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ATTRIBUTING ACTS OF OMISSION TO THE STATE*

Gordon A. Christenson**

He governs with a loose rein, that he may govern at all; and the whole of the force and vigour of his authority in his centre is derived from a prudent relaxation in all his borders.

Edmund Burke, Speech on Conciliation with the Colonies,
Mar. 22, 1775¹

I. INTRODUCTION: FAILURE OF DUTY AS STATE CONDUCT UNDER INTERNATIONAL LAW

In determining what conduct is attributable to the State under the international law of State responsibility, we normally work from specific behavior of particular government officials acting alone or in concert.² Because the abstract "State" acts only through "agents" in control of the State or some part of its apparatus, any such acts of those individuals are attributed to the State if done under actual or apparent authority of the State.³ Responsibility of the State engages when such conduct causes harm in breach of international obligation.⁴

Beyond these common understandings, however confused they may have become with analogies from private law,⁵ suppose the ques-

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1. 1 WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 464-71, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 3, 5 (P. Kurland & R. Lerner eds. 1987).

2. Briery explains: "[States] have no wills except the wills of the individual human beings who direct their affairs; and they exist not in a political vacuum but in continuous political relations with one another." J. BRIERLY, *THE LAW OF NATIONS* 55 (H. Waldock 6th ed. 1963).

3. Christenson, *The Doctrine of Attribution in State Responsibility*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 321 (R. Lillich ed. 1983).

4. I. BROWNIE, 1 *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* 132-50 (1983).

5. Analogies to agency or vicarious liability in municipal law help explain why a "superior" may be responsible for acts of the agent or subordinate. If pushed too far these private law analogies confuse political power with other policy functions such as allocating risk of economic loss. Likewise, sovereign immunity is used sometimes to determine when conduct is attributed to the corporate legal personality of the State as sovereign and hence immune from municipal liability. States acting in their sovereign capacities are legally responsible to other States only under international law and not under domestic or municipal law of the other State. The conduct of State-owned commercial enterprises is not usually shielded and, hence, not attributed to the State

tion is whether a government acts by omission through its loose reins or failure to control. The problem of an act of omission has a long moral tradition.⁶ By analogy, highly problematic sources of analysis from municipal law abound.⁷ The tendency for those in power to achieve their ends through private or non-State actors, thereby avoiding attribution, engenders a wide range of conduct by inaction where both deniability and non-attribution serve to enhance the power of those in control of a State, if they in fact have control. A domestic form of political corruption (use of public power for private ends) by omission may occur legally, as in loosening the reins of regulatory controls to reward political friends with opportunity to profit from speculation (as in the Teapot Dome or savings and loan scandals in the United States), in effect socializing any loss or transferring gain from public funds. Domestic raids on public coffers for the private ends of public officials often depend upon omissions or official inaction either legitimized by law or reflected in discretionary enforcement. Rents of office leading to transfers to private political supporters often depend upon loose regulatory reins. Traditional moral philosophy places moral responsibility for evil results upon those taking direct and intentional actions. Actions having indirect evil results, as in corruption following from a legislative "green light" or incidental killing of civilians in bombing raids, often do not yield the same degree of culpabil-

under the restrictive theory of sovereign immunity. Similarly, non-State or private conduct not shielded is not attributed. These analogies and tests are not free from challenge, but they are useful to see the main principle that a State ought to be responsible for the official actions of those in control of a State. See generally H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW* 134-43 (1927); see also H. LASKI, *STUDIES IN LAW AND POLITICS* 268 (1932) (criticizing Hegel's view that international law is merely an external municipal law).

6. See C. FRIED, *RIGHT AND WRONG* 19-29, 52-53 (1978) (introducing intentionality and cause as better tests of right or wrong action than the distinction between act and omission when under duty; and distinguishing between individual choices and results in States-of-the-world).

7. In domestic criminal law, a person who by omission voluntarily brings about a result defined as crime commits a wrongful *act* when under a common law or statutory duty to act. Kadish, *Act and Omission, Mens Rea, and Complicity: Approaches to Codification*, 1 *CRIMINAL LAW FORUM* 65, 70-71 (1989). Hughes, *Criminal Omissions*, 67 *YALE L.J.* 590 (1960). In English law, see Ashworth, *The Scope of Criminal Liability for Omissions*, 105 *L.Q. REV.* 424 (1989). For a comparison of French with English law, see Ashworth & Steiner, *Criminal Omissions and Public Duties: the French Experience*, 10 *LEGAL STUD.* 153 (1990) (moral duty of assisting emanates from social solidarity, but is difficult to prove). A reexamination of the public duties of a citizen is urged in both civil and criminal omissions for revision of English law. *Id.* at 164. In tort law, a duty may arise from a relationship or circumstance of control (such as duty to care for a child in custody or a duty to provide health care service in a hospital or nursing home). The failure of action when required by duty becomes wrongful action attributable to the person with the duty. Often the question in private tort actions involves intent or negligence, namely some form of fault. But see, I. BROWNLIE, *supra* note 4, at 37-38, 40-47 (challenging the use of municipal law metaphors such as intention (*dolus*) or negligence (*culpa*) in international law of State responsibility and maintaining an objective standard of failure of duty (an omission being then an objective failure of duty to act)).

ity. Theologians have been debating the relevance of the traditional distinctions and await an expected Vatican statement.⁸ When does this kind of failure of action or control amount to State conduct for the purpose of determining the responsibility of the State under international law?⁹

Pinning down these omissions as conduct of State would seem hopelessly like clutching for air were it not for a surprising number of recurring examples and experiences in State practice that insist on examination. A classic confusion often begins with the *Trail Smelter* arbitration, cited for the proposition that under international law a State is responsible for private activities originating within its territory passing into the territory of another State and causing harm.¹⁰ Consider, for example, emerging State practice about determining a government's responsibility when it fails to control vigilantes¹¹ or private death squads,¹² fails to prevent massive pollution of the environment,¹³ fails to contain terrorist violence,¹⁴ fails to protect against terrorism or private violence or threats directed against aliens and their property,¹⁵ fails to prevent a massacre of innocent civilians in occupied territory,¹⁶ fails to control its law enforcement officials when operating

8. See Steinfels, *Theology Awaits the Vatican's Word on Evils Lesser and Greater*, N.Y. Times, Sept. 2, 1990, § 4, at 6, col. 1.

9. See Christenson, *supra* note 3, at 335-41. See also I. BROWNLIE, *supra* note 4, at 161-62, 165-66.

10. *Trail Smelter Case* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1938 (1941). See C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 80 (1928) ("A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction."). While the *Trail Smelter* arbitration award held Canada "responsible in international law for the conduct of the Trail Smelter," a private smelting plant in Canada, whose emissions caused injury to orchards in the United States, the holding seems narrowly limited to the context of the *compromis*. Properly analyzed, the attribution of conduct to Canada would not be under some strict liability theory of *respondeat superior* for the private conduct of the Trail Smelter but rather would be for the Canadian Government's own official failure to maintain a regime of control in the face of the duty recognized in the *compromis* as grounded in international law. Failure to establish and supervise a regime of control would thus constitute an act of omission attributable to the State.

11. See J. MOORE, 6 DIG. OF INT'L L. 837-44 (1906) (lynching of Italians at New Orleans); C. EAGLETON, *supra* note 10, at 131-34.

12. See Berman & Clark, *infra* note 150 and accompanying text.

13. Christenson, *supra* note 3, at 337. See Handl, *Liability as an Obligation Established by a Primary Rule of International Law*, 16 NETH. Y.B. INT'L L. 49 (1985).

14. Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISR. Y.B. HUM. RTS. 233 (1990) ("horizontal effect" or "*Drittwerkung*" of human rights places a duty to control and prevent terrorist activities under State's jurisdiction, the failure of which is attributable as State conduct). The difficulty of the burden of producing evidence showing the State had the means to prevent terrorist activity and the rarity of cases of attributing such an omission relates to presumptions about attribution, discussed *infra* note 154 and accompanying text.

15. Lillich & Paxman, *infra* note 150.

16. See discussion of the Sabra and Shatila Massacre, *infra* notes 163-72 and accompanying text.

with police in another country,¹⁷ or fails to prevent massive abuse of human rights in State territory.¹⁸ Loose reins or inadequate control over private activities by States under mandatory obligations from United Nations Security Council resolutions present even more dramatically the vital public order questions central to the problem of attributing omissions as conduct of State.¹⁹

As Professor Ian Brownlie explains, procedural questions giving practical effect to expectations of the international community are equally, if not more, important to international legitimacy and the recognition of arrangements of control within a State when a State has exclusive control over internal events, information and communications.²⁰ Where are claims of failures of duty made? Who decides the validity of the claim and for what purpose? Is proof of "attribution" of an omission to the State an element of claim? Are intentionality and causation part of the elements of claim? What burdens of proof or presumptions of evidence operate?²¹

A. Asking the Right Questions

The initial question seems empirical. Have those in control of the State objectively failed to take action required to meet an international obligation?²² This question defining an omission of State has two for-

17. One example is the Mexican protest over the abduction of Dr. Alvarez Machain in Mexico and his subsequent transfer to the United States for indictment in the torture and murder of Enrique Camarena, an American agent in Mexico. The abduction may have involved "under the table" deals and a denial that "agents" paid by the Drug Enforcement Agency in fact were government officials when they forcibly captured Dr. Machain. See Lowenfeld, *Kidnaping by Government Order: A Follow-up*, 84 AM. J. INT'L L. 712 (1990) (skepticism about assertions by U.S. Government that abductions of persons ending up in U.S. custody were done by foreign police and that foreign country consented or that U.S. agents did not participate in torture). U.S. District Judge Edward Rafeedie ordered Dr. Alvarez extradited back to Mexico because the abduction violated the Treaty of Extradition between the United States and Mexico. See *U.S. Appeals Order to Return Suspect to Mexico*, N.Y. Times, Aug. 18, 1990, § 1, at 9, col. 2 (U.S. Department of Justice has appealed the order).

18. Shelton, *infra* note 21.

19. Enforcement actions are rare, but they impose the clearest of affirmative obligations upon States to implement Security Council actions taken by controlling persons, events and things under control of members of the United Nations. Two have called on nations to exercise control to implement certain actions against aggressor nations, North Korea in 1950 and Iraq in 1990; two have called for sanctions against Rhodesia and South Africa. See H. STRACK, *SANCTIONS: THE CASE OF RHODESIA* 244 (1978) (governments may be unable or unwilling to control transnational relations by non-governmental elites in order to carry out sanctions).

20. I. BROWNIE, *supra* note 4, at 164-65.

21. *Id.* at 86-88. For an excellent review, including burdens of proof and presumptions involving omissions, see Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989).

22. See Dupuy, *The International Law of State Responsibility: Revolution or Evolution?*, 11 MICH. J. INT'L L. 105, 110 (1989) (following classical doctrine of objective international law articulated by Anzilotti as a causal link imputing wrongful activities to State behavior, signifying a break from the theory of *culpa* or fault from natural law).

mal aspects as well as a third perspective which is more subjective and psychological.²³ The first aspect formally addresses the sources of substantive obligation requiring positive action in the particular situation, whether from the clearest Security Council directives, from less clear treaty obligations, or from arguable duties under customary international law. The second aspect frames decision through process, using analysis of procedural matters to shape attribution questions. Who decides whether to attribute an omission to a State? What party has standing to claim an omission of State is wrongful? How is the burden of persuasion allocated? What presumptions and inferences of fact, burdens of proof and standards of evidence are used to show a duty and a breach by omission and for what purposes? What measures, remedies or sanctions follow from an omission of State breaching international obligation?

The inquiry scarcely scratches the surface with these two traditional and formal questions. More critically, do we want to know about motives of individual officials, often hidden in expressions of national self-interest? Do we care, for example, what reasons and incentives national officials have to undertake or to avoid undertaking an affirmative international obligation?²⁴ How might they mask their true motives by legalistic escape techniques? Before they are morally culpable, must their intentions be shown to the same extent as Professor Fried thinks is required for omissions by individuals?²⁵ Against powerful internal or domestic forces such as a fundamentalist religious revolution, revolutionary or mob violence against outsiders, a declaration of independence by a political subunit, or external aggression, action to control aberrant behavior may not be prudent. Though obligatory concerted action may be demanded by an international norm or directive, benign neglect of State may serve many subjective political purposes. Indeed, through loose reins government inaction can function as easily as a conscious part of the prudent exercise of power,²⁶ as a function of corruption or impotence, to paraphrase Ed-

23. In the objective theory, no reference is made to the psychological state of the actor or the subjective motive, thus requiring rationalization through fictions. *Id.* For the view that omissions of State require proof of a subjective state of mind approaching malice while overt actions may rely upon the objective theory, see I. BROWNLIE, *supra* note 4, at 42-43, 46-47 (criticizing Strupp, Guggenheim and others for requiring fault in the case of wrongs of omission but not for wrongs of commission, since failure of duty to act is wholly consistent with objective theory). Professor Harris points out that "State practice on this theoretical question is, so far as it is available, of little help." D. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 378, 384 (3d ed. 1983).

24. Dupuy, *supra* note 22, at 110-11.

25. C. FRIED, *supra* note 6.

26. See 1 THE FOUNDERS' CONSTITUTION, *supra* note 1, at 5.

mund Burke. Inaction also may reflect merely the realism of impotence, a loss of any effective power to control, which if not attributed to the State has consequences for those under the State's protection.

Considerable energy and political skill are needed to marshal resources and organize the operations necessary to carry out some international duty to act. Unless survival or a vital interest is at stake, it is often easier for decision-makers to stop some minor official outrage or to ensure a process to compensate or pay compensation (often "*ex gratia*" or without responsibility)²⁷ for the harms emanating from those with power, than it is to organize the apparatus of public and non-State actors cooperatively to comply with international obligations requiring action in the first place.²⁸ Self-interested private action might be easier to motivate and sustain through pursuit of private profit or personal power by conscious restraint or by a posturing policy of rhetoric without action. In appraising omissions of State, therefore, the distinction between public (or official) and private (or non-State) conduct remains troublesome.

B. *The Context of Attribution in State Responsibility*

In the nation-State system, with obligations and rights running between sovereign States, the modern law of State responsibility has developed historically through what Professor R.B. Lillich calls twin fictions.²⁹

These legal fictions are devices for attributing an injury to a claimant State (or community of States) and a wrongful act to a respondent State.³⁰ They are useful fictions for erecting opaque barriers to protect those in control of the affairs of a State. Harm to a State always burdens particular individuals (officials, elites or private citizens) even if expressed as harm to a national interest such as environment or security. State conduct always involves human behavior and decisions, even if cloaked in State or public interest (public choice theory seeks to

27. See Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 AM. J. INT'L L. 319 (1989); Maier, *Ex Gratia Compensation Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325 (1989) (payments *ex gratia* withhold acquiescence and evidence demonstrating a sense of legal obligation for emerging norm of customary international law).

28. See Lowenfeld, *Looking Back and Looking Ahead*, 83 AM. J. INT'L L. 336 (1989) (reparations accepting responsibility, not *ex gratia* payments, should be made when objective State responsibility is clear under treaty or customary international law, as in the Iranian airliner incident).

29. R. LILLICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 11-14 (1984).

30. One of the best conceptual interpretations of inter-State relations accounting for the attribution of harm (diplomatic protection) and attribution of wrongful conduct (international responsibility) is found in C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 236, 277-94 (P. Corbett trans. rev. ed. 1968).

explain incentives for individual official choices in terms of personal power or self-interestedness).³¹ Attributing harm or conduct to sovereignty personified is a convenient metaphor for concentrating and protecting internal power to integrate national interests by the controlling elites.

The first legal fiction follows Vattel's State positivism, often used in the 19th and early 20th Centuries, in recognizing that a State is injured when its nationals or direct interests suffer international wrong and that the State may seek satisfaction or reparation for that harm.³² This kind of attribution of harm developed generally under the category of diplomatic protection of nationals, a modern form of the paternalistic organization of blood feud or kinship claims preliminary to their being "bought off" or "composed," a primitive but effective form of self-help remedy.³³ German idealism also helped personify injury in the corporate body of the State even while rejecting the natural rights of free and equal States in pre-society propounded by Vattel. Hegel criticized the European Enlightenment view that underpinned Vattel's natural rights theory, that States independent and equal in nature must consent to international law just as individuals in a state of nature do in the social contract to form government. This critique led Hegel to propound a different view of a State's identity, one that sees a State as a Romantic "person" through a World Spirit in history. The State's purpose, on that view, would define injury to this identity, and reparations no doubt would serve to compose injury or wrong into the State's ultimate purpose from within through a dialectic rectitude of mediating and transcending Spirit embodying the State's will.³⁴

31. See generally J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); D. MUELLER, *PUBLIC CHOICE* (1979); R. HARDIN, *COLLECTIVE ACTION* (1982).

32. *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 6, 12 (Aug. 30). See E. DE VATTEL, 2 *THE LAW OF NATIONS* 136 (C. Fenwick trans. 1916): "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection."

33. See A. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938).

34. See C. TAYLOR, *HEGEL* 542-44 (1975). Hegel's State, according to Taylor, now has disintegrated by prizing "the individual more and more loose from any partial grouping." *Id.* at 543. For Hegel, the "modern mixture of private Romanticism and public utilitarianism is rather civil society run wild, a society which has become a 'heap'." *Id.* at 542. Carty believes that the remnant of this idealized and personified State creates opaqueness and an inability to penetrate into inner power structures to relate them to an international moral order, hence decay. A. CARTY, *THE DECAY OF INTERNATIONAL LAW?* 108-115 (1986); Carty, *Changing Models of the International System*, in *PERESTROIKA AND INTERNATIONAL LAW* 13, 22-23 (W.E. Butler ed. 1990) (outlining the further demise of liberalism in international law and the near impossibility of using international legal discourse to restructure the international system).

The second fiction, the other side of Vattel's coin symbolizing States as individuals in nature, is the attribution to the State of the wrongful acts or omissions by specific natural persons. Here as well, German idealism reinforced the transformation of the individual will of officials into the purpose of the State and its personified will. Kant differed from Hegel in allowing the possibility that a personification of subjective State action could breach an objective obligation, subjective moral duty being in conflict with the objective agreement of States. Through objective law, States would compose or settle the conflict by invoking legal principle and relying upon external judgment such as arbitration. Hegel destroyed the idea of the social contract and natural rights as applied to States and merged the subjective will of the State with its universal spirit, admitting no possibility of acting inconsistently with another normative system not its own. The constant dialectic and synthesis may require war to resolve the contradiction. He rejected the Kantian idea of an everlasting peace kept by a league of nations settling disputes by invoking a highly contingent unanimity resting upon consensus of particular independent wills. Hegel would not overlook the failures of the internal organism of the State itself in dwelling upon its extrinsic phases.³⁵ The affirmative spirit remains despite defect in the organic State. The world court is World Spirit.

Under any of these theories, attribution of conduct became an indivisible part of the concept of international responsibility. This conceptual formulation has definite Kantian roots in the Enlightenment notion of a State as subjective actor with responsibility attaching only after an objective obligation is breached by the subjective act.³⁶ Thereby, in inter-State relations, both harm to nationals or national interests and responsibility for wrongful conduct were reified in the abstraction of the sovereign person of the "State."³⁷

35. See *supra* note 34. See also E. CASSIRER, *THE MYTH OF THE STATE* 263-76 (1946). HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* 247, 338-39 (S. Dyde trans. 1896); *THE PHILOSOPHY OF HEGEL* 280-84, 325-29 (C. Friedrich trans. 1954).

36. C. DE VISSCHER, *supra* note 30, at 285-94.

37. Brierly severely criticized Vattel for his notion of States as individuals free and equal in a state of nature without social bonds. J. BRIERLY, *supra* note 2, at 37-40. Some contemporary scholars seek to render "translucent" what they criticize as the personification of the State to allow international law to penetrate sovereignty thereby reaching individuals, as Hegel's State would permit. D'Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 TEX. INT'L L.J. 1 (1989) (Bentham's sovereign power rather than Hegel's universal spirit creates opaqueness); A. D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 116, 214, 240 (1984) (Hegel suggests universal personal relations are internally embodied in the State); F. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 55-75 (1988). Others, using Hegel and Gierke to justify the State, point out that the State is more than a convenient fiction for sovereign authority or for the mechanical sum of its personalized parts. They recognize the dialectic forces within a State to integrate national decisions and relate to other States more efficiently as a corporate whole greater than the sum of

Specific questions considering the attribution of omissions to the State as conduct fall within the second attribution category, that of State responsibility, which is the juridical idea that a State as a collective polity is held accountable for the wrongful conduct of those in control of its affairs, as distinguished from that of the attribution of injury to the collective polity of the State wronged. Situated within this context, the following sections of this article examine and critically interpret specific contemporary practice for attributing official failures and omissions as State conduct. A complex process, the analysis required for attributing failures and omissions reaches uncomfortably into the heart of the working apparatus of the State and its power. Attribution doctrine thus may be viewed within particular contexts as a technical instrument for hiding or revealing assorted policy objectives of the persons seeking effective control of the State's decision-making apparatus and for distributing the benefits and burdens flowing from omissions of a State.

Important nuances in attributing omissions to States have been influenced by the draft codification of State responsibility by the International Law Commission ("ILC"). The most recent reflection of State practice, however, is found in two decisions of the World Court, decisions of the Iran-United States Claims Commission, a 1983 report of the Israeli Commission of Inquiry investigating the 1982 massacre in Beirut and in emerging practice and decisions concerning disappearances and other failures of protecting human rights such as inaction in regard to death squads and loose controls over parastatal organizations or subordinate groups within national polities. This experience requires us to rethink the conceptual framework for allocating responsibility for wrongs between private or non-State conduct and public or State omissions as conduct.³⁸

its parts. M. FROST, *TOWARDS A NORMATIVE THEORY OF INTERNATIONAL RELATIONS* 167-84 (1986). See H. LASKI, *supra* note 5, at 262. Laski himself sympathized with a cosmopolitan stance viewing sovereignty and the Grotian States system as obsolete. *Id.* at 271-73. However, he used social policy analysis rather than moral universalism to explain sovereignty. He wrote to Holmes,

[S]overeignty in law really means nothing more than that the ultimate source of immediate reference has spoken, where in politics we are dealing with the much less tangible factor of influences. By responsibility I simply mean that if the state injures X more than it injures the mass of men, unless a vital source of social interest is involved, the treasury ought to assist X; and if it doesn't probably the control over officials is relaxed dangerously.

1 HOLMES-LASKI LETTERS 191 (M. Howe ed. 1953). See also J. STONE, *VISIONS OF WORLD ORDER* 79-86 (1984) (criticizing Vattel's "sovereign dialectic" or interaction of purely autonomous States in nature without social bonds).

38. Christenson, *supra* note 3, at 321-23, 326-29 (postulating the two spheres and analyzing the positive and negative duties associated with each).

C. A Preliminary Appraisal

Critical review of this recent experience will show it to have narrowed considerably the legal attribution of omissions of State under international law. These technical shifts have substantive effect in several ways not anticipated in an earlier study.³⁹ First, recent normative experience, with several exceptions,⁴⁰ has introduced a new stringency in applying the doctrine for the purpose of attributing conduct from "official inaction."⁴¹ The new stringency, in effect an increased burden on a claimant to show intentional State conduct from an omission, validates loose reins on officials' affirmative international duties without addressing the policy shift directly. Second, the decisions show the extraordinary forbearance of decision-makers in attributing omissions of State resulting from loose control over powerful subordinate groups in the national polity, including non-State actors. Relaxation of international duty to control an effective State power apparatus appears to follow. Paradoxically, these restrictive trends come at a time when, as anticipated less than a decade ago,⁴² greater State involvement and cooperation might be required from crucial responsibilities of governments to achieve important goals, subjecting both State organs and non-State or private parties to greater control. Without responsible controls, the international community would have great difficulty preventing environmental degradation, reducing terrorism across borders or against aliens, preventing private violence against minorities, stopping abuses of human rights and curtailing propaganda-inspired mob or vigilante action against alien workers or hated outsiders. Among the most important of public order concerns, Security Council measures and directives require the clearest cooperation to control persons, events and things within a State's jurisdiction (as in enforcement of sanctions against Rhodesia or Iraq).

If the above interpretation from experience is accurate, the trends show a shift from the objective to the fault notion of responsibility

39. *Id.* at 335-58 (indicating a trend toward increasing responsibility for failure to meet affirmative international obligations through pressure from attribution theory).

40. See *infra* notes 149-62 and accompanying text (discussion of the Honduran disappearance cases decided by the Inter-American Court of Human Rights) and *infra* notes 122 and 215 (reflecting decisions attributing omissions in face of affirmative duties by the European Court of Human Rights and the European Court of Justice of the European Community).

41. This term is adopted by the RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 comment c (1986) [hereinafter RESTATEMENT (THIRD)]. The adoption of this term reflects a judgment by the Reporters that customary international law regarding attribution of omissions should be based upon "official" omissions, or conscious ones indicating official fault, and a movement away from attributing omissions on the basis of objective failure of duty irrespective of intent or neglect. See *infra* note 54 and accompanying text.

42. Christenson, *supra* note 3, at 340-41.

through the techniques of intentionality and causation. This shift specifically reflects trends of an increase of effective power and influence of intermediate and transnational institutions, an increase of local self-determination in complex federal structures and an increase of collective national and regional responsibility to define clear substantive obligations and affirmative duties cooperatively among States with varying degrees of effective international or regional supervision within domestic legal orders. It will also mean a greater burden in presenting international claims, a further decline in the tort side of State responsibility for injuries to aliens and an increase in the purely collective responsibilities of each State to all others (the public order side of State responsibility), while leaving the administration of such responsibility to internal treatment under loosening domestic control.

II. THREE PRINCIPLES FOR ATTRIBUTING CONDUCT TO THE STATE

The State is not responsible to other States for every act or omission within its jurisdiction but only for conduct of those in control of the power apparatus of the State. This separation of conduct of the State from that of private or non-State persons, an entirely European liberal development, became almost universal once feudal collective responsibility receded. The central function of international law in sustaining this separation has remained unquestioned.⁴³ The contemporary practice of responsibility of States under international law follows from this distinction.

Three principles, reflected in recent codifications and restatements, summarize the tradition.⁴⁴

A. *Attribution for Actors in Effective Control*

The first principle, a tautology, is that a State acts through people exercising its machinery of power and authority. This principle means that acts or omissions of official organs, agents or political subdivisions, including those of successful revolutionary regimes, necessarily are those of the State. These include acts of *de facto* agents under direct control of those in power in a State or of those acting as government in its absence. This principle developed its substance from the protection of aliens during the 19th and 20th Centuries and is codified in the draft articles and commentary on State responsibility of the ILC

43. C. DE VISSCHER, *supra* note 30, at 287.

44. Christenson, *supra* note 3, at 326.

("ILC Draft Articles").⁴⁵ The Restatement (Third) of Foreign Relations Law of the United States⁴⁶ and the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens⁴⁷ codify the same experience from an American perspective building on earlier draft codifications.

B. *Non-Attribution for Non-State Actors*

The second principle, also tautological, is that international law does not attribute conduct of non-State actors, such as acts or omissions of private persons, mobs, associations, corporations, trade unions, or unsuccessful insurgents, to a State. The ILC Draft Articles make this principle explicit in articles 11 to 14.⁴⁸ The Restatement (Third) addresses it in commentary.⁴⁹ The Harvard Draft emphasizes the independent duty upon the State to protect aliens and distinguishes State conduct for failure of a duty from the actual acts of non-State parties.⁵⁰ The Harvard Draft also codifies a commercial act of State exception from official conduct, using the restrictive view of sovereign immunity to justify not attributing such commercial acts of a State trading company, for example, to a State.⁵¹

C. *Attribution for Failure of Duty to Act*

The third principle is that a State may act through its own independent failure of duty or inaction when an international obligation requires State action in relation to non-State conduct. This principle

45. *Report of the International Law Commission on the Work of its Thirty-Second Session (5 May-25 July 1980)*, [1980] 2 Y.B. INT'L L. COMM'N (pt. 2) 30-32, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (Draft Articles on State Responsibility) [hereinafter 1980 ILC Draft Articles]. Articles 5 and 6 cover conduct of State organs acting in that capacity, regardless of their position in the State. Articles 7 and 8 cover attribution to the State of other entities and territorial units, and of de facto acts of non-State persons in the absence of official authority. Article 9 attributes to a State acts of organs placed at its disposal by another State or by an international organization (so-called indirect attribution, according to Ago). Article 10 covers acts or omissions of organs or entities beyond their instructions or internal law.

46. RESTATEMENT (THIRD), *supra* note 41, at §§ 206, 207.

47. 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, arts. 15-18 (Final Draft with Explanatory Notes 1961) (L. Sohn and R. Baxter reporters) [hereinafter Harvard Draft], *reprinted in* F. GARCIA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 133 (1974).

48. 1980 Draft Articles, *supra* note 45, at 31. Articles 11 to 14 define which acts are not attributable to the State: acts of persons not acting for the State (either explicitly or de facto), acts of organs of another State or international organization in a State's territory and acts of organs of insurrectional movements.

49. RESTATEMENT (THIRD), *supra* note 41, at § 207 comment c.

50. Harvard Draft, *supra* note 47, at 234-35, 238-39.

51. *Id.* at 253-56.

properly is a corollary to the first principle, as the ILC Draft Articles make clear.⁵² For example, a State has a duty to take reasonable care to protect foreign citizens from attack or harm and to apprehend and punish offenders with due diligence.⁵³ Inaction in the face of this duty is conduct attributable to the State quite independently of the status of the perpetrator of the immediate wrongful acts. The Restatement (Third) specifically includes the principle of inaction of government as a basis for attribution. The commentary would attribute to the State "official inaction where there was a duty to act."⁵⁴ An example of this duty is "to provide aliens reasonable police protection; the state is not responsible for injuries caused by private persons that result despite such police protection."⁵⁵ The ILC Draft Articles explicitly refer to wrongful acts or omissions in article 3.⁵⁶ Later commentary defines conduct to include omissions where a duty to act derives from international obligation. Article 11(2) preserves the possibility for attributing conduct related to non-State action, but only for a State's independent conduct in relation to it. That provision could include failure of duty to protect aliens, for example, but the substance of the international obligation creating such a duty is left to the primary rules of obligation formed in customary international law or international agreement.⁵⁷ The principle reinforced in that article is foundational for attributing conduct for failure to do any number of substantive affirmative duties, ranging from protecting human rights to control over enterprises for important purposes.⁵⁸

III. THE STRUCTURE OF RECENT RESTATEMENTS OR DRAFT CODIFICATIONS

A. *Main Outlines for Attributing Conduct*

The Restatement (Third) simplifies the above three principles into just one section devoted to the attribution of conduct (the earlier edi-

52. *Report of the International Law Commission to the General Assembly*, [1974] 2 Y.B. INT'L L. COMM'N (pt. 1) 276, 277-90, U.N. Doc. A/CN.4/SER.A/1974/Add.1 (Part 1) (Draft Articles on State Responsibility, commentary to articles 7-9) [hereinafter 1974 ILC Draft Articles].

53. *Youmans Claim (U.S. v. Mex.)*, 4 R. Int'l Arb. Awards 110 (1926). *See generally* Lillich, *Duties of States Regarding the Civil Rights of Aliens*, 161 RECUEIL DES COURS 329 (1978-III).

54. RESTATEMENT (THIRD), *supra* note 41, at § 207 comment c.

55. *Id.*

56. 1980 ILC Draft Articles, *supra* note 45, at 30.

57. *Report of the International Law Commission to the General Assembly*, [1975] 2 Y.B. INT'L L. COMM'N 59, 71, U.N. Doc. A/CN.4/SER.A/1975/Add.1 (Draft Articles on State Responsibility) [hereinafter 1975 ILC Draft Articles].

58. Christenson, *supra* note 3, at 336-37.

tion had two).⁵⁹ Significantly, this most recent black-letter restatement is organized not in the section on Responsibility of States for Injuries to Aliens, but in the earlier general section on Persons in International Law, which also contains general responsibilities of States to each other.⁶⁰ Since States are the main persons or subjects of international law, this relocation is an important organizational change roughly paralleling the separation of the conduct of subjects of international law from the wrongfulness of those acts in the eleven sections of the draft codification prepared by Special Rapporteur and now International Court of Justice Judge Roberto Ago under consideration by the ILC.⁶¹ These sections of the Ago draft explicitly work through the three principles and the distinction between State and non-State conduct. The organizational and conceptual distinction both of the Ago draft and the Restatement follows from a similar distinction beginning in Roman law between the law of persons and the law of obligations, the latter including both breach of contract and delict. So, at least conceptually, the rules for determining responsibility and the consequences and remedies that follow include both tortious wrongs and breaches of agreement.

In contrast, the Sohn and Baxter Harvard Draft conceptually begins with the wrongful act or omission causing injury to aliens and then spells out when it is attributable to the State as part of an integrated doctrinal presentation.⁶² This concrete and specific approach, following Garcia-Amador's initial attempt at codification⁶³ (six sections on attribution) which was rejected by the ILC, emphasizes the harm wrongfully done to individuals or persons by States rather than focusing first on the abstract possibility of attributing conduct to

59. RESTATEMENT (THIRD), *supra* note 41, at § 207. Section 207 states:

A state is responsible for any violation of its obligations under international law resulting from action or inaction by

- (a) the government of the state,
- (b) the government or authorities of any political subdivision of the state, or
- (c) any organ, agency, official, employee, or other agent of a government or of any political sub-division, acting within the scope of authority or under color of such authority.

Comment c explains that, "[i]n general, a state is responsible under international law only for official acts, or for official inaction where there was a duty to act." *Id.*

60. *Id.* at § 206.

61. 1980 ILC Draft Articles, *supra* note 45, at 31 (Chapter II, "The 'Act of the State' Under International Law" is separate from Chapter III, "Breach of an International Obligation").

62. Harvard Draft, *supra* note 47, at 247-60 (article 15 (Circumstances of Attribution); article 16 (Persons and Agencies through Which a State Acts); article 17 (Levels of Government); and article 18 (Activities of Revolutionaries)).

63. *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens—Reparation of the Injury*, [1961] 2 Y.B. INT'L L. COMM'N 1, 46-47, U.N. Doc. A/CN.4/SER.A/1961/Add.1 (addendum, revised draft, articles 3-8).

States as collective persons.⁶⁴ It would not include breaches of agreement.

The commentary to the ILC draft article 3 explains in circular logic why Special Rapporteur Ago addresses first the formal possibility of defining the acts of States as subjects before defining the objective element of obligation. "[I]t is necessary to determine whether State conduct exists," he states axiomatically, "before it can be determined whether or not it constitutes a breach of an international obligation."⁶⁵ Whether an omission is attributable conduct, however, depends upon an international obligation by agreement or custom requiring action in the circumstances. The substantive basis for obligation (whether fault, risk, well-being or the general security) thus inescapably becomes the prior question for attributing omissions. Showing an omission in the face of duty then becomes a highly subjective problem, quite belying Ago's objective theory, of proving intent approaching malice in the neglect of duty. The formal separation of the concept of State conduct from that of obligation thus anatomizes international wrongs into pure abstractions that do not implement explicit community policy as much as support those who have taken control of the apparatus of the State.

B. Doctrinal Development

So international responsibility depends largely upon political factors of organization of power within a State and a duty of effective control over it.⁶⁶ Traditional State responsibility doctrine, growing from the protection of aliens, often considered the failure of duty as part of the question of denial of justice, that is whether a State had provided adequate protection or, in case of a crime against an alien, had failed in the duty to apprehend or punish the perpetrators.⁶⁷

64. Harvard Draft, *supra* note 47, at 179-240. Articles 5 (Arrest and Detention), 6 (Denial of Access to a Tribunal or an Administrative Agency), 7 (Denial of a Fair Hearing), 8 (Adverse Decisions and Judgments), 9 (Destruction of and Damage to Property), 10 (Taking and Deprivation of Use or Enjoyment of Property), 11 (Deprivation of Means of Livelihood), 12 (Violation, Modification, or Annulment of Contract or Concession), and 13 (Lack of Due Diligence in Protecting Aliens) of the Draft all describe, in great detail, acts which constitute an international wrong before the Draft addresses, in articles 15-18 (*supra* note 47), whether these wrongs are attributable to the State.

65. *Report of the International Law Commission to the General Assembly*, [1973] 2 Y.B. INT'L L. COMM'N 161, 173, 179-84, U.N. Doc. A/CN.4/SER.A/1973/Add.1 (Draft Articles on State Responsibility, commentary on article 3) [hereinafter 1973 ILC Draft Articles]. The logic of priority begs the question of which omissions should be attributed, because an omission is conduct only in relation to substantive obligation. Christenson, *supra* note 3, at 325-26.

66. C. DE VISSCHER, *supra* note 30, at 285.

67. *Neer Claim (U.S. v. Mex.)*, 4 R. Int'l. Arb. Awards 60 (1926); A. FREEMAN, *supra* note 33, at 8-21.

When mobs attacked foreigners, any conduct attributed to the State short of actually directing the mob attack is an omission of State arising from the particular circumstances. Traditionally, this omission involves failure of the duty to take reasonable steps to protect the lives and property of foreigners or to apprehend and punish offenders.⁶⁸ Injury from the omission becomes that of the injured alien's State.

An autonomous sovereign State, however, cannot be held responsible as a legal person for injuries by non-State actors unless its internal processes do not meet international standards for protection or, except where there is a breakdown of process due to civil strife, the State fails to control a mob or militants.⁶⁹ The State acts by an omission if the organized apparatus of the State as a whole fails in this minimum expectation owed to all other States. The fiction of attributing State action when the internal process fails to meet civilized standards yields a claim when nationals of another State (or even its own) suffer injury and are denied justice after exhausting remedies.⁷⁰ Some commentators suggest outright that an omission should be judged by a subjective standard of willful neglect, or fault, rather than an objective standard of inaction.⁷¹ When the injured State seeks to engage the responsibility of the State that wrongfully acts by omission, any ensuing responsibility is satisfied by reparations or other settlement of the international claim.⁷²

This doctrine of responsibility for injury to aliens and its assumptions encounters considerable difficulty in contemporary State practice, particularly after World War II. According to its most severe critics, not only does the doctrine embody imperialistic tendencies of a Eurocentric view of international law, but it shows little respect for new and developing nations which use the standard that aliens should receive treatment equal to that of nationals and no more.⁷³ To these critics, it seems hypocritical for a poor nation to be held responsible

68. *Youmans Claim (U.S. v. Mex.)*, 4 R. Int'l Arb. Awards 110 (1926); R. LILICH, *supra* note 29, at 8-21.

69. *See Neer Claim*, 4 R. Int'l Arb. Awards at 62 (separate opinion of Commissioner Nielson).

70. *See generally* Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS, *supra* note 3, at 1.

71. *Supra* notes 4 & 22; *infra* note 221. *See Caire Claim (Fr. v. Mex.)*, 5 R. Int'l Arb. Awards 516 (1929).

72. I. BROWNIE, *supra* note 4, at 199-200.

73. *See generally*, Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961). *See also* R. ANAND, *NEW STATES AND INTERNATIONAL LAW* 39-43 (1972); Falk, *The New States and International Legal Order*, 118 RECUEIL DES COURS 1, 94-96 (1966-II).

for treating foreign corporations and aliens better than its own when it could not have any claim against the nations whose enterprises were seen to exploit its people and resources.⁷⁴ Under human rights doctrine, all nations would be held to the same standard,⁷⁵ and the need for special protection of aliens would diminish. The emphasis of the codifications reflects this shift, to the chagrin of some scholars who lament a decline in effective international standards for human rights including foreign minorities such as migrant workers and displaced persons.⁷⁶

International responsibility for omissions, in its broadest contemporary setting, began with the decision of the International Court of Justice in the *Corfu Channel Case* in 1949.⁷⁷ The Court held that Albania was internationally responsible to the United Kingdom for failure to take all necessary steps to warn approaching ships of the danger of mines some unknown actor placed near sealanes in Albanian territorial waters. The omission was wrongful conduct, the Court concluded, and Albania was responsible for the explosions and loss of life and damage that resulted from the failure to maintain a monitoring system and to send warnings.⁷⁸ The Court inferred that Albania knew of the minefields from indirect evidence of Albania's close surveillance over the straits.⁷⁹ The Court here addressed an important burden of proof. The mere fact of control over territory does not mean that a State necessarily knew or ought to have known of an unlawful act perpetrated within that territory or the identity of the parties involved. Without more, that fact of control does not imply *prima facie* responsibility or shift the burden of proof to the respondent State.

Exclusive territorial control often means, however, that the claimant State might not be able to furnish direct proof of facts concealed by the State in control. The element of exclusive control by Albania in the circumstances, the Court concluded, does allow wider recourse to inferences of fact and circumstantial evidence.⁸⁰ The Court drew such an inference of Albania's likely knowledge of the existence of the

74. Christenson, *supra* note 3, at 329.

75. Garcia-Amador's draft codification sought to achieve this result. See *supra* note 63.

76. Professor Lillich, for example, points out that apart from property claims, the rules for protecting aliens have not received any criticism. Lillich, *supra* note 70, at 7-16. See also R. LILLICH, *supra* note 29, at 119-24.

77. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment on Merits of Apr. 4).

78. *Id.* at 22-23.

79. *Id.* at 18.

80. Brownlie finds that there is no general burden on a claimant to prove attribution of an omission, and that "no general presumption against attributability exists." I. BROWNIE, *supra* note 4, at 164-65.

mines from circumstantial evidence of its probable surveillance activities. This inference of knowledge led directly to the obligation to notify approaching ships of the danger, the failure of which was attributed as an omission of Albania engaging its international responsibility to the United Kingdom. This case broadened the obligation on States to assume affirmative community-wide responsibilities in relation to other States. It generously expanded inferences that might be drawn from the fact of control. This attribution of an omission of State was inseparable from the factual context and a State's obligation as a member of a society.

Following this decision and with the expansion of States in the United Nations system after World War II, the International Law Commission sought a comprehensive codification of the jurisprudence of responsibility of States for all wrongs against each other, both collectively and against individuals protected by international law.⁸¹ The *Corfu Channel Case* figured prominently in the comprehensive approach toward contemporary State responsibility. In the influential reports by Roberto Ago, as explained above, the question of what conduct may be attributed to the State became separated from the factual context giving rise to duty to individuals or States. This formal doctrinal separation has had a more pervasive effect upon attributing omissions than it has upon attributing official actions.

Severing the act of a State from obligations derived from primary rules and isolating it within a secondary rule system defining conduct and breach of international obligation spell conceptual trouble in defining an omission as State conduct. These secondary rules express a theory of various possibilities of subjective conduct by which a State exercises its volition, thus defining what acts or omissions might possibly be "willed" by the State. This subjective conduct then might encounter any number of possible substantive and objective norms of international law, the primary substantive rules defining obligation.⁸² These primary obligations include both customary international law and international agreements. If those in control of the State, for example, simply remain supine in face of private threats and violence

81. The ILC rejected a first attempt by Garcia-Amador to codify State responsibility for the protection of aliens and appointed then Professor Roberto Ago as rapporteur to prepare a comprehensive report and draft articles on the general law of State responsibility. R. LILlich, *supra* note 29, at 49-50.

82. See Combacau & Alland, "Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations, 16 NETH. Y.B. INT'L L. 81 (1985). This division should not be confused with H.L.A. Hart's primary rules of obligation and secondary rules of recognition. The distinctions are clarified in Christenson, *supra* note 3, at 324-25 nn.23 & 27, and Goldie, *State Responsibility and the Expropriation of Property*, 12 INT'L LAW. 63, 75-77 (1978).

against a racial or national minority, the omission is State conduct which breaches the primary rules of obligation of the State to take reasonable steps to prevent private racial violence under international law. The legal result would be to engage the international responsibility of that State through an omission of State. An entirely new legal relationship follows from such "responsibility": another set of rules defining a full range of legal consequences such as sanctions or remedies including counter-measures, reparations, a claim to peaceful settlement and satisfaction by apology.⁸³ The remedial side theoretically would apply both to a delict and a treaty breach.⁸⁴ This comprehensive approach differs entirely from the more skeptical case-at-a-time jurisprudential approach often referred to as the Anglo-American method of international settlement of disputes in contrast to the Continental approach.⁸⁵

Ago's work on State responsibility thus transformed earlier experience into a European-dominated codification in the Roman law tradition, powerfully influenced by a Kantian and Kelsenian set of *a priori* assumptions.⁸⁶ The jurisprudential consequence is to increase the collective power of a national polity over individuals and corporations internal to it, in relation to other national polities, to meet international obligations among States.⁸⁷ It reduced the protection afforded "aliens" under previous norms of customary international law in part

83. See 1973 ILC Draft Articles, *supra* note 65, at 179-84 (Roberto Ago's commentary to article 3, where he sets out his organization for the comprehensive codification of state responsibility). See also Alland, *International Responsibility and Sanctions: Self-Defense and Counter-measures in the ILC Codification of Rules Governing International Responsibility*, in UNITED NATIONS CODIFICATIONS OF STATE RESPONSIBILITY 143 (M. Spinedi & B. Simma eds. 1987).

84. Mazzeschi, *Termination and Suspension of Treaties for Breach in the ILC Works on State Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY, *supra* note 83, at 57.

85. Writers in the Anglo-American tradition such as Brownlie, Goldie and Lillich have been highly critical of the abstractness and usefulness of the ILC codification. I. BROWNIE, *supra* note 4, at 164; Lillich, *supra* note 70, at 20-21, 47 nn.170 & 171, 48-49 nn.176 & 177; Goldie, *supra* note 82, at 65, 80; McDougal, Lasswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432 (1976).

86. See Alland, *supra* note 83, at 171-72. See also Riphagen, *State Responsibility: New Theories of Obligation in Interstate Relations*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 581 (R. MacDonald & D. Johnston eds. 1983).

87. An example is the *Barcelona Traction Case* which placed the organizing principle of State injury on the State of incorporation of the injured foreign corporation and not on the State of the minority shareholders. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Judgment on Merits of Feb. 5). As Judge Jessup pointed out in his Separate Opinion, speaking of an injured corporation "is really a bit of anthropomorphism since, as Sir Edward Coke remarked, corporations 'have no souls'. . . and as stated by more recent jurists, the corporation 'is not a thing. It is a method.' . . . That corporations have a nationality is a legal fiction." *Id.* at 195 (citations omitted).

by restructuring attribution doctrine and making diplomatic protection of aliens into a substantive or primary norm not the subject of codification. This approach handled the problem of conflict between the national treatment standard and the minimum standard for treatment of aliens in international law by recognizing the primary norms of human rights that national enforcement would provide for citizens and foreigners alike.⁸⁸ If a State failed in this obligation, responsibility could arise either under customary international law of protection of aliens or under the newer human rights norms.⁸⁹

By separating attribution doctrine from those obligations when omissions are at issue, the codification allows important attribution decisions to be decided separately from the factual context of duty to States or individuals.⁹⁰ This separation strengthens the tendency to convert attribution into an element of responsibility to be proved.⁹¹ It also converts into a preliminary question of proof the direct connection or linkage between omissions of particular State officials and the claimed injury.⁹²

IV. THE WORLD COURT REFINES THE DUTY TO ACT OR CONTROL

The International Court of Justice ("ICJ") relied more upon the work of the International Law Commission than upon its own principles for attributing omissions laid down in the *Corfu Channel Case*

88. See R. LILICH, *supra* note 29, at 48-56.

89. See T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 157-60 (1989) (disagreeing with Restatement (Third) that *ultra vires* violations of human rights norms by officials are attributed to the State for harm to aliens, but not for injury to the State's own nationals under customary international law); see RESTATEMENT (THIRD), *supra* note 41, at § 702 comment b & Reporters' note 2. The Restatement is silent about attributing omissions of State for failure of duty under customary international law in regard to human rights violations of its own citizens. Presumably, where a clear duty is found in an international agreement, as in recent decisions by the Inter-American Court of Human Rights (*infra* notes 151-54 and accompanying text) an official failure of duty would be attributed to the State under international law, according to the Restatement, for violations of the human rights of its own citizens. See RESTATEMENT (THIRD), *supra* note 41, at § 207(c) comment d & Reporters' note 4, § 711(a) comments a-c.

90. Thus the substantive rules of primary obligation for State responsibility for omissions causing injuries to aliens might differ in the effects of attribution from human rights violations of citizens, mainly because the duty arising from the primary obligation is the measure for attributing an omission to the State. The Restatement (Third) suggests that the source for affirmative duty when it involves a State's own citizens requires a treaty since customary international law does not find adequate support in State practice. RESTATEMENT (THIRD), *supra* note 41, at § 711 comments a-c, e, & Reporters' note 2.

91. See an example of this tendency in the study on contributory fault developed by the Iran-United States Claims Tribunal. Bederman, *Contributory Fault and State Responsibility*, 30 VA. J. INT'L L. 335 (1990).

92. Brownlie strongly disagrees with any attempt to convert "attribution" into an element of a claim or a preliminary matter of proof. See *supra* note 80.

when it applied attribution doctrine in the *Hostages Case*⁹³ and the *Nicaragua Case*.⁹⁴ The first case dealt with whether either acts of militants in taking hostages or inaction in the face of duty could be attributed to the Revolutionary Government of Iran. The second case attributed certain acts of covert operations to the United States while acts of the *Contra* insurgency itself were not so attributed. Both decisions dealt with the failure of duty or control by governments. The first case considered briefly a duty to protect the embassy and diplomatic personnel in State territory and the alleged duty to control militants before their attack. The second case considered the control over sponsored insurgents in another country insufficient to attribute conduct that violated obligations of non-intervention under international law.

A. *Hostages Case*

The first World Court case to use the ILC draft codification in supporting a decision of an attribution issue was the *Hostages Case* brought by the United States against Iran.⁹⁵ The application sought to secure release of hostages taken by militants in the American Embassy during the chaotic days following the revolution in Iran. The U.S. decision to permit the deposed Shah to enter the United States for medical treatment was a key triggering event. The Court recognized the acts of the militants in seizing the Embassy and in taking hostages as conduct of the State of Iran but only after the initial non-State conduct was ratified by the new government and made its own.⁹⁶

The Revolutionary Government's failure to protect the Embassy, the diplomats and staff from the first attacks of the militants was an omission of State, according to the decision, although the Court's decision gave much greater emphasis to the phase after governmental ratification of the seizure.⁹⁷ It did not attribute the failure of any duty to

93. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29-30 (Judgment on Merits of May 24) [hereinafter *Hostages Case*].

94. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 62-65 (Judgment on Merits of June 27) [hereinafter *Nicaragua Case*].

95. Although the *Barcelona Traction Case* developed the concept of responsibility *erga omnes*, later used by the ILC, the attribution articles in part 1, chapter II of the Draft Articles on State Responsibility (articles 5 through 15) had not yet been accepted on first reading by the Commission. 1980 ILC Draft Articles, *supra* note 45, at 30, 31-32.

96. *Hostages Case*, 1980 I.C.J. at 29-33.

97. *Id.* at 32. The Court stated that "[T]his inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of . . . the 1961 Vienna Convention on Diplomatic Relations. . . ." *Id.* The Court had earlier distinguished the non-attribution to Iran of the initiation of the attacks by the militants on the Embassy and Consulates from Iran's own responsibility not to remain supine in the face of "the most categorical obligations, as a receiving State, to take appropriate steps to ensure the

protect the non-diplomatic or Embassy-related foreigners involved. Initially, the Court decided, the acts of an armed band of militant students were not acts of the State.⁹⁸ The later approval and adoption by the Ayatollah and government agencies of the militants' harmful acts and the continuation of the militants' policies of seeking the return of the Shah made the militants de facto agents of the State under principles codified in article 8 of the ILC draft codification.⁹⁹ Failure to intervene to end the wrong after it occurred also was State inaction by Iran because there was now an even clearer wrong and affirmative duty to take steps to end the seizure by taking control and acting.¹⁰⁰ These "repeated and multiple breaches of the applicable provisions of the Vienna Conventions [were] even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff."¹⁰¹ The Court, however, did not rest its holding and orders directly upon the failure to protect the Embassy and its occupants under international obligations extant before the occupation, despite its language indicating that the omission of State itself violated these obligations.¹⁰²

The ICJ addressed a completely different attribution question when it rejected the American argument that the Ayatollah's exhortations to his supporters to "expand with all their might" attacks against the United States and Israel constituted an authorization by the Iranian government to perform the specific act of invading and seizing the American Embassy. The Court held that official approval subsequent to the event did not change the independent nature of the militants' initial seizure of the embassy.¹⁰³ The Court, however, did establish that once the Embassy had been seized, the Iranian Govern-

protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs." *Id.* at 29-30.

98. *Id.* at 29-30.

99. *Id.* at 33-35. The Court of Justice stated:

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. . . .

Id. at 35.

Brownlie classifies such responsibility as that based upon "approval and adoption of harmful acts," the main attribution holding of the Court. I. BROWNLIE, *supra* note 4, at 157-58.

100. *Hostages Case*, 1980 I.C.J. at 36.

101. *Id.* at 36.

102. *Id.*

103. *Id.* at 35-36.

ment had a duty to make every attempt to bring the hostage situation to a quick conclusion. The Ayatollah breached this duty by endorsing the militants' conduct; not only did the Ayatollah refuse to order the militants to end their embassy occupation, he forbade any government officials from meeting the U.S. officials sent to Iran to negotiate the release of the hostages.¹⁰⁴

As the case makes clear, there are two distinct legal concepts at work. The first concept examines the nature of official action making the non-governmental conduct the State's own. There were two parts to this inquiry. One part questions whether the initial acts were de facto sponsored and the other part questions the point at which non-State acts were transformed into State action. The second legal concept deals with omission of the State, the failure of the State's controlling elites to act to perform a duty required under international law to protect the Embassy and personnel from attack. The Court found a duty to protect in treaty provisions, but this duty prior to governmental ratification of the actions of the militants was not the main emphasis of the opinion. Even less important was the customary international law of State responsibility by which a State owes a duty of reasonable care to protect foreigners from private violence and to exercise due diligence to apprehend and punish persons committing such acts. Failure of this customary duty is conduct attributable to the State,¹⁰⁵ but the Court did not reach it, preferring to ground duty in international agreements protecting embassies, consulates and their personnel. Prior to the time the Revolutionary Government approved and adopted the action and policy of the militants, which transformed the non-governmental conduct to that of the State, the new government's failure to protect the Embassy and the diplomatic personnel as well as aliens surely in circumstances of conscious neglect would have been an omission of State attributable to Iran under customary international law and practice, even if no treaty obligations existed. The Court did not place much emphasis on customary law in creating that duty.

The conclusion that inaction amounts to an attributable omission

104. *Id.*

105. See generally I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 445-47 (3d ed. 1979) ("[A] failure to take the appropriate steps to punish the culprits will . . . give rise to [State] responsibility."); B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 218-32 (1987); H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 200 (R. Tucker 2d ed. 1966) ("Under general international law the state is obliged to employ due diligence to prevent [harm to aliens], and, if it is not possible to prevent [this harm], to punish the delinquents . . ."). See also Tanzi, *Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?* in *UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY*, *supra* note 83, at 1, 3.

of State when international law clearly imposes an affirmative obligation¹⁰⁶ should mean that there is no need for vicarious responsibility, no need for any worry about "indirect" attribution and no need for the fiction of transformation of the acts of the militants into those of the State. Official inaction would entail a policy choice in deliberately refusing an affirmative duty. Unless excused, the conduct would be as directly attributable to the State as when a State approves and makes the non-government action its own. The Court, however, resists attributing conduct from such inaction without the clearest duty and the clearest involvement of government. This reluctance loosens the expectation that government will control non-governmental actors and mirrors a subtle rearrangement of power within a State's system.

Since the Court did require Iran affirmatively to protect the Embassy after the militants' acts became those of Iran,¹⁰⁷ the only conduct of omission actually attributed to Iran as a result was tied narrowly and closely to its continuing failure to act after it wrongfully made the policies of the militants its own. The practical consequence of this point becomes more apparent in the later decisions of the Iran-United States Claims Tribunal which refused to extend the liberal evidentiary principles of the *Corfu Channel Case* to inferences of omissions in protecting private Americans from hostile Iranians that otherwise might have been attributed to Iran. In effect, at least in cases involving the protection of aliens from the excess fervor of a successful revolution, the burden of attributing omissions to the State through liberal inferences from evidence has become a presumption against attribution for such failures. This presumption against attributing omissions of State can be overcome only by meeting an exacting special burden of proof, precisely the opposite of Brownlie's conclusions about where the attribution burden lay.¹⁰⁸

B. *Nicaragua Case*

Nicaragua brought the second recent World Court case that addressed the attribution of omissions or failure to control. The case involved the United States' responsibility for the Contras' insurgency in Nicaragua as well as for the mining of a harbor and other acts of intervention including the distribution of a guerilla manual. The

106. The Court, in both the *Hostages Case* and *Nicaragua Case*, took note of treaties which it could have used to establish such a duty. See Treaty on Friendship, Commerce, and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024; Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853.

107. *Hostages Case*, 1980 I.C.J. at 30-33.

108. I. BROWNIE, *supra* note 4, at 164-65.

Court held non-attributable to the United States the acts of the Contras during their insurgency in Nicaragua, though supported by military and other assistance from the United States.¹⁰⁹ The opinion found that Nicaragua did not present sufficient evidence that the United States controlled the specific military operations of the insurgency.¹¹⁰ The Court also found insufficient evidence of U.S. involvement in the financing and tactical and strategic planning of Contra attacks. Even if the United States "generally controlled" the Contras and the Contras were "highly dependent" on the United States, this fact in itself would not mean that Contra acts were attributable to the United States, according to the decision.¹¹¹ In order for Contra conduct to be attributable, the U.S. government would have had to possess effective control of the Contras at the time the disputed activities occurred and to direct the particular actions.¹¹²

The CIA-directed mining of Nicaraguan harbors and attacks on ports and oil installations, on the other hand, as well as the preparation and distribution of a guerilla manual were acts of agents completely controlled by the U.S. government and thus attributable to it.¹¹³ These were independent acts of the United States under principles of customary international law contained in ILC draft article 11(2).¹¹⁴ Acts of the Contras using the instructions in the CIA manual on psychological guerilla warfare encouraging the commission of unlawful acts were not attributable to the United States, since the evidence did not show sufficient control and authorization of the non-State group as required under ILC draft article 8.¹¹⁵ The acts, therefore, were those of non-State persons not acting on behalf of the United States, under ILC draft article 11(1).¹¹⁶ The Court did not address (although Judge Ago in concurrence suggested the analysis) whether the United States might have acted by failing in its affirmative obligation to keep control over conduct of the Contras.¹¹⁷ Such an

109. *Nicaragua Case*, 1986 I.C.J. 14, 65 (Judgment on Merits of June 27).

110. *Id.*

111. *Id.* at 64-65.

112. *Id.*

113. *Id.* at 48-51, 65.

114. 1980 ILC Draft Articles, *supra* note 45, at 31. Article 11(2) acknowledges that a State can be responsible for the actions of persons who are not officially part of a governmental organ. In this particular instance, article 11(2) resolves any potential inconsistency between article 11(1) and article 8.

115. *Id.*; see also *Nicaragua Case*, 1986 I.C.J. at 68, 148.

116. 1980 ILC Draft Articles, *supra* note 45, at 31.

117. *Nicaragua Case*, 1986 I.C.J. at 190 (Ago, J., separate opinion).

analysis is surely a conceit, for evidentiary inferences about United States' intentions and its effective control easily were available.

C. *Appraisal: The Archaeology of Power*

These two cases suggest a shift in attribution doctrine underway within the International Court of Justice, especially a retreat from the humanitarian principles of responsibility based upon liberal inferences from inaction of those in exclusive control, as set out in the *Corfu Channel Case*.¹¹⁸ In each of the two more recent attribution cases, the noticeable development is the Court's greater reluctance to attribute conduct from failure of duty to protect or control. State responsibility means that conduct must flow from the exercise of power by the active will of those in control of the State, causing harm in breach of an international obligation through a close linkage of volition and injury. In a rhetorical sense, the decisions simply reaffirmed long standing custom and practice.¹¹⁹ In another sense, by its reluctance to rely upon inference and rebuttable presumptions to find volitional acts of State power from inaction by State leaders, the Court increases its toleration for tacit exercise of State power by non-State actors, absent the most explicit duty or connection.¹²⁰

Ironically, a similar, more exacting standard for attributing omissions as State conduct has been adopted by the U.S. Supreme Court, thus moving in a direction opposite from that of the European com-

118. See *supra* notes 76-79 and accompanying text. In the *Corfu Channel Case*, even though Britain could not present direct evidence that the Albanians actually knew about the mines to give adequate warnings, the Court allowed liberal indirect evidence to create inferences of knowledge from which a duty to notify arose. The omission in the face of such knowledge and duty was attributable to Albania. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 21-22 (Judgment on Merits of Apr. 9). Judge Alvarez, in his concurrence, proposed six guidelines for future courts to consider when attempting to assess responsibility for omissions. Collectively, these guidelines would impose a duty on States to eliminate or contain any prejudicial or criminal acts, and maintain a vigil against any danger to the rights of any alien. *Id.* at 44-46 (Alvarez, J., concurring). Brownlie analyzed this kind of responsibility as deriving from the "provenance of harm and the failure to exercise proper control." I. BROWNIE, *supra* note 4, at 153. The Honduran disappearance cases have refined and applied this concept, but trends of recent decisions involving aliens apply a much stricter standard for attributing conduct to the State for an omission.

119. In the *Hostages Case*, although the Court does attribute omissions to Iran, the court does not attribute full responsibility to Iran until the government approved and adopted the policies and acts or omissions of non-State actors. *Hostages Case*, 1980 I.C.J. 3, 42 (Judgment on Merits of May 24) ("[F]ailure on the part of the Iranian authorities to oppose the armed attack by militants . . . [and] the almost immediate endorsement by those authorities of the situation thus created," constitute acts which are attributable to Iran).

120. Some scholars argue that the practice of requiring an act of the State, rather than stressing the State's duty to hold to stricter account private actions violating human rights, should be clarified to enforce international obligations upon private persons. See T. MERON, *supra* note 89, at 162-71.

munity.¹²¹ In a narrow construction of conduct attributable as "state action" under the Fourteenth Amendment to the Constitution, the Supreme Court denied that a State acts by inaction for the purpose of determining a constitutional wrong, unless there is a clear affirmative duty by State law or through a special relationship between the State and the plaintiff.¹²² The Restatement expresses a similar concept for attributing official inaction only in the face of a duty.¹²³

The shift loosens the reins international law requires for controlling internal conduct and erodes the distinction between public and private or non-governmental conduct. It invites a State to exercise insidious control over private or non-governmental actors by subtle indirection. At the same time, it may mirror a diminution of actual power in a central government and invite non-State actors to assert control without international public responsibility.

Communitarians and post-Marxists have long sought to obliterate the distinction between the public and the private spheres, in part at

121. See Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 873 (1990).

122. *DeShaney v. Winnebago County Dept. Social Services*, 489 U.S. 189, 195 (1989). Chief Justice Rehnquist for the majority explains as mistaken the notion that a state has an implicit constitutional duty to care for a child and that failure of the social services agency to intervene to prevent child abuse by a custodial parent, even with notice of its likelihood, imposes any liability under 42 U.S.C. § 1983. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* Without an explicit statutory or common law duty to protect the person, the state has no responsibility for a constitutional wrong. Explicit duties could arise also because a person has a special relationship with the state, such as incarceration, commitment in a state hospital or child custody under state law. Justice Brennan's dissent reasoned from the same premises as found in international jurisprudence, that "inaction can be every bit as abusive of power as action. . . ." *Id.* at 212.

Professor Shelton suggests that if the United States "were ever to deteriorate into the kind of political violence that terrorizes many countries throughout the world with disappearances, summary executions, and torture, the government would be immune from responsibility unless the private conduct" received the imprimatur of the State. Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1, 30 (1989-1990). Her point shows the conceptual similarity between the approval and adoption reasoning behind the actual holding in the *Hostages Case* and the reluctance of the Supreme Court to attribute omissions to the State. Would the constitutional or international responsibility for omissions be any different were the United States to ratify the American Convention on Human Rights that contains affirmative obligations? As Shelton speculates further, might an alien receive greater protection under customary international law of State responsibility for a government's failure to protect in the face of duty than American citizens? *Id.* at 33. This conclusion seems doubtful in the light of trends and burdens of proof analyzed in the present article for attributing omissions to States. See also Christenson, *supra* note 3, at 341.

Professor Strossen compares this denial of affirmative duty to the quite different European experience, noting that affirmative duties in protecting human rights are recognized as such in decisions by both the Court of Justice of the European Communities and the European Court of Human Rights. Failure in meeting duties implied from the Rome Treaty and from the European Convention on Human Rights are considered omissions attributed to a State, for which responsibility attaches under the treaties, a trend markedly opposite to that of the U.S. Supreme Court. Strossen, *supra* note 121, at 846-49, 873.

123. RESTATEMENT (THIRD), *supra* note 41, at § 207 comment c.

least to rein in private violence and class exploitation. They seek to demystify the artifacts of legal myth protecting the powerful and dominant private spheres of money and power sustained under an "objective" and "formal" legal system.¹²⁴ The doctrine of attribution for omissions under international law points out the dilemmas in this ideological critique of the rule of law in liberal thought. Which sphere will swallow the other through legal technology such as technical shifts of burdens of proof and presumptions? Which sphere of power benefits most from the application of intentionality or volition (fault) required if an omission is attributed fictionally to the legal personality of a State? On the one hand, boundaries are realigned in favor of non-State power by more exacting scrutiny over duties upon governments and their inaction. On the other, power of those who keep control by tacitly relying upon non-State actors might be increased even more. Interestingly, the perceived reluctance (or inability) by the international community to supervise these instruments of control becomes what Michel Foucault describes as part of a larger archeology of power, a complex merger of the public and the private from within.¹²⁵

The boundary question itself becomes meaningless, for non-State power (economic, religious, social) arranges itself, accomodates itself to the loose reins and forms tacit reciprocal relationships not unlike

124. For an excellent review of the issues and literature, see LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM? (A. Hutchinson & L. Green eds. 1989) (containing papers and articles of thoughtful scholars appraising contemporary critical theory about rival traditions such as communitarianism, classical liberalism and the public and private spheres).

125. See Foucault, *Afterword: The Subject and Power* to H. DREYFUS & P. RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208 (2d ed. 1983). We study power to imagine "what we could be to get rid of this kind of 'double bind,' which is the simultaneous individuation and totalization of modern power structures." The major problem "is not to try to liberate the individual from the state, and from the state's institutions, but to liberate us both from the state and from the type of individualization which is linked to the state. We have to promote new forms of subjectivity through the refusal of this kind of individuality which has been imposed on us for several centuries." *Id.* at 216.

For Foucault, the exercise of power "is a total structure of actions brought to bear upon possible actions; it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely; it is nevertheless always a way of acting upon an acting subject or acting subjects by virtue of their acting or being capable of action. A set of actions upon other actions." *Id.* at 220. Foucault views power as government in the broad meaning it had in the sixteenth century, not just political structures or management of States, but "the way in which the conduct of individuals or of groups might be directed: the government of children, of souls, of communities, of families, of the sick. . . . To govern, in this sense, is to structure the possible field of action of others." *Id.* at 221. In this sense of government, power relations have been progressively "elaborated, rationalized, and centralized in the form of, or under the auspices of, state institutions." *Id.* at 224. As in the radical critique of liberalism, action or inaction in the private sphere has connection in institutions controlled by the State through alternating State omissions or actions. These are strategies of struggle perpetually confronting and keeping a relationship of domination and resistance "in a massive and universalizing form, at the level of the whole social body." *Id.* at 226. See Turkel, *Michel Foucault: Law, Power, and Knowledge*, 17 J. L. & Soc'y 170 (1990).

feudal arrangements with those ostensibly controlling the State. One of the founders of the Frankfurt School, Walter Benjamin, saw clearly by metaphor and experience the modern world's destruction of privacy, the tendency to break down the barriers between the public and the private spheres. To illustrate, he used the experience of seeing "bull's-eye windows in the closets" in Germany. One cannot hide in closets.¹²⁶ The symbol of this arrangement seen through technical attribution doctrine is the problem of omissions of those in control of the State in the face of expectation (or duty). To be freer from the expectation of action for some end of the larger community reduces responsibility upon public officials and leads to pluralistic bargains among all with power.

Eliminating boundaries thus does not necessarily favor human freedom or dignity; nor does it hold actual power responsible in times of emergency. My argument pushes such a contradiction into attribution doctrine to show that the dialectic tension introduced in State responsibility between the public and private spheres favors resolution not through eliminating the boundaries between the spheres, but in keeping them in order to hide actual power and effective control of the apparatus of State within the private sphere partly through the device of non-attribution of an omission or the deniability of the wink and the nod. Similarly, power escapes attribution in the avoidance of intermediate responsibility where a parastatal or other subordinate entity has more power, *de facto*, than the central organs of State. Classic liberalism in State responsibility thus is transformed into a tool for those in effective control of the State to use to maintain power "without attribution" so to speak.¹²⁷

Moreover, if State organs themselves are in fact controlled by parastatals, non-governmental power centers such as solidarity, religious or enterprise elites, the principle codified in ILC draft article 8 provides a basis for attributing conduct through the test of *de facto* control.¹²⁸ Under the analysis of the International Court of Justice, non-

126. For a reconstruction of Benjamin's philosophy, see S. BUCK-MORSS, *THE DIALECTICS OF SEEING: WALTER BENJAMIN AND THE ARCADES PROJECT* (1989).

127. Professor Lobel, for example, describes the "struggle to revive the dichotomies of liberal thought . . . [as] contradictory." The separation of the public and private spheres confines totalitarian government to crisis periods, he argues. Weakening the boundaries by continual emergency crises thus increases the "grave danger of authoritarian rule." When we revive the dichotomies of liberal thought such as inspired by Gorbachev's restructuring (Yeltsin's liberal agenda seems more apt), we must also recognize that the "restriction of emergency powers ultimately requires the abandonment of the dualistic model." Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1433 (1989).

128. 1980 ILC Draft ILC Articles, *supra* note 45, at 31 (article 8). Article 8 reads:

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

governmental conduct similarly would be attributable to a State only if it in fact acts for or controls in place of government. Neither the militants in Iran nor the Contras in Nicaragua were found to have acted as government, for they were insufficiently shown to have been controlled by government and thus did not act in its place. Whom did they act for, then? Can it be maintained without cynicism that neither were part of the power apparatus controlled by or controlling the respondent States? Why should it not be enough that those in power could have acted but failed to take action to fulfill international obligations or expectations? Framed that way, the question whether volitional forbearance or inadequate control is independent conduct attributable to the State would depend only upon clear affirmative international obligation to act and adequate power to act. Otherwise, the clearest interpretation suggests that the State's system, whose law is administered at least in part by the International Court of Justice, reinforces tacit control by those in fact in power in the sense Foucault saw.¹²⁹

V. OTHER RECENT DECISIONS ON ATTRIBUTING OFFICIAL INACTION

A. *Wrongful Expulsion Cases of Iran-United States Claims Tribunal*

One observes a most notable reluctance to attribute omissions of State in certain decisions by Chambers of the Iran-United States Claims Tribunal. This important category of attribution cases asks whether allegedly coercive techniques of expulsion of Americans from Iran was conduct attributable to Iran for the purpose of determining responsibility under the terms of the Algiers Accords.¹³⁰ In general, the Tribunal has been very reluctant to attribute conduct to Iran for failure to control the threats against Americans from non-State actors without the clearest linkage of such acts to the revolutionary government.¹³¹

(a) it is established that such persons or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

129. See *supra* note 125. See also Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987) for the use of linguistic techniques of legal doctrine to sustain pervasive attitudes of power through professional subjectivities (as in non-attribution).

130. See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 81 DEP'T ST. BULL. 3 (Feb. 1981) [hereinafter Algiers Accords].

131. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. C.T.R. 92 (1987); William L. Pereira Assoc., Iran v. Islamic Republic of Iran, 5 Iran-U.S. C.T.R. 198 (1984). In both of these cases

In *Rankin v. Iran*,¹³² the Tribunal decided that, even though the general policy of the revolutionary Iranian government violated international obligations in the treatment of Americans, as expressed both in the treaty of amity and under customary international law, to hold Iran internationally responsible the claimants needed to show that the wrongful conduct could be attributed to Iran by identifying directives of specific agents of the revolutionary government expelling the Americans.¹³³ The Tribunal did not find evidence of such conduct attributable to Iran and did not reach the question of whether Iran was responsible to the claimant for the resulting loss of his property.¹³⁴

A different Chamber of the Tribunal had earlier applied similar reasoning over American Judge Brower's vigorous dissent. In *Short v. Iran*,¹³⁵ the fact that the claimant left Iran because violence and disorder accompanied the revolution did not make the new government responsible for the departure, according to the Tribunal. The new government, coming to power by revolution, is responsible for the wrongful acts of the successful revolutionaries who seized power.¹³⁶ In this case, however, the claimant had left Iran before the formal establishment of the new government. More important, he could not identify any acts of agents specifically imputable to the successful revolutionary faction nor rely on a general duty of the old regime to protect aliens from private violence during the revolution.¹³⁷ The new government might have been responsible for injuries suffered by the claimant as a result of his sudden departure from Iran, but only if the expulsion were linked to agents of the successful revolution before it became the government. The burden lay upon the claimant.

Iran was held responsible for the expulsion of the Americans because the claimants could present evidence of specific acts of the revolutionary government which led directly to the injuries alleged by the claimants. *But see* *Leach v. Islamic Republic of Iran*, Award No. 440-12183-1 (Oct. 6, 1989) (WESTLAW, INT-IRAN database); *Arthur Young & Co. v. Islamic Republic of Iran*, 17 Iran-U.S. C.T.R. 245 (1987); *Rankin v. Islamic Republic of Iran*, 17 Iran-U.S. C.T.R. 135 (1987); *Short v. Islamic Republic of Iran*, 16 Iran-U.S. C.T.R. 76 (1987); *Sea-Land Service, Inc. v. Islamic Republic of Iran*, 6 Iran-U.S. C.T.R. 149 (1984). In each of these last five cases, the claimant could not present evidence of specific acts of the revolutionary government, and the tribunal refused to attribute the causation of the injuries to Iran based solely on general allegations of misconduct on the part of Iranian citizens. The tribunal also refused to assign any affirmative duty to the Iranian Government to protect American citizens, even though the United States and Iran had signed a Treaty of Amity, Economic Relations and Consular Rights in 1955 which placed a duty on Iran to protect Americans in Iran. Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853.

132. *Rankin v. Islamic Republic of Iran*, 17 Iran-U.S. C.T.R. 135, 147-48, 151 (1987).

133. *Id.* at 147-48, 151.

134. *Id.* at 151-52.

135. *Short v. Islamic Republic of Iran*, 16 Iran-U.S. C.T.R. 76, 83-84 (1987).

136. *Id.* at 83-84.

137. *Id.* at 85.

In the *Yeager* case,¹³⁸ however, the Tribunal shifted the burden by creating a rebuttable presumption that the "Komitehs" or "Guards" were acting on behalf of the revolutionary government and thereby attributed those actions to Iran under principles codified in article 8 of the ILC draft articles.¹³⁹ The claimant met a strict initial burden showing that his departure was forced by specific members of the Revolutionary Guards after the new government formally took power. This narrow factual showing distinguished the claim from those forced expulsions occurring before the revolutionary movement became the government. The Tribunal held Iran responsible for conduct attributable after, but not necessarily before, the revolution.¹⁴⁰ Under customary international law codified in the ILC draft, wrongs attributable to a successful revolutionary movement also would become those of the State. While the *Short* case recognized this principle, the Tribunal viewed quite skeptically the evidentiary link between the movement and the conduct. It did not address whether a revolutionary movement itself has a duty to protect or whether a failure to protect is attributable as an omission of State of the revolutionary government if successful. The failure of either the movement or the government to control the non-State actors or the failure of duty by either to protect aliens from expulsion did not receive much serious attention.

In summary, the Tribunal required exacting proof of conduct attributable to the revolutionary government both before and after the revolution's success. Anti-American propaganda by the Ayatollah might have been attributed to Iran. However, the link between this conduct and the acts of non-State groups in leading to the expulsion of Americans would have to be established without any help from inferences leading to rebuttable presumptions, unless direct orders could be traced back to the leadership. Moreover, the Tribunal decided no cases on any clear affirmative duty to control mob action enflamed by propaganda against Americans. Thus, no conduct was attributed to Iran from its failure to protect, despite customary international law codified in the Ago draft, citing decisions of mixed claims tribunals under special settlement agreements. As evidence of custom, these decisions offer only limited utility in establishing a general affirmative duty on governments and insurgencies alike to protect outsiders from mobs. The particular context of the *compromis* would define such duties. The special context of the Algiers Accords and the political events leading to it also might have reflected a different standard of

138. *Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. C.T.R. 92, 94-95, 103 (1987).

139. *Id.* at 94-95, 103.

140. *Id.* at 105-07.

affirmative protection or duty for purposes of the settlement of claims. Careful scrutiny of the sources for affirmative duty and stringent proof dominate especially in the special context where customary affirmative duties simply were not invoked.

Ago's concurrence in the *Nicaragua Case* helps clarify the confusion surrounding attribution in the Tribunal's decisions. The concurrence shows clear disagreement with some Tribunal opinions in the attempted use of indirect attribution to suggest a kind of vicarious responsibility for acts of non-State actors. Ago is correct in rejecting that usage, in my view, for two reasons. First, that kind of analysis is inconsistent with the ILC's codified definition. Indirect attribution in the framework of the ILC Draft Articles is between States, where control of acts of one country is exercised through a third country. This usage is not a form of vicarious responsibility for acts of private mobs.¹⁴¹ Second, Ago's concurrence implies a rejection of the Tribunal's misuse in legal theory of what should be left to moral philosophy, namely the concept of intentionality, where results not intended directly from actions should have less culpability than those directly intended. As repeatedly seen, results from inaction very well may be intended.

A correct application of Ago's approach would be that the failure of a clear duty to control a directly inflamed mob should constitute direct conduct. There would be no need to reach either for a fiction of "indirect" or vicarious responsibility or for the "constructive expulsion" fiction cogently argued as the alternative by Judge Brower of the Tribunal in his dissent in the *Short* case. The better view would agree with Ago's objective theory of a linkage of harm to a failure of objective duty without any such fiction. Under this kind of analysis, the Tribunal, with some factual inferences drawn from the fact of the Ayatollah's control, should have concluded either that the State acted by omission in its failure of affirmative duty to prevent private coercion leading to expulsion under international law or that the non-State group acted under the effective control of the revolutionary leader. Neither conclusion would be an "indirect" attribution.¹⁴² Either could follow from the objective theory, eliminating a subjective morality whose use simply increases the difficulty of showing individual moral culpability and then transferring it to the State.

141. *Nicaragua Case*, 1986 I.C.J. 14, 188-89 (Judgment on Merits of June 27).

142. In *Short v. Iran*, after invoking the ILC Draft Articles, the Tribunal framed the preliminary issue as whether the "facts invoked by the Claimant as having caused his departure from Iran are attributable to Iran, either directly, or indirectly as a result of its deliberate policies, or whether they reveal a lack of due diligence in meeting Iran's international duties towards the Claimant." *Short v. Islamic Republic of Iran*, 16 Iran-U.S. C.T.R. 76, 83 (1987).

If Iran owed an affirmative duty under customary international law or the amity treaty to prevent non-State groups from driving Americans from Iran, a difficult duty to establish under the rigorous standard of the *Hostages Case*, Ago's analysis might very well have led to Brower's conclusion. Under the Ago approach, moreover, the constructive expulsion argument is probably an application of ILC draft article 8(a), that the non-State actors in fact or presumptively were acting on behalf of Iran.¹⁴³ Applying the objective theory, the ILC commentary states that the article encompasses two situations, both involving a real link between the State machinery and non-State actors. The first situation is where the State or State organ "instructs" the private persons to act. The second situation is where the State or State organ "prompts" private persons to act.¹⁴⁴

Does inciteful propaganda emanating from the Ayatollah sufficiently "prompt" the enflamed private Iranian citizens during the revolution to drive out the Americans? Here Ago's concurrence in the *Nicaragua Case* clarifies the difference between the State's independent acts and the acts of non-State groups. The concurrence criticizes the World Court opinion for sloppy reasoning in reaching the conclusion that the United States was not responsible for the acts of the *Contras*. He points out that the United States' action in producing a guerilla manual inciting insurgent action quite properly is attributable to the United States as such, independent of the *Contras'* acts. Attribution of such independent conduct to the United States, however, was not extended to the acts of the *Contras* without a much stricter link of control and direction of their specific acts to the power apparatus of the U.S. government.¹⁴⁵

Similarly, in one of the Tribunal's cases the Ayatollah's inciteful propaganda was attributed to Iran as such, quite independent of the action of private persons. The Ayatollah's powerful tirades, independently attributable to Iran, may very well have prompted and effectively controlled private acts directed against Americans leading to their expulsion from Iran, but the link between that incitement and the private action had to be established with particularity.¹⁴⁶ In some cases it was; in others it was not. Calling the ouster "constructive

143. See Cove, *State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals*, 11 FORDHAM INT'L L.J. 802 (1988) (reviewing the customary international law of unlawful expulsion of foreign nationals, including attribution to the State, and concluding that even without official orders from leaders of a successful revolutionary movement a "nation should be responsible when a mob, moved by state-inspired propaganda, forces aliens to leave the country.").

144. 1974 ILC Draft Articles, *supra* note 52, at 283 (commentary to article 8).

145. *Nicaragua Case*, 1986 I.C.J. at 188-90.

146. *Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. C.T.R. 92, 103 (1987).

expulsion" giving rise to a rebuttable presumption of wrongful conduct may be a useful analogy to a common law fiction, but the analytic construct still requires focus on the connection between the incitement and the acts themselves to provide an adequate linkage to the machinery of the revolution. By rejecting Judge Brower's attempt to shift the burden to Iran to rebut the presumption that the Ayatollah prompted or instructed the expulsions carried out by non-State parties, the decisions demonstrate the increased demands of proof before attributing clever or sophisticated action or inaction to a State.¹⁴⁷ Inferences possible under the *Corfu Channel Case* were eliminated, making attribution now an element of the claim even under the objective theory. This claim must now be sustained as an independent legal assertion by a burden of proof without assistance of inferences drawn from factual circumstances or control.

The decisions thus confirm the general trend that claimants or their nations' espousing claims must show a direct causal link to conduct of an agent of the State, not merely inaction in the face of duty, before action will be attributed to the State.¹⁴⁸ The decisions tend tacitly to recognize the legitimacy of increased power of governments and successful revolutionary regimes to achieve State policy objectives through non-State conduct.

B. *Disappearances Cases*

Non-governmental death squads in some countries have systematically eliminated political opposition by the tragic terror of torture, ar-

147. *Short v. Islamic Republic of Iran*, 16 Iran-U.S. C.T.R. 76, 89-93 (1987) (Brower, J., dissenting).

148. See D. Caron, *Attribution Amidst Revolution: The Experience of the Iran-United States Claims Tribunal* (paper presented at the Annual Meeting of the American Society of International Law on March 29, 1990). Professor Caron focuses on the Tribunal's application of the ILC draft articles to the Iranian revolution. The Tribunal found that, in accordance with article 15, acts of revolutionaries which led to the establishment of The Islamic Republic of Iran were attributable to the Republic. However, the acts of other revolutionary sects were not attributable to the Republic. *Id.* at 9 (citing *Short*, 16 Iran-U.S. C.T.R. at 84-85). Ago's Commentary to Article 15 states that "it is legitimate to attribute to a government resulting from a successful revolution the injurious acts committed earlier by the revolutionaries" 1975 ILC Draft Articles, *supra* note 57, at 104. The Tribunal, as Caron points out, established very stringent standards of proof which had to be met before the Tribunal would accept the connection between an expulsion of a claimant and the Iranian government. Caron, *supra*, at 17. Imposing a strict standard of proof may have kept within the letter of the ILC draft, but made it almost impossible for claimants to prove that the revolutionaries who wronged them were under instructions from the leaders who became the new government. The Tribunal found no acts or omissions before the formal establishment of The Islamic Republic attributable to the Republic. Clearly, however, the Ago draft did not mean that successful revolutionaries should be presumed free of responsibility for their acts as revolutionaries, unless the strict standard of proof means a substantive move toward no attribution for acts of successful liberation movements. See, e.g., Atlam, *International Liberation Movements and International Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY, *supra* note 83, at 35.

bitrary killings and forced or involuntary disappearances.¹⁴⁹ This conduct may not be directed by any official action but is achieved nonetheless by a form of omission of State, perhaps by the averting of eyes by responsible government officials, if not by outright collusion through winks and nods. Tacit approval or complicity by officials unquestionably would be conduct attributable to the State as a breach of human rights law or, possibly, as a crime of a State against its own citizens.¹⁵⁰ The Inter-American Court of Human Rights recently decided three cases involving disappearances. In two cases the Court found Honduras responsible for the acts of officers or persons acting under orders from officers of the State.¹⁵¹ In the *Fairén Garbi and Solís Corrales Case*, the Court found insufficient evidence to relate the disappearances to the governmental practice of disappearances and decided in favor of Honduras.¹⁵² Language in the opinions, however, emphasized the affirmative duty under the American Convention on Human Rights to protect specified human rights, and that a corresponding failure to protect these rights could be attributed to a State.¹⁵³ In contrast with the stringent proof required by the Iran-United States Claims Tribunal in the wrongful expulsion cases, the Inter-American Court of Human Rights developed well-reasoned presumptions and burdens of proof to provide the evidentiary basis for inferences linking government complicity in the disappearances.¹⁵⁴

Now, suppose that the link to government is much more difficult to show, as when the wink and the nod denoting approval is neither traceable nor easily presumed from the fact of control, and that authorities wish the work of assassination or terrorist squads to be seen

149. Many cases have been documented by Amnesty International and are reported in the press from time to time. A recent example involves death squads killing juveniles in Brazil. *Killing of Brazil Youths Reported*, N.Y. Times, Sept. 6, 1990, at A8, col. 3.

150. See T. MERON, *supra* note 89, at 159-71; Berman & Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531 (1982); Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217, 225-31 (1977); Shelton, *supra* note 122, at 32-33.

151. Velásquez Rodríguez Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 91 (ser. C) No. 4 (1988); Godínez Cruz Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85 (ser. C) No. 5 (1989); Fairén Garbi and Solís Corrales Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 73 (ser. C) No. 6 (1989). See also Shelton, *supra* note 122, at 12-14.

152. *Fairén Garbi*, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS at 134-36.

153. The disappearance cases each make this point, as summarized by Shelton, *supra* note 150, at 5-14.

154. Velásquez Rodríguez, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS at 140-44; Godínez Cruz, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS at 128-33; *Fairén Garbi*, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS at 119-24, 129-36. See also Shelton, *supra* note 21, at 382-84 (initial burden on the Inter-American Commission on Human Rights, shifting to the government to refute allegations, with failure to come forward creating from silence a presumption of truth of allegations).

as the work of non-State vigilantes or private terrorists.¹⁵⁵ When the objects of such omission are foreigners, the State has a clear affirmative duty under customary international law to protect against criminal acts and may be held responsible for failure of a reasonable duty of protection.¹⁵⁶ More often, the victims are nationals of the country as well as foreigners. In these cases, the separation of attribution doctrine from the responsibility of States for the protection solely of aliens provides a basis for international responsibility for crimes or violations of human rights.¹⁵⁷ Failure to protect citizens from "private" death squads in these systematic disappearances by doing nothing or by failing to exercise due diligence in apprehending and punishing clearly should be attributed as an omission of State.¹⁵⁸

In the *Velásquez Rodríguez Case*, the Inter-American Court of Human Rights drew upon attribution doctrine developed as customary international law, but applied it to an affirmative obligation of Honduras under the American Convention on Human Rights to protect the specified human rights of its own citizens as well as those of aliens. Under the clearest of affirmative duties, the Court found a systematic practice of disappearances in Honduras. There was "public and notorious knowledge . . . that the kidnappings were carried out by military personnel or the police, or persons acting under their orders"¹⁵⁹ The Court then shaped an important set of evidentiary inferences. Evidence linking the disappearance of a particular individual to official practice is always difficult if not impossible to obtain when the facts remain in control of the defending government. Giving weight to the investigation made by the Inter-American Human Rights Commission and evidence it presented in bringing the case, the Court shifted to the government in control the burden of refuting the allegations, thereby solving that problem along the lines of the *Corfu Chan-*

155. An excellent example might be the complicity of the former East German government through its secret police with the terrorist known as "Carlos" implicating a number of private actions. Recent security files made available to the free press have revealed that East German agents monitored and tapped into every stage of the planning for the West Berlin discotheque bombing in 1986 by terrorists and knew about the explosives and weapons smuggled to carry it out. When Erich Honecker and other East German authorities were informed, they told the agents to do nothing about it. Having intercepted messages from the Libyan Embassy in East Berlin implicating Qaddafi, the United States bombed Tripoli and Benghazi ten days later. The caption on the news report reads "Loose Cannons, Loose Reins." Whitney, *East's Archives Reveal Ties to Terrorists*, N.Y. Times, July 15, 1990, § 1, at 6. col. 1.

156. See *id.*; Lillich & Paxman, *supra* note 150.

157. See T. MERON, *supra* note 89, at 159-60 (disagreeing with the distinction drawn between aliens and nationals under customary international law in the Restatement (Third)).

158. *Id.* at 162-71.

159. Velásquez Rodríguez Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 91, 141 (ser. C) No. 4 (1988).

nel Case.¹⁶⁰ Recall that the Iran-United States Claims Tribunal refused to create a similar rebuttable presumption or evidentiary inference in the wrongful expulsion cases without explicit evidence produced by the claimant linking the revolutionary government to the expulsion. The Inter-American Court faced this problem, squarely combining well-established attribution principles of customary international law and sensible evidentiary practices.

If all governments, however, were to have affirmative duties to all persons within their jurisdiction, then the central power of a legitimate government to control private vigilante groups and death squads must be strengthened, especially if any question of complicity of the secret police might be involved, a curious dilemma for all modern liberal democracies.¹⁶¹ Governments benefitting most from this trend are benevolent autocracies and *noblesse oblige* polyarchies.¹⁶²

C. *The Sabra and Shatila Massacre*

Control over occupied territories also brings affirmative duties to protect civilian populations, the failure of which is attributable to the State. Following the massacre of Palestinian civilians in the Sabra and Shatila refugee camps in West Beirut by Phalangist militiamen during the Israeli invasion of Lebanon in 1982, the Israeli Government established a domestic Commission of Inquiry to determine responsibility for the massacre and to make recommendations.¹⁶³ The Commission placed "direct" responsibility upon the Phalangist forces who perpetrated the atrocities, and "indirect" responsibility on Israel.¹⁶⁴ Israeli commanders gave no direct orders but knew of their Phalangist ally's deep hatred of the Palestinians in the wake of atrocities against Christians. The Phalangists longed to avenge the murder of their admired

160. *Id.* at 61-62.

161. As Patricia Derian, said to Congress:

Whether these disappearances are the result of authorized actions, unauthorized excesses by law enforcement and security agencies, paramilitary or private groups, governments are responsible for bringing them under control, even in times of emergency. There is no justification under domestic or international law to such violations. Governments cannot pretend not to know.

Human Rights and the Phenomenon of Disappearances: Hearings Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 293 (1979) (statement of Hon. Patricia M. Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

162. See *supra* notes 125 and 127 and accompanying text.

163. See Cassese, *Genocide and the International Community: The Case of Sabra and Shatila*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 97-106 (E. Lutz, H. Hannum & K. Burke eds. 1989).

164. THE BEIRUT MASSACRE: THE COMPLETE KAHAN COMMISSION REPORT 55-56, 63 (1983) [hereinafter KAHAN COMMISSION REPORT].

leader Bashir and the killing of several dozen Phalangists two days before the force entered the camp.

"Indirect" responsibility followed from the decision to allow Phalangists to enter the refugee camps, according to the Commission, "without consideration of the danger — which the makers and executors of the decision were obligated to foresee as probable — that the Phalangists would commit massacres and pogroms against the inhabitants of the camps, and without an examination of the means for preventing this danger."¹⁶⁵ The Report reasoned that the affirmative duty to protect the civilian population devolved either from the duty of an occupier of territory under rules of customary international law or from "obligations applying to every civilized nation and the ethical rules accepted by civilized peoples"¹⁶⁶ The Israeli public's stand has always been that responsibility for such atrocities falls not only upon those who actually riot or commit them, but also upon those responsible for the safety and public order, "who could have prevented the disturbances and did not fulfill their obligations in this respect."¹⁶⁷ Israel's failure to anticipate the danger and to provide adequate control was an omission of State, "the basis for imputing indirect responsibility to those persons who in our view did not fulfill the obligations placed on them."¹⁶⁸ The Commission then placed responsibility on the various officials acting on behalf of Israel and made recommendations for sanctions.¹⁶⁹

While the distinction between direct and indirect responsibility might be used in a political or moral sense to distinguish shades of culpability,¹⁷⁰ it is quite clear even from the Israeli Commission that such distinction confuses the attribution of omissions of State with the wrongs perpetrated by the non-State actors, confirming the point lucidly made by Ago in his concurrence in the *Nicaragua Case*. Conduct of the non-governmental Phalangists should not be indirectly attributed to Israel unless it is that of a force controlled by Israel and thus conduct indirectly that of Israel by transfer of State conduct. Rather, the conduct of Israel should be attributed by reason of its own omission, its particular failure of duty. Under contemporary attribution theory, such an omission of State is quite directly that of the State and needs no mystical transformation. Given Israel's long-standing

165. *Id.* at 63.

166. *Id.* at 57.

167. *Id.*

168. *Id.* at 63.

169. *Id.*

170. See *supra* notes 6 and 8 (shades of culpability in moral philosophy).

legal and moral position on the failure of governments to protect Jewish minorities in other countries, it could not duck its own failure of a similar duty; but reflecting the modern trend to limit conduct attributable to its narrowest link to action, the Israeli Commission used the direct-indirect distinction as an effective lessening of the degree of responsibility. This political use in mitigation does not affect the legal attribution of conduct from an omission of duty as such.

A similar imprecision in attribution analysis found its way into an Iran-United States Claims Tribunal opinion that seemingly distinguished between the "direct" conduct of Iranian officials or agents and that of the militants which later ought to have been imputed "indirectly" to Iran by reasoning in the *Hostages Case*.¹⁷¹ But until the militants were shown to have acted in fact for Iran, the conduct attributed to Iran in the *Hostages Case* was directly its own initial failure to act to protect the Embassy and Embassy personnel and its subsequent failure to intervene once the new government adopted the policies of the militants as its own.¹⁷² There was nothing "indirect" about the attribution of the inaction, even though the Court did not rest its decision solely on the failure of duty issue at the earliest point it might have.

D. Failure to Control Parastatals

If a parastatal¹⁷³ qualifies as an organ of State or acts de facto as an agent under control of the State, attribution for any act or omission follows traditional principles, but with stringent standards of proof of control similar to those required for non-State actors such as the militants in the *Hostages Case* and for the Contras in the *Nicaragua Case*.¹⁷⁴

1. Iran-United States Claims Tribunal Cases

Two cases decided by the Iran-United States Claims Tribunal demonstrate that evidence of tight government control over acts or omissions of parastatals must be labelled wrongful before they can be

171. See *Short v. Islamic Republic of Iran*, 16 Iran-U.S. C.T.R. 76, 83 (1987).

172. See *Hostages Case*, 1980 I.C.J. 3 (Judgment on Merits of May 24).

173. These entities are

neither private legal persons nor simple organs of the state (according to the pertinent system of internal law) but which are public in terms of their provenance and function. They may be described as public corporations, 'parastatal entities,' or 'quasi-public' legal persons. In appropriate conditions the state may become responsible for failure to control the acts and policies of such legal persons

I. BROWNIE, *supra* note 4, at 162-63.

174. See *supra* notes 118-29 and accompanying text.

attributed to Iran. In each case, the Tribunal found insufficient evidence to attribute acts of the parastatal to Iran even when the government owned or controlled the entity. In one case, Iran took complete control over two private shipping companies that later breached contracts with the claimant. The Tribunal held that, in the absence of evidence of "orders, directives, recommendations, or instructions" issued by a government agency, the action could not be attributed to Iran.¹⁷⁵ In the other case, the Tribunal held that a State-owned bank should be presumed to have acted in its commercial capacity when it took control of and title to the claimant's building, in the absence of evidence that it was acting as a State organ or with government complicity in the transfer.¹⁷⁶ These decisions make clear, as another decision stated explicitly,¹⁷⁷ that attribution is a constituent element of the claim requiring the claimant to sustain the burden of proof.

As Brownlie's strong criticism explains, any argument placing on the claimant generally such "burden of proof (and, moreover, an exacting standard of proof) in respect of the initial question of attributability of the acts concerned" when the immediate actor was not an official gives too much license to officials.¹⁷⁸ While the facts of each case may require particular evidentiary presumptions and burdens,¹⁷⁹ "no general presumption against attributability exists . . . [for] such a presumption would produce an odd result: the more bizarre and bloodthirsty the behaviour of the state organs . . . the easier it would be for the respondent state to escape responsibility."¹⁸⁰

2. *Martin v. South Africa*

The case of Barry Martin dramatizes the use of strict attribution standards to avoid State responsibility for official policy. The failure of a State-owned South African hospital to give adequate medical treatment to Martin, an injured African-American, presents a kind of omission produced by the State's policy of apartheid carried out by parastatal organizations.¹⁸¹ Barry Martin is now a quadriplegic in the care of the state of New York. As an African-American professional

175. *Sea-Land Service, Inc. v. Islamic Republic of Iran*, 6 Iran-U.S. C.T.R. 149, 166 (1984).

176. *International Technical Prod. Corp. v. Islamic Republic of Iran*, 9 Iran-U.S. C.T.R. 206, 238-39 (1985). This case draws upon the restrictive theory of sovereign immunity as the test for a presumption of non-attribution. See Harvard Draft, *supra* note 47 and accompanying text.

177. *Yeager v. The Islamic Republic of Iran*, 17 Iran-U.S. C.T.R. 92, 101 (1987) ("[A]ttributability of an act to the State is a constituent element of State responsibility.").

178. I. BROWNIE, *supra* note 4, at 164-65.

179. *Id.*, citing *Youmans Claim (U.S. v. Mex.)*, 4 R. Int'l Arb. Awards 110 (1926).

180. *Id.*

181. *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987).

dancer, he was performing under contract in Sun City, South Africa in the Transvaal township.¹⁸² During that time and while a passenger in an automobile of a White colleague, he was involved in an accident in Transvaal. Both persons received injuries. A "White" ambulance transported the White colleague to Paul Kruger Hospital, leaving Martin at the scene of the accident. Later, a private automobile took him to the same hospital. On arrival, he waited for a long time, received no medical treatment, and eventually was transferred to the "Black" section of the H.F. Verwoerd Hospital, sixty-five miles away over rough roads. He waited there twenty-four hours before receiving any medical treatment. Martin claims that he became a quadriplegic during the wait and transfer from one hospital to the other and before he received treatment.¹⁸³ This injury, he claims, resulted from the failure of equal and proper care due to the South African government's policy of apartheid.

Advised that action for compensation in South Africa would be futile, Martin brought suit in the United States against South Africa, the Transvaal Department of Hospital Services and the two hospitals. The Federal Court for the Southern District of New York dismissed the action for lack of subject matter jurisdiction under the effects test of the Foreign Sovereign Immunities Act ("FSIA").¹⁸⁴

Should the U.S. Department of State espouse an international claim on his behalf against South Africa?¹⁸⁵ Should the United States view the failure to provide adequate medical treatment as conduct attributable to South Africa under its policy of apartheid? The customary international law of human rights most likely imposes a clear duty not to discriminate in the treatment of aliens on account of race.¹⁸⁶ An official policy leading to a decision to refuse medical treatment or discriminate in giving it on account of race in violation of this duty

182. *Id.*

183. *Id.* at 91-96.

184. Comment, *Martin v. South Africa: Alienating Injured Americans*, 15 BROOKLYN J. INT'L L. 153, 166-67 (1989). Martin brought suit in the Southern District of New York, but the case was dismissed for lack of jurisdiction because Martin failed to satisfy the direct effect requirement of the FSIA and the defendants could, therefore, invoke sovereign immunity. Martin appealed the dismissal to the Second Circuit, attempting to show his injury had a direct effect in the United States within the meaning of the FSIA. The Second Circuit affirmed the District Court's dismissal. For a criticism of the opaque nature of sovereignty preventing adjudication of universal human rights claims, see Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1302-05 (1990).

185. In a significant change in apartheid policy for medical treatment, South Africa recently announced the opening of a desegregated public hospital for all races. Wren, *South Africa to Admit All Races As Patients in Its Public Hospitals*, N.Y. Times, May 17, 1990, at A1, col. 3.

186. I. BROWNLEE, *supra* note 105, at 596-98.

should reveal the clearest kind of conduct attributable to South Africa. The failure of a parastatal following official State policy in disregard of its international responsibility to an alien, however, would be easy to characterize as non-attributable under the stringent burden of proof developing in recent decisions for several reasons.

First, under the Iranian parastatal cases, were the United States to present Martin's claim, it might have to prove attribution as an element of the claim.¹⁸⁷ Since the hospitals in question probably were not government organs at the time, the evidence might have to show that some official of the government instructed the hospital to refuse treatment. Second, even if a general instruction from the State policy of official discrimination in hospital treatment were produced, would that showing be sufficient to shift the burden to South Africa to show that it did not apply or that the hospital's omission was independent of State policy?

If a general presumption holds against attribution for an omission by a parastatal under State policy of discrimination, the United States would have a serious evidentiary problem. If, however, attribution of an omission of State is not an element of the claim but may be inferred from circumstantial evidence (as applied in the *Corfu Channel Case* and the Honduran disappearances cases), then a policy of apartheid applicable to State hospitals should be sufficient circumstantial evidence of control to shift the burden to South Africa. No doubt the causal linkage between the failure to accord equal medical treatment and the resulting injury would be probed carefully, as well, under the stricter standards for proving causation that Professor Caron has examined.¹⁸⁸

The case demonstrates precisely that exacting standards easily might lead to irresponsibility in situations where the State has exclusive control. The burden of linking official policy of inaction or unequal treatment with non-State inaction in carrying out the State policy becomes a near impossibility without more reasonable inferences. The better view would be that the apartheid policy applied to hospitals is so pervasive that the official failure of non-discriminatory medical treatment to aliens in emergencies should be seen as directly attributable irrespective of whether the immediate actors were public or private. The failure of policy itself is demonstrated by the fact that it commands to provide treatment on the basis of race.

187. See *supra* notes 131-37 and accompanying text.

188. D. Caron, *supra* note 148.

3. Loose Reins over State-Owned or Controlled Business Enterprises

Attribution doctrine has used the restrictive theory of sovereign immunity in creating a separate sphere where conduct of State-owned and even State-controlled enterprises does not become that of the State.¹⁸⁹ The test, as Sohn and Baxter stated it, is whether the enterprise is a separate legal entity under the law of the State and unable to plead sovereign immunity in the courts of another State.¹⁹⁰ The International Law Commission would require the test of whether the enterprise exercised actual governmental functions.

Much of the underlying theory draws upon Dunn's realism in arguing that the question of State responsibility for the protection of nationals should rest solely upon whether the State, the enterprise or the individual should bear the risk of potential harm resulting from doing business in economic matters or of potential harm for personal injuries.¹⁹¹ Dunn's theory proposes that, when settled expectations are upset, the State should assume more of the risk. As Central Europe and the Third World face the reality of transforming non-market and State-owned enterprises into those more compatible with private or mixed markets, Dunn's analysis becomes far more relevant today than it was in the 1920's and 1930's when he proposed it from the realist tradition developing in the United States.¹⁹² States have come under pressure to maintain control by regulating commercial or other activities that cause environmental or other harm across national boundaries.¹⁹³ The Law of the Sea Convention of 1982, for example, allocates certain resources in all peoples as a whole and places a duty on member States to control enterprises under their jurisdiction in accordance with a regime established under the treaty provisions.¹⁹⁴

189. See J. Chalmers, *State Responsibility for Acts of Parastatals Organized in Corporate Form* (paper presented to the Annual Meeting of the American Society of International Law, Washington D.C., March 29, 1990). For criticism, see Christenson, *supra* note 3, at 332-33.

190. Harvard Draft, *supra* note 47, at 143, 155-56 (draft article 1 and commentary). See *supra* note 5 for analogy to vicarious liability.

191. F. DUNN, *THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW* (1932). But as Professor Nahmod asks in the context of risk analysis involving constitutional tort in the United States, is an act or omission wrongful when it is unconstitutional without regard to risk? Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990).

192. For the place of Dunn in modern theory, see Lillich, *supra* note 70, at 1-2, 31-32. For the use of Dunn's theory in a utilitarian theory of attribution, see Christenson, *supra* note 3, at 335-36, 358 n.82.

193. See Lachs, *The Challenge of the Environment*, 39 INT'L & COMP. L.Q. 663 (1990); Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 544 (1980).

194. Resources here refers to mineral resources on the "sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction," defined as the Area. United Nations Conven-

Similar affirmative duties to control national enterprises are found for the use of outer space, including commercial satellites,¹⁹⁵ pollution at sea,¹⁹⁶ nuclear energy activities¹⁹⁷ and harm to the global atmosphere.¹⁹⁸

The political pressure exerted by attributing omissions of State in one sense tends to hold States increasingly accountable for failure to control private and non-State activities.¹⁹⁹ The experience reviewed in the present article, however, suggests a much more complex develop-

tion on the Law of the Sea, Oct. 7, 1982, art. 1(1), U.N. Doc. A/CONF.62/122, at 2. *See also id.* at 52 (article 136 (Common Heritage of Mankind), article 137 (Legal Status of Area and its Resources)). *Id.* at 52. If the treaty enters force, regulation of deep-sea mining would be delegated to the Seabed Authority. Resources from the deep seabed could only be mined in accordance with the rules and procedures established by treaty provisions (e.g., section 3 (Development of Resources of the Area)). *Id.* at 57-62. Under article 153 (System of Exploration and Exploitation), only "state parties, or state enterprises or natural or judicial persons which possess the nationality of state parties or are *effectively controlled* by them or their nationals when sponsored by such states," will be given the rights in association with the Seabed Authority to conduct any mining activities in the Area. *Id.* at 61-62 (article 153(2)(b)) (emphasis added). And article 139 (Responsibility to Ensure Compliance and Liability of Damage) States that damage caused by a State party in carrying out its responsibilities "shall entail liability." *Id.* at 53 (article 139(2)). The attribution of conduct for activities not those of the State would be for the State's failure to control in the face of duty, an act of omission.

195. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter Treaty on the Use of Outer Space]. Article 6 provides that the parties "shall bear international responsibility for national activities in outer space, . . . whether such activities are carried on by governmental agencies or by non-governmental entities . . ." *Id.* at 209. This article explicitly requires "authorization and continuing supervision by the appropriate State Party" when non-governmental entities undertake activities in outer space. *Id.* By General Assembly resolution adopted Dec. 10, 1982, such responsibility is extended to "activities in the field of international direct television broadcasting by satellite carried out . . . under . . . jurisdiction" of a State. GA Res. 37/92 Annex, para. 8, 37 U.N. GADR Supp. (No. 51) at 98, U.N. Doc. A/37/646 (1982).

196. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, *reprinted in* 9 I.L.M. 25 (1970); Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Feb. 15, 1972, 932 U.N.T.S. 3, *reprinted in* 11 I.L.M. 262 (1972); Convention for the Prevention of Maritime Pollution from Land-Based Sources, Feb. 21, 1974, *reprinted in* 13 I.L.M. 352 (1974).

197. Miatello, *International Responsibility for the Use of Nuclear Energy*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY, *supra* note 83, at 287. This study asserts that the basis for attribution for operations of a private nuclear company would be 1974 Draft Articles, article 8, *supra* note 52, "[o]n account of the nature of the State's strict control over their activities such companies would be considered to be persons acting on behalf of the State . . ." *Id.* at 312. While this assertion of the basis for attribution might be shown as a matter of fact under the exacting requirements demanding specific evidence of particular orders to a parastatal (*see supra* notes 175, 189 and accompanying text), a much better theory of attribution would be for failure of the State to maintain adequate supervision or control when under strict duty, in other words an act of omission of State.

198. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, *reprinted in* 18 I.L.M. 1442 (1979); Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 (1987) [hereinafter Montreal Protocol]. Attribution theory builds from the Trail Smelter Case (U.S. v. Can.), 3 R. Int'l. Arb. Awards 1938 (1941). *See Lachs, supra* note 193, at 665; Handl, *supra* note 193.

199. Christenson, *supra* note 3, at 335-41.

ment, including reluctance by States to attribute conduct to each other when it results from inaction without the clearest affirmative primary obligation shown to have been breached by the most stringent standards of proof. These trends modify the earlier appraisal, but confirm the political and substantive underpinnings of attribution doctrine.

E. *Intermediate Actors: Attribution for Failure to Control*

The problem of attribution of acts of omission of semi-autonomous political subdivisions or parastatals under State control (such as State-owned ventures or joint public-private ventures) is becoming more important as the international community may have to address questions such as Soviet responsibility for international wrongs in semi-independent nations such as the Baltic republics, United States' responsibility for acts or omissions of Guam or Puerto Rico,²⁰⁰ China's responsibility for acts or omission of Macao or Taiwan,²⁰¹ the Palestine Liberation Organization's responsibility for failure to prevent acts of violence under its control, or Canada's responsibility for acts or omissions in Quebec (anticipating a claim to looser association under the Canadian Constitution after the failure of the Meech Lake accord).²⁰² Moreover, in the movement from State-controlled enterprise to market economies, attribution doctrine could easily become, as Dunn tried to develop, a tool for allocation of responsibility for bearing the risk of loss from international transactions and investments.²⁰³ Shifting the responsibility away from governments to market mechanisms provides an additional explanation of the movement away from the protection function of governments, except when the government clearly takes property or radically disrupts settled expectations.²⁰⁴

The concept of "intermediate responsibility" would pierce through the fictional personhood of a State and attribute both acts and omissions to autonomous but politically connected subdivisions of a modern State.²⁰⁵ Rather than holding the State accountable for failure to control its political subdivisions and parastatals, this concept would entail direct accountability under international law of intermediate political and, perhaps, parastatal entities. The central State properly

200. See W. M. REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* (1975).

201. J. HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 150 (1990).

202. McConnell, *The Meech Lake Accord: Laws or Flaws?*, 52 SASK. L. REV. 115 (1988); Baines, *An Alternative Vision of the Meech Lake Accord*, 13 QUEEN'S L.J., Winter 1988, at 1.

203. See F. DUNN, *supra* note 191, at 133-36.

204. *Id.* at 133-43.

205. Christenson, *supra* note 3, at 333-35.

should be held responsible as well; but for its failure of supervision or control on behalf of the community of States rather than for the direct acts or omissions of the political subdivision or parastatal.²⁰⁶ Maybe it is time to consider such an idea more broadly, as a middle ground between the control expected but not practically realizable in the central State and the totally private or non-governmental sphere. Contemporary international law of State responsibility does not recognize this possibility yet, on the theory that the States system leaves to sovereign States the internal maintenance of legal liability for public or private acts and prevents the international legal order from intervening in the internal allocation of power of the States themselves.²⁰⁷

As shown in this study, however, the technical doctrine of attribution does reflect interposition from the international community. The fiction of the sovereign State with complete internal control has also succumbed to erosion of sovereignty in human rights and international crimes cases, and *de facto* in the flow of money, people and ideas, but not yet in the basic allocation of power and responsibility among political subdivisions. The policy effect of the doctrine of attribution is to assure national uniformity in keeping international obligations, but it reinforces a fiction of complete control by the national authority when it may have very loose reins, not necessarily by policy choice but from ineffective control.

State responsibility through attribution theory should be revised in light of the radical changes within many subpolitical entities which, in the last decade, have claimed recognition from the international community. There has been a resurgence of rights being asserted by minority groups who have experienced a resistance by States to recognize meaningful pluralism or self-determination. In many States, a new political decentralization increases tensions between minorities and the majority, and the minimum international standards of human rights might be extended directly to sub-political organizations under some looser national supervisory control. International law can help to rec-

206. The analogy to the Treaty on the Use Outer Space is a good illustration, for the treaty uses the term "supervision" to describe the duty of the State over non-governmental outer space activities. See, Treaty on the Use of Outer Space, *supra* note 195, at 209 (article 6).

207. The International Law Commission's draft articles 14 and 15 on State responsibility are applicable not only to insurrectional movements but also to national liberation movements. In its commentary to both articles the Commission affirmed this position and only saw the continuity between the liberation movement and the State (or government) created by these actions. See 1975 Draft Articles, *supra* note 57, at 136-54.

This distinction has repercussions on the question of responsibility for acts committed by organs of these movements especially with the introduction of the principle of the international legality of national liberation movements. The objective of national liberation movements is to carry out their struggle against non-democratic systems of domination and constraint which may distinguish them from other internal conflicts. Atlam, *supra* note 148, at 35, 37-39.

ognize these movements as legitimate by attributing to them the responsibility for inaction in the face of duty, without the fiction that the central State must be responsible for the subdivision's own action or inaction. Such supervisory responsibility would rest upon an attribution theory of failure to maintain adequate minimum control and supervision.

In Canada, for example, the reassertion of quasi-independence of French-speaking Quebec throughout the 1970s and 1980s in refusing to approve the new Constitution is well known. In May of 1987, Quebec agreed to sign the 1982 Canadian Constitution under the terms of the "Meech Lake Accord," which included amending the 1982 Constitution, *inter alia*, to designate Quebec as a "distinct society."²⁰⁸ The agreement would have granted the legislature and government of the French provinces power to preserve and promote its "distinct identity." With the failure of the ratification process by several provinces, the question of Quebec's international status—possibly a loosely affiliated sovereign—suggests an intermediate status over which the central government would not have complete control. Intermediate responsibility through attributing to Quebec its own conduct that might not meet minimum standards of international obligations would avoid the fiction that the central government has political control over the apparatus of international power and thereby assumes responsibility for acts of the political subdivisions. Such realism would reduce the tendency for a central government to deny responsibility in the face of duty and would, under international law, place it squarely upon a subordinate political group, clarifying the supervising authority's own international obligations.

The Palestinian Liberation Organization ("PLO"), another intermediate non-State actor, has been recognized since its formation in 1964 as an international personality in the struggle of the Palestinian people to return to their homelands. The PLO has been recognized by the Arab League as the sole legitimate representative of the Palestinian people; the United States has engaged the PLO in "substantive dialogue" off and on since 1987, essentially recognizing the PLO as being in control of its eight constituent groups and expecting the PLO to exercise control over these groups.²⁰⁹ Under intermediate responsibility, the failure of the PLO to control or punish illegal terrorist acts of

208. See also J. HANNUM, *supra* note 201, at 66; McConnell, *supra* note 202; and Baines, *supra* note 202.

209. Friedman, *Bush Calls Off U.S.-P.L.O. Talks, Citing Arab Raid*, N.Y. Times, June 21, 1990, A1, col. 6; Atlam, *supra* note 148, at 45-46; W. MALLISON & S. MALLISON, *THE PALESTINIAN PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 174-213 (1986).

one of its constituent groups would be attributed to the PLO directly without having to await its succession to the government of some State.

VI. TRENDS: TIGHTER CRITERIA FOR ATTRIBUTING OMISSIONS OF STATE

Close analysis of the decisional experience in light of the codifications confirms a trend of reluctance to attribute various omissions of State absent strong treaty commitments otherwise. Special reluctance applies to omissions involving protection of aliens.²¹⁰ The trends reflect an actual loosening of control over non-State or subordinate actors in some cases. A counter-trend toward attributing omissions is noticeable when regional courts have jurisdiction and the tradition and treaty obligations are strong and clear. While the trends may mean that the traditional concept of the "nation-State" is in the process of revision, it also may mean a more sophisticated consideration of identifying those with effective power to control decisions on behalf of the State in relation to shared values and obligations. Four points summarize and explain these substantive trends. A fifth point summarizes the procedural aspects of the trends.

A. *Attributing Omissions of State Depends upon Explicit International Obligation to Act*

National and international decision-makers alike resist finding an affirmative duty on governments to act from customary international law or treaty without the clearest normative expression of such duty. While the World Court in the *Hostages Case*²¹¹ said that Iran may have failed in its duty under international law initially to protect the Embassy and diplomats from the militants, it rested its decision and order only on the later specific approval by leaders of the successful revolution.²¹² The stronger duty to protect arose after the militants' acts were ratified. The liberal tradition insists on the widest presumption that non-State actors are motivated solely by their own passion and self-interest unless explicitly shown to have followed directions of those in power.

210. Even the U.S. Supreme Court has refused to extend the constitutional prohibition against warrantless searches by U.S. enforcement officials to aliens abroad. *United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990). U.S. law enforcement abroad, moreover, against aliens has been extended constitutionally without regard to international law. See Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444 (1990).

211. *Hostages Case*, 1980 I.C.J. 3 (Judgment on Merits of May 24).

212. *Id.* at 30.

Similarly, in the wrongful expulsion cases of the Iran-United States Claims Tribunal, the decisions found no attributable omission of State for Iran's failure of a duty to protect American citizens from being driven from their homes and businesses and out of the country by private Iranians. Only when the evidence showed explicit expulsion orders from identifiable Revolutionary Guards was conduct attributed.²¹³ Even the Israeli Commission of Inquiry on the responsibility for the Beirut massacre reluctantly held Israel responsible only "indirectly" for its failure to protect civilians in occupied territory.²¹⁴ These decisions show reticence in attributing conduct for official failure of duty even in the clearest cases. On the other hand, where affirmative duty on States is found in treaties applied by regional courts such as the Court of Justice of the European Community, the European Court of Human Rights or the Inter-American Court of Human Rights, these courts are beginning to work out by generous construction a coherent doctrine for attributing acts of omission in the face of such duty to the States, even in relation to their own nationals, quite in contrast with the direction taken by the U.S. Supreme Court.²¹⁵

B. *An Omission of State Must Be Willful and Linked to Injury*

Even in the face of the clearest duty, any inaction attributable as State conduct must be willful or "official" inaction. This requirement imposes a subjective element for omissions. It distinguishes two types of inaction. In the first type, the government deliberately fails to act. In the second, the State simply does nothing for reasons of inertia or impotence rather than malice. This trend moves away from the objective theory of State responsibility for omissions relied upon in the *Corfu Channel Case*. The Honduran disappearances cases and the wrongful expulsion cases, while major contributions to the attribution of omissions of State, illustrate the difficulties of showing willful neglect.

In the Honduran disappearance cases, the Inter-American Court of Human Rights relied upon the American Convention on Human Rights for the clear affirmative duty to protect citizens from so-called vigilante torture and death squads.²¹⁶ The circumstances and evi-

213. See *supra* note 131.

214. KAHAN COMMISSION REPORT, *supra* note 164, at 63.

215. T. MERON, *supra* note 89, at 146, 161-71. See Strossen, *supra* note 121, at 846-49; Forde, *Non-Governmental Interferences With Human Rights*, 56 BRIT. Y.B. INT'L L. 253, 271-78 (1985).

216. Velásquez Rodríguez Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 35, 69 (ser. C) No. 4 (1988).

dence created an inference of "official" omission in the face of Honduran government knowledge of disappearances for which it was responsible by choice and complicity.²¹⁷ The European courts, too, attribute conduct to States from failure of duty.²¹⁸

In other cases, however, the attribution of the omission of State is scarcely a possible element of claim, as shown in the wrongful expulsion cases. Even if the Iran-United States Claims Tribunal had accepted that Iran had a duty to take reasonable steps to protect Americans from the acts of angry private citizens, the American claimants had to show a connection between inaction by the police and the expulsion.²¹⁹ The most the American agent and claimants could show was that there was a duty to provide reasonable protection and a *de facto* situation at odds with this duty, and the Tribunal refused to attribute the failure to control the private threats to Iran without proof of direct link to the revolutionary government or a conscious governmental decision not to protect.²²⁰ A paradox ensues. The trend in attributing omissions of State proceeds from "objective responsibility," the organizing fiction of a State as a corporate legal person, which measures conduct against obligation in the particular circumstances.²²¹ Including in this trend the objective cause factor, the end effect of decisions and practice is to require evidence that omissions of particular officials are intentional and that either direct orders are given to private actors or a clear linkage to omission is established.²²² The net result seems to be a constriction of State responsibility through attribution decisions in customary international law. While Brownlie surely is correct in rejecting any distinction between acts and omissions of States on the basis of the principle of fault (as proposed by Strupp and Guggenheim), the decisional trends outside the European courts have that precise effect.²²³

217. *Id.* at 73. The court held that the failure of the Honduran court system to ensure that the citizens would be protected was clearly proven from facts and inferences such as a domestic court's refusal to grant a writ of habeas corpus to free one of those who "disappeared."

218. *See supra* note 215.

219. The same use of non-attribution was exhibited when German citizens, inflamed against the Jews by the Nazi Party, forced many Jews to leave Germany while the police did nothing.

220. *See* Wrongful Expulsion cases, *supra* note 131.

221. While Brownlie does not agree with Lauterpacht's assessment of the *Corfu Channel Case* as an affirmation of the principle of fault, he does view the Albanian omission as compatible with objective duty and responsibility based upon knowledge of danger to shipping of giving warning. I. BROWNLIE, *supra* note 4, at 42-43. Predicating this upon responsibility in the particular circumstances does not require a theoretical grounding, according to Brownlie, either objective or subjective. *Id.* at 40-42.

222. Ironically, introducing the natural law idea of intentional moral culpability originating in Grotius has the effect of diminishing the ability to prove an omission of State.

223. *See* I. BROWNLIE, *supra* note 4, at 42-43.

In the *Martin* case, yet to reach the international level, the same substantive issue arises. Martin would have to show that the failure of the hospital to treat his injuries was "official" in the face of affirmative duty, not simply negligent, and resulted in his injuries.²²⁴ Even with apartheid as national policy, the link between that policy of discrimination and the case of injury as a result of inaction in following the policy would be more difficult to show than if injury were presumed in the circumstances from official failure of clear duty.

C. Direct and Indirect Attribution Should Not Be Confused

Even after attributing an act of omission to the State, a decision-making body may sometimes try to distinguish between direct and indirect responsibility to mitigate the consequences. This false distinction creates needless confusion.²²⁵ It was used nonetheless by the Israeli Commission²²⁶ and in the *Nicaragua Case*²²⁷ to mitigate the consequences of responsibility. Although Judge Ago concurred with the World Court's decision in the *Nicaragua Case*, he criticized the Court for its imprecise analysis.²²⁸ He said that indirect responsibility meant that a State that exerts control over the actions of another can be held responsible for internationally wrongful acts committed by or attributable to the second State.²²⁹ Judge Ago believes that indirect responsibility is not the imputability to a State of unauthorized conduct of persons or groups that do not form part of the official apparatus of the State, what is often mistakenly referred to as vicarious

224. See *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987).

225. It is difficult to perceive how any division of State acts into "direct" or "indirect" can aid in determining whether an internationally unlawful act has been committed by a State. Attribution for an omission can never be anything but direct in the sense that it can only arise after a failure on the part of State organs to observe some international obligation incumbent on them. A. FREEMAN, *supra* note 33, at 21-22.

226. See KAHAN COMMISSION REPORT, *supra* note 164, at 50-63. The Kahan Commission concluded that the "direct" responsibility for the perpetration of the acts of slaughter rested on the Phalangist forces that actually perpetrated the massacre. The Commission also concluded that those who made the decision to allow the Phalangist forces into the camps and implemented this decision were "indirectly" responsible for what ultimately occurred, i.e., the Israelis were indirectly responsible, even though they did not intend for the massacre to occur or anticipate the danger. *Id.* at 55-56.

227. *Nicaragua Case*, 1986 I.C.J. 14 (Judgment on Merits of June 27). Judge Ago refers to indirect responsibility as those situations in which one State that "exerts control over the actions of another can be held responsible for an internationally wrongful act committed by and imputable to that second state." *Id.* at 189 (Ago, J., separate opinion).

228. Judge Ago cited the *Hostages Case* as the precedent to which the court should have referred. In that case, the court ruled that the acts of the Iranian "militants" could not be attributed properly to the Iranian Government because the "militants were not officially agents of the state nor were they acting on its behalf." *Nicaragua Case*, 1986 I.C.J. at 190 (citing *Hostages Case*).

229. *Id.* at 189 (Ago, J., separate opinion).

responsibility.²³⁰ Rather, indirect responsibility refers to a transfer of responsibility from one State to another.²³¹

D. Failure of Duty to Control Subordinate Political and Parastatal Entities not Attributable without Actual Control

The element of actual control of a government over acts or omissions of political subdivisions and subordinate groups or parastatal organs is an increasingly relevant factor in attributing conduct to the State. The trend recognizes looser political bonds of control (hence stricter rules for attributing conduct from failure of control) between a central government and political subdivisions or intermediate non-State institutions in civil society.²³²

The trend could accommodate Dunn's risk allocation theory, for not all harmful acts of organs and agents of the State would be attributable to it. The test for allocating the responsibility under that theory would be whether failure to control conduct threatens expectations for normal transactions. If it does, the risk, and hence the duty to control the risk, is shifted from the individual to the State.²³³ Stricter rules of attribution simply confirm the liberal policy (whether conscious or not) of looser controls over enterprise.

Control over non-State actors must be specific and directed before their acts are attributed, under either the risk or objective theories, even in the face of a duty to control, as the International Court of Justice established in the *Hostages Case* and for the *Contras* in Nicaragua. The *Martin* case anticipates the trend of reluctance to attribute conduct of service organizations to the State. A better basis for attribution, however, is for a failure to exercise the supervisory controls expected by the international community and reflected as

230. Oppenheim draws the distinction between original (authorized by government) and vicarious (unauthorized acts of agents or of private actors) responsibility from municipal law analogies, a source of great confusion, according to Brownlie. I. BROWNLIE, *supra* note 4, at 36. The direct-indirect distinction generates similar confusion.

231. *Hostages Case*, 1980 I.C.J. 3, 188-89 (Judgment on Merits of May 24) (Ago, J., separate opinion).

232. The Iran-United States Claims Tribunal thus refused to attribute to Iran actions of the Iranian Ports and Shipping Organization in disrupting performance of a contract with an American company even though it was an official organ of Iran and its conduct harmed Sea-Land Service. *Sea-Land Service, Inc. v. Islamic Republic of Iran*, 6 Iran-U.S. C.T.R. 149 (1984). In *Sea-Land Service*, the Tribunal decided that an "arrangement" between a U.S. shipping company and the Iranian Ports and Shipping Organization (PSO) based on the "good faith of the parties," was not enforceable against the Iranian Government. *Id.* at 162-63. The Tribunal held that disruptions in PSO's management and the subsequent confusion and inefficiency in the management of the port facilities was not attributable to Iran as a whole because Sea-Land could not prove that Iran acted intentionally to disrupt PSO and thus injure Sea-Land. *Id.* at 165-66.

233. See F. DUNN, *supra* note 191, at 133-43, 159-63.

obligation.²³⁴

E. *Process of Decision Affects Outcome*

The context of the international decision process shapes the stringency of the standards and burdens for attributing conduct to States for their omissions and failures of control. This process serves important substantive policies through evidentiary inferences and burdens of proof in complex situations.

1. Presenting the Claim of Wrongful Omission

The most stringent practical burden for attributing wrongful conduct to a State for its inaction falls upon an injured, private alien such as Barry Martin, who must show both a clear affirmative duty on South Africa to prevent racial discrimination against aliens under customary international law or treaty and in addition prove that the injury was caused by willful failure of officials to act in the face of duty (requiring exhaustion of local remedies with a denial of justice). Even surviving exacting scrutiny by the Department of State or foreign office, such a claim meets resistance because it seeks to attribute conduct from failure of action.

Private claimants before an international tribunal, when the claimant's State espouses or presents the claim, bear similar burdens as shown in the wrongful expulsion claims before the Iran-United States Claims Tribunal. Evidentiary rebuttable presumptions from inferences or equitable aids such as "constructive expulsion" encounter similar resistance in these contexts. A tribunal requires the most direct evidence and the clearest duty to be shown. These procedural barriers further the emerging policy to reduce diplomatic protection for aliens except in the most egregious cases and to focus upon the collective pressure upon States to treat all persons within their jurisdiction according to minimum standards of human rights.

When a human rights commission or a collective judgment at the political level investigates and brings the claim of systematic violation of human rights, as the Inter-American Human Rights Commission did against Honduras in the disappearances cases or the European Commission and Courts have done, then the deference shown to the investigation provides the basis for favorable inferences to be drawn both from inaction in the face of international obligation and from

234. As in the duty to supervise non-governmental activities in the Treaty on the Use of Outer Space. See *supra* note 195 and accompanying text.

inaction in responding to inquiries for information.²³⁵ Here, the procedural burdens of drawing inferences from affirmative international duties and official inaction appear less stringent, especially with the particularly competent judges situated in the regional human rights courts.

When the State itself claims injury to its interests through official inaction or through control of non-State conduct by another State, as the United States did against Iran for failure to protect the Embassy and hostages or as Nicaragua did against the United States for conduct of the *Contras*, then the clearest evidence linking the injury to the failure of duty or control must be shown. The trend here moves away from the favorable inference of fact drawn from Albania's control over surveillance of the Corfu Channel that it knew of the mines and did nothing to notify approaching ships. The fact that Iran and the United States did not appear on the merits in the cases brought against them before the International Court of Justice might have increased the reluctance of the Court to draw inferences, create presumptions or find evidence of affirmative international obligations. These respondents removed themselves from the position of failure to respond formally to inquiries of fact from which negative inferences could be drawn. Honduras as a compulsory party before the Inter-American Court of Human Rights found itself subject to inferences of fact drawn from failure to explain or answer the Court's inquiries.

2. The Forum for Decision

The International Court of Justice requires the most exacting standards of responsibility and of proof of official inaction before attributing an omission to the State. A similar stringency is seen in the decision of the Iran-United States Claims Tribunal. More flexible standards and more creative decision-making come from the Inter-American Court of Human Rights in administering the clearer affirmative obligations of the region, and similar observations hold for the European courts.²³⁶ Each of the regional human rights courts, however, takes a case only after investigation by its respective human rights commission. This relationship provides much sounder basis for inferences of evidence from failure to explain the results of a commission's findings. The Court of Justice of the European Community relies upon facts and inference developed in national courts or administrative organs.

235. T. MERON, *supra* note 89; Shelton, *supra* note 21; Strossen, *supra* note 121.

236. See I. BROWNLEE, *supra* note 4, at 151.

When the decision forum leads to bilateral claim and response and diplomatic settlement at the inter-governmental level, the traditional reluctance of governments to hold each other responsible for failures of duty, easily used as precedent for State practice against the claiming government, leads to the most narrow claim for attributing such inaction. When it is successful, the precise failure of duty might be left to factual determination by an international arbitration or might be mooted by the *ex gratia* device for settlement without conceding the wrongfulness of the inaction, as in the Iranian airline incident²³⁷ and the Letelier assassination case.²³⁸ When no question of control of the event causing harm arises, as in the Canadian claim for damage caused by the Soviet Cosmos 954 satellite, the conduct is attributable without identifying the organ or official acting on behalf of the State.²³⁹

3. Proposed Intermediate Process

The proposed process for intermediate responsibility would entail presenting a claim for failure to control a non-State entity or failure of duty by an intermediate political organization such as a parastatal enterprise or a quasi-sovereign state such as Quebec. Two conditions of process would allow experience to develop. First, another State on behalf of an injured national might present a claim directly to the intermediate organization or parastatal, with acquiescence or prodding from the central government,²⁴⁰ directly reaching the question of official inaction and placing the international community standards, rather than the internal political standards artificially attributed to sovereign States, in the position of maintaining accountability. Second, an intermediate organization could be party to international adjudication with or without the tacit consent of the central government. These procedures will be highly controversial, for they reduce the expectation by the international community that the sovereign State will

237. See Lowenfeld, *supra* note 210.

238. See settlement between Chile and the United States whereby Chile agreed to submit the amount of compensation, but not liability, for the assassination to arbitration between the two governments and to pay *ex gratia* (without admission of liability). Pear, *Chile Agrees to Pay Reparations to U.S. in Slaying of Envoy*, N.Y. Times, May 13, 1990, § 1, at 1, col. 6.

239. See Canada: Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954, *reprinted in* 18 I.L.M. 899, 902 (1979). The offer of *ex gratia* payment of compensation by the United States for the shooting down of the civilian Iranian airliner accepted attribution by virtue of control even though responsibility was not admitted.

240. In effect, that process occurred when Canada raised a claim against the United States in 1972 after the Liberian tanker *World* spilled 45,000 litres of crude oil while unloading at a refinery in the state of Washington, thereby polluting the coast of British Columbia. Initially, the *Trail Smelter* arbitration was invoked as the basis of responsibility, but later the claim was addressed to the ship owners who agreed to pay. See Feldman, *Remarks*, 68 PROC. AM. SOC'Y INT'L L. 138, 141 (1974).

maintain domestic political control so that its international obligations will be safely kept. But in the imperceptible movement toward a more cosmopolitan and global society, where the nation-State simply does not have the realistic power to control all official failures within its subordinate political entities, a process providing greater responsibility to the rule of law in that evolving order would be most welcomed. The forms already exist within confederations or functional communities such as the European Common Market, so the procedural device would not be radical. Moreover, it would tend to place responsibility for official inaction involving international obligations more directly upon those accountable without straining the internal constitutional order. Finally, the process would more closely link the most important shared values of human dignity and human rights to those officials most directly responsible for maintaining them, but with guidance from the larger society through the supervisory role of the central State.

VII. CONCLUSION

In a theoretically totalitarian, absolute State, there would be total control of all private conduct and both official action as well as official inaction would be that of the State. Any attempt to carve out a sphere of non-State or private action free from responsibility to other States would be seen as nothing more than the ducking of responsibility of maintaining that absolute control over the minutest detail of organized human activity. If a citizen murdered a foreign migrant worker, or if a mob lynched a foreigner, the State, because it could have prevented the killings but chose not to, would have acted. The conduct would not be the actual physical act, but rather the failure to exercise its control to prevent the killings when it could and ought to have done so. Any failure to control would be by definition an act of State. To the external international community, it might even reject the voluntariness of objective obligation and assert a type of Hegelian super will, under which it is not accountable to anything else because its organic relationships are interpersonal and total universally. In effect, the State would become a universal municipal law.

Such a State acts to allow internal recourse but not to be responsible to other States for the failure to control its public or non-State elites or to prevent non-State or mob violence. The inaction or failure to protect becomes in itself an instrument of control of the State through its universal presence, hiding control under traditional non-State action and double-think to deny responsibility for remaining su-

pine, while so-called non-State actors could brutalize human beings under the averted glance of officials.

By contrast, in a theoretically democratic liberal State, wide spheres of private conduct would be free from State control. Ironically, though, the non-action by the State in the face of duty under international law to act to protect human rights or fundamental freedoms, including economic and social freedoms, of the person or family from private abuse might lead to greater anarchy and political chaos, a fear long associated with democracy. The tradition of civil society with intermediate institutions that are neither market nor State offers a form of pluralism to rethink the international legal order's attention to attribution theory.²⁴¹ Allocating supervisory responsibility and control to conduct of modern States in relation to non-State actors in an exclusive system of territorial States will revise attribution theory to reflect the new realities of power.²⁴²

In a democratic, pluralistic society, free elections minimize the disparity between official power and de facto power or failure to control when under an affirmative international obligation. An omission of State is less likely to lead to abuse. Elected representatives in government, however, do answer to powerful factions, and some representatives might prefer not to act to control these powerful non-State factions (for example, affirmative obligations under treaty to establish effective controls over enterprises whose cumulative activities lead to massive pollution of the environment or over-recovery of resources from deep seabed mining) in order to stay in power. Ultimately, therefore, attribution theory will lead us to face a conflict between omissions of State responding to democratic national politics and affirmative obligations required for international cooperation.

When the international community tolerates failure to control, thereby privileging actual power, a kind of anarchy of confrontation mirrors an ideal not uncomfortable to the radical contractarians.²⁴³ The requirement of showing the clearest affirmative duty and an official decision of forbearance in the face of such duty, when the State could reasonably act, increases the possible use of non-governmental power by those in fact in control. If the instruments of State power are controlled by factions or concealed elites, or if the de facto control-

241. See H. LASKI, *supra* note 5, at 273-74.

242. The *Trail Smelter* arbitral award, by party agreement, in fact did propose a supervisory regime to ensure against continuing pollution from the smelting plant in Canada. The omission of State in failing to have such a supervisory regime in the face of duty to control might be viewed as attributable to the State, as opposed to the activities of the non-State enterprise. Lachs, *supra* note 193.

243. Kropotkin, Zinn, Nozick, and Godwin.

ling elites wish simply to cooperate with similar elites in other States to immunize themselves from accountability, they have every incentive to hide under the old fiction that the State is a legally autonomous sovereign person protected from responsibility for acts by non-State or private parties.

Power hides, for the burden of showing that non-State actors exercised governmental authority *de facto* is a difficult one. Moreover, any affirmative duty of the State to control so-called non-government conduct in order to prevent an international wrong or achieve a positive good now must survive (1) the very strictest scrutiny of the sources for such duty, as in explicit provisions of a treaty or customary international law, and (2) the now exacting burden of proof, aided considerably by international legal processes, in establishing a linkage between the harm and a conscious decision or policy not to act.

I have presented the substantive and procedural framework for attributing government inaction or failure to control as conduct of the State. The newest normative experiences reveal substantive policy underpinnings that make this technical doctrine more interesting. Trends developing within the framework of the comprehensive codification of State responsibility by the International Law Commission reinterpret the customary international law of State responsibility. In these trends are tendencies not yet reconciled toward collective responsibility and control by the State for internal events and toward a lessening of the claims of powerful States to protect their nationals abroad or to control their subordinate non-State organizations (either internally or abroad) in relation to international obligation.

One solution to the either/or quality of the false choice between the two spheres of public and private responsibility would be to create another, intermediate sphere of responsibility to accompany the growth of autonomy in political subdivisions or parastatals and the emergence of pluralistic intermediate institutions in civil society under less control by central State elites, but still under supervision. Attribution of an act of omission of the central State will increasingly be for failure of supervision when under international duty. Attribution of an omission to an intermediate institution directly under international law will then become a prudent artifact for recognizing this third sphere, but the argument still begs the question whether the States system would tolerate it.