



FACULTY OF LAW
University of Lund

Teresa Andersson

State Responsibility during State Failure

– A Question of Attribution and State Definition

Master thesis
20 points

Supervisor: Ulf Linderfalk

Public International Law

Spring 2005

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Subject and Purpose	6
1.2 Limitation, Literature and Problems	6
2 BACKGROUND	8
2.1 Definitions and Indicators of Failure	8
2.1.1 Weak States	9
2.1.2 Failed States	10
2.1.3 Collapsed States	10
2.2 Causes of Failure	10
3 STATE RESPONSIBILITY AND STATE FAILURE	13
3.1 The Situation of State Failure	13
3.2 ILC Articles on State Responsibility	14
3.2.1 The Element of Attribution	15
3.2.2 Conduct of Organs of a State – Article 4	17
3.2.3 Conduct of Persons not acting as State Organs – Articles 5 and 8	18
3.2.4 Conduct in the Absence or Default of Official Authorities – Article 9	20
3.2.5 Conduct of an Insurrectional or other Movements – Article 10	21
3.2.6 Legal Writing on the Attribution Articles	23
3.3 The Iran – United States Claims Tribunal	23
3.3.1 Yeager vs. the Islamic Republic of Iran	24
3.3.2 Short v. the Islamic Republic of Iran	26
3.3.3 Young v. the Islamic Republic of Iran	27
3.3.4 Rankin v. the Islamic Republic of Iran	28
3.4 The Tribunal’s Contribution to the Law of State Responsibility	30
3.4.1 Criticism against the Tribunal	31
3.4.2 Alternatives to a Search for Agency	32
3.5 State Responsibility during State Failure	33
3.5.1 The Applicability of Article 9	33
4 THE CONCEPT OF STATEHOOD	35

4.1	The Criteria of Statehood	35
4.2	State Recognition	36
4.3	The Principles of Continuity and Sovereignty	36
4.4	Issues of Recognition in Relation to the Case of Somalia	37
4.4.1	The Meaning of (Non-)Recognition of Somaliland	39
5	FINAL CONCLUSIONS	40
5.1	The Applicability of the ILC Articles	40
5.2	The Significance of Statehood	41
5.3	States as Building Blocks of the International Order?	43
	SUPPLEMENT A	45
	BIBLIOGRAPHY	47
	TABLE OF CASES	50

Summary

The term ‘failed states’ is still new to the international society and has as such not yet received any legal status. Nevertheless, the concept of failed states does have legal implications on many fields of international law. The law of State Responsibility constitutes such a field. The International Law Commission has in its articles on State Responsibility attempted to clarify legal uncertainty and to avoid the possible evading of responsibility by disintegrating states with a specific rule of attribution. The question in this thesis is to analyze – from a failed state perspective - whether the International Law Commission has succeeded in its attempt.

In the thesis it is concluded that the articles on State Responsibility of most interest in the context of failed states are articles 9 and 10. Article 9 deals with the situation of when State Responsibility can be raised for acts carried out in the absence or default of official authorities. The prerequisites set out in the article are not applicable to every situation of state failure. For instance, the article does state that private persons shall perform the conduct. Failed states are in many cases characterized by a fight over power by different factions or by *de facto* governments. The International Law Commission has also in its commentaries emphasized the exceptionality of the situation in question, something that further diminishes the applicability of the article to situations of state failure. Yet, practice by the Iran-United States Claims Tribunal shows that article 9 is applicable to situations of temporary state failure, when the prerequisites in the article are met. Moreover, an examination of the Tribunal’s contribution to the law of State Responsibility has, *inter alia*, shown that the Tribunal set the standards for burden of proof high for the part to the case that claimed State Responsibility.

Furthermore, it is concluded in the thesis, that the law of State Responsibility is dependant upon the concept of statehood and what the international community considers a state to be. The law of State Responsibility can, as the name suggests, only be applied to states, not to other entities or occurrences in current international law. Situations of prolonged state failure – state collapse – therefore raises the question of state definition and state recognition. The meaning of state recognition is contested in the legal writing. Some scholars consider state recognition to have a merely declaratory function, while others consider it to have a semi-constitutive or an evidentiary function. This thesis concludes that state recognition at least reinforces the criteria for statehood. Somalia is an example of a state which suffers from state collapse. The northern part of Somalia, Somaliland, has declared independence, but is not yet recognized as a state by the international community. Since it is impossible to raise State Responsibility vis-à-vis Somalia, no violator against which injured states could claim redress exists, as long as the international community continues to withhold recognition of entities such as Somaliland. The

International Law Commission has therefore failed in its attempt to avoid the possible evading of responsibility in disintegrating states.

Preface

I would like to thank everyone who supported me during the writing of this thesis, especially those who kept me company during the long hours at juridicum and the Raoul Wallenberg Institute. I would also like to express my gratitude towards my supervisor, Ulf Linderfalk, who gave me guidance when I was in need, and towards my friend Fredrik Ringquist, who helped me with good advice and proofreading.

Abbreviations

AIV	Netherlands Advisory Council on International Affairs
CAVV	Netherlands Advisory Council on Issues of Public International Law
ESS	European Security Strategy
EU	European Union
GNP	Gross National Product
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
I.U.S.C.T.R.	Iran-United States Claims Tribunal
NIC	National Intelligence Council (U.S. Government)
OECD	Organisation for Economic Co-operation and Development.
PCIJ	Permanent Court of International Justice
UD/ANA	The Policy Analysis Office of the Swedish Ministry for Foreign Affairs
UNGA	United Nations General Assembly
UNRIAA	United Nations Reports of International Arbitral Awards
UNSC	United Nations Security Council
UNSG	United Nations Secretary General

1 Introduction

Since the beginning of the 1990's the expression 'failed states' has become more and more used by politicians and in the international law doctrine. The rise and fall of nation-states is not new, but in today's international order, where nation-states constitute the building blocks of the world order the stability and non-existence of "villainous" states are of major importance for a secure world. The attack on World Trade Centre in New York on September 11, 2001 has also had a great impact and enhanced effect on the research regarding failed states. The research has lately focused largely on an understanding of the nature of weak states and on how to prevent and rebuild failed and collapsed states. The current international legal order is somehow unprepared for the concept of failed states which is the reason why failed states give rise to a great deal of interesting questions, in the context of international law. One of these questions is how, and if, the legal framework on State Responsibility is applicable in the context of failed states.

Rules regarding State Responsibility in international law are codified in the ILC draft articles on Responsibility of States for internationally wrongful acts, adopted by the UNGA in 2001 (hereafter referred to as the ILC Articles).¹ The International Law Commission, in its work with the ILC Articles, aimed to clarify legal uncertainty and to avoid the possible evading of responsibility by disintegrating states with a specific rule of attribution. My intention in this thesis is to answer the question whether the ILC succeeded in its work and, therefore, whether State Responsibility can be claimed for conduct performed by various actors during times of state failure. To get a clear picture of the concept of failed states, and of which issues of international law it raises, this examination also contains parts about facts and indicators of failure and of the concept of statehood. There are several suggestions in the international law doctrine of how to define the concept of state failure. The American scholar Robert I. Rotberg has presented one of the most detailed suggestions. He has introduced a sliding scale constituted by weak, failed and collapsed states. A failed state is, according to Rotberg, *inter alia* characterised by a governing power not in control of the whole territory of the state and which are incapable of providing basic political goods to its people.² A collapsed state is a state which suffers from a prolonged situation of state failure and is characterized by the complete lack of a governing power.³ In the text the terms 'failed'- and 'collapsed' states will be used in accordance with Rotberg's definition.

¹ Draft Articles on Responsibility of States for internationally wrongful acts adopted by the ILC at its fifty-third session (2001) and by the UNGA in A/RES/56/83, 12 December 2001.

² Rotberg in Rotberg (ed.), pp. 6-7.

³ *Id.*, pp. 9-10.

1.1 Subject and Purpose

This thesis contains both descriptive and analytic parts. My intention with this examination is to focus on the question of State Responsibility in the context of failed states. In doing so I have examined practice and preparatory work as regards the ILC Articles. Thereafter, I have analyzed questions which are of importance in the context of State Responsibility. Even though the quality and authority of the ILC Articles are by most scholars considered to be satisfactory, and even though they are written with the aim to erase the existence of “loop-holes” – i.e. situations when state responsibility cannot be raised - they are not constructed with the concept of failed states in mind. Since the concept of State Responsibility in itself reveals that states are the subjects in relation to the law of State Responsibility, questions as regards the concept of statehood and the recognition and definition of states must therefore be examined in the context of this thesis. Since no legal- or governmental authorities exist during state failure, a condition which the traditional element of attribution is based upon, the challenge for this thesis has been to examine whether State Responsibility can be raised without the existence of such authority. Consequently, my aim is to examine whether the ILC has succeeded in its attempt to erase the existence of loop-holes in the field of State Responsibility, and to highlight what kind of, and in which cases, State Responsibility exists in the context of failed states.

1.2 Limitation, Literature and Problems

Most research on the topic of failed states is focused on state and nation building and on how to prevent a state’s failure. Since this is a graduate thesis on the subject of international law much of this research has only been useful in the background description. My purpose has been to investigate the concept of failed states in the context of international law and that is why state and nation building, post conflict-resolutions and other issues of a more political character have no room in this essay. Because of the limited extent of this thesis I was forced to focus solely on one of the legal implications of the concept of state failure. I chose the issue of State Responsibility, but for the reader to get a grip of what state failure means and which questions it raises I decided to undertake a short odyssey in the field of causes of failure and state failure in the context of state definition.

As previously mentioned, the research on the topic of state failure increased after the events on September 11, 2001 and its emphasis has been on terrorism derived from failed states. That is why most research has been carried out by American, British and Australian legal scholars and in the field of political science. This is something I have tried to bear in mind when writing this thesis and it has also meant that the literature usable for this examination has been limited. As regards the practice of State Responsibility and the Iran United States Claims Tribunal’s contribution to the field of State Responsibility American scholars, of whom many have

been directly involved in the work of the Tribunal, performed most of the legal writing I found. The impartiality of these authors can therefore be questioned.

2 Background

2.1 Definitions and Indicators of Failure

The term failed or failing state is of somewhat recent origin and has as such not yet been recognized in international law. Nevertheless, politicians and academics use it, although not always in the same way. Elements of definitions are also found in state practice and in the pronouncements of international organisations.⁴ The conceptual difficulty has been said to stem from the rivalry between expansive and narrow definitions of the minimum requirements for governments in international relations.⁵ The expansive definitions are often preferred in the political discourse while legal scholars often prefer the narrow definitions.⁶

Different scholars and organisations have given differing meanings to the term failed state. The first time the definition *failed nation-state* was used was in an article in *Foreign Policy* in 1992, where Gerald Helman and Steven Ratner referred to failed nation-states as states “utterly incapable of sustaining itself as a member of the international community” and “depending on steady streams of foreign assistance”.⁷ The European Security Strategy has referred to failed states as states corroded from within along with a collapse of state institutions.⁸ The World Bank employs the term ‘Low Income States under Stress (LICUS)’ while OECD uses the terms ‘fragile states’ and ‘difficult partnerships’.⁹ Robert I. Rotberg, director of the Kennedy School of Government’s Belfer Center Program on Intrastate Conflict at Harvard University and president of the World Peace Foundation, has contributed by using a sliding scale constituted by the terms strong, weak, failed and collapsed states which will be explained below. This is the most well prepared – although not the most stringent – version of definition. Even though some states are ‘morally bad’ they need not to be failing. In American doctrine the definitions ‘criminal/predatory states’ and ‘rogue states’ have been used. The former definition refers to states which are governed by a small ruling class for self-enrichment at the expense of the greater part of the population. The latter definition refers to states where those in power decide on a policy that infringes upon the rights of other states and upon citizens of third states.¹⁰

The Dutch advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law have, on a request by the

⁴ AIV/CAVV, p. 8.

⁵ A. Yannis as recited in Koskenmäki, p. 4.

⁶ Koskenmäki, p. 4.

⁷ Reproduced by Molin in a paper prepared within the Swedish Ministry for Foreign Affairs (UD/ANA), 5 October 2004.

⁸ ESS, p. 8.

⁹ AIV/CAVV, p. 8.

¹⁰ *Id.*, pp. 9-10.

Dutch Minister of Foreign Affairs, the Minister of Defence and the Minister for Development Cooperation, jointly produced an advisory report on failing states in which they decided not to adopt the element of unwillingness and decided on the following definition:

A failing state is a state which:

- is unable to control its territory and guarantee the security of its citizens, because it has lost its monopoly on the use of force;
- is no longer able to uphold its internal legal order;
- is no longer able to deliver public services to its population or create the conditions for such delivery.¹¹

Elements that are important in the distinction between weak and strong states are the level of effective delivery of the most essential public goods such as public communications (roads and phone lines *et cetera*), health care, water supply and the ability to protect citizens from human rights violations. The governing powers in failed states can also be said not to be able to fulfil the obligations in the social contract, which Thomas Hobbes and John Locke wrote about in the 17th century. Rotberg has in several articles clarified that by public goods he refers to the claim a citizen once made on a sovereign and now makes on a state. He also argues that there exist a hierarchy of public goods in which the delivery of public security is first ranked.¹² Other prime functions of a state are the ability to uphold the rule of law and the ability to enable citizens to take part of the political process. The supply of these political goods together constitutes the elements needed in order to decide whether a state should be referred to as strong or weak.¹³ He also underlines the importance that the definitions should be used precisely, i.e. not loosely or as having the same meaning as state implosion.¹⁴ Rotberg's distinctions are not generally accepted and many do not distinguish between the concept of 'failed' and 'collapsed' states. I have for the purpose of clarity in this thesis chosen to base my examination of State Responsibility in failed states on Rotberg's definitions. Consequently, I make a distinction between failed and collapsed states.

2.1.1 Weak States

A weak state is a state which might be inherently weak because of e.g. geographical or economical factors or temporarily weak because of internal disturbances *et cetera*. In the world of today a long list of states can be included under the definition of weak states. Typical for weak states is that there exist ethnical, religious or other tensions, which may develop into internal conflicts between different groups.¹⁵ The governing powers' ability to provide adequate amounts of political goods is also decreasing or

¹¹ AIV/CAVV, p. 11.

¹² Rotberg, pp. 4-5.

¹³ Rotberg in Rotberg (ed.), pp. 1-2.

¹⁴ Rotberg, p. 2.

¹⁵ Rotberg, p. 2.

diminished and the GNP per capita and comparable indicators have fallen or are falling.¹⁶ Rotberg also distinguishes a category of weak states that are seemingly strong, e.g. Cambodia under Pol Pot's rule, North Korea, Belarus and Iraq under Saddam Hussein's rule.¹⁷ They seem strong since the leaders are in total control of the territory, but they are affected by different problems similar to those mentioned above.

2.1.2 Failed States

Failed states are described as conflicted, dangerous and contested by different factions.¹⁸ The governing power in a failed state is not capable of controlling the different peripheral regions and is unable or unwilling to perform the basic tasks of a nation-state in the modern world, such as protecting its citizens from human rights violations. The infrastructure in a failed state is deteriorating or already destroyed and mortal diseases like HIV enhance along with increasing rates of illiteracy and child mortality. The state is also unable to uphold the rule of law and democratic values.¹⁹ Examples of failed states today are The Democratic Republic of Congo, Zimbabwe, Cote d'Ivoire and Nepal.

2.1.3 Collapsed States

Collapsed states are extreme versions of failed states and occur rarely. A typical sign of collapse is that no authorities or governing power exist. Political goods are provided through private and ad hoc-means. Rotberg argues that:

Collapsed states can only return to being failed, and then perhaps to being weak, if sufficient security is restored to rebuild the institutions and strengthen the legitimacy of the resuscitated state.²⁰

Examples of once collapsed states are Bosnia, Nigeria, Sierra Leone and Somalia. The latter can be referred to as still being collapsed.

2.2 Causes of Failure

Although Africa is overrepresented in number of failed states, causes of failure and collapse must not necessarily originate from a colonial history, exploitation or insufficient or misplaced support. Jeffrey Herbst, Chair, Department of Politics at Princeton University, and Christopher Clapham, Professor at the Department of Politics and International Relations at Lancaster University, have both argued that state failure stems from a

¹⁶ *Id.* p. 2.

¹⁷ Rotberg in Rotberg (ed.), p. 5.

¹⁸ *Id.* pp. 6-7.

¹⁹ Rotberg, p. 4.

²⁰ *Id.* p. 4.

premature assumption that a state authority is capable of running the state “western-wise”. To evaluate these statements a consideration of the concept of statehood in the modern international law is necessary. Such a consideration will follow below. Clapham argues that one reason of failure was that postcolonial states were ill equipped for the demands that were made on them after the decolonization.²¹ He further argues that the importance of economic resources for the ability to create and uphold a strong state is not as important as the impact of social resources:

What matters, in short, is not states’ access to a given level of wealth, [----] but whether governments and the societies that sustain them are capable of creating, from their own resources, the levels of authority that are needed to maintain basic structures of production. If they are to generate continuous development, states must provide the social, legal, and political institutions that are now widely regarded as essential; but these institutions require the support of underlying social practises and values. Economic performance is the dependent variable, political culture the independent one.²²

Sierra Leone and Angola are states which are economically well gifted, but lacking of social structures. These countries, both with extensive diamond resources, both failing, are in comparison with Botswana – also a diamond economy – elucidating examples of Clapham’s theory. Botswana has more stable social structures and has been able to gain from its resources – even though the distribution politics of the state leaders is questionable.

According to some scholars including Nicholas Van de Walle, Director of the Mario Einaudi Center for International Studies, it is possible to distinguish between two types of state failure: failure because of internal disturbances and failure because of a progressive implosion of the state apparatus. These two forms have distinct economic explanations.²³ Van de Walle also objects to different scholars’ opinion that the fight between different factions to win possession over a state’s natural resources is the start off-factors to state failure. He instead distinguishes between structural and contingent factors. Economic structural factors are deep-seated and sociological factors which put pressure on states or which inflict constraints on state formation. For instance, a state’s fiscal capacity one of the most important institutional capabilities for a weak state.²⁴ Although the significant importance of the structural factors it is the contingent factors which push a weak state over the edge. Contingent factors can be internal and external and do not necessarily have to be of an economic nature. An example of an external factor is drought which causes famine while an internal factor can be military coups etc.²⁵ In spite of his economic viewpoint van de Walle agrees with Clapham and emphasizes that other factors than economic ones often have a bigger impact on a failing state. As

²¹ Clapham in Rotberg (ed.), p. 83.

²² *Id.*, pp 88-89.

²³ Van de Walle in Rotberg (ed.), p. 94.

²⁴ *Id.*, pp. 98-99.

²⁵ Van de Walle in Rotberg (ed.), p. 98.

an example, he mentions the difference between Botswana and Zambia and claims that that difference has far more to do with historical and political factors than with economical.²⁶

Other causes of state failure can be extensive assets of small arms which are often being used by paramilitary groups and which sometimes were delivered as support from either the United States or Soviet Union during the Cold War. The assumption that each superpower needed support was many times counterproductive and may have led to the fostering of a level of militarization that, instead of sustaining the states, led to their deterioration.²⁷

²⁶ *Id.*, p. 99.

²⁷ Clapham in Rotberg (ed.), p. 91.

3 State Responsibility and State Failure

It has for a long time been a principle of international law that an internationally wrongful act of a state leads to international responsibility of that state. The rules of State Responsibility in international law are, *inter alia*, codified in the above-mentioned ILC Articles.²⁸ The purpose of the work carried out by the ILC was partly to avoid situations where no state could be held accountable for actions or omissions, which implies a breach of an international obligation. Nevertheless, the work was not carried out specifically with the concept of failed states in mind. My ambition is to examine how the ILC Articles relate to a situation of state failure and how, or if, State Responsibility can be applied in a situation of failure.

By doing this I am first going to formulate the problem of State Responsibility in relation to a situation of state failure. This will be followed by an exposition of articles which can be applicable to the situation. The Iran - United States Claims Tribunal is the judicial organ in the international law which foremost has had to deal with attribution issues in relation to a situation resembling state failure. I have therefore chosen to examine the tribunal's contribution to the doctrine of State Responsibility. This examination will be followed by an analytic part.

3.1 The Situation of State Failure

Since a failed state lacks an effective government, the ordinary way of applying State Responsibility is not effective. The question whether a state could be held responsible for breaches of international obligations during the time of state failure therefore becomes a question of attribution. This is the case as the actors under a period of state failure often consist of loosely organized factions or groups of individuals acting in their private capacity. Conduct of private nature is never attributable to the state unless the state has failed in fulfilling its duty of due diligence, i.e. a state is responsible when it has not taken reasonable steps to prevent conduct of private nature which lead to a breach of an international obligation. It should be noted that this duty often presupposes some sort of functioning structures within a state.

The articles of attribution in the ILC Articles which are of most interest in the context of state failure are articles 9 and 10. The former regulates conduct in the absence or default of official authorities and the latter regulates conduct of an insurrectional movement. Another article which may be of interest if a state was presented with a claim concerning State

²⁸ See supra note 1.

Responsibility for a breach of its international obligations during the time of failure, is that of *force majeure*, article 23. A claim presented to a failed state during its failure would not pass from the very start. This is because a failed state lacking an official government would have no one to represent it before a court, i.e. it has no *locus standi* in a judicial forum.²⁹ Nevertheless, a claim could be presented when the phase of state failure has passed.

3.2 ILC Articles on State Responsibility

In 1949 the UNGA referred the subject of State Responsibility to the ILC as a topic for discussion and resolution. Since then five special rapporteurs have been appointed to work on the subject and 27 reports concerning most fields of State Responsibility have been the results. Draft articles on State Responsibility were adopted by the ILC in 1996.³⁰ There was for a long time disagreement in the ILC whether the ILC draft on State Responsibility, published 1996, should be codified in a treaty or by an adoption of the articles by the UNGA. The advantage of making the articles into a treaty would have been that the member states would have had a full input of the text and that the text would have been given a certain authority and durability. An unsuccessful treaty could on the other hand have a 'decodifying' effect on existing rules. The latter alternative prevailed and the ILC draft articles on state responsibility were adopted by the UNGA on the 28 January 2002.³¹ According to James Crawford, elected as Special Rapporteur on State Responsibility in 1998, the articles stand for a combination of a codification of the then existing customary rules on State Responsibility and a progressive development of the rules in the field.³²

The emphasis of the ILC Articles is on the secondary rules of State Responsibility, i.e. the general conditions under international law for a state to be considered responsible for its acts or omissions. The ILC, in the drafting of the articles, made no attempt of defining the content of the international obligations, which, when breached, give rise to responsibility.³³ This is the role of the primary rules and an attempt to codify them would have to include the lion part of existing international law. There are also other matters that do not fall under the ILC Articles. An example of such is the question whether and for how long particular primary obligations are in force for a state. This question is dealt with in the law of treaties. Neither do the ILC Articles deal with the consequences of a breach of an international obligation. The treaty or the rule of the obligation that have been breached determines these consequences.³⁴ Another important delimitation to have in mind is that the ILC Articles do not deal with conduct, which is lawful, e.g. cases where states are obligated to

²⁹ Koskenmäki, p. 33.

³⁰ Provost (ed.), p. XI.

³¹ See supra note 1.

³² Crawford, 2002, p. 60.

³³ ILC, p. 59.

³⁴ *Id.*, p. 61.

compensate for injurious consequences of a conduct that is not illegal *per se*. Nevertheless, the present articles can be applied on the whole field of State Responsibility, whether an obligation is owed to a single state, a group of states or to the whole of the international community.³⁵

Part one of the ILC Articles is concerned with which prerequisites are needed for State Responsibility to arise. There are two basic conditions in international law that have to be met for a state to be held responsible for an action or omission; first the action or omission must be attributable to the state, and second the action or omission must constitute a breach of an international obligation of that state. These conditions are spelled out in article 2 of the ILC Articles under the heading ‘elements of an internationally wrongful act of a state’.

3.2.1 The Element of Attribution

The elements of attribution and breach of an international obligation have often been said to be the respectively subjective and objective requisites of State Responsibility. Nothing in the ILC Articles supports this view. The opinion of many scholars including James Crawford is that the question of subjective and objective requisites depends on the facts in the case and the interpretation and application of its primary rules.³⁶ The statute of the International Criminal Court (ICC), article 6 concerning genocide, states that “‘genocide’ means any of the following acts committed with *intent* to destroy, in whole or in part, a national, ethnical or religious group”.³⁷ Intent is a subjective criterion but is supposed to represent the objective criterion of State Responsibility. Hence, it depends on the circumstances of the case whether responsibility is objective or not.

A conduct attributable to a state can be an act or an omission. Cases where a state has been held responsible because of an omission are as many as the cases where the conduct was constituted by an act, and the rules of State Responsibility apply in the same way.³⁸ In the *Corfu Channel Case*, the ICJ found it to be necessary for responsibility to be invoked that Albania knew, or must have known, about the mines in its territorial waters without warning passing ships or notifying shipping authorities about the mines.³⁹ Also in the *Diplomatic Consular Case* the ICJ found that Iran, after the attack on the United States embassy on 4 November 1979, was responsible, not for the initial phase of the attacks, but later for its omission not to have

³⁵ ILC, pp. 61-62.

³⁶ *Id.*, pp. 69-70.

³⁷ Rome Statute of the International Criminal Court, 1998, United Nations, *Treaty Series*, vol. 2187, p. 3. Entered into force on 1 July 2002.

³⁸ ILC, p. 70.

³⁹ *The Corfu Channel Case* (United Kingdom v. The People’s Republic of Albania), Merits, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4.

taken reasonable steps to stop the hostage situation on the American embassy.⁴⁰

In the context of State Responsibility, the concept of ‘state’ means a state as a subject of international law.⁴¹ Municipal legislation is in this respect of no importance since a state is treated as a unity. Hence, it is of no importance in the context how power is divided within a nation (federal etc.).⁴² According to Brownlie it is a well-established principle of international law that a state cannot use the excuse of national legislation if a claim has been raised in the international context. The form of administration is therefore secondary.⁴³

Even if a state is a subject of international law, and seen as a legal person, a state cannot act in itself. An act of a state must therefore entail a person’s or a group of persons’ actions or omissions. The PCIJ established this in the *German Settlers in Poland* case: “states can act only by and through their agents and representatives”.⁴⁴ In theory, all actions and omissions performed by people, corporations or groups, linked to the state by nationality, residence or incorporation, could be attributable to the state, but this far-reaching alternative has been avoided in the international law. The reasons for this have been partly to acknowledge the autonomy of people and partly to limit the responsibility for actions which involve the state as an organisation.⁴⁵ The general rule is that only conduct by state organs or agents of a state is attributable to the state on an international level. Conduct performed by a private person is in itself not attributable to a state, but exceptions exist. State Responsibility can arise for a state which has not taken reasonable measures to prevent or to stop an action by a private person or group of persons. This was the case for Iran in the *Diplomatic Consular* case, where Iran was held responsible for not have taken reasonable steps to prevent the students, acting in their capacity as private persons, from further delaying the hostage situation at the American embassy in Teheran.⁴⁶

The rules of chapter 2 in the ILC Articles are limitative. A state cannot be held responsible for the conduct of a group or a person not mentioned in the chapter if it has not made a guarantee or agreed on a specific undertaking. This would be a *lex specialis*, which are dealt with in article 55 of the ILC Articles. It is also important to distinguish the question of attribution in the context of State Responsibility from other cohesions of international law

⁴⁰ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Order of 24 May 1980, I.C.J. Reports 1980, p. 4. Judgment of 24 May 1980 General list no 64, paragraph 61.

⁴¹ For more information about state definition in international law see 4.1.

⁴² ILC, p. 71.

⁴³ Brownlie, p. 141.

⁴⁴ *German Settlers in Poland* Case, P.C.I.J. Publications, Series B, 1923, Advisory opinion no. 6, at p. 22.

⁴⁵ ILC, p. 80.

⁴⁶ See supra note 40.

such as issues concerning legitimate representative or treaty-making competence. Such issues do not concern the field of State Responsibility.⁴⁷

3.2.2 Conduct of Organs of a State – Article 4

As mentioned earlier, the rules of the ILC Articles on attribution are limitative. A state is not responsible for conduct by other persons than those stated in the articles. The importance of identifying actors whose conduct could be attributable to a state was emphasized by the Iran - United States Claims Tribunal in the *Yeager* case:

In order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State.⁴⁸

In order to decide what constitutes an organ of a state the municipal legislation must be given a certain weight. Yet, the international law has a distinct role. For instance, certain types of state organs such as the police force of a state are always considered to be organs of that state, irrespectively of what the national legislation states.⁴⁹ What constitutes an organ of the state has therefore more to do with facts than with national legislation. Someone's status as an authority or an agent of the state shall on the other hand not be taken as a definitive proof of responsibility, but as a sign of *prima facie* responsibility; an organ of a state can be acting on behalf of another state.⁵⁰

No matter how minor or subordinated an organ of a state or an agent of a state is, the government is still responsible for controlling its officials and agents. The conduct of the legislative and the judiciary organs of a state can also raise State Responsibility. This for instance when a treaty presupposes that certain rules shall be incorporated in the national legislation or when the judiciary pass a sentence that is not in accordance with a treaty or with international law. The judiciary has the right to interpret treaties but the interpretation must be in accordance with obligations taken on by the state or with the peremptory norms of international law. These types of situations have often occurred in connection with human rights treaties - especially the European Convention on Human Rights.⁵¹

According to the commentaries to the ILC Articles the concept of 'an organ of a state' includes all individual and collective entities which constitute the organisation of a state and which are able to act on behalf of the state.⁵² As mentioned earlier this include all types of organs, i.e. also federal entities. This is also stated in the last sentence of the first paragraph of article 4 as:

⁴⁷ ILC, p. 82.

⁴⁸ *Yeager v. the Islamic Republic of Iran* (1987), Iran – United States Claims Tribunal vol. 17, pp. 101-102.

⁴⁹ ILC, p. 82.

⁵⁰ Brownlie, pp. 135-136.

⁵¹ *Id.*, pp. 142-144.

⁵² ILC, p. 84.

“and whatever its character as an organ of the central government or of a territorial unit of the State”. An exception could be a federal clause in a treaty; such a clause would in that case constitute *lex specialis*.

No distinctions are made between whether a subordinate or a superior official conducts the act or whether the official is connected to regional or local authorities. One problematic issue in this context is whether a person who is a state organ is acting in his/her official capacity. The general rule is that if a person acts under the colour of his or her authority this act is attributable to the state. In the international arbitral practise this distinction has been clearly drawn, for instance by the United States/Mexican Claims Commission in the *Mallén* case and by the French-Mexican Claims Commission in the *Caire* case.⁵³ It is important to distinguish these kinds of acts from acts carried out *ultra vires*. The latter type of acts is dealt with in article 7 of the ILC Articles.

3.2.3 Conduct of Persons not acting as State Organs – Articles 5 and 8

While article 4 is the main article on the element of attribution, articles 5 to 11 can be seen as complementary and elucidating. Article 5 of the ILC articles is dealing with the conduct of a person or entities, not official organs of a state, but empowered by the law of the state. Such persons or entities could be public corporations, semi-public entities or even private companies, as long as they are authorized to exercise governmental activities of the kind that a state organ usually would do. Examples of such entities could be an airline which has received a certain delegation in relation to immigration control, or private companies delegated to execute punishments, e.g. privatized penal institutions.⁵⁴ Thus, the conduct must be related to governmental authority of any kind. The concept of ‘governmental authority’ is not defined in article 5.

Article 8 of the ILC Articles concerns conduct directed or controlled by a state, i.e. conduct not of state organs but under the influence of a state. This type of conduct can be observed under two kinds of circumstances: conduct of private persons acting under the instructions of a state and conduct of private persons acting under the state’s direction and control.⁵⁵ On account of the principle of effectiveness in international law it is in both cases important to establish a real link between the state and the actors. Doing this is more difficult in connection with the second circumstance and it is only when a state has control over the specific act of a person or an entity that State Responsibility can be established.⁵⁶ There are particularly two court cases in the international practise which have dealt with this kind of

⁵³ ILC, p. 101.

⁵⁴ *Id.*, p. 92.

⁵⁵ *Id.*, p. 104.

⁵⁶ ILC, pp. 104 -105.

situation: the *Military and Paramilitary Activities Case*, also called the Nicaragua case (ICJ) and *Tadic* case (ICTY).⁵⁷

In the *Nicaragua* case the ICJ had to determine the link between the armed insurrectional movement *Contras* and the United States. The ICJ stated that it was not enough if the conduct of the *Contras* was incidentally linked to the United States. Without a certain degree of control the United States could not be held responsible under international law. The financing, organizing, training, supplying and equipping of the *Contras* were not sufficient for the attributing of acts committed by *Contras* to the United States. The ICJ considered that it needed to be proved that the United States had effective control of the military operations in question in the case.⁵⁸ The Appeals chamber of ICTY in the *Tadic* case came to a different conclusion. The issue in this case was to prove a link between the Bosnian Serb army and the Yugoslav army. The Appeals chamber found that the requisite degree of control by the Yugoslavian authorities over the armed forces in question was: “overall control going behind the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations”.⁵⁹ This was to disagree with the ICJ’s definition of sufficient degree of control, but the circumstances in the two cases were different. The Appeals chamber in *Tadic* case argued that the degree of control may vary according to the factual circumstances in each case. For instance, acts by private individuals or an unorganised group of persons may demand a higher level of control than organised military groups.⁶⁰ The Appeals chamber further argued that international practise in general used a lower level of control than the Nicaragua-test, e.g. the Iran-United States Claims Tribunal, which, in the *Yeager* case, did not require a specific order for the acts of the revolutionary guards to be attributable to the new Iranian government.⁶¹

In the text of article 8 the terms “instructions”, “direction” and “control” are alternative, i.e. it is enough to establish one of them. Still unclear is, as mentioned above, to what degree they have to be connected to the particular act in question. When it comes to actions going beyond the extent of authorisation by a state to a person or groups of persons the question whether these actions could raise State Responsibility for the state arises. Such an issue could, according to the ILC, be determined by asking whether the action was incidental to, or clearly beyond, the instructions made by the state. If a state has given lawful instructions to persons who are not its organs the risk of these instructions to be carried out in an unlawful way is small. Nevertheless, when persons or other entities have committed

⁵⁷ *Tadic* case (appeal), Prosecutor v. Dusko Tadic, Judgment of 15 July 1999, Case no: 94-1-A and *Nicaragua* case, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Order of 26 November 1984, I.C.J. Reports 1984, p. 392.

⁵⁸ *Nicaragua* case, supra note 57, paragraph 115.

⁵⁹ *Tadic* case (appeal), supra note 57, paragraph 131.

⁶⁰ *Id.*, paragraphs 117-118.

⁶¹ *Id.*, paragraphs 124 and 127. For more information about the *Yeager* case see chapter 3.3.1.

unlawful acts under the state's control, the conditions for attribution will still be met and the actions will raise State Responsibility under article 8.⁶²

As to the conduct of state owned, or state controlled, private companies the international law acknowledges the principle of separateness between conduct of such and conduct of state organs. This is the case if the company-form is not used solely as a cover for governmental activities, i.e. if a state is using its ownership in order to look after its own interests.⁶³

3.2.4 Conduct in the Absence or Default of Official Authorities – Article 9

Article 9 is the one of the ILC Articles that is of most interest in the context of State Responsibility during state failure. This article deals with the case when a person or a group of persons are carrying out acts of governmental authority in the absence or default of a real government authority. Such conduct can raise State Responsibility when the actions are taken 'in circumstances such as to call for', i.e. when regular authorities dissolve, are disintegrating, suppressed or for the time being inoperative, but also when regular authorities are gradually being restored. Examples of situations when article 9 could be applicable are during a foreign occupation, during an armed conflict or during a revolution.⁶⁴ The principle in article 9 is said to respond to the case of *levée en masse*, the self-defence of the citizenry in the absence of regular forces.⁶⁵ This principle is also stated in article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land which reads:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.⁶⁶

A similar rule can be seen in article 4 paragraph A (6) of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War which reads:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: [-----] (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist

⁶² ILC, pp. 108-109.

⁶³ *Id.*, pp. 107-108.

⁶⁴ *Id.*, p. 109.

⁶⁵ *Id.*

⁶⁶ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, entered into force 26 January 1910.

the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.⁶⁷

In its effect the principle reflects a form of necessity.

Regarding the applicability of article 9 there are three conditions stated in the article: First, the conduct must effectively relate to the exercise of elements of governmental authority. Second, the conduct must be carried out in the absence or default of the official authorities. Third, the circumstances must be such as to call for the exercise of those elements of authority.⁶⁸ As to the first condition the nature of the activity has more weight than the existence of a relation to an organ of the state. The persons referred to in article 9 must be performing governmental activities, though on their own initiative. They are not comparable with a *de facto* government, which in itself is an apparatus of the state replacing the former government of a state and as such falls under the scope of article 4. Article 9 presupposes an existing government that has been overthrown or for other reasons has no sovereignty over the territory or parts of the territory. According to the ILC, article 9 might be applicable to the conduct of a government in exile, although this depends on the circumstances.⁶⁹ As regards the second condition the formulation of ‘absence and default of the official authorities’ is supposed to cover both the situation of total collapse and that of partial collapse.⁷⁰ Noteworthy is, as mentioned above, that these situations are characterizations of the situations of state failure – partial collapse, and state collapse – total collapse. The third condition implies that some exercise of governmental functions must be called for, although not necessarily for the specific conduct in question. This means that the circumstances in relation to the persons in question must have been justifying the attempt to exercise governmental functions. This normative element in the form of conduct entailed by article 9 distinguishes the article from the general principle that the conduct of private persons, including insurrectional groups, is not attributable to the state.⁷¹

3.2.5 Conduct of an Insurrectional or other Movements – Article 10

This article is supposed to cover the exceptional case when an insurrectional movement succeeds in its attempt to overthrow, and replace, the existing

⁶⁷ Geneva Convention (III) relative to the Treatment of Prisoners of War Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950. (75 United Nations, *Treaty Series*, 135).

⁶⁸ ILC, p. 110.

⁶⁹ *Id.*, note 178.

⁷⁰ *Id.*, p. 111.

⁷¹ *Id.*

government of a state. State Responsibility can thereafter be raised for the conduct committed by the movement during the time of insurrection. This is an exception to the principle that conduct of private persons is not attributable to a state. This exception is based partly on the principle of continuity, and partly on the fact that a government, which has no control over the conduct of an insurrectional movement, cannot be held responsible for the movement's actions. The content of article 10 is also supported in arbitral jurisprudence, for instance in the *Solis* case, and in diplomatic practise.⁷² In the *Solis* case Commissioner Nielsen stated that it was a well-established principle of law that a government could not be held responsible for the actions of an insurrectional movement when the government itself was not guilty of the breach of good faith or negligence in suppressing rebellious action.⁷³

According to the ILC, there must be a real and substantial continuity between the insurrectional movement and the government it later forms. The meaning of paragraph 1 in the article should also not be taken too far, i.e. it is not enough that parts of a rebellious movement or elements of its politics, in the spirit of reconciliation, is included in a reconstructed government to raise responsibility for the state for the conduct committed by the movement.⁷⁴ The definition 'insurrectional groups or other movements' is hard to define since it could contain different kinds of groups which can be based both on the territory of the state and on the territories of third states. The definition in article 1 of the second additional protocol on the laws of armed conflict of 1977 can be taken as a guideline.⁷⁵ Article 1 paragraph 1 of the protocol refers to: "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its [a High Contracting Party] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".⁷⁶ The intention with the writing of the second paragraph in article 10 of the ILC Articles – 'the whole or parts of the territory' and 'or in any other territory under its administration' is to take account of the differing legal status of various dependent territories.⁷⁷

Acceptance for the two positive rules of attribution in article 10 can be found in both state practise and in arbitral decisions. For instance, the Supreme Court of Namibia expressed in a ruling the state's willingness to accept "anything done" by the predecessor South African administration and the mixed commission for Venezuela, established as early as 1903, supported the attribution of conduct of insurrectionary movements when they succeeded in achieving their revolutionary goals.⁷⁸

⁷² ILC, p. 112.

⁷³ *Solis* case, UNRIIA, vol. IV, p. 358, at p. 361.

⁷⁴ ILC, p. 114.

⁷⁵ *Id.*, p. 115

⁷⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) United Nations, *Treaty Series*, vol. 1125, p. 609. Entered into force 7 December 1978.

⁷⁷ ILC, p. 114.

⁷⁸ ILC, pp. 116-118.

3.2.6 Legal Writing on the Attribution Articles

Most scholars, among them Pierre Klein, Professor of International Law at the *Université libre de Bruxelles*, agree on the fact that a major part of the ILC Articles reflects international customary law.⁷⁹ The attribution articles are considered to be among the most detailed and widely accepted of the ILC Articles.⁸⁰ The attribution articles are based on three rationales; the search for agency, encouragement of control and encouragement of lawful behaviour. The search for agency is seen in the efforts of establishing a necessary link between an act and a state for the act to be an act of state. The articles also encourage control by the government for minor violence and in relation to other states and their nationals. The encouragement of lawful behaviour is linked to the principle of continuity, which easiest can be seen in relation to article 10.⁸¹ In case of state succession, even through a state coup, the new government will be held responsible both for actions by the old government and for its own conduct during times of revolution.

David D. Caron, C. William Maxeiner Distinguished Professor of Law at the University of California at Berkeley, has in several articles emphasized the importance of not treating the ILC Articles as a treaty. The ILC Articles are therefore not to be seen as a source of law, but rather as an evidence of a source of law. The form in which the articles were adopted is not one of the listed sources of law in article 38 in the ICJ Statute and the articles cannot be interpreted according to the interpretation rules in the Vienna Convention on the Law of Treaties.⁸² According to Caron it is therefore important that arbitrators and others do not apply the articles too uncritically and that they do not comply with them too easily, something, which he considers arbitrators of the Iran – United States Claims Tribunal to have done.⁸³

3.3 The Iran – United States Claims Tribunal

The Iran – United States Claims Tribunal was founded as a result of a part of the Algiers accords in The Hague, the Netherlands, in 1981. The claims settlement agreement which, *inter alia*, defines the jurisdiction of the Tribunal, is in form a declaration by the government of Algeria but in effect an international agreement between the United States and Iran.⁸⁴ The Tribunal came into existence as one of the efforts taken to resolve the crisis between the Islamic Republic of Iran and the United States after the hostage crisis in November 1979 and after Iranian assets were frozen by the United States. The Tribunal has the general character of an International Mixed

⁷⁹ Klein, p. 168.

⁸⁰ Christenson in Lillich (ed), 1983, p. 323.

⁸¹ Caron in Lillich (ed), 1998, p. 129.

⁸² Vienna Convention on the Law of Treaties, 1969, United Nations, *Treaty Series*, vol. 1155, p. 331. The Convention entered into force on 27 January 1980.

⁸³ Caron, pp. 867-869.

⁸⁴ Selby, p. 240.

Arbitral Tribunal and its jurisdiction consists of both official claims between the two states and claims of nationals of either party against the government of the other.⁸⁵ There has been some debate whether the Tribunal is of public or private nature especially as regards the claims of nationals of either state, but most scholars have agreed on the Tribunal as being a hybrid between the two. In its function as an interstate Tribunal it is charged with deciding on questions of State Responsibility, on which it applies the rules of public international law.⁸⁶

Most of the rulings of the Tribunal involving questions of State Responsibility have been in the context of the wrongful expulsion awards. In these cases it has been for the Tribunal to decide whether the actions of different revolutionary groups are attributable to the government of the Islamic Republic of Iran. Examples of such cases will be given below. When considering the worth of the contribution of the Tribunal to the subject of State Responsibility one has to keep in mind that some aspects of the Tribunal's rulings are dictated by the terms of the claims settlement agreement. Nevertheless, a number of important decisions in the field of State Responsibility have been made.

3.3.1 Yeager vs. the Islamic Republic of Iran

On January 18, 1982, the United States filed a statement of claim to the Iran-United States Claims Tribunal on behalf of Kenneth P. Yeager for, *inter alia*, wrongful expulsion from Iran. The United States also filed a request for an interlocutory award on behalf of the approximately 1 500 U.S. claimants who left Iran during the period from October 1978 through February 1979. The U.S. considered these people to have been expelled in violation of international law.⁸⁷

The Claimant considered the increasing anti-Americanism during the end of the 1970's, which erupted in the revolution in 1979, to have been instigated by Ayatollah Khomeini and supported by the leaders of the revolution.⁸⁸ The Claimant considered himself to have been expelled from the country in violation of international law. The expulsion had been executed by the revolutionary guards who had come to his apartment, told him that he had 30 minutes to pack and leave, escorted him to a hotel where he was guarded overnight, and put him on a plane the next day. According to the Claimant he was searched several times, for instance, when he and his wife were forced to leave the apartment and before they got on the plane.⁸⁹

⁸⁵ Information from the official homepage of the Iran – United States Claims Tribunal (at: <http://www.iusct.org/background-english.html>. Last accessed on Mars 29, 2006).

⁸⁶ Lloyd Jones, p. 277.

⁸⁷ *Kenneth P. Yeager v. the Islamic Republic of Iran* (1987)

Iran – United States Claims Tribunal, vol. 17, pp. 92 – 116, at p. 93.

⁸⁸ *Yeager* case, supra note 87, at p. 94.

⁸⁹ *Id.*, p. 95.

The Respondent denied that Ayatollah Khomeini, who was now the head of the Iranian government, had deliberately instigated the anti-Americanism and claimed that the anti-American activities, which took place before and during the revolution, were not attributable to the new government. During the time numerous groups, among them counter-revolutionaries and armed Afghans, had operated outside the control of the new government. The Respondent admitted that the revolutionary guards and the Komiteh personnel were engaged in the maintenance of law and order from January 1979 to some months after February 1979. At the same time, government police forces quickly lost control over the situation.⁹⁰

The Tribunal decided that each case must individually be the subject of a trial and dismissed the United States request for an interlocutory award on behalf of the 1 500 expelled American citizens.⁹¹ In the merits the Tribunal had to decide whether the conduct by the revolutionary guards, who had acted in the expulsion of the Claimant from Iran, could be attributed to the new government. It was convinced that the statements and acts of the leader, Ayatollah Khomeini, were attributable to the new government, but was not sure about the attributability of statements and acts by others.⁹² The tribunal emphasised the need to “identify with reasonable certainty the actors and their association with the State”. It thereafter stated that the committees founded, the so called Komitehs, served as local security forces in the immediate aftermath of the revolution and that they in general had been loyal to Ayatollah Khomeini and the clergy.⁹³ The Komitehs had also, after the revolution, been incorporated within the State and had gotten a firm position within the State structure. In May 1979, the Komitehs were officially recognized under the name Revolutionary Guard. The two men who took the claimant to the Hotel were members of this group. The Tribunal further argued that, for the actions of the revolutionary guards to be attributable to the State, they must have been exercising elements of governmental authority in the absence of official authorities under circumstances that justified those elements of authority to be performed.⁹⁴ The Tribunal found sufficient evidence to establish a presumption that the Revolutionary Guards (the Komitehs) after 11 February 1979 were acting in fact or on behalf of the new government or at least exercised elements of governmental authority in the absence of official authorities.⁹⁵ It further stated that the new government must have known about the conduct performed by the revolutionary groups, but that it never objected to it.⁹⁶ The wrongful expulsion of the Claimant was therefore attributable to the Islamic Republic of Iran. One of the arbitrators, Mr. Mostafavi, dissented in part.

⁹⁰ *Id.*, pp. 96-97.

⁹¹ *Id.*, p. 96.

⁹² *Id.*, p. 101.

⁹³ *Id.*, p. 102.

⁹⁴ *Yeager* case, *supra* note 87, at p 103.

⁹⁵ *Id.*

⁹⁶ *Id.*, p. 104.

3.3.2 Short v. the Islamic Republic of Iran

On January 19, 1982 the U.S. government filed a statement of claim on behalf of the American citizen Alfred L.W. Short. The claimant sought substitution for the respondent's wrongful acts or omissions, which compelled him to leave Iran. This substitution would cover the loss of employment benefits and of personal property allegedly resulting from the wrongful expulsion of the Claimant from Iran.⁹⁷

The Claimant began his employment in Iran in the late 1978. He experienced that he was practically sat under house arrest after the declaration of martial law on the onset of the Islamic revolution. On January 13 the Claimant accepted an extension of his contract with the employer. On February 4, 1979, the Claimant was notified by his employer to pack his personal belongings in order to be evacuated. The evacuation took place on 8 February by U.S. air force. On the following day the Claimant's employment was terminated, according to the Claimant, solely due to his forced evacuation for which the Islamic Republic of Iran was responsible.⁹⁸

The Respondent claimed that evacuations of Americans from Iran often took place "voluntarily" or upon recommendation of the American government or of the employers and emphasized the fact that other nationals, such as Europeans or Asians, also had left the country during the time in question. The Respondent argued that the Claimant had departed Iran voluntarily and that no action had been taken that could be construed as an expulsion of nationals of the United States. The causes for the departure of the U.S. nationals could therefore not be attributable to the new government of Iran.⁹⁹

The Tribunal had to decide on the question whether the facts invoked by the Claimant were attributable directly or indirectly - as a result of lack of due diligence or of deliberate policies - to the new government of Iran. It first addressed the question of the causes for expulsions. Even though some causes are attributable to a state, the Tribunal claimed that when foreigners leave a country on the grounds of political turmoil, no assumption could be made that this always constitute cases of wrongful expulsion.¹⁰⁰ The Tribunal stated that although conduct by an insurrectional movement in name of continuity can be attributable to the new government after a successful revolution, the Claimant had in this case not identified any agent of the revolutionary movement whose actions compelled him to leave Iran.¹⁰¹ The Claimant had left the country on February 8, three days before the proclamation of the Islamic revolution. The Tribunal considered the revolutionary movement at that time not capable of establishing control over

⁹⁷ *Alfred L.W. Short v. the Islamic Republic of Iran* (1987)

Iran - United States Claims Tribunal, vol. 16, pp. 76-102, at p. 78.

⁹⁸ *Id.*, pp. 80-81.

⁹⁹ *Id.*, p. 82.

¹⁰⁰ *Short* case, *supra* note 97, p. 83.

¹⁰¹ *Id.*, p. 84.

any part of the Iranian territory. The Tribunal further stated that acts of supporters of a revolution cannot be attributed to the government following a successful revolution. This, in accordance with the fact that conducts by government supporters cannot be attributed to a government. This was recalled in the *United States Diplomatic and Consular Staff in Teheran*.¹⁰² The Claimants reliance on the declarations made by the revolutionary leaders lacked the ingredient of being the cause for the Claimants expulsion. The case was therefore dismissed because of the Claimants failure to prove that his departure from Iran was attributable to the wrongful conduct of Iran.¹⁰³ The dissenting opinion by Mr. Brower will be discussed later on.¹⁰⁴

3.3.3 Young v. the Islamic Republic of Iran

The Claimant, Arthur Young & Company, filed a statement of claim on 18 January 1982. The Claimant was a partnership of certified public accounts, which between September 1972 and April 1979 had an office and practice in Tehran, and whose clientele was mostly non-Iranian. The Claimant had, allegedly due to wrongful actions by the government of Iran, been compelled to close its Tehran office, evacuate its non-Iranian personnel and finally leave the country. Due to the acts attributable to the new government of Iran, the Claimant sought compensation for losses and damages. The Respondent denied that the actions, which made the Claimant close its office and leave the country, were attributable to Iran.¹⁰⁵

The Claimant argued that anti-Americanism tendencies had started as early as 1976 and thereafter increased. On 5 November 1979 the Claimant's bank was blown up by members of the revolutionary movement, something which made it harder for the Claimant to maintain its business. On 6-7 November 1978, the family of a US partner in Iran, James Ervin, was compelled to leave Iran due to risks for their health and safety created by actions by the Revolutionary guards. Armed members of the Revolutionary Committee also broke into Mr Ervin's house searched it for two and a half days. One employee to the company was threatened with bodily injury and threats towards Americans increased. Due to the actions of the new government the Claimant lost clients, the government also breached the contracts of the clients, which caused a rapid deterioration of the company's business. It finally had to close its Tehran office and leave Iran.¹⁰⁶

The Respondent argued that the actions mentioned by the Claimant were not attributable to Iran. Iran had not terminated contracts with the Claimant's clients and it had neither caused the closing of the Claimant's business nor

¹⁰² *Id.*

¹⁰³ *Id.*, p. 85.

¹⁰⁴ See chapter 3.4.2.

¹⁰⁵ *Arthur Young & Company v. the Islamic Republic of Iran* (1987)

Iran-United States Claims Tribunal, vol. 17, pp. 245-265, at pp. 246-247.

¹⁰⁶ *Young* case, supra note 104, pp. 247-248.

ordered the expulsion of the Claimant. The Claimant had left on its own initiative because of the revolutionary situation in the country.¹⁰⁷

The Tribunal stated that the decisive issue for the case was whether the acts described by the Claimant were attributable to the new government of Iran. It further stated that the Claimant carried the burden of proof.¹⁰⁸ The Claimant had only given general reference about ‘actions of agents of the Iranian government’ which was insufficient in giving enough evidentiary support to these actions. The Claimant had also failed to explain who these agents were and how they were associated with the new Iranian government. In the Tribunal’s view the attributability of acts to a state is justified only when the identity of acting persons and their associations with the state is established with reasonable certainty.¹⁰⁹

The Tribunal further argued that the employee to the company, James Ervin, had no reliable source to know that members of the revolutionary groups performed the break-in to his apartment. The Claimant had also not given evidence that the increasing threats were attributable to Iran. The Tribunal also questioned why, if its client’s contracts were wrongfully breached, the Claimant considered itself entitled to damage for the breached contracts. Consequently, the Claimant had given insufficient evidence that its expulsion was due to actions attributable to the new Iranian government. A unanimous chamber dismissed the claim.¹¹⁰

3.3.4 Rankin v. the Islamic Republic of Iran

The Claimant, Jack Rankin, left Iran on 17 February 1979 on an evacuation flight organized for American nationals by the United States embassy in Iran. The Claimant was employed by the Bell Helicopter International, Inc. and claimed compensation for loss of personal property and property rights for his wrongful expulsion from Iran. The Respondent, the government of the Islamic Republic of Iran, denied that a wrongful expulsion had taken place and stated that the Claimant left voluntarily or under instructions from his employer or his own government.¹¹¹

The Claimant arrived in Iran on 19 February 1974 and had thereafter gotten his employment extended on a two-year basis several times. The last extension he applied for was approved in October 1978 and was supposed to have duration until February 1980. In October 1978 the Claimant stated that it became harder to live in Iran as a foreigner and that his company offered repatriation at the company’s expense. Nevertheless, the company encouraged people to stay on their positions in Iran. On 12 February 1979

¹⁰⁷ *Id.*, p. 249.

¹⁰⁸ *Id.*, p. 256.

¹⁰⁹ *Id.*, pp. 257-258.

¹¹⁰ *Id.*, p. 258.

¹¹¹ *Jack Rankin v. the Islamic Republic of Iran* (1987) Iran-United States Claims Tribunal, vol. 17, pp. 135-152, at p. 136.

the Claimant and his wife required the company's permission to leave their apartment in order to join the Claimant's co-workers who had gathered at the Hilton Hotel. The couple got permission and went to the Hilton where armed clashes between different groups, *inter alia*, Afghan labourers, were taking place. Subsequently a group from the revolutionary movement established order and the company's management met with Dr. Ibrahim Yazdi, a senior leading figure in the revolutionary movement, who told them that he wanted all of the company's staff to leave Iran. The Claimant was taken by bus to the airport on the 17 of February from where he left for the United States.¹¹²

The Tribunal stated, as in *Yeager* and *Short* case, that an interlocutory claim by the United States was dismissed because of the importance to try every case individually.¹¹³ It further stated that the burden of proving the wrongfulness in the case was on the Claimant.¹¹⁴ The Tribunal, when referring to the ILC draft article 15 (now article 10), stated that a successful revolutionary movement can be able to raise State Responsibility, but that it must be clear that the actions leading to the alleged wrongful expulsion are acts of the revolutionary movement itself and not the acts of an unorganized mob or its liking.¹¹⁵ The Claimant considered the anti-Americanism to be the driving force of the revolution while the Respondent stated that the target for the revolution had been the Shah and his supporters. The Tribunal found evidence in the form of public statements by the Ayatollah Khomeini that the new Government's policy was to eliminate the influence of foreigners in Iran, something which caused the departure of most Americans from Iran. The question in this case was, since the circumstances of each departure must be examined, whether the Claimant had intended to leave Iran or whether he was wrongfully expelled from the country.¹¹⁶

The Claimant stated that he had intended to leave Iran for vacation, but to come back after a couple of weeks. He also claimed that he had not sold any possessions in order to prepare for a permanent departure from the country. The fact that his landlord testified that the Claimant had sold most of his belongings to different people before he left contradicted this.¹¹⁷ The Tribunal found that there were conflicting statements regarding which purpose the Claimant had had to go to Hilton. The Claimant had therefore failed to prove his intention to return to Iran. Consequently, he had not satisfied the burden of proving that the implementation of the new policy by the Respondent was the reason why he decided to leave the country. Rather it was the turmoil and chaotic conditions associated with this stage of the revolution which was the reason for the Claimants departure. A unanimous chamber therefore, dismissed the claim for lack of proof that his departure

¹¹² *Id.*, pp. 136-137.

¹¹³ *Id.*, p. 138.

¹¹⁴ *Id.*, p. 142.

¹¹⁵ *Id.*, p. 144.

¹¹⁶ *Id.*, pp. 149-150.

¹¹⁷ *Rankin* case, supra note 110, p. 148.

was caused by wrongful acts of the government or acts attributable to it under law.¹¹⁸

3.4 The Tribunal's Contribution to the Law of State Responsibility

The Tribunal's jurisprudence is by many scholars seen as an important counterpoint to the more abstract and generalized work by the ILC. In 1997 the Tribunal had produced 580 awards, among which a modest number of cases involved questions of public international law.¹¹⁹ In comparison with the customary rules of State Responsibility the Tribunal's jurisdiction is possibly a bit wider. For instance, in the jurisdiction of the Tribunal, the concept of government is supplemented by 'any political division' and 'any entity controlled by the government', which goes beyond the customary concept of state notion.¹²⁰ The meaning of 'Iran' also has a wider implication than the government of Iran.¹²¹

The Tribunal made a distinction between *de jure*- and *de facto* tests in its awards. *De jure* means that the organ or agent has an official link to the government while *de facto* means that there is an unofficial link proved by facts. Example of this can be seen in the *Yeager* case where the Tribunal stated that the Revolutionary guards *de facto* exercised sovereign powers when they seized the claimant's money at the airport. By this the Tribunal also explicitly employed the rationale 'encouragement of control'.¹²² The Tribunal also, in its reasoning, stated that the Revolutionary guards later got a firm position within the state structure. Therein arose the *de jure* link and the Tribunal hence noted the difference between the *de jure* and the *de facto* tests.¹²³ There was a short period after the overthrow of the Shah before the Islamic Republic of Iran was founded during which time several groups that were not *de jure* part of the government exercised elements of governmental authority. According to Caron the Tribunal overlooked that different attribution analysis maybe should have been done between the revolution before the Revolutionary guards and others received their status within the system.¹²⁴

The Tribunal has also repeatedly held the new government of Iran responsible for breach of contracts which the Shah-government had entered into. This standpoint was completely in accordance with the principle of continuity, but some exceptions were accepted. These exceptions were related to whether there had been a fundamental change of circumstance,

¹¹⁸ *Id.*, p. 151.

¹¹⁹ Caron in Lillich (ed.), 1998, p. 119.

¹²⁰ Article VII (3) and (4) of the Claims Settlement Declaration for the Tribunal (available at: <http://www.iusct.org/claims-settlement.pdf>, last accessed on 28 March 2006).

¹²¹ Caron in Lillich, 1998, p. 112.

¹²² *Yeager* case, supra note 87, p. 110.

¹²³ *Id.*, p. 103-104.

¹²⁴ Caron in Lillich (ed.), 1998, p. 139-140.

e.g. in the so called *Questech* case where a contract of military nature was considered legitimate to breach due to political sensitivity.¹²⁵

According to Caron, the practise of the Tribunal is an important tool in the interpretation and application of the ILC Articles. Because of the Tribunal's bilateral character it was easier for the arbitrators to lean on the ILC draft, particularly when the Iranian arbitrators criticized them, than to make their own interpretation of the rules of State Responsibility. Nevertheless, he claims that the Tribunal's jurisprudence also shows the difficulties and the failure of the ILC to create articles that are also easy to apply in practise.¹²⁶ He further states that the ILC Articles are too theoretical and not in conformity with state practise.

3.4.1 Criticism against the Tribunal

The Tribunal has been criticized to decline to take on some of the difficult questions presented to it. As stated earlier, Caron disapproved of the fact that the Tribunal did not seem to consider whether the analysis should diverse between the time following right after the revolution and the time when the new Islamic Republic was founded.

The Tribunal has also been criticized for using the same agency rules regarding revolutionary groups as for states.¹²⁷ Judge Brower, in his dissenting opinion to the *Short* case, also questioned this by asking why the same rules should be applied for 'movements' as for 'organisations'.¹²⁸ Caron and Brower both question the necessity of searching for agency even when the situation involves revolutionary movements, i.e. circumstances resembling those later stated in articles 9 and 10 in the ILC articles. Since the Tribunal very rarely attributed conduct by supporters of the revolution to the new government the burden of proof laid heavy on the claimants. Jamison Selby Borek (Jamison M. Selby), Assistant Legal Adviser for Legislation and Management at the U.S. Department of State, has stated that the burden of proof on the claimants was too heavy, especially in the wrongful expulsion cases.¹²⁹ The *Yeager* case is the only wrongful expulsion case where the claimant succeeded in his complaint. Yeager could prove that the persons who fetched him in his apartment and took him to the Hilton hotel were members of the revolutionary guard. In his case the persons wore distinctive armlets and the Hilton hotel was during the time controlled by the revolutionary guards. Both in the *Short* and *Young* cases the claimants failed in proving who the agents really were. According to Caron the Tribunal created a 'fortuity of proof', i.e. it depended on

¹²⁵ *Id.*, p. 180.

¹²⁶ *Id.*, pp. 181-182.

¹²⁷ *Id.*, p. 147.

¹²⁸ Judge Brower in the *Short* case, supra note 97, p. 86.

¹²⁹ Selby in Lillich (ed.), 1998, p. 320 and Selby, p. 244.

coincidences whether the claimant would be able to establish a basis for State Responsibility or not.¹³⁰

The Tribunal has also been criticized that it, in demanding partial proof in each claim, presumed certain qualities of social order not present under revolutionary circumstances.¹³¹ Suggestions of how to diverse private from public conduct under such circumstances will be presented below.

3.4.2 Alternatives to a Search for Agency

Different suggestions on how to establish State Responsibility have been presented in the legal writings. Selby proposes a causality link to be established between the conduct and the respondent.¹³² To establish such a link would make it more difficult for governments to hide beneath seemingly private conduct. As can be seen in the *Short* and the *Young* cases governmental action enjoys a high degree of protection when it is private conduct that directly causes the harm.

Judge Brower suggests a presumption to be made, for instance in the wrongful expulsion cases. In his dissenting opinion to *Short*, he argued:

Given the rather small number of departing Americans who have made any claim here, and having regard for all of the other circumstances, cited above, I believe the appropriate way for the Tribunal to approach this Case (and others like it) would be to presume that any American claimant here alleging that he (sic!) was wrongfully expelled by Iran who departed Iran after 1 February 1979 did so because of the aforementioned acts and omissions of Ayatollah Khomeini, his supporters and followers. In order to leave it open to the Tribunal to find in a given case that the departure in question was due to other factors, and thus rule in favour of the Respondent, such presumption should be rebuttable.¹³³

In taking such a presumption, it would thereafter be up to the Tribunal to decide whether the departure was due to other circumstances than the beforehand. In applying the notion of constructive expulsion, i.e. that the leaders of the revolution had a specific intent to expel all Americans from the country, Judge Brower emphasises the foreseeable effect of the declarations made by Ayatollah Khomeini. He considered the majority in the case to be inconsistent when they recognized the notion of constructive expulsion but still required the claimant to prove attributability. He argued:

First of all, this view of things overlooks the fact that this Case is premised on allegations of a constructive expulsion of all Americans in Iran (including this Claimant) rather than on a specific event or act

¹³⁰ Caron in Lillich (ed.), 1998, p. 151.

¹³¹ *Id.*, p. 182.

¹³² Selby in Lillich (ed.), 1998, pp. 317-320.

¹³³ Judge Brower in *Short* case, supra note 97, p. 101, at paragraph 32.

aimed at Claimant individually by direction of the revolutionary authorities. [-----] It is inherent in a constructive mass expulsion that the acts effectuating it will be, in a high degree, general, unspecific, unfocused and indirect.¹³⁴

3.5 State Responsibility during State Failure

The intent of the ILC in the writing of the ILC Articles was to cover all situations, i.e. there should not be any “loop holes” where responsibility could not be raised. Nevertheless, the ILC did not have the specific concept of failed states in mind when forming the articles.

Although criticism has been raised as regards the applicability of the ILC Articles, the attribution articles and most parts of the ILC Articles are seen as codifying international customary law. The jurisprudence of the Iran-United States Claims Tribunal shows that there are more to wish for regarding the application of the articles. Even though one must keep in mind that the criticism for most part has come from American scholars, I cannot disagree with the fact that the burden of proof was held at an extremely high level. The circumstances under which revolutions take place are often turmoil, which make it harder to collect evidence or to have a clear image of the situation in question. In the future more practice by international courts and arbitral tribunals will be needed to get a better picture of how to apply the ILC Articles.

3.5.1 The Applicability of Article 9

Article 9 of the ILC Articles is the article that is most often applicable in situations of state failure. The ILC has in the article listed three conditions which must be fulfilled for State Responsibility to be raised. First there must be elements of official authorities. Second there must be an absence of official authorities and, third, the situation must be of such nature as to call for the exercise of these governmental authorities.¹³⁵ The article is supposed to cover situations of both partial and total collapse of state authorities. As far as this goes article 9 is applicable in many situations of state failure, but the commentaries to the article also states that it is applicable when regular authorities dissolves, are disintegrating or when regular authorities are being restored. Examples of such situations are armed revolutions during a foreign occupation or during armed conflict. Article 9 is clarifying as regards situations of state failure, but cannot be applied in all cases. For instance, failed states are often characterized by the fight over power by different *de facto* regimes. The commentaries to article 9 states clearly that the article concerns acts by an individual person or group of persons. These actors are, according to the ILC, not equivalent to a *de facto* regime.¹³⁶ Furthermore,

¹³⁴ *Short case*, supra note 87, p. 94, at paragraph 15.

¹³⁵ See chapter 3.2.4.

¹³⁶ ILC, p. 110.

the application of article 9 in the absence of official authorities is not valid in cases of states suffering from a longer period of state failure – state collapse. Such a state is Somalia.

Somalia has been without a regular government since the death of its former president Siad Barre in 1991. After that, all attempts of reconciliation and rebuilding have failed. The case of Somalia also constitutes a unique occurrence in the history of the UN; the state had no representation in the organisation between the years 1992 – 2000. Somalia remained unrepresented in the UNGA because it lacked a government and entities claiming to be the legitimate representatives. Nevertheless, the UNGA did not make any formal decision concerning the representation of Somalia.¹³⁷ Somalia therefore seemingly hang lose in the context of State Responsibility. Neither article 9 nor article 10 is applicable and the other articles on attribution presuppose that “normal” state structures exist.

Even in situations of state failure when article 9 is applicable, the rules of State Responsibility are only valid in relation to states. As mentioned earlier in this thesis, scholars like Christopher Clapham believe that state failure in many cases emanates from the assumption that authorities in post-colonial states were able to run the states “western-wise”.¹³⁸ This raises the question of what constitutes a state and how a state is defined. The rules of State Responsibility are ultimately dependant on how the concept of statehood is defined in international law and by the international community. An examination of the rules on statehood is therefore necessary.

¹³⁷ Koskenmäki, pp. 13-14.

¹³⁸ See chapter 2.2.

4 The Concept of Statehood

States, as we know them, constitute the building blocks of the modern order and are often based on a West European (Westphalian) model. Before an entity is recognized as a state it is not accepted as a full member of the international community and can therefore not obtain the obligations and rights which come with statehood. A state also has the privilege to be able to contribute - both by state practise and through treaties – to the development of international law. For an entity to be recognized as a state it must meet the defined requirements laid down by international law.

4.1 The Criteria of Statehood

The basic requirements for an entity to be recognized as a state are stated in the 1933 Montevideo convention.¹³⁹ According to the basic criteria a state must have a permanent population, a defined territory, a government which exercises control over its territory and the capacity to enter into relations with other states (the criterion of independence). Further, the independence should have been obtained in keeping with the principles of self-determination and not in order to carry out a racist policy. These criteria could be said to represent an institutional (formal) approach.¹⁴⁰ Article 1 of the Montevideo convention can be considered to be a customary norm.¹⁴¹ The criterion of an ‘effective government’ does not imply that a state has to have a certain type of government, but rather some sort of authority which effectively exercises governmental functions and which is able to represent the state in the international context.¹⁴² As regards the criterion of independence, Crawford suggests a presumption of independence to be applied when an entity is formally independent and the independence was not achieved in an illegal way.¹⁴³ After the disintegration of the republic of Yugoslavia and the Soviet Union, the EU formulated new criteria for states to be recognized by the organisation. For example, if a state wanted to be recognized by EU, it would have to respect democratic principles, human rights and the rights of ethnic and national groups and minorities, accept all agreements about security and stability within the region and adopt all disarmament commitments entered into by the predecessor state.¹⁴⁴ These criteria were by some scholars considered to be too strict, and have not impacted on international law as was expected.

Another approach is the substantive or functional approach. It is based on the functions of a modern state, e.g. the ability to maintain security and

¹³⁹ Montevideo Convention on the Rights and Duties of States, 1933, League of Nations, *Treaty Series*, vol. 165, p. 19. Entered into force 26 December 1934.

¹⁴⁰ AIV and CAVV, pp. 6-7.

¹⁴¹ Schoiswohl, p. 12.

¹⁴² *Id.*, pp. 14-15.

¹⁴³ Crawford, 1979, p. 70.

¹⁴⁴ AIV and CAVV, p. 7.

public order and to deliver public services such as health care and education. Other examples of such norms are the demands that a state must observe the rule of law, practise good governance and contribute to the members of the international community's efforts to make the world safer. Many scholars have protested against these tough demands and have argued that, if these criteria were supposed to be valid, a large amount of the world's states today would fall short.¹⁴⁵

4.2 State Recognition

Recognition of states is to be separated from recognition of governments, of belligerency groups or of national liberation movements etc. Since there is no higher instance – with the ICJ as an exception - which declare entities as states it is often up to states themselves to decide on an entity's status in the international community, and to treat it accordingly. The question of recognition is also to be separated from the question of when a state arises. Recognition is therefore to be seen as having an *ex post* character in international law; one can only recognise what already exists.¹⁴⁶ The meaning of recognition has been contested. Some consider state recognition to be of a merely declaratory nature while others think that recognition has a constitutive function.¹⁴⁷ The first theory seems to have most support, e.g. by the ICTY. Rule 2 in the ICTY's rules of procedure states the definition of a state to be “(iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not.”¹⁴⁸ Others see recognition as either evidentiary or semi-constitutive. The first implies recognition to be an indicator of statehood and a help to establish a fulfilment of the different criteria, while the second considers recognition in borderline cases to have a semi-constitutive function.¹⁴⁹ Reasons why states decide to grant or withhold recognition of entities are often based on political rather than legal considerations. Hence, treaty law, state practise or doctrine cannot state a commonly accepted defining formula of recognition.¹⁵⁰

4.3 The Principles of Continuity and Sovereignty

The continuity of states is one of the most important features in modern international law and even if a state's authority is interrupted, e.g. because of a civil war, the state continues to exist as a state.¹⁵¹ Even if this is a well-stated principle, recent UN practice regarding the state of Somalia could indicate a change; for the first time in UN history UN declared that a member state (Somalia) completely lacked a functioning authority. Yet,

¹⁴⁵ AIV and CAVV, p. 8.

¹⁴⁶ Schoiswohl, p. 6.

¹⁴⁷ *Id.*, pp. 33-34.

¹⁴⁸ ICTY Rules of Procedure, IT/32/Rev. 36 (also available at:

<http://www.un.org/icty/legaldoc-e/index.htm>, last accessed February 16, 2006).

¹⁴⁹ Schoiswohl, pp. 40-43.

¹⁵⁰ *Id.*, pp. 4 and 8.

¹⁵¹ AIV and CAVV, p. 7.

except for some doubts raised by legal scholars, no statements concerning an eventual loss of statehood were made.¹⁵²

Certain rights and obligations come with statehood. An acknowledged state has sovereignty, which means that it has legislative, executive and judicial authority over its territory. The sovereignty is only limited by the obligations a state has taken on itself and obligations inherited in international law. The principle of sovereignty goes hand in hand with the principle of non-intervention and the ban against use of force.

Many scholars are now questioning the two principles of continuity and sovereignty. One example is Jeffrey Herbst, Professor of Politics and International affairs at Princeton University, who argues that a state should be ‘decertified’ if it cannot – or will not – deliver its citizens basic goods. A ‘decertification’ should be used restrictively and would be a way for the United States and other important international actors to protest against the actions of a state which are not acting in accordance with international rules.¹⁵³ Important to note is that most scholars disagree with Herbst’s opinion. Despite the fact that there is a tendency of a decreasing support of the principles of continuity and sovereignty, these opinions are often presented by politicians and scholars in the fields of political science and international relations. The persistence of states is still a fundamental condition of today’s international legal system.¹⁵⁴

The principle of continuity is also challenged by the concept of failed states, something that the case of Somalia and Somaliland explicitly exemplifies.

4.4 Issues of Recognition in Relation to the Case of Somalia

The history of Somalia resembles that of many African nations. The area was colonized after the Berlin conference of 1884-1885 and the Somali people were divided into five different areas, namely British Somaliland Protectorate, French Somaliland, Italian Somalia, the Ethiopian Ogaden and Northern Kenya.¹⁵⁵ The territory was before the colonization not organised as a state and was characterised by a clan- and sub clan system with nomadic pastoralists in the north and agro-pastoralists in the south.¹⁵⁶ Somalia and Somaliland were liberated in 1960 and united in a union to which the people in Somaliland (the north) voted no. The country functioned as a democracy until 1969 when General Siad Barre was brought to power through a successful coup.¹⁵⁷ Barre remained in power until the early nineties and played during the time of the cold war on both ‘halves’.

¹⁵² Koskenmäki, p. 6.

¹⁵³ Herbst in Rotberg (ed.), pp. 312-313.

¹⁵⁴ Koskenmäki, p. 6.

¹⁵⁵ Schoiswohl, p. 97.

¹⁵⁶ Ahmed, p. 115.

¹⁵⁷ Ahmed, p. 116.

Somalia was one of the main recipients of aid during the Cold War and therefore also became one of the most heavily militarized countries in Africa.¹⁵⁸ After years of growing internal dissent and the formation of different movements, such as the Somali National movement in Somaliland, the Somali civil war broke out in the end of the 1980's. The state of Somalia's collapse can be dated from 1991 when Barre was assassinated. Somaliland declared itself independent 1991.¹⁵⁹ After the collapse of Somalia a number of UN-operations aiming to reconstitute the State have been carried through.¹⁶⁰ None of these have been successful.

The entity of Somaliland is today functioning in the same way as many other African states. A governmental structure exists, it has its own currency named Somaliland Shilling, it has three official languages, 11 million inhabitants, large parts of the infrastructure has been reconstructed and minimum international Human Rights standards are being met.¹⁶¹ Nevertheless, it is important to remain critical. Somaliland has not been recognized as a state by the international community and is accordingly not being treated as such.¹⁶² Somalia's current status is unclear. In accordance with the principle of continuity, Somalia is still considered a state. This is also the opinion of scholars such as Riika Koskenmäki, Legal Assistant to the I.U.S.C.T, who, leaning on the opinion of Gerard Kreijen, a Netherland public attorney with expert knowledge of Public International Law, argues as follows:

Consequently, state failure must be associated with a situation of prolonged internal strife and anarchy, which does not affect the continued existence of statehood, protected by sovereignty, and it alone does not lead to state extinction. Any other conclusion would be, in fact, impossible, since the persistence of states is the essential condition of the present international system.¹⁶³

Other scholars, such as Michael Schoiswohl, legal officer of the United Nations Agencies in Afghanistan, are more sceptical to the presumption of continuity in relation to Somalia. According to international law doctrine the state of Somalia has *de facto* ceased to function, most western states have for example issued travel warnings which often refer to the lack of functioning powers in Somalia.¹⁶⁴ In extreme cases a state's disintegration can lead to state dissolution which would make way for the rise of a new state on the territory. The presumption of continuity results in difficulties to

¹⁵⁸ *Id.*

¹⁵⁹ Schoiswohl, pp. 103-104 and 116.

¹⁶⁰ Examples of these operations are operation 'Restore Hope' launched under UNSG resolution 794 in 1992, UNITAF and UNISOM II carried out in accordance with a UNSG decision under chapter VII of the UN-Charter on 26 March, 1993, S/Res/814 (1993). (For more information see Schoiswohl pp. 107-110 and Ahmed, pp. 121-124).

¹⁶¹ Schoiswohl, p. 123.

¹⁶² Minor exceptions exist; Ethiopia approves of Somaliland passports and international aid to Somaliland has been increasing.

¹⁶³ Koskenmäki, p. 6.

¹⁶⁴ Schoiswohl, p. 127.

decide when, and if, a state could be reconstructed and state practise in this area is unclear.

4.4.1 The Meaning of (Non-)Recognition of Somaliland

In cases of secession the most significant recognition for a seceding state would be that of the parent state. In the case of Somaliland that is not a possibility since Somalia has no capacity to grant recognition. Whether Somaliland fulfils the criteria of statehood, and what meaning recognition by the international society has, is, as stated above, often discussed in international legal writing. Clear is, that non-recognition by the international community reinforces the presumption in favour of Somalia. This presumption decreases when the preceding state ceases to exist.¹⁶⁵ Therefore, the remaining question is for how long the international community must, or will, wait for a parent state, in this case Somalia, to recover.

¹⁶⁵ *Id.*, p. 83.

5 Final Conclusions

The expression state failure and its different connotations is a somewhat recent phenomenon in international law and are not yet considered to have any legal value. Nevertheless, failed states exist and they do give rise to several interesting question in relation to international law. I have taken the ILC Articles as a point of departure in order to examine if, and, in such case, in accordance with which articles, State Responsibility can be raised. During the drafting of the articles the ILC had the intention to cover all situations where State Responsibility could be raised, i.e. not to leave any blank spots where an injured state had no state against which to claim redress. The conclusion I have come to is that the ILC has failed with this intent. My conclusion is based on above mentioned, and in the following repeated, facts.

5.1 The Applicability of the ILC Articles

Article 9 is the article of most interest in the context of state failure. The conditions for the article to be applicable are set at a high level. Private persons or groups of persons must perform the conduct in the absence of official authority. The conduct must also contain elements of governmental authority. The exact meaning of the criterion ‘elements of governmental authority’ is not explicitly stated in the articles. Many failed states are also characterized by the fight over power by different factions, or *de facto* governments, or organizations with a quasi-governmental structure. According to the wording in article 9 it is likely that the article mainly concerns provisional acts by individual persons or groups, and not *de facto* governments or organizations with a quasi-governmental structure. The ILC underlines this by stating in its commentaries that: “It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* government”.¹⁶⁶ In addition, the ILC emphasizes the exceptionality of the situation in question, something which further diminishes the possibility to apply the article in situations of state failure.¹⁶⁷

Yet, practice has shown that the article is applicable in situations of temporary state failure, when the requisites in the article are being met. Such a situation occurred during the Islamic revolution in Iran in 1979. The Iran - United States Claims Tribunal, which was founded in order to deal with legal disputes between citizens and the governments of the states, applied the ILC Articles in awards where State Responsibility was in question. Its contribution to the law of State Responsibility has consisted in giving a more concrete picture of the applicability of the ILC Articles. As mentioned earlier, practice by the Tribunal showed that the burden of proof was set on a very high level regarding the claimants. The Tribunal has also

¹⁶⁶ ILC, p. 110.

¹⁶⁷ *Id.*, p. 109.

been criticized for using the ILC Articles too uncritically. Among the wrongful expulsion-cases, which were the cases where the question of attribution was raised most often, only had one case, the *Yeager* case, concluded that the respondent was accountable for actions by the Revolutionary guard. Despite of the fact that the link between the Revolutionary guards and the new government of Iran in the Tribunal's view, was considered sufficient to establish responsibility for the government. The claimant in the *Yeager* case could prove that he was taken away by members of the Revolutionary guard by identifying them by their armllets, and he could also prove that the causes for his departure from Iran had no voluntary ingredient. In the *Short* case the Claimant could not identify the persons who took him away, which was the reason for the, for him, negative outcome of the case. Regardless of the fact that some objections can be made against the constitution of the chambers of the Tribunal and the background of the same, the jurisprudence of the I.U.S.C.T. shows that there is some more to wish for when it comes to the applicability of the ILC Articles. More practice as regards the Articles, especially article 9, in the context of failed states is therefore desirable.

Ultimately the law of State Responsibility is dependant upon the concept of statehood and what the international society considers a state to be. The law of State Responsibility can, as the name suggests, only be applied to states, not to other entities or occurrences in current international law. State failure also raises the question of what a state is consisted of, i.e. which criteria exist for an entity to be considered a state? The rules regarding statehood and state definition in international law therefore become a matter of highest importance.

5.2 The Significance of Statehood

The concept of statehood in international law is a field distinguished by great vagueness. The accepted criteria of statehood, also considered to be a codification of international customary law, are stated in article 1 of the 1933 Montevideo Convention. In accordance with this article a state must have a permanent population, a defined territory, a government and the capacity to enter into relations with other states. The meaning of recognition is largely discussed and contested. Two opposite poles among scholars are those who consider recognition to have a merely declaratory effect, and those who consider recognition to have a constitutive effect. The first theory seems to have more support in the international practice, for instance in the ICTY rules of procedure.¹⁶⁸ Others claim the meaning of recognition to be a synthesis of fact and law. Examples of such synthesis are the evidentiary and the semi-constitutive views on the function of recognition. Apart from these different views recognition does play a role as a reinforcement of the criteria for statehood. For instance, the state's capacity to enter into relations

¹⁶⁸ See chapter 4.2.

with other states is improved by recognition by the international community.

The significance of statehood in international law cannot be underestimated and it is therefore important that a state has clear criteria for state recognition. Reasons for states to withhold or grant recognition seem to be founded more on a political than a legal basis. One reason for the international community not to recognize an entity like Somaliland could be based on the international community's fear of a similar course of events as in the Balkans, where the former Yugoslavia through a bloody civil war dissolved into several different states. The international community maybe in this case has the aim to respect and preserve the *uti possidetis* principle. Another reason for non-recognition of Somaliland can be that the international community does not want yet another state in the world, incapable of sustaining itself.

Clear criteria for statehood for a European state can be based on western opinions of what a state shall, or shall not, deliver to its citizens. Examples of highly set criteria are the ones set up by the European Union after the disintegration of the Soviet Union and Yugoslavia. Yet, there lies a danger in setting the demands to high. Many scholars are warning that this can lead to a regression to old international law, i.e. a modern version of a world divided into 'civilized' and 'non-civilized' nations, in which the non-civilized nations do not enjoy the same rights or have the same obligations to the international community as the civilized nations.¹⁶⁹ I agree with these scholars but, on the other hand, I find it important that the relativism is not allowed to go as far as to recognition of villainous states by the international community. Nevertheless, one cannot deny that the criteria for statehood have a basis in the western opinion of what a state is, and which functions it is supposed to have.

Jeffrey Herbst has also pointed out other problems which come with a resistance by the international community to recognize new entities such as Somaliland. One of them is constituted by the fact that, because Somaliland has not been recognized as a state, it has not received any assistance from the World Bank. This has led to unnecessary human suffering.¹⁷⁰

The main conclusion in this thesis is that ILC has failed in its attempt to avoid blank spots in the rules of attribution. Even if article 9 covers some situations of state failure, it does not cover situations where *de facto* governments are competing for power, or situations of a prolonged state collapse. Since the law of State Responsibility only concerns states, the law of State Responsibility is dependent upon the concept of statehood and state definition. As long as the international community continues to withhold recognition of entities such as Somaliland, the situation arises that no violator exists for injured states to claim redress.

¹⁶⁹ For a survey of statehood in the international law of the 19th century see Crawford, 1979, pp. 12-15.

¹⁷⁰ Herbst in Rotberg (ed.), p. 310.

5.3 States as Building Blocks of the International Order?

An interesting issue which arises in the context of the question in this thesis, is whether a change in international law is about to happen. Is the principle of continuity diminishing for the benefit of effectiveness?

The international order is based on states as the sole subject of international law. The emergence of Human Rights principles after World War Two has constituted a challenge to this order. The practise of Human Rights Courts, especially the European Court of Human Rights, has shown a tendency to try to extend the area of responsibility of states. For instance has the European Court for Human Rights in its award *X&Y v. The Netherlands* considered the Netherlands responsible for not having the sufficient means to punish abuses by a private actor. Hence, the Court considered it to be a state's responsibility to have the means to protect the respect for private life, as stated in article 8(1) of the European Convention on Human Rights, even when it was a private person who committed the violation.¹⁷¹ Does this mean that the Court increases the criteria for statehood by setting higher demands on what standards a state shall have for it to be a state? In international law doctrine, other actors than states have for a long time been given certain obligations, and therefore certain recognition. For instance, in the International Humanitarian Law, belligerents and insurgent groups in a high contracting party to any of the four Geneva conventions, have certain obligations in accordance with common article 3 - also called a minimum convention.¹⁷² Suggestions for norms concerning Trans National Corporations have also occurred in Human Rights doctrine. These norms place certain duties on Trans National Corporations regarding *inter alia* ethic action.¹⁷³

As mentioned above the presumption of continuity in the context of state responsibility and failed states hinders new entities to arise to which injured states could claim redress. The principle of continuity still has great support in international law and among scholars, but is also questioned, e.g. by Jeffrey Herbst.¹⁷⁴ If Somaliland were to be recognized as a state by the international society the principle of continuity would weaken in favour of the principle, and criterion, of effectiveness. There is also a question of which prize can be paid in order to uphold the principle of continuity.

Consequently, states are the building blocks of the international order. As discovered, *inter alia*, in this thesis, this order leaves black holes at least in

¹⁷¹ Case of X and Y v. the Netherlands, Judgment of 26 March 1985, Publications of the European Court of Human Rights, Series A, Vol. 91.

¹⁷² See for instance article 3, Geneva Convention (III) relative to the Treatment of Prisoners of War, supra note 64.

¹⁷³ Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. Adopted by the Commission for Economic, Social and Cultural Rights at its 22nd meeting, on 13 August 2003.

¹⁷⁴ See chapter 4.3.

relation to the law of State Responsibility. Human Rights jurisprudence and International Humanitarian Law have attempted to widen the exclusive group that are subjects of international law. Whether international law will follow will be a question for the future. Such a development would be more realistic in relation to situations in the world of today, but would also mark the beginning of an uncertain journey.

Supplement A

The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts

Article 2 – Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when 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.

Article 3 – Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Article 4 – Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5 – Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 8 – Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the 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.

Article 9 – Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the 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.

Article 10 – Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Montevideo Convention on the Rights and Duties of States

Article 1

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

Article 2

The federal state shall constitute a sole person in the eyes of international law.

Bibliography

- Ahmed, Ismail I & Green, Reginald Herbold The Heritage of War and State Collapse in Somalia and Somaliland: Local-Level Effects, External Interventions and Reconstruction, *Third World Quarterly*, Vol. 20, No 1, 113-127, 1999.
- AIV/CAVV *Failing States: a Global Responsibility*, Report No. 25, May 2004.
- Brownlie, Ian *System of the Law of Nations – State Responsibility Part 1*, Clarendon Press, Oxford, 1983.
- Caron, David D The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, *The American Journal of International Law*, Vol. 96, No. 4, 857-873, 2002.
- Crawford, James *The Creation of States in International Law*, Clarendon Press, Oxford, 1979.
- Crawford, James *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002.
- ESS *A secure Europe in a better World*, Brussels 12 December 2003 (also available at: <http://www.iss-eu.org/solana/solanae.pdf>, last accessed 8 Mars 2006).
- Klein, Pierre (*et al*) The State of State Responsibility, *American Society of International Law. Proceedings of the Annual Meeting; 2002*, 168-180, 2002.
- Koskenmäki, Riika Legal Implications Resulting from State Failure in Light of the Case of Somalia, *Nordic Journal of International Law* 73, 1-36, 2004.
- Lillich, Richard B (ed.) *International Law of State Responsibility for Injuries to Aliens*, the University Press of Virginia, Charlottesville, 1983.

- Lillich, Richard B (ed.) *The Iran-United States Claims Tribunal; its Contribution to the Law of State Responsibility*, Transnational Publishers Inc., Irvington-on-Hudson, New York, 1998.
- Lloyd Jones, David *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 *Virginia Journal of International Law*, 259-285, 1983-1984.
- Provost, René (ed.) *State Responsibility in International Law*, Ashgate Publishing Limited, Aldershot, 2002.
- Rotberg, Robert I. (ed.) *When States Fail – Causes and Consequences*, Princeton University Press, Princeton, 2004.
- Rotberg, Robert I. *Nation-State Failure: A Recurring Phenomenon?*, Discussion paper associated with the NIC 2020 Project, 6 November 2003 (available at: http://www.cia.gov/nic/PDF_GIF_2020_Support/2003_11_06_papers/panel2_nov6.pdf. last accessed on February 23, 2006).
- Selby, Jamison M *State Responsibility and the Iran-United States Claims Tribunal*, 83 *American Society of International Law; Proceedings*, 240 – 245, 1989.
- Schoiswohl, Michael *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'*, Martinus Nijhoff Publishers, Leiden, 2004.
- UD/ANA *Failed States – en första ämnesorientering*, Working paper produced within the Swedish Ministry for Foreign Affairs, 10 May 2004.
- Wallace-Bruce, Nii Lante *Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law*, *Netherlands International Law Review*, XL VII, 2000.

Internet sources

Background concerning the Iran-United States Claims Tribunal
<<http://www.iusct.org/background-english.html>> (I.U.S.C.T's own homepage. Last accessed 29 March 2006).

ICTY – Rules of procedure
<<http://www.un.org/icty/legaldoc-e/index.htm>> (ICTY's own homepage. Last accessed 16 February 2006).

Other Sources

Purdue University, Failed States Conferences:
<http://www.ippu.purdue.edu/global_initiatives/historical.cfm>, (Purdue University's homepage for one of their global initiatives which includes a failed states initiative, last accessed 31 March 2006).

Table of Cases

PCIJ

German Settlers in Poland Case:

German Settlers in Poland Case, P.C.I.J. Publications, Series B, Vol. 1, 1923, Advisory Opinion No. 6.

ICJ

Corfu Channel Case:

The Corfu Channel Case (United Kingdom v. The People's Republic of Albania), Merits, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4.

Nicaragua case:

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Order of 26 November 1984, I.C.J. Reports 1984, p. 392.

Tehran Hostages Case:

Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order of 24 May 1980, I.C.J. Reports 1980, p. 4.

Mexico/U.S.A. General Claims Commission

Solis Case:

G.L. Solis (U.S.A.) v. United Mexican States, 3 October 1928, UNRIAA, Vol. IV, p. 358.

Iran - United States Claims Tribunal

Questech, Inc. v. the Islamic Republic of Iran (1985)

Iran – United States Claims Tribunal, vol. 9, pp. 107-152.

Jack Rankin v. the Islamic Republic of Iran (1987)

Iran-United States Claims Tribunal, vol. 17, pp. 135-152.

Alfred L.W. Short v. the Islamic Republic of Iran (1987)

Iran - United States Claims Tribunal, vol. 16, pp. 76-102.

Kenneth P. Yeager v. the Islamic Republic of Iran (1987)

Iran – United States Claims Tribunal, vol. 17, pp. 92-116.

Arthur Young & Company v. the Islamic Republic of Iran (1987)

Iran-United States Claims Tribunal, vol. 17, pp. 245-265.

ICTY

Tadic Case (Appeal):

Prosecutor v. Dusko Tadic, Appeals Chamber, Judgement of 15 July 1999,

Case no: -94-I-A,

<http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

European Court of Human Rights

X and Y v. the Netherlands:

Case of X and Y v. the Netherlands, Judgment of 26 March 1985,

Publications of the European Court of Human Rights, Series A, Vol. 91.

Treaties and Instruments

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, also available at:

<<http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>> (last accessed 7 Mars 2006).

Montevideo Convention on the Rights and Duties of States, 1933, League of Nations, *Treaty Series*, vol. 165, p. 19.

Statute of the International Court of Justice, also available at:

<<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> (last accessed 1 Mars 2006).

Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, United Nations, *Treaty Series*, vol. 75, p. 135. Also available at:

<<http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>> (last accessed 7 Mars 2006).

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Council of Europe, *Treaty Series*, No: 005.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) United Nations, *Treaty Series*, vol. 1125, p. 609.

Vienna Convention on the Law of Treaties, 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

Rome Statute of the International Criminal Court, 1998, United Nations, *Treaty Series*, vol. 2187, p. 3.

UN Documents

UNSC Resolutions

S/Res/751 (1992) 24 April 1992 (UNOSOM).

S/Res/794 (1992) 3 December 1992 (Operation Restore Hope).

S/Res/814 (1993) 26 Mars 1993.

International Law Commission

Draft Articles on Responsibility of States for internationally wrongful acts adopted by the ILC at its fifty-third session (2001) and by the UNGA in A/RES/56/83, 12 December 2001.

Draft Articles on Responsibility of States for internationally wrongful acts with commentaries 2001, also available at:

<http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, last accessed 1 Mars 2006.

The Commission for Economic, Social and Cultural Rights

Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. Adopted by the Commission for Economic, Social and Cultural Rights at its 22nd meeting, on 13 August 2003.