Establishing state responsibility in the absence of effective government

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5 Attributing the Conduct of Private Actors II: The Functional, Legal, Continuity- and Discretion-based Rationales

5.1 Introduction

While the factual rationale for attribution may be one of the most often applied in the absence of effective government, it is far from the only one that can be relied on. Accordingly, this chapter turns to the rationales based on exercising governmental functions; legal links with the state in the case of remaining low-level *de jure* organs or through the co-optation of private actors; the continuity in the case of an insurrectional movement that becomes the government; and discretionary acknowledgement and adoption of private conduct.

The existing literature on the subject is very skeptical regarding the possibility of successfully attributing *any* conduct to a 'failed state' (including, but not only, under Articles 4/8 ARSIWA, as already discussed above). This is due to two related factors. Firstly, attribution is based on a public/private divide and the conduct of actors on the private side of that divide has to be traced back to 'the state' – but since the state is an abstraction, private conduct in effect has to be linked to the embodiment of the state, i.e. the government. It is thus no surprise that the ARSIWA Commentary describes Article 4 as the 'starting point' even for the attribution of private conduct.[1] This linkage is quite explicit in Article 8 ARSIWA, where the requisite instructions, direction or control has to emanate from state organs;[2] and is implicit in Article 11 ARSIWA, where the necessary acknowledgement and adoption must arguably also come from state organs.[3] The 'starting point' does not have to be the existing government in the case of Article 10 ARSIWA, where the insurrectional movement itself *becomes* the government over time – but the underlying principle is the same. In the end, the only exception to this approach is Article 9 ARSIWA, explicitly aimed at covering situations where private actors act 'in the absence or

1 ARSIWA Commentary to Article 4, para. 2.

2 See *ibid.*; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, para. 397; ARSIWA Commentary to Part One, Chapter II, para. 2.

3 There does not seem to be any practice indicating the contrary, see the ARSIWA Commentary to Article 11; J. Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014), 182-187; and particularly *United States Diplomatic and Consular Staff in Tehran* (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 ICJ Reports 3 (hereinafter *Tehran Hostages*), para. 74.

default of the official authorities'. Secondly, as explained at the beginning of the dissertation, 'the absence of effective government' is commonly – but all too restrictively – defined in the literature as the disappearance or complete collapse of state institutions, rather than the lack of control over (part of) the state's territory.[4] The cumulative effect of these two factors all but excludes any possibility of attribution: if private conduct is only attributable through state organs, and there are no state organs to speak of, authors must logically conclude that private conduct is simply not attributable to the state in the absence of effective government.[5]

For the same reason, much of the literature focuses partly on Article 9 ARSIWA, which does not require a link to the government; and partly on Articles 10 and 11 ARSIWA, which allow for retroactive application, essentially circumventing the problem of a collapsed or inexistent government by simply becoming operational once a new government has been established. Discussions of attributing the conduct of remaining state organs (Articles 4 or 5 ARSIWA) or private actors controlled by a government (Article 8 ARSIWA) are comparatively rare.[6]

Nonetheless, as the examples throughout this chapter illustrate, the functional and legal rationales appear to be particularly relevant in practice. In the first of these scenarios, there is neither a legal, nor a factual link between the government and the non-state actor – in the absence of the former, the latter simply proceeds to fill the vacuum left by the state and carry out state(-like) functions, enabling attribution under Article 9 ARSIWA. In the second scenario, meanwhile, there may be remaining state organs, or the government (of the affected state or a third state) may co-opt private actors, whose conduct thus becomes attributable through Articles 4 or 5 ARSIWA, depending on the type of official link created between the state and the non-state actor. Accordingly, the next section turns to the rationale of exercising governmental functions, investigating the origin and requirements of Article 9 ARSIWA and exploring whether this Article could be used to attribute the conduct of local *de facto* governments to the state.[7] The third section focuses on remaining *de jure* organs following the collapse of the government, and the possibility of the state co-opting private actors.

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4 See Section 1.2.2.1 above.

5 See e.g. G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Nijhoff, 2004), 274-275; P. Pustorino, 'Failed States and International Law: The Impact of UN Practice on Somalia in Respect of Fundamental Rules of International Law' (2010) 53 *German Yearbook of International Law* 727, at 749-750.

6 See notes 156-157 below, as well as Chapter 4, note 3 and accompanying text.

7 While *de facto* organs are subordinated to an existing (*de jure*) government, (local or general) *de facto* governments exercise (the full range of) governmental functions without being subordinated to another government, see e.g. ARSIWA Commentary to Article 9, para. 4; *Bosnian Genocide*, paras. 390-395; and notes 100-101 and accompanying text below.

Lastly, the fourth section makes a few brief observations on Articles 10 and 11 ARSIWA, before the chapter offers some concluding remarks on how the concept of agency appears in each of these rationales.

5.2 The Functional: Is Article 9 ARSIWA 'Tailored for Situations of State Failure'?

Since its application does not seem to be directly linked to the existence of a government, Article 9 ARSIWA is probably the most often discussed attribution rule in the literature on state responsibility in the absence of effective government. It has even been stated that 'at first glance, [this] rule seems to be tailored to the situation in failed states.'[8] The Article provides that:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Indeed, with its reference to 'the absence or default of the official authorities', Article 9 appears to be uniquely placed to address the problem of attribution in the absence of effective government.

Those who assert this view seem to argue exclusively on the basis of the wording of Article 9 itself, however.[9] Upon closer examination of the background to this rule, most of the literature is quick to point out that the provision is meant to address a different type of situation, particularly (though not exclusively) because the ILC Commentary explicitly states that '[t]he cases envisaged by article 9 presuppose the existence of a Government

8 H. Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Baden-Baden: Nomos, 2007), 88: 'Die in Art. 9 ILC-Entwurf zur Staatenverantwortlichkeit formulierte Zurechnungsregel scheint auf den ersten Blick auf die Situation in failed States zugeschnitten zu sein.' See also R. Geiss, *"Failed states": Die normative Erfassung gescheiterter Staaten* (Berlin: Duncker & Humblot, 2005), 261, pointing out that in the literature, failed states are regarded as the typical case of application ('typischer Anwendungsfall') for Article 9 ARSIWA, referring – among others – to D. Bodansky & J.R. Cook, 'Introduction and Overview' (2002) 96 *American Journal of International Law* 773, at 783; and D. Thürer, 'Der Wegfall effektiver Staatsgewalt: "The Failed State"', in: D. Thürer, M. Herdegen & G. Hohloch, *Der Wegfall effektiver Staatsgewalt: 'The Failed State' (The Breakdown of Effective Government)* (Heidelberg: C.F. Müller, 1996), 9, at 32. Bodansky & Cook specifically write that '[i]n failed or poorly functioning states, Article 9 provides for state responsibility if nonstate actors step in to perform governmental functions in the absence or default of official authority.' See also H. Duffy, *The 'War on Terror' and the Framework of International Law* (2nd ed., Cambridge: Cambridge University Press, 2014), 79.

9 See e.g. Bodansky & Cook, 'Introduction and Overview', 783; Thürer, 'Der Wegfall effektiver Staatsgewalt', 32.

in office'.[10] In the end, virtually all authors – with the exception of Gérard Cahin – conclude that the Article is not applicable to situations of 'failed' or 'collapsed' states.[11]

To a large extent, this skepticism can be traced back to the fact that authors tend to use a very narrow definition of the absence of effective government.[12] In fact, Hinrich Schröder explicitly concedes that Article 9 could play an important role in 'failing' (as opposed to 'failed') states, where a government is still in existence.[13] But such a concession does not resolve the problem entirely: since Article 9 ARSIWA is based on the 'absence or default' of the government, the possibility of applying the Article to cases of complete collapse cannot be dismissed so easily.[14] In addition, some further features of Article 9 ARSIWA have been identified in the literature as limitations or even obstacles to the applicability of the Article in the absence of effective government, which warrant further analysis.[15]

Against this backdrop, the following sections first trace the origins of the rule in Article 9 and the conditions set by the case law, then turn to examine the ILC's work on the Article and the problems highlighted by the literature, in order to determine whether these concerns do indeed preclude the application of the rule in situations of 'state failure'. Finally, the third section analyzes the question of attributing the conduct of local *de facto* governments – a topic that is intimately linked to the subject-matter of Article 9, but which was excluded from the ILC's considerations in the course of formulating the Article.

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10 ARSIWA Commentary to Article 9, para. 4.

11 Geiss, *"Failed states": Die normative Erfassung*, 261-265; F. Leidenmühler, *Kollabierter Staat und Völkerrechtsordnung: zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt* (Wien: Neuer Wissenschaftlicher Verlag, 2011), 523-525; Pustorino, 'Failed States', 750; Schröder, *Die völkerrechtliche Verantwortlichkeit*, 88-90. The one notable exception is Gérard Cahin, who maintains that the aim of this qualification is merely to distinguish this scenario from a general *de facto* government, rather than no government at all, see note 64 below. That said, it is odd that the ARSIWA Commentary does not make any mention of applying Article 9 in situations of complete governmental collapse, particularly in light of the comments of the Netherlands on the draft article, see note 28 below. Geiss, *"Failed states": Die normative Erfassung*, 263 argues that this is because Article 9 ARSIWA was never meant to apply to such situations, but the ILC's work he cites in support of this contention – analyzed throughout this section – does not offer conclusive proof of his stance.

12 See Section 1.2.2.1 above.

13 Schröder, *Die völkerrechtliche Verantwortlichkeit*, 104-105.

14 This is different from the case of Article 8 ARSIWA, for instance, where it is undisputed that Article 8 ARSIWA cannot be applied in the complete absence of government. Expanding the definition to include situations of partial lack of control thus simply admits the applicability of Article 8 in those scenarios, without questioning its inapplicability in cases of complete collapse.

15 Schröder, *Die völkerrechtliche Verantwortlichkeit*, 89-90, relying on *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Award No. 324-10199-1, 2 November 1987, (1987) 17 Iran-US Claims Tribunal Reports 92, cites governmental knowledge as such a requirement, for instance.

5.2.1 The Origin of Article 9: Codification or Progressive Development?

The ILC Commentary cites only one case in support of Article 9 ARSIWA, that of *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, decided in 1987 by the Iran-US Claims Tribunal (IUSCT), which in turn relied on an earlier draft of the ILC Articles to support its conclusion.[16] Furthermore, the final ILC Commentary does not cite any instances of state practice or established law, other than a passing reference to the idea of *levée en masse* in the law of armed conflict.[17] Considering this lack of evidence, the question arises whether the rule embodied in Article 9 is in fact a result of the progressive development of international law, rather than its codification. Granted, even if the Article could not have been regarded as a rule of customary international law at the time of the ARSIWA's finalization in 2001, it could have since become a customary rule, through widespread adherence.[18] However, there are no indications of Article 9 having been applied in subsequent state practice or international jurisprudence, either.[19]

The drafting history of the Article does not explicitly address whether it should be considered the result of codification or progressive development; there are indications, however, that it is indeed the latter. The ILC's 1974 Commentary to then-Draft Article 8(b) – the precursor of Article 9 – noted that practice on the rule was 'very limited', but considered it 'hardly

16 ARSIWA Commentary to Article 9, para. 2; see *Yeager*, paras. 42-43, referring to then Draft Article 8 (ILC, *Text of draft articles 7-9 and commentaries thereto as adopted by the Commission at its twenty-sixth session*, in: *Yearbook of the International Law Commission*, 1974, vol. II, Part One, 277 (hereinafter ILC Commentary (1974)), at 283). Cf. O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 257, at 273; see also Schröder, *Die völkerrechtliche Verantwortlichkeit*, 90, arguing that besides the *Yeager* case, there is no state practice supporting this rule.

17 ARSIWA Commentary to Article 9, para. 2.

18 Although the ARSIWA is not a treaty, the process described by the ICJ in *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, 1969 ICJ Reports 3, paras. 70-81, could apply by analogy.

19 Only one case appears to have referred to Article 9 ARSIWA: in *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company* v. *The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf, para. 576, the tribunal cited as relevant 'Articles 4, 5 and 9 of the [ARSIWA], which are generally considered as representing current customary international law.' However, the matter of attribution was then decided on the basis of Articles 4 and 5, with no further discussion of Article 9. See *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General – Addendum*, 20 June 2017, UN Doc. A/71/80/Add.1, at 8 on the lack of further references; as well as the UNSG's triennial reports on *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General*, 21 April 2016, UN Doc. A/71/80 and *Responsibility of States for internationally wrongful acts: Comments and information received from Governments, Report of the Secretary-General*, 21 April 2016, UN Doc. A/71/79 (including the previous reports cited therein).

surprising in view of the rather exceptional nature of the situations envisaged and, in particular, of the hypothesis that the conduct in question may constitute internationally wrongful acts.'[20] In other words, it is already quite rare that private persons have to take over state functions in the absence of the government; such persons violating international law in the course of their conduct logically constitutes an even smaller subset of cases. Given such limited practice, the ILC justified the inclusion of this rule in the Draft Articles by relying on the following reasoning instead:

> [N]ational laws often regard such conduct as conduct of the State under internal law and even hold the State responsible for such acts. In the Commission's view the State, as a subject of international law, should *a fortiori* bear the responsibility for such conduct when it has led to a breach of an international obligation of that State.[21]

The language used by the Commission – that the state *should* bear responsibility in such cases – indicates that the Article is best viewed as having been an instance of progressive development. More recently, this is reinforced by the fact that the 2001 Commentary, having dropped the above passage, apparently considered the *Yeager* award as stronger evidence in support of the rule contained in Article 9 ARSIWA.

How did states react to this rule? Early on in the process, Canada noted in relation to both Draft Articles 7 and 8(b) – the eventual Articles 5 and 9 ARSIWA – that the question of attributing such conduct required 'further study' and that 'the circumstances in which a State may be held responsible for such actions must be more restrictively delineated'.[22] Since Canada unfortunately did not elaborate any further on this statement, it is not quite clear what kind of restrictions it had in mind. Later on the UK, commenting on the same two Articles, repeatedly stressed that the scope of 'governmental authority' was not sufficiently clear and the term should

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20 ILC Commentary (1974), at 285, para. 11.

21 *Ibid*; the ILC went on to note that 'this view is shared by the few writers that have dealt with the case'.

22 ILC, *Observations and comments of Governments on chapters I, II and III of part 1 of the draft articles on State responsibility for internationally wrongful acts*, 6 March, 1 and 21 April, 6 and 21 May 1980, UN Doc. A/CN.4/328 and Add. 1-4, in: *Yearbook of the International Law Commission*, 1980, vol. II, Part One, 87 (hereinafter ILC Governmental Comments (1980)), at 94, paras. 2-3; on the lack of further comments, see ILC, *First report on State responsibility by Mr. James Crawford, Special Rapporteur*, 24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998, UN Doc. A/CN.4/490 and Add.1-7, in: *Yearbook of the International Law Commission*, 1998, vol. I, Part One, 1 (hereinafter *Crawford's First Report*), para. 215. Article 5 ARSIWA establishes attribution where persons or entities are 'empowered by the law of that State to exercise elements of the governmental authority'; see Section 5.3 below for a more detailed discussion.

be further specified.[23] The Netherlands similarly noted the vagueness of the term in relation to Article 5, but was of the opinion that 'this obscurity seems unavoidable' and that redrafting was unlikely to present a better alternative.[24] The most direct comment on the status – rather than the content – of the rule came from the United States, pointing out that the 1974 Commentary 'noted that international practice in this area is very limited and thus acknowledged that there is little authority to support this article.'[25] Even so, such lack of practice apparently did not warrant deletion of the Draft Article in the eyes of the US.[26] In a different comment, referring to the Commentary's own remark that the rule is only applicable in 'genuinely exceptional cases', the US merely suggested redrafting the provision 'to more explicitly convey this exceptional nature.'[27] The Netherlands, meanwhile, deemed the Draft Article to be 'useful', specifically pointing to the situation in Somalia as one where the rule could apply.[28] In sum, with perhaps the possible exception of Canada, states did not consider the Draft Article's perceived shortcomings so grave as to warrant proposing its elimination or major revision; and apart from these few remarks, the Draft Article drew no other substantive comments throughout the process. Overall, this suggests that states did not regard the rule as a controversial one, be it emerging or established.

Furthermore, the *Yeager* award may not be the only case to support this rule after all. Ago's initial proposal for Draft Article 8 covered two different scenarios – where private persons 'in fact act on behalf of the State' or 'in fact perform public functions' – which later followed distinct trajectories, first separated into Articles 8(a) and (b), and eventually becoming Articles 8 and 9 ARSIWA. At the time of Ago's report, however, that delineation was not yet clear in every respect. During the discussions of an early draft of Article 8 in the ILC, Paul Reuter – then a member of the Commission – even raised the question whether the two were alternative or cumulative require-

23 ILC, *Comments and observations received by Governments*, 25 March, 30 April, 4 May, 20 July 1998, UN Doc. A/CN.4/488 and Add.1-3, in: *Yearbook of the International Law Commission*, 1998, vol. II, Part One, 81 (hereinafter ILC Governmental Comments (1998)), at 106, 107; ILC, *Comments and observations received from Governments*, 19 March, 3 April, 1 May and 28 June 2001, UN Doc. A/CN.4/515 and Add.1-3, in: *Yearbook of the International Law Commission*, 2001, vol. II, Part One, 33 (hereinafter ILC Governmental Comments (2001)), at 48, 49, 50.

24 ILC Governmental Comments (2001), 49.

25 *Ibid.*, 50.

26 In fact, the US drew no conclusions whatsoever from this lack of practice, but merely highlighted it, see *ibid*.

27 *Ibid.* In response, the Drafting Committee was of the opinion that 'the suggestion, made by a Government, that the exceptional character of the article be stressed would best be reflected in the commentary.' ILC, *Responsibility of States for Internationally Wrongful Acts [State Responsibility]*, Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, http://legal.un.org/docs/?path=../ilc/sessions/53/pdfs/english/dc_resp1.pdf&lang=E, 12.

28 ILC Governmental Comments (2001), 49.

ments for attribution.[29] While Ago (backed by the rest of the Commission) was quick to clarify that the two scenarios were indeed alternatives,[30] a few of the judicial decisions cited in his original report – later referenced as supporting the eventual Article 8 ARSIWA – do appear to contain elements of both. Accordingly, it is worth taking a closer look at the awards in the *Zafiro* and *Stephens* cases to determine their relevance for the purpose of Article 9 ARSIWA.[31]

The *Zafiro* case concerned responsibility for looting and destruction of property during the 1898 battle of Manila in the Spanish-American War by the crew of the *Zafiro*, a merchant ship which had been bought, placed under naval command, and used as a supply ship by a US Admiral. While the US argued that the *Zafiro* was an ordinary merchant vessel, for whose conduct it could not be held responsible, the Commission held that 'the liability of the State for [the ship's] actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed'.[32] Upon examining the facts, the Commission concluded that rather than being 'a mere merchant ship', the *Zafiro* was in fact 'a supply ship, acting in Manila Bay as a part of Admiral Dewey's force, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.'[33] In the end, however, the Commission appears to have held the US responsible at least partly – if not mainly – on the basis that its officers failed to prevent or put a prompt end to the looting.[34] In other words, the case ultimately turned on the question of control and failure to prevent, while the function of the ship played only a preliminary role.[35] Furthermore, the conduct in question did not take place 'in the absence of the official authorities' – quite the contrary, in fact.

Much more relevant to the topic at hand was the *Stephens* case before the US-Mexico General Claims Commission, concerning the killing of a US national by a member of a local militia during a period of revolutionary

29 ILC, *Summary record: 1258th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 31, at 35, para. 22.

30 ILC, *Summary record: 1260th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 43, at 46, para. 26.

31 See also Finck, 'L'imputabilité', 137-140.

32 *D. Earnshaw and Others (Great Britain)* v. *United States* (*Zafiro* case), Award of 30 November 1925, 6 UNRIAA 160, at 162.

33 *Ibid.*, 163.

34 *Ibid.*, 164; see in particular the Commission's following statement: 'Had the officers been ashore with the crew, liability would be clear enough. But to let the crew go ashore uncontrolled, and thus to let them get out of the control that obtained when they were on the ship, seems to us in substance the same thing.' (It must also be noted that the award contains several morally objectionable statements.)

35 Cf. ILC, *Summary record: 1259th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 36, at 39, para. 25, where José Sette Câmara noted that '[t]he *Zafiro* case […] did not appear to support an approach to the problem of *de facto* officials along the lines of article 8, since the vessel had been under the command of a naval officer and had undeniably been used for State purposes in naval operations.'

upheaval in Mexico. The victim was driving his car when a sergeant in the militia ordered two guards to halt it, 'not adding that they should fire.'[36] When the car did not stop, though, one of the guards (Lorenzo Valenzuela) fired, killing Edward Stephens.[37] As to the status of the militia, which was not entirely clear, the Commission stated the following:

> Since nearly all of the federal troops had been withdrawn from [Chihuahua] State and were used farther south to quell this insurrection, a sort of informal municipal guards organization—at first called 'defensas sociales'—had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion, if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were 'acting for' Mexico or for its political subdivisions.[38]

It is important to highlight that the militia had a *dual* aim: 'partly to defend peaceful citizens, partly to take the field against the rebellion, if necessary.' Each of these two functions triggers a different ground for attribution. Inasmuch as the group was acting 'to defend peaceful citizens', it could be considered as exercising elements of governmental authority, namely maintaining public order. To the extent that the group was taking action 'against the rebellion', it was acting *for the government* in office, and since the government is considered to represent the state, the militia was thus *acting for the state*.[39] These two functions correspond to the two scenarios covered by Draft Article 8, later split into Articles 8(b) and (a), and eventually evolving into Articles 9 and 8 ARSIWA. The Claims Commission ultimately concluded that '[t]aking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.'[40]

Subsequent interpretations of the Commission's reasoning in *Stephens* have variously classified it as attribution on the basis of Articles 4, 8 and/or 9 ARSIWA.[41] Upon closer examination, however, it becomes clear that

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36 *Charles S. Stephens and Bowman Stephens (U.S.A.)* v. *United Mexican States*, Award of 15 July 1927, 4 UNRIAA 265, paras. 1, 5.

37 *Ibid.*

38 *Ibid.*, para. 4; also quoted in *Yeager*, para. 43, note 9.

39 Cf. *Hopkins* and the distinction between 'personal' and 'unpersonal' acts of a local *de facto* government, discussed in Section 5.2.3 below. See also H. Silvanie, 'Responsibility of States for Acts of Insurgent Governments' (1939) 33 *American Journal of International Law* 78, at 102, on international law's tendency to equate the government with the state.

40 *Stephens*, para. 7.

41 See e.g. *ibid.*, Opinion of Commissioner Nielsen, 268, who describes Valenzuela as 'a Mexican soldier, in the presence and under the command of an officer'; J.G. de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico under the Convention of September 8, 1923* (The Hague: Nijhoff, 1938), 102; *Crawford's First Report*, para. 195; *Yeager*, para. 43, note 9. See also Finck, 'L'imputabilité', 139, noting that the award is unclear as to the precise basis.

the case does not correspond to any modern understanding of Articles 4 or 8 ARSIWA. The militia could not be considered a *de jure* organ of Mexico; at best it was 'an irregular auxiliary of the army' but even that could not be established with certainty.[42] It would be equally difficult to regard the militia as acting under the instructions, direction or control of Mexico, or as its *de facto* organ, since there was no evidence of governmental control over the group's actions.[43] While, as noted above, the group's conduct could *in part* be considered as falling under the initial definition of (then-Draft) Article 8, the *Stephens* case is thus best seen as supporting the rule in Article 9 ARSIWA.

Nonetheless, it is noteworthy that the same lack of distinction between Articles 8 and 9 ARSIWA plagued the *Yeager* award at the IUSCT. The applicant claimed that he was wrongfully expelled from Iran and forced to leave his possessions behind by the so-called Revolutionary Guards in the aftermath of the Iranian revolution. Iran admitted that '"revolutionary guards and Komiteh personnel" were engaged in the maintenance of law and order from January 1979 to months after February 1979 as government police forces rapidly lost control over the situation', but denied that these groups would have been affiliated with the Provisional Government.[44] The state also claimed that the government 'did not have the means to control the actions of extremist revolutionary groups.'[45] The IUSCT, after reviewing the facts and making reference to both Draft Articles 8(a) and (b), came to the following conclusion:

> The Tribunal finds sufficient evidence in the record to establish a presumption that revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances, and for the kind of measures involved here, the Respondent has the burden of coming forward with evidence showing that members of 'Komitehs' or 'Guards' were in fact not acting on its behalf, or were not exercising elements of government authority, or that it could not control them.[46]

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42 For the same reason, its conduct could not be regarded as attributable under Article 5 ARSIWA, either, as that would have required the militia to be 'empowered by internal law to exercise governmental authority' (see ARSIWA Commentary to Article 5, para. 7), which was likewise not the case.

43 While the guard in question was ordered to halt the car, that command came from a superior *within the militia* which, as an entity, could not be considered a *de facto* organ or acting under the instructions, direction or control of Mexico in the absence of control by the state's *de jure* organs.

44 *Yeager*, para. 23.

45 *Ibid.*

46 *Ibid.*, para. 43 (footnote omitted).

The Tribunal's analysis refers to three different grounds – acting for the state, exercising elements of governmental authority, and the government's knowledge and inaction – but it is not entirely clear whether these are treated as alternative or cumulative requirements for attribution. While the first two appear to be alternative grounds (as indicated by the phrase 'or at least', and further supported by the Tribunal's previous separate discussion of Articles 8(a) and (b)), the role of the third one is particularly ambiguous.[47] If it is considered to be an alternative requirement, this would mean that – in the IUSCT's view – governmental knowledge and inaction are sufficient for attribution. However, while such knowledge and inaction may lead to the state's responsibility based on the government's *own* failure to comply with its duty to protect, international law treats this as a separate violation which does not entail attributing the conduct of the private actor.[48] In other words, even if the Tribunal did consider governmental knowledge and inaction to be a (self-standing) basis for attributing the conduct of the private actor, this position does not find support in international law. The same problem arises even if the third requirement is seen as cumulative. To begin with, it is unclear whether the additional criterion is supposed to attach to the first or the second ground, or perhaps both. Either way, there appears to be no support in international law for its inclusion. With regard to the first one (acting for the state), this has developed in a way over the years that requires not only governmental knowledge, but high degrees of control – as opposed to *lack of* control – over the private actors.[49] As for the second one (exercising elements of governmental authority), there is nothing to indicate, either before or after the *Yeager* award, that governmental knowledge and inaction would be deemed a general requirement of Article 9 ARSIWA.[50] On the contrary: the ILC Commentary to Draft Article 8(b) specifically noted that 'in many cases, [such persons] act without the

47 To further complicate matters, the last sentence of the paragraph (referring to the same set of criteria), suggests that all three may be cumulative, since in that case it would be sufficient for Iran to disprove any *one* of them. However, considering the strong evidence in favor of viewing the first two grounds as alternative (not to mention that treating them as cumulative would contradict the ILC's understanding of how Articles 8(a) and (b) operate), this cannot be seen as conclusive evidence.

48 See Finck, 'L'imputabilité', 132 in the same vein; and Chapter 3 above. But see D. Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules', in: R.B. Lillich & D.B. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, NY: Transnational, 1998), 109, at 142-143, who read the award as laying down the rationale that 'the acts of entities de facto exercising elements of governmental authority […] are to be attributed unless the State can show it is not capable of controlling the actor de facto exercising governmental authority.'

49 See Chapter 4 above.

50 The ILC's work, which the Tribunal relied on, did not contain such a requirement, nor did the Commission include one in response to the *Yeager* award. The *Stephens* case, also mentioned by the IUSCT, did not set a knowledge requirement, either – its *ratio decidendi* (at para. 7) was simply that the perpetrator 'must be considered as, or assimilated to, a soldier.' See also Finck, 'L'imputabilité', 127, 132.

knowledge of the official organs.'[51] Granted, since there are relatively few cases underpinning the Article, a single award may have a bigger impact on the state of the law; but even so, at best it remains to be seen whether that stance would be followed by other courts and tribunals.

Thus, while some authors seem to take this requirement for granted,[52] it is advisable to approach the matter with some caution – particularly because in the end, the likeliest answer is much simpler than either of these two scenarios regarding alternative and cumulative criteria. The Tribunal's statement seems to have come merely in response to Iran's defensive argument regarding its inability to rein in extremist elements of the revolutionaries, rather than out of general considerations regarding the conditions of the Draft Article's application. This is also supported by the fact that the IUSCT made no reference to any such requirement when discussing Draft Article 8(a) and (b) *in abstracto* in the preceding paragraph. Furthermore, given Iran's admission that the Revolutionary Guards 'were engaged in the maintenance of law and order', its attempt to distance itself from the Guards was likely meant to counter the argument that these groups were *acting for* the government, and thus for the state – which would mean that this issue as such relates to Draft Article 8(a), rather than 8(b). Accordingly, and in line with the Tribunal's own statement (that the Guards 'were acting in fact on behalf of the new government, *or at least* exercised elements of governmental authority in the absence of official authorities'), the award is best viewed as making concurrent (alternative) recourse to Draft Articles 8(a) and 8(b), where there may have been some doubt as to the fulfilment of the conditions of Article 8(a), but not that of 8(b).

In sum, while neither *Stephens* nor *Yeager* are pure applications of the rule contained in Article 9 ARSIWA, both cases offer support for that rule. That said, with such a scarcity of supporting jurisprudence, it is difficult to identify the characteristics that proved decisive in establishing attribution in the tribunals' view. The only elements shared by these cases were the requirements that the persons in question (1) exercise governmental functions (2) in the absence of official authorities. With this in mind, the chapter turns to examine how the issue of these (and possibly other) criteria was approached by the ILC.

5.2.2 The Conditions of Article 9 ARSIWA

The ILC Commentary to Article 9 begins by noting that the rule is meant to apply only in *exceptional* circumstances, such as in cases of 'revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being

51 ILC Commentary (1974), 285, para. 10.

52 See Schröder, *Die völkerrechtliche Verantwortlichkeit*, 89-90; cf. Geiss, *"Failed states": Die normative Erfassung*, 264, who uses this ostensible condition of knowledge as support for this argument that Article 9 requires the existence of a central government to apply.

inoperative.'[53] It then goes on to discuss the three conditions determining the applicability of the Article, namely (1) the exercise of 'elements of the governmental authority', (2) in the absence or default of authorities, and (3) in circumstances calling for the exercise of these functions.

Accordingly, the first question to be answered is: what constitutes governmental authority? Ago's initial formulation of Draft Article 8 and the accompanying report referred to the performance of 'public functions', but neither the Draft Article, nor the report defined what 'public functions' were to entail. The need for a better definition was highlighted by several members of the ILC in the ensuing discussions; in response, the Drafting Committee replaced the term 'public functions' with that of 'elements of the governmental authority'.[54] However, it is unclear how this change in wording would help clarify the scope of tasks covered. The UK specifically pointed out in its comments that 'a problem arises from the absence of any definition in the Draft Articles, and of any shared international understanding, of what acts are and what are not "governmental"' and called on the ILC 'to consider whether an effective criterion of "governmental" functions can be devised and incorporated in the draft.'[55] The Commission, however, did not make any further changes to the formulation; nor did it define 'governmental' in the ARSIWA Commentary.

Article 9 is not the only one of the ARSIWA to face this problem. Two of the ILC's attribution articles refer to the exercise of 'elements of the governmental authority', either pursuant to internal legal authorization (Article 5 ARSIWA) or in the absence or default of the government (Article 9 ARSIWA). The Commentary to Article 9 is silent on what such authority might entail, while the Commentary to Article 5 expressly declines to offer a definition:

> Article 5 does not attempt to identify precisely the scope of 'governmental authority' for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just

53 ARSIWA Commentary to Article 9, para. 1. Authors also sometimes argue that Article 9 was intended to cover only transitional/temporary situations, even using this argument to exclude Article 9's applicability in situations of 'state failure', see e.g. Pustorino, 'Failed States', 750; G. Cahin, 'L'état défaillant en droit international: quel régime pour quelle notion?', in: *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 177, at 203-204. Such a criterion (beyond the general reference to exceptional circumstances) is not apparent from the ILC's work, though.

54 ILC, *Summary record: 1278th meeting*, in: *Yearbook of the International Law Commission*, 1974, vol. I, 151, at 152-153; this formulation was adopted on first reading without any further changes, see ILC Commentary (1974), 283.

55 ILC Governmental Comments (1998), 37. While the UK made this comment primarily in the context of then Draft Articles 5 and 6, it noted that 'a similar point arises in relation to draft articles 7, paragraph 2, 8(b), 9 and 10.' Similarly, in *Crawford's First Report*, para. 152, this was treated by the Special Rapporteur as a general comment on Part One, Chapter II ARSIWA as a whole.

> the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.[56]

This lack of definition is somewhat understandable in the case of Article 5, at least to the extent that it addresses situations falling beyond that 'certain limit' where the governmental nature of particular functions may vary from state to state.[57] But the ILC made no attempt to define what falls *within* that 'certain limit', either – and unlike Article 5, the narrowly defined applicability of Article 9 suggests that it would ostensibly apply to the *core* functions of the state.[58] Furthermore, most of the additional factors listed for Article 5 to overcome this uncertainty are of little or no help in the case of Article 9. The powers exercised under the latter scenario are not conferred by the government; the Commentary explicitly notes that those acting under Article 9 'are doing so on their own initiative'.[59] For the same reason, it is difficult to see how they could be accountable to the government. This leaves 'the content of the powers' as the paramount factor for Article 9, which is likewise confirmed in the Commentary to that Article: 'the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State.'[60] The only other factor which may play a role is 'the purposes for which [these powers] are to be exercised'. In this respect, the concept of requiring the private person, group or entity to act *in the interest of* the state or 'the national community' (rather than out of selfish motives) recurs with some frequency in the literature, even though this is not a criterion set by the ILC for Article 9.[61] Either way, although a requirement of acting in the public interest may provide some guidance, it does not change the fact that 'elements of the governmental authority' remains an elusive term.

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56 ARSIWA Commentary to Article 5, para. 6.

57 As the Netherlands has noted in its comment to the draft of Article 5, it is probably impossible to provide a precise definition of the scope of functions to be covered, see ILC Governmental Comments (2001), 49.

58 This narrow application is apparent from the Article's exceptional nature and its normative requirement.

59 ARSIWA Commentary to Article 9, para. 4.

60 *Ibid*.

61 See Pustorino, 'Failed States', 750: 'the actions carried out by private persons in Somalia are not performed on the basis of the general interest of the national community, but exclusively on the basis of personal and selfish interests of those who act'. Similarly, Kreijen, *State Failure*, 275, puts forward generally that 'warlords and factional opposition groups as a rule will act out of narrowly perceived self-interest, and, therefore, not in the interest of the public cause.' That said, he does not raise the same point in the context of Article 9 ARSIWA specifically, where he frames his analysis in terms of functions, rather than interests.

These concerns notwithstanding, it is not the lack of definition of 'governmental authority' which has sparked the most comments on Article 9's conditions in the literature, but rather the ILC's remark that Article 9 ARSIWA presupposes the existence of a government in office. This has been widely interpreted as excluding the operation of Article 9 in situations of 'state collapse' (though allowing for its application in 'failing states' which still have a government in office).[62] This interpretation, however, appears to be based largely on an out-of-context reading of a single sentence in the Commentary. When the statement is read in context, the Commentary reveals that the ILC was merely concerned with distinguishing the situations addressed by Article 9 from those falling under Article 4 ARSIWA:

> It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[63]

The Commentary does not mention situations of total governmental absence, being focused on delineating Article 9 from Article 4 ARSIWA instead.[64] That focus is explained by the fact that this passage can be traced back to Roberto Ago's 1971 report to the ILC, which marked the first appearance of then-Draft Article 8. Since the Special Rapporteur labelled those acting under this article as '*de facto* officials', he sought to distinguish them from *de facto* governments; and in the end, the final Commentary to the ARSIWA simply took over Ago's formulation nearly verbatim.[65]

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62 See notes 9-11 above.

63 ARSIWA Commentary to Article 9, para. 4.

64 This interpretation is the one favoured by Gérard Cahin as well, see Cahin, 'L'état défaillant', 202-203 (footnote omitted): 'Le fait que les situations envisagées supposent « l'existence d'un gouvernement officiel et d'un appareil d'Etat dont des irréguliers prennent la place ou dont l'action est complétée dans certains cas » ne signifie donc pas, contrairement à une interprétation restrictive, qu'en soit exclue la situation du *failed State*, mais seulement que ce groupe de personnes n'est pas assimilable à un gouvernement *de facto* dont les actes devraient être alors considérés comme ceux d'un organe ordinaire de l'Etat.'

65 ILC, *Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur – The internationally wrongful act of the State, source of international responsibility*, 5 March, 7 April, 28 April and 18 May 1971, UN Doc. A/CN.4/246 and Add.1-3, in: *Yearbook of the International Law Commission*, 1971, vol. II, Part One, 199 (hereinafter *Ago's Third Report*), para. 196.

Robin Geiss, in particular, has argued that the exclusion of situations of complete collapse is further supported by the reference to 'elements' of governmental authority, as this ostensibly implies 'that governmental authority is absent only in certain fields which are thus occupied by private actors'.[66] While this is a reasonable interpretation, the distinction between Articles 4 and 9 ARSIWA arguably offers a more plausible explanation for the ILC's reliance on the term. As long as the emerging private actors only exercise certain *elements* of governmental authority, their conduct is attributable to the state under Article 9 ARSIWA, regardless of whether there is a central government in existence. After all, since the applicability of Article 9 is conditioned on the unavailability of governmental authority in the given circumstances, why would – or should – it matter whether a government exists if it is by definition unavailable in the case at hand? But as soon as one group or entity becomes the *general* government of the state (its conduct attributable under Article 4), it no longer exercises mere elements, but rather the *entirety* of governmental authority.

Furthermore, interpreting the Commission's statement as a distinction between Articles 4 and 9 (rather than as the exclusion of state collapse) has the added benefit of resolving the apparent contradiction between the first and second conditions of Article 9 ARSIWA.[67] The second requirement of Article 9 – the 'absence or default' of the government – is, according to the ILC, 'intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality.'[68] Yet Article 9 cannot possibly cover situations of 'total collapse' and at the same time 'presuppose the existence of a Government in office' – hence the contradiction. But if the latter is read simply as a distinction from Article 4, it could still allow for a scenario of total collapse to be covered by Article 9.

There may be an alternative explanation of this apparent contradiction based on the Statement of Peter Tomka, the ILC Drafting Committee's Chairman, elaborating on the meaning of 'absence or default':

> As to the terms "absence or default", the first covers the situation where the official authorities do exist, but are not physically there at the time, and the second covers cases where they are incapable of taking any action. Indeed, the reference to "default" was specifically added during the second reading to cover such a situation. The combination of "absence or default" was thus considered appropriate to capture all possible scenarios.[69]

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66 R. Geiss, 'Failed States: Legal Aspects and Security Implications' (2005) 47 *German Yearbook of International Law* 457, at 481.

67 But even where this contradiction is highlighted in the literature, it is still not deemed sufficient to question the inapplicability of Article 9 ARSIWA to situations of governmental collapse; see e.g. Geiss, *"Failed states": Die normative Erfassung*, 263-264.

68 ARSIWA Commentary to Article 9, para. 5.

69 Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, 13.

But although this passage does appear to assume the existence of a government in office, its focus is on the distinction between (local) governmental absence and incapacitation – and more specifically, on the acknowledgement that governmental *presence* does not necessarily equate to governmental *control* – rather than the existence or lack of a central government. Even if the statement could be read as requiring a government in office, it does not explain how 'total collapse' could be covered under Article 9 ARSIWA, as the Commentary asserts – leaving the ILC's work contradictory at best on this issue.

Granted, it is puzzling that the Commission did not address situations of complete governmental absence (more) specifically, given that the phenomenon was well known by the time the ARSIWA were finalized in 2001: at that point, Somalia had been without an internationally recognized government for almost a decade.[70] In fact, when commenting on the Draft Articles, the Netherlands specifically mentioned the case of Somalia as a situation to which it could be applicable and regarded Article 9 as 'useful' in this respect.[71] But while there is no mention of such scenarios in the ILC's work, there is no indication that this would have been a deliberate omission, either.[72] In the end, the first criterion does not explicitly exclude (or even address) total collapse, while the second one does explicitly include it; and such an inclusive reading also helps resolve an unnecessary contradiction. On balance, therefore, there are more persuasive arguments supporting the interpretation of the ILC's statement as a distinction than as a restriction.

Finally, the third requirement of Article 9 ARSIWA is that the circumstances must have *called for* the exercise of state functions. As the Commentary points out, there is thus a 'normative element' in Article 9, which makes it unique among the attribution articles regarding private conduct.[73] But it is unfortunately not specified any further what that normative element might be, beyond generally stating that 'some exercise of governmental functions was called for, though not necessarily the conduct in question.'[74] Similarly, in his statement on the work of the Drafting Committee, its Chairman

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70 See e.g. R. Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' (2004) 73 *Nordic Journal of International Law* 1, at 2, as well as note 84 below on the governments that followed.

71 ILC Governmental Comments (2001), 49.

72 Geiss, 'Failed States: Legal Aspects', 481, contends that the reason why the ILC Commentary does not refer to Somalia or Afghanistan is that Article 9 was not meant to cover cases of complete collapse (on this, see notes 9-11, 62-71 and accompanying text above); but he offers no evidence in support of this contention. Given that Somalia was the only example of such total collapse and that the ARSIWA were intended to codify (and progressively develop) the *general* rules of state responsibility, it is also possible that the Commission simply considered this scenario to be too exceptional and/or too specific to warrant closer attention.

73 ARSIWA Commentary to Article 9, para. 6.

74 *Ibid.*

Tomka simply recounted the facts of the *Yeager* case, noting that 'the situation was such as to call for the exercise of the immigration authority, and this was done by a *de facto* authority.'[75] This does not clarify what it was in that particular situation which called for an exercise of state functions, though; there were no factor(s) isolated which could explain the need to do so. As a result, it remains unclear what the added value of the third requirement is – or, in other words, which are the scenarios that could meet the first and second criteria, yet still fall short of the third.

In order to answer this question, one must turn to the ILC's 1974 Commentary to the articles adopted on first reading, where the Commission stressed that attribution under the Article could only take place in 'genuinely exceptional' cases, namely under the following conditions:

> [I]n the first place, the conduct of the person or group of persons must effectively relate to the exercise of elements of the governmental authority. In the second place, the conduct must have been engaged in because of the absence of official authorities […] and, *furthermore,* in circumstances which justified the exercise of these elements of authority by private persons: *that is to say, in the last resort, in one of the circumstances mentioned in the commentary to the present article*.[76]

A footnote at the end of the last sentence then referred back to a previous paragraph of the Commentary, where the ILC cited war and 'natural events such as an earthquake, a flood or some other major disaster' as such circumstances.[77] In other words, the third requirement was indeed intended to be an additional limitation ('furthermore') on the applicability of the Article, restricting it to those situations where governmental absence is due to one of the aforementioned reasons.

Do these reasons – war and natural disaster – constitute an exhaustive list? Ago's original report, as well as the ILC Drafting Committee's comments allowed for 'other exceptional circumstances' besides wars and natural disasters.[78] Likewise, although the 2001 Commentary does not mention natural disasters at all, focusing instead on 'revolution, armed conflict or foreign occupation' as the main examples, it treats this list as non-exhaustive.[79] While the 1974 Commentary is unclear as to whether it viewed wars and natural disasters as the only scenarios in which the Article could apply, in light of both its antecedents and the ILC's final commentary, it is highly unlikely that this list would be exhaustive.

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75 Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, 13.

76 ILC Commentary (1974), 285, para. 11 (emphases added; footnote omitted).

77 *Ibid.*, note 597, referring to *ibid.*, para. 9.

78 ILC, *Summary record: 1278th meeting*, 153, para. 17; cf. *Ago's Third Report*, para. 189: 'circumstances in which, for one reason or another, the regular administrative authorities have disappeared.'

79 See ARSIWA Commentary to Article 9, para. 1 ('such as').

However, if the list of possible scenarios is indeed non-exhaustive, it is difficult to imagine a situation where governmental absence could be the result of anything other than 'exceptional circumstances', which leads one back to the original question regarding the added value of the third requirement.[80] The answer may lie in the remark made during the ILC's discussions of Draft Article 8, whereby 'the mere fact that an individual ha[s] usurped a governmental function [i]s not in itself sufficient to attribute liability to the State.'[81] The third criterion of Article 9 would thus filter out cases where governmental functions have been 'usurped' – in other words, where the exercise of state functions by private persons is the *cause*, rather than the *result* of governmental absence. Accordingly, parallel institutions used as instruments of resistance would not be attributable to the affected state.[82] Such an interpretation would also accord with the 2001 Commentary's characterization of the rule in Article 9 ARSIWA as 'a form of agency of necessity.'[83]

Two real-life examples may serve to illustrate the difference: while the conduct of the Islamic Courts Union (ICU) in southern and central Somalia could likely be attributed to the state, the same cannot be said of the (self-organized) Serbian parallel structures' conduct with respect to post-independence Kosovo.

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80 Cf. *Ago's Third Report*, para. 189, pointing out that 'private persons who do not hold any public office may come to assume public functions in order to carry on services which cannot be interrupted, or which must be provided *precisely because of the exceptional situation*.' (Emphasis added.) During the discussions of Draft Article 8, one ILC member noted that 'during the power failure in the eastern United States some years ago, private persons had taken it upon themselves to regulate traffic in the dark, thereby performing a public function, which, in the event of injury or damage of international relevance, might, under article 8, have entailed the responsibility of the United States. That would clearly be stretching the principle of State responsibility too far.' ILC, *Summary record: 1258th meeting*, 34, para. 16.

81 ILC, *Summary record: 1259th meeting*, 37, para. 4. This comment was made during discussions of Ago's proposed Article 8, which stated that '[t]he conduct of a person or group of persons who, under the internal legal order, do not formally possess the character of organs of the State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.' ILC, *Summary record: 1258th meeting*, 32, para. 1. Although it is not quite clear whether the comment was intended for what became Draft Article 8(b) – or rather 8(a) instead – the reference to a state 'function' suggests that it was made in regard of the limb that eventually became Draft Article 8(b).

82 Similarly, setting up a 'shadow state' while the government continues to function – as happened in Kosovo in the early 1990s, see B. Pula, 'The Emergence of the Kosovo "Parallel State", 1988-1992' (2004) 32 *Nationalities Papers* 797 – would not be attributable under Article 9 ARSIWA, either. Such a situation would already be eliminated through the application of the second requirement, though, as there is no real 'absence of the official authorities' in these situations. But see also a further possible refinement of the third criterion discussed at the end of Section 5.2.3 below.

83 ARSIWA Commentary to Article 9, para. 1.

Following the collapse of Siad Barre's regime in 1991, Somalia remained without an internationally recognized government until 2000; this was followed by a series of transitional governments, none of which managed to extend their control to much of the country.[84] 'Warlordism' characterized southern and central Somalia throughout much of the 1990s and the early 2000s; but at the same time bottom-up efforts resulted in 'governance without government'.[85] Public services – such as health care and education – were provided by the private sector, and even justice and security had come to depend on private initiatives.[86] Islamic *(sharia)* courts were established as early as 1994 with the support of local businessmen, clan elders and faction militia leaders, in order to restore law and order. Initially based in certain neighborhoods of Mogadishu, the courts expanded to the countryside over time, acquiring their own militias.[87] They eventually formed an alliance, the so-called Islamic Courts Union, encompassing moderate and fundamen-

84 The Transitional National Government was formed in 2000, see *Report of the Secretary-General on the situation in Somalia*, 19 December 2000, UN Doc. S/2000/1211, paras. 12-14; see also K. Menkhaus, 'The Crisis in Somalia: Tragedy in Five Acts' (2007) 106 *African Affairs* 357, at 359-360. This was followed by the Transitional Federal Government in 2004, see *Report of the Secretary-General on the situation in Somalia*, 15 February 2005, UN Doc. S/2005/89, paras. 2-10; for an assessment, see e.g. ICG Africa Report No. 170, *Somalia: The Transitional Government on Life Support*, 21 February 2011, https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-transitional-government-life-support. This, in turn, was followed by the country's first permanent government in over twenty years – the Somali Federal Government – in 2012, see *Report of the Secretary-General on Somalia*, 31 January 2013, UN Doc. S/2013/69, paras. 2-6; for an assessment, see M. Bryden, 'Somalia Redux? Assessing the New Somali Federal Government', Center for Strategic & International Studies, 19 August 2013, https://www.csis.org/analysis/somalia-redux.

85 See generally K. Menkhaus, 'Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping' (2007) 31 *International Security* 74; see also S. Kibble, 'Somaliland: Surviving Without Recognition; Somalia: Recognised but Failing?' (2001) 15 *International Relations* 5, at 23, endnote 22.

86 See e.g. *Report of the Panel of Experts on Somalia pursuant to Security Council resolution 1425 (2002)*, 25 March 2003, UN Doc. S/2003/223, paras. 26, 100-101, 153-158; T. Nenova, *Private Sector Response to the Absence of Government Institutions in Somalia*, World Bank, Draft, 30 July 2004, http://documents.worldbank.org/curated/en/248811468302977154/Private-sector-response-to-the-absence-of-government-institutions-in-Somalia, 1.

87 For an overview, see A. Le Sage, 'Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives', *Centre for Humanitarian Dialogue*, July 2005, https://www.hdcentre.org/wp-content/uploads/2016/07/StatelessJusticeinSomalia-July-2005.pdf, 38-48; United Nations & World Bank, *Somali Joint Needs Assessment: Governance, Security, and the Rule of Law*, Cluster Report, August 2006, http://documents.worldbank.org/curated/en/821581468335693649/pdf/802250WP0ENGLI0Box0379802B00PUBLIC0.pdf, paras. 126-129; C. Barnes & H. Hassan, 'The Rise and Fall of Mogadishu's Islamic Courts' (2007) 1 *Journal of Eastern African Studies* 151.

talist elements alike.[88] The ICU drove out the warlords from Mogadishu, successfully restoring peace and security, and for the first time since 1991, a relatively unified power emerged in the capital and parts of south-central Somalia in June 2006.[89] The ICU's success was, however, short-lived: fearing an Islamist threat, neighboring Ethiopia intervened in December 2006, leading to the defeat and fragmentation of the ICU and a marked deterioration of the security situation.[90] During their existence, though, these courts fulfilled all three requirements set by Article 9: they were exercising elements of governmental authority (judicial and police functions), in the absence of the official authorities (as the transitional governments exercised little control), and in circumstances that called for the exercise of such functions (as they moved to fill a void).

But while institutions can be created to fill a power vacuum, they may also be employed as a form of resistance. Following the establishment of the UN territorial administration in Kosovo in 1999, Kosovo Serbs maintained a set of parallel structures, including courts, public administration bodies, police, as well as healthcare and education bodies.[91] After the Pristina authorities issued their unilateral declaration of independence in 2008, they successfully sidelined the UN Mission in Kosovo (UNMIK), and gained control over most of Kosovo – but the parallel structures persisted. These structures have been funded by Serbia, operating according to Serbian rules and regulations, applying Serbian law, and in many cases, integrated into

88 See e.g. Le Sage, 'Stateless Justice', 47; ICG Africa Report No. 116, *Can the Somali Crisis Be Contained?*, 10 August 2006, https://www.crisisgroup.org/africa/horn-africa/somalia/can-somali-crisis-be-contained, 15; *Report of the Secretary-General on the situation in Somalia*, 20 June 2006, UN Doc. S/2006/418, para. 6. For more on the ICU, see e.g. ICG Africa Report No. 100, *Somalia's Islamists*, 12 December 2005, https://www.crisisgroup.org/africa/horn-africa/somalia/somalias-islamists, 19-21; ICG, *Somali Crisis*, 9-18; *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1676 (2006)*, 22 November 2006, UN Doc. S/2006/913, paras. 200-210.

89 See e.g. UN Doc. S/2006/418, paras. 5-15; *Report of the Secretary-General on the situation in Somalia*, 23 October 2006, UN Doc. S/2006/838, paras. 2-3, 27-29; Barnes & Hassan, 'Islamic Courts', 154-155.

90 See e.g. Barnes & Hassan, 'Islamic Courts', 156-158.

91 See generally OSCE Mission in Kosovo, *Parallel Structures in Kosovo*, 7 October 2003, http://www.osce.org/kosovo/42584; OSCE Mission in Kosovo, *Parallel Structures in Kosovo 2006-2007*, 4 April 2007, http://www.osce.org/kosovo/24618; ICG Europe Report No. 211, *North Kosovo: Dual Sovereignty in Practice*, 14 March 2011, https://www.crisisgroup.org/europe-central-asia/balkans/kosovo/north-kosovo-dual-sovereignty-practice; C. van der Borgh, 'Resisting International State Building in Kosovo' (2012) 59(2) *Problems of Post-Communism* 31; Balkans Policy Research Group (BPRG), *Serb Integration in Kosovo After the Brussels Agreement*, 19 March 2015, http://balkansgroup.org/blog/post/publications/serb-integration-kosovo-after-brussels-agreement.

the Serbian state apparatus.[92] They have covered most of Kosovo's Serb-inhabited areas and enclaves, with varying levels of control and influence by Belgrade, being the strongest in the north.[93] Granted, these links raise the prospect of attribution to Serbia: to the extent that these institutions were integrated into the Serbian state apparatus, they may be considered *de jure* organs;[94] and inasmuch as they 'survive by virtue of' Serbia's support, the ECtHR may well view their conduct attributable to that state.[95] But can that conduct nonetheless be attributed to Kosovo (too), assuming the latter is a state under international law? While it is not entirely clear to what extent the people maintaining these parallel structures may be described as acting 'on their own initiative' (as opposed to Serbia's), this is not so much a criterion as a distinguishing feature from attribution under Article 5 ARSIWA, and the Pristina authorities have not legally empowered them to carry out governmental functions.[96] In any case, at least some of these institutions were indeed self-organizing.[97] The Kosovo Serb parallel structures, however, only meet the first two criteria of Article 9 ARSIWA: they exercised governmental functions (judicial and executive), while the official authorities – first UNMIK, then the Pristina authorities – were absent from

92 Funding figures range between €200-450 million annually, depending on the source and the time period, see ICG, *North Kosovo*, 4; G. Andric, 'Kosovo "Costing Serbia €450m a year", NGO', *BalkanInsight*, 16 March 2011, http://www.balkaninsight.com/en/article/kosovo-cots-serbia-e6-billion; BPRG, *Serb Integration in Kosovo*, 18. The parallel structures have regularly been described as 'Belgrade-sponsored' in UN parlance, see e.g. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 26 July 2013, UN Doc. S/2013/444, para. 17. On the other factors, see note 183 and accompanying text below.

93 See e.g. OSCE, *Parallel Structures* (2007), 40; cf. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 9 March 2007, UN Doc. S/2007/134, para. 7.

94 See Section 5.3.2 below.

95 See note 184 below and Section 4.4 above.

96 Although see Section 5.3.2 below on co-optation.

97 For instance, the so-called 'Bridge-watchers' militia was formed in Mitrovica in 1999, originally to keep the main bridge on the Ibar river between the north and the south of the ethnically divided city under constant surveillance. The Bridge-watchers became more organized over time, and temporarily took up policing tasks, before infighting and the withdrawal of support from the Serbian government caused it to largely disband from 2003 onwards. See OSCE, *Parallel Structures* (2003), 12-14; OSCE, *Parallel Structures* (2007), 24-26. Most notably, although Serbia committed to the dismantling of the parallel structures in April 2013 and dissolved the four northern local administrations a few months later, recalcitrant municipalities established their own 'Provisional Assembly of the Autonomous Province of Kosovo and Metohija', even though this was 'not recognized by either the Belgrade or the Pristina authorities'. UN Doc. S/2013/444, para. 18; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 28 October 2013, UN Doc. S/2013/631, para. 13. See also generally BPRG, *Serb Integration in Kosovo*, 12-21, 24-29, on the relations between Belgrade and Kosovo Serbs, and the persistence of parallel municipal administrations.

the northern region of Kosovo. But there is little doubt that these authorities would have been able to extend their control over Northern Kosovo, *had it not been* for the Serbian parallel structures. In other words, there was no real necessity for these structures to operate, and as such, their conduct cannot be considered a case of 'agency of necessity'.[98]

In sum, the most logical and persuasive interpretation of first two conditions of Article 9 – 'in fact exercising elements of the governmental authority in the absence or default of the official authorities' – is that they do not require the existence of a government in office to be applicable. As for the third criterion of circumstances calling for the exercise of governmental functions, this is best interpreted as excluding situations where the exercise of such functions is the *cause*, rather than the *result*, of the absence of official authorities. The antagonistic relationship between institutions usurping governmental functions and the official authorities is similar to the one which exists between the government and armed opposition groups in case of an internal armed conflict. Such groups, and their exercise of governmental authority, are what the next section turns to address.

5.2.3 What the ILC Did Not (Sufficiently) Address: Local *De Facto* Governments

While there are some instances of spontaneous grassroots action by the population to restore the provision of public goods, the exercise of state functions in the absence or default of the government occurs most frequently by armed groups in control of certain territory. This is hardly surprising when one considers the capacity required to act as a quasi-state. Once such cases are included under the purview of Article 9 ARSIWA, the scenarios potentially covered by the Article become far less exceptional: there are numerous examples of state-like behavior by armed groups, ranging from the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka,

98 Except perhaps in the (immediate) aftermath of the 1999 war, before the start of UNMIK's operation (see also ARSIWA Commentary to Article 9, para. 1, noting that the circumstances mentioned in Article 9 'may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation'). For instance, the parallel courts – applying Serbian law – were most active in the years immediately following the war, as there was often no alternative to them during this period: UNMIK courts in the north – applying the law of Kosovo as of 1989, supplemented by UNMIK regulations – were established as late as 2003. See OSCE, *Parallel Structures* (2003), 17; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 14 April 2003, UN Doc. S/2003/421, para. 19; see generally OSCE, *Parallel Structures* (2007), 19-20. On the applicable law, see note 182 below. Similarly, the 'parallel' public administration bodies were often the only ones available, see UN High Commissioner for Refugees, *UNHCR's Background Note on Ethnic Albanians from Kosovo Who are in Continued Need of International Protection*, 1 March 2000, http://www.refworld.org/docid/3ae6b31b8f.html, 13; OSCE, *Parallel Structures* (2007), 29.

through the FARC in Colombia, to Hamas in the Gaza Strip and the Islamic State in Syria and Iraq.[99]

This phenomenon is captured in international law by the term 'local *de facto* government', described by the ILC as 'the machinery of an insurrectional movement which, in the course of its struggle against the *de jure* Government, has succeeded in establishing itself in a part of the State's territory.'[100] By contrast, general *de facto* governments exercise control over (practically) the entire state: while there is no precise threshold to determine when a *de facto* government ceases to be local and becomes general, 'real control and paramountcy […] over a major portion of the territory and a

99 See generally on this phenomenon (including on the LTTE) Z.C. Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War* (Ithaca: Cornell University Press, 2011); as well as A. Arjona, N. Kasfir & Z.C. Mampilly (eds.), *Rebel Governance in Civil War* (Cambridge: Cambridge University Press, 2015); V. Felbab-Brown, H. Trinkunas & S. Hamid, *Militants, Criminals, and Warlords: The Challenge of Local Governance in an Age of Disorder* (Washington, DC: Brookings Institution Press, 2017). On the FARC, see e.g. A. Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Cambridge: Cambridge University Press, 2017); R. Provost, 'FARC Justice: Rebel Rule of Law' (2018) 8 *UC Irvine Law Review* 227. On Hamas, see e.g. B. Berti, 'Non-State Actors as Providers of Governance: The Hamas Government in Gaza between Effective Sovereignty, Centralized Authority, and Resistance' (2015) 69 *Middle East Journal* 9. On the Islamic State, see e.g. M. Revkin, 'The Legal Foundations of the Islamic State', *The Brookings Project on U.S. Relations with the Islamic World*, Analysis Paper No. 23, July 2016, https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Mara-Revkin_Web_v2.pdf.

100 ILC Commentary (1974), 286, note 598. It must be pointed out that local *de facto* governments are distinguished from general *de facto* governments by the extent of their territorial control, and not – as is occasionally maintained in the literature, see e.g. Silvanie, 'Acts of Insurgent Governments', 78, essentially equating the two categorizations – by their ultimate success or failure. Granted, all successful insurrectional movements must by definition become the general *de facto* (if not *de jure*) government at some point – otherwise they could not be considered successful. Likewise, the vast majority of unsuccessful movements never become a general *de facto* government – if they did, that would likely put an end to the conflict itself and turn them into successful insurrectionists. However, it could also be the case that an ultimately successful movement first establishes itself in part of the country, before gaining control over the rest of the state. Similarly, it is possible that a group temporarily seizes power over the state as a whole during the course of the struggle, but is nonetheless defeated in the end. The Claims Commission in *George W. Hopkins (U.S.A.)* v. *United Mexican States*, Award of 31 March 1926, 4 UNRIAA 41, para. 12, also pointed out that there are different ways of seizing power, differentiating between seizure from the center, or from the periphery, working towards the center.

majority of the people' has been put forward as a possible yardstick.[101] But what is the relevance of the distinction between local and general *de facto* governments in terms of responsibility? The crucial difference is that while the latter are generally accepted as being capable of binding the state and engaging its responsibility, the same cannot be said of the former.[102] Accordingly, this section explores whether – and to what extent – the conduct of local *de facto* governments is attributable to the state.

Since this phenomenon involves both the exercise of public functions by private persons in the absence of the (*de jure*) government, as well as the conduct of insurrectional movements, local *de facto* governments find themselves at the intersection of Articles 9 and 10 ARSIWA.[103] But which characteristic is more dominant in the end? The nature of the conduct (governmental functions), or the identity of its authors (insurrectional movement)? For the ILC, the latter appears to have been the decisive factor: the only reason why the Commission mentioned local *de facto* governments in its 1974 Commentary to then-Draft Article 8 was to specifically exclude them from the scope of the Article, pointing out that they would be addressed instead under what was to become Article 10 ARSIWA.[104]

Article 10 codifies the general rule whereby the state is not responsible for the conduct of an insurrectional movement, unless the latter proves to be successful and becomes the new government. If it does, all conduct of the movement becomes attributable to the state with retroactive effect, including the insurrectionists' tenure as a local *de facto* government, as well as the period when they were not (yet) organized in governmental form.[105] But if the movement does not succeed, its conduct cannot be attributed to

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101 *Hopkins*, para. 12; see also *ibid.*, referring to the general *de facto* government being the 'real master of the nation'. Note, though, that this was an *obiter dictum* of the tribunal, see note 117 and accompanying text below. E.M. Borchard, 'International Pecuniary Claims against Mexico' (1917) 26 *Yale Law Journal* 339, at 340, speaks of 'control over the whole or practically the whole nation'. But see also N.D. Houghton, 'The Responsibility of the State for the Acts and Obligations of Local De Facto Governments and Revolutionists' (1929-1930) 14 *Minnesota Law Review* 251, at 251-252, noting the lack of a clear threshold, at least before the *Hopkins* case. The ability of general *de facto* governments to bind states was most famously affirmed in the *Tinoco Arbitration*, officially the *Aguilar-Amory and Royal Bank of Canada Claims* (Great Britain *v.* Costa Rica), Award of 18 October 1923, 1 UNRIAA 369, at 377-382; the conduct of such governments is attributable under Article 4 ARSIWA, see ARSIWA Commentary to Article 9, para. 4.

102 See e.g. Borchard, 'Pecuniary Claims against Mexico', 340.

103 See ARSIWA Commentary to Article 9, para. 2. On the topic of local *de facto* governments, see e.g. Borchard, 'Pecuniary Claims against Mexico'; Houghton, 'Local De Facto Governments and Revolutionists'; H. Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (New York: Columbia University Press, 1939), 84-103; D. Morris, 'Revolutionary Movements and *De Facto* Governments – Implications of the "Arab Spring" for International Investors' (2012) 28 *Arbitration International* 721.

104 ILC Commentary (1974), 286, note 598.

105 See e.g. ARSIWA Commentary to Article 10, paras. 4-5; Houghton, 'Local De Facto Governments and Revolutionists', 252-254 as regards local *de facto* governments specifically.

the state under Article 10, not even in cases where it is in effective control of territory, exercising what are normally considered to be state functions. Having excluded local *de facto* governments from the scope of Draft Article 8(b), the ILC did point out in its 1975 Commentary to Draft Article 14 (the predecessor of Article 10 ARSIWA) that certain authors had argued for an exception to this rule, regarding 'any routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control.'[106] In the end, however, the Commission remained unconvinced, and simply treated the matter as covered by the general rule, whereby attribution is conditioned upon the movement's ultimate success.[107]

In light of this drafting history, it certainly comes as a surprise to see the final Commentary to Article 10 specifically highlight Article 9 when noting that the conduct of unsuccessful insurrectional movements may be attributable to the state under other articles of the ARSIWA.[108] What is even more surprising, though, is the fact that the ILC's work does not include any mention, let alone discussion, of the case law backing the position of the authors favoring an exception.

Like so many questions of state responsibility, the problem of whether local *de facto* governments' conduct could be attributed to the state initially surfaced in the early jurisprudence on injuries to aliens. For several decades, this case law consistently held that states could not be held responsible for the conduct of unsuccessful revolutionaries – as was later codified by the ILC.[109] Tribunals, however, did admit a limited exception (regarding taxa-

106 ILC, *Text of articles 10-15 and commentaries thereto as adopted by the Commission at its twenty-seventh session*, in: *Yearbook of the International Law Commission*, 1975, vol. II, 61 (hereinafter ILC Commentary (1975)), at 98, para. 26, referring to the work of Silvanie, Reuter, Schwarzenberger and O'Connell.

107 Austria specifically pointed out that it was 'not clear whether [then-draft] article 14, paragraph 1, include[d] the case of an insurrectional movement, *recognized by foreign States as a local* de facto *government*, which in the end […] is defeated by the central authorities.' ILC Governmental Comments (1980), 92, para. 38 (emphasis in original). These concerns were apparently not shared by Special Rapporteur Riphagen, though, who replied that recognition (or lack thereof) has no impact on the non-attributability of unsuccessful insurgents' conduct; see ILC, *Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur*, 4 March and 23 April 1986, UN Doc. A/CN.4/397 and Add.1, in: *Yearbook of the International Law Commission*, 1986, vol. II, Part One, 1, at 13, paras. 1-2.

108 See ARSIWA Commentary to Article 10, para. 2. The Netherlands even commented on Draft Article 10 that '[t]his article, taken in conjunction with article 7 [i.e. Article 9 ARSIWA], leads to the conclusion that *every internationally wrongful act* of an insurrectional movement which does not succeed in becoming the new government will immediately be directly attributed in full to the State', doubting whether case law in fact supported such a conclusion, see ILC Governmental Comments (2001), 50 (emphasis added). However, as explained in this Section, Article 9 ARSIWA only extends to conduct covered by the functional rationale.

109 See e.g. Borchard, 'Pecuniary Claims against Mexico', 339; see also Draft Articles 14 and 15 and commentary thereto, in: ILC Commentary (1975), 91-106; ARSIWA Commentary to Article 10, paras. 2-4.

tion and customs) to this rule[110] and a broader rationale was formulated for attributing some of the conduct of local *de facto* governments in the 1926 *Hopkins* case before the US-Mexico General Claims Commission.

The case of *George W. Hopkins* v. *United Mexican States* concerned the purchase of postal money orders by the applicant during the 1910-1920 Mexican Revolution, which Mexico later refused to pay, contending that they were issued by an illegal administration.[111] The administration in question was that of Victoriano Huerta, who seized power in a *coup d'état* in February 1913, but gradually lost control over large parts of the country in the following months, and was eventually forced to resign in July 1914.[112] The Claims Commission concluded that the Huerta regime had indeed come into power illegally, but went on to hold that a distinction must be drawn between the 'personal' and 'unpersonal' [*sic*] acts of such an administration. 'The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers', the Commission pointed out, arguing that as a result, the state cannot deny responsibility in connection with 'unpersonal' acts, i.e. 'purely government routine having no connection with or relation to the individuals administering the Government for the time being', such as registration of births, deaths and marriages, taxation, and 'even many rulings by the police'.[113] By contrast, individuals' 'personal' interactions with the government are acts 'in support of the particular agencies administering the government for the time being', such as 'voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like.'[114] Finding that the issuance of postal money orders was an unpersonal act, the Claims Commission held that Mexico was bound by the Huerta regime's conduct, and therefore liable to pay the applicant.[115]

At this juncture, a careful reader might point out that – having seized power through a *coup* – the Huerta administration initially controlled all (or most) of Mexico. Accordingly, it would be better classified as a general *de facto* government during that early period, only turning into a local one as it began to lose control over much of the country.[116] But as the Commission explained in an *obiter dictum*, this would only be relevant inasmuch as the Huerta regime's personal acts were concerned.[117] In respect of this latter category, the award upheld the traditional rule whereby general

110 See, for an overview, e.g. E.M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York: The Banks Law, 1915; reprint by New York: Kraus Reprint, 1970), 239-241; Silvanie, *Acts of Unsuccessful Insurgent Governments*, 104-134.

111 *Hopkins*, para. 1. Postal money orders are essentially a form of money transfer, purchased at one post office and redeemed by the beneficiary at another.

112 *Ibid.*, paras. 2, 12.

113 *Ibid.*, paras. 11, 4.

114 *Ibid.*, para. 5.

115 *Ibid.*, para. 11.

116 See e.g. Borchard, 'Pecuniary Claims against Mexico', 340.

117 *Hopkins*, para. 12.

de facto governments are capable of binding the state (and engaging its responsibility), while the attributability of a local *de facto* government's acts is dependent on its ultimate success.[118] In other words, the Claims Commission held that the state is always responsible for the unpersonal acts of a *de facto* regime (whether general or local); but as regards personal acts, only those of a general *de facto* government are attributable.

In addition to the state's responsibility for acts 'in the discharge of […] *usual* and ordinary functions', the Claims Commission also noted that the state is bound 'to the extent that it received benefits from transactions of an *unusual* nature'.[119] This exception is based on the same underlying principle, namely that the transaction in question benefited the state as such, rather than the particular persons in power. In support of this view, the Commission referred to Mexico's own treatment of bonds issued by the Huerta administration, which were deemed valid or invalid by the subsequent *de jure* government depending on whether they were used to pay off the pre-existing state debt or maintain the *de facto* regime in power.[120]

Both of these rationales regarding routine acts and benefit to the state were consistently upheld in a number of other cases before the General Claims Commission, regarding other postal money orders,[121] as well as 'printing machinery, paper envelopes and other goods',[122] automobile

118 *Ibid.* The award itself did not use the (then common) terminology of local or general *de facto* governments – a fact that was also noted by commentators, see E.M. Borchard, 'Decisions of the Claims Commissions, United States and Mexico' (1926) 20 *American Journal of International Law* 536, at 541; de Beus, *Jurisprudence of the General Claims Commission*, 108. Nonetheless, as acknowledged by de Beus, *ibid.*, the Huerta administration was a general *de facto* government.

119 *Hopkins*, para. 11 (emphasis added).

120 *Ibid.*, para. 10.

121 *George W. Cook (U.S.A.)* v. *United Mexican States*, Award of 3 June 1927, 4 UNRIAA 213, paras. 2, 6; *Parsons Trading Company (U.S.A.)* v. *United Mexican States*, Award of 3 June 1927, 4 UNRIAA 217, for full text, see *Opinions of Commissioners under the Convention concluded September 8, 1923 between the United States and Mexico: February 4, 1926, to July 23, 1927* (Washington, DC: Government Printing Office, 1927), 324, para. 2; *John A. McPherson (U.S.A.)* v. *United Mexican States*, Award of 3 June 1927, 4 UNRIAA 218, for full text, see *Opinions of Commissioners* (1927), 325, para. 2; *National Paper and Type Company (U.S.A.)* v. *United Mexican States*, Award of 26 September 1928, 4 UNRIAA 327, para. 2; *Francis J. Acosta (U.S.A.)* v. *United Mexican States*, Award of 18 October 1928, 4 UNRIAA 411, for full text, see *Opinions of Commissioners under the Convention Concluded September 8, 1923, as Extended by the Convention Signed August 16, 1927, between the United States and Mexico* (Washington, DC: Government Printing Office, 1928), 121, at 122; *Singer Sewing Machine Co. (U.S.A.)* v. *United Mexican States*, Award of 18 October 1928, 4 UNRIAA 411, for full text, see *Opinions of Commissioners* (1928), 123, at 123; and *Esther Moffit (U.S.A.)* v. *United Mexican States*, Award of 9 May 1929, 4 UNRIAA 521, at 522.

122 *National Paper and Type Company*, para. 1.

services,[123] school benches,[124] and ambulances[125] sold to different departments of the Mexican government under Huerta.[126] This body of case law – *Hopkins* in particular – has, in turn, served as the basis for authors to argue that there is an exception to the non-attributability of unsuccessful insurgents' conduct, inasmuch as routine administrative acts are concerned.[127] Once the topic was excluded from the ILC's canon, though, it received little further attention. Even the terminology of 'local *de facto* government' seems to have largely fallen out of use over the past decades,[128] despite the fact that the phenomenon is no less common – and the Commission's observations in *Hopkins* no less valid – today than in the 1920s.

But since *Hopkins* constitutes a marked departure from previous jurisprudence, the question inevitably arises: how can it be reconciled with the position that unsuccessful local *de facto* governments cannot engage the state's responsibility? The non-attribution of revolutionary conduct to states is based on a simple rationale: since the state can only be responsible for its own actions, it cannot possibly be required to account for the conduct

123 *Lee A. Craw (U.S.A.)* v. *United Mexican States*, Award of 26 September 1928, 4 UNRIAA 327, for full text, see *Opinions of Commissioners* (1928), 1, at 1-2.

124 *George W. Cook (U.S.A.)* v. *United Mexican States*, Award of 30 April 1929, 4 UNRIAA 506, at 506.

125 *The Peerless Motor Car Company (U.S.A.)* v. *United Mexican States*, Award of 13 May 1927, 4 UNRIAA 203, paras. 3-4; see also the concurrence of Commissioner van Vollenhoven *ibid.*, at 204.

126 See generally Silvanie, 'Acts of Insurgent Governments', 98-99; de Beus, *Jurisprudence of the General Claims Commission,* 105-106 for an overview. It is also worth noting that in *The British Shareholders of the Mariposa Company (Great Britain)* v. *United Mexican States*, Award of 6 August 1931, 5 UNRIAA 272, para. 3, the British-Mexican Claims Commission awarded compensation to the claimants for cattle taken by one of the competing armed forces, noting that the cattle in question was 'to a large extent confiscated in order to supply the population of the town of Muzquiz with meat. It seems a postulate of equity, to award compensation for cattle thus exacted.'

127 D.P. O'Connell, *International Law* (2 vols., 2nd ed., London: Stevens, 1970), vol. II, 975; C. de Visscher, *Theory and Reality in Public International Law* (rev. ed., Princeton: Princeton University Press, 1968), 257; G. Schwarzenberger, *International Law, Vol. 1: International law as applied by international courts and tribunals* (3rd ed., London: Stevens, 1957), 630; Silvanie, *Acts of Unsuccessful Insurgent Governments*, 84-103; and Silvanie, 'Acts of Insurgent Governments', 95-103.

128 In recent literature, Stefan Talmon appears to be the only author who regularly refers to it, see e.g. S. Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: *Tertium Non Datur*?' (2005) 75 *British Yearbook of International Law* 101, at 147-148; S. Talmon, 'Recognition of the Libyan National Transitional Council', *ASIL Insights*, Vol. 15, Issue 16, 16 June 2011, https://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council; though see, for a recent example, Morris, 'Revolutionary Movements and *De Facto* Governments', 729-735. J. van Essen, 'De Facto Regimes in International Law' (2012) 28(74) *Merkourios: Utrecht Journal of International and European Law* 31, uses the terminology of 'de facto regimes' instead, see at 33.

of those who rise up against it.[129] Importantly, the *Hopkins* award does not question this logic – it merely refines the principle. Rather than simply assuming that *all* acts of an insurrectional movement are directed against the state, it separates conduct which is indeed meant to further the success of the movement – by attempting to overthrow the government or hold onto power – from conduct which is carried out in a regular exercise of state functions.[130]

Drawing the line between personal and unpersonal acts is not an easy task, though. While the Commission in *Hopkins* provided a basic definition of the two categories, it also stressed that the assessment has to be made on case-by-case basis, acknowledging that there is a 'large doubtful zone' between the two endpoints of the spectrum.[131] Case-by-case analysis indeed appears to be best suited to address the full spectrum of issues that could possibly arise from the conduct of local *de facto* governments; but there is one particular type of problem which is worth highlighting in more general terms. The Commission's premise in *Hopkins* was that personal changes at the top governmental offices generally do not affect the functioning of the state's administrative apparatus – and in some situations, this may indeed be the case. But many, if not most, insurrections start with the aim of changing the existing social order in some way and imposing their own view of how society and the state should operate.[132] Once the movement has succeeded in establishing itself on part of the state's territory, it will likely proceed to implement its views within that setting.

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129 See e.g. *Sambiaggio Case (Italy* v. *Venezuela)*, 1903, 10 UNRIAA 499, at 513; Schwarzenberger, *International Law*, 629; E. Castrén, *Civil War* (Helsinki: Suomalainen Tiedeakatemia, 1966), 231. Also, as convincingly argued by Silvanie, this rests on a tendency to equate the government with the state; those who rise up against the government do not necessarily act against the state. Silvanie, 'Acts of Insurgent Governments', 102; cf. O'Connell, *International Law*, vol. II, 975.

130 See also Silvanie, 'Acts of Insurgent Governments', 102-103.

131 *Hopkins*, para. 6. The Commission itself later encountered such difficulties in the *Peerless Motor Car Company* case, concerning the purchase of 'two automobile ambulances' on the order of the Department of War and Navy during the Huerta regime. While Commissioner Nielsen saw the purchase as clearly falling within the category of unpersonal acts, Presiding Commissioner van Vollenhoven did not share this view, arguing that it fell within the 'doubtful zone' instead. He nonetheless concluded, at 204, that 'it is much more akin to a transaction of government routine (the one extreme) than to any kind of voluntary undertaking "having for its object the support of an individual or group of individuals seeking to maintain themselves in office" (the other extreme), and therefore should, under the principles laid down in the said opinion, be assimilated to the first group, to wit, the routine acts.' D.P. O'Connell later relied partly on the *Peerless* case to argue that the distinction between personal and unpersonal acts is 'unclear', see O'Connell, *International Law*, vol. II, 975.

132 See e.g. S.L. Woodward, 'Do the Root Causes of Civil War Matter? On Using Knowledge to Improve Peacebuilding Interventions' (2007) 1 *Journal of Intervention and Statebuilding* 143, at 150-151.

In fact, whether those exercising governmental functions rely on existing structures or establish new ones, practical examples point to a mix between maintaining prior laws inherited from the state and drafting new ones. In the Gaza Strip, Hamas consolidated its power largely by taking over the existing apparatus of the Palestinian Authority, much like the scenario envisaged by the Commission in *Hopkins*.[133] But while – due to public pressure towards reconciliation – legislating by Hamas has reportedly been generally restricted to 'the technical and necessary', the takeover has also led to increased Islamization of the Gaza Strip, particularly through 'moral policing'.[134] In Sri Lanka, when the LTTE adopted its own civil and criminal code in 1994, '[t]hese were based on pre-existing laws that were updated and extended to cater for the social issues that LTTE has chosen to focus on, such as women's rights and the caste systems'.[135] In Colombia, the FARC reportedly applied 95% state law in terms of substance (but deviated significantly in terms of procedural law and sentencing in criminal law) when dealing with civilians.[136] The FARC would also 'invoke local customs, rooted in the values and traditions of peasant life, which happened to accord with those embraced by the FARC's own ideology.'[137] In Somalia, the Islamic courts' authority derived from the clans and thus 'primarily from Somali customary law (*xeer*)'.[138] *Sharia* (Islamic law) was 'applied by default, since no other legal system […] functioned since the collapse of the government', but 'the most severe Islamic punishments […] that contradict[ed] Somali *xeer* [were] rarely imposed'.[139] Once the more

133 See A. Hovdenak (ed.), 'The Public Services Under Hamas In Gaza: Islamic Revolution or Crisis Management?', *Peace Research Institute Oslo Report 3*, 2010, https://www.prio.org/Publications/Publication/?x=7374, 11-12; Y. Sayigh, 'Hamas Rule in Gaza: Three Years On', *Brandeis University, Crown Center for Middle East Studies*, Middle East Brief No. 41, March 2010, https://www.brandeis.edu/crown/publications/middle-east-briefs/pdfs/1-100/meb41.pdf, 2.

134 N.J. Brown, 'Gaza Five Years On: Hamas Settles In', *Carnegie Papers*, Middle East, June 2012, http://carnegieendowment.org/files/hamas_settles_in.pdf, 12; Sayigh, 'Hamas Rule in Gaza', 3-5; Hovdenak, 'Public Services Under Hamas', 14; B. Milton-Edwards, 'Order Without Law? An Anatomy of Hamas Security: The Executive Force (*Tanfithya*)' (2008) 15 *International Peacekeeping* 663, at 672-673.

135 K. Stokke, 'Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-controlled Areas in Sri Lanka' (2007) 27 *Third World Quarterly* 1021, at 1027.

136 M. Aguilera Peña, *Contrapoder y justicia guerrillera: fragmentación política y orden insurgente en Colombia (1952-2003)* (Bogotá: IEPRI, 2014), 107. In English, see Provost, 'FARC Justice', 247-251 on 'FARC Civilian Justice'.

137 Provost, 'FARC Justice', 247, citing A. Molano, 'La justicia guerrillera', in: B. de Sousa Santos & M. García Villegas (eds.), *El caleidoscopio de las justicias en Colombia: análisis socio-jurídico* (2 vols., Bogotá: Colciencias, 2004), vol. II, 331, at 334.

138 ICG, *Somalia's Islamists*, 19.

139 *Ibid*.

fundamentalist elements became dominant and started applying a harsher version of *sharia* was also when the courts' popularity declined.[140]

In some cases, the new rules adopted by the local *de facto* government may come into conflict with the state's international obligations. For instance, the Commission in *Hopkins* mentioned 'many rulings by the police' as falling under governmental routine – but what if policing is carried out pursuant to rules, newly introduced by the local *de facto* government, which violate human rights law? Or, to mention an extreme (but unfortunately real-life) example, the Islamic State apparently 'developed a detailed bureaucracy of sex slavery, including sales contracts notarized by the ISIS-run Islamic courts.'[141] The fact that such abhorrent practices may be given a veneer of officialdom cannot possibly transform them into 'routine'. Quite the contrary: inasmuch as the new social order is meant to ensure the population's cooperation, whether by instilling fear or winning popular support, it indirectly contributes to securing the movement's victory.[142] As a result, conduct in pursuit of that new order will likely be considered 'personal', thus falling outside the scope of the exception and not attributable to the state. But while these are sound reasons to exclude the attribution of such conduct to the state, such exclusion will often result in leaving the gravest violations without redress, thereby severely limiting the usefulness of the rule.

Nonetheless, the division between personal and unpersonal acts does not completely overlap with the application of new laws and those inherited from the government. On the one hand, where there is no source of continuing legislation, as in Somalia, those exercising governmental functions may reach back to customary laws to fill in the gaps, without this necessarily being considered a personal act. On the other hand, armed groups and local *de facto* governments may carry out routine governmental functions (like the Hamas in the Gaza Strip[143]) or rely on customary laws (like the FARC) to enhance their legitimacy in the eyes of the local popu-

140 See S. Samatar, 'The Islamic Courts and Ethiopia's Intervention in Somali: Redemption or Adventurism?', *Chatham House*, 25 April 2007, https://www.chathamhouse.org/sites/default/files/public/Research/Africa/250407samatar.pdf, 7-8; Barnes & Hassan, 'Islamic Courts', 155.

141 R. Callimachi, 'ISIS Enshrines a Theology of Rape', *New York Times*, 13 August 2015, https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html. See also R. Callimachi, 'The Case of the Purloined Poultry: How ISIS Prosecuted Petty Crime', *New York Times*, 1 July 2018, https://www.nytimes.com/2018/07/01/world/middleeast/islamic-state-iraq.html, for less dramatic examples of how ISIS dispensed justice based on its own set of rules.

142 In the example given, the connection is even more direct, as this practice is used to recruit fighters, see Callimachi, 'Theology of Rape'.

143 See B. Berti & B. Gutiérrez, 'Rebel-to-Political and Back? Hamas as a Security Provider in Gaza between Rebellion, Politics and Governance' (2016) 23 *Democratization* 1059, concluding at 1069 that Hamas 'used the provision of security as a key tool to boost both its power and its political legitimacy.'

lation with the ultimate goal of furthering their own cause.[144] In the end, while the type of laws applied may be a useful indication, it can only be determined on a case-by-case basis whether the actor in question acted in pursuance of government routine or its own goals – and given the qualifications outlined above, the former is likely to be a very narrow subset of cases.

How does this distinction between personal and unpersonal acts relate to the ILC's third, normative, requirement? This question arises with respect to both local *de facto* governments and authorities established through self-organizing bottom-up grassroots action; and the interaction between the two sets of criteria (from *Hopkins* and the ILC's work) can be clarified through four hypothetical scenarios. The four scenarios represent the possible combinations in response to the following questions:

(1) How did the institution come into power?
  (a) Was it a response to governmental absence (i.e. a pre-existing vacuum); or
  (b) Was it a cause of governmental absence (e.g. did it force the government out)?
(2) What type of conduct is under examination?
  (a) Personal conduct, carried out for the benefit of the organization; or
  (b) Unpersonal conduct, i.e. the continuance of governmental routine?

First, where the institution moved into a pre-existing vacuum, but acts for its own benefit, the state's responsibility cannot be engaged. Such conduct not only fails the *Hopkins* requirement of unpersonal acts; it cannot be deemed as acting on the state's behalf, either, which is the principle underlying attribution in the ARSIWA. Second, where the institution was a response to governmental absence and carries out governmental routine, this meets the *Hopkins* requirement and is the archetypal scenario envisaged by Article 9 ARSIWA, leading to attribution. Third, where the institution is the cause of governmental absence and acts for its own benefit, there cannot be any question of state responsibility; this scenario fails the tests of both *Hopkins* and the ILC's third condition. Fourth and finally, where the institution forced the government out but carries out routine tasks, assessments following the *Hopkins* and ILC criteria lead to divergent results. Following the rationale of *Hopkins*, such conduct is still attributable to the state, as it is unpersonal. According to the ILC's third criterion, however, the

144 See also more generally e.g. A. Arjona, N. Kasfir & Z.C. Mampilly, 'Introduction', in: Arjona, Kasfir & Mampilly (eds.), *Rebel Governance in Civil War*, 1, at 3: 'By creating systems of governance, rebels seek to win over local populations – or at least dissuade them from actively collaborating with incumbents.' Given that 'the provision of public services by an armed group may often serve a dual purpose', Katharine Fortin argues in *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017), at 268-269, that 'the acts of a rebel administration must be impartially assessed and consideration must be given to whether they are wholly connected to the exercise of government in its impersonal aspect', rather than relying on 'the group's professed motivation in providing the service in question.'

'usurpation' of governmental authority precludes the possibility of attribution. As a result, if the ILC's third requirement were to be given effect, it would exclude attribution in every instance except where a local *de facto* government or other institution has been established to fill a pre-existing vacuum.[145] It is a highly difficult decision between the two, but given that the idea behind unpersonal acts in *Hopkins* is precisely that of acting on the state's behalf (which is what underpins the ARSIWA's entire approach to attribution), while the status of the ILC's third criterion is rather uncertain, on balance it may be better to let the *Hopkins* rationale prevail. That said, given the limitations described above regarding unpersonal acts, the choice of applying or not applying the ILC's third requirement is unlikely to significantly affect the scope of attributable conduct.

5.2.4 Concluding Remarks

Functionality constitutes a powerful rationale for attributing the conduct of persons who are not otherwise linked to the state. So powerful, in fact, that the ILC decided to include it in the ARSIWA – in a carefully circumscribed form – even in the relative absence of supporting international practice. Yet at the same time, the ILC did not deem it compelling enough to prevail when (seemingly) coming into conflict with the general rule against attributing the conduct of unsuccessful insurrectional movements. The existence of such a seemingly contrary rule explains why the ILC's treatment of the issue shows such contrast depending on the actor involved: simple individuals or insurrectional movements. But is it worth maintaining such a distinction? To begin with, the dividing line between the two categories of actors is not always clear. This is well illustrated by the *Yeager* case, which was cited by the ILC in support of Article 9, despite the fact that the Revolutionary Guards are essentially best described as the auxiliaries of an ultimately successful revolutionary movement – eventually given official status by the new government.[146] Furthermore, as shown above, the clash between *Hopkins* and the general rule on non-attribution is more apparent than actual – and in the end, even the ILC left the door open for attributing certain conduct by insurrectional movements under Article 9 ARSIWA.

With case law on the topic being scarce, though, there have been few opportunities to elaborate on the precise content of functionality-based attribution, and its contours have remained quite vague. All that can be

145 This is not unheard of in the case of armed groups, either. For instance, in its early years, the FARC would often choose the most underdeveloped areas as its base, with little to no state presence, see e.g. M.A. Vélez, 'FARC-ELN: evolución y expansión territorial' (2001) No. 47 *Desarrollo y Sociedad* 151, at 160 and the sources cited therein. Similar strategies could sometimes be observed later on as well, as in the case of the conflict's spillover into Ecuador, see M. Kingsley, 'Ungoverned Space? Examining the FARC's Interactions with Local Populations in Northern Ecuador' (2014) 25 *Small Wars & Insurgencies* 1017.

146 In fact, the award did refer to the ILC's Draft Article 15 as well, see *Yeager*, para. 35; on this aspect, see also Caron, 'The Basis of Responsibility', 143-146.

safely stated is that the rule covers (1) the exercise of state functions (2) in the absence of the (official) government. The status of any additional criteria is unclear. The ILC's third requirement – i.e. the existence of 'circumstances such as to call for the exercise' of governmental authority – appears to have been intended to filter out cases where the absence of effective government is the cause, rather than the result, of private actors exercising state functions. This is also consistent with the ILC's exclusion of local *de facto* governments from attribution, since they almost by definition displace the *de jure* government. But such blanket exclusion does not accord with the *Hopkins* award and subsequent jurisprudence from the US-Mexico General Claims Commission, which relied instead on a distinction between personal and unpersonal acts and which the ILC did not take into account during its deliberations; nor does it explain why Article 9 is nonetheless mentioned as an option in the Commentary regarding insurrectional movements. (That said, one possibility is that it refers only to instances where the armed group moves into a pre-existing vacuum.) Similarly, the objections raised in the literature to the applicability of Article 9 ARSIWA to situations of 'state failure' – requirements relating to the existence of government, its knowledge of the conduct in question, and acting in the public interest – are based on a misinterpretation, unsupported, or simply absorbed into the functionality requirement.

However, even if one decides to cast the net of Article 9 ARSIWA as wide as possible, dismissing all but the two core criteria and allowing for the attribution of local *de facto* governments' unpersonal conduct, the rule still cannot serve as a silver bullet, ensuring that there is no vacuum of responsibility in the absence of effective government. Ironically, the rule's most severe limitations are inherent, stemming from the very same rationale of functionality which lends it such compelling force. That rationale is what restricts attribution to incidental breaches which occur in the course of carrying out state functions – but the gravest violations of international law often take place when the state *abuses* its position, and is not acting within its functions. Similarly, as Gerard Kreijen points out, '[t]he non-governmental actors within the failed State who commit acts in violation of international law that may raise concerns of state responsibility will generally do so in ways that lack any connection with the exercise of public functions.'[147]

Yet at the same time, in situations of upheaval not only will it not be possible to attribute the conduct of an insurrectional movement to the state, but as the 1975 Commentary highlights, '[i]t will rarely be possible to accuse a State of failing in its own obligations of vigilance and protection in relation to the conduct of organs of an insurrectional movement because,

147 Kreijen, *State Failure*, 278.

most of the time, the actions in question are entirely beyond its control.'[148] In other words, since the conduct in question cannot be attributed, and the state cannot be found in violation of its duties of protection, either, such a situation will inevitably result in a responsibility gap.[149] Likely motivated by the desire to close this gap, certain authors – namely Erik Castrén and D.P. O'Connell – have gone even further, advocating for the position that all acts of *de facto* governments should be attributable to the state, based on a rationale of effectiveness, rather than functionality.[150] O'Connell, in particular, has argued that the ultimate success of the insurrectional movement should only matter in those cases where 'at the instant time, there was a vacuum of government at the relevant place', i.e. the revolutionaries were not organized as a government.[151] This stance, however, has not found support in practice either before or since these arguments were made.

In sum, the conditions of Article 9 ARSIWA do in fact allow for it to be applied even in cases where there is no central government in existence; the article does indeed seem to be suited, if not tailored, to the situation in failing or failed states, even upon closer inspection. Furthermore, the rationale of functionality can be reconciled with the principle of conditioning the attributability of insurrectional movements' conduct on their ultimate success or failure. This reconciliation, in turn, enables the attribution of the unpersonal conduct of local *de facto* governments under Article 9, at the very least in cases where they have moved into a pre-existing vacuum. That said, the rationale of functionality – as opposed to effectiveness (i.e. a factual basis) – carries an inherent limitation which restricts the scope of Article 9's applicability considerably, regarding both individuals and local *de facto* governments.

148 ILC Commentary (1975), 92, para. 4; see also *Crawford's First Report*, para. 263: 'once an organized insurrectional movement comes into existence as a matter of fact, it will rarely if ever be possible to impute responsibility to the State, since the movement will by then be "entirely beyond its control".'

149 Unless the non-state actor is held responsible in its own right, but that faces a number of serious limitations, due to persistent doubts as to the international legal personality of such actors.

150 Castrén based his argument partly on recognition of belligerency, partly on effective control over territory; O'Connell on the substitution of governments. See O'Connell, *International Law*, vol. II, 970; Castrén, *Civil War*, 231: 'even if the insurrection has been unsuccessful, the insurgents may nevertheless have exercised effective authority over a large portion of the national territory and for a long period of time.' The argument of these authors was also noted in passing at the ILC, with the 1975 Commentary mentioning that they 'argue[d] *de jure condendo* that the State should always be held responsible, when the revolution is over, for the acts of insurgents acting on behalf of a local *de facto* government', i.e. not only for routine administrative acts: ILC Commentary (1975), 97, note 251, referring to O'Connell, *International Law*, vol. II, 969-970 and Castrén, *Civil War*, 232.

151 O'Connell, *International Law*, vol. II, 970; Castrén, *Civil War*, 231-232.

5.3 The Legal: 'State Collapse', Co-optation, and Articles 4 and 5 ARSIWA

Having addressed the factual and functional rationales of attribution, this section turns to those situations where attribution is based on a link under domestic law. Article 4 ARSIWA codifies the basic rule – described by the Commentary as 'a point of departure' – that the conduct of its organs is attributable to the state.[152] Complementing this rule is Article 5 ARSIWA, which covers the conduct of so-called parastatal entities, i.e. persons or entities that are not organs, but are 'empowered by the law of that State to exercise elements of the governmental authority'.[153]

Both Articles 4 and 5 ARSIWA operate on the same basis: the existence of a domestic legal link with the state. In case the text of Article 5 itself should leave the reader with any doubt, the Commentary explicitly states that the 'justification for attributing […] the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority.'[154] Article 4, meanwhile, defines an organ as 'includ[ing] any person or entity which has that status in accordance with the internal law of the State'.[155] Granted, this definition is not limited to *de jure* organs; but as the attribution of *de facto* organs is based on a different overall rationale (discussed in Chapter 4 above), this section is focused only on the former category. Within the scope of the legal rationale, the following sections will first examine the possibility of attributing the conduct of remaining low-level *de jure* organs of the state, then turn to the phenomenon of co-optation by the (affected or a third) state, conferring official status on non-state actors.

5.3.1 Remaining Low-Level Organs in the Event of 'State Collapse'

Working on the assumption that 'failed' or 'collapsed' states lack organs by definition, most authors do not address the option of attributing conduct under Article 4 ARSIWA at all.[156] Nonetheless, even under such a narrow definition of 'state failure', there are a few who admit the possibility that some low-level institutions may have survived the collapse of the central

152 ARSIWA Commentary to Article 4, para. 2.

153 See ARSIWA Commentary to Article 5, para. 1. The text of Article 5 (unlike that of Article 4) further requires that 'the person or entity is acting in that capacity in the particular instance'; but a closer look at the ARSIWA reveals that this criterion is equally applicable to Article 4: see ARSIWA Commentary to Article 4, para. 13, as well as Article 7 ARSIWA.

154 ARSIWA Commentary to Article 5, para. 5.

155 Article 4(2) ARSIWA.

156 See e.g. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 85, 104; Kreijen, *State Failure*, 273. Cahin, in 'L'état défaillant', and Pustorino, in 'Failed States', do not discuss it at all, for instance.

government, continuing to function.[157] Can their conduct be attributed to the state?

In the early twentieth century, it was briefly contended by certain authors – most notably Edwin Borchard – that the conduct of 'minor' or 'subordinate' organs cannot engage the state's responsibility.[158] This argument was eventually dismissed by the ILC, on the basis that even at the time of its original espousal, it only found rather questionable support in practice, and was entirely unsupported in later decades.[159] Accordingly, Article 4 ARSIWA specifically notes that the conduct of an organ, 'whatever position it holds in the organization of the State', is attributable.[160]

The theoretical foundation of this rule – in other words, the reason behind the lack of contrary practice – is the principle of the state's unity.[161] In the principle's most famous expression, '[a]n officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority.'[162] Robin Geiss, however, has argued that in the case of 'failed states', the collapse of central authority dissolves that unity, as remaining low-level organs can no longer 'contribute' to the 'upper-level organization of the state as a unit'.[163] In other words, the state – instead of forming a single entity – disintegrates into several smaller units, with nothing to connect them to each other in the absence of central institutions.

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157 Geiss, *"Failed states": Die normative Erfassung*, 257-259; Leidenmühler, *Kollabierter Staat*, 520-522. See also N. Schrijver *et al.*, 'Failing States: A Global Responsibility', *Adviesraad Internationale Vraagstukken (Advisory Council on International Affairs)*, Advice No. 35 / *Commissie van advies inzake volkenrechtelijke vraagstukken*, Advice No. 14, 7 May 2004, https://www.advisorycouncilinternationalaffairs.nl/documents/publications/2004/05/07/failing-states, 16.

158 See Borchard, *Diplomatic Protection*, 189-193.

159 See *Ago's Third Report*, paras. 151-160; ILC, *Draft articles on State responsibility: Chapter II. The "act of the State" according to international law (articles 5-6)*, in: *Yearbook of the International Law Commission*, 1973, vol. II, 188, at 196-197, paras. 9-15.

160 See also ARSIWA Commentary to Article 4, paras. 6-7.

161 See ARSIWA Commentary to Article 2, para. 6 and to Article 4, para. 5; ILC, *Draft articles on State responsibility: Chapter II*, 197, para. 16.

162 *Isaac Moses, assignee, etc.* v. *Mexico,* Decision of 14 April 1871, in: J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been Party* (6 vols., Washington, DC: Government Printing Office, 1898), vol. III, 3127, at 3129.

163 Geiss, *"Failed states": Die normative Erfassung*, 258 (translation by author). Geiss argues that the state cannot be held responsible for the omissions of any remaining low-level organs, either (as no conduct – be it act or omission – can be attributed to the state): *ibid.*, 258-259. In support of his argument that the fall of the central government precludes attribution, Geiss cites the *Hopkins* case, where the Claims Commission concluded that once the *de facto* regime of Victoriano Huerta had lost control over most of Mexico, the regime's remaining 'personal' acts were not attributable to the state (*Hopkins*, para. 12). Rather than negating the continued attributability of *any* remaining low-level organs, though, this simply highlights that there are questions of legitimacy involved: it makes a difference whether the period of central governmental absence (and the activity of remaining low-level organs) follows a *de jure* or a *de facto* government.

But as logical as this argument may seem at first glance, the notion of local authorities merely 'contributing' to the work of the central government does not always accurately capture the relationship between these organs. The shortcomings of such a depiction are highlighted in particular by the example of federal states, where constituent units often have competences that are entirely distinct from – rather than subordinate to – those of the central government.[164] Where competences do not even overlap, it is difficult to see these units as 'contributing' to the efforts of the central organs. Furthermore, the logical counterpart to such simple bottom-up 'contribution' would be top-down authority, whereby the higher-level organ can legally compel the lower-level organ to compliance. Yet the ARSIWA Commentary to Article 4 explicitly acknowledges that it is 'irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations.'[165] Going beyond the federal context, Article 7 ARSIWA makes it clear that the conduct of a person or entity covered under Articles 4 or 5 ARSIWA is attributable to the state when 'acts in that capacity, even if it exceeds its authority *or contravenes instructions*.'[166] Thus, even in cases where the central government does have the power to compel a subordinate organ, whether it has attempted to exercise this power still does not have any bearing on the state's responsibility for the conduct of the lower-level organ.[167] Instead, as Article 7 reveals, the decisive element in such cases is acting in an official capacity: once an entity has been designated as an organ or otherwise empowered to exercise elements of govern-

164 See e.g. I. Duchacek, 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations', in: H.J. Michelmann & P. Soldatos (eds.), *Federalism and International Relations: The Role of Subnational Units* (Oxford: Clarendon, 1990), 1, at 3, defining a federal state as a 'pluralistic democracy in which two sets of governments, neither being fully at the mercy of the other, legislate and administer within their separate and yet interlocked jurisdictions'; cf. G. Hernández, 'Federated Entities in International Law: Disaggregating the Federal State?', in: D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013), 491, at 492, defining a federal state as 'a State that, according to its constitutional arrangements, distributes the competences which normally fall to a State between two or more orders of government.'

165 ARSIWA Commentary to Article 4, para. 9; as the commentary points out, this rule is also supported by international jurisprudence, most recently in *LaGrand* (Germany *v.* United States of America), Judgment of 27 June 2001, 2001 ICJ Reports 466 and *Avena and Other Mexican Nationals* (Mexico *v.* United States of America), Judgment of 31 March 2004, 2004 ICJ Reports 12.

166 Emphasis added.

167 But (the lack of) such an attempt may be relevant for the state's responsibility for the conduct of a higher-level organ, see *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *v.* Uganda), Judgment of 19 December 2005, 2005 ICJ Reports 168, para. 246, where Uganda was held responsible for its failure to prevent 'looting, plundering and exploitation of the DRC's natural resources' by the Ugandan armed forces.

mental authority, attribution can only be successfully challenged where the conduct was carried out in a purely private capacity, entirely unconnected to the authority conferred.

Having established that the rationale for attribution under Articles 4 and 5 ARSIWA is the existence of legal authority, the next step is to identify the source of that authority. One may of course simply argue that such authority is conferred by the central government, but that line of argumentation faces the same problem that has just been described: in federal systems, the constituent entities do not, in fact, derive their authority from the federal government. As Gleider Hernández explains, for instance, the 'constitutional arrangement [of a federal state] can only be amended through a new agreement *which requires the consent of the different levels of government* which comprise a State'; this is exactly what differentiates federal states from merely decentralized ones, where the central government can unilaterally reverse the delegation of powers to subordinate levels.[168] Given that one can reasonably expect a solution to be capable of providing an equally sound explanation for both federal and unitary states, the answer must be sought elsewhere.

That answer, in the end, is quite simple. After all, what determines the relationship – subordinate or otherwise – between the central government and the local organs in each and every case is the domestic legal order. In other words, both central and local organs derive their authority from the domestic legal system;[169] and where the central government may delegate competences to the subordinate organs, this is because the legal order empowers it to do so. For the same reason, the foundation of the state's unity lies in its legal system, rather than the existence of a central government. But even under such a conceptualization, Franz Leidenmühler concludes that the legal order may lose its validity due to ineffectiveness, and once that has happened, the conduct of any remaining organs cannot be attributed to the state.[170] In the same vein, he maintains that absent a legal order capable of providing authorization for the exercise of elements of governmental authority, attribution cannot take place through Article 5 ARSIWA, either.[171]

Practice on the subject, however, while admittedly limited, takes the contrary position: the attributability of local organs' conduct in the absence of a central government was in fact upheld in the case of *Christina Patton* v. *United Mexican States* before the British-Mexican Special Claims Commission. According to the facts of the case, members of one of the armed

168 Hernández, 'Federated Entities in International Law', 493 (emphasis added).

169 Cf. Leidenmühler, *Kollabierter Staat*, 521.

170 *Ibid.*: 'Hat aber diese Ordnung mangels Wirksamkeit insgesamt ihre Geltung verloren, so können ihr auch allenfalls *de facto* weiterbestehende (ehemalige) Organwalter nicht mehr zugerechnet werden.'

171 *Ibid.*, 522.

factions contending for power during the 1910-1920 Mexican Revolution looted the claimant's residence in March 1915.[172] While the conduct of the looters themselves could not be attributed to Mexico, the question arose whether the state authorities have failed in their duty to protect. During the relevant period, no single faction was in control of Mexico as a whole (or even a majority of it), leading the Commission to conclude that the country was without a government. But instead of ending its enquiry there, as it could have done, the Claims Commission proceeded to note that '[e]ven when a country passes through a period of anarchy, even when an established and recognized Government is not in existence, the permanent machinery of the public service continues its activity. The Commission share the view expressed in this regard in [the *Hopkins* case].'[173] Pointing out that the police and judiciary remained functional in the capital, where the events of the case took place, the Commission held that 'public authorities that were obliged to watch over and to protect life and property continued to exist, although it is not denied that the performance of those duties will often have been very difficult in those disturbed times of civil war.'[174] Accordingly, if these authorities had failed in their duties, Mexico would have been found liable.[175] This turned out not to be the case here, as it was never proven that the local authorities knew (or should have known) of the attack – but it was the element of breach, not attribution, that was missing for a finding of responsibility.[176]

How – if at all – can this outcome in *Patton* be reconciled with the analyses put forward in the literature by Geiss and Leidenmühler? There are, in essence, two possible solutions, each of them carrying its own implications regarding the scope of attributable conduct.

Having dismissed the attributability of remaining low-level organs under Article 4 ARSIWA, Geiss and Leidenmühler concede that the conduct of such organs may be covered by Article 9 ARSIWA instead.[177] This is somewhat of a surprising choice, given that – as explained above in Section 5.2 – Article 9 ARSIWA is characterized precisely by the *lack* of legal authorization; but such an explanation is consistent with the position that the collapse of the central government invalidates the legal order and thus any previous legal authorization.

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172 *Christina Patton (Great Britain)* v. *United Mexican States*, Award of 8 July 1931, 5 UNRIAA 224, para. 1.

173 *Ibid.*, para. 7; on the *Hopkins* case, see Section 5.2.3 above.

174 *Patton*, para. 7.

175 See Article 3(4) of the Convention between Great Britain and the United Mexican States, 5 December 1930, 5 UNRIAA 10; and *Patton*, paras. 3-6, as to the characterization of the Zapatista soldiers.

176 *Patton*, para. 8; see Chapter 3 above on duties to protect and the 'knew or should have known' formula.

177 See Geiss, *"Failed states": Die normative Erfassung*, 262; Leidenmühler, *Kollabierter Staat*, 523-524.

The *Patton* award itself, however, appears to contradict this argument. The Claims Commission's crucial statement – that '*public* authorities that were *obliged* to watch over and to protect life and property continued to exist'[178] – contrasts sharply with the situations envisaged under Article 9 ARSIWA, where the Commentary notes that private actors act 'on their own initiative.'[179] Instead, the Commission attributed the conduct of these authorities to Mexico based simply on their status as state organs and their continued functioning. This conclusion is, in fact, consistent with the conceptualization of the state as a legal order. Even if the effectiveness of the legal system is necessarily impaired by the collapse of the central government (since certain functions can no longer be performed), it is precisely the continued functioning of lower-level organs which prevents the legal system from becoming *wholly* ineffective and thereby losing its validity. As the *Patton* case illustrates: despite the difficulties they may have faced, the police and the judiciary were working to ensure that the laws were upheld in Mexico City even – or especially – during those turbulent times. Accordingly, as long as organs continue to function, their conduct will, by definition, be attributable to the state. The same rationale applies to entities covered under Article 5 ARSIWA as well. While new authorizations – inasmuch as these were the prerogative of the central government – cannot be issued, it is difficult to see why previously empowered entities could not legally continue to exercise their governmental authority.

Beyond providing theoretical consistency, attribution under Articles 4 or 5 (rather than Article 9) also has practical consequences. Since Article 9 ARSIWA is based on the rationale of functionality, its scope is rather limited, extending only to those acts and omissions that are intrinsic to the exercise of governmental functions. In contrast, attribution under Articles 4 or 5 ARSIWA triggers the applicability of Article 7, extending the scope of attributable conduct to include abuse of authority.

Nonetheless, it is important to highlight that *continuity* plays a key role here. This is best demonstrated by the case of Puntland, which – rather than claiming independence from Somalia – awaits the re-establishment of federal state structures, intending to become a constituent unit. However, since the 'Puntland State of Somalia' was only established in 1998, it cannot claim continuity with the legal system which preceded the government's collapse in 1991 – and neither does it attempt to do so, having adopted its

178 *Patton*, para. 7 (emphasis added).
179 ARSIWA Commentary to Article 9, para. 4.

own constitutions in 2001 and 2012.[180] In light of these circumstances, it cannot be said that Puntland organs derive their authority from the legal system of the Somali state; as such, they cannot be classified as *de jure* organs of Somalia – but their conduct may instead be attributable under Article 9 ARSIWA as persons exercising elements of governmental authority in the absence of the Somali central government.

5.3.2 The Involvement of Other Actors: Integration, Co-Optation, and the Continued Payment of Civil Servants

In the scenarios discussed above, low-level organs are simply operating in a situation where there is no actor whatsoever to which they could be subordinated. But it may also be the case that such low-level organs come to operate within the governmental apparatus of a third state, or that the (re-established) government of the affected state decides to co-opt structures external to the governmental apparatus. While such cases are admittedly rare, it is nonetheless useful to examine them briefly through the example of the Northern Kosovo parallel structures, which illustrate both of these scenarios. In addition, this section addresses the more common situation where the government continues to pay the salaries of civil servants in parts of the state beyond its control.

180 See *Report of the Secretary-General on the situation in Somalia*, 16 August 1999, UN Doc. S/1999/882, para. 18, on the establishment of Puntland and its approach to this issue; Articles 2(4) and 10 of the Transitional Constitution of Puntland Regional Government, 1 July 2001, http://www.refworld.org/docid/4bc589e92.html; Constitution of Puntland State of Somalia, December 2009, English translation available at https://issuu.com/mahadfarah/docs/puntland_constitution. This constitution was officially adopted without substantive changes in 2012, see A. Stanley, P. Simkin & K. Samuels, 'Building from the Bottom: Political Accommodation in Somalia at the Regional and Local Levels', *Conflict Dynamics International*, Governance and Peacebuilding Series Briefing Note, June 2013, http://www.cdint.org/documents/BuildingFromTheBottom.pdf, at 14, note 12. Furthermore, despite not seeking independence, Puntland has displayed a number of contradictory features over the years. Artcle 11 of its 2001 transitional constitution proclaimed Puntland's acceptance of all of Somalia's previous treaty obligations under international law, unless they were contrary to Puntland's interests. At the same time as declaring that 'Puntland State is part of Somalia; its duty is to contribute to the establishment and protection of a Somali government based on a federal system', Article 4 of its subsequent constitution stated that '[p]ending the completion of the Federal Constitution, ratified by Puntland, and approved by a popular referendum, Puntland State shall have the status of an independent State.'

Firstly, it may be the case that certain low-level organs continue to function based on a legal system that has been displaced, but survives elsewhere. In Kosovo, pursuant to UN Security Council Resolution 1244, '[a]ll legislative and executive authority […], including the administration of the judiciary' was vested in UNMIK in 1999.[181] While Serbia formally retained sovereignty, the international administration of Kosovo placed the latter on a different legal trajectory: UNMIK reinstated the Serbian laws as they stood in 1989, then proceeded to legislate independently, including by issuing the 2001 Constitutional Framework for Provisional Self-Government.[182] In 2008, Kosovo issued a (heavily contested) declaration of independence, and adopted its own constitution, as well as many other laws in the years that followed. Yet during the same period, both before and after the declaration of independence, 'parallel structures' have operated in the north of Kosovo not only with the support – financial and otherwise – of Serbia, but on the basis of the Serbian legal system, from police through courts and public administration bodies to health care and educational institutions.[183]

181 Section 1.1 of UNMIK Regulation No. 1999/1, 'On the Authority of the Interim Administration in Kosovo', 25 July 1999, UN Doc. UNMIK/REG/1999/1.

182 See UNMIK Regulation No. 1999/24, 'On the Law Applicable in Kosovo', 12 December 1999, UN Doc. UNMIK/REG/1999/24 and UNMIK Regulation No. 1999/25, 'Amending UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo', 12 December 1999, UN Doc. UNMIK/REG/1999/25. Initially, Section 3 of UNMIK Regulation No. 1999/1 set the applicable law as the 'laws applicable in the territory of Kosovo prior to 24 March 1999'; this was soon changed, however, as many of the post-1989 laws were seen as 'an instrument of oppression' by the local judicial community, see H. Krieger (ed.), *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (Cambridge: Cambridge University Press, 2001), 561. UNMIK Regulation No. 2001/9, 'On a Constitutional Framework for Provisional Self-Government in Kosovo', 15 May 2001, UN Doc. UNMIK/REG/2001/9.

183 The Serbian police maintained a permanent but relatively low-key presence in the area, in their numbers as well as in their visibility. Courts used to cover every region of Kosovo, with most as courts-in-exile, relocated to Serbia after the war, especially at the level of district courts; but a number of lower-level courts remained in the territory of Kosovo, operating mostly in the north. These courts, in open defiance of the UNMIK administration, continued to apply Serbian law and remained 'connected to' the Serbian Ministry of Justice, with the Supreme Court of Serbia as their ultimate appellate body (OSCE, *Parallel Structures* (2003), 17; OSCE, *Parallel Structures* (2007), 15). Serbian law also continued to be applied by a significant number of public administration bodies, handling property issues, Serbian passports, and other official documents issued by Serbian Ministry of Interior officers. Parallel health care and education institutions were functioning under the supervision and authority of the Serbian Ministries of Health, and Education and Sport, respectively, with schools applying the Serbian curriculum. The staff of health care and educational facilities was on the Serbian payroll, with appointments made by Serbia. However, it was also reported that the lack of efficient control on a daily basis allowed abuse to take place. See generally OSCE, *Parallel Structures* (2003); OSCE, *Parallel Structures* (2007); ICG, *North Kosovo*; E.A. Baylis, 'Parallel Courts in Post-Conflict Kosovo' (2007) 32 *Yale Journal of International Law* 1; van der Borgh, 'Resisting International State Building'; BPRG, *Serb Integration in Kosovo*.

Given that they have been operating under Serbian law and in many cases continued to be integrated into the governing structures of Serbia, these parallel institutions may be deemed organs of Serbia, making their conduct attributable.[184]

Secondly, it may also happen that the central government decides to co-opt structures created or maintained by non-state actors (and possibly supported by third states). Granted, while most post-conflict reconciliation processes provide for the inclusion of non-state actors in positions of power, this is usually achieved though integration into a single governmental structure (e.g. via a power-sharing arrangement), with the non-state parallel governmental organizations dismantled. But where institutions of resistance prove to be particularly resilient, the state may choose to accommodate them to some extent, in order to avoid further conflict. A few months after Kosovo's unilateral declaration of independence, the Pristina authorities extended the mandates of a number of municipal assemblies with a Kosovo Serbian majority; these assemblies had been elected under the UNMIK system, but based their legitimacy on the Serbian elections and functioned based on the Serbian law on local self-governance.[185] This led to a peculiar situation where the same municipalities could carry out functions in two different legal systems: the Serbian and the Kosovar one. In such a case, the extension of the mandate arguably constitutes a conferral of the status of state organ. Accordingly, the conduct of these municipalities may be attributable to Serbia *or* Kosovo under Article 4 ARSIWA, depending on the question in which legal system (i.e. in which capacity) they act – although delineating their conduct in each legal system may be exceedingly difficult in practice.

Thirdly, the capacity in which individuals act is also the crucial factor in the relatively common scenario where a government tries to maintain its influence – or simply ensure the provision of services – in areas beyond its control through the continued payment of civil servants. For instance, the Ramallah government continued paying its employees in the Gaza Strip following the Hamas takeover (while initially ordering them on a

184 It is interesting to consider the ECtHR's decision on admissibility in the case of *Azemi* v. *Serbia* (Application No. 11209/09, Decision of 5 November 2013) in this context. The Court declared the case – concerning the non-enforcement of a Kosovo court's judgment – inadmissible, partly because it found that 'there is no evidence that Serbia exercised any control over UNMIK, Kosovo's judiciary or other institutions that had been established by virtue of UNMIK regulations. Neither can it be said that the Serbian authorities supported militarily, economically, financially or politically Kosovo's institutions' (para. 45). This suggests that if the case had involved the Kosovo Serbian parallel institutions, the Court could have established attribution to Serbia – but given how reminiscent this reasoning is of the Northern Cyprus and Transdniestria cases, it is likely that such attribution would have been based on control (see Section 4.4 above), rather than the status of governmental organ.

185 *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 24 November 2008, UN Doc. S/2008/692, paras. 4, 10; ICG, *North Kosovo*, 2, 3, 18.

strike).[186] In Sri Lanka, the government kept providing public goods (such as healthcare and education) through its employees in territory controlled by the LTTE, and even managed to keep the justice system functioning for a while.[187] In Syria, the Assad regime continued to pay teachers in rebel-held areas.[188] In such cases, the payment of salaries is arguably not the decisive element for attribution. In post-independence Northern Kosovo, instances of people holding offices concurrently in the Serbian and Kosovar systems and/or drawing salaries from both the Belgrade and Pristina authorities were not uncommon, leading to the boundaries between the two systems being described as 'porous'.[189] In the Gaza Strip, by the time the Ramallah-paid employees returned to work (with the approval of the Ramallah government, mostly in the areas of social affairs, health, and education), Hamas had replaced those in higher-ranking managerial positions with its own loyalists, thereby gaining control over the ministries in question.[190] As a result, civil servants paid by the Ramallah government could be acting on instructions from the Hamas government. In such situations, it is once again the capacity in which the particular persons act – in line with Articles 4-5 ARSIWA[191] – that determines whether or not their conduct is attributable to a given state.

186 In the wake of the takeover in 2007, the Ramallah government ordered public servants to go on strike and not to cooperate with Hamas, under threat of losing their salaries and pensions. Where staff later returned to work, they continued to be paid by the Ramallah government, with the Gaza government only paying those public servants whom it hired itself. See generally Sayigh, 'Hamas Rule in Gaza', 2; Hovdenak, 'Public Services Under Hamas', 11-12.

187 See Mampilly, *Rebel Rulers*, 109, 111-115.

188 'Rebels carve out a safe haven in northern and central Syria', *Seattle Times*, 7 June 2012, https://www.seattletimes.com/nation-world/rebels-carve-out-a-safe-haven-in-northern-and-central-syria; K. Khaddour, 'The Assad Regime's Hold on the Syrian State', *Carnegie Middle East Center*, July 2015, http://carnegieendowment.org/files/syrian_state1.pdf, 7. See also the discussion in K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017), 168-169.

189 ICG Europe Report No. 218, *Setting Kosovo Free: Remaining Challenges*, 10 September 2012, https://www.crisisgroup.org/europe-central-asia/balkans/kosovo/setting-kosovo-free-remaining-challenges, 2; see also BPRG, *Serb Integration in Kosovo*, 20-21.

190 Sayigh, 'Hamas Rule in Gaza', 2; Hovdenak, 'Public Services Under Hamas', 11-12.

191 See ARSIWA Commentary to Article 4, paras. 3, 7 and 13; as well as the text of Article 5 ARSIWA. This is essentially a matter of determining on whose behalf the person is acting; cf. ARSIWA Commentary to Article 6, para. 6 by analogy.

5.3.3 Concluding Remarks

The legal link established between the state and a person (or institution) by designating the latter under domestic law as an organ or an entity empowered to exercise governmental functions creates a lasting bond. This bond is so strong, in fact, that it cannot be deemed to have dissolved by the collapse of the central government. Neither does such a collapse invalidate the legal order of the state – on the contrary: the remaining local authorities are still bound to do their best to uphold that legal order under the circumstances. Accordingly, the conduct of such authorities is attributable to the state even in the absence of a central government.

In addition, where there is still (or once again) a central government in existence, it may choose to co-opt resilient non-state actors in order to ensure peace and/or boost its capacity. Where such co-optation involves a conferral of official status on the non-state actors, their conduct – carried out in their official capacity – similarly becomes attributable to the state by virtue of the domestic legal link created between the two.

The central government may also decide to continue paying the salaries of civil servants in areas beyond its control, in order to maintain authority and/or provide public services as much as possible. But where those civil servants are under the control of another actor, the payment of salaries is not, in and of itself, determinative of whether the conduct of such persons is attributable to the state. Rather, the crucial question is in which capacity they act. The same applies in situations where the central government is that of a third state, continuing the payment of (former) officials acting pursuant to a legal system that is defunct in the particular territory.

5.4 Retroactive Effect: Some Remarks on the Operation of Articles 10 and 11 ARSIWA

Having addressed the three main rationales of factual, functional, and legal links between the state and private actors, the chapter now turns to briefly address Articles 10 and 11 ARSIWA, based on the rationales of continuity and discretion, respectively, and sharing the characteristic of (possible) retroactive application.

5.4.1 Article 10 ARSIWA and the Rationale of Continuity

As noted earlier in this chapter, the attributability of insurgents' conduct is generally deemed to depend on the ultimate success or failure of the movement. As a reflection of this view, Article 10 ARSIWA codifies the rule whereby the conduct of a successful insurgency – i.e. one that 'becomes the new Government of a State' or 'succeeds in establishing a new State' – is

attributable to the (new) state.[192] The rationale behind this rule, supported by a long line of cases, is the continuity of the actor in question, i.e. the insurrectional movement which turns into a government. In the words of the Commentary, 'it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it.'[193] Since this continuity is unaffected by the identity of the opposing party or parties (be they governmental forces or other armed groups), the rule is equally applicable to situations where the insurrection comes to power by defeating other armed groups in the absence of a government.[194]

Nonetheless, the conditions attached to Article 10 ARSIWA are such that they severely limit the applicability of the rule in the situations under discussion here. First and foremost, the Article is based on the underlying assumption that the conflict will be settled relatively quickly one way or another, i.e. it will end either with the victory of the government (in which case the movement is dismantled), or with the victory of the movement (in which case it replaces the government).[195] However, this binary way of thinking does not accurately capture situations of governmental absence (or even internal armed conflicts more broadly), which often turn into protracted – sometimes decades-long – struggles with no clear winner(s).[196]

Secondly, there is the matter of an organizational threshold to what is considered to be an insurrectional movement. Rather than establishing its own definition of such a movement, the ILC has suggested that Additional Protocol II to the 1949 Geneva Conventions 'may be taken as a guide.'[197] The Protocol lays down quite a high threshold, speaking of 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them

192 In fact, while Article 10(1) speaks of insurrectional movements, Article 10(2) speaks of 'insurrectional or other' movements, to reflect 'the existence of a greater variety of movements whose actions may result in the formation of a new State', most notably national liberation movements, see ARSIWA Commentary to Article 10, paras. 10-11. An in-depth discussion of this issue is beyond the scope of the dissertation, but for more on this question, see e.g. G. Cahin, 'Attribution of Conduct to the State: Insurrectional Movements', in: Crawford, Pellet & Olleson, *The Law of International Responsibility*, 247, at 251-252; Crawford, *State Responsibility*, 172-173; and more generally, H. Atlam, 'National Liberation Movements and International Responsibility', in: M. Spinedi & B. Simma (eds.), *United Nations Codification of State Responsibility* (New York: Oceana, 1987), 35.

193 ARSIWA Commentary to Article 10, para. 4; on the rationale of continuity, see e.g. *Bolívar Railway Company (Great Britain)* v. *Venezuela*, Award of 17 February 1903, 9 UNRIAA 445, at 453.

194 Cf. Schröder, *Die völkerrechtliche Verantwortlichkeit*, 92-93.

195 ARSIWA Commentary to Article 10, para. 4; Crawford, *State Responsibility*, 176: 'For the most part, application of ARSIWA Article 10 will be binary: either the insurrection has succeeded or it has not.'

196 See Kreijen, *State Failure*, 281, regarding cases of 'state failure'; cf. more broadly L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 156, noting that 'most opposition groups do not become either governments or states.'

197 ARSIWA Commentary to Article 10, para. 9.

to carry out sustained and concerted military operations and to implement this Protocol.'[198] But as pointed out by several authors, many (if not most) of the actors that operate in the absence of a government cannot meet this threshold: they often tend to be loosely organized (criminal) gangs, rather than the highly structured and disciplined armed groups that Article 10 envisages.[199] Lowering the threshold to that of Common Article 3 of the Geneva Conventions could ostensibly capture a larger segment of actors, but even that would be of limited help, as not all of these groups are interested in public power and thus likely to ever become part of the government.[200]

Last, but not least, the ILC advises against applying this rule to governments established through national reconciliation, arguing that '[t]he State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government.'[201] Accordingly, the Commission requires 'a real and substantial continuity' between the insurrectional movement and the government for Article 10 to be applicable.[202] However, as noted above, such clear victories are rare in practice; instead, conflicts – and, some argue, situations of 'state failure' in particular – are most frequently resolved through some form of reconciliation, involving a broad coalition of actors.[203] In other words, it is exactly the most commonly employed solution that is excluded from the scope of Article 10 ARSIWA.

In the end, the cumulative effect of these limitations is to narrow the scope of Article 10's applicability to such a degree as to render the rule largely irrelevant in the situations contemplated here.[204]

5.4.2 Article 11 ARSIWA and the Question of Retroactivity

The last of the attribution articles in ARSIWA, Article 11, provides for attribution of conduct that is not otherwise attributable 'if and to the extent that the State acknowledges and adopts the conduct in question as its own.' Despite the apparent straightforwardness of this Article, the litera-

198 Article 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), Geneva, 8 June 1977, in force 7 December 1978, 1125 UNTS 609.

199 See Kreijen, *State Failure*, 279-281; Geiss, *"Failed states": Die normative Erfassung*, 266-267; Geiss, 'Failed States: Legal Aspects', 483; Cahin, 'L'état défaillant', 197-198, 204; Leidenmühler, *Kollabierter Staat*, 525.

200 Geiss, *"Failed states": Die normative Erfassung*, 267, relying on the opinion of Commissioner Zuloaga in *Sambiaggio*, 507.

201 ARSIWA Commentary to Article 10, para. 7.

202 *Ibid*.

203 See e.g. Kreijen, *State Failure*, 281.

204 See *ibid*., 281-282; cf. Cahin, 'Insurrectional Movements', 252: 'Such strict conditions, however, would seem to limit the envisaged situations to those of a large-scale civil war.'

ture is surprisingly divided on the question of whether it can be applied to situations where an effective government has been lacking. Employing a narrow definition of 'state failure', authors tend to consider the applicability of Article 11 only in cases where the government has already been re-established following the period of absence, the underlying assumption being that in the absence of a government, there is no-one on behalf of the state to acknowledge and adopt the conduct in question.[205] Accordingly, the most often voiced concerns relate (directly or indirectly) to whether this rule can operate retroactively – a question that was left unanswered by the ICJ in *Tehran Hostages*, the case which prompted the Article's inclusion in the ARSIWA.

Against the backdrop of this uncertainty, each author has put forward a different opinion on the matter. Daniel Thürer has simply proceeded on the assumption that the rule could be applicable to such situations, without analyzing the question in any detail.[206] Robin Geiss has cited criticism from the literature on how *ex post facto* endorsement is too weak a link to be deemed sufficient grounds for attribution; yet at the same time, he has also highlighted that the application of this rule depends on the *discretion* of the new government, which would suggest that he admits the possibility of such retroactive attribution.[207] Hinrich Schröder has gone furthest in dismissing the applicability of Article 11. Relying on Astrid Epiney, he has argued that the ICJ in effect set two conditions in *Tehran Hostages*: the state must want to actually control the conduct of the non-state actors, and it must be able to decide on the course of events.[208] It is important to note that this last argument goes beyond the problem of retroactivity, denying the possibility of attribution even under a broad definition of 'state failure', i.e. where the government still exists at the time of the events but has no control over them.

In order to find out whether these counter-arguments are well-founded, it is necessary to examine the origins of Article 11 ARSIWA and the conditions required for attribution under this rule – and what better place to start

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205 Thürer, 'Der Wegfall effektiver Staatsgewalt', 33; Geiss, *"Failed states": Die normative Erfassung*, 268; Leidenmühler, *Kollabierter Staat*, 526-527. Kreijen, in *State Failure*; Cahin, in 'L'état défaillant'; and Pustorino, in 'Failed States', do not discuss it at all, for instance.

206 Thürer, 'Der Wegfall effektiver Staatsgewalt', 33, relying on I. Brownlie, *System of the Law of Nations: State Responsibility: Part I* (Oxford: Clarendon, 1983); but Brownlie does not discuss the question of retroactivity, either, see *ibid.*, 157-158, 161.

207 Geiss, *"Failed states": Die normative Erfassung*, 269, citing K. Ziegler, *Fluchtverursachung als völkerrechtliches Delikt: die völkerrechtliche Verantwortlichkeit des Herkunftsstaates für die Verursachung von Fluchtbewegungen* (Berlin: Duncker & Humblot, 2002), 130.

208 A. Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (Baden-Baden: Nomos, 1992), 189: 'Der Staat muß […] das Verhalten der Privaten tatsächlich kontrollieren und auch kontrollieren wollen sowie selbst über den Fortgang der Ereignisse entscheiden.' Schröder's formulation in *Die völkerrechtliche Verantwortlichkeit*, 96, is slightly different, noting that the state 'muss […] selbst über den Fortgang der Ereignisse entscheiden *können*' (emphasis added), i.e. that the state must *be able to* decide the course of events, while in Epiney's, the state must decide the course of events.

than the *Tehran Hostages* case, described by Special Rapporteur James Crawford as the 'archetype of how Article 11 works'.[209] The case concerned the seizure of the US embassy in Tehran on 4 November 1979, its subsequent occupation, and the holding of its personnel hostage by a group of private militants.[210] Regarding the first phase of events (i.e. the seizure of the embassy and hostage-taking), the ICJ found that Iran was not responsible for the conduct of the militants, only for the state's own failure to protect the embassy and its personnel.[211] In fact, the Court specifically pointed out that 'several public declarations against the United States' before the attack, 'congratulations after the event, […] and other subsequent statements of official approval, though highly significant' in the context of the second phase, were not sufficient to establish attribution in the first phase.[212]

By contrast, in the second phase (i.e. the continued occupation and holding of hostages), the ICJ held that the conduct of the militants was attributable to Iran, on the grounds that the state had given its official approval to said conduct. The Court observed that, following a series of endorsements and 'expressions of approval' by Iranian officials, including Ayatollah Khomeini himself, '[t]he seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini.'[213] The decree stated that 'the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran', qualified only by a request to the militants to release certain hostages.[214] The Court pointed out that:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with *by other Iranian authorities* and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, *and the decision to perpetuate them*, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.[215]

209 Crawford, *State Responsibility*, 183.
210 For the facts of the case, see *Tehran Hostages*, paras. 11-32.
211 *Ibid.*, paras. 57-68.
212 *Ibid.*, para. 59.
213 *Ibid.*, paras. 70-71 and 73, respectively.
214 *Ibid.*, para. 73.
215 *Ibid.*, para. 74 (emphases added).

It is difficult to discern what the ICJ considered as the decisive element(s) in arriving at this conclusion. The reference to the Iranian organs' 'decision to perpetuate' the situation does seem to suggest that Iran's power to influence the course of events was a factor.[216] It could not have been the only factor, though: otherwise how would this scenario be distinguished from Iran's duty to protect the embassy and its staff? After all, consciously refraining from any action (as in the first phase) would have equally resulted in the continuation of the situation, and could accordingly be viewed as a 'decision to perpetuate'. However, as the Court rightly concluded, there is a qualitative difference between inaction and the active endorsement of the conduct in question. From the perspective of the power to influence events, this qualitative difference could be captured by the capacity to influence the conduct of the militants *directly*, rather than indirectly (e.g. through the deployment of the security forces). But this does not seem to have been a factor, either: while the ICJ had noted in its summary of the facts that the release of 13 hostages 'was effected pursuant to' the decree of 17 November 1979, it did not mention compliance by the militants at all in its analysis, only referring to compliance 'by other Iranian authorities'.[217] This, in turn, raises another question: why would it be relevant *for the attribution of private conduct* whether *other officials* complied with the Ayatollah's decree? The likeliest explanation is that since such governmental approval is not to be lightly assumed (given the general presumption against the attribution of private conduct), requiring compliance served the purpose of making sure that the state spoke with one voice on the matter.

Despite these uncertainties, the issuance of an official decree emerges as the central element of the ICJ's reasoning and the decisive factor in distinguishing the second phase from the first one. After all, statements of support and endorsement already had their counterparts during the first phase, which means that issuing the decree was the only new element during phase two. The significance of this step is also reflected in the judgment, which stated that '[t]he seal of official government approval was finally set on this situation by a decree'.[218] And while its most noticeable feature is probably the official *form*, the decree also introduced something new in terms of *substance*: by announcing that the situation would remain unchanged until the US met certain conditions, the decree went beyond the

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216 See also *ibid.*, para. 76: 'The Iranian *authorities' decision to continue* the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions' on diplomatic and consular relations (emphasis added).

217 *Ibid.*, paras. 21 and 74, respectively; cf. J.A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *NYU Journal of International Law and Policy* 265, at 271: 'The Court held that Iran was responsible […] because Ayatollah Khomeini had endorsed the acts publicly as a matter of State policy and other Iranian authorities complied with his statements.'

218 *Tehran Hostages*, para. 73.

expressions of endorsement which had characterized previous statements, and *took ownership* of the militants' conduct. This taking of ownership is arguably what the Court referred to when speaking of the 'decision to perpetuate' the facts at hand.[219] Furthermore, given that the ICJ spoke of the '*policy* thus announced by the Ayatollah' – in other words, the substance of the decree, rather than its form – it would be difficult to argue that the Court favored form over substance. Accordingly, it appears that this taking of ownership was the decisive factor in the ICJ's decision to attribute the militants' conduct to Iran.

Despite *Tehran Hostages* being the main inspiration behind Article 11, the ILC's subsequent incorporation of the rule into the ARSIWA departed from, or went beyond, the judgment on a few points. To begin with, the Commission introduced an entirely new formulation, with the phrasing 'intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.'[220] The ICJ had not used the terms 'acknowledge' or 'adopt' in the judgment – and given the Court's vocabulary of official 'approval' and 'endorsement', a casual observer could be forgiven for thinking that the ILC's formulation in fact *raises* the threshold required for attribution. Nonetheless, as highlighted above, the ICJ drew a sharp distinction between the two phases of events, dismissing the relevance of both prior declarations against the US as well as subsequent statements of approval regarding the first phase. This indicates that the Court did indeed see a qualitative difference between these statements and the ones which accompanied the second phase – and that difference may well lie in the issuance of an official decree, rather than mere statements of support. Against this backdrop, it appears that the ILC's formulation, by setting a relatively high threshold, does, in fact, accurately capture the essence of the Court's reasoning. Going beyond the matter of threshold, it is also telling to consider what the ILC did *not* include as a criterion for attribution: the Commission made no reference whatsoever to either the capacity to influence the non-state actor's conduct, or compliance by other state officials. In other words, these factors were not deemed to be decisive by the ILC.

In addition to putting forward a – formally, though not substantially – different formulation, the ILC also took a position on certain aspects of the rule that the ICJ did not (or would not) address, namely: retroactivity, proof, and the 'piecemeal' nature of Article 11. Firstly, since the violation in *Tehran Hostages* was a continuing one (i.e. the events were still underway when attribution was established), the Court saw no need to clarify whether the adoption of conduct only extended prospectively or also retrospectively. Despite the ICJ's silence on the matter, the Commission

219 This is also likely what formed the basis of Epiney's and Schröder's argument on the capacity to control the course of events, see note 208 above.

220 ARSIWA Commentary to Article 11, para. 6. Note that the term 'approval and adoption' was already used by Ian Brownlie in 1983, which is likely what had inspired the ILC; see Brownlie, *State Responsibility*, 157-158, 161.

embraced retroactivity, stating that '[w]here the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect'.[221] Secondly, on the matter of how to establish attribution, the Commentary, while noting that acknowledgement and adoption may be explicit or 'inferred from the conduct of the State in question', stresses that it must also be 'clear and unequivocal.'[222] This requirement of 'clear and unequivocal', in turn, means that – without an accompanying statement, at least – acknowledgement and adoption cannot be inferred from an omission, however deliberate.[223] The stipulations of 'unequivocal and unqualified' and 'clear and unequivocal' also highlight that the alleged weakness of the link created by *ex post facto* endorsement is best approached as a question of threshold. In other words, the reason why such an endorsement must be treated with caution is that it may not be sufficiently clear or unequivocal to be considered as an acknowledgement and adoption of certain conduct (and a retroactive one at that). This does not mean, however, that such an endorsement can be rejected outright, without any examination of whether it meets this threshold, simply because it took place after the conduct itself had ended. If the terms of the statement are sufficiently clear and unequivocal, it may well serve as the basis for attribution. Lastly, the Committee also clarified that – unlike most attribution rules – Article 11 operates on a conduct-by-conduct (rather than actor-by-actor) basis: in the words of the Commentary, 'a State may elect to acknowledge and adopt only some of the conduct in question.'[224]

Moving beyond these criteria, the feature that sets Article 11 apart more than anything is its discretionary nature. The acknowledgement and adoption inevitably takes place when the conduct in question is at least underway, if not already completed; consequently, the state has a choice whether or not to adopt certain conduct *when it is already aware of the facts*. This discretion is further enhanced by the fact that the state is free to adopt 'only some of the conduct in question'. Together, these characteristics afford the state a degree of freedom that is unmatched in any of the other attribution articles. This element of discretion may also explain why Luigi

221 ARSIWA Commentary to Article 11, para. 4, relying in particular on the *Lighthouses* arbitration: *Affaire relative à la concession des phares de l'Empire ottoman* (Grèce, France), Award of 24/27 July 1956, 12 UNRIAA 155, at 198 (for the English translation, see 23 ILR 90-93). That said, the issue remains debated in literature – see e.g. T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart, 2006), 74 – and it remains to be seen whether practice will confirm or reject the ILC's position.

222 ARSIWA Commentary to Article 11, paras. 9 and 8, respectively.

223 Cf. Becker, *Terrorism and the State*, 72. De Frouville, 'Private Individuals', 275, goes even further, arguing that it cannot be inferred from action, either: 'If oral "approval" does not suffice, it is difficult to see how simple "conduct" [i.e. action or omission], even an ostensible one, could be so as to manifest the intention of the State to *adopt* the reproached conduct.' (Emphasis in original.)

224 ARSIWA Commentary to Article 11, para. 8; see also Crawford, *State Responsibility*, 187; de Frouville, 'Private Individuals', 275.

Condorelli and Claus Kress, despite questioning Article 11's basis in practice, admit that 'there are no objections of principle against that rule'.[225] After all, in line with the *Lotus* principle,[226] if the state wishes to retroactively acknowledge and adopt certain conduct, who is to say that it cannot?

In light of all this, and with the caveat that the acknowledgement and adoption needs to be 'clear and unequivocal', there is no reason why Article 11 could not be equally applicable to situations beyond the government's control. This applies regardless of whether the government was still in existence, without its control extending to the entire territory of the state; or whether there was no government in existence at all and the acknowledgement and adoption took place after the recovery of authority. That said, the rule's greatest weakness is – once again – inherent: as Geiss points out, given that recourse to this rule depends on the discretion of the new government, it is unsuitable to cover *all* conduct during the period of governmental absence.[227] This policy concern, however, should not serve as a basis for rejecting the rule out of hand, excluding its application even in those (few) cases where it could be helpful.

5.5 Concluding Remarks

As the preceding sections have shown, a considerable range of conduct has been or may be attributed to the state even where the government ceases to function or lacks effective control over (part of) its territory. Contrary to what has been argued in the literature, the operation of neither Articles 4/5, nor Article 9 ARSIWA requires that a central government still be in existence. How much ground do these options cover? In other words, how much of the accountability gap can be closed by relying on these bases for attribution?

As noted above in Section 4.5, the basic notion underlying attribution is that of acting on the state's behalf. Each rationale – be it factual, legal, functional or otherwise – provides an answer to the question of who, and in what circumstances, is or should be regarded as acting on the state's behalf; that answer delimits the scope of attribution at the same time as supplying the basis for it, determining what can and cannot be attributed to the state.

In the case of the legal rationale, this delimitation is done by reference to the concept of acting in the capacity of state organs, which thus serves as the decisive factor in attribution. At the most basic level, the state continues to

225 L. Condorelli & C. Kress, 'The Rules of Attribution: General Considerations', in: Crawford, Pellet & Olleson, *The Law of International Responsibility*, 221, at 231.

226 The principle takes its name from the case of the *S.S. Lotus* (*France* v. *Turkey*), Judgment of 7 September 1927, PCIJ Series A, No. 10, at 18, where the Court declared that '[r]estrictions upon the independence of States cannot […] be presumed'; in other words, in the absence of prohibitive rules under international law, states are free to act as they wish.

227 Geiss, *"Failed states": Die normative Erfassung*, 269.

be responsible for the conduct of its own (lower-level) *de jure* organs under Article 4 ARSIWA, even in the absence of a central government. In the same vein, the conduct of *de jure* organs which continue to operate in territory controlled by a non-state armed group is likewise attributable to the state, as long as they act in their capacity of organs. This capacity continues to function as the decisive element in cases where the persons in question have multiple simultaneous allegiances – for instance, where state organs are co-opted by a private actor, or where structures outside the state's own apparatus are co-opted by the government.

In the case of the functional rationale, the scope of attribution is delineated by the distinction between 'personal' and 'unpersonal' acts (notwithstanding the difficulties of classifying a particular act as one or the other). If those exercising governmental functions do so to further their own goals, this by definition cannot be regarded as acting on the state's behalf. If, on the other hand, they do so simply to carry on performing routine functions, for instance in providing public goods, this can reasonably be seen as acting on the state's behalf – even if not on the (central) government's behalf. This can also have implications for the unpersonal acts of co-opted officials with multiple allegiances. Article 4 ARSIWA only covers the conduct of such officials as long as they act within their capacity as *de jure* organs. Article 9, however – at least if one decides not to apply the ILC's third, normative, requirement – extends to the situation where such officials act in a different capacity (e.g. under the control of a non-state actor or third state), as long as their conduct is unpersonal. But while the rule's functional rationale – the reason for its inherent restriction to unpersonal acts – ensures that only those acts are captured which may indeed be considered as carried out on the state's behalf, the same rationale severely limits the scope of applicability and thus the practical utility of this Article. Furthermore, if one does apply the ILC's third criterion in Article 9, this leads to precluding attribution in all cases except where the authority exercising governmental functions – be it a self-organizing grassroots institution or a local *de facto* government – moved into a pre-existing vacuum. That said, once an actor secures control over (practically) the entire territory of the state, the rationale shifts from functionality to effectiveness, and all acts of a general *de facto* government – now considered to be acting on behalf of, rather than against, the state – will be attributable under Article 4 ARSIWA.

Finally, Articles 10 and 11 ARSIWA offer options of retroactive applicability to situations where the government lost control over part of its territory. Neither option is particularly useful in ensuring accountability, however, simply because the situations in which these rules may apply are highly limited. In the case of Article 10 – which relies on the rationale of continuity – armed groups very rarely win a conflict outright. In the case of Article 11, acknowledging and adopting conduct is *ex post facto* discretionary (this discretion is also the rationale underpinning attribution under Article 11), making it unlikely that a state would knowingly accept responsibility once the consequences of the conduct have become apparent.

Overall, as Chapters 4 and 5 have demonstrated, more conduct is attributable to the state in the absence of effective government than has previously been argued in the literature on this issue. Granted, this is partly due to the broader definition of 'the absence of effective government' adopted by the dissertation, which is not limited to cases where the government has ceased to exist. This is readily apparent in the case of attribution to the affected state based on the factual rationale, which – regardless of the threshold necessary for attribution – requires links between the private actor and the government that continues to exist, even if the latter does not control all of the state's territory. But in other cases, particularly where *de jure* organs under Article 4 and private actors' governmental functions under Article 9 are concerned, the chapter's conclusions are equally applicable to situations where the state's central government has ceased to exist. That said, due to the inherent limitations of the functional, legal, continuity- and discretion-based rationales, the factual one remains the rationale with the greatest potential to narrow the accountability gap in the absence of effective government.