

The statehood of ‘collapsed’ states in Public International Law

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1. Introduction

Over the last few years the international community has been witnessing a phenomenon commonly referred to as ‘State failure’ or ‘State collapse’, which has featured the disintegration of governmental structures in association with grave and intense internal armed conflicts, to the point that the social organization of society what international law considers the *government* of the State, a legal condition for statehood – has almost, or in the case of Somalia totally, disappeared from the ground.

Such a loss of effective control that the *government* exercises over the population and territory of the State – the other legal conditions for statehood – pose several complex international legal questions. First and foremost, from a formal perspective, the issue is raised of whether a State that loses one of its constitutive elements of statehood continues to be a State under International Law. Such a question may only be answered after considering the international legal conditions for statehood, as well as the way current international law has dealt with the creation, continuity and extinction of States.

If entities suffering from State ‘failure’, ‘collapse’ or ‘disintegration’ and referred to as ‘failed’, ‘collapsed’ or ‘disintegrated’ States continue to be States in an international legal sense, then the juridical consequences that the lack of effective government create on their condition of States and their international legal personality have to be identified and analysed.

Our point of departure will therefore be to analyze ‘State collapse’ and the ‘collapsed’ State from a formal, legal perspective, which will allow us to determine both whether

the entities concerned continue to be States and the international legal consequences of such a phenomenon over the statehood of the concerned entities. Although several different approaches could be taken and multiple other legal questions arise from the phenomenon of 'State collapse', we will limit ourselves to the analysis of the statehood of 'collapsed' or 'disintegrated' States in the above mentioned manner since, in our understanding, that is the initial legal problem that such entities present from an international law perspective.

Section One below will be dedicated to the analysis of statehood in current international law, in particular we will deal with the international legal criteria for statehood and the topics of creation, continuity and extinction of States. Our goal in that Section will be to establish with certainty the relevant international norms and principles applicable to establish that an entity is a State, as well as the circumstances in which they originate, are transformed but continue their international legal personality and become extinct.

On Section Two we will analyse the phenomenon of State 'failure' or 'collapse', beginning with the concept of a 'failed' or 'collapsed' State generally in use and the conceptual and terminological difficulties that such concepts entail. We will then propose a legal approach to such a definition, in order for it be more apt to an international law analysis and application. The same Section will end with some sample cases of State 'collapse' that will help us understand more the way the phenomenon occurs in practice.

Section Three of this paper will be dedicated to the analysis of the statehood of 'collapsed' or 'disintegrated' States in public international law, in particular the determination of their continuity as subjects of international law and the legal consequences of the lack of effective government on the statehood of such entities. Finally, our conclusions will be included at the end of this study.

2. Statehood in current International Law

Every State has a beginning, a moment in which its existence under international law can be identified and from which it enjoys a full international legal personality. That moment is commonly accepted to begin with when what are known as the constitutive elements of statehood are verified in practice. During its existence, a State may suffer transformations in those constitutive elements which raise questions under international law regarding its condition of State, its international obligations and its relations with other subjects of international law. Finally, under certain circumstances, a State may cease to exist as such, which, in turn, will raise several complex international legal questions; such extinction of a State can also be

understood in terms of the permanent disappearance in practice of *what makes a State a State* under international law, that is, its constitutive elements.

This Section will cover the main issues regarding Statehood in current international law taking into particular consideration two features that permeate the Law on this field. The first one being the relationship between the constitutive elements of Statehood and the process of creation, transformation and extinction of States, since such phenomena can be explained in reference to the said elements. The second, more subtle feature, is that of the *dynamic of the State in time*, that is, when referring to the creation, transformation and extinction of States we are referring to different, successive, moments of the existence of a State. Logically, transformation can only occur after the creation of a State; similarly, its extinction will follow the creation and, if such is the case, the previous transformation of a State. This does not mean that every State will go through the exact same process or that all States will end up ceasing to exist at some predictable time in the future; it means that considering the creation, transformation and extinction of a State as part of the *dynamic of the State in time* will help us identify the different characteristics and effects that such processes have on the existence of a State under international law.

2.1. The creation of States and their constitutive elements

A State will exist as such under international law when its constitutive elements are verified in practice. Such elements are a population, a territory and a government.¹ This means that the existence of a State is in principle a matter of fact and that the recognition of a State has no constitutive effect. However, as we will see below, international law plays a central role in determining if an entity is a State, reason why the mere factual verification of the constitutive elements is not enough to determine whether an entity enjoys statehood or not, particularly when the creation of a State is contrary to international law.

2.1.1. Population

A State must have a population in order to be considered as such under international law. The population of a State is, naturally, a human group that inhabits permanently

¹ The constitutive elements of statehood are generally considered to be contained in the Montevideo Convention on Rights and Duties of States of 1933. Indeed, Article 1 of the Convention states that, a State as a person of international law should possess a permanent population, a defined territory, a government and the capacity to enter into relations with the other states, although the latter, as we will argue below, is part of the definition of government and not a separate element. Montevideo Convention on Rights and Duties of States of 26 February 1933. Article 1. For further reference see: CRAWFORD, J. *The Creation of States in International Law*. New York: Oxford University Press, 2006, pp. 96 *et ss.*

a particular territory. That population does not necessarily have to be culturally, socially or ethnically homogeneous, since a State's population must not be confused with the international legal concept of a *people*.² Reality shows, indeed, that most States are plurinational or multinational,³ whilst many *peoples are spread throughout different States*.⁴

The relationship between a State and its population is manifested in the legal link of nationality, which is granted by each State according to its domestic norms on the matter. The population of a State will be comprise, therefore, those persons living in the territory of a State and enjoying its nationality as well as, by extension, its nationals living abroad.

2.1.2. Territory

A State requires for its existence also a territory, a geographic area comprising the soil, sub-soil, maritime area and air space in which it exercises exclusive competences under international law. That geographic area may be continuous or not,⁵ large or tiny,⁶ and does not require to have completely defined borders or lack territorial disputes.⁷ Now, a State may perfectly exercise competences over geographical areas that are not part of its territory, so we must keep in mind that not all the physical space over which a State exercises competences is to be considered part of its territory.

2.1.3. Government

The third constitutive element of Statehood is a *government* or the political organization of society, which must be independent and have the capacity to enter into relations with other subjects of international law. It should be pointed out that it is the *capacity* to enter into relations with other subjects of international law that

² A *people* enjoys under international law the right of self-determination. On the right of self-determination applied to statehood see: RAIC, D. *Statehood and the Law of Self-Determination*. The Hague: Kluwer Law International, 2002, pp. 171 *et ss*.

³ Even States considered traditionally as Nation-States lack a homogenous human community within. Such is the case of France, inhabited by the Gallic people, as well as by Bretons, Basques, Franco-Germans and Corsicans.

⁴ E.g. the Kurdish people, which inhabits contiguous areas of Iran, Iraq, Syria and Turkey.

⁵ E.g. Alaska and Hawaii, which are part of the territory of the United States of America, even though are separated from the rest of the territory.

⁶ Russia and Mauritius are equally States regardless of their difference in geographical area and, indeed, the geographical areas of Tuvalu (seven square kilometres) and Nauru (twenty one square kilometres) do not affect their statehood. See RAIC, D. *Op. cit.*, p. 60.

⁷ It is very common for States to have territorial differences or dispute territories, a fact that does not affect their statehood. As the ICJ has confirmed, 'there is [...] no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not'. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands)*, Judgment of 20 February 1969. ICJ Reports 1969, p. 32, para. 46.

should be considered part of the definition of government, rather than the *actual establishment* of such relations.⁸

The element *government* must not be identified exclusively with the executive power of a State, i.e. the government in power, but comprises also the other organs of the State, including the judiciary and parliament, the armed forces, etc., as well as the regional and local levels of government. Furthermore, as the ICJ has states, '[n]o rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.'⁹

The *government* of a State must be in principle effective, that is, it must exercise an effective control over the *population* and *territory* of the State meaning it must be in a position to exercise all governmental functions effectively. In that sense, effectiveness means 'la *capacité réelle* d'exercer toutes les fonctions étatiques, y compris le maintien de l'ordre et de la sécurité à l'intérieur, et l'exécution des engagements extérieurs.'¹⁰ The exercise of such State functions in the internal and external levels is, naturally, done through State organs, i.e. the element *government*.

Raic explains how effectiveness is applied to the concept of statehood:

[E]ffectiveness operates to some extent as evidence of the ability to possess legal rights and to fulfil legal obligations. Thus [...] an entity wishing to acquire (full) international personality must show the effective existence of certain facts (that is, it must satisfy the traditional criteria for statehood) before the attribution of this status will take place by the international legal system.¹¹

A *government* would, on the other hand, lack effectiveness when its exercise of power is not complete over the *population* and *territory* of the State. In this sense, '[e]ffectiveness [...] means the quality of a fact (here the exercise of power or territorial jurisdiction), which – according to international law – makes this fact suitable as a condition for the attribution of [the] full international legal personality [that States enjoy].'¹²

⁸ As Raic explains, '[i]t does not seem to be correct to state that a territorial and political entity must have relations with existing States in order to qualify as a State, because the existence or lack of such relations is largely dependent on the will of the existing States to enter into relations with the entity in question. The emphasis must, therefore, be put on the term 'capacity'.' RAIC, D. *Op. cit.*, p. 73.

⁹ *Western Sahara, Advisory Opinion*. ICJ Reports 1975, pp. 35-6, para. 94.

¹⁰ QUOC DINH, Nguyen, Patrick DAILLIER and Alain PELLET. *Droit International Public*. Paris: Librairie générale de droit et de jurisprudence, 2009, p. 459. Kohen agrees, '[d]'une manière générale toutefois, on peut considérer comme condition de fond pour l'existence de l'Etat que celui-ci soit doté d'organes ayant vocation à remplir les fonctions étatiques traditionnelles.' KOHEN, M. G. 'La création d'Etats en droit international contemporain'. In *Curso Euromediterráneo Bancaja de Derecho Internacional*, Vol. VI, 2002, p. 617.

¹¹ RAIC, D. *Op. cit.*, p. 51.

¹² *Ibid.*, p. 58.

This is a very relevant issue because, otherwise, the *government* and thus the State would lack a base in reality. International law has always considered the effectiveness of the *government* as a central issue of Statehood. As De Visscher has noted, '[I]es effectivités tiennent une place de premier plan dans la théorie de la personnalité des Etats et par conséquent, dans les conditions d'établissement [...] de l'ordre étatique.'¹³

When Finland declared its independence from the Russian Empire in the aftermath of the soviet revolution, it was subject to a series of military actions and interventions from Russia and Germany lasting during 1917-1918, which raised the issue of at what point in time Finland became a State.¹⁴ The League of Nations appointed a Commission of Jurists to report on certain aspects of the Aland Islands, which gave the following opinion:

[F]or a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves [...] the Government had been chased from the capital and forcibly prevented from carrying out its duties [...] It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.¹⁵

This strict application of the necessary effectiveness that a government must possess in order for the constitution of a new State to take place contrast dramatically, however, from other more recent situations of State creation. When the Republic of the Congo (later known as Zaire and since 1997 the Democratic Republic of Congo) gained its independence in 1960 it lacked any real, effective, government: there was no preparation for independence; there were various secessionist movements in its territory; the central government was divided in two factions, both claiming to be the lawful government; etc.¹⁶ Regarding the creation of the Republic of the Congo Crawford observes that:

Anything less like effective government it would be hard to imagine. Yet despite this there can be little doubt that in 1960 the Congo was a State in the full sense of the term. It was widely recognized. Its application for United Nations membership was

¹³ DE VISSCHER, C. *Les Effectivités du Droit International Public*. Paris: Pedone, 1967, p. 36.

¹⁴ CRAWFORD, J. *Op. cit.*, p. 58.

¹⁵ *League of Nations Official Journal*. Special Supplement No. 4 (1920), pp. 8-9. Quoted by Crawford, J. *Op. cit.*, p. 58.

¹⁶ CRAWFORD, J. *Op. cit.*, pp. 56-57.

approved without dissent. United Nations action subsequent to admission was based on the 'sovereign rights of the Republic of the Congo'. On no other basis could the attempted secession of the Katanga province have been condemned as 'illegal'.¹⁷

What had changed between 1917-1918 and 1960 that would explain the different approaches taken in the cases of Finland and the Congo? A major new development in international law had been introduced by the United Nations: the principle of self-determination of peoples.

In effect, the UN General Assembly had proclaimed in 1960 that when a people exercises its right of self-determination, '[i]nadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence'.¹⁸ That resolution, indeed, has been qualified by the International Court of Justice as the basis of the decolonization process¹⁹ and in its application, the principle of self-determination of peoples has given rise to the creation of States without effective governments. This has given rise to a disassociation between Statehood and the factual, real, basis that international law has traditionally required for the creation of States. In other words, the criterion of effective government has been relaxed and entities that traditionally would not have qualified have been granted Statehood under international law.

2.1.4. *Other elements*

The capacity to enter into relations with other subjects of international law is sometimes referred to as an independent element of statehood²⁰; we believe that because this capacity originates and is intimately related to the element *government* it should be considered as part of the definition of the later and not an independent criterion.

Independence has also been considered as a separate element of Statehood,²¹ although its inevitable association with the element *government* also leads us to consider that

¹⁷ *Ibid.*, p. 57.

¹⁸ UN General Assembly Resolution 1514 (XV) of 14 December 1960, para. 3.

¹⁹ *Western Sahara. Advisory Opinion*. ICJ Reports 1975, p. 32, para. 57.

²⁰ The origin of that claim is the criteria for statehood established in the Montevideo Convention of 1933. Article 1 of the Convention states that, besides a permanent population, a defined territory and a government, a State as a person of international law should possess the 'capacity to enter into relations with the other states.' Montevideo Convention on Rights and Duties of States of 26 February 1933. Article 1(d). However, as Akpinarli points out, 'whether this element is a constitutive element of the state is subject to dispute.' Some authors do consider it an independent criterion, while others view it as a 'requirement of independence' or a consequence of it, making Akpinarli conclude that 'no interpretation satisfactorily clarifies the fourth criterion.' AKPINARLI, N. *The Fragility of the 'Failed State' Paradigm. A Different International Law Perception of the Absence of Effective Government*. Leiden/Boston: Martinus Nijhoff, 2010, pp. 6-7.

²¹ Crawford qualifies it as the 'central criterion for statehood'. CRAWFORD, J. *Op. cit.*, p. 62.

it is a characteristic of the *government*, a part of its definition. In other words, we consider the capacity to enter into relations with other subjects of international law and independence to be crucial for the existence of a State. However, since both criteria refer directly to the *government*, we include them as part of the definition of government, not as separate elements that exist in parallel to the *government* and that could be verified independently of whether exists a government or not.²²

2.1.5. *The role of international law in the creation of a State*

The application of the principle of self-determination of peoples shows that the creation of States is more than just a question of facts: international law can and has granted the qualification of States to entities whose governments lacked effective control, that is, a factual basis. On the other side, if the creation of a State was a purely matter of fact, and as we will further explain below, then a problem would arise when the creation of a State was based in an illegal situation, in facts produced in violation of norms of international law, particularly when the violated norm is one of imperative character. International law, then, has a double role in the creation of States, a positive role and a negative role, both of which we will analyse in the following lines.

2.1.5.1. *Statehood granted by international law*

As we have previously mentioned, certain entities have, in application of the principle of self-determination of peoples, achieved Statehood from decolonization without the requirement of an *effective government*, particularly after 1960. Indeed, the principle of self-determination of peoples establishes the people's right to determine its political status internally and externally. Internal self-determination refers to the relationship between the government of a State and the people of that State, whereas external self-determination generally denotes the determination of the international status of a people,²³ including the possibility of creating a new State.²⁴

²² For other criteria that is sometimes suggested as necessary for Statehood but is not generally accepted as such see *Ibid.*, pp. 89-95.

²³ RAIC, D. *Op. cit.*, p. 205.

²⁴ A people may exercise its right of *external* self-determination in three ways: through (i) the emergence of a sovereign, independent State; (ii) the free association with an independent State, or; (iii) the integration with an independent State. UN General Assembly Resolution 1541 (XV) of 15 December 1960, principle VI. We must keep in mind, however, that the General Assembly has also proclaimed that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.' UN General Assembly Resolution 1514 (XV) of 14 December 1960, para. 6. Furthermore, the principle of self-determination is applicable in cases of colonial or foreign occupation and has been regarded as a norm of *ius cogens*. KOHEN, M. G. *Op. cit.*, p. 583.

Prior to the recognition of self-determination as a positive right of a people by the UN General Assembly in the 1960s, State practice chiefly pointed out to that effectiveness of governmental control was a *condition sine qua non* for the recognition of statehood.²⁵ However, as mentioned above, the granting of independence to colonial peoples was done independently of the requirement of an effective government, meaning that States came into existence under operation of international law despite a substantial lack of effective control by the authorities of the previously colonial territory over the relevant *territory* and *population*.²⁶ This leads Raic to conclude that 'while there is (still) no empirical statehood, the State does exist in a juridical sense (juridical statehood), provided, of course, that the other criteria for statehood are satisfied.'²⁷

In other words, the traditional international law condition for the creation of a State, which required an entity to be effective, to have a solid base in reality, in order to receive its qualification of State -with the full international legal personality that it entailed and all the rights and obligations thereto- was set aside in cases of decolonization. In such situations, statehood was granted by what could be considered *pure* operation of international law, without the previous requirement of effectiveness that had always been associated with the creation of a State.

Raic, when analysing the criteria of statehood, explains how effectiveness is set aside in this type of circumstances:

[E]ffectiveness as a pre-condition for the acquisition of a legal right is required only when this right is *claimed* or when it has to be *proved*. Thus, when the existence of a right can directly be based on, for instance, a treaty provision or another source of law, or when a right is inherent or implied in another right, power or competence, then the notion of effectiveness as a basis for the evaluation of the existence of the right becomes substantially less relevant and sometimes even irrelevant, at least from a theoretical point of view.²⁸

It is then clear that international law can and has qualified an entity as a State even in the absence of a practical verification that the entity has a *government* in effective control of the *population* and *territory*. Such an entity, therefore, derives its condition of State strictly by operation of International Law, rather than, as continues to be the case with the creation of States outside colonization, having international law verify what already exists in reality.

²⁵ This is evidence in the fact that, for instance, the United Kingdom and the United States of America required the verification of an effective government to grant their recognition to a new State. LAUTERPACHT, H. *Recognition in International Law*. London: Cambridge University Press, 1947, pp. 28 et ss., 98-102 and 115-36.

²⁶ RAIC, D. *Op. cit.*, p. 104.

²⁷ *Ibid.*

²⁸ RAIC, D. *Op. cit.*, p. 51.

2.1.5.2. *Illegal entities claiming statehood*

Lauterpacht was of the opinion in 1947 that '[i]nternational law acknowledges as a source of rights and obligations such facts and situations as are not the result of acts which it prohibits and stigmatizes as unlawful'.²⁹ In fact, the principle of *ex injuria non oritur jus* plays an important role in international law. Naturally and in principle, law may not arise from unlawful situations, or, unlawful situations should not derive effects from the law. When Japan invaded Manchuria in 1931 and proclaimed the puppet-State of Manchukuo, it was not granted recognition by the international community because the League of Nations proclaimed that it was 'incompatible with the fundamental principles of existing international obligations'.³⁰

Similarly, when South Africa created the *Bantustan States* of Transkei, Bophuthatswana, Venda and Ciskei between 1976 and 1981 as part of its Apartheid policy, they were not considered as States by the rest of the international community. Such entities were created in order to deprive black South African from their South African nationality and all inherent political, social and economic rights. The General Assembly consistently rejected such entities and condemned in 1971 that:

[T]he establishment by the Government of South Africa of Bantu homelands (Bantustans) and the forcible removal of the African people of South Africa and Namibia to those areas as a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to the territorial integrity of the countries and the unity of their peoples.³¹

The creation of such entities, thus, violated the international law principles of racial equality and non-discrimination, which have 'considerable support [...] as a peremptory norm of general international law'³² and which explains why no third State ever recognized any Bantustan as a State.

The International Law Commission (ILC) has acknowledged that there is an obligation to not recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law.³³ That obligation has, according to the ILC, been already established by international

²⁹ LAUTERPACHT, H. *Op. cit.*, pp. 409-10.

³⁰ League of Nations Assembly Resolution, 24 February 1933. Quoted by Crawford, J. *Op. cit.*, p. 132.

³¹ UN General Assembly Resolution 2775E (XXVI) of 29 November 1971, para. 1.

³² CRAWFORD, J. *Op. cit.*, p. 345.

³³ International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts (2001). Article 41(2). In the commentary to those Articles, the ILC provided as an example of a situation fallen under the obligation to not recognize, the 'attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples.' Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001). UN Doc. A/56/10, p. 114, para. 5.

practice and decisions of international courts.³⁴ The UN General Assembly has, furthermore, unequivocally declared in its *Declaration on Principles of International Law, Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* that '[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.'³⁵

The obligation of non-recognition is, indeed, linked to the above mentioned principle of *ex injuria non oritur jus*. As Raic explains:

Because the obligation of non-recognition is [...] strongly related to the principle of *ex injuria non oritur jus* according to which acts contrary to international law cannot become a source of legal rights for a wrongdoer, the obligation of non-recognition is primarily directed at the consequences or 'poisoned fruits' of the illegal conduct. The reason for this is obvious. [...] [T]he *fundamental norm* upon which the illegality is based might be seriously undermined as a result of the validation of the consequences of the illegal conduct through recognition. This in turn may – if the legal rule is substantial – threaten the international legal order as a whole.³⁶

The establishment of the Turkish Republic of Northern Cyprus is another example of collective non recognition for the reasons here discussed; its non recognition by States other than Turkey has been linked to the illegality of the military intervention that led to its eventual establishment.³⁷ In all these cases we see how illegality has been a major consideration when determining if an entity qualifies as a State and we can conclude that international law plays a determining role in this matter.

2.2. The transformation of States and State continuity

States suffer constant transformations in their constitutive elements that do not affect their condition of State. The population of a State is in constant change: at any two given moments in time the population of a State would be different. Nationals die constantly and new are born, new people obtain a State's nationality and others renounce it, etc. This does not affect the State's character because, even though

³⁴ In particular, State practice on this regard was manifested as early as the 1930s when the United States of America, joined by the majority of members of the League of Nations, declared that the establishment of the puppet State of Manchukuo would not be recognized as it impaired the sovereignty, independence and territorial integrity of the Republic of China. *Ibid.*, para. 6.

³⁵ UN General Assembly Resolution 2625 (XXV) of 24 October 1970, first principle. Moreover, the ICJ has stated in the *Nicaragua* case that the unanimous consent of States to this declaration 'may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves'. In that regard, the ICJ continues, '[i]t would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules)'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports 1986, p. 100, para. 188.

³⁶ RAIC, D. *Op. cit.*, p. 109. Emphasis added.

³⁷ CRAWFORD, J. *Op. cit.*, p. 133.

the population is not exactly the same, the State continues to have *a population*. Territorial changes are rarer but have occurred historically nonetheless without affecting the State's character. As long as a State continues to have *a territory* it will continue to be a State.

Governments also change constantly, either their internal composition is altered or after elections or political crisis changes in governments take place, even through illegitimate means (e.g. revolutions and *coups d'État*). In neither of these cases is statehood questioned. That is so,

[E]n vertu du principe de la *continuité de l'État*. Par souci d'éviter des atteintes aux droits des autres États à l'occasion des soubresauts de la vie politique internes des États, conformément aussi au principe de *non-ingérence dans les affaires intérieures*, corollaire de la souveraineté et de l'autonomie constitutionnelle, le droit international affirme la survie de la personnalité juridique de chaque État à travers ses régimes constitutionnels successifs.³⁸

The internal political organization of a society may suffer even deeper changes that do not affect Statehood: a monarchy may become a republic, a federal State may become unitary, new constitutions may be adopted in States, etc. These are all normal transformations in the constitutive element of *government* that do not mean that States cease to exist as such or that new States emerge to occupy the position of the former.

The concept of *State continuity* is thus a useful category that helps understand the continual existence of a State even though the transformations it may suffer in its constitutive elements. For Cansacchi:

On peut considérer un État comme continuellement existant lorsqu'il est resté toujours en vie comme le même sujet international, c'est-à-dire qu'il n'a pas disparu par *debellatio* ou par annexion de la part d'un État étranger ou par réception, comme État membre, dans un État fédéral.³⁹

Indeed, the continuity of a State in international law can be understood as the situation where the State continues to be one even though it suffers some internal changes in its constitutive elements that, however, do not affect its condition of State

³⁸ QUOC DINH, N. *et al. Op. cit.*, p. 601.

³⁹ CANSACCHI, Giorgio. 'Identité et continuité des sujets internationaux'. *Recueil des Cours de l'Académie de Droit International de La Haye*, 130, 1970-II, pp. 9-10. Some authors, however, disagree on the utility of the term 'continuity'; for Brownlie, it is 'employed with any precision, and may be used to preface a diversity of legal problems'. See BROWNLIE, I. *International Law*. Oxford: Oxford University Press, 2008, p. 80 *et ss.* However, for our analysis it is of particular importance and usefulness since continuity means that the State continues to exist as such, i.e. that it has not become extinct.

or legal personality.⁴⁰ Continuity is, therefore, linked to the extinction of a State; more specifically, it is the negation of State extinction. For Marek,

The problem of the identity and continuity of a State is the problem of its very existence. This is so because it merely represents another aspect of the problem of State extinction. To ask whether a State is identical with a State which has preceded it in time [...] is to enquire whether one State has died and another has been born in its place, or whether the old State continues its unchanged legal personality.⁴¹

State continuity does not only occur when the changes in constitutive elements described above take place. Regarding the element *government*, Crawford reminds us that '[t]here is a strong presumption that the State continues, with its rights and obligations, despite revolutionary changes in government, or *despite a period in which there is no, or no effective, government*.'⁴² Indeed, international law provides for the continuation of the State when it has lost its effective government by the use of force: '[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.'⁴³

If Statehood was purely understood as a matter of fact, then the loss of effective government under the use of force would mean the automatic extinction of the State, as it would have lost its base in reality. However, such illegality does not affect the continuation of the State in what could be considered a manifestation of the principle of *ex injuria non oritur jus*. State continuation in these cases is certainly done under operation of the Law because, as mentioned earlier, a State with no effective government lacks a base in reality.

That is precisely why, at the end of the Second World War, occupied States in Europe that had lacked an effective government for several years were not considered to have

⁴⁰ We are referring here, naturally, to a State and its constitutive elements from an international law perspective, since the nature of this analysis and the constraints of this piece do not allow us to incorporate views of a sociological or political type.

⁴¹ MAREK, Krystyna. *Identity and continuity of States in Public International Law*. Genève: Droz, 1968, p. 1. Furthermore, State continuity is related to the notion of State identity. For Czaplinski, '[l]a notion de continuité d'États est liée à l'identité mais on peut indiquer la différence entre les deux: on décide de l'identité d'États en comparant les deux organismes étatiques dans deux moments différents, tandis qu'on parle de la continuité quand un État existe sans interruption pendant une certaine période.' CZAPLINSKI, W. 'La Continuité, l'Identité et la Succession d'États: Évaluation de Cas Récents'. 26 *Revue Belge de Droit International* (1993), p. 374. Furthermore, a State may be considered identical to a previous State when 'il s'agit d'un État «nouveau» qui vient d'être *fictivement* identifié à un État qui s'était jadis éteint par *debellatio* ou pour une autre cause.' CANSACCHI, Giorgio. *Op. cit.*, p. 10. Identity, therefore and unlike continuity, can imply that a previous State became extinct but a later State is however identified with the former State. We will not, however, focus on this figure and concentrate rather on State continuity.

⁴² CRAWFORD, J. *Op. cit.*, p. 34. Emphasis added.

⁴³ *Ibid.*

become extinct or annexed by Germany.⁴⁴ That is also why, when Iraq invaded Kuwait illegally in 1990 and its annexation was declared the international community did not consider it to have become extinct. In that case, the Security Council called upon 'all States, international organizations and specialized agencies not to recognize [the] annexation [of Kuwait], and to refrain, from any action or dealing that might be interpreted as an indirect recognition of the annexation.'⁴⁵ Similarly, when Iraq was invaded and occupied in 2003 the Security Council reaffirmed 'the sovereignty and territorial integrity of Iraq',⁴⁶ clearly implying that Iraq continued to be a State and that it had not become extinct. State continuity, then, has been accepted to occur even in cases of loss of effective government.

2.3. State extinction

When does a State cease to exist as such from an international law perspective? The classical answer to this question is that a State ceases to exist when one of its constitutive elements ceases to exist in practice. Indeed, it seems logical to affirm that, since a State requires certain elements to be constituted as such, the disappearance of one of those elements would make the State disappear. This view of purely factual character, does not, however, satisfactorily explain the situations described above when the disappearance of an effective government occurs under the use of force while international law guarantees the continuity of the State in question. Indeed, as Shaw reminds us:

While the disappearance, like the existence, of a state is a matter of fact, it is a matter of fact that is legally conditioned in that it is international law that will apportion particular legal consequences to particular factual situations and the appreciation of these facts will take place within a certain legal framework.⁴⁷

We must keep in mind, therefore, that international law has a role to play regarding the extinction of States, as it does regarding their creation and continuity, and that factual situations must be assessed according to the applicable international legal considerations. Now, if we consider that, in principle, the extinction of a State will

⁴⁴ For Czaplinski, '[p]armi les facteurs indifférents pour la continuité des États, on peut indiquer finalement l'occupation militaire, temporaire et transitoire et n'étant pas liée à un changement de souveraineté. La 2^e guerre mondiale a introduit des éléments importants modifiant l'institution traditionnelle de l'occupation militaire et concernant le fonctionnement des gouvernements en exil. Même non effectifs, ces gouvernements étaient généralement reconnus, concluaient des accords internationaux, maintenaient des relations diplomatiques et exerçaient le contrôle de forces armées. De cette manière, ils soutenaient la continuité fictive de l'État.' CZAPLINSKI, W. *Op. cit.*, p. 379.

⁴⁵ UN Security Council Resolution 662 of 9 August 1990, para. 2. The basis for such a call of non-recognition was the determination of the Security Council that the 'annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void'. *Ibid.*, para. 1.

⁴⁶ UN Security Council Resolution 1511 of 16 October 2003, para. 1.

⁴⁷ SHAW, M. N. *Op. cit.*, p. 208.

occur when one of its constitutive elements disappears we will, naturally, find that there are three possible scenarios of a State becoming extinct.

The first such scenario would be that of a State losing all of its population, in which case it would be clear that it would cease to be a State.⁴⁸ Although no such case has occurred in practice, if a hypothetical catastrophe or disease wipes out the entire population of a State there would be no logical way to substantiate the continuity of the State. Furthermore, without population, there would be no political organization of society, i.e. no government, and so the loss of the population would simultaneously mean that a second element of Statehood would be lost. There is, of course, a complication presented by the nationals of that State living abroad and whether if they repopulate the State its continuity could be considered, but, notwithstanding that improbable scenario, a State that loses its human component would inevitably lose its Statehood under international law.

Similarly, a State that physically loses all of its territory would become extinct; such would be the case of a small island State submerged in the sea or a devastating volcanic eruption: without a geographical area over which to exercise its competences the State would cease to be considered as such.⁴⁹ Indeed, States are *par excellence* territorial subjects of international law and if the entire territory is lost its remaining population spread around the world, even if politically organized, would have no basis to continue being considered a State under international law. This would be a case different to that of the population resettling in a new territory in case their previous territory is somehow lost, for in such a case the State would continue to have a geographical basis; our point being that there can be no State lacking a geographical basis.

To sum up, the physical and total disappearance of the first two elements of Statehood, population and territory, poses no serious questions as to whether the State becomes extinct. It would indeed be an extreme case for a State to lose its entire population or its territory, but in such cases it is not possible to see how the State could remain in existence.

The disappearance of a government is, however, a different and more legally complex scenario. We are not referring here to a simple change of governments, a common and natural situation, but to the disappearance of *all* effective government. As we have seen when discussing the creation of States, Statehood has been achieved in certain situations even without an effective government. Furthermore, the loss of an effective government due to the violation of the prohibition on the use of force does

⁴⁸ CZAPLINSKI, W. *Op. cit.*, p. 377.

⁴⁹ *Ibid.*

not entail the extinction of the State, but its continuation under international law. Both cases show that international law allows for the existence of States without an effective government, even though on very specific situations. Having considered that, we must be careful not to assume that the loss of all effective government automatically means the extinction of the State.

In more general terms, in order to determine the conditions for a State to become extinct we must consider the actual cases of State extinction that have occurred in recent times. After that analysis, we will be able to determine what have been the accepted circumstances in which a State may become extinct. Crawford has identified the following cases of State extinction in the period between 1945 and 2005:⁵⁰

Name	Date	Comment
Hyderabad	1948-1949	Involuntary merger with India
Somaliland	1 July 1960	Voluntary union with Somali Republic
Tanganyika & Zanzibar	26 April 1964	Voluntary merger in United Republic of Tanganyika and Zanzibar, name changed to Tanzania in 1 November 1964
Republic of Vietnam	2 July 1976	Merger into Socialist Republic of Vietnam after forcible change of government
Yemen Arab Republic & People's Democratic Republic of Yemen	26 May 1990	Voluntary merger in Republic of Yemen
German Democratic Republic	3 October 1990	Voluntary union with Federal Republic of Germany
Socialist Federal Republic of Yugoslavia	Uncertain (not before 29 November 1991)	Involuntary dissolution (despite initial claim to continuity by FRY)
Czech and Slovak Federal Republic	1 January 1993	Voluntary dissolution

⁵⁰ CRAWFORD, J. *Op. cit.*, p. 716. It should be noted that Crawford does not include the dissolution of the Soviet Union as a case of State extinction. For him, '[t]he better view, and certainly the view that prevailed, is that the legal process was one of devolution resulting in the establishment of a number of new States with the 'core' State, Russia, retaining the identity of the former Union'. *Ibid.*, p. 705. Shaw points out that '[i]t has been commonly accepted that Russia constitutes a continuation of the USSR [...] It is therefore a case of dismemberment basically consisting of the transformation of an existing state.' SHAW, M. N. *Op. cit.*, p. 209. We are of the same view and consider that the USSR was transformed into Russia at the time of the dissolution; it therefore did not become extinct. The case of Tibet is also not included in the list by Crawford because he accepts the general view that it was not considered a State at the time of the Chinese invasion of 1951. Also excluded are States temporarily merged in short-lived unions, e.g. Syria and Egypt in the United Arab Republic. CRAWFORD, J. *Op. cit.*, p. 715. For further discussion on Tibet see: *Ibid.*, pp. 323-325.

Two conclusions can be drawn from observing the only accepted cases of State extinction in the UN era: first, extinction can be voluntary or involuntary; second, it has involved in all cases a succession of States. We will now examine both issues separately.

2.3.1. *Voluntary and involuntary extinction*

Indeed, regarding our first conclusion, the extinctions of Somaliland, Tanganyika, Zanzibar, the two Yemens, the German Democratic Republic and Czechoslovakia are all cases of voluntary extinction, either by union with another State (Somaliland, German Democratic Republic), merger to form a new State (Tanganyika, Zanzibar and the two Yemens) or dissolution into two or more States (Czechoslovakia). It is indeed perfectly possible for a State to voluntarily decide to cease to exist in order to be united, merged or dissolved and therefore this possibility does not present any problems in terms of our analysis.

The cases of involuntary extinction, however, require further explanation. Hyderabad was an 'Indian Native State' until 1947, that is, it enjoyed a general right of internal self-government and other certain rights, but its ruler was under a relationship of *suzerainty* to the British monarch which implied subordination.⁵¹ Hyderabad was not considered to be independent and its relationship to the United Kingdom was analogous to that of an international protectorate. When India and Pakistan received their independence in 1947 the 'Indian Native States' were granted the choice to accede to India or Pakistan or neither. The British Indian Independence act of 1947 provided for the lapse of suzerainty over the 'Indian Native States' to India or Pakistan, whichever they wished to join, so 'it was arguable that those States which had not acceded were rendered fully independent.'⁵²

Hyderabad did not make a choice and, therefore, become an independent State in 1947; but that independence was short-lived, India invaded and annexed it in September 1948. The UN Security Council included this situation in its agenda, but after Hyderabad surrendered it took no specific action.⁵³ It has been argued that 'the continuance of even an illegal occupation for a sufficiently long time after the cessation of hostilities will lead to the extinction of the occupied State by *debellatio*' and that this has been, precisely, the case of Hyderabad.⁵⁴ In our opinion, the case of Hyderabad can be considered the last example of *debellatio* accepted by the international community and explainable by its complicated colonial relationship

⁵¹ CRAWFORD, J. *Op. cit.*, pp. 321-323.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p. 74.

with the UK, the uncertainty of its Statehood at the moment of independence and the inaction of the Security Council. Furthermore, its annexation occurred in a time when the peremptory character of the prohibition of the use of force was not fully applied in practice. It is thus, an anomaly, a case of *debellatio* in the UN era which in practice is an exception to the principle of *ex injuria non oritur jus*.

The case of Vietnam is similar to that of Hyderabad but with certain peculiarities. Although there are uncertainties over the Statehood of the Republic of Vietnam (South Vietnam) and the Democratic Republic of North Vietnam (North Vietnam) and even on whether there were two States or one prior to 1973,⁵⁵ the Paris Peace Agreement of that year 'definitively, if not explicitly, recognized the existence of two Vietnamese States.'⁵⁶ The armed conflict, however, continued until Saigon fell on 30 April 1975. The next day, a Provisional Revolutionary Government was proclaimed and one year later a National Assembly was elected with delegates from both States. On 2 July 1976 South Vietnam was merged with North Vietnam into the Socialist Republic of Vietnam, a unified State that was granted UN membership in 1977.⁵⁷ What is peculiar about this case is that by the use of force one State forced a change in government in another State, a government that later approved unification with the later State.

As in the case of Hyderabad, the international community resigned itself from further action in the case of Vietnam and considered the issue a matter of *fait accompli*. It seems that the long armed conflict that had preceded the unification had an effect on the international community wishing to see the situation resolved once and for all. Nevertheless, the principle of *ex injuria non oritur jus* was left aside once more and the effects of an illegal use of force were recognized internationally. We consider, however, that this was another exception to the general rule, which has been affirmed in many other cases, which time has settled and so no questions are posed today as if South Vietnam is still a State. Indeed, we must stress that this case was also an exception, in the sense that the prohibition on the use of force established in the UN Charter disregarded the use of force in the relationship between States, except in those exceptions provided for in the Chapter itself.

The third case of involuntary extinction is that of the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). The dissolution was achieved through a complex and violent process that took place between early 1990 and reaching a 'certain, by no

⁵⁵ *Ibid.*, pp. 472-477.

⁵⁶ *Ibid.*, p. 475.

⁵⁷ *Ibid.*, p. 477.

means complete' conclusion in the Dayton-Paris Peace Agreement of 1995.⁵⁸ Five States emerged during that period of time: the Federal Republic of Yugoslavia (FRY), later Serbia and Montenegro (2003), today Serbia (2006), as well as Bosnia and Herzegovina, Croatia, Slovenia and the Former Yugoslav Republic of Macedonia. The Federal Republic of Yugoslavia claimed to continue the international legal personality of the SFRY and although its Statehood was not contested, its claim of continuity was rejected by the UN Security Council. In 1992 the Council declared that:

[T]he state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist [...]

[The Security Council] [c]onsiders that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly [...]⁵⁹

Although the General Assembly and the Secretary General did not so unequivocally reject the claim of identity of the FRY, the former decided that it should apply for membership and, until so, it would not participate in its work.⁶⁰ The FRY only accepted this position in 2000 and in November of that year it was admitted to the organization as a new member.⁶¹

It has been suggested that '[i]t is probably not a coincidence that the rejection of the claim of automatic continuity was associated with the involvement of the FRY in the civil wars in Croatia and Bosnia and Herzegovina.'⁶² Although it is very likely that the attitude of the Security Council was influenced by the state of affairs in the territory of the former Yugoslavia, there are also international legal considerations that we must take into account. The Arbitration Commission of the Conference on Yugoslavia set up by the Council of Ministers of the European Economic Community in 1991 reached the conclusion in November of that year that the SFRY was 'in the process of dissolution'.⁶³ By the next year, however, the Commission was of the opinion that the process of dissolution had been completed and the SFRY no longer existed.⁶⁴

⁵⁸ *Ibid.*, pp. 395-396.

⁵⁹ UN Security Council Resolution 777 of 19 September 1992, preamble and para. 1.

⁶⁰ UN General Assembly Resolution 47/1 of 22 September 1992, para. 1.

⁶¹ UN General Assembly Resolution 55/12 of 1 November 2000.

⁶² CRAWFORD, J. *Op. cit.*, pp. 708-709.

⁶³ Opinion No.1 of 29 November 1991. 92 *International Law Reports* (1993), pp. 162-163.

⁶⁴ Opinion No. 8 of 4 July 1992. 92 *International Law Reports* (1993), p. 202.

The basis of such conclusion was that Slovenia, Croatia and Bosnia and Herzegovina had been recognized as States, and that Serbia and Montenegro had adopted a new constitution for the Federal Republic of Yugoslavia constituting a new State. Furthermore, the Commission took into consideration UN Security Council Resolutions 752 and 777 as well as a European Council Declaration of 27 June 1992, referring to the *former SFRY*, the former, and to the *former Yugoslavia*, the latter.⁶⁵

Moreover, the Commission noted that what was before the population and national territory of the SFRY were now under the authority of the new States, whereas the common federal bodies that represented all the Yugoslav Republics no longer existed; no similar bodies having functioned since. The Commission also emphasised a characteristic proper to the SFRY, that is, its character of federal State. Indeed, the Commission was of the opinion that the existence of a federal States is seriously compromised when a majority of the constituent entities, comprising a majority of the population and territory of the federal State, constitute themselves as sovereign States with the result that federal authority could no longer be effectively exercised.⁶⁶

Unlike the cases of Hyderabad and Vietnam, which we insist, were exceptions to the principle of *ex injuria non oritur jus*,⁶⁷ the dissolution of Yugoslavia occurred because the grave internal situation there made no longer possible to maintain the *federal* State, prompting its federal entities to regain their Statehood while the continuity claims of the FRY were rejected. There was no illegality in the extinction of the SFRY, it was simply precipitated its internal the state of affairs.

2.3.2. *Extinction and succession of States*

All known and accepted cases of State extinction in recent times have involved a succession of States. By State succession we understand the ‘replacement of one State by another in the responsibility for the international relations of a territory’.⁶⁸ In principle, a State exercises the responsibility over the international relations of its own territory, although it may do so over other types of territories. Now, affirming that all cases of State extinction in the UN have involved a succession of State means that the former State’s territory has always been transferred to a new or existing State.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p. 201.

⁶⁷ There is no doubt that since the adoption of the UN Charter, international law has prohibited the use of force between States, except in cases of self-defence or under the authorization of the Security Council under Chapter VII of the Charter. The reason why the cases of Hyderabad and Vietnam are relevant for our analysis is that they are the only two cases of State extinction in the UN era that involved the use of force and so no other, perhaps more recent cases, allow us to examine the extinction of States that have involved the use of force.

⁶⁸ Article 2.1.b. of the 1978 Vienna Convention on Succession of States in respect of Treaties.

In no case has the territory of an extinct State, then, been left outside the control of a new or existing State.

Although the term *State* succession refers only to the element *territory*, it is clear that a population inhabits that territory and so the extinction of a State without a succession of States presents several complex difficulties to international law that go beyond the administration of the international relations of a territory. In particular, the extinction of a State without an accompanying State succession would mean that the territory and inherent population would devolve to a pre-State type of situation, a condition that has been foreign to international law.

This view is supported by Wallace-Bruce when he writes that 'international law has clear principles which apply to new entities which emerge onto the international scene and claim to be states. Similarly, there are established principles to apply when a new state claims to be the successor to a previous one',⁶⁹ the latter situation including 'the dismembering of an existing state, whether voluntarily or otherwise.'⁷⁰ However, in his words, '[w]hat is not provided for is a state which ceases to function as such but which at the same time does not fit any of the situations previously discussed.'⁷¹

In particular, we must keep in mind that although the disappearance of the *population* or the *territory* of a State may result in its extinction, when it comes to the loss of the government, State extinction only occurs when accompanied by a succession of States. As Czaplinski notes,

Selon l'opinion dominante dans la doctrine du droit international, les changements dans la structure du pouvoir étatique n'ont aucune importance pour la continuité, indépendamment de leur légalité. Seul un manque permanent et définitif de pouvoir étatique peut conduire à la disparition d'un État, s'il est lié à son remplacement par le pouvoir d'un autre État.⁷²

2.3.3. Corollary on State extinction

As Shaw points out, '[w]hile it is not unusual for governments to disappear, it is rather rarer for states to become extinct.'⁷³ Indeed, the extinction of States has been uncommon in the Charter era and, in the same time-period, at least 128 new States have come into existence or been reconstituted.⁷⁴ It follows that the extinction

⁶⁹ WALLACE-BRUCE, N. L. 'Of Collapsed, Dysfunctional and Disoriented States'. XLVII *Netherlands International Law Review* (2000), p. 66.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 67.

⁷² CZAPLINSKI, W. *Op. cit.*, p. 378.

⁷³ SHAW, M. N. *Op. cit.*, p. 208.

⁷⁴ CRAWFORD, J. *Op. cit.*, p. 715.

of a State is a rather extraordinary circumstance, a situation that today is not even accomplished when the use of force is involved as the relatively recent case of Kuwait proves. Even in the aftermath of the dissolution of the Soviet Union its continuity by Russia has prevailed as the most accepted view. As Crawford highlights:

It is significant that almost all the cases of extinction [...] involved either entities that were ephemeral or whose independence was not clearly established or were instances of voluntary extinction, when a people (in the case of the GDR) or their representatives (in the case of Czechoslovakia) decided to put an end to their State and to opt for a different one.⁷⁵

State extinction, then, must be regarded as an unusual phenomenon. When it is voluntary, there are no doubts that Statehood ceases to exist, although a new State may be formed if that is the case. When it is not voluntary, extinction cannot be presumed but must be determined according to the circumstances of the case. In that regard, 'there is a strong presumption against the extinction of States once firmly established.'⁷⁶ If the extinction of a State cannot be determined in a particular case with certainty, then, it can be presumed that the State continues to exist as such until the circumstances show that an actual State extinction has occurred. In case of doubt, then, State continuity can be presumed but not State extinction. For Czaplinski:

La présomption de la continuité d'État constitue la prémisse fondamentale dans le domaine du droit de la subjectivité internationale. Selon cette présomption, l'État continue son existence du point de vue du droit international, à moins qu'on puisse constater sans aucun doute sa dissolution (la cessation de son existence).⁷⁷

3. State 'Failure' or 'Collapse'

In the present Section we will analyze the phenomenon of State 'failure' or State 'collapse', discussing the conceptual and terminological problems that they entail and providing a legal definition of 'collapsed' or 'disintegrated' State that, in our view, is suitable for an analysis based in international law. We will then provide sample cases of such States in order to show the exact nature of the phenomenon under analysis.

3.1. The concept of 'failed' or 'collapsed' States

The concept of 'failed' States is a category that originated in international relations and gained prominence in 1993 with the article 'Saving Failed States' by Helman and Ratner.⁷⁸ As has been pointed out, since then, 'this paradigm has been widely used

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ CZAPLINSKI, W. *Op. cit.*, p. 375.

⁷⁸ HELMAN, G. B. and S. R. RATNER. 'Saving Failed States'. 89 *Foreign Policy*, (1992-3), pp. 3-20.

in various ways to define the phenomenon of states which are unable to maintain themselves as members of the international community.⁷⁹

There is no clear or standard definition of what is a 'failed' State.⁸⁰ Generally, the expression 'failed State' is used when 'the public authority, the power of a State, has completely broken down.'⁸¹ Moreover, different terms are used by different authors to refer to similar or the same situation: 'collapsed' States, 'crumbling' States, 'imploding' States, 'eroding' States, 'disintegrating' States, 'dysfunctional' States, 'fractured' States, 'disoriented' States and 'troubled' States, as well as 'weak' States are all found in the specialized literature.⁸² Sometimes, not only the terms 'failed' or 'collapsed' State are used, also the terms 'failing' and 'collapsing' are employed;

⁷⁹ DE BRABANDERE, E. *Post-conflict Administrations in International Law. International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice*. Leiden/Boston: Martinus Nijhoff, 2009, p. 65.

⁸⁰ Thürer points out that '[t]he term "failed State" does not denote a precisely defined and classifiable situation but serves rather as a broad label for a phenomenon which can be interpreted in various ways.' THÜRER, D. 'The "failed State" and international law'. In: 81 *International Review of the Red Cross* (1999), p. 733. Wallace-Bruce notes that 'the scope of the term ["failed State"] is not entirely clear. To start with, it would seem that the term has no legal meaning, and therefore, different people use it to refer to different things.' WALLACE-BRUCE, N. L. *Op. cit.*, p. 58. Similarly, Geiss considers that 'the concept of failing or weak States embraces [a great] variety of States, and a Babylonian diversity of terminology furthermore enhances the legal uncertainty entailed in this concept.' GEISS, R. 'Failed States. Legal Aspects and Security Implications'. 47 *German Yearbook of International Law* (2005), p. 458. Akpinarli highlights the 'terminological uncertainties in the notion [of] "failed state"'. AKPINARLI, N. *Op. cit.*, p. 94. When utilizing alternative terms to 'failed' States legal authors reach the same conclusion: Koskenmäki agrees that '[d]ue to the complex nature of the phenomenon [...] no well established definition of state collapse exists.' KOSKENMÄKI, R. 'Legal Implications Resulting from State Failure in Light of the Case of Somalia'. In: 73 *Nordic Journal of International Law* (2004), p. 2. Yannis, similarly, points out that there is a 'lack of precise conceptions about state disintegration'. YANNIS, A. 'State Collapse and its Implications for Peace-Building and Reconstruction'. 33 *Development and Change* (2002), p. 823.

⁸¹ CLASSEN, C. D. "'Failed States" and the Prohibition of the Use of Force'. In Société Française pour le Droit International. *Journée Franco-allemande: Les Nouvelles Menaces contre la Paix et la Sécurité Internationales. New Threats to International Peace and Security*. Paris: Pedone, 2004, p. 129. See also: THÜRER D., M. HERDEGEN and G. HOHLOCH (eds.). 'Der Wegfall effektiver Staatsgewalt: "The Failed State"'. In: *Berichte der deutschen Gesellschaft für Völkerrecht*. Heidelberg: Verlag C. F. Müller, (1996), p. 10 et seq. For Thürer, 'failed' States are those 'in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence in the world map'. THÜRER, D. *Op. cit.*, p. 732. Österdahl considers a 'failed State' one 'in which the government structure is no longer effective', meaning 'a state where the public administrative apparatus no longer works or the government is no longer in control of the country.' ÖSTERDAHL, I. 'Relatively Failed. Troubled Statehood and International Law'. XIV *Finnish Yearbook of International Law* (2003), p. 51. For De Brabandere, 'the general description [of a 'failed' State] relates to the internal dissolution and collapse of a State and the impossibility for that state to deliver essential public services to its population.' DE BRABANDERE, E. *Op. cit.*, p. 65.

⁸² ÖSTERDAHL, I. *Op. cit.*, pp. 53 and 55. See also: GEISS, R. *Op. cit.*, pp. 458-9, note no. 6; KOSKENMÄKI, R. *Op. cit.*, p. 5; AKPINARLI, N. *Op. cit.*, pp. 88 and 96. Advisory Council on International Affairs of the Netherlands. Advisory Report No. 35: *Failing States. A Global Responsibility* (May 2004), p. 9. Available at: <http://www.aiv-advies.nl/ContentSuite/template/aiv/adv/collection.asp?id=1942&language=UK>

depending on the circumstances, 'the latter designation may or may not be a manner of indicating that the state in question is going downward, but has not yet reached the bottom.'⁸³

The origin of 'failed' States is often considered to be the decolonization process of the 1960s, when the application of the principle of self-determination of peoples as defined by the UN General Assembly produced a large number of new States that lacked the capacity to govern themselves.⁸⁴ Indeed, '[d]ecolonization did not necessarily coincide with institution-building processes', a phenomenon whose 'emphasis [laid] on the immediate independence of states.'⁸⁵ In this regard, the rigid application of the *uti possidetis* rule as a heritage of the colonization era has been pointed out as a major cause.⁸⁶ As Wallace-Bruce points out, decolonization occurred, particularly in Africa, in such a way that:

The result was the emergence of states on the African continent which had no difficulty qualifying for acceptance into the international legal system, but which being artificial creations, did not coincide with or represent, the indigenous nations which existed prior to the colonial domination.⁸⁷

Other causes of this phenomenon have been pointed out, such as the aftermath of the cold war, in particular the sudden withdrawal of super-power assistance, including the 'supply of arms or through ideology-based power structures which kept the unity of the State intact by force',⁸⁸ as well as the 'marginalization globalization' as a prominent contributing factor.⁸⁹

⁸³ ÖSTERDAHL, I. *Op. cit.*, p. 53. In those lines, Koskenmäki proposes to reserve the term 'failed' or 'collapsed' State to those 'in which the government institutions have ceased to function, or have totally disappeared, for a long period of time', whereas those that 'temporarily lack some of the requirements for effective or legitimate government' should be called 'failing' or 'collapsing' States. KOSKENMÄKI, R. *Op. cit.*, p. 5.

⁸⁴ We must keep in mind that the Declaration on the Granting of Independence to Colonial Countries and Peoples expressly states that '[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.' UN General Assembly Res. 1514 (XV) of 14 December 1960, para. 3.

⁸⁵ DE BRABANDERE, E. *Op. cit.*, p. 66. Thürer, similarly considers that the heritage of colonial regimes which lasted for so long but did not establish effective constitutional structures or the identity of States by the time of decolonization was a major factor in the origin of this phenomenon. THÜRER, D. *Op. cit.*, p. 734.

⁸⁶ GEISS, R. *Op. cit.*, p. 460.

⁸⁷ WALLACE-BRUCE, N. L., *Op. cit.*, p. 55.

⁸⁸ THÜRER, D. *Op. cit.*, p. 734. Giorgetti agrees that '[a]s a result of the end of the Cold War, super powers became less inclined to support weak regimes and declined their economical and military support to former allies in Africa and Asia. As financial assistance and political support given to politicians dried up, governments became too weak to maintain power.' GIORGETTI, C. *A Principled Approach to State Failure. International Community Actions in Emergency Situations*. Leiden/Boston: Martinus Nijhoff, 2010, p. 45.

⁸⁹ GEISS, R. *Op. cit.*, p. 460.

The terms 'failed' State, 'failing' State or State 'failure' are not only found in academic journals or private analysis reports, they have influenced governmental and international policy strategies and found their way to official documents.⁹⁰

The then UN Secretary General Boutros Boutros-Ghali described the situation of these types of States in the following way:

A feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, but its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of international reconciliation and the re-establishment of effective government.⁹¹

From a geographical or territorial perspective, what are commonly known as 'failed' States suffer from internal and endogenous problems, even though they may have cross-border impacts; they are in a situation of *implosion* of the structures of power and authority, *disintegration* and *destructuring* of the State.⁹²

3.1.1. Terminological issues

Besides the conceptual problems described above, the term 'failed' State presents a series of terminological difficulties. For Thüerer, the term 'failed' is not sufficiently precise. He argues that is too broad a term, for 'going to the opposite extreme, the aggressive, arbitrary, tyrannical or totalitarian State would equally be regarded as having "failed" – at least according to the norms and standards of modern-day international law.'⁹³

Moreover, the term 'failed' State and its derivatives are problematic because they involve a value judgment, as if there exist 'specific standards of social, political and economic performance and success to which all states should aspire'.⁹⁴ Indeed, a State can only be 'failed' or have 'failed' if it has not achieved some supposed goal

⁹⁰ In the US National Security Strategy of 17 September 2002, it was stated that the US 'is now threatened less by conquering states than [...] by failing ones'. The European Security Strategy of 12 December 2003 lists state failure among the five key security threats. See: ÖSTERDAHL, I. *Op. cit.*, p. 55.

⁹¹ See the concluding statement by the United Nations Secretary General Boutros Boutros-Ghali of the United Nations Congress on Public International Law (March 1995). In: *Towards the Twenty-First Century: International Law as a Language for International Relations* (1996), Documents, p. 9.

⁹² THÜRER, D. *Op. cit.*, p. 733.

⁹³ *Ibid.*, pp. 732-3. He goes on to criticize the term 'State without government' (*État sans gouvernement*) for being too narrow a term: 'in the type of State discussed [...] it is not only the central government but all other functions of the State which have collapsed.' For that reason, the term 'failed State' used in his article 'should be understood to mean "disintegrated" or "collapsed" State.' *Ibid.*, p. 733.

⁹⁴ YANNIS, A. *Op. cit.*, p. 818, note no. 1.

of what makes a State 'successful'. Such a value judgment should be avoided when performing an international legal analysis of this phenomenon. Instead, as Yanniss points out, such situations should be evaluated in terms of the 'minimum standards of governance that reflect a universal consensus about the minimum requirements of effective and responsible government.'⁹⁵

Additionally, a related problem arises when utilising the term 'failed' State:

[T]he picture portrayed when 'failed state' is used is one of societal failure. This automatically attributes the entire political responsibility and moral liability for state collapse to local communities — generating a moral justification for outside intervention to assist 'those who have failed'.⁹⁶

Indeed, the term 'failed' State has been accused of being tainted with neo-colonialism and different authors have refused to use it in public international law because of its negative connotations.⁹⁷ On the grounds described above, the term 'failed' State and its derivatives ('failing', State 'failure'), is erroneous and, consequently, we will not employ them in our analysis.⁹⁸

In our opinion, international legal terms should be employed when performing an analysis based on international law. As we will see below, the phenomenon analysed in this study is directly related to the loss of effective government, effective government being a constitutive element of Statehood and a legal term. For that reason, we believe that it is more appropriate to refer to the situation experienced by the analysed States as the 'loss of effective government' and 'States with no effective government' or, when appropriate, 'States with no government', rather than to employ the more employed expression of 'State failure' and 'failed State'. As we will see in this study, State collapse has far-reaching legal consequences. As required in any legal analysis, terms must be used with full awareness of their meaning and legal implications, meaning that broad and problematic definitions of this phenomenon must be avoided.⁹⁹

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ RICHARDSON, H. J. 'Failed State', Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations'. 10 *Temple International and Comparative Law Journal* (1996), p. 6; GORDON, R. 'Saving Failed States: Sometimes a Neo-colonialist Notion'. 12 *American University Journal of International Law and Policy* (1997), p. 911. See also: AKPINARLI, N. *Op. cit.*, p. 89, note no. 14.

⁹⁸ Akpinarli point out that several authors 'are reluctant to use the term 'failed state' on the grounds that the word 'failed' is not only descriptive but valuational.' *Ibid.*, p. 88. His view is that, for the various reasons given, 'the term 'failed state' should remain outside the sphere of international law.' *Ibid.*, p. 91.

⁹⁹ Koskenmäki rightly points out that '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.'

However, alternative terms such as 'State disintegration/disintegrated State' and 'State collapse/collapsed State'¹⁰⁰ will be employed when necessary to describe the phenomenon and the affected entity since those terms are, unlike 'State failure/failed or failing State', value-free and more neutral, while at the same time represent well the deep gravity of the situation that such States experience.

3.1.2. *A legal approach for a definition: the loss of effective government*

Even though several characteristics of 'collapsed' or 'disintegrated' States can be identified, it is important to separate the *symptoms* or *features* that characterize them with what, in legal terms, can constitute their defining criteria. In that sense, wide-spread and severe violations of human rights and humanitarian law, large internal displacement flows and international refugee flows, famine and poverty, although present in these cases, are also common to other types of crises, 'such as international or internal armed conflict, natural disasters or dictatorial regimes in which governmental control is all too effective.'¹⁰¹ Other parameters, such as the UN human development index, child mortality rate, a State's status as one of the least developed countries, etc. may serve as indicators of this phenomenon but they can hardly be the defining criteria for a legal definition.¹⁰²

The type of States here analysed are characterized for the total or near total breakdown of structures guaranteeing law and order.¹⁰³ Indeed, in such States, 'the police, judiciary and other bodies serving to maintain law and order have either ceased to exist or are no longer able to operate.'¹⁰⁴ For Geiss, 'from an international law perspective, effective government is absent if its core element, the ability to guarantee law and order, has dissolved.'¹⁰⁵ Akpinarli agrees and points out that

¹⁰⁰ Some authors, however, differentiate between 'failed State' and 'collapsed State', a distinction that we will not utilize, since we believe that the second term represents better the phenomenon. Koskenmäki, for example, highlights the difference in the way the terms are employed: '[t]he 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.' KOSKENMÄKI, R. *Op. cit.*, p. 5. Another example of how those terms are used differently is the terminology proposed by Wallace-Bruce. For him the term 'collapsed State' should be reserved to those States 'whose basic institutions of governance have ceased to function' and 'in which the very survival of the entity as a state is in serious doubt'; whereas a 'failed State' is one 'which is undergoing severe economic, political and other problems but is otherwise functioning satisfactorily'. He is of the opinion that the latter situation does not denote that the very survival of the State is in question. WALLACE-BRUCE, N. L., *Op. cit.*, pp. 59-60.

¹⁰¹ GEISS, R. *Op. cit.*, pp. 460-1.

¹⁰² *Ibid.*, p. 461.

¹⁰³ THÜRER, D. *Op. cit.*, pp. 733-4.

¹⁰⁴ *Ibid.*, p. 735. Not only that, in many cases such bodies are used for purposes other than those for which they were created, e.g. the Congo militias that disintegrated into armed groups of looters and military commanders setting up their own businesses using army units for their own enrichment. *Ibid.*

¹⁰⁵ GEISS, R. *Op. cit.*, pp. 463.

the long-term collapse of political institutions brings, as a consequence, 'the end of law and order.'¹⁰⁶ Kreijen, in the same line, points out that 'the virtual absence of government [...] generates a general inability on the part of the failed State to maintain law and order.'¹⁰⁷ Furthermore, in such situations, the State 'unable to govern its own territory, [...] cannot eliminate external threats or attacks on the state and social order.'¹⁰⁸

However, during an armed conflict the ability to effectively govern a State and to uphold law and order may also be seriously compromised for a considerable period of time. It would thus seem appropriate that, besides the absence of effective government, an additional qualitative criterion be utilized: a State's inability to reorganize and to rebuild an effective government by its own means.¹⁰⁹

Now, even though, in general, armed conflicts may affect a State's ability to uphold law and order, we must bear in mind that State collapse is deeply linked to a particular type of armed conflicts,¹¹⁰ so linked in fact, that they are the immediate cause for the disintegration of State structures to occur; they are the way through which the causes for State collapse discussed above are manifested in a society to the point that the collapse of governmental authority occurs. Indeed, it would not be possible to see how the deep level of governmental collapse here described could occur without an armed conflict of the characteristics explained below.

The International Committee of the Red Cross (ICRC) has identified such types of armed conflicts and refers to them as *conflicts déstructurés*¹¹¹ (or *anarchic conflicts in the English equivalent*),¹¹² the essential characteristics of which are: (i) the disintegration of the organs of the central government, which is no longer able to exercise its rights or perform its duties in relation to the territory and the population; (ii) the presence of many armed factions; (iii) divided control of the national territory, and; (iv) the breakdown of the chain of command within the various factions and their militias.¹¹³

¹⁰⁶ AKPINARLI, N. *Op. cit.*, p. 14.

¹⁰⁷ KREIJEN, G. *State Failure, Sovereignty and Effectiveness. Lessons from the Decolonization of Sub-Saharan Africa*. Leiden/Boston: Martinus Nijhoff, 2003, p. 84.

¹⁰⁸ AKPINARLI, N. *Op. cit.*, pp. 14-15.

¹⁰⁹ GEISS, R. *Op. cit.*, pp. 463.

¹¹⁰ KOSKENMÄKI, R. *Op. cit.*, p. 2. For Yannis, 'state collapse usually [implies] an extreme disruption of the political order of a country due to protracted domestic conflicts and disintegration of public authorities'. YANNIS, A. *Op. cit.*, p. 818.

¹¹¹ ICRC. *Les conflits armés liés à la désintégration des structures de l'État. Document préparatoire du Comité international de la Croix-Rouge pour la 1re réunion périodique sur le droit international humanitaire, Genève, 9 - 23 janvier 1998*. Available at: www.icrc.org/web/fre/sitefre0.nsf/htmlall/5fzfn9?opendocument

¹¹² For the english translation from the original French see: <http://www.icrc.org/web/eng/siteeng0.nsf/iwplIst74/02CED570ABFDD384C1256B66005C91C6>

¹¹³ *Ibid.*

Such *anarchic conflicts*, the ICRC has found, are armed conflicts of a non-international character, regulated by the applicable norms of international humanitarian law.¹¹⁴

Indeed, in such types of armed conflicts no group is militarily organized, politically identified, or striving for the autonomy or independence of a territory of the State. As Akpinarli notes, '[n]either the aims of the conflict parties nor the alliances are clear because the conflict is rarely triggered by a political issue.'¹¹⁵ In such scenarios, it is sometimes impossible to identify the number of parties in the conflict, although the fragmentation of the conflict parties is determined mainly along ethnic, religious and cultural lines, or as a conflict for the control or distribution of natural resources.¹¹⁶

From an international law perspective, considering the phenomenon of State collapse in light of the criteria for statehood (i.e. the constitutive elements of a State), we find that the main characteristic of collapsed or disintegrated States is the absence of an effective government.¹¹⁷ We must keep in mind, however, that no State in the world exercises through its *government* a complete degree of control over its *population* and *territory* (the three constitutive elements of statehood). The terms collapsed or disintegrated States will, then, be reserved to those States that due to an *anarchic* conflict lack, totally or partially, an effective government to the point that law and order may not be guaranteed in most of its territory and which lack the capacity to rebuild their governments by their own means.¹¹⁸

One final observation must be made regarding the definition of collapsed or disintegrated State that we will utilize: the degree of State collapse or disintegration will determine the degree of lack of effective government. The most extreme case

¹¹⁴ *Ibid.*

¹¹⁵ AKPINARLI, N. *Op. cit.*, p. 17.

¹¹⁶ *Ibid.*, pp. 17-18. In Somalia alone, during the 1990s there were more than fifteen parties to the conflict. *Ibid.*, p. 18.

¹¹⁷ For Geiss 'the absence of effective government is the predominant characteristic of a failed State.' GEISS, R. *Op. cit.*, pp. 461. Koskenmäki writes that '[f]rom the international law perspective [State collapse] may be simply understood as the implosion of effective government'. KOSKENMÄKI, R. *Op. cit.*, p. 2; also that 'state failure implies the loss of effective government, one of the conditions for the legal existence of a state'. *Ibid.*, p. 5. For the ICRC, '[l]a désintégration de l'État semble survenir lorsqu'il perd son troisième élément de base, c'est-à-dire un gouvernement qui assure un contrôle effectif.' ICRC. *Op. cit.*

¹¹⁸ This definition allows us to clearly differentiate between collapsed or disintegrated States and other situations that, commonly, are referred also as 'failed' States. Thürer, for instance, differentiates between a 'failed' State and one suffering from fragmentation of State authority typical of civil wars, where identified military or paramilitary groups to either strengthen their position within the State or break away from it, as are the cases of Afghanistan, Angola, Colombia and Kosovo. THÜRER, D. *Op. cit.*, pp. 733-4. Kreijen highlights the need to differentiate between a 'failed State' and those that are not genuine cases of 'State failure': firstly, totalitarian, dictatorial and what are normally referred to as 'rogue' States; secondly, conventional cases of civil war; and, thirdly, cases of State dissolution, either by agreement (e.g. Czechoslovakia) or in disagreement (e.g. Yugoslavia), since they are the result of disputes concerning the structure and operating method of an established government, rather than the consequence of the collapse of a government. KREIJEN, G. *Op. cit.*, pp. 91-4.

of disintegration of State structures will lead to a complete lack of government, e.g. Somalia during the 1990s, whereas in all other cases there was, at least, a nominal government although its effective control over the population and territory of the State was marginal.¹¹⁹

3.2. Sample cases of State collapse

We will now examine three sample cases of State collapse in order to have a more graphical understanding of how this phenomenon occurs in practice. The first of the cases is that of Somalia, a situation of complete State collapse where no government existed during most of the 1990s. The other two cases, Liberia and Sierra Leone, are representative of the absence of effective government whilst a nominal government still existed. The legal consequences of this phenomenon will be dealt with in Section 4 *infra* and, therefore, we will leave our legal comments on this issue for the said Section.

3.2.1. *The case of a complete loss of government: Somalia*

The situation of Somalia has been deteriorating since civil strife began in 1988. The overthrow of President Mohammed Siad Barre in January 1991 escalated to a full-scale civil war, a conflict which '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.'¹²⁰

Indeed, with the fall of Barre's regime, Somalia came to what has been described as a 'general collapse': all the basic institutions of state; legislative, executive and judicial ceased to operate and the economic and social infrastructures came to a halt.¹²¹

The UN Secretary-General has emphasized that '[t]he situation in Somalia will continue to deteriorate until the political will exists among the parties to reach a peaceful solution to their dispute, or until the international community gives itself new instruments to address the phenomenon of a failed State.'¹²² He has also described the situation of Somalia as follows:

As a country without a national government, Somalia remains unique. The functions that States perform, such as the provision of social services, including health and

¹¹⁹ Koskenmaki indeed points out that '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.' KOSKENMÄKI, R. *Op. cit.*, p. 2.

¹²⁰ *Ibid.*, p. 2, note no. 4.

¹²¹ WALLACE-BRUCE, N. L., *Op. cit.*, p. 61.

¹²² BOUTROS-GHALI, B. Introduction in: United Nations. *The United Nations and Somalia 1992-1996*. New York: Dept. of Public Information, United Nations, 1996, p. 87.

education, the regulation, for example, of the movement of goods and persons, control of the environment, airspace and coasts, and so on, as well as the representation of the Somali people in intergovernmental and international fora, are absent, notwithstanding the fact that administrations in some parts of the country, notably in north-western Somalia ("Somaliland") and north-east Somalia ("Puntland"), have begun to provide some basic services to their people.¹²³

As a matter of fact, Somaliland and Puntland declared their independences in 18 May 1991 and 1 July 1998, respectively, but have not been recognized as States by any other State, even though they do exercise effective control over their respective populations and territories.¹²⁴

After several failed peace-making initiatives, the civil society-based Somali National Peace Conference approved in 2000 the Transitional National Charter for provisional governance¹²⁵ that culminated in national elections 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'.¹²⁶

The Somali transitional government was elected at the end of 2004, with Abdullahi Jussuf as president, but has been unable to establish its authority over the majority of the territory of Somalia, mainly because of the struggle that still occurs between different factions.¹²⁷ The lack of effective government has continued in Somalia over the last few years, characterized by Ethiopian intervention (2006-2009) and by the current presence of African Union troops.¹²⁸

Furthermore, since 2008 the vacuum of power in Somalia has given rise to continuous acts of international piracy based in its coasts, an activity that helps finance the armed conflict in its territory.¹²⁹ In light of that state of affairs, the Security Council has determined that 'the situation in Somalia constitutes a threat to international peace and security in the region'¹³⁰ and has authorized States to '[e]nter the territorial

¹²³ Report of the Secretary-General on the Situation of Somalia. 16 August 1999. UN Doc. S/1999/882, para. 63. On the situation of Somaliland, see: International Crisis Group. Africa Report No. 110: *Somaliland: Time for African Union Leadership* (23 May 2006). Available at: <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/somaliland/110-somaliland-time-for-african-union-leadership.aspx>

¹²⁴ WALLACE-BRUCE, N. L., *Op. cit.*, p. 67-8.

¹²⁵ On the establishment of transitional institutions in Somalia see: Report of the Secretary General on the Situation of Somalia. 19 December 2000. UN Doc. S/2000/1211.

¹²⁶ KOSKENMÄKI, R. *Op. cit.*, p. 2, note no. 4.

¹²⁷ AKPINARLI, N. *Op. cit.*, p. 48.

¹²⁸ *Ibid.*, p. 49.

¹²⁹ *Ibid.*

¹³⁰ UN Security Council Resolution 1863 of 16 January 2009.

waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea' using 'all necessary means to repress [such] acts'.¹³¹

3.2.2. Liberia

Liberia enjoyed political stability until 1980, when Master Sergeant Samuel Doe seized power in a military *coup* and took over government. Between 1980 and 1989 Doe led the country into a steady decaying of its political, economic and social infrastructures. A full-scale civil insurrection against the regime occurred in 1989 after Doe's promise to hand over power to a civilian administration was not fulfilled. In around May 1990 the National Patriotic Front of Liberia led by Charles Taylor controlled a large part of the country, President Doe was under siege as he held on to power and a third force led by Prince Johnson controlled a part of the capital.¹³²

President Doe, having no alternative but to seek international help, appealed to the Economic Community of West African States (ECOWAS) to bring in a peace-keeping force. On 7 August 1990, ECOWAS created the ECOWAS Cease-Fire Monitoring Group (ECOMOG) with the mandate to restore law and order, as well as to create the necessary conditions for free and fair elections in Liberia. In those circumstances, a national conference of all political parties took place in the Gambian capital on 29 August 1990 and created an interim government of Liberia, appointing Dr. Amos Sawyer as Interim President.¹³³

Doe was murdered in 9 September 1990, but before that, since the appointment of Sawyer, three persons claimed to be the head of state of Liberia: Doe remained the only recognised head of state and his government partly controlled the capital; Taylor controlled most of the country with the exception of the capital; whereas Sawyer controlled no territory. In the meantime, as Wallace-Bruce points out, 'anarchy reigned all over the country as Doe's government was totally ineffectual and the various military forces battled it out for control'.¹³⁴

As the Secretary General of the UN described, in Liberia '[t]he immediate origins of the three-year war can be traced to the complete breakdown of law and order and civil authority which accompanied the overthrow in 1990 of the regime headed by President Samuel Doe.'¹³⁵ Furthermore, '[t]he civil conflict that raged across Liberia during most of the 1990 completely disrupted the country's social, administrative

¹³¹ UN Security Council Resolution 1816 of 2 June 2008.

¹³² WALLACE-BRUCE, N. L., *Op. cit.*, p. 62.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, pp. 62-3.

¹³⁵ Report of the Secretary General on the Question of Liberia. 12 March 1993. UN Doc. S/25402. Reproduced in AKPINARLI, N. *Op. cit.*, p. 12.

and economic infrastructure. Over 1 million Liberians were forced to abandon their homes.¹³⁶

3.2.3. *Sierra Leone*

Civil war broke out in Sierra Leone in the early 1990s between government forces and the rebel forces of the Revolutionary United Front (RUF). In February and March 1996, parliamentary and presidential elections were held, the first time in thirty years, with the intention of providing legitimacy to the new government to be elected and end the civil war. The elections brought Ahmad Tejan Kabbah and his political party to power but the civil war did not end.¹³⁷

In November 1996 different parties sponsored peace talks which culminated in the Abidjan Accord, ending the civil war. However, Sierra Leone's institutions for law and order were not functioning effectively. The national military had been disbanded and the government was been relying on Nigerian soldiers to provide security. In particular, President Kabbah had indicated to the United Nations that his government was not in a position to provide adequate security presence in the country.¹³⁸

On 25 May 1997 Major Johnny Koromah and other junior military officers overthrew the democratically elected government, while President Kabbah fled the country and requested assistance from Nigeria and ECOWAS. On 30 August 1997, ECOWAS responded by sending in ECOMOG troops with a mandate to restore law and order in Sierra Leone, accomplished its mission by removing the military government from power in February 1998. On 10 March 1998, President Kabbah was restored to office as head of state of Sierra Leone. In May 1999 President Kabbah signed a peace-fire agreement with the rebels, followed by a peace accord in July of the same year.¹³⁹

4. The Statehood of 'Collapsed' or 'Disintegrated' States

In this Section we will first analyze the two different approaches that can be taken regarding the Statehood of collapsed or disintegrated States: their extinction or their continuity under international law. We will then determine the international legal consequences that the prevailing position entails for the entities involved.

¹³⁶ UN Doc. GA/46/403 of 30 August 1991. Cited by Akpinarli, N. *Op. cit.*, p. 13.

¹³⁷ WALLACE-BRUCE, N. L., *Op. cit.*, p. 63.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, pp. 63-4.

4.1. Alternative approaches

From a theoretical perspective, the loss of effective government may imply either the extinction of the State or its continuity under international law, two situations that we dealt with, in general terms, in Section 2 *supra*. We will analyse both situations separately in order to determine which one is supported by the current international legal order.

4.1.1. Extinction of States with no effective government

It could be argued that a State that loses its effective government becomes extinct, since the international legal condition for its creation (the element of effective government) has disappeared. However, the only evidence of a perception of loss of statehood in a collapsed State can, according to Geiss,¹⁴⁰ arguably be derived from the following statement: '[T]he international community was searching for a peaceful resolution of political disputes, which could allow the *rebirth of Somalia*'¹⁴¹ In addition, a German lower court Judgment of 1996 found that Somalia had ceased to exist as a State.¹⁴²

According to Wallace-Bruce:

What has happened in Somalia amounts to the demise of the state. What was known as the Republic of Somalia has ceased to operate. It has no government and the basic institutions of state which can provide governance. This has been the case for nearly a decade now. Significantly, it means that the Republic of Somalia cannot enjoy the rights which statehood brings with it at the international level. Tellingly, Somalia at present has no capacity to maintain international relations. Without a government and a capacity to enter into international relations, an entity can hardly claim to be a state.¹⁴³

For him, the 'demise' of Somalia has exposed a gap in the international legal order, that is, 'how to ascertain the demise of a state and what should be done to it.'¹⁴⁴ However, did Somalia really become extinct when it lost its government? Wallace-Bruce questions why Somaliland and Puntland have not been recognized as new States and believes that the reason why Somalia is still considered to be a State is 'pragmatic international politics'; in his view, '[t]he global community has been determined to save and sustain the Republic of Somalia despite its demise.' For that reason, he continues, 'the global community would be very reluctant to accept any

¹⁴⁰ GEISS, R. *Op. cit.*, p. 465, note no. 28.

¹⁴¹ Security Council Press release of 15 March 1996, UN Doc. SC/6194. Emphasis added.

¹⁴² Hessischer Verwaltungsgerichtshof, Case no. 13 UE 2378/96.A, Judgment of 29 July 1996. Cited by Geiss, R. *Op. cit.*, p. 465, note no. 28.

¹⁴³ WALLACE-BRUCE, N. L., *Op. cit.*, p. 67.

¹⁴⁴ *Ibid.*

new state emerging out of it, as that would surely spell doom for the Republic of Somalia.¹⁴⁵

There is, in light of the above, no support for the view that the loss of effective government in cases of State collapse entails the extinction of the State. Before moving into the view of State continuity in these cases, however, it is appropriate to explore some certain arguments of why State extinction in these cases should not occur.

In that regard, Österdahl points out that the acceptance of State extinction in cases of a complete loss of effective government is closely connected with a discussion on the intrinsic value of States as a form of social organization.¹⁴⁶ In other words, State extinction in these cases must be evaluated in connection with the desirability of maintaining a State because it has, as such, an intrinsic value. The same author points out that the view of the intrinsic value of the State can have, at least, two different dimensions:

On the one hand the state may be a useful form of social organization from a practical perspective. On the other hand, one may view the state from an ideological perspective and consider the idea of the independent equal state to be the best irrespective of practical realities.

[...] It may be added that the ideological or normative way of viewing the state has been dominant in modern international law and politics and still is, but not quite as heavily as before. The ideological perception of the intrinsic value of the state is probably most often combined with the view that the state is also the most viable form of social organization. The practical perspective on the state, however, must not necessarily be combined with the ideological view of the state.¹⁴⁷

We are of the opinion that States do have an important value as a form of social organization, not only because of their internal value, but also because of the significance they confer to a socially organized *people* in a *territory* in international affairs. This view is relevant to our analysis because it could be argued that it is desirable that statehood, as a form of social organization, be maintained by international law and that no human group that inhabits a particular territory and which has enjoyed statehood loses it devolving to a pre-State situation.

Indeed, some of what could be qualified as the benefits of statehood are the recognition that it brings to an entity's sovereignty in the sense that it exercises certain exclusive competences over persons and a territory; the full enjoyment of an international legal personality, including the full capacity to celebrate international treaties and to

¹⁴⁵ *Ibid.*, p. 68.

¹⁴⁶ ÖSTERDAHL, I. *Op. cit.*, p. 67.

¹⁴⁷ *Ibid.*, p. 68.

contribute to the development of international law through State practice; as well as the full protection of the principle of non-interference in its domestic affairs.¹⁴⁸ To enjoy statehood in that regard is extremely beneficial to a politically organized people inhabiting a particular territory.

Thürer considers that analysing this type of borderline situations 'bring[s] back into clear focus the civilizing value of the State as a source of its own internal law and order and as a member of the international community based on the rule of law.'¹⁴⁹ Symptomatic in this regard, he continues, is the fact that international law is 'consistently striving to ensure recognition for the statehood of "failed States" and to restore their institutions.'¹⁵⁰

Österdahl is of the opinion that regarding 'failed' States there is a gap so wide between the reality and international norms that a change in the norms must come.¹⁵¹ For him, 'once international law has freed itself of its strong ideological heritage in favour of independent equal states', then, 'new normative solutions which would match the reality better might be constructively considered.'¹⁵² One of his alternatives of adapting international law to this new reality of things would be to either construct a gradation of States into different categories such as full States, semi-States and quasi-States on which '[i]n all three scenarios the fundamental norm of sovereign equality could be kept' or to completely abandon the norm of sovereign equality.¹⁵³

The views of Österdahl show the problems associated with the eventual acceptance of the extinction of a collapsed State, which would directly collide with some fundamental norms of international law, including the principle of sovereign equality of States, one of the bases of the current legal order. In reality, as we will further explain below, the extinction of collapsed or disintegrated States is not provided for in international law and, in our opinion, their continuity is not only the accepted view but the one to be preferred.

¹⁴⁸ WALLACE-BRUCE, N. L., *Op. cit.*, pp. 55-7.

¹⁴⁹ THÜRER, D. *Op. cit.*, p. 760.

¹⁵⁰ *Ibid.*

¹⁵¹ ÖSTERDAHL, I. *Op. cit.*, p. 79. Yannis points out that there is an 'absence of comprehensive international mechanisms to respond effectively to the challenges posed by the disappearance of effective central governments'. YANNIS, A. *Op. cit.*, p. 823. In his view, '[t]he phenomenon of state collapse [...] calls for further development of the international system. This includes not only rules and normative conceptions but also procedures and mechanisms for their authoritative interpretation and application.' *Ibid.*, p. 828.

¹⁵² ÖSTERDAHL, I. *Op. cit.*, p. 82.

¹⁵³ *Ibid.*, p. 87.

4.1.2. *Continuity of States with no effective government*

For Classen, the legal effects of a breakdown of public authority in a 'failed' State are limited: '[i]n principle, the legal personality of the State survives and so do all rights which are derived from it. In particular, the State retains its territorial sovereignty and enjoys the protection of the prohibition of interference in internal affairs, and of military intervention.'¹⁵⁴

Indeed, the prevailing view is that the Statehood of collapsed States continues in international law,¹⁵⁵ despite the absence of a constitutive element of statehood.¹⁵⁶

¹⁵⁴ CLASSEN, C. D. *Op. cit.*, p. 130.

¹⁵⁵ When commenting on the so-called 'failed' States, Crawford points out that '[n]one of the situations [...] described — Somalia, the Congo, Liberia, etc.— has involved the extinction of the State in question, and it is difficult to see what possible basis there could be for supporting otherwise.' CRAWFORD, J. *Op. cit.*, p. 722. When referring to Somalia, Raic establishes that 'Somalia's statehood was always considered juridically intact, despite the fact that the exercise of the rights attached to statehood were suspended as a result of the absence of government.' RAIC, D. *Op. cit.*, p. 71, note no. 81. For Geiss, '[q]uite strikingly, the legal personality of States that have lacked an effective government [such as] Somalia, for example, [...] has never been questioned.' GEISS, R. *Op. cit.*, p. 465. Thürer also recognizes that '[e]ven when States have collapsed, their borders and legal personality have not been called in question.' THÜRER, D. *Op. cit.*, p. 752. Akpinarli highlights that the international community 'has not questioned the international law subjectivity of any state dealing with the absence of effective government, even Somalia, despite its long-term lack of effective government.' AKPINARLI, N. *Op. cit.*, p. 108. Giorgetti concludes as well that '[i]t is beyond doubt that State failure does not extinguish statehood, once it is given, and, in fact, failed States do not become extinct'. GIORGETTI, C. *Op. cit.*, p. 52. Österdahl, similarly, states that '[t]he implosion of the state administrative apparatus or of the control of the government of its territory has not been considered a cause for the extinction of statehood in international law so far.' ÖSTERDAHL, I. *Op. cit.*, p. 51. For Koskenmäki, 'International law provides [...] strong protection against disturbances that might threaten the statehood of a once established state. [...] [T]he temporary ineffectiveness or absence of a government, as may be the case in failing state situations, does not affect statehood.' KOSKENMÄKI, R. *Op. cit.*, p. 6. The Advisory Council on International Affairs of the Netherlands agrees that '[o]nce a state exists (i.e. has obtained statehood), a temporary interruption in the effectiveness of its authority (for example as a result of internal unrest, civil war or hostile military occupation) does not affect its statehood. Even where there is protracted anarchy and *de facto* collapse of the state as an organisation, as in the case of Somalia and Sierra Leone, nothing has been done in state practice to deny the statehood of the entity concerned.' Advisory Council on International Affairs of the Netherlands. *Op. cit.*, p. 7.

¹⁵⁶ GEISS, R. *Op. cit.*, pp. 465-6. Thürer considers that in these cases 'there [has been] an invocation of the old-established practice and theory whereby the identity and continuity of the State cannot be called in question through any temporary loss of unified and effective authority.' THÜRER, D. *Op. cit.*, p. 737. Koskenmäki concludes that 'International Law provides [...] strong protection against disturbances that might threaten the statehood of a once established state', in particular, that 'the temporary ineffectiveness or absence of a government [...] does not affect statehood.' KOSKENMÄKI, R. *Op. cit.*, p. 6. For Wallace-Bruce, even though in the cases of Liberia and Sierra Leone 'the effectiveness of governance was at time almost ineffectual [...] the state as a legal entity remained intact throughout.' WALLACE-BRUCE, N. L., *Op. cit.*, p. 71. As we have previously mentioned, his view on Somalia, who lacked *all* government is however different. Akpinarli, on his part, concludes that '[t]he international community has developed the standard and consistent practice that statehood and international law subjectivity persist in state despite the absence of effective government.' AKPINARLI, N. *Op. cit.*, p. 108. On a more general way, Kohen writes '[l]e droit international ne peut pas tout seul faire naître un Etat par le biais d'une fiction juridique, mais il peut maintenir l'existence d'un Etat qui a perdu l'un ou l'autre de ses éléments constitutifs ou l'effectivité de ceux-ci.' KOHEN, M. G. *Op. cit.*, p. 630.

The UN has certainly and repeatedly understood that even those States whose governments have collapsed enjoy their sovereignty and their territorial integrity must be respected. Regarding Somalia, the Security Council has highlighted the absence of law and order while, simultaneously, calling for 'respect for the sovereignty and territorial integrity of Somalia'.¹⁵⁷ In the case of Afghanistan, the Security Council has decided '[r]eaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan'.¹⁵⁸ Similarly, regarding Albania, it has acted '[a]ffirming the sovereignty, independence, and territorial integrity of the Republic of Albania'.¹⁵⁹

The continuity of States with no effective government can also be concluded from the continued membership of Somalia, Liberia and Afghanistan in the UN, even though UN organs have repeatedly emphasized the lack of an effective government in the respective States. Indeed, the UN Charter stipulates that only States can be members of the organization (Article 4). Regarding Somalia, furthermore, the same can be concluded *a contrario* from the fact that neither Somaliland nor Puntland have been internationally recognized as States.¹⁶⁰

Another consideration is relevant when determining the continuity of a State with no effective government: there is no entity ready to succeed it into its international legal obligations. The principle of continuity applied in these cases aims, thus, to ensure legal stability in the continuation of the State's legal personality. Geiss considers that '[t]his practice seems plausible as a continuation of a long standing tradition, and pragmatic considerations such as not to incite or to fuel boundary disputes argue in its favor'.¹⁶¹

A people's right of self-determination may also be affected when the State they inhabit becomes extinct without its consent. The Security Council has repeatedly addressed the people of Somalia as bearer of the right to self-determination.¹⁶² Similarly, the States of the Economic Community of West African States (ECOWAS) have

¹⁵⁷ UN Security Council Resolutions 923 of 31 May 1994 and 954 of 4 November 1994.

¹⁵⁸ UN Security Council Resolutions 1214 of 8 December 1998, 1267 of 24 November 1999, 1333 of 19 December 2000.

¹⁵⁹ UN Security Council Resolution 1101 of 28 March 1997. Indeed, the Security Council has mentioned the sovereignty, independence, territorial integrity and unity in almost every resolution concerning States with no effective government. See AKPINARLI, N. *Op. cit.*, p. 113, note no. 51.

¹⁶⁰ GEISS, R. *Op. cit.*, p. 466 and note no. 29.

¹⁶¹ *Ibid.*, p. 466. Giorgetti also points out that the loss of effective government does not imply any of the 'finite number of ways in which statehood can become extinct', all the cases that she mentions being cases of State Succession. GIORGETTI, C. *Op. cit.*, pp. 52-3.

¹⁶² See UN Security Council Resolutions 794 of 3 December 1992, 814 of 26 March 1993, 865 of 22 September 1993, 885 of 13 November 1993, 886 of 18 November 1993.

emphasized the right to self-determination of the people of Liberia.¹⁶³ Such States were formed in the exercise of their people's right of self-determination, but if they become extinct when they lose their effective governments, their extinction would run counter to those people's same right since they have at no point expressed their wills to alter their status of States.¹⁶⁴

Geiss makes the following point:

[I]n the case of a failed State, despite the loss of all central authority the absence of government cannot be regarded to be ultimate and definitive as long as a right to self-determination remains on which the continuity of the State can be rested. [...] As long as a bearer of the right of self-determination is existent, *i.e.* as long as the people of a failed State have not disintegrated to such an extent that they cannot be regarded as a people under international law anymore, the legal personality of a failed State continues.

The fact that the statehood of entities that have lost their effective government is maintained gains further support from the norms regarding non-intervention, even in cases where law and order has to be re-established; that includes, to our understanding, when they are absent in a State.¹⁶⁵ Article 3(1) of Additional Protocol II to the Geneva Conventions of 1949 stipulates that:

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or *re-establish law and order* in the State or to defend the national unity and territorial integrity of the State.¹⁶⁶

Similarly, Article 8(3) of the Rome Statute of the International Criminal Court (ICC) states that '[n]othing in paragraph 2 (c)¹⁶⁷ and (e)¹⁶⁸ shall affect the responsibility of a Government to maintain or *re-establish law and order* in the State or to defend the unity and territorial integrity of the State, by all legitimate means.'¹⁶⁹

¹⁶³ ECOWAS, First Meeting of the Committee of Nine on the Liberian Crisis, Final Communiqué, Abuja 7 November 1992. Reprinted in: Weller, Marc (ed.). *Regional Peacekeeping and International Enforcement: The Liberian Crisis*. Cambridge: Cambridge University Press, 1994, p. 241.

¹⁶⁴ GEISS, R. *Op. cit.*, p. 469.

¹⁶⁵ *Ibid.*, p. 471.

¹⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977. Article 3(1). Emphasis added.

¹⁶⁷ Refers to war crimes committed in non-international armed conflicts in connection to serious violations of common Article 3 to the Geneva Conventions.

¹⁶⁸ Refers to other serious violations of the laws and customs applicable to international armed conflicts.

¹⁶⁹ The phrase *re-establish law and order*, indeed, points out that law and order have been lost, indicating that the government of the State has lost some degree of control over its population and territory. However, it must be noted, the Article is directed at States, even those that may lack a large degree of *law and order*. Rome Statute of the International Criminal Court of 17 July 1998. Article 8(3). Emphasis added.

In sum, international law does not allow the extinction of States that have lost their effective governments due to State collapse, a view supported by the practice of States and international organizations, as well as by international legal commentators who have analysed this phenomenon. In that regard, the statehood of such entities presents a set of difficulties and challenges to international law that will be analysed in Section 3.2. *infra*.

4.2. International legal consequences of the continuity of States with no effective government

4.2.1. *The incapacity to interact with other subjects of international law*

As the Permanent Court of International Justice pointed out in 1923, 'States can act only by and through their agents and representatives'.¹⁷⁰ One of the problems with collapsed States, as will be further explained below, is that their lack of effective government means that they may not be in a condition to provide such agents and representatives. Such a situation may lead to serious problems or representation that may entail the total or partial exclusion of the State, and of its people, from international interaction.¹⁷¹ Kreijen describes this situation as follows:

[F]rom a material point of view [...] the capacity of the failed State to enter into international relations is affected. It stands to reason that this capacity must be severely reduced by the virtual absence of government within the failed State. As revealed by the extreme case of Somalia, the general lack of a clearly identifiable responsible agent severely complicates, and may even render impossible, the conduct and maintenance of any bilateral or multilateral international relations. Both individual States and international organizations will as a rule find it very difficult, if not impossible, to identify a counterpart to deal with in the failed State.¹⁷²

From a functional perspective, these types of States lack bodies capable of representing the State in an international level: either no institution exists which has the authority to negotiate, represent and/or enforce, or, if one does, it may be completely unreliable to carry out its functions.¹⁷³

A State that lacks *any* government is naturally incapable of concluding international treaties. Somalia, for example, could not ratify the Lomé IV Convention and could

¹⁷⁰ *German Settlers in Poland Advisory Opinion*, 10 September 1923. PCIJ, Ser. B., No. 6, p. 22.

¹⁷¹ KOSKENMÄKI, R. *Op. cit.*, p. 7.

¹⁷² KREIJEN, G. *Op. cit.*, pp. 87-8.

¹⁷³ THÜRER, D. *Op. cit.*, p. 734. The same author points out that, from a legal perspective, a 'failed' State is one which, although retains its legal capacity, it 'has for all practical purposes lost the ability to exercise it.' There is, for example, no body which can commit the State in an effective and legally binding way. *Ibid.* Although, in our opinion, this can only be verified in States with no government at all, i.e. Somalia.

not participate in the Lomé IV *bis* treaty, or the Cotonou agreement, making it unable to benefit from international aid that would greatly benefit its population.¹⁷⁴ Similarly, no agreements could be concluded between Somalia and the World Bank in order for the first to benefit from the programmes of the second, nor could a status of forces agreement be concluded with the UN for the troops that intervened in its territory.¹⁷⁵ The same does not apply when there *is* a government but which lack effective control, for the treaty making capacity of a State remains, as a general rule, unaffected even if its government becomes temporarily ineffective due to an internal situation.¹⁷⁶

A State like Somalia may also be incapable of participating in international proceedings. That is so because the existence of a government is necessary for the *locus standi* in a judicial forum.¹⁷⁷ In the 1992 United Kingdom's *Somalia v. Woodhouse Drake & Carey (Suisse) S.A. and Others* case the British High Court determined that '[t]he instructions and authority [the agents] had received from the interim government are not instructions and authority from the Government of the Republic.'¹⁷⁸

Given the fact that a State with no government cannot issue credentials to a mission's personnel, its ability to engage in diplomatic relations suffers as a consequence. This has been pointed out to be '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.'¹⁷⁹ Regarding a Somali diplomat in the *Woodhouse Drake* case, the UK's High Court denied its diplomatic status because 'the former government of President Siad Barre has ceased to exist and she [the diplomat] has no accreditation or authority from any other government',

¹⁷⁴ GEISS, R. *Op. cit.*, p. 472. This situation was resolved when the ACP-EU (African, Caribbean and Pacific Group of States-European Union) Council of Ministers, in light of Somalia's inability to become a party to the respective treaty, declared 'the political accession of Somalia to the Lomé Convention, despite the fact that Somalia has not been able to ratify the Convention for reasons beyond its control'. European Court of Justice, Case C-369/95, *Somalifruit SpA, Camar SpA v. Ministero delle Finanze, Ministero del Commercio con l'Estero*, 1997, para. 11. Article 93(VI) of the Cotonou Agreement provides that 'the Council of Ministers may decide to accord special support to ACP States party to previous ACP-EC Conventions which, *in the absence of normally established government institutions*, have not been able to sign or ratify this agreement.' Cited in Geiss, R. *Op. cit.*, p. 477. Emphasis added. This specifically tailored legal exceptions do not, however, diminish the general difficulties that a State with no government faces when required to conclude international treaties.

¹⁷⁵ KOSKENMÄKI, R. *Op. cit.*, p. 18.

¹⁷⁶ *Ibid.*, p. 17.

¹⁷⁷ *Ibid.*

¹⁷⁸ British High Court, Queen's Bench Division, *Somalia v. Woodhouse Drake & Carey (Suisse) S.A. and Others*, 13 March 1992. Quoted by Geiss, R. *Op. cit.*, p. 473, note no. 64. See also ARISTODEMOU, M. 'Choice and Evasion in Judicial Recognition of Government: Lessons from Somalia'. 15 *European Journal of International Law* (1994), pp. 532-55.

¹⁷⁹ KOSKENMÄKI, R. *Op. cit.*, p. 8.

therefore, the Court concluded, 'it is clear that she has no diplomatic status in the UK and has no recognition from Her Majesty's Government as a representative of the Republic of Somalia in this country'.¹⁸⁰

Regarding representation in the UN General Assembly, the absence of *any* government makes it impossible for a State's representation to have its credentials renewed for every session. This was evidenced by the letter submitted by the *Chargé d'affaires* of the Somali UN mission to the organization's Secretary General on 14 September 1992, where the following was stated: 'we wish [...] to stress that we find it untimely to allow for any delegation to represent Somalia in the forty-seventh session of the GA since there is no representative government yet in place.'¹⁸¹ This situation continued while Somalia lacked any government; thus, in practice, Somalia, as a member State, had a place in the General Assembly 'but nobody was authorized to sit behind it between 1992 and 2000.'¹⁸²

The situation of Somalia is different from that of States that do have a government but which lack an effective control of the people and territory; in such situations, '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 continuity, at least as long as no other authority has replaced it effectively.'¹⁸³ Indeed, in the cases of Liberia, Rwanda and Sierra Leone, the credentials of State representatives were accepted by the Credentials Committee of the organization as formally in order.¹⁸⁴

Outside of the General Assembly work, practice in the UN system has differed. The Somali *Chargé d'Affaires a.i.* in New York participated in the Security Council's discussions concerning the situation in Somalia between 1992 and 1994. Curiously, her attendance did not raise any objections, nor did her presumably defective or non-existent credentials result on issues of representation during that time.¹⁸⁵ We have found no explanation of why this occurred other than the fact that issues of representation to the General Assembly and the Security Council are managed

¹⁸⁰ British High Court, Queen's Bench Division, *Somalia v. Woodhouse Drake* [...] *Op. cit.* Quoted by Geiss, R. *Op. cit.*, p. 473, note no. 67.

¹⁸¹ Unpublished internal memo of the UN Department of Legal Affairs. Cited in: Yannis, A. *State Collapse and the International System. Implosion of Government and the International Legal Order from the French Revolution to the Disintegration of Somalia*. Geneva: Institut Universitaire de Hauté Études Internationales, 2000, p. 110.

¹⁸² KOSKENMÄKI, R. *Op. cit.*, p. 13. In this regard, '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, but due to the absence of any government and purporting entities.' *Ibid.*

¹⁸³ KOSKENMÄKI, R. *Op. cit.*, pp. 13-14.

¹⁸⁴ GEISS, R. *Op. cit.*, p. 475.

¹⁸⁵ KOSKENMÄKI, R. *Op. cit.*, p. 15.

separately by the organization;¹⁸⁶ in any case, the situation ended by the time the Security Council referred to the absence of government in Somalia.¹⁸⁷

Other UN bodies and specialized agencies followed a relatively uniform practice regarding Somalia, i.e. 'nobody had been authorized to represent a non-existent government in the functioning of the organs.'¹⁸⁸ There was, although, an exception to the later: UN human right bodies continued to invite Somalia to their meetings.¹⁸⁹ Also, the UN Compensation Commission (UNCC) continued to process requests from the Permanent Mission of Somalia to the UN in Geneva after the government had completely collapsed, although compensations were not paid to the Permanent Mission, but transferred through the UN Development Programme offices directly to the victims so that individuals would not be deprived of their right to compensation 'simply because of the lack of government.'¹⁹⁰

Koskenmäki summarizes well the UN practice regarding the representation of Somalia:

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.¹⁹¹

Such a situation naturally reflects the unpreparedness of the organization, and the UN system as whole, to deal with questions of representation in cases of State collapse, in particular the lack of a uniform system to determine when the loss of representative powers has occurred.

On a more general level, the inability to issue new credentials affects all diplomatic posts a State has abroad. In the case of Somalia, its 'missions [...] and their individual staff members ceased to represent the collapsed government, or any other government, due to lack of credentials.'¹⁹² Nevertheless, its missions, which had not been recalled, retained their diplomatic status, since formal diplomatic relations

¹⁸⁶ *Ibid.*

¹⁸⁷ Security Council Resolution 897 of 4 February 1994.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ KOSKENMÄKI, R. *Op. cit.*, p. 16.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, p. 8.

exist between States, not their governments. However, since the maintenance of diplomatic missions depends on the mutual consent of the concerned states, some of the Somalia embassies were closed at the request of the receiving states, meaning that diplomatic relations were continued at a lower level, not that diplomatic relations were ruptured.¹⁹³

The absence of effective government also has an effect on the capacity of a State to finance its diplomatic missions abroad, meaning that a State may be forced to close its diplomatic representations abroad. For example Sierra Leone closed 18 embassies in 1989 for this reason.¹⁹⁴

It is also relevant to mention that the practical consequences of the lack of representative powers and the absence of diplomatic missions can be dramatic for the nationals of a collapsed State, in order to verify the gravity of the situation. For instance, their passports cannot be renewed and their interests abroad cannot be protected.¹⁹⁵ Interestingly, even after the complete collapse of the government in Somalia, by March 2001 it still had at least five functioning diplomatic missions which, with the approval of the receiving States, continued out of necessity to issue passports and other official documents.¹⁹⁶

Some of the related problems to the interruption in the normal work of diplomatic missions of a collapsed State and the lack of representative powers are the inability to pay salaries and render social security for diplomats as well as problems related to the misuse of State funds and other similar abuses.¹⁹⁷ In the later cases, since diplomatic staff enjoys immunity from the local jurisdiction of the receiving State but the sending State has no effective judicial system, such personnel escapes in practice all jurisdiction.¹⁹⁸

Some more recent international instruments contain provisions that, although indirectly, deal with the problems of a State's inability to engage in international relation. Article 57(3)(d) of the Rome Statute of the ICC, for instance, allows for the Prosecutor to conduct investigations without State consent when 'the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the

¹⁹³ *Ibid.*, pp. 8-9. For instance, the Embassy and Consular Section in Washington D.C. were closed in May 1999 at the request of the United States. *Ibid.*, p. 9, note no. 38.

¹⁹⁴ AKPINARLI, N. *Op. cit.*, p. 25.

¹⁹⁵ KOSKENMÄKI, R. *Op. cit.*, p. 9.

¹⁹⁶ *Ibid.* However, this situation constitutes rather the exception.

¹⁹⁷ *Ibid.*, pp. 9-10.

¹⁹⁸ *Ibid.*, p. 10.

request for cooperation'.¹⁹⁹ This type of solution, however, although appropriate for the purposes of a particular international treaty, do not and cannot solve the entire problematic here described.

4.2.2. *The inability to fulfil international legal obligations*

States suffering from the disintegration of its governmental institutions retain their legal personality and, therefore, its rights and duties under international law.²⁰⁰ A State that lacks an effective government or one that lacks *any* government at all is, however, in a difficult, if not impossible, position to fulfil its international legal obligations, whether they derive from conventional or customary international law. Indeed, States fulfil their duties to the international community, as well as vindicate their international legal rights through their organs and agents²⁰¹ and their absence seriously threatens the fulfilment of their obligations and enjoyment of their rights.

Not only that, in such cases the enforcement of law and order is neglected, its own national as well as foreigners residing in its territory are left unprotected and its contractual obligations are not implemented.²⁰² In particular, as Koskenmäki has pointed out, 'the prolonged absence of *any* state organs, entails an absolute impossibility to comply with the international obligations of the state.'²⁰³ Herdegen has described this factual situation as 'subjective impossibility' (*subjektive Unmöglichkeit*).²⁰⁴

Akpınarlı has described such a lack of capacity to fulfil international legal duties in the following way:

The lack or restricted effectiveness of the central organs hinders the fulfilment of international duties in good faith. A state with no effective government cannot observe treaties according to the general principle of *pact sunt servanda* [sic] in Article 26 of the Vienna Convention on the Law of Treaties. The state could appear to default on its payment or fail to fulfil multinational treaties on human rights or international humanitarian law. Such a state cannot meet its obligation under the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular relations. For example, it cannot protect the facilities, archives, property, and accommodations of the sending state [...].²⁰⁵

¹⁹⁹ Rome Statute of the International Criminal Court of 17 July 1998. Article 57(3)(d).

²⁰⁰ Advisory Council on International Affairs of the Netherlands. *Op. cit.*, p. 15.

²⁰¹ AKPINARLI, N. *Op. cit.*, p. 24.

²⁰² KOSKENMÄKI, R. *Op. cit.*, p. 19.

²⁰³ *Ibid.* Emphasis added.

²⁰⁴ HERDEGEN, M. 'Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State"'. In: Thürer, D. *et al.* (eds.). *Op. cit.*, p. 77. See KOSKENMÄKI, R. *Op. cit.*, p. 19.

²⁰⁵ AKPINARLI, N. *Op. cit.*, p. 28.

Regarding conventional international law, the Vienna Convention on the Law of the Treaties of 1969 (VCLT) contains two provisions which may apply in this circumstances. Article 61 of the Convention deals with the supervening impossibility of performance, whereas article 62 refers to the fundamental change of circumstances or the *clausula rebus sic stantibus*. However, neither article was drafted having in mind the cases mentioned above nor therefore, their application to specific cases is rather problematic.

Article 61 of the VCLT deals with the impossibility of performance when that impossibility is either permanent or temporary, as long as it relates to the disappearance or destruction of an *object* indispensable for the execution of the treaty.²⁰⁶ The commentary of the ILC to the draft article it prepared on the subject, which would later become Article 61(1) of the VCLT, points out that the objects that would permanently disappeared or be destroyed envisaged 'the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of the treaty.'²⁰⁷

The *clausula rebus sic stantibus* of Article 62 of the VCLT²⁰⁸ refers to the occurrence of an event that, according to the ICJ, 'radically transform[s] the extent of the obligations.'²⁰⁹ It appears that situations of partial or total State disintegration would fulfil the first condition for Article 62 to apply, i.e. it would qualify as an unforeseeable external change which has affected the circumstances that formed the basis for concluding the treaty and, that indeed, the existence of functioning State structures constitutes the basis of any international treaty obligation.²¹⁰ The second condition for Article 62 to apply, however, is difficult to argue in cases of State collapse, i.e. that the disintegration of State structures has the effect of radically

²⁰⁶ Article 61(1) reads: 'A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.' Vienna Convention on the Law of Treaties of 23 May 1969.

²⁰⁷ Report of the International Law Commission on the work of its eighteenth session (4 May-19 July 1966). UN Doc. A/CN.4/191. Yearbook of the International Law Commission, 1966, Vol. II, p. 256, para. 2.

²⁰⁸ Article 62(1) reads: 'A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'. Vienna Convention on the Law of Treaties of 23 May 1969.

²⁰⁹ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997. ICJ Reports 1997, p. 65, para. 104.

²¹⁰ KOSKENMÄKI, R. *Op. cit.*, pp. 20-1.

transforming the extent of obligations still to be performed under a treaty. Thus, it remains uncertain whether this clause can apply to all cases of State disintegration.²¹¹

On a procedural level, Article 62 may only be applied when the procedure in articles 65 to 68 of the Convention is followed, as to provide legal certainty and to rule out potential abuse, any form of automatic suspension being intentionally excluded.²¹² The ICJ indeed has held that 'the doctrine [of *rebus sic stantibus*] never operates so as to extinguish a treaty automatically or to allow an unchallengeable denunciation by one part; it only operates to confer a right to call for termination'.²¹³

A State, therefore, may only invoke the possibilities here discussed if it has the necessary organs required to engage in international relations, otherwise, if the State lacks all governmental structures, it may only invoke the VCLT after the re-establishment of its State organs. If such is the case, then, the application of the VCLT leads to the unlawful non-application of treaties, possibly originating state responsibility.²¹⁴ We agree, then, with Koskenmäki when she points out that:

[T]he 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.²¹⁵

Geiss is of the opinion that the inability of a State with no effective government to perform its treaty obligations, being apparent to all the parties involved, and keeping in mind that the suspension is temporary in nature, makes in the parties' mutual interest that neither one of them is obliged to fulfil its treaty obligations in a time of crisis.²¹⁶

4.2.3. *International responsibility*

Since States that have lost all government or their effective governments in the analysed circumstances continue to enjoy their international legal personality, they continue to have, in principle, rights and obligations on the international level, and are thus subject to be held internationally responsible.²¹⁷

²¹¹ *Ibid.*, p. 21.

²¹² GEISS, R. *Op. cit.*, p. 479.

²¹³ *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Judgment of 2 February 1973, ICJ Reports 1973, p. 21, para. 44.

²¹⁴ KOSKENMÄKI, R. *Op. cit.*, p. 22.

²¹⁵ *Ibid.*

²¹⁶ GEISS, R. *Op. cit.*, pp. 479-80.

²¹⁷ 'Though [such] State is for all practical purposes incapable of acting, it continues to have rights and obligations.' THÜRER, D. *Op. cit.*, pp. 746-7.

Thürer makes the general argument that a State with no organs or agents capable of acting on its behalf is not internationally responsible for the violations of international law committed by individuals in its territory:

[I]n principle, current international law holds that a State cannot be held liable for any breaches if it no longer has institutions or officials authorized to act on its behalf. In particular, the State cannot be held responsible for not having prevented offences against international law committed by private individuals or for not having called them to account for their conduct. The reason for this is that the State does not have the necessary power to act.²¹⁸

However, on this regard, the work of the International Law Commission (ILC) on international responsibility, in particular, its Articles on State Responsibility (ASR) provide the guidelines of what the ILC considers to be the established norms on this area or of what the norms *should be*, reasons why we will base this Section's analysis on the mentioned Articles.

One aspect to consider regarding the eventual international responsibility of a State with no effective government is the issue of attribution of conduct to a State. In principle, States are responsible for the conduct of its agents or organs and, in general terms, the conduct of private persons or entities is not attributable to the State under international law, unless in certain exceptions. Since, in general, the actors concerned in collapsed or collapsing States are loosely organized factions or groups consisting of individual acting on their private capacity, in normal circumstances their actions do not compromise the State, except when State organs or agents have manifestly neglected the measures that are normally taken to prevent them.²¹⁹

Article 9 of ILC's Articles on State Responsibility provides one such exception: private behaviour is attributable to the State when 'a person or group of persons is 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.'²²⁰ Those circumstances, according to the ILC's commentary to Article 9:

²¹⁸ *Ibid.*, p. 747. That author supports his conclusion with the fact that, on the Corfu channel case, the ICJ declared Albania liable because it *could* have complied with its obligations of care and information; a State that *a contrario* cannot comply with its obligations under International Law, it is implied by the author, cannot be held responsible. *Ibid.* See also: *Corfu Channel case, Judgment of April 9th, 1949*. ICJ Reports 1949, p. 18 et ss.

²¹⁹ KOSKENMÄKI, R. *Op. cit.*, p. 32. Indeed, Article 2 of the ILC Articles on State Responsibility states that: 'There is an internationally wrongful act of a State when a conduct consisting of an action or *omission*: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.' International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts (2001). Article 2. Emphasis added.

²²⁰ International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts (2001). Article 9.

[O]ccur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.²²¹

Furthermore, the same commentary specifically mentions that:

The cases envisaged by Article 9 presuppose the existence of a Government in office and a State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances.²²²

These commentaries lead Geiss to conclude that the provision of Article 9 was primarily intended to cover transitional situations, in which governmental authority is present at least to some degree. He supports this view with the mention of 'elements of the governmental authority' in Article 9, which for him, 'implies that governmental authority is absent only in certain fields which are thus occupied by private actors.'²²³ The example mentioned in the ILC's commentary to the case of the Iranian revolutionary guard for him 'hardly allows any analogies to the failed State scenario where the performance of the most basic governmental functions is at issue and the failed State, thus, is not a case "such as to call for the exercise of those elements of authority."²²⁴

However, the ILC's commentary refers specifically to situations of State collapse as a possibility for the application of Article 9, in particular, the ILC notes that:

[T]he phrase "in the absence or default of" is intended to cover 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 case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.²²⁵

This commentary, specifically the phrase 'total collapse of the State apparatus' is in contradiction to the one cited above which States that Article 9 'presuppose[s] the existence of a Government in office and a State machinery whose place is taken by irregulars or whose action is supplemented in certain cases'.²²⁶

²²¹ Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001). UN Doc. A/56/10, p. 49, para. 1.

²²² *Ibid.*, para. 4.

²²³ GEISS, R. *Op. cit.*, p. 481.

²²⁴ *Ibid.*, p. 482.

²²⁵ Report of the International Law Commission on the work of its fifty-third session. *Op. cit.*, p. 49, para 5.

²²⁶ Koskenmäki concludes from this commentary that the situations of total State collapse are not covered by in Article 9. KOSKENMÄKI, R. *Op. cit.*, p. 33.

Article 10 of the ASR contains the provision under which, when an insurrectional movement succeeds in becoming the new government of a State, its acts *ex ante* are attributed to that State.²²⁷ However, this article only applies to the party that establishes itself as the new government of the State and not to the often multiple other parties that fight for power in the situations referred to in this analysis. Furthermore, it is typical in such situations that no single party manages to prevail and that, if peace is eventually achieved, a number of factions have to be engaged in the peace process and will most likely be represented in a newly established government.²²⁸ The ILC makes the following commentary:

The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government, thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.²²⁹

Once a certain conduct has been attributed to a collapsed State in light of the prescriptions of Articles 9 or 10 of the ASR, then the State may be held internationally responsible unless its conduct falls under one of the circumstances precluding wrongfulness specified in Chapter V of the ASR.²³⁰ One of the circumstances described in that Chapter is of particular relevance when it comes to State collapse.

Such circumstance is *force majeure*, which is ‘the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.’²³¹ The question, then, is whether the loss of effective government can occur fulfilling the three conditions of article 23(1) of the ASR: (a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) which is beyond the control of the State concerned; and (c) which makes it materially impossible in the circumstances to perform the obligation.²³²

Regarding the first condition for *force majeure* to apply, it can be reasonably argued that the loss of effective government due to State collapse occurs in such a way as

²²⁷ International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts (2001). Article 10(1).

²²⁸ GEISS, R. *Op. cit.*, p. 483.

²²⁹ Report of the International Law Commission on the work of its fifty-third session. *Op. cit.*, p. 51, para 7.

²³⁰ Geiss is of the opinion that attribution of conduct is not possible to this type of States either under article 9 or 10 of the ASR, and so there is no need to recur to *force majeure* or state of necessity, both of which, according to Arts. 23 and 25, refer to an attributable act of State. GEISS, R. *Op. cit.*, p. 484, note no. 113.

²³¹ International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts (2001). Article 23(1).

²³² Report of the International Law Commission on the work of its fifty-third session. *Op. cit.*, p. 76, para. 2.

to be irresistible, an adjective understood by the ILC in the way that 'there must be a constraint which the State was unable to avoid or oppose by its own means'.²³³ Indeed, as previously mentioned, the disintegration of State structures involved in State collapse occurs in such a way, force and intensity that the State is unable to avoid it by its own means. In that sense, such disintegration of State structures is also beyond its control, since a State with weak institutions that either gained its independence with no previous preparation to maintain it or which lost the international support of a super-power at the end of the Cold War never enjoyed a real control of its institutions.

Concerning the third condition for *force majeure* to apply, the ILC has made clear that the material impossibility of performance may be due to natural/physical events or to human intervention, the later including 'the loss of control over a portion of the State's territory as a result of an insurrection'.²³⁴ The three conditions for *force majeure* to be validly invoked may, therefore, be present in a situation of State collapse, meaning that the plea would, most likely, be successful and preclude the wrongfulness of the illegal acts which occurred during State collapse, releasing the State from international responsibility.²³⁵ However, we must keep in mind that the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question.²³⁶

Now, we must keep in mind that there is an additional difficulty in claiming the international responsibility of a collapsed State, a difficulty that is associate with a disintegrated State's ability to interact in the international level; in Koskenmäki's words, '[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'.²³⁷

4.3. Corollary to the statehood of 'collapsed' States

Since collapsed or disintegrated States continue to be considered States under international law but, as seen above, have grave difficulties in exercising their international legal personality, it is relevant to reflect, if only briefly, on what could occur to them in the future. There have been suggestions to transfer the responsibility for the types of States analyzed to the UN Trusteeship Council, which has been inactive

²³³ *Ibid.*

²³⁴ Report of the International Law Commission on the work of its fifty-third session. *Op. cit.*, p. 76, para. 3.

²³⁵ KOSKENMÄKI, R. *Op. cit.*, p. 34.

²³⁶ International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts (2001). Article 27(b).

²³⁷ KOSKENMÄKI, R. *Op. cit.*, p. 33.

since the last trust territory, Palau, achieved its independence in 1994. However, for such a proposal to be put in practice the UN Charter would necessarily require to be amended,²³⁸ since it stipulates that '[t]he trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.'²³⁹ The principle of sovereign equality is, thus, seen by some authors as an impediment to re-institute the Trusteeship Council as a solution to the phenomenon of State collapse.²⁴⁰

An alternative in these cases, one which would not collide with a fundamental principle of international law, would be to set up a new institution separate from the tradition of decolonization, which according to Thüerer, would have 'the task of drawing together peoples which are at odds with each other and supporting efforts for the establishment of State structures'.²⁴¹ He proposes that such an institution could take the form of an organ or agency of the UN, an international organization or perhaps even an NGO along the lines of the ICRC. Interestingly, he is of the opinion that 'it would be important to give appropriate representation not only to the African and Asian States but also to the former European colonial powers in view of their specific experience in this field.'²⁴²

From a formal perspective, what is clear is that if the situation of collapsed or disintegrated States continues as has been occurring for several years, international law must provide a solution to help alleviate the grave difficulties that such entities have experienced in the international level. Although it escapes the scope of this analysis, the determination of what is the best route for that solution must not be incompatible with fundamental norms of international law, such as the right of a people to self-determination or the principle of sovereign equality of States.

5. Conclusions

International requires three constitutive elements for an entity to qualify as a State: a permanent population, a territory and an effective government capable of maintaining relations with other subjects of international law. Furthermore, international law plays an important role for the determination of when an entity constitutes a State, since it is for the international legal order to provide a legal qualification and establish the legal consequences of a subject of international law, in particular its rights and

²³⁸ THÜRER, D. *Op. cit.*, p. 756.

²³⁹ UN Charter, Article 78.

²⁴⁰ KREIJEN, G. *Op. cit.*, p. 319.

²⁴¹ THÜRER, D. *Op. cit.*, p. 756.

²⁴² *Ibid.*

obligations. The role of international law in this regard is twofold: it has a positive role of determining, in certain cases, whether an entity constitutes a State even in the absence of effective government, as well as a negative role of denying Statehood to entities which claim it but which were established in violation of a peremptory norm of international law.

States, furthermore, suffer constant transformations in their constitutive elements that do not affect their condition of State. In such circumstances, the principle of State continuity is applied and the international legal personality of a State continues through time. Indeed, a strong presumption applies to the continuity of a State once it has been created, and, therefore, against its extinction even when the loss of an effective government occurs. States, however, do become extinct, either in voluntary or involuntary ways, as long as a succession of States occurs, i.e. another States, which may be a new one, takes over the responsibility of the population and territory of the State it succeeds.

Regarding the phenomenon of State 'failure', 'collapse' or 'disintegration' there exists no standard definition of what constitutes a 'failed', 'collapsed' or 'disintegrated' State and different terms are employed to describe either the same situation or different ones but closely related. In particular, the term 'failed' State has been severely criticized because of its origin, connotations and employment. Other terms, such as State 'collapse' and 'disintegration' better reflect the phenomenon whilst avoiding the negative implications of qualifying a State as having 'failed'.

On the other hand, the employment of the expressions *loss* or *lack of effective government* due to the collapse or disintegration of the State better reflects to describe the phenomenon, particularly considering that it employs definitions of international law and refers directly to what occurs, from an international law perspective, when the collapse or disintegration of State structures occurs. In our view, then, the terms 'collapsed' or 'disintegrated' States will, then, be reserved to those States that due to an *anarchic conflict lack*, totally or partially, an effective government to the point that law and order may not be guaranteed in most of its territory and which lack the capacity to rebuild their governments by their own means.

From an analysis based in current international law we have determined that there is no basis to support the view that 'collapsed' or 'disintegrated' States become extinct because of the loss of effective government they suffer. Indeed, State practice as well as that of international organizations, particularly the United Nations through its General Assembly and Security Council, and the overwhelming majority of legal commentators, agree that such States continue their international legal personality, despite the absence of a constitutive element of statehood.

‘Collapsed’ or ‘disintegrated’ States, however, suffer serious consequences in the exercise of their international legal personality associated to the loss of effective government. In particular, they are unable to interact normally with other subjects of international law: their capacity to celebrate international treaties is diminished, they may be unable to participate in international proceedings, their normal diplomatic and consular relations with other States are affected and their participation in the work of international organizations is affected as well – particularly by a State that loses *all* government, as the case of Somalia proved –, etc.

Furthermore, ‘collapsed’ or ‘disintegrated’ States are in such a position that their ability to fulfil international legal obligations is seriously hampered. When it comes to the fulfilment of treaty obligations, the lack of effective government makes the application of the norms contained in the Vienna Convention on the Law of the Treaties difficult to occur in practice, with the possible consequence of an unlawful not applications of treaties to occur and the possible origin of international responsibility.

The type of States here analysed may, indeed, incur in international responsibility in certain cases when considering the regulation of this branch of international law proposed by the International Law Commission in its Articles on State Responsibility. However, the grave circumstances that such States suffer make it possible for a situation precluding wrongfulness — *force majeure* — to apply and such States could thus avoid international responsibility, although they would still have to compensate for material losses they may cause. In certain extreme cases of State ‘collapse’, however, the State’s ability to participate in international proceedings may be compromised and, therefore, the invocation of State responsibility in this type of cases may fail from the start.

It is clear that international law has several complex challenges that it needs to address regarding ‘collapsed’ or ‘disintegrated’ States. However, the international legal order cannot abandon some of its fundamental principles, such as sovereign equality and the right of a people to self-determination when finding solutions for the phenomenon of State ‘collapse’. Whatever solutions and new norms emerge to address such situations, the international law community must find ways to help restore the effective governments of such entities while guaranteeing the rights of the people concerned and the integrity of the international legal order.