireland	1.2	Free	1	1
168	Canada	1.8	Free	1	1
167	Austria	1.7	Free	1	1
166	Netherlands	1.0	Free	1	1
165	Germany	1.5	Free	1	1
164	Portugal	2.3	Free	1	1

It is evident that, whereas dysfunctional states exhibit poor human rights credentials, the contrary is true of functional states, which score highly for human rights, rule of law, political rights and civil liberties.

Noting this, three features emerge as significant. Firstly, there appears to be a relationship between the variables of state dysfunction on the one hand, and the erosion of human rights on the other. This observation recalls Weber's conceptualisation of the state, according to which the paramount function of the state is essentially to act as *guarantor of safety* to those who reside within its borders. Dysfunctional states are unable to fulfil such a role, both in relation to domestic and external threats to human rights. Secondly, a significant preponderance of the dysfunctional states that are characterised by poor human rights records are encountered in the developing world (with ten of the 16 states being African), whilst the six *most* dysfunctional states are located in Africa. The current challenges surrounding human rights in these states are confirmed by Amnesty International:

Table 3 – Amnesty International notes on human rights incidents in six dysfunctional African states

FSI 2015 Ranking	State	Extracts from Amnesty International Notes for 2014/15[i]
1	South Sudan	*In August, after more than 20 months of intermittent negotiations, South Sudan's warring parties finally agreed to the terms of a wide-ranging peace agreement. However, despite the peace agreement and a subsequent ceasefire declaration, conflict continued in several parts of the country, although at a lower intensity than previously. All parties flouted international human rights and international humanitarian law during the fighting, but no one was held accountable for crimes under international law committed in the context of the internal armed conflict. Security agents repressed independent and critical voices from the opposition, media and civil society.*
2	Somalia	*Over 500 people were killed or injured by armed conflict and generalized violence, and at least 50,000 people were displaced. All parties to the conflict were responsible for crimes under international law and human rights violations, which remained unpunished. Armed groups continued to conscript children, and abduct, torture and unlawfully kill civilians. Rape and other forms of sexual violence were widespread. Continued conflict, insecurity and restrictions imposed by the warring parties hampered aid agencies' access to some regions.*
3	Central African Republic	*Crimes under international law, including war crimes and crimes against humanity, were committed by all parties to the conflict. Many of those suspected of criminal responsibility for crimes under international law, including commanders of the Séléka and anti-Balaka forces, as well as other militias and their allies, were yet to be effectively investigated or brought to justice. According to the UN and relief organizations, 2.7 million people remained in need of humanitarian assistance, including more than 460,000 internally displaced people and 452,000 refugees in neighbouring countries.*
4	Sudan	*The authorities repressed the media, civil society organizations and opposition political parties, severely curtailing freedoms of expression, association and assembly. Armed conflict in Darfur, South Kordofan and Blue Nile states continued to cause mass displacement and civilian casualties; human rights abuses were perpetrated by all parties to these conflicts. Government forces destroyed civilian buildings, including schools, hospitals and clinics in conflict areas, and obstructed humanitarian access to civilians needing support because of the ongoing hostilities.*
5	D.R. of Congo	*Government repression of protests against attempts by President Kabila to run for the presidency beyond the two terms allowed by the Constitution intensified. Violations of the rights to freedoms of expression, association and peaceful assembly increased. Human rights defenders, youth activists and politicians were threatened, harassed, arbitrarily arrested and in some cases convicted for peacefully exercising their rights. The failure of the Congolese army and the UN peacekeeping force MONUSCO (UN Organization Stabilization Mission in the DRC) to protect the civilian population led to a high civilian death toll and mass displacements.*
6	Chad	*Boko Haram stepped up attacks in the capital, N'Djamena, and around Lake Chad, killing and abducting civilians, and looting and destroying properties. The authorities took several counter-terrorism and security measures, including passing a restrictive anti-terrorism law. The security forces carried out arbitrary arrests and detentions. The*

Thirdly, with the partial exception of the newly-independent South Sudan, the African states that share both variables of dysfunction and compromised human rights are progenies of the post-WWII wave of decolonisation, with most to date having enjoyed the status sovereign autonomy for more than half a century. They are therefore post-colonial states in having previously been colonised by an external power, subsequently decolonising and attaining formal independence.

Table 4 - African fragile states by year of independence

FSI 2015 Ranking	State	Year of Independence
1	South Sudan	2011
2	Somalia	1960
3	Central African Republic	1960
4	Sudan	1956
5	D.R. of the Congo	1960
6	Chad	1960
10	Guinea	1958
14	Nigeria	1960
15	Cote d'Ivoire	1960
16	Zimbabwe	1980

Of course, it is true that almost *all* of Africa's current 54 states are post-colonial states in one way or another, the continent having been extensively colonised in the eighteenth century. Furthermore, relatively functional post-colonial African states such as Botswana, Senegal, Benin and Ghana possess respectable human rights records. Even though these states represent a small minority in the African context, their human rights performance suggests that there is no *automatic* correlation between post-colonial African states and the erosion of human rights. Nonetheless, the preceding discussion would appear to point towards a distinctive interaction between the variables of human rights abuse, state dysfunction and post-coloniality, especially in Africa. The remainder of this article be devoted to understanding the dynamics of this trifecta, by drawing on the theoretical contributions of Robert Jackson, who has done more than any other scholar in the fields of international law and political science to chart the complex relationship postcolonial sovereignty and state dysfunction, according to his conceptualisation of 'quasi-states'.[1]

3. A post-war reconfiguration of international society

During the immediate post-war period in the international political environment became receptive to the ideas of anti-colonial ideologies (spurred on by the success of the Civil Rights Movement in the United States) amongst which the notion of self-determination featured centrally. The United Nations (UN), in particular, played a pivotal role in discrediting the premise of colonialism through the promulgation of its Charter (1945), and documents such

1 *Jackson's concept of 'quasi-states' is employed in many introductory and advanced books in the field of International Relations. Recent examples include Chandler D, International State-building: The Rise of Post-Liberal Governance. New York: Routledge, 2010, p. 47.; Lake D, Hierarchy in International Relations. Ithaca: Cornell University Press, 2009, p. 39.; Nexon D, The Struggle for Power in Early Modern Europe: Religious Conflict, Dynastic Empires and International Change. Princeton: Princeton University Press, 2009, p. 58.; and Thomson A, An Introduction to African Politics. New York: Routledge, 2010, p. 77.*

as the Universal Declaration of Human Rights (1948), which acquired significant moral and legal momentum. As a result, European colonial powers were unable to sustain widespread belief in the legitimacy of colonialism. The growing tide of international criticism and censure pressured these powers to initiate a process of decolonisation that, once begun, snowballed as dozens of colonies clamoured for immediate independence, citing the newfound international morality of the era. The central and overarching principle was a jarring juxtaposition to what had hitherto been accepted in international relations, and held that all colonial peoples are entitled to be independent regardless of their culture, race, wealth, geography or any such criterion (Jackson, 2007:16).

Put differently, no prerequisite of political viability prevented colonies from attaining independence, since self-determination became a fundamental norm – that is, a right.

However, the abolition of a colonial hierarchy of states and its subsequent replacement with egalitarianism has failed to bring an end to the *de facto* practice differentiation between states. The persistent stratification of states, decades after colonialism, is most acutely emphasised by the different adjectives that have emerged to describe various tiers of state capacity (including 'fragile states'). Formerly, the world was divided into metropolitan powers and colonies or dependencies. These two categories have largely continued to exist (albeit clad in a postcolonial idiom) as developed, developing and less-developed states. The sphere of less-developed states also harbours a significant number of dysfunctional states. As Jackson (2007:18) notes:

> Today in addition however there is a North-South gap between states disclosed by profoundly unequal standards of living which cannot be altered fundamentally by international agreements and diplomacy. The division is likely to persist indefinitely regardless of international decisions to the contrary because it is rooted in deep-seated cultural, material, and even psychological conditions of sovereign states.

What has, in essence, been fundamentally altered are the *international rules of the game* concerning the 'obligation to be a colony and the right to be a sovereign state' (Jackson, 2007:21).

This, then, is the central premise of this investigation's approach to evaluating the nexus between postcolonial sovereignty, state dysfunction, and human rights – namely that, not unlike colonial times, an international order of strong and weak states is being perpetuated *with little substantive change in state capabilities and government*, being instead merely nominally reconfigured according to the formal requirements of international egalitarianism.

4. A differentiated approach to postcolonial sovereignty

A differentiated conceptualisation of sovereignty is integral to understanding the rights and obligations of quasi-states in the contemporary international world order, according to which the dual nature of postcolonial sovereignty may be expressed in terms of its positive and negative manifestations. These notions of positive and negative sovereignty[2] are premised on Isiah Berlin's influential cognate ideas of negative and positive liberty. Berlin (1969:122) defines negative liberty as the area within which an individual can act unobstructed by others. Negative liberty provides individuals freedom *from* interference, and thus presupposes the self-determined nature of that individual's existence. Curtailment of an individual's negative liberty is only justified when he/she harms or threatens or acts maliciously toward others – the so-called harm principle (Mill, 1861:21).

2 *The theoretical differentiation of sovereignty has also notably been conducted by Stephen Krasner who identifies four variations of sovereignty. Several of Krasner's insights are based upon Jackson's analysis of quasi-states. See Krasner SD, Sovereignty: Organised Hypocrisy. Princeton: Princeton University Press, 1999, pp. 34.*

Analogously, negative *sovereignty* (as applied to states) can be defined as freedom from outside interference, in a formal-legal sense. In this application, possessing sovereignty and being free from outside intervention represent two sides of the same juridical coin. It is also the central principle upon which the law of nations and the Weberian conception of statehood is premised – the notion that each state has exclusive legal jurisdiction in its own territory, free from incursion by other states. Accordingly, Jackson (2007:27) notes that:

> Negative sovereignty as regards quasi-states primarily involves decolonisation: it is the distinctive liberty acquired by former colonies as a consequence of the international enfranchisement movement … It is a *formal legal entitlement* and therefore something which the international society is capable of conferring.

Thus, negative sovereignty could be described as a *passive attribute*, since it is not dependent on any conditions or positive actions by a given state (as holder of sovereignty). Rather, it rests on the observance and forbearance of *other* states in the international community of sovereign states.

In contrast, positive liberty (as conceptualised by Berlin) consists of being one's own master. Thus, where negative liberty is interpreted as freedom *from*, positive liberty is freedom *to*: being active, self-directive, exercising choice, and pursuing and realising goals (Berlin, 1969:131).[3] Positive *sovereignty* likewise presupposes capabilities that enable governments to be their own masters and is, therefore, a substantive (empirical) rather than a formal condition or status that may be conferred – it is not a legal, but a *political* attribute.[4] Therefore, a positively sovereign state is one that not only enjoys rights of non-intervention and other international immunities, *but also possesses the wherewithal to provide political goods and protection for its citizens* and, as such, positive sovereignty could be considered the distinctive overall feature of a 'developed' state.

Although all internationally recognised states enjoy the rights which negative sovereignty guarantees (such as autonomous diplomatic relations and non-intervention) only some possess the capabilities to maximise the advantage of their independence. Yet is worth noting that the ability to achieve substantive positive sovereignty is neither a function of a particular state's size, nor its power, and that functional small states and dysfunctional large states have existed throughout history. Both in economic and geographic terms, states such Denmark, Luxembourg, Singapore, and New Zealand are dwarfed by other neighbouring states or proximate regional powers, yet these small states are able to provide for their populations as well as any state and better than most . It is therefore not a question of being a dwarf or a giant among states, but rather, of being a state in *organised domestic reality* and not merely according to the letter of international law.

Through their domestic incapacity, dysfunctional quasi-states lack positive sovereignty and many of the concomitant positive (empirical) attributes of statehood, such as means to act as guardian of their citizens' human rights. In certain cases, these states may exist merely by virtue of their inherent rights, enshrined according to negative sovereignty, which maintain them with little trace of the features that typify authentic self-determination. Such states are the product of a new postcolonial arrangement of sovereignty that stands in contrast to the conventional, evolutionary development of sovereignty over the last 500 years.

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3 Berlin I, Four Essays on Liberty. London: Oxford University Press, 1969, p. 131.

4 Marshall's description of sovereignty is predicated especially upon the capabilities of states, and serves as a good example of the classical (positive) conceptualisation of sovereignty. Whilst its length prohibits its quotation here, Marshall's conceptualisation captures the essence of classical positive sovereignty (which Jackson employs in his own work). See Marshall C, The Exercise of Sovereignty. Baltimore: Johns Hopkins Press, 1965, p. 5.

5. Old and new sovereignty regimes

It was noted previously that in terms of the prevailing international legal framework, sovereignty implies constitutional independence from other states, meaning that a state's constitution is not part of a larger constitutional arrangement (James, 1986:25). By the same token, there can be no half-measure, or semi-sovereignty – a state is either wholly sovereign or subject to a measure of control by another sovereign state and therefore not sovereign. Historically, various types of non-sovereign entities existed that were maintained by imperial powers such as protectorates, colonies, mandates, trust territories or condominiums (Grossman, 2001:858; Fawcett, 1949:86-107). These aforementioned political-constitutional arrangements entailed legal subordination to a foreign power – effectively the denial of sovereignty. Jackson (2007:48) remarks that the manner in which colonial independence was expedited has:

> … resulted in the formation for the first time of two simultaneous games of sovereignty within universal international society: the continuing demanding 'hardball' game based on positive sovereignty, and a new, softer, third division game derived from negative sovereignty … The new game is the North-South 'dialogue' which is the successor of Western colonialism. It is in many respects a collaborative regime fashioned to replace the imperial orders which governed non-Western areas in the past … What is fundamentally changed, therefore, is not the geographical distribution of power in the world. Rather, it is the moral and legal framework of the states-system and the way that underdeveloped parts of the world are supported externally.

The rules of the sovereignty game are influenced by the fundamental reality of the plural nature of states in an international system. Collectively, these rules maintain the constitutional independence of states, observing legal equality between states, mutual recognition, jurisdiction, non-intervention, entering into and honouring treaties, diplomacy, and a broad framework of international law that even regulates violent conflict between states in a rule-bound playing field protecting non-combatants and other spectators.[5] Thus, the aforementioned rules include every convention and practice of international life that serve to moderate and civilise the relations of states.[6] The classical international game of sovereignty is therefore essentially a game of liberty, as discussed previously with reference to Berlin. It represents the overarching central institution in a liberal political order as it 'exists to order the relations of states, prevent damaging collisions between them, and – when they do occur – regulate the conflicts and restore peace' (Jackson, 2007:34).

Traditionally, therefore, besides being *positively capable* entities, states are also viewed as *intrinsically valuable* and worth protecting and preserving, since they provide the necessary conditions of the good life to their citizens. Consequently, each sovereign player aims to achieve advantage and gain through the pursuance of its foreign policy, mindful of the fact that irreverence towards rules will destroy the game itself, including the valuable political goods and independence that derive from it. Ultimately, then, the national interest of sovereign states is the protection and preservation of their own way of life, through preserving the rules of the game. Historically, the prominent players of this classical sovereignty game were generally functional, empirically sovereign, often Western states. In the traditional sovereignty game, efficacy of government was a supporting pillar of sovereign statehood, whereby the supreme authoritative power resided in a particular territorial unit and evolved from 'within'. Demonstrable capacity for survival and self-government created credibility and esteem that warranted recognition beyond one's borders – *sovereigns therefore preceded*

5 *Such rules would include, for example, The Hague (1907) and Geneva (1949) Conventions*

6 *A notion first arrived at by Hugo Grotius, upon which the rationalist conception of international relations is largely based*

sovereignty. Kelsen (1945:29) underscored the requirement of functionality for participation in the classical sovereignty game when he argued that:

> A national legal order begins to be valid as soon as it has become, on the whole, efficacious, and ceases to be valid as soon as it loses this efficacy.

If Kelsen's test of validity continued to be applied today, many states in the developing world would not be regarded as sovereign (as a cursory evaluation of the Fragile States Index would confirm). Indeed, it is true that the original and most successful participants of the old sovereignty game were governments that had successfully asserted sovereignty in the past, had never surrendered sovereignty or succumbed to another state, and consequently had a strong historical right to play the game. When the United States achieved freedom from the British Empire through its War of Independence or when Japan eluded Western imperialism, empirical statehood and the accompanying positive title to sovereignty was *capably demonstrated*. The players of the old sovereignty game therefore excluded the various less significant colonies and dependencies that existed at the time. It was, as Kreijen (2004:51) notes, a game for the 'big boys'.

6. The emergence of self-determination as paramount principle

Subsequent to the constitutional-political strata of dependencies being eliminated from the international legal order, sovereignty became conferrable upon any entity based on the normative moral criteria of self-determination. Whilst the philosophical notion of self-determination had been part of liberal thought since the eighteenth century, it was Woodrow Wilson's Fourteen Points that precipitated its incorporated as part of a *normative framework for international relations,* when he argued for:

> A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of the government whose title is to be determined.[7]

However, it was only after another world war that the principle of self-determination became formally integrated into the framework of international law under the auspices of the UN. Since then, it has figured prominently in the UN's most influential declarations and documents and, as such, came to represent a *ius cogens* norm:

- Chapter 1, Article 1, part 2 of the UN Charter states that purpose of the charter is: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.'
- Article 1 of both the CCPR and the CESCR read: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'
- The UDHR, Article 15, states that everyone has the right to a nationality and that no one should be arbitrarily deprived of a nationality or denied the right to change nationality.

7 *Wilson's Fourteen Points were drafted after the First World War, according to which the principle of national self-determination was applied to the breakup of the Austrian, German and Ottoman Empires. The principle of national self-determination is also embodied in the UN Declaration on the Granting of Independence of Colonial Countries and Peoples (1960), and in the Declaration of the Principles of International Law (1970).*

It is on the basis of these articles, and the normative shift they signified, that erstwhile liberation movements justified their struggle against colonialism from the position of the moral and juridical high ground. Of course, the concept of self-determination is in itself just, and concurs with the broad liberal-democratic tradition that acknowledges the human rights of the individual and many other virtuous principles that collectively promote a civilised human existence. However, it has been argued that enshrining self-determination as an *unconditional* right resulted in the crucial determinant of *state feasibility* being wholly disregarded – in fact, it was quickly relegated to the ranks of political incorrectness. It represents, therefore, an extreme example of idealism triumphing over realism. Its extreme idealism was demonstrated by the fact that aspirant indigenous governments had neither the social nor the institutional control, authority, and functional capabilities to consolidate and develop statehood (decades later, indices such as the Fragile States Index and Freedom in the World bear stark witness to this).

7. A corollary to self-determination – the right to non-intervention

If the right to self-determination serves as the legal grounds for the *founding* of states in the postcolonial era, the right to non-intervention serves as a mechanism to *perpetuate* their existence. According to UN resolution 2131:

> In fulfilment of the principle of self-determination, the General Assembly, in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in resolution 1514(XV) of 14 December 1960, stated its conviction that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development … All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

This resolution links the concepts of self-determination and non-intervention with the purpose of establishing permanent (inviolable) postcolonial states. Presumably, the guiding purpose of this resolution (given its ratification in 1965) was to prevent the re-emergence of colonialism and the acquisition of territorial possessions by states capable of doing so. It can be said, almost fifty years later, that this goal has been achieved. Colonialism did not re-emerge in the post-war period, and is as of today a non-existent feature of international relations. However, the doctrine of non-intervention has also hermetically sealed the postcolonial configuration of states, eliminating the possibilities of subsequent self-determination for ethnic groups or nationalities other than those represented by liberation movements in the struggle for independence. The volatile and acute nature of this configuration has been demonstrated frequently in recent history, where fragmented societies (consisting of multiple ethnicities, religions, or languages) are contained within postcolonial territorial boundaries, and civil conflict subsequently emerges during which one side is normally supported by the state.

Thus, the post-war formalisation of national self-determination as a sufficient and necessary ground for sovereignty and constitutional independence prompted the emergence of a new sovereignty game. The doctrine of independence based upon the right of self-determination not only established ex-colonies' categorical right to independence, it also cemented the *permanent inviolability* of these territories. Furthermore, it was no longer seen as a *positive* right of national self-determination (as very few modern states emerge concurrently with, or

from, nations). It instead became an exclusive negative right of ex-colonies, which typically contain a multitude of ethnic and tribal entities and rarely a homogenous ethnic community. The right to self-determination therefore became, first and foremost, an instrument toward anti-colonial liberation (Jackson, 2007:41). However, various nations and communities that were not colonies argued for their right to independence based upon the doctrine of self-determination and have been denied by the rules of the new sovereignty game. The 'accidents of imperial history' have consigned them to the status of outcasts in the current sovereignty game, even where they represent *de facto* governments in effective control of territory. Examples in Africa include Igbos, Tuaregs, Sahrawis, Furs, Baganda amongst other ethno-nationalities worldwide, which have been referred to as 'stateless nations'.[8] Several of these nations are denied independence since geographically they form part of former colonies of which the sovereignty and territorial integrity cannot be challenged or amended in the current international order of states, due to the dictates of negative sovereignty and non-intervention. Subsequently, these peoples are often relegated to a rogue status and described as separatists, secessionists or irredentists (indeed, many have chosen violence as a means to further their political goal of independence). Additionally, ethnic minorities in African states have frequently been persecuted by postcolonial governments, culminating in genocides such as those in Zanzibar (1964), Burundi (1972), Rwanda (1993), and the Democratic Republic of the Congo (1998-2003) where gross abuses of human rights were perpetrated.

Therefore, to a significant extent, national self-determination has transformed into a *reactionary right* of quasi-states in the postcolonial world. The leaders of such states are generally determined to prohibit 'secessionist' ethno-nationalities from attaining independence, since it would involve loss of jurisdiction over the territories in question and the redrawing of international frontiers, which could threaten internal and regional power relations. With regards to this conservative interpretation of the right to self-determination, it has been noted that international and national decision-makers decided to follow the route of *uti possidetis,* whereby the geographical integrity of newly-independent states emerging during decolonisation was seen as a paramount goal – at the expense of minority groups with legitimate claims to national self-determination (Labuschagne, 2006:78-92). Whilst granting independence to ethnic minorities based upon the principle of national self-determination may in certain instances create viable states, the sheer number of aspirant minorities poses a risk of regional fragmentation and destabilisation. Regardless, the principle of true national self-determination is one that has been rendered obsolete with the completion of decolonisation – and it emerged from this process that the only truly self-determined groups were those represented (often narrowly and exclusively) by victorious liberation movements.

8. The adverse impact of negative sovereignty on human rights

The ascendancy of the doctrine of self-determination has created indigenous governments in the developing world, but has simultaneously subjected many populations to unstable and predatory regimes in the form of dysfunctional states that often employ their sovereign privileges as a foil in neglecting or abusing human rights within their borders, as reported by NGOs such as Amnesty International and Freedom House. This outcome is not only deeply saddening but also profoundly ironic, since many of the liberation movements that led the charge for colonial independence did so on the basis of a moral and normative appeal in which *human rights was the central pillar*. In certain instances these self-same

8 *The cases of Scots, Catalans and Gibraltarians have also been cited as cases of 'stateless nations'. See Keating M, 'Stateless Nation-Building: Quebec, Catalonia and Scotland in the Changing State System', Nations and Nationalism, 3, 4, 1997, pp. 689-717; and Azopardi K, Sovereignty and the Stateless Nation: Gibraltar in the Modern Legal Context. Portland: Hart Publishing, 2009.*

liberation movements are still governing, often with scant regard for issues of human rights in their domestic contexts. This jarring contradiction was underscored in 2008 when Robert Mugabe remarked, referring to ZANU PF, that 'We, not the British, established democracy based on one person, one vote - democracy which rejected racial or gender discrimination and upheld human rights and religious freedom' (WikiNews, 2008).

Indeed, the prevailing negative sovereignty regime bears important domestic consequences with regards to human rights for those living in dysfunctional quasi-states. In the same manner that the inviolable right of non-intervention prohibits donors of development assistance in dictating the application of such assistance, the international community is similarly constrained in preventing abuses of human rights in dysfunctional states (Kreijen, 2004:97). Buzan (1983:3) describes this situation in dysfunctional states as the 'paradox of the state' according to which states and their governments become a source of threat to their citizens, rather than security, representing what has been referred to as a 'predatory state' (Diamond, 2008:36). Some have even gone as far as to label the postcolonial African state as 'a terrorist organisation masquerading as the repository of popular will' (Mutua, 1995:489). To be sure, citizenship in dysfunctional states is often scarcely more than a nominal status with little or no real substantive privilege, since dysfunctional states are (at best) incapable of delivering political goods, and may even predate upon the citizens whom the social contract enjoins them to protect.

It has been argued that the expansion of the community of states brought about by decolonisation has not resulted in a corresponding extension of human rights protection, but instead increased opportunity for human rights violations (Freeman, 2005:243-245). Such atrocities have come to be vividly publicised by international humanitarian organisations and NGOs, cited previously. As a result, public perceptions relating to human rights abuses are more acute than ever, especially in the developed world where 'the comparative civility of Western states and the corresponding expectations of their populations have undoubtedly created heightened awareness of inhumanity everywhere' (Jackson, 2007:141).

The advent of contemporary international human rights law and its incorporation as *ius cogens* is therefore an important admission that sovereign states cannot *automatically* be considered civil states[9] – the poor human rights record of many dysfunctional postcolonial states as well as supposedly developed states would attest to this. Yet, even if the common law of mankind cannot be enforced without the co-operation of the states involved in human rights violations, which is obviously difficult to secure, it nevertheless constitutes not only a moral but a legal standard for attempting to bring them to some accountability (Jackson, 2007:145). Conversely however, the dilemma of enforcing human rights in dysfunctional and quasi-states is compounded by the rights of negative sovereignty and non-intervention by such states, and the fact that in certain instances human rights violations are condoned and executed by the state itself (Buzan's notion of predatory states). Therefore, it stands to reason that the precarious status of human rights in dysfunctional states could in part be attributed to the current postcolonial negative sovereignty regime, which inaugurated and perpetuates uncivil rule in such states.

Indeed, many dysfunctional states in which human rights are abused adopt overtly hostile postures in their international relations, especially surrounding issues of human rights. Invariably, external attempts to secure human rights in these states are portrayed by leaders as conspiracies to meddle in domestic affairs and undermine their national sovereignty. For example, during a 2004 visit to Venezuela, President Robert Mugabe stressed the importance of poor countries co-operating to build 'integrated, strong economies able to resist the dominance of the North', whilst President Hugo Chavez remarked in a speech in

9 By far the most authoritative discussion on the notions of civility and civilisation are conducted by RG Collingwood. His perspectives are well worth engaging, although constraints of space prohibit such a detour in this paper. See Collingwood RG, The New Leviathan. Oxford: Clarendon Press, 1944.

honour of his Zimbabwean counterpart that 'We are confronting conspiracies and coups supported by Washington, whose government is once again charging with the fiercest flags of imperialism' (News24, 2004). The decision of International Criminal Court (ICC) to prosecute Sudanese President Omar al-Bashir for seven counts of crimes against humanity was interpreted by Bashir's regime as proof that the ICC has 'consigned Africa only as a laboratory for politically motivated prosecutions' (International Refugee Rights Initiative, 2008). Similarly, Ugandan President Yoweri Museveni accused the ICC of 'blackmail' and attempting to 'install leaders of their choice in Africa and eliminate the ones they do not like' (Institute for War and Peace Reporting, 2013). Leaders in postcolonial Africa frequently lament the existence of a 'new conspiracy to recolonize it in the name of democracy' by Western states in order to the natural resources of the continent (Ghana Broadcasting Corporation, 2011), whilst former Ivorian President Laurent Gbagbo accused the West of 'a project of destabilization and fragmentation of peace and social cohesion' after violence occurred when he refused to acknowledge his 2010 electoral defeat (Cocks, 2010).[10]

Thus, the doctrine of non-intervention is often implicitly or explicitly invoked by regimes as a stratagem to obstruct international involvement in domestic crises, from which it becomes evident that the extent of state dysfunction makes any constructive domestic intervention unlikely. For example in July 2008 under the agenda item entitled 'Peace and security in Africa', the UN Security Council failed to adopt a draft resolution by which the Council would have imposed sanctions on Zimbabwe. The representative of Zimbabwe strongly opposed any Council action against his country, emphasising that the draft resolution was a clear abuse of Chapter VII of the Charter. He held that it was not the role of the Council to certify national elections of member states and that Zimbabweans had a right to choose their own leaders (UN, 2008:33-34). In this instance, solidarity with the Zimbabwean representative was shown by Vietnam and Muammar Gadhafi's Libya (both rotating member states of the Security Council that time with dubious human rights records). However, the right of non-intervention is applied *selectively* by many dysfunctional states, particularly in the interaction with other states of the developing world. For example, the UN (2008:17) noted that in the period 2008-2009:

> There were a number of instances in which the Council condemned hostile acts across the border of a State and the support by States of foreign armed groups, including through use of their territory. In particular, the Council constantly encouraged the respective Governments of the Sudan, Chad and the Central African Republic to ensure that their territories were not used to undermine the sovereignty of others and to cooperate with a view to putting an end to the activities of armed groups in the region and their attempts to seize power by force.

The reader will recall that the Sudan, Chad and the CAR feature prominently in the FSI and rank poorly in in the protection of human rights (see Table 1). However, the most problematic contemporary example of the selective and often duplicitous application of the right to non-intervention as it relates to dysfunctional states can be found in the DRC. The Second Congo War (1998-2003) destabilised the entire region, resulting in numerous related hostilities such as the Lord's Resistance Army Insurgency (active in South Sudan, Central African Republic, and the DRC), and the Kivu (eastern DRC) and Ituri (northern DRC) conflicts. Neighbouring states were drawn into the conflict, either in support of (Zimbabwe, Namibia, Angola, Chad, Sudan) or fighting against the DRC (Rwanda, Uganda, Burundi). Belligerents in the DRC conflict also fought amongst themselves in related but separate conflicts (Rwanda vs. Uganda), and armed non-state groups were co-opted to the various conflicting blocs. The resulting complex and confusing morass of conflict exhibits many

10 Incidentally, Laurent Gbagbo subsequently hired two prominent French lawyers to provide legal counsel, of which one is Jacques Vergès, notorious for defending Klaus Barbie, a Gestapo officer known as the 'Butcher of Lyon', and for his association with terrorist Carlos the Jackal and Serbian dictator Slobodan Milosevic.

instances of wanton disregard for the right of non-intervention, so prized by postcolonial states in their dealings with the Global North. A UN Report (2002:8) of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC concluded that:

> Criminal groups linked to the armies of Rwanda, Uganda and Zimbabwe and the Government of the Democratic Republic of the Congo have benefited from the micro-conflicts. They have built up a self-financing war economy centred on mineral exploitation … The Governments of Rwanda and Zimbabwe, as well as powerful individuals in Uganda, have adopted other strategies for maintaining the mechanisms for revenue generation, many of which involve criminal activities, once their troops have departed.

It is therefore evident that the tenets of negative sovereignty may be asserted by dysfunctional states in a duplicitous manner. On the one hand, dealings with states of the developed world are conducted from a *de jure* position whereby negative sovereignty grants freedom from external intervention, as well as a *de facto* normative appeal for development assistance or financial aid. On the other hand, as far as postcolonial peers and issues of human rights are concerned, dysfunctional states exhibit a much more pragmatic approach to the international norms to which they routinely appeal in their relations with the Global North.

9. Concluding perspectives

As noted in the introduction, the goal of this article was to explore and understand the interrelationship between state dysfunction, postcolonial states and human rights in the African context. From the empirical perspectives on state dysfunction and human rights respectively, it was evident that there exists a significant overlap between states that are dysfunctional and states in which human rights are routinely abused or entirely neglected. On the other hand, it was demonstrated that states which are generally considered to be functional and stable tend to observe and enforce human rights domestically. Furthermore, it was noted that most African states are also postcolonial states, and that in order to understand the current context of state dysfunction and human rights abuse, the historical dynamics of decolonisation (in both political and international legal terms) must be accounted for. To this end, the theoretical contribution of Robert Jackson focusing on quasi-states and negative sovereignty was employed. Jackson's argument centres on the evolving nature of sovereignty in the post-war era during which many former colonies attained independence and subsequently became so-called quasi-states. The essence of this process of change is represented below:

Table 5 - Comparison of sovereignty regimes

Historical and Current Sovereignty Regimes		
Old	**TYPE**	New
Positive	**ORIENTATION**	Negative
Developed world [Global North]	**OCCURRENCE**	Developing world [Global South]
Evolutionary [Since 1648]	**DEVELOPMENT**	Revolutionary [Decolonisation]
Power + Competition [Empirical capabilities]	**FOUNDATION**	Self-determination [Moral/legal doctrine]
Assistance to developing states	**OBLIGATIONS**	Marginal
Generally functional	**STATE ATTRIBUTES**	Generally dysfunctional

The realpolitik of this situation is essentially that postcolonial states exist, and are held accountable, according to a different set of norms, notwithstanding the supposedly universal and indivisible concept of sovereign statehood in international law. Negative sovereignty and its components may be deployed by quasi-states, not only to conceal or defend their dysfunction, but also to obstruct and abuse the human rights of their citizens with relative impunity.

The threat which the negative sovereignty paradigm poses to international human rights, and that has been demonstrated in this article, is best encapsulated by former Secretary-General of the UN, Kofi Annan, when he remarked that:

> [I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?.

The emergence of negative sovereignty as a tacit set of rules serves to reaffirm the fundamentally unequal nature of the international community of states, and the dangers implicit in ignoring such discrepancies in capabilities and civility at the expense of citizens in dysfunctional states. Moreover, by including the variable of state dysfunction into the analysis of human rights abuses, this article supports the notion that *domestic conditions* contribute at least as to the problem as international relations do. Henderson (2009:32) provides a perspective on this situation when he argues that:

> [...] the combination of low levels of interstate war and high levels of intrastate (i.e. civil) war suggests the inversion of conflict processes in Africa. That is, in Africa, international politics has been 'domesticated', with interstate conflicts often resolved non-violently in the way that one would expect of domestic conflicts, while domestic politics has been 'internationalized', with domestic disputes often resolved violently in a manner usually reserved for interstate disputes.

Such an inversion would suggest that the most important bulwark against human rights abuses are states themselves. Whereas functional states have the institutional and political means to manage and diffuse conflict that may lead to human rights abuses, dysfunctional states do not possess such capability. Furthermore, in many dysfunctional states, the institutions of state are complicit in the perpetrations of human rights violations (particularly in authoritarian regimes), whilst in others, systemic dysfunction has rendered the state incapable of intervention (Greffrath, 2015:252). Viewed from this vantage point, human rights violations represent the devastating repercussion of breaching the social compact.

This article previously recounted how the international community discredited and delegitimised colonialism in the 21st century through means of changes in international norms legal principles. Moreover, this feat was achieved in a remarkably short period of time, and with a moral solidarity that was not seen since the abolition of slavery. In the same manner, international legal orthodoxy must be re-evaluated if it serves to degrade the civility upon which the international community of states is premised – particularly if certain sacrosanct rights of states are maintained at the expense of individual human rights domestically. The plight of human rights in the postcolonial world is no less of an aberration than slavery and colonialism, and like those stains on the record of humankind, it can only be remedied through the collective will of those capable members of the international community. It may be considered a tragic irony that the United Nations, which stood at the vanguard of decolonisation half a century ago as its leading moral authority and collective political embodiment, is now in large part occupied with remedying the abuses of human rights in those self-same postcolonial states. Noting this, one may be inclined to view the UN as an appropriate 'one size fits all' corporate approach to dealing with human rights abuses. However, this paper has contended that such an assumption would be incongruous, since the onus rests on individual governments to promote and maintain civility *within their respective sovereign domains*. As such, it is imperative that any remedy must begin, domestically, with the 'do's' of governance, rather than the 'don'ts' of negative sovereignty.

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