Establishing state responsibility in the absence of effective government

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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.