

Legal Implications Resulting from State Failure in Light of the Case of Somalia

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Abstract. State failure, the implosion of effective government, has even led to the emergence of a state totally lacking government, Somalia from 1991 through 2000, the failed state par excellence. As the existence of a state with no government has not been foreseen by international law, this inquiry seeks to sketch, by exploring, analyzing and discussing the case of Somalia and studying rules of international law, a pattern of legal consequences caused by its failure. Though focused on Somalia, the only contemporary example of complete state collapse, the study is conducted in comparison with states, which are undergoing lesser degrees of failure ('failing states'), addressing thus some of the legal consequences of the phenomenon also in a broader framework. The inquiry indicates that while the rights and duties of failing states appear to remain generally unaffected by temporary problems of governance, complete state collapse, by contrast, has far-reaching legal implications. Most notably, without a representative authority the state becomes incapable of acting as a subject of international law, and consequently, absent in the international sphere. Without alternative models for international representation, this entails the exclusion of the people of the failed state from international interaction. Furthermore, the analysis identifies a number of difficulties related to both applying the existing and formulating new rules of international law with regard to failed states, because the phenomenon touches upon the state institution itself, the core of international law.

1. Introduction

While the existence of states suffering from governance problems is nothing new in international relations, the intensity and frequency of state collapse in the early 1990s was unprecedented.¹ Consequently, the concept of a failed,

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¹ The phenomenon is predominately, but not exclusively, located in sub-Saharan Africa. States often referred to include Somalia, Liberia and Afghanistan. See e.g., G. Helman and S. Ratner, 'Saving Failed States', 89 *Foreign Policy* (1992), pp. 3–20 at p. 5 and I.W. Zartman, 'Introduction: Posing the Problem of State Collapse', in I. W. Zartman (ed.), *Collapsed States. The Disintegration and Restoration of Legitimate Authority* (Boulder, Lynne Rienner, London, 1995), pp. 1–11 at pp. 3–5.

collapsed or disintegrated state was introduced in the international political and legal lexicon.² Due to the complex nature of the phenomenon, discussed at length elsewhere, no well established definition of state collapse exists.³ From the international law perspective it may be simply understood as the implosion of effective government, usually linked to an internal armed conflict. State failure occurs with varying intensity and geographical scope, and it has even led to the emergence of a state totally lacking government, Somalia from 1991 through 2000, the failed state par excellence.⁴

State collapse poses a number of complex and fundamental legal and political dilemmas as it puts the state institution itself, the very basis of the international system, in doubt. Therefore, the natural first reaction of the international community was to respond to the phenomenon with humanitarian intervention and reconstruction of state institutions.⁵ However, after its failure

² G. Helman and S. Ratner first introduced the term ‘failed state’ in an article in 1992 (supra note 1). Due to its arresting formulation, the term was quickly adopted by policy-makers and the media in America. On terminology see infra accompanying text to notes 16–18.

³ A number of definitions have been suggested. See e.g., I. W. Zartman, supra note 1, p. 1 (‘a situation where the structure, authority (legitimate power), law and political order have fallen apart’) and A. Eckert, ‘United Nations Peacekeeping in Collapsed States’, 5 *Journal of International Law and Practice* (1996) p. 280 (‘the disintegration of legitimate governmental authority’). See also D. Thürer, ‘Der Wegfall effektiver Staatsgewalt: ‘The Failed State’’, in D. Thürer et al. (eds.), *Der Wegfall effektiver Staatsgewalt: ‘The Failed State’ (The Breakdown of Effective Government)*, (C. F. Müller Verlag, Heidelberg, 1996), pp. 9–47 at pp. 12–13 (English translation ‘The “failed State” and international law’, 836 *International Review of the Red Cross* (hereafter ‘IRRC’) (1999) pp. 731–761) and A. Yannis, *State Collapse and the International System. Implosion of government and the international legal order from the French Revolution to the disintegration of Somalia*. (Thèse No 604, Université de Genève, IUHEL, Genève 2000), pp. 9, 104–134.

⁴ The civil strife in Somalia, which dates from 1988, escalated to a full-scale civil war after the overthrow of Mohammed Siad Barre in January 1991. The conflict led to the virtual disappearance of all state structures, to a significant disruption of economic, social and political life and to an unforeseen humanitarian catastrophe. After a dozen failed peace-making initiatives, the civil-society-based Somali National Peace Conference approved in 2000 the Transitional National Charter for provisional governance that would culminate in national elections in 2003 and elected the Transitional National Assembly and a President. The Transitional National Government, the first government of the country in a decade, controls, however, only a small part of the territory and its authority is contested by faction leaders and the self-proclaimed break-away state ‘Somaliland’. See on the state collapse e.g., H. M. Hessein, ‘Somalia: A Terrible Beauty Being Borne?’, in I. W. Zartman (ed.), supra note 1, pp. 69–89 and on the establishment of the transitional institutions Report of the Secretary-General on the Situation in Somalia, UN Doc. S/2000/1211, 19 December 2000, paras 11–14.

⁵ See e.g., M.R. Hutchinson, ‘Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention’, 34 *Harvard International Law Journal* (1993), pp. 624–640, T. Lyons and A. Samatar, *Somalia. State Collapse, Multilateral*

in Somalia and the end of the early post-Cold War international activism, interest in collapsed states was largely lost.⁶ Ironically, a decade after the emergence of the phenomenon, the international community has a renewed interest in these ‘no law zones’, long known to be centres of illegal activities, including international terrorism.⁷

Scholars have addressed state failure primarily in the contexts of humanitarian intervention, state-building and (neo)colonialism.⁸ Also, certain central legal questions arising from the phenomenon, such as, its impact on the statehood and sovereignty of failed states, as well as international human rights and humanitarian law concerns, have received attention.⁹ It has also been noted in the more general debates on the future of the state and the erosion of

Intervention, and Strategies for Political Reconstruction (The Brookings Institution, Washington D.C., 1995), M.-C. Smouts, ‘Les Nations Unies, Ultime Recours pour la Restauration de l’État?’, in Y. Daudet (ed.), *Les Nations Unies et la Restauration de l’État*. Colloque des 16 et 17 décembre 1994 (Pedone, Paris, 1995), pp. 141–144, J. Herbst, ‘Responding to State Failure in Africa’, 21 *International Security* (1996/97), pp. 120–144 and R. van Eijk, ‘The United Nations and the Reconstruction of Collapsed States in Africa’, 9 *African Journal of International and Comparative Law* (1997), pp. 573–599.

⁶ See e.g., J. Chopra, ‘Achilles’ Heel in Somalia: Learning from a Conceptual Failure’, 31 *Texas International Law Journal* (1996), pp. 495–526.

⁷ See with regard to terrorism e.g., Statement of the President of the Security Council, UN Doc. S/PRST/2003/2, 12 March 2003, at p. 2 and T. Dagne, ‘Africa and the War on Terrorism: The Case of Somalia’, 13(4) *Mediterranean Quarterly* (2002), pp. 62–73. For a recent account of the UN activities in Somalia see Report of the Secretary-General on the Situation in Somalia, UN Doc. S/2003/987, 13 October 2003.

⁸ See references supra note 5. For proposals to place failed states under ‘modern trust’ arrangements see G. Helman and S. Ratner, supra note 1, P. Johnson, ‘Colonialism’s Back – and Not a Moment Too Soon’ *The New York Times Magazine* 18 April 1993 p. 22, W. Pfaff, ‘A New Colonialism? Europe Must Go Back into Africa’, 74 *Foreign Affairs* (1995), pp. 2–6, A. Mazrui, ‘The African State as a Political Refugee: Institutional Collapse and Human Displacement’, *International Journal of Refugee Law* (Summer 1995), pp. 21–36 and for discussion R. Gordon, ‘Some Legal Problems with Trusteeship’, 28 *Cornell International Law Journal* (1995), pp. 301–347, H. Richardson, ‘“Failed States”, Self-Determination and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations’, 10 *Temple International and Comparative Law Journal* (1996), pp. 1–78 and R. Gordon, ‘Saving Failed States: Sometimes a Neo-colonialist Notion’, 12 *American University Journal of International Law and Policy* (1997), pp. 903–975.

⁹ See e.g., D. Thürer, supra note 3, M. Herdegen, ‘Der Wegfall effektiver Staatsgewalt im Völkerrecht: “The Failed State”’, in D. Thürer et al. (eds.), supra note 3, pp. 49–85, R. Gordon, supra note 8, N. L. Wallace-Bruce, ‘Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law’, *XLVII NILR* (2000), pp. 53–73 at pp. 65–70 and G. Kreijen, ‘The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood’, in G. Kreijen et al. (eds.), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002), pp. 45–107.

sovereignty.¹⁰ However, state failure gives rise to a series of additional legal dilemmas, especially of practical importance, which seem to be still largely unexplored.

As the existence of a state with no government has not been foreseen by international law, the objective of this inquiry is to sketch, by exploring, analyzing and discussing the case of Somalia and studying rules of international law, a pattern of legal consequences caused by its failure. The inquiry will be limited to some central legal practices of states and fields of international law, namely diplomatic law, representation in international organizations, judicial competence, treaty-making powers, state property abroad, compliance with international obligations and issues of state responsibility. The study thus seeks to discover whether the rules of international law are applicable to a failed state, an international anomaly, or whether the international community has employed new approaches in dealing with the abnormal. Since Somalia, as the only contemporary example of complete state collapse constitutes, undoubtedly, a case *sui generis*, the findings of this inquiry are accordingly limited. Nonetheless, as that case will be studied in comparison with states, which are undergoing lesser degrees of failure, the legal consequences of state collapse will also be addressed in a broader framework.

2. Some Preliminary Remarks on Terminological and Conceptual Ambiguities

2.1. Between Expansive and Narrow Definitions of State Failure

Before turning to the main object of this inquiry, it is necessary to address some terminological and conceptual problems that studies on failed states often suffer from. The principal source of ambiguity is under which criteria a state may be determined to be in a process of collapse or described as a collapsed or failed state. According to A. Yannis this conceptual difficulty lies in ‘the antagonism between expansive and narrow definitions of the minimum requirements of government in international relations’.¹¹ While the former, expansive definitions, reflect political and social perspectives to state collapse,¹² the latter is preferred in legal discourse.¹³ In fact, the mere existence of an effective government with centralized administrative and legislative organs has been traditionally considered sufficient as the required legal elements of

¹⁰ See e.g., M. Reisman, ‘Designing and Managing the Future of the State’, 8 EJIL (1997), pp. 409–420 at p. 417.

¹¹ A. Yannis, *supra* note 3, p. 85.

¹² *Ibid.* See for an example A. Mazrui, *supra* note 8, p. 28.

¹³ A. Yannis, *supra* note 3, p. 85.

government.¹⁴ Since the expansive definitions of failed states embrace a number of states that temporarily lack some of the requirements for effective or legitimate government, it is suggested that these states should be called failing or collapsing states. Thus, the notion of a failed or collapsed state should be reserved, in line with the narrow definition and for the purpose of conducting a legal analysis, for states in which the government institutions have ceased to function, or have totally disappeared, for a prolonged period of time. As already noted above, such cases include only Somalia and, according to some commentators, perhaps, Liberia.¹⁵

2.2. Failed or Collapsed States?

The second source of confusion is the use of terminology. As noted above, the original term to describe a state the government of which has collapsed, the 'failed state', was soon followed by other terms, such as 'disintegrated' and 'collapsed state'. Especially the latter expression has gained wide acceptance among scholars.¹⁶ The major difference between the terms seems to be that the 'failed state' may also be understood to describe states undergoing economic, political and social problems that do not amount to state collapse.¹⁷ Furthermore, it may carry suggestive power as its early proponents and the American media used it for interventionist proposals with neo-colonialist underpinnings.¹⁸ Nonetheless, the term 'failed state' has become the object of frequent and at least apparently value-free use, in parallel with the other terms. In this study, the terms will be used interchangeably in reference to the same factual situation.

2.3. State Failure and Statehood

The last preliminary observation follows logically from the narrow definition of state collapse adopted above: if state failure implies the loss of effective government, one of the conditions for the legal existence of a state,¹⁹ it must be

¹⁴ Western Sahara Advisory Opinion, 16 October 1975, ICJ Reports (1975), p. 12 at p. 43 and I. Brownlie, *Principles of Public International Law*, 4th edition (Oxford University Press, Oxford, 1990), p. 73.

¹⁵ See for case analysis e.g., Yannis, *supra* note 3, pp. 104–134.

¹⁶ See e.g., W. I. Zartman, *supra* note 1 and N.L. Wallace-Bruce, *supra* note 9.

¹⁷ N. L. Wallace-Bruce, *supra* note 9, p. 59 and A. Yannis, *supra* note 3, pp. 97–101. For a different view see J. Wildner, 'States and Statelessness in Late Twentieth-Century Africa', 124 *DAEDALUS* (1995), pp. 129–153 at p. 147.

¹⁸ See references *supra* note 8.

¹⁹ See J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 1979), pp. 44–46.

questioned whether a failed state continues to qualify as a state or whether it ceases to exist as a legal entity.²⁰ International law provides, however, strong protection against disturbances that might threaten the statehood of a once established state. Firstly, governments are protected by a presumption in favour of their effectiveness and continuity. Therefore, the temporary ineffectiveness or absence of a government, as may be the case in failing state situations, does not affect statehood.²¹ Secondly, state identity also enjoys legal protection by a presumption in favour of its continuity and against its extinction. Thus, even the temporary removal of a government, extensive internal strife and prolonged periods of anarchy do not threaten state identity.²² Notwithstanding these well-established positions, recent state practice seems to have put the existence of statehood in serious doubt when the United Nations (hereafter 'UN') declared, for the first time in its history, that one of its member states, Somalia, suffered from the total absence of a government.²³ However, no statements concerning the possible loss of statehood were made, except for the doubts raised by some legal scholars.²⁴ By contrast, the Security Council repeatedly referred to 'the sovereignty, territorial integrity, political independence and unity of Somalia', and treated Somalia as a sovereign state.²⁵ Consequently, state failure must be associated with a situation of prolonged internal strife and anarchy, which does not affect the continued existence of statehood, protected by sovereignty, and it alone does not lead to state extinction. Any other conclusion would be, in fact, impossible, since the persistence of states is the essential condition of the present international system.²⁶

²⁰ See A. Raestad, 'La Cessation des Etats d'Après le Droit des Gens', *XX Revue de Droit International et de Legislation Comparée* (1939), pp. 441–449 at p. 442 and K. Marek, *Identity and Continuity of States in Public International Law* (Librairie E. Droz, Genève, 1954), p. 7.

²¹ J. Hobhouse confirmed in *Somalia v. Woodhouse Drake* that 'a loss of control by the constitutional government may not immediately deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government'. *Republic of Somalia v. Woodhouse Drake & Carey (Suisse) S.A. and Others*, British High Court, Queen's Bench Division, 13 March 1992, 3 *The Weekly Law Reports* (6 November 1992), pp. 744, 756 at D (hereafter '*Somalia v. Woodhouse Drake*'). See also R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994), p. 40.

²² K. Marek, *supra* note 20, p. 549 and J. Crawford, *supra* note 19, p. 417.

²³ See e.g., Letter of the Secretary-General to the Security Council, UN Doc. S/24868, 30 November 1992, at para. 6 and the preamble of SC Res. 897, UN Doc. SC/RES/897, 4 February 1994.

²⁴ See e.g., R. van Eijk, *supra* note 5, p. 573.

²⁵ See e.g., SC Res. 733, UN Doc. SC/RES/733, 23 January 1992.

²⁶ G. Kreijen, *supra* note 9, pp. 100–101.

3. Examination of Legal Practice and Rules of Positive International Law

3.1. Problems of International Representation

State failure poses fundamental limitations upon the state's ability to act in the international sphere since, in the words of the Permanent Court of International Justice, '[s]tates can act only by and through their agents and representatives'.²⁷ Thus, the absence of government leads inevitably to serious problems of representation that may entail the total exclusion of the state, and of its people, from international interaction.

3.1.1. Failing States and the Preservation of Representative Powers

When a state suffers only from the temporary loss of effective government, the previous or the factually ineffective government continues, as a general rule, to preserve its representative powers.

This follows, as already noted above, from the presumed effectiveness of a once established government that protects it against temporary disturbances and compensates its possible ineffectiveness. Thus, the principle of continuity supports the practical need for predictable and stable international relations. Also the legitimacy of a constitutionally established government, as in the case of Liberia,²⁸ and in some particular instances, even the democratic entitlement of an ousted government, as in the case of Haiti in 1991,²⁹ may have the same effect. The presumed effectiveness continues, however, only until the government has been replaced by another effective entity that has been recognized internationally.³⁰ By contrast, if the government institutions become totally absent and the state plunges into complete failure, the situation changes dramatically.

3.1.2. Failed States and the Gradual Loss of Representative Powers

3.1.2.1. Bilateral Diplomatic Relations

When the government of a state has virtually disappeared, the government-to-government based official connections between states obviously cease.

²⁷ German Settlers in Poland Advisory Opinion, 10 September 1923, PCIJ, Ser. B, No. 6, p. 1 at p. 22.

²⁸ It has been argued that the ECOWAS intervention in Liberia in 1990 supported the constitutional but ineffective government of Samuel Doe. See M. Herdegen, *supra* note 9, p. 53. Cf. *Somalia v. Woodhouse Drake*, citation *supra* note 21.

²⁹ UN General Assembly (hereafter 'GA') Res. 46/7, UN Doc. GA/RES/46/7, 11 October 1991.

³⁰ J. Crawford, *supra* note 19, p. 46.

Nonetheless, the formal diplomatic relations may continue normally, as they exist between states, not between their respective governments.³¹ State collapse does not thus automatically imply the recall of diplomatic missions or the severance of, or an end to, formal diplomatic relations between states. The recall of a diplomatic mission in a failed state situation may only signify the continuation of diplomatic relations at a lower level, as was the case in Somalia.³² Moreover, practice implies that states may maintain formal contact with the warring parties without conceding implied recognition to them.³³ This may take place out of practical necessity, for example, in order to protect nationals in the territory or to mediate between the parties to the conflict.³⁴

Diplomatic missions abroad are essential for the maintenance of foreign relations and for the protection of the state's and its nationals' international interests. State failure has direct effects both on the status of diplomatic missions and of individual diplomatic agents abroad. In a failing state situation the diplomatic agents abroad are normally considered to be authorized to continue to exercise their functions. When a new government is formed in the country concerned, and the receiving state has recognized it, the diplomatic agents accredited by the former government need to receive new credentials to continue their functions.³⁵ However, in the case of a failed state, when there is sufficient certainty over the total loss of government effectiveness with no prospects of recovery, the diplomatic and consular missions of the state lose their representative powers. This is inevitable, since the continued existence of uncontrolled representative powers for an unlimited period of time could lead to difficult situations, especially, if several entities claim authority for the failed state. Thus the missions of Somalia and their individual staff members ceased to represent the collapsed government, or any other government, due to lack of credentials.³⁶ Nevertheless, its missions, which had not been recalled,

³¹ Cf. Article 2 of the Vienna Convention on Diplomatic Relations, 18 April 1961, 95 UNTS 500 (hereafter 'VCDR').

³² No diplomatic missions have been exchanged between Somalia and e.g., the United States since 1991. The countries maintain, however, formal diplomatic relations. E. Denza, *Diplomatic Law. A Commentary on the Vienna Conventions on Diplomatic Relations*, 2nd ed. (Clarendon Press, Oxford, 1998), p. 28.

³³ See Letter of the Foreign and Commonwealth Office, 20 February 1992, cited in *Somalia v. Woodhouse Drake*, supra note 21, p. 754.

³⁴ E.g., the states, which had participated in the second Djibouti Conference in 1991 where inter alia an interim President for Somalia was appointed, later denied any recognition. See *Somalia v. Woodhouse Drake*, supra note 21, pp. 747, 754–755 and M. Herdegen, supra note 9, p. 56.

³⁵ Cf. E. Denza, supra note 32, p. 387.

³⁶ In *Somalia v. Woodhouse Drake* the Court rejected the application of the Somali Ambassador in Geneva accredited by the ousted Barre regime to join as a party to the case since

retained their diplomatic status.³⁷ As the maintenance of diplomatic missions depends on the mutual consent of the concerned states, state failure in Somalia led to the closure of some of its embassies at the request of the receiving states. As noted above, that did not necessarily signify the eruption of diplomatic relations but their continuance at a lower level.³⁸ The practical consequences of the loss of representative powers and the absence of diplomatic missions were dramatic for Somali nationals. For instance, their visas or passports could not be renewed nor could their interests abroad be protected.³⁹ Curiously, practice suggests that this was not necessarily the case. In fact, the diplomatic missions of Somalia that remained in place after state collapse continued to provide consular services, including issuing passports and other 'official' documents, out of practical necessity and with the approval of the receiving states.⁴⁰

On the other hand, an individual member of the Somali diplomatic staff, who had been properly accredited by the former government, continued to retain his/her diplomatic status in the receiving state, notwithstanding the loss of representative powers.⁴¹ Problems have arisen, however, due to Somalia's inability to pay salaries and to render social security for its diplomats.⁴² The Superior Administrative Court of North Rhine-Westphalia established in the Somali Diplomat case in 1992 that the receiving state may provide financial assistance to diplomatic agents in cases of urgent distress in accordance with its legislation. However, if such permanent provision of assistance would be considered to prevent the diplomat from properly fulfilling his functions, the receiving state could seek the recall of the person concerned or to declare him

'the former government of President Siad Barre has ceased to exist and she has received no accreditation or authority from any other government'. *Somalia v. WoodhouseDrake*, supra note 21, p. 750 at A.

³⁷ Somali Diplomat case, Case No. 8 B536/92, Federal Republic of Germany, Superior Administrative Court (OVG) of North Rhine-Westphalia, 11 February 1992, 94 ILR (1994), pp. 597–608 at p. 602. Obviously, in the absence of a government, there is no entity in place that would have the authority to recall a diplomatic mission.

³⁸ The embassy and consular section of Somalia in Washington DC were reportedly closed at the request of the United States on 8 May 1991. See R. Howell, 'Link to World Imperilled. Somalia's UN mission penniless', *New York Newsday*, 16 August 1992.

³⁹ *Ibid.*

⁴⁰ In March 2001 Somalia had at least five functioning diplomatic missions. Interview with Chargé d'affaires a.i., Mr. Mohamed Dubad, Permanent Mission of Somalia to the UN in Geneva, 13 March 2001.

⁴¹ Somali Diplomat case, supra note 37, p. 602. Cf. Article 39(2) of the VCDR, supra note 31.

⁴² The Somali Diplomat case concerned a diplomat from the Embassy of Somalia in Bonn who had applied for social security assistance from the German authorities after Somalia had suspended all payments to its diplomats in September 1990. Somali Diplomat case, supra note 37, p. 606.

persona non grata.⁴³ The decision is at this point unsatisfactory: although the Court had acknowledged the absence of government in Somalia, it still presumed the existence of an authority that could be approached for the recall of a diplomatic agent.⁴⁴ In addition, it did not pronounce on whether his functions had changed due to state collapse. Finally, in its decision the Court ignored the potential difficulties related to a forced return to a state the situation of which it had itself described as anarchic.⁴⁵

State failure may also generate other legal problems with regard to its diplomatic agents and missions that seem to escape legal regulation. For example, problems related to the misuse of state funds and other similar abuses, which arise often during internal conflicts, may cause curious legal dilemmas.⁴⁶ In general, if a member of the diplomatic staff was suspected of such abuses, the only possible remedy for the receiving state is to declare the individual persona non grata.⁴⁷ Although diplomatic staff enjoys immunity from the local jurisdiction, it is not exempt from the jurisdiction of the sending state.⁴⁸ Ironically, in the absence of a functioning centralized judicial system⁴⁹ and diplomatic channels, a failed state has no means to prosecute its diplomats abroad, and they consequently escape all jurisdiction. Furthermore, the indebtedness of a diplomatic mission may become a serious problem endangering even the formal diplomatic relations between states. The financial distress may be caused by the general inability of the collapsed state to maintain its missions or by the misuses of the diplomatic staff. The receiving state also remains powerless in such situations due to the protection provided by diplomatic law.⁵⁰

On the other side of the coin, the collapse of state authority does not automatically imply the recall of the foreign diplomatic missions to a failed state

⁴³ Ibid., p. 605.

⁴⁴ The Federal Republic of Germany did not, however, recognize any government for Somalia at the time of the decision. Ibid., p. 606.

⁴⁵ Cf. *Ahmed v. Austria* in which the European Court of Human Rights (hereafter 'ECHR') found that an individual could not be deported to Somalia due to the situation prevailing in the country. *Ahmed v. Austria*, 17 December 1996, ECHR, paras 44–47, available at <www.hudoc.echr.coe.int>. See also *Elmi v. Australia*, Case No. 120/1998, Committee against Torture, 14 May 1999, UN Doc. CAT/C/22/D/120/1998, at 7.

⁴⁶ See e.g., J.-L. Schneeberger, 'L'ambassadrice de Somalie mal barrée', *La Tribune de Genève*, 12 March 1991.

⁴⁷ Cf. also *supra* notes 37 and 45.

⁴⁸ Article 31 of the VCDR, *supra* note 31.

⁴⁹ See for Somalia's judicial system e.g., Report of the Independent Expert on the situation of human rights in Somalia, UN Doc. E/CN.4/1997/88, 3 March 1997, paras 46–52.

⁵⁰ See e.g., on the inviolability of diplomatic missions Article 22(1) of the VCDR, *supra* note 31. See with regard to Somalia R. Howell, *supra* note 38, and United Nations Juridical Yearbook (UNJYB) (1992), pp. 491–492.

either. In general, the functions of diplomatic agents are by no means restricted to dealings with the government of the receiving state.⁵¹ Nonetheless, in a failed state situation diplomatic missions are often withdrawn temporarily because they are unable to fulfil their functions effectively and, most of all, safety in an unstable environment. Although a state may entrust the protection of its interests and those of its nationals' to a third state,⁵² it is hardly possible in this context since once the security situation has become unbearable, all diplomatic agents tend to 'flee from the sinking boat'.⁵³ Similarly, the diplomatic premises left behind will not enjoy the protection of the receiving state, as provided by diplomatic law.⁵⁴ Thus, after the recall of the foreign diplomatic missions, foreign nationals and their property in the country are left without diplomatic protection. In practice, when an acute need for diplomatic protection has arisen in Somalia, for example when an alien has become the object of a crime, states have requested assistance from the international humanitarian personnel present in the territory.⁵⁵ Another effect of the absence of foreign diplomatic missions is that the local population is left in isolation from the external world. For instance, information of the prevailing situation may be obtained only through the humanitarian organizations possibly still functioning in the country. Moreover, the people are prevented from leaving the country, since in the absence of foreign diplomatic missions they have great difficulties obtaining visas and other necessary travel documents. Consequently, the people of a failed state have virtually become prisoners in their own country. The only possibility to leave may be to seek refuge in a less unstable area, or to enter a neighbouring country illegally and to join the refugee flows.

3.1.2.2. Inter-state Forums with Special Regard to the United Nations System

The question of who represents of states undergoing domestic conflicts in inter-state forums, such as universal and regional organizations and conferences, has great political, legal and practical importance. For instance, the government accepted to represent a state might argue that the acceptance would evidence

⁵¹ See Article 3 of the VCDR, *supra* note 31.

⁵² Articles 45 and 46 *ibid*.

⁵³ Nearly all the diplomatic missions had been recalled from Somalia by 1992. Some African and Arab states had re-established them by 1999. Somalia revisited, IRIN special report on Mogadishu, United Nations, Office for the Co-ordination of Humanitarian Affairs, IRIN-CEA, 27 April 1999.

⁵⁴ Article 45(a) of the VCDR, *supra* note 31.

⁵⁵ See e.g., a case concerning the hostage-taking of two Finnish nationals on 29 April 1999 in Somalia. The local UN authorities had reportedly helped in releasing the hostages. 'Somalian rannikolla siepatut suomalaiset vapaaksi', *Helsingin Sanomat*, 5 May 1999.

its legitimacy.⁵⁶ Furthermore, its representatives provide information on the situation in the country and are heard when deciding, for example, humanitarian measures or sanctions, directed to the country. State failure poses many dilemmas with regard to representation: while in a failing state there may be several entities claiming to be entitled to represent the country, in a failed state there is possibly no such entity at all.

The question of representation usually arises in practice when multiple sets of credentials are presented for a state, or another state objects to the submitted credentials.⁵⁷ However, inter-state forums in general have not managed to agree upon any pre-established, satisfactory legal criteria to determine representation disputes.⁵⁸ Nonetheless, since only an effective entity may be capable of fulfilling the obligations deriving from the membership, the authority that exercises effective control over the people and territory should represent a state.⁵⁹ For a variety of reasons inter-state forums have not always adhered to this criterion. In particular, the principles of continuity and legitimacy have sometimes compensated the lack of government effectiveness in this context.⁶⁰ Practice is, therefore, inconsistent, even within one forum,⁶¹ which reveals the dominant role of politics in shaping credentials, debates and decisions. Therefore, when several entities claim to be entitled to represent a failing state, it is far from evident that the credentials of the factually most effective entity would be accepted. Some forums have even resorted to the so-called ‘empty chair policy’ where no delegation is allowed to take the seat of a member state when its determination has been found to be impossible.⁶² That seems, however, impossible in the UN context since under the UN Charter a member state arguably has a right of delegation, and consequently, the General Assembly (hereafter ‘GA’) is obliged to decide the legitimate authority.⁶³

Against this background, it is now curious to turn to examine the representation of Somalia in the UN System during its collapse, from 1991 through

⁵⁶ See S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, Oxford, 1998), p. 183.

⁵⁷ See UN GAOR, 5th Sess., Annexes, Agenda item 61, UN Doc. A/1308 (1950), at 3.

⁵⁸ See e.g., S. Ratliff, ‘UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century’, 87 *California Law Review* (1999), pp. 1207–1264.

⁵⁹ R. Higgins, *supra* note 21, p. 166 and S. Magiera, ‘Article 9’, in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (Oxford University Press, Oxford, 1994), pp. 217–226 at p. 224.

⁶⁰ See e.g., S. Ratliff, *supra* note 58.

⁶¹ See R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, London/New York/Toronto, 1963), pp. 158–159.

⁶² See S. Talmon, *supra* note 56, pp. 183–184.

⁶³ S. Magiera, *supra* note 59, p. 223.

2000.⁶⁴ First, at the 46th session of the GA in 1991, the Permanent Mission of Somalia to the UN informed the Secretary-General that since the delegation expected from Somalia did not arrive, its delegation would consist of some members of the Mission headed by the Chargé d'Affaires a.i.⁶⁵ The Credentials Committee accepted the note verbale as 'provisional' credentials with the understanding that the formal credentials would be communicated to the Secretary-General as soon as possible, in accordance with its general practice.⁶⁶ They were, however, never received. The following year the Mission informed the Secretary-General that it considered it 'untimely to allow for any delegation to represent Somalia . . . since there is no representative government yet in place'.⁶⁷ Thereafter, at least one of the warring factions paid attention to the question of Somalia's representation demanding that the Somali seat be declared vacant until a national government is established.⁶⁸ Finally, the Secretary-General received no appropriate notifications during the 47th session of the GA, or the sessions thereafter, until the 55th session of the GA.⁶⁹ Thus, no formal decisions were made on the representation of Somalia in the UN.⁷⁰ In practice, Somalia, as a member state had a nameplate in the GA but nobody was authorized to sit behind it between 1992 and 2000.

Somalia constitutes a unique case in the UN history: for the first time no government represented a member state in the GA, not due to the rejection of credentials,⁷¹ but due to the absence of any government and purporting entities. Thus, the situation differs fundamentally from that of failing states in which there still exists some form of government. In the latter situation, the government will generally continue to be entitled to represent the country in the GA, notwithstanding its ineffectiveness and in accordance with the principle of

⁶⁴ See supra note 4.

⁶⁵ Note verbale of the Chargé d'Affaires a.i., Permanent Mission of Somalia to the UN addressed to the UN Secretary-General, 4 November 1991 (on file with the author).

⁶⁶ See Second Report of the Credentials Committee, UN Doc. A/46/563/Add.1, GAOR 46th Sess., Annexes, agenda item 3, at 5 and S. Magiera, supra note 59, p. 222.

⁶⁷ Unpublished internal memo of the UN Department of Legal Affairs cited in A. Yannis, supra note 3, p. 110.

⁶⁸ Communication of the Somali National Alliance, 14 September 1992 (circulated as a press release).

⁶⁹ See First and Second Report of the Credentials Committee, UN Doc. A/47/517 and A/47/517/Add.1, GAOR 47th Session, Annexes, agenda item 3 and for the 55th Session the Second Report of the Credentials Committee, UN Doc. A/55/537/Add.1 GAOR 47th Session, Annexes, agenda item 3. On the 55th session see infra notes 203–206 and accompanying text.

⁷⁰ Unpublished internal memo of the UN Department of Legal Affairs, cited in A. Yannis, supra note 3, p. 111.

⁷¹ Cf. South Africa between 1974 and 1994. See R. Suttner, 'Has South Africa been illegally excluded from the United Nations General Assembly?', XVII The Comparative and International Law Journal of Southern Africa (1984), pp. 279–301.

continuity, at least as long as no other authority has replaced it effectively.⁷² By contrast, in the case of Somalia, its seat remained empty with no decision made in that respect. However, should a representation dispute arise between new entities, the GA seems to be left with the following possibilities: first, it could examine the credentials of all the purported entities, and if none of them fulfils the criteria laid down in Rule 27 of the GA Rules of Procedure, refuse them all.⁷³ Second, the GA might decide to leave the seat temporarily vacant implicitly, i.e. by rejecting all the submitted credentials, or by an explicit decision. The latter option would, however, be highly unlikely without the consent of the purporting entities, as there is no precedent for such a decision and, as noted above, a member state arguably has a right of representation under the UN Charter.

As to the representation of Somalia in the UN System, it may be noted first that the object of the UN's policy is system-wide uniformity. Thus, although the different organs and the UN Specialized Agencies resolve representation questions independently,⁷⁴ the GA has recommended that its position be taken into account.⁷⁵ However, as seen above, the GA did not make any decision with regard to the representation of Somalia. First, as to the UN Secretariat, it continues relations, in general, with the representatives who have been duly accredited to the Organization until a new government is established. The Permanent Missions of Somalia to the UN in New York and in Geneva continued to function accordingly during state collapse, though on a lower level.⁷⁶ Curiously, the position of the last Somali Ambassador in Geneva before Somalia's collapse was challenged soon after the overthrow of the Barre regime, but the UN rejected the alleged recall of the Ambassador as not duly authorized.⁷⁷ On the other hand, for the purposes of mediation, humanitarian relief and other functions in the field, 'the normal policy of the Secretariat is to deal with the authorities which are apparently in control of the government of a member state'.⁷⁸ By these contacts it does not, however, intend to concede

⁷² Cf. the 1973 Cambodian representation dispute. S. Ratliff, *supra* note 58, pp. 1243–1250.

⁷³ GA Rules of Procedure, UN Doc. A/520/Rev.15, United Nations, 1985.

⁷⁴ Legal Aspects of the Problem of Representation in the United Nations. Memorandum of the UN Secretary-General, UN Doc. A/1466, 8 March 1950, at 20.

⁷⁵ GA Res. 396 (V) (1950), para. 3.

⁷⁶ A Chargé d'Affaires a.i. functioned in New York from August 1991 until the arrival of the new Permanent Representative in September 2001. See Bibliographical Note, UN Press Release BIO/3377, 'New Permanent Representative of Somalia Presents Credentials', 12 September 2001, available at <www.un.org/News/Press/docs/2001/bio3377.doc.htm> (visited on 10 October 2003).

⁷⁷ See J.-L. Schneeberger, *supra* note 46.

⁷⁸ Communiqué of Secretary-General U Thant, 6 April 1970 cited in S. Talmon, *supra* note 56, p. 173, fn. 314.

recognition to any of the entities. Following the overthrow of the Barre regime, the Secretariat seems to have first used the 'interim government of Somalia' led by Ali Mahdi as the main, if not the only, channel of communication with Somalia. It even distributed a press release on the negotiations of the Secretary-General with the 'Prime Minister of Somalia'.⁷⁹ However, as the collapse endured and the absence of government became manifest, the Secretariat ceased to deal with it as the main focal point and adopted a more cautious and impartial attitude with respect to all the factions. By contrast, in the practice of the Security Council the Somali Chargé d'Affaires a.i. in New York participated, curiously, in the Council's discussions concerning the situation in Somalia as the representative of the country from 1992 to 1994.⁸⁰ Her participation, or rather attendance, since she never took the floor at her own request, did not raise objections.⁸¹ Neither did her presumably defective or non-existent credentials result in questions of representation.⁸² Furthermore, the Secretariat published at her request documents as official UN documents.⁸³ Presumably it did not have any other alternative, since the Chargé d'Affaires a.i. was formally accredited to the Organization and the Secretariat is obliged to fulfil such official requests.

The other UN bodies and Specialized Agencies seem to have followed, at first sight, a relatively uniform practice concerning Somalia, i.e. nobody had been authorized to represent a non-existent government in the functioning of the organs. Nonetheless, some inconsistencies do appear, in particular in the field of human rights. In fact, several UN human rights bodies continued to invite Somalia to their meetings and to submit periodic reports throughout the period of state collapse.⁸⁴ Somalia also finished its term as a member of the Commission on Human Rights that lasted until the end of 1992. Moreover,

⁷⁹ See Press Release, Wednesday Highlights, 5 June 1991. DH/904. UN Department of Public Information, para. 3. The interim government was not recognized by any state. See S. Talmon, *supra* note 56, p. 314.

⁸⁰ Cf. Arts. 31 and 32 of the UN Charter.

⁸¹ See e.g., Provisional verbatim record of the 3145th meeting of the SC on 3 December 1992, UN Doc. S/PV.3145, p. 2.

⁸² Rules 14 and 15 of the SC Provisional Rules. See in general for SC practice Report of the Secretary-General UN Doc. S/21047, 21 December 1989, pp. 1–2. As to Somalia, the SC practice appears, nonetheless, consistent since the Council itself referred to the absence of government in Somalia only on 4 February 1994 in SC Res. 897, UN Doc. SC/RES/897.

⁸³ See Letter from the Charge d'Affaires a.i. of the Permanent Mission of Somalia to the United Nations addressed to the Security Council. UN Doc. S/26412, 7 September 1993.

⁸⁴ Interview with Chargé d'Affaires a.i., *supra* note 40. The remaining Somali diplomatic representatives seem to have consistently refrained from responding to such requests. See e.g., Review of the Application of the CERD: Somalia. 22/09/95, UN Doc. A/50/18, 22 September 1995, paras 593–596, at para. 594.

the country appears on a roll-call vote list in the report of the World Conference on Human Rights in 1993 although, ironically, it is not included in the list of participants to the Conference.⁸⁵ Another recent and important exception can be found in the practice of the UN Compensation Commission (hereafter 'UNCC'), which consistently refers to the Government of Somalia in its documentation. It has processed hundreds of claims from Somalia and awarded millions of dollars of compensation to them.⁸⁶ The President of the UNCC Governing Council even reported that despite the fact that some claims had been filed by the Government of Somalia after the expiration of the filing deadline, they were 'accepted, given the particular situation in the country'.⁸⁷ It would thus seem that part of the compensation awarded was paid to a non-existent government. As in most cases, a logical explanation is also found to this riddle: the remaining Permanent Mission of Somalia to the UN in Geneva had distributed information on the UNCC to Somalis dispersed around the world and submitted the claims made by individual Somalis to the UNCC. However, the compensation awarded was not paid to the Permanent Mission but transferred through the United Nations Development Programme offices directly to the claimants.⁸⁸ A rather curious arrangement, overlooking formalities, was thus put in place to ensure that individuals were not deprived of their right to compensation simply because of the lack of government.

The system-wide practice of the UN with respect to the representation of Somalia appears quite inconsistent. Nonetheless, it seems that the representatives of a failing state, duly accredited to the Organization by the last government, retain limited representative powers during the period of uncertainty following state collapse. This applies, however, only for certain purposes, such as information sharing. Once the total absence of government, with no foreseeable possibilities of recovery had been established with regard to Somalia, the country had no representative authority in the UN System. The inconsistencies of practice should, therefore, be considered as unintentional incidents rather than deliberate judgements of the situation. However, it appears particularly difficult for the UN human rights bodies to reconcile their quest for universality and respect for human rights with the realities of

⁸⁵ Report of the World Conference on Human Rights. Report of the Secretary-General, UN Doc. A/CONF.157/24 (Part I), at 51. The list of attendance appears in UN Doc. A/CONF.157/24 (Part II).

⁸⁶ See the decisions of the UNCC Governing Council, e.g., 48th meeting on 14 December 1994, UN Doc. S/AC.26/Dec.26 and 60th meeting on 30 May 1996, UN Doc. S/AC./Dec.36.

⁸⁷ Letter dated 6 June 1996 from the President of the Governing Council of the UNCC addressed to the President of the Security Council, UN Doc. S/1996/462, 26 June 1996, p. 2.

⁸⁸ Interview with Chargé d'Affaires a.i., *supra* note 40.

international life. Although their practice may be justifiable to some extent by their need for information, it is difficult to accept their practice of dealing on a continued basis with the remnants of a non-existing government. Finally, the relative unpreparedness of the UN System to address questions of representation in cases of state failure seems to result from the absence of a mechanism to determine when the representatives accredited by the former government have totally lost their representative powers.

3.1.2.3. Judicial Proceedings

The question of international representation does not only arise in political international forums but also in judicial forums. As the representative powers of a state are vested in its government, its existence is necessary for the *locus standi* in a judicial forum. Courts have considered the forum state's recognition of an entity as the government as strong or even conclusive evidence of its status.⁸⁹ Thus, the ineffective government of a failing state, that is formally recognized by the forum state, or with which it has government-to-government dealings, may be allowed to act on behalf of the state concerned.⁹⁰ By contrast, when the state has collapsed totally, no entity may act on behalf of the state. In *Somalia v. Woodhouse Drake* the issue in question concerned whether the solicitors instructed by the 'Prime Minister of the Interim Government of the Somali Republic' had properly constituted authority to represent Somalia.⁹¹ After establishing that the 'interim government' did not qualify as the government of Somalia, the Court concluded in simple terms that the solicitors were not entitled to appear in the case since 'the instructions and authority they had received from the interim government are not instructions and authority from the Government of the Republic'.⁹²

2.1.2.4. Treaty-Making Competence

The treaty-making capacity of a recognized government remains, as a general rule, unaffected even if it becomes temporarily ineffective as a result of internal troubles.⁹³ But, when the total absence of a government has become manifest, there is no state agent that could be regarded as authorized to represent

⁸⁹ See e.g., *Somalia v. Woodhouse Drake*, supra note 21, p. 755, at A. and I. Brownlie, supra note 14, pp. 98–99.

⁹⁰ See e.g., *Republic of Haiti v. Duvalier*, 626 NYS2d 472 (AD 1st Dept. 1995) (cited in S. Talmon, supra note 56, p. 190, fn. 401) and *Somalia v. Woodhouse Drake*, supra note 21, p. 755 at A.

⁹¹ *Ibid.* p. 750 at G–H.

⁹² *Ibid.* p. 757 at F–G.

⁹³ See e.g., the practice with regard to the governments-in-exile of Kampuchea in the 1980s in S. Talmon, supra note 56, p. 121.

the state for the purpose of concluding a treaty.⁹⁴ A rival entity may also possess treaty-making capacity provided that it exercises effective and stable control over a specific territory.⁹⁵ Nonetheless, even then the capacity exists only as much as is conferred to it by its status and to the extent recognized by the other parties to the agreement.⁹⁶ In Somalia, the parties to the conflict could be characterized as unorganized armed factions, generally unable to exercise effective and stable control over territory. Consequently, no entity had the capacity to conclude treaties on its behalf during state collapse. For example, Somalia was not able to ratify the Lomé IV Convention and it no longer benefits from the development framework provided by the Lomé Conventions.⁹⁷ A similar situation arose with the World Bank, the programmes of which require that agreements be concluded with the competent authorities of the country.⁹⁸ Moreover, no status of forces agreement could be concluded when the UN intervened in Somalia.

3.2. State Property Abroad

When a state collapses, the warring parties begin a race for the control over the state's property abroad. Access to a state's assets plays a vital role in the struggle to control the country, to sustain diplomatic missions, and most importantly, to finance military operations. It is commonplace that several parties to a conflict simultaneously claim access to the state's assets. In such situations, foreign banks holding property may make payments at their own peril or refuse to do so until the title to the property has been decided in a judicial proceeding.⁹⁹ Thus, in the case *Somalia v. Woodhouse Drake*, the Court ordered Somalia's fund to remain under its control, since there was no authority entitled 'to receive and deal with the property of the Republic'.¹⁰⁰ Some states follow the practice of freezing assets until the establishment of a recognized government. Thus, Switzerland reportedly refused access to the deposits

⁹⁴ Cf. Article 7 of the Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/CONF.39/11/add.2, 1155 UNTS 331 (hereafter 'VCLT').

⁹⁵ See Article 8 of the Draft Code of the Law of Treaties, Yearbook of the International Law Commission (YBILC) (1958-II), p. 24.

⁹⁶ P. Reuter, Introduction to the Law of Treaties, 2nd edition (Kegan Paul International, London-New York, 1995), p. 76.

⁹⁷ K. van Hippel and A. Yannis, 'The European Response to State Collapse in Somalia', in K. E. Jorgensen (ed.), *European Approaches to Crises Management* (Kluwer, The Hague, 1997), pp. 65–81 at p. 78.

⁹⁸ Report of the Secretary-General on the Situation in Somalia, UN Doc. S/1999/882, 16 August 1999, para. 72.

⁹⁹ S. Talmon, *supra* note 56, p. 196.

¹⁰⁰ *Somalia v. Woodhouse Drake*, *supra* note 21, p. 757 at F–G.

of Somalia until a recognized government was established.¹⁰¹ Furthermore, the United States froze all the funds of Somalia after the overthrow of Siad Barre.¹⁰² Moreover, the diplomatic premises of a failed state abroad, which have ceased to function, do not enjoy diplomatic inviolability and the protection provided by the receiving state indefinitely.¹⁰³ In some states national legislation provides for the termination of their diplomatic status and for their sale or expropriation.¹⁰⁴ In a failed state situation such proceeds should, however, be frozen until the establishment of a new government.¹⁰⁵

3.3. Compliance with International Obligations

3.3.1. State Failure as ‘Subjective Impossibility’

After the total collapse of state institutions, the state has in practice no means to comply with its international obligations. This applies to all of its duties, irrespective of their origin. For instance, the enforcement of law and order in the territory is neglected, its own nationals and aliens residing in its territory are left unprotected, and its contractual obligations are not implemented. Thus, state failure, and in particular the prolonged absence of any state organs, entails an absolute impossibility to comply with the international obligations of the state. The factual situation may be described as ‘subjective impossibility’, as has been suggested by M. Herdegen.¹⁰⁶ The following inquiry will be limited to study some legal implications resulting from state failure with regard to, firstly, treaty obligations in general, and secondly, as a possible special case, international human rights and humanitarian law obligations.

3.3.2. Effect of State Failure on International Treaty Obligations

If state collapse amounts to a factual ‘subjective impossibility’, as suggested above, the question arises as to how does it affect the treaty obligations of a failed state. The problem shall be examined, first, with regard to the status of

¹⁰¹ J.-L. Schneeberger, *supra* note 46.

¹⁰² See e.g., the attempt of the Chargé d’ Affaires a.i. of the Permanent Mission of Somalia to the UN to unfreeze Somali assets, R. Howell, *supra* note 38.

¹⁰³ See Articles 22 and 45 of the VCDR, *supra* note 31, and E. Denza, *supra* note 32, p. 396. Cf. Somali Diplomat case, *supra* note 37, p. 602.

¹⁰⁴ See e.g., the British Diplomatic and Consular Premises Act. c. 46. (1987), sections 1–3, LVIII BYIL (1987), pp. 541–542 and the United States Foreign Missions Act of 1982, section 205(c), 78 AJIL (1984), pp. 430–435 at p. 432.

¹⁰⁵ The United States used the powers conferred under its Foreign Missions Act with respect to the former diplomatic premises of Somalia. E. Denza, *supra* note 32, p. 399.

¹⁰⁶ The expression is translated from ‘subjektive Unmöglichkeit’ as accurately employed by M. Herdegen in *supra* note 9, p. 77.

treaties concluded before state failure, and second, as to the possible effect of state failure on their application.

As is well known, the security of international treaty relations is one of the core objects of the law of treaties. Therefore, even extensive civil strife or prolonged periods of anarchy do not disrupt the continuity of international obligations incumbent upon a state. A state could, otherwise, claim, for example after a revolutionary change of government, that the treaties concluded by the former government would not continue to bind it. A revolution does not, however, affect the identity of the state and the international treaty commitments concluded before remain, as a general rule, in force in accordance with the principle of continuity.¹⁰⁷ This is also the case with regard to state collapse.¹⁰⁸ In practice, several sub-state entities in Somalia declared their adherence to international treaties signed and ratified by the former governments of Somalia.¹⁰⁹ Nonetheless, the implementation of international obligations depends largely on the existence of effective state structures. State failure has thus fundamental effects on their application.

Although the principle of *pacta sunt servanda* requires the strict performance of treaty obligations, the non-application of treaties due to extraneous reasons is permitted under certain circumstances.¹¹⁰ Article 62 of the Vienna Convention on the Law of Treaties (hereafter ‘VCLT’) concerning the fundamental change of circumstances is considered largely a codification of customary international law¹¹¹ and formulated narrowly, underlining its highly exceptional character.¹¹² Accordingly, international tribunals have been reluctant to apply *rebus sic stantibus*, at least until June 1998 when the European Court of Justice upheld an appeal to it in the *Racke* case, probably for the first time ever on the international level.¹¹³ However, it appears that state failure

¹⁰⁷ See supra note 22 and accompanying text.

¹⁰⁸ See e.g., M. Herdegen, supra note 9, p. 77 and *Armed conflicts linked to the disintegration of State structures*. Preparatory document drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998, ICRC, available at <www.icrc.org/web/eng/siteeng0.nsf/iwpList74/02CED570ABFDD384C1256B66005C91C6> visited on 10 October 2003.

¹⁰⁹ A. Yannis, supra note 3, pp. 281–282. See also Article 3 of the Transitional National Charter cited in *The situation of human rights in Somalia*, Commission on Human Rights, UN Doc. E/CN.4/2001/105, 13 March 2001, at 7.

¹¹⁰ Article 26 of the VCLT, supra note 94.

¹¹¹ *Fisheries Jurisdiction case, jurisdiction (United Kingdom v. Iceland)* 2 February 1973, ICJ Reports (1973), p. 2 at para. 36 and *Gaboikovo-Nagyramos Project (Hungary v. Slovakia)* 25 September 1997, ICJ Reports (1997), p. 7 at para. 99. See also *A. Racke GmbH & Co. v. Hauptzollamt Maintz*, C-162/96, 16 June 1998, ECR (1998), p. 3655, para. 53.

¹¹² *Gaboikovo-Nagyramos Project*, supra note 111, para. 104.

¹¹³ *A. Racke GmbH & Co. v. Hauptzollamt Maintz*, supra note 111. For analysis see

would easily fulfil the first condition of the rule, that it would qualify as an unforeseeable external change, which has affected the circumstances that formed the basis for concluding a treaty.¹¹⁴ Furthermore, the changed circumstance, the existence of functioning state structures, constitutes, obviously, the essential basis of any international treaty engagement. However, it is difficult to argue that state collapse would always have the effect of radically transforming the extent of obligations still to be performed under the treaty, as also required by the provision. Due to the highly exceptional nature of *rebus sic stantibus* and the different factual circumstances, it remains thus uncertain whether the rule may be applied to all cases of state collapse. Recourse could, perhaps, also be made to the doctrine of *force majeure*, which provides in its general framework ‘a certain refinement of the treaty theory’.¹¹⁵ Although *force majeure* is in fact a circumstance precluding wrongfulness in relation to non-performance of treaty obligations, the International Law Commission acknowledged the link between *force majeure* and the impossibility of performance in its preparatory work of the VCLT.¹¹⁶ The main characteristics of *force majeure* are irresistibility, unforeseeability and externality of the impossibility of performance to the party invoking it.¹¹⁷ Furthermore, it is unintentional and, most notably, the impossibility is not linked to the material disappearance or destruction of the physical object of the treaty, as under Article 61 of the VCLT.¹¹⁸ Although the Vienna Conference was not prepared to accept *force majeure* as such as a ground for terminating or suspending treaties,¹¹⁹ it could, it is suggested, be invoked to that effect in case of state failure.¹²⁰

The effects of pleas for the non-application of treaties vary according to the permanence and scope of their grounds. Since it may be presumed that state failure is only temporary, ‘subjective impossibility’ could be invoked to suspend a treaty. Nonetheless, state failure may also generate circumstances, such as the permanent disappearance of the object of a treaty, which may

J. Klabbers, ‘Re-inventing the Law of Treaties: the Contribution of the EC Courts’, XXX Netherlands Yearbook of International Law (1999), pp. 45–74 at pp. 58–59.

¹¹⁴ Article 62(1) of the VCLT, *supra* note 94.

¹¹⁵ P. Reuter, *supra* note 96, p. 187.

¹¹⁶ YBILC (1966–II), p. 256.

¹¹⁷ P. Reuter, *supra* note 96, p. 187. See also Commentary of the ILC to the draft articles on Responsibility of States for internationally wrongful acts, Report of the ILC, GAOR 53rd Sess., Supp. No. 10, UN Doc. A/56/10, pp. 59–365, at pp. 183–184 (hereafter ‘ILC Commentary’).

¹¹⁸ *Ibid.*, p. 185.

¹¹⁹ See in particular the proposal of Mexico to extend the scope of Article 61. UN Doc. A/CONF.39/14, para. 531 (a).

¹²⁰ Cf. *infra* notes 194–195 and accompanying text.

justify the termination of a treaty or the withdrawal of a state therefrom. But in all cases, while the real effect of state failure on the application of treaties is immediate and absolute, the grounds for legitimate non-compliance under the VCLT do not have automatic effect, but need to be invoked. It is, thus, only *ex post facto*, that is after the re-establishment of state structures, when the state itself is able to make such claims. Therefore, should another party or parties to a treaty not invoke its breach during state failure,¹²¹ state collapse leads inevitably to the unlawful non-application of treaties, giving rise to possible state responsibility.¹²² To conclude, the application of the VCLT to situations of state failure seems unsatisfactory, first, since its provisions on the non-application of treaties are difficult to apply to that particular situation, and second, as it completely ignores the possibility of the absence of a representative authority.

3.3.3. International Human Rights and Humanitarian Law Obligations – A Special Case?

State failure is usually linked to the occurrence of an internal armed conflict or disturbances.¹²³ In a failing state, the parties to the conflict may include governmental forces or belligerent groups, but the more the state shifts towards complete collapse, the less organized is the structure of the opposing entities. In a failed state, the situation on the ground is characterized by the fighting among armed groups that lack clear chains of command. The discipline among the troops is rare and the use of violence is irregular. In such ‘anarchic conflicts’, as named by the International Committee of the Red Cross (hereafter ‘ICRC’), the distinction between combatants and civilians is blurred, and civilians become the direct object of hostilities as well as banditry and other penal-law crime.¹²⁴ The conflict has thus some specific features and gives rise to a series of concerns that merit attention. The following remarks are limited to the application and implementation of international human rights and humanitarian law when a state has collapsed completely, in light of the case of Somalia.

3.3.3.1. Problems of Application

Human rights are traditionally asserted to protect individuals primarily against the abuse of states and state officials. The technique used in treaties to ensure

¹²¹ Article 60 of the VCLT, *supra* note 94.

¹²² See *infra* notes 185–197 and accompanying text.

¹²³ See e.g., *Armed conflicts linked to the disintegration of State structures*, *supra* note 108.

¹²⁴ Chairman’s report of the First ICRC International Meeting on International Humanitarian Law, ICRC, Geneva, 19–23 January 1998, 323 IRRC (1998), pp. 366–371 and *Armed conflicts linked to the disintegration of State structures*, *supra* note 108 at II.

effective protection is to impose obligations on states, first, to implement human rights, and second, to ensure their enjoyment within state territory. Hence, the state is seen, on the one hand, as the main target of human rights and, on the other, as their guarantor. The state seems to be, in fact, the very *raison d'être* of human rights law.¹²⁵ In a failed state, the situation appears totally the opposite to the traditional scenario: the abusers of human rights are non-state actors instead of state officials, and the prospects for any human rights protection in the absence of state structures are non-existent. Thus, the question arises whether the application of treaties of a humanitarian character would constitute a special case or an exception from other multilateral treaties, which are, as was suggested above, temporarily suspended during state failure.¹²⁶ On the one hand, suspending the application of all the treaties, irrespective of their substance, would seem logical, since the state is unable to comply with any of its international obligations. Human rights treaties would be thus treated as any other multilateral treaty. Consequently, only the obligations arising from *jus cogens* would continue to be applicable.¹²⁷ Moreover, suspension appears inevitable with regard to the procedural obligations of states established in the treaty, such as the notification of a state of emergency and periodic reporting, which a failed state, by definition, cannot conduct.¹²⁸ On the other hand, it could be argued that human rights treaties constitute, indeed, a special case and continue to be applicable notwithstanding state collapse. Firstly, human rights treaties are arguably of a special nature, since the obligations assumed by states under them exist primarily *vis-à-vis* their own nationals, who are the beneficiaries of the rights. Furthermore, it could be asserted that the obligations are of objective and absolute character, and even, that they form part of an 'international public order'.¹²⁹ Consequently, human rights treaties could not be suspended as classical inter-state treaties.¹³⁰ For argument's sake, it would, perhaps, be more convincing to simply assert that

¹²⁵ M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *Harvard International Law Journal* (2001), pp. 201–245 at pp. 203 and 219–220.

¹²⁶ Cf. B. Simma, 'International Human Rights and General International Law: A Comparative Analysis', IV/2 *Collected Courses of the Academy of European Law* (1993), pp. 153–236.

¹²⁷ Cf. Article 53 of the VCLT, *supra* note 94. For *jus cogens* norms see *East Timor case (Portugal v. Australia)* 30 June 1995, ICJ Reports (1995), p. 90 at p. 102, para. 29.

¹²⁸ Cf. Article 44 of the VCLT, *supra* note 94. See also B. Simma, *supra* note 126, pp. 195–198.

¹²⁹ Cf. e.g., *Pfunders case (Austria v. Italy)* admissibility, 11 January 1961, ECHR, 4 *Yearbook of the European Court of Human Rights* (1961), at pp. 138 and 140.

¹³⁰ Cf. distinction made between classical inter-state and human rights treaties in CCPR General Comment 24 (on reservations), UN Doc. CCPR/C/21/REV.1/ADD.6, 11 November 1994.

suspension is not permitted under the VCLT, which may be, as seen above, difficult to apply to situations of state failure. One could also, perhaps, invoke by analogy Article 60(5) of the VCLT which excludes the possibility to suspend ‘provisions relating to the protection of the human person contained in treaties of a humanitarian character’ as a consequence of a material breach of treaty. It is thus suggested that caution is needed as to drawing legal implications from the particular characteristics of human rights law, since it remains, paraphrasing M. Koskenniemi, that people have human rights only so far as actually implemented by states.¹³¹ It is, however, not surprising that the practice of treaty monitoring bodies supports the position that human rights treaties continue to be applicable during state failure, illustrated by the fact that they continued to request periodic reports and to invite the non-existing government of Somalia to their meetings.¹³² The support for the continued application of human rights treaties does not, however, change the fact that, in the absence of state structures, they are *de facto* suspended.

The same question of applicability may be posed with regard to the law of armed conflict. It seems, at least in practical terms, to be somewhat less important, since the advantage of the rules concerning non-international armed conflicts is in this context that they, unlike human rights treaties, presumably pose obligations directly to certain non-state actors. Thus, even if the treaty obligations of a failed state were considered suspended during state collapse, the actors in the conflict would still be bound by the applicable rules of humanitarian law. Firstly, it is clear that the rules contained in Protocol II concerning non-international armed conflicts cannot be applied in the present context due to the stringent conditions for its application.¹³³ Thus, one must turn to the customary law ‘minimum yardstick’ to be applied in armed conflicts, namely Article 3 common to the four Geneva Conventions (hereafter ‘common Article 3’).¹³⁴ As is well known Article 3 obliges all the parties to an internal armed

¹³¹ M. Koskenniemi, ‘Pull of the Mainstream’, 88 *Michigan Journal of International Law* (1990), pp. 1946–1962 at p. 1951.

¹³² See *supra* note 84 and accompanying text.

¹³³ Article 1(1) of Protocol (II) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 August 1977, 1125 UNTS 609.

¹³⁴ See *Military and Paramilitary Activities in and against Nicaragua, merits (Nicaragua v. United States)* 27 June 1986, ICJ Reports (1986), p. 14 at p. 114 para. 218 and Article 3 common to Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, Geneva Convention (II) for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

conflict to respect certain minimum humanitarian rules. However, in order to establish that common Article 3 is applicable to 'anarchic conflicts', first it needs to be examined whether the armed groups concerned would qualify as 'a party to the conflict' under the provision. It is generally considered that an armed group must have, to that end, a minimum degree of organization and discipline to be able to respect humanitarian law.¹³⁵ Nonetheless, it has been contended that due to the humanitarian purpose of common Article 3, its scope of application should not be limited by 'unduly formal requirements'.¹³⁶ The practice of the UN Security Council with regard to Liberia and Somalia supports the view that factions would, indeed, qualify as 'a party to the conflict': the Council has repeatedly called upon 'all parties to the conflict', including factions, to respect international humanitarian law.¹³⁷ It seems, however, unlikely that common Article 3 would cover all the individuals involved in the hostilities, since they are not necessarily associated with factions but with groups, which use violence for purely criminal or commercial ends. Second, in order to apply common Article 3 the intensity of violence should amount to an 'armed conflict'. It has been argued, on the one hand, that the threshold of violence would need to be rather high to qualify as 'a genuine armed conflict'.¹³⁸ On the other, the International Criminal Tribunal for the Former Yugoslavia (hereafter 'ICTY') has established that the existence of 'protracted armed violence' between 'organized armed groups' was enough to constitute an armed conflict.¹³⁹ Moreover, the International Court of Justice has even declared that the rules of common Article 3, in so far as they constitute 'elementary considerations of humanity', apply, not only in cases of armed conflict, but in all situations.¹⁴⁰ Finally, the practice of the UN Security Council with regard to Somalia supports the view that hostilities linked to state collapse indeed constitute an armed conflict.¹⁴¹ To conclude, although some

¹³⁵ Cf. Article 1(1) of Protocol II, *supra* note 133. See also Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *Commentary on the Additional Protocols to the Geneva Conventions* (Martinus Nijhoff, Dordrecht/ICRC, Geneva, 1987), p. 1348 et seq.

¹³⁶ *Armed conflicts linked to the disintegration of State structures*, *supra* note 108 at III.1.a.

¹³⁷ See e.g., SC Res. 788 on Liberia, UN Doc. SC/RES/788, 19 November 1992, at para. 5 and SC Res. 814 on Somalia, UN Doc. SC/RES/814, 26 March 1993, at para. 13.

¹³⁸ J. Pictet (ed.), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (ICRC, Geneva, 1952), p. 50.

¹³⁹ *Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ICTY, 2 October 1995, 35 ILM (1996) (hereafter 'Tadic (Jurisdiction) case'), p. 32 at para. 70. See also G. Abi-Saab, 'Non-International Armed Conflicts', in *International Dimensions of Humanitarian Law*, UNESCO, Henri-Dunant Institute-Geneva, Dordrecht/Boston/London, 1988, pp. 217–239 at p. 238.

¹⁴⁰ *Nicaragua case*, *supra* note 134, p. 114, para. 218.

¹⁴¹ See SC Res. 814, *supra* note 137.

ambiguities persist as to whether the conditions for applying common Article 3 are always fulfilled in ‘anarchic conflicts’, it seems that the provision would be applicable to most actors participating in the hostilities.¹⁴²

While state collapse endured in Somalia and the factions and local communities gained strength and organization, the situation became more stable, leaving violence local and sporadic. The question then arises whether the law of armed conflict that had previously become applicable with regard to the parties to the conflict, continued to bind them under the new circumstances, and in particular, in the peaceful parts of the territory. Guidance may be sought, once again, from the Tadic (Jurisdiction) case, according to which ‘[i]nternational humanitarian law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities until . . . a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole of the territory under the control of a party, whether or not actual combat takes place there.’¹⁴³ At the outset, it would thus seem that international humanitarian law would continue to apply in the whole territory of a failed state until a settlement is reached.¹⁴⁴ However, not all areas of a collapsed state are necessarily ‘under the control of a party’, as required by the ICTY pronouncement. Furthermore, one may question whether the application of international humanitarian law extends over notoriously long periods, as settlements may not be reached for decades. The position of the Tribunal serves, no doubt, a clear humanitarian purpose, since the effectiveness of human rights protection is in general notoriously weak in situations qualified as internal tensions and disturbances.¹⁴⁵ The pronouncement does not, however, help to resolve the dilemmas related to the application of the norms in situations of state failure.

¹⁴² By contrast, the ICRC considers that common Article 3 is applicable, with no exceptions, in ‘anarchic conflicts’. Chairman’s report of the First ICRC International Meeting on International Humanitarian Law, *supra* note 124. See also Report of the Independent Expert, *supra* note 49, paras 53–57, and Articles I, II and IV of Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties. Resolution of the Institute of International Law, 25 August 1999, 68-II *Annuaire de l’Institut de Droit international* (1999), pp. 386–399. The Resolution was explicitly intended to cover cases of state collapse. Cf. comments by Mr Dienstein, *ibid.* p. 303 and *Rapport définitif*, 8 juin 1998, 68-I *Annuaire de l’Institut de Droit international* (1999), pp. 327–334 at p. 329.

¹⁴³ Tadic (Jurisdiction) case, *supra* note 139, para. 70.

¹⁴⁴ See Report of the Independent Expert, *supra* note 49, para. 55.

¹⁴⁵ Cf. Article 1(2) of Protocol II, *supra* note 133. For discussion see e.g., T. Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge University Press, Cambridge, 1987), in particular pp. 45–70.

3.3.3.2. Problems of Implementation and Enforcement

As seen above, ‘anarchic conflicts’ do not necessarily fall beyond the scope of law. Its implementation is, however, severely hampered, since both human rights and international humanitarian law rely heavily on state organization.¹⁴⁶ In addition, the latter traditionally depends on the existence of effective military command and organized armed units.¹⁴⁷ That is hardly the case with factions and loosely organized groups. As to enforcement, in the absence of functioning state structures, sufficient military organization and the rule of law, the prosecution and punishment of alleged perpetrators at the local level is virtually impossible, or it is left to occasionally functioning local bodies.¹⁴⁸ It may also be doubted whether the warring parties themselves are able to enforce humanitarian law by conducting lawful reprisals against the violating parties. Reprisals, moreover, entail further risks, such as degeneration into greater violence and misjudgements of proportionality, and should therefore be discouraged.¹⁴⁹ Hence, as the local means of enforcement are nearly non-existent, they need to be looked for at the international level.

Individual states and international organizations, in particular the ICRC and the UN, have several tools at their disposal to encourage respect for human rights and compliance with international humanitarian law.¹⁵⁰ Those means have remained, however, relatively ineffective in situations of state collapse. Even the UN intervention in Somalia, that aimed, *inter alia*, to restore the rule of law in the country, was unsuccessful.¹⁵¹ The elaborate machinery of human rights enforcement and monitoring at the universal and regional levels could also be of interest in the failed state context, since it addresses not only human rights violations committed by both states and non-state actors but also violations of international humanitarian law, to the extent that the latter overlaps with the former. The system is, unfortunately, only of marginal significance here, since the enforcement measures provided exist only with respect to states as opposed to non-state actors.¹⁵² The machinery has admittedly other important functions and it has even been of direct relevance in cases where Somali refugees, who had reached a third state, were faced with problems, such

¹⁴⁶ Cf. Article 1 of the four Geneva Conventions, *supra* note 134, Nicaragua case, *supra* note 134, at 114 and *supra* note 125 and accompanying text.

¹⁴⁷ See e.g., Article 1(1) of Protocol II (*supra* note 133) which refers to ‘organized armed groups’ and ‘responsible command’.

¹⁴⁸ See *supra* note 49.

¹⁴⁹ See L. Moir, ‘The Implementation and Enforcement of the Laws of Non-international Armed Conflict’, 3 *Journal of Armed Conflict Law* (1998), pp. 163–195, pp. 169–172.

¹⁵⁰ The tools include, e.g., exercise of diplomatic pressure, passing of resolutions and dissemination.

¹⁵¹ Cf. e.g., preamble of SC Res. 794, UN Doc. S/RES/794, 3 December 1992.

¹⁵² See L. Moir, *supra* note 149, pp. 180–187.

as, the non-recognition of violations conducted by non-state actors as human rights violations permitting their forced return to Somalia.¹⁵³ Though the decisions provided effective protection to the particular victims, they were, however, addressed to third states instead of the violators themselves.

The most efficient tool to enforce humanitarian law seems to be individual accountability of perpetrators at the international level. The questions that arise are no less than whether international law provides for individual criminal responsibility for 'ordinary war crimes'¹⁵⁴ conducted in the failed state context, and if so, also for jurisdiction to prosecute for the crimes. For obvious reasons the study of these questions is limited here to some fairly general remarks. It may first be recalled that since common Article 3 does not contemplate individual criminal responsibility at the international level, it was, until recently, generally accepted that 'ordinary war crimes' conducted in internal conflicts would not incur such responsibility. However, in the course of the 1990s, the decade of civil wars and shocking internal atrocities, new measures were sought to enforce international humanitarian law. Most notably, the UN Security Council established two international ad hoc criminal tribunals¹⁵⁵ and the efforts to establish a permanent international criminal court culminated in the conclusion of the Rome Statute in 1998.¹⁵⁶ As the existing rules were not suited to prosecute the offenders of internal atrocities, 'it was . . . necessary to establish . . . an entire corpus of rules concerning war crimes in internal armed conflicts' (first emphasis added).¹⁵⁷ In fact, violations of common Article 3 were criminalized for the first time in the Statute of the International Criminal Tribunal for Rwanda.¹⁵⁸ The ICTY adopted the same view in its case

¹⁵³ See e.g., *Ahmed v. Austria*, supra note 45, paras 46–47 and *Elmi v. Australia*, supra note 45, at paras 6.6, 6.9 and 7. See generally J. Moore, 'From Nation-State to Failed State: International Protection from Human Rights Abuses by Non-State Actors', 31 *Columbia Human Rights Law Review* (1999), pp. 81–121.

¹⁵⁴ A distinction is made between crimes such as genocide, which undoubtedly constitute individual criminal responsibility and 'ordinary war crimes'. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 28 March 1951, ICJ Reports (1951), p. 15 at p. 23. The following discussion is limited to 'ordinary war crimes' without, obviously, excluding the possibility that other crimes might be committed in the territory of a failed state.

¹⁵⁵ The ICTY and the International Criminal Tribunal for Rwanda were established pursuant to SC Res. 808, UN Doc. S/RES/808, 22 February 1993, and SC Res. 955, UN Doc. S/RES/955, 8 November 1994 respectively.

¹⁵⁶ Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 (hereafter 'ICC Statute').

¹⁵⁷ L. Condorelli, 'War Crimes and Internal Conflicts in the Statute of the ICC', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court. A Challenge to Impunity* (Ashgate/Dartmouth, Aldershot, 2001), pp. 107–117 at p. 109.

¹⁵⁸ Commentary of the UN Secretary-General, UN Doc. S/1995/134, 13 February 1995, para. 12.

law.¹⁵⁹ However, when drafting the Statute of the International Criminal Court (hereafter 'ICC'), some states were, just as when negotiating the Protocols of 1977, reluctant to include such violations in the Statute.¹⁶⁰ A compromise was finally reached and the Statute now defines as war crimes both serious violations of common Article 3 and other serious violations of the laws and customs of war applicable in internal conflicts, following to a great extent the statutes and case law of the ad hoc criminal tribunals.¹⁶¹ Furthermore, the scope of application of the latter definition was specifically drafted with the characteristics of 'anarchic conflicts' in mind.¹⁶² Finally, the definition of crimes against humanity under Article 7 may also be applicable in the failed state context.¹⁶³

The intention of the drafters of the ICC Statute reportedly was that only the norms that had customary character and entailed individual criminal responsibility under customary international law would be adopted.¹⁶⁴ Consequently, the Statute is now frequently referred to as an indication of the existing customary rules of international humanitarian law,¹⁶⁵ even though its stipulations are explicitly limited to that treaty and it leaves an open door as to the customary status of rules outside its framework.¹⁶⁶ It has even been suggested that the provisions of the ICC Statute were a codification or crystallization of rules established in the course of only few years by a 'coutume à grande vitesse'.¹⁶⁷ On the other hand, several scholars have argued convincingly that the rule criminalizing violations of international humanitarian law applicable in internal conflicts had already previously become part of customary international law.¹⁶⁸ In any event, it seems debatable whether the rule would have a

¹⁵⁹ Tadic (Jurisdiction) case, *supra* note 139, para. 134.

¹⁶⁰ See A. Zimmermann, 'Article 8. War Crimes', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), pp. 262–286 at para. 234.

¹⁶¹ See Articles 8(2)(c) and (e) of the ICC Statute, *supra* note 156.

¹⁶² See Article 8(2)(f) *ibid.* See A. Zimmermann, *supra* note 160, paras 333–338.

¹⁶³ Cf. chapeau of Article 7(1) of the ICC Statute, *supra* note 156.

¹⁶⁴ It is also clear that the Statute includes many manifestly innovative elements. See e.g., D. Momtaz, 'War Crimes in Non-international Armed Conflicts under the Statute of the International Criminal Court', 2 *Yearbook of International Humanitarian Law* (1999), pp. 177–192 at p. 185.

¹⁶⁵ See e.g., D. Robinson and H. von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute', 2 *Yearbook of International Humanitarian Law* (1999), pp. 193–209 at p. 209.

¹⁶⁶ Cf. Article 10 of the ICC Statute, *supra* note 156.

¹⁶⁷ L. Condorelli, *supra* note 157, pp. 109, 116.

¹⁶⁸ See e.g., C. Meindersma, 'Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War Under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia', *XLII NILJ* (1995), pp. 373–396 at pp. 387–396 and C. Greenwood, 'International Humanitarian Law and the Tadic Case', 7 *EJIL* (1996), pp. 265–283 at pp. 277–279.

customary nature, if the classical requirements for the formation of customary international law were strictly followed, i.e. that the *opinio iuris* must be accompanied with general state practice.¹⁶⁹ The application of the two-element test is, however, an ambiguous and essentially subjective process that may lead to diverging results. Nonetheless, it seems today certain that there exists a general conviction that serious violations of international humanitarian law committed in all armed conflicts should be punished either at the national or international level. The scarcity and fragmentary nature of the relevant state practice is, perhaps, due to another controversial question, that of jurisdiction, which shall now be examined briefly.

As already noted, in the absence of an enforcement mechanism at the national level, the perpetrators will escape prosecution and punishment in the failed state. The recent establishment of the ICC promises that international enforcement may be available with regard to serious violations committed in future ‘anarchic conflicts’:¹⁷⁰ in fact, one of the ICC’s underlying ideas is precisely to ensure prosecution and punishment in cases where a state itself is unable to bring perpetrators to justice. The usefulness of the Court in a situation of state failure depends, however, on the existence of political will to trigger the mechanism.¹⁷¹ Furthermore, it remains yet unclear how the limitation of the Court’s jurisdiction to ‘the most serious crimes of concern to the international community as a whole’ will be interpreted.¹⁷² The stringent conditions for the exercise of the Court’s jurisdiction will thus likely leave a large gap, in addition to the crimes committed before its entry into force, which are expressly excluded from its jurisdiction.¹⁷³ Filling the jurisdictional gap by the establishment of further international ad hoc criminal tribunals is uncertain, since the policy is selective, costly and politically a difficult undertaking. The international community has been, in fact, reluctant to take such a step with regard to Somalia, despite the proposals made to that end.¹⁷⁴ Finally, the ICC is supposed to replace the ad hoc arrangements, at least with regard to future conflicts.

Hence, the core question appears to be whether the domestic courts of third states could fill the jurisdictional void. However, the ‘grave breaches’ regime

¹⁶⁹ See e.g., Nicaragua case, *supra* note 134, at 97. Cf. Tadic (Jurisdiction) case, *supra* note 139, paras 131–133.

¹⁷⁰ Cf. Article 11(2) of the ICC Statute, *supra* note 156.

¹⁷¹ Cf. Articles 12 and 13 *ibid.*

¹⁷² Article 5, *ibid.*

¹⁷³ Cf. Article 11(2) *ibid.*

¹⁷⁴ See e.g., a proposal by a local leader in Report of the Secretary-General, *supra* note 98, para. 34. Cf. Situation of human rights in Somalia, UN Doc. E/CN.4/2000/110, 26 January 2000, paras 32 and 40.

is not applicable to violations occurring in internal conflicts,¹⁷⁵ notwithstanding some recent practice and views to the contrary.¹⁷⁶ On the other hand, it is currently debated whether states could choose to exercise universal jurisdiction with regard to the most serious international crimes,¹⁷⁷ even when committed in internal conflicts¹⁷⁸ and in the absence of the accused.¹⁷⁹ If admitted, a person suspected of having committed serious violations of international humanitarian law in a failed state could be prosecuted and punished by a third state, irrespective of the nationality of the perpetrator and that of the victim.¹⁸⁰ It is here only possible to note that the existence of scholarly opinion supporting the emergence of such a customary norm does not, as long as relevant state practice is nearly absent,¹⁸¹ imply that it would have become part of international law. Nonetheless, even if one would argue that there existed indications of the evolution of such a principle,¹⁸² it seems doubtful whether it would also cover 'ordinary war crimes' committed during state collapse.¹⁸³

¹⁷⁵ The 'grave breaches' regime is established under Article 51 of the Geneva Convention I, Article 52 of the Geneva Convention II, Article 131 of the Geneva Convention III, and Article 148 of the Geneva Convention IV, *supra* note 134. It is limited by common Article 2 to international armed conflicts, as confirmed in the *Tadic* (Jurisdiction) case, *supra* note 139, para. 84.

¹⁷⁶ See *Darco Knezevic case*, Supreme Court of The Netherlands (cited in R. van Elst, 'Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions', 13 *Leiden Journal of International Law* (2000), pp. 815–854 at pp. 846–847). See also Res. 1999/1 of the Commission on Human Rights concerning the situation of human rights in Sierra Leone, UN Doc. E/CN.4/1999/1, 6 April 1999 and Separate opinion of Judge *Abi-Saab*, *Tadic* (Jurisdiction) case, *supra* note 139, p. 5.

¹⁷⁷ See e.g., *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) 14 February 2002, available at <www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (visited on 10 October 2003), Separate opinion of Judge *Koroma*, p. 3 at para. 9.

¹⁷⁸ The proponents of this view seem to consider that universal jurisdiction would be a corollary to the international criminalization of the violations. See e.g., T. Meron, 'Criminalization of Internal Atrocities', 89 *AJIL* (1995), pp. 554–577 at p. 576 and M.T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', 23 *Human Rights Quarterly* (2001), pp. 940–974 at pp. 947–948.

¹⁷⁹ See *Arrest Warrant of 11 April 2000* (*supra* note 177) Separate opinion of Judges *Higgins*, *Kooijmans* and *Buergethal*, p. 14 at para. 59 supporting universal jurisdiction in absentia. To the contrary see separate opinion of President *Guillaume*, p. 8 at para. 16 and Declaration of Judge *Ranjeva*, p. 3–4.

¹⁸⁰ The Special Rapporteur of the Commission on Human Rights has encouraged third states where suspected Somali war criminals reside to prosecute them by virtue of universal jurisdiction. *Situation of human rights in Somalia*, *supra* note 174, para. 32.

¹⁸¹ See e.g., Separate opinion of Judges *Higgins*, *Kooijmans* and *Buergethal*, *supra* note 179, pp. 5–7 and M.T. Kamminga, *supra* note 178, pp. 965–974.

¹⁸² See e.g., Separate opinion of Judges *Higgins*, *Kooijmans* and *Buergethal*, *supra* note 179, p. 13, para. 51.

¹⁸³ Cf. J. Dugard, 'Comblent la lacune entre droits de l'homme et droit humanitaire: la punition des délinquants', 831 *Revue internationale de la Croix-Rouge* (1998), pp. 477–486 at p. 484.

To conclude, wide-scale prosecution of serious violations of international humanitarian law committed during state failure by the domestic courts of third states remains a distant scenario, subject to the continuing evolution of international criminal law. However, it is not unreasonable to think that such future acts could be, one day, prosecuted by the ICC, provided that the violations were serious enough, the procedural and practical difficulties posed by state failure were overcome and that there existed sufficient political will to that end. As to the violations committed in Somalia during its collapse, absent a domestic enforcement system, international jurisdiction and/or prosecution by third states, the warnings of the UN Security Council that the perpetrators would be held individually responsible¹⁸⁴ remain, to date, a dead letter.

3.4. State Responsibility

3.4.1. Problem of Attribution

Since a failed state, by definition, lacks an effective government, the question whether the state could be held responsible for the illegal acts committed during state collapse centers on the concept of attribution.¹⁸⁵ This is so because the actors concerned are loosely organized factions or groups consisting of individuals acting in their private capacity. Such private acts are not in general attributable to a state, except when state organs have manifestly neglected the measures that are normally taken to prevent them, as required by its duty of due diligence.¹⁸⁶ Furthermore, state practice implies that when an internal conflict has gone beyond state control, its negligence in this regard becomes difficult to establish.¹⁸⁷ Moreover, the very concept of due diligence seems to presume the existence of at least some functioning state structures. Therefore, after the total absence of government has become manifest, it appears doubtful that a failed state could be held responsible for breaches of its international obligations that occurred during the period of its total collapse.

The Articles on Responsibility of States for internationally wrongful acts aim to clarify this legal uncertainty and to avoid the possible evasion of responsibility by disintegrating states with a specific rule of attribution. Its

¹⁸⁴ See e.g., SC Res. 794, *supra* note 151, para. 5.

¹⁸⁵ Cf. Article 3 of the Articles on Responsibility of States for internationally wrongful acts annexed to GA Res. 56/83, UN Doc. A/RES/56/83, 28 January 2002 (hereafter ‘Articles on State Responsibility’).

¹⁸⁶ See YBILC (1957–II), pp. 121–128 and I. Brownlie, *System of the Law of Nations. State Responsibility*, Part I (Clarendon Press, Oxford, 1983), pp. 161–162.

¹⁸⁷ See e.g., the position of Belgium with respect to damages suffered by Belgian nationals in the Democratic Republic of Congo during the civil war following its collapse in 1960 in VIII *Revue belge de droit internationale* (1972), p. 372.

Article 9 provides that the conduct of a person or group of persons shall be considered an act of a state if they are ‘in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority’. According to the Commentary of the International Law Commission (hereafter ‘ILC’), the provision is intended to cover exceptional situations ‘where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative’.¹⁸⁸ In particular, the phrase ‘absence or default’ is aimed to embrace ‘both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the partial collapse of the State or its loss of control over certain locality’.¹⁸⁹ However, the cases envisaged ‘pre-suppose the existence of a government in office and of State machinery whose place is taken by irregulars’.¹⁹⁰ It is thus clear that Somalia during its collapse would not fall under the provision. The rule is, nonetheless, of great importance in failing state situations, since it provides a welcome clarification with regard to problems of attribution.

A claim concerning the responsibility of a failed state presented during its collapse would fail from the very beginning, since in the absence of a government, it has no *locus standi* in a judicial forum.¹⁹¹ If a claim concerning internationally wrongful acts committed during the collapse was made after the re-establishment of state structures, it would not be successful either: as was seen above, the state could not be held liable for the acts, due to the absence of a link of attribution. By contrast, if the acts were committed during state collapse by groups, which formed the new government of the state, or their conduct resulted in the formation of a new state, responsibility for the acts would arise in accordance with the principle of continuity.¹⁹² In all of these scenarios, the revived state would be, nonetheless, under an obligation to prosecute and punish the alleged perpetrators for the violations committed during state failure.¹⁹³

3.4.2. Exemption from Responsibility

A state, claimed to have breached its international obligations during state failure could, moreover, argue that the collapse constituted a situation of force

¹⁸⁸ ILC Commentary, *supra* note 117, p. 109. Cf. YBILC (1974–II), pp. 283–286.

¹⁸⁹ ILC Commentary, *supra* note 117, p. 111.

¹⁹⁰ *Ibid.*, p. 110.

¹⁹¹ See *supra* notes 89–92 and accompanying text.

¹⁹² Article 10 of Articles on State Responsibility, *supra* note 185.

¹⁹³ Cf. YBILC (1975–2), p. 93.

majeure. The plea may be made when ‘an irresistible force or an unforeseen external event, beyond the control of the State’ has prevented it from acting in conformity with its obligations.¹⁹⁴ Interestingly, the ILC has considered that impossibility due to ‘human intervention’, for example, the loss of control over a part of territory to an insurrectional movement, which leads to a breach of an international obligation of the state, entitles invocation of force majeure.¹⁹⁵ Therefore, the plea would, most likely, preclude the wrongfulness of the illegal acts which occurred during state failure and release the state from responsibility.¹⁹⁶ It would not, however, necessarily release the state from an obligation to compensate for the damages caused by the conduct.¹⁹⁷

4. Concluding Remarks

The preceding inquiry indicates, first, that the rights and duties of failing states remain generally unaffected by temporary problems of governance. However, once the total absence of government in Somalia was established with no foreseeable perspectives of recovery, the situation changed dramatically: although the state continued to exist as a shell of sovereignty, it became incapable of acting as a subject of international law.¹⁹⁸ As bluntly noted by the former UN Secretary-General Boutros Boutros-Ghali, Somalia, consequently, ‘lost its place as a member of the international community’.¹⁹⁹ As a result, the Somali people had no means to be heard in the international sphere. Moreover, their rights conferred by international law were left unprotected, not to mention the illusory promises of international criminal law.

The examined practice reveals, however, that Somalia, rather mysteriously, continued to act in some international instances. These exceptions concerned either humanitarian questions in general or cases where the interests of individuals were directly affected. The lack of representative authority was then either ignored or bypassed by using innovative and even questionable techniques, for example when the UN Security Council pretended to act upon invitation when deciding on the UN intervention in Somalia in 1992.²⁰⁰ The

¹⁹⁴ *Ibid.*, and accompanying text to note 117.

¹⁹⁵ ILC Commentary, *supra* note 117, p. 184 and YBILC (1979–II), p. 124, fn. 621.

¹⁹⁶ Article 23 of Articles on State Responsibility, *supra* note 185.

¹⁹⁷ Article 27(b) *ibid.* and YBILC (1980–II), p. 51.

¹⁹⁸ Cf. Report of the Secretary-General, *supra* note 98, at 63.

¹⁹⁹ Introduction of the UN Secretary-General to United Nations and Somalia, The United Nations Blue Book Series, Vol. VIII, Department of Public Information, United Nations, New York, 1996, p. 87.

²⁰⁰ See SC Res. 794 (*supra* note 151) adopted in response ‘to the urgent calls from Somalia for the international community to take measures . . .’ (emphasis added). However, it has been

absence of clear rules regulating state collapse was thus interpreted to allow certain 'flexibility' from the general rules concerning international representation for the benefit of individuals. On the other hand, the fact that such instances remained isolated emphasizes the continued centrality of the state, and of government as its only legitimate representative, in the international system.

The marginalization of the Somali people by the operation of international law manifests how law may function as a form of exclusion and suppression reinforcing social injustice. One can here only note the proposals made elsewhere that the international community should be ready to re-conceptualise models for international representation in cases of state collapse.²⁰¹ Since some of these challenge the virtues of liberal Western political institutions and the very structure of the international system, it is not surprising that the international community has been reluctant to consider them.²⁰² Hence, the absence of objections when the newly elected transitional Somali President, Mr Abdikassim Salad Hassan, suddenly addressed the UN Millennium Summit²⁰³ may have partly reflected a sense of general relief that the country finally had a government again and that it 'returned' to the international community.²⁰⁴ Curiously, at the time of his de facto acceptance as the legitimate representative of Somalia, less than two weeks after his election, the President had no government and had barely visited the country.²⁰⁵ Although his transitional mandate expired recently, on 26 August 2003, his contested government stayed in office,²⁰⁶ but controls only a small part of the territory. As the ongoing peace

argued that the intervention's legitimacy was derived from a letter from the 'interim Prime Minister of Somalia' to the President of the SC (UN Doc. S/23445 Annex I, 20 January 1992). See J. Herbst, *supra* note 5, p. 125 and R. Gordon (1995), *supra* note 8, p. 551.

²⁰¹ Cf. H. Richardson, *supra* note 8, pp. 52, 75–76, J. Herbst, *supra* note 5, p. 144 and R. Gordon (1997), *supra* note 8, p. 174.

²⁰² In Somalia, no recognition has been granted to the emerged sub-state entities in fear of increasing state disintegration. Nonetheless, the UN 'building-block approach', which provided support for the emerged local administrative capacities during state collapse, may have lent some support to the proposals on empowering local communities. See Report of the Secretary-General, *supra* note 98, paras 14–18, 40, 52.

²⁰³ Statement by H.E. Dr. Abdikassim Salad Hassan, President of the Somali Republic, 8 September, 2000, available at <www.un.org/millennium/webcast/statements/somalie.htm> visited on 10 October 2003.

²⁰⁴ Cf. welcoming words by Mr Holkeri, Chairman of the 55th Session of the General Assembly, addressed to President Abdikassim. UN Doc. A/55/PV.16, 12 September 2000, at p. 21.

²⁰⁵ See Report of the Secretary-General, UN Doc. S/2000/1211, *supra* note 4, para. 16 and Anonymous, 'Government Recognition in Somalia and Regional Political Stability in the Horn of Africa', 40 *Journal of Modern African Studies* (2002), pp. 247–272 at p. 254.

²⁰⁶ Cf. Report of the Secretary-General, *supra* note 7, para. 28.

talks are conflict-ridden²⁰⁷ and the security and humanitarian situations in the country continue to be of serious concern,²⁰⁸ major challenges need still to be overcome before an effective central government is re-established in the country.

The preceding study indicates that state failure in general, and the loss of representative authority in particular, have far-reaching legal implications. Therefore, contrary to the not uncommon practice, the terms ‘failed’ or ‘collapsed state’ should not be employed carelessly, at least in legal discourse, but with awareness of their meaning and legal consequences. Furthermore, the analysis highlights, almost at every turn, the difficulties of applying rules of international law to complete state failure. The recent attempts in international forums to address such problems show increasing and welcome awareness of their importance. Their results do not, however, always manage to capture the core problematique of the failed state, i.e. the prolonged absence of effective government, replaced by a number of non-state actors. The difficulties related to both applying the existing and formulating new rules are obvious since state failure touches upon the state institution itself, which remains the primary subject of international law.²⁰⁹ The discipline, though claiming generality and universality, has problems addressing the particular reality of the failed state. To conclude, complete state failure fits uneasily to the state-centric structure of international law, it escapes the classical legal techniques and exposes the law’s static nature.²¹⁰

²⁰⁷ The Somalia National Reconciliation Conference, aimed at negotiating an all-inclusive government is, at the time of writing (October 2003), in its final phase. See *ibid.*, paras 3–27 and for news updates at <www.irinnews.org>.

²⁰⁸ See Report of the Secretary-General, *supra* note 7, paras 31–49.

²⁰⁹ See e.g., R. Higgins, *supra* note 21, p. 39.

²¹⁰ Cf. A. Carty, ‘Critical International Law: Recent Trends in the Theory of International Law’, 2 *EJIL* (1991), pp. 66–96 at p. 66.