Establishing state responsibility in the absence of effective government

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Table of Contents

List of Abbreviations

AC	Appeals Chamber
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
AUC	Autodefensas Unidas de Colombia (United Self-Defense Forces of Colombia)
CIA	Central Intelligence Agency
CoE CDDH	Council of Europe, Steering Committee for Human Rights
DMZ	demilitarized zone
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
HRC	Human Rights Committee
HRW	Human Rights Watch
HV	Hrvatska Vojska (Croatian Army)
HVO	Hrvatsko Vijeće Obrane (Croatian Defence Council)
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICU	Islamic Courts Union
IHL	international humanitarian law
ILC	International Law Commission
ISIS	Islamic State in Iraq and Syria
IUSCT	Iran-US Claims Tribunal
LTTE	Liberation Tigers of Tamil Eelam
MRT	Moldavian Republic of Transdniestria
NGO	non-governmental organization
NKR	Nagorno-Karabakh Republic

OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
TC	Trial Chamber
TRNC	Turkish Republic of Northern Cyprus
UK	United Kingdom
UN	United Nations
UNMIK	United Nations Mission in Kosovo
US	United States
VJ	Vojska Jugoslavije (Yugoslav Army)
VRS	Vojska Republike Srpske (Army of the Republika Srpska)

1 Introduction

'For too many of the world's people,
formal state institutions are paper entities.'[1]

1.1 Objective and Delimitation of Subject

'Failed states' have been a much discussed topic in international relations ever since the term was first coined by Gerald Helman and Steven Ratner in 1992.[2] Not so in international law, though, where the phenomenon – usually described in legal terms as the absence of effective government – only garnered more widespread academic attention in recent years.[3] Even then, much of the discussion has focused on issues related to statehood, armed

1 Z.C. Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War* (Ithaca: Cornell University Press, 2011), xiii.

2 G.B. Helman & S.R. Ratner, 'Saving Failed States' (1992) No. 89 *Foreign Policy* 3.

3 While the first examination of the topic from a legal perspective was published in 1996 – D. Thürer, M. Herdegen & G. Hohloch, *Der Wegfall effektiver Staatsgewalt: 'The Failed State' (The Breakdown of Effective Government)* (Heidelberg: C.F. Müller, 1996) – most of the literature comes from the past 15 years, see e.g. M. Silva, *State Legitimacy and Failure in International Law* (Leiden: Brill Nijhoff, 2014); G. Cahin, 'Le droit international face aux « États défaillants »', in: J-D. Mouton & J-P. Cot (eds.), *L'État dans la mondialisation: colloque de Nancy* (Paris: Editions Pedone, 2013), 51; G. Cahin, 'L'état défaillant en droit international: quel régime pour quelle notion?', in: *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 177; R. Garciandía Garmendia, *De los estados fallidos a los estados frágiles: un reto para el derecho internacional contemporáneo* (Granada: Comares, 2013); F. Leidenmühler, *Kollabierter Staat und Völkerrechtsordnung: zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt* (Wien: Neuer Wissenschaftlicher Verlag, 2011); N. Akpınarlı, *The Fragility of the 'Failed State' Paradigm: A Different International Law Perception of the Absence of Effective Government* (Leiden: Nijhoff, 2010); C. Giorgetti, *A Principled Approach to State Failure: International Community Actions in Emergency Situations* (Leiden: Brill, 2010); R. Geiss, *"Failed states": Die normative Erfassung gescheiterter Staaten* (Berlin: Duncker & Humblot, 2005); R. Geiss, 'Failed States: Legal Aspects and Security Implications' (2005) 47 *German Yearbook of International Law* 457; R. Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' (2004) 73 *Nordic Journal of International Law* 1; G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Nijhoff, 2004); A.A. Yusuf, 'Government Collapse and State Continuity: The Case of Somalia' (2003) 13 *Italian Yearbook of International Law* 11.

intervention, and reconstruction,[4] while the question of state responsibility – of the affected state and possibly of third states – has been largely overlooked.[5]

Yet at the same time, 'failed states' have been the scene of some of the worst atrocities committed worldwide. Taking advantage of the turmoil and governmental absence, armed groups use these states as an operating base; in the areas controlled by such groups, and in the struggle for power, widespread violations of human rights and international humanitarian law are an everyday occurrence. One need only think of the terror inflicted by the paramilitaries in Colombia or the Islamic State in Iraq and Syria to see the gravity of what may happen in these situations.

To the extent that 'state failure' has been addressed in the literature, it has been argued that international law is ill-equipped to deal with the phenomenon.[6] This is little surprise considering the tension between the characteristics of the international legal system and those of 'state failure'. On the one hand, the Westphalian legal system is based on the sovereign equality of territorially delimited states. Since statehood is binary (an entity is either a state or it is not), the concomitant rights and obligations, such as non-intervention, also operate on a binary basis. On the other hand, the loss of effective government over (part of) the state's territory usually shows gradation, which cannot be reflected in such a binary system. Since the system favors stability, it is generally accepted that such loss does not negate the statehood of an already existing state.[7] Accordingly, at least in principle, the obligations (and rights) of the state remain in place. That said, whether the loss of effective government affects the application of certain norms remains heavily debated – for instance, diametrically opposed argu-

4 On statehood, see e.g. Cahin, 'Le droit international'; C. Richter, *Collapsed States: Perspektiven nach dem Wegfall von Staatlichkeit: Zugleich ein Beitrag zu den Grundlagen des Selbstbestimmungsrechts der Völker und zur Struktur des völkerrechtlichen Staatsbegriffs* (Baden-Baden: Nomos, 2011), 112-114; P. Moscoso de la Cuba, 'The Statehood of Collapsed States in Public International Law' (2011) 18 *Agenda internacional* 121; H. Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Baden-Baden: Nomos, 2007), 66-83; Kreijen, *State Failure*, 7-100; I. Österdahl, 'Relatively Failed: Troubled Statehood and International Law' (2003) 14 *Finnish Yearbook of International Law* 49; Yusuf, 'Government Collapse'. On intervention, see e.g. H. Woolaver, 'State Failure, Sovereign Equality and Non-Intervention: Assessing Claimed Rights to Intervene in Failed States' (2014) 32 *Wisconsin International Law Journal* 595; K. Chan, 'State Failure and the Changing Face of the Jus ad Bellum' (2013) 18 *Journal of Conflict and Security Law* 395; T. Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105 *American Journal of International Law* 244. On reconstruction and responding to health and environmental emergencies, see e.g. Akpınarlı, *'Failed State' Paradigm*, 149-228; Giorgetti, *Principled Approach*, 71-152.

5 See Section 2.2 below.

6 Regarding international law in general, see e.g. Giorgetti, *Principled Approach*, 43-70; with regard to state responsibility in particular, see M. Herdegen, 'Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State"', in: Thürer, Herdegen & Hohloch, *Der Wegfall effektiver Staatsgewalt*, 49, at 77.

7 See Chapter 2, notes 24-29 and accompanying text below.

ments have been put forward on the question whether the prohibition on intervention still applies in cases of 'state failure'.[8] One group of obligations that bears particular relevance for this dissertation is states' duties to prevent and redress certain 'catalyst events';[9] the applicability of such obligations in territory under the state's sovereignty but beyond its control has likewise generated debate.[10]

Furthermore, the basic presumption of the law of state responsibility – and of international law more broadly – is that states usually act through their governments. The law maintains a strong public/private divide, whereby the state is generally only responsible for the conduct of public authorities, but not of private (non-state) actors.[11] Thus, when the government is absent, or at least absent from part of the state's territory, it becomes difficult to hold the state responsible, because there is no public actor whose conduct could be attributed to the state. At the same time, the loss of effective government is usually accompanied by the emergence of non-state actors, either as a cause (the private actors forcing the government to withdraw, e.g. in an internal armed conflict) or as a consequence (filling the power vacuum left by the government).[12] Occasionally, the state may even form alliances with non-state groups, if this serves its interests.

In short, there is a sharp contrast between international law's state-centric view, focused on public authority, and the prominence of private actors which characterizes situations of 'state failure'. Against this backdrop, the dissertation asks the following questions:

(1) Under the existing rules of international law, under what circumstances can states be held responsible in connection with private conduct taking place in situations where an effective government is absent from (part of) a state's territory?
(2) Where, in such situations, states are involved in private conduct in a way that is not captured by the current rules, how can those rules be changed to reduce any remaining accountability gaps while generally respecting the principles that underpin limitations on state responsibility?

Note that the first question speaks of state responsibility *in connection with* private conduct, as the state may not always be responsible for the private conduct itself. In the same vein, state involvement in the second question should be understood broadly. In that question, the limitations underpin-

8 See Chan, 'State Failure', and Woolaver, 'State Failure'.
9 On the terminology of catalyst events, see Chapter 3, notes 18-21 and accompanying text below.
10 See Chapter 3 below.
11 See Section 2.1 below.
12 Cf. P. Pustorino, 'Failed States and International Law: The Impact of UN Practice on Somalia in Respect of Fundamental Rules of International Law' (2010) 53 *German Yearbook of International Law* 727, at 729; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 84.

ning state responsibility refer to the principle that a state is only responsible for its own conduct (that is, conduct carried out on its behalf) and that, as regards duties of protection, these are not risk-based, and the state cannot be expected to control *everything* that happens at any time within its boundaries.[13]

In answering the research questions, the dissertation explores three main avenues, corresponding to the degree of state involvement in each of them, as summarized in the following table:

PUBLIC/PRIVATE ROLE	BASIS OF RESPONSIBILITY
public conduct, triggered by private conduct	duty to protect
public-private collaboration	complicity
private conduct transformed into public conduct	attribution

The first of these avenues consists of examining how the affected state's duties of protection operate under such circumstances. In this case, the private conduct provides the 'catalyst event', but the state is responsible for its own omission in failing to prevent or redress that event. The second scenario involves cases where the state assists or co-operates with a private actor, e.g. by providing information or financial support. This avenue explores the option of finding the state complicit in violations committed by the private actor. The third avenue analyzes the possibility of attributing the conduct of the private actors to the affected state and/or a third state, which would essentially transform private conduct into public conduct.

At the same time, it is also useful – and necessary – to delimit the subject of the dissertation. The aim of this work is to focus on the most common scenarios with the most practical relevance, captured under the three categories outlined above. Accordingly, the dissertation only briefly touches upon third states' potential extraterritorial duties of protection.[14] Within the law of state responsibility, the dissertation is limited to the initial step of establishing the existence of an internationally wrongful act in the sense of Article 2 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[15]

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13 See further Section 1.3.2 below.

14 This is done in the context of analyzing the state's 'jurisdiction' in the sense of international human rights law, see Section 4.4 below. For more on this topic, see e.g. N. van der Have, *The Prevention of Gross Human Rights Violations Under International Human Rights Law* (The Hague: Asser, 2018), 161-219; M. Hakimi, 'State Bystander Responsibility' (2010) 21 *European Journal of International Law* 341, at 362-367, 376-379; R. McCorquodale & P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598.

15 ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, annexed to UN General Assembly Resolution 56/83: *Responsibility of States for internationally wrongful acts*, 12 December 2001, UN Doc. A/RES/56/83; for more on the ARSIWA and its drafting, see Section 2.1 below.

Due to constraints of space, the next step of considering circumstances precluding wrongfulness is excluded from the scope of the analysis, as are the legal consequences of establishing state responsibility, such as reparations – except to shed some light on the reasoning of the Inter-American Court of Human Rights (IACtHR).[16] Since the dissertation is concerned with *state* responsibility, any discussion of individual criminal responsibility, the responsibility of international organizations, or the possible responsibility of private actors themselves, falls beyond its scope. Despite the apparent similarity in terminology, the concept of 'responsibility to protect' is not concerned with matters of state responsibility *stricto sensu*, thus also falling outside the topic.[17] Finally, as the dissertation focuses on the law of state responsibility, it does not cover attribution standards employed or advocated for the purposes of individual or collective self-defense (such as the 'unable or unwilling' standard).[18]

Having stated the dissertation's objectives and delimited its scope, the question remains: why is there a need to focus on state responsibility in circumstances that are characterized precisely by the decline of the state and the rise of private actors? One may be tempted to argue that 'state failure' is the very negation of the state, making *state* responsibility an inherently inadequate tool to address these situations. This position, however, assumes that 'state failure' equals the complete collapse of state institutions, which is an extremely rare occurrence. In most cases, while the official government may have lost control over part of the state's territory, it continues to play a (significant) role in the rest of that territory. The state may also work with private actors, such as paramilitary groups, to regain control over its territory (or third states may support rebel groups or secessionist entities). Even in cases of partial or total governmental absence, the private actors rising to prominence behave in many ways like the state they want to capture or replace, exercising state-like functions. Nonetheless, one can argue that private actors operating in the absence of effective government

16 See Chapter 4, notes 170-175, 189-191 and accompanying text.

17 See notably H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon, 1968), 210-230, distinguishing several different meanings of responsibility in four different categories. 'Responsibility to protect' is what Hart classified as 'role-responsibility', while state responsibility is 'liability-responsibility'. This is not to say that the two notions are unrelated, though: as C. Kutz notes in his 'Responsibility', in: J. Coleman & S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford: Oxford University Press, 2002), 548, at 549, 'role responsibility is the foundation of liability responsibility'. While the English language uses the term 'responsibility' to describe both of these notions, some languages expressly distinguish between the two: for example, Dutch uses the terms 'verantwoordelijkheid' and 'aansprakelijkheid', referring to state responsibility as 'staatsaansprakelijkheid'.

18 On the use of attribution for various purposes (and the distinctions between them), see G. Kajtár, *A nem állami szereplők elleni önvédelem a nemzetközi jogban* (Budapest: ELTE Eötvös Kiadó, 2015), 219-257.

should simply be held directly responsible. This is indeed desirable, but the international legal personality of such actors – and thus the existence and scope of their rights and obligations – is still largely unsettled. Furthermore, while the development of international criminal law has enabled the prosecution of a select few of the *individual* leaders, there are no (quasi-)judicial mechanisms to hold private actors *organizationally* responsible under current international law, even if they are deemed to be holding international legal obligations. This may be the case for instance with non-state armed groups' obligations under international humanitarian law (IHL) and – to the extent they hold such duties – under international human rights law. In light of these circumstances, the law of state responsibility is still the best placed mechanism under international law to respond to accountability problems in situations of 'state failure'. This is not to say that the state should be responsible for any and all conduct by private actors simply because the latter cannot be held responsible themselves. But to the extent that there *are* sufficient links tying private actors to the state, the regime of state responsibility can and should operate to ensure accountability. In addition, there are cases where state and private responsibility may be complementary: for instance, a private actor may be responsible for committing a human rights abuse, while the state may be responsible for failing to prevent or redress the abuse.[19] In the end, the aim of the dissertation is to identify the conditions under which the state may still be held responsible in relation to the conduct of private actors – through its failure to prevent or redress; assistance or co-operation; or circumstances which transform private conduct into public conduct – and to maximize accountability through these avenues.

1.2 Basic Concepts

1.2.1 Private Actors, Affected States and Accountability: Some Clarifications on Terminology

Before proceeding any further, a few brief notes are in order on the terminology employed in the dissertation, for reasons of simplicity and convenience. First, the terms 'private actors' and 'non-state actors' are used interchangeably; this is not to challenge that technically the latter also encompasses international organizations, which are not covered by the dissertation. Although they may exercise 'public' functions, (virtually) unrecognized secessionist entities and paramilitaries are still deemed to

19 See e.g. K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017), 168-169; D. Murray, *Human Rights Obligations of Non-State Armed Groups* (Oxford: Hart, 2016), 179-180.

be private actors. Second, the term 'affected state' is used to describe the state where the government has lost control over part of the territory, notwithstanding the fact that other states may also be affected by such loss of control (for instance, through the spillover effects of an armed conflict). Third, while recognizing that 'the concept of international legal "responsibility" denotes a particular form of legal accountability',[20] 'accountability' is used synonymously with 'responsibility' in the context of discussing the existence of an accountability gap (and ways to ensure accountability), in order to emphasize the normative aspect of this problem.

1.2.2 'State Failure' and the Absence of Effective Government: A Working Definition

When embarking on an examination of state responsibility in cases of 'state failure', one must first ask: what exactly *is* 'state failure'? There is no uniform definition of 'state failure' in international relations, and the list of 'failed', 'collapsed', 'failing', 'fragile', or 'weak' states varies from author to author.[21] (There is often a distinction drawn, based on the severity of the situation, between 'collapsed' or 'failed' states on the one hand, and 'failing', 'fragile', or 'weak' states on the other hand.[22]) In fact, definitions are so diverse that one might even question the utility of the concept itself.[23] Nonetheless, it is possible to identify certain recurring elements. State failure is most commonly described in broad terms as (the process leading to) a situation of anarchy, breakdown of government, the inability to fulfil state functions.[24] There is no agreement on what those state functions are to begin with, however; they run from narrow definitions (monopoly on violence and provision of security) to broad ones (including the provision

20 J. Brunnée, 'International Legal Accountability Through the Lens of the Law of State Responsibility' (2005) 36 *Netherlands Yearbook of International Law* 21, at 22.

21 See e.g. generally C.T. Call, 'The Fallacy of the "Failed State"' (2008) 29 *Third World Quarterly* 1491.

22 See e.g. R.I. Rotberg, 'The Challenge of Weak, Failing, and Collapsed States', in: C.A. Crocker, F.O. Hampson & P. Aall (eds.), *Leashing the Dogs of War: Conflict Management in a Divided World* (Washington, DC: United States Institute of Peace Press, 2007), 84.

23 See e.g. A. Taylor, *State Failure* (Basingstoke: Palgrave Macmillan, 2013), 2; Call, 'Fallacy of the "Failed State"', 1492.

24 See e.g. R.I. Rotberg, *When States Fail: Causes and Consequences* (Princeton: Princeton University Press, 2004), 5; A. Yannis, 'State Collapse and its Implications for Peace-Building and Reconstruction' (2002) 33 *Development and Change* 817, at 822: 'state collapse is currently understood in international relations primarily as the descent of a state into Hobbesian anarchy. It signifies the violent collapse of government and the implosion of the domestic structures of authority that can ensure minimum law and order and the physical security of the local population.'

of public goods such as health care or education).[25] Many authors find it difficult to provide a succinct definition, typically relying instead on a long list of indicators, ranging from 'disharmony between communities' through a declining GDP to 'brain drain'.[26] Occasionally, even undemocratic, dictatorial states with frequent and large-scale human rights violations are treated as 'failed states' broadly speaking, under the label of 'rogue states'. However, these 'rogue states' cannot be considered 'failed states'; if anything, they suffer from the opposite problem of being *too effective* in their control of the population.[27] In sum, international relations terminology is often vague or even arbitrary, and has also been rightly criticized as stigmatizing the states in question.[28] Given these concerns, the dissertation seeks to avoid terms such as 'state failure' and 'failed states' as much as possible.[29]

While there is no single definition of 'state failure' in international law, attempts to define it are more consistent than those in international relations, converging around the notion of the absence of effective government, with a shared understanding of the term.[30] But if 'state failure' is defined in legal terms as 'the absence of effective government', what constitutes 'effective government'? The term originates from the criteria for statehood. One of the most prominent formulations of these criteria is Article 1 of the 1933 Montevideo Convention, stipulating that '[t]he 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

25 See e.g. Rotberg, 'Weak, Failing, and Collapsed States', 83-88; N. Schrijver *et al.*, 'Failing States: A Global Responsibility', *Adviesraad Internationale Vraagstukken (Advisory Council on International Affairs)*, Advice No. 35 / *Commissie van advies inzake volkenrechtelijke vraagstukken*, Advice No. 14, 7 May 2004, https://www.advisorycouncilinternationalaffairs.nl/documents/publications/2004/05/07/failing-states, 7-8.

26 See e.g. Call, 'Fallacy of the "Failed State"', 1494-1496, criticizing this practice.

27 Cf. Kreijen, *State Failure*, 93-94, similarly excluding 'rogue states' from his definition of 'failed states' under international law; Schrijver *et al.*, 'Failing States', 9-10.

28 See e.g. Akpınarlı, *'Failed State' Paradigm*, 89; R. Wilde, 'The Skewed Responsibility Narrative of the Failed States Concept' (2003) 9 *ILSA Journal of International and Comparative Law* 425.

29 This does not exclude references to the term when discussing the work of authors who do make use of this terminology.

30 Already Thürer, Herdegen & Hohloch, *Der Wegfall effektiver Staatsgewalt* referred to it as 'the breakdown of effective government' in the title. See also e.g. D. Thürer, 'The "Failed State" and International Law' (1999) 81(836) *International Review of the Red Cross* 731, at 733; Geiss, 'Failed States: Legal Aspects', 461; Akpınarlı, *'Failed State' Paradigm*, 88; Giorgetti, *Principled Approach*, 44. Although a handful of authors define 'state failure' as the inability to comply with obligations under international law (see e.g. Giorgetti, *Principled Approach*, 43; Pustorino, 'Failed States', 729), such inability is better viewed as a consequence of 'state failure', rather than its criterion. Furthermore, the inadequacy of this definition is illustrated by the fact that inasmuch as negative obligations are concerned, 'failed states' are not only able to comply with, but actually unable to *violate* these obligations under international law, cf. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 84-85.

into relations with the other states.'[31] Government in this sense refers not only to the executive, and not even only to the central government of a state, but rather to the entirety of the state's governing structures, i.e. the state apparatus as a whole. The epithet of 'effective', which came to be added over the years, is meant to reflect the requirement that this apparatus must be in actual control of the state's territory, rather than merely nominally acting as the government.[32] Beyond that, however, not much is required of

31 While, as J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford: Oxford University Press, 2006), 37, notes, there is 'no generally accepted and satisfactory legal definition of statehood', the Montevideo criteria are the most widely cited and well-established, see e.g. the discussion on Palestinian statehood in the UN Security Council in the *Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations*, 11 November 2011, UN Doc. S/2011/705. Other well-known formulations include Jellinek's *Drei-Elemente-Lehre* (holding particular sway in German-language literature), which defines a state as consisting of a territory (*Staatsgebiet*), population (*Staatsvolk*) and government (*Staatsgewalt*), see G. Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 1919); and the Badinter Commission's definition, according to which 'the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority', see Opinion No.1 of the Arbitration Commission of the Conference on Yugoslavia, *Opinions on Questions Arising from the Dissolution of Yugoslavia*, 11 January and 4 July 1992, (1992) 31 ILM 1488, at 1495. For more on the criteria for statehood, see also T.D. Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37 *Columbia Journal of Transnational Law* 403.

32 See e.g. H. Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 28-29. See also Section 1.2.3 below on effectiveness and its interplay with legality and legitimacy. This requirement of effectiveness is also reflected in cases regarding sovereign title to territory: see e.g. *Clipperton Island* (Mexico v. France), Award of 28 January 1931, 2 UNRIAA 1105, at 1110 (English translation in (1932) 26 *American Journal of International Law* 390, at 393-394, emphasis added): 'It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself *an organization capable of making its laws respected*.' See also Geiss, 'Failed States: Legal Aspects', 463, arguing that 'from an international law perspective, effective government is absent if its core element, the ability to guarantee law and order, are dissolved.'

a government under international law, and even control is defined in fairly minimalistic terms.[33] As James Crawford explains:

> [T]o be a State, an entity must possess a government or a system of government in general control of its territory, to the exclusion of other entities not claiming through or under it. […] [I]nternational law lays down no specific requirements as to nature and extent of this control, except that it include some degree of maintenance of law and order and the establishment of basic institutions.[34]

In other words, there are two basic elements discernible in the requirement of effective government: basic institutions and control, where control is essentially equated with a monopoly on violence.[35] This minimalism is hardly surprising, given the freedom of states to determine their own internal organization.[36]

1.2.2.1 The (Overly) Narrow Definitions Used in the Existing Literature

Since the definition of 'effective government' is so minimalistic in international law, 'the absence of effective government' is bound to be defined in equally narrow terms. Interestingly, though, most international lawyers seem to have adopted an even narrower definition. If effective government consists of (1) institutions exercising (2) control, it stands to reason that the loss of such control already qualifies as the absence of effective government. To put it differently, if the state loses control over part of its territory, there is no effective government *in that part* of the country. Usually, the government will lose control over much (or all) of the state's territory before the institutions themselves collapse or disintegrate. Yet much of the literature in international law only considers the absence of effective government to occur with the absence – or complete breakdown – of state institutions,

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33 This is also confirmed by a series of cases concerning title to territory. See e.g. *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B, No. 53, at 45-46, where the PCIJ asserted that 'a claim to sovereignty based […] upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. […] [I]n many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.' See, to the same effect, *Western Sahara*, Advisory Opinion of 16 October 1975, 1975 ICJ Reports 12, para. 92. Although generally requiring 'an organization capable of making its laws respected', *Clipperton Island*, 1110 (translation at 26 *AJIL* 394), disposed entirely of that requirement in light of the fact that the island in question was 'completely uninhabited'.

34 Crawford, *Creation of States*, 59 (footnote omitted).

35 Cf. *Clipperton Island*, 1110 (translation at 26 *AJIL* 394) generally requiring 'an organization capable of making its laws respected.'

36 See e.g. *Western Sahara*, para. 94: 'No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.'

a scenario that is often termed a 'collapsed state'.[37] This is an erroneous approach: while international law's narrow definition of effective government justifies the exclusion of economic factors or the provision of public goods like health care or education, it does not warrant the exclusion of control from the definition.[38]

This choice by scholars to focus on the extreme scenario is likely explained by the fact that most works dealing with 'state failure' under international law are of a general nature, analyzing the impact of the phenomenon in different fields of the law. Most of the state's capacities – diplomatic representation, conclusion of treaties, or international litigation, to name just a few – are not affected by the loss of territorial control, only by the collapse or disappearance of centralized governmental organs. In other words, only the latter scenario has a truly general impact across all fields of international law. Thus, for many of these fields, the choice in favor of a narrow definition is quite understandable. However, since state responsibility *can* contain a strong territorial element (regarding e.g. duties of prevention and redress), the 'simple' loss of control already affects the way it operates. Furthermore, complete collapse is rather exceptional. The absence of effective government (or 'state failure') manifests itself much more commonly as the loss of control over part of the state's territory – governmental institutions collapse only in extreme cases, with Somalia essentially being the only example to date.[39] Adopting such a narrow definition unduly restricts the scope of inquiry.[40]

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37 See e.g. Thürer, 'The "Failed State" and International Law', 734: 'From a legal point of view, it could be said that the "failed State" is one which, though retaining legal capacity, has for all practical purposes lost the ability to exercise it. A key element in this respect is the fact that there is no body which can commit the State in an effective and legally binding way, for example, by concluding an agreement.' Silva, *State Legitimacy and Failure*, 44: 'Failed states result from a temporary or prolonged loss of appropriate institutions, which […] ensure[] the provision of security and basic political goods.' Akpınarlı, *'Failed State' Paradigm*, 11: 'The collapse of state institutions and apparatus is the dominant element in the absence of effective government.'

38 See e.g. Koskenmäki, 'Legal Implications Resulting from State Failure', 4-5, for an illustration of this problem; she does admit a broader definition of 'failing or collapsing states', but does not discuss them as part of her analysis.

39 See e.g. Wolfgang Benedek's remark in the debate in Thürer, Herdegen & Hohloch, *Der Wegfall effektiver Staatsgewalt*, 168, pointing out 'daß es in der Praxis in der Regel nicht um ein völliges Wegfallen der Staatsgewalt geht, sondern eigentlich um graduelle, phasenartige Probleme, die auch territorial differenziert sein können. Darauf sollte man in der Diskussion versuchen, stärker einzugehen.' Koskenmäki, 'Legal Implications Resulting from State Failure', 5, admits that such a narrow definition 'include[s] only Somalia, and, according to some commentators, perhaps, Liberia.' See also Call, 'Fallacy of the "Failed State"', 1492; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 64.

40 For concrete examples, see Chapter 2, notes 30-38, Chapter 4, note 3, and Chapter 5, notes 5, 156, 205 and accompanying text below.

1.2.2.2 *Putting Forward an Alternative Definition*

In order to avoid such undue restrictions, the absence of effective government is better defined as the loss of governmental control over (part of) the state's territory.[41] This requires some further clarifications, though, as the loss of such control raises the question of whether any other actor is in control of said territory. Technically, scenarios where other 'public' actors – a third state (through belligerent occupation) or an international organization (through a territorial administration) – exercise control *directly* over certain territory could also fall under this definition. However, these scenarios are by definition characterized by the effective exercise of public authority. Under international law, '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'[42] The test of the International Court of Justice (ICJ) in the *Armed Activities* case was whether 'the Ugandan armed forces […] had substituted their own authority for that of the Congolese government.'[43] Similarly, the two United Nations (UN) territorial administrations to date (in Kosovo and East Timor) have both been established with the purpose of post-conflict reconstruction; accordingly, their mandates have explicitly included the establishment of administration and the maintenance of law and order.[44]

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41 This definition includes, but is not limited to, the situation where the government collapses entirely and the institutions themselves disappear or lose the ability to carry out their functions. Cf. Schrijver *et al.*, 'Failing States', 11, noting that the 'de facto loss of the monopoly on the use of force is the most fundamental characteristic of a failing state'; the report uses the term 'failing state' to denote 'a state that has become caught up in a process that may result in its becoming a failed state – a condition that will be reached when the government no longer has any control.'

42 Article 42 of the so-called 1907 Hague Regulations, in: Convention (IV) concerning the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 205 CTS 277. This definition of occupation has become part of customary international law, see e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Reports 136, paras. 78, 89; *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *v.* Uganda), Judgment of 19 December 2005, 2005 ICJ Reports 168, paras. 172-173.

43 *Armed Activities*, para. 173. There is quite some controversy as to whether the occupying power has to have actual or potential control, though; see E. Benvenisti, 'Occupation, Belligerent', in: *Max Planck Encyclopedia of Public International Law*, May 2009, available at https://opil.ouplaw.com/home/mpil, para. 5.

44 See UNSC Resolution 1244, 10 June 1999, UN Doc. S/RES/1244(1999), para. 11(b)(i); UNSC Resolution 1272, 25 October 1999, UN Doc. S/RES/1272(1999), para. 2(a)(b). See also e.g. D. Pacquée & S. Dewulf, 'International Territorial Administrations and the Rule of Law: The Case of Kosovo' (2007) 4 *Essex Human Rights Review* (2007), 14, describing the UN Mission in Kosovo and the Kosovo Force as having 'state-like' powers. These situations must be distinguished from the ones where the substitution of authority occurs not comprehensively but with regard to a particular task, e.g. when the UN took control over Somali airspace (see Giorgetti, *Principled Approach*, 30-32).

In other words, these situations are characterized by the substitution of one public authority for another, in circumstances regulated by international law.[45] By contrast, 'state failure' is characterized by the prominence of *private* actors, in circumstances that are not well regulated by international law (as the international legal personality of these actors and the scope of their rights and obligations remains doubtful).[46] Admittedly, in some cases it may be difficult to draw the line between direct and indirect control, as in Northern Cyprus, where occupation by Turkey resulted in the establishment of the 'Turkish Republic of Northern Cyprus' (TRNC). However, the crucial difference in such cases is that both the entity in question and the occupying state claim that the former is distinct from the latter and acts with independence, whether or not that is indeed the case.[47] Furthermore, due to the presence of such a distinct entity, these situations bear a closer resemblance to cases where outside influence on the private actor is less direct (such as Transdniestria) than to cases of outright occupation. Accordingly, the dissertation draws a distinction between cases of direct and indirect control over territory, and defines the absence of effective government as the situation where (part of) the state's territory is not under the direct control of any state or international organization.[48]

Including (the loss of) control in the definition of governmental absence is not only necessary; it also has the added benefit of helping to avoid the binary categories of 'failed' and 'non-failed' states. As pointed out above, 'state failure' happens gradually, with 'state collapse' merely the endpoint of the continuum. Unlike binary categories, control is able to capture that

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45 Belligerent occupation is governed by the law of occupation, on which see generally e.g. E. Benvenisti, *The International Law of Occupation* (2nd ed., Oxford: Oxford University Press, 2012); while the UN territorial administrations were each established pursuant to UNSC resolutions, and their responsibility is governed by the law on the responsibility of international organizations. This is not to say that holding these actors responsible is entirely unproblematic. But the problems that typically arise in these cases are different from those stemming from the 'privatization' which characterizes state failure. These situations concern effective control exercised by undisputed subjects of international law acting through their own organs; thus, there is no real debate regarding the duty to protect, nor attribution. See e.g. *Armed Activities*, para. 178-180. Cf. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 65, distinguishing failed and failing states from belligerent occupation.

46 See notes 12 above, 92, 99-102 below and accompanying text, as well as e.g. V. Bílková & M. Noortmann, 'Final Report', *International Law Association Committee on Non-State Actors*, 2016, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1206&StorageFileGuid=fd5b9048-2919-45dc-bcbe-bca53fd4c7a7, 13-15.

47 See e.g. ECtHR, *Loizidou* v. *Turkey*, Preliminary Objections, Application No. 15318/89, Grand Chamber, Judgment of 23 March 1995, para. 47, where Turkey claimed the TRNC to be an independent state.

48 Cf. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 56-65, who takes a slightly different approach to defining 'failed' and 'failing states', but similarly excludes belligerent occupation and includes *de facto* governments. In fact, his definition of 'failing states' includes the government no longer being the sole external representative of the state. (He does not consider UN territorial administrations.)

gradation. That said, the question remains whether it is necessary to set a particular threshold for (the lack of) control.[49] Generally, the purpose of such thresholds – and the categorization that comes with them – is to determine when a situation gives rise to specific legal consequences. But upon closer examination, it becomes apparent that for the purposes of state responsibility, it is not necessary to set a fixed threshold of control – at least not for the state as a whole. Since duties of protection are obligations of conduct assessed by a due diligence standard, they are sufficiently flexible to correspond to the level and scope of control exercised by the state at any given time in any given place, whatever that level of control may be, without the need to establish a specific threshold. As regards complicity and attribution, these are a matter of linking the state to particular *persons*, not places. Granted, where attribution is based on control over the acts of certain persons, this requires establishing a threshold to distinguish attributable conduct from non-attributable conduct: a textbook example of binary categorization with different legal consequences flowing from each of the two scenarios.[50] However, since this concerns control over persons, it does not require setting a threshold of territorial control for the definition of 'state failure' or the absence of effective government.[51] More pertinently, attribution may also be based on private persons '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.'[52] Even in such cases, though, the governmental absence or default may be restricted to a particular locality (or, for that matter, a particular function), obviating the need to engage in an examination of control over the state as a whole.[53] Thus, in sum, for the purposes of addressing state responsibility in the absence of effective government, it is not necessary to set a general threshold for loss of control over state territory. In situations that do require the extent or level of control to be determined, this may

49 See e.g. Geiss, 'Failed States: Legal Aspects', 461: 'the absence of effective government is the predominant characteristic of the failed state. While in abstracto this criterion is not disputed, the difficulty remains to determine the degree of ineffectiveness necessary so as to amount to the absence of effective governmental authority in *casu concreto*.' (For Geiss, the particular case is the state as a whole.)

50 Attribution is one of the two requirements for state responsibility under Article 2 ARSIWA, see Section 2.1 below. Thus, if certain conduct is attributable, the state may be held responsible, provided that the other requirement (breach) exists as well; if, on the other hand, conduct is not attributable, the state cannot be held responsible. On the requisite threshold of control in such cases, see Chapter 4 below.

51 While control over persons may be inferred from control over territory, as in the case of the ECtHR's 'effective overall control' test, discussed in Section 4.4.1 below, such situations concern the existence of control by a third state, not the loss of control by the affected state – a subtle, but important distinction.

52 Article 9 ARSIWA.

53 See ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, in: *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 31 (hereinafter ARSIWA Commentary), Commentary to Article 9, para. 5.

be assessed on a case-by-case basis regarding particular persons, functions or localities, rather than through an abstract threshold.

In a similar vein, the question arises whether there is a need for a temporal requirement, as definitions of 'state failure' often include a temporal element. But as setting a specific timeframe would be inherently arbitrary, most authors simply refer to a 'prolonged' absence of effective government, or the government having no prospect of recovering its authority in the foreseeable future.[54] Fortunately, there is no need to set a threshold, since what has been discussed regarding a possible threshold of control applies equally to a threshold of time. State responsibility is generally not concerned with how long a certain area has been beyond the government's control, nor whether it has a prospect of recovering its authority – only whether it was beyond control at the material time of the particular case.[55] That said, the practical examples cited throughout the dissertation concern absence of some duration, simply because these are the situations where private actors have had the chance to become prominent – especially in an organized fashion.

The introduction of a temporal element is also linked to the question of how 'state failure' relates to civil wars, which are often considered to be more temporary in nature.[56] However, the traditional conception of a relatively brief and intense civil war with a clear victor at the end has been increasingly challenged by the phenomenon of low-intensity internal armed conflicts continuing for decades, with neither an end, nor a winner in sight.[57] This, in turn, makes the distinction between armed conflict and the absence of effective government not only difficult but also somewhat futile in many cases. On the one hand, non-international armed conflicts as defined by Additional Protocol II to the Geneva Conventions – conflicts in which an armed group controls territory – overlap with the absence of effective government by definition.[58] On the other hand, relatively few armed

54 See e.g. Herdegen, 'Der Wegfall effektiver Staatsgewalt', 84; Koskenmäki, 'Legal Implications Resulting from State Failure', 5; Pustorino, 'Failed States', 729-730; Geiss, 'Failed States: Legal Aspects', 463.

55 That 'material time' may of course be an extended period, see Article 14 ARSIWA on continuing violations; but even in such cases, it is irrelevant whether the state had controlled the territory in question *before* that time.

56 Cf. Leidenmühler, *Kollabierter Staat*, 195.

57 See Kreijen, *State Failure*, 281, regarding cases of 'state failure'.

58 This is the threshold of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), Geneva, 8 June 1977, in force 7 December 1978, 1125 UNTS 609, which stipulates in Article 1 (emphasis added) that it applies to 'all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, *exercise such control over a part of its territory* as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'

conflicts are deemed to reach the threshold of Additional Protocol II.[59] In the end, the presence or absence of an armed conflict is not a determinative factor in itself, especially since 'state failure' may lead to armed conflict and *vice versa*.[60]

In sum, the dissertation addresses state responsibility in the absence of effective government, defined as the situation where (part of) the state's territory is not under the direct control of any state or international organization.[61] Having arrived at such a definition, it is also important to delineate the topic of the dissertation from other related areas. In accordance with this definition, the dissertation focuses on the existence or absence of control and institutions, and does not address the role of democracy or good governance. Furthermore, it lies beyond the scope of this work – and indeed, the realm of law itself – to assert the possible causes of (or solutions to) 'state failure' or the absence of effective government.[62] Instead, the focus is on how problems of accountability may be addressed – and responsibility gaps closed or at least narrowed – through the framework of state responsibility, once such a situation has arisen.

1.2.3 The Interplay between Effectiveness, Legitimacy and Legality

Despite the fact that 'state failure' is defined as the absence of *effective* government, it must also be pointed out that effectiveness does not have unlimited explanatory value. Contrary to popular conceptions, depicting 'state failure' as Hobbesian anarchy is somewhat misleading.[63] As the analysis in the following chapters shows, areas beyond the government's reach are often under (varying degrees of) control by another actor. Power vacuums are relatively rare, and even when they occur, they are usually short-lived. In most cases, governance is typically fragmented between multiple actors, who maintain order in the areas where they have consolidated their control. There are various situations where armed groups or local

59 See L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 143-146.

60 Although authors such as Thürer, 'The "Failed State" and International Law', 734; Kreijen, *State Failure*, 93-96; and Leidenmühler, *Kollabierter Staat*, 195-197, exclude civil war situations from their definition of state failure, this is due to the narrowness of their definition of complete institutional collapse, see Section 1.2.2.1 above.

61 Cf. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 56-65, who takes a slightly different approach to defining 'failed' and 'failing states', but similarly excludes belligerent occupation and includes *de facto* governments. In fact, his definition of 'failing states' includes the government no longer being the sole external representative of the state. (He does not consider UN territorial administrations.)

62 These causes are difficult to determine, but they are usually ascribed to political, social and economic factors, rather than legal ones; it thus stands to reason that the solution must also come from these fields.

63 See e.g. T. Hagmann & M.V. Hoehne, 'Failures of the State Failure Debate: Evidence from the Somali Territories' (2009) 21 *Journal of International Development* 42, at 45, 52.

de facto governments display authority that may be at least as effective as that of the central government. Perhaps the most notable – but certainly not the only – example is Somaliland, which has had a stable and reasonably effective government for years, while Somalia as a whole saw a succession of ineffective central governments or no government at all.[64] This, however, leads to the next question: if there is an actor exercising effective control over a certain territory, why is it not regarded as an 'effective government'? In order to explain this seeming incongruence, recourse must be made to the concepts of legality and legitimacy and their relationship with effectiveness.[65]

The principle of effectiveness is what endows facts with legal relevance (*ex factis jus oritur*); it is meant to ensure that the law corresponds with reality.[66] In the absence of a centralized authority in the international system, effectiveness plays a greater role in international law than in domestic systems.[67] However, if effectiveness is given too much weight, the law is inevitably relegated to the role of providing *ex post facto* justification for 'might is right', rendering international law meaningless.[68] Accordingly, there are limits to the principle of effectiveness, which generally cannot 'cure' illegality (*ex injuria jus non oritur*).[69] At the same time, though, if legality and legitimacy are given exclusive consideration with no regard for effectiveness, they become a piece of fiction completely detached from reality – and what is worse, unable to fulfil their function. In the end, a careful balance must be struck between effectiveness on the one hand, and considerations not based on effectiveness – legality and/or legitimacy – on the other.[70]

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64 See e.g. M. Bradbury, A.Y. Abokor & H.A. Yusuf, 'Somaliland: Choosing Politics over Violence' (2003) 30 *Review of African Political Economy* 455.

65 For a concise definition of legality and legitimacy, see R. Wolfrum, 'Legitimacy in International Law', in: *Max Planck Encyclopedia of Public International Law*, March 2011, available at https://opil.ouplaw.com/home/mpil, para. 1, defining legitimacy as 'the justification of the exercise of public authority' and legality as 'conformity with international law.'

66 See e.g. S. Zappalà, 'Can Legality Trump Effectiveness in Today's International Law?', in: A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 105, at 105-106.

67 See e.g. C. de Visscher, *Theory and Reality in Public International Law* (rev. ed., Princeton: Princeton University Press, 1968), 318; Zappalà, 'Can Legality Trump Effectiveness', 106-107.

68 See e.g. E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Leiden: Nijhoff, 2006), 45: 'to consider the principle of effectiveness as dominant in international law is tantamount to the negation of international law.'

69 See e.g. C. de Visscher, *Les effectivités du droit international public* (Paris: Pedone, 1967), 24-25; Zappalà, 'Can Legality Trump Effectiveness', 107.

70 For more on the principle of effectiveness and this dichotomy, see e.g. Zappalà, 'Can Legality Trump Effectiveness'; Milano, *Unlawful Territorial Situations*, 21-54; H. Krieger, *Das Effektivitätsprinzip im Völkerrecht* (Berlin: Duncker & Humblot, 2000); de Visscher, *Les effectivités*.

These poles of effectiveness and legality/legitimacy are found in many fields of international law, but for the purposes of this dissertation, it is particularly relevant how they interact with regard to statehood, governments, and state responsibility.

1.2.3.1 Effectiveness and Legality in Statehood

As regards statehood, its traditional criteria are based on effectiveness in the first place, while criteria based on legality or legitimacy 'operate only in exceptional cases.'[71] The question whether an entity meets the requirements of territory, population, and government is a factual matter. As a result, the non-fulfillment of the effective government criterion will generally bar an entity from becoming a state – though the requirement may be eased where the putative state has an uncontested title to exercise its authority, having obtained the previous sovereign's consent.[72]

In contrast, the requirement of effectiveness is applied more strictly in cases of unilateral secession, as the 'seceding entity seeks statehood by way of an adverse claim'.[73] This is not to say that secession as such is illegal: in general, there is neither a right to secede under international law, nor is it prohibited.[74]

Indeed, as has been pointed out in the literature, it would be unrealistic to expect states to accept a rule permitting secession that could be a threat to any one of them.[75] At the same time, it has been contended that the principle of states' territorial integrity constitutes 'a serious barrier' to secession.[76] The 1970 Friendly Relations Declaration, for instance, included a safeguard clause in its discussion of the principle of equal rights and self-determination of peoples, noting that:

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71 Crawford, *Creation of States*, 46; cf. de Visscher, *Les effectivités*, 36.

72 See Crawford, *Creation of States*, 56-60.

73 *Ibid.*, 58; see also *ibid.*, 58-60, 374-448.

74 See e.g. Crawford, *Creation of States*, 390; P. Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 *Chinese Journal of International Law* 47, at 55-56; J. Dugard, 'The Secession of States and Their Recognition in the Wake of Kosovo' (2013) 357 *Recueil des Cours* 9, at 203; and, for a slightly more qualified view, M.G. Kohen, 'Introduction', in: M.G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2009), 1, at 19-20.

75 A. Peters, 'Does Kosovo Lie in the *Lotus*-Land of Freedom?' (2011) 24 *Leiden Journal of International Law* 95, at 104; P. Hilpold, 'Secession in International Law: Does the Kosovo Opinion Require a Re-Assessment of This Concept?', in: P. Hilpold (ed.), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Leiden: Brill, 2012), 47, at 52-53; Dugard, 'The Secession of States', 203.

76 S.F. van den Driest, 'From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law' (2015) 22 *International Journal on Minority and Group Rights* 467, at 481; see also more generally *ibid.*, 474-481, including the views summarized therein. See also e.g. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Written Comments of Cyprus, 17 July 2009, paras. 13-18 (submissions to the Court are available at https://www.icj-cij.org).

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[77]

The ICJ, however, firmly stated in its 2010 *Kosovo* advisory opinion that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States.'[78] This statement, in turn, has been described as 'a dismissal, or serious limitation, of the principle of territorial integrity as an obstacle to the secession of minorities from non-colonial States'.[79]

That said, it is fair to say that international law 'disfavours' secession and 'creates a presumption against the effectiveness of the secession and in favour of the territorial integrity of the parent state, which can use all lawful means at its disposal in order to battle secession.'[80] Since secession outside the colonial context is not based on a right (notwithstanding the debate over remedial secession as *lex ferenda*), and the title to exercise authority is heavily contested, effectiveness plays a central role. In practice, the efforts of the parent state to regain control over the territory in question make it difficult for the secessionist regime to display effectiveness precisely when it would be crucial to do so. These circumstances, and the fact that the international system favors stability, help explain why – especially outside the context of decolonization – states have been very reluctant to recognize entities attempting to secede unilaterally, i.e. against the will of the parent state.[81]

But while secession in itself is neither legal nor illegal under international law, the situation changes dramatically where a third state forcibly intervenes on the side of the secessionists. In accordance with the general prohibition on the threat or use of force between states in international law,

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77 UN General Assembly Resolution 2625(XXV): *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, UN Doc. A/RES/2625(XXV), Annex, para. 1. On this and other similar safeguard clauses, see e.g. van den Driest, 'From Kosovo to Crimea and Beyond', 474-476.

78 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, 2010 ICJ Reports 403, para. 80.

79 Dugard, 'The Secession of States', 202; see also *ibid*., 207-209.

80 T. Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' (2011) 24 *Leiden Journal of International Law* 73, at 84.

81 See J. Crawford, 'State Practice and International Law in Relation to Secession' (1998) 69 *British Yearbook of International Law* 85.

states cannot be created as a result of the unlawful use of force.[82] When new 'states' are established with the assistance of a third state – as in the case of the TRNC – these are illegal. Since these entities continue to exist in fact, though, their illegality can only be expressed through collective non-recognition; this role for recognition is also reflected in the relevant terminology, which refers to unrecognized or *de facto* states.[83]

1.2.3.2 Effectiveness and Legitimacy in Governments

Since international law lays down no particular requirements as to the internal organization of a state, there is no question of 'illegal' governments. Rather, the tension is between effectiveness and legitimacy, the latter being most commonly assessed by whether the government came into power in accordance with the domestic (constitutional) arrangements of the state.[84]

As in the case of statehood, other states' views on the effectiveness and legitimacy of a government (used to) find expression in the granting or withholding of recognition. In most cases, states have been guided by the test of effectiveness in awarding recognition of governments, based on enquiry into whether the government in fact controlled (practically) the whole territory of the state, had 'a reasonable prospect of permanency', and enjoyed 'the habitual obedience of the bulk of the population.'[85]

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82 See Crawford, *Creation of States*, 131-148; on other situations where illegality may be a bar to statehood, see generally *ibid.*, 96-173. The situation appears to be somewhat less clear where the intervention does not involve the use of force. For a view that intervention (as distinct from the use of force) may also preclude achieving statehood, see Kohen, 'Introduction', 19. Intervention, however, encompasses such a broad range of actions that it is more difficult to see how, for instance, premature recognition of a secessionist entity as a state (likewise considered to be a form of intervention, see e.g. Lauterpacht, *Recognition*, 8) could, in and of itself, preclude legal statehood. In the end, much depends on the circumstances of the case and the nature, form and significance of the intervention.

83 Such illegality often results in UN Security Council resolutions calling on member states not to recognize a particular entity, see e.g. UNSC Resolution 541, 18 November 1983, UN Doc. S/RES/541(1983), regarding the TRNC; UNSC Resolution 787, 16 November 1992, UN Doc. S/RES/787(1992), regarding the Republika Srpska; and UNSC Resolution 216, 12 November 1965, UN Doc. S/RES/216(1965) and UNSC Resolution 217, 20 November 1965, UN Doc. S/RES/217(1965), regarding Southern Rhodesia.

84 Cf. C. Warbrick, 'The New British Policy on Recognition of Governments' (1981) 30 *International and Comparative Law Quarterly* 568, at 571: 'Recognition of a new government is necessary only when that government comes to power by unconstitutional means.' See also B.R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon, 1999), 142-149, on various strands of legitimism, including 'constitutional legitimism'.

85 Lauterpacht, *Recognition*, 98 and 28, respectively. For more on the effectiveness test, see Roth, *Governmental Illegitimacy*, 137-142. See also Arbitrator Taft in *Aguilar-Amory and Royal Bank of Canada Claims* (Great Britain *v.* Costa Rica), Award of 18 October 1923, 1 UNRIAA 369 (better known as the *Tinoco Arbitration*), at 381, dismissing the evidentiary weight of (the lack of) recognition where it is not based on considerations of effectiveness.

While the explicit recognition of governments has largely fallen out of practice in the last decades, and recognition is implied instead in the simple continuation of relations with the new government, effectiveness has generally remained the guiding principle.[86] In fact, the effectiveness test was applied as recently as 2014 by the Office of the Prosecutor at the International Criminal Court, in deciding whether to accept a declaration submitting Egypt to the Court's jurisdiction by Mohamed Morsi's government. The fact that Morsi's government had been democratically elected and Morsi had been displaced by a *coup d'état* – i.e. through undemocratic and unconstitutional means – apparently did not factor into the decision. The Office of the Prosecutor rejected the declaration on the basis that his government was no longer in effective control of Egypt and that UN Member States, in accepting the credentials of the (new) Egyptian delegation, have considered the new government to be the one representing the country.[87]

As illustrated by the case of Egypt, where a government – whatever its origin – is indisputably in control of a state, it is generally considered to be *the* government representing the state.[88] The situation may be different in cases where power is contested: general *de facto* governments are treated differently from local *de facto* governments controlling only part of a state's territory.[89] As no single actor can claim effective control over the entirety of the state, effectiveness as a yardstick loses at least some of its usefulness,

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86 For more on the abandonment of recognition of governments, see S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford: Clarendon, 1998), 3-14 and the sources cited therein. On the continued role of effectiveness, see e.g. Swiss Federal Department of Foreign Affairs, *The Recognition of States and Governments under International Law*, <without date>, https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/PDF_Anerkennung__en_05.pdf. Even where opposition groups or figures are recognized as the legitimate representative of the people (as happened in the cases of Libya, Syria and Venezuela recently), such statements are seen as more political than legal: see e.g. S. Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 *Chinese Journal of International Law* 219; F. Paddeu & A. Gurmendi Dunkelberg, 'Recognition of Governments: Legitimacy and Control Six Months after Guaidó', *Opinio Juris*, 18 July 2019, http://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido. This is not to say that the paramountcy of effectiveness is without exception: see the high-profile cases of Côte d'Ivoire and Gambia cited by Francesca Paddeu and Alonso Gurmendi Dunkelberg.

87 ICC Press Release, *The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt*, 8 May 2014, https://www.icc-cpi.int/Pages/item.aspx?name=pr1003, paras. 3-4.

88 See also *Tinoco Arbitration*, 379, 382; Talmon, *Recognition of Governments*, 107-108.

89 Cf. E.M. Borchard, 'International Pecuniary Claims against Mexico' (1917) 26 *Yale Law Journal* 339, at 340 (with regard to responsibility); de Visscher, *Theory and Reality*, 323; and the UK case of *Republic of Somalia* v. *Woodhouse Drake & Carey (Suisse) SA*, High Court, Queen's Bench Division, 13 March 1992, 94 ILR 608, at 619.

and considerations of legitimacy may play a greater role.[90] But in general, as Brad Roth concludes in his monograph on governmental illegitimacy in international law:

> The effective control doctrine, flawed though it is, will remain for the foreseeable future the presumptive guide to respect for popular will. The habitual obedience of the populace articulates the people's decision to accept the regime, unless well-nigh incontrovertible evidence exists to the contrary, or unless the ruling apparatus has itself conceded a crisis of legitimacy[.][91]

In other words, effectiveness generally continues to be the decisive element in considering a government to be the representative of a state.

1.2.3.3 Effectiveness and Legality/Legitimacy in State Responsibility

Having witnessed the dichotomy of effectiveness and legality/legitimacy in matters of statehood and government, the question remains how this tension manifests itself in the law of (state) responsibility. Overall, there are two main principles working against each other in this field. On the one hand, those who are in effective control should not be able to hide behind the possibly illegal origin of their power to escape responsibility for their subsequent conduct. On the other hand, the prerequisite of being held responsible is international legal personality – i.e. the capacity to have rights and obligations under international law – and in case of actors who lack such personality, the formal acknowledgment of a legal status is often feared to confer legitimacy on them.[92]

The combined effect of these two underlying principles is that holding states responsible is a relatively straightforward matter, even when they control territory as a consequence of unlawful acts (problem of illegality), or when they are acting through a general *de facto* government (problem of illegitimacy). As the ICJ famously held in the *Namibia* advisory opinion,

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90 See e.g. the case of Somalia, where successive central governments have been treated as 'the' representative of the state, despite the fact that they have had relatively little territory under their control; see e.g. *Report of the Panel of Experts on Somalia pursuant to Security Council resolution 1425 (2002)*, 25 March 2003, UN Doc. S/2003/223, para. 28; ICG Africa Report No. 170, *Somalia: The Transitional Government on Life Support*, 21 February 2011, https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-transitional-government-life-support, 1; M. Bryden, 'Somalia Redux? Assessing the New Somali Federal Government', *Center for Strategic & International Studies*, 19 August 2013, https://www.csis.org/analysis/somalia-redux, 3.

91 Roth, *Governmental Illegitimacy*, 419; see also *ibid.*, 413-419, especially at 413: 'the traditional version of the effective control doctrine no longer represents current positive law, but […] it has not been, and is not necessarily in the process of being, replaced by a new liberal-democratic legitimism.'

92 See e.g. J.K. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, at 455; cf. Zegveld, *Accountability of Armed Opposition Groups*, 134, 141.

'[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.'[93] The European Court of Human Rights (ECtHR) made a statement to the same effect in the *Loizidou* case regarding acts that affected the rights of individuals, holding that 'the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.'[94] Both of these cases concerned states (South Africa and Turkey) which unlawfully controlled certain territory (Namibia and Northern Cyprus, respectively). But the statehood of these states – their international legal personality – was not in question, and consequently, neither was their capacity to be held responsible.

As regards states acting through a general *de facto* government, the seminal case is the *Tinoco* arbitration, where Costa Rica argued that it could not be held responsible for the acts of a previous government which had come into power unconstitutionally. Sole arbitrator William H. Taft dismissed this argument, stating that:

> The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?[95]

Finding the answers to these questions to be in the affirmative, Taft concluded that 'the Tinoco government was an actual sovereign government'[96] and that Costa Rica could accordingly be held responsible for the actions of that regime. Charles de Visscher has similarly spoken of 'an indisputable tendency in international law to separate responsibility from any question of the legitimacy of the government and to attach it to effective control in a sufficiently important part of the territory.'[97] He pointed out that:

> [T]he effectivity of the control exercised by the State over its territory broadly determines the responsibilities that it may incur as a result of illegal acts committed there. These responsibilities are independent of any recognition *de facto* or *de jure*: they derive directly from the mere factual existence of a government and the effectivity of its control.[98]

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93 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, 1971 ICJ Reports 16, para. 118.
94 *Loizidou* (Preliminary Objections), para. 62.
95 *Tinoco Arbitration*, 382.
96 *Ibid.*, 380, see also *ibid.*, 379.
97 De Visscher, *Theory and Reality*, 287.
98 *Ibid.*, 324-325.

However, when it comes to actors whose legal personality is doubtful at best, effectiveness as a basis for responsibility encounters serious limitations. Some of these actors display a high degree of organization, as is the case with certain armed groups or *de facto* governments of secessionist entities. When such actors exercise effective control over territory, it is widely accepted that they are bound by human rights obligations, and some authors even argue that they may have limited international legal personality based on such effective control.[99] But even if it is possible to engage with these actors on an informal basis, responsibility is one of the most formalized processes of international law, especially in judicial fora. The state-centrism of standing judicial mechanisms, expressed in their jurisdictional limitations, excludes the possibility of dealing with other types of actors, resulting in responsibility gaps.[100] This is illustrated for example by the striking imbalance in the case of Colombia, where the IACtHR has issued several judgments holding the state responsible for the conduct of the military as well as paramilitaries with strong ties to the state, but there is an absence of cases involving the insurgent groups which have been active in large swathes of the country.[101] Similarly, Kosovo's unsettled status means that it is unable to accede to human rights treaties – but when a case

99 See e.g. Human Rights Council, *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, 12 January 2012, UN Doc. A/HRC/17/44, para. 62; Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 16 August 2012, Annex II, para. 10; Zappalà, 'Can Legality Trump Effectiveness', 108; Murray, *Human Rights Obligations*, 120-154; Fortin, *The Accountability of Armed Groups*, 240-245. The scope of applicable human rights obligations is often seen as (something that should be) commensurate with the armed group's capacity to comply (in which the extent of control exercised is a major factor), see generally Murray, *Human Rights Obligations*, 172-202; Fortin, *The Accountability of Armed Groups*, 160-170. On occasion, the applicability of human rights obligations to armed groups has even been asserted in the absence of territorial control, see Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69, 22 February 2012, para. 106 (for *jus cogens* rights); A. Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *International Review of the Red Cross* 491; T. Rodenhäuser, 'Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example' (2012) 3 *Journal of International Humanitarian Legal Studies* 263.

100 Cf. Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, UN Doc. E/CN.4/2006/98, 28 December 2005, para. 69. There is no doubt that IHL is applicable to armed groups in international or non-international armed conflict (even if the precise legal basis for this is somewhat uncertain, see Kleffner, 'Organized Armed Groups'). But IHL does not have its own judicial mechanism for holding violators responsible; and to the extent that IHL can be applied by standing international courts and tribunals, these face the same jurisdictional limitations. The flexibility of *ad hoc* arbitration offers the best chance of overcoming this organizational hurdle, as in the case of *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Final Award of 22 July 2009, (2009) 48 ILM 1258, although that case concerned territorial delimitation and not responsibility.

101 On the relevant jurisprudence, see Section 4.3.2 below.

was brought against Serbia instead, the ECtHR found that as the latter does not exercise control over Kosovo, it cannot be held responsible.[102] Under current international law, it is practically impossible to ensure responsibility in these situations, unless the conduct of these actors is linked – through attribution – to an already existing international legal person: a state.[103] In cases where that is not possible, either because the facts do not support attribution under the relevant rules, or because statehood is in contention, responsibility gaps remain.

1.3 Structure and Methodology

1.3.1 Structure

The aim of this work is to explore when the state can be held responsible in the absence of effective government, and to attempt to close, or at least narrow, responsibility gaps arising from these situations. In doing so, the dissertation begins by providing a brief overview of the law of state responsibility, followed by four chapters dedicated to analyzing each of the three main strands of responsibility described above under the work's objectives – corresponding to the state's degree of involvement in the conduct of private actors – before the dissertation offers some conclusions.

Chapter 2 starts by describing the main contours of the current regime of state responsibility in international law, recounting how the law in this area has developed historically, focusing in particular on the ILC's codification project over the past decades, which resulted in the ARSIWA. The chapter then turns to how issues of state responsibility in the absence of effective government have generally been treated in the literature.

Having outlined the basic legal background, Chapters 3 to 6 then provide in-depth analysis of how state responsibility may be established in the absence of effective government, through one of the three main bases identified above. Chapter 3 analyzes the scope and application of the state's duties of protection, exploring how obligations of effort operate in cases of limited control and what due diligence requires in such cases. Chapters 4 and 5 focus on the grounds allowing the attribution of non-state actors' conduct to the state, particularly on the basis of control and functionality

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102 See ECtHR, *Azemi* v. *Serbia*, Application No. 11209/09, Second Section, Admissibility Decision of 5 November 2013, paras. 46-47. See further the discussion in Chapter 3, notes 174-179 and accompanying text below.

103 The articles on attribution in the ARSIWA similarly display the dichotomy of effectiveness and legality. On the one hand, Articles 4-7 are primarily based on legality (note the reference to domestic law in Articles 4 and 5, and the fact that by virtue of Article 7, *ultra vires* acts are also covered). On the other hand, Articles 8-10 have a stronger link to effectiveness, especially Article 8, whose commentary specifically refers to 'the important role played by the principle of effectiveness in international law' (ARSIWA Commentary to Article 8, para. 1); see also Zappalà, 'Can Legality Trump Effectiveness', 108-109.

(Articles 8 and 9 ARSIWA). Chapter 6 argues that there should be a prohibition of state complicity in the wrongful conduct of non-state actors, and explores the possible boundaries of such a rule, relying on the ILC's interstate complicity provision (Article 16 ARSIWA) by analogy. In addition, this chapter investigates whether, in the absence of a state/non-state complicity rule, complicity may serve as a basis for attribution. Given that in terms of the state's degree of involvement in the private actor's conduct, complicity is located on the spectrum *between* duties to protect and attribution, it may seem like an odd choice to discuss it after, rather than before, attribution. But since state complicity in the conduct of non-state actors is not yet established law, and would need to be delineated from the concepts of duties to protect and attribution if and when it does become *lex lata*, it was deemed more logical to discuss complicity last, in order to see how it may be defined *vis-à-vis* not only duties to protect, but also attribution – especially since some of the jurisprudence appears to establish attribution on the basis of complicity.

Having analyzed the three bases of responsibility in detail, the dissertation concludes by offering remarks in Chapter 7 regarding the adaptability of the current law of state responsibility to situations where an effective government is absent, including suggestions for improvement.

1.3.2 Methodology

The dissertation's two research questions each require a different methodological approach. Determining the content of current rules and how they operate necessitates doctrinal analysis, based on treaties, customary law, and subsidiary sources such as the work of the ILC in drafting the ARSIWA, the jurisprudence of various courts and tribunals, and views expressed in the literature.[104] As there are relatively few treaty rules in the field of state responsibility, much of the focus is on subsidiary sources, including where they identify customary rules. Which of these types of sources is examined in greater detail is driven by the substance. For instance, much of the ILC's early work on what eventually became Article 8 ARSIWA has been superseded by developments in the case law, starting with *Nicaragua*; accordingly, much of that early work is not discussed in detail. In contrast, since there is a scarcity of (recent) jurisprudence on Article 9 ARSIWA and local *de facto* governments, the dissertation focuses more on the drafting process in the ILC and case law from the early twentieth century.

With regard to all three bases of responsibility (failure to protect, complicity and attribution), the chapters lay the groundwork by reviewing the relevant *general* legal rules, before turning to examine how these rules operate – or relate to other rules that may apply – in the absence of effective

104 See Article 38(1) of the Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, certified true copy at https://treaties.un.org/doc/Publication/CTC/uncharter.pdf.

government. Chapter 3 provides an illustrative (but by no means exhaustive) overview of duties of protection to identify the common elements in the way they operate. This helps to show why cases concerning different duties – human rights jurisprudence on positive obligations and the ICJ's judgment in *Armed Activities* on the duty of vigilance – are comparable in the first place. In Chapter 4, the well-known case law of the ICJ and the ICTY, and the work of the ILC – all asserted to be generally applicable – serve as a basis for comparison with the jurisprudence of human rights courts. Although the phenomenon addressed (third state control over, or support of, private actors) is not necessarily limited to situations where effective government is absent, it is a phenomenon that does occur in such situations. In addition, the case law of the IACtHR and the ECtHR has been challenged by states and in the literature precisely on the grounds that these two courts deviate from the jurisprudence of the ICJ (or even the ICTY). In Chapter 6, the inter-state complicity rule serves as a model for a possible state/non-state complicity rule. Where the literature on 'failed states' has identified particular problems regarding the application of certain rules, this is also noted at the beginning of the relevant chapter or section, so that – as part of the analysis that follows – it can be evaluated whether these concerns are warranted.

In general, state responsibility tends to most prominently play out before international courts and tribunals. Accordingly, much of the dissertation relies on case law analysis, while bearing in mind that since judgments are only subsidiary sources, their authority depends in large part on their persuasiveness on a given issue. In terms of case selection, the reader may notice a particular (though not exclusive) focus on human rights jurisprudence.[105] Considering that the law of state responsibility is a set of secondary rules and as such applicable to any field of international law, this may seem surprising at first glance. However, this is simply due to the fact that human rights law is the single largest generator of jurisprudence regarding the type of situations under examination. In some areas of law and in respect of certain courts – most notably investment law, the

105 That said, the scope of the dissertation is limited to human rights *courts*. While the work of quasi-judicial human rights bodies is certainly an area for further research, in this dissertation it is only mentioned in relation to the courts' jurisprudence. This is due to the fact that the sheer volume of cases makes it difficult to process the output of these quasi-judicial bodies, and that these decisions tend to be somewhat less rigorous in their analysis, see e.g. K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905 on UN treaty bodies; cf. M. Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 *Human Rights Quarterly* 342, at 349, noting regarding the African Commission on Human and Peoples' Rights (ACommHPR) that '[a]lthough the Commission's decision-making procedure appears quasi-judicial, the Commission sees its principal objective as creating a dialogue between the parties, leading to the amicable settlement of the dispute in question.' The sole exception to this approach in the dissertation is the views of the ACommHPR on the duty to protect, as they appear – at least at first sight – to be markedly different from any other jurisprudence on the subject.

ICJ and the ECtHR – the existing literature provided sufficient guidance to identify the pertinent case law, at least as a starting point. Having realized that the relevant ECtHR case law focuses on secessionist entities, this was then supplemented by searches in the Court's database for the names of such entities and, in the case of Transdniestria, particular respondents.[106] With respect to other courts, there is little discussion of state responsibility – especially of attribution – in the literature. Accordingly, the identification of cases relevant to attribution at the IACtHR and the African Court of Human and Peoples' Rights required processing all existing jurisprudence of these courts. This proved to be particularly beneficial in the case of the IACtHR, where the Court has only recently started to develop a consistent and uniform vocabulary regarding attribution based on a factual rationale. As a result, any attempt at identifying the relevant case law based on a search for particular terms or phrases would have led to an underinclusive set of cases. At the African Court of Human and Peoples' Rights, no cases were found that would have been relevant to attribution.

In terms of case law analysis, one of the most pervasive problems encountered in the dissertation was that judgments often use misleading terminology or are unclear on questions of responsibility. Some are even characterized by conceptual confusion, for instance between extraterritorial jurisdiction and state responsibility. In order to counteract the effects of this confusion and vagueness, the dissertation sought to examine the courts' statements in each case focusing on how the judgment's reasoning as a whole unfolded and what the outcome was in effect, rather than concentrating on the use of particular terms. Furthermore, where the text of the judgment was unclear, the dissertation turned to the broader context beyond the court's reasoning itself. Such context may be supplied by several different factors, such as: the parties' arguments (particularly where a court adopted one party's reasoning or, on the contrary, responded to a challenge from a party);[107] how the judgment fits into the court's overall jurisprudence;[108] and a comparison of the amount of reparations awarded.[109] Identifying the relevant rules based on the case law required

106 Since the applicants' success in ECtHR, *Ilaşcu and others* v. *Moldova and Russia*, Application No. 48787/99, Grand Chamber, Judgment of 8 July 2004, applications regarding Transdniestria follow a pattern of being brought against both Moldova and Russia; this eliminated the need for a separate search for judgments that are only available in French.

107 See, in particular, the African Commission on Human and Peoples' Rights seemingly adopting the applicants' reasoning in *Association of Victims of Post Electoral Violence* (Chapter 3); the IACtHR responding to Colombia's challenge in *Mapiripán* and the ECtHR responding to Russia's challenge in *Catan* (Chapter 4). See also the lack of evidence faced by the ICJ in *Armed Activities* (Chapter 3).

108 See, in particular, the IACtHR's classification of its own case law; but also the ECtHR's approach building on its previous case law. Similarly, the ICJ's judgment in *Bosnian Genocide* was interpreted in light of *Nicaragua* (see Chapter 4).

109 This was used to help clarify the IACtHR's case law on attribution, see Section 4.3.4.1.1 below.

inductive reasoning, particularly where the case law itself did not articulate a general rule or the formulation of the rule left certain aspects unclear.

At the same time, throughout the dissertation, it was important to keep in mind the broader principles behind the particular rules. As regards duties of protection, this meant recognizing their link to state sovereignty, bearing in mind that '[t]erritorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.'[110] Still, this does not lead to responsibility based on risk, and states – with necessarily limited resources – cannot be expected to control everything within their boundaries, which is why a fundamental characteristic of such duties is that they are obligations of effort.[111]

As regards attribution, 'the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations'.[112] What is considered to be the state's own conduct is determined by the rules of attribution, based on the notion of 'acting on behalf of the State'.[113] The reason for this is twofold: it is done 'both with

110 *Island of Palmas* (Netherlands/USA), Award of 4 April 1928, 2 UNRIAA 829, at 839.

111 See e.g. ECtHR, *Osman* v. *The United Kingdom*, Application No. 23452/94, Grand Chamber, Judgment of 28 October 1998, para. 116, where the Court noted 'the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources' to conclude that 'such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'. Although this statement was made in the particular context of the right to life under the European Convention on Human Rights, these considerations can be extrapolated to other situations involving duties of protection as well. To some extent, this is also linked to the principle that the state is only responsible for its own conduct, see O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 257, at 261: '[A] systematic link between territorial sovereignty and responsibility can only result from a regime of objective responsibility "for risk". But responsibility on this basis is no longer based on the attribution of a wrongful act to the State.' See also note 114 below on concerns related to personal autonomy.

112 ARSIWA Commentary to Article 1, para. 6; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, para. 406 on 'the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'. In the context of state responsibility 'in connection with the act of another state', this has been described as 'the principle of independent responsibility' by the ILC, see ARSIWA Commentary to Part One, Chapter IV, para. 1; see further A. Nollkaemper & D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, at 379-393.

113 ARSIWA Commentary to Article 2, para. 5. See also the Commentary to Article 4, para. 1, Article 6, para. 1, Article 11, para. 2; as well as *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, para. 109; *Bosnian Genocide*, paras. 388, 406.

a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority'.[114] In other words, states cannot be expected to take responsibility for the conduct of persons entirely unconnected with the state. The notion of 'acting on the state's behalf' is in turn underpinned by different rationales in different situations: the link between the state and the private actor may be factual, functional, legal, or based on continuity or discretion. This not only informed the structure of the dissertation, but also helped guide the analysis, particularly where examining the more specific rules was not sufficient to provide an answer to certain questions. For instance, bearing in mind the fundamental question ('is the person acting on the state's behalf?') helped identify the capacity in which the person acts under Article 4 ARSIWA as the decisive factor in cases where that person may have multiple allegiances; it also helped clarify the scope of Article 9 ARSIWA. That said, when it comes to factual links, the notion of 'acting on the state's behalf' is open to varying (broader and narrower) understandings, which did help explain the differences between the different courts but did not entirely manage to resolve those differences.[115]

On the question of reducing any remaining accountability gaps, the dissertation was guided by the following normative premises. On the one hand, state responsibility must be subject to certain limitations. For instance, an easy and straightforward way to close the accountability gap would be to simply assert that a state is responsible for everything that happens on its territory. Whether this is based on a violation of duties to protect (regardless of whether the state knew or should have known of the event, let alone had the means to counteract it) or attribution (regardless of whether the perpetrators were wholly unconnected to the state or have even risen up against it), the results would be highly unsatisfactory, for both conceptual

114 ARSIWA Commentary to Part One, Chapter II, para. 2. Furthermore, as noted e.g. by Rick Lawson in 'Out of Control – State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' meet the Challenges of the 21st Century?', in: M. Castermans-Holleman, F. van Hoof & J. Smith (eds.), *The Role of the Nation State in the 21st Century: Human Rights, International Organisations and Foreign Policy – Essays in Honour of Peter Baehr* (The Hague: Kluwer, 1998), 91, at 108, otherwise 'the State, wishing to prevent the responsibility for the acts of private individuals, might feel tempted to suppress private actions of any sort liable to raise problems', potentially leading to 'what is literally a totalitarian State'. See also D. Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules', in: R.B. Lillich & D.B. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, NY: Transnational, 1998), 109, at 127 and de Frouville, 'Private Individuals', 261, in the same vein.

115 See Section 4.5.4 below. In considering possible justifications of the human rights courts' approaches (given their divergence from ICJ jurisprudence), the dissertation also took into account the broader socio-political context faced by these courts to understand what is driving their reasoning.

and pragmatic reasons. Conceptually, the dissertation accepts the basic principle that the state's responsibility should be limited to conduct carried out on its behalf; and as regards duties of protection, that these are obligations of effort. Pragmatically, international law remains a system based on state consent and it is unrealistic to expect states to agree to rules that would stretch their responsibility quite so far.

On the other hand, the rules of state responsibility should seek to minimize the possibility of states evading responsibility,[116] in the interest of the beneficiaries of states' obligations and the effectiveness of international legal rules.[117] The aim of minimizing evasion is apparent in the ILC's work on the ARSIWA, most prominently in the context of foreclosing reliance on states' internal law for such evasion – including, in the context of attribution, whether a person or entity was designed as a *de jure* organ.[118] The issue was also specifically raised at the ILC in the context of states acting through private persons,[119] and played a prominent role in the reasoning of the ICTY Appeals Chamber in the *Tadić* case. There, the tribunal – in the same vein as Special Rapporteur Willem Riphagen 13 years earlier – noted that:

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116 In international relations literature, Z.I. Búzás, 'Evading International Law: How Agents Comply with the Letter of the Law but Violate its Purpose' (2017) 23 *European Journal of International Relations* 857, describes evasion at 858 as 'following the letter of the law but violating its purpose (spirit) in order to minimize inconvenient obligations in a way that is arguably legal.' Transposed to the context of state responsibility and private actors, this would essentially entail the state having private actors act on its behalf in a way that nonetheless avoided attribution under the particular rules.

117 If states regularly violate an obligation through private actors not captured by particular attribution rules but still acting on the state's behalf, this impairs the effectiveness of the rule laying down that duty, even if states comply with the same obligation through their *de jure* organs. On effectiveness and its relation to the purpose of (both treaty and customary) rules, see A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008), at 9-48, and more specifically at 393-398, 497. These two interests are broadly linked to the private and public dimensions of state responsibility, on which see more generally Nollkaemper & Jacobs, 'Shared Responsibility', 400-403.

118 See e.g. Article 3 ARSIWA; ARSIWA Commentary to Part One, Chapter II, para. 7, Article 4, para. 11 and Article 7, para. 2; see also in a similar vein ARSIWA Commentary to Article 10, para. 4. See also Lawson, 'Out of Control', observing at 97 more generally that 'the Draft Articles are clearly inspired – and rightly so! – by the desire that States should not be allowed to evade international responsibility.'

119 ILC, *Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur*, 4 March and 23 April 1986, UN Doc. A/CN.4/397 and Add.1, in: *Yearbook of the International Law Commission*, 1986, vol. II, Part One, 1, at 11, para. 6: 'Subparagraph (a) deals with the unofficial agents of State entities *lato sensu*. It is obvious that, if such agents are used in order to try to evade the State responsibility which would have been incurred by the same conduct of an official agent, such evasion cannot be admitted by international law.' Then-Draft Article 8(a) provided that '[t]he conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) it is established that such person or group of persons was in fact acting on behalf of that State', *ibid.*, 10.

> The rationale behind this rule [Article 8 ARSIWA] is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.[120]

This reasoning can arguably be extended to complicity as well, in the sense that states should not be allowed to take advantage of the underdevelopment of international law and support wrongful conduct by private actors that would also be wrongful if enacted by the state's own organs.[121] As the ILC noted in its commentary to the inter-state complicity rule, 'a State cannot do by another what it cannot do by itself'.[122] Indeed, political science research has shown that states rely on pro-government militias partly to reduce the state's accountability (with the term used here in a broad sense),[123] and similar observations have been made in the cross-border context as well, i.e. where third states support anti-government rebel groups.[124]

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120 *Prosecutor* v. *Duško Tadić*, ICTY Appeals Chamber, Judgment of 15 July 1999, IT-94-1-A, para. 117.

121 At a minimum, this should be the case where states and private actors (or at least certain types, such as armed groups and secessionist entities) are both considered to be bound by the obligations under human rights and humanitarian law, see Section 1.2.3.3 above and Chapter 6, notes 52-53 and accompanying text below. In addition, there are particularly strong arguments to be made for a general state/non-state complicity rule in both of these areas, see Section 6.1 below.

122 ARSIWA Commentary to Article 16, para. 6. See also more generally M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015), at 12-17 on 'the wrongness of complicity'.

123 S.C. Carey, M.P. Colaresi & N.J. Mitchell, 'Governments, Informal Links to Militias, and Accountability' (2015) 59 *Journal of Conflict Resolution* 850, especially at 864-867 regarding international accountability (note that the term does not only refer to responsibility here). For the purposes of the authors' research, pro-government militias are defined as 'a group that 1. is identified as pro-government or sponsored by the government (national or subnational), 2. is identified as not being part of the regular security forces, 3. is armed, and 4. has some level of organization', see S.C. Carey, N.J. Mitchell & W. Lowe, 'States, the Security Sector, and the Monopoly of Violence: A New Database on Pro-Government Militias' (2013) 50 *Journal of Peace Research* 249, at 250. See also N.J. Mitchell, S.C. Carey & C.K. Butler, 'The Impact of Pro-Government Militias on Human Rights Violations' (2014) 40 *International Interactions* 812.

124 See e.g. I. Salehyan, 'The Delegation of War to Rebel Organizations' (2010) 54 *International Organization* 493, at 503-504; A.S. Bowen, 'Coercive Diplomacy and the Donbas: Explaining Russian Strategy in Eastern Ukraine' (2019) 42 *Journal of Strategic Studies* 312, at 318-320, 335; D. Lynch, 'Separatist States and Post-Soviet Conflicts' (2002) 78 *International Affairs* 831, at 847. Note that in international relations literature, this issue is often framed as one of 'deniability'.

What is the cumulative effect of these two considerations? Acknowledging that states are – and should be – responsible only for their own conduct while recognizing the need to minimize evasion can easily lead to tension.[125] Much of this tension is due to the underdevelopment of international law regarding the direct responsibility of private actors and state complicity in the wrongful conduct of private actors. Ideally, private actors[126] would be held directly responsible for their own violations of international law (such as human rights law), while states would be held responsible for their own contributions to such violations. This would make evasion of responsibility much more difficult and would respect the limitations on states' responsibility at the same time. But despite the growing recognition of private actors' human rights obligations, it is unlikely that the institutional mechanisms necessary for holding them responsible would emerge anytime in the foreseeable future.[127] For related reasons, and given that inter-state complicity has only recently gained a foothold in international law,[128] the prohibition of state/non-state complicity also appears out of reach for now.

This, in turn, leads to an additional, more pragmatic consideration: that the solutions offered in the dissertation should, as much as possible, be realistic and practicable.[129] In essence, they should work largely within the confines of the existing legal and institutional framework of state responsibility, or at least not depart too far from the mechanisms already in place. States may not have much of an appetite for a sweeping new rule of responsibility; and it is difficult to see it become either a treaty or customary rule anytime soon.[130] There may be a more viable option in international

125 Cf. the observation – albeit made in a slightly different context – in Nollkaemper & Jacobs, 'Shared Responsibility', 393: '[T]he principle of individual responsibility and the accompanying procedures may undermine the main functions of responsibility, in particular the restoration of legality and the protection of the rights of injured parties. If states can effectively shift blame to others and avoid being held responsible, it is unlikely that they will be required to change their (wrongful) conduct. Similarly, injured parties, as a result of jurisdictional limitations, may be unable to bring successful claims against one or more of the responsible parties.'

126 Or at least non-state armed groups and secessionist entities, since these types of private actors tend to be almost by definition beyond the reach of the state, see e.g. Chapter 5, note 148 below.

127 See Section 1.2.3.3 above.

128 See Chapter 6, notes 48-49 and accompanying text below.

129 For instance, as regards states' duties to protect, since the existing law appears to be in conformity with the considerations outlined above. Accordingly, the only recommendation of the dissertation on this issue relates to partially shifting the burden of proof to counter the information asymmetry between the parties.

130 There are no current plans to convene a multilateral conference to conclude a treaty on state responsibility based on the ARSIWA, see Chapter 2, note 8. As for a customary rule, that would take a significant time to emerge, and given the political sensitivities involved, it is unlikely that the necessary state practice would be sufficiently consistent; see *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, 1969 ICJ Reports 3, paras. 73-81 and *Nicaragua*, paras. 183-186 on the process of customary law formation.

human rights and humanitarian law, though, where such a rule could be 'read into' the treaty provisions on states' general obligations to respect and protect human rights, and 'respect and ensure respect for' IHL.[131] Limiting such a rule to certain fields of law and, even more importantly, anchoring it in existing treaty language may make it more palatable to states. Even so, given (human rights) courts' jurisdictional limits, adjudicating possible instances of state complicity would require 'detaching' the state's conduct from the principal's act, which may raise conceptual difficulties.[132] These issues notwithstanding, even such a limited complicity rule would be preferable to none, as it could more accurately capture the possible gradation in the state's involvement than simply relying on the existing categories of (1) a violation of a duty to protect or (2) attribution.

But to the extent that a complicity rule is not possible (i.e. in areas beyond human rights law and IHL, and/or if the suggestion above is rejected), those two existing categories are all that remain as options. This, however, can easily conflict with the idea that the state should not be held responsible for more, or for less, than its own conduct. (Re-)classifying complicit conduct as a failure to protect is likely to result in the state being held responsible for *less* than the extent of its involvement, while using complicity as a basis for attribution is likely to lead to the state being held responsible for *more*. Still, are there any circumstances where the state's involvement runs so deep that complicity-based attribution would not necessarily result in a greater degree of responsibility than complicity as such? Admittedly, any complicity-based attribution would make the state responsible not only for its own conduct but also for the conduct of the private actor, departing from the principle that the state is only responsible for its own conduct. But this principle is now weighed against the need to minimize evasion, given that they cannot both be feasibly achieved at the same time. The inter-state complicity rule – providing an analogy – suggests that in cases of *sine qua non* contribution, the effect of complicity-based attribution and complicity as such is the same in terms of *outcome* (i.e. attribution of injury, and thus reparations). The dissertation takes the position that this minimal compromise on the conceptual basis (but not the outcome) of responsibility is an acceptable cost for avoiding a scenario whereby a state is held responsible for much less than its degree of involvement or – where duties of protection are inapplicable – a state would escape responsibility altogether. Note that a complicity-based attribution rule limited to cases of *sine qua non* contributions would still be unable to capture cases of complicity with a lesser degree of contribution. But if the latter cases would also serve as a basis for attribution, the state's responsibility would stretch beyond its current confines not only in terms of basis, but also in terms of outcome – arguably going a step too far.

131 See Section 6.1 below.
132 See *ibid*.

In sum, the normative part of the dissertation is driven by the following three considerations: the principle that the state is only responsible for its own conduct should be respected; evasion of responsibility should be minimized; and any solution offered should be practically feasible. Ultimately, within the limits of the current international legal system, there is no solution that could simultaneously comply with all three of these considerations. Reading a complicity rule into international human rights (and IHL) treaties comes closest to achieving all three, even if it raises some conceptual difficulties due to its 'detached' nature. Failing that, complicity-based attribution in cases of *sine qua non* contribution offers a feasible solution that partially achieves the other two aims, without compromising too much on either of them.

2 The Starting Point: The Current State Responsibility Regime and the Existing Literature

Before analyzing how state responsibility operates in cases where an effective government is (partially) absent, it is useful to briefly review the history and certain defining features of the current state responsibility regime.

2.1 The Process and Result of the ILC's Codification

Upon the establishment of the ILC, tasked with the codification and progressive development of international law, state responsibility was among the first topics considered suitable for codification in 1949.[1] Work commenced in 1955, with a focus on state responsibility for injuries to aliens, under the guidance of Special Rapporteur Francisco García Amador.[2] By then, this topic had already seen numerous – private and public – codification attempts, such as the 1929 Harvard Draft and the 1930 Hague Codification Conference.[3] Between 1956 and 1961, García Amador prepared six reports; the Commission, engaged in other projects at the time, only discussed two of them.[4] While these reports dealt with a number of general concepts relating to state responsibility, limiting the inquiry to injuries of aliens prevented a broader consideration of the field.

At the suggestion of the next Special Rapporteur, Roberto Ago, the Commission reconsidered its approach to the topic and decided to focus on

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1 ILC, *Report of the International Law Commission on the work of its first Session*, 12 April 1949, UN Doc. A/CN.4/13, in: *Yearbook of the International Law Commission*, 1949, vol. I, 277, at 281, para. 16; UN General Assembly Resolution 799(VIII): *Request for the codification of the principles of international law governing State responsibility*, 7 December 1953, UN Doc. A/RES/799(VIII). The ILC was established through UN General Assembly Resolution 174(II): *Establishment of an International Law Commission*, 21 November 1947, UN Doc. A/RES/174(II); in pursuance of Article 13(1)(a) of the Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, certified true copy at https://treaties.un.org/doc/Publication/CTC/uncharter.pdf, requiring the General Assembly to 'initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification'.

2 ILC, *First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur – Review of previous work on codification of the topic of the international responsibility of States*, 7 May 1969 and 20 January 1970, UN Doc. A/CN.4/217 and Add.1, in: *Yearbook of the International Law Commission*, 1969, vol. II, 125 (hereinafter *Ago's First Report*), paras. 41-45.

3 For an overview of previous codification efforts, see *Ago's First Report*.

4 *Ibid.*, paras. 47-72.

the so-called secondary rules of international law.[5] In other words, rather than being concerned with the rules whose breach would lead to state responsibility (primary rules), the ILC turned to the rules which govern the definition and consequences of an internationally wrongful act, regardless of the content of the obligation breached.[6] This fundamental shift – Ago's main legacy – has come to define the law of state responsibility to this very day, but it also meant that work essentially had to begin anew on the topic. After Ago's tenure (1963-1979), work continued under Special Rapporteurs Willem Riphagen (1979-1986) and Gaetano Arangio-Ruiz (1987-1996). Despite repeatedly asserting the topic's high priority, however, the Commission continued to be occupied with other projects, and progress remained slow. It was only once the ILC completed its first reading of the Draft Articles in 1996 that state responsibility became the focus of its attention. In 1997, James Crawford was appointed Special Rapporteur, who is widely credited with streamlining the Articles and bringing the Commission's work to a speedy conclusion: after more than fifty years, the ILC eventually completed the Draft Articles in 2001.[7]

Unlike many of the ILC's previous outcomes on various topics, the Articles on Responsibility of States for Internationally Wrongful Acts have not formed the basis of a multilateral treaty. After careful consideration, the Commission itself advised against this option, ostensibly for fear that any major diplomatic conference to conclude such a treaty would dilute the principles arrived at after such a long and arduous process.[8] Instead, the UN General Assembly took note of the Articles and 'commend[ed] them to

5 ILC, *Report of the International Law Commission on the work of its twenty-first session*, 2 June-8 August 1969, UN Doc. A/7610/Rev.1, in: *Yearbook of the International Law Commission*, 1969, vol. II, 203, at 231-232, paras. 70-84; ILC, *Second report on State responsibility, by Mr. Roberto Ago, Special Rapporteur – The origin of international responsibility,* 20 April 1970, UN Doc. A/CN.4/233, in: *Yearbook of the International Law Commission*, 1970, vol. II, 177, paras. 7, 8, 11.

6 See *ibid*.

7 ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, annexed to UN General Assembly Resolution 56/83: *Responsibility of States for internationally wrongful acts*, 12 December 2001, UN Doc. A/RES/56/83.

8 See ILC, *Report of the International Law Commission on the work of its fifty-third session,* 23 April-1 June and 2 July-10 August 2001, UN Doc. A/56/10, in: *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 1, at 24-25, paras. 61-67; J. Crawford, J. Peel & S. Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 *European Journal of International Law* 963, at 969-970; J. Crawford & S. Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 *International and Comparative Law Quarterly* 959. See also D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *American Journal of International Law* 857; S. Rosenne, 'State Responsibility: *Festina Lente*' (2004) 75 *British Yearbook of International Law* 363. *Responsibility of States for internationally wrongful acts: Comments and information received from Governments, Report of the Secretary-General*, 21 April 2016, UN Doc. A/71/79, shows that states are still divided on the question of converting the ARSIWA into a binding multilateral convention.

the attention of Governments'.[9] That said, large parts of the ARSIWA are considered to be reflecting customary international law, and they are highly regarded – and frequently relied on – by scholars, governments and tribunals alike.[10] When it comes to the law of state responsibility, the ARSIWA are without a doubt the starting point of any analysis.[11]

According to the ARSIWA, '[t]here 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.'[12] Defining an internationally wrongful act by the two elements of attribution and breach has meant, in turn, that other possible requirements – such as fault, damage and causation – were not directly addressed in the Articles.[13] Even as regards these two elements, the ARSIWA are not particularly concerned with breach, since that is defined by reference to the primary rules of international law (such as human rights law). Attribution, on the other hand, is seen as a matter of secondary rules, applicable regardless of the content of the primary rule breached.[14]

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9 UN General Assembly Resolution 56/83, para. 3. The General Assembly has since been periodically commending the ARSIWA to the attention of states, see most recently UN General Assembly Resolution 71/133: *Responsibility of States for internationally wrongful acts*, 13 December 2016, UN Doc. A/RES/71/133, para. 2.

10 See e.g. S. Olleson, 'The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts – Preliminary Draft', *British Institute of International and Comparative Law*, 10 October 2007, https://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf; as well as the UNSG's triennial reports, the latest of which is *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General*, 21 April 2016, UN Doc. A/71/80, also listing the previous reports. The ARSIWA certainly has its fair share of controversial provisions, see e.g. Caron, 'The ILC Articles on State Responsibility'; the issue of what exactly is considered customary international law is addressed as the dissertation deals with the specific articles of the ARSIWA.

11 The authors who have written on the question of state responsibility of 'failed states' have all taken (explicitly or implicitly) the ARSIWA as the basis of their analysis; for an explicit reference, see G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Nijhoff, 2004), 270-271; R. Geiss, 'Failed States: Legal Aspects and Security Implications' (2005) 47 *German Yearbook of International Law* 457, at 480. Even C. Richter, *Collapsed States: Perspektiven nach dem Wegfall von Staatlichkeit: Zugleich ein Beitrag zu den Grundlagen des Selbstbestimmungsrechts der Völker und zur Struktur des völkerrechtlichen Staatsbegriffs* (Baden-Baden: Nomos, 2011), 222-226, who rejects the statehood of 'collapsed states' and accordingly finds that the ARSIWA are not applicable to them directly, considers their applicability by analogy.

12 Article 2 ARSIWA; see also *United States Diplomatic and Consular Staff in Tehran* (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 ICJ Reports 3, para. 56.

13 Causation is mentioned only as regards reparations, see Article 31 ARSIWA (though see also ARSIWA Commentary to Article 2, para. 6); fault and damage are left up to the primary rules, see ARSIWA Commentary to Article 2, paras. 10-11.

14 That said, the ARSIWA do allow *lex specialis* rules, including on attribution; see Article 55 ARSIWA and ARSIWA Commentary to Part One, Chapter II, para. 9.

The purpose of attribution – sometimes referred to as imputation[15] – is to determine whether the breach in question was in fact committed *by the state*. Since states are abstract entities, they 'can act only by and through their agents and representatives', as pointed out aptly by the Permanent Court of International Justice (PCIJ).[16] Attribution is thus meant to answer the basic question of 'which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.'[17] Who are then those 'agents and representatives' mentioned by the PCIJ, the persons whose conduct is seen as the state's conduct? How are they to be defined? By reference to their nationality? Their presence in the state's territory? As the ILC's commentary to the ARSIWA notes, '[i]n theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government.'[18] Ultimately, however, in the law of state responsibility – as in international law more generally – states are usually considered to be acting through their governments.[19] Accordingly, attribution is limited to 'conduct which engages the State as an organization',[20] which means that:

> [T]he general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State. As a corollary, the conduct of private persons is not as such attributable to the State.[21]

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15 See ARSIWA Commentary to Article 2, para. 12 on the ILC's choice of terminology; 'imputation' has been used e.g. by the IACtHR in *Velásquez Rodríguez* v. *Honduras*, Merits, Judgment of 29 July 1988, Series C, No. 4, para. 172; and the ECtHR in *Loizidou* v. *Turkey*, Merits, Application No. 15318/89, Grand Chamber, Judgment of 18 December 1996, paras. 52-57.

16 *German Settlers in Poland*, Advisory Opinion of 10 September 1923, PCIJ Series B, No. 6, at 22; also quoted in ARSIWA Commentary to Article 2, para. 5.

17 ARSIWA Commentary to Article 2, para. 5.

18 ARSIWA Commentary to Part One, Chapter II, para. 2.

19 Beyond the field of state responsibility, this is evidenced, for example, in the recognition of governments (see generally e.g. S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford: Clarendon, 1998); B.R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon, 1999)) and in the capacity to bind the state (see Article 7 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, referring to certain governmental officials as automatically considered to have full powers). Cf. ARSIWA Commentary to Part One, Chapter II, para. 5, where the ILC saw it fit to distinguish the question of attribution from that of full powers, thus indirectly illustrating the similarity.

20 ARSIWA Commentary to Part One, Chapter II, para. 2.

21 *Ibid*.

Thus, attribution is based on a fundamental distinction between governmental (public) and private conduct, of which only the former is considered to be state conduct. This public/private distinction is strongly reflected in the Articles themselves, as Articles 4-11 ARSIWA on attribution can be divided into two main groups. Articles 4-7 espouse and elaborate on the general rule of attributing governmental conduct; Articles 8-11, meanwhile, list the exceptional circumstances under which private conduct is nonetheless attributable, due to a certain connection with the state, which essentially transforms private conduct into public conduct.

Crucially, since attribution is rooted in a distinction between public and private, it presupposes the existence of a government. Even where the actor in question is not the government, some link between the (private) actor and governmental organs must be shown. The only exception to this presumption seems to be Article 9 ARSIWA,[22] specifically dealing with situations where a 'person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities'. Against this backdrop, how does the literature view the applicability of state responsibility law to situations where an effective government is absent?

2.2 State Responsibility and the Absence of Effective Government: Views from the Literature

The issue of state responsibility in the absence of effective government has been largely overlooked in the literature. Virtually all the works that consider the question do so in the context of general works on 'failed states' and international law, with only a few pages – or, in a handful of cases,

22 Articles 8 and 11 ARSIWA refer to the instructions, direction or control of the state, and adoption or acknowledgment by the state, respectively, which, in turn, refers to the government; under Article 10 ARSIWA, the insurrectional movement *becomes* the new government.

a chapter – dedicated to state responsibility.[23] Nonetheless, it is helpful to identify the commonly recurring elements of the discussion, with a closer examination of the particular views reserved for the analysis in Chapters 3 through 5 of the dissertation.

As a starting point, it is generally accepted that a state which loses its (effective) government nonetheless retains its statehood.[24] While effectiveness plays an important role in the creation of states, once a state is established, international law maintains a strong presumption in favor of its continuity.[25] In the words of Gerard Kreijen, 'States may have a complicated birth, but they do not die easily.'[26] Since international law values stability, when it comes to a clash between the principles of effectiveness and continuity, this presumption is powerful enough to overcome the

23 See Kreijen, *State Failure*, 269-289; R. Geiss, *"Failed states": Die normative Erfassung gescheiterter Staaten* (Berlin: Duncker & Humblot, 2005), 251-291; H. Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Baden-Baden: Nomos, 2007), 84-107; F. Leidenmühler, *Kollabierter Staat und Völkerrechtsordnung: zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt* (Wien: Neuer Wissenschaftlicher Verlag, 2011), 506-544; as well as D. Thürer, 'Der Wegfall effektiver Staatsgewalt: "The Failed State"', in: D. Thürer, M. Herdegen & G. Hohloch, *Der Wegfall effektiver Staatsgewalt: 'The Failed State' (The Breakdown of Effective Government)* (Heidelberg: C.F. Müller, 1996), 9, at 31-33; M. Herdegen, 'Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State"', in: Thürer, Herdegen & Hohloch, *Der Wegfall effektiver Staatsgewalt*, 49, at 77-79; Geiss, 'Failed States: Legal Aspects', 480-484; G. Cahin, 'L'état défaillant en droit international: quel régime pour quelle notion?', in: *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 177, at 202-207; P. Pustorino, 'Failed States and International Law: The Impact of UN Practice on Somalia in Respect of Fundamental Rules of International Law' (2010) 53 *German Yearbook of International Law* 727, at 749-751; Richter, *Collapsed States*, 222-226; R. Garciandía Garmendia, *De los estados fallidos a los estados frágiles: un reto para el derecho internacional contemporáneo* (Granada: Comares, 2013), 253-261. For a non-general work, see R. Lawson, 'Out of Control – State Responsibility and Human Rights: Will the ILC's Definition of the ' Act of State' meet the Challenges of the 21st Century?', in: M. Castermans-Holleman, F. van Hoof & J. Smith (eds.), *The Role of the Nation State in the 21st Century: Human Rights, International Organisations and Foreign Policy – Essays in Honour of Peter Baehr* (The Hague: Kluwer, 1998), 91, specifically on this issue in the context of the ECHR.

24 This is true both for those authors who consider the question more generally, as well as those who write about state responsibility. See e.g. G. Cahin, 'Le droit international face aux « États défaillants »', in: J-D. Mouton & J-P. Cot (eds.), *L'État dans la mondialisation: colloque de Nancy* (Paris: Editions Pedone, 2013), 51, at 69-72; Pustorino, 'Failed States', 732-733, 748; J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford: Oxford University Press, 2006), 722; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 66-83; R. Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' (2004) 73 *Nordic Journal of International Law* 1, at 5-6. Geiss, 'Failed States: Legal Aspects', 465, even points out that '[q]uite strikingly, the legal personality of States that have lacked an effective government over a significant period of time […] has never been questioned.' But see, for the rare exception (writing a few years after Geiss), Richter, *Collapsed States*, 112-114.

25 See e.g. Crawford, *Creation of States*, 701; R. Jennings & A. Watts (eds.), *Oppenheim's International Law* (2 vols., 9th ed., Harlow: Longman, 1992), vol. I, 122.

26 Kreijen, *State Failure*, 37.

'temporary' loss of effectiveness.[27] Thus, analyses almost invariably come to the conclusion that 'failed states' remain states under international law. Indeed, it would be difficult to argue otherwise, considering that this is the position which practice, most notably in the case of Somalia, confirms.[28] Accordingly, the state continues to be the bearer of rights and obligations under international law.[29]

Nonetheless, most authors seem to share a certain skepticism regarding the possibility of holding the 'failed state' responsible. Statements asserting that 'international responsibility […] is nonexistent in a failed state situation', that '[state] failure and irresponsibility seem to go hand in hand in practice' or that 'State failure generates a responsibility vacuum' are a recurring feature of these works.[30] To a large extent, this is the result of the definitional problem discussed above: much of the skepticism stems from the fact that authors generally limit their analysis to the worst-case scenario, where the loss of government is understood not only as the loss of control, but as the complete collapse of the institutions themselves.[31]

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27 Cf. *Grisbådarna* (Norway, Sweden), Award of 23 October 1909, 11 UNRIAA 147, at 161 (English translation in (1910) 4 *American Journal of International Law* 226, at 233): 'It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible'. See also C. de Visscher, *Les effectivités du droit international public* (Paris: Pedone, 1967), 21; C. de Visscher, *Theory and Reality in Public International Law* (rev. ed., Princeton: Princeton University Press, 1968), 177.

28 Even throughout the 1990s, when it did not have a government, Somalia retained its UN membership and was treated as a state, despite the fact that it could not represent itself, see generally e.g. Koskenmäki, 'Legal Implications Resulting from State Failure', 11-17; Pustorino, 'Failed States', 736-741.

29 Thürer, 'Der Wegfall effektiver Staatsgewalt', 31, explicitly argues that this is the case even with a factually incapacitated state. See also the analysis in Cahin, 'L'état défaillant', 200-202; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 86-87, 97-101; Geiss, 'Failed States: Legal Aspects', 477-480, concluding that 'state failure' does not constitute a ground for suspension or termination of treaties, thus the state's treaty obligations remain in place (though Geiss makes a normative argument in favor of automatic suspension).

30 Geiss, 'Failed States: Legal Aspects', 484; Cahin, 'L'état défaillant', 202; Kreijen, *State Failure*, 228, respectively, Cahin stating in the original French that: '[d]éfaillance et irresponsabilité semblent en réalité aller de pair'. See also Thürer, 'Der Wegfall effektiver Staatsgewalt', 46 (emphasis in original): '[g]enerally, a *failed state* is exempt from responsibility in international law'; Kreijen, *State Failure*, 270, even entitled the respective section 'The Irresponsibility of the Failed State'; Pustorino, 'Failed States', 749, points out that in practice, the situation creates a certain imbalance between rights and obligations, where the state is still entitled to its rights, yet at the same time it cannot be held responsible for violating its obligations.

31 See Section 1.2.2.1 above; with regard to state responsibility in particular, see e.g. Kreijen, *State Failure*, 275 (emphasis in original): 'The sheer *absence of government* […] rules out any realistic application of the concept of *public* authority in the first place.' See also the contrast in Schröder, *Die völkerrechtliche Verantwortlichkeit*, 103-107, who distinguishes between 'failed' and 'failing' states (the former referring to the complete absence of government), and much of his analysis regarding 'failing states' merely points out that the rules on responsibility apply as they would in the case of a state with full capacity to act.

Under such an approach, 'failed states' are *by definition* characterized by the incapacity to act, leading several authors to argue that these states are 'inherently unable' to fulfil many of their international obligations.[32] Analyses commonly point out that the major hurdle to overcome in these situations is attribution: in the complete absence of a government, there is no conduct which could be attributable to the state.[33] With the attribution of governmental conduct automatically excluded, it is no surprise that attention tends to focus exclusively on Articles 8-11 of the ARSIWA, regulating private conduct.[34] Yet even the outcome of these analyses is anything but optimistic. Most authors argue that many of these scenarios still require some connection with the government (Articles 8, 9 and 11), or that the 'failed state' situation fails to meet other conditions of the particular Article

32 See e.g. Geiss, 'Failed States: Legal Aspects', 477 (emphasis added): '[i]n the absence of any governmental authority, the failed State is *inherently* unable to fulfil any of its international obligations'. However, this is not entirely correct; see rather Schröder, *Die völkerrechtliche Verantwortlichkeit*, 84-85, distinguishing between obligations of prevention (*Verhinderungspflichten*), obligations to refrain from certain conduct (*Unterlassungspflichten*), and obligations to perform a certain conduct (*Leistungspflichten*), though a slightly better classification is offered by relying on the categories of obligations of conduct, negative obligations (of result), and (positive) obligations of result, respectively. Since obligations of conduct are generally commensurate to the state's capabilities, a reduction in such capabilities automatically affects what is expected of the state. In the case of negative obligations of result, the state is actually inherently unable to *breach* these obligations. It is only in the case of positive obligations of result that the state is inherently unable to fulfil them. C. Giorgetti, *A Principled Approach to State Failure: International Community Actions in Emergency Situations* (Leiden: Brill, 2010), 43, even defines state failure 'as the incapacity of a State to perform its obligations towards its citizens and towards the international community in general'; cf. Garciandía Garmendia, *De los estados fallidos*, 260, using virtually identical wording: 'un Estado frágil se define como aquel Estado incapaz de cumplir sus obligaciones con sus ciudadanos y a nivel internacional.' However, this incapacity is better understood as the *consequence* of state failure, rather than its definition.

33 Thürer, 'Der Wegfall effektiver Staatsgewalt', 31; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 85-86; Geiss, *"Failed states": Die normative Erfassung*, 256; Cahin, 'L'état défaillant', 202; Kreijen, *State Failure*, 273-275; Koskenmäki, 'Legal Implications Resulting from State Failure', 32-33.

34 See Thürer, 'Der Wegfall effektiver Staatsgewalt', 32-33; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 84-107; Kreijen, *State Failure*, 275-282; Cahin, 'L'état défaillant', 202-205; Geiss, *"Failed states": Die normative Erfassung*, 259-270, though he does briefly consider attribution under Article 4 ARSIWA at 257-259; see similarly Leidenmühler, *Kollabierter Staat*, 520-523.

(Articles 9 and 10).[35] Exceptions are rare and limited.[36] Furthermore, the ARSIWA is not only the starting point of most of these works, but also the endpoint, since – according to their own definition – there is no international jurisprudence on the matter: a state with no government cannot even represent itself in proceedings.[37] Thus, case law tends to be considered only where it was so important to the drafting of an Article that it is extensively referenced in the ARSIWA Commentary itself.[38]

The dissertation does not share this grim view, and with regard to these fundamental points, there are three ways in which it distinguishes itself from previous works. Firstly, by defining the absence of effective government as the lack of control over state territory, it extends the scope of inquiry beyond the scenario of a 'collapsed state' to cover the more commonly occurring situations of governmental absence. Secondly, by analyzing the relevant jurisprudence, in particular that of human rights courts, the dissertation provides a more elaborate examination of state responsibility in these

35 Regarding Article 8 ARSIWA, see Pustorino, 'Failed States', 750; Cahin, 'L'état défaillant', 203; Kreijen, *State Failure*, 276-277; Geiss, *"Failed states": Die normative Erfassung*, 260-261. Regarding Article 9 ARSIWA, most authors argue that a 'failed state' situation simply does not meet the conditions laid down in the Article, which was arguably drafted with different circumstances in mind, see e.g. Pustorino, 'Failed States', 750; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 88-90; Geiss, *"Failed states": Die normative Erfassung*, 261-265; Kreijen, *State Failure*, 277-279; only Cahin, 'L'état défaillant', 202-204, cautiously argues that a broad reading of Article 9 could allow for attribution. Regarding Article 10 ARSIWA, Schröder, *Die völkerrechtliche Verantwortlichkeit*, 90-95, argues that it can form the basis for subsequent attribution and thus responsibility, while Geiss, *"Failed states": Die normative Erfassung*, 265-268; Kreijen, *State Failure*, 279-282, are dismissive of the possibility. See also Kreijen, *State Failure*, 282, generally on the importance of there being a government.

36 Schröder, *Die völkerrechtliche Verantwortlichkeit*, 91-93, 97, on Article 10; Cahin, 'L'état défaillant', 202-204, cautiously on Article 9.

37 Cf. in the UK courts *Republic of Somalia* v. *Woodhouse Drake & Carey (Suisse) SA*, High Court, Queen's Bench Division, 13 March 1992, 94 ILR 608, at 619; see also Koskenmäki, 'Legal Implications Resulting from State Failure', 7-18.

38 Most notably *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Award No. 324-10199-1, 2 November 1987, (1987) 17 Iran-US Claims Tribunal Reports 92 and *Tehran Hostages*, see e.g. Cahin, 'L'état défaillant', 204; Geiss, 'Failed States: Legal Aspects', 484; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 89, 95-96 (though he also mentions the *Lighthouses* case – *Affaire relative à la concession des phares de l'Empire ottoman* (Grèce, France), Award of 24/27 July 1956, 12 UNRIAA 155; likewise cited in the ARSIWA Commentary – and a handful of claims commission cases). Kreijen, *State Failure*, 276-277, also mentions *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14 and *Prosecutor* v. *Duško Tadić*, ICTY Appeals Chamber, Judgment of 15 July 1999, IT-94-1-A, while Thürer, in 'Der Wegfall effektiver Staatsgewalt', 32, refers to *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland *v.* Albania), Merits, Judgment of 9 April 1949, 1949 ICJ Reports 4, in a comment in a footnote. That said, Schröder, *Die völkerrechtliche Verantwortlichkeit*, 95 and Geiss, *"Failed states": Die normative Erfassung*, 255, 257-258, 267, also mention the case of *George W. Hopkins (U.S.A.)* v. *United Mexican States*, Award of 31 March 1926, 4 UNRIAA 41, not discussed in the ARSIWA Commentary.

situations, especially in the fora where it is adjudicated most frequently, such as the European and Inter-American Courts of Human Rights. Thirdly, it ventures onto novel ground not covered by the literature on state responsibility in the absence of effective government by exploring the possibility of state complicity in the conduct of non-state actors.

3 The State's Duty to Protect in the Absence of Effective Government

3.1 Introduction

Having briefly reviewed the ILC's work on state responsibility and views from the relevant literature, this chapter turns to the first of three bases of responsibility that may arise in connection with the conduct of private actors: violations of obligations to prevent and redress. In such cases, the state is responsible not for the conduct of the private actor as such, but rather its own failure to prevent or redress said conduct.

In doing so, the chapter first discusses the role of sovereignty as the source of a general duty to maintain order in the state's territory, before providing a brief overview of the variety of states' concrete obligations to prevent and redress. The chapter then turns to analysing the common elements of the due diligence standard used to assess compliance with such obligations, with particular focus on how these elements may be affected by the loss of effective control. Based on this analysis, the chapter posits that the state's obligations to prevent and redress remain operational *to the extent that it is capable of doing so*, even in respect of territory beyond its control (but still under its sovereignty). Finally, the chapter considers possible counterarguments to this claim, before offering some concluding remarks.

3.2 Sovereignty as a General Duty to Maintain Order

Much of the discourse on state sovereignty focuses on the rights which emanate from sovereignty, such as the right to be free from intervention.[1] Sovereignty, however, entails not only the *right*, but also the *obligation* to control the state's territory, mandating the state to maintain order within its borders. As Max Huber wrote in the 1925 *Spanish Zone of Morocco* award, the state's 'primary purpose [is] the maintenance of internal peace and social order. The State is bound to a certain vigilance.'[2] He then went on to say that '[t]he responsibility for events which may affect international law

1 See e.g. M.N. Shaw, *International Law* (7th ed., Cambridge: Cambridge University Press, 2014), 153-157, speaking of the 'fundamental rights of states'; but see e.g. S. Besson, 'Sovereignty', in: *Max Planck Encyclopedia of Public International Law*, April 2011, available at https://opil.ouplaw.com/home/mpil, paras. 113-127 for a more balanced approach.

2 *Affaire des biens britanniques au Maroc espagnol* (Espagne *c.* Royaume-Uni), Award of 1 May 1925, 2 UNRIAA 615, at 642 (translation by author).

and which occur in a given territory goes hand in hand with the right to exercise, to the exclusion of other states, the prerogatives of sovereignty.'[3]

Huber elaborated on this issue in the *Island of Palmas* case in 1928, eloquently explaining that:

> Territorial sovereignty […] involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States […], together with the rights which each State may claim for its nationals in foreign territory. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.[4]

The notion surfaced again in the *Corfu Channel* case in 1949, where the ICJ described 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' as one of 'certain general and well-recognized principles'.[5] In his separate opinion, Judge Alvarez noted that:

> (1) Every State is bound to preserve in its territory such order as is indispensable for the accomplishment of its international obligations: for otherwise its responsibility will be involved.
> (2) Every State is bound to exercise proper vigilance in its territory. […]
> (3) As a consequence of the foregoing, every State is considered as having known, or as having a *duty* to have known, of prejudicial acts committed in parts of its territory where local authorities are installed; that is not a presumption, nor is it a hypothesis, *it is the consequence of its sovereignty*.[6]

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3 *Ibid.*, 649 (translation in: *Yearbook of the International Law Commission*, 1979, vol. II, part Two, at 98, note 505).

4 *Island of Palmas* (Netherlands/USA), Award of 4 April 1928, 2 UNRIAA 829, at 839. See also S. Bastid, 'Les Problèmes Territoriaux dans la Jurisprudence de la Cour Internationale de Justice' (1962-III) 107 *Recueil des Cours* 360, at 367. Cf. N. Schrijver, 'The Changing Nature of State Sovereignty' (2000) 70 *British Yearbook of International Law* 65, at 95-96.

5 *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland *v.* Albania), Merits, Judgment of 9 April 1949, 1949 ICJ Reports 4, at 22. As far as the classification of sources go, it is not entirely clear whether this is a rule of customary international law or a general principle. While the Court's pronouncement may suggest the latter, e.g. I.Y. Chung, *Legal Problems Involved in the Corfu Channel Incident* (Geneva: Droz, 1959), 161, maintains that it is the former. In addition, at least some manifestations of the obligation are considered customary law, see e.g. *Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, 2010 ICJ Reports 14, para. 101 (where the Court describes the *principle* of prevention as customary law). Regardless of how rhe rule/principle is classified, though, there is no doubt that it is a binding source of international law.

6 *Corfu Channel*, Separate Opinion of Judge Alvarez, 1949 ICJ Reports 39, at 44 (first emphasis in original, second added).

The issue was also discussed by the ILC's first Special Rapporteur on state responsibility, Francisco García Amador, in the context of whether there can be responsibility 'even in the absence of any breach or non-observance of a specific international obligation'.[7] Referring, for example, to the *Trail Smelter* arbitration, the Rapporteur noted in 1957 that in such cases:

> There is admittedly no breach or non-performance of a concrete or specific obligation, but there is a breach or non-performance of *a general duty which is implicit in the functions of the State* from the point of view of both municipal and international law, namely, the duty to ensure that in its territory conditions prevail which guarantee the safety of persons and property. The rule of 'due diligence' […] is in reality nothing more than an expression of the same idea, and is recognized as an integral part of the international law relating to responsibility.[8]

Similar statements have occasionally been made by states as well. For instance, the French Secretary of State for Foreign Affairs, in his reply to a parliamentary question concerning the assassination of French nationals in Morocco, referred to 'the elementary duty incumbent upon any independent Government to maintain order in its territory.'[9]

More recently, the strong connection between state sovereignty and such a duty was highlighted by ICJ President Peter Tomka. In his 2005 declaration in the *Armed Activities* case, he pointed out that '[s]overeignty of a State does not involve only rights but also obligations of a territorial State. The State has an obligation not only to protect its own people, but also to avoid harming its neighbours.'[10]

In sum, as a corollary of their sovereignty, states are expected to maintain order in their territory, confirmed in a long line of pronouncements in international law over the decades.

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7 ILC, *International Responsibility: Second Report by F.V. García Amador, Special Rapporteur*, 15 February 1957, UN Doc. A/CN.4/106, in: *Yearbook of the International Law Commission*, 1957, vol. II, 104 (hereinafter *García Amador's Second Report*), at 105, para. 6. Cf. ILC, *International Responsibility: Fifth Report by F.V. García Amador, Special Rapporteur*, 9 February 1960, UN Doc. A/CN.4/125, in: *Yearbook of the International Law Commission*, 1960, vol. II, 41 (hereinafter *García Amador's Fifth Report*), paras. 66-78, discussing *Trail Smelter* (USA, Canada), Award of 16 April 1938 and 11 March 1941, 3 UNRIAA 1905, in the context of 'abuse of rights', rather than the violation of specific obligation.

8 *García Amador's Second Report*, at 105, para. 7 (Commentary to Article 1) (emphasis added).

9 Cited in ILC, *Fourth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur – The internationally wrongful act of the State, source of international responsibility (continued)*, 30 June 1972 and 9 April 1973, UN Doc. A/CN.4/264 and Add.1, in: *Yearbook of the International Law Commission*, 1972, vol. II, 71 (hereinafter *Ago's Fourth Report*), para. 112.

10 *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *v.* Uganda), Judgment of 19 December 2005, 2005 ICJ Reports 168, Declaration of Judge Tomka, 2005 ICJ Reports 351, para. 2.

3.3 Concrete Obligations to Prevent / Redress (Private) Conduct

But even if one recognizes that there is a general obligation on states to maintain order in their territory, such a duty may be difficult to put into concrete terms. Nonetheless, there are numerous concrete obligations in various areas of international law which mandate states to prevent or redress certain conduct – and which, in some form or another, can probably trace their origins to this general duty.[11]

In order to comply with such obligations, the state has to take active steps to prevent and redress certain conduct. For instance, the state has to not only respect, but also ensure respect for the human rights of those under its jurisdiction, and if it fails to do so, it may be held responsible under international law for its omission. As long as a government exists, attributing such an omission (i.e. government inaction) to the state usually does not raise problems: the attributability of the conduct of governmental organs has been confirmed in a long line of cases and codified in Article 4 ARSIWA. Rather, the questions that arise are related to the element of 'breach', i.e. the content and operation of the state's duty. Was there anything the state (the government) *could have done*? What are the limits of this obligation? What can be required of a government that exercises little or no control over vast swathes of the country? Is it sufficient to plead the lack of state control to escape responsibility?

Before delving into these questions, two preliminary remarks on terminology are in order. Firstly, such obligations have had many names over the years and across the different fields of international law, such as 'due diligence obligations', 'positive obligations', 'obligations to guarantee', 'duty of vigilance', 'duty to prevent', 'duty to protect', or *sic utere tuo ut alienum non*

11 For instance, as the ICJ pointed out in the environmental context in *Pulp Mills*, para. 101, 'the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory.' The Court even referred to the general formulation of the *Corfu Channel* case, see *ibid*. Similarly, in *Armed Activities*, which concerned an entirely different set of circumstances, the Court highlighted how Uganda argued based on the *Corfu Channel* case, see *Armed Activities*, para. 277; see also *ibid.*, Declaration of Judge Tomka, para. 2, likewise referring to the case. See also T. Stephens & D. French, 'Second Report', *International Law Association, Study Group on Due Diligence in International Law*, July 2016, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f, 5-6. Another example is a Swiss legal opinion from 1955 on a diplomatic incident, which noted that '[t]he State of residence has the obligation to prevent acts by individuals which contravene international law and to impose a penal sanction against the perpetrators of those acts after they have been committed' (quoted in *Ago's Fourth Report*, para. 130). It is not clear why the legal opinion refers to 'the State of residence', and it is highly unlikely that the state of residence would be obliged to prevent or punish said acts when the individual in question has acted abroad.

laedas.[12] Perhaps the most general way to refer to this type of obligation has been 'due diligence obligations', or simply 'due diligence'. But this terminology is misleading, as due diligence is not the obligation itself, but rather *the standard* used to assess compliance with the obligation.[13] The reason why a standard must be used to evaluate compliance is that these duties are obligations of conduct, also known as obligations of effort or obligations of means. Accordingly, the state is required to take (all necessary) measures to prevent or redress certain conduct, but cannot be held responsible on the sole basis that a certain event has taken place.[14] To add to the confusion, due diligence is not limited to state responsibility in relation to preventing or repressing certain conduct by private actors (or the state's own organs or third states).[15] The term is also used in connection with other obligations of effort, most notably the progressive realization of economic, social and cultural rights.[16] For ease of reference and to avoid any misunderstandings, obligations requiring states to prevent or redress certain conduct will be referred to as 'duties to protect' throughout this chapter (except where a

12 See e.g. ECtHR, *Ilaşcu and others* v. *Moldova and Russia*, Application No. 48787/99, Grand Chamber, Judgment of 8 July 2004, para. 331; IACtHR, *González* et al. *('Cotton Field')* v. *Mexico*, Judgment of 16 November 2009, Preliminary Objection, Merits, Reparations and Costs, Series C, No. 205, para. 236; *Armed Activities*, paras. 246, 300; *Pulp Mills*, para. 204; *American Manufacturing & Trading, Inc.* v. *Republic of Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997, (1997) 36 ILM 1534, para. 6.05; R. Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9; J. Brunnée, 'Sic utere tuo ut alienum non laedas', in: *Max Planck Encyclopedia of Public International Law*, March 2010, available at https://opil.ouplaw.com/home/mpil. Many of these terms come from human rights and environmental law, where such obligations are stipulated the most frequently, but duties of this kind are by no means limited to these fields.

13 See e.g. T. Stephens & D. French, 'First Report', *International Law Association, Study Group on Due Diligence in International Law*, 7 March 2014, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1429&StorageFileGuid=fd770a95-9118-4a20-ac61-df12356f74d0, 1.

14 By contrast, obligations of result demand a particular outcome from the state. For more on the distinction between the two types of obligations, see e.g. P-M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 *European Journal of International Law* 371; C.P. Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 371.

15 Such obligations extend to the conduct of all actors on the state's territory, including its own organs or agents (see *Armed Activities*, para. 246), as well as third states (see e.g. *Ilaşcu*, discussed below in Section 3.4.2.2.2.2).

16 See e.g. Stephens & French, 'First Report', 14; cf. C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (Berlin: Springer, 2003), 6.

particular source or institution uses different terminology), encompassing both 'duty to prevent' and 'duty to redress' type obligations.[17]

Secondly, such obligations arise predominantly in connection with certain conduct by private actors.[18] That conduct has been variously described as an 'injurious act', 'prejudicial act', 'unlawful act', 'external event', 'external fact' or 'catalyst'.[19] The ICJ in *Corfu Channel* spoke of the prohibition on states of allowing their territory to be used 'for acts contrary to the *rights* of other States'.[20] Many of these terms are best avoided, though, as they (1) either imply the private actor's capacity to violate international law, which presupposes international legal personality, an issue that is far from settled; (2) or presume the necessity of injury or damage, which is not always required for a violation of this type of obligation.[21] In view of these implications, the more neutral term of 'catalyst' will be used throughout the chapter to describe the conduct of (private) actors which may trigger state responsibility.

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17 Cf. Pisillo-Mazzeschi, 'Due Diligence Rule', 26, using the same terminology. Such 'duties to protect' are not to be confused with the 'responsibility to protect': although they are based on the same basic idea, responsibility to protect (R2P) is more limited in its scope (intended to address large-scale humanitarian disasters) and in large part concerned with the role of third states. Furthermore, while the legal status of R2P is highly contestable (see e.g. C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *American Journal of International Law* 99, at 120), duties to protect are binding obligations under international law.

18 But see note 15 above regarding other types of actors.

19 See e.g. *Corfu Channel*, 18; *ibid.*, Separate Opinion of Judge Alvarez, 44; ILC, *Seventh Report on State responsibility by Mr. Roberto Ago, Special Rapporteur*, 29 March, 17 April and 4 July 1978, UN Doc. A/CN.4/307 and Add.1-2, in: *Yearbook of the International Law Commission*, 1978, vol. II, Part One, 31 (hereinafter *Ago's Seventh Report*), paras. 4-6, 15; Pisillo-Mazzeschi, 'Due Diligence Rule', 26.

20 *Corfu Channel*, 22 (emphasis added); similarly, in German-language literature, one may encounter the term 'völkerrechtswidriges Verhalten', i.e. 'conduct contrary to international law', see e.g. H. Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Baden-Baden: Nomos, 2007), 84. The UK alleged (and there was a strong suspicion, see e.g. *Corfu Channel*, Dissenting Opinion of Judge Badawi Pasha, 1949 ICJ Reports 58, at 58) that the mines were laid by Serbia, so the Court may have had in mind a scenario where a state lets its territory used by another state to violate the rights of a third state. In such a case, the problem of legal personality does not arise. That said, Serbia's involvement was ultimately not proven, and the Court made its pronouncement with the identity of the minelayers unknown.

21 The no-harm rule in international environmental law, for example, does come with an explicit stipulation of damage, see e.g. *Pulp Mills*, para. 101. But for instance, the state is considered to have violated its duty by tolerating an insurgent group on its territory whose activities are directed against another state; it is not necessary that the group carries out successful operations in the territory of the third state, thereby causing damage; see *Ago's Seventh Report*, para. 15. Furthermore, since in the absence of damage, the likelihood of litigation is low, in many cases it may be difficult to ascertain conclusively whether such a requirement exists; cf. *Asian Agricultural Products Ltd. (AAPL)* v. *Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990, (1991) 6 *ICSID Review* 526, para. 85(A).

With these considerations in mind, the following sections offer a brief overview of the most common obligations to prevent and redress. The aim of this exercise is not to provide an exhaustive taxonomy of all such duties (as that is beyond the scope of the dissertation), but rather to illustrate how ubiquitous and wide-ranging they can be, as well as to show that they are comparable in that they rely on the due diligence standard for assessment of compliance with the particular obligation.

3.3.1 Inter-State Obligations

Obligations to protect first surfaced in a series of claims commission cases concerning injuries to aliens, which – like diplomatic protection today – were conceptualized as inter-state disputes, with the state of nationality bringing a case on behalf of its national against the host state.[22] Since then, such obligations have been affirmed in various fields of international law – most notably environmental law,[23] diplomatic law,[24] and the repression of rebels and terrorists targeting third states[25] – and are assessed according to a due diligence standard.[26] To date, the broadest formulation of such an obligation in an inter-state context remains the ICJ's sweeping declaration in *Corfu Channel* of 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'[27] Indeed, a variety of more specific duties under international law have been traced back to this broad articulation: for instance, it was this general obligation which was held by the ICJ to form the origins of 'the principle of prevention, as a customary rule' in environmental law, and which was relied on by Uganda in its arguments in *Armed Activities* on the duty of vigilance regarding rebel groups.[28]

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22 For an overview of these cases, see e.g. R.P. Barnidge, 'The Due Diligence Principle under International Law' (2006) 8 *International Community Law Review* 81, at 91-99; Pisillo-Mazzeschi, 'Due Diligence Rule', 25-30.

23 See e.g. *Trail Smelter*, at 1965; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Reports 226, para. 29; *Pulp Mills*, para. 101; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion of 1 February 2011, 2011 ITLOS Reports 10, paras. 107-120.

24 See e.g. Articles 22(2) and 29 of the Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, in force 24 April 1964, 500 UNTS 95; *Tehran Hostages*, paras. 61-68.

25 See e.g. UN General Assembly Resolution 2625(XXV): *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, UN Doc. A/RES/2625(XXV), Annex, para. 1; *Armed Activities*, paras. 277, 297-301; T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart, 2006), 118-152.

26 See the overview in Pisillo-Mazzeschi, 'Due Diligence Rule', 22-41.

27 *Corfu Channel*, 22.

28 *Pulp Mills*, para. 101; *Armed Activities*, para. 277. See also note 11 above.

3.3.2 Obligations *vis-à-vis* International Organizations

With regard to international organizations, duties to protect – by member states, and in some cases, even non-member states – arise in respect of the premises and personnel of the organization.

There is a duty to protect the premises of international organizations,[29] the exact scope of which is usually detailed in host agreements with the respective states. Although the law of this field is overwhelmingly conventional law,[30] and the wording may vary from agreement to agreement,[31] this obligation also generally implies due diligence standards.[32] One such example is provided by the headquarters agreement of the International Criminal Tribunal for the former Yugoslavia (ICTY), concluded between the UN and the Netherlands, which stipulates that the 'competent authorities shall exercise due diligence to ensure the security and protection of the Tribunal'.[33]

The same is true for agents of international organizations, a duty similarly stipulated in host agreements,[34] as well as indirectly confirmed by the ICJ in the *Reparation for Injuries* case. Count Folke Bernadotte, mediator of the UN, and Colonel André Sérot, a French UN observer, were killed by members of an extremist group while on a mission in Israel, 'and in presence of liaison officers assigned to [the Count] by the Jewish authorities. His safety, therefore, and that of his lieutenants under the ordinary rules [of] law and order was a responsibility of [the] Provisional Government [of] Israel whose armed forces and representatives control and administer the [area].'[35] Thus the basis of responsibility was that the act took place in

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29 See A.S. Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (The Hague: Kluwer, 1995), 194-198; S. Dikker Hupkes, 'Protection and Effective Functioning of International Organizations', *Universiteit Leiden, Secure Haven Final Report of WP 1110, International Institutional Law*, July 2009, https://openaccess.leidenuniv.nl/handle/1887/14119, 68-106.

30 Muller, *International Organizations*, 47, 54. But see Dikker Hupkes, 'Protection and Effective Functioning', 82-86 on the possibility of a customary o bligation, distinguishing between preventive and reactive aspects of the duty to protect, concluding (at 86) that while the former is limited to cases where the host agreement includes an explicit provision to that effect, all international organizations benefit from the latter by virtue of the inviolability of their premises.

31 For a detailed analysis, see e.g. *ibid.*, 68-75; cf. Economides, 'Content of the Obligation', 378.

32 See Dikker Hupkes, 'Protection and Effective Functioning', 97-106.

33 Article 7(1) of the Agreement concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, New York, 29 July 1994, in force provisionally 29 July 1994, definitively 17 November 1994, 1792 UNTS 351.

34 See e.g. Article 43 of the Headquarters Agreement between the International Criminal Court and the Host State, The Hague, 7 June 2007, in force 1 March 2008, 2517 UNTS 173.

35 *Message dated 17 September 1948 addressed by Ralph Bunche, Personal Representative of the Secretary-General, to Mr. M. Shertok, Foreign Minister of Israel, concerning assassination of United Nations mediator*, 18 September 1948, UN Doc. S/1004; also reproduced in Q. Wright, 'Responsibility for Injuries to United Nations Officials' (1949) 43 *American Journal of International Law* 95, at 95.

territory controlled by said authorities, who furthermore assumed the duty to protect by assigning liaison officers to the victims, yet failed to exercise due diligence.[36] That there was a breach of obligation on the part of Israel was not itself the subject of dispute, but was already implied in the question posed to the Court, which referred to 'circumstances involving the responsibility of a State'.[37]

Notably, Israel was not a member of the UN at the time of the incident. But while 'the non-member state does not owe specific duties to the organization […] a basis for claims may exist in particular cases'[38] by virtue of a treaty (e.g. host agreement with a non-member); state consent to receive agents of the organization (as was the case with Israel);[39] or through the application of general international law by analogy.[40]

Regarding member states, these obligations also flow from their general commitment to the international organization in question. In the *Reparations* case, the ICJ made reference to 'obligations entered into by [member states] in the interest of the good working of the organization',[41] including more generally Article 2(5) of the UN Charter, which requires that '[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter'.[42] Similar obligations may be established in the case of other international organizations, whether explicitly stated in their constitutive documents or implicitly understood; and there may indeed be an obligation on member states to support the work of the organization under customary law.[43] Thus, it would not be reconcilable with such a general *positive* obligation of the member state to allow non-state actors in its territory to violate the rights of international organizations.

3.3.3 Obligations *vis-à-vis* Individuals and Domestic Legal Persons

3.3.3.1 Human Rights Law

Although international human rights law was originally conceived as a system to protect individuals from the excesses of the state,[44] the tools for developing the state's duty to protect individuals from other actors have been

36 See Wright, 'Responsibility for Injuries', 95-96, 102. Israel was not *de jure* recognized at the time, but its *de facto* control over the area served as a basis for responsibility, *ibid.*, 102.

37 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 1949 ICJ Reports 174, at 175.

38 C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd rev. ed., Cambridge: Cambridge University Press, 2005), 393.

39 See Wright, 'Responsibility for Injuries', 100.

40 Amerasinghe, *Institutional Law of International Organizations*, 393.

41 *Reparation for Injuries*, 184.

42 *Ibid.*, 183.

43 Cf. Amerasinghe, *Institutional Law of International Organizations*, 391. Furthermore, Amerasinghe repeatedly refers to possible analogies with inter-state law, see *ibid.*, 391-393.

44 See e.g. H.J. Steiner, 'International Protection of Human Rights', in: M.D. Evans (ed.), *International Law* (2nd ed., Oxford: Oxford University Press, 2006), 753, at 772.

included in the treaty texts from the very beginning. The gateway through which the duty of states to protect human rights can be asserted is the general language found in human rights treaties not only requiring states to 'respect' the rights in question, but also placing a positive obligation on them to 'ensure' or 'secure' enjoyment of such rights within their jurisdiction.[45]

Over time, non-state actors started to play a greater role in society; and with this enhanced role came the realization that these private actors are also capable of abusing human rights.[46] Accordingly, human rights treaties have been interpreted by courts and quasi-judicial bodies as including an obligation – with a due diligence standard – on the part of the state to prevent and redress violations by non-state actors. One of the earliest examples of such a holding is the *Velásquez Rodríguez* case before the IACtHR from the late 1980s.[47] The case concerned the unlawful arrest, detention and torture of a Honduran student, allegedly by state agents, and his subsequent disappearance.[48] Although the Court was unable to establish the identity of the perpetrators with certainty, it held that even if they were not state agents, Honduras was in any case responsible for breaching its duty to protect:[49]

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[50]

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45 See e.g. Article 2(1) of the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171; Article 1(1) of the American Convention on Human Rights, Costa Rica, 22 November 1969, in force 18 July 1978, 1144 UNTS 123; Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221.

46 See e.g. A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 1-19; H.J. Steiner, P. Alston & R. Goodman (eds.), *International Human Rights in Context: Law, Politics, Morals* (3rd ed., Oxford: Oxford University Press, 2008), 1385; A. Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors', in: P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 37, at 74-78.

47 IACtHR, *Velásquez Rodríguez* v. *Honduras*, Merits, Judgment of 29 July 1988, Series C, No. 4.

48 *Ibid.*, para. 3. Note that the IACtHR (as well as the ACommHPR and the ECtHR, see e.g. notes 292-293, as well as Chapter 4, notes 110, 246, 280 below) uses the term 'state agents' in the sense of state organs, while the ARSIWA Commentary to Chapter II, para. 2, suggests that the ILC uses the term 'agent' in a broader sense, encompassing those 'who have acted under the direction, instigation or control of [state] organs' (and possibly all those whose conduct is attributable to the state under Articles 8-11 ARSIWA, although this is not made clear by the Commentary). See also A.J.J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *British Yearbook of International Law* 255, at 267-268 on the terminology of agent/organ at the ILC.

49 *Velásquez Rodríguez*, para. 182.

50 *Ibid.*, para. 172.

Similar positions have been taken by other treaty bodies, including the Human Rights Committee (HRC),[51] the ECtHR,[52] and the African Commission on Human and Peoples' Rights (ACommHPR);[53] also with regard to social, economic and cultural rights.[54] On a fundamental level, international human rights law is conceptualized as encompassing duties to respect, protect, and fulfil human rights, whereby '[t]he obligation to protect requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the […] human rights of the individual' and to redress such abuses.[55] Furthermore, in certain conventions, the text itself explicitly refers to a state duty to prevent and redress in connection with private conduct; this is typically the case with anti-discrimination treaties.[56]

There have, of course, been certain differences between the approaches of different human rights courts, ranging from the particular to the general. The ECtHR has considered that it 'does not have to develop a general theory of the positive obligations which may flow from the Convention',[57] and has focused instead on positive obligations in the context of particular

51 HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8.

52 Both the Court and the Commission have extensive jurisprudence in this field; for an overview, see e.g. Dröge, *Positive Verpflichtungen*; B. Conforti, 'Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights' (2003) 13 *Italian Yearbook of International Law* 3; J-P. Costa, 'The European Court of Human Rights: Consistency of Its Case-Law and Positive Obligations' (2008) 26 *Netherlands Quarterly of Human Rights* 449.

53 See e.g. ACommHPR, *Communication No. 74/92: Commission Nationale des Droits de l'Homme et des Libertés / Chad*, Decision of 11 October 1995; ACommHPR, *Communication No. 245/02: Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, Decision of 15 May 2006, paras. 142-164.

54 See D.M. Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melbourne Journal of International Law* 1, at 18-26, providing an overview of the (quasi-)jurisprudence of human rights courts and commissions on the positive obligations of the affected state in respect of social, economic and cultural rights.

55 This classification was originally articulated in a preparatory report to what became CESCR, *General Comment No. 12: The right to adequate food (art. 11)*, 12 May 1999, UN Doc. E/C.12/1999/5, para. 15; see Commission on Human Rights, *Report on the right to adequate food as a human right, submitted by Mr. Asbjørn Eide*, 7 July 1987, UN Doc. E/CN.4/Sub.2/1987/23, paras. 66-69, with para. 68 quoted.

56 See Article 2(1)(d) of the International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, in force 4 January 1969, 660 UNTS 195; Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

57 ECtHR, *Plattform "Ärzte für das Leben"* v. *Austria*, Application No. 10126/82, Chamber, Judgment of 21 June 1988, para. 31.

articles of the European Convention on Human Rights (ECHR).[58] That said, the Court has developed extensive jurisprudence linked to almost every single one of the Convention's articles over the decades, and as noted by a former president of the ECtHR, '[t]here is no *a priori* limit to the contexts in which a positive obligation may be found to arise'.[59] Furthermore, it should be noted that in the *Ilaşcu* case (discussed below), the Court first examined Moldova's positive obligations generally and then formed its article-by-article conclusions by referring back to this general examination.[60]

The HRC declared in 1981 in its General Comment No. 3 that while the duty to protect is 'obvious in a number of articles', 'in principle this undertaking relates to all rights set forth in the Covenant.'[61] In other words, states' positive obligations are not limited to certain articles of the International Covenant on Civil and Political Rights (ICCPR), but cover all the rights contained in the treaty. General Comment No. 3 was later replaced by General Comment No. 31, which does not specifically address positive obligations, but nonetheless maintains that there is a 'general obligation' on states to ensure the enjoyment of human rights 'in their territory and subject to their jurisdiction'.[62]

Likewise, the IACtHR pointed out already in *Velásquez Rodríguez* that Article 1(1) of the American Convention on Human Rights (ACHR) 'specifies the obligation assumed by the States Parties in relation to *each of the rights* protected [by the Convention].'[63] In a later case, then Judge of the Court Antônio Cançado Trindade even asserted that a violation of the duty

58 See e.g. Dröge, *Positive Verpflichtungen*, and A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004) for article-by-article analysis; D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London: Routledge, 2012); L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge: Intersentia, 2016).

59 Costa, 'Positive Obligations', 453.

60 *Ilaşcu*, paras. 336-352 on the general examination, and paras. 441, 448, 453, 464 on the conclusions regarding the violations of each article. The only issue examined separately was the respondent states' alleged interference with the application, see paras. 475-482. See also K. Mujezinović Larsen, '"Territorial Non-Application" of the European Convention on Human Rights' (2009) 78 *Nordic Journal of International Law* 73, at 86-87; and M. Milanović & T. Papić, 'The Applicability of the ECHR in Contested Territories' (2018) 67 *International and Comparative Law Quarterly* 779, at 788, noting that this was a departure from the Court's previous jurisprudence, which had developed the concept of positive obligations on an article-by-article basis. The Court later developed a specific test in the *Mozer* case for the purposes of Article 13 ECHR, see note 238 below.

61 HRC, *General Comment No. 3: Article 2 (Implementation at the national level)*, in: *Human Rights Instruments, Volume I: Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 27 May 2008, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 174, para. 1.

62 HRC, *General Comment No. 31*, para. 3.

63 *Velásquez Rodríguez*, para. 162; see also paras. 165-166.

to protect under this Article does not need to be linked to a violation of another Convention right.[64] He argued that 'the lack of positive protection measures – and even preventive ones – by the State, in a situation that reveals a consistent pattern of violent and flagrant and grave human rights violations, entails *per se* a violation of' Article 1(1) ACHR.[65] While this is not necessarily supported by the case law of the Court (which addresses violations of Article 1(1) virtually always in combination with another Convention article),[66] it is undisputed that the duty to protect can be invoked in connection with any of the Convention rights.[67]

All in all, based on the treaty language and the jurisprudence of human rights bodies, it is safe to conclude that 'international law firmly establishes that States have a duty to protect against non-State human rights abuses within their jurisdiction'.[68]

3.3.3.2 Investment Law

International investment law has strong ties to the customary law on injuries to aliens.[69] This may explain why, unlike in human rights law, where the concept of positive obligations was developed over time, the duty to protect was present in investment law from the moment that states began concluding agreements on the subject.[70] Many, if not most, of these agreements stipulate the obligation of the host state to ensure the (full) protection

64 IACtHR, *Mapiripán Massacre* v. *Colombia*, Merits, Reparations and Costs, Judgment of 15 September 2005, Series C, No. 134, Separate Opinion of Judge Cançado Trindade, para. 7.

65 *Ibid.*, para. 6.

66 See L. Burgorgue-Larsen & A. Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford: Oxford University Press, 2011), 257, noting that the only exception is IACtHR, *Palamara-Iribarne* v. *Chile*, Merits, Reparations and Costs, Judgment of 22 November 2005, Series C, No. 135.

67 See e.g. IACtHR, *Moiwana Community* v. *Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, Series C, No. 124, Concurring Opinion of Judge Medina-Quiroga, paras. 3-5.

68 Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, 19 February 2007, UN Doc. A/HRC/4/35, para. 10.

69 See e.g. E. De Brabandere, 'Host States' Due Diligence Obligations in International Investment Law' (2015) 42 *Syracuse Journal of International Law and Commerce* 319, at 328.

70 Even before states began concluding investment agreements specifically (or free trade agreements with investment chapters), they often concluded so-called 'friendship, navigation and commerce' (FCN) treaties. Such a treaty formed the basis of *Elettronica Sicula S.p.A. (ELSI)* (United States of America *v.* Italy), Judgment of 20 July 1989, 1989 ICJ Reports 15, in which the ICJ confirmed Italy's duty to protect a production plant based on similar treaty language, in paras. 102-112.

and security of investments.[71] Equally importantly, the agreements have enabled investors to bring claims directly against the host state, without needing to resort to the diplomatic protection of their home state.

Jurisprudence resulting from investor-state dispute settlement has confirmed the duty to provide full protection and security, as well as its link to the law on injuries to aliens. In one of the earliest investment arbitration cases, *AAPL* v. *Sri Lanka*, the tribunal essentially treated 'full protection and security' as part of the customary international minimum standard in the treatment of aliens, requiring due diligence from the host state in protecting the investment.[72] Over the past few decades, subsequent awards have confirmed the host state's obligation to protect foreign investments in a long line of cases, likewise with a due diligence standard.[73] In some cases, full protection and security has been interpreted as going beyond the customary minimum standard to also include legal security, but this aspect of security is in any case not deemed to be something that private actors would generally be able to interfere with.[74]

3.3.4 The Shared Standard of Due Diligence

As this brief overview has shown, states are bound by various obligations under international law to prevent and redress certain private conduct; and compliance with these obligations is assessed according to the due diligence standard. Given these wide-ranging obligations, the following section turns

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71 See e.g. UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (2007), http://unctad.org/en/Docs/iteiia20065_en.pdf, 28-33. See also Article 5 of the 2012 United States Model Bilateral Investment Treaty, https://2009-2017.state.gov/documents/organization/188371.pdf; as well as Article 9(1) of the Netherlands Model Investment Agreement, 19 October 2018, https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden/modeltekst-voor-bilaterale-investeringsakkoorden.pdf, speaking of 'full physical security and protection'. On full protection and security, see generally C. Schreuer, 'Full Protection and Security' (2010) 1 *Journal of International Dispute Settlement* 353; G. Cordero Moss, 'Full Protection and Security', in: A. Reinisch (ed.), *Standards of Investment Protection* (Oxford: Oxford University Press, 2008), 131.

72 *AAPL* v. *Sri Lanka*, paras. 67-70; see also *ibid.*, paras. 72-78, reviewing arbitral awards on injuries to aliens. See also *Noble Ventures, Inc.* v. *Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, (2005) IIC 179, para. 164.

73 Most notably *AMT* v. *Zaire*, paras. 6.04-6.11; *Wena Hotels* v. *Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, (2002) 41 ILM 896, paras. 84-95; *Noble Ventures* v. *Romania*, paras. 164-167; *Pantechniki S.A. Contractors & Engineers (Greece)* v. *The Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, (2009) IIC 383, paras. 71-84; and *Joseph Houben* v. *Burundi*, ICSID Case No. ARB/13/7, Award of 12 January 2016, (2016) IIC 987, paras. 157-179. See also De Brabandere, 'Host States' Due Diligence Obligations'; Schreuer, 'Full Protection and Security', 366-368; Cordero Moss, 'Full Protection and Security'.

74 See De Brabandere, 'Host States' Due Diligence Obligations', 345-346. See also Schreuer, 'Full Protection and Security', 354-362, distinguishing between private and state actors when discussing physical security, but mentioning only state interference when it comes to legal security; cf. Cordero Moss, 'Full Protection and Security', 144-149.

to examining whether this standard – beyond sharing the label of 'due diligence' – indeed applies in a similar manner across different fields, as the chapter delves deeper into the substance of due diligence.

3.4 What Exactly is Required of the State? The Role of Knowledge, Due Diligence, and Fault

Having established the (relative) ubiquity of duties of protection, with due diligence as the standard of assessment, the next task is to look at how this standard operates and what behavior it requires of the state. Granted, the precise response required will vary according to the particularities of the situation: after all, the threat of environmental pollution demands a different reaction than a threat posed by armed groups.[75] Nonetheless, there are certain commonalities in the different obligations.

Even under normal circumstances, no state can be expected to control every square inch of its territory and every single person in it, all of the time.[76] As the ICJ noted in *Corfu Channel*:

> [I]t cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the actors. This fact, by itself and apart from other circumstances, [does not involve] *prima facie* responsibility.[77]

Thus, exclusive territorial control does not in itself presuppose that the state is aware of any and all conduct in its territory, much less so that the state is responsible for the consequences of all such conduct. Duties to protect are obligations of conduct, not of result, assessed by a standard of due diligence.[78] In other words, the state is not expected to guarantee a particular outcome (such as the non-occurrence of the catalyst event), but rather to do

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75 This may even have an impact on the level of diligence required, see Stephens & French, 'Second Report', 20-22, although the report also accepts that 'there may be a single *baseline* standard of due diligence that underlies all positive obligations that applies in the absence of more specific (and demanding) requirements' (*ibid.*, 20).

76 Cf. *Island of Palmas*, 840: 'Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory.'

77 *Corfu Channel*, 18.

78 See e.g. *Armed Activities*, Declaration of Judge Tomka, para. 4; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, para. 430 (see, though, surprisingly, *ibid.*, Declaration of Judge Skotnikov, 2007 ICJ Reports 366, at 379, arguing the contrary); *Cotton Field*, paras. 279-280; *AAPL* v. *Sri Lanka*, paras. 45-53; *ELSI*, para. 108. Obligations of conduct are also known as 'obligations of means' or 'obligations of effort'.

its best in trying to prevent and/or redress the event.[79] Accordingly, this section examines what those best efforts may (and must) be, particularly in the absence of governmental control.

The clearest formulations of what this entails have been provided in the *Tehran Hostages* case by the ICJ and in the case law of the IACtHR. In the former, the ICJ held that the authorities of Iran:

> (a) were fully aware of their obligations […];
> (b) were fully aware […] of the urgent need for action on their part;
> (c) had the means at their disposal to perform their obligations;
> (d) completely failed to comply with these obligations.[80]

Since states are presumed to be aware of their international obligations, the first condition is rarely dealt with expressly. But the elements of knowledge, means and inaction (or insufficient action) are repeated in remarkably similar terms across jurisprudence in different fields of international law, even if means and their (non-)use are frequently collapsed into a single issue.[81] An example of this latter practice is the IACtHR's approach, articulating the conditions of 'awareness of a situation of real and imminent danger for a specific individual or group of individuals and […] reasonable possibilities of preventing or avoiding that danger.'[82]

The fact that these obligations are similarly structured and share a standard of assessment allows comparisons to be carried out between the way(s) in which they operate. The following analysis will make use of such comparisons in delving deeper into the factors which play a role in determining compliance with the due diligence standard, in order to shed light on how they may be affected by the lack of effective control over territory. In particular, the analysis will compare the ICJ's approach in *Armed Activities* regarding the obligation of the Democratic Republic of the Congo (DRC) to repress the activities of anti-Ugandan rebel groups, and the ECtHR's

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79 While judgments of the IACtHR refer to 'guarantee', this is simply because the Spanish version of Article 1(1) ACHR refers to 'garantizar', which appears as 'ensure' in the English version of the Convention, but is translated as 'guarantee' in the Court's work. Nonetheless, as can be seen throughout this chapter, the IACtHR's substantive understanding of the operation of this duty is that of an obligation of effort.

80 *Tehran Hostages*, para. 68.

81 See e.g. *Mexico City Bombardment Claims (Great Britain)* v. *United Mexican States*, Award of 15 February 1930, 5 UNRIAA 76, at 80, para. 6; *Wena Hotels* v. *Egypt*, para. 84; *Cotton Field*, para. 280. See also Draft Article 7(2), in ILC, *International Responsibility: Sixth Report by F.V. García Amador, Special Rapporteur*, 26 January 1961, UN Doc. A/CN.4/134 and Add.1, in: *Yearbook of the International Law Commission*, 1961, vol. II, 1 (hereinafter *García Amador's Sixth Report*), at 47; D.P. O'Connell, *International Law* (2 vols., 2nd ed., London: Stevens, 1970), vol. II, 967; Pisillo-Mazzeschi, 'Due Diligence Rule', 44; Stephens & French, 'First Report', 3.

82 IACtHR, *Pueblo Bello Massacre* v. *Colombia*, Merits, Reparations and Costs, Judgment of 31 January 2006, Series C, No. 140, para. 123. The IACtHR's approach is essentially a more succinct formulation of the ECtHR's *Osman* test, see note 90 below.

approach in *Ilaşcu* regarding Moldova's duty to secure human rights for those under its jurisdiction – as both cases concern the extent of states' obligations in the absence of effective control.

In line with the analytical framework outlined by the jurisprudence for assessing compliance with due diligence obligations, the following sections first address the element of knowledge, followed by an analysis of the means and action required from the state.

3.4.1 The State Knew or Should Have Known…

As highlighted by the analysis in *Corfu Channel* – concerning damage caused to British warships by mines laid (by unknown actors) off the coast of Albania – the first question that needs to be answered is whether the affected state knew about the catalyst event.[83] If the answer is yes, the next step is to examine what the state did, or should have done, in response – an issue that will be discussed in the next section.

But what if the answer is no? Is that the end of the matter? After all, the United Kingdom (UK) even conceded that if Albania had no knowledge of the minelaying, it could not be responsible.[84] Since the Court came to the conclusion that Albania knew – or rather, that it must have known – about the minelaying, the judgment did not need to address the issue.[85] Nevertheless, some of the judges who concluded in their dissenting opinions that Albania did not necessarily know of the mines promptly proceeded to examine the question of whether it *should have known*.[86] This knew-or-should-have-known formula is well established under international law, with courts and tribunals making frequent recourse to it.[87]

While knowledge is simply determined by reference to the case-specific facts, the question whether a state should have known about a particular

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83 Interestingly, though, as Chung points out in *Corfu Channel Incident*, at 166, the French version of the judgment does not contain the word 'knowingly'. Instead, it refers to 'l'obligation, pour tout État, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres États'. The question of knowledge is particularly important in cases of prevention – when it comes to the duty to redress, knowledge is usually not an issue.

84 See *Corfu Channel*, Dissenting Opinion of Judge Badawi Pasha, 65; Dissenting Opinion of Judge Winiarski, 1949 ICJ Reports 49, at 51.

85 *Corfu Channel*, 22: 'the laying of the minefield […] could not have been accomplished without the knowledge of the Albanian Government.'

86 *Ibid.*, Dissenting Opinion of Judge Krylov, 1949 ICJ Reports 68, at 71-72 and Dissenting Opinion of Judge Azevedo, 1949 ICJ Reports 78, paras. 19-21 (it is worth pointing out, though, that both judges linked this to the concept of fault, which is not generally required for an internationally wrongful act, see Section 3.4.2.4 below). Cf. *ibid.*, Dissenting Opinion of Judge Winiarski, 54-56.

87 Besides *Corfu Channel*, 18; see e.g. *Bosnian Genocide*, para. 432; ECtHR, *Osman* v. *The United Kingdom*, Application No. 23452/94, Grand Chamber, Judgment of 28 October 1998, para. 116; the diplomatic correspondence following the *Cutler* incident, recounted in *Ago's Fourth Report*, para. 109.

event poses a more complex problem, assessed by reference to a due diligence standard. Due diligence is an inherently flexible standard; its exact content is determined on a case-by-case basis. As such, it is virtually impossible (as well as futile) to define its content *in abstracto* – nonetheless, it is possible to pinpoint certain recurring factors. When it comes to knowledge and due diligence, perhaps the most important factor is foreseeability, which, in turn, is strongly connected to the specificity and/or certainty of the knowledge required.[88] In other words, the more reasonably foreseeable an event is, the lesser the degree of specificity and certainty required.

Generally speaking, large-scale events are less likely to escape the state's attention than small-scale (or even individual) instances.[89] It is thus no surprise that the jurisprudence of human rights courts regularly conditions the state's duty to protect on 'awareness of a situation of *real and imminent* danger for a *specific* individual or group of individuals'; this forms part of what is known as the *Osman* test, named after the case where it originated.[90] At the same time, both the arbitral awards on injuries to aliens and contemporary human rights jurisprudence recognize that this type of obligation extends beyond reacting to threats reported by individuals. In the 1930 *Mead* award, the United States-Mexico General Claims Commission held that:

88 On foreseeability as a requirement, see e.g. Draft Article 7(2), in *García Amador's Sixth Report*, 47; Stephens & French, 'First Report', 3; A. Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (Baden-Baden: Nomos, 1992), 250-253.

89 Cf. O'Connell, *International Law*, vol. II, 968: 'the larger the group [of perpetrators] involved the greater the degree of official diligence that is demanded.'

90 *Cotton Field*, para. 280. The full formulation of the test is as follows (*Osman*, para. 116): 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'. See further F.C. Ebert & R.I. Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 *Human Rights Law Review* 343 and V. Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights', 26 November 2019, https://ssrn.com/abstract=3486853. Note that the requirement is only that there must be 'a situation of *danger*', i.e. certainty is not required. The ICJ similarly dismissed the requirement of certainty in the *Bosnian Genocide* case, where it stated that 'it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.' *Bosnian Genocide*, para. 432 (emphasis added). A caveat is in order on the case: since the judgment is limited to the specific obligation imposed by the Genocide Convention, one must be cautious in drawing overly broad general conclusions from it. However, as the obligation to prevent is virtually undefined in both the treaty text and the *travaux* – see W.A. Schabas, *Genocide in International Law* (1st ed., Cambridge: Cambridge University Press, 2000), 72; also quoted in the Separate Opinion of Judge Tomka, 2007 ICJ Reports 310, para. 66 – it is only reasonable to assume that the Court had to construe it by reference to the due diligence standard as applied generally. Where the judgment does depart from the general criteria (such as replacing territorial control with the 'capacity to influence'; *Bosnian Genocide*, para. 430), this is duly noted in the dissertation too.

> In normal conditions, in the absence of untoward occurrences or unusual situations giving indication of possible illegal acts prompting precautionary measures for the prevention of such acts, requests of aliens to authorities for protection may obviously be very important evidence of warning as to the need of such measures. But the protection of a community through the exercise of proper police measures is of course a function of authorities of a State and not of persons having no official functions. The discharge of duties of this nature should not be contingent on requests of members of the community.[91]

Similarly, in a recent judgment concerning the 2004 school hostage crisis in Beslan, the ECtHR has stated that 'a positive obligation may apply not only to situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act, but also in cases raising the obligation to afford general protection to society'.[92] In certain contexts, the state may even be under an obligation – potentially carrying organizational implications – to share relevant infor-

91 *Mrs. Elmer Elsworth Mead (Helen O. Mead) (U.S.A.)* v. *United Mexican States*, Award of 29 October 1930, 4 UNRIAA 653, at 655. Cf. *Mexico City Bombardment Claims*, para. 6, where the British-Mexican Claims Commission held that in such cases it must be shown that 'the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their [the authorities'] knowledge in due time'. This reasoning was followed in subsequent awards of the Claims Commission: *William E. Bowerman and Messrs. Burberry's (Ltd.) (Great Britain)* v. *United Mexican States*, 15 February 1930, 5 UNRIAA 104, para. 7; and *Santa Gertrudis Jute Mill Company (Ltd.) (Great Britain)* v. *United Mexican States*, 15 February 1930, 5 UNRIAA 108, paras. 9, 15; *John Gill (Great Britain)* v. *United Mexican States*, Award of 19 May 1931, 5 UNRIAA 157, para. 5. Note, however, that the facts of these cases concerned simply whether the Mexican authorities *knew* of the events in question, not whether they *should have known*.

92 ECtHR, *Tagayeva and others* v. *Russia*, Applications Nos. 26562/07, 49380/08, 21294/11, 37096/11, 14755/08, 49339/08 and 51313/08, First Section, Judgment of 13 April 2017, para. 482, referring to previous jurisprudence – from as early as 2002 – on killings committed by prisoners on leave (or having escaped while on leave). On this 'general protection to society', see also *Cevrioğlu* v. *Turkey*, Application No. 69546/12, Second Section, Judgment of 4 October 2016, para. 50 and the cases cited therein; and Stoyanova, 'Fault, Knowledge and Risk', 9-10. In *Tagayeva*, the Court went on to conclude at para. 486 that 'the information known to the authorities […] can be seen as confirming the existence of a real and immediate risk to life. The Court notes that the experts pointed out that, although the targeted individuals or groups had not been identified with precision, complementary information should have been available to the competent authorities from covert sources and intelligence operations […]. In any event, in the face of a threat of such magnitude, predictability and imminence, it could be reasonably expected that some preventive and protective measures would cover all educational facilities in the districts concerned and include a range of other security steps, in order to detect, deter and neutralise the terrorists as soon as possible and with minimal risk to life.' In contrast, in the *Finogenov* case concerning the 2002 hostage crisis at the Dubrovka theater in Moscow, the Court found 'no evidence that the authorities had any specific information about the hostage-taking being prepared', see ECtHR, *Finogenov and others* v. *Russia*, Applications Nos. 18299/03 and 27311/03, First Section, Admissibility Decision of 18 March 2010, para. 173.

mation between various governmental organs or to take proactive measures that would enable the state to gain knowledge of (risk of) abuse.[93]

That the scale of events may influence foreseeability – and even affect the immediacy and specificity requirements – is well illustrated by the *Pueblo Bello Massacre* case at the IACtHR. The facts of the case took place in the context of the Colombian armed conflict, and concerned the abduction and murder of 43 people by a group of 60 paramilitaries in the course of an incursion into a village, in an area where paramilitary groups had been active for some time.[94] The Court pointed out that 'it ha[d] not been proved that the State authorities had *specific* prior knowledge of the day and time of the attack on the population of Pueblo Bello and the way it would be carried out.'[95] Nonetheless, the IACtHR essentially reasoned that if the army had acted with due diligence, it would not have been possible for such a large operation to go unnoticed *in an area that had already been a military operation zone*.[96] This case also illustrates how difficult it can be to separate knowledge from taking action: ostensibly, the way the army should have gained knowledge of the paramilitary group's movement (by controlling the available routes in the area) would also have been the way to take action to prevent the massacre (by intercepting the group). That said, the IACtHR may also have been influenced by the fact that 'the State itself had contributed to creating' this risk, through its policies encouraging the formation of paramilitaries: the Court noted that this 'accentuate[d] the State's special obligations of prevention and protection in the zones where the paramilitary groups were present'.[97]

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93 See e.g. ECtHR, *E. and others* v. *United Kingdom*, Application No. 33218/96, Second Section, Judgment of 26 November 2002, paras. 92-100 (repeated sexual and physical abuse taking place in a family that was known to state social services); ECtHR, *O'Keeffe* v. *Ireland*, Application No. 35810/09, Grand Chamber, Judgment of 28 January 2014, paras. 162-169 (sexual abuse in privately-operated schools (that predominantly made up the national school system)), on which see also note 127 below; see also Ebert & Sijniensky, 'Preventing Violations', 356, discussing ECtHR case law on preventing third-party killing and suicides in police custody.

94 *Pueblo Bello*, para. 95(21)-(44).

95 *Ibid.*, para. 135 (emphasis added).

96 *Ibid.*, paras. 134-140, particularly 138-139: 'the mobilization of a considerable number of people in this zone […] reveals that the State had not adopted reasonable measures to control the available routes in the area. […] [T]he State did not adopt, with due diligence, all the necessary measures to avoid operations of this size being carried out in a zone that had been declared "an emergency zone, subject to military operations," and the latter situation places the State in a special position of guarantor, owing to the situation of armed conflict in the zone, which had led the State itself to adopt special measures.'

97 *Pueblo Bello*, para. 126, see also *ibid*., para. 151; discussed – along with similar case law from the ECtHR – by Ebert & Sijniensky in 'Preventing Violations', 356-357, 359-360. On the relationship between the Colombian state and paramilitaries, see the opening paragraphs of Section 4.3.2 below.

As the examples above illustrate, the specificity of the individual(s) at risk and the requirement of immediacy may vary with the circumstances.[98] In particular, such requirements may be less stringent 'where there is a context of overall violence or where the existence of a risk in itself depends on State action.'[99] But even with the *Osman* test flexibly interpreted, Franz Ebert and Romina Sijniensky have argued that the test may be unsuitable to address 'structural risk' affecting the members of certain groups (such as women or human rights defenders), given that 'authorities are likely to lack knowledge of the risk's "immediacy"', while at the same time, 'many structural risks cannot be addressed effectively when they have become immediate'.[100] Note that although this criticism is framed by the authors as a matter of immediacy, it also has implications for specificity – i.e. for *which* member of the group is the risk becoming immediate.

In this regard, the *Castillo González* case deserves particular attention, concerning the killing of a (former) human rights defender in Venezuela by unidentified attackers. In this case, the victims' representatives argued for a test of 'structural risk', consisting of three elements: '1) the existence of group that is vulnerable or a situation of defenselessness[,] 2) the existence of a well-defined pattern of systematic violence against a specific group, and 3) the absence of a general State policy that is sufficient and effective to remedy this pattern of violence'.[101] In response, the IACtHR noted that:

> 126. […] [T]here is consensus between the parties and the Commission regarding the existence, at the time of the events, of a situation of insecurity and increased violence that affected the State of Zulia and particularly "campesino" leaders, as indicated by the uncontested and proven facts. Even [Venezuela] acknowledged the general situation of insecurity in the area, and the fact that this had affected the "campesino" sector. Accordingly, it stated that "[i]f the murdered "campesino" leaders are considered human rights defenders then, indeed, there was an increase in acts of aggression against human rights defenders in that area."
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> 127. However, the Court also notes that, on one hand, the references presented by the representatives and the Commission generally refer to the situation of human rights defenders in Venezuela and not exclusively to their situation in

98 For a detailed overview, see Ebert & Sijniensky, 'Preventing Violations', 358-362; Stoyanova, 'Fault, Knowledge and Risk', 10, 17, 20-26.

99 Ebert & Sijniensky, 'Preventing Violations', 360.

100 *Ibid*., 363, as well as 362-364 more generally, discussing *Cotton Field* and IACtHR, *Castillo González* et al. v. *Venezuela*, Merits, Judgment of 27 November 2012, Series C, No. 256. In *Cotton Field*, the state had known that 'in 2001, Ciudad Juárez experienced a powerful wave of violence against women' but, according to the IACtHR, Mexico 'has not shown that, prior to November 2001, it had adopted effective measures of prevention that would have reduced the risk factors for the women' (paras. 278-279). Still, applying the *Osman* test, the Court only held Mexico responsible for its conduct *after* the women's disappearances (before their bodies were found), and not for its conduct *before* the disappearances (paras. 280-286).

101 *Castillo González*, para. 104.

> Zulia and, on the other, that, according to the evidence provided and beyond the complex situation of insecurity that existed in the area, in which certain events occurred that involved attacks against human rights defenders, it was not proven that these constituted a widespread situation or a systematic practice. Therefore, it is unnecessary for the Court to consider the other alleged circumstances, as well as the relevance of conducting an analysis based on the aforementioned increased obligation of prevention, in light of the presumed situation of "structural risk".[102]

The Court then proceeded to apply the *Osman* test. In doing so, it noted that in response to the security sitation, Venezuela 'increased police and military surveillance in the area', but also that 'prior to the attack, Joe Luis Castillo was not subjected to threats or acts of intimidation and […] there was no public complaint or any report made to the State authorities regarding a risk to him or to his family, or regarding the need to provide measures of protection'.[103] Accordingly, the Court found that Venezuela did not violate its duty to protect under Article 1(1) ACHR in respect of the victim's right to life.[104] The IACtHR thus appears to have regarded the state's *general* response (increased vigilance) to a *general* situation of insecurity as sufficient.[105] In such cases, if violence escalates sharply without any particular warning signs, little can be done at that point to prevent the catalyst act – which is precisely the problem pointed out by Ebert and Sijniensky. The Court's refusal to consider a test of 'structural risk' appears

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102 *Ibid.*, paras. 126-127 (internal citations omitted).

103 *Ibid.*, paras. 130-131.

104 *Ibid.*, para. 132. The case shows interesting parallels with ECtHR jurisprudence on the killings of persons linked to the Kurdish cause. In both *Kılıç* and *Mahmut Kaya*, the government argued that the victims were 'not more at risk than any other person or journalist[/doctor] in the south-east [of Turkey], referring to the tragic number of victims to the conflict in that region' (ECtHR, *Kılıç* v. *Turkey*, Application No. 22492/93, First Section, Judgment of 28 March 2000, para. 66; *Mahmut Kaya* v. *Turkey*, Application No. 22535/93, First Section, Judgment of 28 March 2000, para. 89). In *Kılıç*, the victim had requested protection (which was then refused); in *Mahmut Kaya*, there had been no such request, but the victim 'believed that his life was at risk and that he was under surveillance by the police' (para. 88) and police had 'made threats that [he] would be punished', though not to him directly (para. 90). In both cases, there were broader contextual elements, including 'a significant number of' attacks and killings of people (suspected of) working for a Kurdish newspaper or 'suspected of supporting the PKK [Workers' Party of Kurdistan]' (*Kılıç*, para. 66; *Mahmut Kaya*, para. 89). Applying the *Osman* test (somewhat flexibly, see Ebert & Sijniensky, 'Preventing Violations', 359), the ECtHR found that the victims were at real and immediate risk (*Kılıç*, para. 66; *Mahmut Kaya*, para. 89). Furthermore, the Court found that 'the authorities were aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces' (*Kılıç*, para. 68; *Mahmut Kaya*, para. 91). It is not entirely clear precisely which of these factors sets these two cases apart from *Castillo González*: the victim's request for protection / fear and police threat; the number of attacks in context; or the links to the authorities (which was alleged but could not be proven in *Castillo González*: see Chapter 4, note 176 and accompanying text below).

105 This contrasts with *Cotton Field*, see note 100 above.

to be more a matter of evidence than a matter of principle; but the issue in any case gives rise to difficult questions. On the one hand, what is the threshold (and the cost in human lives) for establishing that attacks are widespread or systematic and thus regarding a risk as structural? On the other hand, what can be expected of states faced with structural risks, bearing in mind their resource constraints? In other words, what exactly would 'a general State policy that is sufficient and effective to remedy this pattern of violence' entail? How would the effectiveness of such policies be assessed in individual instances? For now, the *Osman* test continues to be the standard applied, and it remains to be seen how courts will respond to such structural risks.

Still, in general it seems that beyond cases where knowledge and action coincide, the issue of knowledge does not tend to pose specific problems related to the lack of control. The smaller the scale of the event, the more significant role individual reporting may play, and this may be amplified where the state is unable to exercise its normal police functions. This is illustrated by the ECtHR's jurisprudence on Moldova's positive obligations in the secessionist entity of Transdniestria. In cases where the applicant had not (proven that they had) informed the Moldovan authorities of the alleged abuse, the Court simply held that since the state did not have the requisite knowledge, it could not have violated its positive obligations; in doing so, the ECtHR did not even consider whether Moldova *should have known* of the situation.[106] Nonetheless, staying informed of what is happening in any given territory – especially when it comes to large-scale events – is a much lower bar to meet than actually controlling, or taking action in said territory.[107] Accordingly, it is in the assessment of the state's (in)action that the impact of governmental control plays a greater role.

3.4.2 …and It Should Have Acted with Due Diligence

If the state does – or should – have knowledge of the catalyst event, it is under an obligation to act in order to prevent the event and/or redress its

106 See ECtHR, *Apcov* v. *the Republic of Moldova and Russia*, Application No. 13463/07, Second Section, Judgment of 30 May 2017, para. 46; ECtHR, *Canter and Magaleas* v. *the Republic of Moldova and Russia*, Application No. 7529/10, Second Section Committee, Judgment of 18 June 2019, para. 38; ECtHR, *Coțofan* v. *the Republic of Moldova and Russia*, Application No. 5659/07, Second Section Committee, Judgment of 18 June 2019, para. 32; ECtHR, *Sobco and Ghent* v. *the Republic of Moldova and Russia*, Applications Nos. 3060/07 and 45533/09, Second Section Committee, Judgment of 18 June 2019, para. 30; ECtHR, *Istratiy* v. *the Republic of Moldova and Russia*, Application No. 15956/11, Second Section Committee, Judgment of 17 September 2019, para. 41; ECtHR, *Untilov* v. *the Republic of Moldova and Russia*, Application No. 80882/13, Second Section Committee, Judgment of 17 September 2019, para. 38; ECtHR, *Grama and Dîrul* v. *the Republic of Moldova and Russia*, Applications Nos. 28432/06 and 5665/07, Second Section Committee, Judgment of 15 October 2019, para. 36.

107 For instance, in *Armed Activities*, the DRC's knowledge of rebel groups operating on its territory (ostensibly beyond its control) was not even disputed, see note 137 below.

consequences.[108] Like the question of whether the state should have known about a particular event, the state's (lack of) action is assessed by a due diligence standard, by reference to what a reasonable state would have done.[109] As noted above, while due diligence is difficult to define in the abstract, it is possible to identify certain factors which play a role in its application. In terms of action, the most notable factors – that the state can have an impact on – are the means at the state's disposal to prevent and/or redress certain conduct, which in turn depends (at least partly) on the effectiveness of control exercised by the state over the relevant part of its territory.[110]

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108 This point was not disputed between the UK and Albania, see *Corfu Channel*, 22. See also Chung, *Corfu Channel Incident*, 168.

109 See e.g. Commentary to Draft Article 23, para. 6; Stephens & French, 'Second Report', 8-9; *Velásquez Rodríguez*, paras. 187, 188; *Osman*, para. 116; and the particularly illuminating formulation in *Bosnian Genocide*, para. 430: 'the obligation of States parties is […] to employ all means reasonably available to them'. Any discussion in this chapter regarding the availability of means should be read with this qualification in mind; see also the discussion on 'excessive burden' in Section 3.5.2 below. For more on due diligence, see e.g. Pisillo-Mazzeschi, 'Due Diligence Rule', particularly at 42-45; Epiney, *Aktionen Privater*, 211-255; *García Amador's Second Report*, 122-123; T. Koivurova, 'Due Diligence', in: *Max Planck Encyclopedia of Public International Law*, February 2010, available at https://opil.ouplaw.com/home/mpil; ILC, *Second report on State responsibility by Mr. James Crawford, Special Rapporteur*, 17 March, 1 and 30 April, 19 July 1999, UN Doc. A/CN.4/498 and Add.1-4, in: *Yearbook of the International Law Commission*, 1999, vol. II, Part One, 3 (hereinafter *Crawford's Second Report*), para. 83: 'to take all reasonable or necessary measures to ensure that the event does not occur.' See also Economides, 'Content of the Obligation', 378, for other variants of the formulation.

110 See e.g. Pisillo-Mazzeschi, 'Due Diligence Rule', 44; Epiney, *Aktionen Privater*, 246-247 and 253-255; ILC, *International Responsibility: Report by F.V. García Amador, Special Rapporteur*, 20 January 1956, UN Doc. A/CN.4/96, in: *Yearbook of the International Law Commission*, 1956, vol. II, 173 (hereinafter *García Amador's First Report*), para. 74; *García Amador's Second Report*, 122, para. 6; Draft Article 7(2), in *García Amador's Sixth Report*, 47. See also *Bosnian Genocide*, para. 430, where the ICJ pointed out that '[v]arious parameters operate when assessing whether a State has duly discharged the obligation' to prevent genocide. At the same time, though, the Court only identified one such parameter: the state's 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide.' This was in fact a rather novel criterion, see e.g. A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 *European Journal of International Law* 695, at 699-701; S. Heathcote, 'State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility', in: K. Bannelier, T. Christakis & S. Heathcote (eds.), *The ICJ and the Evolution of International Law: The Enduring Impact of the "Corfu Channel" Case* (London: Routledge, 2012), 295, at 301. Other factors identified in the literature, based on jurisprudence, are: the 'importance of the interest to be protected' (Pisillo-Mazzeschi, 'Due Diligence Rule', 44-45), which essentially corresponds to Epiney's 'scale of expected damage' (Epiney, *Aktionen Privater*, 248-249) and 'circle of protected persons' (*ibid.*, 249-250); timing (*ibid.*, 247-248); and the identity of the private actors (*ibid.*, 249), which partly corresponds to the scale of events described above. Since these are not factors that the state can influence, though, the remainder of this chapter focuses on the means at the state's disposal.

3.4.2.1 The Institutional Requirement

The prominence of control as a variable is little surprise considering not only the nature of the obligation, but also the fact that much of the case law on injuries to aliens arose out of cases of large-scale violence by private actors (such as mobs or revolutionaries).[111]

An examination of the arbitral jurisprudence on injuries to aliens reveals that the obligation of acting with due diligence in fact encompasses two interrelated requirements: the maintenance of a governmental apparatus that is capable of upholding law and order in general; and the diligent use of this apparatus in the particular circumstances of the case. The fulfilment of both these requirements is assessed according to a (minimum) standard defined by international law.

Note that the *existence* of a governmental apparatus for the maintenance of order is not judged by a due diligence standard, only the *use* of this machinery.[112] This does not necessarily mean that all states are held to the exact same requirements, regardless of their level of development. In most cases, the state 'must exercise the level of due diligence of a […] state in its particular circumstances'.[113] In the structure of due diligence, this is arguably covered by the flexibility of the 'means' requirement, taking into account what means were available to the state to counteract the catalyst event given its level of development. Furthermore, the arbitral jurisprudence on injuries to aliens has recognized that where states facing internal unrest or civil war are concerned, these circumstances may limit the scope of means available to the state.[114] In other words, if a state finds

111 See e.g. O'Connell, *International Law*, vol. II, 967 *et seq.*

112 See Pisillo-Mazzeschi, 'Due Diligence Rule', 26-30; De Brabandere, 'Host States' Due Diligence Obligations', 341-345. Cf. how the ECtHR organized its analysis in *Volodina* v. *Russia*, Application No. 41261/17, Third Section, Judgment of 9 July 2019, para. 77, although in that case the Court speaks more broadly of '*the obligation to establish and apply in practice an adequate legal framework* affording protection against ill-treatment by private individuals', rather than a governmental machinery as such (emphasis added); see also note 127 below on the interrelation between legal framework and governmental apparatus in such cases.

113 *Pantechniki*, para. 81, citing A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatments* (Alphen aan den Rijn: Kluwer, 2009), 310; *Pantechniki* was also followed in *Houben*, para. 163. See more generally Stephens & French, 'Second Report', 13-20 on 'subjective' and 'objective' standards of due diligence, but firmly stating that even 'where subjective factors affect the degree of diligence required of States, *this is nevertheless still a standard of international law* and does not relate to the standard of care States exercise in their own domestic affairs' (*ibid.*, 20, emphasis in original). But see ITLOS, *Responsibilities and Obligations of States*, paras. 158-159, where the Seabed Disputes Chamber held that the level of diligence required was not dependent on the state's level of development, as noted also by e.g. A. Seibert-Fohr, 'Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung?' (2013) 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 37, at 59.

114 See the overview provided by Epiney, *Aktionen Privater*, 232-243; R. Geiss, *"Failed states": Die normative Erfassung gescheiterter Staaten* (Berlin: Duncker & Humblot, 2005), 272-277.

itself incapable of taking action due to the loss of control over territory or (partial) collapse of its governmental apparatus under such circumstances, this would not automatically result in its responsibility under international law.[115] The case in which a tribunal came closest to – but still stopped short of – holding a state responsible for failing to maintain an adequate governmental apparatus is illustrative in this regard. The *Mead* case concerned the murder of an American mine employee by bandits in 1923, during a period of instability following the 1910-1920 Mexican Revolution. In evaluating Mexico's efforts to provide protection, the tribunal noted that:

> There is information that an unfortunate condition of lawlessness, beginning in 1910, existed in the locality in question during a considerable period of time. It appears that a local military commander found himself unable effectively to combat these conditions because as he declared, his forces were diminished by the withdrawal of troops for military operations in another section of the country. The sparsely settled condition of this locality and military exigencies are emphasized in the Mexican Brief as a defense to the complaint of lack of protection.
>
> The Commission has taken account of such matters in considering the subject of the capacity to give protection. *But there are of course limits to the extent to which they can justify a failure effectively to deal with lawlessness. And conditions such as it appears existed in this region may also reveal both the necessity for urgent measures as well as a censurable failure of efforts on the part of authorities to deal with lawlessness.*[116]

Nonetheless, the failure of the authorities 'to deal with lawlessness' was then contrasted with the fact that they *had* been equipped with the means to take some action in the same locality on other occasions.[117] In other words, the tribunal was questioning whether the authorities did indeed face a lack of means, rather than preparing to hold Mexico responsible in the absence of such means. In the end, given that there was 'evidence of unusual difficulties confronting the authorities in the region in question' and that

115 See Schröder, *Die völkerrechtliche Verantwortlichkeit*, 103-104; Geiss, *"Failed states": Die normative Erfassung*, 272-277, particularly at 277.

116 *Mead*, 654-655.

117 *Ibid.*, 655: 'The plea of the military commander as to the scarcity of soldiers under his command is not altogether convincing in view of the fact that it appears that he found himself able to send troops to the mines on one occasion prior to the murder of Mead and also subsequent to that tragic occurrence. And the statement of Harris in a communication accompanying the Memorial to the effect that persons in charge of the mine were given some rifles to form a guard of their own suggests at least that protection might have been furnished through agencies other than that of the army.' Cf. *Tehran Hostages*, para. 64, where the ICJ likewise contrasted Iran's lack of action to protect the American embassy and consulates with its prompt response on previous occasions involving protests against the US embassy, as well as other states' embassies around the same time.

the Mexican authorities *had* made some efforts, the tribunal dismissed the claim.[118]

Although somewhat ambiguous in its commentary, the 1929 Harvard Research Draft – one of the early attempts at codifying the law on injuries to aliens, which even dedicated a specific article to this issue – likewise appears to support this view. Article 4 of the Draft stated that:

> A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.[119]

Article 4 creates a very limited exception, with the commentary noting that 'a state should not be held to duties which it cannot perform, *provided the disability is temporary only and due to exceptional causes or circumstances*.'[120] That said, it may well be the case that the Draft simply did not foresee the possibility of long-term breakdown of government, and that the narrow definition of the exception is merely meant to reinforce the general importance of the obligation to maintain order.[121] Be that as it may, it is instructive to examine what the Draft considered to be the consequences of such a breakdown. The commentary to Article 4 clarified that:

> [I]n every state temporary abnormal conditions may result in the dislocation of the governmental organization, and such possibility is to be taken into account in determining whether responsibility exists in a given case. Even in abnormal times, however, a state has a duty to use the means at its disposal for the protection of aliens […]. The term 'means at its disposal' is employed because it is desired to emphasize the instrumentalities of government that may be available for use. The term is thus different from the term 'due diligence' […], which has reference to the efficiency and diligence with which the instrumentalities of government are employed.[122]

118 *Mead*, 655: 'There is also evidence showing that the Mexican authorities were not utterly indifferent with respect to their duties to endeavor to give suitable protection.'

119 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23(Suppl.) *American Journal of International Law* 131, at 146 (hereinafter Harvard Draft).

120 *Ibid*. (emphasis added).

121 See e.g. O'Connell, *International Law*, vol. II, 966, who goes on to contrast this with the 'general principle […] that the State is obliged to maintain governmental organisation adequate under normal conditions for the performance of its international law duties', referring back to the Harvard Draft.

122 Harvard Draft, 146.

By referring to 'the instrumentalities of government *that may be available for use*', the commentary seems to take into account that a breakdown of government can also have an impact on the means available to the government, not only their diligent use. However, it also adds that '[t]he proposed article would still hold the state under a duty to possess machinery adequate to the performance of its international duty of protection in normal times.'[123] This statement can be read in one of two ways: either it is simply a reaffirmation of the duty to possess such machinery 'in normal times'; or it is a requirement that even during a breakdown, the state's machinery (though not its use) has to be at the level required 'in normal times'. Unfortunately, the commentary gives no further indication as to which of these might be the correct reading, although the reference to instrumentalities 'that may be available for use' does favor the first interpretation. Either way, the distinction between the possession of an adequate state machinery and its use with due diligence has not featured prominently in later case law beyond injuries to aliens.

That said, over the past few decades, a variant of the concept of adequate governmental machinery has (re-)surfaced in the jurisprudence of the Inter-American and the European Court of Human Rights. The IACtHR has repeatedly held that the obligation under Article 1(1) ACHR to ensure human rights 'implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.'[124] In the same vein, the ECtHR has held that '[t]he general duty imposed on the State by Article 1 of the [European] Convention [to secure human rights] entails and requires the implementation of a national system capable of securing compliance with the Convention throughout the territory of the State for everyone.'[125] But the cases which prompted these observations at the two courts concerned the *abuse or non-use* of the governmental apparatus, rather than its non-

123 *Ibid.*

124 *Velásquez Rodríguez*, para. 166. This has been repeatedly affirmed in the Court's subsequent case law, see e.g. IACtHR, *Godínez Cruz* v. *Honduras*, Merits, Judgment of 20 January 1989, Series C, No. 5, para. 175; IACtHR, *Fairén Garbi and Solís Corrales* v. *Honduras*, Merits, Judgment of 15 March 1989, Series C, No. 6, para. 152; IACtHR, *Blake* v. *Guatemala*, Merits, Judgment of 24 January 1998, Series C, No. 36, para. 65; IACtHR, *Bámaca Velásquez* v. *Guatemala*, Merits, Judgment of 25 November 2000, Series C, No. 91, para. 129; IACtHR, *19 Merchants* v. *Colombia*, Merits, Reparations and Costs, Judgment of 5 July 2004, Series C, No. 109, para. 142. In IACtHR, *"White Van" (Paniagua Morales* et al.*)* v. *Guatemala*, Merits, Judgment of 8 March 1998, Series C, No. 37, para. 174, the Court also added that '[t]he foregoing applies whether those responsible for the violations of those rights are members of the public authorities, private individuals, or groups.' This obligation tends to be raised in the of context enforced disappearances, which the Court regards as violations of a systemic nature.

125 ECtHR, *Assanidze* v. *Georgia*, Application No. 71503/01, Grand Chamber, Judgment of 8 April 2004, para. 147.

existence or non-availability. In addition, it remains doubtful whether applicants could rely on these general pronouncements in the absence of a violation of another Convention article.[126]

In the context of lack of control over territory, it appears that such non-availability has only been considered so far in the ECtHR's jurisprudence on the right to fair trial (Article 6 ECHR) in situations of internal conflict.[127] In these cases, the Court has required the state authorities to take 'all the measures available to them to organise the judicial system in a way that would render the rights guaranteed by Article 6 effective in the specific situation of ongoing conflict' and take the steps that can be 'reasonably expected of them to ensure the proper functioning of the judicial system making it accessible to the residents of the territories currently outside the control of the Government'.[128] As indicated by the language employed – referring to available measures and reasonably expected steps – the ECtHR recognizes the challenges faced by the state in such situations, and does not impose a minimum institutional requirement within the affected territory.[129] Indeed, according to the Court, compliance with Article 6 ECHR can be achieved by measures as simple as endowing courts in the territory *within* the government's control with jurisdiction over cases arising in territory that is beyond such control.[130]

126 In respect of the ECHR, it has been argued that this obligation cannot be invoked on its own, see J-F. Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights', *Council of Europe Human Rights Handbooks*, No. 7 (2007), https://rm.coe.int/168007ff4d, 8-9. See, conversely, notes 64-65 above for the assertion of Judge Cançado Trindade that a violation of the duty to protect under Article 1 ACHR does not need to be linked to a violation of another Convention right, although practice is yet to confirm this.

127 That said, this issue has arisen in other contexts, see e.g. ECtHR, *Opuz* v. *Turkey*, Application No. 33401/02, Third Section, Judgment of 9 June 2009, para. 145 (domestic violence); and *O'Keeffe*, paras. 162-169 (sexual abuse in privately-operated schools that nonetheless predominantly made up the national school system). Note, though, that in such cases, the line (1) between the non-existence of an appropriate legislative framework and that of an implementing institutional mechanism (the former implying more of a resource commitment), and (2) between such non-existence and the non-use of the existing legislative and institutional mechanisms in a way that would ensure protection tends to be somewhat blurred.

128 ECtHR, *Tsezar and others* v. *Ukraine*, Applications nos. 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15 and 7289/15, Fourth Section, Judgment of 13 February 2018, para. 55; see also ECtHR, *Khamidov* v. *Russia*, Application No. 72118/01, Fifth Section, Judgment of 15 November 2007, para. 156.

129 See further *Tsezar*, para. 55: 'The limitation of that right [of access to court] was due to the objective fact of the hostilities in the areas the Government do not control […] and, taking into account the objective obstacles that the Ukrainian authorities had to face, was obviously not disproportionate.'

130 *Tsezar*, paras. 52-55; *Khamidov*, para. 156.

3.4.2.2 *The Effectiveness of Control in General*

While the requirement of a sufficiently well-organized governmental apparatus has experienced a relative decline, the effectiveness of control has continued to be an important factor in jurisprudence. In the *Corfu Channel* case, many of the dissenting opinions highlighted the ineffectiveness of Albania's coastal watch.[131] In his separate opinion, Judge Alvarez even went beyond the circumstances of the particular case, elaborating on the duty of vigilance and the role of effective control in more general terms, noting that:

> Every State is bound to exercise proper vigilance in its territory. *This vigilance does not extend to uninhabited areas*; and it is not of the same nature in the terrestrial part of the territory as in the maritime, aerial or other parts. This obligation of vigilance *varies with the geographical conditions* of the countries and with other circumstances: a State exercises greater vigilance in certain areas than in others, according to its interests. Moreover, this vigilance *depends on the means available* to a given State.[132]

Judge Alvarez thus assigned a considerable margin of discretion to states in deciding how to exercise their 'vigilance', even allowing for the state's interests to determine its degree of vigilance.[133] How does this compare with more recent jurisprudence on the issue, namely the *Armed Activities* case at the ICJ and the case law of the ECtHR regarding secessionist entities?

3.4.2.2.1 *The ICJ's Non-examination in Armed Activities on the Territory of the Congo*

In the *Armed Activities* case between the DRC and Uganda, the effectiveness of governmental control and the duty of vigilance similarly formed the basis of a dispute.[134] One of Uganda's counterclaims – specifically invoking the *Corfu Channel* case – alleged that the DRC had supported, or at least toler-

131 *Corfu Channel*, Dissenting Opinion of Judge Winiarski, 55; Dissenting Opinion of Judge Azevedo, 93; Dissenting Opinion of Dr. Ečer, 1949 ICJ Reports 115, at 121.

132 *Corfu Channel*, Separate Opinion of Judge Alvarez, 44 (emphasis added).

133 At the same time, though, Alvarez also argued *ibid.* that 'every State is considered as having known, or as having a *duty* to have known, of prejudicial acts committed in parts of its territory where local authorities are installed' (emphasis in original), which was deemed too strict of a requirement by Epiney in *Aktionen Privater*, 252-253.

134 This complex case arose out of the armed conflict in the Great Lakes region involving multiple states. The DRC submitted three claims against Uganda: violation of the prohibition on the use of force and related principles; failure to respect and ensure respect for international human rights law and international humanitarian law; and looting of the DRC's natural resources. The Court also adjudicated upon two counter-claims by Uganda, concerning the duty of vigilance, and alleged violations of the Vienna Convention on Diplomatic Relations.

ated, anti-Ugandan rebel groups operating in Congolese territory.[135] The ICJ examined the claim divided into three time-periods due to the different factual circumstances of each, and ultimately rejected the counterclaim for all three. Of these periods, the first one is of particular interest, where the Court examined the question of support and 'tolerance' separately, and held the following regarding the latter:

> The Court has noted that, according to Uganda, the rebel groups were able to operate "unimpeded" in the border region between the DRC and Uganda "because of its mountainous terrain, its remoteness from Kinshasa (more than 1,500 km), and the almost complete absence of central government presence or authority in the region during President Mobutu's 32-year term in office".
> During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities.[136]

The judgment unfortunately leaves unclear *why* the DRC (Zaire at the relevant time) was not 'in a position to put an end to' the activities of rebel groups. It was undisputed between the parties that the DRC knew of the existence of these groups.[137] It also appears to be established that there was an 'absence of action by Zaire's government' – in other words, the DRC did nothing to prevent the operation of these groups. Why was it not held responsible then? It seems that according to the Court, inaction does not, in and of itself, necessarily imply tolerance: since the DRC's inaction was due to governmental absence, this was sufficient for the majority to conclude that the state was not responsible.[138] At first glance, it appears that this circumstance of 'governmental absence' was taken to mean not only that the

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135 *Armed Activities*, paras. 276-278. It must be pointed out that according to the ILC's commentary to Draft Article 23, para. 2, 'the customary law obligation to prohibit the formation or existence in the territory of a State of movements whose aim is subversion in a neighbouring State' was *not* an obligation to prevent, but rather an obligation of conduct, see ILC, *Text of articles 23 to 27, with commentaries thereto, adopted by the Commission at its thirtieth session*, in: *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, 81 (hereinafter Commentary to Draft Article 23), at 81; see also *Ago's Seventh Report*, para. 15. However, even according to Ago's own classification of obligations of conduct and result (which is different from how the terms are understood in contemporary international law, see generally Dupuy, 'Reviewing the Difficulties of Codification'; *Crawford's Second Report*, paras. 57-58), it is not clear why this duty would be an obligation of conduct, and not one of result.

136 *Armed Activities*, para. 301.

137 *Ibid.*, para. 300: '[T]he Parties do not dispute the presence of the anti-Ugandan rebels on the territory of the DRC as a factual matter. The DRC recognized that anti-Ugandan groups operated on the territory of the DRC from at least 1986.'

138 This is also supported by the Separate Opinion of Judge Kooijmans, paras. 82-83.

government *did not* control part of the DRC's territory, but also that it *could not* control said territory.

But 'did not' does not always imply 'could not', as neatly illustrated by the parties' own arguments in *Armed Activities*. Uganda had pointed to the lack of state presence to support its allegation that Mobutu used rebel groups to exert military pressure on Uganda.[139] The DRC, however, took the exact same quote as Uganda's admission of the difficulty faced by the DRC in controlling its border region.[140] Given these opposing interpretations and bearing in mind the distinction between 'did not' and 'could not', it is unfortunate that the Court was not more explicit in its reasoning.

The key to addressing this problem would have been to conduct an analysis of the efforts that the DRC made – or should have made – to curtail the rebels' activities, including efforts to (re-)establish governmental presence in the area.[141] More precisely, the answer to whether the DRC in fact 'could not' control the area would have been supplied by examining whether it had the *means* to repress the rebel groups. After all, according to the Court's analytical steps, as laid out in *Tehran Hostages*, the following elements must be established to find a violation of the duty to vigilance: that (1) the DRC knew (or should have known) of the rebel groups' activities, (2) *had the means at its disposal to counteract these activities*, but (3) failed to use them.

That the Court did not engage in such an examination is most likely explained by the fact that neither Uganda, nor the DRC had provided any evidence of the (unused) means at the DRC's disposal, or of efforts carried out in this period.[142] Instead, the Ugandan argument was that the DRC had failed to take any steps whatsoever to combat the armed groups in question, maintaining that this in and of itself constituted a sufficient basis for finding the DRC responsible.[143] The DRC, meanwhile, merely pointed in general terms to the difficulty, or even impossibility, of controlling the area in question, with reference to the inhospitable environment.[144] In addition, the DRC noted that the area in question was also home to certain rebel groups which

139 *Ibid.*, Counter-Memorial of Uganda, 21 April 2001, para. 15. The parties' written and oral submissions are available at http://www.icj-cij.org.

140 *Ibid.*, Reply of the DRC, 29 May 2002, para. 3.98.

141 This is further supported by the fact that in his declaration, Judge Tomka went on to note that the nature of the duty of vigilance is an obligation of conduct, i.e. an obligation of *effort*: see *ibid.*, Declaration of Judge Tomka, para. 4.

142 See *Armed Activities,* Reply of the DRC, paras. 3.95-3.103, 6.16-6.34; Additional Written Observations of the DRC, 28 February 2003, paras. 1.37-1.40; Verbatim Record CR 2005/16, paras. 10-14 (Mr. Kalala). Cf. *ibid.*, Separate Opinion of Judge Kooijmans, 2005 ICJ Reports 306, para. 82: 'the DRC has not even tried to provide such evidence.'

143 See *ibid.*, Verbatim Record CR 2005/10, para. 14 (Prof. Suy); Verbatim Record CR 2005/15, paras. 22-23 (Prof. Suy).

144 See *ibid.*, Reply of the DRC, paras. 3.10, 3.98; Verbatim Record CR 2005/16, para. 12.

were hostile to – and eventually toppled – the Mobutu regime.[145] This was presumably meant to imply that it was not in the DRC's interest to leave the area uncontrolled – but even if that was the case, the argument was never elaborated, and no evidence was adduced by the DRC regarding any measures taken against either these or the anti-Ugandan rebel groups.[146] By contrast, in the second time-period the ICJ rejected the counterclaim because it was clear from the evidence before the Court that the DRC, cooperating with Uganda, had shown an effort to rein in the rebel groups.[147] But in the first period, the ICJ merely referred to the lack of evidence adduced.

Judges Peter Tomka and Pieter Kooijmans disagreed with the Court's ruling on this particular point, arguing instead that the burden of proof rested on the DRC to show that it had made the required effort and that the DRC did not meet that burden.[148] In addition, both of them pointed out that the geographical features of a state's territory 'may explain a lack of result but can never justify inadequate efforts or the failure to make efforts.'[149] As regards the absence of government, although neither of the judges stated this in explicit terms, there are strong indications that both of them did indeed draw a distinction between scenarios where a state 'did not' or 'could not' control part of its territory. Judge Kooijmans argued that the DRC had only substantiated governmental absence (ostensibly in the sense of inability to control) in the period between October 1996 and May 1997, 'the time of the first civil war', but not in the period *before* October 1996.[150] The fact that the judge only considered governmental absence to be proven in a situation of civil war suggests that the threshold for such absence would be quite high; that said, since the DRC essentially did not advance *any* proof of efforts carried out, it is difficult to establish what threshold the state would have needed to meet in its actions (in other words, what due diligence would entail under such circumstances). The distinction between 'did not' and 'could not' is even clearer in the declaration of Judge Tomka, who stated that:

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145 *Ibid.*, Reply of the DRC, para. 6.23; Additional Written Observations of the DRC, para. 1.38; see also Verbatim Record CR 2005/16, para. 14.

146 In fact, *ibid.*, the Additional Written Observations of the DRC, para. 1.38 and Verbatim Record CR 2005/16, para. 14 only use this fact to make the point that Uganda (which, according to the DRC, actively supported these groups) was particularly ill-placed to level accusations at the DRC concerning a possible lack of vigilance.

147 *Armed Activities*, paras. 302-303.

148 See *ibid.*, para. 9 of the *dispositif*; Declaration of Judge Tomka, paras. 1-6, especially para. 4; Separate Opinion of Judge Kooijmans, paras. 79-84, especially para. 82. The declaration and the separate opinion reveal that the judges only disagreed regarding the first time-period examined by the Court, and only as regards the Court's conclusion on tolerance (not on support).

149 *Ibid.*, Separate Opinion of Judge Kooijmans, para. 84; cf. *ibid.*, Declaration of Judge Tomka, para. 4.

150 *Ibid.*, Separate Opinion of Judge Kooijmans, para. 82.

> The duty of vigilance required Zaire to exert all good efforts in order to prevent its territory from being used to the detriment of Uganda. Whether Zaire complied with such a duty should be determined on the basis of Zaire's conduct. The geomorphological features or size of the territory does not relieve a State of its duty of vigilance nor render it less strict. *Nor does the absence of central governmental presence in certain areas of a State's territory set aside the duty of vigilance for a State in relation to those areas.*[151]

This statement stands in stark contrast with Judge Alvarez's opinion in *Corfu Channel*, which made significant allowances to the state in this regard.[152]

In effect, according to Judges Tomka and Kooijmans, knowledge and inaction create a presumption in favor of the respondent state's responsibility, except perhaps in certain narrowly defined circumstances, such as civil wars. This presumption finds historical antecedents in the jurisprudence of the British-Mexican Claims Commission, which held that:

> In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities.[153]

As in the opinions of Judges Tomka and Kooijmans, the Claims Commission's presumption relies on a (partial) shifting of the burden of proof, and it is difficult to see how the presumption could work in the absence of such a shift. But the general rule in proceedings before the ICJ is *actori incumbit onus probandi* (whoever alleges must prove), and the Court explicitly confirmed in *Corfu Channel* that this rule continues to apply even in cases concerning

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151 *Ibid.*, Declaration of Judge Tomka, at 352, para. 4 (emphasis added). This is interesting to compare with Judge Tomka's separate opinion in the *Bosnian Genocide* case, where he argued that the Genocide Convention's obligation to prevent was limited to the territory of the state (although including areas under its jurisdiction and the actions of persons under its control): *Bosnian Genocide*, Separate Opinion of Judge Tomka, paras. 66-67.

152 See notes 132-133 above.

153 *Mexico City Bombardment Claims*, para. 6. This holding was followed in a number of further cases before the Commission, see e.g. *Bowerman and Burberry's*, para. 7; *Santa Gertrudis Jute Mill Company*, para. 9; *John Gill*, para. 5. Note that while this approach contradicts the ICJ's reasoning in *Corfu Channel*, it does not clash with the Court's views on presumptions as such. In *Corfu Channel*, 18, the ICJ stated that the mere fact that the catalyst event has taken place on the state's territory 'by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof' – but the Claims Commission's presumption rests on more than the mere location of the catalyst event: it requires proof of knowledge, to be supplied by the claimant, and lack of proof from the respondent state.

the duty of vigilance. Instead of shifting the burden of proof, the Court's response to the evidentiary difficulties faced by claimant states has been to allow them 'a more liberal recourse to inferences of fact and circumstantial evidence.'[154] Given that there had been nothing in the ICJ's subsequent jurisprudence to suggest a departure from this position, the DRC could hardly have been aware that, according to Judges Tomka and Kooijmans, it was expected to bear the burden of proof. In light of previous case law on the matter, the ICJ may be understandably reluctant to change course. At the very least, such a shift would need to be clearly communicated to the parties early on in the proceedings. Still, it is not unreasonable to assume that the respondent state is best placed to elucidate what measures it has taken in response to a known threat (even if the imbalance between the parties' capabilities to provide evidence is likely to be less significant than in human rights cases).

In sum, the likely reason why the ICJ found the DRC not to be in violation of its duty to protect is that Uganda did not meet its burden of proving that the DRC had the means to suppress the rebel groups. Nonetheless, it would have been preferable for the ICJ to be more explicit in its reasoning, in order to avoid the suggestion that states may escape responsibility in such cases by simply claiming that they have no control over part of their territory, or that such lack of control renders the duty to protect inapplicable.

3.4.2.2.2 The Intra-territorial Presumption of Jurisdiction at the ECtHR

The system of European human rights protection has similarly been faced with the question of what (if anything) states are required to do to comply with their positive obligations in areas within their territory but beyond their control. As shown below, the human rights bodies' response has shifted over time. In the early 1990s, the European Commission on Human Rights (ECommHR) declined to entertain the possibility that a state may be able to violate its positive obligations in respect of uncontrolled sovereign territory. The ECtHR, however, decided to take a different approach in a string of cases starting with *Ilaşcu* in 2004, holding that states are obliged to use the means that are still available to them to – in the words of Article 1 ECHR – 'secure to everyone within their jurisdiction the rights and freedoms' of the Convention.

3.4.2.2.2.1 Prelude: An and others v. Cyprus before the Commission

In 1991, an application was filed against Cyprus before the ECommHR, concerning restrictions placed on freedom of movement within the island by the Turkish Cypriot authorities in the north.[155] The Commission rejected the application as inadmissible, reasoning that although the ECHR

154 *Corfu Channel*, 18.

155 ECommHR, *An and others* v. *Cyprus*, Application No. 18270/91, Decision of 8 October 1991.

'continues to apply to the whole of the territory of the Republic of Cyprus', 'the authority of the respondent Government is in fact […] limited to the southern part of Cyprus. It follows that the Republic of Cyprus cannot be held responsible under Article 1 of the Convention for the acts of Turkish Cypriot authorities in the north of Cyprus of which the present applicants complain.'[156] In other words, the ECommHR held that since the Turkish occupation barred Cyprus from exercising its jurisdiction over the northern part of the island, the respondent state could not be held responsible for the conduct of the Turkish Cypriot authorities – or, to put it differently, said conduct could not be attributed to Cyprus.[157] However, the application of positive obligations does not require attributing the conduct which resulted in the catalyst event. As discussed above, in such cases the state is 'only' responsible for its own conduct (i.e. what is attributable to the state) *in relation to* preventing or redressing the catalyst event – but the Commission did not examine the conduct of Cyprus in relation to the restrictions in question.

The decision did not explicitly dismiss the possibility of Cyprus being under positive obligations in relation to the Turkish Cypriot authorities (or any other actor in Northern Cyprus, for that matter). Instead, the Commission simply stayed silent on the issue, and it is this silence, coupled with the application's dismissal, which indicates that the ECommHR did not consider Cyprus to be capable of violating any of its obligations – positive or negative – in the north. It should be highlighted that this silence may simply have been due to the fact that the applicants' complaint was limited to the conduct of the Turkish Cypriot authorities and, unlike *Ilaşcu*, did not raise the issue of positive obligations.[158] Nonetheless, the fact remains that the Commission could have addressed the issue *sua sponte* but did not do so.

156 *Ibid*.

157 The relationship between jurisdiction and attribution will be explored in greater detail in Section 4.4 below. For now, suffice it to say that the Commission's conceptualization of there being no attribution *as a result of* there being no exercise of jurisdiction is not entirely accurate; rather, the same set of facts which prove (the lack of) control over territory may also be capable of proving (the lack of) control over the conduct of certain persons. But see, for an alternative reading, Milanović & Papić, 'ECHR in Contested Territories', 786, arguing that in context, 'the Commission was thinking in terms of lack of *obligation* on the part of Cyprus', rather than an attribution test (emphasis in original).

158 See also G. Yudkivska, 'Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues under Article 1 of the Convention', in: A. van Aaken & I. Motoç (eds.), *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018), 135, at 139, noting that '[n]o issue of poisitive obligations arose' in the case. On the issue of positive obligations having been raised by the parties (and a third party) in *Ilaşcu*, see paras. 304, 306-307 and 309 for the arguments made by Moldova, the applicants, and Romania, respectively, to the Court.

3.4.2.2.2.2 The Change in Tune: Ilaşcu and others v. Moldova and Russia

In 2004, a similar case came before the Grand Chamber of the European Court of Human Rights: *Ilaşcu and others* v. *Moldova and Russia*, which concerned political prisoners detained in the so-called 'Moldavian Republic of Transdniestria' (MRT), a secessionist entity, and was brought by the applicants against both Moldova as the state with sovereignty, and Russia as the state allegedly with control.[159]

In line with the requirements of Article 1 ECHR, the Court first had to determine whether the applicants came within the jurisdiction of Moldova and Russia. Discussing the legal principles applicable in respect of the state with sovereignty, the ECtHR stated that 'jurisdiction is presumed to be exercised normally throughout the State's territory.'[160] While the Court noted that '[t]his presumption may be limited in exceptional circumstances', it also held that positive 'obligations remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.'[161]

Applying these principles to the concrete situation of Moldova, the ECtHR held that the state's lack of effective control 'reduces the scope of [its] jurisdiction in that the undertaking given by the State under Article 1 [ECHR] must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory.'[162] This conceptual construction of the problem is unfortunate in that it suggests that only the Convention's positive obligations remain applicable in such territories. Instead, the more accurate conceptualization is that neither the scope of the state's jurisdiction, nor the scope of its obligations is altered by the loss of control over part of its territory; what is affected is the state's capability. In other words, the Convention remains applicable in its entirety

159 *Ilaşcu*, paras. 3, 28-289.

160 *Ibid.*, para. 312.

161 *Ibid.*, para. 313; see also para. 333. R. Lawson, in 'Out of Control – State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' meet the Challenges of the 21st Century?', in: M. Castermans-Holleman, F. van Hoof & J. Smith (eds.), *The Role of the Nation State in the 21st Century: Human Rights, International Organisations and Foreign Policy – Essays in Honour of Peter Baehr* (The Hague: Kluwer, 1998), 91, at 112-114, made this argument already in 1998. Although the ECtHR spoke of 'all […] appropriate measures' and did not add an express qualification of reasonableness in *Ilaşcu* or the line of case law that followed, such a qualification is almost certainly implied, given human rights courts' references to reasonableness in their jurisprudence on positive obligations and their sensitivity to avoiding the imposition of an excessive burden on the state (see note 109 above and Section 3.5.2 below).

162 *Ilaşcu*, para. 333. Following the same reasoning, the ECtHR even stated in *Ivanţoc and others* v. *Moldova and Russia*, Application No. 23687/05, Fourth Section, Judgment of 15 November 2011, that 'Moldova's responsibility could not be engaged under Article 1 of the Convention on account of a wrongful act within the meaning of international law' (para. 105). This is simply misleading, since (as explained above in Section 2.1) an internationally wrongful act may equally consist of an omission attributable to the state – which is exactly what happened in *Ilaşcu*.

throughout Moldova, but since the state exercises no control – and has no presence – in Transdniestria, it is simply incapable of violating any of its negative obligations there.[163] This distinction does not make any difference in the case at hand. But there may be cases where it does: for instance, if Moldova sends one or more state official(s) to Transdniestria on government business, it will be able to violate its negative obligations through the conduct of those officials, even in the absence of territorial control. It is unlikely that the ECtHR would have wanted to exclude responsibility in such situations, given its jurisprudence on the extraterritorial acts of state officials,[164] which would apply *a fortiori* in an 'intraterritorial' scenario. That said, whichever conceptualization is chosen in the end, the choice does not affect (the validity of) the further reasoning or outcome of the *Ilaşcu* case.

With regard to the case at hand, the ECtHR held that – notwithstanding the state's lack of effective control over Transdniestria – Moldova was under 'a *positive* obligation […] to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention'.[165] According to the Court, this positive obligation operated on two different levels, entailing not only particular 'measures to ensure respect for the applicants' rights', but also generally 'measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction'.[166] The ECtHR then conducted an analysis of Moldova's efforts, and stated – regarding general measures – that:

> The obligation to re-establish control over Transdniestria required Moldova, firstly, to refrain from supporting the separatist regime of the 'MRT', and secondly to act by taking all the political, judicial and other measures at its disposal to re-establish its control over that territory. *It is not for the Court to indicate the most appropriate measures Moldova should have taken or should take to that end, or whether such measures were sufficient. It must only verify Moldova's will, expressed through specific acts or measures, to re-establish its control over the territory of the 'MRT'.*[167]

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163 Cf. *Ilaşcu*, Partly Dissenting Opinion of Judge Ress, para. 1, arguing that '[t]he "scope" of the jurisdiction is always the same but the responsibility of the Contracting State […] relate[s] only to the positive obligations'. Cf. also Milanović & Papić, 'ECHR in Contested Territories', 798-799, outlining a capacity-based 'functional' approach to states' obligations in such cases.

164 See e.g. ECtHR, *Al-Skeini and others* v. *United Kingdom*, Application No. 55721/07, Grand Chamber, Judgment of 7 July 2011; ECtHR, *Jaloud* v. *The Netherlands*, Application No. 47708/08, Grand Chamber, Judgment of 20 November 2014.

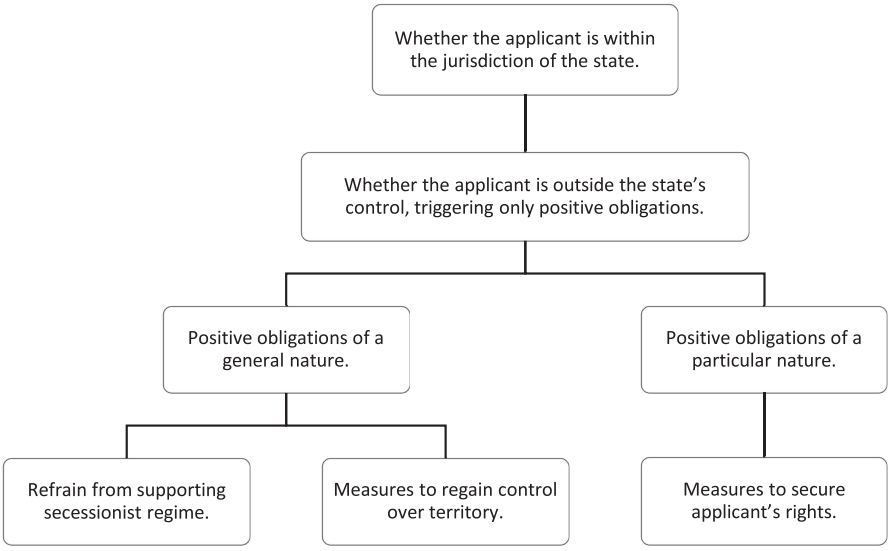
165 *Ilaşcu*, paras. 330 (on the lack of effective control) and 331 (emphasis added).

166 *Ibid.*, paras. 331, 339. This dual approach also has historical antecedents in the arbitral jurisprudence on injuries to aliens, see e.g. *George Adams Kennedy (U.S.A.)* v. *United Mexican States*, Award of 6 May 1927, 4 UNRIAA 194, para. 7; *Elvira Almaguer (U.S.A.)* v. *United Mexican States*, Award of 13 May 1929, 4 UNRIAA 523, at 525; *Walter A. Noyes (United States)* v. *Panama*, Award of 22 May 1933, 6 UNRIAA 308, at 311.

167 *Ilaşcu*, para. 340.

The Court set a very low bar for Moldova to clear: in essence, the ECtHR was merely concerned with whether the state upheld its formal claim to the territory and refrained from acquiescing in the situation.[168] The Court also recognized that Moldova's lack of control affected the means at its disposal to ensure respect for the applicants' rights specifically, i.e. regarding particular measures. This is apparent from the ECtHR's finding that Moldova's (arguably limited) efforts – such as systematically raising the issue of the prisoners' release in negotiations and sending doctors to examine their health – were sufficient to meet the state's positive obligations until May 2001 (when one of the applicants was released and Moldova's efforts significantly diminished).[169]

The Court's analytical steps in *Ilaşcu* may be summarized as follows:



168 *Ibid.*, paras. 341-345; note that the Court went on to express its opinion in para. 341 that 'when confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation […], there was little Moldova could do to re-establish its authority over Transdniestrian territory'.

169 *Ibid.*, paras. 346-352.

This line of analysis has since been followed in all subsequent cases regarding Transdniestria.[170] But as regards the 'general' limb of this test, the only other case in which the Court examined Moldova's actions was *Ivanțoc*

170 See *Ivanțoc*, paras. 105-111; ECtHR, *Catan and others* v. *the Republic of Moldova and Russia*, Applications Nos. 43370/04, 8252/05 and 18454/06, Grand Chamber, Judgment of 19 October 2012, paras. 109-110, 145-148; ECtHR, *Mozer* v. *the Republic of Moldova and Russia*, Application No. 11138/10, Grand Chamber, Judgment of 23 February 2016, paras. 99-100, 151-155, 183, 200, 213-216; ECtHR, *Turturica and Casian* v. *the Republic of Moldova and Russia*, Applications Nos. 28648/06 and 18832/07, Second Section, Judgment of 30 August 2016, paras. 28-29, 51-54; ECtHR, *Paduret* v. *the Republic of Moldova and Russia*, Application No. 26626/11, Second Section, Judgment of 9 May 2017, paras. 16-17, 31-33; ECtHR, *Eriomenco* v. *the Republic of Moldova and Russia*, Application No. 42224/11, Second Section, Judgment of 9 May 2017, paras. 43-44, 58-62, 73, 87, 97, 107; *Apcov*, paras. 44-46; ECtHR, *Soyma* v. *the Republic of Moldova, Russia and Ukraine*, Application No. 1203/05, Second Section, Judgment of 30 May 2017, paras. 20-21, 36-39; ECtHR, *Vardanean* v. *the Republic of Moldova and Russia*, Application No. 22200/10, Second Section, Judgment of 30 May 2017, paras. 40-43; ECtHR, *Braga* v. *the Republic of Moldova and Russia*, Application No. 76957/01, Second Section, Judgment of 17 October 2017, paras. 22-23, 38-47; ECtHR, *Draci* v. *the Republic of Moldova and Russia*, Application No. 5349/02, Second Section, Judgment of 17 October 2017, paras. 26-27, 59-61; ECtHR, *Pocasovschi and Mihaila* v. *the Republic of Moldova and Russia*, Application No. 1089/09, Second Section, Judgment of 29 May 2018, paras. 44-46, 81-82; ECtHR, *Mangîr and others* v. *the Republic of Moldova and Russia*, Application No. 50157/06, Second Section, Judgment of 17 July 2018, paras. 26-27, 39-42, 59, 71; ECtHR, *Sandu and others* v. *the Republic of Moldova and Russia*, Applications Nos. 21034/05, 41569/04, 41573/04, 41574/04, 7105/06, 9713/06, 18327/06 and 38649/06, Second Section, Judgment of 17 July 2018, paras. 34-35, 85-88, 98-100; ECtHR, *Kolobychko* v. *the Republic of Moldova, Russia and Ukraine*, Application No. 36724/10, Second Section, Judgment of 18 September 2018, paras. 31-32, 59-62; ECtHR, *Stomatii* v. *the Republic of Moldova and Russia*, Application No. 69528/10, Second Section, Judgment of 18 September 2018, paras. 44-45, 69-72; ECtHR, *Bobeico and others* v. *the Republic of Moldova and Russia*, Application No. 30003/04, Second Section Committee, Judgment of 23 October 2018, paras. 28-29, 49-52; ECtHR, *Canter and Magaleas* v. *the Republic of Moldova and Russia*, Application No. 7529/10, Second Section Committee, Judgment of 18 June 2019, paras. 17-18, 36-39; ECtHR, *Coțofan* v. *the Republic of Moldova and Russia*, Application No. 5659/07, Second Section Committee, Judgment of 18 June 2019, paras. 16-17, 30-33; ECtHR, *Sobco and Ghent* v. *the Republic of Moldova and Russia*, Applications Nos. 3060/07 and 45533/09, Second Section Committee, Judgment of 18 June 2019, paras. 15-16, 28-31; ECtHR, *Beşleagă* v. *the Republic of Moldova and Russia*, Application No. 48108/07, Second Section Committee, Judgment of 2 July 2019, paras. 16-17, 32-37, 49, 59; ECtHR, *Panteleiciuc* v. *the Republic of Moldova and Russia*, Application No. 57468/08, Second Section Committee, Judgment of 2 July 2019, paras. 21-22, 56-59; ECtHR, *Antonov and others* v. *the Republic of Moldova and Russia*, Applications Nos. 315/10, 1153/10 and 1158/10, Second Section Committee, Judgment of 2 July 2019, paras. 37-38, 62-67, 78, 91; ECtHR, *Dobrovitskaya and others* v. *the Republic of Moldova and Russia*, Applications Nos. 41660/10, 25197/11, 8064/11, 6151/12, 28972/13 and 29182/14, Second Section Committee, Judgment of 3 September 2019, paras. 30-31, 60-66, 78, 88, 98; ECtHR, *Matcenco* v. *the Republic of Moldova and Russia*, Application No. 10094/10, Second Section Committee, Judgment of 17 September 2019, paras. 22-23, 38-41; ECtHR, *Berzan and others* v. *the Republic of Moldova and Russia*, Applications Nos. 56618/08, 46367/10, 16281/11, 33446/11, 64075/11, 32528/12, 33694/12, 75813/12, 3020/13 and 45464/13, Second Section Committee, Judgment of 17 September 2019, paras. 16-17, 32-35, 50; *Istratiy*, paras. 20-21, 40-42, 50; ECtHR, *Filin* v. *the Republic of Moldova and Russia*, Application No. 48841/11, Second Section Committee, Judgment of 17 September 2019, paras. 21-22, 34-38, 48; ECtHR, *Negruța* v. *the Republic of*

– essentially a continuation of the *Ilaşcu* case, brought by the remaining political prisoners in 2005 and decided by the Court in 2011.[171] In all other judgments since then, the Court simply extended its conclusions in the absence of any new evidence submitted by the parties on this point.[172] In light of the very low threshold set by the Court, as well as these automatic extensions, this general limb – as an ECtHR judge has argued – 'appears to be pure political rhetoric with little to do with legal obligations, and also is hardly subject to assessment by legal measures.'[173] This statement seems to be supported by the Court's jurisprudence from contexts beyond Transdniestria as well: in none of these cases did the ECtHR examine the test's general limb.

3.4.2.2.2.3 Variations on a Theme? The Ilaşcu test in Kosovo, Nagorno-Karabakh and Eastern Ukraine

While the Court set out the test in clear terms in *Ilaşcu*, and followed it meticulously in other cases regarding Transdniestria, the same cannot be said in the contexts of Kosovo, Eastern Ukraine, or Nagorno-Karabakh. Although none of the judgments in these latter cases – *Azemi*, *Khlebik* and *Sargsyan* – questioned the *Ilaşcu* test, and some of them even reaffirmed part of it in principle, they did not apply all of its elements to the facts at hand. In the admissibility decision in *Azemi* and the judgment in *Khlebik*, the Court did not examine the test's general limb; while in the *Sargsyan* case before the Grand Chamber, it rejected Azerbaijan's argument that the state's obligations under the ECHR were limited to positive ones and as such, it

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Moldova and Russia, Application No. 3445/13, Second Section Committee, Judgment of 17 September 2019, paras. 26-27, 43-47, 56, 65; *Untilov*, paras. 16-17, 36-39; ECtHR, *Iovcev and others* v. *the Republic of Moldova and Russia*, Application No. 40942/14, Second Section Committee, Judgment of 17 September 2019, paras. 45-46, 63-66, 78, 93; ECtHR, *Babchin* v. *the Republic of Moldova and Russia*, Application No. 55698/14, Second Section Committee, Judgment of 17 September 2019, paras. 24-25, 42-45, 61, 76; *Grama and Dîrul*, paras. 17-18, 34-37; ECtHR, *Cazac and Surchician* v. *the Republic of Moldova and Russia*, Application No. 22365/10, Second Section Committee, Judgment of 7 January 2020, paras. 45-46, 58-61, 74, 84; ECtHR, *Oprea and others* v. *the Republic of Moldova and Russia*, Application No. 36545/06, Second Section Committee, Judgment of 18 February 2020, paras. 23-24, 47-50. The Court developed a more specific test for Article 13 ECHR, see note 238 below.

171 *Ivanţoc*, para. 108.

172 *Catan*, para. 146; *Mozer*, para. 152 (extended to July 2010); *Turturica and Casian*, para. 52; *Paduret*, para. 32 (October 2010); *Eriomenco*, para. 46 (September 2016); *Apcov*, para. 45 (April 2012); *Soyma*, para. 37; *Vardanean*, para. 41 (May 2011); *Braga*, para. 39; and *Draci*, para. 60; *Mangîr*, para. 40; *Sandu*, para. 86; *Kolobychko*, para. 60; *Stomatii*, para. 70; *Bobeico*, para. 50; *Canter and Magaleas*, para. 37; *Coţofan*, para. 31; *Sobco and Ghent*, para. 29; *Beşleagă*, para. 33; *Panteleiciuc*, para. 57; *Antonov*, para. 63; *Dobrovitskaya*, para. 61; *Matcenco*, para. 39; *Berzan*, para. 33; *Filin*, para. 35 (March 2015); *Istratiy*, para. 40 (December 2010); *Babchin*, para. 43 (March 2017); *Iovcev*, para. 64 (April 2014); *Untilov*, para. 37; *Negruţa*, para. 44 (October 2014); *Grama and Dîrul*, para. 35; *Cazac and Surchician*, para. 59; *Oprea*, para. 48.

173 Yudkivska, 'Territorial Jurisdiction and Positive Obligations', 143. See also Milanović & Papić, 'ECHR in Contested Territories', 795-796.

did not proceed to either limb. (As regards the test's particular limb, that is examined more closely in Section 3.4.2.3 below, as part of the discussion on whether there is a requirement of causation in cases involving duties of protection.)

In the 2013 *Azemi* v. *Serbia* case, the applicant – a resident of Kosovo – submitted a complaint against Serbia concerning the non-enforcement of a judgment issued in 2002 by the Municipal Court of Ferizaj in Kosovo.[174] First, the Court affirmed the (by now familiar) principles of its jurisprudence, namely that states' jurisdiction in the sense of Article 1 ECHR is 'presumed to be exercised normally throughout the State's territory', only susceptible to limitations 'in exceptional circumstances', and that being 'prevented from exercising [the State's] authority in part of its territory' may constitute such a circumstance.[175] Echoing *Ilaşcu*, the ECtHR then stated that in such cases, it must carry out an analysis examining 'all the objective facts capable of limiting the effective exercise of a State's authority over its territory as well as the State's positive obligations under the Convention to take all the appropriate measures which are still within its power to take to ensure respect for the Convention's rights and freedoms within its territory'.[176] Reaching the conclusion that 'there existed objective limitations which prevented Serbia from securing the rights and freedoms in Kosovo',[177] the Court turned to the question of Serbia's positive obligations. But instead of applying the two-track test developed in *Ilaşcu*, the ECtHR did not examine measures of a general nature, likely due to the legal circumstances and political sensitivities surrounding the situation. Kosovo had been placed under a UN territorial administration in 1999 pursuant to a binding Security Council resolution, which meant that Serbia would have been violating its obligations under international law if it tried to re-establish control over the province.[178] Even after Kosovo's unilateral

174 ECtHR, *Azemi* v. *Serbia*, Application No. 11209/09, Second Section, Admissibility Decision of 5 November 2013. See also K. Istrefi, *Azemi v. Serbia in the European Court of Human Rights: (Dis)continuity of Serbia's De Jure Jurisdiction over Kosovo*, EJIL: *Talk!*, 13 March 2014, http://www.ejiltalk.org/azemi-v-serbia-in-the-european-court-of-human-rights-discontinuity-of-serbias-de-jure-jurisdiction-over-kosovo.

175 *Azemi*, paras. 41-42.

176 *Ibid.*, para. 42.

177 *Ibid.*, para. 46. In *Ilaşcu*, it was undisputed that Moldova lacked control over Trasndniestria; instead of examining the extent (of lack) of Moldovan control, the ECtHR simply recounted the history of the Transdniestrian conflict briefly: *Ilaşcu*, paras. 322-331. Meanwhile, in *Azemi*, the Court examined whether Serbia exercised any control over 'UNMIK, Kosovo's judiciary or other institutions' in terms comparable to those which were applied to Russia – not Moldova – in respect of Transdniestria; see also Milanović & Papić, 'ECHR in Contested Territories', 792.

178 UNSC Resolution 1244, 10 June 1999, UN Doc. S/RES/1244(1999); see also C. Stahn & A. Zimmermann, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo' (2001) 70 *Nordic Journal of International Law* 423, at 438-441 on how difficulties related to the FRY's UN membership do not affect this conclusion, since the FRY consented to Resolution 1244 and it became a UN member on 1 November 2000.

declaration of independence in 2008, any suggestion that Serbia was under a legal obligation to regain control over Kosovo would have inevitably inflamed tensions. Instead, the Court turned immediately to efforts to secure the applicant's rights in particular, simply noting that 'the applicant ha[d] not been able to point to a particular action or inaction of the respondent State or substantiated any breach of the respondent State's duty to take all the appropriate measures with regard to his right which are still within its power to take.'[179] On this basis, the Court concluded that it 'cannot point to any positive obligations that the respondent State had towards the applicant' in the particular case, and the ECtHR did not undertake any analysis of its own to examine what steps (if any) Serbia had taken to secure the rights at issue.

The 'general' limb of the *Ilaşcu* test was given similarly short shrift in the 2017 *Khlebik* v. *Ukraine* case. The applicant complained of the Ukrainian courts' inability to examine his appeal against a criminal conviction, alleging that it constituted undue delay and that his continued detention in the absence of a final judgment violated Article 5 ECHR.[180] The case presented a rather complex fact pattern: the applicant himself was under Ukraine's control, but the local courts' inability to hear the appeal was due to the fact that the relevant case file had come under the control of secessionist armed groups in Eastern Ukraine in 2014.[181] Ukraine did not argue that its obligations were restricted to positive ones, possibly becaue its loss of control did not extend to *all* aspects of the case. Accordingly, the Court did not refer to the test applied in *Ilaşcu*, even though the reasoning applied was similar to how the ECtHR approached the issue in *Azemi*. Once again, in deciding the case, the Court did not examine what steps Ukraine has (or might have) taken to regain control over the area in general, and whether the state had refrained from supporting the secessionist armed groups. Instead, it turned immediately to the applicant's three suggestions of what Ukraine could have done in his particular situation – and finding them to be either ineffectual or prejudicial to the applicant, held that the state had not violated the Convention.[182]

In the 2015 case of *Sargsyan* v. *Azerbaijan*, meanwhile, the ECtHR's analysis came to an early halt in going through the steps of the *Ilaşcu* test. The facts of the case took place in the context of the – likewise secessionist –

179 *Azemi*, para. 47.

180 ECtHR, *Khlebik* v. *Ukraine*, Application No. 2945/16, Fourth Section, Judgment of 25 July 2017, para. 3.

181 See *ibid.*, paras. 5-34.

182 *Ibid.*, paras. 72-81; the ECtHR also noted, at para. 66, that unlike in *Ilaşcu*, the application was directed solely against Ukraine, and that 'the applicant did not allege that his rights had been breached due to a deficiency in the mechanisms of international cooperation between Ukraine and any other High Contracting Party.' The Court likely did so to distinguish the case from ECtHR, *Güzelyurtlu and others* v. *Cyprus and Turkey*, Application No. 36925/07, Third Section, Judgment of 4 April 2017, paras. 282-296, where the Chamber judgment was handed down just a few months earlier; see note 234 below.

Nagorno-Karabakh conflict. The predominantly Armenian-inhabited region declared the establishment of the so-called 'Nagorno-Karabakh Republic' (NKR) and its independence from Azerbaijan in 1991, and the situation 'gradually escalated into full-scale war' in early 1992, before turning into a (largely) frozen conflict in the mid-1990s.[183] The case was brought by an applicant displaced from the village of Gulistan, alleging that his rights to enjoyment of property and family life have been violated due to his displacement and inability to return. Azerbaijan, in turn, claimed that it did not exercise effective control over the village, and argued – relying on the Court's position in *Ilaşcu* – that the state's responsibility could only be engaged in respect of its positive obligations. However, since Gulistan has been on the frontlines of the conflict, it presented a rather peculiar situation in terms of effective control. It was uncontested between the parties that:

> The village lies in a v-shaped valley on the north bank of the river Indzachay. Azerbaijani military positions are on the north bank of the river, while "NKR" military positions are on the south bank of the river. There are no civilians in the village. At least, the surroundings of the village are mined and ceasefire violations occur frequently.[184]

It was, however, disputed throughout the proceedings whether the village itself was mined, and most importantly, whether there were Azerbaijani military positions *in* the village.[185] In the end, the ECtHR found 'indications of Azerbaijani military presence in the village itself' based on satellite imagery of trenches, but did not 'dispose of sufficient elements to establish whether there have been Azerbaijani forces in Gulistan throughout the whole period' in question.[186] In contrast, the Court found no indication of NKR presence in the village at any time (nor was such presence claimed by the parties).[187]

The Court held, as it did in *Ilaşcu*, that there is a 'presumption of jurisdiction' by the state across its territory, which can only be rebutted in 'exceptional circumstances'.[188] But unlike Moldova in respect of Transdniestria, Azerbaijan could not, in the Court's view, show that such 'exceptional circumstances' existed in the case of Gulistan. Following a brief look at international humanitarian law on the subject, the ECtHR concluded that occupation 'would require a presence of foreign troops in Gulistan', and as there was no NKR presence in the village, it could not be considered

183 ECtHR, *Sargsyan* v. *Azerbaijan*, Merits, Application No. 40167/06, Grand Chamber, Judgment of 16 June 2015, para. 19-20; see also *ibid.*, paras. 14-22.
184 *Ibid.*, para. 134.
185 *Ibid.*
186 *Ibid.*, para. 138.
187 *Ibid.*
188 *Ibid.*, para. 139.

'occupied by or under the effective control of foreign forces'.[189] Since, by this measure, no other actor – third state or secessionist entity – had replaced Azerbaijan in control of the territory, the Court found that the state's responsibility cannot be limited to its positive obligations under the European Convention.[190]

In doing so, the ECtHR also highlighted two further factors. Firstly, the Court pointed out that 'the respondent Government have not maintained their initial position that they had no effective control over Gulistan. Rather they argued that it was in a disputed area' and that the rationale of *Ilaşcu* 'should equally be applied to disputed zones or, as they expressed it at the hearing of 5 February 2014, "areas which are rendered inaccessible by the circumstances".'[191] Nonetheless, Azerbaijan's argument on this point could still ostensibly be framed as claiming that Gulistan is not under *anyone's* control.[192] In any event, it is doubtful whether this inconsistency in pleadings would have been decisive in and of itself. More importantly, the Court was particularly attentive to the fact that the territory of Azerbaijan forms part of the 'Convention legal space' and that in *Ilaşcu*, the limited nature of Moldovan responsibility was 'compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention.'[193] As there was no such compensatory element in *Sargsyan*, the ECtHR explicitly cited 'the need to avoid a vacuum in Convention protection' as a factor featuring in its decision.[194] While avoiding such a vacuum is indeed a laudable goal, this statement sits somewhat uncomfortably with the Court's pronouncement, made just a few paragraphs earlier, that 'the respondent Government would have to show that another State or separatist regime has effective control over Gulistan'.[195] *Ilaşcu* – and the Court's subsequent jurisprudence – has shown that where (a separatist regime whose conduct is imputable to) an ECHR third state establishes effective control over part of the affected state, the latter's responsibility is limited to violations of its positive obligations.

189 *Ibid*., paras. 94, 144. The requisite type and degree of control to establish occupation is beyond the scope of this dissertation; for more on how occupation under international humanitarian law, and 'jurisdiction' under international human rights relate to each other, see e.g. M. Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011), 141-147; M. Milanović, 'European Court Decides that Israel Is Not Occupying Gaza', EJIL: *Talk!*, 17 June 2015, https://www.ejiltalk.org/european-court-decides-that-israel-is-not-occupying-gaza.

190 *Sargsyan*, paras. 142-149.

191 *Ibid*., paras. 145-146.

192 Particularly since Azerbaijani military presence in the village had been disputed, see *ibid*., paras. 132-138.

193 *Ibid*., para. 148.

194 *Ibid.* Cf. Mujezinović Larsen, 'Territorial Non-Application', 84-85.

195 *Sargsyan*, para. 142.

Yet taken together, the two statements in *Sargsyan* suggest that where a non-ECHR third state (or a separatist regime whose conduct is not imputable to an ECHR third state) takes effective control over part of the territory of an ECHR state party, the latter's responsibility is *not* limited to its positive obligations. The identity of the third state or separatist regime, however, should not be a determining factor in the scope of the affected state's obligations, as this is not something that it can influence. The key to resolving this problem is to recall that, as discussed at the beginning of the previous section, the loss of effective control does not (or at least should not) affect the scope of the state's obligations under the ECHR – rather, it is the state's capacity to violate its negative obligations which changes. In other words, the affected state's duties include both positive and negative obligations in every one of the following scenarios: no replacement of the affected state in the effective control of the territory; replacement by an ECHR third state / separatist regime; and replacement by a non-ECHR third state / separatist regime. At the same time, the state's capacity to violate its negative obligations becomes limited in all cases of replacement, regardless of the identity of the third state / separatist regime.

3.4.2.2.2.4 Concluding Remarks

Overall, the work of the European human rights protection system has charted a remarkable path over the years. Following the Commission's initial non-consideration of the idea that states may have the capacity to violate their positive obligations under the Convention even where part of their territory is beyond their control, the Court subscribed to this idea fully in *Ilaşcu* and subsequent case law. That said, the ECtHR's detailed analytical framework developed in *Ilaşcu* has not been applied with the same rigor in cases beyond Transdniestria as regards its general limb. Granted, the requirements imposed by that limb – refraining from supporting the non-state actor and expressing the state's will (through specific measures) to re-establish control over the territory in question – are rather minimalistic. In fact, it is difficult to imagine a scenario where the state is in violation of its positive obligations in general, while complying with such obligations in the applicant's particular circumstances. Accordingly, it appears that the success or failure of such applications depends on the Court's findings of what means were available to the state and how these have been employed to secure *the applicant's rights specifically*. Against this backdrop, the next section explores how the effectiveness of means is evaluated and whether the state's lack of action must have partly caused the catalyst event – both in the context of the ECHR (as regards the particular limb of the Court's approach) and beyond.

3.4.2.3 The Role of Causation in Particular

Although the effectiveness of control generally exercised over (part of) the state's territory will often be determinative of the means it has at its

disposal to prevent a given event, those means always have to be examined with regard to the particular circumstances of any given case. Simply put, the question is: was there anything the state could have done (or could have reasonably been expected to do, rather) to prevent the catalyst event? Or would that event have occurred in any case, regardless of the state's efforts to the contrary?

Even if it is proven that the state knew or should have known about the catalyst event, this is not sufficient, in and of itself, to find a violation of the duty to protect. This was already apparent in *Corfu Channel*. The ICJ, having established that Albania must have known about the mines, proceeded to examine *when* it acquired such knowledge, in order to find out whether it had enough time to warn the approaching British warships and international shipping more generally.[196] In other words, if Albania could not have warned the ships in time under any circumstance, it would not have been held responsible.[197] This is simply because in that case, it would not have – could not have – contributed to the injury to the British warships: that injury would have occurred regardless of Albania's efforts. The Court found that even under a worst case scenario, it would have been possible to warn the British ships in particular, though in that case 'a general notification to the shipping of all States before the time of the explosions would have been difficult, perhaps even impossible.'[198]

The requirement that the state must have partly caused the catalyst event was articulated even more explicitly during the codification of state responsibility at the ILC. The Commission, following the suggestion of Special Rapporteur Roberto Ago, adopted an article on first reading specifically on obligations to prevent. As Ago highlighted, Draft Article 23 required two conditions for a breach of such obligations: 'the event to be prevented must have occurred, and *it must have been made possible by a lack of vigilance* on the part of State organs.'[199] The commentary to the Draft Article explained that 'for there to be a breach of the obligation, a certain causal link – indirect, of course, not direct – must exist between the occurrence of the event and the conduct adopted in the matter by the organs

196 *Corfu Channel*, 22-23.

197 See *ibid.*, 22.

198 *Ibid.*, 23.

199 *Ago's Seventh Report*, para. 3 (emphasis added). Sadly, the text of Draft Article 23 itself – see ILC, *Text of all the draft articles adopted so far by the Commission*, in: *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, 78, at 80 – was not as clear on these criteria as it could have been. It read: 'When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.' Nonetheless, the Commentary did confirm both requirements in unequivocal terms, see Commentary to Draft Article 23, at 81-86, especially at 82-83, paras. 4-8 on the requirement of a causal link. See e.g. *García Amador's Second Report*, 123-124, para. 14 for an earlier articulation of this position.

of the State.'[200] This (indirect) causal link was emphasized throughout the commentary, even referred to as a *sine qua non* element of the event to be prevented.[201] The reason why such a causal nexus is required is that obligations to prevent do not constitute a guarantee by the affected state that the event to be prevented will not occur under any circumstance.[202] The state is required to exercise vigilance to prevent a given event only 'in so far as it is materially possible' to do so.[203] In order to assess whether the state has done all it could to prevent the catalyst event, one must compare 'the conduct actually adopted by the State and the conduct that it might reasonably have been expected to adopt to prevent the event from occurring.'[204] In the end, the Draft Article was deleted on second reading, as it came to be seen as overly elaborate and having more to do with primary rules than secondary ones[205] – but not because the underlying principles had been questioned.

Despite the ILC's firmness on the matter, some of the recent jurisprudence seems to indicate that the requirement of causality may not be so strict, particularly in situations which are complex and multicausal.[206] Notably, the ICJ departed from this condition in the 2007 *Bosnian Genocide* judgment, holding that:

> [I]t is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. […] [F]or a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.[207]

200 Commentary to Draft Article 23, para. 7; see also *Ago's Seventh Report*, para. 14.
201 Commentary to Draft Article 23, para. 14; see also *Ago's Seventh Report*, para. 14.
202 Cf. *Crawford's Second Report*, para. 83. See note 79 above on the IACtHR's terminology; similarly, the ACommHPR spoke in terms of a guarantee in the *Association of Victims of Post Electoral Violence* case, but (despite some confusion) appears to have treated the duty as one of effort, aimed at taking effective measures capable of producing results, see Section 3.5.2.1.2 below.
203 *Ago's Seventh Report*, para. 2; cf. Commentary to Draft Article 23, para. 6 (emphasis added): 'The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event *as far as lies within its power*.'
204 Commentary to Draft Article 23, para. 6.
205 See *Crawford's Second Report*, paras. 81-92, recommending deletion.
206 See e.g. *Bosnian Genocide*, para. 430, where – besides the difficulty of proof – the Court was motivated in its decision by the possibility 'that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result […] which the efforts of only one State were insufficient to produce.'
207 *Ibid.*, paras. 430 and 438.

In other words, the Court did not consider (indirect) causality, or contribution to the injury as a requirement for the breach of the duty to prevent. The ICJ did, however, consider a causal nexus necessary for awarding compensation, requiring proof 'with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.'[208] Despite holding that Serbia did *nothing* to prevent the genocide at Srebrenica,[209] the Court did not consider such a causal nexus to be established, and rejected Bosnia's claim to financial compensation.[210] It is noteworthy that it was this denial of compensation (and not the non-requirement of causation for responsibility) which attracted criticism in subsequent commentary on the case.[211] Furthermore, it is striking that the Court only dealt with the possibility of having *averted* the genocide, and did not consider the possibility that perhaps its impact could have been mitigated – lives could have been saved – if the Respondent had intervened.

The IACtHR has applied the same approach (regarding responsibility, not compensation) in the 2014 *Rodríguez Vera* case, which concerned the infamous taking of the Colombian Palace of Justice by the M-19 rebel group in 1985.[212] The state withdrew additional security from the building only days before the attack; but Colombia argued before the Court that the takeover would have taken place even if the added security had stayed in place. In response to this argument, the IACtHR held that 'regardless of whether the attack would have occurred, even with the surveillance that was withdrawn, the State's failure to adopt the measures that should reasonably have been taken in view of the danger that had been verified constituted non-compliance with its obligation of prevention.'[213]

Similarly, in the 2004 *Ilaşcu* case, the ECtHR did not suggest that Moldova's efforts would certainly have been able to secure the release of the applicants.[214] The Court analyzed the measures taken by Moldova to ensure

208 *Ibid.*, para. 462.
209 *Ibid.*, para. 438.
210 *Ibid.*, para. 462.
211 See C. Tomuschat, 'Reparation in Cases of Genocide' (2007) 5 *Journal of International Criminal Justice* 905; M. Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669, at 688-692.
212 IACtHR, *Rodríguez Vera* et al. *(The Disappeared from the Palace of Justice)* v. *Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 14 November 2014, Series C, No. 287.
213 *Rodríguez Vera*, para. 527.
214 Cf. Milanović, 'State Responsibility for Genocide: A Follow-Up', 689-690. See also more generally V. Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 *Human Rights Law Review* 309, at 316-318, noting that the ECtHR has rejected a *sine qua non* requirement and has articulated a test whereby '[a] failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State' (*E. and others*, para. 99), but also that this is not always the standard used by the Court, generating some uncertainty.

respect for the applicants' rights, including systematically raising the issue of the prisoners' release in negotiations and sending doctors to examine their health. It found that Moldova's efforts significantly diminished following the release of one of the applicants in May 2001, even though 'it was within the power of the Moldovan Government to take measures to secure to the applicants their rights under the Convention.'[215] The Court pointed out that Moldova only raised the applicants' situation in its negotiations with the MRT orally, without trying to reach an agreement; the matter was not addressed in general plans for the settlement of the conflict; nor was it raised by Moldova in its negotiations with Russia.[216] Based on these circumstances, the Court concluded that Moldova had breached the Convention for failing to discharge its positive obligations.[217] In other words, the ECtHR held Moldova responsible on the basis that it had the means to help the applicants, but failed to use these means – without requiring proof that its efforts would certainly have led to a different outcome. In this respect, the European Court's reasoning matches that of the ICJ in the *Bosnian Genocide* case and that of the IACtHR in *Rodríguez Vera*.

Subsequent cases at the ECtHR, however, while still using the language of means, paint a more complicated picture. Many cases from Transdniestria suggest that the Court is merely interested in seeing that Moldova had taken some steps (any steps) to secure the applicants' rights, regardless of the possible effectiveness of the measures. In a series of cases, the Second Section of the ECtHR – professing to apply the Grand Chamber's reasoning in *Ilaşcu* – simply observed that Moldova had 'made efforts' to secure the applicants' rights in the particular situations, without examining the effectiveness of those efforts, before concluding that the state had complied with its positive obligations.[218] In some cases, the 'efforts' included various measures, such as seeking help through diplomatic channels by informing the Organization for Security and Co-operation in Europe (OSCE) or other international actors; but in at least one, they consisted solely of launching

215 *Ilaşcu*, para. 351.

216 *Ibid.*, paras. 348-350.

217 *Ibid.*, paras. 346-352 in general, and paras. 448-449, 453-454, 463-464 on the specific violations.

218 *Turturica and Casian*, para. 53; *Paduret*, paras. 33-34; *Eriomenco*, para. 60; *Vardanean*, paras. 42-43; *Draci*, para. 61; *Mangîr*, para. 41; *Sandu*, para. 87; *Kolobychko*, para. 61; *Stomatii*, para. 71. Although many of these cases refer to *Mozer* (as the most recent Grand Chamber case regarding positive obligations in Transdniestria) instead of *Ilaşcu*, the Court's reasoning in *Mozer* simply follows that of *Ilaşcu*, see *Mozer*, paras. 151-155. In contrast, in *Catan*, para. 147, the Court found that 'the Moldovan Government have made considerable efforts to support the applicants. In particular, following the requisitioning of the schools' former buildings by the "MRT", the Moldovan Government have paid for the rent and refurbishment of new premises and have also paid for all equipment, staff salaries and transport costs, *thereby enabling the schools to continue operating* and the children to continue learning in Moldovan, albeit in far from ideal conditions' (emphasis added).

a criminal investigation.[219] The Grand Chamber, however, had established already in *Ilaşcu* that 'in the absence of control over Transdniestrian territory by the Moldovan authorities any judicial investigation in respect of persons living in Transdniestria or linked to offences committed in Transdniestria would be ineffectual.'[220] In accordance with this holding, the (discontinuation of) investigation did not play a role in the ECtHR's finding of a violation in *Ilaşcu*.[221] Given that the Court has held measures which it had previously found ineffectual (i.e. investigation) to be sufficient to meet Moldova's positive obligations, it would appear that as long as Moldova can show proof of *any* effort undertaken, regardless of its (potential) effectiveness, the ECtHR will be satisfied.[222]

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219 *Paduret*, paras. 33-34. In *Soyma*, the applicant's mother complained of a lack of investigation into his son's death, but the Court, referring back to its previous conclusion that 'the applicant never complained to the Moldovan authorities of any breach of his Convention rights' (para. 38), and 'taking into account the fact that the Moldovan authorities are not in a position to carry out a meaningful investigation', the ECtHR declared this claim inadmissible (para. 48); in *Draci*, the only other measure taken by Moldova was sending 'the documents relevant to the investigation of the complaint of kidnapping from Ukrainian territory […] to Ukrainian prosecutors' (para. 17), and it is difficult to see how an investigation by Ukraine would be more effective than one carried out by Moldova; in *Stomatii*, paras. 32-35, the only other Moldovan measure besides opening an investigation (which had to be closed as no suspect could be identified given the MRT's lack of cooperation) was the ombudsman's office transmitting the applicant's complaint to the Transnistrian delegate for human rights.

220 *Ilaşcu*, para. 347; this was later confirmed in *Ivanţoc*, para. 110, and *Soyma*, para. 48. Cf. *Khlebik*, para. 75.

221 See *Ilaşcu*, paras. 346-350.

222 In fact, the only cases since *Ilaşcu* in which Moldova has been found responsible for violating its (positive) obligations had little to do with its lack of control over Transdniestria. In *Braga*, the applicant was arrested and imprisoned by the MRT authorities, then transferred to Pruncul Prison Hospital, under the control of the Moldovan authorities; he stayed there for nearly a month, before Moldova allowed him to be transferred back to the prison – under MRT control – where he had been serving his sentence (see paras. 9-12, 41-47). In *Pocasovschi and Mihaila*, the applicants were exposed to inhuman detention conditions following the disconnection of a Moldovan-controlled prison from the electricity, water and heating network by the MRT-controlled municipality where the prison was located. The Court held that insofar as the case concerned the prison's disconnection by the MRT authorities, Moldova's responsibility would operate the same way as in other cases regarding Transdniestria (para. 45). However, since Moldova had 'full control' over the prison itself (and thus the applicants), it was also the state's responsibility to alleviate their situation through measures in the prison or by transferring the prisoners (para. 46). While Moldova did eventually take *some* measures and later transferred the prisoners, the Court found that allowing the prisoners to remain in inhuman conditions for 19 and 13 months respectively constituted a violation of Article 3 ECHR (paras. 57-68). In *Filin*, the applicant was arrested by MRT officials on the territory controlled by Moldova and then taken to the MRT, despite the existence of checkpoints in between (para. 36). In *Negruţa*, the facts were in dispute, but the applicant was arrested at the very least in the presence of Moldovan officers and then taken to the MRT (paras. 7-9, 45).

Another explanation for this apparent inconsistency may be that in its post-*Ilaşcu* case law, the Court only examines the potential efficacy of means *not* employed by the state, in order to determine whether it could have made a difference. This would also accord with the ECtHR's approach in the 2017 *Khlebik* case. Instead of analyzing the steps undertaken by Ukraine, the Court's starting point in that case was the applicant's three suggestions of what the Ukrainian authorities could have done in his particular situation. These were: '(i) to request the assistance of [Ukraine's] Parliamentary Commissioner for Human Rights in obtaining the case file from the territory that is not under the Government's control; (ii) to conduct a new investigation and trial; (iii) to review the judgment based on the available material.'[223] Examining each of these options in turn, the Court concluded that the first two would be ineffective, while the third one would be prejudicial to the applicant. As '[t]he applicant ha[d] not been able to point to any other particular action which it would still be in the respondent Government's power to take', the Court held that Ukraine had not violated its obligations under the ECHR.[224] (That said, the fact that – given the circumstances of his case – the applicant had at some point been released from prison by the Ukraininan authorities also factored into the ECtHR's conclusion.[225])

The judgment in *Khlebik* also illustrates that the burden of proof rests on the applicant. In order to bring a successful case, the applicant must be able to point to a means that was available to the state, had the potential to make a difference, but was not used by the state. Given this distribution of the burden of proof (and possibly out of deference to states and due to a lack of capacity to investigate on its own), the Court tends not to examine *sua sponte* what (else) the state could have done in a particular situation.[226] If the applicant cannot point to an omission with the potential to have made a difference, the Court is unlikely to find the state to be in breach of its positive obligations under the Convention, even if the state had not taken *any* measures to secure the applicant's rights.[227]

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223 *Khlebik*, para. 73.

224 *Ibid.*, para. 79.

225 *Ibid.*, para. 78.

226 Note the repeated references to the applicants being unable to point to an(other) omission by the state in *Azemi*, para. 47; *Khlebik*, para. 79; *Draci*, para. 61: 'the applicant did not submit to the Court a copy of the complaint he made in 1997 in order that it might determine exactly what the Moldovan authorities had been asked to do.' Cf. Cordero Moss, 'Full Protection and Security', noting at 139 that investment 'tribunals tend to accept the measures taken by the States as sufficient to meet the obligation [to provide full protection and security]. […] If measures have been taken, the threshold for questioning them seems to be quite high.' See also *ibid.*, 141-142.

227 Cf. *Azemi*, para. 47; that said, one must also consider the highly sensitive nature of any potential Serbian intervention in Kosovo. Although the ECtHR made no specific reference to this consideration, it might have nonetheless influenced the Court's decision.

But the ECtHR's most recent jurisprudence in three cases decided by a Second Section Committee of the Court in 2019 – *Beşleagă*, *Antonov* and *Dobrovitskaya* – calls into question both of these interpretations (proof of any effort suffices and efficacy of means only examined where not used). In all three cases, concerning detention by the MRT and conditions in MRT prisons, the applicants argued that 'Moldova had not discharged its positive obligations since various State authorities replied that they could not take action on the territory under the *de facto* control of the "MRT"'.[228] In *Antonov*, Moldova does not appear to have taken any measures in respect of some of the applicants.[229] Still, the Court simply held that:

> Moldovan authorities did not have any real means of improving the conditions of detention in the "MRT" prisons. Nor could they properly investigate the allegations of ill-treatment or insufficient medical treatment by the "MRT" militia, in the absence of any cooperation by the "MRT" authorities, which did not allow access even by independent organisations such as the OSCE. At the same time, the applicants submitted evidence that at least in respect of Mr Bezrodnii the Moldovan prosecutor's office in Bender initiated a criminal investigation into his unlawful deprivation of liberty.[230]

Accordingly, Moldova was not found responsible. It is unclear why it would be significant that a criminal investigation was launched regarding 'at least' one of the applicants if the same was not done for the others. Even so, as the applicants do not seem to have indicated specific measures that should have been taken by Moldova, this judgment could still fit with the second explanation offered above.

In *Beşleagă* and *Dobrovitskaya*, however, the applicants also complained that – unlike in the 2016 Grand Chamber case of *Mozer* – the Moldovan authorities 'failed to address international organisations and embassies in order to ask for assistance regarding each individual applicant'.[231] In these cases, the Court likewise simply held that Moldova had no real means of improving the applicants' situation or investigating their detention.[232] In doing so, the ECtHR seems to have implied that the diplomatic measures suggested by the applicants had no potential to effect change, but it did not explicitly consider whether this was indeed the case. The Court may have felt uncomfortable wading into the rather sensitive area of diplomacy – but such considerations did not stop the Grand Chamber in *Ilaşcu*; and in *Mozer*, 'urging Russia to fulfil its obligations under the Convention in its treatment of the "MRT" and the decisions taken there' was specifically highlighted

228 *Beşleagă*, para. 34; *Antonov*, para. 64; *Dobrovitskaya*, para. 62.
229 *Antonov*, paras. 9, 17, 29 and 65.
230 *Ibid*., para. 65.
231 *Dobrovitskaya*, para. 62; see also *Beşleagă*, para. 34. The applicants also complained that Moldovan criminal investigations had been 'suspended for lack of cooperation by [MRT] institutions'.
232 *Dobrovitskaya*, para. 63; *Beşleagă*, para. 35.

by the ECtHR as a possible measure.[233] Either way, the Court should have offered *some* explanation as to why it did not regard such diplomatic steps as a potentially viable route or, at the very least, why it did not wish to pronounce on such steps.

To some extent, the Court's approach is explained by a further factor: where the effectiveness of measures is at least partly dependent on the cooperation of actors other than the state, this is taken into account by the Court in its assessment.[234] In *Khlebik*, regarding the efforts of the Ukrainian Parliamentary Commissioner for Human Rights to obtain the applicant's case file from the 'Luhansk People's Republic' (the applicant's first suggestion), the ECtHR noted that:

> [The Commissioner] was unable to provide any help […], possibly because, unlike in the Donetsk Region […], she has not succeeded in establishing mechanisms for resolving such problems occurring in non-Government-controlled areas of the Luhansk Region, where the applicant's file was left. The applicant did not argue that the lack of a mechanism for the Luhansk Region was due to a shortcoming on the part of the Ukrainian authorities rather than any other party.[235]

In other words, the state is still expected to exert best efforts, but if those efforts fail due to factors beyond its control, the state will not be held in violation. Regarding cases in Transdniestria, the Court held that the MRT's lack of cooperation was the reason why it was impossible for Moldova to carry out a proper investigation into alleged abuses.[236] But it is not clear from the judgments whether and to what extent this lack of cooperation is also considered to impact other possible measures and thus form the basis for the conclusion that Moldova did not have 'any real means' to improve the situation. Furthermore, any measure that would have to take place in Transdniestria ultimately depends on cooperation by the MRT. If any possible measure were to be *automatically* dismissed on this basis, regardless

233 *Mozer*, para. 215. See also *Ilaşcu*, para. 333: 'The State in question must endeavour, with *all the legal and diplomatic means available to it* vis-à-vis *foreign States and international organisations*, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.'

234 *Khlebik*, para. 74; cf. *Draci*, para. 61. But compare *Güzelyurtlu* (2017), paras. 282-296, where the Court found both Cyprus and Turkey responsible for failure to cooperate in investigating and prosecuting a murder where the suspects fled to the TRNC; the Chamber holding in respect of Cyprus was later overturned by the Grand Chamber in ECtHR, *Güzelyurtlu and others* v. *Cyprus and Turkey*, Application No. 36925/07, Grand Chamber, Judgment of 29 January 2019, paras. 241-257.

235 *Khlebik*, para. 74.

236 See *Draci*, para. 61, where the Court held that since 'the applicant did not submit to the Court a copy of the complaint he made in 1997 in order that it might determine exactly what the Moldovan authorities had been asked to do' and 'in view of the actions taken by the Moldovan Prosecutor General's Office within the limits of what could be done in the absence of cooperation on the part of the "MRT" authorities, the Court concludes that the Republic of Moldova did not fail to fulfil its positive obligations in respect of the applicant'. See also *Antonov*, para. 65; *Dobrovitskaya*, para. 63.

of whether the state exerted any effort, the particular limb – the core – of the ECtHR's test would be hollowed out completely.

In order to understand the ECtHR's approach, it may be helpful to distinguish between three types of means: (1) means which definitely would have led to a different outcome; (2) means which had the potential to lead to a different outcome; and (3) means which did not even have such potential, i.e. which definitely could not have led to a different outcome. The case law in *Bosnian Genocide*, *Rodríguez Vera* and *Ilaşcu* (and also at the ECtHR more broadly) focused on the second category in finding the respondent states responsible. In the ECtHR's post-*Ilaşcu* case law, it appears that the Court did not find responsibility where the state had no means with the potential to make a difference (i.e. the third category). But this does not necessarily mean that the Court would only be prepared to hold Moldova responsible if the latter had refrained from using means that would have definitely led to a different outcome (i.e. the first category). In other words, rejecting responsibility under the third category is still compatible with the second, applied in *Ilaşcu* and elsewhere. In any event, the ECtHR should clarify its reasoning to confirm that this is indeed the approach taken and to elucidate what exactly is required of the state. As of now, the key appears to be that, as noted above, the applicant has to point to a measure that was reasonably available and had the potential to make a difference, but was not used by the state.

That said, it may well be the case that Moldova has no real means (with the potential to effect change) to improve the situation of people detained in the MRT. A meaningful role for the obligation laid down by the European Court may then be limited to cases where Moldova can offer crucial financial or material support to those impacted by MRT actions, for instance to Latin-script schools or agricultural communities,[237] rather than cases that depend on the exercise of enforcement or police powers.[238]

All in all, rather than focusing on causation as a *sine qua non* element, recent jurisprudence (even at the ECtHR) appears to put the emphasis on the means available to the state (and their employment) with the *potential* to have an impact on the outcome of the case at hand, rather than the certainty that it would have had such an impact. Nonetheless, the burden of pointing to a means with such potential continues to rest with the applicant.

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237 *Catan*, para. 147, *Bobeico*, para. 51, *Iovcev*, para. 65 (schools); *Sandu*, para. 87, *Oprea*, para. 49 (agricultural communities).

238 Cf. *Mozer*, para. 214, noting Moldova's 'inability to enforce any decisions adopted by the Moldovan authorities on the territory under the effective control of the "MRT"'. It was for this reason that the Court set the following standard *ibid.* in the context of Article 13 ECHR (right to an effective remedy): 'the "remedies" which Moldova must offer the applicant consist in enabling him to inform the Moldovan authorities of the details of his situation and to be kept informed of the various legal and diplomatic actions taken.'

3.4.2.4 *In the Absence of Control: A Question of Means, Not Intent*

Both *Armed Activities* and *Ilaşcu* raise the important issue of distinguishing between ability and willingness – or rather, inability or unwillingness – to act. This distinction is what explains the different readings of the same situation by Uganda and the DRC in *Armed Activities*: while Uganda alleged unwillingness, the DRC pleaded inability. In *Ilaşcu*, the ECtHR stated that it 'must only verify Moldova's will, expressed through specific acts or measures, to re-establish its control over the territory of the "MRT".'[239] These cases seem to suggest that in the absence of actual governmental control, expressing the *intent to control* the state's territory may be crucial. Can this signal a requirement of intent (fault) as a condition of state responsibility in such cases?

Whether fault is required for a state to be held responsible is a question which has long preoccupied international lawyers, especially regarding the types of cases under discussion here, i.e. obligations related to the conduct of private persons, judged by a due diligence standard.[240] In the end, the ILC decided not to take a general position on the matter of fault, leaving it to the primary rule in question; and courts have consistently rejected it as a requirement in cases concerning duties to protect.[241] In short, Dionisio 'Anzilotti's position is now widely accepted that [the obligation(s) judged by] due diligence is a primary norm that *consists of* fault (negligence)', but such fault has been objectivized.[242] In other words, there must have been some negligence on the state's part in order to find a violation of a duty to protect – if the state had done everything as it should have, it cannot possibly be held responsible. But rather than investigating a subjective mental element, compliance with the due diligence standard focuses on objective factors, whereby the adequacy of the state's response is determined solely by the steps it has or has not taken, irrespective of the motivation behind them.

There is no reason to depart from this approach in cases concerning the lack of a state's control over part of its territory, either. For instance, in *Armed Activities*, despite the parties' clash on this point, the ICJ in the end did not verify the DRC's intent to reassert control over its territory. In any case, as pointed out above, what the Court should have done is examine *what* steps the DRC did or did not take in the given circumstances, not *why*

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239 *Ilaşcu*, para. 340.

240 *García Amador's First Report*, para. 191; see, for an excellent overview of the main theoretical positions, Pisillo-Mazzeschi, 'Due Diligence Rule', 10-21 (particularly the so-called 'eclectic' positions), 49-50.

241 See ARSIWA Commentary to Article 2, para. 10. In addition to the cases discussed above, see e.g. *García Amador's Fifth Report*, para. 91 (citing *Trail Smelter* as not requiring fault); *Osman*, para. 116; *Rodríguez Vera*, para. 529; Pisillo-Mazzeschi, 'Due Diligence Rule', 42-45.

242 Heathcote, 'State Omissions and Due Diligence', 304 (footnotes omitted); see also Pisillo-Mazzeschi, 'Due Diligence Rule', 42-44.

it did or did not take them. In other words, the question needs to be framed as one of *means*, rather than *intent*. Granted, there may be situations where the only means available to the state are domestic or diplomatic protestations and/or negotiations. In some cases, these may be little more than symbolic,[243] which explains why they may be (mis)taken for mere expressions of intent. But rarely, if ever, does it happen that the state does not have any means whatsoever to employ in regaining control over its territory.

More often than not, states actually face the opposite problem: a choice between different means to achieve the same goal of regaining control. Decisions in favor of one approach over another involve delicate policy considerations, and courts may be understandably reluctant to second-guess states' chosen means (or even foreclose certain options) in resolving a given situation. An example of such deference is the *Ilaşcu* case, where, rather than prescribing a particular course of action, the ECtHR restricted itself to verifying Moldova's 'will […] to re-establish control' over Transdniestria. Even then, however, such will has to be 'expressed through specific acts or measures', rather than some subjective mental element – reinforcing once again that due diligence is assessed according to objective factors. In effect, the Court is saying that whatever Moldova chooses to do in the end, it must choose to do *something*.

Nonetheless, due to policy considerations, there may be a limited exception to the non-consideration of intent: while negative intent is not necessary for a breach, *positive* intent may play a role in deeming certain acts of the state as not violating its obligation. For instance, Moldova implemented certain cooperation measures with Transdniestria, 'out of a concern to improve the everyday lives of the people' living under the separatist regime.[244] The ECtHR found that 'given their nature and limited character, these acts [could not] be regarded as support for the Transdniestrian regime' and thus did not come into conflict with Moldova's obligation to re-establish control over its territory.[245] This rationale is analogous to the non-recognition of the acts of illegal regimes: while such acts are generally considered to be 'illegal and invalid', there is an exception regarding 'those acts […] the effects of which can be ignored only to the detriment of the inhabitants', such as birth or marriage certificates.[246]

This is not to say that anything can be justified under the banner of good intentions, though – and the example of Colombia illustrates the limits of such justifications. As part of an (ultimately failed) peace process,

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243 Cf. *Ilaşcu*, Partly Dissenting Opinion of Judge Ress, para. 5; and Partly Dissenting Opinion of Judge Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panţîru, para. 17, maintaining opposing views on the symbolism and effectiveness of certain Moldovan measures.

244 *Ilaşcu*, para. 345.

245 *Ibid.*

246 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, 1971 ICJ Reports 16, para. 125.

the Colombian government voluntarily and unconditionally withdrew its security forces from 42,000 square kilometers of its territory (roughly equivalent to the size of the Netherlands) between late 1998 and early 2002, conceding to the precondition of the FARC (*Fuerzas Armadas Revolucionarias de Colombia*, Revolutionary Armed Forces of Colombia) to negotiations.[247] The area 'was cleared of police, army and almost any signs of the state at the end of 1998',[248] with only municipal civil servants remaining, who were to 'exercise the only authority in this zone without interference exercised by the national government.'[249] Although the demilitarized zone (DMZ) was originally planned for only 90 days, the government kept extending the time limit,[250] despite a lack of tangible results in the negotiations, repeated security incidents, and frequent allegations that the FARC was abusing the zone to hold kidnap victims, cultivate coca undisturbed, and launch attacks.[251] Eventually, after three years of failed negotiations and a series of high-profile incidents, Colombian President Andrés Pastrana ordered the military to retake the zone in February 2002.[252]

As the creation of the DMZ took place in the context of a peace process, it can be argued that the Colombian government was trying to regain control over its *entire* territory in the longer term – not militarily, but by resolving the conflict peacefully.[253] Seen in this light, the question whether or not such a zone can be established becomes part of a difficult balancing act. On the one hand, by granting the DMZ, the state arguably abandoned the roughly 90,000 inhabitants of the area, leaving them at the mercy of

247 See e.g. H.F. Kline, *Chronicle of a Failure Foretold: The Peace Process of Colombian President Andrés Pastrana* (Tuscaloosa: University of Alabama Press, 2007), 50, 54; ICG Latin America Report No. 1, *Colombia's Elusive Quest for Peace*, 26 March 2002, https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/colombias-elusive-quest-peace, 20-22.

248 J. McDermott, 'Welcome to Farclandia', *BBC News*, 13 January 2001, http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/1106893.stm.

249 Kline, *Chronicle of a Failure*, 121.

250 See *ibid.*, 69, 112; ICG, *Elusive Quest for Peace*, 20.

251 See e.g. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia*, 28 February 2002, UN Doc. E/CN.4/2002/17, paras. 165, 198; Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia*, 8 February 2001, UN Doc. E/CN.4/2001/15, para. 128; Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Office in Colombia*, 9 March 2000, UN Doc. E/CN.4/2000/11, para. 107; ICG, *Elusive Quest for Peace*, 21-22.

252 See Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia*, 24 February 2003, UN Doc. E/CN.4/2003/13, paras. 6-7; ICG, *Elusive Quest for Peace*, 22-25.

253 Some have hypothesized that granting the DMZ also provided the Colombian military with time to modernize and regain its strength after several defeats in the 1990s, see Kline, *Chronicle of a Failure*, 70, 125.

the FARC.[254] On the other hand, the government withdrew the security forces in the hope of resolving the conflict, presumably keeping in mind the interests of the 40 million inhabitants of Colombia as a whole. Can those 90,000 inhabitants be asked for such a sacrifice in the interest of the entire population? Can the state even make that decision on their behalf? These are difficult policy issues, with far-reaching implications.

Although there have not (yet) been any cases at the international level on this particular issue, domestic jurisprudence from Colombia has grappled with the same dilemma. On the one hand, the country's Constitutional Court upheld the legality of the demilitarized zone, when it was challenged on the grounds of violating the President's constitutional duty to '[c]onserve the public order throughout the territory and restore it where it has been disturbed.'[255] The Court upheld the law authorizing the establishment of the DMZ on the basis that the zone was a temporary measure meant to achieve peace in a situation where the state had already proved incapable of resolving the conflict by force.[256] On the other hand, the constitutionality of the demilitarized zone did not exclude the possibility of finding the state responsible for failing to protect the zone's inhabitants. Colombia's highest administrative court, the Consejo de Estado, has held the state responsible in a series of such cases, in connection with acts perpetrated by the FARC in and around the zone, explicitly stating that 'the decision to advance the peace process does not exclude the responsibility of the state'.[257]

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254 The area was considered to be the heartland of the FARC, much of which was beyond the control of the military even before the demilitarized zone was established, see e.g. Kline, *Chronicle of a Failure*, 58. In subsequent Colombian jurisprudence, it has become a 'notorious fact' (*hecho notorio*), i.e. one requiring no proof, that the FARC increased its (criminal) activity, see e.g. *Ricardo Gómez Manchola*, note 257 below, para. 42.

255 Article 189(4) of the Constitution of Colombia, 4 July 1991, available at http://www.corteconstitucional.gov.co/inicio/Constitucion politica de Colombia.pdf with amendments up to and including 2016. (Translation by Max Planck Institute, with updates by the Comparative Constitutions Project, available at https://www.constituteproject.org/constitution/Colombia_2015.)

256 Colombia, Corte Constitucional, Judgment C-048/01 of 24 January 2001, para. 12.

257 Title to section 3.5.1 in *Ismael Díaz Gaitán* v. *Ministerio de Defensa – Ejército Nacional*, Judgment of 31 May 2013, Case No. 18001-23-31-000-1999-00146-01 (25624). See also the following cases at the Consejo de Estado: *Numael Barbosa Hernández y otros* v. *Departamento Administrativo de la Presidencia de la República y otros*, Judgment of 12 June 2013, Case No. 50001-23-31-000-1999-00286-01 (25949); *Fondo Ganadero del Meta S.A.* v. *Ministerio de Defensa – Policía Nacional*, Judgment of 2 September 2013, Case No. 50001-23-31-000-1999-00254-01 (27553); *Mercedes Franco Galeano y otros* v. *Nación – Ministerio de Defensa – Ejército Nacional y Policía Nacional*, Judgment of 6 December 2013, Case No. 50001-23-31-000-2001-00150-01 (30814); *María del Carmen Aristizábal Franco y otros v. Defensoría del Pueblo*, Judgment of 28 May 2015, Case No. 18001-23-31-000-2002-00264-01 (31422); *José Arturo Blanco Rincón y otros v. Ministerio de Defensa – Ejército Nacional y otros*, Judgment of 29 July 2015, Case No. 50001-23-31-000-2000-20211-01 (33219); *Abraham Parra Piñeros* v. *Nación – Presidencia de la República y otros*, Judgment of 3 September 2015, Case No. 20001-23-31-000-2002-00136-01 (32180); *Ricardo Gómez Manchola y otros* v. *Nación – Ministerio de Defensa, Policía Nacional y otros*, Judgment of 12 October 2017, Case No. 41001-23-31-000-2005-00044-01 (42098).

Although these cases have been decided under Colombian domestic law, the principles applied by the Consejo de Estado are in some cases essentially the same as they would have been under international law. Under Colombian law, finding the state responsible requires (1) the existence of unlawful damage (*daño antijurídico*) that is (2) 'imputable' to the state.[258] This imputability may, in turn, be established through a failure on the part of state organs to provide service (*falla del servicio*), special damage caused by the actions of the state (*daño especial*), or the state creating situations of exceptional risk (*riesgo excepcional*).[259] Of these possible grounds, failure of service bears the closest resemblance to a duty to protect under international law: in order to prove such failure, it must be established that the state knew or should have known of the catalyst event, yet failed to take (sufficient) measures to avoid or mitigate the event.[260] But since *falla del servicio* is a subjective (fault-based) regime of responsibility, the Consejo de Estado appears to have excluded its applicability to the DMZ on account of the zone's constitutionality.[261] Even so – and even where *daño especial* was likewise excluded (on the grounds that the immediate cause of the damage was a third party, rather than the state's creation of the DMZ) – the Consejo de Estado still found the state responsible on the basis of exceptional risk, holding that the creation of the zone left its inhabitants 'at the mercy of an armed actor'.[262]

These judgments inevitably raise the question of how the legality of the DMZ can be reconciled with the multiple violations of the state's duties to protect. Are there any circumstances under which Colombia could have complied with all of its obligations? Writing at the time when the DMZ was in force, Liesbeth Zegveld noted President Pastrana's assertion that the Colombian security forces were standing at the ready to reinstate governmental authority if the FARC fails to respect human rights in the zone.[263] She argued that if this was indeed how the government would respond,

258 See e.g. *Abraham Parra Piñeros*, paras. 16-17. Note that the term 'imputation' is used in a different sense here than imputation/attribution under international law.

259 See, for an overview, *ibid.*, paras. 26-48.

260 See e.g. *Numael Barbosa Hernández*, section 5: 'existirá falla del servicio en aquellos casos en que conociendo la previsibilidad de un resultado, la Administración no intervino para evitarlo o con su actuar amplificó las posibilidades de su producción.' The next paragraph in the judgment then explains that foreseeability does not depend exclusively on the existence of concrete threats, but should be assessed according to the circumstances (and level of risk) present in the particular case. See also *Fondo Ganadero del Meta S.A.*, section 4.1.

261 See e.g. *Abraham Parra Piñeros*, paras. 28-34. Although *falla del servicio* was established in *Numael Barbosa Hernández*, section 5, and *Fondo Ganadero del Meta S.A.*, section 4.1, these cases concerned events following the announcement, but preceding the entry into force, of the DMZ.

262 *Abraham Parra Piñeros*, paras. 35-48, particularly at para. 41 (translation by autor). Cf. *Ricardo Gómez Manchola*, paras. 42-59 and 60-63.

263 L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 213.

that would be sufficient to meet its obligations, but 'if the state is unable to implement its claims, the conclusion is justified that the unconditional transfer of territory to armed opposition groups, in the way Colombia did, is not permitted under international law.'[264] Even so, there is arguably only a rather narrow set of circumstances in which Colombia would have been able to comply with all of its obligations: essentially, its security forces would have had to intervene at the first sign of real and imminent danger in order to prevent a potential catalyst event. And if the government's actions proved to be unsuccessful, it might still be argued – in line with what has been discussed above in respect of knowledge, foreseeability and general police functions – that if the state had been present throughout the DMZ, it would have been better informed and could have reacted faster.

In view of these difficulties, and the fact that limiting acceptable responses to military/police options arguably goes beyond what is required by duties to protect, and may harm the cause of peace, what else could Colombia have done to comply with its obligations? In particular, given that retaking the DMZ would necessarily have been (and ultimately was) a reactive measure, what could have been the state's more proactive options? To a large degree, this is a matter of policy, and the aim here is not to second-guess Colombian decisions on the peace process with the benefit of hindsight; but rather to identify the parameters within which states in such situations may operate. As duties of protection do not prescribe the particular means through which they must be fulfilled, the state had the option – and arguably the obligation – of providing alternative safeguard mechanisms to protect the rights of the zone's inhabitants (and others possibly affected, such as the inhabitants of neighboring areas).

The crucial question is: do these alternative safeguards have to provide a level of protection that is equivalent to what would have been in place without the withdrawal? Or is it permissible to lower the level of protection, as long as it does not fall below a certain minimum standard? It is put forward here that the criterion to be met by any such alternative mechanism is *effectiveness*. The question of what *form* such a mechanism could have taken – as long as it was effective – is beyond the regulatory scope of international law, lying squarely within the realm of the state's discretion. Merely for the purposes of illustration: possible examples might have included tying the DMZ's establishment to certain conditions (such as a ceasefire) and making the zone subject to domestic or international monitoring. But the state security forces' withdrawal from the area was unconditional; each

264 *Ibid*.; with the clarification that the transfer of territory in and of itself is not wrongful, since for state responsibility to be triggered, the catalyst event must have actually taken place, see e.g. note 199 above; *Bosnian Genocide*, para. 431; Article 14(3) ARSIWA. In other words, the duty to protect cannot be relied on 'preventively'. However, the moment there is a triggering event – a catalyst taking place in that non-controlled territory – the state's responsibility is engaged, because it should have controlled its territory in order to prevent the violation.

subsequent extension was likewise granted by the government unilaterally, without requiring anything from the FARC in exchange.[265] The DMZ was not conditional upon a ceasefire; in fact, the issue of a ceasefire was not even seriously discussed until January 2002.[266] There was no international monitoring; and nothing ever came of the proposals to address complaints coming from within the zone.[267] This is all the more striking when one considers that other – planned and actual – similar zones in the Colombian conflict did have at least some of these elements.[268] Accordingly, one may reasonably conclude that even when done in pursuance of a peace process, voluntarily and unconditionally withdrawing from part of a state's territory without providing effective safeguards for the inhabitants (and others affected) will result in an all but certain finding of state responsibility if and when a catalyst event takes place in that territory.

In sum, as regards the question of intent: negligence (in the sense of a subjective mental element) is not required for finding that a duty to protect has been violated; and while the positive intention of the state may be taken into consideration when evaluating its conduct, the fact that the measures taken were well-meaning cannot justify *all* possible courses of conduct.

3.5 Possible Counterarguments to a Sovereignty-based Approach

In cases where the state exercises no effective control over (part of) its own territory, the question is whether sovereignty, in and of itself, gives rise to certain obligations. Can a state escape its duties of protection simply by reference to its lack of control? The ECtHR's answer to this question in *Ilaşcu* is an emphatic 'no'. Notwithstanding the evidentiary problems in *Armed Activities* regarding the first phase of events, the ICJ's evaluation of the second phase points even in that case to the conclusion that states have to show at least the willingness to control their territory; otherwise they could simply withdraw from a certain area and let non-state actors, whose

265 See Kline, *Chronicle of a Failure*, 68; ICG, *Elusive Quest for Peace*, 20. The first time the government demanded something tangible in order to prolong the DMZ was in January 2002, when it required that the issue of a ceasefire be discussed, see Kline, *Chronicle of a Failure*, 115. (In February 2001, the government made a demand, but it was more procedural than substantive: that the FARC leader, Manuel Marulanda, sit down at the negotiating table and meet with President Pastrana in person, see *ibid.*, 92.)

266 See note 265 above.

267 See Kline, *Chronicle of a Failure*, 54, 69, 75-77; see also UN Doc. E/CN.4/2000/11, para. 18.

268 See ICG Latin America Report No. 2, *Colombia: Prospects for Peace with the ELN*, 4 October 2002, https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/colombia-prospects-peace-eln, 16-17; ICG Latin America Report No. 8, *Demobilising the Paramilitaries in Colombia: An Achievable Goal?*, 5 August 2004, https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/demobilising-paramilitaries-colombia-achievable-goal, 2-3, 10; Acuerdo entre Gobierno Nacional y la Autodefensas Unidas de Colombia para la zona de ubicación en Tierralta, Córdoba (Acuerdo de Fátima), 13 May 2004, available at https://peacemaker.un.org/colombiaacuerdofatima2004.

conduct is unattributable to the state, do their 'dirty work'.[269] This accords with the idea that – as discussed at the beginning of this chapter – sovereignty implies not only the right, but also the duty to control the state's territory in order to maintain order therein.

Accordingly, it is posited that where states are under obligations to prevent or redress certain conduct, these obligations are rooted in the sovereignty of states over a given territory; as such, they extend throughout the state's entire territory, even when the state does not exercise effective control over (all of) that territory. Before concluding that this is indeed the case, though, it is worth exploring the possible counterarguments, namely: the possibility that such obligations may, as a matter of positive law, be conditioned by effective control, rather than sovereignty; and the related argument that conditioning them by sovereignty would place an excessive burden on states.

3.5.1 Applicability Based on Effective Control, Rather Than Sovereignty

Turning to the first of these arguments, it is easy to see that the concepts of sovereignty and effective control are closely intertwined: sovereignty at its inception (i.e. at the time of the establishment of the state or the acquisition of title to territory) is, more often than not, predicated on some form of control over territory;[270] and once it has been established over a given territory, sovereignty tends to presuppose such control.[271] Given these strong links, can it be the case that obligations to protect are in fact conditioned by effective control, rather than sovereignty, over territory (so that they would simply cease to be applicable in areas that the affected state cannot control)? In particular, how is this sovereignty-based position to be reconciled with the ICJ's statement in the *Namibia* advisory opinion that '[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States'?[272] Similarly, the scope of human rights obligations is determined by what is 'under the state's jurisdiction', and jurisdiction in this sense has been interpreted in many cases as denoting

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269 Cf. *Bosnian Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, 2007 ICJ Reports 241, paras. 36-39, which concerns the question of attribution, but shows to some extent a similar logic.

270 In the context of establishing statehood, see Crawford, *Creation of States*, 55-61, although such control does not have to be complete; on title to territory, see e.g. *Island of Palmas*, 839.

271 See e.g. C. de Visscher, *Les effectivités du droit international public* (Paris: Pedone, 1967), 118. However, even de Visscher admitted elsewhere (C. de Visscher, *Theory and Reality in Public International Law* (rev. ed., Princeton: Princeton University Press, 1968), 324-325) that while the state's responsibilities in this respect 'may vary according to the efficacy of the means of supervision, investigation and repression at the disposal of the government, […] the government remains accountable up to a certain point for the existence and organization of public services.'

272 *Namibia*, para. 118.

(effective) control over the territory or alleged victim(s) in question.[273] In fact, Liesbeth Zegveld has put forward the opposite of what is posited here, arguing that the lack of territorial control could mean that human rights and humanitarian law treaties become suspended.[274]

However, as illustrated at the beginning of this chapter, there is a consistent view, expressed by prominent authorities of international law and spanning several decades, which links these obligations (or the more general duty to maintain order) to *sovereignty*, rather than effective control. Furthermore, in the case of treaty-based obligations, it should be recalled that as a general rule – i.e. '[u]nless a different intention appears from the treaty or is otherwise established' – treaties apply across the state's entire territory.[275]

As to the more particular objections, both the ICJ's statement in *Namibia* and the human rights law interpretation of the term 'jurisdiction' share a common characteristic: they are intended to ensure that states do not escape responsibility for their *extraterritorial* wrongful acts.[276] In other words, these statements were not meant to exclude or diminish responsibility over the state's own territory. The *Namibia* advisory opinion, for instance, has been

273 See generally Milanović, *Extraterritorial Application*, 21-41, particularly at 39; see also e.g. Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, 24 January 2008, UN Doc. CAT/C/GC/2, para. 16; ACommHPR, *General Comment No. 3: On the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 18 November 2015, https://www.achpr.org/legalinstruments/detail?id=10, para. 14; but see ECtHR, *Banković and others* v. *Belgium and others*, Application No. 52207/99, Grand Chamber, Admissibility Decision of 12 December 2001, paras. 59-61. In fact, the finding of Transdniestria being under Moldovan jurisdiction (based on Moldova's sovereignty over the territory) was more controversial within the ECtHR than its finding of Transdniestria being under Russian jurisdiction (based on Russia's control over the secessionist regime), with the Grand Chamber split eleven to six on the first issue, but only sixteen to one on the second, see *Ilaşcu*, operative paras. 1, 2; *ibid.*, Partly Dissenting Opinion of Judge Loucaides (arguing, at 139, that jurisdiction denotes 'actual authority'); and *ibid.*, Partly Dissenting Opinion of Judge Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panţîru, paras. 6-9, arguing along similar lines, but admitting the possibility of state responsibility for inaction (in para. 9) 'in exceptional circumstances where the evidence before the Court clearly demonstrates such a lack of commitment or effort on the part of the State concerned to reassert its authority or to reinstate constitutional order within the territory as to amount to a tacit acquiescence in the continued exercise of authority or "jurisdiction" within the territory by the unlawful administration.'

274 Zegveld, *Accountability of Armed Opposition Groups*, 207-219.

275 Article 29 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

276 *Namibia*, para. 118: 'The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory'; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Reports 136, para. 109: 'the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, *vis-à-vis* their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence'; ACommHPR, *General Comment No. 3*, para. 14; see more generally Milanović, *Extraterritorial Application*, 58-61.

described as having established 'the principle that territorial control *also*, rather than the enjoyment of territorial sovereignty (that is, title), *only*, should be the basis for the operation of State obligations in general.'[277]

With regard to human rights treaties, the lack of such a limitation is borne out both by their *travaux préparatoires* and their subsequent interpretation. Although Article 1 ECHR speaks of states' obligation to secure the rights in the Convention to 'everyone within their jurisdiction', its draft originally referred to 'all persons residing within the territories of the signatory States', and was changed only because the drafters considered limiting the scope of the Convention to residents – as opposed to anyone who may be 'within the territories of the signatory States' – to be too restrictive.[278] Article 2(1) ICCPR, meanwhile, refers to 'all individuals within [the State Party's] territory and subject to its jurisdiction'. At first glance, this could be interpreted as a limitation *within* state territory to cover only those parts where the state exercises control. However, this strictest of interpretations is immediately undermined when one considers that the reference to territory was added pursuant to a United States (US) amendment which sought to limit the applicability of the Covenant *outside* the state's sovereign territory.[279] Furthermore, the ICCPR's treaty body, the Human Rights Committee, has interpreted this clause to be disjunctive, holding that state parties' obligation to respect and ensure the Covenant rights extends to 'all persons who may be within their territory and to all persons subject to their jurisdiction'; this interpretation has also been adopted by the ICJ.[280] The African Charter on Human and Peoples' Rights represents a third approach, not making any reference to either territory or jurisdiction.[281] In accordance with the Vienna Convention on the Law of Treaties, this already suggests that the Charter applies across the entire territory of state parties. Should any doubts remain, the General Comment of the ACommHPR on the right to life likewise speaks of states' obligation to hold accountable those responsible for 'arbitrary deprivations of life in the State's territory *or* jurisdiction'.[282] Other human rights treaties follow similar or identical

277 R. Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 *Chinese Journal of International Law* 639, para. 43 (emphasis added).

278 Milanović, *Extraterritorial Application*, 38-39; Lawson, 'Out of Control', 114. Cf. Article 34 of the European Social Charter, Turin, 18 October 1961, in force 26 February 1965, 529 UNTS 89, which does define its applicability in territorial terms, applying by default to the 'metropolitan territory' of state parties, who have the option of extending it to their non-metropolitan territories.

279 Milanović, *Extraterritorial Application*, 58, 224.

280 HRC, *General Comment No. 31*, para. 10; *Wall*, paras. 108-111.

281 Article 1 of the African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, in force 21 October 1986, 1520 UNTS 218.

282 ACommHPR, *General Comment No. 3*, para. 18 (emphasis added).

formulations.[283] Perhaps the clearest articulation of this understanding of 'jurisdiction' can be found in General Comment No. 2 of the Committee Against Torture on the obligation of each state party to 'take effective […] measures to prevent acts of torture in any territory under its jurisdiction' in Article 2(1) of the Convention Against Torture. This obligation was interpreted by the Committee as requiring 'that each State party shall take effective measures to prevent acts of torture *not only in its sovereign territory* but also "in any territory under its jurisdiction."'[284]

But even if such obligations remain applicable despite the lack of effective control over part of the state's territory, they may be rendered temporarily inoperable, through the suspension of the treaty in question (based on the loss of control). Writing in 2002, Zegveld argued – regarding human rights treaties – that such suspension may be invoked on the basis of a fundamental change of circumstances, but admitted that 'in the absence of international practice, the arguments [on this point] remain purely hypothetical.'[285] Although she presented a sound and plausible argument, international practice eventually developed in a different direction: ECtHR judgments issued in subsequent years – starting with *Ilaşcu* in 2004 – explicitly contradict her argument.[286] Furthermore, rather than challenging the Court's stance, in post-*Ilaşcu* cases both Moldova and Azerbaijan were prepared to argue in line with its reasoning.[287] To be sure, these developments do not foreclose the possibility of a different approach taken by other courts, but that does seem quite unlikely at this point.

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283 See e.g. Article 14 of the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3: 'in its metropolitan territory or other territories under its jurisdiction'; Articles 3, 6, 14(1) and (2) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18 December 1990, in force 1 July 2003, 2220 UNTS 3: 'within their territory or subject to their jurisdiction'; Article 4(5) of the Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, in force 3 May 2008, 2515 UNTS 3: '[t]he provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.'

284 Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85; Committee Against Torture, *General Comment No. 2*, para. 16.

285 Zegveld, *Accountability of Armed Opposition Groups*, 217.

286 In addition, similar views have been expressed by the HRC in its concluding observations on Georgia and Moldova in 2007 and 2016, urging these states to take 'all possible measures' / 'all measures appropriate' to ensure the enjoyment of Covenant rights to the population in the respective secessionist entities. See HRC, *Concluding Observations: Georgia*, 15 November 2007, UN Doc. CCPR/C/GEO/CO/3, para. 6; HRC, *Concluding Observations: Republic of Moldova*, 18 November 2016, UN Doc. CCPR/C/MDA/CO/3, paras. 5-6. See also S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed., Oxford: Oxford University Press, 2013), para. 4.18.

287 See e.g. *Ivanțoc*, paras. 100-101; *Sargsyan*, paras. 123-124. In contrast, Russia has consistently challenged the ECtHR's findings on jurisdiction, see e.g. *Mozer*, paras. 92-95.

3.5.2 An Excessive Burden on the State?

Another possible argument against conditioning duties of protection on sovereignty is that it would place an excessive burden on the state. However, a closer examination of the judgments above reveals such fears to be unfounded. Since the state is only required to employ the means at its disposal at any given time, and the availability of those means is largely determined by the extent of control exercised over a given territory, the combination of these two factors ensures that the state is never required to act beyond its means. In fact, it is explicitly laid down in the ECtHR's jurisprudence on positive obligations – also adopted in the case law of the IACtHR – that such obligations must not be 'interpreted in such a way as to impose an impossible or disproportionate burden' on states.[288] In the context of difficulties with governmental control, this point is reinforced with particular clarity in the IACtHR's judgment in the *Durand and Ugarte* case, concerning two victims of enforced disappearance. In that case, the Court held that even 'if internal order difficulties supposedly prevent the identification of the liable parties due to the nature of their offenses, the right of the victims' relatives to know about their fate and the whereabouts of their mortal remains' subsists, and that 'the State should meet these fair expectations with any of its available resources.'[289]

3.5.2.1 Decisions of the African Commission of Human and Peoples' Rights

That said, there are a couple of decisions by the ACommHPR which suggest that – contrary to the ECtHR's and IACtHR's statements above – states are always held to the same standard, regardless of the existence of internal disturbances, civil war, or other exceptional circumstances capable of

288 *Ilaşcu*, para. 332: 'In determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden'. See also ECtHR, *Özgür Gündem* v. *Turkey*, Application No. 23144/93, Fourth Section, Judgment of 16 March 2000, para. 43; *Osman*, para. 116. This reasoning has also been applied by the IACtHR, see e.g. IACtHR, *Sawhoyamaxa Indigenous Community* v. *Paraguay*, Merits, Reparations and Costs, Judgment of 29 March 2006, Series C, No. 146, para. 155.

289 IACtHR, *Durand and Ugarte* v. *Peru*, Merits, Judgment of 16 August 2000, Series C, No. 68, para. 143; cf. *Al-Skeini*, para. 164 (also citing numerous intra-territorial cases from Turkey and Russia): 'where the death to be investigated under Article 2 [ECHR] occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and […] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed', but 'even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life'.

limiting the means available to the state. This, in turn, may well result in a 'disproportionate burden' on states in their efforts to comply with their obligations.[290] However, a closer examination reveals that neither of these cases have led to a result whereby incapacitated states would have been required to act beyond their means.

3.5.2.1.1 Commission Nationale des Droits de l'Homme et des Libertés / Chad

The 1995 *Commission Nationale des Droits de l'Homme et des Libertés* case concerned claims of harassment of journalists, arbitrary arrests, illegal detentions and 'killings, disappearances and torture'.[291] In response to these allegations, the state argued that 'no violations were committed by its agents, and that it had no control over violations committed by other parties, as Chad [was] in a state of civil war.'[292] The ACommHPR rejected this argument, stating – in general terms – that:

> 21. The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.
>
> 22. In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.[293]

Turning to the particular violations alleged, the Commission then held that 'no substantive response' had been received from Chad, 'only a blanket denial of responsibility', and proceeded to apply the human rights law principle of taking uncontested complaints as established facts.[294] In discussing these particular violations, the ACommHPR's analysis was restricted

290 Cf. F. Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2012), 333-334, noting that 'it is perhaps an unrealistically high standard to expect states never to derogate from rights, even during legitimately declared states of emergency, occasioned by, for example, flooding.' Nonetheless, Viljoen also notes (*ibid.*, at 334), that as a result, '[a]s with other limitations, the only basis on which to justify a 'derogation' is article 27(2) of the Charter. If such derogation is proportionate and necessary to achieve the protection of the rights of others, collective security, morality, or common interest, and does not erode the right to render it illusory, it may be Charter-compliant.'

291 *Commission Nationale des Droits de l'Homme*, paras. 2-6.

292 *Ibid.*, para. 19.

293 *Ibid.*, para. 22.

294 *Ibid.*, paras. 24-25.

to evidentiary matters, and did not engage with substantive questions regarding Chad's responsibility any further.

There are two aspects of this case which caution against drawing far-reaching conclusions regarding the operation of duties to protect. Firstly, the question whether derogations may apply is conceptually distinct from whether the state has complied with its obligation to protect under the ACHPR. The derogations clauses of international human rights treaties speak of adopting 'measures derogating from [the state's] obligations',[295] which suggests taking active steps that would otherwise not be in conformity with the content of the rights.[296] But duties to protect are normally violated by omission, rather than by action; furthermore, as the content of a duty to protect is already dependent on the means available to the state at any given time and in any given circumstance, there is no need to have recourse to the derogations regime. Secondly, having relied on the principle of taking uncontested complaints as established facts, the ACommHPR never examined the particular events (including the state's conduct) in any detail, and did not go through the analytical steps usually applied to establish a violation of the duty to protect.[297] Note that Chad's argument was in fact quite similar to that of the DRC in *Armed Activities* – but in that case, Uganda's allegation was not sufficient to meet the burden of proof, while in *Commission Nationale*, the operation of this evidentiary rule turned the applicant's allegations into facts capable of meeting that proof. Yet at the same time, the Commission's lack of analysis meant that the decision in the end did not address what exactly is required of states in a situation of civil war. As such, it cannot be cited in support of the argument that states would have to bear an excessive burden in times of crisis.

3.5.2.1.2 Association of Victims of Post Electoral Violence & INTERIGHTS / Cameroon

The 2009 *Association of Victims of Post Electoral Violence* case likewise concerned large-scale post-election violence – this time in Cameroon, with the applicants alleging inadequate state response. In particular, the applicants contended that the duty to protect under Article 1 of the African Charter is an obligation of result; conversely, Cameroon argued that it is an

295 Article 15(1) ECHR; Article 4(1) ICCPR; Article 27(1) ACHR.

296 Cf. W. Schabas, 'Art.15 Derogation in time of emergency/Dérogation en cas d'état d'urgence', in: W. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), 587, at 588: 'Most derogations seem to be concerned with detention issues.'

297 It is difficult to say anything in the abstract, but the facts of the case suggest that the issue was not the incapacitation, but rather the unwillingness, of state organs to act. The application maintained that at least some of the alleged violations had been carried out by the Chadian security services and 'unidentified individuals who the Complainants claim to be security service agents of the Government', *Commission Nationale des Droits de l'Homme*, para. 2.

obligation of means.[298] Against this backdrop, the ACommHPR set out to establish whether the duty is an obligation of result or one 'of diligence' – despite having already held in the 2006 *Zimbabwe Human Rights NGO Forum* case that this obligation was assessed by the standard of due diligence.[299] In the Cameroonian case at hand, the Commission stated that:

> Article 1 of the African Charter imposes on the States Parties the obligation of using the necessary diligence to implement the provisions prescribed by the Charter since the said diligence has to evolve in relation to the time, space and circumstances, and has to be followed by practical action on the ground in order to produce concrete results.[300]

Although this statement arguably describes an obligation of effort with a due diligence standard (where the state's efforts must be *capable of* producing results),[301] the Commission relied on it to declare the duty to protect to be an obligation of result.[302] But even after making this finding, the ACommHPR continued its analysis in ambiguous terms. In applying this holding to the circumstances of the case, it found that:

> [T]he obligations which ensue from Article 1 impose on the State of Cameroon the need to implement all the measures required to produce the result of protecting the individuals living on its territory. The use of the legal, technical, human and material resources that the State of Cameroon claims to have did not produce the expected result, namely that of guaranteeing the protection of human rights. For the post electoral events which gave rise to serious violations against the lives and property of the citizens would not have taken place if the State which, through its investigations knew or should have known about the planning of the said events, had taken the necessary measures to prevent their happening.[303]

298 ACommHPR, *Communication No. 272/03: Association of Victims of Post Electoral Violence & INTERIGHTS / Cameroon*, Decision of 25 November 2009, paras. 76, 82.

299 *Ibid.*, para. 93; *Zimbabwe Human Rights NGO Forum*, paras. 142-164.

300 *Association of Victims of Post Electoral Violence*, para. 110.

301 Cf. the Commission noting *ibid.*, at para. 83 (emphasis added) that 'according to the complainant party, Article 1 of the African Charter imposes an obligation on the States Parties to take measures which *can* produce concrete results' and, in particular, the ACommHPR itself describing the obligation at para. 119 (emphasis added) as mandating states 'to put in place all measures *liable to* produce the result of preventing all violations of the African Charter over their entire territory.'

302 *Ibid.*, para. 111. The confusion might have been due in part to a different interpretation of obligations of result, see *ibid.*, paras. 99-102; ILC, *Texts of articles 20 to 22 with commentaries thereto, adopted by the Commission at its twenty-ninth session*, in: *Yearbook of the International Law Commission*, 1977, vol. II, Part Two, 11, at 11-30; Dupuy, 'Reviewing the Difficulties of Codification'.

303 *Association of Victims of Post Electoral Violence*, para. 115.

In particular, the Commission pointed out that the authorities waited four days to act after the eruption of violence, concluding that 'the Respondent State has failed in its obligation to protect, considering its lack of diligence and allowed the destruction of lives and property.'[304] Overall, it seems that despite its explicit statement to the contrary, the Commission in fact assessed Cameroon's conduct as an obligation of effort, or at least oscillated between conceptualizing the duty as one of effort or result. After all, if the duty to protect was indeed an obligation of result, then the mere fact that human rights abuses had taken place would have sufficed to find the state in breach of its obligation, regardless of the extent of its efforts.

Turning to Cameroon's argument of *force majeure* as a circumstance precluding wrongfulness, the ACommHPR noted that the state's reliance on this justification implied that the obligation to protect is one of result.[305] Yet the Commission's analysis of why *force majeure* was not applicable also doubles as a demonstration of why Cameroon cannot be deemed to have exercised due diligence. Finding that the events were foreseeable,[306] and that Cameroon did, in fact, have control over its territory,[307] the ACommHPR held that the means at the state's disposal 'should have, in principle, produced the result of preventing the events in question since the said events were foreseeable; the said means should at least, have served to bring the perpetrators to justice'.[308] This way, the Commission reached an outcome that was not substantially different from what it would have been if the usual analytical steps of a due diligence test had been applied.

In the end, the case serves as a useful reminder that there is a crucial distinction between requiring that in giving effect to human rights, states adopt measures which are effective (i.e. capable of leading to concrete results), and viewing the duty to protect as an obligation of result. Under the latter interpretation, the state would be automatically held responsible in connection with *any* human rights abuse committed in its territory by non-state actors, regardless of whether or not it knew or should have known of the threat, or any effort it might have exerted to prevent or redress the abuse. But since the Commission's reasoning does not conform to its declaration that the duty to protect is an obligation of result, this case – like *Commission Nationale* – cannot serve as proof that states would have to bear an excessive burden.

304 *Ibid.*, para. 116.

305 *Ibid.* The way due diligence operates indeed obviates the need to rely on *force majeure* as a justification; but the state's recourse to *force majeure* at most shows that *Cameroon (implicitly) regarded* the duty to protect as an obligation of result, not that it is objectively so.

306 *Ibid.*, paras. 117, 119.

307 *Ibid.*, para. 118.

308 *Ibid.*, para. 119.

3.5.2.2 *Concluding Remarks*

The way the due diligence standard operates – where compliance is assessed according to the utilization of the means that are available to the state in the particular circumstances – ensures that the state is not required to act beyond its means at any given time. In addition, the need to avoid a disproportionate burden on the state is expressly and regularly acknowledged in the jurisprudence of the European and Inter-American human rights courts.

Although there are a couple of decisions by the African Commission on Human and Peoples' Rights which seem to suggest that compliance with the duty to protect may not be tied to the means available to the state (leading to a potentially excessive burden), the above analysis has shown that neither case makes this point conclusively. Even if these cases were to be interpreted as supporting a due diligence standard with no regard for how circumstances may affect the availability of means (*Commission Nationale*) or viewing the duty to protect as an obligation of result (*Association of Victims*), there are two further factors to consider. Firstly, from a descriptive standpoint, the most that could be said of the Commission's work is that it displays inconsistency, given its contrary decision in the *Zimbabwe Human Rights NGO Forum* case. It is thus difficult to regard these cases as part of an approach which consciously diverges from the established jurisprudence in both human rights law and other areas of international law. Secondly, from a normative perspective, inasmuch as these decisions do remove the conditionality that ties the duty to protect to the means available to the state, they can indeed impose an excessive burden on states. But such an outcome would be undesirable, and would go beyond what is argued in this chapter – that in order to comply with their duties of protection, states must continue to use *the means still at their disposal* in respect of territories under their sovereignty but beyond their control.

3.6 Concluding Remarks

As a corollary of their sovereignty, states are arguably obliged to maintain order and ensure respect for international law in their territory. But even if this obligation may be difficult to operationalize as such, various duties of protection abound in international law, which require the state to prevent and/or redress a wide range of so-called 'catalyst acts' carried out primarily (though not exclusively) by private actors.

States' compliance with these duties of protection is assessed according to the due diligence standard, which is violated when the state (1) knew or should have known of a catalyst event; (2) had the means to counteract it; but (3) failed to use those means. The extent of means available to the state is, in turn, strongly connected to – even predicated on – the state's control over its territory. In light of such a deep connection, it is to be expected that

the loss of control would also have an impact on the operation of this obligation. However, that impact is more limited than it may appear at first sight. While the loss of control can indeed affect the range of available means to be applied, it does *not* render the obligation inapplicable. On the contrary: the state continues to be bound to use whatever means are still at its disposal in any given situation to prevent and/or redress catalyst events. This was explicitly affirmed by the ECtHR in the *Ilaşcu* case (and subsequent jurisprudence), where the Court expressly acknowledged Moldova's lack of control over Transdniestria, but held that the state was still under the obligation to take all measures at its disposal to protect the applicants' rights. It was also arguably implied by the ICJ in its analysis of the second phase of events in *Armed Activities*, where the Court rejected Uganda's counterclaim given the DRC's efforts to re-establish control over its territory. Granted, there may not be much the state can do in situations where its control is diminished or lacking completely, but it should – and must – do whatever it still can to secure the rights in question.

Since the state is only required to use the means that are available to it – and such availability is dependent on the extent of state control – the way the due diligence standard operates ensures that these obligations do not place a burden on states that would be beyond their capacity to meet. In the same vein, the ECtHR takes into account where the success of a particular measure depends on cooperation from another actor, such as a secessionist entity. However, where the state *voluntarily* limits the means at its disposal, it cannot justify a lack of (sufficient) action by reference to such a limitation. The domestic judicial response to acts committed by the FARC in a demilitarized zone – following Colombia's unconditional withdrawal of all security forces from part of its territory – suggests that even if the withdrawal is in pursuance of a legitimate aim, the state is likely required to put effective safeguards in place in order to comply with its obligations.

Nonetheless, the allocation of the burden of proof can often pose a significant obstacle to the judicial enforcement of such obligations. In line with the general rule of *actori incumbit onus probandi* – upheld in both ICJ and ECtHR jurisprudence – for the state to be found responsible, the applicant must prove that the respondent state had means at its disposal with the capacity to effect change, but failed to use them. In *Ilaşcu*, the only successful case so far, the applicants had the advantage of being able to point to a set of measures which had not only been deployed by Moldova already (thereby proving their availability), but which had also secured the release of Mr. Ilaşcu (thereby proving their effectiveness). But in most other cases, applicants do not benefit from such a constellation of facts, which may partly explain why there have not been any successful cases before the ECtHR in the years since *Ilaşcu*.

In the arbitral jurisprudence on injuries to aliens, the British-Mexican Claims Commission sought to alleviate this difficulty by partially shifting the burden of proof. Where the applicant could prove that the respondent state knew of the catalyst event, it fell on the respondent to disclose what

measures it had taken in response; if the state did not point to any such measures, this resulted in a presumption of its responsibility. In more recent years, a similar position has been advocated by Judges Tomka and Kooijmans in their partial dissents to the ICJ's judgment in the *Armed Activities* case. The dissertation proposes following this approach, as it could help better ensure accountability; but for now, this position is still the minority view, and it remains to be seen whether such a partial shift in the burden of proof can take hold in the years to come.

4 Attributing the Conduct of Private Actors I: The Factual Rationale and the Standards of Control under Articles 4 and 8 ARSIWA

4.1 Introduction

Having discussed state responsibility for failure to prevent or redress 'catalyst events' carried out by private actors, the next two chapters turn to address cases where the degree of state involvement in the conduct of such actors is so high as to render that conduct itself attributable to the state. In doing so, these two chapters are organized according to the rationales underpinning attribution, namely:

(1) the factual: no official legal link to the state, but state control or support of the private actor;
(2) the functional: the exercise of governmental functions by a private actor;
(3) the legal: remaining *de jure* organs and private actors linked to the state through co-optation;
(4) the continuity-based: successful insurgents becoming the government;
(5) the discretion-based: acknowledgement and adoption of private conduct by the state.[1]

1 See also F. Finck, 'L'imputabilité dans le droit de la responsabilité internationale: Essai sur la commission d'un fait illicite par un État ou une organisation internationale', *PhD Dissertation, University of Strasbourg* (2011) [on file with author], 135, observing that formal (legal), functional, and material (factual) links supply the three main grounds for attribution; cf. O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 257, at 261.

Since these scenarios are delineated on the basis of the applicable rationale for attribution, the structure of the chapters departs from the classification followed in the ARSIWA on one particular point: although Article 4 ARSIWA covers both *de jure* and *de facto* organs, both the method and the rationale of attributing the conduct of the latter show greater similarity with control-based attribution under Article 8 ARSIWA.[2] From an analytical perspective, it is thus best to split the methods used for attributing *de jure* and *de facto* organs from each other.

This chapter addresses the factual scenario – i.e. control-based attribution (including that of *de facto* organs) under Articles 4 and 8 ARSIWA – which has generated not only the biggest volume of jurisprudence, but also the most controversy over the years. Chapter 5, meanwhile, covers the functional, legal, continuity- and discretion-based rationales.

Relying on a narrow definition of 'state failure', authors tend to immediately dismiss the possibility of control-based attribution, arguing that in situations of 'state failure' there is simply no government which could

2 Cf. Finck, 'L'imputabilité', 152. As indicated by its phrasing, the scope of Article 4 ARSIWA is not limited to organs designated as such under domestic law, and the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, has formally classified *de facto* organs as falling under the same Article in paras. 385, 390-395. In addition to the text of Article 4(2) ARSIWA, see also ARSIWA Commentary to Article 4, para. 11 (though the ILC itself does not use the term '*de facto* organ'). Meanwhile, human rights courts apply a framework that does not rely on the ARSIWA; accordingly, they do not apply either category, see Sections 4.3 and 4.4 below. This is not to say that the designation of *de facto* organ under Article 4 ARSIWA, as opposed to a person or group under state control in the sense of Article 8 ARSIWA, is irrelevant. The consequences of the categorizations are different: all conduct of a person or entity found to be a *de facto* organ under Article 4 ARSIWA – carried out in that capacity – will be attributable to the state, without the need to establish attribution for each act or omission separately, as would be the case under Article 8; see Section 4.2.4 below. This theoretically includes *ultra vires* conduct (as Article 7 ARSIWA applies to Articles 4-5 ARSIWA), although the ICJ's standard is so stringent that the question of such conduct simply does not arise. Furthermore, C. Kress, 'L'organe de facto en droit international public: Réflexions sur l'imputation à l'état de l'acte d'un particulier à la lumière des développements récents' (2001) 105 *Revue générale de droit international public* 93, at 135-136, argues against applying Article 7 to any *de facto* organ (broadly understood, including conduct attributable under Article 8 ARSIWA); while A.J.J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *British Yearbook of International Law* 255, at 281-286, argues for extending Article 7 even to the conduct of agents/agencies under Article 8 ARSIWA.

exercise control over private actors.[3] Yet where governments do exist, it is in fact quite common for them to act through persons, groups or entities with whom they have little or no formal connection: where the government lacks the resources to exercise control over the state's entire territory, or wants to keep its distance from a certain situation, it often relies on paramilitary groups to act as proxies. Organizing the population into 'civil patrols' or encouraging the formation of 'self-defense groups' has been a particularly common strategy by Latin-American states facing insurrections – but as illustrated by the example of the Janjaweed in Sudan, or the Shiite militias operating in Iraq, the phenomenon occurs far beyond Latin-America.[4] Similarly, third states may use the opportunity created by the affected state's loss of control to extend their influence through proxy forces (those same Shiite militias in Iraq are backed by Iran, for instance); or they may even decide to use armed groups as a destabilizing force (as the US did with the *contras*).

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3 See G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Nijhoff, 2004), 276-77; R. Geiss, *"Failed states": Die normative Erfassung gescheiterter Staaten* (Berlin: Duncker & Humblot, 2005), 260-261, argues that effective control is lacking 'by definition' ('definitionsgemäß') in such cases, and attribution could not even be established with overall control as a test; G. Cahin, 'L'état défaillant en droit international: quel régime pour quelle notion?', in: *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 177, at 203; P. Pustorino, 'Failed States and International Law: The Impact of UN Practice on Somalia in Respect of Fundamental Rules of International Law' (2010) 53 *German Yearbook of International Law* 727, at 749-750; F. Leidenmühler, *Kollabierter Staat und Völkerrechtsordnung: zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt* (Wien: Neuer Wissenschaftlicher Verlag, 2011), 523. D. Thürer, 'Der Wegfall effektiver Staatsgewalt: "The Failed State"', in: D. Thürer, M. Herdegen & G. Hohloch, *Der Wegfall effektiver Staatsgewalt: 'The Failed State' (The Breakdown of Effective Government)* (Heidelberg: C.F. Müller, 1996), 9 and H. Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Baden-Baden: Nomos, 2007) do not even consider the issue.

4 See Section 4.3.2 below on the paramilitaries in Colombia; on the civil patrols in Guatemala, also featuring in IACtHR jurisprudence, see e.g. J-M. Simon, *Civil Patrols in Guatemala* (New York: Americas Watch Committee, 1986); on the Janjaweed, see e.g. HRW, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, December 2005, https://www.hrw.org/sites/default/files/reports/darfur1205webwcover.pdf; and Enough Project, *Janjaweed Reincarnate: Sudan's New Army of War Criminals*, June 2014, https://enoughproject.org/files/JanjaweedReincarnate_June2014.pdf; on the Shiite militias' complex links to Iran and Iraq, see ICG Middle East Report No. 188, *Iraq's Paramilitary Groups: The Challenge of Rebuilding a Functioning State*, 30 July 2018, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/188-iraqs-paramilitary-groups-challenge-rebuilding-functioning-state. See also generally D. Francis (ed.), *Civil Militia: Africa's Intractable Security Menace?* (Aldershot: Ashgate, 2005).

Under what circumstances is the conduct of such groups attributable to the state? In the absence of any formal (legal) link, the emphasis is placed on the factual relationship between the private actor and the state. What kind of factual relationship is then necessary for the state to incur responsibility for the conduct of the non-state actor? The most commonly recurring factors have been support, creation, control, planning, instructions, and direct participation by the state, but the requisite degree of support and/or control in particular has been a matter of quite some contention over the decades, with different courts setting different standards for attribution. In fact, some of these attribution thresholds are so low – or based on factors other than control – that the state's involvement cannot properly be described as exercising 'control' over the private actor in question. In such cases, speaking of *control*-based attribution may admittedly be slightly misleading. Nonetheless, for the sake of simplicity, 'control-based attribution' will be used as a shorthand throughout this chapter (and the rest of the dissertation) to describe this type of attribution.[5]

With this in mind, the following sections analyze the three main strands of jurisprudence on the subject: firstly, the strict standard(s) of the ICJ, adopted by the ILC but directly challenged by the ICTY Appeals Chamber (all of this case law concerning control by third states); secondly, the work of the IACtHR, requiring a much lower threshold than the ICJ *vis-à-vis* affected states; and thirdly, the case law of the ECtHR, which has addressed situations of control by third states, and also applied lower thresholds than the ICJ.[6] In light of these different standards, the chapter concludes by examining whether any common features may be identified in them; whether they can be reconciled some other way; and to what extent they are justifiable as departures from the ILC/ICJ framework – with this latter discussion continued in Chapter 6, in light of the complicity-like approaches adopted by human rights courts.

4.2 Setting the Scene: The *Nicaragua* and *Tadić* tests

Any discussion of control-based attribution tests must begin with a review of the cases which have defined the debate for the past decades: the ICJ's *Nicaragua* judgment from 1986, the ICTY Appeals Chamber's 1999 verdict

5 In the same vein, 'control tests' or 'control-based attribution tests' are used to describe the various solutions developed by courts, with the understanding that at least some of these tests may be based on factors other than control.

6 The African Court of Human Rights has not yet been faced with cases concerning control-based attribution. As noted above in Section 1.3, the work of international human rights bodies issuing non-binding decisions (such as the Inter-American Commission on Human Rights (IACHR), African Commission on Human and Peoples' Rights and the UN treaty bodies) are excluded from the scope of the dissertation.

in *Tadić*, and the ICJ's 2007 ruling in the *Bosnian Genocide* case.[7] The aim here is not to rehash old debates; but the only way to gain a full understanding of the control tests developed by the IACtHR and the ECtHR is to view them against the backdrop of ICJ and ICTY jurisprudence, and the debate it generated.

4.2.1 Military and Paramilitary Activities in and against Nicaragua

In this 1986 landmark case at the ICJ, Nicaragua accused the US of violating the prohibition on non-intervention, use of force, and certain rules of international humanitarian law in attempting to overthrow the Nicaraguan government by various means. As part of the case, the Court had to decide whether it was possible to attribute the conduct of the *contras* – Nicaraguan insurgent groups intent on overthrowing the government and operating with significant US involvement – to the United States. Having established that – contrary to Nicaragua's claim – the US did not create the *contras*,[8] the Court turned to dependence and control as the relevant factors in determining whether the *contras*' conduct could be attributed to the US, holding that:

> What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[9]

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7 While there had been other cases (notably *United States Diplomatic and Consular Staff in Tehran* (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 ICJ Reports 3, and *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Award No. 324-10199-1, 2 November 1987, (1987) 17 Iran-US Claims Tribunal Reports 92) predating *Nicaragua* which also touched upon the issue of control, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, was the first case to consider the matter in depth. In the literature, see generally de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles'; Kress, 'L'organe de facto'; see also F.A. Boyle, 'Determining U.S. Responsibility for Contra Operations under International Law' (1987) 81 *American Journal of International Law* 86; M. Milanović, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553; M. Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669; A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649; Finck, 'L'imputabilité'.

8 *Nicaragua*, paras. 94, 108. Interestingly, it has been suggested by de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', at 269, that: 'Although no more was said about this, the implication [of the ICJ's conclusion that the US had not created the *contras*] might be that if the United States had indeed created the contras, then the Court's conclusion on attribution might have been different.' See also Kress, 'L'organe de facto', 128.

9 *Nicaragua*, para. 109.

Applying these requirements to the facts, the Court found the criterion of dependence fulfilled regarding a certain time period, but – while it acknowledged 'the potential for control inherent in the degree of the *contras*' dependence' – it did not find conclusive evidence to consider the requirement of control to have been met.[10] Nonetheless, the Court continued to discuss the degree of control exercised by the US over the *contras* (as well as the latter's dependence on the former), eventually coming to the conclusion that:

> United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[11]

The Court's standard – which became known as the 'effective control' test – set a particularly high threshold for attribution, requiring close control over the specific operations themselves. Based on this test, the ICJ concluded that the conduct of the *contras* could not be attributed to the US.[12] Despite the Court's answer being in the negative, the *Nicaragua* case remains crucial for having provided the initial spark for the debate on control-based attribution.

4.2.2 *Prosecutor* v. *Duško Tadić*

The next installment of the debate on control-based attribution took place at the ICTY in the 1999 *Tadić* case. In order to establish the applicable law in the case, the Tribunal had to determine whether the conflict in Bosnia was internal or international. Arguing that IHL itself did not provide a test to decide the issue, both the Trial and Appeals Chambers of the Tribunal main-

10 *Ibid.*, paras. 109-110.
11 *Ibid.*, para. 115.
12 *Ibid.*, paras. 116ff. That said, the US remained responsible for conduct of its *de jure* organs 'directly in connection with the activities of the *contras*', such as the distribution of a manual on psychological warfare written by a low-level CIA official, see *ibid*.

tained that the question had to be answered by recourse to general international law, and attribution in the law of state responsibility in particular. This argument was based on quite simple logic: if the conduct of one of the participating armed groups could be attributed to another state, that would make the conflict international – otherwise it would be internal.[13]

However, in determining whether the conduct of the Army of the Republika Srpska (*Vojska Republike Srpske*, VRS) could be attributed to the Federal Republic of Yugoslavia (FRY), the Trial and Appeals Chamber took opposing views. The Trial Chamber was deferential to the ICJ's jurisprudence in *Nicaragua*, and came to the conclusion that the relationship between the VRS and the FRY was coordination rather than 'command and control'.[14] By contrast, the Appeals Chamber eschewed the *Nicaragua* test as setting an unreasonably high threshold in the case of 'organised and hierarchically structured group[s]', and not being in conformity with customary international law.[15] Instead, following a review of state practice and jurisprudence, the Appeals Chamber put forward the 'overall control test' for organized – such as military or paramilitary – groups (though it did sustain the necessity of specific instructions for individuals and unorganized groups).[16] The test of 'overall control' was laid down in the following terms:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. […] However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law. […] Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them […]. The control required by international law may be deemed to exist when a State […] *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.[17]

There are two main features of this test, which the Appeals Chamber repeatedly emphasized throughout its analysis. Firstly, overall control 'must comprise more than the mere provision of financial assistance or military equipment or training'.[18] It is not entirely clear, though, whether

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13 *Prosecutor* v. *Duško Tadić*, ICTY Trial Chamber, Judgment of 7 May 1997, IT-94-1-T, para. 584; *Prosecutor* v. *Duško Tadić*, ICTY Appeals Chamber, Judgment of 15 July 1999, IT-94-1-A, para. 98.

14 *Tadić* (TC), paras. 584-607, particularly 598, 604, 606.

15 *Tadić* (AC), paras. 115-130.

16 *Ibid.*, paras. 131-137. While the judgment focuses primarily on military and paramilitary groups, it also clarifies that the overall control test can apply to other kinds of organized groups as well, see *ibid.*, paras. 120, 122, 146.

17 *Ibid.*, paras. 131, 137.

18 *Ibid.*, para. 137; see also *ibid.*, paras. 130, 145.

such support is a necessary (but not sufficient) requirement, or whether the Appeals Chamber highlighted it simply to point out that it is not relevant (i.e. not even necessary) for the test. The wording of the judgment suggests that the former interpretation is the correct one, as every iteration of the test refers to control as something *additional* to such support – but neither option is dismissed conclusively.[19]

Secondly, while it is clear that the requisite control is general, rather than specific, the judgment uses several different formulations regarding the state's role, which do not necessarily describe the same degree of involvement: 'coordinating or helping in the general planning', 'a role in organising, coordinating or planning', 'generally directing or helping plan their actions', 'participation in the planning and supervision of military operations'.[20] Strikingly, while control – whether effective or overall – would imply subordination, not all of these terms actually denote subordinate relationships. At the strongest end of the spectrum, 'directing' or 'supervision' does describe subordination, and a role in organizing or planning may also imply a certain degree of control, depending on the circumstances. At the weakest end of the spectrum, however, 'coordination' does not involve *any* degree of control, referring to a horizontal, rather than vertical, relationship.[21] When applying the overall control test to the facts of the case, the Appeals Chamber took a slightly different stance compared to the test's description *in abstracto*, holding that 'the relationship between the VJ [*Vojska Jugoslavije*, Yugoslav Army (the army of the FRY)] and VRS cannot be characterised as one of merely coordinating political and military activities', and that 'the FRY/VJ directed and supervised the activities and operations of the VRS'.[22] This holding by Appeals Chamber suggests that despite the loose general formulation, the 'overall control' test tilts toward the stronger end of the scale.

In the context of the 'overall control' test, the Appeals Chamber also made a few remarks about the identity of the controlling state, observing that:

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19 See *ibid.*, paras. 131 ('not only […] but also'), 137 ('in addition to', 'more than'). See also the ICTY's subsequent interpretation of 'overall control' as a two-part test, discussed at notes 24-28 and accompanying text below.

20 *Tadić* (AC), paras. 131, 137, 138 and 145, respectively.

21 In fact, the ICTY's Trial Chamber found that there was indeed coordination between the VRS and the FRY/VJ, but held that this was not sufficient to establish (effective) control, explicitly noting that '[c]oordination is not the same as command and control' and referring to the VRS and the FRY/VJ as 'allies' instead: *Tadić* (TC), para. 598; see also *ibid.*, paras. 603-606.

22 *Tadić* (AC), paras. 152, 151(ii), respectively; see Kress, 'L'organe de facto', 115, 129, and E. Savarese, 'Issues of Attribution to States of Private Acts: Between the Concept of *De Facto* Organs and Complicity' (2005) 15 *Italian Yearbook of International Law* 111, at 118-119, observing the same. Note that the Appeals Chamber arrived at this conclusion based on the same facts as the Trial Chamber, since the former made no findings of fact of its own, see *Tadić* (AC), para. 148.

> 138. Of course, if, as in *Nicaragua*, the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.
>
> 139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.
>
> 140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.[23]

Note, however, that these remarks appear to be limited to *evidentiary* matters, and the Appeals Chamber has not gone so far as to suggest that a different *substantive* threshold applies to (certain) third states than to (certain) affected ones. Subsequent cases from the ICTY do not appear to have considered this issue any further.

The ICTY's later jurisprudence did, however, call into question the Appeals Chamber's interpretation of 'overall control' in *Tadić* on substance, by not strictly requiring control to establish attribution pursuant to this test. In the 2001 *Kordić and Čerkez* case, the ICTY Trial Chamber interpreted 'overall control' to be a two-part test, consisting of:

> a) The provision of financial and training assistance, military equipment and operational support;
> b) Participation in the organisation, coordination or planning of military operations.[24]

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23 *Tadić* (AC), paras. 138-140 (emphasis in original).

24 *Prosecutor* v. *Dario Kordić and Mario Čerkez*, ICTY Trial Chamber, Judgment of 26 February 2001, IT-95-14/2-T, para. 115; see also *ibid.*, para. 145. This interpretation is in all likelihood based on the Appeals Chamber's *in abstracto* statement in *Tadić* (AC), para. 137, that overall control 'may be deemed to exist when a State […] has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.'

Subsequent case law has followed the same interpretation.[25] While – mirroring the ambiguity of *Tadić* – in the concerete applications of this test the chambers also referred to a 'leadership' or 'supervisory role' and/or cited the issuance of orders,[26] it is unclear what weight these were assigned when evaluating the body of evidence as a whole on this issue. When read in context, the judgments suggest that such elements – with a connotation of subordination – were not necessarily decisive.[27] This indicates a substantial further lowering of the threshold for attribution, even if this subsequent ICTY case law was only satisfied with coordination when it appeared *alongside* forms of support, rather than in itself.[28] In the end, though, there is no case law from the ICTY which would support coordination in and of itself as a threshold for attribution.

4.2.3 The ILC Articles of State Responsibility

How was the debate between the ICJ and the ICTY reflected in the International Law Commission's codification efforts? Article 8 of the ARSIWA (adopted in 2001), addressing '[c]onduct directed or controlled by a State', provides that:

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25 See *Prosecutor* v. *Dario Kordić and Mario Čerkez*, ICTY Appeals Chamber, Judgment of 17 December 2004, IT-95-14/2-A, para. 361; *Prosecutor* v. *Mladen Naletilić and Vinko Martinović*, ICTY Trial Chamber, Judgment of 31 March 2003, IT-98-34-T, para. 198; *Prosecutor* v. *Jadranko Prlić* et al., ICTY Trial Chamber, Judgment of 29 May 2013, IT-04-74-T, para. 86(a); cf. *Prosecutor* v. *Jadranko Prlić* et al., ICTY Appeals Chamber, Judgment of 29 November 2017, IT-04-74-A, para. 289.

26 *Kordić and Čerkez* (TC), paras. 124 ('leadership role'), 126 ('supervisory role'; 'influence and leadership') and 143 ('leadership in the planning, coordination and organisation of the HVO [*Hrvatsko Vijeće Obrane*, Croatian Defence Council (army of the Bosnian Croats)]'); *Kordić and Čerkez* (AC), paras. 365 (repeating 'influence and leadership'), 371 (repeating 'leadership in the planning, coordination and organisation of the HVO', but also speaking simply of 'Croatian involvement in the HVO's organisation') and 372 ('controlled'); *Naletilić and Martinović*, para. 201 ('the Croatian leadership issued orders for HVO or HV [*Hrvatska Vojska*, Croatian Army] troop movements and military strategies in Bosnia and Herzegovina. It further ensured control over the HVO by appointing HV officers at the most senior positions in the HVO command structure.' (footnotes omitted)); *Prlić* (TC), para. 550 ('commanding officers of the HV issued orders to the units of the HVO for certain military operations').

27 See e.g. Savarese, '*De Facto* Organs and Complicity', 119 (emphasis in original): 'The concrete application of the "overall control" test by these decisions [subsequent to *Tadić* (AC)], in fact, confirms the relevance of the coordination between State and group actions, sometimes *in addition* to, and other times *instead of*, the exercise of hierarchical control by the State.' See e.g. the discussion of evidence in *Prlić* (TC), paras. 545-567. Cf. *Prosecutor* v. *Tihomir Blaškić*, ICTY Trial Chamber, Judgment of 3 March 2000, IT-95-14-T, para. 118 (issued prior to *Kordić and Čerkez* (TC)): 'The Bosnian Croat leaders followed the directions given by Zagreb or, at least, co-ordinated their decisions with the Croatian government'.

28 See also Savarese, '*De Facto* Organs and Complicity', 120, note 37.

> 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 acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[29]

As is apparent on plain reading, the text of Article 8 does not prescribe any particular level of control, presumably to ensure the widest possible applicability of the Article by retaining its flexibility. Nonetheless, the Commentary reveals that the ILC has, in effect, sided with the ICJ over the ICTY.[30] Granted, the Commission has been quite subtle: the Commentary does not openly or unequivocally dismiss *Tadić* or support *Nicaragua*, and notes – somewhat vaguely – that 'it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State'.[31] However, at the same time, the ILC states that 'conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation' – which corresponds to the ICJ's 'effective control' test.[32]

At the time the ARSIWA was finalized, it was not evident that this debate would also implicate Article 4 – this would only be clarified by the ICJ six years later, in *Bosnian Genocide*.[33] As a result, Article 4 and its Commentary does not address the issue of *de facto* organs in any great detail; the ILC does not even use the term of *de facto* organs. The text of Article 4 merely notes that the ARSIWA's definition of state organs 'includes' those so designated under domestic law, which indicates that the category stretches further.[34] Indeed, the Commentary notes that 'it is not sufficient to refer to internal law for the status of State organs' but stops short of setting

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29 Interestingly, the initial draft of Article 8, adopted on first reading in 1974, made no reference to the concept of control (see Draft Article 8(a) and the commentary thereto, in ILC, *Text of draft articles 7-9 and commentaries thereto as adopted by the Commission at its twenty-sixth session*, in: *Yearbook of the International Law Commission*, 1974, vol. II, Part One, 277, at 283, and 284-285, para. 8). Elsewhere, however, the ILC set a much lower threshold: the commentary to Draft Article 11 ('Conduct of persons not acting on behalf of the State'), in ILC, *Text of articles 10-15 and commentaries thereto as adopted by the Commission at its twenty-seventh session*, in: *Yearbook of the International Law Commission*, 1975, vol. II, 61, at 80, para. 32, set a threshold that is closest to the 'overall control' test as interpreted by the Trial Chamber in *Kordić and Čerkez* (TC), para. 115.

30 Cf. S. Villalpando, 'Le codificateur et le juge face à la responsabilité internationale de l'État: interaction entre la CDI et la CIJ dans la détermination des règles secondaires' (2009) 55 *Annuaire français de droit international* 39, at 43-44; S. Olleson, 'The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts – Preliminary Draft', *British Institute of International and Comparative Law*, 10 October 2007, https://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraft-final.pdf, 82; Kress, 'L'organe de facto', 138.

31 ARSIWA Commentary to Article 8, para. 5, citing, among others, the *Loizidou* case at the ECtHR.

32 *Ibid.*, para. 3.

33 See notes 38-39 and accompanying text below.

34 Article 4(2) ARSIWA; ARSIWA Commentary to Article 4, para. 11.

any criteria for identifying *de facto* organs.[35] Instead, after describing a few possible examples in general terms, it simply concludes that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'.[36]

4.2.4 Bosnian Genocide

The question of attribution was revisited in 2007 in the ICJ's *Bosnian Genocide* judgment, concerning broadly the same set of facts as the *Tadić* case.[37] Dismissing the 'overall control' test, the Court reaffirmed its own previous jurisprudence, and settled an issue that had divided judicial authorities over the years: it clarified that the *Nicaragua* judgment included two tests, rather than one.[38] According to the ICJ, what came to be known as 'dependence and control' in the intervening years – now termed 'complete dependence' by the Court – is required for *de facto* organs whose conduct is attributable under Article 4 ARSIWA, while 'effective control' is necessary for attribution under Article 8 ARSIWA.[39]

Sensing the apparent similarity, the Court went out of its way to emphasize that the two tests are distinct.[40] But while the ICJ stated that effective control 'differs in two respects' from complete dependence, in the end it only pointed to one difference, namely whether the tests have to be met generally or specifically: while complete dependence is to be established 'in general', effective control must be shown 'in respect of each operation'.[41] This would imply that the two tests require the same threshold of control. However, since the second difference contemplated by the Court could have been a different threshold, a closer examination of the 'complete dependence' test is required before reaching such a conclusion.

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35 ARSIWA Commentary to Article 4, para. 11.

36 *Ibid*.

37 The facts of the *Tadić* case took place in 1992, not long after the creation of the VRS, while the genocide at Srebrenica took place in 1995; but the basic question was the same: whether the conduct of the VRS could be attributed to the FRY.

38 *Bosnian Genocide*, paras. 385-415. Both the Trial and Appeals Chamber in *Tadić* interpreted the *Nicaragua* judgment as providing a single attribution test, see *Tadić* (TC), paras. 584-588; *Tadić* (AC), paras. 106-114. The ARSIWA Commentary only referred to *Nicaragua* under Article 8, which suggests that the ILC itself also interpreted the case as describing a single test. Judge McDonald disagreed with the majority's approach in the Trial Chamber's judgment in *Tadić*, arguing that 'dependence and control' and 'effective control' were two different tests applied by the ICJ: the first resulting in general attribution of all conduct by the actor in question, the second attributing only certain specific instances of conduct by the actor, see *Tadić* (TC), Separate and Dissenting Opinion of Judge McDonald, at 295-296. See also Milanović, 'State Responsibility for Genocide', 576-578, arguing for the two-test interpretation.

39 *Bosnian Genocide*, paras. 385-415.

40 See *ibid*., para. 397.

41 *Ibid*., para. 400. It thus appears that of the different judicial opinions, Judge McDonald's interpretation (see note 38 above) came closest to the ICJ's own understanding of the tests.

Contrary to what the term 'complete dependence' might suggest, dependence in itself is actually not sufficient to meet the test. In order to find attribution, the existence of control must also be established: otherwise it would be impossible to reconcile the ICJ's finding of non-attribution in *Nicaragua* with its conclusion that the *contras* had, in fact, been completely dependent on the US at least during one period of time.[42] This is also confirmed by the *Bosnian Genocide* judgment, where the Court pointed out that attribution under the test 'must be exceptional, for it requires proof of a particularly great degree of State *control*'.[43] In fact, not only is dependence not sufficient for attribution, one may even question whether it is necessary at all.[44] Since dependence creates 'the potential for control',[45] it appears to be an intermediate step in establishing the existence of control, rather than a separate component of the test *besides* control. Admittedly, it is difficult to imagine a situation in practice where a state is in control of a group and yet that group is not dependent on the state – and inasmuch as control is a consequence of dependence, the latter is necessary for establishing the former. As the ICJ pointed out in *Nicaragua*, 'a degree of control […] is inherent' in a dependent relationship.[46] Ultimately, though, given the relationship between the two factors, the decisive element of the test is control, not dependence.

This raises the question once again: what is the requisite standard of control for the 'complete dependence' test? The ICJ does not provide much guidance for an answer, except that the persons, groups or entities in question are 'ultimately merely the instrument' of the state, 'lacking any real autonomy'.[47] This sets such a high threshold that it is difficult to interpret the 'complete dependence' test as anything other than a general application of the 'effective control' test – particularly from an evidentiary standpoint. In order to *disprove* the existence of complete dependence and control, it is sufficient to point to a single incident where the group acted on its own accord, i.e. with some degree of autonomy.[48] Accordingly, while it may not be necessary to provide *proof* of effective control over every single act of the group, in practice it is impossible to meet the requirements of the test in the absence of such strict control. There is nothing in the judgment that

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42 *Nicaragua*, para. 110. See also S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493, at 498, 500.

43 *Bosnian Genocide*, para. 393 (emphasis added).

44 In applying *Nicaragua* (though on the understanding that it was a single test), the ICTY's Trial Chamber in *Tadić* held at para. 588 that 'it is neither necessary nor sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the [FRY]'.

45 *Nicaragua*, para. 109.

46 *Ibid.*, para. 111.

47 *Bosnian Genocide*, paras. 392, 394.

48 Cf. *Nicaragua*, para. 106; Finck, 'L'imputabilité', 170, describing effective control as requiring that 'l'entité subordonnée ne doit avoir aucune marge de manœuvre' ; see also *ibid.*, 194.

would point to a lower threshold. If anything, the Court's reference to the 'exceptional' nature of attribution under the 'complete dependence' test and the requirement of 'a particularly great degree of State control' suggests that the threshold may even be *higher* than that of effective control – although it is difficult to imagine what that could be.[49]

When applying the two tests to the facts at hand, the Court found that notwithstanding the strong ties between the FRY and the VRS, the latter 'had some qualified, but real, margin of independence'.[50] Despite conceding that the VRS 'could not have "conduct[ed] its crucial or most significant military and paramilitary activities"' without FRY support, the Court held that this did not 'signify a total dependence'.[51] Having found the 'complete dependence' test unmet, the Court turned to the 'effective control' test, examining whether the genocide at Srebrenica was carried out under the instructions, direction or effective control of the FRY, but found no evidence to that effect.[52]

Vice President Awn Shawkat Al-Khasawneh, however, disagreed with the majority's approach, maintaining that the case could – and should – be distinguished from that of *Nicaragua*. He argued that while the shared objective of the US and the *contras* (the overthrow of the Nicaraguan government) could have been achieved without committing violations of IHL, the shared objective of the FRY and the VRS was in fact the very commission of international crimes.[53] The Judge pointed out that under such circumstances, there is simply no need for the state to control the non-state actor; in such a case, requiring control over the specific operations would run the risk of allowing states to escape responsibility by relying on non-state actors.[54]

Ultimately, though, the majority view was dismissive of alternative control tests, reaffirming the *Nicaragua* judgment as the authoritative pronouncement on control-based attribution, and interpreting it as putting forward two tests: 'effective control' over particular instances of conduct, and 'complete dependence' (or rather, complete control) for a general attribution of all conduct of a particular actor.

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49 *Bosnian Genocide*, para. 393.

50 *Ibid.*, para. 394.

51 *Ibid.*, citing *Nicaragua*, para. 111. Yet oddly enough, the same quote in *Nicaragua* – when read in context – appears to have indicated complete dependence.

52 *Bosnian Genocide*, paras. 407-413.

53 *Ibid.*, Dissenting Opinion of Vice President Al-Khasawneh, 2007 ICJ Reports 241, para. 39. The Vice President actually began by arguing at para. 36 that in *Bosnian Genocide*, 'there was a unity of goals, unity of ethnicity and a common ideology, such that effective control over non-State actors would not be necessary.' But there was arguably a unity of goals and a common ideology present in the *Nicaragua* case between the US and the *contras* as well, and it is unclear why a unity of ethnicity would change the analysis.

54 *Ibid.*, para. 39; cf. *Tadić* (TC), Separate and Dissenting Opinion of Judge McDonald, at 298.

4.2.5 Concluding Remarks

The confrontation between the ICJ and the ICTY provides for a colorful history of control-based attribution tests in the past few decades. The ICJ's 'effective control' and 'complete dependence' tests are ultimately variations of the same high-threshold test which does not allow for any autonomy whatsoever for the subordinate person or group, either specifically or generally. By contrast, the ICTY Appeals Chamber in *Tadić* put forward a test with a significantly lower threshold for attributing the conduct of *organized* non-state actors – one that still required more than the provision of financial support, training, equipment, and (ostensibly) coordination, but could be satisfied by control of a general nature that allowed some degree of autonomy for the subordinate group. (Meanwhile, in its post-*Tadić* jurisprudence, the ICTY appears to have reinterpreted 'overall control' as a two-part test that does not even rely on control anymore.) The ILC sided with the ICJ on this question (although it did so without including any particular threshold in the text of Article 8 itself), and the Court firmly rejected the 'overall control' test, which in the end did not take hold in the international jurisprudence on state responsibility – but has been followed for the purpose of determining the (non-)international character of an armed conflict ever since.[55]

The tests developed by the ICJ – and endorsed by the ILC – reflect the notion that attribution is to be based on agency, i.e. that 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.[56] This is ensured both by the 'complete dependence' test, which requires the private actor to be nothing more than an instrument of the state, with no autonomy whatsoever, and by the 'effective control' test, as illustrated by the Court's prononoucement in *Nicaragua* that the IHL violations in question 'could well be committed by members of the *contras* without the control of the United States', i.e. of their own accord.[57] However, at the same time, the threshold(s) set by the ICJ are so high that it is virtually impossible to meet them.[58] As a result, it is

55 In addition to those cited at notes 24-27 above, see *Prosecutor* v. *Zlatko Aleksovski*, ICTY Appeals Chamber, Judgment of 24 March 2000, IT-95-14/1-A, paras. 134, 143-145; *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo ('Čelebići Camp')*, ICTY Appeals Chamber, Judgment of 20 February 2001, IT-96-21-A, paras. 26, 34-48; and see *Prosecutor* v. *Thomas Lubanga Dyilo*, ICC Trial Chamber I, Judgment of 14 March 2012, ICC-01/04-01/06, paras. 541, 552-561. See also R. Jorritsma, 'Where General International Law Meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts' (2018) 23 *Journal of Conflict and Security Law* 405, at 410, 426-427.

56 *Bosnian Genocide*, para. 406.

57 *Nicaragua*, para. 115.

58 Cf. M. Gibney, 'Genocide and State Responsibility' (2007) 7 *Human Rights Law Review* 760, at 771, remarking on *Bosnian Genocide* that 'the case reads […] like a primer on how to avoid responsibility'. See also de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', noting at 269 that 'it would not at all have been unreasonable to equate the *contras* to an organ of the United States' in *Nicaragua*; as well as Finck, 'L'imputabilité', 199.

remarkably easy for states to circumvent the rule and evade responsibility for the consequences of their actions. All a state needs to do is find a like-minded group of people whose goals align with the state's own, and let them do the 'dirty work'. Even if the state provides them with training, funding, equipment, intelligence, and coordinates their activities with its own, it will escape responsibility as long as it does not instruct or enforce (through its control) the commission of a violation of international law.[59] As Vice President Al-Khasawneh pointed out, this is particularly objectionable where the very aim of the entire venture – shared between the state and the private actor – is to violate international law, as there is simply no need to formulate such instructions or force the private actor. But even where the shared goal itself is not contrary to international law, limiting the scope of state responsibility by the agency principle (as understood by the ICJ) disregards the – often crucial – role played by the state in enabling the group to operate (including to the state's benefit) and thus commit abuses in the first place.[60] The reasoning behind the 'overall control' test in *Tadić* captures these situations in a more lifelike manner, even if the ICTY has lost out in its clash with the ICJ, at least as regards state responsibility. As for the post-*Tadić*, two-part reading of the test, it has not so much lowered the threshold as disposed of it entirely, moving to a different rationale (of support and coordination) altogether.

One of the criticisms cited by the ILC against the *Tadić* judgment – later also one of the ICJ's reasons for dismissing the 'overall control' test – was that the ICTY, as a criminal tribunal, was not meant to address matters of state responsibility.[61] The persuasiveness of this argument is somewhat questionable, since the ICTY Appeals Chamber did not purport to pass *direct* judgment on state responsibility; it merely put forward that the test for determining the (non-)international character of an armed conflict was *identical* to the test applied to determine attribution for the purpose of state responsibility.[62] Nonetheless, in light of this argument, it is particularly interesting to examine the jurisprudence of regional human rights courts, which regularly apply control tests with arguably even lower thresholds for

59 See *Nicaragua*, para. 115, where the ICJ was not satisfied that 'the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law'.

60 Cf. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', 290-291.

61 See ARSIWA Commentary to Article 8, para. 5; *Bosnian Genocide*, para. 403. Indeed, the distinction between state and individual responsibility has even been used to argue that 'some differences of perception between the ICJ and the ICTY exist on this control test for purposes of responsibility, but given the different relevant contexts, they are readily understandable and hardly constitute a drama', see *Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs*, 29 October 2007, https://www.icj-cij.org/files/press-releases/7/14097.pdf, at 5.

62 See *Tadić* (AC), para. 98; cf. *Bosnian Genocide*, Dissenting Opinion of Vice President Al-Khasawneh, para. 38. On whether or not this is a tenable argument, see notes 260-271 and accompanying text below.

the purpose of determining state responsibility. Accordingly, the following sections turn to the case law of the Inter-American and the European Court of Human Rights, respectively.

4.3 Lowering the Threshold for Attribution to the Affected State: The Jurisprudence of the Inter-American Court of Human Rights

Before delving into the jurisprudence of the Inter-American Court, it should be pointed out that unlike other courts (or the ILC), the IACtHR has – at least initially – dismissed the idea of predefined grounds of attribution, arguing instead that:

> [T]he attribution of international responsibility to a State owing to the acts of State agents or individuals *must be determined on the basis of the characteristics and circumstances of each case*, and also on the corresponding special obligations of prevention and protection that are applicable. Although this attribution is made on the basis of international law, the many different forms and characteristics that the facts may assume in situations that violate human rights makes it almost illusory to expect international law to define specifically – or rigorously or *numerus clausus* – all the hypotheses or situations – or structures – for attributing to the State each of the possible and eventual acts or omissions of State agents or individuals.[63]

Rather than developing generalized control tests, the IACtHR decided to approach attribution on a case-by-case basis instead and did not meaningfully engage with any jurisprudence, including its own, on control-based attribution for several years. As the Court built up more extensive case law on this issue in the context of Colombia, this began to slowly change, with the IACtHR starting to classify its own previous jurisprudence and establish the contours of a more general test in recent years. That said, as of 2019, the Court's engagement is still quite limited, and it remains to be seen whether the conclusions from this embryonically systematic approach can and will be transposed into contexts beyond that of Colombia.

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63 IACtHR, *Pueblo Bello Massacre* v. *Colombia*, Merits, Reparations and Costs, Judgment of 31 January 2006, Series C, No. 140, para. 116 (first emphasis added); reaffirmed in IACtHR, *Ríos* et al. v. *Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 January 2009, Series C, No. 194, para. 118, and almost verbatim in IACtHR, *Perozo* et al. v. *Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 January 2009, Series C, No. 195, para. 129. The Court's statement came in response to Colombia's argument that '[t]he structures for attributing responsibility to the State constitute *numerus clausus*, because they consist of a rigorous description of the events in which the violation of the treaty-based obligation is attributable to the State in question. This premise constitutes a guarantee of the principle of legal certainty[.]' *Pueblo Bello*, para. 103(c). Note that the IACtHR (as well as the ECtHR) tends to use the term 'state agent' in the ILC's sense of state organ, see Chapter 3, note 48 above.

Given this rather *ad hoc* approach, the following sections analyze the Court's case law on control-based attribution with the aim of identifying the relevant elements in each case, and to examine which (if any) of these factors are taken into account recurrently when determining such attribution in the IACtHR's jurisprudence. For ease of reference, and as the context varies from state to state, the cases are grouped together by country for the purpose of the initial analysis, before the concluding remarks offer some overarching observations.

4.3.1 *Blake* v. *Guatemala*

The first case to touch upon control-based attribution before the Court was *Blake* v. *Guatemala* in 1998, regarding the forced disappearance and murder of a journalist and a photographer by members of a local 'Civil Self-Defense Patrol' in 1985.[64] These patrols had been created in the early 1980s as part of the government's counterinsurgency efforts; in 1986, they were even 'legally recognized […] after years of operation and described […] as "auxiliary forces coordinated by the Ministry of Defense."'[65] Nonetheless, Guatemala claimed that these patrols were 'voluntary community organizations' and that as such, their conduct was not attributable to the state.[66]

In the particular case at hand, upon their arrival in the village of El Llano, the victims 'were questioned by Mario Cano, Commander of the El Llano Civil Self-Defense Patrol, who sought instructions from officers of the Las Majadas military garrison and ordered members of the civil patrol to take them to the border with El Quiché, telling them, "you can kill them if you wish."'[67] While this passage leaves unclear whether the commander of the civil patrol actually *received* any instructions from the military,[68] it appears that this was in any case not the decisive element in the Court's reasoning, which focused rather on the general relationship between the patrols and the state.

With regard to that relationship, the Court held that 'the civil patrols *in fact acted as* agents of the State during the period in which the acts pertaining to the instant case occurred', as they 'enjoyed an institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision.'[69]

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64 *Blake*, para. 52. The bodies of the journalist and photographer were found seven years later, see *ibid*.

65 *Ibid.*, para. 71.

66 *Ibid.*, paras. 71, 73. For more on the civil patrols, see e.g. Simon, *Civil Patrols in Guatemala*; 'Guatemala Mobilizes 700,000 Civilians in Local Patrols', *New York Times*, 18 November 1983, https://www.nytimes.com/1983/11/18/world/guatemala-mobilizes-700000-civilians-in-local-patrols.html.

67 *Blake*, para. 52(a).

68 Although the Commission interpreted the facts this way, see *ibid.*, para. 72.

69 *Ibid.*, paras. 75 (emphasis added) and 76, respectively.

It is not entirely clear which element weighed more in determining attribution: the factual support and orders, or the performance of state (military) functions. Regarding the latter, the IACtHR highlighted that the domestic legislation rescinding the civil patrols' legalization stated in one of its preambular paragraphs that 'they had fulfilled *missions belonging to the regular State organs*, provoking repeated human rights violations by members of those committees'.[70] The Court then held that 'the *acquiescence* of the State of Guatemala in the perpetration of such activities by the civil patrols indicates that those patrols should be deemed to be agents of the State and that the actions they perpetrated should therefore be imputable to the State.'[71] The conclusion thus appears to add yet another element to the Court's considerations: acquiescence.[72]

In the end, the likeliest explanation is that since the Court did not feel the need to classify the different types of links between the state and the civil patrols – the factual links, the commission of human rights violations while exercising state functions, as well as the state's acquiescence therein – it decided based on the combination of all these grounds, rather than any single one of them.

4.3.2 The Colombian Cases: *19 Merchants*, *Rochela*, *Pueblo Bello*, *Ituango*, *Mapiripán*, *Operation Genesis*, *Yarce*, *Vereda La Esperanza* and *Omeara Carrascal*

Most of the Court's case law on control-based attribution, meanwhile, comes from the Colombian conflict, where paramilitary groups have similarly enjoyed a close relationship with the state (and the military in particular). In response to the guerilla threat, the establishment of so-called 'self-defense groups' had been legalized in Colombia as early as 1965;[73] and in most cases, the creation of paramilitary groups was actively encouraged by the military, which provided them with training, arms and other

70 *Ibid.*, para. 77 (emphasis by the Court).

71 *Ibid.*, para. 78 (emphasis added).

72 This could point in the direction of Article 11 ARSIWA as a basis for attribution, but as explained below, Article 11's formulation of acknowledging or adopting conduct sets a significantly higher threshold than that of acquiescence, see Section 5.4.2 below.

73 Decree 3398 of 1965, Diario Oficial No. 31.842, 25 January 1966, Articles 25 and 33(3); see also Law 48 of 1968, Diario Oficial No. 32.467, 29 March 1968.

forms of support.[74] Although paramilitaries were outlawed in 1989,[75] this had little impact on the ground, where they continued their activities, often with the support of the military.[76] The various paramilitary groups operated locally, with no aspirations at the national level, until in 1997 the majority of them formed an umbrella organization, the AUC (*Autodefensas Unidas de Colombia*, United Self-Defense Forces of Colombia). Their tactics relied mostly on attacking supposed guerilla sympathizers and the civilian population at large, carrying out massacres and deliberately forcing people

74 The following passages from an analysis of the paramilitary's emergence in Puerto Boyacá are illustrative: 'Despite its impressive buildup, paramilitarism was initially quite distant from any semblance of a disciplined group. Building an organised force with hierarchy and combat capacity involved direct army participation. Between 1981 and 1983 the army developed an organisational blueprint for the paramilitary, and an energetic recruitment campaign took place.' F. Gutiérrez Sanín & M. Barón, 'Re-Stating the State: Paramilitary Territorial Control and Political Order in Colombia (1978-2004)', *LSE Crisis States Programme*, Working Paper No. 66 (series 1), September 2005, http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-one/wp66-restating-the-state-in-colombia.pdf, 11. More generally on military-paramilitary links, see e.g. HRW, *Colombia's Killer Networks: The Military-Paramilitary Partnership and the United States*, November 1996, https://www.hrw.org/legacy/reports/1996/killertoc.htm; HRW, *The Ties That Bind: Colombia and Military-Paramilitary Links*, February 2000, https://www.hrw.org/legacy/reports/2000/colombia; W. Avilés, 'Paramilitarism and Colombia's Low-Intensity Democracy' (2006) 38 *Journal of Latin American Studies* 379.

75 Corte Suprema de Justicia, Sala Plena, Judgment No. 22 of 25 May 1989; see also Decrees 813, 814 and 815 of 1989, all in Diario Oficial No. 38.785, 19 April 1989; Decree 1194 of 1989, Diario Oficial No. 38.849, 8 June 1989. For a few years in 1994, the creation of another form of self-defense groups – so-called 'CONVIVIR' associations – was again legalized through Decree 356 of 1994, Diario Oficial No. 41.220, 11 February 1994. The government exercised almost no oversight of these groups, which spread rapidly, committing violations, often indistinguishable from the illegal paramilitaries, and generally adding to the paramilitary phenomenon; see e.g. ICG Latin America Report No. 5, *Colombia: Negotiating with the Paramilitaries*, 16 September 2003, https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/colombia-negotiating-paramilitaries, 7-8, 9; Avilés, 'Paramilitarism', 397-399; Commission on Human Rights, *Report by the United Nations High Commissioner for Human Rights*, 9 March 1998, UN Doc. E/CN.4/1998/16, paras. 92-95. CONVIVIR groups dispersed – or rather, merged into illegal paramilitary groups – after 1997, when the Constitutional Court upheld their constitutionality, but heavily curbed most of their rights, see Corte Constitucional, Judgment C-572/97 of 7 November 1997; Grupo de Memoria Histórica, *¡Basta ya! Colombia: Memorias de guerra y dignidad*, August 2013, http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-memorias-guerra-dignidad-12-sept.pdf, 158, 241; they were abolished in 1999, see F. Cubides, 'From Private to Public Violence: The Paramilitaries', in: C. Bergquist, R. Peñaranda & G. Sánchez, *Violence in Colombia, 1990-2000: Waging War and Negotiating Peace* (Wilmington: SR Books, 2001), 127, at 131.

76 See e.g. HRW, *Colombia's Killer Networks*; HRW, *The Ties That Bind*.

into displacement in order to deprive the rebel groups of their support.[77] In the early 2000s, a paramilitary demobilization program was initiated under the presidency of Álvaro Uribe; but many ostensibly demobilized paramilitary members returned to their former activities within a matter of months, as the demobilization spawned multiple successor organizations. These groups, while less organized than the paramilitaries before, and motivated more criminally than politically, have been operating in much the same way as their predecessors.[78] In particular, there have been several reports of tolerance, connivance, and collusion by the security forces in the activities of the successor groups.[79]

The atrocities committed by the paramilitaries, with varying degrees of state involvement, have formed the basis of several cases brought before the IACtHR. Two of these cases (*19 Merchants* and *Rochela*) took place within the pre-1989 legal framework; seven others (*Pueblo Bello*, *Ituango*, *Mapiripán*, *Operation Genesis*, *Yarce*, *Vereda La Esperanza* and *Omeara Carrascal*) in the post-1989 era, when paramilitaries were no longer legal in Colombia.[80] The Court found the state responsible in all of these cases, but while in *Pueblo Bello* and *Yarce* it did so on the basis of the state's failure to prevent the violations, in *Rochela*, *Mapiripán, Operation Genesis* and *Vereda La Esperanza* it found the paramilitaries' conduct attributable to the state. The judgments in *19 Merchants* and *Ituango*, meanwhile, give rise to some confusion as to the precise basis of responsibility. Finally, in *Omeara Carrascal*, the IACtHR found Colombia responsible for violating its *negative* obligations through

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77 See e.g. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia*, 28 February 2002, UN Doc. E/CN.4/2002/17, para. 147; Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia*, 8 February 2001, UN Doc. E/CN.4/2001/15, paras. 44, 88, 121, 130; Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Office in Colombia*, 9 March 2000, UN Doc. E/CN.4/2000/11, para. 82; Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Office in Colombia*, 16 March 1999, UN Doc. E/CN.4/1999/8, para. 117.

78 For more on these groups, see e.g. ICG Latin America Report No. 20, *Colombia's New Armed Groups*, 10 May 2007, https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/colombia-s-new-armed-groups; ICG Latin America Report No. 41, *Dismantling Colombia's New Illegal Armed Groups: Lessons from a Surrender*, 8 June 2012, https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/dismantling-colombia-s-new-illegal-armed-groups-lessons-surrender; HRW, *Paramilitaries' Heirs: The New Face of Violence in Colombia*, February 2010, https://www.hrw.org/sites/default/files/reports/colombia0210webwcover_1.pdf; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, 31 January 2012, UN Doc. A/HRC/19/21/Add.3, paras. 37-43.

79 See e.g. HRW, *Paramilitaries' Heirs*, 99-107; UN Doc. A/HRC/19/21/Add.3, para. 42.

80 The IACtHR noted Colombia's 'CONVIVIR' legislation (see note 75 above) in IACtHR, *Ituango Massacres* v. *Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 1 July 2006, Series C, No. 148, paras. 125(8)-125(12); but only considered it as part of the state's (limited) efforts at curbing the paramilitary phenomenon, see *ibid.*, paras. 134-135.

the conduct of its agents (collaborating with the paramilitaries), and as a result, saw no need to establish whether the conduct of the paramilitaries themselves was attributable to the state. But even where the Court did not find attribution, some of these cases – particularly *Yarce* – still shed some light on the IACtHR's analytical process, and are thus included in the examination below.

Since the pre-1989 legal framework could be seen as providing a basis for attribution under Article 5 ARSIWA (i.e. the private actor empowered by domestic law to exercise elements of governmental authority), the *19 Merchants* and *Rochela* cases are examined first to see on what grounds the IACtHR considered attribution: solely the legal framework, or also the factual relationship between the paramilitaries and the state. This is important to settle before proceeding any further, as only in the latter case can these two judgments be regarded as jurisprudence addressing control-based attribution. The section then turns to the case law concerning post-1989 human rights violations, analyzing the factors considered by the Court in examining control-based attribution, in order to identify those which may be decisive.

19 Merchants, decided in 2004, was the first case to come before the IACtHR on the subject of attributing paramilitary conduct to Colombia. The case concerned the abduction and murder of 19 merchants traveling in the country's Magdalena Medio region by paramilitaries in October 1987, with the evidence pointing to some degree of involvement by state organs. The Court took a two-pronged approach to analyzing the relationship between the paramilitary group and the state, contemplating both the pre-1989 legislation in force, and the factual links between the group and state organs.

With respect to the legislation on self-defense groups, the Court highlighted Colombia's role in the creation of such groups, its failure to rein them in once they transformed into paramilitary groups, and the local military authorities' encouragement of the particular group in question 'to assume an offensive attitude'.[81] The IACtHR then turned to the factual

81 IACtHR, *19 Merchants* v. *Colombia*, Merits, Reparations and Costs, Judgment of 5 July 2004, Series C, No. 109, paras. 118, 122, 124: 'The "self-defense groups" were formed lawfully under the protection of the said norms [see note 73 above], so they had the support of the State authorities. The State encouraged their creation among the civilian population, with the main purpose of assisting the law enforcement bodies in anti-subversive operations and to defend themselves from the guerrilla groups; in other words, at their inception, they did not have criminal purposes. The State gave them permission to own and carry arms, and also provided logistic support. However, many "self-defense groups" changed their aims and became criminal groups, commonly called "paramilitary" groups. […] In the instant case, the violations against the 19 tradesmen were perpetrated by one of these "self-defense" groups that became a "paramilitary" group, at a time when the State had not taken the necessary measure to prohibit, prevent and punish adequately the criminal activities of such groups, even though such activities were already notorious. […] Even though Colombia argues that it did not have a policy to encourage the formation of such criminal groups, that does not free the State of responsibility for the interpretation which, for many years, was given to the legal framework that protected such "paramilitary"

relationship between the local law enforcement forces and the paramilitary group, both in general and 'to establish specifically whether State agents participated directly in the planning and execution of the violations committed against the alleged victims.'[82] The Court concluded that at the time of the events, the paramilitary group in question 'had close ties to senior officers of the law enforcement bodies of the Magdalena Medio region, and received support and collaboration from them.'[83] With regard to the particular case, 'members of law enforcement bodies supported the "paramilitary personnel" in the acts that preceded the detention of the alleged victims and the crimes committed against them'; and the decision to kill the victims was taken at a paramilitary meeting 'held with the acquiescence of some members of the Army, since they agreed with the plan. There is even some evidence indicating that some members of the Army took part in the said meeting.'[84]

Having established the nature of the relationship between the paramilitary group and state organs, the IACtHR moved on to discuss Colombia's responsibility for the events in question. While the Court's analytical process is not entirely clear in doing so, it made reference to the following: (1) the need to attribute a specific act or omission to the state, in order to establish its responsibility; (2) the attributability of the conduct of state organs; (3) states' due diligence obligations; (4) the need 'to demonstrate that public authorities have supported or tolerated the violation of the rights established in the Convention' to establish state responsibility; and that (5) in cases of forced disappearance, 'the obligation to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention has been disregarded.'[85] Having highlighted these factors and established the element of breach, the IACtHR declared Colombia responsible for violating the victims' right to life, humane treatment and personal liberty 'in relation to' Article 1(1) of the American Convention on Human Rights.[86] The Court's conclusion is highly ambiguous as to the basis of responsibility; it is difficult to draw any firm conclusions from its reasoning. Nonetheless, on balance, the emphasis on these factors suggests

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groups, for the disproportionate use of the arms given to them, and for failing to adopt the necessary measures to prohibit, prevent and punish adequately the said criminal activities. Besides, the military authorities of Puerto Boyacá [a city in the region] encouraged the "self-defense" group that controlled the said region to assume an offensive attitude towards the guerrilla, as happened in this case, because they believed the tradesmen collaborated with the guerrilla groups.'

82 *Ibid.*, para. 125.

83 *Ibid.*, para. 134.

84 *Ibid.*, para. 135. See also *ibid.*, paras. 85-86, 124, 134-136.

85 *Ibid.*, paras. 139-142; see also *ibid.*, para. 156. On the organizational requirement of the state apparatus, see also Chapter 3, notes 124-126 and accompanying text above.

86 Article 1(1) of the American Convention on Human Rights, Costa Rica, 22 November 1969, in force 18 July 1978, 1144 UNTS 123 stipulates state parties' obligation to 'respect' and 'ensure' the rights included in the Convention.

that the IACtHR may have found the state responsible for failing to protect the merchants, rather than for the acts of the paramilitaries as such. In light of the Court's subsequent jurisprudence, though, this would be a rather surprising conclusion, as the IACtHR later found similar degrees of involvement to constitute sufficient grounds for control-based attribution. What is more, the Court's later classifications of its own case law cite *19 Merchants* as an example of such attribution.[87]

Turning to the 2007 case of the *Rochela Massacre*, this was in many ways closely linked to *19 Merchants*, as it concerned the abduction and murder of judicial investigators who had been investigating the events of the former case.[88] The massacre took place in January 1989, which meant that the Colombian legislation providing for the legality of 'self-defence groups' was still in force at the time.[89] Moreover:

> [T]here were legal regulations in force which expressly authorized that civilians be armed, trained, and organized by the State to receive orders from officers of the Armed Forces such that they might participate in and cooperate with security operations of the State. […] [T]hese legal regulations were applied in the instant case.[90]

In other words, it appears at first glance that the legal framework in the particular case went even beyond the general legalization and encouragement provided to paramilitaries. Furthermore, state agents were involved in the particular paramilitary group's activities in several different ways: promoting the group's creation; allowing them to operate from an army base; providing them with training, army uniforms and other equipment; carrying out joint patrols; and making payments to paramilitary members hired as guides or informants.[91] All this state support was in conformity with the counter-guerilla regulations.[92] Members of the armed forces even allegedly participated in some of the meetings where the abduction and murder of the investigators was decided and planned.[93]

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87 For a discussion of *19 Merchants*' place within the Court's case law, see notes 165-175 and accompanying text below.

88 Fifteen investigators were kidnapped, twelve of them murdered; three miraculously survived the attack, but only because the paramilitaries believed them to be dead: IACtHR, *Rochela Massacre* v. *Colombia*, Merits, Reparations and Costs, Judgment of 11 May 2007, Series C, No. 163, paras. 74-75, 105-120. The victims had been investigating the events of the *19 Merchants* case.

89 The legal framework was thus essentially the same as in *19 Merchants*, see *Rochela*, paras. 82-87, noting at para. 84 that 'Decree 0180 of January 27, 1988, which classified some conduct as criminal, is the legal instrument that differentiates the instant case from the *Case of the 19 Tradesmen*', referring to Decree 0180 of 1988, Diario Oficial No. 38.191, 27 January 1988.

90 *Rochela*, para. 89; see also para. 88.

91 *Ibid.*, paras. 94-100.

92 *Ibid.*, para. 96.

93 *Ibid.*, paras. 98-99.

In light of such evidence of state participation, the Court found the conduct of the paramilitary group attributable to Colombia, concluding that:

> [T]he State allowed the involvement and cooperation of private individuals in the performance of certain duties (such as the military patrol of public order areas, the employment of arms designed for the exclusive use of the armed forces or the performance of military intelligence activities), which, in general, are within the exclusive competence of the State and where the State has a special duty to act as a guarantor. Therefore, the State is directly responsible, either as a result of its acts or omissions, for all the activities undertaken by these private individuals in the performance of the foregoing duties[.][94]

Although the IACtHR made no reference to the ILC's work on state responsibility, this passage seems to indicate that the basis of attribution was something akin to Article 5 ARSIWA.[95] The Court based its decision on the fact that the state allowed private persons to participate 'in the performance of certain duties […], which, in general, are within the exclusive competence of the State' – or, to put it in the terms of Article 5, these persons had been 'exercising elements of governmental authority'. Furthermore, the scope of Colombia's responsibility was confined to where these persons had been 'acting in that [governmental] capacity' as required by Article 5; this is indicated by the IACtHR's reference to 'activities undertaken […] in the performance of the foregoing duties'. Nonetheless, there is one subtle, but important difference between the Court's approach and that of the ILC. Article 5 ARSIWA requires that the persons exercising governmental authority are 'empowered by the law of that State' to do so.[96] The IACtHR, however, made no such qualification as to how Colombia allowed this to happen. It came to its conclusion in light of *all* the circumstances, including not only the legal framework, but also the extensive factual evidence on the army's role in relation to the paramilitary group. Yet the Court did not explain what weight it assigned to each of these two factors – legal and factual – respectively; or even whether the legal and factual requirements for such a finding were disjunctive or cumulative.

In the absence of further clarification, the Court's approach can be interpreted both as broadening and as narrowing the scope of Article 5 ARSIWA. On the one hand, it seems to suggest that attribution might be possible even in situations where the state allows private persons to exercise exclusive state competences *without* explicit legal authorization. On the other hand,

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94 *Ibid.*, para. 102.

95 See also Ó.M. Reina García, 'La responsabilidad internacional del Estado colombiano en la jurisprudencia de la Corte Interamericana de Derechos Humanos' (2009) 7 *Iustitia* 69, noting the same at 82, note 42, but without going into further analysis on the differences.

96 See further ARSIWA Commentary to Article 5, para. 7.

based on the domestic legal framework alone, reliance on Article 5 is arguably sufficient grounds for attributing the conduct of paramilitaries to Colombia in the entire period between 1965 and 1989; yet the Court was careful to point out early on in *Rochela* that it was not passing judgment on the paramilitary phenomenon in general.[97] Furthermore, in *19 Merchants*, the Court appears to have held Colombia responsible only for violating its own duty to protect, but not directly for the paramilitary conduct – despite the fact that the events of the case took place in 1987, under the same legal framework.[98]

How can the – at least seemingly – different outcomes in *19 Merchants* and *Rochela* be explained? There are two factors in particular which may be able to shed light on this matter. Firstly, the *Rochela* case was decided about three years after *19 Merchants*, and it was the victims' representatives in *Rochela* who brought the more specific legal regulations to the Court's attention. It is therefore possible that at the time when the Court rendered its judgment in the *19 Merchants* case, it was simply not aware of them. Given that one of these regulations had already been discussed and quoted in a publicly available 1996 Human Rights Watch report,[99] this seems somewhat unlikely – but it may still be the case that the parties simply did not submit the report to the Court, which did not have the capacity to conduct its own research into the matter beyond the parties' submissions. Secondly, although the state's involvement had also been significant in *19 Merchants*, it had not been quite as far-reaching as in *Rochela*.

In the end, whatever the reason for the Court deciding the way it did, the *19 Merchants* and the *Rochela* cases both show that the IACtHR did not consider the general legal framework in place between 1965 and 1989 as sufficient grounds for attribution. Accordingly, the Court's analysis in these cases must also be regarded as relevant for control-based attribution.

The Court's unwillingness to attribute paramilitary conduct to Colombia based solely on the pre-1989 legislation brings special relevance to the 2005 *Mapiripán Massacre* case, whose facts took place *after* the paramilitaries had already been declared illegal. In July 1997, approximately one hundred members of the AUC landed at an army-controlled airport, and proceeded in trucks provided by the military to the town of Mapiripán. They surrounded the town and, in the course of five days, tortured,

97 *Rochela*, para. 32.

98 See notes 81-87, 89 and accompanying text above; and see *Rochela*, para. 88, pointing out that the two specific legal regulations had been 'approved by the Military General Commander on April 9, 1969 and June 25, 1982, respectively.' Since the facts of the *Rochela* case took place shortly after those of the *19 Merchants* case, and the regulations were applicable at the time of the *Rochela* case, it may reasonably be assumed that these regulations were also in force at the time of the *19 Merchants* case.

99 HRW, *Colombia's Killer Networks*, Chapter II, notes 19-22 and accompanying text.

dismembered and murdered dozens of civilians.[100] While the paramilitary incursion had been 'carried out […] with the collaboration, acquiescence, and omissions by members of the Army',[101] the Court declared that:

> There is in fact no documentary evidence before this Court proving that the State directly conducted the massacre or that there was a dependent relationship between the Army and the paramilitary groups or a delegation of the public functions of the former to the latter.[102]

The IACtHR's statement effectively excludes attribution on any of the previously discussed grounds under ARSIWA. It points out the lack of three factors, which are best addressed here in order of decreasing formalization. Firstly, since there was no (official) delegation of public functions, the paramilitary group cannot be seen as 'exercising elements of governmental authority' (Article 5 ARSIWA). Secondly, as the state did not directly conduct the massacre, it was not carried out 'under the direction' of the state (Article 8 ARSIWA). Thirdly, the lack of a dependent relationship makes it unlikely that the paramilitary group could be considered a *de facto* organ of Colombia (Article 4 ARSIWA).[103] Finally, although taken separately, these exclusions would still leave room for attribution through effective or overall control (Article 8 ARSIWA), reading the Court's statement as a whole suggests that attribution would not be possible through either of these control tests, either.

This reading of the IACtHR's statement is also supported by the fact that the Court ultimately did not rely on the ARSIWA at all. On the contrary: although Colombia based its arguments against attribution specifically

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100 IACtHR, *Mapiripán Massacre* v. *Colombia*, Merits, Reparations and Costs, Judgment of 15 September 2005, Series C, No. 134, paras. 96.30-96.47. Although the number of victims is not entirely clear (due, in part, to some fraudulent claims of victimhood, see e.g. 'Con 12 judicializados, cierran ciclo de falsas víctimas de Mapiripán', *El Tiempo*, 23 May 2017, http://www.eltiempo.com/justicia/investigacion/termina-investigacion-por-falsas-victimas-de-mapiripan-91648), the state 'explicitly acknowledged' the basic facts of the case, see IACHR Press Release No. 114/11, *With Regard to Recent Events Surrounding the Mapiripán Massacre in Colombia*, 31 October 2011, http://www.oas.org/en/iachr/media_center/PReleases/2011/114.asp.

101 *Mapiripán*, para. 96.43; see also *ibid*., para. 96.44 (emphasis added): 'Omissions by the VII Brigade are not merely non-fulfillment of its legal duty to control the area, [but] rather, according to the [Colombian] Attorney General's Office, they involved "abstaining from action, necessarily in connivance with the illegal armed group, as well as effective positive attitudes tending to enable the paramilitary to attain their objective, as *they undoubtedly would not have been able to act without that support*."'

102 *Ibid*., para. 120.

103 See notes 10, 42-46 and accompanying text above on the relationship between dependence and control.

on the Articles on State Responsibility,[104] the IACtHR was of a different opinion regarding their applicability. The Court stated that:

> While the American Convention itself explicitly refers to the rules of general International Law for its interpretation and application, the obligations set forth in Articles 1(1) and 2 of the Convention are ultimately the basis for the establishment of the international responsibility of a State for abridgments to the Convention. Thus, said instrument constitutes *lex specialis* regarding State responsibility, in view of its special nature as an international human rights treaty *vis-à-vis* general International Law. Therefore, attribution of international responsibility to the State […] must take place in light of the Convention itself.[105]

In other words, the Court effectively dismissed the ARSIWA as providing the grounds for attribution – at least in international human rights law. Instead, holding up the American Convention as *lex specialis*, it went on to declare that 'attribution of […] responsibility to a State for acts by State agents or private individuals must be established based on the specificities and circumstances of each case'.[106]

In the case at hand, the IACtHR relied on the state's acknowledgement of facts, as well as Colombian domestic court decisions related to the *Mapiripán* case to show that 'the actions of said State agents constitute true acts of collaboration, and not mere omissions, as the State argued before this Court.'[107] More specifically, the army helped the AUC enter the area, allowed them to move unrestricted through military training ground, provided logistical support, moved the local army battalion away from the area, and tried to cover up the massacre;[108] and army officials were charged and convicted as co-perpetrators and accomplices under domestic law.[109] Faced with this evidence, the Court concluded that:

> [W]hile the acts that took place between July 15 and 20, 1997, in Mapiripán, were committed by members of paramilitary groups, the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tol-

104 *Mapiripán*, para. 97, also noted by the Court in para. 102. The state also argued 'that said responsibility derives from irregular actions by its agents and not from a policy of the State or of its Institutions' (para. 97(a)).

105 *Ibid.*, para. 107 (footnote omitted).

106 *Ibid.*, para. 113; the Court later affirmed this in *Pueblo Bello*, para. 116, see note 60 above.

107 *Mapiripán*, para. 118. See also *Diplomatic Cable from the US Embassy in Bogotá to the US Department of State*, 5 March 1999, para. 10, available at https://nsarchive.files.wordpress.com/2012/07/19990305-part5.pdf. The state's acknowledgement of the facts should not be confused with 'acknowledgement and adoption' under Article 11 ARSIWA; while the latter is a ground for attribution, the former is simply a possibility provided for the state under the Inter-American system to acknowledge (i.e. not to contest) certain facts alleged by the victim(s) or the Commission, and does not constitute a ground for attribution in and of itself.

108 *Mapiripán*, para. 116.

109 *Ibid.*, paras. 117-118.

> erance, expressed through several actions and omissions, of the Armed Forces of the State, including high officials of the latter. […] [B]ased on an analysis of the facts acknowledged by the State, it clearly follows that both the behavior of its own agents and that of the members of the paramilitary groups are attributable to the State *insofar as they in fact acted in a situation and in areas that were under the control of the State*. In point of fact, the incursion by the paramilitary in Mapiripán was an act planned several months before July 1997, carried out with full knowledge, logistic preparations and collaboration by the Armed Forces[.][110]

According to this passage, the ultimate basis for attribution seems to be that the paramilitary group 'acted in a situation and in areas that were under the control of the State'. However, the mere fact that the violation took place in a state-controlled area is not sufficient to attribute the conduct of the paramilitaries to the state in question – although it may have greater relevance for establishing that the state has violated its duty to protect under the ACHR.[111] The IACtHR's case law itself supports this in the 2006 *Pueblo Bello* case, which similarly occurred in a military-controlled area. There, the Court, while stressing the state's special position of guarantor and enhanced duty to protect in these areas, did not attribute paramilitary conduct to the state.[112] This leaves having acted 'in a situation […] under the control of the State' as the decisive factor. But what exactly does such a situation entail? Although the Court does not specifically elaborate on this concept, the context of its statement does offer some guidance. Throughout the section on attribution, the judgment repeatedly stresses the collaboration between the paramilitary group and the army,[113] which suggests that it was (the extent of) this collaboration which led the Court to attribute the paramilitaries' conduct to Colombia. There is also evidence to support this in the concluding paragraph on attribution, which held that:

> [T]he international responsibility of the State has resulted from a set of actions and omissions by State agents and private citizens, conducted in a coordinated, parallel or linked manner, with the aim of carrying out the massacre. First of all, said agents collaborated directly or indirectly with the acts committed by the paramilitary, and secondly, they were remiss regarding their duty to protect the victims against said acts and regarding their duty to effectively investigate them, all of which has led to violations of human rights embodied in the Convention. In other words, since the acts committed by the paramilitary against the victims in the instant case cannot be considered mere acts amongst private individuals, as they are linked to actions and omissions by State officials, the State is found to be responsible for said acts, based on non-fulfillment of its […] treaty obligations to ensure the effective exercise of human rights in said relations amongst individuals.[114]

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110 *Ibid.*, para. 120 (emphasis added).
111 See Chapter 3 above.
112 For more on this case, see Chapter 3, notes 94-96 and accompanying text.
113 *Mapiripán*, paras. 118, 120, 123.
114 *Ibid.*, para. 123.

In the end, this overall conclusion sends a mixed message, however. At first, the Court clearly distinguishes between attributing the conduct of state agents (and paramilitaries) to the state, and the separate violation of the duty to protect. But in the following sentence, the distinction between the two all but disappears, and the IACtHR's reference to Colombia's failure 'to *ensure* the effective exercise of human rights' suggests that the state's violation of its duty to protect is what supplies the (main) grounds for attribution.[115] This duty to protect, however, is a rule regarding breach, not attribution, in the 'breach-plus-attribution-equals-internationally-wrongful-act' formula – and one that would ordinarily lead to attributing only the conduct of state organs.[116] Ultimately, while the Court is unequivocal in its determination that the paramilitary group's conduct is indeed attributable to the state, it remains somewhat unclear how exactly the IACtHR reached this conclusion. The judgment would benefit from greater clarity both as regards the precise basis for attribution, as well as the necessary degree of collaboration.

Ten months after *Mapiripán*, in July 2006, the Court issued its judgment in the *Ituango* case, which concerned massacres carried out by paramilitaries in two towns in June 1996 and October-November 1997.[117] The IACtHR stated that Colombia's responsibility arose 'from the acts of omission, acquiescence and collaboration by members of the law enforcement bodies' in that region, noting that:

> State agents were fully aware of the terrorist activities perpetrated by these paramilitary groups on the inhabitants of La Granja and El Aro. Far from taking measures to protect the population, members of the National Army *not only acquiesced* to the acts perpetrated by the paramilitary groups, *but at times collaborated with and took part in them directly*. Indeed, the participation of State agents in the armed raids was not limited to facilitating the entry into the region of the paramilitary groups, but they also failed to assist the civilian population during the incursions, leaving them totally defenseless.[118]

But while the Court used terms similar to those in *Mapiripán* (acquiescence and collaboration), and even referred to direct participation, it did not employ the terminology of attribution, nor did it declare that Colombia was (directly) responsible for the acts of the paramilitaries, as it did in *Rochela* and *Mapiripán*.[119] Instead, the IACtHR – in addition to specifically highlighting that the right to life entailed not only a negative, but also a positive obligation – stressed 'the State's obligation to adopt positive measures of prevention and protection' in the penultimate paragraph of the section.[120]

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115 *Ibid*. (emphasis added); cf. note 124 and accompanying text below.
116 See Chapter 3 above on the duty to protect.
117 For the facts of the case, see *Ituango*, para. 125.
118 *Ituango*, paras. 132 and 133, respectively (emphases added).
119 *Rochela*, para. 102; *Mapiripán*, para. 123.
120 *Ituango*, paras. 130 and 137, respectively.

It then went on to conclude that 'the State failed to comply with its obligation to *guarantee* the right to life', which – especially when read in light of the whole section – would suggest that Colombia was in fact held responsible for its own violation of the duty to protect under Article 1(1) ACHR, rather than for the conduct of the paramilitaries as such.[121] Nonetheless, the IACtHR's subsequent classifications of its own jurisprudence list this case as one of those where the Court had established control-based attribution based on 'acquiescence or tolerance'.[122]

The apparent confusion in *Mapiripán* and *Ituango* surfaced again, this time even more explicitly, in the 2013 *Operation Genesis* judgment. The case concerned two concurrent operations carried out in 1997 by the Colombian armed forces and paramilitary groups in broadly the same area, where the paramilitaries murdered a local inhabitant and forced the displacement of several settlements.[123] In discussing the generally applicable considerations to a case of this kind, the IACtHR noted that:

> The State's international responsibility can also be generated by the attribution to it of acts that violate human rights committed by third parties or private individuals when the State fails to comply, by act or omission of its agents who are in a position of guarantors, with its obligation to take the necessary measures to ensure the effective protection of human rights in inter-personal relations, contained in Articles 1(1) and 2 of the Convention.[124]

In essence, the Court argued that the failure to comply with the duty to protect is a ground for attribution, further illustrating its tendency to blur the two concepts.

With regard to the specific facts of the case, the Court concluded that 'acts of collaboration between members of the Armed Forces who executed Operation Genesis and the paramilitary units that were implementing "Operation Cacarica" occurred', and that the paramilitary groups would not have been able to carry out Operation Cacarica 'without the collaboration, or at least the acquiescence of State agents'.[125] On this basis, the Court proceeded to hold that:

> [T]he cruel, inhuman and degrading acts […], committed by members of the paramilitary groups, *can be attributed to the State owing to the acquiescence or collaboration* that agents of the Armed Forces provided to the operations of those groups, which facilitated their incursions into the communities of the Cacarica and encouraged and permitted the perpetration of this type of act. *Consequently,*

121 *Ibid.*, para. 138.
122 See notes 165-175 and accompanying text below.
123 For the facts of the case, see IACtHR, *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis)* v. *Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 20 November 2013, Series C, No. 270, paras. 81-196.
124 *Ibid.*, para. 224.
125 *Ibid.*, para. 280.

> *the State is responsible for having failed to comply with its obligation to prevent violations* […], as well as to investigate the facts effectively, in relation to the general obligation of guarantee recognized in Article 1(1) of this instrument.[126]

In other words, the IACtHR attributed paramilitary conduct to the state of Colombia on the basis of acquiescence or collaboration; but then went on to hold that such attribution is the basis for finding a violation of the duty to protect – this latter being a reversal of the Court's previous argument that the failure to comply with the duty to protect is a ground for attribution. Granted, if a certain breach is attributable to the state, it is almost certain that the conditions for a violation of the duty to protect are also met: the state will have known about the catalyst event, it will have had means to counteract it, and will have failed to do so.[127] But if the IACtHR wanted to make a finding of both, it should have followed these analytical steps, as attribution and the duty to protect are distinct concepts, each with its own rules, which are not interchangeable.

The next case to come before the IACtHR was *Yarce and others*, decided in 2016, which concerned the forced displacement of several women human rights defenders and the killing of one of them, Ana Teresa Yarce, by paramilitaries in Medellín in the early 2000s. Departing from its previous practice, the Court – for the first time – analyzed the state's obligations to respect and to guarantee the rights at issue separately. With regard to the duty to respect Ms. Yarce's right to life, the IACtHR – also for the first time – formulated the contours of a general rule, holding that according to its jurisprudence, 'in order to find state responsibility in relation to the acts of third parties, it is not sufficient to point to a general context' of links between the two; instead, 'it is necessary that in the concrete case, acquiescence or collaboration by the state can be deduced from the circumstances' in question.[128] As neither the Inter-American Commission, nor the applicants have been able to point to anything more than a general context, the Court found that Colombia was not responsible for violating its duty to respect the right to life.[129]

As regards the duty to respect the cluster of rights violated by forced displacement, the Court's analysis started with pointing out that a finding of state responsibility required establishing 'the *participation* of state agents in the concrete acts which led to the [applicants'] displacement'.[130] The IACtHR then went on to conclude – referring back to its holding on the right to life – that a general context of 'acquiescence or tolerance, collaboration,

126 *Ibid.*, para. 281.

127 For more on the duty to protect, see Chapter 3 above. Note, though, how the Court did not follow its usual methodology in determining a violation of the duty to protect in this case: *Operation Genesis*, para. 281.

128 IACtHR, *Yarce* et al. v. *Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 22 November 2016, Series C, No. 325, para. 180 (translation by author).

129 *Ibid.*

130 *Ibid.*, para. 219 (emphasis added; translation by author).

assistance or support' is insufficient to find the state responsible. Rather, such 'acquiescence (or tolerance, collaboration, assistance or support)' must be established in the specific circumstances, or the circumstances must indicate that the third parties 'could not have succeeded without the acquiescence or collaboration of the state'.[131] This suggests that 'participation' has been given a broad meaning by the Court, referring not only to direct participation in the execution of the acts, but also participation in their planning or the provision of assistance for such execution.[132]

All in all, the *Yarce* case constitutes a remarkable contribution to the IACtHR's jurisprudence in two respects. Firstly, the Court drew a clear distinction between negative and positive obligations in its analysis, in a case that concerned both.[133] Secondly, the IACtHR made explicit what had already been crystallizing from its case law: that in order to establish the state's responsibility for violating its duty to respect, its involvement must be proven regarding the specific *conduct* under examination, rather than the particular (type of) *actor* in question. Note that in formulating this rule, the Court initially spoke of state responsibility 'in relation to' the conduct of third parties, but later explicitly denoted responsibility 'for' the conduct of third parties.[134]

The Court's following case on control-based attribution, *Vereda La Esperanza* from 2017, provided further guidance on what kind of proof the IACtHR deems sufficient in situations of state involvement. The case concerned a series of forced disappearances and an extrajudicial execution in the department of Antioquia over the course of six months in 1996, committed by paramilitaries. As Colombia had acknowledged its responsibility for failing to guarantee the rights in question, the judgment focused exclusively on whether the state was responsible for the conduct of the paramilitaries as well, through control-based attribution.[135] In examining this issue, the Court reaffirmed its position, articulated in *Yarce*, that a finding of state responsibility 'in relation to the conduct of third parties' necessitated more than a general context of collaboration or acquiescence

131 *Ibid.*, para. 220 (translation by author).

132 This interpretation is further supported by Colombia's argument in the case (*ibid.*, para. 177) that 'there is no indication which would point to state agents having committed the killing *either directly or indirectly (in connivance with third parties)*' (translation by author, emphasis added). Cf. *ibid.*, para. 180, where the Court noted that the domestic judgments related to Mrs. Yarce's murder did not find that it was carried out with the participation of state agents 'in any form' ('en alguna forma').

133 In other cases where the Court was quite clear on attribution, Colombia had acknowledged its responsibility for violating its positive obligations, which meant that the IACtHR only had to address control-based attribution, rather than both issues at the same time, see *Rochela*, paras. 10-15, 29-39, 66-68 and *Vereda La Esperanza*, note 135 below.

134 *Yarce*, paras. 180, 220.

135 IACtHR, *Vereda La Esperanza* v. *Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August 2017, Series C, No. 341, paras. 16-17, 21-24, 146-148.

between the state and the paramilitary group, requiring 'acquiescence or collaboration' in the particular circumstances of the case.[136]

The IACtHR, weighing up the evidence adduced by the parties, concluded that 'the acts took place in the framework of a collaborative relationship between the military forces stationed in the area' and the paramilitary group.[137] In arriving at this conclusion, the Court highlighted the following factors in particular: (1) threats received by some of the inhabitants from the Army a few days before the events; (2) the disappearance of some of the victims taking place after they had accused the Army of being responsible for the events in the area; (3) the absence of reports of hostilities between the Army and the paramilitary group operating in the area; and (4) the free movement of the paramilitaries using the Medellín-Bogotá highway, without being intercepted at any one of the multiple military checkpoints set up along that road.[138] As a result, the IACtHR found the disappearances attributable to Colombia, by reason of 'the support and acquiescence provided by agents of the security forces for the actions of this paramilitary group, which facilitated the incursions into Vereda La Esperanza and enabled or permitted the commission of these acts contrary to an international obligation'.[139]

This judgment indicates that from an evidentiary standpoint, the requirement of specificity is not quite so strict as the Court's work would otherwise suggest. Despite its previous holding that a general context of acquiescence or collaboration is not sufficient for attribution, the Court did not demand proof of state involvement in every instance of disappearance. Instead, it was willing to rely on a pattern of evidence showing involvement in the acts of a particular paramilitary group committed over a limited period in a specific geographic area.[140] In other words, the IACtHR is satisfied by contextual – circumstantial – evidence, as long as the circumstances are specific enough to indicate state involvement in the particular conduct under examination.

At the same time, the Court's reference to the security forces having 'enabled or permitted' the commission of the paramilitary group's acts suggests a return to the blurring of distinction between control-based attribution and the duty to protect, despite the clear separation of the two in *Yarce* and the fact that *Vereda La Esperanza* exclusively concerned attribution.

There *is* a more favorable reading of the judgment, though, which allows maintaining the integrity of its logic concerning attribution. In that reading, the IACtHR's reference is best explained by recalling its holding

136 *Ibid.*, para. 152.
137 *Ibid.*, para. 166.
138 *Ibid.*, para. 167. Although these four were the only factors specifically highlighted by the IACtHR in its conclusion, the Court did note that these facts appear 'among others', with its previous analysis referring to no less than twelve different elements, see *ibid.*, paras. 149-165.
139 *Ibid.*, para. 168 (translation by author).
140 Note that not all of the factors cited by the Court applied to *all* of the victims, for instance.

in *Yarce* that one way of establishing control-based attribution is to demonstrate that the paramilitaries could not have successfully carried out their acts without acquiescence or collaboration from the state. The reference to enabling or permitting the paramilitary group's conduct could be read as a different formulation of this way of establishing attribution, rather than evidence of a conceptual confusion between control-based attribution and the duty to protect under the ACHR. That said, given how close this formula – and the accompanying threshold of acquiescence (or collaboration) – is to the method of establishing a violation of the duty to protect, maintaining the internal integrity of the IACtHR's reasoning still does not necessarily mean that the Court's approach is unproblematic, as will be discussed in the concluding remarks below.

The latest case to be decided by the IACtHR on this issue was that of *Omeara Carrascal* in November 2018. The case concerned the attack on (and subsequent death of) Noel Emiro Omeara Carrascal, the forced disappearance and execution of his son, Manuel, and the attack on (and subsequent death of) Manuel's father-in-law, Héctor Álvarez Sánchez, all alleged to have been carried out by paramilitaries with the collaboration of state agents in 1994.[141] The Colombian state – for the first time – accepted responsibility not only for the omissions, but also for the actions of its agents 'in conjunction with illegal armed groups, who acted in confluence in the attack and subsequent death' of Noel Emiro Omeara Carrascal and in the forced disappearance and execution of his son.[142] At the same time, though, the language employed suggests that while the state accepted responsibility for the role played by its own agents (i.e. *de jure* organs) in the events, Colombia did not consider the conduct of the paramilitaries to be attributable. Indeed, this was the reading of the IACtHR as well, which interpreted the recognition as 'includ[ing] the direct participation, collaboration or acquiescence of state agents in the facts of the case. Therefore, this Court considered that it is not necessary to rule on the alleged direct responsibility of the State for the actions of illegal armed groups.'[143]

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141 For the facts of the case, see IACtHR, *Omeara Carrascal* et al. v. *Colombia*, Merits, Reparations and Costs, Judgment of 21 November 2018, Series C, No. 368, paras. 70-168. Noel Emiro Omeara Carrascal was having a meal in a restaurant in Aguachica, opposite the local office of the National Anti-Abduction and Anti-Extortion Unit, when four civilian-clad armed men entered the restaurant and fired shots, with the aim of killing José Erminso Sepúlveda Saravia, Private Secretary to the Town Hall and member of a political group widely perceived as linked to the former M-19 rebel group. Sepúlveda Saravia died the same day, Omeara Carrascal died of his injuries six months later. His son, Manuel Guillermo Omeara Miraval, was trying to find out who were responsible for his father's death, when he was abducted by a group of armed men; his corpse was found a month later. His father-in-law, Héctor Álvarez Sánchez made a statement to the regional prosecutor's office in Barranquilla regarding his disappearance, and was shot from a motorcycle while entering his home a month and a half later; he was rendered quadriplegic and unable to speak, and died almost six years later.

142 *Ibid*., paras. 16(a) and 19(a) (translation by author).

143 *Ibid*., para. 36 (translation by author).

With respect to the third victim, Héctor Álvarez Sánchez, Colombia only admitted to omissions in the investigation of the attack on him, not to omissions in preventing the attack or to actions.[144] This left the Court to examine whether the state had violated its duty to respect (and guarantee, in terms of prevention) the victim's right to life and physical integrity. In other words, the IACtHR had to analyze whether Colombia bore responsibility for the attack itself, breaching its negative (and not only positive) obligations. In doing so, the Court reaffirmed its previous jurisprudence, according to which a general context of links is insufficient 'to establish state responsibility for a violation of the duty to respect in relation to the conduct of third parties'; instead, it is necessary to prove the state's 'acquiescence or collaboration in the particular circumstances of the case'.[145] In the case of Héctor Álvarez Sánchez, those circumstances were the following: (1) members of the paramilitary group later admitted that the attack had been ordered by the head of the group and carried out with the participation of its members, and that in the time-period when the attack took place, there had been 'connivance' between the state security forces and the paramilitary group; (2) the victim had made a statement to the regional prosecutor's office regarding the disappearance of his son-in-law, including that the latter believed the paramilitaries or a unit of the state security forces to be responsible for his father's death (but more likely the paramilitaries), and citing further indications of the paramilitaries' involvement in the disappearance; (3) the victim's family members testified that upon signing his statement, he noted that 'he had signed his death sentence', while the prosecutor remained silent and made no comment.[146] In light of these circumstances, the Court found Colombia responsible for violating the duty to *respect* the victim's right to life and personal integrity, given that 'the collaboration between state agents and members of the Prada family, who have permitted the attack against him to take place, has been proven'.[147] Like the state's admission in respect of the Noel Omeara Carrascal and his son, the Court's conclusion was clear as to Colombia's responsibility for violating its negative obligations, but left the question whether the conduct of the paramilitary group is attributable to the state unanswered.

There are two elements that are particularly striking about this case. Firstly, there appears to be very little (direct) evidence tying Colombia to the attack. This evidence consists of statements that there was 'connivance' between the state security forces and the paramilitaries in the relevant time-period and locality, and the ostensible link (not quite made explicit by the Court) whereby complaints to local law enforcement invited reprisals from the paramilitaries.[148] This affirms once again that while it demands

144 *Ibid.*, paras. 22, 174.
145 *Ibid.*, para. 179 (translation by author).
146 *Ibid.*, paras. 180-183.
147 *Ibid.*, para. 188 (translation by author).
148 Cf. *Vereda La Esperanza*, paras. 149-165, 167.

proof of the state's 'acquiescence or collaboration in the particular circumstances of the case', the IACtHR is willing to rely on highly circumstantial evidence to establish said acquiescence or collaboration. Secondly, while the Court's previous case law employed language to the effect of attributing the conduct of the paramilitaries to Colombia, the state's responsibility for violating its duty to respect in this case was established solely on the basis of the – acquiescing or collaborative – conduct of its agents.

4.3.3 The Venezuelan Cases: *Ríos*, *Perozo*, and *Castillo González*

Last, but not least, brief mention should be made of three Venezuelan cases before the IACtHR. While none of these cases addressed attribution in great depth, the reasoning applied nonetheless helps shed light on the Court's process and illustrate where the limits of attribution may lie according to the IACtHR.

The *Ríos* and *Perozo* cases – decided in 2009 – both concerned private acts of violence against journalists critical of the government. The applicants claimed that inflammatory statements by Venezuelan political leaders had been construed by supporters of the government as authorization to carry out the verbal and physical attacks in question.[149] The Court dismissed this argument, holding that the statements constituted an exercise of free speech, and that the state could not be held responsible for the actions of the government's political supporters.[150]

The 2012 *Castillo González* case, meanwhile, concerned the murder of a (former) human rights defender by unknown assailants – alleged to be paramilitaries – in 2003.[151] It is instructive to see how the Court organized its analysis of the case, drawing a distinction between 'alleged attribution of state responsibility' based on the 'acquiescence, tolerance or involvement' of state agents on the one hand, and 'alleged attribution of state responsibility' based on the obligation of prevention on the other hand.[152] Admittedly, the terminology of 'attributing responsibility' cannot be interpreted as referring to attribution of *conduct* in this case, especially as it is used with regard to both situations. However, when read in light of the Court's previous jurisprudence, it appears that the first scenario would indeed entail attributing the conduct of private actors, while the second would be limited to addressing the duty to protect under Article 1(1) ACHR. This interpretation is also supported by the fact that treating the first scenario as part of

149 *Ríos*, paras. 112-149; *Perozo*, paras. 123-161.

150 *Ríos*, paras. 129-149, particularly 135, 149; cf. *Perozo*, paras. 141-161, particularly 147, 161.

151 For the facts, see IACtHR, *Castillo González* et al. v. *Venezuela*, Merits, Judgment of 27 November 2012, Series C, No. 256, paras. 34-96.

152 *Ibid.*, paras. 109-116 and 117-132, respectively. Note that what has been translated into English as 'involvement' appears in the original Spanish version of the judgment as 'participación'; this accords with the broad construction of 'participation' discussed above in *Yarce*, see notes 130-132 and accompanying text.

the duty to protect would render the distinction meaningless. The Court's distinction thus implies that the threshold for attribution can be set as low as mere 'acquiescence' or 'tolerance' – concepts which are more commonly associated with duties of protection.[153] That said, the outcome of the Court's analysis in the case fails to settle this question decisively.

4.3.4 Concluding Remarks

Overall, the IACtHR has followed a markedly different path on the question of attribution from that of the ICJ or the ICTY, holding up the American Convention on Human Rights as *lex specialis* and – at least initially – favoring a case-by-case approach instead of developing general tests of attribution. Nonetheless, over time, the Court identified (the contours of) a general rule on control-based attribution, stating in *Yarce* that 'in order to find state responsibility in relation to the acts of third parties, it is not sufficient to point to a general context [of links], but it is necessary that in the concrete case, acquiescence or collaboration by the state can be deduced from the circumstances [of the case].'[154] The sum of the Court's jurisprudence reveals two – likely interrelated – tendencies: (1) setting low thresholds of attribution; and (2) maintaining a degree of conceptual confusion between the duty to protect under Article 1 ACHR and the attribution of private conduct. In addition, the IACtHR's approach in its latest case – finding a violation of the duty to respect through state agents' acquiescence or collaboration as such, rather than using the latter to attribute the conduct of paramilitaries – warrants a closer look at how these situations are best conceptualized.

4.3.4.1 The Threshold for Attribution

The IACtHR has demonstrated a willingness to set very low thresholds for attribution.[155] It has repeatedly referred to concepts that arguably form part of the same cluster: 'involvement and cooperation' (*Rochela*); 'collaboration, acquiescence, and tolerance' (*Mapiripán*); 'acquiescence *and* collaboration' (*Ituango*); 'acquiescence *or* collaboration' (*Operation Genesis*, *Yarce*, *Vereda La Esperanza*, *Omeara Carrascal*); 'acquiescence, tolerance or involvement' (*Castillo González*); 'acquiescence or tolerance, collaboration, assistance

153 See e.g. *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *v.* Uganda), Judgment of 19 December 2005, 2005 ICJ Reports 168, paras. 300-301.

154 *Yarce*, para. 180.

155 So low, in fact, that it has even been argued that the IACtHR establishes attribution on the basis of state complicity: see D. Amoroso, 'Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law' (2011) 24 *Leiden Journal of International Law* 989, at 996; and J. Cerone, 'Re-Examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 *ILSA Journal of International & Comparative Law* 525, at 529-530.

or support' (*Yarce*); and 'support and acquiescence' (*Vereda La Esperanza*, *Omeara Carrascal*).[156] As with the ICTY Appeals Chamber's judgment in the *Tadić* case, these terms span a spectrum, ranging from tolerance to collaboration; and as in *Tadić*, the general rule and its specific application do not completely overlap. While the IACtHR's articulation of the general rule in *Yarce* – repeated in subsequent cases – refers to 'acquiescence or collaboration', *Yarce*, *Vereda La Esperanza* and *Omeara Carrascal* all used a variety of other terms as well when applying this rule to the specific circumstances of the case, as illustrated by the enumeration above. To complicate matters further, some (but not all) of these judgments also list other factors which change from case to case: the exercise of state functions (*Rochela*), or acting 'in a situation […] under the control of the State' (*Mapiripán*).[157] What role do these elements play, and what weight is to be attached to them? Are they to be considered *additional* criteria, or do they simply serve the aim of proving the existence of cooperation, collaboration, acquiescence, etc.? These factors have disappeared from the Court's jurisprudence in *Castillo González* (2012) in Venezuela and from *Operation Genesis* onwards (2013-) in Colombia, and have not returned since the Court articulated its general rule in *Yarce* (2016), suggesting that they are not to be regarded as *additional* criteria. Note, at the same time, that the cases which no longer cite such factors are also the ones which tend to present collaboration, acquiescence, tolerance, support and participation as disjunctive requirements.

Given this variety of terms, where exactly along this spectrum – or at least within what range – can attribution be established according to the IACtHR? One feature recurring in some (though not all) of the case law that could shed light on this question is these elements forming part of the argument that the conduct in question could not have been carried out without the ['collaboration, acquiescence, and tolerance' / 'acquiescence or collaboration'] of the state (*Mapiripán, Operation Genesis*).[158]

But before this feature can be evaluated as part of the IACtHR's analytical steps, another question must be answered: does this formula indeed refer

156 *Rochela*, para. 102; *Mapiripán*, para. 120; *Ituango*, para. 132 (emphasis added); *Operation Genesis*, para. 281, *Yarce*, para. 180, *Vereda La Esperanza*, para. 152, and *Omeara Carrascal*, para. 179 (emphases added); *Castillo González*, title to the section constituted by paras. 109-116; *Yarce*, para. 220; and *Vereda La Esperanza*, para. 168 and *Omeara Carrascal*, para. 185, respectively.

157 *Rochela*, para. 102; *Mapiripán*, para. 120; *Ituango*, para. 133. *Yarce*, at paras. 180 and 219-220, cites participation more broadly, but as explained above (see notes 130-132 and accompanying text), this appears to include collaboration and other forms of indirect participation, rather than being a self-standing requirement.

158 *Mapiripán*, para. 120: 'could not have been prepared and carried out without the collaboration, acquiescence, and tolerance […] of the Armed Forces of the State'; cf. *Operation Genesis*, para. 280: 'a hypothesis in which the paramilitaries would have been able to carry out "Operation Cacarica" without the collaboration, or at least the acquiescence of State agents, is unsustainable'.

to a *substantive* requirement, or merely an *evidentiary* one?[159] If substantive, the formula indicates a *sine qua non* requirement: the state can only be held responsible for the conduct of private actors (through control-based attribution) where its own contribution has been indispensable to the success of that conduct. If evidentiary, the formula is used simply to require proof (by inference) that the state *must have been* involved in the private conduct. This does not necessarily require that such involvement be a *sine qua non* element of said conduct – although where recourse is made to this formula, the evidentiary and the substantive threshold will always coincide. In other words, where the state's involvement is proven by the fact that the private actor could not have successfully carried out a certain act without such involvement, the extent of that involvement will always reach a *sine qua non* threshold. By definition, it cannot be any less; if it were, it could not constitute sufficient proof. The important difference under this second, evidentiary, scenario is that the state's responsibility for the conduct of private actors is not limited to cases where its contribution is indispensable for that conduct's success. Treating this formula as an evidentiary – rather than substantive – rule allows for the existence of cases where the state's involvement can be proven by direct evidence (rather than inference), and attribution can thus be established even where the state's involvement does not reach the threshold of being a *sine qua non* element of the private actor's conduct. This is precisely what seems to have been the case in *Yarce*, where the judgment presented (1) facts showing state acquiescence or collaboration, and (2) facts showing that the private actor 'could not have succeeded without the acquiescence or collaboration of the state' as *alternatives*.[160]

This distinction in *Yarce* indicates that the IACtHR views the formula as an evidentiary rule, rather than a substantive requirement. This is further supported by *Omeara Carrascal*,[161] where the state's contribution does not appear to have been of a *sine qua non* nature. In that case, the only case-specific (as opposed to actor-specific) evidence was the ostensible information-sharing by the state following Héctor Álvarez Sánchez's complaint to the regional prosecutor's office. There was no direct evidence that such information-sharing did in fact take place; and the paramilitary group could ostensibly have found out about the complaint (and the identity of the complainant) from another source, which means that it would be difficult to conclude that the state *must have* shared that information (either from a substantive or from an evidentiary perspective). In other words, even though the state was held responsible for violating its duty to respect, there

159 Cf. N.H.B. Jørgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 *Chinese Journal of International Law* 11, at 33, raising the same idea in the context of the ECtHR's jurisprudence on (inter-state) complicity in extraordinary renditions.

160 *Yarce*, para. 220.

161 As seen throughout Section 4.3, other judgments of the IACtHR are either somewhat unclear, or there was direct proof available to the Court regarding at least some degree of state involvement.

is no indication in the case facts that the state's assistance was a *sine qua non* element to the paramilitary group's success in carrying out the attack on Sánchez. Given that this formula is thus an evidentiary – rather than substantive – standard, it does not help clarify what the Court considers to be the necessary minimum threshold for control-based attribution – or rather, it clarifies that the threshold is not so *high* as to require the state's role to constitute a *sine qua non* element of the conduct, but it does not specify how *low* the threshold may be.

4.3.4.1.1 Attribution Through Omission as a Minimum Threshold?

At the lower end of the spectrum, the use of the terms 'acquiescence' and 'tolerance', in particular, raises the issue of where the minimum threshold lies. In some of the IACtHR's iterations of the relevant factors, 'acquiescence' and 'tolerance' are even presented as disjunctive, rather than cumulative, requirements; the Court's general rule likewise speaks of 'acquiescence *or* collaboration'. This suggests that the threshold for attribution may be as low as 'tolerance' or 'acquiescence'. What type of behavior would that entail on the part of the state? The formulation of 'acquiescence or collaboration' appears to suggest that 'acquiescence' captures situations of passive support (since acquiescence denotes tacit consent), while collaboration refers to active forms of support. The Court's use of the term 'tolerance' alongside acquiescence (in *Mapiripán*, *Castillo González* and *Yarce*) likewise suggests that this cluster of terms covers passive, rather than active, conduct.[162] In fact, in *Omeara Carrascal*, the IACtHR explicitly equated omissions with 'acquiescence or tolerance' when discussing links between paramilitary groups and members of the state security forces.[163]

This raises the question whether attribution may be established solely on the basis of omissions, rather than actions, by the state. Although the IACtHR's jurisprudence does not provide a conclusive answer to this question, the sum of the Court's work so far suggests that an omission, in and of itself, is unlikely to (be able to) serve as the basis for attribution. Acquiescence and tolerance are never cited in and of themselves in the judgments; they are always accompanied by terms that are further along the spectrum, such as collaboration or involvement.[164] To date, there appears to be no case where the Court has found a violation of the state's duty to respect solely on the basis of acquiescence or tolerance. Beginning with *Operation Genesis*, the IACtHR started taking a more systemic view of its jurisprudence on Colombia, categorizing its previous cases. At first glance, these classifications suggest that acts and omissions do not necessarily correspond to attri-

162 Note that tolerance was explicitly equated with a violation of the state's duty to protect by the ICJ in *Armed Activities*, paras. 300-301.

163 *Omeara Carrascal*, para. 71.

164 Cf. Cerone, '"Complicity" in the Context of Human Rights Violations', 529, note 20, although he only refers to '*the facts* show[ing] a degree of involvement far greater than acquiescence' (emphasis added). See note 156 above on the terms employed.

bution and violations of the duty to protect, allowing for the possibility of attribution taking place based solely on omissions. A closer look, however, reveals inconsistencies in the Court's work that indicate otherwise.

The IACtHR categorized cases in two respects: according to acts and omissions, and according to whether it had found a violation of the duty to respect. The first of these classifications takes place in the context of the factual background to the case(s), discussing whether the existence of links between the military and certain paramilitary groups has been established on the basis of 'specific acts of support or collaboration' or 'omissions that allowed or facilitated the perpetration of serious crimes by non-State agents'.[165] The second classification forms part of the Court's legal analysis, listing cases which it regards as examples of violations of the duty to respect, with a brief description of the grounds on which such a violation was established.[166]

The two sets of classifications do not overlap completely, suggesting that omissions may serve as the basis for attribution of private conduct; but in the end, there are internal inconsistencies in each 'crossover' instance that do not support this conclusion. *19 Merchants* is listed as an example of military-paramilitary links based on omissions, but cited as a violation of the duty to respect based on the state's 'collaboration in acts preceding the illicit act of the third party, state acquiescence in the meeting of third parties where the act was planned, and active collaboration in the execution of the illicit acts of the third parties'.[167] In other words, while acquiescence was part of the factors considered by the Court, *19 Merchants* is not regarded by the IACtHR as a case of attribution based solely on omissions. *Ituango*, meanwhile, is listed as an example of factual links based on acts, but cited among violations of the duty to respect 'based on the acquiescence or tolerance of the military in the acts perpetrated by the paramilitaries'.[168] But in the judgment itself, the Court appears to have drawn its conclusions in terms of a violation of the duty to *protect* the right to life.[169]

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165 *Operation Genesis*, para. 248 and *Vereda La Esperanza*, para. 68, listing *Mapiripán*, *Rochela*, *Ituango*, *Cepeda Vargas* (IACtHR, *Cepeda Vargas* v. *Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 May 2010, Series C, No. 213) and, in the latter case, *Operation Genesis* in the first category, and *19 Merchants*, *Pueblo Bello* and *Valle Jaramillo* (IACtHR, *Valle Jaramillo* et al. v. *Colombia*, Merits, Reparations and Costs, Judgment of 27 November 2008, Series C, No. 192) in the second. Cf. *Omeara Carrascal*, para. 71, albeit the Court is no longer listing cases separately there.

166 See *Yarce*, para. 180 and *Vereda La Esperanza*, para. 152, listing *19 Merchants*, *Mapiripán*, *Ituango* and *Operation Genesis* under this heading. Cf. *Omeara Carrascal*, para. 179, listing *Operation Genesis* and *Vereda La Esperanza* as examples, without discussing any earlier cases.

167 *Yarce*, para. 180, note 259 and *Vereda La Esperanza*, para. 152, note 241 (translation by author).

168 *Yarce*, para. 180, note 259 and *Vereda La Esperanza*, para. 152, note 241 (translation by author).

169 *Ituango*, para. 138; see further notes 117-122 and accompanying text above.

Furthermore, the amount of reparations awarded in the two judgments – compared with the IACtHR's practice in similar cases – confirms that *19 Merchants* is best seen as a case of attribution based on active collaboration, while *Ituango* is most reasonably interpreted as a violation of the state's duty to protect based on its omissions.[170] Given the highly complex nature of calculating reparations awarded in response to a range of different violations to the various types of victims (different familial relations), a comprehensive examination is beyond the scope of the dissertation – but it is arguably not necessary, either. There is one particular element of reparations that is present throughout the Court's entire Colombian case law, making it a good basis for comparison: non-pecuniary damages for those who have been the direct victims of enforced disappearances or extrajudicial killings (to be paid to the next of kin).[171] In cases where the attribution of paramilitary conduct is well-established (*Rochela*, *Mapiripán*, *Operation Genesis*, and *Vereda La Esperanza*), the amount awarded under this heading varies – depending on the circumstances of the case – between 70,000 and 100,000 USD per person.[172] In cases where the state's violation indisputably concerns its duty to protect (*Pueblo Bello* and *Yarce*), the figure is 30,000 USD.[173] In *19 Merchants*, the Court awarded 80,000 USD each to the direct victims of forced disappearances and extrajudicial killings, which suggests that – despite its ambiguous stance in the judgment, and in line with subsequent classifications – the IACtHR treated the case at least *as if*

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170 Admittedly, Ago firmly held that '[t]he amount of reparation […] will not provide any clarification as to whether […] the act attributed to the State as the source of responsibility was that of an individual [i.e. private actor] or that of an organ'; see ILC, *Fourth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur – The internationally wrongful act of the State, source of international responsibility (continued)*, 30 June 1972 and 9 April 1973, UN Doc. A/CN.4/264 and Add.1, in: *Yearbook of the International Law Commission*, 1972, vol. II, 71 (hereinafter *Ago's Fourth Report*), para. 67. It is, however, maintained here that while the amount of reparations should not be relied on as the *sole* indicator of attribution, it may serve to clarify the outcome *in addition to* the court's own reasoning (and subsequent classifications).

171 While pecuniary damages will depend on the particular economic circumstances of the victim (to determine e.g. projected earnings), the same is not the case for non-pecuniary damages; extrajudicial killings and enforced disappearances are of comparable gravity and may even form part of the same pattern of conduct; and the sums awarded to the direct victims (rather than family members) are the most easily comparable.

172 *Rochela*, paras. 269 and 273, awarding 100,000 USD to each of the 12 victims of extrajudicial killings and the sole surviving victim of the attack; *Mapiripán*, para. 288, awarding 80,000 USD each to 49 victims of extrajudicial killings or forced disappearances and 90,000 USD each to two underage victims of forced disappearance; *Operation Genesis*, para. 476, awarding 70,000 USD 'for the pecuniary and non-pecuniary harm caused to Marino López Mena', victim of an extrajudicial killing; *Vereda La Esperanza*, para. 312, awarding 100,000 USD each to the 12 victims disappeared and 80,000 USD to Javier Giraldo Giraldo, victim of an extrajudicial killing.

173 *Pueblo Bello*, para. 258, awarding 30,000 USD '[f]or each of the 37 victims disappeared and the six deprived of life'; *Yarce*, para. 370, awarding 30,000 USD for Ana Teresa Yarce, victim of an extrajudicial killing.

the conduct of the paramilitaries was attributable.[174] In *Ituango*, meanwhile, the direct victims of extrajudicial killings were awarded 30,000 USD each (in the case of two minors, 35,000 USD each).[175] This supports the view, already apparent from a plain reading of the judgment itself, that – notwithstanding the Court's subsequent classifications – Colombia was in fact held responsible for (the effects of) failing in its duty to protect, and not for (the effects of) the conduct of the paramilitaries as such. In other words, even though the IACtHR's later classification suggests that the 'acquiescence or tolerance' of the military served as a basis for attribution in *Ituango*, the amount of reparations awarded does not support this conclusion.

With these two instances clarified, there is ultimately no case law at the IACtHR which would support the contention that attribution can be based solely on omissions. The same transpires from the Court's work in the Venezuelan context, where *Castillo González* deserves particular attention. The IACtHR's distinction in that case between state responsibility based on 'acquiescence, tolerance or involvement of state agents' on the one hand, and 'the duty to prevent violations' on the other suggests that the threshold for attribution may be as low as acquiescence or tolerance. But while two testimonies acquired in police interviews indicated that the town's mayor knew of the paramilitaries' presence and aim, and a complaint filed with the domestic authorities alleged that the mayor was the intellectual author of the attack, the IACtHR found this evidence to be of insufficient quality and consistency to establish acquiescence, tolerance, or direct involvement on the part of state agents.[176] The Court's approach in this case leaves open the question whether acquiescence or tolerance can in fact form the basis for attribution, and if so, what evidence is required to establish such acquiescence or tolerance. In the end, although the IACtHR's statements *in abstracto* suggest that attribution may be based solely on omissions, there are no cases before the Court where attribution has in fact been established on this basis.[177]

Another, closely related question is the generality or specificity with which the necessary threshold must be established. Does 'acquiescence or collaboration' need to be shown at the level of the actor, or at the level of the conduct? Although the IACtHR's formulation of the general rule strongly suggests that it has to be proven at the level of the conduct (in the circumstances of the concrete case), the Court's practice in this regard is somewhat

174 *19 Merchants*, para. 252.

175 *Ituango*, para. 390.

176 *Castillo González*, paras. 59-60, 96, 114-115.

177 Beyond the Court's own pronouncements and classifications, it is worth highlighting that when Colombia accepted responsibility for violating its duty to respect the rights of Noel Emiro Omeara Carrascal and his son, it did so 'for the actions of state agents', and the state's admission explicitly associated the duty to respect with actions and the duty to protect with omissions, see *Omeara Carrascal*, paras. 16, 19. See also Reina García, 'La responsabilidad internacional del Estado colombiano', 81, making the same association in 2009.

more complicated. In *Yarce*, the Inter-American Commission on Human Rights contended that the state should be held responsible for violating its duty to respect based on the paramilitary group having acted with the coordination and acquiescence of state agents in the particular time-period and district of Medellín.[178] The Court rejected this argument, specifically noting that none of the domestic judgments in the case concluded that state agents had 'participated in the homicide in any form'.[179] This accords with the IACtHR's rule that 'acquiescence or collaboration' must be established at the level of conduct, rather than the level of the actor. At the same time, though, the Court's willingness to rely on circumstantial evidence to support its findings in *Vereda La Esperanza*, and especially in *Omeara Carrascal*, suggest that acquiescence or collaboration in the particular time-period and locality may, in fact, be sufficient to establish state responsibility for violating the duty to respect – even though it was not sufficient in *Yarce*. In *Vereda La Esperanza*, not all of the evidentiary elements cited by the Court in support of its conclusion applied to all of the victims; but at least they formed part of a broader pattern whereby 'acquiescence or collaboration' could be demonstrated in most of the individual cases. In *Omeara Carrascal*, meanwhile, there was even less evidence tying the state to the conduct in question. The perpetrators of the attack on Héctor Álvarez Sánchez had been identified as members of a paramilitary group, and the Court did not discuss any evidence that would have suggested state participation in e.g. the meetings where the attack was planned (as had been the case in *19 Merchants* and *Rochela*) or the provision of logistical support. Apart from 'acquiescence or collaboration' in the particular time-period and region, the only other connection between the state and the paramilitary group appears to have been the possible information-sharing between the regional prosecutor's office and the group, which can only be established by inference – and even that was not quite made explicit by the Court. In other words, notwithstanding the Court's proclaimed rule in favor of conduct-level attribution, the degree to which it is willing to rely on circumstantial evidence showing 'acquiescence or collaboration' in the particular time-period and locality indicates a move towards actor-level attribution.

Overall, the following can be established regarding the threshold applied by the IACtHR and the level of specificity at which that threshold operates. Firstly, in order to establish attribution, the Court requires some form of collaboration or support from the state, which does not have to constitute a *sine qua non* contribution to the third party's conduct; at the same time, the threshold is possibly not so low as to enable attribution solely on the basis of contributive omissions, despite *in abstracto* suggestions to the contrary. Secondly, although the Court proclaims to require such collaboration or support in the concrete case (in other words, at the level of the specific conduct), its reliance on circumstantial evidence softens

178 *Yarce*, para. 172.
179 *Ibid*., para. 180 (translation by author).

that rule, indicating a possible move towards actor-level attribution in cases where collaboration can be established in the particular time-period and locality.

4.3.4.1.2 Comparing the IACtHR's Approach to Other Tests

Having identified these basic parameters of the IACtHR's approach, the next question is: how does this approach compare to other tests of control-based attribution? When examined comparatively, the threshold set by the IACtHR is not only lower than that of the ICJ, but also falls short of 'overall control' as understood by the ICTY Appeals Chamber in *Tadić*, which requires more than support and (ostensibly) coordination. The IACtHR does not require control of any kind; its approach is closest to the ICTY's post-*Tadić* understanding of the 'overall control' test, which requires coordination *alongside* support.[180] But even when comparing the Inter-American Court's approach to the Appeals Chamber's original understanding of *Tadić*, there is one important difference between 'overall control' and the jurisprudence of the IACtHR that militates against a simple one-dimensional comparison: while the former only demands the existence of control at the more *general* level of the actor, the latter requires collaboration in the *specific* conduct under adjudication. In other words, the two are best compared along two dimensions simultaneously: 'overall control' sets a higher threshold, but one that only needs to be met as regards the actor in general; while the IACtHR sets a lower threshold, but that threshold needs to be met with regard to the particular conduct (with the caveat noted above regarding circumstantial evidence).

Is the IACtHR justified in setting such a low threshold? In order to understand the Court's approach to state responsibility for the conduct of third parties, one must recall that this has been shaped almost exclusively by the situations it has encountered arising from Colombia. In this context, the state (and the military in particular) strongly encouraged the creation of numerous paramilitary groups around the country; provided them with training, weapons and other forms of support; and continued to maintain extensive links with such groups, often coordinating their actions.[181] Colombia's role was so far-reaching that it is reasonable to say that the paramilitary phenomenon could not have grown nearly as significant as it did without the state's involvement. In fact, the military and the paramilitary groups have been so closely intertwined that the Colombian Ombudsman's Office has even described the latter as 'the illegal arm of the armed forces and police, for whom they carry out the dirty work which the armed forces and police cannot do as authorities subject to the rule of law'.[182] At the same time, the paramilitaries always retained a degree of autonomy; many of them grew quite powerful in their own right. But given the general align-

180 See notably *Kordić and Čerkez* (TC), para. 115.
181 See Section 4.3.2 above.
182 Quoted in UN Doc. E/CN.4/1998/16, para. 91.

ment of goals between the military and the various paramilitary groups, there was arguably no need for the former to exercise close control over the latter.[183] In light of these circumstances, and in particular Colombia's extensive role in the creation and maintenance of the paramilitary phenomenon, can the extent of the state's responsibility accurately be captured by finding that it failed to protect the victims in question? That is doubtful, to say the least. Instead, the IACtHR chose to describe the nature of this collaborative relationship in legal terms through the category of attribution, by lowering the necessary threshold. In doing so, it departed from the agency principle as understood by the ICJ, even if – as the quote from the Ombudsman's Office shows – the paramilitary groups were in many cases acting on behalf of the state security forces in a certain sense, doing what the latter could not do. Rather than relying on the agency principle, the IACtHR based attribution on state support for and collaboration with the paramilitary groups – factual circumstances that are best described as complicity. In other words, the Court essentially turned state complicity in the conduct of non-state actors into a ground for attribution.

Seen against this factual backdrop, the IACtHR's impetus to set an attribution threshold that is sufficiently low to capture the state's collaboration in paramilitary conduct is to a large extent understandable;[184] and as discussed in Chapter 6 below, this approach is justifiable within the framework of the ARSIWA in cases of *sine qua non* contribution by the state. Even so, its approach suffers from a degree of ad hocism, indeterminacy and inconsistency, even if this has diminished somewhat over time. The IACtHR initially struggled with articulating clear and consistent guidelines for what type of conduct (and under what circumstances) it would deem attributable to the state, addressing these issues in an *ad hoc* and somewhat piecemeal fashion instead. Even if the Court wished to follow a case-by-case approach (in the sense of eschewing a limited number of predefined grounds of attribution), the cases that have come before the IACtHR have been sufficiently similar to warrant a consistent method laying down at least the *factors* to be considered when deciding questions of attribution. Instead, the Court's judgments in the first few cases were often unclear as to precisely which element(s) it regarded as decisive; and the fact that it did not even engage with its own previous jurisprudence made it all the more difficult to assess how these cases relate to each other, in the hopes of identifying the relevant factors. Nonetheless, this aspect of the IACtHR's work has shown improvement over time, as the Court started engaging with its jurisprudence from *Operation Genesis* onwards and formulated a general rule from *Yarce* onwards. This engagement – and the Court's reliance on its previous case law for the *ratio decidendi* on this issue – is a welcome change that helps develop a coherent framework on control-based attribution,

183 Cf. *Tadić* (TC), para. 604, observing the same between the VRS and the FRY/VJ.

184 See also M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015), 197.

which in turn helps ensure legal certainty. So far, this engagement is limited to the IACtHR's Colombian jurisprudence – understandably, given that most of the Court's case law on this issue comes from Colombia, and that the same socio-political context makes comparison between cases easier. Still, it remains to be seen whether the IACtHR will rely on this analytical framework in situations beyond Colombia.

4.3.4.2 Blurring the Line between Attribution and the Duty to Protect under the ACHR

Beyond the matter of attribution thresholds, the second main tendency in the jurisprudence of the IACtHR is blurring the line between attributing the conduct of private actors and the duty to protect under Article 1(1) ACHR, or even confusing the two concepts in some cases. There are indications of this in *Mapiripán* and *Ituango*, but it is best demonstrated in *Operation Genesis*, where the Court essentially used the two categories interchangeably, viewing attribution as the basis for finding a violation of the duty to protect, and *vice versa*. Thankfully, this confusion has diminished significantly in more recent cases; the *Yarce* judgment, in particular, shows greater awareness of the distinction between the duty to protect and control-based attribution. That said, the relationship between attribution and the duty to protect may require further clarification in another respect. If the IACtHR indeed intends to allow attribution based solely on omissions, as some of its statements suggest, the Court must clarify how it plans to distinguish omissions that form the basis of attribution from omissions that give rise to a violation of the state's duty to protect. As there have not yet been any cases before the IACtHR where the Court found attribution based on omissions, it is unclear as of yet how and where such a distinction would be drawn.

4.3.4.3 An Alternative Construction? The Court's Approach in Omeara Carrascal

Finally, the IACtHR's decision in *Omeara Carrascal* not to examine whether the conduct of paramilitaries is attributable to the state raises the question whether it is possible to read the Court's jurisprudence in a different conceptual construction. In this alternative interpretation, the IACtHR regards state 'acquiescence or collaboration' not as a basis for attributing the conduct of third parties, but as a ground for finding that the state has violated its duty to respect the rights in question *through its organs*. While the Court does not elaborate on the source or parameters of such a rule, it is ostensibly conceptualized as a primary rule under the ACHR whereby state complicity in human rights abuses committed by third parties is considered to constitute a breach of the state's duty to respect the victim's rights. Why is this important? While both the extent of the state's involvement and the resulting outcome (violation of the duty to respect) is the same in both interpretations, one of them requires attributing the conduct of the paramilitaries, while the other other one does away with the need to do so.

How does this alternative reading fit with the IACtHR's previous jurisprudence? In that case law, state collaboration was used – often explicitly – to establish attribution of the paramilitary groups' conduct, and there is little indication of the possibility of an alternative construction. In *Rochela*, the Court spoke of the state being directly responsible *for* the activities of paramilitaries;[185] in *Mapiripán*, it declared that 'both the behavior of its own agents and that of the members of the paramilitary groups are attributable to the State'.[186] In *Operation Genesis* and *Vereda La Esperanza*, it spoke of the violations (such as enforced disappearances) being attributable to the state,[187] which likewise suggests that it is the conduct constituting the violation (be it of the state security forces, the paramilitaries, or both) that is being attributed. That said, the Court's formulation of the general rule in *Yarce* – repeated verbatim in *Vereda La Esperanza* and *Omeara Carrascal* – did speak of state responsibility 'in relation to' the conduct of third parties when discussing violations of the duty to respect.[188] This formulation allows accommodating an alternative construction whereby the the conduct of third parties themselves does not necessarily have to be attributed to the state. Once again, there appears to be some degree of discrepancy between the IACtHR's pronouncements in the abstract and its findings in concrete cases (upon articulating the rule in *Yarce*, the Court made a general reference to its previous jurisprudence as being supportive of this rule, but did not mention any case by name).

In any event, even though the violation of the duty to respect was based only on state conduct in *Omeara Carrascal*, the same does not hold true for the damages. While the IACtHR did not attribute the conduct of the paramilitaries to Colombia (leaving this question open), its approach effectively resulted in attributing *the injury* caused by the paramilitaries' conduct (in addition to that of the state agents). This is confirmed by once again taking a comparative look at the IACtHR's practice concerning reparations.[189]

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185 *Rochela*, para. 102: 'the State is directly responsible, either as a result of its acts or omissions, for all the activities undertaken by these private individuals'.

186 *Mapiripán*, para. 120: 'both the behavior of its own agents and that of the members of the paramilitary groups are attributable to the State'; *Operation Genesis*, para. 281: the 'acts […] committed by members of the paramilitary groups, can be attributed to the state owing to the acquiescence or collaboration that agents of the Armed Forces provided to the operations of those groups'.

187 *Vereda La Esperanza*, para. 168: 'las desapariciones forzadas ocurridas en la Vereda La Esperanza, son atribuibles al Estado por el apoyo y la aquiescencia que prestaron agentes de la Fuerza Pública para el actuar de ese grupo paramilitar'.

188 Although later in *Yarce*, the Court spoke of 'state responsibility for the acts of third parties' ('responsabilidad estatal por el actuar de terceros') at para. 220.

189 Even if one accepts Ago's position whereby the amount of reparations awarded cannot clarify whether the state is being held responsible only for the conduct of its own organs or also that of the private actors (see note 170 above), the purpose of this exercise is not to establish the scope of responsibility (on which point the Court was clear), but to verify the suspected attribution *of injury*; accordingly, for this purpose, it is appropriate to turn to reparations.

As noted above, non-pecuniary damages for the direct victims of enforced disappearances or extrajudicial killings have ranged between 70,000 and 100,000 USD per person where paramilitary conduct was attributed to the state; the figure has been 30,000 USD per person where the responsibility resulted from the state's violation of its duty to protect.[190] In *Omeara Carrascal*, the sums awarded once again range between 70,000 and 100,000 USD, confirming that the IACtHR indeed attributed the injury caused by the conduct of the paramilitaries to the state.[191]

In effect, the Court treated the case *as if* the conduct of the paramilitaries was attributable to the state, rather than regarding the case as one of complicity. Complicit states are only responsible for the injury arising from their own contribution, i.e. the amount of reparations is determined by their own conduct.[192] Granted, where the contribution is of a *sine qua non* character, the state likely becomes a co-perpetrator and as such, responsible for all of the resulting injury – but this was not the case in *Omeara Carrascal*.[193] That the IACtHR nonetheless attributed the injury as a whole to Colombia indicates that the Court did, in fact, view the state's responsibility as encompassing the conduct of the paramilitary group, even if the attribution of that conduct was not formally established.

What legal basis does the Court have to rely on such a construction? The ACHR does not include a (primary) rule on complicity constituting a violation of the state's duty to respect. Granted, in respect of Noel Emiro Omeara Carrascal and his son, Colombia's acceptance of responsibility – for violating its duty to respect, based on the collaboration of its agents – obviates the need to identify such a basis. But what about Héctor Álvarez Sánchez? The Court's conclusion in his case is framed in very similar terms to those of Colombia's admission, leaving it unclear whether the conduct of paramilitaries is attributed (or whether it even needs to be attributed) to the state. Can Colombia's admission in the concrete cases of Noel Emiro Omeara Carrascal and his son be regarded as a general acceptance that collaboration by state agents in human rights abuses committed by third parties constitutes a violation of the state's duty to respect the rights in question? While it is possible to read the admission as logically implying such acceptance, one should not come to such a conclusion lightly. Furthermore, this does not resolve the question of what happens in cases where the respondent state does not accept responsibility on this basis. As such, it remains highly doubtful that the Court has a legal basis for applying such a construction in general.

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190 See notes 172-173 and accompanying text above.

191 *Omeara Carrascal*, paras. 333-335: 80,000 USD for Noel Emiro Omeara Carrascal (extrajudicial killing); 100,000 USD for Manuel Guillermo Omeara Miraval (enforced disappearance and extrajudicial killing); and 70,000 USD for Héctor Álvarez Sánchez (extrajudicial killing).

192 See ARSIWA Commentary to Article 16, para. 10.

193 *Ibid*.; and see the text accompanying note 161 above.

In light of these circumstances, the utility of this novel construction in *Omeara Carrascal* is quite mixed. On the one hand, the legal basis for complicity-based attribution of private conduct is tenuous, as it constitutes a departure from the agency principle and the ICJ's established standards. State acceptance of responsibility for a violation of the duty to respect based on the conduct (collaboration) *of its own agents* supplies the missing foundation; and such acceptance is unlikely to be forthcoming in respect of the paramilitary groups' conduct. On the other hand, in the absence of such acceptance of responsibility, complicity-based attribution (as opposed to complicity as a basis for finding a violation of the duty to respect *without* attribution) has the advantage of relying on existing legal categories, rather than necessitating a new primary rule.

4.3.4.4 Summarizing the IACtHR's Approach

Over the past two decades, the IACtHR has addressed control-based attribution in a number of cases, developing its own approach to this issue. Attempts to analyze the Court's jurisprudence are complicated by the fact that it is characterized by multiple sets of interrelated dichotomies – acts and omissions, violations of the duty to respect and protect, attribution at the level of conduct or actor, attribution of third party conduct or only that of state agents – which can be difficult to untangle. The IACtHR often fails to clarify not only the distinction between the two elements of a single dichotomy, but also the relationship between the different pairings, resulting in a degree of indeterminacy. That said, the Court's case law has by and large become clearer and more coherent over time, allowing the identification of the relevant factors – and through them, a number of tendencies – in the Court's reasoning. Faced with the extensive role played by Colombia in the formation and activities of paramilitary groups, which operated as the illegal arm of the state security forces (without the latter even needing to control the former), the IACtHR chose to react by establishing attribution of private conduct based on state support and collaboration – in other words, employing the rationale of complicity, rather than agency (at least as understood by the ICJ). Such support or collaboration must be established at the level of conduct, rather than the level of the actor – although the IACtHR's somewhat liberal recourse to circumstantial evidence has softened this requirement. The requisite degree of contribution appears to be something more than an omission (despite some ambiguity from the IACtHR), but not necessarily a *sine qua non* element of the abuse in question. However, as explored more extensively in Chapter 6, inasmuch as complicity below a *sine qua non* contribution is concerned, this is arguably too low of a threshold for attribution, extending state responsibility too far – even if the Court's motivation is understandable.[194] Nonetheless,

194 See Section 6.3.2 below.

it is noteworthy that Colombia itself, in the latest case to come before the IACtHR, accepted responsibility for violation of its duty to respect based on the collaborative acts of its agents; it remains to be seen whether this was an exceptional instance, or an indication that the Court's approach is gaining acceptance among the states of the region.

4.4 Lowering the Threshold for Attribution to Third States: The Jurisprudence of the European Court of Human Rights

The IACtHR, however, is not the only human rights court to face problems in distinguishing control-based attribution from other, related, concepts: in the case of the ECtHR, the source of confusion has been the (lack of) distinction between attribution for the purposes of (extraterritorial) jurisdiction and state responsibility.[195] Unlike the IACtHR, which has mostly been faced with paramilitary actions with governmental support in the state's own territory, the ECtHR has encountered the issue of control-based attribution in situations where secessionist governments are operating with the involvement of a third state. Since these cases concern states acting beyond their own territory, they also raise the distinct but related problem of extraterritorial jurisdiction. The relationship between the concepts of jurisdiction and attribution has generated much confusion in the Court's jurisprudence, and has even led some to questioning whether the ECtHR has in fact developed attribution tests.[196]

4.4.1 The Northern Cyprus Cases: *Loizidou* and *Cyprus* v. *Turkey*

Much of this confusion originates from *Loizidou* v. *Turkey* in the mid-1990s, the Court's first case addressing such matters, concerning the situation in Northern Cyprus. Following Turkish occupation of the northern part of the island in 1974, the so-called 'Turkish Republic of Northern Cyprus' was proclaimed in 1983. But the TRNC had only ever been recognized as a state by Turkey, and it had been the subject of UN Security Council resolutions affirming the unlawfulness of the occupation and calling for non-

195 The Court's lack of clear distinction between jurisdiction under Article 1 ECHR and attribution has been pointed out numerous times, see e.g. Talmon, 'The Responsibility of Outside Powers', 508; M. Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011), 41; Council of Europe, Steering Committee for Human Rights (hereinafter CoE CDDH), *CDDH Report on the place of the European Convention on Human Rights in the European and international legal order*, CDDH(2019)R92Addendum1, 29 November 2019, https://rm.coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279 (hereinafter CDDH(2019)R92Addendum1), para. 197.

196 See Milanović, *Extraterritorial Application*, 46-51; but see Finck, 'L'imputabilité', 209-219; J.A. Hessbruegge, 'Introductory Note to European Court of Human Rights: Catan and others v. Moldova and Russia' (2013) 52 *International Legal Materials* 217, at 218.

recognition of the TRNC.[197] The applicant, Titina Loizidou, claimed that – due to the actions of the TRNC as well as Turkish troops – she was barred from accessing (and thereby enjoying) her property in Northern Cyprus, and initiated proceedings against Turkey.[198] Article 1 of the ECHR stipulates that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in […] this Convention.' Accordingly, in order for the Court to be able to adjudicate the matter, it first had to examine whether the facts of the case took place 'within the jurisdiction' of Turkey.[199] Dismissing the latter's objection, the Grand Chamber of the Court held the acts in question to be 'capable of falling within Turkish "jurisdiction" within the meaning of Article 1', on the grounds that:

> [T]he responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[200]

The Court thus settled the question of jurisdiction in the preliminary objections phase based on 'effective control of an area'. At the same time, the ECtHR drew a clear distinction between jurisdiction and attribution, noting that '[w]hether the matters complained of are imputable to Turkey and give rise to State responsibility are […] questions which fall to be determined by the Court at the merits phase.'[201] But once the ECtHR reached the merits phase, that distinction all but disappeared. In discussing attribution ('imputability'), the Court put forward the following line of reasoning:

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197 See Chapter 1, note 83 above; see also e.g. ECtHR, *Cyprus* v. *Turkey*, Application No. 25781/94, Grand Chamber, Judgment of 10 May 2001, paras. 14-15, 86.

198 ECtHR, *Loizidou* v. *Turkey*, Preliminary Objections, Application No. 15318/89, Judgment of 23 March 1995, para. 10-14.

199 'Jurisdiction' in the context of the extraterritorial application of human rights denotes some form of control, see e.g. Milanović, *Extraterritorial Application*, 21-41. There are two main models of extraterritorial jurisdiction in this context, resting on control over persons or territory, respectively, see *ibid*., 127-209. Under the personal model, it is the victim who has to be 'within the jurisdiction' of the state, while the cases discussed in this section fall under the territorial model; in *Loizidou* (Preliminary Objections), para. 60, the Court talks about 'matters' which may or may not fall within the jurisdiction of Turkey. There is an unfortunate coincidence of terminology here, since jurisdiction may refer to both the state's jurisdiction in the sense of Article 1 ECHR and the Court's jurisdiction. Moreover, the two are closely related, since the existence of state jurisdiction determines the applicability of the ECHR, and consequently, whether the Court has jurisdiction over the case. Unless otherwise indicated, jurisdiction is used throughout this section to refer to the state's jurisdiction in the sense of Article 1 ECHR.

200 *Loizidou* (Preliminary Objections), para. 62; cited again in ECtHR, *Loizidou* v. *Turkey*, Merits, Application No. 15318/89, Grand Chamber, Judgment of 18 December 1996, para. 52.

201 *Loizidou* (Preliminary Objections), para. 64; see also *ibid*., para. 61.

> It is not necessary to determine whether […] Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus […] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' […]. Those affected by such policies or actions *therefore* come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention […].[202]

On the one hand, the Court relied on the Turkish army's 'effective overall control' over Northern Cyprus to find that Turkey is responsible 'for the policies and actions of the "TRNC"' – in other words, that the conduct of the TRNC is attributable to Turkey. On the other hand, the ECtHR used this control (and the ensuing attribution) to establish jurisdiction – something that was not necessary, since the Court had already settled the matter of jurisdiction in its judgment on the preliminary objections.[203] Furthermore, the Court appears to have based attribution on jurisdiction (or equated the two notions with each other), concluding the section on imputability by holding that the matter 'falls within Turkey's "jurisdiction" within the meaning of Article 1 […] and is *thus* imputable to Turkey.'[204] This would suggest that Turkey is responsible for the conduct of all persons in Northern Cyprus, regardless of whether they are part of the 'subordinate local administration' or not. Yet in deciding on attribution, the Court attached special importance not only to Turkey's acknowledgement that 'the applicant's loss of control of her property stems from the occupation', but also to the direct role of Turkish troops in blocking Mrs. Loizidou's access to her property.[205] This, in turn, would suggest that Turkey is responsible only for the conduct of its own *de jure* organs.

In sum, there are three possible interpretations of the *Loizidou* judgment as to what constitutes conduct attributable to Turkey: (1) the conduct of all persons in Northern Cyprus; or (2) the conduct of the TRNC, as well as the Turkish army; or (3) only the conduct of the Turkish army. Only the first two of these interpretations would necessarily imply that the Court has used 'effective overall control' as an attribution test, in addition to applying it as a jurisdictional test. The third option, meanwhile, would mean that Turkey can only be held responsible inasmuch as its troops have

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202 *Loizidou* (Merits), para. 56 (emphasis added); note that 'effective overall control' corresponds to the term 'effective control of an area' used in the Preliminary Objections judgment.

203 And since jurisdiction was based on the Turkish military's (i.e. a state organ's) control over the territory of northern Cyprus, it was simply not necessary to attribute the conduct of the TRNC to establish jurisdiction; see Finck, 'L'imputabilité', 211-212 in the same vein.

204 *Loizidou* (Merits), para. 57 (emphasis added); see also *Cyprus* v. *Turkey*, para. 80. The quote above at note 202, meanwhile, suggests that the Court established Turkey's jurisdiction based on the attribution of the TRNC's conduct to the state – on the role of attribution in establishing jurisdiction, see notes 251-271 and accompanying text below.

205 *Loizidou* (Merits), para. 54.

directly participated in human rights violations or have failed to prevent (or redress) them. The first of these interpretations has not garnered much support, which is little surprise considering that it is at odds with the basic idea of the public/private distinction underlying attribution.[206] The second one has been favored by the European Commission of Human Rights and the ICTY Appeals Chamber, among others.[207] The third option – which had been the European Commission's stance before *Loizidou* – has also had its share of proponents.[208] Which of these interpretations is to be followed?

In the end, the ECtHR itself clarified the matter in the 2001 *Cyprus* v. *Turkey* case, proving that the second interpretation is the correct one. The case concerned a range of incidents arising from the 'continuing division of the territory of Cyprus', not all of which involved the Turkish military – or even the TRNC, for that matter.[209] Regarding Turkey's responsibility, the Grand Chamber concluded that:

> Having effective overall control over northern Cyprus, *its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration* which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing *the entire range of substantive rights* set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.[210]

In other words, the conduct attributable to Turkey goes beyond that of its own *de jure* organs (i.e. its military) and includes that of the TRNC, disproving the third interpretation. And while it is unfortunate that the Court is again discussing attribution and jurisdiction together, the reference to 'the entire range of substantive rights' is arguably meant to reinforce this reading of the judgment. If only the conduct of its military is attributable to Turkey, then – at least as far as the actions of the TRNC are concerned – Turkey may only be responsible for violating its positive obligations.

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206 This seems to be the interpretation given to the judgment by Judge Bernhardt in *Loizidou* (Merits), Dissenting Opinion of Judge Bernhardt joined by Judge Lopes Rocha, para. 3. However, as Kress, 'L'organe de facto', at 108, note 60, points out, it is doubtful whether this interpretation is correct, as the Court was only asked to determine whether the conduct of the TRNC was attributable to Turkey.

207 See ECommHR, *Cyprus* v. *Turkey*, Application No. 25781/94, Report of 4 June 1999, paras. 98-102; *Tadić* (AC), para. 128; as well as more generally Milanović, *Extraterritorial Application*, 42-45 (including on the Commission's interpretation); Finck, 'L'imputabilité', 215; de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', 271-274; Kress, 'L'organe de facto', 107-109.

208 Most notably Milanović, *Extraterritorial Application*, 46-51. On the Commission's previous practice, see e.g. *Loizidou* (Preliminary Objections), para. 57; ECommHR, *Cyprus* v. *Turkey*, paras. 96-97.

209 See *Cyprus* v. *Turkey*, paras. 13, 18 for the complaint; as well as note 211 below.

210 *Cyprus* v. *Turkey*, para. 77 (emphasis added).

However, if the TRNC's conduct itself is attributable, then Turkey's responsibility extends to violations of both positive *and* negative obligations – i.e. the entire range of Convention rights – stemming from TRNC conduct.

At the same time, Cyprus argued that the conduct of a number of private individuals should also be attributed to Turkey.[211] In response to this claim, the Court merely noted that 'the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention.'[212] As the Court does not specify the nature of the state's responsibility, this statement can be read in one of two ways. According to one possible reading, this merely refers to positive obligations under the ECHR to prevent (and redress) human rights abuses committed by individuals, without the requirement that the conduct of these private actors need to be attributable to the state. According to the second possible reading, 'acquiescence or connivance' is regarded as a basis for attribution, as suggested by the IACtHR and perhaps some of the ECtHR's inter-state jurisprudence.[213] But even in that case, the ECtHR's statement indicates that the conduct of private actors is not *generally* attributable to Turkey, but would require further examination and evidence of involvement in each individual instance (unlike the conduct of the TRNC, which is considered attributable in its entirety). Whichever reading is followed, this statement disproves the first possible interpretation of *Loizidou*, and confirms that in addition to the Turkish military, the conduct of the TRNC – and only the TRNC – is attributable to Turkey based solely on its 'effective overall control' of Northern Cyprus.

The Grand Chamber findings in *Loizidou* and *Cyprus* v. *Turkey* holding Turkey responsible for the conduct of the TRNC have been consistently reaffirmed by the ECtHR in subsequent cases.[214] For more than a decade,

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211 Although this was described by the Court as 'the applicant Government's further claim that this "jurisdiction" must also be taken to extend to the acts of private parties in northern Cyprus' (*Cyprus* v. *Turkey*, para. 81), it is in fact a matter of attribution, as it refers to control over the *perpetrator* of an act (even if such attribution may then be used to establish jurisdiction under the personal model, which is not the case here), see notes 253-257 and accompanying text below. Note that while the TRNC authorities – being the *de facto* government of an unrecognized entity claiming statehood – are also essentially 'private' for the purposes of state responsibility, this claim of Cyprus was referring to private actors unaffiliated with the TRNC.

212 *Ibid.*

213 See Section 6.3.2 below.

214 See e.g. ECtHR, *Protopapa* v. *Turkey*, Application No. 16084/90, Third Section, Admissibility Decision of 26 September 2002; ECtHR, *Djavit An* v. *Turkey*, Application No. 20652/92, Third Section, Judgment of 20 February 2003, paras. 21-23; ECtHR, *Xenides-Arestis* v. *Turkey*, Application No. 46347/99, Third Section, Decision of 14 March 2005; ECtHR, *Foka* v. *Turkey*, Application No. 28940/95, Third Section, Admissibility Decision of 9 November 2006; ECtHR, *Alexandrou* v. *Turkey*, Application No. 16162/90, Fourth Section, Judgment of 20 January 2009, paras. 18-20; ECtHR, *Kyriacou Tsiakkourmas and others* v. *Turkey*, Second Section, Application No. 13320/02, Judgment of 2 June 2015, para. 150-151.

Turkey has kept challenging this line of reasoning, reiterating its assertion that the TRNC is an independent state, but not relying on jurisprudence from other courts.[215] That said, in recent years the state's signals have been somewhat mixed.[216]

Having arrived at the conclusion that the 'effective overall control' test is indeed a test of attribution, the next question is: how does it operate? Unlike the tests applied by other courts, it examines control over territory, not persons.[217] How can it then form the basis for attributing the conduct of some persons in that territory (the TRNC authorities), but not others (private individuals)? The key to answering this question is the Court's statement that the local administration of the TRNC 'survives by virtue of Turkish military and other support.'[218] Consider the following hypothetical scenario: what would happen if all Turkish troops were to suddenly withdraw from Northern Cyprus? The TRNC would almost certainly fall, but the effect on private individuals, businesses and non-governmental organizations (NGOs) would likely be much more limited.[219] Note, however, that this does not exclude the possibility of attributing to Turkey the conduct of any other private actors whose ties are so close to the state that they 'survive[] by virtue of' Turkish support. There is another factor which may have featured in the ECtHR's reasoning and is capable of further limiting the scope of actors whose conduct is attributable to Turkey: the latter's

215 See e.g. *Protopapa*; *Djavit An*, paras. 18-19; *Xenides-Arestis*; *Foka*; *Alexandrou*, para. 11.

216 Turkey did start taking a different approach in respect of property claims following the establishment of the Immovable Property Commission by the TRNC, with the Court noting in *Demopoulos* that 'the Turkish Government no longer contested their responsibility under the Convention for the areas under the control of the "TRNC" and that they have, in substance, acknowledged the rights of Greek Cypriot owners to remedies for breaches of their rights under Article 1 of Protocol No. 1'. ECtHR, *Demopoulos and others* v. *Turkey*, Application Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, Grand Chamber, Admissibility Decision of 1 March 2010, para. 108; see also ECtHR, *Joannou* v. *Turkey*, Application No. 53240/14, Second Section, Judgment of 12 December 2017, para. 75. In respect of other types of complaints, the picture in recent years is less clear, but there are signs that Turkey may be prepared to argue somewhat more in line with the Court's reasoning: in the 2015 *Kyriacou Tsiakkourmas* case Turkey acknowledged the ECtHR's holdings in *Loizidou* and *Cyprus* v. *Turkey*, but claimed at para. 146 'that the Court had not clarified the issue as to whether such general responsibility [for the policies and actions of the "TRNC" authorities] existed in respect of judicial decisions delivered by the courts of the "TRNC", over which the Turkish authorities had no control whatsoever.'

217 As also pointed out by e.g. Milanović, *Extraterritorial Application*, 48 (who relies on it to argue that it is in fact *not* an attribution test); Finck, 'L'imputabilité', 211; Talmon, 'The Responsibility of Outside Powers', 509-510; de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', 272.

218 *Cyprus* v. *Turkey*, para. 77.

219 The regime change may affect the rights of private individuals to the extent that the previous regime's acts were considered illegal (e.g. Mrs. Loizidou could enjoy use of her property again), but such effects would all link back to the TRNC.

decisive role in the *creation* of the TRNC.[220] But even when applied cumulatively, these two criteria – survival by virtue of third state support and that state's decisive role in the creation of the private actor – still do not limit attribution solely to the Northern Cypriot administration. If 'effective overall control' as an attribution test is to be applicable *only* to the TRNC authorities, this may be explained by the type of actor these authorities are: a local administration, exercising 'public' functions, even if (since the TRNC is not a state) it must be regarded as a 'private' actor.[221] Since there is only one local administration in Northern Cyprus, this would unequivocally limit attribution to the TRNC authorities. That said, the significance of these three factors – survival, creation and the character of local administration – is difficult to tease out, as no cases have come before the Court concerning actors which meet only one or two (rather than all three) of these criteria. Nonetheless, these factors, separately or cumulatively, help explain why effective overall control as an attribution test will result in the attribution of the TRNC administration's conduct to Turkey, but not generally of private individuals' conduct.

How does 'effective overall control' compare with other tests? It differs from both the 'effective control' test and the IACtHR's approach in the required degree of specificity. While these tests demand control (or 'acquiescence or collaboration') to be established with regard to each incident specifically, the ECtHR has held that 'it is not necessary to determine whether […] Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC".'[222] In this respect, 'effective overall control' shows a closer resemblance to the 'complete dependence' test, which has even led to the claim that the ECtHR 'clearly' regards the TRNC as a *de facto* organ, whose conduct is attributable to Turkey under Article 4 ARISWA.[223] But as the Court has developed the test autonomously – with no reference to the work of the ILC, the ICJ or the ICTY – the ECtHR arguably does not carry out its analysis in those terms.[224] Even if it was possible to fit 'effective overall control' into the ILC/ICJ framework, the jurisprudence of the ECtHR and the ICJ would still be at odds with each other, since the 'effective overall control' test sets a lower threshold than that of 'complete dependence'. The latter requires the *de facto* organ to have 'no real autonomy', which has not been the case in Northern Cyprus: Turkey

220 Cf. Finck, 'L'imputabilité', 214, noting that 'd'autres éléments auraient pu être pris en compte pour renforcer [la] conclusion [de la Cour], notamment que la RTCN a été créée suite à une invasion de l'armée turque, et sur une portion du territoire chypriote occupée par cette armée.'

221 See also de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', 273.

222 *Loizidou* (Merits), para. 56.

223 Finck, 'L'imputabilité', 215.

224 Milanović, *Extraterritorial Application*, at 49-50, relies on this (among other things) to argue that 'effective overall control' is not, in fact, an attribution test.

did not control every aspect of the TRNC's actions.[225] The fact that the TRNC survives by virtue of Turkish support does not, in and of itself, mean that the latter exercises complete control over the former's conduct. As the ICJ pointed out in *Nicaragua*, dependence merely creates the *potential* for control, and it is up to the supporting state to decide how much it wants to exploit that potential.[226] In the TRNC's case, it appears that Turkish control is not all-encompassing; and while the ECtHR did consider the TRNC to be a '*subordinate* local administration' of Turkey,[227] it did not elaborate on the nature of that subordination. In the end, 'effective overall control' is a distinct attribution test, which differs from both the 'effective control' and 'complete dependence' tests, as well as the IACtHR's approach, and shows the closest similarity with the concrete application of the 'overall control' test in *Tadić* – little surprise, considering that *Loizidou* was one of the cases cited by the ICTY Appeals Chamber in support of that test.[228]

4.4.2 The Transdniestria Cases: *Ilaşcu* and *Catan*

Building on the 'effective overall control' test, the Court's subsequent case law has proven to be even more intriguing. While the ECtHR has relied on its TRNC jurisprudence in a series of cases regarding the Moldovan separatist region of Transdniestria, there are certain subtle but significant differences between the Court's treatment of the two situations.

The first of these cases, *Ilaşcu and others* v. *Moldova and Russia* (decided in 2004), concerned the application of four political prisoners who had been unlawfully arrested, sentenced to death, and detained in deplorable conditions for several years in Transdniestria.[229] As in the Northern Cyprus cases, the ECtHR first had to determine whether the applicants came within the jurisdiction of Russia, examining the latter's links to the separatist regime of the so-called 'Moldavian Republic of Transdniestria'. The MRT emerged from a brief armed conflict in 1991-1992, during which it received crucial support from Russia. At the time, 'several thousand' Russian soldiers were stationed in Moldova, protecting major stockpiles of arms and ammunition.[230] These troops supported the separatists, both by actively passing on weapons and by allowing the rebels to 'seize possession of other weapons

225 See e.g. ECommHR, *Chrysostomos and Papachrysostomou* v. *Turkey*, Application Nos. 15299/89 and 15300/89, Report of 8 July 1993, para. 169: 'The Commission has found no indication of control exercised by Turkish authorities over the prison administration or the administration of justice by Turkish Cypriot authorities in the applicants' case.' This lack of control formed the basis for *not* finding certain acts 'imputable' to Turkey in that case.

226 *Nicaragua*, paras. 109-110.

227 *Loizidou* (Preliminary Objections), para. 62; *Loizidou* (Merits), para. 52.

228 *Tadić* (AC), para. 128.

229 See ECtHR, *Ilaşcu and others* v. *Moldova and Russia*, Application No. 48787/99, Grand Chamber, Judgment of 8 July 2004, paras. 188-272 on the facts.

230 *Ibid.*, para. 33.

unopposed'.[231] Following the conflict, Russia continued to support the regime, not only politically but also by providing critically important financial and economic assistance.[232] Although the number of Russian soldiers decreased over time, there were still around 1,500-2,200 troops deployed in the early 2000s, backed by formidable weapons stocks.[233] On the basis of these facts, the ECtHR Grand Chamber concluded that the applicants came within the jurisdiction of Russia, since:

> [T]he 'MRT', set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, *or at the very least* under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.[234]

In short, the Court moved from 'effective overall control' to 'effective authority, or at the very least […] decisive influence' as a test. The two tests differ from each other in a number of ways. Firstly, it seems that the test in *Ilaşcu* is no longer (or at least not exclusively) based on territorial control. Since the MRT is a self-proclaimed state and thus denotes both territory and government, it is somewhat unclear whether the term is used here to describe one or the other, or even both. But the Court's choice of words – 'authority' instead of 'control', as well as 'decisive influence' – seems to suggest that it refers not (only) to the territory, but to the entity as a whole. Secondly, 'decisive influence' is a lower threshold than that of 'effective overall control'.[235] Thirdly, the Court relied on different forms of support to reach its conclusion in *Ilaşcu*. Although the ECtHR held already in *Cyprus* v. *Turkey* that the TRNC 'survives by virtue of Turkish military *and other* support', it never detailed those other forms of support and seemed to base its conclusion exclusively on the Turkish military presence in the northern part of the island.[236] In the case of Transdniestria, meanwhile, the Court pointed out that the MRT 'survives by virtue of the military, economic, financial and political support' provided by Russia, and discussed each

231 *Ibid.*, para. 379-382, particularly para. 380. It is somewhat unclear whether the Russian troops also participated in the hostilities. In para. 380, the Court first notes that 'forces of the 14th Army […] fought with and on behalf of the Transdniestrian separatist forces', but later in the same paragraph, it states that 'it is of no consequence that, as the Russian Government submitted, the 14th Army did not participate as such in the military operations between the Moldovan forces and the Transdniestrian insurgents.'

232 *Ibid.*, paras. 382, 386-391; see also ECtHR, *Catan and others* v. *the Republic of Moldova and Russia*, Applications Nos. 43370/04, 8252/05 and 18454/06, Grand Chamber, Judgment of 19 October 2012, paras. 120-121.

233 *Ilaşcu*, paras. 387-389; on the number of troops and stocks, see *ibid*., para. 131.

234 *Ibid.*, para. 392 (emphasis added).

235 See also M. Milanović, 'Grand Chamber Judgment in Catan and Others', EJIL: *Talk!*, 21 October 2012, http://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others.

236 *Cyprus* v. *Turkey*, para. 77, and more generally paras. 75-80.

form of support extensively.[237] Fourthly and finally, in finding the MRT's conduct attributable to Russia, the Court emphasized the fact that the MRT was created with Russian support:

> [T]he Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus, the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova.[238]

These last two differences in the Court's analysis are particularly interesting because the situations in Northern Cyprus and Transdniestria are in fact very similar on these points. Like the MRT, the TRNC displays a heavy reliance on economic support from Turkey;[239] and the TRNC was likewise created with external (Turkish) support – so much so that the Turkish intervention has been described as 'the decisive factor in establishing a new local administration'.[240]

What explains the different treatment of these two similar situations? In all likelihood, the Court simply saw no need to take account of other forms of Turkish support in Northern Cyprus, deeming the military occupation to be sufficient in itself to justify establishing jurisdiction and attributing the TRNC's conduct to Turkey. By contrast, Russia's involvement in the MRT's affairs has been slightly more subtle, so the Court needed to rely on a combination of factors to establish jurisdiction (and possibly attribution). While there have been more than 30,000 Turkish troops stationed in Northern Cyprus, Russian soldiers in Transdniestria only numbered around 1,500-2,200 in the early 2000s.[241] Even taking into account that these soldiers have been guarding 'at least 200,000 tonnes of military equipment and ammunition',[242] it would have been difficult to base jurisdiction solely on military grounds. This insufficiency of the military factor explains why the Court needed to depart from 'effective overall control' in order to find jurisdiction. What is more, the departure proved to be quite uncontrover-

237 *Ilaşcu*, paras. 379-391.

238 *Ibid.*, para. 382. See also *Catan*, para. 118: 'the separatists were able to secure power in 1992 only as a result of the assistance of the Russian military.'

239 Central Intelligence Agency, *The World Factbook, Cyprus > Economy > Economy – overview*, <without date>, available at https://www.cia.gov/library/publications/the-world-factbook/geos/cy.html: 'Since its creation, the "TRNC" has heavily relied on financial assistance from Turkey which supports the "TRNC" defense, telecommunications, water and postal services.'

240 J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford: Oxford University Press, 2006), 143; see also *ibid.*, 143-147.

241 *Loizidou* (Merits), para. 16; *Ilaşcu*, para. 131.

242 *Ilaşcu*, para. 131.

sial in the Court: the ECtHR's Grand Chamber found jurisdiction with an overwhelming majority of sixteen to one, with only the Russian judge dissenting.[243]

However, as the Court discussed all of this under the heading of jurisdiction, drawing no distinction between jurisdiction and attribution, the same question arises as in *Loizidou*: is 'effective control or decisive influence' also a test of attribution, or merely a test of jurisdiction? Different passages of the judgment support each interpretation. On the one hand, the Court stated that 'the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists', and extensively discussed all the forms of support granted to the MRT, which – like the Turkish support to the TRNC – enable it to survive.[244] All this would seem to suggest that the conduct of the MRT is attributable to Russia. Furthermore, since 'effective overall control' is a jurisdictional *and* attribution test, and *Ilaşcu* is based on the jurisprudence of that test, it would stand to reason that 'effective authority or decisive influence' operates the same way. On the other hand, the ECtHR also highlighted that the applicants had been arrested 'with the participation of [Russian] soldiers' and that three of the four applicants had been initially detained on the premises of the Russian forces.[245] Although these events had taken place before the ECHR entered into force for Russia on 5 May 1998 (and consequently outside of the Court's temporal jurisdiction), the ECtHR held that:

> [T]here is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation *made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations* allegedly committed after 5 May 1998. Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.[246]

This reference to direct participation and the failure to prevent or end the violations suggests that only the conduct of its own soldiers could be attributed to Russia. The Court's concluding sentence on this issue provides little assistance in deciding between the two interpretations, merely stating that the applicants 'come within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility

243 *Ibid.*, operative para. 2. Interestingly, the question whether the applicants came within Moldova's jurisdiction sparked much more controversy: see Chapter 3, note 273 above.
244 *Ilaşcu*, para. 382, and more generally 379-391.
245 *Ibid.*, para. 383.
246 *Ibid.*, para. 393 (emphasis added).

is engaged with regard to the acts complained of.'[247] In the absence of any further indication, it is unclear whether Russia was found responsible only for having violated its positive obligations or also for the conduct of the MRT. Following the pattern in the Northern Cyprus cases, it thus fell on the subsequent jurisprudence of the Court to clarify whether 'effective authority or decisive influence' was indeed a test of attribution, or only of jurisdiction.

That opportunity came with the 2012 *Catan* case, concerning violations of the right to education. The MRT had – by occupying school buildings, and disconnecting water and electricity – placed nearly insurmountable obstacles to the functioning of schools teaching Moldovan in the Latin (as opposed to the Cyrillic) script and using the curricula of the Moldovan (rather than the Transdniestrian) authorities.[248] Unlike in *Ilaşcu*, however, there was no direct involvement by Russia in any of these actions.

Dissatisfied with the outcome of the *Ilaşcu* case, Russia once again disputed having jurisdiction over Transdniestria. The Russian argument was summarized by the ECtHR Grand Chamber as follows:

> [J]urisdiction could exceptionally be extended extra-territorially where a Contracting state exercised effective control over another territory, equivalent to the degree of control exercised over its own territory in peacetime. This might include cases where the State Party was in long-term settled occupation or where a territory was effectively controlled by a government which was properly regarded as an organ of the relevant State Party, in accordance with the test applied by [the ICJ in the *Bosnian Genocide* case]. It could not be said that Russia exercised jurisdiction in the present case, where the territory was controlled by a *de facto* government which was not an organ or instrument of Russia.[249]

The logic of this argument is essentially encapsulated in the following syllogism: if (1) Russia controls the MRT, and (2) the MRT controls Transdniestria, then (3) Russia – indirectly – controls Transdniestria, i.e. the latter falls under Russian jurisdiction. As indicated by the last sentence of the paragraph quoted, the second statement ('the MRT controls Transdniestria')

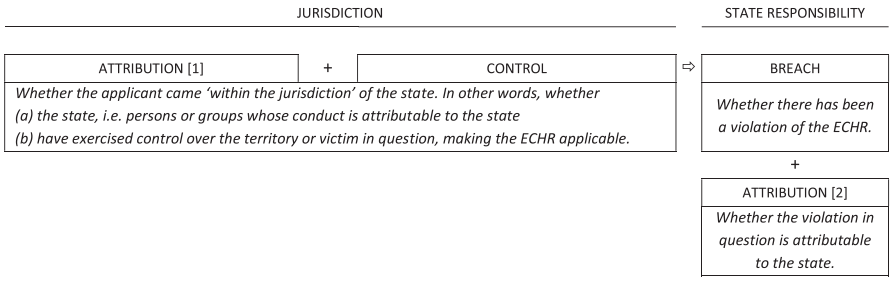
247 *Ibid.*, para. 394.

248 See *Catan*, paras. 43-63.

249 *Ibid.*, para. 96; see also *ibid.*, para. 115: 'The Government of the Russian Federation contend that the Court could only find that Russia was in effective control if it found that the "Government" of the "MRT" could be regarded as an organ of the Russian State in accordance with [the ICJ's approach in *Bosnian Genocide*].' Note that the parties' memorials are not generally released publicly, which means that it is unfortunately difficult to verify the accuracy of the Court's summary.

was treated by Russia as an established fact. What it disputed was the first statement ('Russia controls the MRT'), which is a matter of attributing the MRT's conduct to Russia – making attribution a precondition of finding jurisdiction.[250]

In fact, attribution is always a prerequisite of finding jurisdiction in extraterritorial cases.[251] The state's jurisdiction is normally presumed to extend over its entire territory, but not beyond – accordingly, attribution is needed to establish that it is indeed the respondent state which exercises control over the territory or victim in question.[252] Thus, the process of analysis in extraterritorial cases may be summarized as follows:



The source of confusion here is that control may be a variable in three of these analytical steps: attribution for the purposes of establishing jurisdiction or state responsibility (ATTRIBUTION [1] or [2]), or the determination of control over the territory or victim in question (CONTROL). This is not to say that control is always present in *all three* steps: in fact, it rarely plays a role in determining attribution (ATTRIBUTION [1] or [2]). In the majority of extraterritorial cases before the Court, ATTRIBUTION [1] is not discussed separately, since control over the territory or victim in question (CONTROL) is exercised through *de jure* organs (notably the military), whose conduct is

250 This interpretation was subsequently confirmed in ECtHR, *Sargsyan* v. *Azerbaijan*, Merits, Application No. 40167/06, Grand Chamber, Judgment of 16 June 2015, para. 141.

251 See Milanović, *Extraterritorial Application*, 51-52; M. Milanović, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court', in: A. van Aaken & I. Motoç (eds.), *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018), 97, at 105-106.

252 See e.g. ECtHR, *Al-Skeini and others* v. *United Kingdom*, Application No. 55721/07, Grand Chamber, Judgment of 7 July 2011, paras. 131-132, noting that extraterritorial jurisdiction is exceptional; see e.g. ECtHR, *Assanidze* v. *Georgia*, Application No. 71503/01, Grand Chamber, Judgment of 8 April 2004, para. 139; *Ilaşcu*, para. 312; *Catan*, para. 104; *Sargsyan*, para. 127, on the 'presumption of jurisdiction in respect of a State's territory.' There are two main models of extraterritorial jurisdiction, personal (control over the victim) and spatial (control over the relevant territory), see Milanović, *Extraterritorial Application*, 127-209. On attribution as a precondition of jurisdiction, see *ibid.*, 51-52.

undoubtedly attributable to the state.[253] For instance, in *Loizidou*, the ECtHR was able to establish jurisdiction based on the occupation by the Turkish military.[254] Even in cases where attribution (ATTRIBUTION [1] or [2]) does involve questions of control, that concerns control *over the (alleged) perpetrators*, not over the territory or the victim – accordingly, it is not possible to equate ATTRIBUTION [1] or [2] with CONTROL.[255] Granted, this conceptual distinction may not always be easy to maintain in practice, where – as in Northern Cyprus – the same facts may demonstrate control over both the perpetrators and the territory (or victims).[256] However, even in such situations, one cannot infer attribution from CONTROL without an additional step explaining why territorial control results in the attribution of the conduct of certain persons, but not others.[257]

Breaking down jurisdiction to its elements of ATTRIBUTION [1] and CONTROL also helps decipher what happened in the *Catan* case. While Russia argued that the ICJ's jurisprudence should be followed in determining attribution for the purposes of jurisdiction (ATTRIBUTION [1]), the ECtHR appears to have (mistakenly) assumed that Russia put forward 'effective control' as a test to establish whether control was exercised over the territory of Transdniestria (CONTROL).[258] Having done so, the Court pointed out that the ICJ's test concerned attribution *for the purposes of state responsibility* (ATTRIBUTION [2]), and dismissed it as not being a test of territorial control *for the purposes of jurisdiction* (CONTROL).[259] Since the test for

253 See e.g. Milanović, 'Jurisdiction and Responsibility', 105; although he speaks of attribution not being often discussed as a condition of jurisdiction *in general*, the same can be said for extraterritorial cases. See e.g. *Al-Skeini*; ECtHR, *Jaloud* v. *The Netherlands*, Application No. 47708/08, Grand Chamber, Judgment of 20 November 2014; but also *Pisari* v. *The Republic of Moldova and Russia*, Application No. 42139/12, Third Section, Judgment of 21 April 2015.

254 See notes 200-204 and accompanying text above.

255 Cf. Milanović, 'Jurisdiction and Responsibility', 104.

256 Cf. *ibid.*, 106, noting that in some cases, 'the jurisdiction-establishing conduct and the violation-establishing conduct may actually be one and the same'.

257 See notes 217-221 and accompanying text above.

258 Note that the ICJ's test for a *de facto* organ is 'complete dependence', not 'effective control'. As memorials of the parties are not generally available in ECtHR cases, it is not quite clear which of these tests Russia was arguing for; in the Court's summary of the respondent's arguments, Russia is consistently referring to an 'organ', but at the same time, it does not mention 'complete dependence' by name (*Catan*, paras. 96, 115). The judgment's section on 'relevant international law' is likewise unhelpful: the ECtHR cited Articles 6 and 8 ARSIWA (but not Article 4), as well as those passages of the *Bosnian Genocide* case which had dealt with 'complete dependence', but not the ones addressing 'effective control' (*Catan*, paras. 74, 76). Although the Russian argument does mention 'effective control' of territory at some point (*Catan*, para. 96), it appears that this was intended as a reference to the ECtHR's own terminology in referring to 'effective control over an area' (see e.g. *Al-Skeini*, para. 138), rather than the ICJ's test in *Nicaragua* or *Bosnian Genocide*. In any event, since 'complete dependence' and 'effective control' are both attribution tests (but neither of them is a test of territorial control), the ECtHR's approach was mistaken regardless of which test Russia intended to argue for.

259 *Catan*, para. 115.

ATTRIBUTION [1] or [2] cannot be the same as that for CONTROL, the Court was correct in rejecting 'effective control' as a test for the latter. However, this still leaves Russia's original argument unanswered, and the Court's (otherwise welcome) emphasis on the distinction between jurisdiction and state responsibility raises another question: can the same test be applied to determine attribution for the purposes of both jurisdiction and state responsibility (i.e. ATTRIBUTION [1] = ATTRIBUTION [2])?

On the one hand, it may be argued that the function of attribution is to establish that it is in fact *the state* that is doing something, and whether that 'something' is exercising control over territory or committing a human rights violation has no bearing on the question of whether the state did it or not. Indeed, this was the underlying reasoning of the ICTY's Trials and Appeals Chambers in *Tadić*, where they both held that in the absence of an IHL-specific test for determining when a conflict is international, the answer must be sought in attribution rules in the law of state responsibility. According to their reasoning, if the conduct of one of the participating armed groups can be attributed to another state, that makes the conflict international – otherwise it is internal.[260] It is likewise well documented how investment tribunals have used the ARSIWA's attribution rules for purposes other than establishing state responsibility, with the reception of these trends varying between authors.[261] As regards the ECtHR, the Court has been criticized for its conceptual confusion of (attribution for the purposes of) jurisdiction and attribution (for the purposes of state responsibility) and for employing lower attribution tests than the ICJ, but – interestingly – *not* for employing the same test for both purposes.[262] In fact, Russia's (undoubtedly self-interested) argument in *Catan* was also that the same test – 'complete dependence' – should be applied to determine attribution for the purposes of jurisdiction (ATTRIBUTION [1]) that the ICJ had previously applied for the purposes of establishing state responsibility (ATTRIBUTION [2]). Granted, one may object that attribution for the purposes of jurisdiction

260 See *Tadić* (TC), para. 584; *Tadić* (AC), para. 98; and more generally Jorritsma, 'Attribution of Conduct'. But see, for a critique of using identical tests (including in the context of self-defense against non-state actors), G. Kajtár, *A nem állami szereplők elleni önvédelem a nemzetközi jogban* (Budapest: ELTE Eötvös Kiadó, 2015), 219-257.

261 See e.g. S. Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 *ICSID Review* 457, at 462-470, criticizing this trend; Cs. Kovács, *Attribution in International Investment Law* (Alphen aan den Rijn: Kluwer, 2018), 235-266, on representations serving as the basis of legitimate expectations, whether the state can be deemed party to contractual undertakings, and attribution of knowledge; he is critical on the first two issues, but does not take a position on the third. But see G.A. Cortesi, 'ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law' (2017) 16 *Law and Practice of International Courts and Tribunals* 108, welcoming tribunals being more open about applying attribution tests at the jurisdictional stage to determine whether states can properly constitute respondents in cases brought concerning the conduct of state-owned enterprises.

262 See Milanović, 'Jurisdiction and Responsibility', 103-107.

prejudges attribution for the purposes of state responsibility.[263] If the same test is applied for both purposes, then once the conduct of a certain actor is found attributable to the state for the purpose of jurisdiction, it would be impossible to argue that the conduct of that same actor is *not* attributable for the purpose of state responsibility.[264] But even then, attribution for the purposes of jurisdiction does not necessarily predetermine the existence of breach: establishing jurisdiction (i.e. the applicability of the ECHR) is necessary but not sufficient for finding a violation of the Convention.[265] In other words, even where ATTRIBUTION [1] simultaneously determines ATTRIBUTION [2], it does not automatically lead to a BREACH. Attribution and breach thus remain distinct elements of state responsibility, determined independently of each other.

On the other hand, the ARSIWA Commentary specifically notes that 'the rules concerning attribution set out in [Articles 4-11] are formulated for this particular purpose [i.e. determination of state responsibility], and not for other purposes for which it may be necessary to define the State or its Government.'[266] In the same vein, the Commentary highlights that '[t]he question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State', such as the issue of full powers under Article 7 of the Vienna Convention on the Law of Treaties.[267] It has been noted in the literature on investment law that the same could be said for other questions, such as

263 See Olleson, 'Attribution in Investment Treaty Arbitration', 466-468; Kovács, *Attribution in International Investment Law*, 291. Cf. Milanović in *Extraterritorial Application*, 52 and 'Jurisdiction and Responsibility', 106, noting (but not criticizing) that the same conduct may establish jurisdiction and attribution under the personal model of jurisdiction.

264 Part of the problem here is that attribution for the purpose of jurisdiction tends to take place at the level of the *actor*, which may prejudge the issue of attribution for the purpose of state responsibility even if the latter would have ordinarily turned on a test applying at the level of the *conduct*. This is essentially the criticism of Csaba Kovács as well, see *Attribution in International Investment Law*, 291; cf. Milanović in *Extraterritorial Application*, 52 and 'Jurisdiction and Responsibility', 106, noting that the 'jurisdiction-establishing conduct' may not always be the same as the 'violation-establishing conduct'. Such actor-level attribution has particular relevance in the case of positive obligations; e.g. since the Turkish military is occupying Northern Cyprus, Turkish soldiers are bound to do their best to prevent human rights violations committed *by anyone* within that territory. Even then, it is possible to attribute someone else's conduct to Turkey *in addition to* its own military, be it regarding positive or negative obligations.

265 See e.g. *Ilaşcu*, para. 311: 'The exercise of jurisdiction is a necessary condition for a Contracting State *to be able to be held responsible* for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.' Cf. Cortesi, 'ICSID Jurisdiction', 124, noting in the context of investment arbitration that attribution (even if carried out at the jurisdictional stage) does not prejudge the question of breach.

266 ARSIWA Commentary to Part One, Chapter II, para. 5.

267 *Ibid*.; Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

deciding 'whether the State should be held to have waived an objection to jurisdiction by not raising it at the appropriate juncture in the proceedings', or whether 'a State should be regarded as bound by a particular contractual obligation entered into by a separate entity in the context of claims under an umbrella clause'.[268] That said, there is apparently much more acceptance of the idea of applying attribution tests at the jurisdictional stage in investment arbitrations to determine whether states can properly constitute respondents in cases concerning the conduct of state-owned enterprises.[269] Arguably, this scenario (determining the identity of the appropriate respondent, with the ultimate goal of establishing its responsibility *vel non*) is also the closest to that facing the ECtHR, even if the concept of jurisdiction as control is specific to human rights law.[270] In the particular context of the ECtHR, one of the judges did raise the question in a later case 'whether the Court should apply a different standard of attribution of responsibility than the one in international law and whether more or less the same standard should determine jurisdiction' and expressed 'serious reservations in that regard'.[271] Unfortunately, however, she did not clarify whether those reservations pertained to the first issue, the second one, or both. And if a different test is to be applied to establish attribution for the purposes of jurisdiction, the crucial question would be (how to decide) what test to apply instead.

In the end, despite openly declaring that 'the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been

268 Olleson, 'Attribution in Investment Treaty Arbitration', 464 and 465, more generally 462-466; see also Kovács, *Attribution in International Investment Law*, 242 and 259, and more generally 236-259.

269 See Cortesi, 'ICSID Jurisdiction', welcoming tribunals being more open about applying attribution tests at the jurisdictional stage; even Olleson, 'Attribution in Investment Treaty Arbitration', 466-470, is less critical of this practice, noting at 466-467 that: 'The issue relates not as such to the application of the rules of attribution to a situation to which they have no relevance, but rather to the manner in which the Tribunal purported to apply those rules in resolving the jurisdictional issue before it.' He suggests instead that jurisdiction should be found in such cases unless non-attributability is manifest, and the question of attribution should be joined to the merits. His main counterargument to using attribution tests at the jurisdictional phase appears to be that it prejudges the issue of attribution at the merits stage; and that it relies on actor-level analysis when it would be more appropriate to use conduct-level analysis both in determining the identity of the proper respondent and in evaluating the substance of the claim at the merits stage. See, in a similar vein, Kovács, *Attribution in International Investment Law*, 289-301. However, as noted above, and pointed out by Cortesi in 'ICSID Jurisdiction', 124, even if attribution is determined a the jurisdictional stage, the separate question of breach is still to be analyzed at the merits stage; and Olleson's counterargument as to the level of analysis arguably relates to *the type* of attribution test (from state responsibility) that should be applied, not to *whether* an attribution test from state responsibility should be applied.

270 See note 199 above.

271 ECtHR, *Chiragov and others* v. *Armenia*, Application No. 13216/05, Grand Chamber, Judgment of 16 June 2015, Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, para. 10.

equated with the test for establishing a State's responsibility for an internationally wrongful act under international law',[272] the ECtHR did precisely that: it used the same test to determine attribution for the purposes of both jurisdiction and state responsibility in *Catan* – just not the ICJ's test. Instead, the ECtHR looked at the military, economic and political support provided by Russia (through its *de jure* organs and state-owned corporations), enabling the MRT to survive.[273] Regarding jurisdiction, the Court took its conclusion in *Ilaşcu* as its starting point and held that it fell on Russia to prove that the ECtHR's findings in *Ilaşcu* were 'inaccurate'.[274] As Russia was unable to discharge that burden, the Court confirmed its previous decision on the matter:

> The Court […] maintains its findings in the *Ilaşcu* judgment (cited above), that during the period 2002-2004 the 'MRT' was able to continue in existence […] only because of Russian military, economic and political support. In these circumstances, the 'MRT''s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the 'MRT' administration during the period of the schools' crisis.[275]

Note, though, that the ECtHR went from characterizing the MRT as being 'under the effective authority, *or at the very least* under the decisive influence' of Russia in *Ilaşcu*, to being under the 'effective control *and* decisive influence' of Russia in *Catan*.[276] There is no explanation in the judgment for this modification – but considering that the Court repeatedly stated that it was simply maintaining its findings in *Ilaşcu*, it is unlikely that the change in wording would reflect a change in the substance of the test. This passage also confirms that – as already suspected in *Ilaşcu* – the test is not a territorial one, as the Court referred to Russia's 'effective control and decisive influence over the "MRT" *administration*'.[277] Accordingly, in the conceptual framework described above, this qualifies as a test of attribution for the purposes of jurisdiction (ATTRIBUTION [1]) and not of CONTROL, since it concerns control over the possible perpetrators, and not the territory or the victims.[278]

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272 *Catan*, para. 115.

273 *Catan*, paras. 116-123. This is actually a case of 'double' attribution: in order to determine the attributability of the MRT's conduct, the Court must examine the forms of support provided by the Russian state, i.e. state organs whose conduct must also be attributable to Russia. Cf. *Nicaragua*, para. 109 (speaking of the *contras*' relationship with the US *government*); *Bosnian Genocide*, paras. 391, 397.

274 *Catan*, paras. 119, 121.

275 *Ibid.*, para. 122.

276 *Ilaşcu*, para. 392; *Catan*, para. 122.

277 *Catan*, para. 122 (emphasis added); see note 234 and accompanying text above.

278 Incidentally, it seems that the ECtHR shared Russia's view that the MRT controls Transdniestria, as this was not discussed any further. The Court thus established Russia's jurisdiction following the syllogism described above.

Having established jurisdiction, the Court turned to matters of state responsibility, including attribution for this purpose (ATTRIBUTION [2]).[279] For the first time since the preliminary objections in *Loizidou*, the ECtHR discussed attribution (though not explicitly describing it as such) for the purposes of state responsibility separately from jurisdiction, and provided the following reasoning:

> The Court notes that there is no evidence of any direct participation by Russian agents in the measures taken against the applicants. Nor is there any evidence of Russian involvement in or approbation for the 'MRT''s language policy in general. Indeed, it was through efforts made by Russian mediators, acting together with mediators from Ukraine and the OSCE, that the 'MRT' authorities permitted the schools to reopen as 'foreign institutions of private education' […].
>
> Nonetheless, the Court has established that Russia exercised *effective control* over the 'MRT' during the period in question. In the light of this conclusion, and in accordance with the Court's case-law, it is not necessary to determine whether or not Russia exercised detailed control over the policies and actions of the subordinate local administration […]. By virtue of its continued military, economic and political support for the 'MRT', which could not otherwise survive, Russia incurs responsibility under the Convention for the violation of the applicants' rights to education. In conclusion, the Court holds that there has been a violation of Article 2 of Protocol No. 1 to the Convention in respect of the Russian Federation.[280]

As there was no direct participation by the Russian military, nor was there any question of failure to prevent or end the violation, Russia could not be held responsible for breaching any negative or positive obligation through its *de jure* organs. The fact that Russia was nonetheless held responsible confirms that the test applied in *Catan* (and *Ilaşcu*) is indeed an attribution test.[281]

Furthermore, despite discussing jurisdiction and attribution for the purposes of state responsibility separately, the Court merely referred back to its conclusion on jurisdiction when determining (attribution for the

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279 The ECtHR does not explicitly use the term 'attribution' or 'imputation' in this section, which is quite puzzling, given that it did so earlier in the judgment, in response to the arguments put forward by Russia (*Catan*, para. 115; see also ECtHR, *Mozer* v. *the Republic of Moldova and Russia*, Application No. 11138/10, Grand Chamber, Judgment of 23 February 2016, paras. 102, 156-159). However, the structure of the Court's analysis makes it clear that it is indeed discussing attribution: the Court's assessment in Section II(B) of the *Catan* judgment (the alleged violation of the right to education) consists of three subsections, '1. General principles', '2. Whether there has been a violation of the applicants' right to education in the present case', and '3. The responsibility of the Respondent States'. The first two of these subsections addresses breach, while the third deals with the form of responsibility (a violation of positive or negative obligations, each of which necessarily implies attribution of some conduct).

280 *Catan*, paras. 149-150 (emphasis added); see also *Mozer*, paras. 156-159.

281 See also Hessbruegge, 'Introductory Note', 218; but see, to the contrary, Milanović, 'Grand Chamber Judgment in Catan'.

purposes of) state responsibility, which indicates that the same test is applicable to both. Having previously identified the ICJ's 'effective control' test as an attribution test for the purposes of state responsibility (ATTRIBUTION [2]), it is then all the more surprising that the ECtHR made no mention of the ICJ's jurisprudence (or the work of the ILC, which it had cited as part of the applicable law) in the context of state responsibility.[282] In the absence of any such indication, it is not entirely clear at first glance whether the ECtHR intended to use the term 'effective control' as a reference to the ICJ's test or merely as a synonym of its own terminology of 'effective authority' – although it is noteworthy that 'decisive influence' disappeared from the Court's vocabulary by this stage.

But while the term 'effective control' might give the impression that it is the ICJ's test being applied, the subsequent sentences prove otherwise. As in the case of 'effective overall control', the fact that detailed control is not required puts the ECtHR's test at odds with 'effective control' as understood by the ICJ (i.e. control of specific conduct). 'Effective control and decisive influence' does not correspond to the 'complete dependence' test, either. As noted above, according to the ICJ, dependence merely creates the *potential* for control.[283] The ECtHR's view, however, appears to be that dependence creates a *presumption* of control, as shown by the Court's holding that 'the 'MRT''s high level of dependency on Russian support provides *a strong indication* that Russia exercised effective control and decisive influence over the 'MRT' administration'.[284] In any event, the facts of the *Catan* case point to the conclusion that the MRT was acting on its own accord in its treatment of the schools, which shows that there is at least some measure of autonomy exercised by the MRT. Consequently, it cannot be considered a *de facto* organ under the ICJ's test, since that would require the MRT not to have any autonomy whatsoever. Thus, like the 'effective overall control' test, 'effective authority and/or decisive influence' is an attribution test which differs from both 'effective control' and 'complete dependence'. And, like 'effective overall control', 'effective authority and/or decisive influence' in the end shows the closest similarity with the ICTY Appeals Chamber's 'overall control' test, with both of them applicable at the level of the actor (rather than the conduct) in question and allowing for a degree of autonomy.

Following *Catan*, the ECtHR applied the same reasoning in the Grand Chamber's 2016 *Mozer* judgment, as well as a string of cases before the Court's Second Section. Most of this jurisprudence is quite unremarkable, in the sense that it adds little to the ECtHR's analytical framework on control-

282 While the ECtHR quoted Articles 6 and 8 ARSIWA in the judgment's section listing the 'relevant international law' (*Catan*, para. 74), it never referred to them in its analysis.

283 See Sections 4.2.1 and 4.2.4 above.

284 *Catan*, para. 122. Cf. Finck, 'L'imputabilité', 218, according to whom already in *Ilaşcu*: 'Le lien entre le soutien et l'autorité est implicite mais clair dans le raisonnement de la Cour: l'Etat a directement créé l'entité, il permet sa survie, et ce lien de dépendance implique le contrôle de l'Etat sur l'entité.'

based attribution.[285] The first of these Second Section cases, however, *Turturica and Casian*, departed from the Court's previous reasoning in a small but potentially significant way. The case concerned the confiscation of cars with Moldovan (as opposed to MRT) license plates and the related fining of the applicants by the MRT authorities.[286] After finding that the applicants came within Russia's jurisdiction, the Court held that 'by virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive, Russia's responsibility under the Convention will be engaged *in an automatic manner* as regards *any* violations of the applicants' rights which are found in the present case.'[287] In other words, the Court did not even explicitly limit attribution to the MRT's acts – although the facts of the case left no doubt that the conduct under examination was solely that of the MRT authorities. This formulation has not been followed in subsequent ECtHR jurisprudence, though, leaving *Turturica and Casian* as an outlier case.

4.4.3 Nagorno-Karabakh: *Chiragov* and Subsequent Cases

The latest situation to come before the ECtHR regarding control-based attribution, once again in an extraterritorial context, concerns the Azerbaijani region of Nagorno-Karabakh, which maintains a secessionist regime with the support of Armenia. The population of Nagorno-Karabakh has long been predominantly Armenian, and as the Soviet Union was falling apart in the late 1980s and early 1990s, calls for unification with Armenia (or at least independence) strengthened significantly. In the ensuing conflict, the self-proclaimed 'Nagorno-Karabakh Republic' came to control not only the territory of Nagorno-Karabakh itself, but also seven other neighboring

285 In the 2016 *Mozer* case before the Grand Chamber, the only notable point was that Russia apparently argued, at para. 93, that the ECtHR's concept of 'effective control' 'differed from the interpretation' of not only the ICJ in *Nicaragua* and *Bosnian Genocide*, *but also the ICTY's 'overall control' test*. Although it would have been interesting to see Russia's argument on the 'overall control' test more fully elaborated, the Court's summary does not provide further information and as mentioned in note 249 above, memorials submitted to the ECtHR are not generally released. In any event, the ECtHR deflected Russia's argument on the ICJ's case law the same way as it did in *Catan* (see *Mozer*, para. 102), and did not address the ICTY's jurisprudence at all.

286 ECtHR, *Turturica and Casian* v. *the Republic of Moldova and Russia*, Applications Nos. 28648/06 and 18832/07, Second Section, Judgment of 30 August 2016, paras. 7-8. 'In November 2004, the "MRT" authorities adopted new rules, according to which any car with non-MRT registration plates could only enter the territory of the "MRT" after the payment of customs duties for temporary entry into the "MRT". Failure to observe the new rules was punished with a fine which could be as high as the full value of the car.' (*Ibid*., para. 8.)

287 *Ibid*., para. 33 (emphases added). This also illustrates how applying the same attribution test for the purposes of jurisdiction and state responsibility can result in pre-judging the question of attribution for the purpose of state responsibility.

districts in Azerbaijan. A ceasefire was eventually concluded in 1994, but there has been no comprehensive solution to the conflict to date.[288]

Within this broader context, the 2015 case of *Chiragov and others* v. *Armenia* concerned the right to property and family life of Azerbaijani Kurds, who had been living in the district of Lachin (one of the districts surrounding Nagorno-Karabakh), from where they had been displaced during the war in 1992. They had not been able to return to their homes since then, nor had they received any compensation.[289] Accordingly, the ECtHR Grand Chamber had to examine whether Armenia has exercised jurisdiction over the NKR and whether the state is responsible for the alleged violations of the applicants' human rights.

In determining the preliminary question of jurisdiction, the Court relied on its own previous jurisprudence, holding that the case at hand – like the ones regarding Northern Cyprus and Transdniestria – turned on the question of 'effective control over the mentioned territories'.[290] Citing *Catan*, the ECtHR stated that 'this assessment will primarily depend on military involvement, but other indicators, such as economic and political support, may also be of relevance.'[291] The Court then proceeded to carry out a detailed examination of the support – military and otherwise – provided by Armenia to the NKR.[292] Addressing military support first, the ECtHR emphasized Armenia's role in the war (without which, according to the Court, the NKR would arguably not have been able to secure control over the territory); the 1994 military cooperation agreement concluded between Armenia and the NKR (which provides, among other things, that 'conscripts of Armenia and the "NKR" may do their military service in the other entity'); and certain statements of Armenian officials contradicting the official stance of the state's non-involvement.[293] But perhaps the most remarkable aspect of the Court's analysis was its response to the disputed number of Armenian soldiers in the NKR. While Armenia had argued that there were no more than 1,500 of its troops serving in the NKR, NGO reports had put the number at 8-10,000 instead.[294] Faced with such inconsistent numbers, the Court decided that it 'need not solve this issue',

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288 On these facts, see *Chiragov*, paras. 12-31; *Sargsyan*, paras. 14-28. The two judgments were issued on the same day, in the same Grand Chamber composition of judges (see *Chiragov*, para. 6; *Sargsyan*, para. 6), as the two cases essentially mirrored each other (the judgments even contain several identical paragraphs): both of them concerned the same type of violations – enjoyment of property and family life – in the context of the same conflict, brought by displaced Azerbaijani Kurds against Armenia, and displaced ethnic Armenians against Azerbaijan, respectively, see *Chiragov*, paras. 32-57; *Sargsyan*, paras. 29-42.

289 *Chiragov*, paras. 3, 194.

290 *Ibid.*, para. 169; the applicants had argued on the basis of *Al-Skeini* in the alternative, which the Court rejected *ibid*.

291 *Ibid*.

292 *Ibid.*, paras. 152-187; see also paras. 58-86.

293 *Ibid.*, paras. 172-179, with para. 175 quoted on the cooperation agreement.

294 *Ibid.*, para. 180; see also *ibid.*, paras. 75, 63, 65.

holding that through its various forms of support – including military presence – Armenia 'has been significantly involved in the Nagorno-Karabakh conflict from an early date' and that this support 'has been – and continues to be – *decisive* for the conquest of and continued control over the territories in issue, and the evidence, not the least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the "NKR" are highly integrated.'[295]

The ECtHR's approach here is easier to understand when read in light of the *Ilaşcu* case: even if one were to proceed on the basis of the Armenian government's (as opposed to the NGOs') assertion, the presence of 1,500 soldiers is comparable to the number of Russian troops in Transdniestria in the early 2000s. Those Russian troops have been backed by a massive military arsenal stored on the territory of the MRT, however, which also weighed heavily in the Court's analysis of jurisdiction.[296] In *Chiragov*, meanwhile, the additional factors have been the Armenian 'provision of military equipment and expertise' and the high degree of integration between the two entities' militaries.[297] The Court thus looked beyond the mere number of troops and relied on additional elements in both Transdniestria and Nagorno-Karabakh. That said, and conceding that it is difficult to compare the relative significance of the different forms of support in the two situations, the *Chiragov* case may well represent a reduction in the threshold required for jurisdiction, at least in military terms.[298]

With regard to political links, the Court highlighted the 'interchange of prominent politicians' (who went on to hold high offices in Armenia after having done so in the NKR), the issuance of Armenian passports to NKR residents, the adoption of several NKR laws from Armenian legislation, and 'the operation of Armenian law enforcement agents and the exercise of jurisdiction by Armenian courts on that territory.'[299] As for financial assistance, the ECtHR pointed out that most of the NKR's budget is provided by Armenia (directly and through the Hayastan All-Armenian Fund), concluding that 'the "NKR" would not be able to subsist economically without the substantial support stemming from Armenia.'[300]

The ECtHR ultimately concluded that Armenia did exercise jurisdiction over the territories in question, since:

> All of the above reveals that the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a *significant and decisive influence* over the "NKR", that the two entities are *highly integrated* in virtually all important matters and that this situation persists to this day. In other words, the "NKR" and its

295 *Ibid.*, para. 180 (emphasis added).
296 See *Ilaşcu*, paras. 131, 387-389.
297 *Chiragov*, para. 180.
298 Cf. note 303 below.
299 *Ibid.*, paras. 181-182.
300 *Ibid.*, paras. 183-185.

> administration *survives by virtue of* the military, political, financial and other support given to it by Armenia which, *consequently*, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention.[301]

There are a couple of noteworthy points in the Court's conclusion. Firstly, the terminology of 'significant and decisive influence' is different from both 'effective overall control' (Northern Cyprus) and 'effective authority and/or decisive influence' (Transdniestria) referenced in previous ECtHR jurisprudence. Indeed, the Court seems to be moving away from (strict military) control as a threshold.[302] Even more interesting is the factor cited by the Court – but new to its jurisprudence – that Armenia and the NKR are 'highly integrated', which may well describe a relationship of cooperating equals or allies, and does not necessarily imply a subordinate relationship.[303] Secondly, and more importantly, though: notwithstanding these variations, there is a constant element in the Court's analysis, which is consistent across all of its jurisprudence on the matter, namely that 'the "NKR" and its administration *survives by virtue of* the military, political, financial and other support given to it by Armenia'.[304]

The Court's conclusion also reveals that in its view, Armenia exercises jurisdiction over the territories in question indirectly, through the NKR administration. In other words, Armenia exercises control over the NKR (ATTRIBUTION [1]), and the NKR exercises control over Nagorno-Karabakh and the surrounding occupied regions, including Lachin (CONTROL). It has been argued earlier in this chapter that the ECtHR construed jurisdiction in the same way in its Transdniestria jurisprudence; the Court explicitly confirmed this approach in the *Sargsyan* case, which formed a counterpart to *Chiragov*:

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301 *Ibid.*, para. 186 (emphases added).

302 Cf. M. Milanović, 'The Nagorno-Karabakh Cases', EJIL: *Talk!*, 23 June 2015, http://www.ejiltalk.org/the-nagorno-karabakh-cases, noting that the Court 'is being increasingly generous on threshold questions of the Convention's extraterritorial application.'

303 Note how, inasmuch as this high degree of integration concerns the military, the Court reached its conclusion mostly on the basis of the 1994 military *cooperation* agreement between Armenia and the NKR: *Chiragov*, para. 180. The Court's reliance on the agreement (and more generally, its assessment of the evidence and the threshold applied) has also been criticized in many of the concurring and dissenting opinions of the *Chiragov* case. The Concurring Opinion of Judge Motoç, at 84-85, regarded the Court's conclusion as raising the threshold of control. On the other hand, the Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, paras. 4, 11-12; the Dissenting Opinion of Judge Gyulumyan, 107-124; and the Dissenting Opinion of Judge Pinto de Albuquerque, paras. 34-37, all explicitly or implicitly regarded the Court's test as a departure from the ECtHR's previous case law, implying a lowering of the threshold.

304 *Chiragov*, para. 186 (emphasis added). See also *Cyprus* v. *Turkey*, para. 77; *Ilaşcu*, para. 392; *Catan*, para. 150; *Mozer*, para. 157.

> In the above Moldovan cases, it was not in dispute that the territory in question, namely Transdniestria was under the effective control of the "MRT". In Convention terms Russia was held to have jurisdiction over the area controlled by the "MRT" on account of exercising effective authority or at least decisive influence over the "MRT" and securing its survival by virtue of military, economic, financial and political support and therefore to be responsible for the violations found […].[305]

In *Chiragov*, this interpretation is further supported by the Court's decision to examine 'effective control over Nagorno-Karabakh and the surrounding territories as a whole', rather than Lachin in particular.[306] In fact, it would have been difficult to prove direct Armenian control over Lachin itself: an OSCE fact-finding mission – whose report was cited by the Court in the facts – had pointed out that while '[t]he direct involvement of [the NKR] in Lachin district is uncontested', the mission 'found no evidence of direct involvement of the government of Armenia in Lachin settlement.'[307]

The application of a control-based ATTRIBUTION [1] test becomes particularly significant in light of the fact that when the Court – having established jurisdiction – turned to examine Armenia's responsibility, its analysis was confined to the question of breach, with no explicit discussion of ATTRIBUTION [2].[308] As the applicants' displacement itself fell outside the ECtHR's jurisdiction *ratione temporis*, the Court's task was limited 'to determin[ing] whether the applicants have been denied access to their

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305 *Sargsyan*, para. 141; on the relationship between the *Chiragov* and *Sargsyan* cases, see note 288 above.

306 *Chiragov*, para. 170. Although this is also connected to the Court's dismissal of the personal model of jurisdiction in this case (*ibid.*, para. 169; see also Milanović, 'The Nagorno-Karabakh Cases'), the application of the spatial model would not, in and of itself, have necessarily required a showing of control over the entire NKR, rather than Lachin in particular.

307 See OSCE, *Report of the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (NK)*, 28 February 2005, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dsca20050413_08/dsca20050413_08en.pdf, 30; cited in *Chiragov*, para. 86. Note that the word 'settlement' refers to the process of settlers arriving to the area to establish their lives there (which was the focus of the fact-finding report), not a village or town (in that latter respect, the report distinguishes between – and consistently speaks of – Lachin District and Lachin town).

308 Unlike the judgment itself, many of the concurring and dissenting opinions have explicitly addressed the question of attribution, although it is difficult to identify a common thread in these opinions. See in particular the Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, who raised the question 'whether the [ECtHR] should apply a different standard of attribution of responsibility than the one in international law and whether more or less the same standard should determine jurisdiction' and expressed 'serious reservations in that regard' (para. 10). But see also *ibid.*, paras. 5-6, where the Judge admitted the possibility of a divergent interpretation by the ECtHR and noted that the Court indeed appears to have relied on a different test than that of the ICJ ('complete dependence') in its previous jurisprudence, as well as in the case at hand. In other words, while the ECtHR *can* and *does* apply different standards of attribution, the question is whether it *should* do so.

property after 26 April 2002', the Convention's date of entry into force for Armenia.[309] In answering this question, the Court simply *drew no distinction* between Armenia and the NKR, holding that neither one of them had offered procedures which could ensure the applicants' return, and that the obstacles to such return 'include the continued presence of Armenian and Armenian-backed troops'.[310] The case is thus similar to *Loizidou*, in that Armenian troops – as part of the NKR forces – have a direct role in preventing the applicants' return, which obviates the need for attributing the conduct of the NKR itself to Armenia, at least for the purposes of state responsibility.[311] That said, the Court's lack of distinction may also be read as implying attribution of the NKR's conduct.[312] This becomes apparent when the actions (presence of troops) and omissions (lack of procedures) making up the violation are examined separately. As regards omissions, it seems that if *either* Armenia *or* the NKR had developed the relevant procedures, that would have been sufficient to meet the requirements of the Convention – which, in turn, implies attribution of the NKR's conduct. As regards actions, it appears that as long as *either* Armenian *or* Armenian-backed troops are preventing the applicants' return, this is considered by the Court to be a violation of the Convention – which implies that even if no Armenian troops were directly involved in the violation, it may still be attributable to the state. Ultimately, though, like *Loizidou* and *Ilaşcu* before, the *Chiragov* case is somewhat ambiguous on the question of attribution for the purpose of state responsibility; in that, as in many other aspects, the judgment follows the pattern established by the Court in its previous jurisprudence.[313]

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309 *Chiragov*, para. 193.

310 *Ibid.*, paras. 194-195 (emphases added). This lack of distinction accords well with the high degree of integration highlighted by the Court in its conclusion on jurisdiction at para. 186.

311 Admittedly, the Court did not point to any *particular instances* where Armenian troops directly prevented the applicants' return, referring to the generally prevailing circumstances instead (*ibid.*, para. 195); in the same vein, Judge Motoç has noted that the Court 'd[id] not examine the question of attribution and d[id] not seek to establish the actual participation of the Armenian forces in the acts that resulted in the applicants being deprived of their possessions,' *ibid.*, Concurring Opinion of Judge Motoç, 85. However, in order to find Armenia responsible, the Court *must have* found some conduct in breach of the ECHR to be attributable to Armenia (in accordance with the generally accepted 'breach + attribution' formula codified in Article 2 ARSIWA), even if said attribution was entirely implicit. (Cf. Milanović, 'The Nagorno-Karabakh Cases', emphasis in original: '*some conduct* still had to be attributed to Armenia and the Court does not make it clear which conduct this is.') Such attribution is easiest to establish in respect of Armenian troops, which are *de jure* organs under Article 4 ARSIWA.

312 This was how Judge Ziemele interpreted it in her Partly Concurring, Partly Dissenting Opinion to *Chiragov*: see para. 1.

313 Cf. Milanović, 'The Nagorno-Karabakh Cases' (emphasis in original): 'What is not clear from the judgment is whether the Court believes that the conduct of NKR separatists, which prevents the applicants from accessing their property, is *attributable* to Armenia, or rather whether Armenia is found responsible for failing to fulfil its positive obligations and protect the applicants from the conduct of third parties in areas under its jurisdiction.'

Since *Chiragov*, a handful of cases have come before the First Section of the ECtHR, in which Armenian conscripts serving in Nagorno-Karabakh had been the victims of human rights abuses within the military. In two of these cases, *Zalyan* and *Mirzoyan*, the victims had been assigned to military units of the Armenian army (but NKR authorities were also involved in the events in *Zalyan*).[314] In *Muradyan*, the victim had been assigned to the Nagorno Karabakh Armed Forces, rather than the Armenian army.[315] Armenia apparently did not contest jurisdiction in any of these cases, but the ECtHR examined the question on its own initiative in all three.[316] In *Mirzoyan*, the ECtHR – rather surprisingly – appears to have established jurisdiction based on the personal model, rather than the territorial one, noting that the victim's 'death on the territory of the "NKR" was caused by […] an officer of the Armenian Army'.[317] Still, *Zalyan* and *Muradyan* provide further insight into the question of attribution for the purposes of both jurisdiction and state responsibility.

In *Zalyan*, the Court relied on its finding in *Chiragov* (that Armenia exercised effective control and thus jurisdiction over the NKR) to hold that 'Armenia has jurisdiction under the Convention over the events which happened in those territories and the acts committed by either the Armenian or Karabakh authorities.'[318] In *Muradyan*, following a more extended review of prior case law on Northern Cyprus and Transdniestria, the ECtHR held – as it had in *Cyprus* v. *Turkey* regarding the TRNC – that Armenia's 'responsibility under the Convention cannot be confined to the acts of its own soldiers or officials operating in Nagorno Karabakh but is also engaged by virtue of the acts of the local administration which survives by virtue of Armenian military and other support'.[319] The Court then concluded that 'the matters complained of […] fall within the jurisdiction of Armenia […] and *therefore* entail the respondent State's responsibility under the Convention.'[320] In other words, in replicating the reasoning of *Cyprus* v. *Turkey*, the ECtHR also replicated the conflation of jurisdiction and responsibility within that reasoning. This is further supported by the fact that the Court did not consider the issue of responsibility separately in any of these cases. Notwithstanding this unfortunate conflation, the judgments in *Zalyan* and *Muradyan* indicate that the ECtHR considers attribution (including for the purposes of state responsibility) to cover not only the conduct of Armenia's *de jure* organs, but also the conduct of the NKR.

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314 ECtHR, *Zalyan and others* v. *Armenia*, Applications Nos. 36894/04 and 3521/07, First Section, Judgment of 17 March 2016, para. 7; ECtHR, *Mirzoyan* v. *Armenia*, Application No. 57129/10, First Section, Judgment of 23 May 2019, para. 7.

315 ECtHR, *Muradyan* v. *Armenia*, Application No. 11275/07, First Section, Judgment of 24 November 2016, para. 6.

316 *Zalyan*, paras. 210-215; *Muradyan*, paras. 120-127; *Mirzoyan*, paras. 54-56.

317 *Mirzoyan*, paras. 55-56.

318 *Zalyan*, para. 215.

319 *Muradyan*, para. 126.

320 *Ibid*., para. 127 (emphasis added).

4.4.4 Concluding Remarks

In light of the cases discussed above, the following conclusions can be drawn regarding the ECtHR's jurisprudence on control-based attribution. Firstly, although the Court is rarely, if ever, explicit about this, it does indeed rely on control-based attribution to determine state responsibility. Secondly, despite the varying formulations, the ECtHR in fact applies a single 'survives by virtue of' test, which operates at the level of the actor, denotes *sine qua non* support and possibly serves as the basis for a presumption of control. Thirdly, all of the entities examined share certain characteristics whose significance is still unclear. While the third state's role in the creation of the secessionist entity is unlikely to be decisive, the exercise of governmental functions may be a relevant factor, but this can only be confirmed once other types of actors have come before the Court. Fourthly and finally, the ECtHR's test not only sets a threshold that is lower than that of the ICJ; it relies on a rationale that appears to take it outside the ARSIWA framework.

As the preceding sections have demonstrated, the tests applied by the ECtHR are used to determine attribution not only for the purpose of establishing jurisdiction, but also for the purpose of state responsibility. Without dwelling further on the issues which have already been covered, it is nonetheless worth addressing three more general arguments – raised by Marko Milanović, who has commented extensively on the ECtHR's jurisprudence on extraterritorial jurisdiction – on why the 'effective overall control' test in *Loizidou* could (or should) not be interpreted as a test of attribution. Milanović points out, firstly, that the Court does not use the terms 'attribution' or 'imputability' when discussing the test, despite having used these terms elsewhere in its jurisprudence; secondly, that it does not mention *Nicaragua*, *Tadić* or the work of the ILC; lastly, and according to Milanović, 'most importantly', not regarding 'effective overall control' as an attribution test is 'the only way of reconciling *Loizidou* with the work of both the ILC and the ICJ on state responsibility'.[321]

To take each of these points in turn: the first one, although certainly odd, is essentially a matter of form over substance. While the ECtHR does occasionally refer to 'imputability' (and sometimes 'attribution') in this jurisprudence, it tends to use the single, general heading of 'responsibility' to discuss violations of positive obligations (which implies attribution of *de jure* organs' conduct) and/or attributing the conduct of private actors.[322] This is admittedly troubling, as it can create confusion, making it more difficult to interpret the Court's judgments. But if the judgment does, in effect, attribute the conduct of the TRNC to Turkey or the MRT to Russia,

321 Milanović, *Extraterritorial Application*, 49-50.

322 See e.g. *Cyprus* v. *Turkey*, paras. 69-81; note 279 above. As discussed in Section 4.3.2 above, the IACtHR in its pre-*Yarce* Colombian jurisprudence similarly tended to address the two issues together.

that result cannot be negated by the fact that the Court did not use the term 'attribution' in doing so. Granted, the *Loizidou* case – like *Ilaşcu* and *Chiragov* later on – was somewhat ambiguous in this regard, but the ECtHR's subsequent jurisprudence – in *Cyprus* v. *Turkey* and especially in *Catan* – has provided sufficient proof to conclude that it did indeed use the test for attribution. This is particularly so in the case of *Catan*, where there was no direct Russian participation in the conduct in question,[323] and given that (1) the schools reopened due to (partly) Russian mediation, and (2) the Court did not mention positive obligations in its discussion of Russian responsibility, when it has done so in the preceding paragraphs regarding Moldovan responsibility,[324] it is highly unlikely that Russia was held responsible for violating its positive obligations. The lack of direct participation or violation of a positive obligation by *de jure* organs leaves attribution of the MRT's conduct as the only remaining option for the responsibility of Russia.

As to the second point: while it may likewise be considered somewhat odd, the Court's non-engagement with other sources is similarly incapable of negating the ECtHR's substantive conclusions. In fact, as discussed in the following section, courts seem to be generally unwilling to engage with other courts' jurisprudence, unless compelled by the parties' pleadings. Even in the *Catan* judgment (issued in 2012, after Milanović's initial criticism), where the Court explicitly cited the ARSIWA and the *Bosnian Genocide* judgment as part of the applicable law, it did not consider them on the substance.

The third point, meanwhile, is a normative argument. While Milanović's underlying point – that jurisdiction must be distinguished from responsibility – is indeed crucial, it is different from the question of what threshold must be applied to establish attribution for the purposes of jurisdiction, state responsibility or both, and does not necessitate bringing the ECtHR's jurisprudence into conformity with that of the ICJ. What, if any, is then the inherent value in doing so? It may avoid the fragmentation of control-based attribution tests in international law – but, as discussed in Section 4.5 below, there are ways to ensure the peaceful co-existence of multiple control tests. If the ECtHR had applied either the 'complete dependence' or the 'effective control' tests in the Northern Cyprus or Transdniestria cases, it is highly unlikely that either Turkey or Russia would have been held responsible for anything other than violations committed by their *de jure* organs. In some cases, that would have meant escaping responsibility entirely – which is no doubt why Russia argued on the basis of the *Bosnian Genocide* judgment in the *Catan* case. In the end, none of these three points are persuasive enough to supersede the results reached by analyzing the ECtHR's judgments themselves.

323 *Catan*, para. 149.
324 *Ibid.*, paras. 145-148.

Having concluded that the ECtHR has indeed engaged in control-based attribution, the next question is whether the Court has applied several different tests over the years, or merely different manifestations of the same test? In other words, are 'effective overall control' (Northern Cyprus), 'effective authority and/or decisive influence' (Transdniestria), and 'significant and decisive influence' and 'highly integrated' entities (Nagorno-Karabakh) substantively identical? At first glance, it seems that these are three different tests, whereby the threshold of 'effective overall control' is lowered with each subsequent formula. However, it is also possible to view them as different manifestations of a single 'survives by virtue of' test. After all, 'effective overall control', 'effective authority and/or decisive influence', 'significant and decisive influence' and the 'highly integrated' nature of entities were all used to demonstrate that the TRNC/MRT/NKR survived by virtue of Turkish/Russian/Armenian support; they merely relied on different elements – solely military *versus* military, political and economic factors, and in some cases, a high degree of integration – to prove the same outcome: the dependence of the local administration on the supporting state.[325] It thus stands to reason that the ECtHR ultimately applies a single test, rather than several different ones, while the relevant factors proving that the test is met shift slightly from case to case (or at least from entity to entity). Not surprisingly, the ECtHR itself also tends to classify these cases as following the same pattern. It has been developing a systematic categorization of situations of extraterritorial jurisdiction, which – due to the Court's tendency to blur (attribution for the purposes of) jurisdiction and state responsibility – arguably covers attribution for the purpose of state responsibility as well.[326] One such category is the exercise of 'effective control over an area', which is essentially a collective label for the ECtHR's Northern Cyprus and Transdniestria jurisprudence.[327]

But as observed above in the case of the IACtHR, finding that the private actor could not have carried out its conduct without state support can denote an evidentiary, rather than substantive, requirement for establishing attribution. Could the same be the case at the ECtHR? The crucial difference between the jurisprudence of the two courts is that the Inter-American Court's evaluation takes place at the level of the conduct, while the European Court's analysis is at the level of the actor. The purpose of the evidentiary rule is to determine the state's role indirectly, when there is no

325 This is clearest in the *Chiragov* case, where the Court noted in para. 186 that 'Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. *In other words*, the "NKR" and its administration survives by virtue of the military, political, financial and other support given to it by Armenia' (emphasis added).

326 See e.g. *Al-Skeini*, paras. 130-142.

327 See *Al-Skeini*, paras. 138-139 (as the judgment was rendered in 2011, and the *Chiragov* case was decided in 2015, the ECtHR made no reference to the situation relating to Nagorno-Karabakh in *Al-Skeini*).

direct proof regarding the extent of that role. But at the more general level of the actor (as opposed to the conduct), there is rarely any need to rely on circumstantial evidence, which strongly suggests that the 'survives by virtue of' test is a substantive test of control-based attribution. That said, as explained above, where the formula of 'could not have acted without state support' is used as an evidentiary rule, the procedural and the substantive will always coincide.[328] In other words, this question can only be answered conclusively when cases of private actors acting with *non-decisive* third state support come before the Court.[329] In the meantime, while the ECtHR's test may not be the Court's final answer on the *necessary* minimum threshold for attribution, the test does establish that where the secessionist entity 'survives by virtue of' third state support, this is *sufficient* grounds for control-based attribution.

The cases that have come before the ECtHR in the context of control-based attribution also share two further features: the private actors have been created with (likely decisive) third state support; and they belong to one particular type of private actor, namely a (secessionist) local administration. What is the significance of these features? Regarding the first, it should be recalled that dependence (which, in turn, presumes control) plays a central role in the Court's analysis. The fact that the secessionist entities were created with significant third state support provides a particularly strong indication of the degree of their dependence on these states. But if that dependence can be proven by other means, there is no reason why a role in the private actor's creation should be necessary for attribution. Conversely, if the entities had subsequently become self-sustaining and no longer dependent on the third state, it is unlikely that the Court would still have found attribution. Overall, it appears that a (decisive) state role in the creation of the private actor is neither a necessary, nor a sufficient requirement on its own.

As regards the private actors all being local administrations, the ECtHR – unlike the ICTY Appeals Chamber in *Tadić* – has not explicitly tied the type of test applied to a certain category of non-state actors. Nonetheless, it is possible that this factor has influenced the Court's analysis in two ways. Firstly, the Appeals Chamber's rationale for applying a different test to organized groups – as opposed to individuals – was that the internal (hierarchical) organization of the group ensured the conformity of its members.[330] Consequently, overall control over 'the group as a whole' was considered sufficient for attribution.[331] In other words, the existence of

328 See notes 158-161 and accompanying text above.

329 In particular, the pending applications concerning Eastern Ukraine may be able to supply the answer, where the ECtHR will have temporal jurisdiction over the events which took place *before* the annexation of Crimea and the creation of the Donetsk and Luhansk People's Republics.

330 *Tadić* (AC), para. 120.

331 *Ibid.*

internal control lowered the requisite degree of *external* control. The same logic could also be applied to local administrations – in fact, as noted above, the Appeals Chamber relied on the *Loizidou* judgment (among others) to argue in favor of the overall control test.[332] Secondly, and even more particularly, a local administration is not just any organized entity, but one that exercises governmental functions – which may have provided another reason for lowering the threshold for attribution.[333] That said, as noted above in respect of *Cyprus* v. *Turkey*, it is difficult to tease out the significance of these factors in the absence of case law concerning other types of actors to serve as a basis for comparison.

How does the ECtHR's approach compare *vis-à-vis* other control tests? The Court's underlying rationale for attribution is closest to complicity – which sets it apart from the ICJ's agency principle. The element of complicity-based reasoning is demonstrated by the ECtHR's treatment of the various forms of support as pointing to the conclusion that the secessionist entity 'survives by virtue of' third state (*sine qua non*) support.[334] According to this rationale, if it was not for the support of Turkey/Russia/Armenia, the TRNC/MRT/NKR would not be able to survive and thus would not be able to commit human rights abuses in the first place.[335] But unlike the IACtHR's approach, the European Court's test functions at the level of the actor, not the level of conduct.

Granted, the ECtHR's jurisprudence does refer to 'effective overall control', 'effective authority or decisive influence', and 'effective control and decisive influence', which suggests that the Court does have recourse to some form of *control* test, bringing its approach in line with the rationale of agency (as understood by the ICJ and the ILC), even if it employs a lower threshold. But a closer look at the relevant case law shows that the relationship between support and control is not entirely clear in the Court's jurisprudence. In each of the three situations at hand, this relationship is described in different terms. In Northern Cyprus, the ECtHR relied on control over territory to hold Turkey responsible for the conduct of the TRNC, 'which survives by virtue of Turkish military and other support'.[336] In other words, territorial control was apparently treated as a form of

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332 See *ibid.*, para. 128.

333 See also de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', 273.

334 The *sine qua non* nature of the support is expressed most clearly in *Catan* and *Mozer*, where the Court repeatedly states that the MRT was established and survives 'only' as a result of Russian support, and 'could not otherwise survive', see *Catan*, paras. 119, 120, 122, 150; *Mozer*, paras. 110, 157.

335 Cf. M. Hakimi, 'State Bystander Responsibility' (2010) 21 *European Journal of International Law* 341, at 365-366, noting the ECtHR jurisprudence on the role of Turkey and Russia in 'substantially enabl[ing] an external actor to violate rights', but using it to argue for the applicability of their obligation to protect under the ECHR, rather than attribution.

336 *Cyprus* v. *Turkey*, para. 77. As noted above, the Court speaks of a 'subordinate' local administration in *Loizidou*, although it does not elaborate on the nature of that subordination, see *Loizidou* (Preliminary Objections), para. 62; *Loizidou* (Merits), para. 52

support. In Transdniestria, the Court's reasoning varies even between cases. In *Ilaşcu*, the ECtHR used evidence of various forms of Russian support to hold that the MRT 'remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and *in any case* that it survives by virtue of' such support.[337] This suggests that the concepts of authority/influence and (survival by virtue of external) support are independent. In *Catan* and *Mozer*, meanwhile, the Court stated that 'the "MRT's" high level of dependency on Russian support *provides a strong indication* that Russia continues to exercise effective control and decisive influence over the "MRT"'.[338] Here the Court seems to use the MRT's dependence as the ground for a *presumption* of control. What is more, it appears that this presumption is not rebuttable, or at least it is unclear how it could be rebutted. Finally, in *Chiragov*, the Court adopted yet another formulation, holding that Armenia 'has had a significant and decisive influence over the "NKR", [and] the two entities are highly integrated […]. *In other words*, the "NKR" and its administration survives by virtue of' Armenian support.[339] In this case, the ECtHR appears to have equated influence and integration with (survival by virtue of external) support.

Given these variations, it is difficult to pinpoint how exactly the ECtHR sees control in relation to (*sine qua non*) support. If such support indeed leads to a presumption of control, that would at least nominally bring the Court's work in line with the agency principle (operationalized through control). Even so, the ECtHR's approach would still not conform to the ICJ's 'complete dependence' test, as the former implicitly allows some degree of autonomy, while the latter explicitly excludes that possibility. Furthermore, the one consistent feature of the ECtHR's jurisprudence appears to be that it relies solely on evidence of support, and does not require separate proof of control. This sets the Court apart both from the ICJ (which treats dependence as an intermediate step at best) and the ICTY Appeals Chamber (which relied on direction and supervision to establish attribution in *Tadić*);[340] and indicates that the underlying rationale for attribution in the ECtHR's work is more closely aligned with complicity than agency. However, as explored in Chapter 6 below, complicity operates at the level of conduct, not at the level of the actor, which means that the Court relies on an approach that does not seem to fit into the ARSIWA framework on either attribution or complicity.

337 *Ilaşcu*, para. 392 (emphasis added).

338 *Mozer*, para. 110 (emphasis added); cf. *Catan*, para. 122, using the same formulation nearly verbatim.

339 *Chiragov*, para. 186 (emphasis added). The Court then relied on this conclusion to hold that as a result, Armenia, 'exercises effective control over Nagorno-Karabakh and the surrounding territories' (*ibid*.), but this refers to control over territory, rather than control over the NKR administration as such.

340 See also Talmon, 'The Responsibility of Outside Powers', 510-511, to the same effect.

Why did the Court adopt this approach? As in the case of its Inter-American counterpart, the path taken by ECtHR has been shaped by the situations that come before the Court. In those situations, attribution for the purposes of both jurisdiction and state responsibility has been essential to avoid a vacuum of human rights protection, as the ECtHR itself noted already in 2001 in *Cyprus* v. *Turkey*:

> Having regard to the applicant Government's continuing inability to exercise their Convention obligations in northern Cyprus, any other finding [than establishing Turkey's jurisdiction and its responsibility for acts of the TRNC] would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.[341]

Granted, the Court's approach later became more nuanced in the sense that from *Ilaşcu* onwards (2004-), it held that the state retains jurisdiction over its entire sovereign territory even if it does not exercise control over parts of that territory.[342] In other words, for anyone within the Convention legal space (i.e. on the territory of one of the states party to the ECHR), there will always be a state which has positive obligations *vis-à-vis* that person – a complete vacuum of protection is therefore no longer possible. The Court, however, also understands such a vacuum as encompassing a partial lack of protection regarding negative obligations, as revealed by its reasoning in *Sargsyan* in 2015. In that case, the ECtHR refused to limit Azerbaijan's responsibility to violations of positive obligations, because that would have meant that no state could be held responsible for violations of negative obligations in respect of the territory in question.[343] Although the Court has not explicitly referred to the potential existence of such a vacuum in its jurisprudence on Transdniestria, the same reasoning can be applied there regarding Russia, or in other similar situations. Firstly, since – unlike Turkey in Northern Cyprus – Russia exercises its role in Transdniestria indirectly (through the MRT) rather than directly, control-based attribution for the purposes of jurisdiction is necessary to trigger the extraterritorial applicability of the positive (as well as negative) obligations of the state that is arguably in a better position to protect the rights of the territory's inhabitants than the sovereign state.[344] Secondly, attribution of the MRT's conduct to Russia for the purposes of state responsibility ensures that there is no vacuum in respect of negative obligations where an ECHR third state

341 *Cyprus* v. *Turkey*, para. 78.
342 See Section 3.4.2.2.2.2 above.
343 *Sargsyan*, para. 148.
344 Although the Court in the end chose to apply the same test for the purposes of both jurisdiction and state responsibility, this line of argumentation is equally applicable in a situation where two different tests are used for the two purposes.

maintains a secessionist regime in part of an ECHR state party's territory.[345] This is perhaps best illustrated by *Catan*, where Moldova was found to have complied with its positive obligations, while Russia was not directly involved in the treatment of the schools through its *de jure* organs – in fact, it tried to mediate the issue. In these circumstances, if the ECtHR had applied the ICJ's attribution tests, no state would have been held responsible for conduct that was held to be in contravention of the ECHR. In other words, a vacuum of protection would have arisen in respect of the MRT's conduct. Arguably, it was the threat of such a vacuum that motivated the ECtHR to adopt its own approach.

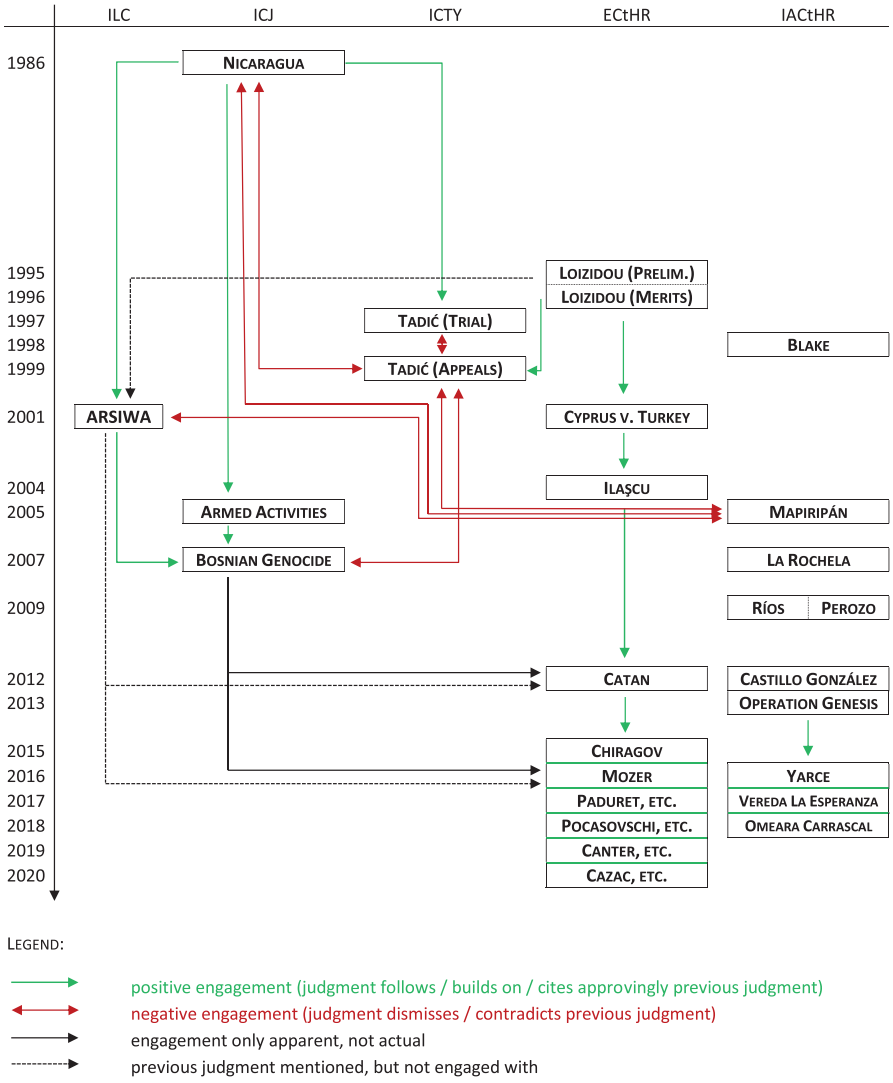
4.5 Concluding Remarks

As the foregoing analysis has demonstrated, various international courts have developed several different control tests over the past decades. Even the IACtHR's case-by-case approach has begun to crystallize into a more general test. To what extent do these tests clash with each other? Or can they perhaps coexist peacefully? This section offers some remarks on the (lack of) judicial dialogue between courts addressing control-based attribution, followed by an examination of the possibility of reconciling these attribution tests on the substance or fitting them into a common framework that could accommodate their coexistence, and concludes with observations on how the different courts conceptualize what it means to be acting on the state's behalf.

4.5.1 (A Lack of) Judicial Dialogue

The dynamics of dialogue between the ICJ, ICTY, ECtHR and IACtHR (and the ILC) are summarized in the chart below, which shows how courts have (not) engaged with each other's case law (as well as their own) over the years. The chart demonstrates two main trends, namely that (1) with the exception of the ILC/ICJ alignment, courts seem generally averse to the idea of 'importing' control tests; while (2) there is significant divergence between courts regarding their willingness to 'export' their tests, with the ECtHR and IACtHR being reluctant, and the ICJ and ICTY deeming their respective tests to be generally applicable. In addition, the chart illustrates that – as discussed above – while the ECtHR has consistently built on its own jurisprudence, the IACtHR initially employed an *ad hoc* approach, and only started referring back to its own case law and viewing it through a more systematic lens with *Operation Genesis*.

345 Cf. the Court's reference to 'securing the entire range of substantive rights set out in the Convention' in *Cyprus* v. *Turkey*, para. 77.



The most vocal opponent of 'importing' a control test was the ICTY Appeals Chamber, which took an openly confrontational stance in *Tadić*, disagreeing with the ICJ's position in *Nicaragua* on whether to require the effective control test for organized armed groups. Human rights courts, meanwhile, have simply established their own control tests in an autonomous manner, with no reference to the work of the ILC, the ICJ or the ICTY (note the lack of any positive engagement by the ECtHR and IACtHR with the work of these three bodies in the chart). When these tests were subsequently challenged by certain states (Russia in *Catan* and *Mozer*, and Colombia in the *Mapiripán Massacre* case), both courts took a conflict-averse, yet ultimately unrelenting position, through different approaches. The ECtHR in principle

acknowledged the ICJ's 'effective control' test as valid for determining attribution (for state responsibility), but in the end it merely adopted *the label* of 'effective control' without actually applying the test set out by the ICJ.[346] Similarly, the ECtHR cited the ARSIWA as relevant applicable law but did not even mention – let alone engage with – the Articles in its analysis. The IACtHR, on the other hand, responded by stating that the American Convention on Human Rights – by virtue of it being a human rights treaty – constitutes *lex specialis* with regard to attribution, thereby implicitly rejecting control tests developed by other courts without questioning their validity in general. In the end, neither the ECtHR, nor the IACtHR changed its own position. Nor did the ICJ, when challenged by the ICTY; the Court stood firmly by the 'effective control' test. Overall, although the ILC appears to have sided with the ICJ, no court has been able to put forward a control-based attribution test that other judicial authorities would find persuasive enough to follow for the purpose of establishing state responsibility.[347]

At the same time, there is a marked difference between courts when it comes to the idea of 'exporting' control tests. At one end of the spectrum, the ICJ and the ICTY have both insisted that their respective tests are generally applicable, even to the point of openly clashing with each other. At the other end of that spectrum, though, neither the Inter-American, nor the European Court of Human Rights has advocated for its control test(s) to be applied by other courts. In other words, regional human rights courts seem equally reluctant to 'import' and 'export' control tests.

4.5.2 A Uniform (Set of) Test(s)?

Moving beyond the issue of judicial dialogue, are there nonetheless any factors that are shared by the different tests, allowing them to be reconciled with each other? There is one element which recurs across the jurisprudence of multiple courts: namely, whether or not the private actor could have carried out the conduct in question without the state's involvement. The IACtHR made reference to this concept regarding the particular events in *Mapiripán*, *Operation Genesis*, and *Yarce*; the ECtHR has held on a more general level that the secessionist regimes in Northern Cyprus, Transdniestria and Nagorno-Karabakh 'survive[] by virtue of' the support of a third state, which similarly implies that they would not have been able to

346 This was also not the only case of apparent but not actual engagement, cf. *Aleksovski*, para. 143 at the ICTY: 'The Appeals Chamber finds that, notwithstanding the express reference to "overall control", the [Trial Chamber's] *Aleksovski* Judgement did not in fact apply the test of overall control.'

347 While the 'overall control' test, as noted at note 55 above, has been followed for the purpose of determining the (non-)international character of an armed conflict in international criminal law, it has not taken hold in the international jurisprudence on state responsibility.

commit the human rights abuses in question without such support.[348] But as demonstrated above, the IACtHR does not use this formula as a substantive test; the Court's threshold for attribution is in fact lower than a *sine qua non* requirement.[349] The ECtHR, however, does appear to use the 'survives by virtue of' test as a substantive test for attribution.[350] In *Nicaragua*, meanwhile, the ICJ essentially justified the effective control test by arguing that 'the acts contrary to human rights and humanitarian law alleged by the applicant State […] could well be committed by members of the *contras* without the control of the United States.'[351] Yet at the same time, in both *Nicaragua* and *Bosnian Genocide*, the Court expressly acknowledged that the *contras* and the VRS 'could not conduct [their] crucial or most significant military and paramilitary activities' without the support of the US and Serbia, respectively.[352] It thus stands to reason that at least some of those human rights and humanitarian law abuses / genocidal acts could not have been committed without the support of these states – but in the absence of control (as opposed to support) the ICJ still held that these acts could not be attributed to the US and Serbia. In sum, even though the element of a *sine qua non* role for the state appears across the jurisprudence of multiple courts, it is not used as a substantive test by the IACtHR at all, while the ICJ and the ECtHR use it in connection with different aspects of state involvement – control or support – to justify different conclusions.[353] As such, the requirement that private actors' conduct could not have been carried out without state support cannot be used to establish common ground between the various tests. As further elements of the tests are otherwise all distinct in one way or another, this also means that it is not possible to consolidate them into a single test.

This divergence is a reflection of the different underlying rationales applied by these courts. The ICJ's approach is governed by the agency principle, where agency is evidenced by control, which in turn has to be proven separately from dependence, even if such dependence is (virtually) complete. Even the ICTY's 'overall control' test – at least in its concrete application in *Tadić* – ascribes to a certain understanding of the agency principle, albeit with a lower threshold. However, the same cannot be said of the IACtHR, which relies on state *support* and collaboration as the rationale underpinning its decisions. The ECtHR, meanwhile, uses a hybrid rationale, whereby support – when it is sufficient to create dependence – appears to establish a presumption of control, and in any case control does not need to

348 *Mapiripán*, para. 120; *Operation Genesis*, para. 280; *Cyprus* v. *Turkey*, para. 77; *Ilaşcu*, para. 392; *Chiragov*, para. 186.

349 See notes 158-161 and accompanying text above. This also explains why the formula only appears in some, not all, of the Court's jurisprudence.

350 See notes 328-329 and accompanying text above.

351 *Nicaragua*, para. 115.

352 *Ibid.*, para. 111; *Bosnian Genocide*, para. 394.

353 Cf. Talmon, 'The Responsibility of Outside Powers', 503, highlighting the need to distinguish between support and control.

be shown separately. This suggests that the central element of the Court's reasoning is support (to the point of dependence), rather than control. In other words, both the IACtHR and the ECtHR apply rationales that are closer to complicity than to (a narrow understanding of) agency.

If there is no *single* test of control-based attribution applicable to all actors and all situations, does that necessarily lead to fragmentation? There are, in essence, three possible approaches to the issue of fragmentation regarding (control-based) attribution, namely:

(1) attribution rules apply equally to all fields of international law, including human rights;
(2) different attribution rules apply to human rights, but they do apply generally to that field;
(3) different attribution rules apply to each human rights treaty (i.e. in the jurisprudence of each human rights court).

The first of these scenarios would in effect require a uniform (set of) control test(s). But as has just been concluded, it is not possible to reconcile the analytical steps of the various courts into a single test. Note, however, that this scenario does not exclude the possibility of developing a *set* of control tests for different situations and/or types of actors, rather than a single test applicable to any and all circumstance. This was the ICJ's approach in developing the 'effective control' test, applicable regarding particular instances of conduct, and the 'complete dependence' test, applicable at the level of the actor – even if the two tests are hardly distinguishable from each other in effect. This was also the ICTY Appeals Chamber's approach in *Tadić*, proposing one type of test ('overall control') for one type of actor (organized groups), and another ('effective control') for all other types of actors (individuals and unorganized groups).[354] The ICTY's approach foundered in particular because the Appeals Chamber declared its own test in direct opposition to the ICJ's already existing test(s), operating within the same parameters – paramilitary group acting with third state support – with no grounds to distinguish the two.[355] But even if a less confrontational and more easily distinguishable test were to come before the ICJ, it is still likely to meet significant resistance from the Court, which appears to regard 'effective control' and 'complete dependence' as the applicable tests in every circumstance concerning control-based attribution.[356]

354 Although see Kress, 'L'organe de facto', 130-131, 137, arguing against such a distinction.
355 Although the ICTY Appeals Chamber interpreted *Nicaragua* as setting a single test, rather than two different ones, the clash would not have been mitigated by adopting a two-test interpretation, either, given that 'effective control' and 'complete dependence' effectively set the same threshold, see Section 4.2.4 above.
356 See *Bosnian Genocide*, paras. 391-415, especially at paras. 392 and 406, referring to 'persons, groups of persons or entities' and 'persons or groups of persons' with no further qualification of the type of group or entity this would be applicable to.

Against this backdrop, could such a 'set of tests' approach work in respect of the human rights courts' and the ICJ's jurisprudence? If the tests cannot be reconciled with each other, are there grounds on which they could be differentiated? Even setting aside the ICJ's *general* opposition for a moment, the likelihood of the distinguishing factors' success is limited. The ECtHR's 'survives by virtue of' test can be distinguished from the ICJ's 'complete dependence' test – both applicable at the level of the actor, but requiring different thresholds, or rather, different factors (support *versus* control) – on the basis that the former is applicable to a particular type of actor that the ICJ has not yet addressed: secessionist local administrations. But if the ICTY Appeals Chamber's argument on the organized nature of the actor did not sway the ICJ, it is unlikely that the type of functions carried out by the actor would warrant a major revision in the eyes of the Court. The IACtHR's case law, meanwhile, like *Tadić*, concerns paramilitary groups: precisely the type of actor to which the ICJ applied the 'effective control' test in both *Nicaragua* and *Bosnian Genocide*. As both the IACtHR's and the ICJ's tests apply at the specific level of conduct, but require significantly different thresholds, this puts the two courts in direct clash with each other.[357] The element which could distinguish between the ICJ's and the IACtHR's jurisprudence is that the latter operates in respect of private actors acting with the support of the affected state, rather than a third state – but whether this could justify such a difference in the applicable threshold is doubtful.

Could the ARSIWA nonetheless accommodate these different tests? As the texts of Article 4 and 8 ARSIWA are, to a large degree, indeterminate on this issue, they may be flexible enough for such accommodation. Article 4 ARSIWA indicates that it is not limited to *de jure* organs but is otherwise silent on *de facto* organs. The Commentary does not elaborate much on this issue, either – leaving considerable room for alternative constructions of what a *de facto* organ is. Similarly, Article 8 ARSIWA does not set a specific threshold for control required for attribution. However, as the Article speaks of 'instructions […] direction or control', it cannot cover attribution tests based on support, rather than control. In other words, it cannot incorporate the IACtHR's approach and can only include the ECtHR's 'survives by virtue of' test if that is regarded as generating a presumption of control. That said, given that the ECtHR's test operates at the level of actor, not conduct, it would likely fall under Article 4, rather than Article 8, ARSIWA.[358]

Be that as it may, by now Articles 4 and 8 ARSIWA are so closely bound up with the ICJ jurisprudence on control-based attribution that it is difficult to see them interpreted independently of the narrow understanding of agency and high thresholds employed by the ICJ – particularly since the ILC

357 Note that the basis for comparison here is the 'effective control' test, as both the IACtHR's jurisprudence and the 'effective control' test operate at the level of the specific conduct.

358 Although this distinction between Articles 4 and 8 ARSIWA was also articulated by the ICJ, not the ILC, it finds support in the overall structure (and the ILC's treatment of Articles 4-7 *versus* 8-11) in Part One, Chapter II of ARSIWA.

itself effectively sided with the ICJ in the Commentary to Article 8. Given how intertwined the ILC and the ICJ's work is on this issue and given the human rights' courts departure from the ICJ's approach, it is little surprise that the IACtHR and ECtHR have not relied on the ARSIWA, either, in their analyses.

If these tests cannot be reconciled with one another in terms of substance (either as a single test, or as a set of tests), which ones should prevail to arrive at a set of uniform tests on control-based attribution? As a court of general *ratione materiae* jurisdiction, the most likely candidate to supply such a set of tests is arguably the ICJ, on the basis of customary international law; specialized human rights courts are somewhat ill-placed to supply *general* rules on attribution, particularly where a set of such rules already exists. In light of these circumstances, it is no surprise that the criticism of control-based attribution at the ECtHR has also used the ICJ's control tests as the basis for comparison.[359] But if the price of avoiding fragmentation is exclusive adherence to the 'effective control' and 'complete dependence' tests, that price may well be deemed too high to pay. These tests are practically impossible to meet (as illustrated by the ICJ's own jurisprudence), thereby allowing states to evade responsibility with relative ease. Moreover, states often rely on private groups exactly because they wish to circumvent legal constraints, which is all the more reason not to let these states avoid responsibility.[360]

4.5.3 *Lex Specialis* in Human Rights Law?

But if substantive reconciliation is unlikely, and following the ICJ's lead in all circumstances may be undesirable, can these control tests peacefully coexist under the second scenario, i.e. as general rules of international law (ICJ) and *lex specialis* rules of human rights law on state responsibility? Both the ILC and the ICJ allow for *lex specialis*, although the ICJ has stipulated that it has to be 'clearly expressed', and the ARSIWA Commentary similarly

359 See e.g. Milanović, *Extraterritorial Application*, 50; Cerone, '"Complicity" in the Context of Human Rights Violations', 529-530; Talmon, 'The Responsibility of Outside Powers', 508-511, 517; cf. Savarese, '*De Facto* Organs and Complicity', 118, note 28.

360 See e.g. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', 270: 'It cannot be denied that the *contras* were an instrument in the hands of the United States government, and that they were being used to do what that government could not do itself (i.e. act by military force) because of reasons of internal policy.' *Ibid.*, 275: 'It is obvious that the FRY used the VRS as an armed extension of its own army for the pursuit of its own objective, namely the creation of a Greater Serbia.' Cf. ILC, *First report on State responsibility by Mr. James Crawford, Special Rapporteur*, 24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998, UN Doc. A/CN.4/490 and Add.1-7, in: *Yearbook of the International Law Commission*, 1998, vol. I, Part One, 1 (hereinafter *Crawford's First Report*), para. 212: 'The difficulty is that, in many operations, in particular those which would obviously be unlawful if attributable to the State, the existence of an express instruction will be very difficult to demonstrate.' See also Chapter 1, notes 123-124 above.

speaks of a 'specific undertaking or guarantee'.[361] The Commentary refers to the Convention Against Torture as an example, which defines torture as committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[362] Although the Commentary notes that this rule is 'probably narrower' than the grounds for attribution under the ARSIWA, it is better viewed as being *both narrower and broader* than the ARSIWA rules. While it does possibly exclude certain grounds of attribution which would normally be applicable (such as Article 10 ARSIWA), it reduces the threshold of attribution of private conduct to 'consent or acquiescence', which is much lower than either the requirement of 'instructions, direction or control' under Article 8 ARSIWA or the 'acknowledged and adopted' standard under Article 11 ARSIWA.[363] The same considerations apply to multilateral treaties on the prohibition of enforced disappearance, which define the phenomenon as perpetrated 'by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state'.[364] These examples illustrate that *lex specialis* may not only restrict, but also broaden the scope of attributable conduct.

Unlike the Convention Against Torture or treaties concerning enforced disappearance, however, general human rights treaties (such as the ICCPR, ECHR or ACHR) do not have any provisions explicitly concerning attribution. Can *lex specialis* still be claimed in these cases?

In the *Mapiripán Massacre* case, the IACtHR claimed *lex specialis* based on Articles 1(1) and 2 ACHR, 'in view of [the ACHR's] special nature as an international human rights treaty *vis-à-vis* general International Law'.[365] However, these articles simply provide the following:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
>
> […]

361 Article 55 ARSIWA; *Bosnian Genocide*, para. 401; ARSIWA Commentary to Part One, Chapter II, para. 9.

362 Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85; ARSIWA Commentary to Article 55, para. 3, note 820.

363 For more on attribution under Article 11 ARSIWA, see Section 5.4.2 below.

364 Article II of the Inter-American Convention on the Forced Disappearance of Persons, Belém do Pará, 9 June 1994, in force 28 March 1996, (1994) 33 ILM 1429; Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, in force 23 December 2010, 2716 UNTS 3.

365 *Mapiripán*, para. 107.

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

It is highly doubtful that articles of such general nature could serve as *lex specialis*, at least in the narrow sense expressed by the ILC and the ICJ above. The ECHR, equipped with a provision similar to Article 1(1) ACHR, has been regarded as not having specific rules on attribution.[366] This, in turn, has served as the basis to argue that the general rules of state responsibility continue to apply.[367]

That said, the ILC's fragmentation report, reviewing the treatment of self-contained regimes in the Commission's work on state responsibility, distinguished between three types of such regimes. The first of these was 'a special set of secondary rules', while the second referred to 'interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law'.[368] As an example of this second category, the report cited 'the technique of interpreting the [ECHR] as "an instrument of European public order (*ordre public*) for the protection of individual human beings"'.[369] Thirdly, the fragmentation report noted that '[s]ometimes whole fields of functional specialization […] are described as self-contained […] in the sense that special rules and techniques of interpretation and administration are thought to apply', listing human rights law as an example.[370] According to the report:

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366 See CDDH(2019)R92Addendum1, paras. 153-155; R. Lawson, 'Out of Control – State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' meet the Challenges of the 21st Century?', in: M. Castermans-Holleman, F. van Hoof & J. Smith (eds.), *The Role of the Nation State in the 21st Century: Human Rights, International Organisations and Foreign Policy – Essays in Honour of Peter Baehr* (The Hague: Kluwer, 1998), 91, at 99.

367 See F. Vanneste, *General International Law before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law* (Antwerp: Intersentia, 2010), 169, noting in respect of attribution that 'human rights courts should *in the absence of specific provision in their treaties* rely on the general rules of international law' (emphasis added); Lawson, 'Out of Control', 99.

368 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi*, 13 April 2006, UN Doc. A/CN.4/L.682 (hereinafter ILC Fragmentation Report), para. 128; these two types are what the ARSIWA Commentary to Article 55, para. 5, mentioned as well, albeit grouped together under the single heading of self-contained regimes. See more broadly ILC Fragmentation Report, paras. 123-128.

369 ILC Fragmentation Report, para. 128. In respect of another example of this type of self-contained regime, the report noted that the '"special" nature of the […] regime appears instead to follow rather from the speciality of the relevant primary rules', instead of being limited to a special set of secondary rules (*ibid.*, para. 127).

370 ILC Fragmentation Report, para. 129.

> A self-contained regime in this third sense has effect predominantly through providing interpretative guidance and direction that in some way deviates from the rules of general law. It covers a very wide set of differently interrelated rule-systems and the degree to which general law is assumed to be affected varies extensively.[371]

Continuing along this path, the report then went on to highlight the significance of different rationalities (for instance, a 'trade rationality' or 'human rights rationality') as permeating the relevant fields of specialization.[372] In the end, in respect of all three types of self-contained regimes (or rather, without distinguishing between them), the report concluded that 'the rules of the general law on State responsibility – like the rest of general international law – supplement [the special/treaty regime] to the extent that no special derogation is provided *or can be inferred* from the instrument(s) constituting the regime'.[373]

What could be the source of such an inference? The ECHR's conceptualization as an instrument of European *ordre public* is indeed the underpinning of the ECtHR's urge not to allow a vacuum of protection within the Convention legal space;[374] and in a broader sense, the diverging rationalities of the ICJ (protection of state sovereignty) and the IACtHR/ECtHR (protection of human rights) may indeed explain the different rationales of attribution applied by each of these courts. However, the question arises whether such *general* considerations could, in and of themselves, constitute sufficient legal basis for a *specific* attribution rule when the treaty text does not address attribution at all.

The core underlying problem here is that in the absence of an explicit *lex specialis* provision on attribution, the approaches of the IACtHR and the ECtHR may conflict with another consideration: state consent.[375] In 'reading into' the conventions such a rule, do the IACtHR and ECtHR

371 *Ibid.*, para. 132.
372 *Ibid.*, paras. 133-134.
373 *Ibid.*, para. 152(3) (emphasis added).
374 See *Cyprus* v. *Turkey*, para. 78.
375 See e.g. CoE CDDH, Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC), Drafting Group on the Place of the European Convention on Human Rights in the European and International Legal Order (DH-SYSC-II), *Draft chapter of Theme 1, subtheme ii): State responsibility and extraterritorial application of the Convention*, DH-SYSC-II(2018)07, 19 February 2018, para. 68. Note, however, that the statement on state consent did not make it into the final version of the report, see CDDH(2019)R92Addendum1. This may have been due at least in part to the fact that Switzerland indicated that it 'do[es] not think there is an issue under the international [l]aw of treaties regarding the validity of consent expressed by the Contracting Parties' (see DH-SYSC-II(2018)18rev in note 382 below, at 67). Still, this is partly how Russia has framed its counterargument, see Appendix VIII in note 382 below. For more on the process that produced this draft chapter, see the same footnote.

engage in judicial law-making that departs too far from what states parties have consented to in the first place? In the case of the IACtHR, Colombia has recently started to formulate its position in line with the Court's approach.[376] Furthermore, that approach – due to its conduct-level operation – is in any case more easily linked to the existing general legal framework on state responsibility.[377] But this issue has been raised at the ECtHR by Russia, which has consistently challenged the Court's approach.[378]

The root of this tension is that the ECHR, like all human rights treaties, is two things at the same time. On the one hand, it is a treaty safeguarding fundamental rights whose primary beneficiaries are individuals, not states.[379] On the other hand, it is a multilateral treaty concluded between states that have given their consent to be bound by the obligations therein.[380] A detailed discussion of the issue of state consent would require delving into questions of treaty interpretation and (regional) customary law formation that unfortunately go beyond the scope of this disserta-

376 See *Yarce*, paras. 177-178 (where the state argued that Inter-American jurisprudence required connivance in the particular circumstances and that was not the case here), especially when compared with the position taken by Colombia in *Mapiripán*, para. 97.

377 As discussed in Section 6.1 below, the provisions on states' general obligations under human rights treaties have a strong basis to be read as including a prohibition state complicity in the conduct of non-state actors. Alternatively, the IACtHR could have recourse to the attribution rule proposed in Section 6.3.2, whereby private conduct can be attributed to the state in cases of on *sine qua non* complicity by the latter. Both of these options rely on complicity (either as a self-standing ground for responsibility or as a basis for attribution), which requires at least knowledge of the principal's act – but such knowledge is not necessarily established under the ECtHR's approach, given that it is actor-based and does not require as close control as the ICJ (and thus involves an element of risk), as discussed in Section 4.5.4 below.

378 In all cases concerning Transdniestria, Russia has argued that the ECtHR's approach is 'wrong and at variance with public international law' (see e.g. *Turturica and Casian*, para. 26). The stances of Turkey and Armenia have been more mixed, see notes 215-216 above regarding Turkey and *Chiragov*, paras. 158-164 compared with note 316 above regarding Armenia. In addition to pleadings in cases before the ECtHR, see states' comments in note 382 below.

379 See e.g. IACtHR, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of 24 September 1982, Series A, No. 2, para. 29.

380 On the dual nature of human rights treaties and the question of reciprocity, see generally M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 *European Journal of International Law* 489; and M. Craven, 'For the "Common Good": Rights and Interests in the Law of State Responsibility', in: M. Fitzmaurice & D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart, 2004), 105.

tion.[381] Suffice it to say that while it is difficult to establish what ECHR states parties' views are on the 'survives by virtue of' test to begin with, no consensus appears to have emerged on this issue as of yet.[382] Furthermore, even if support for such a *lex specialis* rule were to form in the majority of state parties, the question remains whether Russia could be considered a persistent objector, in light of its consistent challenge to this test.[383]

Nonetheless, of the possibilities outlined above, the strongest ground to argue *lex specialis* is likely to rest on the principle of effective protection

381 Besides different interpretative approaches under general international law, such a discussion would also have to cover concepts specific to human rights law or the ECHR (such as evolutive interpretation and the European consensus), and the precise relationship between them. Note that in the conceptual clash between 'reading into' the ECHR and state consent, the ECtHR chose the former early on in *Golder* v. *United Kingdom*, Application No. 4451/70, Court (Plenary), Judgment of 21 February 1975; see also *ibid.*, Separate Opinion of Judge Sir Gerald Fitzmaurice (who dissented on this issue and argued for a restrictive interpretation). The ECtHR has since continued on this path, leading to evolutive interpretation; see generally G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 58-79. Letsas himself also argues against an originalist approach, but notes at 68 that 'the Court in *Bankovic* used intentionalist arguments to interpret a non-substantive provision of the Convention (art 1 ECHR), ie a provision not dealing with the human rights but with general issues of public international law. It could well be that intentionalist or conventionalist methods of interpretation is [*sic*] justified for such provisions.' Unfortunately, however, he does not elaborate further on this issue.

382 In 2017-2019, the Council of Europe commissioned expert analysis on 'the place of the Convention in the European and international legal order', including the ECtHR's work on matters of jurisdiction and responsibility: see CoE CDDH, DH-SYSC, *Decisions adopted at the 1252nd meeting of the Ministers Deputies on the CDDH Report on the longer-term future of the system of the European Convention on Human Rights*, DH-SYSC(2016)009, 31 March 2016, para. 14. Although the process provided the opportunity for member states to weigh in on these questions, most states have not commented at all on this issue or commented only indirectly; of the remaining handful, some were supportive of the Court, others – including, most vocally, Russia – were not. (The full list of documents from the process is available at https://rm.coe.int/1-list-of-documents-dh-sysc-ii-2017-2019/1680994004; for states' comments, see DH-SYSC-II(2018)08rev, DH-SYSC-II(2018)18rev, DH-SYSC-II(2019)28 and DH-SYSC-II(2019)42rev.) The issue did spark strong views, though: most state declarations on the final report (which covered a wide range of other issues as well) concerned the characterization of the ECtHR's case law on Transdniestria and Nagorno-Karabakh: see CoE CDDH, *Report*, 92nd meeting, CDDH(2019)R92, 20 December 2019, Appendices V-VIII, with Azerbaijan and Moldova in support of the ECtHR's approach, Armenia and Russia against. See also I. Ziemele, 'European Consensus and International Law', in: Aaken & Motoç, *The European Convention*, 23, at 30, 31, highlighting the difficulties faced by the ECtHR in ascertaining states' views on any given issue.

383 See e.g. Ziemele, 'European Consensus', 33-34, 37-39, recognizing the possibility of a persistent objector in the context of developments concerning the ECHR over time; see also D. Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*' (2010) 79 *Nordic Journal of International Law* 245, at 275 in a similar vein. The cases of Armenia and Turkey would be more complicated, given that they have not been as consistent as Russia.

of human rights,[384] the nature of the ECHR as an instrument for European *ordre public* and the need to avoid a vacuum of protection within the ECHR legal space. The ECtHR could claim its own jurisdictional test, since international human rights law applies a particular understanding of jurisdiction, denoting control over persons or territory.[385] Although this understanding is not necessarily limited to human rights law, it has arguably been most influenced by that body of law; and it does not compete with any general rule in the first place – unlike attribution for the purposes of state responsibility.[386] This test would be linked explicitly to the need to avoid a vacuum in the Convention space so as to ensure the effective protection of human rights, and – importantly – to the nature of the private actor as a local administration, exercising public functions. This is essentially already what the Court does – at least in its line of jurisprudence on Northern Cyprus,[387] if not quite as clearly elsewhere – but the reasoning could be made more explicit. Crucially, though, the next step would be to openly acknowledge that *the same test* is to be applied for attributing conduct for the purposes of state responsibility. In doing so, the ECtHR could highlight that (given not only its extensive links to the supporting state but also its exercise of public functions) the secessionist administration is in a sense assimilated to the supporting state's *de jure* machinery.[388] This would likewise relate to the need to avoid a vacuum in Convention protection, since the default situation of having no such vacuum is where the state exercises control over

384 Cf. Lawson, 'Out of Control', 101, admitting the possibility that the requirement of effective protection of rights may support a departure from the general rules of state responsibility from attribution.

385 See Milanović, *Extraterritorial Application*, 26-41.

386 See *ibid.*, noting that this understanding is used in other treaties as well (40-41). Milanović regards this as evidence that 'more than one ordinary meaning of the word "jurisdiction" exists in international law' in general (30), and asserts that '[t]here is no fragmentation of general international law here, no self-contained regimes' (39). Be that as it may, given that this understanding is most prevalent in human rights treaties (indeed, many of the further examples may be seen as human rights treaties in a broad sense) and its meaning has been elaborated most of all in human rights jurisprudence, it stands to reason that that jurisprudence would exert the greatest influence in defining the term (and its tests). At the same time, note that the lack of a general rule to compete with is subject to the caveat below on equivalence of attribution tests.

387 See *Loizidou* (Preliminary Objections), para. 62; *Loizidou* (Merits), paras. 52, 56; *Cyprus* v. *Turkey*, paras. 77-78.

388 The parallel was already drawn in *Loizidou* (Preliminary Objections), para. 62, where the ECtHR noted that: 'The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.' On the links between these entities and their supporting states, cf. in international relations literature D. Lynch, 'Separatist States and Post-Soviet Conflicts' (2002) 78 *International Affairs* 831, at 847, noting that '[i]n Karabakh, independence is really a sleight of hand, which barely covers the reality that it is a region of Armenia'; R. Allison, 'Russian "Deniable" Intervention in Ukraine: How and Why Russia Broke the Rules' (2014) 90 *International Affairs* 1255, at 1276, noting that 'some Transnistrian politicians have declared that they would like the region to join Russia in Crimea's footsteps.'

its territory through its organs. Attribution would then rest not purely on a factual basis, but on a partly factual, partly functional one. Significantly, this test could not be extended to any other type of private actor – for instance, any separatist armed groups in Eastern Ukraine found to be operating with Russian support. Capturing the state's link to the conduct of such actors would instead necessitate a complicity-based test requiring knowledge of the impugned private conduct, similarly to the IACtHR's approach.

Grounding the 'survives by virtue of' test in specific concepts already widely applied by the ECtHR – jurisdiction under Article 1 ECHR and the need to avoid a vacuum – is likely to provide the strongest basis for a claim of *lex specialis*. Even so, however, once using the same attribution test for the purposes of jurisdiction and responsibility is accepted, the equivalence cannot be unidirectional (i.e. from jurisdiction to responsibility). This leaves the test open to the challenge mounted by Russia that the ICJ's attribution test(s) for state responsibility is what should apply for the purposes of jurisdiction as well. In the end, the answer to whether the ECtHR's approach can be justified as *lex specialis* is likely to depend on what weight one assigns to the (in this instance) conflicting values of human rights protection and state consent.

Furthermore, while this question has also divided scholarly opinion, most scholars appear to favor the view that the law of state responsibility applies to human rights law like any other field of international law.[389] What is more, human rights courts themselves take different positions on this issue. The IACtHR has explicitly claimed *lex specialis* on the question of state responsibility in *Mapiripán*, on the basis of the ACHR being a human rights treaty.[390] The ECtHR, meanwhile, has been much more ambiguous, holding that:

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389 See e.g. R. McCorquodale, 'Impact on State Responsibility', in: M.T. Kamminga & M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009), 235, at 236-238; Vanneste, *General International Law before Human Rights Courts*, 169, 178-179; C. Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32 *International and Comparative Law Quarterly* 82, at 94; cf. Milanović, *Extraterritorial Application*, 50. See also Lawson, 'Out of Control', 99, although with some flexibility, see note 384 above. See more broadly (not restricted to state responsibility) e.g. A. Pellet, '"Human Rightism" and International Law' (2000) 10 *Italian Yearbook of International Law* 3. But see M.D. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in: M. Fitzmaurice & D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart, 2004), 139; and A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon, 1993), 188, to the contrary. Frédéric Vanneste, however, argues that the ILC did not take a position on the level of control required for Article 8 ARSIWA (leaving it undetermined), and regards both the ECtHR's and the IACtHR's tests as iterations of the 'overall control' test in *Tadić*. Proceeding from these two premises, he treats the human rights courts' tests not as *lex specialis*, but as an effort at developing general international law. See Vanneste, *General International Law before Human Rights Courts*, 171-180.

390 See notes 104-106, 365 and accompanying text above.

> [T]he principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted *as far as possible* in harmony with other principles of international law of which it forms part.[391]

In other words, the Court generally upheld the applicability of the international law of state responsibility, while leaving the door open for divergence given 'the Convention's special character as a human rights treaty'.[392] Unfortunately, though, the ECtHR has not explicitly addressed the question of *lex specialis* in the context of its 'survives by virtue of' jurisprudence so far and it is unclear whether the Court as such realizes that it is applying a divergent responsibility test.[393]

Overall, although human rights treaties lack specific provisions on attribution and cannot claim *lex specialis* on that ground, their 'special character as a human rights treaty' offers a stronger basis for such a claim.[394] Even so, it is unclear whether such a 'special character' can constitute a sufficient legal basis for a specific attribution rule – quite apart from the question whether it *should* be sufficient for such a rule, as a normative matter.

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391 ECtHR, *Banković and others* v. *Belgium and others*, Application No. 52207/99, Grand Chamber, Admissibility Decision of 12 December 2001, para. 57 (emphasis added).

392 See also CDDH(2019)R92Addendum1, paras. 167, 191.

393 Tellingly, and in further evidence of its confusion between jurisdiction and responsibility, the ECtHR in *Loizidou* (Merits), para. 52 regarded its holding in the preliminary objections judgment as being 'in conformity with the relevant principles of international law governing State responsibility'. But that holding was simply that 'the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory' (*Loizidou* (Premilinary Objections), para. 62), and the ECtHR at that stage still distinguished between jurisdiction and responsibility, which at the merits stage the Court no longer did. More recently, the issue has been raised by individual judges, but not by the Court as a whole. In *Chiragov*, Judge Ziemele raised the question 'whether the [ECtHR] should apply a different standard of attribution of responsibility than the one in international law and whether more or less the same standard should determine jurisdiction' and expressed 'serious reservations in that regard.' *Chiragov*, Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, para. 10. But see, to the contrary, *Chiragov*, Concurring Opinion of Judge Motoç, further elaborated in I. Motoç & J.J. Vasel, 'The ECHR and Responsibility of the State: Moving Towards Judicial Integration: A View from the Bench', in: Aaken & Motoç, *The European Convention*, 199, particularly at 202-205, arguing that the Court's approach constitutes *lex specialis* (although note that both the concurring opinion and the chapter display the same confusion between jurisdiction and attribution that characterizes the ECtHR's jurisprudence).

394 Cf. Jorritsma, 'Attribution of Conduct', arguing that the 'overall control' test is *lex specialis* in IHL, which likewise lacks specific provisions on attribution (but arguably has more in the way of primary rules to support such a *lex specialis* claim on attribution, see *ibid.*, 418-424).

Moreover, the fragmentation is arguably present not only at the level of human rights law in general, but also at the level of each court. To what extent is this justified (or justifiable)? While there is no fragmentation in the first scenario, and the second one may be resolved by viewing human rights as a special regime, it is more difficult to see why human rights courts would (have to) apply different tests compared to each other, particularly in the absence of specific provisions on attribution in regional human rights treaties. Nonetheless, a distinction can be drawn on the basis of substance: the IACtHR and ECtHR have faced different types of situations and actors (intraterritorial *versus* extraterritorial; paramilitary groups *versus* local administrations), which may also warrant a difference in treatment.

That said, the personal (rather than territorial) nature of attribution and the factual similarities in the types of links between affected/third states and private actors militate against a simple distinction between intraterritorial *versus* extraterritorial situations. Instead, it appears that the nature of such links is influenced by the type of the private actor and territorial control, rather than sovereignty. Attribution based on the factual rationale tends to arise in connection with two main types of private actors: non-state armed groups (whether pro- or anti-government) and secessionist entities. Secessionist entities are always supported by third states and not the affected state – otherwise the situation would simply be resolved in a consensual manner, resulting in the creation of a new state. As such, there is no basis for comparison between the affected state and third states. As for non-state armed groups, the kinds of links that typically exist between such groups and states do not seem to vary based on whether the state is the affected one or a third state. These links tend to include one or more of the following: funding, supplying of weapons, training and other logistical support (e.g. modes of transportation), intelligence sharing, coordination, joint planning and/or decision-making, supervision and/or control. While not all of these links are present in all cases, they are recurring elements of relationships between states and armed groups, which fall within substantially the same range of possibilities, whether one is examining the paramilitaries in Colombia or the *contras* in Nicaragua.

Still, the extent of territorial control exercised in the relevant area by the armed group or the supporting/controlling state can have an impact on the range of support that can be provided. Territorial control becomes particularly significant in its temporal dimension. Where territory is held by a (state or private) actor over time, this can allow for stability to develop in the relationship, which can become more entrenched. This contrasts with the situation where control ebbs and flows, making it more difficult to move beyond *ad hoc* arrangements. This dynamic is likely what explains both the IACtHR's choice in favor of conduct-level attribution (given the widely varying circumstances across Colombia over time) and the Court's reliance on circumstantial evidence to soften that requirement where state organs and paramilitary groups have had a relationship in a particular time-period and locality. In contrast, the cases before the ECtHR have all concerned

situations where territorial control has remained stable for several years or even decades. In addition, the difference between an armed group and the local administration of a secessionist entity – with the latter carrying out a wider range of functions – explains why the links between secessionist entities and the third states supporting them are more wide-ranging, including broader political and economic support.

The potential importance of territorial control is probably what motivated the ICTY Appeals Chamber as well to require more substantial evidence where the controlling state is not in (full) control of the territory in question, either because it is a third state or because it is the affected state in a situation of turmoil.[395] But as already hinted at by the ICTY's statement, the extent of territorial control does not always correspond with sovereignty: affected states may lose control over part of their territory to an armed group or an occupying third state. Furthermore, the approaches of both the IACtHR and the ICTY Appeals Chamber suggest that the implications of territorial control tend to be evidentiary, rather than substantive. Inasmuch as territorial control can have a substantive influence, this is likely to be indirect, through its impact on the nature of the relationship between the state and the private actor, which in turn forms the basis for the attribution test.

All in all, if the intraterritorial *versus* extraterritorial nature of the situation is unlikely to lead to major (direct) differences, then it is much more likely that the explanatory factor for divergence between the IACtHR and the ECtHR would be the nature of the actor. This is also illustrated by the potential line of (part-factual, part-functional) ECtHR reasoning outlined above.

Furthermore, although both the ECtHR and IACtHR case law clashes with the control tests of the ICJ, there has not been any direct conflict so far *between* the European and Inter-American case law. In fact, the ECtHR requiring Turkey's 'acquiescence or connivance' (through its *de jure* organs or the TRNC) for the attribution of private persons' conduct in Northern Cyprus does not seem to be all that different from the IACtHR's 'acquiescence or collaboration' formula. Furthermore, neither court has conclusively determined the *minimum* threshold required for attribution in their jurisprudence, which allows for room to reconcile the respective tests with each other. As such, there is still a chance that the work of these two human rights courts can form part of a set of attribution tests *within* human rights law, which would place their jurisprudence under the second scenario of fragmentation. Even if the two courts were to come into conflict with each

395 *Tadić* (AC), paras. 138-139. In para. 140, the Appeals Chamber also mentioned a third scenario – that of 'an adjacent State with territorial ambitions […] attempting to achieve its territorial enlargement through the armed forces which it controls'. But despite the apparent connection to the issue of territorial control, the real significance of this factor lies in the fact that in such cases, the state and the armed group *share* a goal; on shared goals, see Section 4.5.4 below.

other, it is still possible to treat them as distinct treaty regimes – although viewing each human rights treaty as giving rise to a distinct treaty regime would admittedly be a highly formalistic argument.

There is one other issue that should be raised briefly. Fragmentation arises when there is a direct conflict between norms – in this case, between various tests concerning the attribution of conduct to the state. But as discussed above, it is possible to conceptualize the IACtHR's approach in a way that relies on attribution of injury, rather than conduct, while still leading to the same outcome in terms of reparations. Nonetheless, resort to such a construction is not without its difficulties. As the case of *Omeara Carrascal* has shown, the utility of this conceptualization is essentially limited to cases where the state has accepted responsibility based on the collaborative conduct of its own organs, as it would otherwise necessitate a new primary rule. In the end, given these obstacles, this conceptualization is unlikely to gain much traction, at least beyond state acceptance of responsibility.

4.5.4 Different Conceptions of What It Means to Act on the State's Behalf

Overall, the following can be concluded on the subject of control-based attribution. Despite some initial confusion as to whether *Nicaragua* entailed one or two tests, the ICJ has laid down clear – if unworkably strict – thresholds for the attribution of conduct (even if the term 'complete dependence' is arguably misleading, given that the core element of the test is control, not dependence). When this was challenged by the ICTY Appeals Chamber regarding organized groups, that challenge was likewise formulated in explicit terms. In contrast, human rights courts rarely discuss attribution with clarity or even use the vocabulary of attribution explicitly. Although some conduct must be attributed in every instance where the state is found responsible, the analytical process of these courts is often murky, making it difficult to identify what conduct was ultimately (implicitly) attributed to the state. The fact that attribution is often not distinguished adequately from other concepts, such as the duty to protect or extraterritorial jurisdiction, only adds to the confusion. In some cases, courts even resort to outright deflection, as in *Catan*, where the ECtHR failed to address Russia's argument on attribution. These tendencies compound the difficulty of trying to identify a coherent framework on attribution, including for parties when preparing their arguments in a subsequent case. In fact, the issue of predictability has also been raised in state pleadings, with Colombia explicitly linking the existence of a '*numerus clausus*' of attribution grounds with the concept of legal certainty.[396] In the European context, the issue has been raised in a Council of Europe report on state responsibility at the ECtHR, arguing that 'a clear methodology and interpretation of the applicable rules

396 *Pueblo Bello*, para. 103(c); see also note 63 above.

is of utmost importance in order to guarantee legal certainty'.[397] With the increase of available case law, patterns, relevant factors and courts' underlying logic can be better identified, which has led to the initial confusion subsiding to an extent, but both the IACtHR and the ECtHR still have some way to go in terms of clarity of reasoning.

Nonetheless, even with the precise contours of some of these attribution tests not yet defined, it is apparent that international courts' approaches diverge markedly on this issue. The source of this divergence can be traced back to the basic principle underlying (the ILC's work on) the concept of attribution: that conduct is attributable when it is carried out on the state's behalf. This, in essence, is the source of the contestation over what is required for attribution under the factual rationale, with competing conceptions of what it means to be acting on the state's behalf.[398]

According to one such conception, attribution necessitates control, which in turn implies that the state has a way of making the private actor carry out the state's will.[399] This is what lies at the heart of the approach followed by the ILC, the ICJ and the ICTY. It is reflected with particular clarity in certain statements of the ICJ. In *Nicaragua*, the Court implied that while the US aimed to topple the Nicaraguan government and planned *contra* operations to achieve that goal, it may not have wanted the *contras* to commit violations of IHL in the course of their operations. In *Bosnian Genocide*, the Court held that in order to establish attribution, the VRS must have served as a mere instrument of the FRY, with no autonomy whatsoever. In the ICJ's conception, either the non-state actor carried out the state's will in the particular conduct (effective control), or that actor simply *had no choice but to* carry out the state's will in *every* instance of conduct (complete dependence). In other words, the ICJ set such a high threshold as to ensure that the private actor did not act / could not have acted (given the state's close control) in any other capacity than as the agent of the state. The ICJ's interpretation of the agency principle ensures that states are not held responsible for conduct that they did not closely control, but for the very same reason, it makes evading responsibility relatively easy for states. These dual reasons are likely why the test enjoys states' continued support (thus maintaining its status as established law), as illustrated by the pleadings of Colombia in *Mapiripán*, and especially Russia's continued reliance on this test in the face of diverging jurisprudence from the ECtHR. In fact, it is probably no coincidence that the thresholds lower than that of the ICJ emerged from

397 CDDH(2019)R92Addendum1, para. 199.

398 Indeed, the term 'acting on behalf of the state' has been described as 'vague' (L. Condorelli, 'L'imputation à l'Etat d'un fait internationalement illicite : solutions classiques et nouvelles tendances' (1984-VI) 189 *Recueil des Cours* 9, at 101); 'très général et susceptible de ce fait même de nombreuses interprétations' (Kress, 'L'organe de facto', 101); and 'trop imprécise' (Finck, 'L'imputabilité', 136).

399 See in the same vein de Frouville, 'Private Individuals', 268, linking this to an ultimately subjective conceptualization of responsibility (where fault still plays a role, even if indirectly).

a criminal tribunal and human rights courts, i.e. adjudicatory bodies that were not deciding cases *between* states.

In the ICTY Appeals Chamber's overall control test in *Tadić*, there is a partial move away from this strict view by lowering the threshold. By allowing the non-state actor to have *some* measure of autonomy, the inevitable corollary of this test is that the state must accept a degree of risk: where the private actor, in the course of its operations, acts in contravention of the state's obligations under international law, the state will be responsible even if its goal was not the commission of such a violation. Nonetheless, the overall control test, as articulated in *Tadić* – despite some inconsistency between the test's formulation *in abstracto* and its application *in concreto* – still requires subordination at a general level, conforming to the basic idea that the non-state actor is, by and large, carrying out the state's will.

This approach, however, raises difficulties when the goals of the state and the non-state actor coincide, since in such a case – as highlighted by the Trial Chamber in *Tadić* – there is simply no need for the state to impose its will on the private actor. Coordination is sufficient to ensure the alignment of goals; and once that alignment is reached, all the state needs to do is provide the means for the private actor to reach its goal. Given this state of affairs, it is little surprise that another strand of jurisprudence relies on support and/or coordination to establish attribution, without the need to demonstrate control. This is the approach followed in the ICTY's post-*Tadić* jurisprudence (support and coordination), as well as in the case law of the IACtHR (acquiescence or collaboration). In many ways, though, the underlying idea is still that the private actor is somehow acting on the state's behalf, as illustrated by the Colombian Ombudsman's Office characterizing paramilitary groups as 'the illegal arm of the armed forces and police'.[400] The problem in these cases is that where goals coincide, the private actor *may* have been acting (not only on its own behalf but also) on the state's behalf, but this is difficult to establish conclusively, and it is difficult to operationalize the element that would set attribution apart from complicity.

The ECtHR's jurisprudence, meanwhile, is noteworthy not only for its exclusive focus on support, but also its ostensible link to control. Essentially, the Court's reasoning seems to rest on the logic that if it was not for the third state's support, the secessionist entity would not exist in the first place and would not be able to commit human rights abuses. This is a risk-based approach similar to that of the ICTY Appeals Chamber in *Tadić*, which stems from the fact that both the ICTY and the ECtHR engage in attribution at the level of the actor, rather than at the level of conduct. In the case of such an actor-based approach, any departure from the stringent standard set by the ICJ will entail some element of risk. But unlike the ICTY (in or after *Tadić*), the ECtHR does not discuss (evidence of) supervision or coordination *as such*. It does speak of authority, control and/or influence, sometimes as

400 UN Doc. E/CN.4/1998/16, para. 91.

arising out of dependence, which may be seen as a presumption of at least *some* degree of control. But in the absence of any further information (e.g. funds made available only on certain conditions), it is difficult to operationalize control, and the only type of control that can be safely extrapolated from support is after-the-fact course correction, forced by (the threat of) withdrawing funds. To illustrate with a concrete example: from the facts available in *Catan*, it appears that the policy adopted towards Latin-script schools was entirely of the MRT's own doing, with no evidence that this policy was steered or coordinated by Russia – or even that it was Russia's goal to force the schools to close. Given that the MRT could not survive without Russian support, it is safe to assume that Russia – by threatening to withdraw support – can force the MRT to change its policy towards the schools. But in such a case, it would be the *reversal* of the school policy that is carrying out Russia's will, not the policy as such. With this in mind, it is admittedly difficult to see the MRT as acting on Russia's behalf in adopting the hostile policy towards Latin-script schools, i.e. in the particular instance. Ultimately, while it may be possible to squeeze the ECtHR's approach intro a framework based on control (or coordination), the conceptualization of risk, based on support, arguably offers a much more natural reading of the Court's analysis. In addition, the fact that these secessionist entities are local administrations exercising public functions may play a role in the ECtHR's reasoning – although this has not yet been made explicit.

The fact that ICTY, IACtHR and ECtHR jurisprudence does not conform to the ICJ's narrow concept of attribution (endorsed by the ILC) – or to the approach based strictly on control, or even necessarily to the idea of acting on the state's behalf more broadly – raises a number of questions. What led the courts to adopt such different reasoning? Can approaches not based on control still be justified within the framework of the ARSIWA, and if so, how? How have states reacted to this departure from the ICJ/ILC dogma?

The likeliest explanation for the application of different approaches is the different underlying motivations of these courts. The ICJ's paramount concern is to safeguard state sovereignty; and in the particular context of attribution, to uphold the principle that 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf', giving a rather narrow interpretation to what conduct on the state's behalf may be.[401] This is why the ICJ dismissed the ICTY's 'overall control' test as 'stretch[ing] too far, almost to [a] breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.'[402] The paramount concern of the ECtHR and

401 *Bosnian Genocide*, para. 406.

402 *Ibid*. See also A. Nollkaemper & D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, at 385-386, pointing out a link between sovereignty and this approach.

IACtHR, however, is the protection of human rights.[403] In other words, this may be an instance of 'human rights rationality' at work. The goal of the ICTY, meanwhile, is to hold the perpetrators of (among other things) war crimes responsible. In this context, having recourse to IHL applicable in international armed conflicts – rather than the more limited rules applicable in non-international conflicts – enables a broader range of conduct to be captured under war crimes. These respective considerations militate in favor of a higher threshold at the ICJ and a lower one at the ICTY, IACtHR and ECtHR.

Indeed, although the two human rights courts' approaches are unlikely to be established law, they offer a much more realistic solution that goes some way in capturing situations that would otherwise fall into an accountability gap.[404] After all, if the IACtHR had applied the ICJ's control test(s), Colombia would only have been held responsible for its violations of the duty to protect under the ACHR; what is more, if the ECtHR had done the same, in many of these cases (such as *Catan*) no state would have been held responsible at all, leading to a vacuum in the European Convention's protection. But while the aim of closing the accountability gap is a commendable one, it needs to be weighed against the principle that the state is only responsible for conduct carried out on its behalf.[405]

Human rights courts may further bolster their case by arguing that human rights law – or a specific human rights treaty – is *lex specialis*, allowing for the application of attribution tests that diverge from those of the ICJ. Admittedly, the aim of closing the accountability gap may have particular normative force within the field of human rights law, given the fundamental nature of the rights at stake. But while the IACtHR has indeed asserted the American Convention to be *lex specialis*, the ECtHR seems to lean against considering the European Convention to be *lex specialis* regarding state responsibility (although it has not foreclosed this option, either). Likewise, the literature appears to support the view that the general rules of state responsibility apply within the field of human rights law, even as the fact remains that – regardless of whether they should or should not, and even of whether they claim to or not – human rights courts *do* apply different tests regarding this type of attribution. As both the IACtHR's and the ECtHR's approaches show closer similarity with complicity than agency as understood by the ICJ and the ILC, Chapter 6 will turn to examining whether (and in what circumstances) complicity may – and should – serve as the basis for attribution, bringing these approaches broadly speaking under the umbrella of the ARSIWA.

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403 See e.g. the ECtHR's repeated reference to the need to avoid a 'regrettable vacuum in the system of human-rights protection' under the ECHR: *Cyprus* v. *Turkey*, para. 78; see also e.g. *Sargsyan*, para. 148.

404 See further Section 6.3.2 below.

405 Cf. also Section 4.5.3 above on weighing the effective protection of human rights against state consent.

Nonetheless, given the likely significance of these subject-specific considerations in the courts' work, it is highly unlikely that the 'survives by virtue of' and 'acquiescence or collaboration' tests could take hold outside the context of human rights law. Indeed, the ICTY's 'overall control' test has already been rejected by the ICJ, even as it continues to be applied as a conflict classification test in the jurisprudence of criminal courts and tribunals.

In this context, it is worth noting the response from states to the IACtHR's and ECtHR's work on this subject. Reactions have been decidedly mixed, but in some cases, the courts' approaches have, in fact, achieved acceptance. While Russia, for instance, continues to object to the ECtHR's reasoning, Colombia – despite its initial resistance – has come to formulate its arguments in line with the IACtHR's approach.[406] In *Omeara Carrascal*, Colombia has even accepted responsibility for violating its duty to respect based on the collaborative acts of its agents. But even when challenged by the respondent states on the basis that the ICJ's tests should be applied instead, the ECtHR and IACtHR have been firm in upholding their respective tests. Thus, whether or not one thinks the courts should apply a higher threshold to conform to ICJ jurisprudence, it seems that both the 'survives by virtue of' and 'acquiescence or collaboration' tests will remain fixtures of the European and Inter-American human rights regimes for the foreseeable future. At the same time, the application of these lower thresholds constitutes the greatest contribution in the past few decades to closing the accountability gap in situations lacking an effective government.

406 See Section 4.5.3 above, also regarding the (more mixed) positions of Turkey and Armenia.

5 Attributing the Conduct of Private Actors II: The Functional, Legal, Continuity- and Discretion-based Rationales

5.1 Introduction

While the factual rationale for attribution may be one of the most often applied in the absence of effective government, it is far from the only one that can be relied on. Accordingly, this chapter turns to the rationales based on exercising governmental functions; legal links with the state in the case of remaining low-level *de jure* organs or through the co-optation of private actors; the continuity in the case of an insurrectional movement that becomes the government; and discretionary acknowledgement and adoption of private conduct.

The existing literature on the subject is very skeptical regarding the possibility of successfully attributing *any* conduct to a 'failed state' (including, but not only, under Articles 4/8 ARSIWA, as already discussed above). This is due to two related factors. Firstly, attribution is based on a public/private divide and the conduct of actors on the private side of that divide has to be traced back to 'the state' – but since the state is an abstraction, private conduct in effect has to be linked to the embodiment of the state, i.e. the government. It is thus no surprise that the ARSIWA Commentary describes Article 4 as the 'starting point' even for the attribution of private conduct.[1] This linkage is quite explicit in Article 8 ARSIWA, where the requisite instructions, direction or control has to emanate from state organs;[2] and is implicit in Article 11 ARSIWA, where the necessary acknowledgement and adoption must arguably also come from state organs.[3] The 'starting point' does not have to be the existing government in the case of Article 10 ARSIWA, where the insurrectional movement itself *becomes* the government over time – but the underlying principle is the same. In the end, the only exception to this approach is Article 9 ARSIWA, explicitly aimed at covering situations where private actors act 'in the absence or

1 ARSIWA Commentary to Article 4, para. 2.

2 See *ibid.*; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, para. 397; ARSIWA Commentary to Part One, Chapter II, para. 2.

3 There does not seem to be any practice indicating the contrary, see the ARSIWA Commentary to Article 11; J. Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014), 182-187; and particularly *United States Diplomatic and Consular Staff in Tehran* (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 ICJ Reports 3 (hereinafter *Tehran Hostages*), para. 74.

default of the official authorities'. Secondly, as explained at the beginning of the dissertation, 'the absence of effective government' is commonly – but all too restrictively – defined in the literature as the disappearance or complete collapse of state institutions, rather than the lack of control over (part of) the state's territory.[4] The cumulative effect of these two factors all but excludes any possibility of attribution: if private conduct is only attributable through state organs, and there are no state organs to speak of, authors must logically conclude that private conduct is simply not attributable to the state in the absence of effective government.[5]

For the same reason, much of the literature focuses partly on Article 9 ARSIWA, which does not require a link to the government; and partly on Articles 10 and 11 ARSIWA, which allow for retroactive application, essentially circumventing the problem of a collapsed or inexistent government by simply becoming operational once a new government has been established. Discussions of attributing the conduct of remaining state organs (Articles 4 or 5 ARSIWA) or private actors controlled by a government (Article 8 ARSIWA) are comparatively rare.[6]

Nonetheless, as the examples throughout this chapter illustrate, the functional and legal rationales appear to be particularly relevant in practice. In the first of these scenarios, there is neither a legal, nor a factual link between the government and the non-state actor – in the absence of the former, the latter simply proceeds to fill the vacuum left by the state and carry out state(-like) functions, enabling attribution under Article 9 ARSIWA. In the second scenario, meanwhile, there may be remaining state organs, or the government (of the affected state or a third state) may co-opt private actors, whose conduct thus becomes attributable through Articles 4 or 5 ARSIWA, depending on the type of official link created between the state and the non-state actor. Accordingly, the next section turns to the rationale of exercising governmental functions, investigating the origin and requirements of Article 9 ARSIWA and exploring whether this Article could be used to attribute the conduct of local *de facto* governments to the state.[7] The third section focuses on remaining *de jure* organs following the collapse of the government, and the possibility of the state co-opting private actors.

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4 See Section 1.2.2.1 above.

5 See e.g. G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Nijhoff, 2004), 274-275; P. Pustorino, 'Failed States and International Law: The Impact of UN Practice on Somalia in Respect of Fundamental Rules of International Law' (2010) 53 *German Yearbook of International Law* 727, at 749-750.

6 See notes 156-157 below, as well as Chapter 4, note 3 and accompanying text.

7 While *de facto* organs are subordinated to an existing (*de jure*) government, (local or general) *de facto* governments exercise (the full range of) governmental functions without being subordinated to another government, see e.g. ARSIWA Commentary to Article 9, para. 4; *Bosnian Genocide*, paras. 390-395; and notes 100-101 and accompanying text below.

Lastly, the fourth section makes a few brief observations on Articles 10 and 11 ARSIWA, before the chapter offers some concluding remarks on how the concept of agency appears in each of these rationales.

5.2 The Functional: Is Article 9 ARSIWA 'Tailored for Situations of State Failure'?

Since its application does not seem to be directly linked to the existence of a government, Article 9 ARSIWA is probably the most often discussed attribution rule in the literature on state responsibility in the absence of effective government. It has even been stated that 'at first glance, [this] rule seems to be tailored to the situation in failed states.'[8] The Article provides that:

> 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.

Indeed, with its reference to 'the absence or default of the official authorities', Article 9 appears to be uniquely placed to address the problem of attribution in the absence of effective government.

Those who assert this view seem to argue exclusively on the basis of the wording of Article 9 itself, however.[9] Upon closer examination of the background to this rule, most of the literature is quick to point out that the provision is meant to address a different type of situation, particularly (though not exclusively) because the ILC Commentary explicitly states that '[t]he cases envisaged by article 9 presuppose the existence of a Government

8 H. Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Baden-Baden: Nomos, 2007), 88: 'Die in Art. 9 ILC-Entwurf zur Staatenverantwortlichkeit formulierte Zurechnungsregel scheint auf den ersten Blick auf die Situation in failed States zugeschnitten zu sein.' See also R. Geiss, *"Failed states": Die normative Erfassung gescheiterter Staaten* (Berlin: Duncker & Humblot, 2005), 261, pointing out that in the literature, failed states are regarded as the typical case of application ('typischer Anwendungsfall') for Article 9 ARSIWA, referring – among others – to D. Bodansky & J.R. Cook, 'Introduction and Overview' (2002) 96 *American Journal of International Law* 773, at 783; and D. Thürer, 'Der Wegfall effektiver Staatsgewalt: "The Failed State"', in: D. Thürer, M. Herdegen & G. Hohloch, *Der Wegfall effektiver Staatsgewalt: 'The Failed State' (The Breakdown of Effective Government)* (Heidelberg: C.F. Müller, 1996), 9, at 32. Bodansky & Cook specifically write that '[i]n failed or poorly functioning states, Article 9 provides for state responsibility if nonstate actors step in to perform governmental functions in the absence or default of official authority.' See also H. Duffy, *The 'War on Terror' and the Framework of International Law* (2nd ed., Cambridge: Cambridge University Press, 2014), 79.

9 See e.g. Bodansky & Cook, 'Introduction and Overview', 783; Thürer, 'Der Wegfall effektiver Staatsgewalt', 32.

in office'.[10] In the end, virtually all authors – with the exception of Gérard Cahin – conclude that the Article is not applicable to situations of 'failed' or 'collapsed' states.[11]

To a large extent, this skepticism can be traced back to the fact that authors tend to use a very narrow definition of the absence of effective government.[12] In fact, Hinrich Schröder explicitly concedes that Article 9 could play an important role in 'failing' (as opposed to 'failed') states, where a government is still in existence.[13] But such a concession does not resolve the problem entirely: since Article 9 ARSIWA is based on the 'absence or default' of the government, the possibility of applying the Article to cases of complete collapse cannot be dismissed so easily.[14] In addition, some further features of Article 9 ARSIWA have been identified in the literature as limitations or even obstacles to the applicability of the Article in the absence of effective government, which warrant further analysis.[15]

Against this backdrop, the following sections first trace the origins of the rule in Article 9 and the conditions set by the case law, then turn to examine the ILC's work on the Article and the problems highlighted by the literature, in order to determine whether these concerns do indeed preclude the application of the rule in situations of 'state failure'. Finally, the third section analyzes the question of attributing the conduct of local *de facto* governments – a topic that is intimately linked to the subject-matter of Article 9, but which was excluded from the ILC's considerations in the course of formulating the Article.

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10 ARSIWA Commentary to Article 9, para. 4.

11 Geiss, *"Failed states": Die normative Erfassung*, 261-265; F. Leidenmühler, *Kollabierter Staat und Völkerrechtsordnung: zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt* (Wien: Neuer Wissenschaftlicher Verlag, 2011), 523-525; Pustorino, 'Failed States', 750; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 88-90. The one notable exception is Gérard Cahin, who maintains that the aim of this qualification is merely to distinguish this scenario from a general *de facto* government, rather than no government at all, see note 64 below. That said, it is odd that the ARSIWA Commentary does not make any mention of applying Article 9 in situations of complete governmental collapse, particularly in light of the comments of the Netherlands on the draft article, see note 28 below. Geiss, *"Failed states": Die normative Erfassung*, 263 argues that this is because Article 9 ARSIWA was never meant to apply to such situations, but the ILC's work he cites in support of this contention – analyzed throughout this section – does not offer conclusive proof of his stance.

12 See Section 1.2.2.1 above.

13 Schröder, *Die völkerrechtliche Verantwortlichkeit*, 104-105.

14 This is different from the case of Article 8 ARSIWA, for instance, where it is undisputed that Article 8 ARSIWA cannot be applied in the complete absence of government. Expanding the definition to include situations of partial lack of control thus simply admits the applicability of Article 8 in those scenarios, without questioning its inapplicability in cases of complete collapse.

15 Schröder, *Die völkerrechtliche Verantwortlichkeit*, 89-90, relying on *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Award No. 324-10199-1, 2 November 1987, (1987) 17 Iran-US Claims Tribunal Reports 92, cites governmental knowledge as such a requirement, for instance.

5.2.1 The Origin of Article 9: Codification or Progressive Development?

The ILC Commentary cites only one case in support of Article 9 ARSIWA, that of *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, decided in 1987 by the Iran-US Claims Tribunal (IUSCT), which in turn relied on an earlier draft of the ILC Articles to support its conclusion.[16] Furthermore, the final ILC Commentary does not cite any instances of state practice or established law, other than a passing reference to the idea of *levée en masse* in the law of armed conflict.[17] Considering this lack of evidence, the question arises whether the rule embodied in Article 9 is in fact a result of the progressive development of international law, rather than its codification. Granted, even if the Article could not have been regarded as a rule of customary international law at the time of the ARSIWA's finalization in 2001, it could have since become a customary rule, through widespread adherence.[18] However, there are no indications of Article 9 having been applied in subsequent state practice or international jurisprudence, either.[19]

The drafting history of the Article does not explicitly address whether it should be considered the result of codification or progressive development; there are indications, however, that it is indeed the latter. The ILC's 1974 Commentary to then-Draft Article 8(b) – the precursor of Article 9 – noted that practice on the rule was 'very limited', but considered it 'hardly

16 ARSIWA Commentary to Article 9, para. 2; see *Yeager*, paras. 42-43, referring to then Draft Article 8 (ILC, *Text of draft articles 7-9 and commentaries thereto as adopted by the Commission at its twenty-sixth session*, in: *Yearbook of the International Law Commission*, 1974, vol. II, Part One, 277 (hereinafter ILC Commentary (1974)), at 283). Cf. O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 257, at 273; see also Schröder, *Die völkerrechtliche Verantwortlichkeit*, 90, arguing that besides the *Yeager* case, there is no state practice supporting this rule.

17 ARSIWA Commentary to Article 9, para. 2.

18 Although the ARSIWA is not a treaty, the process described by the ICJ in *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, 1969 ICJ Reports 3, paras. 70-81, could apply by analogy.

19 Only one case appears to have referred to Article 9 ARSIWA: in *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company* v. *The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf, para. 576, the tribunal cited as relevant 'Articles 4, 5 and 9 of the [ARSIWA], which are generally considered as representing current customary international law.' However, the matter of attribution was then decided on the basis of Articles 4 and 5, with no further discussion of Article 9. See *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General – Addendum*, 20 June 2017, UN Doc. A/71/80/Add.1, at 8 on the lack of further references; as well as the UNSG's triennial reports on *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General*, 21 April 2016, UN Doc. A/71/80 and *Responsibility of States for internationally wrongful acts: Comments and information received from Governments, Report of the Secretary-General*, 21 April 2016, UN Doc. A/71/79 (including the previous reports cited therein).

surprising in view of the rather exceptional nature of the situations envisaged and, in particular, of the hypothesis that the conduct in question may constitute internationally wrongful acts.'[20] In other words, it is already quite rare that private persons have to take over state functions in the absence of the government; such persons violating international law in the course of their conduct logically constitutes an even smaller subset of cases. Given such limited practice, the ILC justified the inclusion of this rule in the Draft Articles by relying on the following reasoning instead:

> [N]ational laws often regard such conduct as conduct of the State under internal law and even hold the State responsible for such acts. In the Commission's view the State, as a subject of international law, should *a fortiori* bear the responsibility for such conduct when it has led to a breach of an international obligation of that State.[21]

The language used by the Commission – that the state *should* bear responsibility in such cases – indicates that the Article is best viewed as having been an instance of progressive development. More recently, this is reinforced by the fact that the 2001 Commentary, having dropped the above passage, apparently considered the *Yeager* award as stronger evidence in support of the rule contained in Article 9 ARSIWA.

How did states react to this rule? Early on in the process, Canada noted in relation to both Draft Articles 7 and 8(b) – the eventual Articles 5 and 9 ARSIWA – that the question of attributing such conduct required 'further study' and that 'the circumstances in which a State may be held responsible for such actions must be more restrictively delineated'.[22] Since Canada unfortunately did not elaborate any further on this statement, it is not quite clear what kind of restrictions it had in mind. Later on the UK, commenting on the same two Articles, repeatedly stressed that the scope of 'governmental authority' was not sufficiently clear and the term should

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20 ILC Commentary (1974), at 285, para. 11.

21 *Ibid*; the ILC went on to note that 'this view is shared by the few writers that have dealt with the case'.

22 ILC, *Observations and comments of Governments on chapters I, II and III of part 1 of the draft articles on State responsibility for internationally wrongful acts*, 6 March, 1 and 21 April, 6 and 21 May 1980, UN Doc. A/CN.4/328 and Add. 1-4, in: *Yearbook of the International Law Commission*, 1980, vol. II, Part One, 87 (hereinafter ILC Governmental Comments (1980)), at 94, paras. 2-3; on the lack of further comments, see ILC, *First report on State responsibility by Mr. James Crawford, Special Rapporteur*, 24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998, UN Doc. A/CN.4/490 and Add.1-7, in: *Yearbook of the International Law Commission*, 1998, vol. I, Part One, 1 (hereinafter *Crawford's First Report*), para. 215. Article 5 ARSIWA establishes attribution where persons or entities are 'empowered by the law of that State to exercise elements of the governmental authority'; see Section 5.3 below for a more detailed discussion.

be further specified.[23] The Netherlands similarly noted the vagueness of the term in relation to Article 5, but was of the opinion that 'this obscurity seems unavoidable' and that redrafting was unlikely to present a better alternative.[24] The most direct comment on the status – rather than the content – of the rule came from the United States, pointing out that the 1974 Commentary 'noted that international practice in this area is very limited and thus acknowledged that there is little authority to support this article.'[25] Even so, such lack of practice apparently did not warrant deletion of the Draft Article in the eyes of the US.[26] In a different comment, referring to the Commentary's own remark that the rule is only applicable in 'genuinely exceptional cases', the US merely suggested redrafting the provision 'to more explicitly convey this exceptional nature.'[27] The Netherlands, meanwhile, deemed the Draft Article to be 'useful', specifically pointing to the situation in Somalia as one where the rule could apply.[28] In sum, with perhaps the possible exception of Canada, states did not consider the Draft Article's perceived shortcomings so grave as to warrant proposing its elimination or major revision; and apart from these few remarks, the Draft Article drew no other substantive comments throughout the process. Overall, this suggests that states did not regard the rule as a controversial one, be it emerging or established.

Furthermore, the *Yeager* award may not be the only case to support this rule after all. Ago's initial proposal for Draft Article 8 covered two different scenarios – where private persons 'in fact act on behalf of the State' or 'in fact perform public functions' – which later followed distinct trajectories, first separated into Articles 8(a) and (b), and eventually becoming Articles 8 and 9 ARSIWA. At the time of Ago's report, however, that delineation was not yet clear in every respect. During the discussions of an early draft of Article 8 in the ILC, Paul Reuter – then a member of the Commission – even raised the question whether the two were alternative or cumulative require-

23 ILC, *Comments and observations received by Governments*, 25 March, 30 April, 4 May, 20 July 1998, UN Doc. A/CN.4/488 and Add.1-3, in: *Yearbook of the International Law Commission*, 1998, vol. II, Part One, 81 (hereinafter ILC Governmental Comments (1998)), at 106, 107; ILC, *Comments and observations received from Governments*, 19 March, 3 April, 1 May and 28 June 2001, UN Doc. A/CN.4/515 and Add.1-3, in: *Yearbook of the International Law Commission*, 2001, vol. II, Part One, 33 (hereinafter ILC Governmental Comments (2001)), at 48, 49, 50.

24 ILC Governmental Comments (2001), 49.

25 *Ibid.*, 50.

26 In fact, the US drew no conclusions whatsoever from this lack of practice, but merely highlighted it, see *ibid*.

27 *Ibid.* In response, the Drafting Committee was of the opinion that 'the suggestion, made by a Government, that the exceptional character of the article be stressed would best be reflected in the commentary.' ILC, *Responsibility of States for Internationally Wrongful Acts [State Responsibility]*, Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, http://legal.un.org/docs/?path=../ilc/sessions/53/pdfs/english/dc_resp1.pdf&lang=E, 12.

28 ILC Governmental Comments (2001), 49.

ments for attribution.[29] While Ago (backed by the rest of the Commission) was quick to clarify that the two scenarios were indeed alternatives,[30] a few of the judicial decisions cited in his original report – later referenced as supporting the eventual Article 8 ARSIWA – do appear to contain elements of both. Accordingly, it is worth taking a closer look at the awards in the *Zafiro* and *Stephens* cases to determine their relevance for the purpose of Article 9 ARSIWA.[31]

The *Zafiro* case concerned responsibility for looting and destruction of property during the 1898 battle of Manila in the Spanish-American War by the crew of the *Zafiro*, a merchant ship which had been bought, placed under naval command, and used as a supply ship by a US Admiral. While the US argued that the *Zafiro* was an ordinary merchant vessel, for whose conduct it could not be held responsible, the Commission held that 'the liability of the State for [the ship's] actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed'.[32] Upon examining the facts, the Commission concluded that rather than being 'a mere merchant ship', the *Zafiro* was in fact 'a supply ship, acting in Manila Bay as a part of Admiral Dewey's force, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.'[33] In the end, however, the Commission appears to have held the US responsible at least partly – if not mainly – on the basis that its officers failed to prevent or put a prompt end to the looting.[34] In other words, the case ultimately turned on the question of control and failure to prevent, while the function of the ship played only a preliminary role.[35] Furthermore, the conduct in question did not take place 'in the absence of the official authorities' – quite the contrary, in fact.

Much more relevant to the topic at hand was the *Stephens* case before the US-Mexico General Claims Commission, concerning the killing of a US national by a member of a local militia during a period of revolutionary

29 ILC, *Summary record: 1258th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 31, at 35, para. 22.

30 ILC, *Summary record: 1260th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 43, at 46, para. 26.

31 See also Finck, 'L'imputabilité', 137-140.

32 *D. Earnshaw and Others (Great Britain)* v. *United States* (*Zafiro* case), Award of 30 November 1925, 6 UNRIAA 160, at 162.

33 *Ibid.*, 163.

34 *Ibid.*, 164; see in particular the Commission's following statement: 'Had the officers been ashore with the crew, liability would be clear enough. But to let the crew go ashore uncontrolled, and thus to let them get out of the control that obtained when they were on the ship, seems to us in substance the same thing.' (It must also be noted that the award contains several morally objectionable statements.)

35 Cf. ILC, *Summary record: 1259th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 36, at 39, para. 25, where José Sette Câmara noted that '[t]he *Zafiro* case […] did not appear to support an approach to the problem of *de facto* officials along the lines of article 8, since the vessel had been under the command of a naval officer and had undeniably been used for State purposes in naval operations.'

upheaval in Mexico. The victim was driving his car when a sergeant in the militia ordered two guards to halt it, 'not adding that they should fire.'[36] When the car did not stop, though, one of the guards (Lorenzo Valenzuela) fired, killing Edward Stephens.[37] As to the status of the militia, which was not entirely clear, the Commission stated the following:

> Since nearly all of the federal troops had been withdrawn from [Chihuahua] State and were used farther south to quell this insurrection, a sort of informal municipal guards organization—at first called 'defensas sociales'—had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion, if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were 'acting for' Mexico or for its political subdivisions.[38]

It is important to highlight that the militia had a *dual* aim: 'partly to defend peaceful citizens, partly to take the field against the rebellion, if necessary.' Each of these two functions triggers a different ground for attribution. Inasmuch as the group was acting 'to defend peaceful citizens', it could be considered as exercising elements of governmental authority, namely maintaining public order. To the extent that the group was taking action 'against the rebellion', it was acting *for the government* in office, and since the government is considered to represent the state, the militia was thus *acting for the state*.[39] These two functions correspond to the two scenarios covered by Draft Article 8, later split into Articles 8(b) and (a), and eventually evolving into Articles 9 and 8 ARSIWA. The Claims Commission ultimately concluded that '[t]aking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.'[40]

Subsequent interpretations of the Commission's reasoning in *Stephens* have variously classified it as attribution on the basis of Articles 4, 8 and/or 9 ARSIWA.[41] Upon closer examination, however, it becomes clear that

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36 *Charles S. Stephens and Bowman Stephens (U.S.A.)* v. *United Mexican States*, Award of 15 July 1927, 4 UNRIAA 265, paras. 1, 5.

37 *Ibid.*

38 *Ibid.*, para. 4; also quoted in *Yeager*, para. 43, note 9.

39 Cf. *Hopkins* and the distinction between 'personal' and 'unpersonal' acts of a local *de facto* government, discussed in Section 5.2.3 below. See also H. Silvanie, 'Responsibility of States for Acts of Insurgent Governments' (1939) 33 *American Journal of International Law* 78, at 102, on international law's tendency to equate the government with the state.

40 *Stephens*, para. 7.

41 See e.g. *ibid.*, Opinion of Commissioner Nielsen, 268, who describes Valenzuela as 'a Mexican soldier, in the presence and under the command of an officer'; J.G. de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico under the Convention of September 8, 1923* (The Hague: Nijhoff, 1938), 102; *Crawford's First Report*, para. 195; *Yeager*, para. 43, note 9. See also Finck, 'L'imputabilité', 139, noting that the award is unclear as to the precise basis.

the case does not correspond to any modern understanding of Articles 4 or 8 ARSIWA. The militia could not be considered a *de jure* organ of Mexico; at best it was 'an irregular auxiliary of the army' but even that could not be established with certainty.[42] It would be equally difficult to regard the militia as acting under the instructions, direction or control of Mexico, or as its *de facto* organ, since there was no evidence of governmental control over the group's actions.[43] While, as noted above, the group's conduct could *in part* be considered as falling under the initial definition of (then-Draft) Article 8, the *Stephens* case is thus best seen as supporting the rule in Article 9 ARSIWA.

Nonetheless, it is noteworthy that the same lack of distinction between Articles 8 and 9 ARSIWA plagued the *Yeager* award at the IUSCT. The applicant claimed that he was wrongfully expelled from Iran and forced to leave his possessions behind by the so-called Revolutionary Guards in the aftermath of the Iranian revolution. Iran admitted that '"revolutionary guards and Komiteh personnel" were engaged in the maintenance of law and order from January 1979 to months after February 1979 as government police forces rapidly lost control over the situation', but denied that these groups would have been affiliated with the Provisional Government.[44] The state also claimed that the government 'did not have the means to control the actions of extremist revolutionary groups.'[45] The IUSCT, after reviewing the facts and making reference to both Draft Articles 8(a) and (b), came to the following conclusion:

> The Tribunal finds sufficient evidence in the record to establish a presumption that revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances, and for the kind of measures involved here, the Respondent has the burden of coming forward with evidence showing that members of 'Komitehs' or 'Guards' were in fact not acting on its behalf, or were not exercising elements of government authority, or that it could not control them.[46]

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42 For the same reason, its conduct could not be regarded as attributable under Article 5 ARSIWA, either, as that would have required the militia to be 'empowered by internal law to exercise governmental authority' (see ARSIWA Commentary to Article 5, para. 7), which was likewise not the case.

43 While the guard in question was ordered to halt the car, that command came from a superior *within the militia* which, as an entity, could not be considered a *de facto* organ or acting under the instructions, direction or control of Mexico in the absence of control by the state's *de jure* organs.

44 *Yeager*, para. 23.

45 *Ibid.*

46 *Ibid.*, para. 43 (footnote omitted).

The Tribunal's analysis refers to three different grounds – acting for the state, exercising elements of governmental authority, and the government's knowledge and inaction – but it is not entirely clear whether these are treated as alternative or cumulative requirements for attribution. While the first two appear to be alternative grounds (as indicated by the phrase 'or at least', and further supported by the Tribunal's previous separate discussion of Articles 8(a) and (b)), the role of the third one is particularly ambiguous.[47] If it is considered to be an alternative requirement, this would mean that – in the IUSCT's view – governmental knowledge and inaction are sufficient for attribution. However, while such knowledge and inaction may lead to the state's responsibility based on the government's *own* failure to comply with its duty to protect, international law treats this as a separate violation which does not entail attributing the conduct of the private actor.[48] In other words, even if the Tribunal did consider governmental knowledge and inaction to be a (self-standing) basis for attributing the conduct of the private actor, this position does not find support in international law. The same problem arises even if the third requirement is seen as cumulative. To begin with, it is unclear whether the additional criterion is supposed to attach to the first or the second ground, or perhaps both. Either way, there appears to be no support in international law for its inclusion. With regard to the first one (acting for the state), this has developed in a way over the years that requires not only governmental knowledge, but high degrees of control – as opposed to *lack of* control – over the private actors.[49] As for the second one (exercising elements of governmental authority), there is nothing to indicate, either before or after the *Yeager* award, that governmental knowledge and inaction would be deemed a general requirement of Article 9 ARSIWA.[50] On the contrary: the ILC Commentary to Draft Article 8(b) specifically noted that 'in many cases, [such persons] act without the

47 To further complicate matters, the last sentence of the paragraph (referring to the same set of criteria), suggests that all three may be cumulative, since in that case it would be sufficient for Iran to disprove any *one* of them. However, considering the strong evidence in favor of viewing the first two grounds as alternative (not to mention that treating them as cumulative would contradict the ILC's understanding of how Articles 8(a) and (b) operate), this cannot be seen as conclusive evidence.

48 See Finck, 'L'imputabilité', 132 in the same vein; and Chapter 3 above. But see D. Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules', in: R.B. Lillich & D.B. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, NY: Transnational, 1998), 109, at 142-143, who read the award as laying down the rationale that 'the acts of entities de facto exercising elements of governmental authority […] are to be attributed unless the State can show it is not capable of controlling the actor de facto exercising governmental authority.'

49 See Chapter 4 above.

50 The ILC's work, which the Tribunal relied on, did not contain such a requirement, nor did the Commission include one in response to the *Yeager* award. The *Stephens* case, also mentioned by the IUSCT, did not set a knowledge requirement, either – its *ratio decidendi* (at para. 7) was simply that the perpetrator 'must be considered as, or assimilated to, a soldier.' See also Finck, 'L'imputabilité', 127, 132.

knowledge of the official organs.'[51] Granted, since there are relatively few cases underpinning the Article, a single award may have a bigger impact on the state of the law; but even so, at best it remains to be seen whether that stance would be followed by other courts and tribunals.

Thus, while some authors seem to take this requirement for granted,[52] it is advisable to approach the matter with some caution – particularly because in the end, the likeliest answer is much simpler than either of these two scenarios regarding alternative and cumulative criteria. The Tribunal's statement seems to have come merely in response to Iran's defensive argument regarding its inability to rein in extremist elements of the revolutionaries, rather than out of general considerations regarding the conditions of the Draft Article's application. This is also supported by the fact that the IUSCT made no reference to any such requirement when discussing Draft Article 8(a) and (b) *in abstracto* in the preceding paragraph. Furthermore, given Iran's admission that the Revolutionary Guards 'were engaged in the maintenance of law and order', its attempt to distance itself from the Guards was likely meant to counter the argument that these groups were *acting for* the government, and thus for the state – which would mean that this issue as such relates to Draft Article 8(a), rather than 8(b). Accordingly, and in line with the Tribunal's own statement (that the Guards 'were acting in fact on behalf of the new government, *or at least* exercised elements of governmental authority in the absence of official authorities'), the award is best viewed as making concurrent (alternative) recourse to Draft Articles 8(a) and 8(b), where there may have been some doubt as to the fulfilment of the conditions of Article 8(a), but not that of 8(b).

In sum, while neither *Stephens* nor *Yeager* are pure applications of the rule contained in Article 9 ARSIWA, both cases offer support for that rule. That said, with such a scarcity of supporting jurisprudence, it is difficult to identify the characteristics that proved decisive in establishing attribution in the tribunals' view. The only elements shared by these cases were the requirements that the persons in question (1) exercise governmental functions (2) in the absence of official authorities. With this in mind, the chapter turns to examine how the issue of these (and possibly other) criteria was approached by the ILC.

5.2.2 The Conditions of Article 9 ARSIWA

The ILC Commentary to Article 9 begins by noting that the rule is meant to apply only in *exceptional* circumstances, such as in cases of 'revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being

51 ILC Commentary (1974), 285, para. 10.

52 See Schröder, *Die völkerrechtliche Verantwortlichkeit*, 89-90; cf. Geiss, *"Failed states": Die normative Erfassung*, 264, who uses this ostensible condition of knowledge as support for this argument that Article 9 requires the existence of a central government to apply.

inoperative.'[53] It then goes on to discuss the three conditions determining the applicability of the Article, namely (1) the exercise of 'elements of the governmental authority', (2) in the absence or default of authorities, and (3) in circumstances calling for the exercise of these functions.

Accordingly, the first question to be answered is: what constitutes governmental authority? Ago's initial formulation of Draft Article 8 and the accompanying report referred to the performance of 'public functions', but neither the Draft Article, nor the report defined what 'public functions' were to entail. The need for a better definition was highlighted by several members of the ILC in the ensuing discussions; in response, the Drafting Committee replaced the term 'public functions' with that of 'elements of the governmental authority'.[54] However, it is unclear how this change in wording would help clarify the scope of tasks covered. The UK specifically pointed out in its comments that 'a problem arises from the absence of any definition in the Draft Articles, and of any shared international understanding, of what acts are and what are not "governmental"' and called on the ILC 'to consider whether an effective criterion of "governmental" functions can be devised and incorporated in the draft.'[55] The Commission, however, did not make any further changes to the formulation; nor did it define 'governmental' in the ARSIWA Commentary.

Article 9 is not the only one of the ARSIWA to face this problem. Two of the ILC's attribution articles refer to the exercise of 'elements of the governmental authority', either pursuant to internal legal authorization (Article 5 ARSIWA) or in the absence or default of the government (Article 9 ARSIWA). The Commentary to Article 9 is silent on what such authority might entail, while the Commentary to Article 5 expressly declines to offer a definition:

> Article 5 does not attempt to identify precisely the scope of 'governmental authority' for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just

53 ARSIWA Commentary to Article 9, para. 1. Authors also sometimes argue that Article 9 was intended to cover only transitional/temporary situations, even using this argument to exclude Article 9's applicability in situations of 'state failure', see e.g. Pustorino, 'Failed States', 750; G. Cahin, 'L'état défaillant en droit international: quel régime pour quelle notion?', in: *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 177, at 203-204. Such a criterion (beyond the general reference to exceptional circumstances) is not apparent from the ILC's work, though.

54 ILC, *Summary record: 1278th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 151, at 152-153; this formulation was adopted on first reading without any further changes, see ILC Commentary (1974), 283.

55 ILC Governmental Comments (1998), 37. While the UK made this comment primarily in the context of then Draft Articles 5 and 6, it noted that 'a similar point arises in relation to draft articles 7, paragraph 2, 8(b), 9 and 10.' Similarly, in *Crawford's First Report*, para. 152, this was treated by the Special Rapporteur as a general comment on Part One, Chapter II ARSIWA as a whole.

> the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.[56]

This lack of definition is somewhat understandable in the case of Article 5, at least to the extent that it addresses situations falling beyond that 'certain limit' where the governmental nature of particular functions may vary from state to state.[57] But the ILC made no attempt to define what falls *within* that 'certain limit', either – and unlike Article 5, the narrowly defined applicability of Article 9 suggests that it would ostensibly apply to the *core* functions of the state.[58] Furthermore, most of the additional factors listed for Article 5 to overcome this uncertainty are of little or no help in the case of Article 9. The powers exercised under the latter scenario are not conferred by the government; the Commentary explicitly notes that those acting under Article 9 'are doing so on their own initiative'.[59] For the same reason, it is difficult to see how they could be accountable to the government. This leaves 'the content of the powers' as the paramount factor for Article 9, which is likewise confirmed in the Commentary to that Article: 'the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State.'[60] The only other factor which may play a role is 'the purposes for which [these powers] are to be exercised'. In this respect, the concept of requiring the private person, group or entity to act *in the interest of* the state or 'the national community' (rather than out of selfish motives) recurs with some frequency in the literature, even though this is not a criterion set by the ILC for Article 9.[61] Either way, although a requirement of acting in the public interest may provide some guidance, it does not change the fact that 'elements of the governmental authority' remains an elusive term.

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56 ARSIWA Commentary to Article 5, para. 6.

57 As the Netherlands has noted in its comment to the draft of Article 5, it is probably impossible to provide a precise definition of the scope of functions to be covered, see ILC Governmental Comments (2001), 49.

58 This narrow application is apparent from the Article's exceptional nature and its normative requirement.

59 ARSIWA Commentary to Article 9, para. 4.

60 *Ibid*.

61 See Pustorino, 'Failed States', 750: 'the actions carried out by private persons in Somalia are not performed on the basis of the general interest of the national community, but exclusively on the basis of personal and selfish interests of those who act'. Similarly, Kreijen, *State Failure*, 275, puts forward generally that 'warlords and factional opposition groups as a rule will act out of narrowly perceived self-interest, and, therefore, not in the interest of the public cause.' That said, he does not raise the same point in the context of Article 9 ARSIWA specifically, where he frames his analysis in terms of functions, rather than interests.

These concerns notwithstanding, it is not the lack of definition of 'governmental authority' which has sparked the most comments on Article 9's conditions in the literature, but rather the ILC's remark that Article 9 ARSIWA presupposes the existence of a government in office. This has been widely interpreted as excluding the operation of Article 9 in situations of 'state collapse' (though allowing for its application in 'failing states' which still have a government in office).[62] This interpretation, however, appears to be based largely on an out-of-context reading of a single sentence in the Commentary. When the statement is read in context, the Commentary reveals that the ILC was merely concerned with distinguishing the situations addressed by Article 9 from those falling under Article 4 ARSIWA:

> It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[63]

The Commentary does not mention situations of total governmental absence, being focused on delineating Article 9 from Article 4 ARSIWA instead.[64] That focus is explained by the fact that this passage can be traced back to Roberto Ago's 1971 report to the ILC, which marked the first appearance of then-Draft Article 8. Since the Special Rapporteur labelled those acting under this article as '*de facto* officials', he sought to distinguish them from *de facto* governments; and in the end, the final Commentary to the ARSIWA simply took over Ago's formulation nearly verbatim.[65]

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62 See notes 9-11 above.

63 ARSIWA Commentary to Article 9, para. 4.

64 This interpretation is the one favoured by Gérard Cahin as well, see Cahin, 'L'état défaillant', 202-203 (footnote omitted): 'Le fait que les situations envisagées supposent « l'existence d'un gouvernement officiel et d'un appareil d'Etat dont des irréguliers prennent la place ou dont l'action est complétée dans certains cas » ne signifie donc pas, contrairement à une interprétation restrictive, qu'en soit exclue la situation du *failed State*, mais seulement que ce groupe de personnes n'est pas assimilable à un gouvernement *de facto* dont les actes devraient être alors considérés comme ceux d'un organe ordinaire de l'Etat.'

65 ILC, *Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur – The internationally wrongful act of the State, source of international responsibility*, 5 March, 7 April, 28 April and 18 May 1971, UN Doc. A/CN.4/246 and Add.1-3, in: *Yearbook of the International Law Commission*, 1971, vol. II, Part One, 199 (hereinafter *Ago's Third Report*), para. 196.

Robin Geiss, in particular, has argued that the exclusion of situations of complete collapse is further supported by the reference to 'elements' of governmental authority, as this ostensibly implies 'that governmental authority is absent only in certain fields which are thus occupied by private actors'.[66] While this is a reasonable interpretation, the distinction between Articles 4 and 9 ARSIWA arguably offers a more plausible explanation for the ILC's reliance on the term. As long as the emerging private actors only exercise certain *elements* of governmental authority, their conduct is attributable to the state under Article 9 ARSIWA, regardless of whether there is a central government in existence. After all, since the applicability of Article 9 is conditioned on the unavailability of governmental authority in the given circumstances, why would – or should – it matter whether a government exists if it is by definition unavailable in the case at hand? But as soon as one group or entity becomes the *general* government of the state (its conduct attributable under Article 4), it no longer exercises mere elements, but rather the *entirety* of governmental authority.

Furthermore, interpreting the Commission's statement as a distinction between Articles 4 and 9 (rather than as the exclusion of state collapse) has the added benefit of resolving the apparent contradiction between the first and second conditions of Article 9 ARSIWA.[67] The second requirement of Article 9 – the 'absence or default' of the government – is, according to the ILC, 'intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality.'[68] Yet Article 9 cannot possibly cover situations of 'total collapse' and at the same time 'presuppose the existence of a Government in office' – hence the contradiction. But if the latter is read simply as a distinction from Article 4, it could still allow for a scenario of total collapse to be covered by Article 9.

There may be an alternative explanation of this apparent contradiction based on the Statement of Peter Tomka, the ILC Drafting Committee's Chairman, elaborating on the meaning of 'absence or default':

> As to the terms "absence or default", the first covers the situation where the official authorities do exist, but are not physically there at the time, and the second covers cases where they are incapable of taking any action. Indeed, the reference to "default" was specifically added during the second reading to cover such a situation. The combination of "absence or default" was thus considered appropriate to capture all possible scenarios.[69]

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66 R. Geiss, 'Failed States: Legal Aspects and Security Implications' (2005) 47 *German Yearbook of International Law* 457, at 481.

67 But even where this contradiction is highlighted in the literature, it is still not deemed sufficient to question the inapplicability of Article 9 ARSIWA to situations of governmental collapse; see e.g. Geiss, *"Failed states": Die normative Erfassung*, 263-264.

68 ARSIWA Commentary to Article 9, para. 5.

69 Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, 13.

But although this passage does appear to assume the existence of a government in office, its focus is on the distinction between (local) governmental absence and incapacitation – and more specifically, on the acknowledgement that governmental *presence* does not necessarily equate to governmental *control* – rather than the existence or lack of a central government. Even if the statement could be read as requiring a government in office, it does not explain how 'total collapse' could be covered under Article 9 ARSIWA, as the Commentary asserts – leaving the ILC's work contradictory at best on this issue.

Granted, it is puzzling that the Commission did not address situations of complete governmental absence (more) specifically, given that the phenomenon was well known by the time the ARSIWA were finalized in 2001: at that point, Somalia had been without an internationally recognized government for almost a decade.[70] In fact, when commenting on the Draft Articles, the Netherlands specifically mentioned the case of Somalia as a situation to which it could be applicable and regarded Article 9 as 'useful' in this respect.[71] But while there is no mention of such scenarios in the ILC's work, there is no indication that this would have been a deliberate omission, either.[72] In the end, the first criterion does not explicitly exclude (or even address) total collapse, while the second one does explicitly include it; and such an inclusive reading also helps resolve an unnecessary contradiction. On balance, therefore, there are more persuasive arguments supporting the interpretation of the ILC's statement as a distinction than as a restriction.

Finally, the third requirement of Article 9 ARSIWA is that the circumstances must have *called for* the exercise of state functions. As the Commentary points out, there is thus a 'normative element' in Article 9, which makes it unique among the attribution articles regarding private conduct.[73] But it is unfortunately not specified any further what that normative element might be, beyond generally stating that 'some exercise of governmental functions was called for, though not necessarily the conduct in question.'[74] Similarly, in his statement on the work of the Drafting Committee, its Chairman

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70 See e.g. R. Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' (2004) 73 *Nordic Journal of International Law* 1, at 2, as well as note 84 below on the governments that followed.

71 ILC Governmental Comments (2001), 49.

72 Geiss, 'Failed States: Legal Aspects', 481, contends that the reason why the ILC Commentary does not refer to Somalia or Afghanistan is that Article 9 was not meant to cover cases of complete collapse (on this, see notes 9-11, 62-71 and accompanying text above); but he offers no evidence in support of this contention. Given that Somalia was the only example of such total collapse and that the ARSIWA were intended to codify (and progressively develop) the *general* rules of state responsibility, it is also possible that the Commission simply considered this scenario to be too exceptional and/or too specific to warrant closer attention.

73 ARSIWA Commentary to Article 9, para. 6.

74 *Ibid.*

Tomka simply recounted the facts of the *Yeager* case, noting that 'the situation was such as to call for the exercise of the immigration authority, and this was done by a *de facto* authority.'[75] This does not clarify what it was in that particular situation which called for an exercise of state functions, though; there were no factor(s) isolated which could explain the need to do so. As a result, it remains unclear what the added value of the third requirement is – or, in other words, which are the scenarios that could meet the first and second criteria, yet still fall short of the third.

In order to answer this question, one must turn to the ILC's 1974 Commentary to the articles adopted on first reading, where the Commission stressed that attribution under the Article could only take place in 'genuinely exceptional' cases, namely under the following conditions:

> [I]n the first place, the conduct of the person or group of persons must effectively relate to the exercise of elements of the governmental authority. In the second place, the conduct must have been engaged in because of the absence of official authorities […] and, *furthermore,* in circumstances which justified the exercise of these elements of authority by private persons: *that is to say, in the last resort, in one of the circumstances mentioned in the commentary to the present article*.[76]

A footnote at the end of the last sentence then referred back to a previous paragraph of the Commentary, where the ILC cited war and 'natural events such as an earthquake, a flood or some other major disaster' as such circumstances.[77] In other words, the third requirement was indeed intended to be an additional limitation ('furthermore') on the applicability of the Article, restricting it to those situations where governmental absence is due to one of the aforementioned reasons.

Do these reasons – war and natural disaster – constitute an exhaustive list? Ago's original report, as well as the ILC Drafting Committee's comments allowed for 'other exceptional circumstances' besides wars and natural disasters.[78] Likewise, although the 2001 Commentary does not mention natural disasters at all, focusing instead on 'revolution, armed conflict or foreign occupation' as the main examples, it treats this list as non-exhaustive.[79] While the 1974 Commentary is unclear as to whether it viewed wars and natural disasters as the only scenarios in which the Article could apply, in light of both its antecedents and the ILC's final commentary, it is highly unlikely that this list would be exhaustive.

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75 Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, 13.

76 ILC Commentary (1974), 285, para. 11 (emphases added; footnote omitted).

77 *Ibid.*, note 597, referring to *ibid.*, para. 9.

78 ILC, *Summary record: 1278th meeting*, 153, para. 17; cf. *Ago's Third Report*, para. 189: 'circumstances in which, for one reason or another, the regular administrative authorities have disappeared.'

79 See ARSIWA Commentary to Article 9, para. 1 ('such as').

However, if the list of possible scenarios is indeed non-exhaustive, it is difficult to imagine a situation where governmental absence could be the result of anything other than 'exceptional circumstances', which leads one back to the original question regarding the added value of the third requirement.[80] The answer may lie in the remark made during the ILC's discussions of Draft Article 8, whereby 'the mere fact that an individual ha[s] usurped a governmental function [i]s not in itself sufficient to attribute liability to the State.'[81] The third criterion of Article 9 would thus filter out cases where governmental functions have been 'usurped' – in other words, where the exercise of state functions by private persons is the *cause*, rather than the *result* of governmental absence. Accordingly, parallel institutions used as instruments of resistance would not be attributable to the affected state.[82] Such an interpretation would also accord with the 2001 Commentary's characterization of the rule in Article 9 ARSIWA as 'a form of agency of necessity.'[83]

Two real-life examples may serve to illustrate the difference: while the conduct of the Islamic Courts Union (ICU) in southern and central Somalia could likely be attributed to the state, the same cannot be said of the (self-organized) Serbian parallel structures' conduct with respect to post-independence Kosovo.

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80 Cf. *Ago's Third Report*, para. 189, pointing out that 'private persons who do not hold any public office may come to assume public functions in order to carry on services which cannot be interrupted, or which must be provided *precisely because of the exceptional situation*.' (Emphasis added.) During the discussions of Draft Article 8, one ILC member noted that 'during the power failure in the eastern United States some years ago, private persons had taken it upon themselves to regulate traffic in the dark, thereby performing a public function, which, in the event of injury or damage of international relevance, might, under article 8, have entailed the responsibility of the United States. That would clearly be stretching the principle of State responsibility too far.' ILC, *Summary record: 1258th meeting*, 34, para. 16.

81 ILC, *Summary record: 1259th meeting*, 37, para. 4. This comment was made during discussions of Ago's proposed Article 8, which stated that '[t]he conduct of a person or group of persons who, under the internal legal order, do not formally possess the character of organs of the State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.' ILC, *Summary record: 1258th meeting*, 32, para. 1. Although it is not quite clear whether the comment was intended for what became Draft Article 8(b) – or rather 8(a) instead – the reference to a state 'function' suggests that it was made in regard of the limb that eventually became Draft Article 8(b).

82 Similarly, setting up a 'shadow state' while the government continues to function – as happened in Kosovo in the early 1990s, see B. Pula, 'The Emergence of the Kosovo "Parallel State", 1988-1992' (2004) 32 *Nationalities Papers* 797 – would not be attributable under Article 9 ARSIWA, either. Such a situation would already be eliminated through the application of the second requirement, though, as there is no real 'absence of the official authorities' in these situations. But see also a further possible refinement of the third criterion discussed at the end of Section 5.2.3 below.

83 ARSIWA Commentary to Article 9, para. 1.

Following the collapse of Siad Barre's regime in 1991, Somalia remained without an internationally recognized government until 2000; this was followed by a series of transitional governments, none of which managed to extend their control to much of the country.[84] 'Warlordism' characterized southern and central Somalia throughout much of the 1990s and the early 2000s; but at the same time bottom-up efforts resulted in 'governance without government'.[85] Public services – such as health care and education – were provided by the private sector, and even justice and security had come to depend on private initiatives.[86] Islamic *(sharia)* courts were established as early as 1994 with the support of local businessmen, clan elders and faction militia leaders, in order to restore law and order. Initially based in certain neighborhoods of Mogadishu, the courts expanded to the countryside over time, acquiring their own militias.[87] They eventually formed an alliance, the so-called Islamic Courts Union, encompassing moderate and fundamen-

84 The Transitional National Government was formed in 2000, see *Report of the Secretary-General on the situation in Somalia*, 19 December 2000, UN Doc. S/2000/1211, paras. 12-14; see also K. Menkhaus, 'The Crisis in Somalia: Tragedy in Five Acts' (2007) 106 *African Affairs* 357, at 359-360. This was followed by the Transitional Federal Government in 2004, see *Report of the Secretary-General on the situation in Somalia*, 15 February 2005, UN Doc. S/2005/89, paras. 2-10; for an assessment, see e.g. ICG Africa Report No. 170, *Somalia: The Transitional Government on Life Support*, 21 February 2011, https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-transitional-government-life-support. This, in turn, was followed by the country's first permanent government in over twenty years – the Somali Federal Government – in 2012, see *Report of the Secretary-General on Somalia*, 31 January 2013, UN Doc. S/2013/69, paras. 2-6; for an assessment, see M. Bryden, 'Somalia Redux? Assessing the New Somali Federal Government', Center for Strategic & International Studies, 19 August 2013, https://www.csis.org/analysis/somalia-redux.

85 See generally K. Menkhaus, 'Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping' (2007) 31 *International Security* 74; see also S. Kibble, 'Somaliland: Surviving Without Recognition; Somalia: Recognised but Failing?' (2001) 15 *International Relations* 5, at 23, endnote 22.

86 See e.g. *Report of the Panel of Experts on Somalia pursuant to Security Council resolution 1425 (2002)*, 25 March 2003, UN Doc. S/2003/223, paras. 26, 100-101, 153-158; T. Nenova, *Private Sector Response to the Absence of Government Institutions in Somalia*, World Bank, Draft, 30 July 2004, http://documents.worldbank.org/curated/en/248811468302977154/Private-sector-response-to-the-absence-of-government-institutions-in-Somalia, 1.

87 For an overview, see A. Le Sage, 'Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives', *Centre for Humanitarian Dialogue*, July 2005, https://www.hdcentre.org/wp-content/uploads/2016/07/StatelessJusticeinSomalia-July-2005.pdf, 38-48; United Nations & World Bank, *Somali Joint Needs Assessment: Governance, Security, and the Rule of Law*, Cluster Report, August 2006, http://documents.worldbank.org/curated/en/821581468335693649/pdf/802250WP0ENGLI0Box0379802B00PUBLIC0.pdf, paras. 126-129; C. Barnes & H. Hassan, 'The Rise and Fall of Mogadishu's Islamic Courts' (2007) 1 *Journal of Eastern African Studies* 151.

talist elements alike.[88] The ICU drove out the warlords from Mogadishu, successfully restoring peace and security, and for the first time since 1991, a relatively unified power emerged in the capital and parts of south-central Somalia in June 2006.[89] The ICU's success was, however, short-lived: fearing an Islamist threat, neighboring Ethiopia intervened in December 2006, leading to the defeat and fragmentation of the ICU and a marked deterioration of the security situation.[90] During their existence, though, these courts fulfilled all three requirements set by Article 9: they were exercising elements of governmental authority (judicial and police functions), in the absence of the official authorities (as the transitional governments exercised little control), and in circumstances that called for the exercise of such functions (as they moved to fill a void).

But while institutions can be created to fill a power vacuum, they may also be employed as a form of resistance. Following the establishment of the UN territorial administration in Kosovo in 1999, Kosovo Serbs maintained a set of parallel structures, including courts, public administration bodies, police, as well as healthcare and education bodies.[91] After the Pristina authorities issued their unilateral declaration of independence in 2008, they successfully sidelined the UN Mission in Kosovo (UNMIK), and gained control over most of Kosovo – but the parallel structures persisted. These structures have been funded by Serbia, operating according to Serbian rules and regulations, applying Serbian law, and in many cases, integrated into

88 See e.g. Le Sage, 'Stateless Justice', 47; ICG Africa Report No. 116, *Can the Somali Crisis Be Contained?*, 10 August 2006, https://www.crisisgroup.org/africa/horn-africa/somalia/can-somali-crisis-be-contained, 15; *Report of the Secretary-General on the situation in Somalia*, 20 June 2006, UN Doc. S/2006/418, para. 6. For more on the ICU, see e.g. ICG Africa Report No. 100, *Somalia's Islamists*, 12 December 2005, https://www.crisisgroup.org/africa/horn-africa/somalia/somalias-islamists, 19-21; ICG, *Somali Crisis*, 9-18; *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1676 (2006)*, 22 November 2006, UN Doc. S/2006/913, paras. 200-210.

89 See e.g. UN Doc. S/2006/418, paras. 5-15; *Report of the Secretary-General on the situation in Somalia*, 23 October 2006, UN Doc. S/2006/838, paras. 2-3, 27-29; Barnes & Hassan, 'Islamic Courts', 154-155.

90 See e.g. Barnes & Hassan, 'Islamic Courts', 156-158.

91 See generally OSCE Mission in Kosovo, *Parallel Structures in Kosovo*, 7 October 2003, http://www.osce.org/kosovo/42584; OSCE Mission in Kosovo, *Parallel Structures in Kosovo 2006-2007*, 4 April 2007, http://www.osce.org/kosovo/24618; ICG Europe Report No. 211, *North Kosovo: Dual Sovereignty in Practice*, 14 March 2011, https://www.crisisgroup.org/europe-central-asia/balkans/kosovo/north-kosovo-dual-sovereignty-practice; C. van der Borgh, 'Resisting International State Building in Kosovo' (2012) 59(2) *Problems of Post-Communism* 31; Balkans Policy Research Group (BPRG), *Serb Integration in Kosovo After the Brussels Agreement*, 19 March 2015, http://balkansgroup.org/blog/post/publications/serb-integration-kosovo-after-brussels-agreement.

the Serbian state apparatus.[92] They have covered most of Kosovo's Serb-inhabited areas and enclaves, with varying levels of control and influence by Belgrade, being the strongest in the north.[93] Granted, these links raise the prospect of attribution to Serbia: to the extent that these institutions were integrated into the Serbian state apparatus, they may be considered *de jure* organs;[94] and inasmuch as they 'survive by virtue of' Serbia's support, the ECtHR may well view their conduct attributable to that state.[95] But can that conduct nonetheless be attributed to Kosovo (too), assuming the latter is a state under international law? While it is not entirely clear to what extent the people maintaining these parallel structures may be described as acting 'on their own initiative' (as opposed to Serbia's), this is not so much a criterion as a distinguishing feature from attribution under Article 5 ARSIWA, and the Pristina authorities have not legally empowered them to carry out governmental functions.[96] In any case, at least some of these institutions were indeed self-organizing.[97] The Kosovo Serb parallel structures, however, only meet the first two criteria of Article 9 ARSIWA: they exercised governmental functions (judicial and executive), while the official authorities – first UNMIK, then the Pristina authorities – were absent from

92 Funding figures range between €200-450 million annually, depending on the source and the time period, see ICG, *North Kosovo*, 4; G. Andric, 'Kosovo "Costing Serbia €450m a year", NGO', *BalkanInsight*, 16 March 2011, http://www.balkaninsight.com/en/article/kosovo-cots-serbia-e6-billion; BPRG, *Serb Integration in Kosovo*, 18. The parallel structures have regularly been described as 'Belgrade-sponsored' in UN parlance, see e.g. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 26 July 2013, UN Doc. S/2013/444, para. 17. On the other factors, see note 183 and accompanying text below.

93 See e.g. OSCE, *Parallel Structures* (2007), 40; cf. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 9 March 2007, UN Doc. S/2007/134, para. 7.

94 See Section 5.3.2 below.

95 See note 184 below and Section 4.4 above.

96 Although see Section 5.3.2 below on co-optation.

97 For instance, the so-called 'Bridge-watchers' militia was formed in Mitrovica in 1999, originally to keep the main bridge on the Ibar river between the north and the south of the ethnically divided city under constant surveillance. The Bridge-watchers became more organized over time, and temporarily took up policing tasks, before infighting and the withdrawal of support from the Serbian government caused it to largely disband from 2003 onwards. See OSCE, *Parallel Structures* (2003), 12-14; OSCE, *Parallel Structures* (2007), 24-26. Most notably, although Serbia committed to the dismantling of the parallel structures in April 2013 and dissolved the four northern local administrations a few months later, recalcitrant municipalities established their own 'Provisional Assembly of the Autonomous Province of Kosovo and Metohija', even though this was 'not recognized by either the Belgrade or the Pristina authorities'. UN Doc. S/2013/444, para. 18; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 28 October 2013, UN Doc. S/2013/631, para. 13. See also generally BPRG, *Serb Integration in Kosovo*, 12-21, 24-29, on the relations between Belgrade and Kosovo Serbs, and the persistence of parallel municipal administrations.

the northern region of Kosovo. But there is little doubt that these authorities would have been able to extend their control over Northern Kosovo, *had it not been* for the Serbian parallel structures. In other words, there was no real necessity for these structures to operate, and as such, their conduct cannot be considered a case of 'agency of necessity'.[98]

In sum, the most logical and persuasive interpretation of first two conditions of Article 9 – 'in fact exercising elements of the governmental authority in the absence or default of the official authorities' – is that they do not require the existence of a government in office to be applicable. As for the third criterion of circumstances calling for the exercise of governmental functions, this is best interpreted as excluding situations where the exercise of such functions is the *cause*, rather than the *result*, of the absence of official authorities. The antagonistic relationship between institutions usurping governmental functions and the official authorities is similar to the one which exists between the government and armed opposition groups in case of an internal armed conflict. Such groups, and their exercise of governmental authority, are what the next section turns to address.

5.2.3 What the ILC Did Not (Sufficiently) Address: Local *De Facto* Governments

While there are some instances of spontaneous grassroots action by the population to restore the provision of public goods, the exercise of state functions in the absence or default of the government occurs most frequently by armed groups in control of certain territory. This is hardly surprising when one considers the capacity required to act as a quasi-state. Once such cases are included under the purview of Article 9 ARSIWA, the scenarios potentially covered by the Article become far less exceptional: there are numerous examples of state-like behavior by armed groups, ranging from the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka,

98 Except perhaps in the (immediate) aftermath of the 1999 war, before the start of UNMIK's operation (see also ARSIWA Commentary to Article 9, para. 1, noting that the circumstances mentioned in Article 9 'may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation'). For instance, the parallel courts – applying Serbian law – were most active in the years immediately following the war, as there was often no alternative to them during this period: UNMIK courts in the north – applying the law of Kosovo as of 1989, supplemented by UNMIK regulations – were established as late as 2003. See OSCE, *Parallel Structures* (2003), 17; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 14 April 2003, UN Doc. S/2003/421, para. 19; see generally OSCE, *Parallel Structures* (2007), 19-20. On the applicable law, see note 182 below. Similarly, the 'parallel' public administration bodies were often the only ones available, see UN High Commissioner for Refugees, *UNHCR's Background Note on Ethnic Albanians from Kosovo Who are in Continued Need of International Protection*, 1 March 2000, http://www.refworld.org/docid/3ae6b31b8f.html, 13; OSCE, *Parallel Structures* (2007), 29.

through the FARC in Colombia, to Hamas in the Gaza Strip and the Islamic State in Syria and Iraq.[99]

This phenomenon is captured in international law by the term 'local *de facto* government', described by the ILC as 'the machinery of an insurrectional movement which, in the course of its struggle against the *de jure* Government, has succeeded in establishing itself in a part of the State's territory.'[100] By contrast, general *de facto* governments exercise control over (practically) the entire state: while there is no precise threshold to determine when a *de facto* government ceases to be local and becomes general, 'real control and paramountcy […] over a major portion of the territory and a

99 See generally on this phenomenon (including on the LTTE) Z.C. Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War* (Ithaca: Cornell University Press, 2011); as well as A. Arjona, N. Kasfir & Z.C. Mampilly (eds.), *Rebel Governance in Civil War* (Cambridge: Cambridge University Press, 2015); V. Felbab-Brown, H. Trinkunas & S. Hamid, *Militants, Criminals, and Warlords: The Challenge of Local Governance in an Age of Disorder* (Washington, DC: Brookings Institution Press, 2017). On the FARC, see e.g. A. Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Cambridge: Cambridge University Press, 2017); R. Provost, 'FARC Justice: Rebel Rule of Law' (2018) 8 *UC Irvine Law Review* 227. On Hamas, see e.g. B. Berti, 'Non-State Actors as Providers of Governance: The Hamas Government in Gaza between Effective Sovereignty, Centralized Authority, and Resistance' (2015) 69 *Middle East Journal* 9. On the Islamic State, see e.g. M. Revkin, 'The Legal Foundations of the Islamic State', *The Brookings Project on U.S. Relations with the Islamic World*, Analysis Paper No. 23, July 2016, https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Mara-Revkin_Web_v2.pdf.

100 ILC Commentary (1974), 286, note 598. It must be pointed out that local *de facto* governments are distinguished from general *de facto* governments by the extent of their territorial control, and not – as is occasionally maintained in the literature, see e.g. Silvanie, 'Acts of Insurgent Governments', 78, essentially equating the two categorizations – by their ultimate success or failure. Granted, all successful insurrectional movements must by definition become the general *de facto* (if not *de jure*) government at some point – otherwise they could not be considered successful. Likewise, the vast majority of unsuccessful movements never become a general *de facto* government – if they did, that would likely put an end to the conflict itself and turn them into successful insurrectionists. However, it could also be the case that an ultimately successful movement first establishes itself in part of the country, before gaining control over the rest of the state. Similarly, it is possible that a group temporarily seizes power over the state as a whole during the course of the struggle, but is nonetheless defeated in the end. The Claims Commission in *George W. Hopkins (U.S.A.)* v. *United Mexican States*, Award of 31 March 1926, 4 UNRIAA 41, para. 12, also pointed out that there are different ways of seizing power, differentiating between seizure from the center, or from the periphery, working towards the center.

majority of the people' has been put forward as a possible yardstick.[101] But what is the relevance of the distinction between local and general *de facto* governments in terms of responsibility? The crucial difference is that while the latter are generally accepted as being capable of binding the state and engaging its responsibility, the same cannot be said of the former.[102] Accordingly, this section explores whether – and to what extent – the conduct of local *de facto* governments is attributable to the state.

Since this phenomenon involves both the exercise of public functions by private persons in the absence of the (*de jure*) government, as well as the conduct of insurrectional movements, local *de facto* governments find themselves at the intersection of Articles 9 and 10 ARSIWA.[103] But which characteristic is more dominant in the end? The nature of the conduct (governmental functions), or the identity of its authors (insurrectional movement)? For the ILC, the latter appears to have been the decisive factor: the only reason why the Commission mentioned local *de facto* governments in its 1974 Commentary to then-Draft Article 8 was to specifically exclude them from the scope of the Article, pointing out that they would be addressed instead under what was to become Article 10 ARSIWA.[104]

Article 10 codifies the general rule whereby the state is not responsible for the conduct of an insurrectional movement, unless the latter proves to be successful and becomes the new government. If it does, all conduct of the movement becomes attributable to the state with retroactive effect, including the insurrectionists' tenure as a local *de facto* government, as well as the period when they were not (yet) organized in governmental form.[105] But if the movement does not succeed, its conduct cannot be attributed to

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101 *Hopkins*, para. 12; see also *ibid.*, referring to the general *de facto* government being the 'real master of the nation'. Note, though, that this was an *obiter dictum* of the tribunal, see note 117 and accompanying text below. E.M. Borchard, 'International Pecuniary Claims against Mexico' (1917) 26 *Yale Law Journal* 339, at 340, speaks of 'control over the whole or practically the whole nation'. But see also N.D. Houghton, 'The Responsibility of the State for the Acts and Obligations of Local De Facto Governments and Revolutionists' (1929-1930) 14 *Minnesota Law Review* 251, at 251-252, noting the lack of a clear threshold, at least before the *Hopkins* case. The ability of general *de facto* governments to bind states was most famously affirmed in the *Tinoco Arbitration*, officially the *Aguilar-Amory and Royal Bank of Canada Claims* (Great Britain *v.* Costa Rica), Award of 18 October 1923, 1 UNRIAA 369, at 377-382; the conduct of such governments is attributable under Article 4 ARSIWA, see ARSIWA Commentary to Article 9, para. 4.

102 See e.g. Borchard, 'Pecuniary Claims against Mexico', 340.

103 See ARSIWA Commentary to Article 9, para. 2. On the topic of local *de facto* governments, see e.g. Borchard, 'Pecuniary Claims against Mexico'; Houghton, 'Local De Facto Governments and Revolutionists'; H. Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (New York: Columbia University Press, 1939), 84-103; D. Morris, 'Revolutionary Movements and *De Facto* Governments – Implications of the "Arab Spring" for International Investors' (2012) 28 *Arbitration International* 721.

104 ILC Commentary (1974), 286, note 598.

105 See e.g. ARSIWA Commentary to Article 10, paras. 4-5; Houghton, 'Local De Facto Governments and Revolutionists', 252-254 as regards local *de facto* governments specifically.

the state under Article 10, not even in cases where it is in effective control of territory, exercising what are normally considered to be state functions. Having excluded local *de facto* governments from the scope of Draft Article 8(b), the ILC did point out in its 1975 Commentary to Draft Article 14 (the predecessor of Article 10 ARSIWA) that certain authors had argued for an exception to this rule, regarding 'any routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control.'[106] In the end, however, the Commission remained unconvinced, and simply treated the matter as covered by the general rule, whereby attribution is conditioned upon the movement's ultimate success.[107]

In light of this drafting history, it certainly comes as a surprise to see the final Commentary to Article 10 specifically highlight Article 9 when noting that the conduct of unsuccessful insurrectional movements may be attributable to the state under other articles of the ARSIWA.[108] What is even more surprising, though, is the fact that the ILC's work does not include any mention, let alone discussion, of the case law backing the position of the authors favoring an exception.

Like so many questions of state responsibility, the problem of whether local *de facto* governments' conduct could be attributed to the state initially surfaced in the early jurisprudence on injuries to aliens. For several decades, this case law consistently held that states could not be held responsible for the conduct of unsuccessful revolutionaries – as was later codified by the ILC.[109] Tribunals, however, did admit a limited exception (regarding taxa-

106 ILC, *Text of articles 10-15 and commentaries thereto as adopted by the Commission at its twenty-seventh session*, in: *Yearbook of the International Law Commission*, 1975, vol. II, 61 (hereinafter ILC Commentary (1975)), at 98, para. 26, referring to the work of Silvanie, Reuter, Schwarzenberger and O'Connell.

107 Austria specifically pointed out that it was 'not clear whether [then-draft] article 14, paragraph 1, include[d] the case of an insurrectional movement, *recognized by foreign States as a local* de facto *government*, which in the end […] is defeated by the central authorities.' ILC Governmental Comments (1980), 92, para. 38 (emphasis in original). These concerns were apparently not shared by Special Rapporteur Riphagen, though, who replied that recognition (or lack thereof) has no impact on the non-attributability of unsuccessful insurgents' conduct; see ILC, *Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur*, 4 March and 23 April 1986, UN Doc. A/CN.4/397 and Add.1, in: *Yearbook of the International Law Commission*, 1986, vol. II, Part One, 1, at 13, paras. 1-2.

108 See ARSIWA Commentary to Article 10, para. 2. The Netherlands even commented on Draft Article 10 that '[t]his article, taken in conjunction with article 7 [i.e. Article 9 ARSIWA], leads to the conclusion that *every internationally wrongful act* of an insurrectional movement which does not succeed in becoming the new government will immediately be directly attributed in full to the State', doubting whether case law in fact supported such a conclusion, see ILC Governmental Comments (2001), 50 (emphasis added). However, as explained in this Section, Article 9 ARSIWA only extends to conduct covered by the functional rationale.

109 See e.g. Borchard, 'Pecuniary Claims against Mexico', 339; see also Draft Articles 14 and 15 and commentary thereto, in: ILC Commentary (1975), 91-106; ARSIWA Commentary to Article 10, paras. 2-4.

tion and customs) to this rule[110] and a broader rationale was formulated for attributing some of the conduct of local *de facto* governments in the 1926 *Hopkins* case before the US-Mexico General Claims Commission.

The case of *George W. Hopkins* v. *United Mexican States* concerned the purchase of postal money orders by the applicant during the 1910-1920 Mexican Revolution, which Mexico later refused to pay, contending that they were issued by an illegal administration.[111] The administration in question was that of Victoriano Huerta, who seized power in a *coup d'état* in February 1913, but gradually lost control over large parts of the country in the following months, and was eventually forced to resign in July 1914.[112] The Claims Commission concluded that the Huerta regime had indeed come into power illegally, but went on to hold that a distinction must be drawn between the 'personal' and 'unpersonal' [*sic*] acts of such an administration. 'The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers', the Commission pointed out, arguing that as a result, the state cannot deny responsibility in connection with 'unpersonal' acts, i.e. 'purely government routine having no connection with or relation to the individuals administering the Government for the time being', such as registration of births, deaths and marriages, taxation, and 'even many rulings by the police'.[113] By contrast, individuals' 'personal' interactions with the government are acts 'in support of the particular agencies administering the government for the time being', such as 'voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like.'[114] Finding that the issuance of postal money orders was an unpersonal act, the Claims Commission held that Mexico was bound by the Huerta regime's conduct, and therefore liable to pay the applicant.[115]

At this juncture, a careful reader might point out that – having seized power through a *coup* – the Huerta administration initially controlled all (or most) of Mexico. Accordingly, it would be better classified as a general *de facto* government during that early period, only turning into a local one as it began to lose control over much of the country.[116] But as the Commission explained in an *obiter dictum*, this would only be relevant inasmuch as the Huerta regime's personal acts were concerned.[117] In respect of this latter category, the award upheld the traditional rule whereby general

110 See, for an overview, e.g. E.M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York: The Banks Law, 1915; reprint by New York: Kraus Reprint, 1970), 239-241; Silvanie, *Acts of Unsuccessful Insurgent Governments*, 104-134.

111 *Hopkins*, para. 1. Postal money orders are essentially a form of money transfer, purchased at one post office and redeemed by the beneficiary at another.

112 *Ibid.*, paras. 2, 12.

113 *Ibid.*, paras. 11, 4.

114 *Ibid.*, para. 5.

115 *Ibid.*, para. 11.

116 See e.g. Borchard, 'Pecuniary Claims against Mexico', 340.

117 *Hopkins*, para. 12.

de facto governments are capable of binding the state (and engaging its responsibility), while the attributability of a local *de facto* government's acts is dependent on its ultimate success.[118] In other words, the Claims Commission held that the state is always responsible for the unpersonal acts of a *de facto* regime (whether general or local); but as regards personal acts, only those of a general *de facto* government are attributable.

In addition to the state's responsibility for acts 'in the discharge of […] *usual* and ordinary functions', the Claims Commission also noted that the state is bound 'to the extent that it received benefits from transactions of an *unusual* nature'.[119] This exception is based on the same underlying principle, namely that the transaction in question benefited the state as such, rather than the particular persons in power. In support of this view, the Commission referred to Mexico's own treatment of bonds issued by the Huerta administration, which were deemed valid or invalid by the subsequent *de jure* government depending on whether they were used to pay off the pre-existing state debt or maintain the *de facto* regime in power.[120]

Both of these rationales regarding routine acts and benefit to the state were consistently upheld in a number of other cases before the General Claims Commission, regarding other postal money orders,[121] as well as 'printing machinery, paper envelopes and other goods',[122] automobile

118 *Ibid.* The award itself did not use the (then common) terminology of local or general *de facto* governments – a fact that was also noted by commentators, see E.M. Borchard, 'Decisions of the Claims Commissions, United States and Mexico' (1926) 20 *American Journal of International Law* 536, at 541; de Beus, *Jurisprudence of the General Claims Commission*, 108. Nonetheless, as acknowledged by de Beus, *ibid.*, the Huerta administration was a general *de facto* government.

119 *Hopkins*, para. 11 (emphasis added).

120 *Ibid.*, para. 10.

121 *George W. Cook (U.S.A.)* v. *United Mexican States*, Award of 3 June 1927, 4 UNRIAA 213, paras. 2, 6; *Parsons Trading Company (U.S.A.)* v. *United Mexican States*, Award of 3 June 1927, 4 UNRIAA 217, for full text, see *Opinions of Commissioners under the Convention concluded September 8, 1923 between the United States and Mexico: February 4, 1926, to July 23, 1927* (Washington, DC: Government Printing Office, 1927), 324, para. 2; *John A. McPherson (U.S.A.)* v. *United Mexican States*, Award of 3 June 1927, 4 UNRIAA 218, for full text, see *Opinions of Commissioners* (1927), 325, para. 2; *National Paper and Type Company (U.S.A.)* v. *United Mexican States*, Award of 26 September 1928, 4 UNRIAA 327, para. 2; *Francis J. Acosta (U.S.A.)* v. *United Mexican States*, Award of 18 October 1928, 4 UNRIAA 411, for full text, see *Opinions of Commissioners under the Convention Concluded September 8, 1923, as Extended by the Convention Signed August 16, 1927, between the United States and Mexico* (Washington, DC: Government Printing Office, 1928), 121, at 122; *Singer Sewing Machine Co. (U.S.A.)* v. *United Mexican States*, Award of 18 October 1928, 4 UNRIAA 411, for full text, see *Opinions of Commissioners* (1928), 123, at 123; and *Esther Moffit (U.S.A.)* v. *United Mexican States*, Award of 9 May 1929, 4 UNRIAA 521, at 522.

122 *National Paper and Type Company*, para. 1.

services,[123] school benches,[124] and ambulances[125] sold to different departments of the Mexican government under Huerta.[126] This body of case law – *Hopkins* in particular – has, in turn, served as the basis for authors to argue that there is an exception to the non-attributability of unsuccessful insurgents' conduct, inasmuch as routine administrative acts are concerned.[127] Once the topic was excluded from the ILC's canon, though, it received little further attention. Even the terminology of 'local *de facto* government' seems to have largely fallen out of use over the past decades,[128] despite the fact that the phenomenon is no less common – and the Commission's observations in *Hopkins* no less valid – today than in the 1920s.

But since *Hopkins* constitutes a marked departure from previous jurisprudence, the question inevitably arises: how can it be reconciled with the position that unsuccessful local *de facto* governments cannot engage the state's responsibility? The non-attribution of revolutionary conduct to states is based on a simple rationale: since the state can only be responsible for its own actions, it cannot possibly be required to account for the conduct

123 *Lee A. Craw (U.S.A.)* v. *United Mexican States*, Award of 26 September 1928, 4 UNRIAA 327, for full text, see *Opinions of Commissioners* (1928), 1, at 1-2.

124 *George W. Cook (U.S.A.)* v. *United Mexican States*, Award of 30 April 1929, 4 UNRIAA 506, at 506.

125 *The Peerless Motor Car Company (U.S.A.)* v. *United Mexican States*, Award of 13 May 1927, 4 UNRIAA 203, paras. 3-4; see also the concurrence of Commissioner van Vollenhoven *ibid.*, at 204.

126 See generally Silvanie, 'Acts of Insurgent Governments', 98-99; de Beus, *Jurisprudence of the General Claims Commission,* 105-106 for an overview. It is also worth noting that in *The British Shareholders of the Mariposa Company (Great Britain)* v. *United Mexican States*, Award of 6 August 1931, 5 UNRIAA 272, para. 3, the British-Mexican Claims Commission awarded compensation to the claimants for cattle taken by one of the competing armed forces, noting that the cattle in question was 'to a large extent confiscated in order to supply the population of the town of Muzquiz with meat. It seems a postulate of equity, to award compensation for cattle thus exacted.'

127 D.P. O'Connell, *International Law* (2 vols., 2nd ed., London: Stevens, 1970), vol. II, 975; C. de Visscher, *Theory and Reality in Public International Law* (rev. ed., Princeton: Princeton University Press, 1968), 257; G. Schwarzenberger, *International Law, Vol. 1: International law as applied by international courts and tribunals* (3rd ed., London: Stevens, 1957), 630; Silvanie, *Acts of Unsuccessful Insurgent Governments*, 84-103; and Silvanie, 'Acts of Insurgent Governments', 95-103.

128 In recent literature, Stefan Talmon appears to be the only author who regularly refers to it, see e.g. S. Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: *Tertium Non Datur*?' (2005) 75 *British Yearbook of International Law* 101, at 147-148; S. Talmon, 'Recognition of the Libyan National Transitional Council', *ASIL Insights*, Vol. 15, Issue 16, 16 June 2011, https://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council; though see, for a recent example, Morris, 'Revolutionary Movements and *De Facto* Governments', 729-735. J. van Essen, 'De Facto Regimes in International Law' (2012) 28(74) *Merkourios: Utrecht Journal of International and European Law* 31, uses the terminology of 'de facto regimes' instead, see at 33.

of those who rise up against it.[129] Importantly, the *Hopkins* award does not question this logic – it merely refines the principle. Rather than simply assuming that *all* acts of an insurrectional movement are directed against the state, it separates conduct which is indeed meant to further the success of the movement – by attempting to overthrow the government or hold onto power – from conduct which is carried out in a regular exercise of state functions.[130]

Drawing the line between personal and unpersonal acts is not an easy task, though. While the Commission in *Hopkins* provided a basic definition of the two categories, it also stressed that the assessment has to be made on case-by-case basis, acknowledging that there is a 'large doubtful zone' between the two endpoints of the spectrum.[131] Case-by-case analysis indeed appears to be best suited to address the full spectrum of issues that could possibly arise from the conduct of local *de facto* governments; but there is one particular type of problem which is worth highlighting in more general terms. The Commission's premise in *Hopkins* was that personal changes at the top governmental offices generally do not affect the functioning of the state's administrative apparatus – and in some situations, this may indeed be the case. But many, if not most, insurrections start with the aim of changing the existing social order in some way and imposing their own view of how society and the state should operate.[132] Once the movement has succeeded in establishing itself on part of the state's territory, it will likely proceed to implement its views within that setting.

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129 See e.g. *Sambiaggio Case (Italy* v. *Venezuela)*, 1903, 10 UNRIAA 499, at 513; Schwarzenberger, *International Law*, 629; E. Castrén, *Civil War* (Helsinki: Suomalainen Tiedeakatemia, 1966), 231. Also, as convincingly argued by Silvanie, this rests on a tendency to equate the government with the state; those who rise up against the government do not necessarily act against the state. Silvanie, 'Acts of Insurgent Governments', 102; cf. O'Connell, *International Law*, vol. II, 975.

130 See also Silvanie, 'Acts of Insurgent Governments', 102-103.

131 *Hopkins*, para. 6. The Commission itself later encountered such difficulties in the *Peerless Motor Car Company* case, concerning the purchase of 'two automobile ambulances' on the order of the Department of War and Navy during the Huerta regime. While Commissioner Nielsen saw the purchase as clearly falling within the category of unpersonal acts, Presiding Commissioner van Vollenhoven did not share this view, arguing that it fell within the 'doubtful zone' instead. He nonetheless concluded, at 204, that 'it is much more akin to a transaction of government routine (the one extreme) than to any kind of voluntary undertaking "having for its object the support of an individual or group of individuals seeking to maintain themselves in office" (the other extreme), and therefore should, under the principles laid down in the said opinion, be assimilated to the first group, to wit, the routine acts.' D.P. O'Connell later relied partly on the *Peerless* case to argue that the distinction between personal and unpersonal acts is 'unclear', see O'Connell, *International Law*, vol. II, 975.

132 See e.g. S.L. Woodward, 'Do the Root Causes of Civil War Matter? On Using Knowledge to Improve Peacebuilding Interventions' (2007) 1 *Journal of Intervention and Statebuilding* 143, at 150-151.

In fact, whether those exercising governmental functions rely on existing structures or establish new ones, practical examples point to a mix between maintaining prior laws inherited from the state and drafting new ones. In the Gaza Strip, Hamas consolidated its power largely by taking over the existing apparatus of the Palestinian Authority, much like the scenario envisaged by the Commission in *Hopkins*.[133] But while – due to public pressure towards reconciliation – legislating by Hamas has reportedly been generally restricted to 'the technical and necessary', the takeover has also led to increased Islamization of the Gaza Strip, particularly through 'moral policing'.[134] In Sri Lanka, when the LTTE adopted its own civil and criminal code in 1994, '[t]hese were based on pre-existing laws that were updated and extended to cater for the social issues that LTTE has chosen to focus on, such as women's rights and the caste systems'.[135] In Colombia, the FARC reportedly applied 95% state law in terms of substance (but deviated significantly in terms of procedural law and sentencing in criminal law) when dealing with civilians.[136] The FARC would also 'invoke local customs, rooted in the values and traditions of peasant life, which happened to accord with those embraced by the FARC's own ideology.'[137] In Somalia, the Islamic courts' authority derived from the clans and thus 'primarily from Somali customary law (*xeer*)'.[138] *Sharia* (Islamic law) was 'applied by default, since no other legal system […] functioned since the collapse of the government', but 'the most severe Islamic punishments […] that contradict[ed] Somali *xeer* [were] rarely imposed'.[139] Once the more

133 See A. Hovdenak (ed.), 'The Public Services Under Hamas In Gaza: Islamic Revolution or Crisis Management?', *Peace Research Institute Oslo Report 3*, 2010, https://www.prio.org/Publications/Publication/?x=7374, 11-12; Y. Sayigh, 'Hamas Rule in Gaza: Three Years On', *Brandeis University, Crown Center for Middle East Studies*, Middle East Brief No. 41, March 2010, https://www.brandeis.edu/crown/publications/middle-east-briefs/pdfs/1-100/meb41.pdf, 2.

134 N.J. Brown, 'Gaza Five Years On: Hamas Settles In', *Carnegie Papers*, Middle East, June 2012, http://carnegieendowment.org/files/hamas_settles_in.pdf, 12; Sayigh, 'Hamas Rule in Gaza', 3-5; Hovdenak, 'Public Services Under Hamas', 14; B. Milton-Edwards, 'Order Without Law? An Anatomy of Hamas Security: The Executive Force (*Tanfithya*)' (2008) 15 *International Peacekeeping* 663, at 672-673.

135 K. Stokke, 'Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-controlled Areas in Sri Lanka' (2007) 27 *Third World Quarterly* 1021, at 1027.

136 M. Aguilera Peña, *Contrapoder y justicia guerrillera: fragmentación política y orden insurgente en Colombia (1952-2003)* (Bogotá: IEPRI, 2014), 107. In English, see Provost, 'FARC Justice', 247-251 on 'FARC Civilian Justice'.

137 Provost, 'FARC Justice', 247, citing A. Molano, 'La justicia guerrillera', in: B. de Sousa Santos & M. García Villegas (eds.), *El caleidoscopio de las justicias en Colombia: análisis socio-jurídico* (2 vols., Bogotá: Colciencias, 2004), vol. II, 331, at 334.

138 ICG, *Somalia's Islamists*, 19.

139 *Ibid*.

fundamentalist elements became dominant and started applying a harsher version of *sharia* was also when the courts' popularity declined.[140]

In some cases, the new rules adopted by the local *de facto* government may come into conflict with the state's international obligations. For instance, the Commission in *Hopkins* mentioned 'many rulings by the police' as falling under governmental routine – but what if policing is carried out pursuant to rules, newly introduced by the local *de facto* government, which violate human rights law? Or, to mention an extreme (but unfortunately real-life) example, the Islamic State apparently 'developed a detailed bureaucracy of sex slavery, including sales contracts notarized by the ISIS-run Islamic courts.'[141] The fact that such abhorrent practices may be given a veneer of officialdom cannot possibly transform them into 'routine'. Quite the contrary: inasmuch as the new social order is meant to ensure the population's cooperation, whether by instilling fear or winning popular support, it indirectly contributes to securing the movement's victory.[142] As a result, conduct in pursuit of that new order will likely be considered 'personal', thus falling outside the scope of the exception and not attributable to the state. But while these are sound reasons to exclude the attribution of such conduct to the state, such exclusion will often result in leaving the gravest violations without redress, thereby severely limiting the usefulness of the rule.

Nonetheless, the division between personal and unpersonal acts does not completely overlap with the application of new laws and those inherited from the government. On the one hand, where there is no source of continuing legislation, as in Somalia, those exercising governmental functions may reach back to customary laws to fill in the gaps, without this necessarily being considered a personal act. On the other hand, armed groups and local *de facto* governments may carry out routine governmental functions (like the Hamas in the Gaza Strip[143]) or rely on customary laws (like the FARC) to enhance their legitimacy in the eyes of the local popu-

140 See S. Samatar, 'The Islamic Courts and Ethiopia's Intervention in Somali: Redemption or Adventurism?', *Chatham House*, 25 April 2007, https://www.chathamhouse.org/sites/default/files/public/Research/Africa/250407samatar.pdf, 7-8; Barnes & Hassan, 'Islamic Courts', 155.

141 R. Callimachi, 'ISIS Enshrines a Theology of Rape', *New York Times*, 13 August 2015, https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html. See also R. Callimachi, 'The Case of the Purloined Poultry: How ISIS Prosecuted Petty Crime', *New York Times*, 1 July 2018, https://www.nytimes.com/2018/07/01/world/middleeast/islamic-state-iraq.html, for less dramatic examples of how ISIS dispensed justice based on its own set of rules.

142 In the example given, the connection is even more direct, as this practice is used to recruit fighters, see Callimachi, 'Theology of Rape'.

143 See B. Berti & B. Gutiérrez, 'Rebel-to-Political and Back? Hamas as a Security Provider in Gaza between Rebellion, Politics and Governance' (2016) 23 *Democratization* 1059, concluding at 1069 that Hamas 'used the provision of security as a key tool to boost both its power and its political legitimacy.'

lation with the ultimate goal of furthering their own cause.[144] In the end, while the type of laws applied may be a useful indication, it can only be determined on a case-by-case basis whether the actor in question acted in pursuance of government routine or its own goals – and given the qualifications outlined above, the former is likely to be a very narrow subset of cases.

How does this distinction between personal and unpersonal acts relate to the ILC's third, normative, requirement? This question arises with respect to both local *de facto* governments and authorities established through self-organizing bottom-up grassroots action; and the interaction between the two sets of criteria (from *Hopkins* and the ILC's work) can be clarified through four hypothetical scenarios. The four scenarios represent the possible combinations in response to the following questions:

(1) How did the institution come into power?
  (a) Was it a response to governmental absence (i.e. a pre-existing vacuum); or
  (b) Was it a cause of governmental absence (e.g. did it force the government out)?
(2) What type of conduct is under examination?
  (a) Personal conduct, carried out for the benefit of the organization; or
  (b) Unpersonal conduct, i.e. the continuance of governmental routine?

First, where the institution moved into a pre-existing vacuum, but acts for its own benefit, the state's responsibility cannot be engaged. Such conduct not only fails the *Hopkins* requirement of unpersonal acts; it cannot be deemed as acting on the state's behalf, either, which is the principle underlying attribution in the ARSIWA. Second, where the institution was a response to governmental absence and carries out governmental routine, this meets the *Hopkins* requirement and is the archetypal scenario envisaged by Article 9 ARSIWA, leading to attribution. Third, where the institution is the cause of governmental absence and acts for its own benefit, there cannot be any question of state responsibility; this scenario fails the tests of both *Hopkins* and the ILC's third condition. Fourth and finally, where the institution forced the government out but carries out routine tasks, assessments following the *Hopkins* and ILC criteria lead to divergent results. Following the rationale of *Hopkins*, such conduct is still attributable to the state, as it is unpersonal. According to the ILC's third criterion, however, the

144 See also more generally e.g. A. Arjona, N. Kasfir & Z.C. Mampilly, 'Introduction', in: Arjona, Kasfir & Mampilly (eds.), *Rebel Governance in Civil War*, 1, at 3: 'By creating systems of governance, rebels seek to win over local populations – or at least dissuade them from actively collaborating with incumbents.' Given that 'the provision of public services by an armed group may often serve a dual purpose', Katharine Fortin argues in *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017), at 268-269, that 'the acts of a rebel administration must be impartially assessed and consideration must be given to whether they are wholly connected to the exercise of government in its impersonal aspect', rather than relying on 'the group's professed motivation in providing the service in question.'

'usurpation' of governmental authority precludes the possibility of attribution. As a result, if the ILC's third requirement were to be given effect, it would exclude attribution in every instance except where a local *de facto* government or other institution has been established to fill a pre-existing vacuum.[145] It is a highly difficult decision between the two, but given that the idea behind unpersonal acts in *Hopkins* is precisely that of acting on the state's behalf (which is what underpins the ARSIWA's entire approach to attribution), while the status of the ILC's third criterion is rather uncertain, on balance it may be better to let the *Hopkins* rationale prevail. That said, given the limitations described above regarding unpersonal acts, the choice of applying or not applying the ILC's third requirement is unlikely to significantly affect the scope of attributable conduct.

5.2.4 Concluding Remarks

Functionality constitutes a powerful rationale for attributing the conduct of persons who are not otherwise linked to the state. So powerful, in fact, that the ILC decided to include it in the ARSIWA – in a carefully circumscribed form – even in the relative absence of supporting international practice. Yet at the same time, the ILC did not deem it compelling enough to prevail when (seemingly) coming into conflict with the general rule against attributing the conduct of unsuccessful insurrectional movements. The existence of such a seemingly contrary rule explains why the ILC's treatment of the issue shows such contrast depending on the actor involved: simple individuals or insurrectional movements. But is it worth maintaining such a distinction? To begin with, the dividing line between the two categories of actors is not always clear. This is well illustrated by the *Yeager* case, which was cited by the ILC in support of Article 9, despite the fact that the Revolutionary Guards are essentially best described as the auxiliaries of an ultimately successful revolutionary movement – eventually given official status by the new government.[146] Furthermore, as shown above, the clash between *Hopkins* and the general rule on non-attribution is more apparent than actual – and in the end, even the ILC left the door open for attributing certain conduct by insurrectional movements under Article 9 ARSIWA.

With case law on the topic being scarce, though, there have been few opportunities to elaborate on the precise content of functionality-based attribution, and its contours have remained quite vague. All that can be

145 This is not unheard of in the case of armed groups, either. For instance, in its early years, the FARC would often choose the most underdeveloped areas as its base, with little to no state presence, see e.g. M.A. Vélez, 'FARC-ELN: evolución y expansión territorial' (2001) No. 47 *Desarrollo y Sociedad* 151, at 160 and the sources cited therein. Similar strategies could sometimes be observed later on as well, as in the case of the conflict's spillover into Ecuador, see M. Kingsley, 'Ungoverned Space? Examining the FARC's Interactions with Local Populations in Northern Ecuador' (2014) 25 *Small Wars & Insurgencies* 1017.

146 In fact, the award did refer to the ILC's Draft Article 15 as well, see *Yeager*, para. 35; on this aspect, see also Caron, 'The Basis of Responsibility', 143-146.

safely stated is that the rule covers (1) the exercise of state functions (2) in the absence of the (official) government. The status of any additional criteria is unclear. The ILC's third requirement – i.e. the existence of 'circumstances such as to call for the exercise' of governmental authority – appears to have been intended to filter out cases where the absence of effective government is the cause, rather than the result, of private actors exercising state functions. This is also consistent with the ILC's exclusion of local *de facto* governments from attribution, since they almost by definition displace the *de jure* government. But such blanket exclusion does not accord with the *Hopkins* award and subsequent jurisprudence from the US-Mexico General Claims Commission, which relied instead on a distinction between personal and unpersonal acts and which the ILC did not take into account during its deliberations; nor does it explain why Article 9 is nonetheless mentioned as an option in the Commentary regarding insurrectional movements. (That said, one possibility is that it refers only to instances where the armed group moves into a pre-existing vacuum.) Similarly, the objections raised in the literature to the applicability of Article 9 ARSIWA to situations of 'state failure' – requirements relating to the existence of government, its knowledge of the conduct in question, and acting in the public interest – are based on a misinterpretation, unsupported, or simply absorbed into the functionality requirement.

However, even if one decides to cast the net of Article 9 ARSIWA as wide as possible, dismissing all but the two core criteria and allowing for the attribution of local *de facto* governments' unpersonal conduct, the rule still cannot serve as a silver bullet, ensuring that there is no vacuum of responsibility in the absence of effective government. Ironically, the rule's most severe limitations are inherent, stemming from the very same rationale of functionality which lends it such compelling force. That rationale is what restricts attribution to incidental breaches which occur in the course of carrying out state functions – but the gravest violations of international law often take place when the state *abuses* its position, and is not acting within its functions. Similarly, as Gerard Kreijen points out, '[t]he non-governmental actors within the failed State who commit acts in violation of international law that may raise concerns of state responsibility will generally do so in ways that lack any connection with the exercise of public functions.'[147]

Yet at the same time, in situations of upheaval not only will it not be possible to attribute the conduct of an insurrectional movement to the state, but as the 1975 Commentary highlights, '[i]t will rarely be possible to accuse a State of failing in its own obligations of vigilance and protection in relation to the conduct of organs of an insurrectional movement because,

147 Kreijen, *State Failure*, 278.

most of the time, the actions in question are entirely beyond its control.'[148] In other words, since the conduct in question cannot be attributed, and the state cannot be found in violation of its duties of protection, either, such a situation will inevitably result in a responsibility gap.[149] Likely motivated by the desire to close this gap, certain authors – namely Erik Castrén and D.P. O'Connell – have gone even further, advocating for the position that all acts of *de facto* governments should be attributable to the state, based on a rationale of effectiveness, rather than functionality.[150] O'Connell, in particular, has argued that the ultimate success of the insurrectional movement should only matter in those cases where 'at the instant time, there was a vacuum of government at the relevant place', i.e. the revolutionaries were not organized as a government.[151] This stance, however, has not found support in practice either before or since these arguments were made.

In sum, the conditions of Article 9 ARSIWA do in fact allow for it to be applied even in cases where there is no central government in existence; the article does indeed seem to be suited, if not tailored, to the situation in failing or failed states, even upon closer inspection. Furthermore, the rationale of functionality can be reconciled with the principle of conditioning the attributability of insurrectional movements' conduct on their ultimate success or failure. This reconciliation, in turn, enables the attribution of the unpersonal conduct of local *de facto* governments under Article 9, at the very least in cases where they have moved into a pre-existing vacuum. That said, the rationale of functionality – as opposed to effectiveness (i.e. a factual basis) – carries an inherent limitation which restricts the scope of Article 9's applicability considerably, regarding both individuals and local *de facto* governments.

148 ILC Commentary (1975), 92, para. 4; see also *Crawford's First Report*, para. 263: 'once an organized insurrectional movement comes into existence as a matter of fact, it will rarely if ever be possible to impute responsibility to the State, since the movement will by then be "entirely beyond its control".'

149 Unless the non-state actor is held responsible in its own right, but that faces a number of serious limitations, due to persistent doubts as to the international legal personality of such actors.

150 Castrén based his argument partly on recognition of belligerency, partly on effective control over territory; O'Connell on the substitution of governments. See O'Connell, *International Law*, vol. II, 970; Castrén, *Civil War*, 231: 'even if the insurrection has been unsuccessful, the insurgents may nevertheless have exercised effective authority over a large portion of the national territory and for a long period of time.' The argument of these authors was also noted in passing at the ILC, with the 1975 Commentary mentioning that they 'argue[d] *de jure condendo* that the State should always be held responsible, when the revolution is over, for the acts of insurgents acting on behalf of a local *de facto* government', i.e. not only for routine administrative acts: ILC Commentary (1975), 97, note 251, referring to O'Connell, *International Law*, vol. II, 969-970 and Castrén, *Civil War*, 232.

151 O'Connell, *International Law*, vol. II, 970; Castrén, *Civil War*, 231-232.

5.3 The Legal: 'State Collapse', Co-optation, and Articles 4 and 5 ARSIWA

Having addressed the factual and functional rationales of attribution, this section turns to those situations where attribution is based on a link under domestic law. Article 4 ARSIWA codifies the basic rule – described by the Commentary as 'a point of departure' – that the conduct of its organs is attributable to the state.[152] Complementing this rule is Article 5 ARSIWA, which covers the conduct of so-called parastatal entities, i.e. persons or entities that are not organs, but are 'empowered by the law of that State to exercise elements of the governmental authority'.[153]

Both Articles 4 and 5 ARSIWA operate on the same basis: the existence of a domestic legal link with the state. In case the text of Article 5 itself should leave the reader with any doubt, the Commentary explicitly states that the 'justification for attributing […] the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority.'[154] Article 4, meanwhile, defines an organ as 'includ[ing] any person or entity which has that status in accordance with the internal law of the State'.[155] Granted, this definition is not limited to *de jure* organs; but as the attribution of *de facto* organs is based on a different overall rationale (discussed in Chapter 4 above), this section is focused only on the former category. Within the scope of the legal rationale, the following sections will first examine the possibility of attributing the conduct of remaining low-level *de jure* organs of the state, then turn to the phenomenon of co-optation by the (affected or a third) state, conferring official status on non-state actors.

5.3.1 Remaining Low-Level Organs in the Event of 'State Collapse'

Working on the assumption that 'failed' or 'collapsed' states lack organs by definition, most authors do not address the option of attributing conduct under Article 4 ARSIWA at all.[156] Nonetheless, even under such a narrow definition of 'state failure', there are a few who admit the possibility that some low-level institutions may have survived the collapse of the central

152 ARSIWA Commentary to Article 4, para. 2.

153 See ARSIWA Commentary to Article 5, para. 1. The text of Article 5 (unlike that of Article 4) further requires that 'the person or entity is acting in that capacity in the particular instance'; but a closer look at the ARSIWA reveals that this criterion is equally applicable to Article 4: see ARSIWA Commentary to Article 4, para. 13, as well as Article 7 ARSIWA.

154 ARSIWA Commentary to Article 5, para. 5.

155 Article 4(2) ARSIWA.

156 See e.g. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 85, 104; Kreijen, *State Failure*, 273. Cahin, in 'L'état défaillant', and Pustorino, in 'Failed States', do not discuss it at all, for instance.

government, continuing to function.[157] Can their conduct be attributed to the state?

In the early twentieth century, it was briefly contended by certain authors – most notably Edwin Borchard – that the conduct of 'minor' or 'subordinate' organs cannot engage the state's responsibility.[158] This argument was eventually dismissed by the ILC, on the basis that even at the time of its original espousal, it only found rather questionable support in practice, and was entirely unsupported in later decades.[159] Accordingly, Article 4 ARSIWA specifically notes that the conduct of an organ, 'whatever position it holds in the organization of the State', is attributable.[160]

The theoretical foundation of this rule – in other words, the reason behind the lack of contrary practice – is the principle of the state's unity.[161] In the principle's most famous expression, '[a]n officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority.'[162] Robin Geiss, however, has argued that in the case of 'failed states', the collapse of central authority dissolves that unity, as remaining low-level organs can no longer 'contribute' to the 'upper-level organization of the state as a unit'.[163] In other words, the state – instead of forming a single entity – disintegrates into several smaller units, with nothing to connect them to each other in the absence of central institutions.

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157 Geiss, *"Failed states": Die normative Erfassung*, 257-259; Leidenmühler, *Kollabierter Staat*, 520-522. See also N. Schrijver *et al.*, 'Failing States: A Global Responsibility', *Adviesraad Internationale Vraagstukken (Advisory Council on International Affairs)*, Advice No. 35 / *Commissie van advies inzake volkenrechtelijke vraagstukken*, Advice No. 14, 7 May 2004, https://www.advisorycouncilinternationalaffairs.nl/documents/publications/2004/05/07/failing-states, 16.

158 See Borchard, *Diplomatic Protection*, 189-193.

159 See *Ago's Third Report*, paras. 151-160; ILC, *Draft articles on State responsibility: Chapter II. The "act of the State" according to international law (articles 5-6)*, in: *Yearbook of the International Law Commission*, 1973, vol. II, 188, at 196-197, paras. 9-15.

160 See also ARSIWA Commentary to Article 4, paras. 6-7.

161 See ARSIWA Commentary to Article 2, para. 6 and to Article 4, para. 5; ILC, *Draft articles on State responsibility: Chapter II*, 197, para. 16.

162 *Isaac Moses, assignee, etc.* v. *Mexico,* Decision of 14 April 1871, in: J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been Party* (6 vols., Washington, DC: Government Printing Office, 1898), vol. III, 3127, at 3129.

163 Geiss, *"Failed states": Die normative Erfassung*, 258 (translation by author). Geiss argues that the state cannot be held responsible for the omissions of any remaining low-level organs, either (as no conduct – be it act or omission – can be attributed to the state): *ibid.*, 258-259. In support of his argument that the fall of the central government precludes attribution, Geiss cites the *Hopkins* case, where the Claims Commission concluded that once the *de facto* regime of Victoriano Huerta had lost control over most of Mexico, the regime's remaining 'personal' acts were not attributable to the state (*Hopkins*, para. 12). Rather than negating the continued attributability of *any* remaining low-level organs, though, this simply highlights that there are questions of legitimacy involved: it makes a difference whether the period of central governmental absence (and the activity of remaining low-level organs) follows a *de jure* or a *de facto* government.

But as logical as this argument may seem at first glance, the notion of local authorities merely 'contributing' to the work of the central government does not always accurately capture the relationship between these organs. The shortcomings of such a depiction are highlighted in particular by the example of federal states, where constituent units often have competences that are entirely distinct from – rather than subordinate to – those of the central government.[164] Where competences do not even overlap, it is difficult to see these units as 'contributing' to the efforts of the central organs. Furthermore, the logical counterpart to such simple bottom-up 'contribution' would be top-down authority, whereby the higher-level organ can legally compel the lower-level organ to compliance. Yet the ARSIWA Commentary to Article 4 explicitly acknowledges that it is 'irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations.'[165] Going beyond the federal context, Article 7 ARSIWA makes it clear that the conduct of a person or entity covered under Articles 4 or 5 ARSIWA is attributable to the state when 'acts in that capacity, even if it exceeds its authority *or contravenes instructions*.'[166] Thus, even in cases where the central government does have the power to compel a subordinate organ, whether it has attempted to exercise this power still does not have any bearing on the state's responsibility for the conduct of the lower-level organ.[167] Instead, as Article 7 reveals, the decisive element in such cases is acting in an official capacity: once an entity has been designated as an organ or otherwise empowered to exercise elements of govern-

164 See e.g. I. Duchacek, 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations', in: H.J. Michelmann & P. Soldatos (eds.), *Federalism and International Relations: The Role of Subnational Units* (Oxford: Clarendon, 1990), 1, at 3, defining a federal state as a 'pluralistic democracy in which two sets of governments, neither being fully at the mercy of the other, legislate and administer within their separate and yet interlocked jurisdictions'; cf. G. Hernández, 'Federated Entities in International Law: Disaggregating the Federal State?', in: D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013), 491, at 492, defining a federal state as 'a State that, according to its constitutional arrangements, distributes the competences which normally fall to a State between two or more orders of government.'

165 ARSIWA Commentary to Article 4, para. 9; as the commentary points out, this rule is also supported by international jurisprudence, most recently in *LaGrand* (Germany *v.* United States of America), Judgment of 27 June 2001, 2001 ICJ Reports 466 and *Avena and Other Mexican Nationals* (Mexico *v.* United States of America), Judgment of 31 March 2004, 2004 ICJ Reports 12.

166 Emphasis added.

167 But (the lack of) such an attempt may be relevant for the state's responsibility for the conduct of a higher-level organ, see *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *v.* Uganda), Judgment of 19 December 2005, 2005 ICJ Reports 168, para. 246, where Uganda was held responsible for its failure to prevent 'looting, plundering and exploitation of the DRC's natural resources' by the Ugandan armed forces.

mental authority, attribution can only be successfully challenged where the conduct was carried out in a purely private capacity, entirely unconnected to the authority conferred.

Having established that the rationale for attribution under Articles 4 and 5 ARSIWA is the existence of legal authority, the next step is to identify the source of that authority. One may of course simply argue that such authority is conferred by the central government, but that line of argumentation faces the same problem that has just been described: in federal systems, the constituent entities do not, in fact, derive their authority from the federal government. As Gleider Hernández explains, for instance, the 'constitutional arrangement [of a federal state] can only be amended through a new agreement *which requires the consent of the different levels of government* which comprise a State'; this is exactly what differentiates federal states from merely decentralized ones, where the central government can unilaterally reverse the delegation of powers to subordinate levels.[168] Given that one can reasonably expect a solution to be capable of providing an equally sound explanation for both federal and unitary states, the answer must be sought elsewhere.

That answer, in the end, is quite simple. After all, what determines the relationship – subordinate or otherwise – between the central government and the local organs in each and every case is the domestic legal order. In other words, both central and local organs derive their authority from the domestic legal system;[169] and where the central government may delegate competences to the subordinate organs, this is because the legal order empowers it to do so. For the same reason, the foundation of the state's unity lies in its legal system, rather than the existence of a central government. But even under such a conceptualization, Franz Leidenmühler concludes that the legal order may lose its validity due to ineffectiveness, and once that has happened, the conduct of any remaining organs cannot be attributed to the state.[170] In the same vein, he maintains that absent a legal order capable of providing authorization for the exercise of elements of governmental authority, attribution cannot take place through Article 5 ARSIWA, either.[171]

Practice on the subject, however, while admittedly limited, takes the contrary position: the attributability of local organs' conduct in the absence of a central government was in fact upheld in the case of *Christina Patton* v. *United Mexican States* before the British-Mexican Special Claims Commission. According to the facts of the case, members of one of the armed

168 Hernández, 'Federated Entities in International Law', 493 (emphasis added).

169 Cf. Leidenmühler, *Kollabierter Staat*, 521.

170 *Ibid.*: 'Hat aber diese Ordnung mangels Wirksamkeit insgesamt ihre Geltung verloren, so können ihr auch allenfalls *de facto* weiterbestehende (ehemalige) Organwalter nicht mehr zugerechnet werden.'

171 *Ibid.*, 522.

factions contending for power during the 1910-1920 Mexican Revolution looted the claimant's residence in March 1915.[172] While the conduct of the looters themselves could not be attributed to Mexico, the question arose whether the state authorities have failed in their duty to protect. During the relevant period, no single faction was in control of Mexico as a whole (or even a majority of it), leading the Commission to conclude that the country was without a government. But instead of ending its enquiry there, as it could have done, the Claims Commission proceeded to note that '[e]ven when a country passes through a period of anarchy, even when an established and recognized Government is not in existence, the permanent machinery of the public service continues its activity. The Commission share the view expressed in this regard in [the *Hopkins* case].'[173] Pointing out that the police and judiciary remained functional in the capital, where the events of the case took place, the Commission held that 'public authorities that were obliged to watch over and to protect life and property continued to exist, although it is not denied that the performance of those duties will often have been very difficult in those disturbed times of civil war.'[174] Accordingly, if these authorities had failed in their duties, Mexico would have been found liable.[175] This turned out not to be the case here, as it was never proven that the local authorities knew (or should have known) of the attack – but it was the element of breach, not attribution, that was missing for a finding of responsibility.[176]

How – if at all – can this outcome in *Patton* be reconciled with the analyses put forward in the literature by Geiss and Leidenmühler? There are, in essence, two possible solutions, each of them carrying its own implications regarding the scope of attributable conduct.

Having dismissed the attributability of remaining low-level organs under Article 4 ARSIWA, Geiss and Leidenmühler concede that the conduct of such organs may be covered by Article 9 ARSIWA instead.[177] This is somewhat of a surprising choice, given that – as explained above in Section 5.2 – Article 9 ARSIWA is characterized precisely by the *lack* of legal authorization; but such an explanation is consistent with the position that the collapse of the central government invalidates the legal order and thus any previous legal authorization.

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172 *Christina Patton (Great Britain)* v. *United Mexican States*, Award of 8 July 1931, 5 UNRIAA 224, para. 1.

173 *Ibid.*, para. 7; on the *Hopkins* case, see Section 5.2.3 above.

174 *Patton*, para. 7.

175 See Article 3(4) of the Convention between Great Britain and the United Mexican States, 5 December 1930, 5 UNRIAA 10; and *Patton*, paras. 3-6, as to the characterization of the Zapatista soldiers.

176 *Patton*, para. 8; see Chapter 3 above on duties to protect and the 'knew or should have known' formula.

177 See Geiss, *"Failed states": Die normative Erfassung*, 262; Leidenmühler, *Kollabierter Staat*, 523-524.

The *Patton* award itself, however, appears to contradict this argument. The Claims Commission's crucial statement – that '*public* authorities that were *obliged* to watch over and to protect life and property continued to exist'[178] – contrasts sharply with the situations envisaged under Article 9 ARSIWA, where the Commentary notes that private actors act 'on their own initiative.'[179] Instead, the Commission attributed the conduct of these authorities to Mexico based simply on their status as state organs and their continued functioning. This conclusion is, in fact, consistent with the conceptualization of the state as a legal order. Even if the effectiveness of the legal system is necessarily impaired by the collapse of the central government (since certain functions can no longer be performed), it is precisely the continued functioning of lower-level organs which prevents the legal system from becoming *wholly* ineffective and thereby losing its validity. As the *Patton* case illustrates: despite the difficulties they may have faced, the police and the judiciary were working to ensure that the laws were upheld in Mexico City even – or especially – during those turbulent times. Accordingly, as long as organs continue to function, their conduct will, by definition, be attributable to the state. The same rationale applies to entities covered under Article 5 ARSIWA as well. While new authorizations – inasmuch as these were the prerogative of the central government – cannot be issued, it is difficult to see why previously empowered entities could not legally continue to exercise their governmental authority.

Beyond providing theoretical consistency, attribution under Articles 4 or 5 (rather than Article 9) also has practical consequences. Since Article 9 ARSIWA is based on the rationale of functionality, its scope is rather limited, extending only to those acts and omissions that are intrinsic to the exercise of governmental functions. In contrast, attribution under Articles 4 or 5 ARSIWA triggers the applicability of Article 7, extending the scope of attributable conduct to include abuse of authority.

Nonetheless, it is important to highlight that *continuity* plays a key role here. This is best demonstrated by the case of Puntland, which – rather than claiming independence from Somalia – awaits the re-establishment of federal state structures, intending to become a constituent unit. However, since the 'Puntland State of Somalia' was only established in 1998, it cannot claim continuity with the legal system which preceded the government's collapse in 1991 – and neither does it attempt to do so, having adopted its

178 *Patton*, para. 7 (emphasis added).
179 ARSIWA Commentary to Article 9, para. 4.

own constitutions in 2001 and 2012.[180] In light of these circumstances, it cannot be said that Puntland organs derive their authority from the legal system of the Somali state; as such, they cannot be classified as *de jure* organs of Somalia – but their conduct may instead be attributable under Article 9 ARSIWA as persons exercising elements of governmental authority in the absence of the Somali central government.

5.3.2 The Involvement of Other Actors: Integration, Co-Optation, and the Continued Payment of Civil Servants

In the scenarios discussed above, low-level organs are simply operating in a situation where there is no actor whatsoever to which they could be subordinated. But it may also be the case that such low-level organs come to operate within the governmental apparatus of a third state, or that the (re-established) government of the affected state decides to co-opt structures external to the governmental apparatus. While such cases are admittedly rare, it is nonetheless useful to examine them briefly through the example of the Northern Kosovo parallel structures, which illustrate both of these scenarios. In addition, this section addresses the more common situation where the government continues to pay the salaries of civil servants in parts of the state beyond its control.

180 See *Report of the Secretary-General on the situation in Somalia*, 16 August 1999, UN Doc. S/1999/882, para. 18, on the establishment of Puntland and its approach to this issue; Articles 2(4) and 10 of the Transitional Constitution of Puntland Regional Government, 1 July 2001, http://www.refworld.org/docid/4bc589e92.html; Constitution of Puntland State of Somalia, December 2009, English translation available at https://issuu.com/mahadfarah/docs/puntland_constitution. This constitution was officially adopted without substantive changes in 2012, see A. Stanley, P. Simkin & K. Samuels, 'Building from the Bottom: Political Accommodation in Somalia at the Regional and Local Levels', *Conflict Dynamics International*, Governance and Peacebuilding Series Briefing Note, June 2013, http://www.cdint.org/documents/BuildingFromTheBottom.pdf, at 14, note 12. Furthermore, despite not seeking independence, Puntland has displayed a number of contradictory features over the years. Artcle 11 of its 2001 transitional constitution proclaimed Puntland's acceptance of all of Somalia's previous treaty obligations under international law, unless they were contrary to Puntland's interests. At the same time as declaring that 'Puntland State is part of Somalia; its duty is to contribute to the establishment and protection of a Somali government based on a federal system', Article 4 of its subsequent constitution stated that '[p]ending the completion of the Federal Constitution, ratified by Puntland, and approved by a popular referendum, Puntland State shall have the status of an independent State.'

Firstly, it may be the case that certain low-level organs continue to function based on a legal system that has been displaced, but survives elsewhere. In Kosovo, pursuant to UN Security Council Resolution 1244, '[a]ll legislative and executive authority […], including the administration of the judiciary' was vested in UNMIK in 1999.[181] While Serbia formally retained sovereignty, the international administration of Kosovo placed the latter on a different legal trajectory: UNMIK reinstated the Serbian laws as they stood in 1989, then proceeded to legislate independently, including by issuing the 2001 Constitutional Framework for Provisional Self-Government.[182] In 2008, Kosovo issued a (heavily contested) declaration of independence, and adopted its own constitution, as well as many other laws in the years that followed. Yet during the same period, both before and after the declaration of independence, 'parallel structures' have operated in the north of Kosovo not only with the support – financial and otherwise – of Serbia, but on the basis of the Serbian legal system, from police through courts and public administration bodies to health care and educational institutions.[183]

181 Section 1.1 of UNMIK Regulation No. 1999/1, 'On the Authority of the Interim Administration in Kosovo', 25 July 1999, UN Doc. UNMIK/REG/1999/1.

182 See UNMIK Regulation No. 1999/24, 'On the Law Applicable in Kosovo', 12 December 1999, UN Doc. UNMIK/REG/1999/24 and UNMIK Regulation No. 1999/25, 'Amending UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo', 12 December 1999, UN Doc. UNMIK/REG/1999/25. Initially, Section 3 of UNMIK Regulation No. 1999/1 set the applicable law as the 'laws applicable in the territory of Kosovo prior to 24 March 1999'; this was soon changed, however, as many of the post-1989 laws were seen as 'an instrument of oppression' by the local judicial community, see H. Krieger (ed.), *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (Cambridge: Cambridge University Press, 2001), 561. UNMIK Regulation No. 2001/9, 'On a Constitutional Framework for Provisional Self-Government in Kosovo', 15 May 2001, UN Doc. UNMIK/REG/2001/9.

183 The Serbian police maintained a permanent but relatively low-key presence in the area, in their numbers as well as in their visibility. Courts used to cover every region of Kosovo, with most as courts-in-exile, relocated to Serbia after the war, especially at the level of district courts; but a number of lower-level courts remained in the territory of Kosovo, operating mostly in the north. These courts, in open defiance of the UNMIK administration, continued to apply Serbian law and remained 'connected to' the Serbian Ministry of Justice, with the Supreme Court of Serbia as their ultimate appellate body (OSCE, *Parallel Structures* (2003), 17; OSCE, *Parallel Structures* (2007), 15). Serbian law also continued to be applied by a significant number of public administration bodies, handling property issues, Serbian passports, and other official documents issued by Serbian Ministry of Interior officers. Parallel health care and education institutions were functioning under the supervision and authority of the Serbian Ministries of Health, and Education and Sport, respectively, with schools applying the Serbian curriculum. The staff of health care and educational facilities was on the Serbian payroll, with appointments made by Serbia. However, it was also reported that the lack of efficient control on a daily basis allowed abuse to take place. See generally OSCE, *Parallel Structures* (2003); OSCE, *Parallel Structures* (2007); ICG, *North Kosovo*; E.A. Baylis, 'Parallel Courts in Post-Conflict Kosovo' (2007) 32 *Yale Journal of International Law* 1; van der Borgh, 'Resisting International State Building'; BPRG, *Serb Integration in Kosovo*.

Given that they have been operating under Serbian law and in many cases continued to be integrated into the governing structures of Serbia, these parallel institutions may be deemed organs of Serbia, making their conduct attributable.[184]

Secondly, it may also happen that the central government decides to co-opt structures created or maintained by non-state actors (and possibly supported by third states). Granted, while most post-conflict reconciliation processes provide for the inclusion of non-state actors in positions of power, this is usually achieved though integration into a single governmental structure (e.g. via a power-sharing arrangement), with the non-state parallel governmental organizations dismantled. But where institutions of resistance prove to be particularly resilient, the state may choose to accommodate them to some extent, in order to avoid further conflict. A few months after Kosovo's unilateral declaration of independence, the Pristina authorities extended the mandates of a number of municipal assemblies with a Kosovo Serbian majority; these assemblies had been elected under the UNMIK system, but based their legitimacy on the Serbian elections and functioned based on the Serbian law on local self-governance.[185] This led to a peculiar situation where the same municipalities could carry out functions in two different legal systems: the Serbian and the Kosovar one. In such a case, the extension of the mandate arguably constitutes a conferral of the status of state organ. Accordingly, the conduct of these municipalities may be attributable to Serbia *or* Kosovo under Article 4 ARSIWA, depending on the question in which legal system (i.e. in which capacity) they act – although delineating their conduct in each legal system may be exceedingly difficult in practice.

Thirdly, the capacity in which individuals act is also the crucial factor in the relatively common scenario where a government tries to maintain its influence – or simply ensure the provision of services – in areas beyond its control through the continued payment of civil servants. For instance, the Ramallah government continued paying its employees in the Gaza Strip following the Hamas takeover (while initially ordering them on a

184 It is interesting to consider the ECtHR's decision on admissibility in the case of *Azemi* v. *Serbia* (Application No. 11209/09, Decision of 5 November 2013) in this context. The Court declared the case – concerning the non-enforcement of a Kosovo court's judgment – inadmissible, partly because it found that 'there is no evidence that Serbia exercised any control over UNMIK, Kosovo's judiciary or other institutions that had been established by virtue of UNMIK regulations. Neither can it be said that the Serbian authorities supported militarily, economically, financially or politically Kosovo's institutions' (para. 45). This suggests that if the case had involved the Kosovo Serbian parallel institutions, the Court could have established attribution to Serbia – but given how reminiscent this reasoning is of the Northern Cyprus and Transdniestria cases, it is likely that such attribution would have been based on control (see Section 4.4 above), rather than the status of governmental organ.

185 *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 24 November 2008, UN Doc. S/2008/692, paras. 4, 10; ICG, *North Kosovo*, 2, 3, 18.

strike).[186] In Sri Lanka, the government kept providing public goods (such as healthcare and education) through its employees in territory controlled by the LTTE, and even managed to keep the justice system functioning for a while.[187] In Syria, the Assad regime continued to pay teachers in rebel-held areas.[188] In such cases, the payment of salaries is arguably not the decisive element for attribution. In post-independence Northern Kosovo, instances of people holding offices concurrently in the Serbian and Kosovar systems and/or drawing salaries from both the Belgrade and Pristina authorities were not uncommon, leading to the boundaries between the two systems being described as 'porous'.[189] In the Gaza Strip, by the time the Ramallah-paid employees returned to work (with the approval of the Ramallah government, mostly in the areas of social affairs, health, and education), Hamas had replaced those in higher-ranking managerial positions with its own loyalists, thereby gaining control over the ministries in question.[190] As a result, civil servants paid by the Ramallah government could be acting on instructions from the Hamas government. In such situations, it is once again the capacity in which the particular persons act – in line with Articles 4-5 ARSIWA[191] – that determines whether or not their conduct is attributable to a given state.

186 In the wake of the takeover in 2007, the Ramallah government ordered public servants to go on strike and not to cooperate with Hamas, under threat of losing their salaries and pensions. Where staff later returned to work, they continued to be paid by the Ramallah government, with the Gaza government only paying those public servants whom it hired itself. See generally Sayigh, 'Hamas Rule in Gaza', 2; Hovdenak, 'Public Services Under Hamas', 11-12.

187 See Mampilly, *Rebel Rulers*, 109, 111-115.

188 'Rebels carve out a safe haven in northern and central Syria', *Seattle Times*, 7 June 2012, https://www.seattletimes.com/nation-world/rebels-carve-out-a-safe-haven-in-northern-and-central-syria; K. Khaddour, 'The Assad Regime's Hold on the Syrian State', *Carnegie Middle East Center*, July 2015, http://carnegieendowment.org/files/syrian_state1.pdf, 7. See also the discussion in K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017), 168-169.

189 ICG Europe Report No. 218, *Setting Kosovo Free: Remaining Challenges*, 10 September 2012, https://www.crisisgroup.org/europe-central-asia/balkans/kosovo/setting-kosovo-free-remaining-challenges, 2; see also BPRG, *Serb Integration in Kosovo*, 20-21.

190 Sayigh, 'Hamas Rule in Gaza', 2; Hovdenak, 'Public Services Under Hamas', 11-12.

191 See ARSIWA Commentary to Article 4, paras. 3, 7 and 13; as well as the text of Article 5 ARSIWA. This is essentially a matter of determining on whose behalf the person is acting; cf. ARSIWA Commentary to Article 6, para. 6 by analogy.

5.3.3 Concluding Remarks

The legal link established between the state and a person (or institution) by designating the latter under domestic law as an organ or an entity empowered to exercise governmental functions creates a lasting bond. This bond is so strong, in fact, that it cannot be deemed to have dissolved by the collapse of the central government. Neither does such a collapse invalidate the legal order of the state – on the contrary: the remaining local authorities are still bound to do their best to uphold that legal order under the circumstances. Accordingly, the conduct of such authorities is attributable to the state even in the absence of a central government.

In addition, where there is still (or once again) a central government in existence, it may choose to co-opt resilient non-state actors in order to ensure peace and/or boost its capacity. Where such co-optation involves a conferral of official status on the non-state actors, their conduct – carried out in their official capacity – similarly becomes attributable to the state by virtue of the domestic legal link created between the two.

The central government may also decide to continue paying the salaries of civil servants in areas beyond its control, in order to maintain authority and/or provide public services as much as possible. But where those civil servants are under the control of another actor, the payment of salaries is not, in and of itself, determinative of whether the conduct of such persons is attributable to the state. Rather, the crucial question is in which capacity they act. The same applies in situations where the central government is that of a third state, continuing the payment of (former) officials acting pursuant to a legal system that is defunct in the particular territory.

5.4 Retroactive Effect: Some Remarks on the Operation of Articles 10 and 11 ARSIWA

Having addressed the three main rationales of factual, functional, and legal links between the state and private actors, the chapter now turns to briefly address Articles 10 and 11 ARSIWA, based on the rationales of continuity and discretion, respectively, and sharing the characteristic of (possible) retroactive application.

5.4.1 Article 10 ARSIWA and the Rationale of Continuity

As noted earlier in this chapter, the attributability of insurgents' conduct is generally deemed to depend on the ultimate success or failure of the movement. As a reflection of this view, Article 10 ARSIWA codifies the rule whereby the conduct of a successful insurgency – i.e. one that 'becomes the new Government of a State' or 'succeeds in establishing a new State' – is

attributable to the (new) state.[192] The rationale behind this rule, supported by a long line of cases, is the continuity of the actor in question, i.e. the insurrectional movement which turns into a government. In the words of the Commentary, 'it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it.'[193] Since this continuity is unaffected by the identity of the opposing party or parties (be they governmental forces or other armed groups), the rule is equally applicable to situations where the insurrection comes to power by defeating other armed groups in the absence of a government.[194]

Nonetheless, the conditions attached to Article 10 ARSIWA are such that they severely limit the applicability of the rule in the situations under discussion here. First and foremost, the Article is based on the underlying assumption that the conflict will be settled relatively quickly one way or another, i.e. it will end either with the victory of the government (in which case the movement is dismantled), or with the victory of the movement (in which case it replaces the government).[195] However, this binary way of thinking does not accurately capture situations of governmental absence (or even internal armed conflicts more broadly), which often turn into protracted – sometimes decades-long – struggles with no clear winner(s).[196]

Secondly, there is the matter of an organizational threshold to what is considered to be an insurrectional movement. Rather than establishing its own definition of such a movement, the ILC has suggested that Additional Protocol II to the 1949 Geneva Conventions 'may be taken as a guide.'[197] The Protocol lays down quite a high threshold, speaking of 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them

192 In fact, while Article 10(1) speaks of insurrectional movements, Article 10(2) speaks of 'insurrectional or other' movements, to reflect 'the existence of a greater variety of movements whose actions may result in the formation of a new State', most notably national liberation movements, see ARSIWA Commentary to Article 10, paras. 10-11. An in-depth discussion of this issue is beyond the scope of the dissertation, but for more on this question, see e.g. G. Cahin, 'Attribution of Conduct to the State: Insurrectional Movements', in: Crawford, Pellet & Olleson, *The Law of International Responsibility*, 247, at 251-252; Crawford, *State Responsibility*, 172-173; and more generally, H. Atlam, 'National Liberation Movements and International Responsibility', in: M. Spinedi & B. Simma (eds.), *United Nations Codification of State Responsibility* (New York: Oceana, 1987), 35.

193 ARSIWA Commentary to Article 10, para. 4; on the rationale of continuity, see e.g. *Bolívar Railway Company (Great Britain)* v. *Venezuela*, Award of 17 February 1903, 9 UNRIAA 445, at 453.

194 Cf. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 92-93.

195 ARSIWA Commentary to Article 10, para. 4; Crawford, *State Responsibility*, 176: 'For the most part, application of ARSIWA Article 10 will be binary: either the insurrection has succeeded or it has not.'

196 See Kreijen, *State Failure*, 281, regarding cases of 'state failure'; cf. more broadly L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 156, noting that 'most opposition groups do not become either governments or states.'

197 ARSIWA Commentary to Article 10, para. 9.

to carry out sustained and concerted military operations and to implement this Protocol.'[198] But as pointed out by several authors, many (if not most) of the actors that operate in the absence of a government cannot meet this threshold: they often tend to be loosely organized (criminal) gangs, rather than the highly structured and disciplined armed groups that Article 10 envisages.[199] Lowering the threshold to that of Common Article 3 of the Geneva Conventions could ostensibly capture a larger segment of actors, but even that would be of limited help, as not all of these groups are interested in public power and thus likely to ever become part of the government.[200]

Last, but not least, the ILC advises against applying this rule to governments established through national reconciliation, arguing that '[t]he State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government.'[201] Accordingly, the Commission requires 'a real and substantial continuity' between the insurrectional movement and the government for Article 10 to be applicable.[202] However, as noted above, such clear victories are rare in practice; instead, conflicts – and, some argue, situations of 'state failure' in particular – are most frequently resolved through some form of reconciliation, involving a broad coalition of actors.[203] In other words, it is exactly the most commonly employed solution that is excluded from the scope of Article 10 ARSIWA.

In the end, the cumulative effect of these limitations is to narrow the scope of Article 10's applicability to such a degree as to render the rule largely irrelevant in the situations contemplated here.[204]

5.4.2 Article 11 ARSIWA and the Question of Retroactivity

The last of the attribution articles in ARSIWA, Article 11, provides for attribution of conduct that is not otherwise attributable 'if and to the extent that the State acknowledges and adopts the conduct in question as its own.' Despite the apparent straightforwardness of this Article, the litera-

198 Article 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), Geneva, 8 June 1977, in force 7 December 1978, 1125 UNTS 609.

199 See Kreijen, *State Failure*, 279-281; Geiss, *"Failed states": Die normative Erfassung*, 266-267; Geiss, 'Failed States: Legal Aspects', 483; Cahin, 'L'état défaillant', 197-198, 204; Leidenmühler, *Kollabierter Staat*, 525.

200 Geiss, *"Failed states": Die normative Erfassung*, 267, relying on the opinion of Commissioner Zuloaga in *Sambiaggio*, 507.

201 ARSIWA Commentary to Article 10, para. 7.

202 *Ibid*.

203 See e.g. Kreijen, *State Failure*, 281.

204 See *ibid*., 281-282; cf. Cahin, 'Insurrectional Movements', 252: 'Such strict conditions, however, would seem to limit the envisaged situations to those of a large-scale civil war.'

ture is surprisingly divided on the question of whether it can be applied to situations where an effective government has been lacking. Employing a narrow definition of 'state failure', authors tend to consider the applicability of Article 11 only in cases where the government has already been re-established following the period of absence, the underlying assumption being that in the absence of a government, there is no-one on behalf of the state to acknowledge and adopt the conduct in question.[205] Accordingly, the most often voiced concerns relate (directly or indirectly) to whether this rule can operate retroactively – a question that was left unanswered by the ICJ in *Tehran Hostages*, the case which prompted the Article's inclusion in the ARSIWA.

Against the backdrop of this uncertainty, each author has put forward a different opinion on the matter. Daniel Thürer has simply proceeded on the assumption that the rule could be applicable to such situations, without analyzing the question in any detail.[206] Robin Geiss has cited criticism from the literature on how *ex post facto* endorsement is too weak a link to be deemed sufficient grounds for attribution; yet at the same time, he has also highlighted that the application of this rule depends on the *discretion* of the new government, which would suggest that he admits the possibility of such retroactive attribution.[207] Hinrich Schröder has gone furthest in dismissing the applicability of Article 11. Relying on Astrid Epiney, he has argued that the ICJ in effect set two conditions in *Tehran Hostages*: the state must want to actually control the conduct of the non-state actors, and it must be able to decide on the course of events.[208] It is important to note that this last argument goes beyond the problem of retroactivity, denying the possibility of attribution even under a broad definition of 'state failure', i.e. where the government still exists at the time of the events but has no control over them.

In order to find out whether these counter-arguments are well-founded, it is necessary to examine the origins of Article 11 ARSIWA and the conditions required for attribution under this rule – and what better place to start

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205 Thürer, 'Der Wegfall effektiver Staatsgewalt', 33; Geiss, *"Failed states": Die normative Erfassung*, 268; Leidenmühler, *Kollabierter Staat*, 526-527. Kreijen, in *State Failure*; Cahin, in 'L'état défaillant'; and Pustorino, in 'Failed States', do not discuss it at all, for instance.

206 Thürer, 'Der Wegfall effektiver Staatsgewalt', 33, relying on I. Brownlie, *System of the Law of Nations: State Responsibility: Part I* (Oxford: Clarendon, 1983); but Brownlie does not discuss the question of retroactivity, either, see *ibid.*, 157-158, 161.

207 Geiss, *"Failed states": Die normative Erfassung*, 269, citing K. Ziegler, *Fluchtverursachung als völkerrechtliches Delikt: die völkerrechtliche Verantwortlichkeit des Herkunftsstaates für die Verursachung von Fluchtbewegungen* (Berlin: Duncker & Humblot, 2002), 130.

208 A. Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (Baden-Baden: Nomos, 1992), 189: 'Der Staat muß […] das Verhalten der Privaten tatsächlich kontrollieren und auch kontrollieren wollen sowie selbst über den Fortgang der Ereignisse entscheiden.' Schröder's formulation in *Die völkerrechtliche Verantwortlichkeit*, 96, is slightly different, noting that the state 'muss […] selbst über den Fortgang der Ereignisse entscheiden *können*' (emphasis added), i.e. that the state must *be able to* decide the course of events, while in Epiney's, the state must decide the course of events.

than the *Tehran Hostages* case, described by Special Rapporteur James Crawford as the 'archetype of how Article 11 works'.[209] The case concerned the seizure of the US embassy in Tehran on 4 November 1979, its subsequent occupation, and the holding of its personnel hostage by a group of private militants.[210] Regarding the first phase of events (i.e. the seizure of the embassy and hostage-taking), the ICJ found that Iran was not responsible for the conduct of the militants, only for the state's own failure to protect the embassy and its personnel.[211] In fact, the Court specifically pointed out that 'several public declarations against the United States' before the attack, 'congratulations after the event, […] and other subsequent statements of official approval, though highly significant' in the context of the second phase, were not sufficient to establish attribution in the first phase.[212]

By contrast, in the second phase (i.e. the continued occupation and holding of hostages), the ICJ held that the conduct of the militants was attributable to Iran, on the grounds that the state had given its official approval to said conduct. The Court observed that, following a series of endorsements and 'expressions of approval' by Iranian officials, including Ayatollah Khomeini himself, '[t]he seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini.'[213] The decree stated that 'the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran', qualified only by a request to the militants to release certain hostages.[214] The Court pointed out that:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with *by other Iranian authorities* and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, *and the decision to perpetuate them*, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.[215]

209 Crawford, *State Responsibility*, 183.
210 For the facts of the case, see *Tehran Hostages*, paras. 11-32.
211 *Ibid.*, paras. 57-68.
212 *Ibid.*, para. 59.
213 *Ibid.*, paras. 70-71 and 73, respectively.
214 *Ibid.*, para. 73.
215 *Ibid.*, para. 74 (emphases added).

It is difficult to discern what the ICJ considered as the decisive element(s) in arriving at this conclusion. The reference to the Iranian organs' 'decision to perpetuate' the situation does seem to suggest that Iran's power to influence the course of events was a factor.[216] It could not have been the only factor, though: otherwise how would this scenario be distinguished from Iran's duty to protect the embassy and its staff? After all, consciously refraining from any action (as in the first phase) would have equally resulted in the continuation of the situation, and could accordingly be viewed as a 'decision to perpetuate'. However, as the Court rightly concluded, there is a qualitative difference between inaction and the active endorsement of the conduct in question. From the perspective of the power to influence events, this qualitative difference could be captured by the capacity to influence the conduct of the militants *directly*, rather than indirectly (e.g. through the deployment of the security forces). But this does not seem to have been a factor, either: while the ICJ had noted in its summary of the facts that the release of 13 hostages 'was effected pursuant to' the decree of 17 November 1979, it did not mention compliance by the militants at all in its analysis, only referring to compliance 'by other Iranian authorities'.[217] This, in turn, raises another question: why would it be relevant *for the attribution of private conduct* whether *other officials* complied with the Ayatollah's decree? The likeliest explanation is that since such governmental approval is not to be lightly assumed (given the general presumption against the attribution of private conduct), requiring compliance served the purpose of making sure that the state spoke with one voice on the matter.

Despite these uncertainties, the issuance of an official decree emerges as the central element of the ICJ's reasoning and the decisive factor in distinguishing the second phase from the first one. After all, statements of support and endorsement already had their counterparts during the first phase, which means that issuing the decree was the only new element during phase two. The significance of this step is also reflected in the judgment, which stated that '[t]he seal of official government approval was finally set on this situation by a decree'.[218] And while its most noticeable feature is probably the official *form*, the decree also introduced something new in terms of *substance*: by announcing that the situation would remain unchanged until the US met certain conditions, the decree went beyond the

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216 See also *ibid.*, para. 76: 'The Iranian *authorities' decision to continue* the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions' on diplomatic and consular relations (emphasis added).

217 *Ibid.*, paras. 21 and 74, respectively; cf. J.A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *NYU Journal of International Law and Policy* 265, at 271: 'The Court held that Iran was responsible […] because Ayatollah Khomeini had endorsed the acts publicly as a matter of State policy and other Iranian authorities complied with his statements.'

218 *Tehran Hostages*, para. 73.

expressions of endorsement which had characterized previous statements, and *took ownership* of the militants' conduct. This taking of ownership is arguably what the Court referred to when speaking of the 'decision to perpetuate' the facts at hand.[219] Furthermore, given that the ICJ spoke of the '*policy* thus announced by the Ayatollah' – in other words, the substance of the decree, rather than its form – it would be difficult to argue that the Court favored form over substance. Accordingly, it appears that this taking of ownership was the decisive factor in the ICJ's decision to attribute the militants' conduct to Iran.

Despite *Tehran Hostages* being the main inspiration behind Article 11, the ILC's subsequent incorporation of the rule into the ARSIWA departed from, or went beyond, the judgment on a few points. To begin with, the Commission introduced an entirely new formulation, with the phrasing 'intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.'[220] The ICJ had not used the terms 'acknowledge' or 'adopt' in the judgment – and given the Court's vocabulary of official 'approval' and 'endorsement', a casual observer could be forgiven for thinking that the ILC's formulation in fact *raises* the threshold required for attribution. Nonetheless, as highlighted above, the ICJ drew a sharp distinction between the two phases of events, dismissing the relevance of both prior declarations against the US as well as subsequent statements of approval regarding the first phase. This indicates that the Court did indeed see a qualitative difference between these statements and the ones which accompanied the second phase – and that difference may well lie in the issuance of an official decree, rather than mere statements of support. Against this backdrop, it appears that the ILC's formulation, by setting a relatively high threshold, does, in fact, accurately capture the essence of the Court's reasoning. Going beyond the matter of threshold, it is also telling to consider what the ILC did *not* include as a criterion for attribution: the Commission made no reference whatsoever to either the capacity to influence the non-state actor's conduct, or compliance by other state officials. In other words, these factors were not deemed to be decisive by the ILC.

In addition to putting forward a – formally, though not substantially – different formulation, the ILC also took a position on certain aspects of the rule that the ICJ did not (or would not) address, namely: retroactivity, proof, and the 'piecemeal' nature of Article 11. Firstly, since the violation in *Tehran Hostages* was a continuing one (i.e. the events were still underway when attribution was established), the Court saw no need to clarify whether the adoption of conduct only extended prospectively or also retrospectively. Despite the ICJ's silence on the matter, the Commission

219 This is also likely what formed the basis of Epiney's and Schröder's argument on the capacity to control the course of events, see note 208 above.

220 ARSIWA Commentary to Article 11, para. 6. Note that the term 'approval and adoption' was already used by Ian Brownlie in 1983, which is likely what had inspired the ILC; see Brownlie, *State Responsibility*, 157-158, 161.

embraced retroactivity, stating that '[w]here the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect'.[221] Secondly, on the matter of how to establish attribution, the Commentary, while noting that acknowledgement and adoption may be explicit or 'inferred from the conduct of the State in question', stresses that it must also be 'clear and unequivocal.'[222] This requirement of 'clear and unequivocal', in turn, means that – without an accompanying statement, at least – acknowledgement and adoption cannot be inferred from an omission, however deliberate.[223] The stipulations of 'unequivocal and unqualified' and 'clear and unequivocal' also highlight that the alleged weakness of the link created by *ex post facto* endorsement is best approached as a question of threshold. In other words, the reason why such an endorsement must be treated with caution is that it may not be sufficiently clear or unequivocal to be considered as an acknowledgement and adoption of certain conduct (and a retroactive one at that). This does not mean, however, that such an endorsement can be rejected outright, without any examination of whether it meets this threshold, simply because it took place after the conduct itself had ended. If the terms of the statement are sufficiently clear and unequivocal, it may well serve as the basis for attribution. Lastly, the Committee also clarified that – unlike most attribution rules – Article 11 operates on a conduct-by-conduct (rather than actor-by-actor) basis: in the words of the Commentary, 'a State may elect to acknowledge and adopt only some of the conduct in question.'[224]

Moving beyond these criteria, the feature that sets Article 11 apart more than anything is its discretionary nature. The acknowledgement and adoption inevitably takes place when the conduct in question is at least underway, if not already completed; consequently, the state has a choice whether or not to adopt certain conduct *when it is already aware of the facts*. This discretion is further enhanced by the fact that the state is free to adopt 'only some of the conduct in question'. Together, these characteristics afford the state a degree of freedom that is unmatched in any of the other attribution articles. This element of discretion may also explain why Luigi

221 ARSIWA Commentary to Article 11, para. 4, relying in particular on the *Lighthouses* arbitration: *Affaire relative à la concession des phares de l'Empire ottoman* (Grèce, France), Award of 24/27 July 1956, 12 UNRIAA 155, at 198 (for the English translation, see 23 ILR 90-93). That said, the issue remains debated in literature – see e.g. T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart, 2006), 74 – and it remains to be seen whether practice will confirm or reject the ILC's position.

222 ARSIWA Commentary to Article 11, paras. 9 and 8, respectively.

223 Cf. Becker, *Terrorism and the State*, 72. De Frouville, 'Private Individuals', 275, goes even further, arguing that it cannot be inferred from action, either: 'If oral "approval" does not suffice, it is difficult to see how simple "conduct" [i.e. action or omission], even an ostensible one, could be so as to manifest the intention of the State to *adopt* the reproached conduct.' (Emphasis in original.)

224 ARSIWA Commentary to Article 11, para. 8; see also Crawford, *State Responsibility*, 187; de Frouville, 'Private Individuals', 275.

Condorelli and Claus Kress, despite questioning Article 11's basis in practice, admit that 'there are no objections of principle against that rule'.[225] After all, in line with the *Lotus* principle,[226] if the state wishes to retroactively acknowledge and adopt certain conduct, who is to say that it cannot?

In light of all this, and with the caveat that the acknowledgement and adoption needs to be 'clear and unequivocal', there is no reason why Article 11 could not be equally applicable to situations beyond the government's control. This applies regardless of whether the government was still in existence, without its control extending to the entire territory of the state; or whether there was no government in existence at all and the acknowledgement and adoption took place after the recovery of authority. That said, the rule's greatest weakness is – once again – inherent: as Geiss points out, given that recourse to this rule depends on the discretion of the new government, it is unsuitable to cover *all* conduct during the period of governmental absence.[227] This policy concern, however, should not serve as a basis for rejecting the rule out of hand, excluding its application even in those (few) cases where it could be helpful.

5.5 Concluding Remarks

As the preceding sections have shown, a considerable range of conduct has been or may be attributed to the state even where the government ceases to function or lacks effective control over (part of) its territory. Contrary to what has been argued in the literature, the operation of neither Articles 4/5, nor Article 9 ARSIWA requires that a central government still be in existence. How much ground do these options cover? In other words, how much of the accountability gap can be closed by relying on these bases for attribution?

As noted above in Section 4.5, the basic notion underlying attribution is that of acting on the state's behalf. Each rationale – be it factual, legal, functional or otherwise – provides an answer to the question of who, and in what circumstances, is or should be regarded as acting on the state's behalf; that answer delimits the scope of attribution at the same time as supplying the basis for it, determining what can and cannot be attributed to the state.

In the case of the legal rationale, this delimitation is done by reference to the concept of acting in the capacity of state organs, which thus serves as the decisive factor in attribution. At the most basic level, the state continues to

225 L. Condorelli & C. Kress, 'The Rules of Attribution: General Considerations', in: Crawford, Pellet & Olleson, *The Law of International Responsibility*, 221, at 231.

226 The principle takes its name from the case of the *S.S. Lotus* (*France* v. *Turkey*), Judgment of 7 September 1927, PCIJ Series A, No. 10, at 18, where the Court declared that '[r]estrictions upon the independence of States cannot […] be presumed'; in other words, in the absence of prohibitive rules under international law, states are free to act as they wish.

227 Geiss, *"Failed states": Die normative Erfassung*, 269.

be responsible for the conduct of its own (lower-level) *de jure* organs under Article 4 ARSIWA, even in the absence of a central government. In the same vein, the conduct of *de jure* organs which continue to operate in territory controlled by a non-state armed group is likewise attributable to the state, as long as they act in their capacity of organs. This capacity continues to function as the decisive element in cases where the persons in question have multiple simultaneous allegiances – for instance, where state organs are co-opted by a private actor, or where structures outside the state's own apparatus are co-opted by the government.

In the case of the functional rationale, the scope of attribution is delineated by the distinction between 'personal' and 'unpersonal' acts (notwithstanding the difficulties of classifying a particular act as one or the other). If those exercising governmental functions do so to further their own goals, this by definition cannot be regarded as acting on the state's behalf. If, on the other hand, they do so simply to carry on performing routine functions, for instance in providing public goods, this can reasonably be seen as acting on the state's behalf – even if not on the (central) government's behalf. This can also have implications for the unpersonal acts of co-opted officials with multiple allegiances. Article 4 ARSIWA only covers the conduct of such officials as long as they act within their capacity as *de jure* organs. Article 9, however – at least if one decides not to apply the ILC's third, normative, requirement – extends to the situation where such officials act in a different capacity (e.g. under the control of a non-state actor or third state), as long as their conduct is unpersonal. But while the rule's functional rationale – the reason for its inherent restriction to unpersonal acts – ensures that only those acts are captured which may indeed be considered as carried out on the state's behalf, the same rationale severely limits the scope of applicability and thus the practical utility of this Article. Furthermore, if one does apply the ILC's third criterion in Article 9, this leads to precluding attribution in all cases except where the authority exercising governmental functions – be it a self-organizing grassroots institution or a local *de facto* government – moved into a pre-existing vacuum. That said, once an actor secures control over (practically) the entire territory of the state, the rationale shifts from functionality to effectiveness, and all acts of a general *de facto* government – now considered to be acting on behalf of, rather than against, the state – will be attributable under Article 4 ARSIWA.

Finally, Articles 10 and 11 ARSIWA offer options of retroactive applicability to situations where the government lost control over part of its territory. Neither option is particularly useful in ensuring accountability, however, simply because the situations in which these rules may apply are highly limited. In the case of Article 10 – which relies on the rationale of continuity – armed groups very rarely win a conflict outright. In the case of Article 11, acknowledging and adopting conduct is *ex post facto* discretionary (this discretion is also the rationale underpinning attribution under Article 11), making it unlikely that a state would knowingly accept responsibility once the consequences of the conduct have become apparent.

Overall, as Chapters 4 and 5 have demonstrated, more conduct is attributable to the state in the absence of effective government than has previously been argued in the literature on this issue. Granted, this is partly due to the broader definition of 'the absence of effective government' adopted by the dissertation, which is not limited to cases where the government has ceased to exist. This is readily apparent in the case of attribution to the affected state based on the factual rationale, which – regardless of the threshold necessary for attribution – requires links between the private actor and the government that continues to exist, even if the latter does not control all of the state's territory. But in other cases, particularly where *de jure* organs under Article 4 and private actors' governmental functions under Article 9 are concerned, the chapter's conclusions are equally applicable to situations where the state's central government has ceased to exist. That said, due to the inherent limitations of the functional, legal, continuity- and discretion-based rationales, the factual one remains the rationale with the greatest potential to narrow the accountability gap in the absence of effective government.

6 State Complicity in Acts Perpetrated by Private Actors

6.1 Introduction: The Need for a Complicity Rule

The preceding chapters of this dissertation have discussed state responsibility for failing to prevent or redress a catalyst act[1] carried out by a non-state actor, and for conduct by a non-state actor that is itself attributable to the state. But can these two categories of law – duties to protect on the one hand, and attribution[2] on the other – accurately capture all the factual situations in which states are involved in a violation of international law? What happens in cases where the state's role goes beyond a 'mere' failure to protect, but falls short of the control required for attribution under the agency principle as understood by the ICJ and ILC?

Examples of such situations abound across decades and continents. To cite but two: in the context of the Bosnian war, noting the complementary objectives of the Army of the Republika Srpska on the one hand, and the Federal Republic of Yugoslavia and the Yugoslav Army on the other, the ICTY's Trial Chamber admitted that 'there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS.'[3] In a different context, the initially self-organized Nigerian vigilante groups fighting Boko Haram have received governmental support in the form of weapons, equipment and training; and not only have these groups cooperated with the military and supplied them

1 For an explanation of what a catalyst act (or event) is, see Chapter 3, notes 18-21 and accompanying text above.

2 As explained above in Chapter 3, the duty to protect also requires attributing certain conduct to the state, namely the failure to prevent or punish. However, for ease of reference, this chapter will use the terms of 'duty to protect' and 'attribution' as shorthand, with each of them referring to the respective scenarios described in the opening sentence of this chapter.

3 *Prosecutor* v. *Duško Tadić*, ICTY Trial Chamber, Judgment of 7 May 1997, IT-94-1-T, para. 604.

with intelligence, sometimes the two have even been deployed together.[4] Given all the ways in which various state organs have been supporting these vigilante groups, and the fact that the latter's activities have been accompanied by reports of human rights abuses,[5] the question inevitably arises: what degree of responsibility does Nigeria bear for their conduct?

In domestic law, such scenarios would likely be addressed through the concept of complicity. International law, however, has no general rule providing for state responsibility for complicity in the wrongful conduct of non-state actors. Instead, these situations tend to be subsumed under one of the two categories discussed above,[6] inviting starkly different responses. At one end of the spectrum, it appears to be undisputed that in many cases of such complicity, state responsibility can be established on the basis of the state's violation of a duty to protect.[7] At the other end of the spectrum, where the ICTY and regional human rights courts have set such a low threshold for attributing the conduct of private actors as to encompass factual circumstances that are arguably better described as complicity,

4 See e.g. W. Ross, 'Boko Haram crisis: Among the vigilantes of northeast Nigeria', *BBC News*, 3 December 2014, http://www.bbc.co.uk/news/world-africa-30291040; 'Nigerian vigilantes aim to rout Boko Haram', *Al-Jazeera*, 31 May 2014, https://www.aljazeera.com/indepth/features/2014/05/nigerian-vigilantes-aim-rout-boko-haram-20145261237584448 54.html; F. Chothia, 'Boko Haram crisis: How have Nigeria's militants become so strong?', *BBC News*, 26 January 2015, http://www.bbc.co.uk/news/world-africa-30933860; ICG Africa Report No. 244, *Watchmen of Lake Chad: Vigilante Groups Fighting Boko Haram*, 23 February 2017, https://www.crisisgroup.org/africa/west-africa/nigeria/244-watchmen-lake-chad-vigilante-groups-fighting-boko-haram, 4-12; N. Shotayo, 'Zamfara Government distributes 850 motorcycle to civilian JTF', *Pulse*, 5 December 2018, https://www.pulse.ng/news/local/zamfara-government-distributes-850-motorcycle-to-civilian-jtf/wlw63rb.

5 Such as recruitment of children, torture and extrajudicial killings: see 'Nigeria's vigilantes take on Boko Haram', *BBC News*, 24 July 2013, http://www.bbc.co.uk/news/world-africa-23409387; HRW, *World Report 2015: Nigeria*, https://www.hrw.org/world-report/2015/country-chapters/nigeria; ICG, *Watchmen of Lake Chad*, 14-16.

6 Cf. E. Savarese, 'Issues of Attribution to States of Private Acts: Between the Concept of *De Facto* Organs and Complicity' (2005) 15 *Italian Yearbook of International Law* 111, at 112. Sometimes even both, see e.g. IACtHR, *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis)* v. *Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 20 November 2013, Series C, No. 270, para. 281; cf. the ambiguity of the *Poggioli Case (Italy* v. *Venezuela)*, 1903, 10 UNRIAA 669, at 689-690.

7 See note 9 and accompanying text below; cf. the text accompanying Chapter 4, note 127 above.

this has been criticized as unduly lowering the threshold for attribution as articulated by the ILC and the ICJ.[8]

Seeking to assuage the fears of those who are concerned that the ICJ's high attribution threshold(s) would allow states to escape responsibility, authors tend to note that even if the state's involvement in the conduct of the private actor falls short of 'effective control' or 'complete dependence', the state can still be held responsible for having violated its duty to protect.[9] However, reliance on duties to protect as a 'fallback' option has two major shortcomings. Firstly, while it can indeed result in establishing the responsibility of the state in many situations, it is unable to capture *all* such scenarios, particularly in an extraterritorial context (this may in fact be the reason why the ICJ relied on the rather novel criterion of 'capacity to influence' to find that Serbia violated its duty to prevent genocide).[10] Admittedly, in such extraterritorial situations, the state may still be held responsible for the role of *its own organs* in violating the duty of non-intervention, as illustrated by the *Nicaragua* case,[11] or in breaching other extraterritorially applicable obligations, such as those under human rights law. But the question of non-intervention may fall outside the scope of the court's jurisdiction, as in *Bosnian Genocide* or at regional human rights courts; or it may be the case that the third state was not directly involved through its organs in the particular event, as in *Catan*. Secondly, even where courts are able to adjudicate on these rules, finding a violation of a duty to protect or the obligation of non-intervention may avoid the state escaping responsibility *completely*, but still falls short of accurately capturing the full extent of the state's involvement. In this regard, it is frequently pointed out that a finding of complicity-based responsibility (including through attribu-

8 See Savarese, '*De Facto* Organs and Complicity', 120; J. Cerone, 'Re-Examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 *ILSA Journal of International & Comparative Law* 525, at 529-532; M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015), 194-198; S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493, at 508-511, 517; cf. M. Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011), 50. See also states' positions on the IACtHR's and ECtHR's jurisprudence, discussed in Section 4.5.3 above. But see generally to the contrary D. Amoroso, 'Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law' (2011) 24 *Leiden Journal of International Law* 989.

9 Cerone, '"Complicity" in the Context of Human Rights Violations', 531-533; M. Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669, at 694. On the limitations and shortcomings of this conceptualization, see Amoroso, 'Complicity as a Criterion of Attribution', 991-992.

10 See Chapter 3, note 110 above.

11 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, paras. 226-282, particularly paras. 239-242.

tion) is significant both for its symbolic weight – due to the moral stigma it carries – and for practical reasons, as it may affect the extent of reparation awarded to the applicant.[12]

Simply put, the existing legal categories cannot adequately capture the phenomenon of state support for private actors who engage in wrongful conduct.[13] Reducing such support to a violation of the state's duty to protect may be uncontroversial, but it amounts to holding the state responsible for something *less* than its actual role. Using such support as a basis for attribution, meanwhile, can result in the state being held responsible for conduct that was not carried out on its behalf. This would contravene the basic principle that 'a State is responsible only for its own conduct',[14] as the state would be found responsible for *more* than 'its own conduct'. At the same time, where it is not possible to establish a violation of the duty to protect, rejecting attribution leads to the state escaping responsibility altogether (unless there is a specific primary rule prohibiting state complicity in the particular type of private conduct).

In order to close this responsibility gap, a general rule prohibiting state complicity in the wrongful conduct of non-state actors should be developed in international law. There is a particularly strong argument to be made for such a rule in the fields of international human rights and humanitarian law, for two reasons. Firstly, these are the areas of law that are already considered applicable to certain types of private actors: IHL is binding on non-state armed groups participating in international or non-international armed conflicts; human rights law is widely regarded as applicable to armed groups and secessionist entities, at least when they effectively control territory.[15] If a state is not permitted to aid or assist another state in violating international law, it would make little sense to allow a state to aid or assist a different actor – a non-state armed group – in violating international

12 See e.g. A. Nollkaemper, in 'Complicity in International Law: Some Lessons from the U.S. Rendition Program' (2015) 109 *Proceedings of the ASIL Annual Meeting* 177, at 180; V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Oxford: Hart, 2016), 323-324; N.H.B. Jørgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 *Chinese Journal of International Law* 11, at 33-34. See also Chapter 4, notes 172-173 and accompanying text above on the non-pecuniary damages awarded by the IACtHR, differing significantly depending on whether the violation was of a duty to protect or duty to respect.

13 On what such wrongful conduct would encompass, see notes 52-53 and accompanying text below.

14 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, para. 406.

15 See Section 1.2.3.3 above.

law.[16] Secondly, and just as importantly, a prohibition of complicity could be 'read into' the treaty provisions on states' general obligations to respect and protect human rights,[17] and to 'respect and ensure respect for' IHL.[18] Given that states have not only negative, but also positive obligations of a general scope in these fields of law, a rule against complicity may be seen as implied, simply covering the ground *between* these two types of obligations.[19]

Even so, there is a further – practical – difficulty in bringing such cases to be adjudicated by international courts. In the ILC's construction of complicity, '[t]he wrongfulness of the aid or assistance given by the [assisting state] is dependent, *inter alia*, on the wrongfulness of the conduct of the [principal]',[20] but the existing jurisdictional limitations of human rights courts do not allow holding non-state actors directly responsible.[21]

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16 See ILC, *Draft articles on the responsibility of international organizations, with commentaries*, in: *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, 46 (hereinafter DARIO Commentary), Commentary to Part Two, Chapter IV, para. 1 and especially to Article 14, para. 1, in the same vein. See also Jackson, *Complicity in International Law*, 12-17 on 'the wrongness of complicity'; and Lanovoy, *Complicity and its Limits*, 12, noting that: '[T]he duty not to knowingly facilitate the wrongful act is inherent to the respect of every international obligation […]. No actor should be permitted to knowingly support another in breaching the latter's obligations.' Article 16(b) ARSIWA – which serves as the model for such a complicity rule – requires that the principal's conduct would also be wrongful if committeed by the assisting state. But this is unlikely to pose a problem in international human rights and humanitarian law, where states tend to have more extensive obligations than non-state actors; and, as Special Rapporteur James Crawford notes in *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014), at 410, Article 16(b) 'says nothing of the identity of norms or sources', i.e. the principal and the assisting state do not necessarily have to be bound by *the same* obligation.

17 See Jackson, *Complicity in International Law*, 198; on the relevant treaty language, see Section 3.3.3.1 above.

18 See e.g. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31, Article 1; International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd ed., Cambridge: Cambridge University Press, 2016), para. 120: 'One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties. This view was already expressed in Pictet's 1952 Commentary. Developments in customary international law have since confirmed this view.' See also *ibid.*, para. 126, noting that 'according to the ICRC study on customary international humanitarian law, the obligation to respect and ensure respect is not limited to the Geneva Conventions but to the entire body of international humanitarian law binding upon a particular State.'

19 Cf. Jackson, *Complicity in International Law*, 198-199, in respect of human rights treaties.

20 ARSIWA Commentary to Article 16, para. 11.

21 The ICJ faces the same limitations as well; the discussion focuses on human rights courts simply because that is where such cases are much more likely to be brought, given that – unlike the ICJ – they are open to individuals.

Courts thus may not be able to make a finding of wrongfulness regarding the principal's conduct.[22] This means that for the case to proceed, the state's complicity would in a sense have to be 'detached' from the principal's act.[23] Still, in order to hold the state responsible, the court would in any case first need to (and arguably could) identify an impermissible interference with the victim's rights under the relevant convention – in other words, identify *what the state contributed to*. Such situations are not entirely unknown to human rights courts: in cases concerning duties of protection, the state's conduct is likewise assessed in relation to conduct by a private actor or even, in some cases, unknown perpetrators. For instance, in order to conclude that the state has failed in its duty to prevent inhuman and degrading treatment carried out by a private individual (e.g. in the context of domestic violence), the court has to first conclude that the victim has indeed been subjected to inhuman and degrading treatment.[24] Admittedly, the 'detachment' necessary to make such a rule workable in practice is not ideal or unproblematic. But if it could take hold despite these conceptual difficulties, such a 'detached' complicity rule would still preferable to relying on the existing categories, as it could capture the gradation in the state's involvement more accurately and help ensure that states do not escape responsibility.

In light of this, the purpose of this chapter is to shed light on what a rule prohibiting state complicity in the wrongful conduct of non-state actors would entail. To do so, the chapter provides a brief history of the concept of state complicity in the conduct of non-state actors, then examines the main elements of a possible state/non-state complicity rule, drawing on the law governing inter-state complicity. Given that no such state/non-state rule exists as of yet, the aim of this chapter is not to provide an in-depth analysis

22 There are two main obstacles to a finding of wrongfulness: one substantive ('Is the non-state actor bound by the relevant human rights treaty in the first place?'), the other procedural ('Can that non-state actor be a respondent before the court? If not, does a *Monetary Gold*-type rule apply?'). On substance, the difficulty is that non-state actors are not parties to the treaty and their human rights duties may best be seen as customary instead – although the two may coincide. On procedure, the crucial question is to what extent the *Monetary Gold* rule is linked to sovereignty and whether it may also apply to non-sovereign actors with international legal personality. In the *Monetary Gold* case, the ICJ held that it could not proceed with a case in the absence of a third party (Albania), where 'Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision'; see *Monetary Gold Removed from Rome in 1943* (Italy *v.* France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment of 15 June 1954, 1954 ICJ Reports 19, at 32; see also ARSIWA Commentary to Article 16, para. 11.

23 This is likely why Jackson speaks not of a complicity rule as such, but rather of a (non-derivative) duty of non-participation, see *Complicity in International Law*, 128, 198-199.

24 Similarly, in *Bosnian Genocide* – although that was based on a specific primary rule prohibiting complicity – the ICJ established that 'acts of genocide' had been 'committed by members of the VRS in and around Srebrenica from about 13 July 1995' (para. 297) and examined Serbia's possible complicity without (members of) the VRS being party to the proceedings.

of every possible facet of such a rule. Rather, the focus is on how such a rule of complicity would relate to – and be delineated from – responsibility through a duty to protect on the one hand, and attribution on the other. This latter inquiry then leads to the crucial question whether and to what extent – in the absence of a state/non-state complicity rule – complicity can serve as the basis for attribution.

6.2 Between the Duty to Protect and Attribution: A Brief History

The origins of state complicity in the conduct of private actors can be traced back to the law on injuries to aliens. In the late nineteenth and early twentieth century, jurisprudence had frequent (though not universal) recourse to the notion of 'implied complicity' – also known as the 'theory of complicity' or 'condonation theory' – whereby the state's failure to prevent a certain act or punish its perpetrators was deemed to constitute complicity in the catalyst event itself.[25] This approach had a practical effect on determining reparations, which were calculated on the basis of the damage caused by the private actor, rather than the state's own failure to prevent or punish.[26] In other words, while the criteria of this rule were hardly different from those of the duty to protect, the consequences were such as to equate this implied complicity with attribution.[27]

Although the theory of complicity held traction for a while, it was eventually challenged and gradually abandoned. The turning point in this process was the 1925 award in the *Janes* case, where the United States claimed $25,000 on the basis of Mexico's alleged failure to apprehend and punish the private individual who shot and killed Byron Everett Janes, the

25 See generally e.g. E.M. Borchard, 'Important Decisions of the Mixed Claims Commission United States and Mexico' (1927) 21 *American Journal of International Law* 516; J.L. Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 *British Yearbook of International Law* 42; T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart, 2006), 14-23. For more on the 'theory of complicity', see O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 257, at 275-277. *Laura M. B. Janes et al. (U.S.A.)* v. *United Mexican States*, Award of 16 November 1925, 4 UNRIAA 82, para. 19, speaks of '*serious* lack of diligence in apprehending and/or punishing culprits' (emphasis added).

26 See e.g. *Cotesworth and Powell (Great Britain)* v. *Colombia*, Award of 5 November 1875, in: J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been Party* (6 vols., Washington, DC: Government Printing Office, 1898), vol. II, 2050, at 2082.

27 Indeed, the two were so closely intertwined that when Ago examined whether complicity could form a basis for attribution, he drew special attention to the importance of distinguishing between findings on responsibility and damages, see ILC, *Fourth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur – The internationally wrongful act of the State, source of international responsibility (continued)*, 30 June 1972 and 9 April 1973, UN Doc. A/CN.4/264 and Add.1, in: *Yearbook of the International Law Commission*, 1972, vol. II, 71 (hereinafter *Ago's Fourth Report*), para. 67.

superintendent of a mining firm.[28] The US-Mexico General Claims Commission rejected the implied complicity theory, holding that non-punishment could not be equated with approval, and still less with complicity, and 'even if nonpunishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands.'[29] Accordingly, the commission proceeded to award damages in the amount of $12,000 as satisfaction 'for the personal damage caused by the nonapprehension and nonpunishment of the murderer of Janes', rather than the murder itself.[30]

Nonetheless, the Claims Commission did accept that '[a] reasoning based on presumed [i.e. implied] complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so.'[31] The reference to 'some reason constituting [the state's] liability' suggests that complicity could not be presumed in *every* case where the government 'knows of an intended injurious crime [and] might have averted it'. Indeed, such a presumption would have limited the state's responsibility to its own conduct only in cases where it *should have known* of the catalyst event; all other violations of its duties of prevention would have been subsumed under the category of implied complicity. The Commission unfortunately did not elaborate further on what that reason constituting state liability could be, leaving the precise contours of such a prevention-based 'presumed complicity' undefined.

Still, the Commission's reasoning was well received, and even won the praise of supporters of the implied complicity theory, with Edwin Borchard describing the approach in *Janes* as 'useful', 'because it is analytically correct and because it recognizes various degrees of government delinquency'.[32]

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28 *Janes*, paras. 1-4. Becker, *Terrorism and the State*, at 17, describes the case as a 'watershed'. Other case law had also articulated that the state is only responsible only for its own conduct, and not of private individuals; see most notably the case of *British Property in Spanish Morocco*, in the French original *Affaire des biens britanniques au Maroc espagnol* (Espagne *c.* Royaume-Uni), Award of 1 May 1925, 2 UNRIAA 615, at 641-642, 709-710; see also *Ago's Fourth Report*, para. 81, as well as para. 90 on some earlier case law pertaining to 'riots, revolts and disturbances in general'. Nonetheless, *Janes* is singled out here because it was an express rejection of the implied complicity theory.

29 *Janes*, para. 20.

30 *Ibid.*, para. 26.

31 *Ibid.*, para. 20 (emphasis in original).

32 Borchard, 'Important Decisions', 517.

But while the holding in *Janes* was followed in several other cases,[33] paving the way for the gradual abandonment of implied complicity, this recognition of 'various degrees of government delinquency' was not adopted in subsequent jurisprudence. Instead of drawing a distinction between non-prevention and non-punishment, later cases simply framed the issue in terms of the state's duty to protect, with no reference to complicity.[34]

Later on, the issue of state complicity in the conduct of private actors was addressed twice during the ILC's work on state responsibility. The work of the first Special Rapporteur, Francisco García Amador, included a draft article on 'the connivance or complicity of the authorities of the State in the injurious acts of private individuals' – not as a separate form of responsibility, but as an 'aggravating circumstance' for the purposes of determining reparation.[35] He stressed that such connivance or complicity 'is not the same thing as the failure of the authorities to exercise "due diligence"', but rather 'an attitude utterly at variance with that which the competent organs and authorities would be expected to observe'.[36] Although it is not entirely clear what he meant by this, an overall reading of his comments suggests that he envisaged it to be an intentional and/or active role by the state, as opposed to 'manifest negligence in preventing or punishing the injurious acts.'[37] In any event, as the Commission never discussed this report, there was no follow-up on these ideas.[38]

When Roberto Ago took over the role of Special Rapporteur, he looked at the question of complicity anew, and decided to examine whether the state's complicity in the conduct of non-state actors could constitute a sufficient basis for attribution. He had no objections in principle to such a ground for attribution, and even noted that attribution would resolve the

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33 At the US-Mexico Claims Commission, see *George Adams Kennedy (U.S.A.)* v. *United Mexican States*, Award of 6 May 1927, 4 UNRIAA 194, para. 8; *H.G. Venable (U.S.A.)* v. *United Mexican States*, Award of 8 July 1927, 4 UNRIAA 219, paras. 23-24; *Louise O. Canahl (U.S.A.)* v. *United Mexican States*, Award of 15 October 1928, 4 UNRIAA 389, at 391; *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.)* v. *United Mexican States*, Award of 2 April 1929, 4 UNRIAA 440, at 443-444; *Elvira Almaguer (U.S.A.)* v. *United Mexican States*, Award of 13 May 1929, 4 UNRIAA 523, at 529. For cases before other claims commissions, see *Ago's Fourth Report*, paras. 86-89.

34 See the cases cited in *Ago's Fourth Report*, paras. 86-89.

35 ILC, *International Responsibility: Third Report by F.V. García Amador, Special Rapporteur*, 2 January 1958, UN Doc. A/CN.4/111, in: *Yearbook of the International Law Commission*, 1958, vol. II, 47, at 50.

36 *Ibid.*, 54, para. 22.

37 *Ibid*. This is further supported by his description of connivance' as the 'deliberate and intentional failure to prosecute or to punish' (*ibid.*) and his remark that 'complicity depends on the degree of material or effective participation imputable to the authorities' (*ibid.*, para. 23).

38 See ILC, *First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur – Review of previous work on codification of the topic of the international responsibility of States*, 7 May 1969 and 20 January 1970, UN Doc. A/CN.4/217 and Add.1, in: *Yearbook of the International Law Commission*, 1969, vol. II, 125, paras. 57-77.

problem of private actors lacking international legal personality.[39] In the end, however, given the decline of the 'theory of complicity', international practice did not lend enough support to such a rule, leading Ago to conclude that states can only be held responsible for their own failure to prevent or punish in relation to catalyst events carried out by private actors.[40]

In sum, while the question of state complicity in the conduct of private actors has been raised from time to time in international law, no rule of responsibility has yet been developed to address this issue. Early jurisprudence suggests that a finding of complicity would require something more than a mere failure to prevent or punish, but it is unclear what that additional element would be, making it difficult to determine the possible content of such a rule. These problems are further compounded by the fact that the question of complicity has been strongly intertwined with that of reparation. The most nuanced treatment of complicity and reparations was provided by the *Janes* case, but the distinctions offered in the award were not taken up by later tribunals, and a general rule remains to be formulated.

6.3 Article 16 ARSIWA and Its (Possible) Non-State Analogy

While there is no *general* prohibition on state complicity in wrongful conduct by private actors,[41] there are certain instances where *specific* rules of international law prohibit state/non-state complicity. Such a rule formed (partly) the subject of the 2007 *Bosnian Genocide* case, in which the ICJ had to determine whether Serbia had been complicit in the Srebrenica genocide committed by the Republika Srpska and the VRS.[42] Rather than investigating how (if at all) 'complicity in genocide' is defined within the specific context of the Genocide Convention, the Court immediately turned to the inter-state complicity rule in Article 16 ARSIWA, holding that it saw 'no reason to make any distinction of substance' between the two.[43] In other words, the ICJ essentially equated complicity under the Genocide Convention with complicity as defined by Article 16 ARSIWA.

The ease with which the Court equated state/non-state complicity with Article 16 in a specific context suggests that a possible *general* rule on this subject is also likely to be modeled on the inter-state complicity rule in that

39 *Ago's Fourth Report*, para. 64.

40 *Ibid.*, paras. 61-146, in particular para. 70.

41 On what such wrongful conduct would entail, see notes 52-53 and accompanying text below.

42 *Bosnian Genocide*, paras. 418-424. In fact, Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277, refers to states' duty to prevent and punish genocide (including complicity in genocide); this duty was interpreted by the ICJ to include a prohibition on states themselves to commit (or be complicit in) genocide, see *Bosnian Genocide*, paras. 150-179.

43 *Ibid.*, para. 420.

Article.[44] This analogy is further reinforced by the fact that *state* complicity raises the same issues of (organizational, rather than individual) responsibility, regardless of the identity of the principal actor.[45] This reasoning was also explicitly acknowledged by the ILC in the formulation of Article 58 of the Articles on the Responsibility of International Organizations, concerning state complicity in an internationally wrongful act of an international organization.[46]

With Article 16 ARSIWA as the model, the next step is to examine what the requirements of this Article are for a finding of responsibility for 'aid and assistance', and how these could apply to a state/non-state scenario. Article 16 provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State.

This complicity[47] rule captures a relatively recent development of international law, with virtually all of the supporting practice coming from the post-World War II era.[48] Nonetheless, it was proclaimed to be customary law in the *Bosnian Genocide* case by the ICJ.[49]

Admittedly, compared with complicity in the conduct of a state or an international organization, a state/non-state complicity rule faces an additional obstacle: responsibility for complicity is dependent on the commission

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44 See Jackson, *Complicity in International Law*, 214-215. The application of Article 16 ARSIWA by analogy to state complicity in the conduct of private actors has also been put forward by A. Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations', in: L. Bomann-Larsen & O. Wiggen (eds.), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity* (Tokyo: United Nations University Press, 2004), 50, at 66-68; and R. McCorquodale & P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598, at 611-615.

45 See Crawford, *State Responsibility*, noting at 411 (footnote omitted) that '[i]f, as was noted in *Bosnian Genocide*, ancillary responsibility as between states may be considered a customary norm, there is no reason why the same logic should not apply as between a state and any other actor on the international plane.'

46 DARIO Commentary to Article 58, para. 3; see also Crawford, *State Responsibility*, 411-412.

47 As Special Rapporteur Crawford notes in *State Responsibility*, 399, Article 16 'seeks to regulate *complicity* and is often referred to by this rubric, although the term itself does not appear in order to prevent the drawing of parallels with municipal criminal law.' (Emphasis in original, footnotes omitted.)

48 See e.g. ILC, *Seventh Report on State responsibility by Mr. Roberto Ago, Special Rapporteur*, 29 March, 17 April and 4 July 1978, UN Doc. A/CN.4/307 and Add.1-2, in: *Yearbook of the International Law Commission*, 1978, vol. II, Part One, 31, para. 73; J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *British Yearbook of International Law* 77, 81-107; see also Jackson, *Complicity in International Law*, 150-153.

49 *Bosnian Genocide*, para. 420.

of an internationally wrongful act by the principal actor,[50] for which the latter must be capable of having rights and obligations, i.e. legal personality, under international law. This leads to a rather odd situation: conceptually, complicity is situated *between* duties to protect and attribution in terms of the degree of the state's involvement (and thus the degree of its responsibility), but responsibility for complicity requires that the non-state actor have international legal personality, when neither of the other two bases of responsibility include such a requirement.[51] Yet at the same time, without the capacity to hold rights and obligations, how is it possible to determine *which* non-state conduct states should refrain from aiding or assisting? In general, this problem can be resolved by formulating a rule by recourse to Article 16(b) ARSIWA, requiring the state not to aid or assist any conduct which 'would be internationally wrongful if committed by [the assisting] State'. This would rest on the grounds that 'a State cannot do by another what it cannot do by itself'.[52] Nonetheless, inasmuch as international legal personality remains necessary for state/non-state complicity, for the purposes of the present chapter it is simply noted that states may only be complicit in the conduct of non-state actors *to the extent* that such actors may be capable of holding rights and obligations.[53]

What are the main features of Article 16 ARSIWA, and how would they apply in the context of state complicity in the conduct of non-state actors? As noted above, since no rule of state/non-state complicity is in place as of yet, the following sections focus on determining the outer limits of complicity on either side: the elements which set complicity apart from duties to protect on the one hand, and attribution on the other. As regards duties to protect and complicity, an easy way to distinguish between the two is by limiting complicity to cases of *action*; and inasmuch as the possibility of complicity by omission can (and should) be admitted, this can be distinguished from a violation of a duty to protect through the existence or lack of intent. As for complicity and attribution, the former rests on assistance, the latter on agency. Still, in the absence of a general state/non-state complicity rule, an

50 See ARSIWA Commentary to Article 16, para. 11.

51 In the case of the duty to protect, the conduct of the private actor is merely a 'catalyst' for the state's conduct, and it is only the latter which is adjudged for compliance with international law; as for attribution, the very function of it is to transform the conduct of the private actor into state conduct, i.e. the conduct of an existing international legal person.

52 ARSIWA Commentary to Article 16, para. 6. See also on a more general level Jackson, *Complicity in International Law*, 12-17. This fits particularly well with those explanations of private actors' obligations under international law which trace the legal basis of such obligations to the state's own commitments, see e.g. J.K. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, at 445-449.

53 A discussion of non-state actors' international legal personality is beyond the scope of this dissertation. For a similar approach, see e.g. McCorquodale & Simons, 'Responsibility Beyond Borders', 613-614.

alternative dividing line is offered by the fact that Article 16 ARSIWA does not require the complicit conduct to be an *essential* element in the principal's wrongful act. Accordingly, the dissertation argues that where the state's conduct goes beyond the conditions of Article 16, constituting a *sine qua non* element in the private actor's conduct, it can serve as a basis for attribution.

6.3.1 Distinguishing Complicity from Duties to Protect: The Problem of Complicity by Omission

In seeking to distinguish complicity in genocide from the duty to prevent genocide, the ICJ pointed to two factors underpinning such a distinction in *Bosnian Genocide*. Firstly, the Court noted that 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators', concluding that 'while complicity results from commission, violation of the obligation to prevent results from omission'.[54] Secondly, for a finding of complicity, the ICJ required certainty of knowledge 'that genocide was about to be committed or was under way', whereas in the case of the duty to prevent genocide, it was sufficient 'that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.'[55]

Turning to the first of these distinctions, is complicity indeed limited to cases of 'some positive action'? Neither the text of Article 16 ARSIWA, nor the Commentary specifies whether the aid or assistance in question needs to be a positive action or may also be the lack thereof. Arguably, the phrases 'aid or assistance' and 'doing so' may be interpreted as requiring a positive act; but the lack of explicit specification could just as well suggest that complicity may equally take the form of an act or an omission, in line with the general rule articulated in Article 2 ARSIWA.[56] And while the judgment in *Bosnian Genocide* has lent considerable weight to the argument of limiting complicity to positive acts, this continues to be frequently challenged in the literature.[57] More importantly, though, within the context of inter-state complicity, it appears that at least in some cases, the majority of states support the idea that action, rather than omission, is required for

54 *Bosnian Genocide*, para. 432.

55 *Ibid*.

56 See also H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011), 226-227.

57 See Crawford, *State Responsibility*, 403-405, affirming the ICJ's position; but see, to the contrary, e.g. Lanovoy, *Complicity and its Limits*, 96-97, 165-185; Jackson, *Complicity in International Law*, 155-157, 210-211; P. Palchetti, 'State Responsibility for Complicity in Genocide', in: P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009), 381, at 385-386. Aust, argues in *Complicity*, at 229 that 'complicity through omission may also become relevant if there is already a duty to act incumbent upon the potentially complicit State', but his argument does not sufficiently account for the need to distinguish between the duty to protect and complicity; see Crawford, *State Responsibility*, 404-405, challenging his argument.

complicity.[58] Given this practice, it is likely that a notion of complicity which would include omission would face just as much, if not more, resistance from states in the state/non-state context.

Limiting complicity to positive action offers an easy way of distinguishing it from duties to protect, but excludes the possibility of complicity by omission.[59] Admittedly, most cases of complicity will involve an action by the complicit actor. Still, when it comes to omissions, there is a qualitative difference between an omission resulting from (unintentional) negligence, and a deliberate decision to refrain from action.[60] This difference, however, may be difficult to capture: for instance, inadequate response by the state's armed forces to an armed group operating in its territory and targeting a neighboring state can be seen as simply the failure to take proper action (a violation of the duty of vigilance), but it can also be seen as – at least tacitly – granting use of that territory to the group (complicity by omission).[61] If complicity may also take the form of omission, how can one distinguish between duties to protect and complicity? The examples above already suggest an answer, namely the intent of the complicit state (an issue deliberately left unaddressed by the ICJ in *Bosnian Genocide*), which is closely related to its knowledge of the relevant circumstances (the second distinctive feature cited by the Court).

Probably the single most contentious issue regarding aid or assistance in Article 16 ARSIWA is whether the complicit state must *intend* to aid or assist the principal actor in the commission of the wrongful act, or whether responsibility may also be established on the basis of knowledge. On the one hand, the text of Article 16 appears to provide for two criteria: knowledge and the 'double obligation requirement'.[62] On the other hand, the Commentary explicitly sets *three* criteria for responsibility to be established under the Article.[63] The first and third of these correspond to the text of Article 16. The second one, however, stipulates that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act', and that there can be no finding of responsibility 'unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[64]

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58 See Aust, *Complicity*, 209.

59 See Jackson, *Complicity in International Law*, 210: 'The simplicity of the court's approach, though not unappealing, should be resisted.'

60 Cf. the examples cited *ibid.*, at 41 and 156-157 (although the latter refers to refraining from acting in the face of specific knowledge, without discussing intent).

61 See Palchetti, 'Complicity in Genocide', 385-386; cf. S. Sur, 'Sur les « États défaillants »' (2005) 28 *Commentaire* 891.

62 Articles 16(a) and (b) ARSIWA; on the latter requirement, see Jackson, *Complicity in International Law*, 162-167.

63 ARSIWA Commentary to Article 16, para. 3.

64 *Ibid.*, para. 5. Although the Commentary refers to a wrongful *act*, this cannot be seen as evidence of complicity only taking the form of action, not omission. This is simply a shortening of 'internationally wrongful act', and as the Commentary to Article 1 ARSIWA explains at para. 8, 'the term "act" is intended to encompass omissions'.

This discrepancy has been noted by several authors, prompting a variety of responses. Some have attempted to reconcile the Article's text and its Commentary by arguing that the Commentary is meant to indicate a requirement that the complicit state must (generally intend to) aid or assist the receiving state with the knowledge that this aid or assistance will be used for a wrongful purpose, but it need not specifically intend for the wrongful act to happen.[65] The following example may illustrate the difference between the two types of intent. In the case of general intent, it is only required that the state intends to assist a paramilitary group through the provision of weapons – without necessarily intending for those weapons to be used to commit human rights abuses, but with the knowledge that they will in fact be used to do so. In the case of specific intent, it must be shown that the state provided the weapons with the intent that they be used to commit human rights abuses. But even those authors who do mention a *general* intent under this interpretation (and not all of them do) seem to consider it implied in the provision of aid or assistance itself.[66] In much the same conciliatory vein, it has also been suggested that the Commentary's requirement is meant to ensure that the aid or assistance in question constitutes material contribution to the wrongful act.[67] While such interpretations requiring (general intent or at least) knowledge may reasonably explain the use of the term 'with a view to facilitating', it is difficult – if not impossible – to reconcile them with the Commentary's explicit reference to intent 'to facilitate the occurrence of the wrongful *conduct*', as the latter indicates a requirement of *specific* intent.[68] Others have argued for an accommodating interpretation by suggesting that the ILC appears to have 'wanted Article 16 to be interpreted narrowly so that the "knowledge" element turns into a requirement of wrongful intent.'[69] This is similarly difficult to reconcile with the Commentary, though, given the latter's treatment of intent as a condition *additional* to that of knowledge. Yet another group of authors, viewing the discrepancy as an open contradiction, have framed the issue as an either/or question of which instrument should prevail: the Articles themselves, or the Commentary. When faced with such a binary choice,

65 See Quigley, 'Complicity in International Law', 110. For a more recent articulation of this argument, building on Quigley, see Palchetti, 'Complicity in Genocide', 389-390. See also Milanović, 'State Responsibility for Genocide: A Follow-Up', 683, on the distinction between general and specific intent.

66 See Milanović, 'State Responsibility for Genocide: A Follow-Up', 683; cf. Palchetti, 'Complicity in Genocide', 389-390, who is not as explicit on this issue, but could be read the same way. Quigley, 'Complicity in International Law', 110, does not explicitly mention general intent, focusing on knowledge instead.

67 A. Boivin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' (2005) 87(859) *International Review of the Red Cross* 467, at 471; the required degree of contribution is addressed below in Section 6.3.2.

68 ARSIWA Commentary to Article 16, para. 5 (emphasis added); see also *ibid.*, para. 9.

69 G. Nolte & H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 *International and Comparative Law Quarterly* 1, at 14.

authors favor following the text of the Articles.[70] As Judge – and former ILC Special Rapporteur on the responsibility of international organizations – Giorgio Gaja points out:

> While commentaries are generally helpful in the interpretation of ILC articles, they are not meant to introduce additional rules which have no basis in the article they refer to, nor should they endorse a meaning that is incompatible with the text of the articles. […] As a general rule, giving greater weight to the text of the articles where there are discrepancies with the commentaries reflects the much more detailed attention that the ILC devotes to the adoption of the articles.[71]

As an example of such (asserted) incompatibility and the prevalence of the text of ILC articles over their commentaries, Gaja explicitly cites Article 16 ARSIWA.[72] In sum, whether by means of reconciliation or prevalence, most – though not all – interpretations of the ILC's work support a standard of knowledge (or implied general intent) over (specific) intent.[73]

Perhaps the most prominent argument in favor of an intent requirement is that it helps distinguish between regular international cooperation and complicity in a wrongful act, and doing away with such a requirement would jeopardize such cooperation, as it would prompt states to limit their exposure.[74] Nonetheless, this argument has been contested on the basis that the requirement of knowledge provides sufficient grounds for distinction.[75]

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70 See G. Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2016) 85 *British Yearbook of International Law* 10, at 19-20; Jackson, *Complicity in International Law*, 159-162.

71 Gaja, 'Interpreting Articles', 19-20; cf. Jackson, *Complicity in International Law*, 161: 'As a matter of interpretation, the text itself should be the starting point.'

72 Despite holding that in general the text of the Articles themselves should prevail, Gaja, 'Interpreting Articles', 20, does allow for an exception: where the summary record of the Commission's plenary session shows the ILC adopting the commentary despite being 'aware of a possible discrepancy', he notes that 'this would strengthen the conclusion that the [commentary] prevails'. However, he also goes on to point out that the records indicate no such awareness in the case of Article 16 ARSIWA.

73 In addition to the sources cited above, see generally B. Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue belge de droit international* 370; see also Quigley, 'Complicity in International Law', 108-120; Jackson, *Complicity in International Law*, 159-162, 212-213; Lanovoy, *Complicity and its Limits*, 101-103, 218-240 (based not only on the ILC's work). For a contrary position, see Aust, *Complicity*, 230-249 (although he allows that '[t]he intent standard of Article 16 ASR could be subject to modifications under certain conditions', *ibid*., 245); as well as C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in: Crawford, Pellet & Olleson, *The Law of International Responsibility*, 281, at 286, who simply takes the requirement of intent for granted, based partly on the ARSIWA Commentary (without considering the discrepancy with the text of Article 16) and partly on the assumption that the ICJ set such a condition in *Bosnian Genocide*.

74 See Nolte & Aust, 'Equivocal Helpers', 14-15; Aust, *Complicity*, 239.

75 See Jackson, *Complicity in International Law*, 161; Lanovoy, *Complicity and its Limits*, 235.

Views also diverge on what, if any, common or majority position can be distilled from states' comments on the ILC's work.[76]

As for the views articulated in international jurisprudence on this question, all that can be safely said is that none of the cases point unambiguously to a requirement of wrongful intent. The ECtHR's jurisprudence on (inter-state) complicity in the context of so-called 'extraordinary rendition' cases, for example, does not discuss the issue of intent at all. This suggests that the Court either did not consider intent to be a requirement for establishing responsibility, or that the necessary intent was implied.[77] In the *Bosnian Genocide* case at the ICJ, meanwhile, the question of intent was further complicated by the fact that unlike most obligations under international law, the prohibition of genocide requires the existence of *specific* intent to prove a violation: it can only be established that genocide has indeed taken place if it is proven that the perpetrator(s) have acted with the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[78] In examining the question whether the complicit state needs to have shared this specific intent in order to be found responsible, the ICJ held that the conduct of organs or persons can only be classified as complicity if 'at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.'[79] In other words, the Court required the complicit actor to *at least* have knowledge of the principal's intent – and as the ICJ found the condition of knowledge unmet, it did not proceed to determine whether the complicit state needed to share the principal's intent, leaving

76 See Aust, *Complicity*, 237-238, arguing that 'more States wished to have the intent requirement strengthened than weakened' (footnotes omitted); Lanovoy, *Complicity and its Limits*, 235, noting that '[i]t is difficult to strike a balance between knowledge and intent through a simple mathematical equation between the numbers' of states and international organizations favoring intent, knowledge or 'constructive knowledge or deleting any cognitive requirement altogether.'

77 The Court speaks of the 'acquiescence or connivance' of the respondent states, which in the French version of the judgments is rendered as 'l'approbation formelle ou tacite', i.e. *the formal or tacit approval* of the state authorities in question: see ECtHR, *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Grand Chamber, Judgment of 13 December 2012, para. 206; ECtHR, *Al Nashiri* v. *Poland*, Application No. 28761/11, Fourth Section, Judgment of 24 July 2014, paras. 452, 517; ECtHR, *Husayn (Abu Zubaydah)* v. *Poland*, Application No. 7511/13, Fourth Section, Judgment of 24 July 2014, paras. 449, 512; ECtHR, *Al Nashiri* v. *Romania*, Application No. 33234/12, First Section, Judgment of 31 May 2018, paras. 594, 676-677; ECtHR, *Abu Zubaydah* v. *Lithuania*, Application No. 46454/11, First Section, Judgment of 31 May 2018, paras. 581, 641-642; see also ECtHR, *Nasr and Ghali* v. *Italy*, Application No. 44883/09, Fourth Section, Judgment of 23 February 2016, para. 241. See also Lanovoy, *Complicity and its Limits*, 225-226, arguing that this case law 'recognises knowledge and not intent as a determinative element of international responsibility for complicity'; Nollkaemper, in 'Complicity in International Law', 180, likewise notes that in this case law: 'Intention is either presumed or outright irrelevant.'

78 Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

79 *Bosnian Genocide*, para. 421.

this question unresolved.[80] Although it has been argued that '[t]he words "at the least" suggest that, as a general rule, more than mere knowledge is required',[81] this cannot be sustained on a plain reading of the judgment, which only established the requirement of knowledge.[82]

In the end, the requirement of intent appears to remain largely unsettled in international law. While the ARSIWA Commentary posits a requirement of specific intent (i.e. that the complicit state must intend for the *particular wrongful conduct* to occur), much of the literature and jurisprudence points to the conclusion that specific intent is not a criterion for establishing complicity.[83] That said, and despite some contrary views expressed in the literature, a *general* intent to aid or assist the principal actor may still be required – the practice so far simply does not seem to point to a clear-cut conclusion in favor of or against this requirement. But inasmuch as cases of complicity by positive action are concerned, even if one proceeds on the assumption that general intent is a criterion, the very act of providing aid or assistance 'with knowledge of the circumstances' will imply – and serve as proof of – the existence of such intent.[84] What exactly does 'knowledge of the circumstances' entail, though? And can the same logic be extended to cases of complicity by omission? In other words, are there cases where the certainty and specificity of knowledge is capable of sufficiently distinguishing between a violation of a duty to protect and complicity?

According to the text of Article 16 ARSIWA, the complicit state must provide the aid or assistance 'with knowledge of the circumstances'. The Commentary does not elaborate on the requisite level of knowledge, but Special Rapporteur James Crawford later confirmed the plain reading of this phrase, i.e. that 'knowledge' does not cover the possibility of 'should have known'. He noted that:

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80 Milanović, 'State Responsibility for Genocide: A Follow-Up', 681; Palchetti, 'Complicity in Genocide', 388-389.

81 Nolte & Aust, 'Equivocal Helpers', 14.

82 See also Jackson, *Complicity in International Law*, 160, in the same vein.

83 In light of the unsettled state of the law on this issue, authors tend to argue that such an intent requirement risks rendering the rule unworkable or ineffective, given the difficulties associated with proving such intent (and the fact that states may act out of a multitude of considerations), see Quigley, 'Complicity in International Law', 111; Graefrath, 'Complicity in the Law of International Responsibility', 375; Jackson, *Complicity in International Law*, 161; Lanovoy, *Complicity and its Limits*, 235-237.

84 See note 66 above; cf. Nolte & Aust, 'Equivocal Helpers', 14-15, note 68. It has even been noted in the ILC's work that specific intent may be proved by sufficiently specific knowledge, see ILC, *Second report on State responsibility by Mr. James Crawford, Special Rapporteur*, 17 March, 1 and 30 April, 19 July 1999, UN Doc. A/CN.4/498 and Add.1-4, in: *Yearbook of the International Law Commission*, 1999, vol. II, Part One, 3, para. 171. Cf. Nolte & Aust, 'Equivocal Helpers', at 15, who otherwise argue in favor of a specific intent requirement, but accept that in some cases, 'a lack of intent can be offset by sufficient knowledge', citing the example where 'it is obvious that [the principal state] is systematically violating human rights when repressing its ethnic minorities with the help of' military material supplied by another state.

> Despite the attempts of some states to widen the scope of the mental element to include not only actual but constructive knowledge (i.e. the complicit state *should* have known that it was assisting in the commission of an internationally wrongful act), the wording of [Article 16(a) ARSIWA] is confined to knowledge actually in the possession of the complicit state.[85]

Similarly, the ICJ held that certainty of knowledge that genocide was being or would be committed was one of the two elements which distinguished complicity from the duty to prevent genocide, since proving a violation of the latter only required a showing that Serbia knew, or should have known, '*of the serious danger* that acts of genocide would be committed.'[86] Given the ICJ's equation of the Genocide Convention's complicity provision with aid and assistance as understood in the ARSIWA, this statement can essentially be considered an elaboration of Article 16(a) ARSIWA; and under this approach, two scenarios would be excluded from the scope of complicity, but still covered by a duty to protect. Firstly, the approach of the ILC and the ICJ does not admit the possibility that the state *should have known* that its aid or assistance would be used for the commission of a wrongful act. As the ARSIWA Commentary points out, a state providing aid to another 'does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act'.[87] Given the broad range of activities that states normally engage in, this appears to be a reasonable approach. That said, it has been suggested in the literature that states should act with due diligence under certain circumstances, such as when approving aid or assistance to regimes with widely reported human rights abuses, 'to assure that their support is not used for wrongful ends' – although it has also been acknowledged that this is not yet *lex lata*.[88] The same could be applied within the context of the example above: the state should act with due diligence to ensure that weapons provided to a paramilitary group – widely reported to be committing human rights abuses – are not used for the commission of such abuses. Secondly, according to the ICJ, it is not

85 Crawford, *State Responsibility*, 406 (emphasis in original, footnote omitted).

86 *Bosnian Genocide*, para. 432.

87 ARSIWA Commentary to Article 16, para. 4.

88 Nolte & Aust, 'Equivocal Helpers', 15; see also S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in: P. Shiner & A. Williams (eds.), *The Iraq War and International Law* (Oxford: Hart, 2008), 185, at 219, noting that '[i]nternational law might develop, *de lege ferenda*, a due diligence standard in this context, or otherwise responsibility for aiding or assisting might remain a very narrow and exceptional basis of responsibility.' Cf. ARSIWA Commentary to Article 16, para. 9, noting that 'the [UN] General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations'; Quigley, 'Complicity in International Law', 119-120. See also *Campaign Against Arms Trade, R (On the Application Of)* v. *The Secretary of State for International Trade*, England and Wales Court of Appeal (Civil Division), 20 June 2019, http://www.bailii.org/ew/cases/EWCA/Civ/2019/1020.html, paras. 138-145, finding the UK's arms supply to Saudi Arabia without assessing past IHL violations to be unlawful.

sufficient for a state to be aware that there is a 'serious danger' that its aid or assistance will be used for the commission of a wrongful act – instead, certainty is required.[89]

Closely related to the issue of certainty is the question of how *specific* the knowledge has to be. As a corollary to its requirement of specific intent, and in line with the general non-assumption of risk by the assisting state, the ARSIWA Commentary appears to require conduct-specific knowledge, noting that in the case of alleged human rights abuses, 'the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.'[90]

Jurisprudence from the ECtHR on extraordinary renditions, meanwhile, offers a somewhat more nuanced view on the required certainty and specificity of knowledge, as illustrated by the *Al Nashiri* and *Husayn (Abu Zubaydah)* cases. On the one hand, the Court established that 'the Polish authorities knew that the CIA [Central Intelligence Agency] used its airport in Szymany and the Stare Kiejkuty military base for the purposes of detaining secretly terrorist suspects captured within the "war on terror" operation by the US authorities.'[91] On the other hand, the ECtHR found it 'unlikely that the Polish officials witnessed or knew exactly what happened inside the facility', since 'the interrogations and, therefore, the torture inflicted on the applicant […] were the exclusive responsibility of the CIA'.[92] However, since ill-treatment and abuse were already widely reported at the time, the ECtHR held that 'Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention'.[93] In other words, having established certainty at the *general* level, the Court found complicity on the part of Poland, even if the Polish authorities did not know for certain the *particular* treatment that the two applicants have been subjected to in these cases.

All in all, it appears that while some certainty of knowledge is required for complicity (but not for duties of protection), certainty of knowledge in and of itself is not sufficient to distinguish between the two forms of

89 *Bosnian Genocide*, para. 432.

90 ARSIWA Commentary to Article 16, para. 9.

91 *Al Nashiri* v. *Poland*, para. 441; *Husayn (Abu Zubaydah)* v. *Poland*, para. 443. See also *Al Nashiri* v. *Romania*, para. 584; *Abu Zubaydah* v. *Lithuania*, para. 572.

92 *Al Nashiri* v. *Poland*, para. 517 (see also para. 441); *Husayn (Abu Zubaydah)* v. *Poland*, para. 512 (see also para. 443). See also *Al Nashiri* v. *Romania*, para. 677 (see also para. 587); *Abu Zubaydah* v. *Lithuania*, para. 642 (see also para. 574).

93 *Al Nashiri* v. *Poland*, para. 442; *Husayn (Abu Zubaydah)* v. *Poland*, para. 444. Cf. *Al Nashiri* v. *Romania*, para. 588, in the same vein as *Abu Zubaydah* v. *Lithuania*, para. 575: 'even if the Lithuanian authorities did not have, or could not have had, complete knowledge of the [High-Value Detainees] Programme, the facts available to them […] enabled them to conjure up a reasonably accurate image of the CIA's activities and, more particularly, the treatment to which the CIA was likely to have subjected their prisoners in Lithuania'.

responsibility. For instance, in the scenario described at the beginning of this section, it may be the case that the state knows of the paramilitary group's activities, and fails to prevent them not because it supports the group, but rather simply due to incompetence or negligence. In such a case, the state would be responsible for failing in its duty to protect, not for being complicit in the acts of the armed group.

Since certainty of knowledge alone cannot differentiate between complicity and duties to protect, separate recourse to the criterion of intent is necessary to distinguish between the two. After all, intent may have been the element – additional to knowledge – that the US-Mexico General Claims Commission had in mind when talking about complicity in cases 'where a Government knows of an intended injurious crime, might have averted it, but *for some reason constituting its liability* did not do so.'[94] In line with what has been discussed above regarding complicity more broadly (whether by action or omission), such intent arguably need only be general (intent to aid/assist with knowledge of the circumstances) rather than specific (intent for the wrongful act to take place).

In sum, in cases of complicity by action, the positive act of providing aid or assistance will distinguish the conduct from a violation of a duty to protect. Inasmuch as complicity may require a general intent to aid or assist the principal actor, such intent is implied in the positive act of providing aid or assistance when done with knowledge of the circumstances. Furthermore, although the *lex lata* of inter-state complicity does not yet appear to admit this possibility, the law should arguably capture the fact that complicity may also take place by omission. But while intent may be implicit in complicity by action, this is not the case for complicity by omission; and since the state's inaction, even when coupled with knowledge, can be interpreted in multiple ways, intent will be the decisive feature distinguishing complicity from a violation of a duty to protect. As such, the state's intent to aid or assist the principal (non-state) actor, with knowledge of the circumstances, will need to be examined – and established – separately. That said, in practice it is difficult to imagine a situation of complicity by omission where only general – and not specific – intent can be shown. In other words, the requisite intent will likely fulfil both standards, or neither of them.

6.3.2 Distinguishing Complicity from Attribution and the Possibility of Complicity-based Attribution

Having examined how complicity can be distinguished from the duty to protect, the next question is how it can be delineated from attribution, and whether complicity may serve as grounds for attribution in certain circumstances.

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94 *Janes*, para. 20 (first emphasis in original; second added).

Delineating complicity from attribution is an issue that arises most prominently in cases involving attribution based on the factual rationale, given that support, dependence and control may be closely related. State support to an armed group, for instance, can be so extensive as to make the group (maybe even wholly) dependent on the state, which in turn creates at least the potential for control. At the end of the day, however, attribution is based on the concept of agency (i.e. acting on the state's behalf), whereas complicity is based on support ('aid or assistance'). In order to establish agency, the ICJ in *Nicaragua* and *Bosnian Genocide* – and even the ICTY Appeals Chamber in *Tadić* – relied on control as a factor to be proven separately (not merely presupposed based on dependence).[95] The ICJ's tests were formulated in a way that requires such close control over (the conduct of) the private actor as to eliminate any autonomy on the part of the latter; the 'effective control' test was also endorsed by the ILC in effect.[96] In *Tadić*, the Appeals Chamber expressly stated that 'the mere provision of financial assistance or military equipment or training' was not sufficient to establish attribution and required direction and supervision in addition (despite some ambiguity in the formulation of the test *in abstracto*).[97] In light of this jurisprudence, the two bases of responsibility may be delineated as follows: to demonstrate agency, attribution requires a hierarchical relationship of control (with no autonomy for the private actor, in the interpretation of the ICJ), while complicity describes a relationship that does not imply such hierarchy.[98]

But this approach has not been followed by all international courts and tribunals: subsequent jurisprudence from the ICTY, as well as case law from the ECtHR and the IACtHR, appears to base attribution on state support and/or collaboration. Before recounting this jurisprudence, work at the ILC on complicity-based attribution should be summarized briefly. When Ago considered whether state complicity in the conduct of non-state actors could serve as the basis for attribution, he did not see any conceptual objections to such a rule. And while he did not find sufficient state practice to support such a rule in general, he did find one exception, in relation to armed groups based on the territory of the state. In Ago's words, where the government 'encourages and even promotes the organization of such groups, […] provides them with financial assistance, training and weapons, and co-ordinates their activities with those of its own, and so on,' they will be considered as 'act[ing] in concert with, and at the instigation of, the State'.[99] However, while the threshold described by the Special Rapporteur appears to indicate complicity, he labeled these groups as '*de facto* organs'

95 Unlike the ECtHR's possible *presumption* of control, discussed in Section 4.4.4 above.
96 See Section 4.2 above.
97 *Prosecutor* v. *Duško Tadić*, ICTY Appeals Chamber, Judgment of 15 July 1999, IT-94-1-A, paras. 137 and 151(ii).
98 See also Savarese, '*De Facto* Organs and Complicity', 120.
99 *Ago's Fourth Report*, para. 136.

of the state,[100] and this ground for attribution eventually developed into Articles 4 and 8 ARSIWA with significantly higher thresholds – at least in the eyes of the ICJ and the ILC.[101]

As noted above, the ICJ's 'effective control' and 'complete dependence' tests ended up going far beyond what Ago had outlined, and even the 'overall control' test as articulated and applied by the ICTY Appeals Chamber in *Tadić* required more than complicity. But the test as formulated and applied subsequently by the ICTY – consisting of '[t]he provision of financial and training assistance, military equipment and operational support' and '[p]articipation in the organisation, coordination or planning of military operations' – is strikingly close to Ago's original formulation.[102] Even more significantly, there have been a number of cases before regional human rights courts in the past two decades where attribution was established on the basis of factual circumstances which are closest to complicity. The IACtHR has found the conduct of paramilitaries attributable to Colombia on the basis of collaboration or coordination with the military, in some cases even highlighting that the paramilitaries in question could not have carried out their operations without state assistance.[103] Meanwhile, the ECtHR's case law on secessionist regimes propped up by third states has attributed the conduct of these regimes to the supporting states on the grounds that the secessionist entities would not be able to survive in the absence of such state support.[104]

In a series of cases, the ECtHR may have even made similar determinations in the inter-state context, although the precise grounds for responsibility – and thus the scope of conduct attributed – is not entirely clear in these judgments.[105] The cases concerned the role of certain European states in the US extraordinary rendition program, and their responsibility in connection with the conduct of CIA agents. In the first of these cases, *El-Masri*, the Court's Grand Chamber stated that:

> 206. The Court must firstly assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State [Former Yugoslav Republic of Macedonia, FYROM]. In this connection it emphasises that the acts complained of were carried out in

100 *Ibid*.

101 Even with these higher thresholds, the ICJ noted in *Bosnian Genocide*, para. 419, that 'giving instructions or orders to persons to commit a criminal act' would ordinarily fall under complicity in (certain) domestic systems.

102 *Prosecutor* v. *Dario Kordić and Mario Čerkez*, ICTY Trial Chamber, Judgment of 26 February 2001, IT-95-14/2-T, para. 115.

103 See Section 4.3 above.

104 See Section 4.4 above.

105 See Council of Europe, Steering Committee for Human Rights, *CDDH Report on the place of the European Convention on Human Rights in the European and international legal order*, CDDH(2019)R92Addendum1, 29 November 2019, https://rm.coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279 (hereinafter CDDH(2019)R92Addendum1), paras. 194-198.

> the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.
>
> […]
>
> 211. The respondent State must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring.[106]

On the one hand, the ECtHR's language finding CIA conduct 'imputable' to the FYROM and holding the state '*directly* responsible for the violation of the applicant's rights' strongly suggests that the conduct of CIA agents was attributed to the FYROM. On the other hand, the reference to the FYROM's failure to take preventive measures suggests that the state was only held responsible for violating its positive obligations through the conduct of its own organs. As for active facilitation and 'acquiescence and connivance', these go beyond the minimum requirements for a violation of a positive obligation,[107] but it is unclear whether they are regarded by the Court as forming the basis for attributing third-state (or private) conduct.[108]

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106 *El-Masri*, paras. 206, 211 (emphasis added; case citations omitted). See also *ibid*., paras. 235, 240-241.

107 See e.g. *Bosnian Genocide*, para. 432; *Ilaşcu and others* v. *Moldova and Russia*, Application No. 48787/99, Grand Chamber, Judgment of 8 July 2004, Partly Dissenting Opinion of Judge Ress, para. 3. See also M. Milanović, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights', 24 September 2019, https://ssrn.com/abstract=3454007, conceptualizing 'acquiescence or connivance' as either an ECHR-specific attribution rule or an ECHR-specific complicity rule.

108 In support of the 'acquiescence or connivance' standard, the ECtHR cited *Ilaşcu*, where it made a similar statement regarding private conduct when discussing *Moldova's* (not Russia's) jurisdiction and potential responsibility, which was held to be restricted to positive obligations in the same context (*El-Masri*, para. 206, citing *Ilaşcu*, para. 318). But the concept can be traced even further back, as the statement in *Ilaşcu* had, in turn, been based on *Cyprus* v. *Turkey*, concerning Turkey's responsibility in connection with (non-TRNC) private conduct in Northern Cyprus (*Ilaşcu*, para. 318, citing ECtHR, *Cyprus* v. *Turkey*, Application No. 25781/94, Grand Chamber, Judgment of 10 May 2001, para. 81). As discussed above (see Chapter 4, notes 211-213), however, the *Cyprus* v. *Turkey* judgment did not specify, either, whether 'acquiescence or connivance' would lead to responsibility through attributing private conduct or through a violation of a positive obligation by the state's own organs. See also Milanović, 'State Acquiescence or Connivance', tracing the origins of 'acquiescence or connivance' in the ECtHR's jurisprudence and noting at 9-10 that '[t]he *El-Masri* Court very much seems to be using the acquiescence or connivance formula as an attribution test, whereas virtually all prior cases employing this terminology and actually applying it to the facts, used it in the analysis of a state failure to fulfil positive substantive or procedural obligations' (as he points out at 6-7, neither in *Ilaşcu*, nor in *Cyprus* v. *Turkey* did the Court in fact apply this test).

Against this backdrop, it is no surprise that *El-Masri* has been the subject of varying interpretations in the literature: many have regarded it as a case of complicity-based attribution,[109] or at least have read the judgment as holding the FYROM responsible not only for the conduct of its own organs but also for the conduct of CIA agents as a result of some other legal construction;[110] others have interpreted it as a breach of a positive obligation.[111]

In subsequent cases against Poland, Lithuania and Romania before ECtHR Chambers, the Court no longer spoke of direct responsibility, but consistently upheld the principle – explicitly relying on *El-Masri* – that 'the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[112] On this basis, it then held that each respondent state 'on account of its "acquiescence and connivance" in the [High-Value Detainees] Programme must be regarded as responsible for the violation of the applicant's rights […] committed on its territory'.[113] In these cases, the Court also pointed out that the program could not have been 'undertaken on [these states'] territory without [their] knowledge and without the necessary authorisation' – in later cases 'authorisation and

109 See e.g. Jackson, *Complicity in International Law*, 193-194; Milanović, 'State Acquiescence or Connivance', 9-12.

110 A. Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?', EJIL: *Talk!*, 24 December 2012, https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis (based on 'acquiescence or connivance'); H. Keller & R. Walther, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2019) *International Journal of Human Rights*, https://doi.org/10.1080/13642987.2019.1600508, at 6-7, appear to suggest that this was done on the basis of positive obligations.

111 See R. Lawson, 'Notes of the presentation on Theme 1, sub-theme ii – State responsibility and extraterritorial application of the Convention', submitted to the Council of Europe Drafting Group on the Place of the European Convention on Human Rights in the European and International Legal Order, DH-SYSC-II(2018)12, 3 April 2018, https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/16808d42ac; cf. CDDH(2019)R92Addendum1, paras. 194-198, noting that it is unclear whether the FYROM was held responsible only for its own conduct or also for the conduct of the US agents. See also Jørgensen in note 115 below.

112 *Al Nashiri* v. *Poland*, para. 452; *Husayn (Abu Zubaydah)* v. *Poland*, para. 449; ECtHR, *Al Nashiri* v. *Romania*, para. 594; ECtHR, *Abu Zubaydah* v. *Lithuania*, para. 581. See also *Nasr and Ghali*, para. 241.

113 *Al Nashiri* v. *Poland*, para. 517; *Husayn (Abu Zubaydah)* v. *Poland*, para. 512; *Al Nashiri* v. *Romania*, para. 677; *Abu Zubaydah* v. *Lithuania*, para. 642.

assistance' – 'being given at the appropriate level of the State authorities.'[114] These judgments suffer from a similar ambiguity as *El-Masri*.[115]

The jurisprudence of the ICTY and the human rights courts on the (apparently) complicity-based attribution of private actors' conduct has been criticized precisely on the grounds that it departs from the concept of agency and the work of the ICJ.[116] Similar concerns have been raised in respect of the ECtHR case law on extraordinary rendition as well.[117]

Against this backdrop, the question arises: *should* complicity serve as the basis for attribution? The answer lies in the relative value placed on two different rationales. On the one hand, attribution is based on the rationale of agency, whereby the conduct of persons or entities is attributable to the state only when they act *on behalf of* the state. This has been proclaimed explicitly by the ILC in the ARSIWA Commentary,[118] and can be traced particularly well in the attribution tests devised by the ICJ, where the non-state actor's lack of autonomy either in general ('complete dependence') or in particular ('effective control') proves that the actor could only have been acting on the state's behalf. While these thresholds may be (and have been) considered excessively high, they ensure that the state is never held responsible for conduct beyond its control. Indeed, much of the criticism facing the jurisprudence of the ICTY and the regional human rights courts is based on the argument that their control tests have stretched this rationale to its breaking point. On the other hand, as highlighted in the introduction to this chapter, state complicity in the conduct of private actors falls into an accountability gap between duties of protection and attribution – with the accompanying rationale that this gap should be closed, particularly given the ease with which states can evade responsibility under the 'complete dependence' and 'effective control' tests. Ideally, this problem would be resolved through the introduction of a (general) rule prohibiting state complicity in the wrongful conduct of non-state actors. Such a rule would help close the accountability

114 *Al Nashiri* v. *Poland*, para. 441 and *Husayn (Abu Zubaydah)* v. *Poland*, para. 443; *Al Nashiri* v. *Romania*, para. 588 and *Abu Zubaydah* v. *Lithuania*, para. 575. That said, as Nina Jørgensen points out in respect of knowledge, it is not entirely clear whether the Court relies on this as a substantive or evidentiary standard, see Jørgensen, 'Complicity in Torture', 33.

115 See Jackson, *Complicity in International Law*, 194, likewise regarding these cases as instances of complicity-based attribution. But see Milanović, 'State Acquiescence or Connivance', 12-14, arguing that rendition cases after *El-Masri* have been conceptualized as complicity that does not entail attribution; Jørgensen, 'Complicity in Torture', 37, noting in respect of *Al Nashiri* v. *Poland* and *Husayn (Abu Zubaydah)* v. *Poland* that 'it is questionable whether the Court intended to impute the acts of the absent primary perpetrator to the accomplice, contrary to the ordinary rules of attribution under the law of State responsibility.' (It is unclear whether she holds the same view of *El-Masri*.)

116 See note 8 above.

117 Nollkaemper, 'Complicity in International Law', 180: 'The suggestion that complicity functions as a principle for attribution of conduct is problematic.'

118 ARSIWA Commentary to Article 2, para. 5 and to Part One, Chapter II, para. 2.

gap while still ensuring that attribution is limited to cases where agency can be established. But if that is not a possibility, and the only remaining options are the existing categories (i.e. violation of a duty to protect or attribution), these rationales become competing and cannot both be achieved at the same time.

In that case, it is a matter of deciding which of these rationales is more important: ensuring that states' responsibility is limited to conduct they strictly control, or closing the accountability gap? Note that answering this question does not necessarily require a binary response, simply choosing one rationale over the other. Rather, it is a decision regarding what value should be placed on each *vis-à-vis* the other. To put it differently: how much extension of state responsibility can be tolerated in order to narrow the accountability gap? At one end of the spectrum, for supporters of the ICJ's control tests (and their underlying rationale), the answer may be 'none'. At the other end, it may be argued that in order to fully close the gap, *all* instances of complicity should be captured under attribution. And as for any intermediate options, these raise the additional difficulty of where (and how) to draw the dividing line between complicity as such and complicity as the basis for attribution in a way that maintains a clear conceptual distinction between the two.

With these considerations in mind, the dissertation proposes a solution that strikes a balance between the two rationales, delineating complicity from attribution through the degree of contribution made by the assisting state. There appears to be general agreement – including in the Commentary to Article 16 ARSIWA – that for the assisting state to incur responsibility for complicity, the aid or assistance provided has to 'contribute[] significantly' to the wrongful act.[119] However, it is equally accepted that such aid or assistance need not be *essential* for the commission of the act – in other words, it is not a *sine qua non* requirement.[120] Indeed, as the Commentary itself points out, 'where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.'[121] This view also finds support in the literature, with authors noting that in such

119 ARSIWA Commentary to Article 16, para. 5; see also e.g. Jackson, *Complicity in International Law*, 157-158, 211-212.

120 See e.g. Quigley, 'Complicity in International Law', 121-122; Crawford, *State Responsibility*, 402; Aust, *Complicity*, 212-213.

121 ARSIWA Commentary to Article 16, para. 10.

a case, the assisting state would likely cross the threshold to becoming a co-perpetrator.[122]

Could this approach be adapted to state complicity in the conduct of private actors, setting *sine qua non* support as the basis for attribution? Despite the similar terminology, one has to proceed with caution in attempting to answer this question. After all, the Commentary speaks of attribution *of injury*, not of conduct, and affirms that the assisting state is 'not responsible, as such, for the act of the assisted State'.[123] Rather than the assisting state becoming responsible for the conduct of the assisted state (in addition to its own), the assisting and assisted states are considered jointly responsible co-authors of the internationally wrongful act. However, as the Commentary admits, 'this may be a distinction without a difference', since the consequences for the assisting state would be much the same in both cases.[124]

Applying this reasoning to state complicity in the conduct of private actors by analogy,[125] one finds that holding the state responsible for the conduct of the private actor (through attribution) or for its own *sine qua non* contribution to the injurious act would likewise lead to the same consequences.[126] In fact, the IACtHR has already employed similar reasoning in its 2018 *Omeara Carrascal* judgment, even though that reasoning was not restricted to *sine qua non* contributions. Once Colombia had accepted responsibility for violating the duty to *respect* two victims' rights through the active conduct of its own agents who had collaborated with the paramilitaries, the Court no longer deemed it necessary to decide whether the conduct of the paramilitaries themselves was also attributable to the state.[127] In the case of the third victim, whose situation was not covered

122 A. Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Zürich: Schulthess, 2007), 249, note 643: '[f]alls die Beihilfe eine *conditio sine qua non* darstellt für den Eintritt der Völkerrechtsverletzung, dürfte in den meisten Fällen die Schwelle zur Mittäterschaft überschritten werden'; see also *ibid.*, 251-252. Relying on Felder, see also Aust, *Complicity*, 212-213 in the same vein: 'if the support could be qualified as a *conditio sine qua non*, it is more likely to assume that an independent responsibility of the assisting State would arise in the form of the main authorship of the wrongful act.' Cf. N. Schrijver, 'Regarding "Complicity in the Law of International Responsibility" by Bernhard Graefrath (1996-II): The Evolution of Complicity in International Law' (2015) 48 *Revue belge de droit international* 444, at 448, noting that 'sufficiently significant or essential aid may well transcend into joint responsibility'; Crawford, *State Responsibility*, 402.

123 ARSIWA Commentary to Article 16, para. 10.

124 *Ibid*.

125 The ARSIWA Commentary to Part One, Chapter IV itself notes at para. 7 that 'the idea of the implication of one State in the conduct of another is analogous to problems of attribution'.

126 The term 'consequences' is used here in the sense of Article 28 ARSIWA, setting out the legal consequences of an internationally wrongful act.

127 IACtHR, *Omeara Carrascal* et al. v. *Colombia*, Merits, Reparations and Costs, Judgment of 21 November 2018, Series C, No. 368, paras. 16(a), 19(a), 36; see also the discussion of the case in Section 4.3.2 above.

by Colombia's admission, the Court was likewise firm in holding the state responsible for violating the duty to respect (and not only guarantee) the rights in question.[128] But the IACtHR once again did not clarify whether the state was responsible only for the conduct of its own agents (soldiers and police officers), or also that of the paramilitaries. Nonetheless, the Court treated the case – in respect of all three victims – at least *as if* the conduct of the paramilitary group was attributable to the state, awarding reparations on the same scale as in previous cases where the attribution of paramilitary conduct was well established.[129]

There is one major difference between the two scenarios of complicity as such and complicity as the basis for attribution, though – not in terms of consequences but in terms of hurdles to a finding of responsibility. As noted above, responsibility for complicity is dependent on the principal actor having committed an internationally wrongful act. Given the limitations on the legal personality of private actors, as well as the lack of appropriate international fora to adjudicate these issues, a complicity rule would likely be rendered unworkable in practice. Against this backdrop, there is already some support in the literature for complicity – in its *sine qua non* manifestations or even in general – to serve as a ground for attribution.[130] As mentioned at the beginning of this section, Ago himself noted that complicity-based attribution could circumvent problems associated with non-state actors' lack of legal personality. Granted, attributing the conduct of the private actor to the state based on the latter's complicity – even if its contribution was of a *sine qua non* nature – requires compromising on the principle that the state is only responsible for its own conduct, i.e. conduct carried out on its behalf.[131] But the identity of the consequences of the two scenarios (attribution of conduct *versus* attribution of injury) ensures that the concept of state responsibility is not stretched too far from how it is currently understood under the rules of attribution as conceptualized by the ICJ and the ILC. Furthermore, there is a strong basis to argue from a normative perspective that the state should in any case not be able to escape

128 *Omeara Carrascal*, para. 188.

129 See Section 4.3.4.3 above.

130 See R. Wolfrum & C.E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', (2002) 6 *Max Planck Yearbook of United Nations Law* 559, at 592 for *sine qua non* cases; and Amoroso, 'Complicity as a Criterion of Attribution' for complicity in general. Although A.J.J. de Hoogh does not explicitly describe it as complicity, his argument in 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *British Yearbook of International Law* 255, at 290-291, runs along similar lines. See also Lanovoy, *Complicity and its Limits*, 306-329, who argues (in particular at 325-326) in favor of complicity-based attribution in respect of 'de facto territorial authorities' (essentially local *de facto* governments).

131 See also generally the discussion in Jackson, *Complicity in International Law*, 22-26 on culpability and fair labelling.

(or reduce) responsibility for the consequences of something that would not have happened had it not been for that state's contribution. For instance, where paramilitaries commit human rights abuses which could not have taken place without support from the Colombian military, the state's role is much closer to commission than failure to prevent the abuses – and this should be reflected in the extent of the state's responsibility.

By logical extension of the above proposal, aid or assistance that falls below the *sine qua non* threshold should not be able to serve as a basis for attribution. In such cases, it would arguably be stretching the concept of attribution to hold the state responsible for a private actor's conduct that would have taken place regardless of the state's assistance – even if the latter's contribution was significant.[132] This applies *a fortiori* to aid or assistance that cannot be described as significant, as this would result in attributing the conduct of private actors to the state in circumstances that do not even meet the requirements for complicity. In the same vein, it is generally difficult to see attribution being based on 'acquiescence' or 'tolerance' – this is reminiscent of the implied complicity theory in the jurisprudence on injuries to aliens, which was abandoned in international law nearly a century ago. That said, in line with what has been discussed in the previous section and the current one, acquiescence or tolerance can serve as a basis for attribution under two conditions: (1) these terms must denote a *deliberate* omission (in order to constitute complicity); and (2) that deliberate omission must constitute a *sine qua non* contribution to the conduct of the private actor.

In sum, limiting complicity-based attribution to cases where the state's aid or assistance constitutes a *sine qua non* contribution to the act will ensure, on the one hand, a workable rule that goes some way in closing the accountability gap, and on the other hand, that the scope of state responsibility is not unduly extended.

But even with a *sine qua non* threshold applied, there is one major difference between the approaches of the IACtHR and the ECtHR to complicity-based attribution. While the former examines attribution at the level

132 This is all the more so as there appears to be some uncertainty in the ARSIWA Commentary to Article 16 as to the necessary minimum degree of contribution. Despite laying down the requirement of significant contribution in para. 5, the Commentary subsequently contrasts cases of *sine qua non* assistance with instances where 'the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered.' (*Ibid*., para. 10.) This assessment is difficult to reconcile with the idea of a significant contribution – in fact, it has even been argued on the basis of this apparent contradiction that neither the text of, nor the Commentary to Article 16 identifies a minimum threshold for complicity: Felder, *Die Beihilfe im Recht*, 250. See also Crawford, *State Responsibility*, 403, noting the inconsistency, but resolving it in favor of a significant contribution based on the ILC's subsequent affirmation in the context of the Articles on the Responsibility of International Organizations.

of conduct, the latter does so at the level of the actor.[133] Accordingly, the requirement of knowledge is likely to be met in the case law of the IACtHR (as the Court requires collaboration in the particular circumstances); but this is not the case in the ECtHR's jurisprudence. While a general intent on the part of Turkey/Russia/Armenia to assist the TRNC/MRT/NKR can easily be established through the various forms of support provided, there is no evidence that the third states knew of the specific human rights violations committed by the secessionist entities. With the criterion of knowledge unmet, the ECtHR's approach cannot fit into the conceptual structure of complicity – nor, as a result, that of complicity-based attribution.[134] Accordingly, this approach should be seen as *lex specialis* that lies outside the framework of the ARSIWA.[135]

6.4 Concluding Remarks

As noted by Miles Jackson: 'Complicity is a particular way of contributing to wrongdoing. In reflecting this, legal systems should hold accomplices responsible for their own contribution to the principal's wrong, rather than for the wrong of their principal.'[136] To this one may add that accomplices should be held responsible for the full extent of their contribution, not only their lack of effort in preventing or redressing the principal's wrong. In other words, the state should be responsible exactly for what it has done: not less, not more. Following these considerations, neither duties to protect, nor attribution are able to accurately capture state complicity in the conduct of non-state actors.

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133 See Sections 4.3 and 4.4 above. The establishment of what exactly is a *sine qua non* contribution in a particular case can raise further difficulties in the inter-state context: for instance, although the ECtHR found that the CIA could not have carried out its actions in Romania without the latter's authorization and assistance, there were in total more than 50 states around the world involved in the US rendition program; see Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, February 2013, https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf. It thus stands to reason that the US could have relied on the (likewise indispensable) assistance of a different country. However, as Felder argues in *Die Beihilfe im Recht*, 251, regarding complicity more generally, the existence of such alternative scenarios should not enable those that did in fact provide assistance to avoid responsibility. Furthermore, such problems are much less likely to arise in the state/non-state context, where the extent of private actors' international relations are significantly more limited – for instance, in the absence of support from Russia, it would be difficult to imagine what other state would step in to sustain the MRT.

134 To fit into that framework, one eventual possibility could be to rely on the third states' continued support with knowledge of repeated human rights abuses by the secessionist entities – but as mentioned above at note 88 and accompanying text, this is not yet *lex lata* even in the inter-state context.

135 On the viability of a *lex specialis* argument, see Section 4.5.3 above.

136 Jackson, *Complicity in International Law*, 31.

Unfortunately, in international law, a general rule of complicity is a relatively recent development even in the inter-state context, and it is yet to exist in the state/non-state context. This difficulty is further compounded by the fact that such complicity would require the non-state actor to have international legal personality – an issue which continues to be highly contentious. Nonetheless, given the rapid ascent of inter-state complicity, the increasing acceptance of some non-state actors' international legal personality with at least a limited set of rights and obligations, as well as the inadequacy of the existing legal categories for capturing certain types of state involvement, a state/non-state complicity rule should arguably be developed. There are particularly strong arguments for such a rule in the fields of human rights and IHL, even if the existing jurisdictional limitations of courts may give rise to additional hurdles.

How could such a potential state/non-state complicity rule be delineated from the violation of a duty to protect on the one hand, and the attribution of a private actor's conduct on the other? As duties of protection are violated by omission (including by insufficient action), complicity can easily be distinguished from such a violation where it takes the form of an action. The real difficulty is differentiating between the two in cases of complicity by omission. Although complicity by omission is not currently recognized as *lex lata* even in the inter-state context, many in the literature continue to challenge this stance. This continued challenge shows that the qualitative difference between a state which – due to, for instance, incompetence – fails to prevent or redress a catalyst event and one which knowingly refrains from action in order to assist the private actor provides a strong argument for admitting the category of complicity by omission in international law. In order to capture this qualitative difference and distinguish between complicity by omission and a violation of a duty to protect, one must have recourse to the requirement of (general) intent to assist the private actor. At the same time, complicity by omission – like complicity by action – arguably does not require specific intent, i.e. intent for the particular wrongful act to happen, although in practice it would be difficult to show general but not specific intent in such cases. As regards the distinction between state complicity in the conduct of a private actor and attributing that conduct to the state, the crucial difference is that attribution requires the private actor to have acted on the state's behalf (which, in turn, is operationalized through control), whereas complicity merely requires the state to have assisted the private actor.

Ideally, complicity and attribution would each be captured by the corresponding legal basis for responsibility under international law. But given the difficulties surrounding a potential rule of state/non-state complicity, the question arises whether complicity may instead serve as a basis for attribution until such a state/non-state complicity rule develops. Special Rapporteur Ago did not have any objections to complicity-based attribution in principle; in fact, he specifically pointed out that complicity-based attribution would remedy the problem of non-state actors' lack of international

legal personality. His conclusion that complicity could not serve as a basis for attribution was based simply on the lack of practice. Accordingly, the past few decades' jurisprudence at the IACtHR may be capable of starting to change that assessment, at least inasmuch as it has been accompanied by state acceptance as evidenced by the formulation of pleadings in subsequent cases.[137] Furthermore, from a conceptual point of view, such a complicity-based attribution rule could fit into the ARSIWA framework in the case of a *sine qua non* contribution by the state to the act of the principal (private) actor. Such a *sine qua non* contribution goes beyond the minimum requirement of complicity, and would in any case result in the same legal consequences in terms of reparation, regardless of whether the state's role would be classified as complicity or as warranting attribution of the private actor's conduct, paving the way for complicity-based attribution.

That said, the ECtHR's jurisprudence provides an interesting conundrum. Despite some ambiguity as to the role of control, the Court's sole evidentiary focus on support puts this approach closer to complicity than attribution. Yet at the same time, as the relationship between the secessionist entities and the third states is examined at the level of the actor, rather than the conduct, it does not meet the knowledge requirement of complicity in the first place. As a result, it cannot be properly regarded as an instance of complicity-based attribution, either. This is not to say that the concept at the heart of this case law is not compelling. Quite the contrary: the ECtHR's underlying logic – that if it was not for the third state's (continued) support, the secessionist entity would not exist and could not inflict human rights abuses – makes for a powerful argument in favor of finding the third state responsible. Such responsibility, however, would lie outside the ARSIWA's conceptual framework, unless the secessionist regime's level of dependence is seen as giving rise to a presumption of control. In other words, the basis of responsibility would have to be attribution based on control, rather than complicity, in order to fit into the ARSIWA framework.

137 That said, since that jurisprudence relates almost exclusively to Colombia, which is then also the only state that appears to have accepted the IACtHR's approach, no far-reaching conclusions can be drawn from this yet.

7 Conclusions and Outlook: Narrowing the Accountability Gap

Even where a government loses control over part of the state's territory, the situation is hardly ever characterized by a real power vacuum or Hobbesian anarchy. The government will usually try to hold on to every last scrap of authority it may have – if not through its remaining organs, then through allied militias or by co-opting those who are in control. Where the government falls short, private actors play an increased role. More often than not, someone – armed groups, entities with secessionist ambitions, competing political factions, or even self-organizing locals – will take on governance functions. In doing so, they may rely on crucial support from third states.

But even if the situation does not descend into complete anarchy, it is often accompanied by violence, human rights abuses, and other acts that raise questions of accountability. State responsibility, based as it is on a public/private divide, may not be particularly well-suited to cope with many of these problems, but given the continued role of the affected state's government and/or of third states, it is still the best tool available in international law to ensure at least *some* measure of accountability.

Against this backdrop, and within the context of the absence of effective government, the dissertation had a dual aim. Firstly, to establish when and under what circumstances states can be held responsible in connection with private conduct under the current rules of international law. Secondly, to explore how the existing rules could be changed to ensure greater accountability in cases where states are involved in private conduct in a way that is not (fully) captured by the current rules. That said, the need to close the accountability gap arising in these cases cannot, in and of itself, provide sufficient reason to hold the affected state responsible for any and all activities taking place on territory under its sovereignty but beyond its control, or to hold third states responsible for the conduct of private actors whenever the former have *any* links to the latter. Care must also be taken not to stretch the concept of state responsibility too far, including by respecting the principle that states are only responsible for their own conduct, i.e. conduct carried out on their behalf.

These two research questions may sound quite abstract, but they address a wide range of real-life issues. What, if any, obligations arise from the mere fact of sovereignty over certain territory? Can Moldova be held responsible for dropping the case of political prisoners in Transdniestria from peace negotiations? Or Colombia, for failing to stop human rights abuses on territory that it voluntarily withdrew from as part of a domestic peace process? What about cases where non-state actors operate with significant support

from a state? Can Russia be held responsible for the conduct of Transdniestria, Abkhazia, South Ossetia, or the Donetsk and Luhansk People's Republics – secessionist *de facto* governments that would not even exist without Russian support? Colombia for the paramilitaries? Nigeria for the vigilante groups fighting Boko Haram? When is the state responsible for the acts of those exercising (routine) public functions? Does it matter whether or not they are hostile to the *de jure* government? Can Somalia be held responsible for the conduct of the Islamic courts or Puntland? How about Sri Lanka for the LTTE? Syria and Iraq for ISIS? Are there any cases where the answer should be different than it currently is? Where the aims of closing the accountability gap and respecting the basic limitations on state responsibility come into conflict with each other, how can they best be balanced?

The dissertation's goal was to answer the two research questions by examining three bases of responsibility – duties of protection, attribution and complicity – and the following pages aim to highlight its main findings, place them in the broader socio-political context and offer normative recommendations, taking each of these bases in turn.

Duties to protect: remaining applicable to the extent of available means

First, does the affected state still have any obligations in territory where the government has lost control? Or can the government simply plead lack of effective control to render any remaining duties inapplicable? Under international law, duties of protection abound, and may even be regarded as a corollary of state sovereignty. Granted, there may not be much the state can do in such situations; and it is not the place of international courts and tribunals to second-guess difficult policy decisions made in challenging circumstances (not to mention resource constraints).

But at the very minimum, as a matter of principle, the state is not – and should not be – allowed to abandon the people on its territory in the face of adversity. Nor is it allowed to abdicate its responsibilities *vis-à-vis* other states, in terms of how its territory is used, for instance by non-state armed groups. Acknowledging the limitations and challenges facing the state upon loss of control over territory is not the same as saying that the state should not even *try* its best. The way duties of protection operate – with the focus being on the means available at any given time, including in times of difficulty – ensures that they do not place too high a burden on the state. The due diligence standard also supplies the necessary flexibility not to unduly limit states' policy choices. Thus, even voluntary withdrawal from part of the state's territory might be allowed, for instance in the context of a peace process in a decades-long civil war, as in Colombia. But any such withdrawal must be accompanied by mechanisms that can effectively ensure the rights of inhabitants (and neighboring states) by other means, such as international monitoring.

Note that the state's efforts cannot – and should not be – reduced to a box-ticking exercise. Moldova's dutiful opening of criminal investigations

regarding human rights violations committed in Transdniestria is unlikely to accomplish much, as the ECtHR itself noted already in *Ilaşcu*. In fact, it is hard to shake the impression that the Moldovan authorities keep opening such investigations at least partly, if not mainly, so that they can show the Court that the state has 'made efforts' to secure the applicants' rights. But the point is rather that the state should take measures that at least have the *potential* to be effective. Furthermore, it must be recognized that in some instances, there is genuinely nothing that the state could have done to improve the situation. In such cases, what needs to be assessed is whether the state acted diligently in examining possible measures.

At a practical level, placing the onus on the applicant to prove that the respondent state had means available to act but failed to employ them makes it difficult to bring a successful case. This is particularly so in human rights litigation, where individual applicants are unlikely to have the resources necessary to determine what options were available to the state. It is no accident that the sole successful Transdniestrian case arose from circumstances where both the measures' existence and their effectiveness was demonstrated by the conflict's negotiation history and the release of Ilie Ilaşcu. Indeed, it is likely due to the success of this case that subsequent applications are always brought against both Moldova and Russia – a practice not widely replicated in the context of other secessionist conflicts. At the same time, international courts are not well placed, either, to embark on an investigation of their own to determine the range of options available to the state and evaluate which ones (if any) should have been used.

To counteract this challenge, the dissertation proposes partially shifting the burden of proof where the respondent state knew of the catalyst event and did nothing to prevent or put an end to it. After all, that state is in the best position to show what decision-making processes were involved and led to the lack of action. Such a shift even has historical antecedents in the work of the British-Mexican Claims Commission, but has not been applied in contemporary cases. Since this is a departure from the normal rules on burden of proof, it should be clearly communicated to the parties, as early as possible in the proceedings. At the end of the day, though, even with such a shift in the burden of proof, a surge of successful cases is unlikely to be forthcoming, simply because often there is not much the respondent state could have done to begin with.

Attribution: most rationales unlikely to significantly narrow the accountability gap

Second, under what circumstances can the state be held responsible for the conduct of private actors, rather than its own organs' (lack of) response to such conduct? Using the ILC's framework as the starting point, but with the various rationales underpinning attribution rules as the organizing principle, the dissertation examined factual, functional and legal links to the state as the basis for attribution. It also briefly addressed the retroactively applicable rules relying on the rationale of continuity (Article 10

ARSIWA on insurrectional movements) and discretion (Article 11 on the acknowledgement and adoption of conduct). In doing so, it found that while the scope of applicability of the legal, functional, continuity- and discretion-based rationales is generally greater than what had previously been asserted in the literature, their practical relevance remains limited.

Contrary to the contention of some authors, the fall of the central government does not bar attributing the conduct of any remaining (lower-level) *de jure* organs and entities empowered to exercise governmental functions to the state. But since the situations under examination are by definition characterized by the lack of effective government, this rule's real-life relevance is largely limited to the context of co-opted institutions and the continued payment of civil servants in territory under the control of another actor. In both of these instances, it is the capacity in which the person acts that determines attribution, and it remains doubtful that much conduct can be captured under this rationale.

High hopes tend to be attached to the embodiment of the functional rationale, Article 9 ARSIWA, often seen as being 'tailored' to the absence of effective government. Even though the Article appears to be an instance of progressive development, its inclusion in the ARSIWA despite a solid grounding in custom attests to the power of its rationale. Given the dearth of relevant practice, much remains unclear about the precise scope and operation of this attribution rule, including the status of various requirements asserted in the literature or by the ILC. In particular, the added value of the ILC's normative criterion – that circumstances must be such as to call for the exercise of governmental authority – is unclear. Nonetheless, such added value can be provided by reading this requirement as one meant to exclude the usurpation of governmental powers. The rationale of Article 9 also extends to local *de facto* governments set up by ultimately unsuccessful armed groups – not discussed by the ILC – through the distinction between 'personal' and 'unpersonal' acts, whereby the latter denote simply carrying on with governmental routine, rather than furthering the cause of the insurrection. That said, if the ILC's normative criterion is to be applied, this would preclude attributing even the 'unpersonal' conduct of such *de facto* governments in all cases except where they moved into a pre-existing power vacuum, rather than forcing out the *de jure* authorities.

However, even under the most generous interpretation, setting aside all but the two core criteria – (1) exercising governmental functions (2) in the absence of the government – the rule's greatest limitation is inherent, stemming from the very rationale that underpins it. This rationale only captures violations committed in the course of exercising governmental functions, while most abuses by private actors take place outside that context. State responsibility thus cannot make up for the lack of an international law framework to hold non-state actors directly responsible at an organizational level.

The continuity-based rationale of attributing the conduct of victorious insurrectionists is also unlikely to be widely applicable as armed groups rarely win outright, and governments of national unity are excluded from

the scope of this rule. In the case of attribution based on acknowledgement and adoption, the limitation of the rule's applicability is once again inherent to the underlying rationale: the state's discretion.

Attribution: the significance of the factual rationale and the divergence in jurisprudence

This leaves the factual rationale, which has yielded what is without a doubt the most significant finding of the dissertation: the variety of 'control-based' attribution tests employed by regional human rights courts to hold states responsible for the conduct of private actors – paramilitary groups and secessionist entities. These courts have proven remarkably resistant to external impetus and the cause of coherence among international courts, each of them having developed its own test autonomously. Unfortunately, however, they are not always clear about the precise basis on which they ground responsibility; conceptual confusion between positive and negative obligations and/or jurisdiction and responsibility is quite frequent. In addition, the ECtHR appears to lack a clear common position on whether or not the Court does – and if so, whether or not it should – employ *lex specialis* on attribution. These instances of confusion may at least in part be explained by the fact that such complex issues of state responsibility for non-state conduct only arise in a fraction of the cases that come before these courts. But when these issues do arise, they have far-reaching consequences in terms of the scope of the state's responsibility. Accordingly, they should be subject to clear and rigorous analysis.

That said, with more and more cases decided, it is possible to identify patterns in the jurisprudence that allow establishing at least the basic parameters of these tests, even if their precise contours remain somewhat elusive. The cases reveal that the IACtHR bases attribution on some form of (often, but not always, *sine qua non*) support and/or collaboration in the particular circumstances of the case, i.e. at the level of conduct. While the minimum threshold for attribution remains unclear, there has not been any case so far where the Court attributed conduct solely on the basis of omissions. The ECtHR, meanwhile – for better or worse – relies on the same test to establish attribution for the purposes of extraterritorial jurisdiction and state responsibility; in doing so, it examines the links between the secessionist entity and the third state at the level of the actor. Likely driven by the type of evidence available, the Court focuses only on third-state support, rather than control, establishing attribution on the basis that the entity survives by virtue of such support. As in the case of the IACtHR, the minimum threshold for attribution is unclear; so is the potential significance of a number of factors, such as the nature of the private actor (carrying out public functions as a local administration) and the third state's role in the creation of the entity, as opposed to its continued support. In the end, neither court seems to base attribution on control strictly speaking, even if the ECtHR's reasoning leaves room for a presumption of control based on

dependence. Instead, both courts appear to be relying on something akin to complicity to establish attribution, rather than a narrow understanding of agency based on control.

Attribution: potential objections to – and justifications of – human rights courts' diverging tests

Given these findings, probably the most controversial argument of the dissertation is that despite their departure from ICJ and ILC orthodoxy (even if the Commission stopped short of setting a threshold in the text of the ARSIWA), these attribution tests should continue to be applied – with two caveats. The IACtHR and ECtHR should only apply these tests as long as there is no state/non-state complicity rule in international (human rights) law; and they should limit attribution to cases of *sine qua non* contribution by the state. There are two main arguments against these tests: that they pose a threat of fragmentation within international law, and that they may not be grounded in state consent. But in spite of these concerns, it is the contention of the dissertation that given the extent of states' involvement in these cases, the outcomes reached by the courts were plausible and much preferable to the alternative (states being held responsible only for a violation of a duty to protect or escaping responsibility altogether). Furthermore, the tests' limitation to *sine qua non* contributions ensures that the concept of state responsibility is not stretched too far.

The specter of fragmentation must be considered against the possible alternative. If the price of avoiding fragmentation is following the ICJ's tests, that price is arguably too high. Granted, the 'effective control' and 'complete dependence' tests ensure that states are not held responsible for conduct that was not strictly under their control, so there is no element of risk involved for the state. But the cost of this cautious approach is that these tests virtually guarantee an easy evasion of responsibility. All states need to do is find an ideologically aligned group, give it funding and/or other forms of support, perhaps coordinate its actions, and let it do 'the dirty work' – all while the state remains just far enough removed from the events to be able to deny responsibility. Against this backdrop, it is unlikely that any state will ever be held responsible under either the 'effective control' or the 'complete dependence' test.[1] Simply put, these tests fail to capture the real-life nature and complexity of relations between states and non-state actors. Their purpose is not to be realistic; it is to make sure that responsibility is limited to what is under strict state control. It is thus no wonder that respondent states continue to argue for these tests in various fora. However, faced with situations where respondents were deeply involved in the creation of, and support for, private actors committing

1 The state could still be held responsible if found to have given instructions to the non-state actor for the commission of an internationally wrongful act, but that is another limb of Article 8 ARSIWA.

human rights abuses, the positions of both the IACtHR and the ECtHR are understandable, and their underlying logic quite compelling. Colombia, Turkey, Russia and Armenia *should* be held responsible for the conduct of the paramilitaries, the TRNC, the MRT and the NKR, because if it was not for the role played by these states, these private actors could not have committed the human rights abuses in the first place. This statement, in turn, reveals the minimum threshold that should be applied for attribution: the state's contribution to the wrongful act should be *sine qua non*. This would set attribution sufficiently apart from complicity as a self-standing basis for responsibility to maintain a clear conceptual distinction between the two; and would ensure that state responsibility is not stretched too far, given the extensive role of the state.

Still, these attribution tests raise further difficulties where states continue to resist them. In effect, both the IACtHR's 'acquiescence and collaboration' and the ECtHR's 'survives by virtue of' tests are the result of judicial law-making. The texts of the ACHR and ECHR do not include explicit provisions on attribution, and it is also difficult to read them as implicitly addressing this specific issue. For the same reason, the IACtHR's claim to *lex specialis* based on Articles 1 and 2 ACHR (at least if that term is understood as referring to specific treaty provisions) is not a particularly strong one. In the absence of such explicit or implicit grounding in the treaty text, it is doubtful whether states' consent in becoming a party to the treaty extends to such innovations adopted by the respective courts. Where – as with Colombia – states eventually come to accept the court's reasoning, any possible deficiency in this regard is remedied. But this is not always the case: Russia, in particular, has continued to object in its pleadings to the standard applied by the ECtHR in its jurisprudence on Transdniestria. At the same time, though, its implementation record suggests that Russia has not rejected this strand of case law in its entirety. The state has paid the just satisfaction awarded in both *Ilaşcu* and *Ivanţoc*,[2] and has continued to engage with the Council of Europe regarding *Catan*, even as it complains that the ECtHR's application of 'its own "effective control" doctrine, having attributed to Russia the responsibility for violations occurred in the territory of another State, to which the Russian authorities had no relation whatsoever, […] created serious problems of practical implementation of this judgment.'[3] Besides, this issue still tends to be framed predominantly

2 See the implementation information on *Ilaşcu and others* v. *Russia*, Application No. 48787/99, http://hudoc.exec.coe.int/eng?i=004-7515; and *Ivanţoc and others* v. *Moldova and Russia*, Application No. 23687/05, http://hudoc.exec.coe.int/eng?i=004-27968.

3 Council of Europe, *Communication from the authorities (01/02/2019) in the case of CATAN AND OTHERS v. Russian Federation (Application No. 43370/04)*, DH-DD(2019)123, 4 February 2019, https://rm.coe.int/native/0900001680923e3f, at 1. See also the implementation information on *Catan and others* v. *Russia*, Application No. 43370/04, http://hudoc.exec.coe.int/eng?i=004-5.

as a fragmentation problem, rather than one of consent.[4] Nonetheless, these questions of consent merit further attention and cannot be taken lightly; but as they go beyond the scope of this dissertation, they should be the subject of future research.

Perhaps the most promising line of inquiry to support the application of these tests is relying on the *nature* of human rights treaties, rather than any specific *provisions* of such treaties. That nature – establishing and protecting fundamental rights for individuals, rather than simply creating commitments between states – may offer firmer ground to argue for a differentiated approach allowing for attribution based on *sine qua non* support. Indeed, this would not be the first time that human rights bodies develop concepts or approaches specific to human rights law or a given treaty that become widely established over time, even if their application in particular circumstances is not always without controversy. Extraterritorial jurisdiction or interpreting a human rights treaty as a 'living instrument' come to mind, for instance. There is a possibility that the IACtHR's and ECtHR's attribution tests could follow a similar trajectory; in the case of the ECtHR, the dissertation offered a possible reasoning grounded in more well-established concepts used by the Court.

Concerns relating to fragmentation and consent notwithstanding, it is the contention of this dissertation that – given the deep involvement of the respondent states – the courts' finding of attribution did justice to role of those states, much more than any alternative under existing law (finding a failure to protect or no responsibility at all) could have. This, in the end, is the most powerful argument in favor of the continued application of the IACtHR's and ECtHR's tests, even if it is admittedly a normative one. Under ideal circumstances, the law of state responsibility would have a robust complicity regime – including in relation to private actors – that could capture these scenarios. In that case, attribution could continue to function based on a narrow conception of agency (operationalized as strict control). But unless and until such a legal regime becomes a reality, regional human rights courts' recourse to attribution based on *sine qua non* support provides the best option to ensure that the state does not escape responsibility for its involvement in human rights abuses.

Attribution: opportunities to clarify and improve the human rights courts' analytical framework

Furthermore, there are no signs that either of these tests would be abandoned or significantly transformed in the foreseeable future, as both

4 See e.g. Council of Europe, Steering Committee for Human Rights, *CDDH Report on the place of the European Convention on Human Rights in the European and international legal order*, CDDH(2019)R92Addendum1, 29 November 2019, https://rm.coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279 (hereinafter CDDH(2019)R92Addendum1), paras. 25, 198.

courts have firmly stood by their own approaches when challenged by respondents. The IACtHR dismissed Colombia's argument in *Mapiripán* by stating that the American Convention constitutes *lex specialis*; the ECtHR sidestepped Russia's argument in *Catan* and *Mozer* through obfuscation, while distinguishing between jurisdiction and responsibility but applying the same test for both.

Such evasiveness by the European Court is unacceptable, not to mention harmful to the Court's own position. The ECtHR needs to address Russia's arguments, and if it chooses to depart from the ICJ threshold, it should say so explicitly and put forward a justification. To be sure, it is highly unlikely that Russia could be placated by anything other than the application of the 'effective control' or the 'complete dependence' test. But the state deserves a substantive consideration of its arguments, and the ECtHR's test can only be properly assessed if the underlying reasoning is out in the open. In doing so, the Court need not challenge the ICJ's tests. Like its Inter-American counterpart, the European Court could – and should – choose to adopt an approach that is limited to its own jurisprudence, or at least to human rights law. As a regional court with limited subject-matter jurisdiction, the ECtHR is not well placed to put forward a general test.

More generally, while the outcomes of these cases may have been much preferable to the alternatives, the IACtHR's and ECtHR's reasoning in reaching those outcomes often leaves something to be desired. The single most effective tool that these courts could deploy to strengthen not only their reasoning but also the acceptance of these tests is to clarify their parameters and operation, in order to improve legal certainty so that respondent states (as well as applicants) know what to expect and can plan their arguments – including their challenges – accordingly.

With both the IACtHR and the ECtHR facing further cases in the same vein, these questions are bound to remain on the agenda, not only attesting to the significance of these tests, but also presenting the opportunity to elucidate the reasoning applied. There are several thousand individual applications pending before the ECtHR related to Crimea, Eastern Ukraine, and the 2008 hostilities regarding Abkhazia and South Ossetia, in addition to the cases which continue to reach the Court from Northern Cyprus, Transdniestria, and Nagorno-Karabakh.[5] Cases related to paramilitary

5 See e.g. ECtHR, *Press Country Profile: Ukraine* (last updated: November 2019), https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf, at 11, mentioning 'over 5,000 individual applications' in addition to the inter-state cases; ECtHR, *Press Country Profile: Georgia* (last updated: July 2019), https://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf, at 7, mentioning 'almost 2,000 individual applications concerning the hostilities in 2008' besides two pending inter-state cases; ECtHR, *Press Country Profile: Armenia* (last updated: October 2019), https://www.echr.coe.int/Documents/CP_Armenia_ENG.pdf, at 2, mentioning more than a thousand individual applications of persons displaced in the Nagorno-Karabakh conflict.

activities in Colombia likewise continue to be filed with the IACtHR.[6] Through the resulting case law, the courts should take the chance to clarify their position on a number of issues.[7]

The ECtHR should first and foremost explicitly acknowledge that it is in fact attributing the conduct of non-state actors (secessionist entities) to third states in the course of establishing extraterritorial jurisdiction. In doing so, it should clarify how such attribution for the purposes of jurisdiction relates to attribution for the purposes of state responsibility and confirm that it is applying the same test for both. Second, the Court should provide further information on the kind of support which may be used as evidence that the actor 'survives by virtue of' a third state's conduct and explain how such support relates to control in its analysis. Third, this case law should clarify whether the type of actor (local administration) and the state's (lack of) role in the creation of the actor is relevant to the ECtHR's analysis. Fourth, the Court should clarify the minimum threshold necessary for attribution. Finally, the ECtHR should clarify its position on whether the ECHR supplies *lex specialis* on attribution, and if so, on what basis.

The IACtHR, meanwhile, should first clarify how exactly state agents' collaboration with private actors results in the state's responsibility for violating a duty to respect human rights: whether such collaboration (a) leads to the attribution of the private actor's conduct, or (b) is equated – ostensibly on the basis of a separate primary rule – with the scenario where state agents themselves perpetrate the human rights abuse. Second, the Court should spell out the minimum threshold for attribution,[8] with particular reference to whether omissions can result in attribution, and if so, how such omissions are to be differentiated from those which lead to a violation of the state's duty to *protect* human rights. It should also put forward a justification of complicity-based attribution, especially in cases where the state's contribution falls below a *sine qua non* threshold (which, according to this dissertation, should not lead to attribution). Third, the IACtHR should clarify the type of evidence that is used to establish collaboration, particularly since this can effectively turn attribution at the level of conduct into attribution at the level of the actor, at least in a certain time and place. Fourth and finally, the Court should clear up any remaining confu-

6 See IACHR Press Release No. 162/18, *IACHR Takes Case Involving Colombia to the Inter-American Court of Human Rights*, 25 July 2018, http://www.oas.org/en/iachr/media_center/PReleases/2018/162.asp, concerning 'forced disappearances, threats, forced displacements and homicide attempts against officials and members of the [Unión Patriótica left-wing political party], which were perpetrated either by State agents or by non-State actors with the tolerance and acquiescence of State agents'.

7 Cf. CDDH(2019)R92Addendum1, paras. 189, 192, 193, 198-199, noting that the ECtHR is not clear in its reasoning and that more clarity would be welcome.

8 Since most of the Court's jurisprudence appears to establish attribution of private actors' conduct, it is used here as a shorthand; but given the IACtHR's equivocation on this issue, any references to 'attribution' in this paragraph should be read as referring to *either* attribution *or* collaboration leading to responsibility for violating a duty to respect.

sion and apply a consistent distinction between the duty to protect and the duty to respect human rights under the ACHR.

Complicity: room for complicity by omission and complicity-based attribution

Having considered responsibility based on duties of protection and through attribution, and in light of the dissertation's findings on these issues, the third main ground to explore is complicity. The existing legal categories (failure to protect and attribution) are ill-fitting to capture the phenomenon of state/non-state complicity, leading to the state being held responsible for less or for more than its actual degree of involvement. International law should therefore develop a robust rule prohibiting state complicity in the wrongful conduct of non-state actors. A particularly strong argument for such a rule can be made in international human rights and humanitarian law, given that certain types of non-state actors are regarded as having duties within these fields and that states have general positive and negative obligations extending to these fields. But what would be the boundaries of state/non-state complicity, as a prospective rule of international law modelled on inter-state complicity? And in the absence of such a rule, could complicity nonetheless serve as a basis for attribution?

Complicity should include omissions, given that there is a qualitative difference between, for instance, simple incompetence, and deliberately looking the other way. To capture that difference, the factor distinguishing complicity by omission from violations of duties of protection should be intent to assist the non-state actor. In cases of acts, rather than omissions, such general intent is implicit in the act of providing assistance 'with knowledge of the circumstances', in the words of Article 16 ARSIWA. Much of the argument for a requirement of specific intent (for the principal to commit the wrongful act) is driven by the concern that constructing inter-state complicity too broadly can disincentivize international cooperation, as states may fear that simply by providing assistance, they become vulnerable to litigation. Arguably, this fear is already sufficiently mitigated by the requirement of knowledge on the part of the state providing aid or assistance. But in any case, this problem is much less likely to occur in the case of private actors. Such actors either operate with a relatively narrow purpose (like paramilitaries); or the assistance itself is unlawful in the first place, violating the non-intervention rule, as in the case of third-state support to secessionist entities – even if this falls outside the scope of the ECtHR's jurisdiction.

At the same time, complicity and attribution should be delineated from each other on the basis of whether the non-state actor has acted on the state's behalf. Still, unless and until a state/non-state complicity rule is in place, complicity should be able to serve as the basis for attribution in cases of *sine qua non* contribution. This is a less than ideal solution, but one that is still preferable to capturing such situations under the rubric of failure to prevent or, even worse, letting them fall through the cracks completely.

The dissertation argues that drawing the dividing line between complicity and attribution at such contributions strikes the right compromise between narrowing the accountability gap and respecting the principle that the state is only responsible for its own conduct. It not only goes beyond the requirements of complicity as such, but also ensures that attribution is limited to instances where the state plays a critical role in the non-state actor's wrongful act – instances where merely finding a violation of a duty to protect would simply not do justice to the extent of the state's role. In such a case, the complicit state would likely turn into a co-perpetrator, to whom the resulting injury as a whole can be attributed, which means that in terms of outcome, the state's responsibility would not be stretched too far.

Final thoughts: the role of the ARSIWA and human rights courts in the pursuit of accountability

In all this, it is interesting to note that in situations characterized by the absence of effective government, the bases of responsibility with the most real-life significance have ultimately little to do with the ARSIWA. The final version of the ARSIWA do not address the threshold required for control-based attribution (at least not in the text of the Articles), the possibility of complicity-based attribution, or the functioning of duties of protection, despite all of these questions having been considered during the ARSIWA's drafting. This is not to criticize the Articles, which had to be streamlined to bring the ILC's project to a conclusion after five decades, and had to retain sufficient flexibility on the threshold question to be able to accommodate diverging judicial practice (even if the ILC ended up effectively endorsing the ICJ's approach in the Commentary). Rather, the aim is to point out that there is life outside the ARSIWA, and much in state responsibility that is not covered or definitively settled by the Articles. Perhaps the greatest influence of the ARSIWA in this context is through the inter-state complicity rule, serving as the model for possible state/non-state complicity; but while Article 16 ARSIWA was declared to be customary by the ICJ in 2007, the precise contours of that rule are still frequently debated. But even if the ASRIWA are not the main driving force behind these bases of responsibility, in most cases they can be reconciled with the Articles and placed in the ILC's framework; and in any case, the ARSIWA themselves leave open the possibility of *lex specialis*.

Overall, the main conclusion of the dissertation is that despite the (often inherent) limitations of the law of state responsibility, it is possible to hold states responsible in many ways for their involvement in the conduct of private actors even in situations characterized by the absence of an effective government. In terms of existing rules: duties of protection continue to apply, even if the state's means may be restricted, and the state is still obliged to use the means reasonably available to it to comply; Articles 4, 5 and 9 ARSIWA can operate even if the central government completely collapses; co-optation and the continued payment of civil servants enable

attribution if the person acts in an official capacity; and conduct can be retroactively acknowledged and adopted once a new government is in place. Given the scarcity of practice, there is some uncertainty as to when the conduct of local *de facto* governments may be attributed to the state under Article 9 ARSIWA, but it appears that at the very least, their unpersonal conduct is attributable where they have moved into a pre-existing vacuum.

Importantly, more conduct is attributable to the state than previously asserted in the literature. Granted, inasmuch as the factual rationale is concerned, this stems from the inclusion of third states and the broader definition of 'state failure' adopted at the outset, understood as the (relatively common) loss of control over state territory, rather than the (exceptionally rare) complete collapse of governing institutions. After all, regardless of the requisite threshold for attribution, *state* support or control is understood to be *governmental* support or control, and if there is no government in place, there can be no such support or control (unless it comes from a third state's government). But attributing the conduct of *de jure* organs, those empowered by law to exercise governmental functions, and those exercising such functions in the absence of government (Articles 4, 5 and 9 ARSIWA) is possible even in the case of such collapse, let alone the loss of territorial control. That said, given the typical factual scenarios and/or the rules' inherent limitations, none of these grounds is likely to provide a major contribution to closing the accountability gap emerging in the absence of effective government.

In order to bolster and complement the existing rules and help narrow the accountability gap, the dissertation proposes: that the burden of proof should be partially shifted in cases concerning duties of protection; that a state/non-state complicity rule should be developed in international law (and could be 'read into' treaty provisions on general obligations in human rights and IHL); and that until such a rule is in place, state complicity in the conduct of non-state actors should form a basis for attribution where the state's contribution is *sine qua non*.

The jurisprudence of the IACtHR and the ECtHR, meanwhile, has provided an interesting conundrum, straddling the two research questions, as it were. Under the factual rationale of attribution, these two courts *have* held states responsible for a wider range of conduct than what would be captured under the ICJ's tests, and these judgments are, of course, binding on the respondent states. This departure from the ICJ, however, has not gone unchallenged either in the literature or – more importantly – by states, leaving the status of the human rights courts' attribution tests somewhat uncertain. Still, these courts may be able to claim *lex specialis* based on the human rights character of their respective treaties. Alternatively, and in line with what has been argued more generally, the IACtHR could interpret Article 1 of the American Convention on Human Rights as implying a rule against state/non-state complicity – failing that, it should restrict attribution to cases of *sine qua non* support. The ECtHR, meanwhile, could possibly

bring its approach in line with the ARSIWA framework by clarifying the relationship between support and control (since, in the absence of knowledge, it cannot rely on complicity).

The tests of these two courts are not without their challenges, both internal (regarding the courts' reasoning) and external (regarding issues of fragmentation and consent). But it is only through an open debate that these challenges can be addressed, and the costs, benefits, and suitability of these tests evaluated by the international – or the respective regional – community. Through their growing jurisprudence, the two courts have already clarified a number of issues, and the dissertation has tried to expose, as much as possible, the conceptual framework implicit in the courts' reasoning. But the IACtHR and ECtHR still need to be more forthcoming on both the parameters and the justifications of the tests applied. In the end, though, the fact remains that this case law is probably the most powerful tool in attempting to close the accountability gap arising in the absence of effective government. Any current shortcomings in reasoning notwithstanding, by holding states responsible for human rights abuses committed by paramilitary groups and secessionist entities with *sine qua non* assistance, courts can bring at least some measure of relief to the victims of such abuses.

Summary

Establishing State Responsibility in the Absence of Effective Government

The dissertation examines how the rules of establishing state responsibility apply in situations where the government loses effective control over (part of) the state's territory. While the relevant rules are defined by a public/private distinction, with a focus on the government, loss-of-control situations are characterized by an increased role played by private actors. Given this mismatch, the dissertation asks: (1) Under the existing rules of international law, under what circumstances can states be held responsible in connection with private conduct in such situations? (2) Where states are involved in private conduct, how can any remaining accountability gaps be narrowed or even closed? In exploring these questions, the dissertation focuses on three bases of responsibility, corresponding to the extent of the state's involvement in the conduct of the private actor: violation of an obligation to prevent and/or redress private conduct, complicity, and attribution.

As a starting point for further analysis, Chapter 2 sets out the fundamental features of the law of state responsibility – including the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC ARSIWA) – followed by a general overview of remarks on this topic from the literature on 'failed states' in international law.

Chapter 3 then turns to violations of obligations – on the state affected by loss of control – to prevent and/or redress the conduct of a private actor. The dissertation shows that such obligations are widespread in international law – and may even be considered a corollary of the state's sovereignty – operating with a shared standard of due diligence. The due diligence standard is violated where the state (1) knew or should have known of a catalyst event carried out by a private actor, (2) had the means to counteract the event, but (3) failed to use those means. While the loss of control over (part of) the state's territory may affect the availability of means, the state is still under the obligation to use the means that remain at its disposal to counteract catalyst events. This has been explicitly confirmed by the European Court of Human Rights (ECtHR) in a series of cases. It also conforms with the judgment of the International Court of Justice (ICJ) in *Armed Activities*, even if the Court's formulation does unfortunately leave the judgment open to different interpretations.

In many cases, the practical significance of such duties is likely to be limited, as the state may not be able to do much to prevent and/or redress catalyst events in territory beyond its control. That said, the case of

Colombia indicates that different considerations apply to voluntary, rather than forced, withdrawals, which likely require putting in place effective alternative safeguards. Another obstacle to bringing successful cases of this nature is that the burden of proof continues to rest on the applicant, who may not be in a position to know what means were available to the state. This difficulty can be alleviated by partially shifting the burden of proof and creating a presumption of responsibility where the applicant can prove that the respondent state knew of the catalyst event and the state does not provide proof of *any* measures taken in response. But while there are historical antecedents for this approach, it has not been followed in contemporary cases.

In Chapters 4 and 5, the dissertation turns to consider the question of attributing the conduct of private actors to the (affected or a third) state, with the analysis organized according to the rationales used for attribution: factual, functional, legal, continuity- or discretion-based. Examining the factual rationale yields what is, in terms of practical relevance, the most significant finding of the dissertation: although this is not always openly acknowledged by the two courts, both the ECtHR and the Inter-American Court of Human Rights (IACtHR) in effect apply attribution tests with significantly lower thresholds than the ICJ's 'effective control' and 'complete dependence' tests, thus linking a wider range of conduct to the state.

Identifying the content of these tests is complicated by the fact that the reasoning of the two human rights courts is not always clear or distinguishing adequately between attribution and related concepts, such as duties of protection or extraterritorial jurisdiction. Nonetheless, the tests' core features can be described as follows. The IACtHR establishes attribution based on support and/or collaboration at the level of conduct, relying on a rationale that is closer to complicity than (a strict understanding of) agency. The Court sets no clear minimum threshold, but it appears the requisite contribution is something more than an omission, yet does not have to reach a *sine qua non* threshold. The IACtHR has also left the door open to considering collaborative acts by state agents as a violation of the duty to respect, rather than as a basis for attribution. The ECtHR's test, meanwhile, examines whether the private actor 'survives by virtue of' third-state support. This is essentially a test of *sine qua non* support – and the relationship between support and control is not quite clear in the Court's jurisprudence. Furthermore, as the cases before the ECtHR so far have all concerned secessionist entities established with the help of third states, it is not yet clear whether the state's role in the creation of the private actor or the latter's exercise of governmental functions influences the Court's analysis. Like that of the IACtHR, the rationale of the ECtHR is closer to complicity, but since complicity operates at the level of conduct, not actor, the ECtHR's conceptualization falls outside the framework of the ARSIWA. In sharp contrast to the human rights courts' support-based approaches, the ICJ's tests require such close *control* over either the conduct or the actor as to

exclude any autonomy, ensuring that the private actor – generally or in the particular instance – was indeed carrying out the state's will.

The difference in tests reflects differing conceptions of what it means to be acting on the state's behalf, driven by different underlying considerations: safeguarding state sovereignty and not stretching the concept of state responsibility too far (ICJ) or protecting human rights (IACtHR, ECtHR). Still, while the IACtHR has embraced *lex specialis* on attribution, the ECtHR has been much more ambivalent and seems to be in denial of applying its own attribution test. Although the relevant treaties do not include explicit *lex specialis* provisions on attribution, a broader understanding of *lex specialis* based on the human rights *character* of these treaties offers a stronger justification for the courts' approaches. In any case, these tests are likely to remain staples of IACtHR and ECtHR case law, but unlikely to spread beyond the context of their respective treaty regimes. That said, as similar cases continue to be submitted to both the IACtHR and the ECtHR, future jurisprudence could (and should) further clarify the parameters of these tests.

Turning to the functional rationale, the analysis focuses on Article 9 ARSIWA, which attributes the conduct of private persons exercising public functions 'in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'. While this rule may be the result of progressive development, rather than codification, it was apparently not regarded as controversial by states. Still, given the scarcity of supporting practice, questions arise as to the status of the Article's third requirement: 'circumstances such as to call for the exercise of those elements of authority'. The added value of this third requirement is not entirely clear, either, but it seems to have been intended to filter out cases where the absence of effective government is the cause, rather than the result, of private actors exercising state functions.

Contrary to assertions in the literature, Article 9 ARSIWA continues to apply even where the central government ceases to exist. Furthermore, the logic of this rule can be extended to rebel-run local *de facto* governments, excluded from the ILC's consideration. This can be done by distinguishing between 'personal' and 'unpersonal' acts, where the latter denote simply carrying on providing governmental functions, rather than furthering the cause of the insurrection. Depending on how the ILC's third requirement is viewed, this allows for attribution of unpersonal conduct at least in cases where the local *de facto* government moves into a pre-existing vacuum. Although the extension to local *de facto* governments increases the number of situations where this rule may be applicable, the rationale of functionality constitutes its biggest limitation, as most abuses by non-state actors do not tend to take place in the course of providing routine governmental functions.

Examining the legal rationale likewise shows that the law of state responsibility stretches further than suggested by the literature: the collapse of the central government does not invalidate the state's legal system and,

as a result, does not affect the attribution of the conduct of remaining lower-level state organs. As for co-optation and the official government's continued payment of civil servants operating in areas beyond its control, the decisive element in these cases is the capacity in which the person is acting.

Chapter 5 ends by analyzing the rationales based on continuity and discretion. While Article 10 ARSIWA – allowing for attributing the conduct of successful insurrectional movements – is applicable in theory, the limitations of the rule are such as to render it irrelevant in practice in the situations under consideration. In Article 11 ARSIWA, the decisive element is taking ownership of private conduct in a 'clear and unequivocal' manner, which could also apply retroactively, but the rule's biggest limitation is inherent in its discretionary nature.

Finally, in Chapter 6, the dissertation argues that a rule prohibiting state complicity in the conduct of private actors should be developed in international law; in particular, such a state/non-state complicity rule could be 'read into' treaty provisions on general obligations in human rights and international humanitarian law. The chapter briefly examines (1) how such a rule may be delineated from violations of duties of protection and from attributing private conduct to the state, and (2) whether, in the absence of such a rule, complicity may serve as a basis for attribution. As regards delineation from related categories, complicity may be distinguished from breaches of duties of protection (which are violated by omission) where it is done by action, and through intent, where it is done by omission; and complicity may be distinguished from attribution through the nature of the relationship between the private actor and the state: assistance or agency. Still, the fact remains that the difficulties in establishing a rule of state complicity in the conduct of private actors result in an accountability gap. In order to narrow that gap, the dissertation proposes that – unless and until a state/non-state complicity rule is established – complicity should serve as a basis for attribution where the state's contribution is of a *sine qua non* nature. A *sine qua non* contribution goes beyond what is necessary to establish complicity in the inter-state context and is likely to cross the line from aid and assistance to co-perpetration. In such cases, the ILC commentary to Article 16 ARSIWA already notes that the resulting injury can be concurrently attributed to both responsible states. Applying this reasoning by analogy supplies the foundation for the proposed complicity-based attribution rule.

Overall, the main conclusion of the dissertation is that despite the (often inherent) limitations of the law of state responsibility, it is possible to hold states responsible in many ways for their involvement in the conduct of private actors even in situations characterized by the absence of an effective government. In terms of existing rules: duties of protection continue to apply, even if the state's means may be restricted; Articles 4, 5 and 9 ARSIWA can operate even if the central government completely collapses; co-optation and the continued payment of civil servants enable attribution

if the person acts in an official capacity; and conduct can be retroactively acknowledged and adopted once a new government is in place. In addition, under the factual rationale of attribution, the IACtHR and ECtHR have held states responsible for a wider range of conduct than what would be captured under the ICJ's tests. This departure from the ICJ, however, has not gone unchallenged either in the literature or – more importantly – by states, leaving the status of the human rights courts' attribution tests somewhat uncertain. In order to bolster and complement the existing rules and help narrow the accountability gap, the dissertation proposes that: the burden of proof should be partially shifted in cases concerning duties of protection; that a state/non-state complicity rule should be developed in international law; and that until such a rule is in place, state complicity in the conduct of non-state actors should form a basis for attribution where the state's contribution is *sine qua non*. Furthermore, such a state/non-state complicity rule could be 'read into' treaty provisions on general obligations in human rights and international humanitarian law; and/or the IACtHR and ECtHR may be able to claim *lex specialis* based on the human rights character of these treaties.

Samenvatting (Summary in Dutch)

Vestigen van staatsaansprakelijkheid in afwezigheid van een effectieve overheid

Het proefschrift onderzoekt hoe regels over het vestigen van staatsaansprakelijkheid toegepast worden in situaties waarin de overheid effectieve controle over (een deel van) het grondgebied van de staat verliest. Hoewel de relevante regels worden gekenmerkt door een publiek/privaat onderscheid, met een focus op de overheid, worden situaties waarin controle is verloren gekenmerkt door een toenemende rol van private actoren. Vanwege deze discrepantie stelt het proefschrift de volgende vragen: (1) Gegeven de bestaande regels van internationaal recht, onder welke omstandigheden kunnen staten aansprakelijk worden gesteld in relatie tot gedragingen van private actoren in dergelijke situaties? (2) Wanneer staten betrokken zijn bij gedragingen van private actoren, hoe kunnen bestaande *accountability gaps* worden verkleind of weggenomen? In de beantwoording van deze vragen richt het proefschrift zich op drie bases van verantwoordelijkheid, overeenkomstig de mate waarin de staat betrokken is bij de gedragingen van de private actor: schending van verplichtingen om private gedragingen te voorkomen of te herstellen, medeplichtigheid, en toerekening.

Als aanzet voor het onderzoek geeft hoofdstuk 2 een uiteenzetting van de basiskenmerken van het internationale recht omtrent staatsaansprakelijkheid – inclusief de *Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)* van de *International Law Commission (ILC)* – gevolgd door een algemeen overzicht van inzichten over dit onderwerp vanuit de literatuur over *'failed states'* in het internationaal recht.

Hoofdstuk 3 richt zich vervolgens op schendingen van verplichtingen door staten die zijn getroffen door verlies van controle, om gedragingen van private actoren te voorkomen of te herstellen. Het proefschrift toont aan dat dergelijke verplichtingen wijdverbreid zijn in het internationaal recht – en mogelijk zelfs voortvloeien uit de soevereiniteit van de staat – en dat daarbij een gedeelde standaard ten aanzien van gepaste zorgvuldigheid gehanteerd wordt. De standaard voor gepaste zorgvuldigheid wordt geschonden wanneer de staat (1) wist of had moeten weten van een *catalyst event* uitgevoerd door een private actor, (2) de middelen had om dit tegen te gaan, maar (3) deze middelen niet heeft ingezet. Hoewel het verlies van controle over (een deel van) het grondgebied van de staat de beschikbaarheid van deze middelen beïnvloedt is de staat nog steeds verplicht om de overgebleven middelen waarmee het dergelijke *catalyst events* tegen kan gaan in te zetten. Dit is expliciet bevestigd door het Europees Hof voor de Rechten van de Mens (EHRM) in een aantal zaken. Het sluit ook aan bij de uitspraak van het Internationaal Gerechtshof (IGH) in *Armed Activities*

(DRC *v.* Oeganda), hoewel de formulering van het Hof helaas ruimte laat voor verschillende interpretaties.

In veel gevallen is de praktische relevantie van dergelijke verplichtingen waarschijnlijk beperkt, omdat de staat niet veel kan doen om *catalyst events* op grondgebied waar het geen controle heeft te voorkomen of te herstellen. Dat gezegd hebbende, het voorbeeld van Colombia geeft aan dat verschillende overwegingen van toepassing zijn op vrijwillige, in tegenstelling tot gedwongen, terugtrekkingen, waar waarschijnlijk doeltreffende alternatieve waarborgen voor moeten worden ingesteld. Een ander obstakel voor succesvolle claims is dat de bewijslast bij de eisende partij blijft, die zich wellicht niet in een positie bevindt om te kunnen weten welke middelen beschikbaar waren voor de staat. Deze moeilijkheid zou kunnen worden verminderd door een gedeeltelijke verschuiving van de bewijslast, en het creëren van een vermoeden van verantwoordelijkheid wanneer de eisende partij kan bewijzen dat de gedaagde staat kennis had van het *catalyst event* en geen bewijs levert dat het hiertegen enige maatregelen heeft getroffen. Maar hoewel er historische antecedenten zijn voor deze benadering is deze in hedendaagse gevallen niet gevolgd.

Hoofdstukken 4 en 5 analyseren de vraag van toerekening van het handelen van private actoren aan de staat (de betrokken staat of een derde staat). Deze analyse is gestructureerd op basis van de verschillende grondslagen waarop toerekening plaatsvindt: feitelijk, functioneel, juridisch, continuïteit of keuze. De analyse van de feitelijke grondslag voor toerekening leidt tot de voor de praktijk meest relevante conclusie van deze studie: hoewel de twee hoven er niet altijd expliciet voor uitkomen, hanteren zowel het Europese als het Inter-Amerikaans Hof voor de Rechten van de Mens in feite aanzienlijk lagere standaarden voor toerekening dan de criteria van 'effectieve controle' en 'volledige afhankelijkheid' die worden gebruikt door het IGH. Hierdoor wordt een breder scala aan gedragingen gelinkt aan de staat.

Het identificeren van de inhoud van de toetsen die deze hoven toepassen voor toerekening wordt bemoeilijkt door het feit dat hun argumentatie niet altijd helder is en zij niet altijd adequaat onderscheid maken tussen toerekening en andere aanverwante concepten, zoals beschermingsplichten en extraterritoriale jurisdictie. Toch is het mogelijk de belangrijkste eigenschappen van hun respectievelijke toetsen als volgt samen te vatten: het Inter-Amerikaans Hof voor de Rechten van de Mens (IAHRM) bepaalt toerekening op basis van steun en/of collaboratie wat betreft het handelen en baseert zich dus op een grondslag die meer lijkt op medeplichtigheid dan (een strikte opvatting van) *agency*. Het Hof hanteert geen duidelijk minimumvereiste voor toerekening; het lijkt erop dat de vereiste bijdrage van de staat verder dient te gaan dan een omissie, maar dat deze ook weer geen *conditio sine qua non* hoeft te zijn. Daarnaast laat het IAHRM de mogelijkheid open dat collaboratie door statelijke actoren kan worden beschouwd als een schending van de *duty to respect*, in plaats van een basis voor attributie.

Het EHRM, daarentegen, stelt de vraag of de private actor 'overleeft dankzij' de steun van een derde staat. In essentie betreft dit een *sine qua non* toets – de private actor kan niet zonder de steun van de staat – en de relatie tussen steun en controle is niet geheel duidelijk in de jurisprudentie van het EHRM. Aangezien alle zaken voor het EHRM tot nu toe gingen over afscheidingsbewegingen opgericht met steun van een derde staat, is het bovendien nog niet duidelijk of de rol van de staat in het creëren van de private groep danwel de uitoefening van overheidsfuncties door die laatste, invloed hebben op de analyse van het Hof. Net als bij het IAHRM, ligt de door het EHRM gehanteerde standaard voor toerekening dichterbij medeplichtigheid. Maar aangezien medeplichtigheid opereert op het niveau van het handelen, in plaats van de actor zelf, valt de opvatting van het Hof buiten het kader van de ARSIWA. In tegenstelling tot de op steun gebaseerde benadering van de mensenrechtenhoven, vereist de door het IGH gehanteerde test een zodanig sterke controle over ofwel het handelen van de groep, ofwel de groep zelf, dat elke autonomie van de private actor feitelijk is uitgesloten, waardoor wordt gewaarborgd dat de private actor – over het algemeen of juist in een concreet geval – ook inderdaad de wil van de staat uitvoert.

De verschillen tussen deze testen verraden verschillende opvattingen over wat het betekent om te handelen namens de staat, welke worden gedreven door verschillende onderliggende overwegingen: het beschermen van de soevereiniteit van staten en de wens om de verantwoordelijkheid van staten niet te ver op te rekken (IGH) of het beschermen van mensenrechten (IAHRM, EHRM). Maar waar het IAHRM zich op het standpunt stelt dat het Amerikaans Verdrag voor de Rechten van de Mens een bron van *lex specialis* is met betrekking tot toerekening, is het EHRM veel meer ambivalent en lijkt het te ontkennen een eigen toets voor toerekening te hanteren. Hoewel de relevante verdragen geen expliciete *lex specialis* bepalingen bevatten, biedt een breder begrip van *lex specialis*, gebaseerd op het mensenrechtenkarakter van deze verdragen, een sterkere rechtvaardiging voor de benadering van deze hoven. Hoe dan ook lijkt het erop dat deze toetsen een essentieel onderdeel zullen blijven van de jurisprudentie van het IAHRM en het EHRM, maar dat zij de context van deze respectievelijke regimes niet zullen ontstijgen. Dat gezegd hebbende, aangezien er nog altijd nieuwe, vergelijkbare zaken bij zowel het IAHRM als het EHRM aanhangig worden gemaakt zou toekomstige jurisprudentie de parameters van deze toetsen verder kunnen (en moeten) verduidelijken.

Wat betreft de functionele grondslag voor toerekening, concentreert de analyse zich op artikel 9 ARSIWA, dat gaat over de toerekening aan de staat van het handelen van private actoren die publieke functies uitoefenen 'in afwezigheid van de officiële autoriteiten en onder omstandigheden die vragen om de uitoefening van die onderdelen van gezag'. Hoewel het ernaar uitziet dat deze regel geen codificatie is geweest van een reeds bestaande regel, maar juist het resultaat van de verdere ontwikkeling van het internationaal recht, werd deze naar het schijnt niet als controversieel

gezien door staten. Toch rijzen er, gezien de zeldzaamheid van statenpraktijk op dit punt, vragen met betrekking tot het derde vereiste onder dit artikel: de 'omstandigheden die vragen om de uitoefening van die onderdelen van gezag'. De toegevoegde waarde van dit derde vereiste is niet geheel duidelijk, maar het lijkt te zijn bedoeld om gevallen te selecteren waarin het gebrek aan effectief overheidsgezag de oorzaak is van het feit dat private actoren staatstaken uitvoeren, in plaats van het resultaat daarvan.

In tegenstelling tot wat wel is gesuggereerd in de literatuur, blijft artikel 9 ARSIWA van toepassing wanneer de centrale overheid geheel ophoudt te bestaan. Bovendien kan de strekking van deze regel worden uitgebreid naar lokale *de facto* (rebellen)regeringen, die buiten het blikveld van de ILC vielen. Dit kan worden bereikt door onderscheid te maken tussen 'persoonlijke' en 'onpersoonlijke' handelingen, waarbij de tweede categorie ziet op het enkel vervullen van staatstaken, waarbij niet het doel van de opstand wordt bevorderd. Afhankelijk van de interpretatie die wordt gegeven aan dit derde vereiste van de ILC, zou dit het mogelijk maken dergelijke 'onpersoonlijke' handelingen toe te rekenen aan de staat in ten minste de gevallen waarin de *de facto* regering is getreden in een reeds bestaand machtsvacuüm. Hoewel een dergelijke uitbreiding van artikel 9 ARSIWA naar lokale *de facto* overheden het aantal situaties waarin deze regel van toepassing zou kunnen zijn doet toenemen, wordt dit tegelijkertijd beperkt door de grondslag van functionaliteit. Dit aangezien wandaden door private actoren meestal niet worden gepleegd in de uitoefening van reguliere staatstaken.

De juridische grondslag laat eveneens zien dat het recht van staatsaansprakelijkheid verder reikt dan dat wordt gesuggereerd in de literatuur: het ineenstorten van de centrale overheid maakt niet dat het juridische systeem van de staat ongeldig wordt en, als gevolg hiervan, heeft het geen invloed op toerekening van gedragingen van resterende staatsorganen op een lager niveau. Wat betreft het incorporeren van structuren die zijn opgezet door andere entiteiten en het doorbetalen van ambtenaren van de officiële overheid die werkzaam zijn in gebieden buiten haar controle, is het doorslaggevende element de hoedanigheid waarin de persoon optreedt.

Hoofdstuk 5 eindigt met een analyse van de grondslagen continuïteit en keuze. Hoewel artikel 10 ARSIWA het in theorie mogelijk maakt gedragingen van succesvolle revolutionaire bewegingen toe te rekenen aan de staat, zijn de beperkingen van de regel zodanig dat zij in de praktijk irrelevant zijn voor de hier bestudeerde situaties. In artikel 11 ARSIWA is het doorslaggevende element het op 'duidelijke en ondubbelzinnige' wijze overnemen van particulier gedrag, dat ook met terugwerkende kracht zou kunnen worden toegepast, maar de belangrijkste beperking van de regel is inherent aan het discretionaire karakter ervan.

Ten slotte, in hoofdstuk 6, stelt het proefschrift voor dat in het internationaal recht een regel zou moeten worden ontwikkeld die medeplichtigheid van de staat aan de gedragingen van particuliere actoren verbiedt. In het bijzonder zou een dergelijke regel van medeplichtigheid van een staat/

niet-statelijke actor kunnen worden gelezen in de artikelen over algemene verplichtingen in verdragen over mensenrechten en internationaal humanitair recht. Het hoofdstuk gaat kort in op (1) hoe een dergelijke regel kan worden afgebakend van schendingen van beschermingsverplichtingen en van het toerekenen van privé-handelingen aan de staat; en (2) of, in de afwezigheid van een dergelijke regel, medeplichtigheid als basis kan dienen voor toerekening. Wat de afbakening van verwante categorieën betreft, kan medeplichtigheid worden onderscheiden van inbreuken op de beschermingsverplichtingen (die worden geschonden door een omissie) wanneer dit gebeurt door actief handelen, en door opzet, wanneer dit gebeurt door een omissie; en medeplichtigheid kan worden onderscheiden van toerekening door de aard van de relatie tussen de particuliere actor en de staat: bijstand of *agency*. Toch blijft het zo dat de problemen bij het vaststellen van een norm over medeplichtigheid van de staat aan gedragingen van particuliere actoren resulteren in een *accountability gap*. Om die kloof te verkleinen wordt in het proefschrift voorgesteld dat – tenzij en totdat er een regel van medeplichtigheid van de staat/niet-statelijke actor tot stand komt – medeplichtigheid zou moeten dienen als basis voor toerekening wanneer de rol van de staat een *conditio sine qua non* is. Een *sine qua non* betrokkenheid gaat verder dan wat nodig is om medeplichtigheid in de interstatelijke context vast te stellen en zal waarschijnlijk de grens van hulp en bijstand naar gedeeld daderschap overschrijden. In dergelijke gevallen wordt, zoals het commentaar van de ILC op artikel 16 ARSIWA reeds opmerkt, de daaruit volgende schade tegelijkertijd aan beide verantwoordelijke staten toegeschreven. Door deze redenering naar analogie toe te passen wordt de basis gelegd voor de voorgestelde op medeplichtigheid gebaseerde toerekeningsregel.

De voornaamste conclusie van het proefschrift is dat ondanks de (vaak inherente) beperkingen van het internationale recht van de staatsaansprakelijkheid, het mogelijk is om staten op vele manieren aansprakelijk te stellen voor hun betrokkenheid bij handelingen van private actoren, zelfs in situaties die worden gekenmerkt door het ontbreken van een effectieve overheid. Wat de bestaande regels betreft: de verplichtingen om te beschermen blijven van toepassing, ook al zijn de middelen van de staat beperkt; de artikelen 4, 5 en 9 van de ARSIWA kunnen worden toegepast, zelfs wanneer de centrale overheid volledig ineenstort; incorporeren van structuren en doorbetaling van ambtenaren maken toerekening mogelijk als de persoon in een officiële hoedanigheid handelt; en het gedrag kan met terugwerkende kracht worden erkend en aangenomen wanneer er een nieuwe regering is geïnstalleerd. Bovendien hebben het IAHRM en het EHRM, onder de feitelijke grondslag van toerekening, staten verantwoordelijk gehouden voor een breder scala aan gedragingen dan wat binnen de toets van het IGH zou vallen. Deze afwijking van het IGH is echter niet onbetwist. Zowel reacties in de literatuur, als – wat nog belangrijker is – de reacties van staten, maken dat de status van de toerekeningstoetsen van de mensenrechtenhoven enigszins onzeker is. Om de bestaande regels te versterken en aan te vullen

en de *accountability gap* te helpen dichten, stelt het proefschrift voor om de bewijslast gedeeltelijk te verschuiven in zaken die betrekking hebben op beschermingsplichten; dat een regel zou moeten worden ontwikkeld die medeplichtigheid van de staat aan de gedragingen van particuliere actoren verbiedt; en dat totdat een dergelijke regel ontwikkeld is, de medeplichtigheid van de staat aan het gedrag van niet-statelijke actoren een basis zou moeten vormen voor toerekening wanneer de bijdrage van de staat een *conditio sine qua non* is. Verder zou een regel van medeplichtigheid van een staat/niet-statelijke actor kunnen worden gelezen in de artikelen over algemene verplichtingen in verdragen over mensenrechten en internationaal humanitair recht; en/of het IAHRM en het EHRM kunnen wellicht een beroep op *lex specialis* doen op basis van het mensenrechtenkarakter van deze verdragen.

Appendix:
Articles 4-5, 7-11 and 16 ARSIWA

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 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

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 acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

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.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Article 16
Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

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In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2019 and 2020:

MI-316 R. Zandvliet, *Trade, Investment and Labour: Interactions in International Law,* (diss. Leiden), Amsterdam: Ipskamp Printing 2019

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