Establishing state responsibility in the absence of effective government

Varga, A.

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

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

2.1 The Process and Result of the ILC's Codification

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

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

---

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

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

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

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

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

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

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

6 See *ibid*.

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

17 ARSIWA Commentary to Article 2, para. 5.

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

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

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

21 *Ibid*.

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

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

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

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

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

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

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

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

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

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

26 Kreijen, *State Failure*, 37.

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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