Establishing state responsibility in the absence of effective government

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

3.1 Introduction

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

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

3.2 Sovereignty as a General Duty to Maintain Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3 Concrete Obligations to Prevent / Redress (Private) Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.1 Inter-State Obligations

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

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

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

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

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

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

27 *Corfu Channel*, 22.

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

3.3.2 Obligations *vis-à-vis* International Organizations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.3.1 Human Rights Law

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

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

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

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

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

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

41 *Reparation for Injuries*, 184.

42 *Ibid.*, 183.

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

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

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

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

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

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

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

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

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

49 *Velásquez Rodríguez*, para. 182.

50 *Ibid.*, para. 172.

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

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

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

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

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

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

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

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

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

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

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

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

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

59 Costa, 'Positive Obligations', 453.

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

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

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

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

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

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

3.3.3.2 Investment Law

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

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

65 *Ibid.*, para. 6.

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

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

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

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

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

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

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

3.3.4 The Shared Standard of Due Diligence

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

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

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

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

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

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

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

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

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

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

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

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

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

77 *Corfu Channel*, 18.

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

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

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

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

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

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

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

80 *Tehran Hostages*, para. 68.

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

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

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

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

3.4.1 The State Knew or Should Have Known…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

101 *Castillo González*, para. 104.

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

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

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

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

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

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

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

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

3.4.2 …and It Should Have Acted with Due Diligence

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

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

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

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

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

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

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

3.4.2.1 The Institutional Requirement

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

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

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

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

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

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

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

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

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

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

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

116 *Mead*, 654-655.

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

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

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

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

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

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

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

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

120 *Ibid*. (emphasis added).

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

122 Harvard Draft, 146.

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

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

123 *Ibid.*

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

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

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

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

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

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

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

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

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

3.4.2.2 *The Effectiveness of Control in General*

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

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

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

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

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

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

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

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

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

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

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

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

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

136 *Armed Activities*, para. 301.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

152 See notes 132-133 above.

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

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

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

3.4.2.2.2 The Intra-territorial Presumption of Jurisdiction at the ECtHR

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

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

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

154 *Corfu Channel*, 18.

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

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

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

156 *Ibid*.

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

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

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

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

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

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

159 *Ilaşcu*, paras. 3, 28-289.

160 *Ibid.*, para. 312.

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

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

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

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

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

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

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

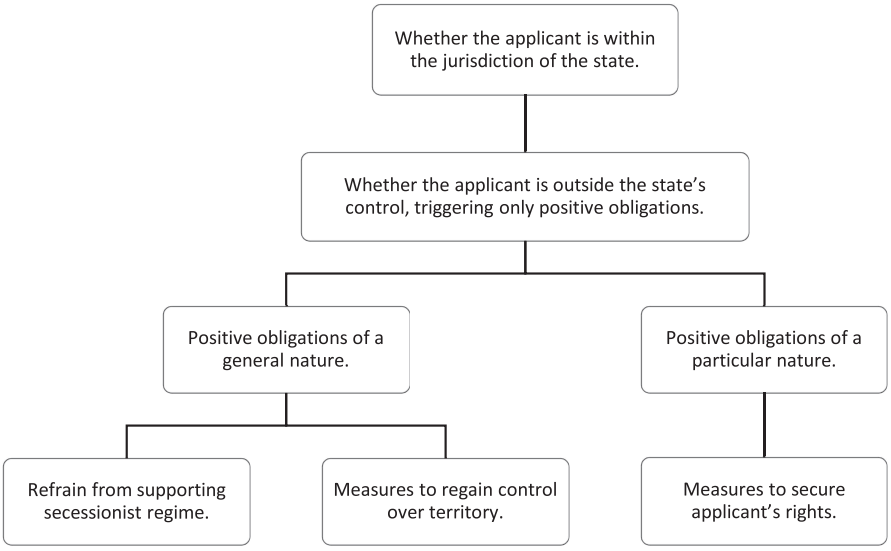
165 *Ilaşcu*, paras. 330 (on the lack of effective control) and 331 (emphasis added).

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

167 *Ilaşcu*, para. 340.

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

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



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

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

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

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

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

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

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

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

171 *Ivanţoc*, para. 108.

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

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

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

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

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

175 *Azemi*, paras. 41-42.

176 *Ibid.*, para. 42.

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

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

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

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

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

179 *Azemi*, para. 47.

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

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

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

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

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

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

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

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

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

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

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

190 *Sargsyan*, paras. 142-149.

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

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

193 *Ibid*., para. 148.

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

195 *Sargsyan*, para. 142.

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

3.4.2.2.2.4 Concluding Remarks

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

3.4.2.3 The Role of Causation in Particular

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

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

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

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

196 *Corfu Channel*, 22-23.

197 See *ibid.*, 22.

198 *Ibid.*, 23.

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

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

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

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

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

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

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

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

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

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

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

215 *Ilaşcu*, para. 351.

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

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

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

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

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

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

221 See *Ilaşcu*, paras. 346-350.

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

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

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

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223 *Khlebik*, para. 73.

224 *Ibid.*, para. 79.

225 *Ibid.*, para. 78.

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

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

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

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

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

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

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

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

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

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

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

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

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

235 *Khlebik*, para. 74.

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

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

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

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

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

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

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

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

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

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

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

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239 *Ilaşcu*, para. 340.

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

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

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

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

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

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

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

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

244 *Ilaşcu*, para. 345.

245 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5 Possible Counterarguments to a Sovereignty-based Approach

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

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

266 See note 265 above.

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

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

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

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

3.5.1 Applicability Based on Effective Control, Rather Than Sovereignty

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

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

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

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

272 *Namibia*, para. 118.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5.2 An Excessive Burden on the State?

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

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

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

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

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

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

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

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

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

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

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

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

292 *Ibid.*, para. 19.

293 *Ibid.*, para. 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

304 *Ibid.*, para. 116.

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

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

307 *Ibid.*, para. 118.

308 *Ibid.*, para. 119.

3.5.2.2 *Concluding Remarks*

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

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

3.6 Concluding Remarks

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

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

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

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

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

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

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