Establishing state responsibility in the absence of effective government

Varga, A.

7 Conclusions and Outlook: Narrowing the Accountability Gap

Even where a government loses control over part of the state's territory, the situation is hardly ever characterized by a real power vacuum or Hobbesian anarchy. The government will usually try to hold on to every last scrap of authority it may have – if not through its remaining organs, then through allied militias or by co-opting those who are in control. Where the government falls short, private actors play an increased role. More often than not, someone – armed groups, entities with secessionist ambitions, competing political factions, or even self-organizing locals – will take on governance functions. In doing so, they may rely on crucial support from third states.

But even if the situation does not descend into complete anarchy, it is often accompanied by violence, human rights abuses, and other acts that raise questions of accountability. State responsibility, based as it is on a public/private divide, may not be particularly well-suited to cope with many of these problems, but given the continued role of the affected state's government and/or of third states, it is still the best tool available in international law to ensure at least *some* measure of accountability.

Against this backdrop, and within the context of the absence of effective government, the dissertation had a dual aim. Firstly, to establish when and under what circumstances states can be held responsible in connection with private conduct under the current rules of international law. Secondly, to explore how the existing rules could be changed to ensure greater accountability in cases where states are involved in private conduct in a way that is not (fully) captured by the current rules. That said, the need to close the accountability gap arising in these cases cannot, in and of itself, provide sufficient reason to hold the affected state responsible for any and all activities taking place on territory under its sovereignty but beyond its control, or to hold third states responsible for the conduct of private actors whenever the former have *any* links to the latter. Care must also be taken not to stretch the concept of state responsibility too far, including by respecting the principle that states are only responsible for their own conduct, i.e. conduct carried out on their behalf.

These two research questions may sound quite abstract, but they address a wide range of real-life issues. What, if any, obligations arise from the mere fact of sovereignty over certain territory? Can Moldova be held responsible for dropping the case of political prisoners in Transdniestria from peace negotiations? Or Colombia, for failing to stop human rights abuses on territory that it voluntarily withdrew from as part of a domestic peace process? What about cases where non-state actors operate with significant support

from a state? Can Russia be held responsible for the conduct of Transdniestria, Abkhazia, South Ossetia, or the Donetsk and Luhansk People's Republics – secessionist *de facto* governments that would not even exist without Russian support? Colombia for the paramilitaries? Nigeria for the vigilante groups fighting Boko Haram? When is the state responsible for the acts of those exercising (routine) public functions? Does it matter whether or not they are hostile to the *de jure* government? Can Somalia be held responsible for the conduct of the Islamic courts or Puntland? How about Sri Lanka for the LTTE? Syria and Iraq for ISIS? Are there any cases where the answer should be different than it currently is? Where the aims of closing the accountability gap and respecting the basic limitations on state responsibility come into conflict with each other, how can they best be balanced?

The dissertation's goal was to answer the two research questions by examining three bases of responsibility – duties of protection, attribution and complicity – and the following pages aim to highlight its main findings, place them in the broader socio-political context and offer normative recommendations, taking each of these bases in turn.

Duties to protect: remaining applicable to the extent of available means

First, does the affected state still have any obligations in territory where the government has lost control? Or can the government simply plead lack of effective control to render any remaining duties inapplicable? Under international law, duties of protection abound, and may even be regarded as a corollary of state sovereignty. Granted, there may not be much the state can do in such situations; and it is not the place of international courts and tribunals to second-guess difficult policy decisions made in challenging circumstances (not to mention resource constraints).

But at the very minimum, as a matter of principle, the state is not – and should not be – allowed to abandon the people on its territory in the face of adversity. Nor is it allowed to abdicate its responsibilities *vis-à-vis* other states, in terms of how its territory is used, for instance by non-state armed groups. Acknowledging the limitations and challenges facing the state upon loss of control over territory is not the same as saying that the state should not even *try* its best. The way duties of protection operate – with the focus being on the means available at any given time, including in times of difficulty – ensures that they do not place too high a burden on the state. The due diligence standard also supplies the necessary flexibility not to unduly limit states' policy choices. Thus, even voluntary withdrawal from part of the state's territory might be allowed, for instance in the context of a peace process in a decades-long civil war, as in Colombia. But any such withdrawal must be accompanied by mechanisms that can effectively ensure the rights of inhabitants (and neighboring states) by other means, such as international monitoring.

Note that the state's efforts cannot – and should not be – reduced to a box-ticking exercise. Moldova's dutiful opening of criminal investigations

regarding human rights violations committed in Transdniestria is unlikely to accomplish much, as the ECtHR itself noted already in *Ilaşcu*. In fact, it is hard to shake the impression that the Moldovan authorities keep opening such investigations at least partly, if not mainly, so that they can show the Court that the state has 'made efforts' to secure the applicants' rights. But the point is rather that the state should take measures that at least have the *potential* to be effective. Furthermore, it must be recognized that in some instances, there is genuinely nothing that the state could have done to improve the situation. In such cases, what needs to be assessed is whether the state acted diligently in examining possible measures.

At a practical level, placing the onus on the applicant to prove that the respondent state had means available to act but failed to employ them makes it difficult to bring a successful case. This is particularly so in human rights litigation, where individual applicants are unlikely to have the resources necessary to determine what options were available to the state. It is no accident that the sole successful Transdniestrian case arose from circumstances where both the measures' existence and their effectiveness was demonstrated by the conflict's negotiation history and the release of Ilie Ilaşcu. Indeed, it is likely due to the success of this case that subsequent applications are always brought against both Moldova and Russia – a practice not widely replicated in the context of other secessionist conflicts. At the same time, international courts are not well placed, either, to embark on an investigation of their own to determine the range of options available to the state and evaluate which ones (if any) should have been used.

To counteract this challenge, the dissertation proposes partially shifting the burden of proof where the respondent state knew of the catalyst event and did nothing to prevent or put an end to it. After all, that state is in the best position to show what decision-making processes were involved and led to the lack of action. Such a shift even has historical antecedents in the work of the British-Mexican Claims Commission, but has not been applied in contemporary cases. Since this is a departure from the normal rules on burden of proof, it should be clearly communicated to the parties, as early as possible in the proceedings. At the end of the day, though, even with such a shift in the burden of proof, a surge of successful cases is unlikely to be forthcoming, simply because often there is not much the respondent state could have done to begin with.

Attribution: most rationales unlikely to significantly narrow the accountability gap

Second, under what circumstances can the state be held responsible for the conduct of private actors, rather than its own organs' (lack of) response to such conduct? Using the ILC's framework as the starting point, but with the various rationales underpinning attribution rules as the organizing principle, the dissertation examined factual, functional and legal links to the state as the basis for attribution. It also briefly addressed the retroactively applicable rules relying on the rationale of continuity (Article 10

ARSIWA on insurrectional movements) and discretion (Article 11 on the acknowledgement and adoption of conduct). In doing so, it found that while the scope of applicability of the legal, functional, continuity- and discretion-based rationales is generally greater than what had previously been asserted in the literature, their practical relevance remains limited.

Contrary to the contention of some authors, the fall of the central government does not bar attributing the conduct of any remaining (lower-level) *de jure* organs and entities empowered to exercise governmental functions to the state. But since the situations under examination are by definition characterized by the lack of effective government, this rule's real-life relevance is largely limited to the context of co-opted institutions and the continued payment of civil servants in territory under the control of another actor. In both of these instances, it is the capacity in which the person acts that determines attribution, and it remains doubtful that much conduct can be captured under this rationale.

High hopes tend to be attached to the embodiment of the functional rationale, Article 9 ARSIWA, often seen as being 'tailored' to the absence of effective government. Even though the Article appears to be an instance of progressive development, its inclusion in the ARSIWA despite a solid grounding in custom attests to the power of its rationale. Given the dearth of relevant practice, much remains unclear about the precise scope and operation of this attribution rule, including the status of various requirements asserted in the literature or by the ILC. In particular, the added value of the ILC's normative criterion – that circumstances must be such as to call for the exercise of governmental authority – is unclear. Nonetheless, such added value can be provided by reading this requirement as one meant to exclude the usurpation of governmental powers. The rationale of Article 9 also extends to local *de facto* governments set up by ultimately unsuccessful armed groups – not discussed by the ILC – through the distinction between 'personal' and 'unpersonal' acts, whereby the latter denote simply carrying on with governmental routine, rather than furthering the cause of the insurrection. That said, if the ILC's normative criterion is to be applied, this would preclude attributing even the 'unpersonal' conduct of such *de facto* governments in all cases except where they moved into a pre-existing power vacuum, rather than forcing out the *de jure* authorities.

However, even under the most generous interpretation, setting aside all but the two core criteria – (1) exercising governmental functions (2) in the absence of the government – the rule's greatest limitation is inherent, stemming from the very rationale that underpins it. This rationale only captures violations committed in the course of exercising governmental functions, while most abuses by private actors take place outside that context. State responsibility thus cannot make up for the lack of an international law framework to hold non-state actors directly responsible at an organizational level.

The continuity-based rationale of attributing the conduct of victorious insurrectionists is also unlikely to be widely applicable as armed groups rarely win outright, and governments of national unity are excluded from

the scope of this rule. In the case of attribution based on acknowledgement and adoption, the limitation of the rule's applicability is once again inherent to the underlying rationale: the state's discretion.

Attribution: the significance of the factual rationale and the divergence in jurisprudence

This leaves the factual rationale, which has yielded what is without a doubt the most significant finding of the dissertation: the variety of 'control-based' attribution tests employed by regional human rights courts to hold states responsible for the conduct of private actors – paramilitary groups and secessionist entities. These courts have proven remarkably resistant to external impetus and the cause of coherence among international courts, each of them having developed its own test autonomously. Unfortunately, however, they are not always clear about the precise basis on which they ground responsibility; conceptual confusion between positive and negative obligations and/or jurisdiction and responsibility is quite frequent. In addition, the ECtHR appears to lack a clear common position on whether or not the Court does – and if so, whether or not it should – employ *lex specialis* on attribution. These instances of confusion may at least in part be explained by the fact that such complex issues of state responsibility for non-state conduct only arise in a fraction of the cases that come before these courts. But when these issues do arise, they have far-reaching consequences in terms of the scope of the state's responsibility. Accordingly, they should be subject to clear and rigorous analysis.

That said, with more and more cases decided, it is possible to identify patterns in the jurisprudence that allow establishing at least the basic parameters of these tests, even if their precise contours remain somewhat elusive. The cases reveal that the IACtHR bases attribution on some form of (often, but not always, *sine qua non*) support and/or collaboration in the particular circumstances of the case, i.e. at the level of conduct. While the minimum threshold for attribution remains unclear, there has not been any case so far where the Court attributed conduct solely on the basis of omissions. The ECtHR, meanwhile – for better or worse – relies on the same test to establish attribution for the purposes of extraterritorial jurisdiction and state responsibility; in doing so, it examines the links between the secessionist entity and the third state at the level of the actor. Likely driven by the type of evidence available, the Court focuses only on third-state support, rather than control, establishing attribution on the basis that the entity survives by virtue of such support. As in the case of the IACtHR, the minimum threshold for attribution is unclear; so is the potential significance of a number of factors, such as the nature of the private actor (carrying out public functions as a local administration) and the third state's role in the creation of the entity, as opposed to its continued support. In the end, neither court seems to base attribution on control strictly speaking, even if the ECtHR's reasoning leaves room for a presumption of control based on

dependence. Instead, both courts appear to be relying on something akin to complicity to establish attribution, rather than a narrow understanding of agency based on control.

Attribution: potential objections to – and justifications of – human rights courts' diverging tests

Given these findings, probably the most controversial argument of the dissertation is that despite their departure from ICJ and ILC orthodoxy (even if the Commission stopped short of setting a threshold in the text of the ARSIWA), these attribution tests should continue to be applied – with two caveats. The IACtHR and ECtHR should only apply these tests as long as there is no state/non-state complicity rule in international (human rights) law; and they should limit attribution to cases of *sine qua non* contribution by the state. There are two main arguments against these tests: that they pose a threat of fragmentation within international law, and that they may not be grounded in state consent. But in spite of these concerns, it is the contention of the dissertation that given the extent of states' involvement in these cases, the outcomes reached by the courts were plausible and much preferable to the alternative (states being held responsible only for a violation of a duty to protect or escaping responsibility altogether). Furthermore, the tests' limitation to *sine qua non* contributions ensures that the concept of state responsibility is not stretched too far.

The specter of fragmentation must be considered against the possible alternative. If the price of avoiding fragmentation is following the ICJ's tests, that price is arguably too high. Granted, the 'effective control' and 'complete dependence' tests ensure that states are not held responsible for conduct that was not strictly under their control, so there is no element of risk involved for the state. But the cost of this cautious approach is that these tests virtually guarantee an easy evasion of responsibility. All states need to do is find an ideologically aligned group, give it funding and/or other forms of support, perhaps coordinate its actions, and let it do 'the dirty work' – all while the state remains just far enough removed from the events to be able to deny responsibility. Against this backdrop, it is unlikely that any state will ever be held responsible under either the 'effective control' or the 'complete dependence' test.[1] Simply put, these tests fail to capture the real-life nature and complexity of relations between states and non-state actors. Their purpose is not to be realistic; it is to make sure that responsibility is limited to what is under strict state control. It is thus no wonder that respondent states continue to argue for these tests in various fora. However, faced with situations where respondents were deeply involved in the creation of, and support for, private actors committing

1 The state could still be held responsible if found to have given instructions to the non-state actor for the commission of an internationally wrongful act, but that is another limb of Article 8 ARSIWA.

human rights abuses, the positions of both the IACtHR and the ECtHR are understandable, and their underlying logic quite compelling. Colombia, Turkey, Russia and Armenia *should* be held responsible for the conduct of the paramilitaries, the TRNC, the MRT and the NKR, because if it was not for the role played by these states, these private actors could not have committed the human rights abuses in the first place. This statement, in turn, reveals the minimum threshold that should be applied for attribution: the state's contribution to the wrongful act should be *sine qua non*. This would set attribution sufficiently apart from complicity as a self-standing basis for responsibility to maintain a clear conceptual distinction between the two; and would ensure that state responsibility is not stretched too far, given the extensive role of the state.

Still, these attribution tests raise further difficulties where states continue to resist them. In effect, both the IACtHR's 'acquiescence and collaboration' and the ECtHR's 'survives by virtue of' tests are the result of judicial law-making. The texts of the ACHR and ECHR do not include explicit provisions on attribution, and it is also difficult to read them as implicitly addressing this specific issue. For the same reason, the IACtHR's claim to *lex specialis* based on Articles 1 and 2 ACHR (at least if that term is understood as referring to specific treaty provisions) is not a particularly strong one. In the absence of such explicit or implicit grounding in the treaty text, it is doubtful whether states' consent in becoming a party to the treaty extends to such innovations adopted by the respective courts. Where – as with Colombia – states eventually come to accept the court's reasoning, any possible deficiency in this regard is remedied. But this is not always the case: Russia, in particular, has continued to object in its pleadings to the standard applied by the ECtHR in its jurisprudence on Transdniestria. At the same time, though, its implementation record suggests that Russia has not rejected this strand of case law in its entirety. The state has paid the just satisfaction awarded in both *Ilaşcu* and *Ivanţoc*,[2] and has continued to engage with the Council of Europe regarding *Catan*, even as it complains that the ECtHR's application of 'its own "effective control" doctrine, having attributed to Russia the responsibility for violations occurred in the territory of another State, to which the Russian authorities had no relation whatsoever, […] created serious problems of practical implementation of this judgment.'[3] Besides, this issue still tends to be framed predominantly

2 See the implementation information on *Ilaşcu and others* v. *Russia*, Application No. 48787/99, http://hudoc.exec.coe.int/eng?i=004-7515; and *Ivanţoc and others* v. *Moldova and Russia*, Application No. 23687/05, http://hudoc.exec.coe.int/eng?i=004-27968.

3 Council of Europe, *Communication from the authorities (01/02/2019) in the case of CATAN AND OTHERS v. Russian Federation (Application No. 43370/04)*, DH-DD(2019)123, 4 February 2019, https://rm.coe.int/native/0900001680923e3f, at 1. See also the implementation information on *Catan and others* v. *Russia*, Application No. 43370/04, http://hudoc.exec.coe.int/eng?i=004-5.

as a fragmentation problem, rather than one of consent.[4] Nonetheless, these questions of consent merit further attention and cannot be taken lightly; but as they go beyond the scope of this dissertation, they should be the subject of future research.

Perhaps the most promising line of inquiry to support the application of these tests is relying on the *nature* of human rights treaties, rather than any specific *provisions* of such treaties. That nature – establishing and protecting fundamental rights for individuals, rather than simply creating commitments between states – may offer firmer ground to argue for a differentiated approach allowing for attribution based on *sine qua non* support. Indeed, this would not be the first time that human rights bodies develop concepts or approaches specific to human rights law or a given treaty that become widely established over time, even if their application in particular circumstances is not always without controversy. Extraterritorial jurisdiction or interpreting a human rights treaty as a 'living instrument' come to mind, for instance. There is a possibility that the IACtHR's and ECtHR's attribution tests could follow a similar trajectory; in the case of the ECtHR, the dissertation offered a possible reasoning grounded in more well-established concepts used by the Court.

Concerns relating to fragmentation and consent notwithstanding, it is the contention of this dissertation that – given the deep involvement of the respondent states – the courts' finding of attribution did justice to role of those states, much more than any alternative under existing law (finding a failure to protect or no responsibility at all) could have. This, in the end, is the most powerful argument in favor of the continued application of the IACtHR's and ECtHR's tests, even if it is admittedly a normative one. Under ideal circumstances, the law of state responsibility would have a robust complicity regime – including in relation to private actors – that could capture these scenarios. In that case, attribution could continue to function based on a narrow conception of agency (operationalized as strict control). But unless and until such a legal regime becomes a reality, regional human rights courts' recourse to attribution based on *sine qua non* support provides the best option to ensure that the state does not escape responsibility for its involvement in human rights abuses.

Attribution: opportunities to clarify and improve the human rights courts' analytical framework

Furthermore, there are no signs that either of these tests would be abandoned or significantly transformed in the foreseeable future, as both

4 See e.g. Council of Europe, Steering Committee for Human Rights, *CDDH Report on the place of the European Convention on Human Rights in the European and international legal order*, CDDH(2019)R92Addendum1, 29 November 2019, https://rm.coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279 (hereinafter CDDH(2019)R92Addendum1), paras. 25, 198.

courts have firmly stood by their own approaches when challenged by respondents. The IACtHR dismissed Colombia's argument in *Mapiripán* by stating that the American Convention constitutes *lex specialis*; the ECtHR sidestepped Russia's argument in *Catan* and *Mozer* through obfuscation, while distinguishing between jurisdiction and responsibility but applying the same test for both.

Such evasiveness by the European Court is unacceptable, not to mention harmful to the Court's own position. The ECtHR needs to address Russia's arguments, and if it chooses to depart from the ICJ threshold, it should say so explicitly and put forward a justification. To be sure, it is highly unlikely that Russia could be placated by anything other than the application of the 'effective control' or the 'complete dependence' test. But the state deserves a substantive consideration of its arguments, and the ECtHR's test can only be properly assessed if the underlying reasoning is out in the open. In doing so, the Court need not challenge the ICJ's tests. Like its Inter-American counterpart, the European Court could – and should – choose to adopt an approach that is limited to its own jurisprudence, or at least to human rights law. As a regional court with limited subject-matter jurisdiction, the ECtHR is not well placed to put forward a general test.

More generally, while the outcomes of these cases may have been much preferable to the alternatives, the IACtHR's and ECtHR's reasoning in reaching those outcomes often leaves something to be desired. The single most effective tool that these courts could deploy to strengthen not only their reasoning but also the acceptance of these tests is to clarify their parameters and operation, in order to improve legal certainty so that respondent states (as well as applicants) know what to expect and can plan their arguments – including their challenges – accordingly.

With both the IACtHR and the ECtHR facing further cases in the same vein, these questions are bound to remain on the agenda, not only attesting to the significance of these tests, but also presenting the opportunity to elucidate the reasoning applied. There are several thousand individual applications pending before the ECtHR related to Crimea, Eastern Ukraine, and the 2008 hostilities regarding Abkhazia and South Ossetia, in addition to the cases which continue to reach the Court from Northern Cyprus, Transdniestria, and Nagorno-Karabakh.[5] Cases related to paramilitary

5 See e.g. ECtHR, *Press Country Profile: Ukraine* (last updated: November 2019), https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf, at 11, mentioning 'over 5,000 individual applications' in addition to the inter-state cases; ECtHR, *Press Country Profile: Georgia* (last updated: July 2019), https://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf, at 7, mentioning 'almost 2,000 individual applications concerning the hostilities in 2008' besides two pending inter-state cases; ECtHR, *Press Country Profile: Armenia* (last updated: October 2019), https://www.echr.coe.int/Documents/CP_Armenia_ENG.pdf, at 2, mentioning more than a thousand individual applications of persons displaced in the Nagorno-Karabakh conflict.

activities in Colombia likewise continue to be filed with the IACtHR.[6] Through the resulting case law, the courts should take the chance to clarify their position on a number of issues.[7]

The ECtHR should first and foremost explicitly acknowledge that it is in fact attributing the conduct of non-state actors (secessionist entities) to third states in the course of establishing extraterritorial jurisdiction. In doing so, it should clarify how such attribution for the purposes of jurisdiction relates to attribution for the purposes of state responsibility and confirm that it is applying the same test for both. Second, the Court should provide further information on the kind of support which may be used as evidence that the actor 'survives by virtue of' a third state's conduct and explain how such support relates to control in its analysis. Third, this case law should clarify whether the type of actor (local administration) and the state's (lack of) role in the creation of the actor is relevant to the ECtHR's analysis. Fourth, the Court should clarify the minimum threshold necessary for attribution. Finally, the ECtHR should clarify its position on whether the ECHR supplies *lex specialis* on attribution, and if so, on what basis.

The IACtHR, meanwhile, should first clarify how exactly state agents' collaboration with private actors results in the state's responsibility for violating a duty to respect human rights: whether such collaboration (a) leads to the attribution of the private actor's conduct, or (b) is equated – ostensibly on the basis of a separate primary rule – with the scenario where state agents themselves perpetrate the human rights abuse. Second, the Court should spell out the minimum threshold for attribution,[8] with particular reference to whether omissions can result in attribution, and if so, how such omissions are to be differentiated from those which lead to a violation of the state's duty to *protect* human rights. It should also put forward a justification of complicity-based attribution, especially in cases where the state's contribution falls below a *sine qua non* threshold (which, according to this dissertation, should not lead to attribution). Third, the IACtHR should clarify the type of evidence that is used to establish collaboration, particularly since this can effectively turn attribution at the level of conduct into attribution at the level of the actor, at least in a certain time and place. Fourth and finally, the Court should clear up any remaining confu-

6 See IACHR Press Release No. 162/18, *IACHR Takes Case Involving Colombia to the Inter-American Court of Human Rights*, 25 July 2018, http://www.oas.org/en/iachr/media_center/PReleases/2018/162.asp, concerning 'forced disappearances, threats, forced displacements and homicide attempts against officials and members of the [Unión Patriótica left-wing political party], which were perpetrated either by State agents or by non-State actors with the tolerance and acquiescence of State agents'.

7 Cf. CDDH(2019)R92Addendum1, paras. 189, 192, 193, 198-199, noting that the ECtHR is not clear in its reasoning and that more clarity would be welcome.

8 Since most of the Court's jurisprudence appears to establish attribution of private actors' conduct, it is used here as a shorthand; but given the IACtHR's equivocation on this issue, any references to 'attribution' in this paragraph should be read as referring to *either* attribution *or* collaboration leading to responsibility for violating a duty to respect.

sion and apply a consistent distinction between the duty to protect and the duty to respect human rights under the ACHR.

Complicity: room for complicity by omission and complicity-based attribution

Having considered responsibility based on duties of protection and through attribution, and in light of the dissertation's findings on these issues, the third main ground to explore is complicity. The existing legal categories (failure to protect and attribution) are ill-fitting to capture the phenomenon of state/non-state complicity, leading to the state being held responsible for less or for more than its actual degree of involvement. International law should therefore develop a robust rule prohibiting state complicity in the wrongful conduct of non-state actors. A particularly strong argument for such a rule can be made in international human rights and humanitarian law, given that certain types of non-state actors are regarded as having duties within these fields and that states have general positive and negative obligations extending to these fields. But what would be the boundaries of state/non-state complicity, as a prospective rule of international law modelled on inter-state complicity? And in the absence of such a rule, could complicity nonetheless serve as a basis for attribution?

Complicity should include omissions, given that there is a qualitative difference between, for instance, simple incompetence, and deliberately looking the other way. To capture that difference, the factor distinguishing complicity by omission from violations of duties of protection should be intent to assist the non-state actor. In cases of acts, rather than omissions, such general intent is implicit in the act of providing assistance 'with knowledge of the circumstances', in the words of Article 16 ARSIWA. Much of the argument for a requirement of specific intent (for the principal to commit the wrongful act) is driven by the concern that constructing inter-state complicity too broadly can disincentivize international cooperation, as states may fear that simply by providing assistance, they become vulnerable to litigation. Arguably, this fear is already sufficiently mitigated by the requirement of knowledge on the part of the state providing aid or assistance. But in any case, this problem is much less likely to occur in the case of private actors. Such actors either operate with a relatively narrow purpose (like paramilitaries); or the assistance itself is unlawful in the first place, violating the non-intervention rule, as in the case of third-state support to secessionist entities – even if this falls outside the scope of the ECtHR's jurisdiction.

At the same time, complicity and attribution should be delineated from each other on the basis of whether the non-state actor has acted on the state's behalf. Still, unless and until a state/non-state complicity rule is in place, complicity should be able to serve as the basis for attribution in cases of *sine qua non* contribution. This is a less than ideal solution, but one that is still preferable to capturing such situations under the rubric of failure to prevent or, even worse, letting them fall through the cracks completely.

The dissertation argues that drawing the dividing line between complicity and attribution at such contributions strikes the right compromise between narrowing the accountability gap and respecting the principle that the state is only responsible for its own conduct. It not only goes beyond the requirements of complicity as such, but also ensures that attribution is limited to instances where the state plays a critical role in the non-state actor's wrongful act – instances where merely finding a violation of a duty to protect would simply not do justice to the extent of the state's role. In such a case, the complicit state would likely turn into a co-perpetrator, to whom the resulting injury as a whole can be attributed, which means that in terms of outcome, the state's responsibility would not be stretched too far.

Final thoughts: the role of the ARSIWA and human rights courts in the pursuit of accountability

In all this, it is interesting to note that in situations characterized by the absence of effective government, the bases of responsibility with the most real-life significance have ultimately little to do with the ARSIWA. The final version of the ARSIWA do not address the threshold required for control-based attribution (at least not in the text of the Articles), the possibility of complicity-based attribution, or the functioning of duties of protection, despite all of these questions having been considered during the ARSIWA's drafting. This is not to criticize the Articles, which had to be streamlined to bring the ILC's project to a conclusion after five decades, and had to retain sufficient flexibility on the threshold question to be able to accommodate diverging judicial practice (even if the ILC ended up effectively endorsing the ICJ's approach in the Commentary). Rather, the aim is to point out that there is life outside the ARSIWA, and much in state responsibility that is not covered or definitively settled by the Articles. Perhaps the greatest influence of the ARSIWA in this context is through the inter-state complicity rule, serving as the model for possible state/non-state complicity; but while Article 16 ARSIWA was declared to be customary by the ICJ in 2007, the precise contours of that rule are still frequently debated. But even if the ASRIWA are not the main driving force behind these bases of responsibility, in most cases they can be reconciled with the Articles and placed in the ILC's framework; and in any case, the ARSIWA themselves leave open the possibility of *lex specialis*.

Overall, the main conclusion of the dissertation is that despite the (often inherent) limitations of the law of state responsibility, it is possible to hold states responsible in many ways for their involvement in the conduct of private actors even in situations characterized by the absence of an effective government. In terms of existing rules: duties of protection continue to apply, even if the state's means may be restricted, and the state is still obliged to use the means reasonably available to it to comply; Articles 4, 5 and 9 ARSIWA can operate even if the central government completely collapses; co-optation and the continued payment of civil servants enable

attribution if the person acts in an official capacity; and conduct can be retroactively acknowledged and adopted once a new government is in place. Given the scarcity of practice, there is some uncertainty as to when the conduct of local *de facto* governments may be attributed to the state under Article 9 ARSIWA, but it appears that at the very least, their unpersonal conduct is attributable where they have moved into a pre-existing vacuum.

Importantly, more conduct is attributable to the state than previously asserted in the literature. Granted, inasmuch as the factual rationale is concerned, this stems from the inclusion of third states and the broader definition of 'state failure' adopted at the outset, understood as the (relatively common) loss of control over state territory, rather than the (exceptionally rare) complete collapse of governing institutions. After all, regardless of the requisite threshold for attribution, *state* support or control is understood to be *governmental* support or control, and if there is no government in place, there can be no such support or control (unless it comes from a third state's government). But attributing the conduct of *de jure* organs, those empowered by law to exercise governmental functions, and those exercising such functions in the absence of government (Articles 4, 5 and 9 ARSIWA) is possible even in the case of such collapse, let alone the loss of territorial control. That said, given the typical factual scenarios and/or the rules' inherent limitations, none of these grounds is likely to provide a major contribution to closing the accountability gap emerging in the absence of effective government.

In order to bolster and complement the existing rules and help narrow the accountability gap, the dissertation proposes: that the burden of proof should be partially shifted in cases concerning duties of protection; that a state/non-state complicity rule should be developed in international law (and could be 'read into' treaty provisions on general obligations in human rights and IHL); and that until such a rule is in place, state complicity in the conduct of non-state actors should form a basis for attribution where the state's contribution is *sine qua non*.

The jurisprudence of the IACtHR and the ECtHR, meanwhile, has provided an interesting conundrum, straddling the two research questions, as it were. Under the factual rationale of attribution, these two courts *have* held states responsible for a wider range of conduct than what would be captured under the ICJ's tests, and these judgments are, of course, binding on the respondent states. This departure from the ICJ, however, has not gone unchallenged either in the literature or – more importantly – by states, leaving the status of the human rights courts' attribution tests somewhat uncertain. Still, these courts may be able to claim *lex specialis* based on the human rights character of their respective treaties. Alternatively, and in line with what has been argued more generally, the IACtHR could interpret Article 1 of the American Convention on Human Rights as implying a rule against state/non-state complicity – failing that, it should restrict attribution to cases of *sine qua non* support. The ECtHR, meanwhile, could possibly

bring its approach in line with the ARSIWA framework by clarifying the relationship between support and control (since, in the absence of knowledge, it cannot rely on complicity).

The tests of these two courts are not without their challenges, both internal (regarding the courts' reasoning) and external (regarding issues of fragmentation and consent). But it is only through an open debate that these challenges can be addressed, and the costs, benefits, and suitability of these tests evaluated by the international – or the respective regional – community. Through their growing jurisprudence, the two courts have already clarified a number of issues, and the dissertation has tried to expose, as much as possible, the conceptual framework implicit in the courts' reasoning. But the IACtHR and ECtHR still need to be more forthcoming on both the parameters and the justifications of the tests applied. In the end, though, the fact remains that this case law is probably the most powerful tool in attempting to close the accountability gap arising in the absence of effective government. Any current shortcomings in reasoning notwithstanding, by holding states responsible for human rights abuses committed by paramilitary groups and secessionist entities with *sine qua non* assistance, courts can bring at least some measure of relief to the victims of such abuses.