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TERRITORIAL BIAS IN INTERNATIONAL LAW: ATTRIBUTION IN STATE AND CORPORATE RESPONSIBLITY

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Territory is ordinarily the basis for and the limit to law-making and law-enforcement: this is the legal meaning of the so-called "Westphalian system." But territory also serves as a fallback for the determination of responsibility, and entities lacking in territory (such as multinational corporations) have a decided advantage in evading responsibility. This paper investigates the role of territory in state and corporate responsibility by looking at attribution. Attribution is the first phase of determining responsibility, wherein we ask whether the illicit acts committed can be attributed to the organization (be it a state or a corporation) that we want to hold liable. Attribution within hierarchical organizations, by most standards, requires both information about the will and knowledge of each relevant actor within the organization and an accepted definition of the limits of the organization. Because of the complexity and the possibility of loopholes in every form of institutional attribution, states' failure to protect becomes a ground for attribution whenever an internationally illicit act takes place on state territory. A short comparison with the responsibility of transnational corporations (TNCs) shows us how TNCs can pass responsibility on to states, because TNCs are based on different national laws and have neither a set territory, nor undisputed organizational limits. Thus, territory leads both towards increased responsibility for states, especially decentralized and federal states, and to corporations which can always push responsibility either onto the states whose territory they are acting on, or onto subsidiaries they can separate from the mother company and discard.

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INTRODUCTION

This paper describes one particular bias in international law: the bias of territoriality.[1] Territory is often seen and described as crucial in international law; one scholar searching for the "constitution of the international order" has gone so far as claiming to have found it in the territorial division of states itself.[2] The birth of (modern) international law is also usually attributed to the birth of a lateral, territorially divided system, itself identified with the Treaty of Westphalia.[3] Upon inspecting international practice and case-law, however, it is immediately apparent that extraterritoriality is much more the rule than the exception, not only in the field of antitrust and business regulation,[4] but also in criminal law[5] and even the law of force.[6] The result is an increasingly global

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1. The program of uncovering structural biases in international law dates from David Kennedy's and Martti Koskenniemi's groundbreaking works in the 1980s. *See* DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

2. Bibó István, *A nemzetközi államközösség bénultsága és annak orvosságai. Önrendelkezés, nagyhatalmi egyetértés, politikai döntőbíráskodás.* [The Paralysis of the International Community and its Cures. Self-determination, Agreement of the Great Powers, Political Arbitration.] *in* 4 BIBÓ ISTVÁN, VÁLOGATOTT TANULMÁNYOK [Selected Writings] 1935-1979, at 307-09 (Magvető, Budapest, 1990), http://mek.niif.hu/02000/02043/html/index.html (translated by author).

3. Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?*, 2 J. HIST. INT'L L. 148, 148-49 (2000); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 28-29 (1948).

4. 15 U.S.C. §§ 78m-78ff (2006); United States v. Aluminium Co. of Am.,148 F.2d 416 (2d Cir. 1945); United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952); P. J. Kuyper, *European Community Law and Extraterritoriality: Some Trends and New Developments*, 33 INT'L & COMP. L.Q. 1013, 1013-21 (1984); A.V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 INT'L & COMP. L.Q. 724, 724-46 (1985); *see also* Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996).

5. Of note also are the traditional principles of extraterritorial criminal jurisdiction (active or passive nationality, effects principle, defensive principle), which in their entirety cover any act the state might have an interest in prosecuting. *See, e.g.*, United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); Lynda M. Clarizo, Case Note, United States v. Yunis, *681 F. Supp. 896 (1988)*, 83 AM. J. INT'L L. 94 (1989).

and effects-centered scope of action for all international actors, which is still, nevertheless, defined through territorial language.

The inverse of this development is the terrain of responsibility, which does not utilize territorially defined language, but is, in fact, controlled by the boundaries of state territory both on the international and transnational levels. This article is an exploration of this territorial bias within the regimes of international responsibility, or, more precisely, a contrasting of attribution in state responsibility with the responsibility of transnational corporations. State responsibility presents us with a "back door" to a functional definition of the state through the law of attribution, as well as the role of territory within the concept of the state, and the existence of territorial bias.

By "territorial bias," I mean the concepts and images of territory (or the lack thereof) that steer the legal handling of power relations in different directions depending upon the use or non-use of territorial markers or even just metaphors, even though the issues and structures involved are similar.[7] Territory is not only "found" in law, as when different water use regulations apply to arid lands as to water-rich lands, it is also constructed through land use and zoning laws, or road signs.[8] One step further into the abstract, law also territorializes itself through the imposition of boundaries and jurisdictional issues, beyond which another law must be applied. Finally, law uses territory as a metaphor for legal relations which have no direct link with physical territory as exemplified in the "zoning" of "cyberspace."[9] When territory is used as a metaphor, the oppositions between abstract concepts and the physical counterparts they are assimilated to using the metaphor result easily in bias. Attributes of the physical object are projected onto the abstract concept, or vice versa, or crucial differences are ignored. Alternatively, place is not ignored and forgotten, but reified, that is treated as a fact of nature, an unquestionable given.[10]

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6. It is interesting to note that a number of the acts categorized as aggression can be committed without violating the territory of the victim state at all; for example "peaceful" blockades or the support of insurgents within another country. G.A. Res. 3314 (XXIX), art. 3(c), (f), U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).

7. Basic literature on law and geography, exploring these connections between geography, semiotics, politics, and the law includes: THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (Nicholas Blomley et al. eds., 2001); THE PLACE OF LAW (Austin Sarat et al. eds., 2003); Nicholas Blomley, *Landscapes of Property*, 32 LAW & SOC'Y REV. 567 (1998); Richard Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999); Symposium, *Surveying Laws and Borders*, 48 STAN. L. REV. 1037, 1037-1429 (1995).

8. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1995).

9. Richard Ford, *Against Cyberspace*, *in* THE PLACE OF LAW, *supra* note 7, at 147, 147-80.

10. Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1857-60 (1994) (on space in law being conceived of either as an unques-

A very common example is a comparison of tangible private property with one type of intellectual property: copyrights. With tangible property, its location is a good indication of ownership. Things in someone's house are presumed by all to belong to him or her, and investigation into the ownership of these things is severely limited by privacy rules. Tangible objects in a trashcan are presumed to be abandoned, and anyone can appropriate them in good faith. With intellectual property, no such geographic signification exists. Copyrights are never presumed to be "abandoned," even though decades may have passed since their last utilization.[11] Therefore, with tangible objects, possession automatically leads to a presumption of ownership. Where we do not want this presumption to work, we individually identify and catalog the objects to prevent them from being appropriated even after being left in public places. Automobiles, for example, which are highly mobile, private, valuable, dangerous, and meant to be in public places a lot, are numbered and catalogued in numerous ways: license plate numbers, engine numbers, chassis numbers, and mileage meters. Place is thus a silent method of regulation; law acknowledges the location of an object as an important factor in deciding whom it belongs to and (less silently) even what laws apply to it. If it is to be overridden, special and, often meticulous, regulation must be used instead of place.

Territory is definitely a key notion in international law as well, but in what ways? International boundaries do not block national jurisdiction, but merely require a justification for it; they do not draw the line between intervention and freedom (consent does);[12] they do not have an effect on the lawfulness of state treatment of human beings. Territorial arguments in international law, if compared to property law, are mostly effects ("nuisance") type arguments (as opposed to trespass or ownership-type arguments).[13]

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tionable fact of nature ("opaque"), or as a completely arbitrary, human decision ("transparent")).

11. Although the specific example of abandonment is not mentioned, the disparities of copyright as property are widely discussed in LAWRENCE LESSIG, FREE CULTURE 139-47 (2004). A classic deconstruction of the concept of property from almost every angle (including reification and personification) is Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

12. International boundaries do not even create a prima facie distinction between intervention and non-intervention, not even in military affairs: a "peaceful blockade," or the funding of rebel groups is an intervention even though it is wholly outside the borders of the blocked state, and most non-military forms of intervention (such as influencing political parties, passing laws having a negative, targeted effect) are verbal acts that can be made anywhere. *See* G.A. Res. 3314, *supra* note 6.

13. Of course, there is substantial case-law on boundary disputes. *See, e.g.*, Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 I.C.J. 1 (Oct.8); Frontier Dispute (Benin v. Niger), 2005 I.C.J. 90 (July 12);

These effects-type arguments are combined with the assigning of objects and people to nations, regardless of place, to create a map of jurisdictions and responsibilities.

Jurisdiction has been previously examined critically, both generally[14] and within international law.[15] I shall use this paper to examine another area where territorialization has a major impact on the functioning of the law: state responsibility, and compare it with the often discussed responsibility of transnational corporations (TNCs) under international law. Territorialization has not yet been discussed in this context for two reasons. The first reason is that language of state responsibility rests on notions of agency, entitlement and function, and never mentions territory outright. It is only through due diligence arguments that territory becomes a central notion of responsibility. The second reason, with regard to TNCs is that although territoriality immediately appears when discussing TNCs' responsibility,[16] it is the inverse scenario that has been little explored, i.e. how would we or could we imagine a global system of closely regulated corporations.

In the first part of this paper, I will consider the rules of attribution to the state as the first step in assigning responsibility for violations of international law by states.[17] I shall argue that acts can be attributed to the state on the basis of four distinct principles, each of which contains a number of rules: (i) acts are attributable where the sovereign (the government) has commanded, authorized, or acknowledged these acts; (ii) acts are attributable if they are committed by state officials as set forth in the laws of the state; (iii) acts are attributable if they are done by persons without official status, but who are performing public functions; and (iv) acts are attributable if the state failed in its duty to prevent or punish these acts. These four grounds present a gradually increasing standard of attribution, from a very narrow concept, in the case of

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Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15); Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18). This is still tiny in comparison with the plethora of jurisdiction-related arguments made every day in all the courts of the world.

14. Ford, *supra* note 7.

15. KENNEDY, *supra* note 1, at 151-66.

16. Because differences in national regulations and jurisdictions are what allow TNCs to exist and thereby dodge regulatory requirements through forum-shopping, incongruence between local regulations are always first on the agenda when discussing TNCs in the contet of international law. *See* Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411, 413-16 (2005).

17. "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (*a*) [i]s attributable to the State under international law; and (*b*) [c]onstitutes a breach of an international obligation of the State." Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 2, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) [hereinafter ILC Articles].

sovereign will, to an almost all-encompassing concept, in the case of failure in prevention. As all grounds of attribution should be examined in every case, the indeterminacy of attribution propels state responsibility to acknowledge attribution to the state in almost every case.

In the second part of the paper, I shall draw the ensuing conclusions from the preceding analysis of the four principles and determine that territorial borders are the only final arbiter of what can or cannot be held the responsibility of a said state. This leads to two further conclusions. First, that international law is not completely indifferent to the internal administrative structure of a state, but it prefers a state with a strong, centralized internal government over one with a federal structure or many autonomous institutions. And second, territory as the default basis for attribution means that anything that happens within a state and cannot be attributed to any other state will be the responsibility of the territorial state. This is particularly troubling with regard to entities that cause damage without being controlled by any state, such as transnational corporations ("TNCs").

The third part of this paper will explore the possibilities of imposing responsibilities on TNCs as unified entities by applying analogies to the four principles used in state responsibility. This experiment can only be unsuccessful because of: (i) the lack of an appropriate analogy to the principle of state unity; (ii) the lack of a conceptually stable "corporate function" to the analogy of "public function," that would not end limited liability for corporations; and (iii) the lack of any analogy to responsibility for acts taking place on state territory. The thought experiment ends either with elevating the TNC to a mini-state with generalized responsibilities, or reaching back to the state to provide ultimate oversight, and, thus, responsibility as well.

I. PRINCIPLES OF ATTRIBUTION

The law of attribution decides in which cases illegal actions should implicate the responsibility of the state. If an action is not attributable to the state, it will only implicate the individual who committed it, and it shall not entail her responsibility under international law. If, on the other hand, the illegal action is attributable to the state, it shall impute the responsibility of the entire state and that state shall be answerable before international tribunals as well (providing no circumstances precluding wrongfulness arise, like necessity, distress, *force majeure*, or consent).

To attribute an action to the state, we must have some idea

what the state is. On a theoretical level, the state could be quite a number of things: it could be the complete population of a defined territory; or those granted the status of citizens by the law of the territory; or all those entrusted with the powers of creating, interpreting, and enforcing the law within that jurisdiction; or those who seem to have this power; or only those who have so much of this power as to be responsible for and to the whole population. And so forth.

In Roberto Ago's words, "[I]t would not really be impossible, theoretically, to accept . . . that, for the purposes of international law, the acts of individuals who have no connection with State itself, other than, for example, the simple fact that they are in its territory, might also be attributed to the State . . . ."[18] But international law nevertheless respects the division between the public and private domains, which is the central organizational idea of the modern liberal state.[19] This leads to a series of decisions determining what is public and what is private, in what situation and for what purpose.

It is somewhat difficult to present the principles guiding attribution and non-attribution clearly, coherently, and concisely at the same time. The starting point would definitely be the 2001 Articles on State Responsibility ("Articles") of the International Law Commission ("ILC").[20] Taking the ILC Articles in their definitive 2001 version would be a logical starting point, yet two circumstances make a thorough analysis of attribution difficult by reference to the Articles alone. On the one hand, the eight Articles detailing attribution are somewhat redundant. Articles 5 and 9, for instance, differ only in whether the "exercise of elements of governmental

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18. Roberto Ago, *Fourth Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility (Continued)*, [1972] 2 Y.B. Int'l L. Comm'n 71, 96, U.N. Doc. A./Cn.4/264.

19. The opinion of the International Court of Justice states:

> [T]he fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 144,¶ 406 (Feb. 26).

20. The International Law Commission is a subsidiary organ of the UN General Assembly (established under Article 22 of the UN Charter), with the role of "encouraging the progressive development of international law and its codification" G.A. Res. 174 (II), pmbl., U.N. Doc. A/174(II) (Nov. 21, 1947). Basically, the ILC prepares draft articles for future codification in the form of international treaties. It is composed of thirty-four eminent international legal scholars of different countries, nominated by member states and elected by the General Assembly.

authority" mentioned in both Articles is validated by law or done only in fact. These two Articles could easily have been condensed into a single Article. Likewise, Articles 4 and 7 and Articles 6 and 11 are similar expressions of the same principles of attribution. By outlining principles of attribution instead of single Articles, the law of attribution can be stated much more clearly. On the other hand, the Articles derive their authority from the case law and the state practice cited in the commentaries, so, presumably, analyzing only the case law would give a more exact picture of attribution and state responsibility. However, this second approach would disregard the Articles' role, which have acquired a certain authority of their own. It would also present serious practical difficulties, such as selecting a few dozen cases out of the hundreds of existing historical awards and analyzing them without reference to previous selective and analytical work by the ILC and other notable scholars.

I have, therefore, chosen to present the law of attribution as being based on four major principles of attribution and present the relevant articles alongside the case law that serves as their basis while sketching each principle. The four main principles are: (i) attribution through sovereign will and the rules of agency (encompassing Articles 6, 8, 10 and 11); (ii) attribution through the status of state agency as described in the laws of the state (Articles 4 and 7); (iii) attribution through any person fulfilling a public function (Articles 5 and 9); and (iv) attribution through control of the territory, which is not listed *per se* in the Articles, but can be linked to all of them but Articles 8 and 11. Certainly many other categorizations are possible, from Vattel's basic "sovereign consent and knowledge = public / no consent and no knowledge = private,"[21] through Gordon Christensen's three-part attribution test,[22] to the eight Articles of the 2002 ILC Articles and the eleven Articles of the 1996 ILC Articles.

The four principles correspond with four different and temporally disparate, but in many respects still existing, images of the state. Attribution through sovereign will harkens back to the be-

21. *See infra* notes 26-28 and accompanying text.

22. 1) Acts of agents or organs of a State are necessarily those of the State.
2) Acts of a non-State character, including acts of individuals, mobs, associations, unsuccessful insurgents, and ordinary criminals, are not those for which a State is responsible.
3) A State may be responsible for acts related to private or non-State conduct if it fails in its own duties regarding that conduct by an independent act or omission.

Gordon A. Christenson, *The Doctrine of Attribution in State Responsibility*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 321, 326 (Richard B. Lillich ed., 1983) (citations omitted).

ginnings of the modern state, the absolute monarchy of the eighteenth-century, as well as evoking the basic unity of the state. Attribution through laws and official state agents represents the nineteenth-century bureaucratic *Rechtsstaat*, reaching out to our times in the idea of the (formal) rule of law.[23] Attribution through public function represents the unity of state and people, in accordance with the twentieth-century appearance of nationalism in international law.[24] Finally, attribution through territoriality helps to reconcile all of the former modes of attribution and assure us of the possibility of coexistence without interference, through evoking the familiar image of the state as a colored area on a map.[25]

The four principles, listed in this way, also represent a narrative of progress: starting from the restrictive interpretation of imputing only acts by persons authorized to wield public power by the laws of the state, the canon of attribution expands, rule by rule, to reasonable appearance of that power, then to persons having equivalent functions. The final step, by incorporating a duty to prevent and protect, is to incur an almost automatic attribution for all illegal acts that happen within the state's territory. Territory, from this point of view, is not a limit to attribution, but rather its limitless extension. Put another way, although nothing that happens outside the state can be attributed, everything that happens inside can.

A. Attribution Through Sovereign Will

The most ancient, and also the most restrictive answer to the question, "who is the state?" is: the ruler of the state, who has dominion over the land where the harm to the foreigner happened and who is the sovereign of the people who live there. In all fair-

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23. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 93 (2002) ("These rules [of attribution] are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee, . . . a State is not responsible for the conduct of persons or entities in circumstances not covered by this Chapter.").

24. One example would be the first instance of a spontaneous gathering of people being granted equal status with state organs: the grant of combatant status to participants in a *levée en masse*. Convention Respecting the Laws and Customs of War on Land, art. 2, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; *see also* Nathaniel Berman, *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

25. On the evolution of territorial jurisdiction as a (relatively modern) technique of power, see BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 170-78 (1991); Ford, *supra* note 7. This paper, aiming to disrupt the above listed categories, was written in the early twenty first-century, when our prior familiar conceptions of territoriality have been undermined, most forcefully by the Internet. *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1995).

ness, the ruler can only be responsible for what she personally did or had knowledge of. As Vattel put it:

> [I]t is impossible for the best governed State or for the most watchful and strict sovereign to regulate at will all the acts of their subjects and to hold them on every occasion to the most exact obedience; it would be unjust to impute to the Nation, or to the sovereign, all the faults of their citizens.[26]

We see, therefore, that for Vattel, the responsibility of the state and the sovereign (ruler) is interchangeable, and that the sovereign's (or the state's) responsibility only arises with the approval and ratification,[27] or general tolerance of unjust acts. The state is thus identical to the sovereign person, and the preconditions of state responsibility mirror the demands of knowledge, will, and capacity familiar to us from private law. Indeed, it seems inherently plausible that state agency in international law should duplicate the structure of private law regarding agency and *respondeat superior*.[28]

Nevertheless, stepping away from private law analogies, this rule seems antiquated, for one would think that the modern, democratic, and pluralistic state has nothing in common with the enlightened or less-enlightened absolutisms of the eighteenth-century. In particular, while sovereignty remains a central attribute of all independent states, the sovereign itself is hard to locate to the point of non-existence.[29] The proliferation of republican governments, the depersonalization of sovereign power, and increasing bureaucratization did not at all affect this basic rule of attribution for quite some time, but its limits are apparent in several late nineteenth-century cases. Roberto Ago recounts the story of Mr. Mix, "a United States national, who, it seems, complained [to the U.S. ambassador] that he had been the victim of an 'outrage' committed by Austrian officials,"[30] to whom Mr. Tripp, the

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26. 3 EMER DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW: TRANSLATION OF THE EDITION OF 1758 bk. II, § 73, at 136 (Charles G. Fenwick trans., 1916).

27. *Id.* § 74, at 136.

28. Christenson, *supra* note 22, at 322.

29. [W]here the sovereign person is not identifiable independently of the rules, we cannot represent the rules in this way as merely the terms or conditions under which the society habitually obeys the sovereign. The rules are *constitutive* of the sovereign, not merely things which we should have to mention in a description of the habits of obedience to the sovereign.

H.L.A. HART, THE CONCEPT OF LAW 76 (2d ed. 1997).

30. Ago, *supra* note 18, at 75, ¶ 10.

U.S. minister, sent back a reply letter dated 11 October 1893, stating that:

> A Government can only be held responsible when it sanctions the action of its officials, done in violation of law; it ought not to be held responsible for unauthorized acts which it promptly disowns upon being cognizant thereof; the responsibility in such case falls upon the offending official. Your remedy lies in a private action against the municipal officers who committed the outrage upon you willfully or through over-zeal in the performance of a supposed duty.[31]

If the private action failed, the state could not be held responsible for the action of the officials, as the state (meaning, the government of Austria, or possibly Emperor Franz Joseph himself) did know of it and did not order the action. The same arguments were used by the Colombian government in the *Star and Herald* case, where the United States sought an indemnity from Colombia for a Colombian general's, Santo Domingo Vila, banning of the Star and Herald, an American-owned newspaper for sixty days for what the general perceived as unfriendly opinions towards the government.[32] Mr. Hurtado, speaking for Colombia, "announced his Government's position to be that it is under no liability to the claimants, because, as it is said, that Government distinctly disavowed General Vila's action. The only recourse of the claimants, Mr. Hurtado suggests, is against General Vila personally in the Colombian courts . . . ."[33]

If, however, an act has to be sanctioned by the highest power to be an act of state, that means that lower authorities acting on their own initiatives are not necessarily part of the state. This possibility evokes the pre-Westphalian world order, without any dividing line between internal and international. Even today, there are, in fact, enough independent organs, creating transnational ties with other independent organs, for us to create an institutional map of the world order without nation states.[34] The principle of state unity, as stated in ILC Article 4,[35] not only formulates but

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31. *Id.*

32. 6 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 775 (1906).

33. *Id.* at 778.

34. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 12-14 (2004); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006).

35. The conduct of any State organ shall be considered an act of that State

also creates the unity of states.

Despite the fact that the responsibility of the state for any of its organs' actions has been the mainstay of attributability since at least the 1920s,[36] the doctrine of attribution through the knowledge and will of a slightly hazy sovereign is still present in several of the Articles agreed to by the ILC. For example, one such applicable rule is that a state is not responsible for the acts of any revolutionary movements that operate within its territory.[37] As the official commentary of the ILC puts it, this principle "is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State."[38] Attribution changes radically, however, if the revolutionary movement achieves its goals of taking over the state or establishing a new state:

> [W]here the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State . . . it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it.[39]

Strikingly, the "it" that committed the conduct that can be complained of is a mobile personality that can fade into nothingness if the rebellion is quenched,[40] or assume the identity of the state even retrospectively, if the revolution triumphs.[41]

Second, there is the rule that attributed any action to the state if the state itself has acknowledged and adapted it as its own, embodied in Article 11 of the ILC Articles. The principle has been the ground for Iran's responsibility for the Iranian students' occupa-

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> under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

ILC Articles, *supra* note 17, art. 4(1).

36. *See infra* notes 50-52 (citing case law of mixed tribunals).

37. *See* ILC Articles, *supra* note 17, art. 10.

38. CRAWFORD, *supra* note 23, at 117.

39. *Id.*

40. *See, e.g.*, Sambiaggio (Italy v. Venez.), 10 R.I.A.A.. 499, 499-525 (Italy-Venez. Comm'n 1903).

41. The Tribunal is convinced that statements and acts of Ayatollah Khomeini are attributable to the new Government, as it is beyond doubt that he was the leading organ of the revolutionary movement which became the new Government. The Tribunal cannot make a finding, however, whether statements and acts of other persons are attributable to the new Government as well . . . .

Yeager v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 101 (1937).

tion of the United States' embassy in Teheran, as the embassy's continued occupation

> was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. . . . 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.[42]

The same principle was relied on for the attribution of Eichmann's kidnapping by a few "volunteers" from Argentina to Israel.[43]

Third, knowledge and will (rephrased as direction and control) are also bases of attribution when no (other) link to the state infrastructure is present. This is embodied in Article 8 of the ILC Articles, stating that "[t]he conduct of a person or group of persons shall be considered an act of a State . . . if [they are] in fact acting on the instructions of, or under the direction or control of that State . . . ."[44] This test has been interpreted in the *Nicaragua* case, and reaffirmed in the *Genocide* case, to mean a pretty high standard:

> What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[45]

In other words, direction and control has to be so tight as to be indistinguishable from a state agency; except that many state agencies have a degree of liberty similar to the contras', who were provided with financial and informational assistance to the point that cessation of that aid would have meant the withering away of

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42. United States Diplomatic and Consular Staff in Tehran (U.S.. v. Iran), 1980 I.C.J. 3, 35, ¶74 (May 24).

43. CRAWFORD, *supra* note 23, at 122; *see also* S.C. Res. 138, U.N. Doc. S/RES/4349 (June 23, 1960). For the events behind the resolution, see Helen Silving, In re Eichmann: *A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307, 311-17 (1961).

44. *See* ILC Articles, *supra* note 17, art. 8.

45. Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 62, ¶ 109. (June 27).

the contras.[46] The test is thus in fact much tighter than that required of a government agency in terms of control: the "eyes and hands of the government" have to be kept constantly on the group or entity for it to be considered as a *de facto* agent of the state. This has been affirmed in the *Genocide* case: the relationship between the state and the de facto agent has to be one of "complete dependence."[47]

A sensible (and post-medieval) rule of attribution would therefore find the state not in the will of a few persons exercising the highest powers in the state, but in all duly authorized agents for the government, as evidenced by the state's own laws.

B. Attribution Through Legal Status

This is the basic ground rule, which was adopted in Article 4 of the International Law Commission's Articles on State Responsibility, saying that "[t]he conduct of any State organ shall be considered an act of that State under international law . . . ." and that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State."[48] This is also arguably in line with the general rule articulated in the creation and recognition of statehood: that the state is free to "form and recruit itself"[49] in any way it wishes.

Generally, international tribunals have no difficulty in identifying the state organ or minor official in question. In most cases, the actor who causes the internationally wrongful act is either a judge,[50] a soldier,[51] or a policeman.[52] In many of the remaining cas-

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46. In the view of the Court it is established that the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. . . . [L]ater the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the *contra* force is merely one aspect among others of the degree of dependency of that force.

Id. at 63, ¶¶ 111-112 (emphasis added).

47. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 140-41, ¶¶ 392-93 (Feb. 26).

48. ILC Articles, *supra* note 17, art. 4.

49. *See infra* note 137 and accompanying text.

50. See the following cases of denial of justice: Putnam (U.S. v. United Mexican States), 4 R.I.A.A. 151 (Mex.-U.S. Gen. Cl. Comm'n 1927); Roper (U.S. v. United Mexican States), 4 R.I.A.A. 148 (Mex.-U.S. Gen. Cl. Comm'n 1927); Faulkner (U.S. v. United Mexican States), 4 R.I.A.A. 67 (Mex.-U.S. Gen. Cl. Comm'n. 1926).

51. *See, e.g.*, Falcón (United Mexican States v. U.S.), 4 R.I.A.A. 104 (Mex.-U.S. Gen. Cl. Comm'n 1926); Garcia (United Mexican States v. U.S.), 4 R.I.A.A. 119 (Mex.-U.S. Gen. Cl. Comm'n 1926); Swinney (U.S. v. United Mexican States), 4 R.I.A.A. 98 (Mex.-U.S. Gen. Cl. Comm'n 1926); Youmans (U.S. v. United Mexican States), 4 R.I.A.A. 110 (Mex.-U.S. Gen. Cl. Comm'n 1926).

es of state responsibility, the "act" that was found to be contrary to international law was a legislative act,[53] which by definition can only be an act of the state.

Attribution through status departs most radically from attribution through will in the case of responsibility for *ultra vires* acts of state organs. This means that "[t]he conduct of an organ of a State . . . shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[54] The fact that a state official was disobeying internal law as well as international law, that he was setting his own will in place of the government's, has no impact on the responsibility of the state. Status (as embedded in law) is everything; will and knowledge are nothing.

The most famous example of this situation is the *Youmans* case, where a mob of Mexican tunnel construction workers, following a disagreement over wages, assaulted their American supervisors, George Arnold, John A. Connelly and Henry Youmans.[55] After the mayor of the town in Mexico heard that the Mexican workers had surrounded the American engineers' house and fired shots at it, he ordered the local chief of police "to proceed with troops to quell the riot and put an end to the attack upon the Americans. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house, as a consequence of which Arnold was killed."[56] Subsequently, the mob set fire to the house and Connelly and Youmans were killed while trying to escape from the burning house[57]. Mexico was found liable for the conduct of the soldiers despite the fact that the soldiers acted in direct contravention to received orders, and that the local chief of police, and all other officials senior to him in rank were blameless.[58] The tribunal found that if no act that exceeds the scope of an official's competency could implicate the state, then "it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable"[59]—except perhaps

52. *See, e.g.*, Mallén (United Mexican States v. U.S.), 4 R.I.A.A. 173 (Mex.-U.S. Gen. Cl. Comm'n 1927); Quintanilla (United Mexican States v. U.S.), 4 R.I.A.A. 101 (Mex.-U.S. Gen. Cl. Comm'n 1926); *see also* Neer (U.S. v. United Mexican States), 4 R.I.A.A. 60 (Mex.-U.S. Gen. Cl. Comm'n 1926); Janes (U.S. v. United Mexican States), 4 R.I.A.A. 82 (Mex.-U.S. Gen. Cl. Comm'n 1925).

53. *E.g.*, S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408 (NAFTA Arb. 2000); Phelps Dodge v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 121, 130 (1986).

54. ILC Articles, *supra* note 17, art. 7.

55. *Youmans*, 4 R.I.A.A. at 111.

56. *Id.*

57. *Id.*

58. *Id.* at 116-17.

59. *Id.* at 116.

acts by members of the government themselves. Similarly, in the *Caire* case, a major and a first captain of Tomás Urbina's Northern Division of the Mexican Army demanded $5000 from Jean-Baptiste Caire, and then arrested him and later shot him for not handing over the money.[60] The tribunal held Mexico responsible for the acts of its soldier, though they were clearly illegal by Mexican law as well as international law, for they were committed as acts of public officials.[61]

In all of these cases, the basis for identifying "the state" is the law—the state is identified with its own law. It does not matter whether the law creates a single, centralized hierarchy or sanctions the distribution of power to all sorts of independent, localized entities. "Official" becomes a synonym for "codified." This method is certainly more effective and democratic than trying to figure out the minds of state leaders. It also enhances certainty and stability in international relations, and it encourages governments to maintain order over their agents and subordinates. Plus, as changing its own law is well within the bounds of any state, the state can at least, in theory, always avoid situations where its own laws would lead it to infringing international law, by changing those laws.[62]

However, the ever-present option of legislation is also a possibility for deregulation in order to avoid responsibility. If an activity is not regulated, but simply tolerated or ignored or supported unofficially, it does not qualify as state action under this approach. Furthermore, it is exactly these extreme situations where harm to foreigners and locals alike is most likely to happen—revolutions, riots, wars—that are least regulated in a state's laws. Also, the approach that equates the state with its own laws has a hard time accommodating private law—are actions that are licensed by the state but left to private initiative part of the state or not? They figure within the laws but would probably not be called "official organs" in accordance with Article 4 of the ILC Articles. On the other hand, most official organs are not labeled as such either, but are merely given powers and authority through the law.

C. Attribution Through Public Function

While status is modifiable at will by the state itself, perhaps

60. Caire (Fr. v. United Mexican States), 5 R.I.A.A. 516 (1929).

61. *Id.* at 530-31. Mexico's attempts to classify the acts of the soldiers as "brigandage," and have them exempted by reference to a treaty clause denying responsibility for bandits and brigands, was overruled by the commission. *Id.* at 527.

62. *See* LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *see also infra* note 131 and accompanying text.

with a view to avoiding responsibility in the future, function is objective and ascertainable by the judge, who is not a party to the dispute at hand. To draw a correct line between private and public activity, perhaps what is needed is a more objective, universal standard, and one that is less open to manipulation by the state that is being investigated: that of function instead of status. Function also exists where written laws describing official state organs might not, and it might exist in times when the state is in turmoil and official organs have collapsed. Attribution through function can also correct excesses of the principle of attribution by status, for through this principle a government official acting off-duty, or without public powers, would not implicate the state but would stay as a private action.

Public function as grounds for state responsibility is stated in Article 5 ("The conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law . . . .")[63] and Article 9 ("The conduct of a person or group of persons shall be considered an act of a State . . . if [they are] . . . in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.")[64] of the ILC Articles.

The concept of public function uncomfortably straddles the small space between attribution through sovereign will and attribution through official status. It is applicable where an entity's actions are tolerated, accepted, or condoned without official recognition. Of course, to use the standard of public function as a viable method of attribution, one must have a relatively stable concept of what "elements of governmental authority" are. The hypothetical examples usually involve private security firms acting as prison guards, airline companies exercising immigration control duties, private railway companies that maintain a police force[65]—in sum, private variants of the basic rule of responsibility for one's police and armed forces. However, these are all exemplary hypotheticals. Very few such cases have arisen so far before an international forum, even for acts of today's ubiquitous private security companies (undoubtedly also because of the rule requiring exhaustion of domestic remedies before moving on to international fora).[66] When

63. ILC Articles, *supra* note 17, art. 5.

64. *Id.* art. 9.

65. CRAWFORD, *supra* note 23, at 100-01.

66. *But see* Stephens (U.S. v. United Mexican States), 4 R.I.A.A. 265, 267 (Mex.-U.S. Gen. Cl. Comm'n 1927) (where an informal, local, non-uniformed militia was found to be an

acts of violence committed by private parties do come up in international cases, they are dealt with not under the principles of entitlement to exercise government authority, but as the failure of official authorities to maintain order.[67]

The reason for this is that "public function" does not exist on the level of facts, outside of the legal context. This is explicit in the wording of Article 5, though missing from Article 9. According to Kelsen's logic, a person giving money to another may be the victim of fraud, blackmail, robbery, or may just be presenting a gift, a loan, due wages, or repaying a loan.[68] The question cannot be decided at the level of facts, as the meaning of these acts cannot be interpreted without recourse to the law.[69] While this principle is supposed to apply to situations where the state "recedes into" the people of whom it is composed, it is very hard for a lawyer to tell in what instances do the actions of the people display the "true essence" of the state, as opposed to revolts and crimes which go against both the state and the people.[70]

To give the term "public function" any meaning at all, recourse must be had to the law of the state where the illegal actions took place, to see whether the laws list a function as public or not. However, our goal in moving to function from status was precisely to avoid looking at the local laws, which could classify something as private in spite of being directed or influenced by the state. Examination of public function thus necessarily becomes an exercise in comparative policy: something is public if it would be classified as such under a Western nation-state, taking into regard what an ordinary citizen is supposed to and allowed to do, and what is beyond that sphere.

This is manifest in *Hyatt International v. Iran*,[71] where Hyatt's properties were taken by the Foundation for the Oppressed, an allegedly private religious foundation. However, the tribunal found

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organ of Mexico):

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

Id.

67. *See infra* Part I.D.

68. *See* HANS KELSEN, PURE THEORY OF LAW 2-3 (Max Knight trans., 1967).

69. *Id.*

70. Hence the confusion of interwar lawyers who were trying to integrate nationalism into the fabric of international law. *See* Berman, *supra* note 24.

71. Hyatt v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 72 (1985).

that the foundation has certain special powers to

> proceed with the use of tribunals, Komitehs (Revolutionary Committees), Revolutionary Guards, Local and State Police and all other bailiffs and the Revolutionary Courts and Tribunals for the discovery, seizure, removal, maintenance, inventory taking, assessment, change for the better, operation and every other action required for the management of the properties [of the former Shah].[72]

The foundation was also audited by the government, and supervised by the prime minister. Therefore, not only was it public by function, but through links with different government authorities, it could also be held to be a state entity through status or though sovereign command. Public function is therefore one of the principles that enforce the global standard of Eurocentric states.

Clearly, however, public function was designed to integrate and incorporate informal but public-spirited activity and a major question is the applicability of attribution by public function in cases involving economic activity. Can profit-making be a public function? Command hierarchies and administrations, and even regulatory and adjudicative mechanisms are widespread in the market sector,[73] but this is not enough for acceptance of a public function. The question of *cui bono* is also not too helpful, as successful economic decisions result in wide-ranging positive externalities regardless of the intent to benefit only the makers of the decision or a whole community.

Regarding business enterprises, the tendency is the inverse of that regarding the use of violence: all actions and entities are presumed to be private, even if they are owned by the state.[74] The tip-

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72. *Id.* at 89.

73. The judiciary? Mediation and arbitration play a widespread and increasing role. Police? Pinkertons are famous in our history; today every large company and school has its own security force, and private eyes continue to be hired for peephole duty; many highly innovating industries have their own secret service working in the world of industrial espionage. Welfare? Any listing of private, highly bureaucratized and authoritative welfare systems would be as long as it is unnecessary.

Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1137 (1980) (quoting Theodore J. Lowi, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 44 (1969)).

74. The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to

ping point, instead of control, is intent: is the private organization meant to advance something beyond profit-making, or not?

The long and winding road to finding a private company as having certain public powers is well illustrated in *Emilio Augusto Maffezini v. The Kingdom of Spain.*[75] Maffezini, an Argentinean national sought to invest in Spanish Galicia, and got different forms of aid (favorable interest rate loans, investment advice, office space, accounting services) from SODIGA, a company under Spanish private law but established by the Spanish government for the purpose of fostering economic growth in Galicia.[76] When Maffezini's investment, a chemical company initialed EAMSA, failed, he commenced arbitration proceedings against Spain, claiming that SODIGA was a government entity and that his investment failed due to bad advice and inappropriate action by SODIGA.[77]

The tribunal found that, structurally, SODIGA was not part of the public administration, but belonged to "a variety of public entities that were governed by private law but which would occasionally exercise public functions that were governed by public law."[78] It agreed that such entities' "status always gave rise to great confusion."[79] The tribunal further found that "State commercial corporations[,] . . . although considered public entities from an economic point of view, are as a matter of law governed by private law, and not administrative law. But even here some activities of these commercial corporations, such as contracting for example, were governed by administrative law."[80] After concluding this structural investigation, the tribunal considers a functional one as well, to consider "the objectives and functions for which the company was created."[81] According to the tribunal, "many of these elements point in the instant case to its public nature,"[82] possibly because of the aforementioned goal of SODIGA to foster (general) economic growth:

> [Most of the supported investments] were not quite

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the State.

CRAWFORD, *supra* note 23, at 100.

75. Maffezini v. Spain, Case No. ARB/97/7, 5 ICSID (W. Bank) 419 (2002), *reprinted in* 16 ICSID REV.: FOREIGN INVESTMENT L.J. 207, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.

76. *Id.*

77. *Id.*

78. *Id.* ¶ 48.

79. *Id.*

80. *Id.* ¶ 49 (citation omitted).

81. *Id.* ¶ 50.

82. *Id.*

> successful from a financial point of view, although they contributed to the development of the industrial and business base of the region concerned. Important shortcomings that have been identified in this policy were the lack of a specific legal and fiscal framework, difficulties in recovering the investments made and the lack of professional expertise. These shortcomings were aggravated by political pressures to support investments of doubtful viability.[83]

A further argument by the tribunal suggests that "[a] decision to increase the investment taken not by Mr. Maffezini but by the entity entrusted by the State to promote the industrialization of Galicia, cannot be considered a commercial activity. Rather, it grew out of the public functions of SODIGA."[84]

In *Maffezini v. Spain*, function is thus reduced to intent on the one hand (a decision is public if it is made with the intent to benefit a whole region, and not just the company itself), and prerogative on the other hand (an entity is public if it exercises powers that are not available to others). Function in this case again is retraceable to status (through special powers combined with government ownership) and will (through the exclusive or principal aim of fostering public good).

D. Due Diligence: From Omission to Territory

State entities, whichever way one goes about identifying them, can incur responsibility not only through their positive acts, but also through their omissions; according to C. F. Amerasinghe, "[t]his point is too obvious to require developing."[85] It is not only obvious, it is also quite old; already in the eighteenth-century, Vattel mentioned that "[a] sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it."[86]

As Vattel's excerpt shows, the responsibility for omissions widens the scope of liability considerably if the duties to act include

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83. *Id.* ¶ 54.

84. *Id.* ¶ 79.

85. C. F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 38 (1967); *see also* CRAWFORD, *supra* note 23, at 80 ("The French term 'fait internationalement illicit' is better than 'acte internationalement illicite', since wrongfulness often results from omissions which are hardly indicated by the term 'acte.' ").

86. 3 VATTEL, *supra* note 26, § 77, at 137.

regulation of others' conduct.[87] Moreover, the duty to regulate others' acts is inherent in sovereignty, indeed in all political power. Therefore, attribution can in theory easily be extended to the limits of sovereignty. That is, to all events that take place within a state's territory. Ian Brownlie's opinion that "[i]n general a state is not under a duty to control the activities of private individuals (being its nationals) beyond the bounds of state territory,"[88] meshes perfectly with the holding of the ICJ in the *Corfu Channel* case, that "[it is] every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[89] Judge Huber's opinion in the *British Property in Spanish Morocco* case provides the perfect summary: "responsibility and territorial sovereignty are mutually conditional of one another."[90]

On the other hand, the responsibility to prevent injury cannot be absolute. That would quite obviously swallow up all other grounds of attribution, and even erase the law of attribution as such, to replace it with the simple doctrine of unconditional, objective responsibility for one's territory. Strict liability has been denied even when there was a plausible interpretation of a treaty between the parties that created strict liability. Thus, in the *Sambiaggio* case, where the Venezuelan government explicitly guarantee[d] by Article 4 of the treaty of 1861 "[t]he protection and security of person and property,"[91] the opposing commissioner and the umpire wrote respectively that "governments are constituted to *afford* protection, not to *guarantee* it,"[92] and that "[t]he ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for

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87. [T]he different rules of attribution stated in Chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.

CRAWFORD, *supra* note 23, at 92.

88. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I 165 (1983).

89. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Sept. 30).

90. Responsabilité et souveraineté territorial se conditionnent réciproquement [British Property in Spanish Morocco] (U.K. v. Spain), 2 R.I.A.A. 615, 636 (1925) (translated by author).

91. Sambiaggio (Italy v. Venez.), 10 R.I.A.A.. 499, 502 (Italy-Venez. Comm'n 1903) (opinion of Commissioner Agnoli); *id.* at 518 (The actual text of article 4 of the Italian-Venezuelan treaty discussed in the case declared that: "[t]he citizens and subjects of one state shall enjoy in the territory of the other the fullest measure of protection and security of person and property").

92. *Id.* at 511 (supplementary opinion of Commissioner Zuloaga).

which is expressly assumed by it."[93] The umpire's answer, of course, still begs the question, how expansively the term "acts" can be interpreted to include omissions and failings.

What is finally required of the state is a standard of due diligence in preventing injuries and righting wrongs. This basically calls for an evaluation of the knowledge of the state agents' and the appropriateness of their actions:

> [W]here the loss complained of results from acts of individuals not employed by the state, or from activities of licensees or trespassers on the territory of the state, the responsibility of the state will depend on a failure to control. In this type of case questions of knowledge may be relevant in establishing the omission or, more properly, responsibility for failure to act.[94]

Therefore, the inquiry is directed back to the second ground of attribution: state agency as determined by the laws. In the ILC's formulation, "[o]bligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur."[95] This is also visible in the universal rejection of the idea of "indirect responsibility of state organs."[96]

If an illegal act has already been committed, a secondary arena of due diligence standards springs up in the courts of the territorial state, this time under the name of "denial of justice."[97] Have the

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93. *Id.* at 512 (opinion of Umpire Ralston).

94. BROWNLIE, *supra* note 88, at 45.

95. CRAWFORD, *supra* note 23, at 140.

96. Abby Cohen Smutny, *State Responsibility and Attribution: When is a State Responsible for the Acts of State Enterprises?* Emilio Augusto Maffezini v. The Kingdom of Spain, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND INTERNATIONAL CUSTOMARY LAW 17, 18 (Todd Weiler ed., 2005).

> The State is not in any way "indirectly" responsible for the misconduct of its nationals, but only for its own acts or omissions . . . . ["]Only a failure on its part to perform duties incumbent upon it either prior to or subsequent to the commission of such acts will render it answerable to the other State."

Id. (quoting ALWYN FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE, 19-20 (1938)); *see also* Christenson, *supra* note 22, at 327-28 ("It is not helpful to analyze [state action], as we have seen, in terms of direct and indirect conduct, for that distinction implies vicarious liability for certain private acts when proper theory must classify all conduct for which a State is responsible as direct acts or failures of duty." (citation omitted)).

97. *See generally* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005).

courts of the state in which an illegal act has been committed failed in granting the injured party their due? The territorial state, it seems, has the possibility of redeeming itself in its own courts by admitting to the injury caused as illegal. Indeed, this possibility is a prerequisite to the engagement of international responsibility, also called the exhaustion of local remedies.[98] Denial of justice can therefore mean inappropriate administrative action, inaction, or an unjust reaction by the courts, or original violations of rights by the courts themselves. Denial of justice thus unites violations of due process with the substantive injustice of the judgments rendered. This aspect of due diligence is often referred to as "the duty to prevent and punish"—thereby implying that if a state punished the offender, the injured foreigner has no more complaints.

It is not certain though whether prevention and punishment are interchangeable obligations. Inflicting a just punishment can be imagined to completely clear the state of all responsibility for its failure in prevention, but the ICJ has ruled that "it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court."[99] This may however refer only to genocide, or the obligations covered by the Genocide Convention. In previous cases, allegations of denial of justice were always considered together with the original illegal acts: the facts were presented as a single narrative, and the injuries were adjudged as one.[100]

Regardless of the positions of the state agents whose acts are being considered, be they in the judiciary or the executive, whether the consideration of omissions along with positive actions enlarges the area of responsibility for a state depends mainly on how high the threshold of diligence is that a state has to show. This is what

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98. International law attaches state responsibility for judicial action only if it is shown that there was no reasonably available national mechanism to correct the challenged action. In case of denial of justice, finality is thus a substantive element of the international delict. States are held to an obligation to provide a fair and efficient *system* of justice, not to an undertaking that there will never be an instance of judicial misconduct.

Id. at 100.

99. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 153, ¶ 427 (Feb. 26).

100. *E.g.*, Stephens (U.S. v. United Mexican States), 4 R.I.A.A. 265, 268, ¶ 8 (Mex.-U.S. Gen. Cl. Comm'n 1927) ("Apart from Mexico's direct liability for the reckless killing of an American . . . the United States alleges indirect responsibility of Mexico on the ground of denial of justice. . . . Both facts are proven by the record, and reveal clearly a failure on the part of Mexico to punish wrongdoers."); *see also* Youmans (U.S. v. United Mexican States), 4 R.I.A.A. 110 (Mex.-U.S. Gen. Cl. Comm'n 1926); Janes (U.S. v. United Mexican States), 4 R.I.A.A. 82, 82-90 (Mex.-U.S. Gen. Cl. Comm'n 1925).

generates the real ambiguity in state responsibility. This uncertainty is most clearly presented in the following two paragraphs of the *Corfu Channel* case:

> It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.
>
> On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.[101]

In other words, control over territory in itself does not establish *prima facie* responsibility; but lack of due diligence need not actually be shown, it can be inferred from a modicum of circumstantial evidence.[102] This is a very high standard, as is readily ac-

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101. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Sept. 30).

102. A similar rhetoric was used in *Asian Agricultural Products Ltd. v. Sri Lanka* to distinguish absolute responsibility from an extremely high standard (also leading to similar practical results of liability through inadequate prevention of harm):

> [T]he addition of words like "constant" or "full" to strengthen the required standards of "protection and security" could justifiably indicate the Parties' intention to require within their treaty relationship a standard of "due diligence" higher than the "minimum standard" of general interna-

knowledged by commentators: "due diligence can be measured by the average general standard of behavior of the 'civilized' or 'well-organized' State . . . . However, in some areas of international law . . . the effort required of the State must not be an 'average' level, but 'good' or even 'excellent.' "[103]

The standard is not described anywhere in more exact terms. All definitions are relative, and exist only in comparison to the "civilized," "well-organized," "good" state. In most cases, however, no standard of comparison is made explicit at all, and the actions of the state agents are examined in the aura of a general standard of reasonableness or correctness. They are compared to what alternative decisions they could have made in the same situation. This standard of reasonableness, vague to the point of non-existence and wildly dependent on the judge's impression of what was possible or commendable in the situation known only from the presentations of the parties, can and does lead to squarely opposing findings of attributability and responsibility.

The standard of the most well-developed country was affirmed by the ICJ in the *Nicaragua* case. In debating whether Nicaragua was responsible for not preventing arms shipments from its territory to reach rebel groups in El Salvador, Nicaragua pleaded that a complete halt to weapons smuggling was impossible for a poor state with geographical conditions like Nicaragua.[104] The Court considered that:

> [I]f the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be

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tional law. But, the nature of both the obligation and ensuing responsibility remain unchanged, since the added words "constant" or "full" are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a "strict liability".

Asian Agric. Prods. Ltd. v. Sri Lanka, Case No. ARB/87/3, 4 ICSID (W. Bank) 246, ¶ 50 (1990), *reprinted in* 6 ICSID REV.: FOREIGN INVESTMENT L.J. 526, 546-47 (1991); *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.

103. Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the International Responsibility of States*, 35 GERMAN Y.B. INT'L L. 9, 45 (1993).

104. Nicaragua's frontier with Honduras, to the north, is 530 kilometers long. Most of it is characterized by rugged mountains, or remote and dense jungles. Most of this border area is inaccessible by motorized land transport and simply impossible to patrol. . . . As a small underdeveloped country with extremely limited resources, and with no modern or sophisticated detection equipment, it is not easy for us to seal off our borders to all unwanted and illegal traffic.

Miguel d'Escoto Brockmann, Foreign Minister of Nicaragua, Declaration to the International Court of Justice (Apr. 21, 1984), *cited in* Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 81, ¶ 147 (June 27).

> unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow.[105]

This, however, is no clarification of the standard; it is just a reaffirmation that the standard is the same for Nicaragua, Honduras, El Salvador, and the United States. More revealing is the comment that if the U.S. was unable to pinpoint the flow of arms by using the sophisticated techniques employed for that purpose, then "a fortiori, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims."[106] The standard here is therefore the one available to the strongest and most well-ordered country examined, that of the United States. As the U.S. itself failed the test, in this case, the standard served the weaker country.

Finally, and contrary to all objections that an absolute standard would abolish the attribution doctrine *per se*, in some cases the obligation to prevent acts from happening is in fact described as absolute, encompassing the entire territory and apparatus of the state. This was the case in the *Velasquez Rodriguez* case, where the Inter-American Court of Human Rights had to decide whether the government of Honduras was responsible for supporting and endorsing the practice of kidnappings, torture, and extrajudicial detention and executions known as "disappearances" in the early 1980s.[107] The Court referred to Article 1(1) of the American Convention on Human Rights,[108] and interpreted it in the following way:

> [t]he . . . obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by

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105. 1986 I.C.J. at 85, ¶ 157.

106. *Id.* at 85, ¶ 156.

107. Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), *reprinted in* 28 I.L.M. 291 (1989).

108. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Id. at 29, ¶ 161 (quoting Organization of American States, American Convention on Human Rights art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123).

> the Convention to every person subject to its jurisdiction. . . . The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.[109]

In the *American Manufacturing and Trading, Inc. v. Republic of Zaire* case, a similar stance was taken. When American Manufacturing and Trading's (AMT) investments in Zaire were ransacked by a rebel group, the tribunal held that Zaire's obligation:

> [A]s the receiving state of investments . . . [is to] take all measures necessary to ensure the full enjoyment of protection and security of its investment[s] . . . [and that] [i]t has not done so, by mere recognition of the existing reality of the damage caused while designating SINZA [AMT's local subsidiary] as the victim and alleging that its own national legislation has exonerated Zaire from all obligations to make reparation . . . in the circumstances such as those giving rise to the present dispute.[110]

Finally, in the *Trail Smelter* case, the arbitration tribunal attributed the damages caused in U.S. territory to Trail Smelter (operating in Canada) by virtue of the principle of *sic utere tuo*—openly stating that territory was the only reason why the air pollution emitted by the smelter (wholly unconnected to the Canadian government or state machinery) was deemed to be Canada's responsibility.[111] The tribunal declared that "under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein . . . ."[112] This conclusion has also been interpreted to refer to pollution in general,[113] but a similar conclusion is reached (without citing the *Trail Smelter* case) in a treatise on climate change and inter-

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109. *Id.* at 30, ¶¶ 166-67.

110. Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, 5 ICSID (W. Bank) 14 (2002), *reprinted in* 36 I.L.M. 1534, 1548-49 (1997).

111. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1938).

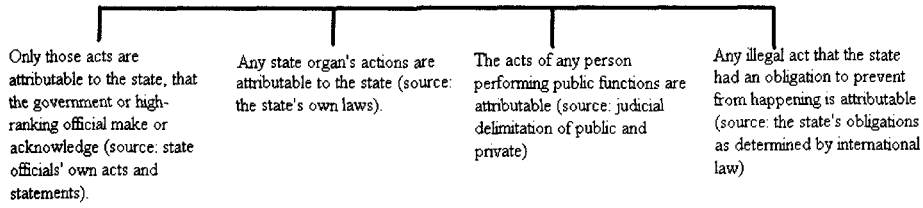
112. *Id.* at 1965.

113. Riccardo Pisillo-Mazzeschi, *Forms of International Responsibility for Environmental Harm, in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 15, 29-30 (Francesco Francioni & Tullio Scovazzi eds., 1991).

national law.[114] The method of imputing responsibility for all illegal acts that happen on a state's territory is nevertheless clearly available to all who care to use it, regardless of the field or domain in which the illegal acts happen.

II. INTERIM CONCLUSION: THE TILT TOWARDS TERRITORIALITY

The four basic principles outlined above are set forth in progression, from the most restrictive (all actions must be clearly traced back to the supreme will of the sovereign) to the most encompassing (any illegal action that has happened on the territory of the state, being a result of its failure to prevent illegal actions, engages the responsibility of the state). Nevertheless, it is clear that this progression is not a progression in time: basically both ends of the spectrum are present already in Vattel's work. Nor is it, or can be, a narrative of moral progress: letting illegal acts go unpunished because of a lack of clear connections to the highest government authorities is neither worse nor better than holding a state responsible for every illegal act, though prevention was practically impossible (even if it had such an obligation). One can depict the stages of responsibility thus:



On this spectrum, the first two principles are sovereignty-based in the sense that attribution does not depend on the judgment of the international judge or arbitrator, but on the declarations and legislative actions of the state party. The last two principles are supranational in the sense that they depend on an international standard of what is public and what is private, or what the obligations of the state in question are. The movement of rhetorical progress is from the local to the global: as the state tries to worm its way out of responsibility through delegating power to subsidiary state organs, controlling agents outside of the state hierarchy, and denying or erasing links to non-state agents, international lawyers have to adopt tighter and tighter standards of con-

114. RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 238-40 (2005).

trol.[115] Progress is illusory because there is virtually no change of standards in time: awards from the 1920s have already condemned states for not enforcing law and order in their territory,[116] while some judgments from the 2000s have acquitted states on certain counts because the links between the state funding the paramilitaries and the soldiers committing massacres on the ground were not close enough.[117]

The line of apparent progress is also disturbed by references between the principles, from one to another. We have seen that responsibility for a state's territory is directed back to responsibility for state organs through the rejection of the doctrine of indirect responsibility.[118] Likewise, responsibility for state organs leads us back to state will, as the status of state organs is only evident from the law of the state, itself an act of the sovereign will. Public function can only be determined if there is a link to the state, such as government ownership or delegation of government functions through law;[119] and a rarely-used epithet to attribution through the actions of state agents mentions that this can only happen if the agent is acting in its public capacity, or appears to do so.[120]

A revised diagram of attribution, including the possible rhetorical moves from one principle to another, would therefore look like this (the red arrows show the possible rhetorical moves):

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115. In [cases of complete dependence from a state], it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 140-41 ¶ 392 (Feb. 26).

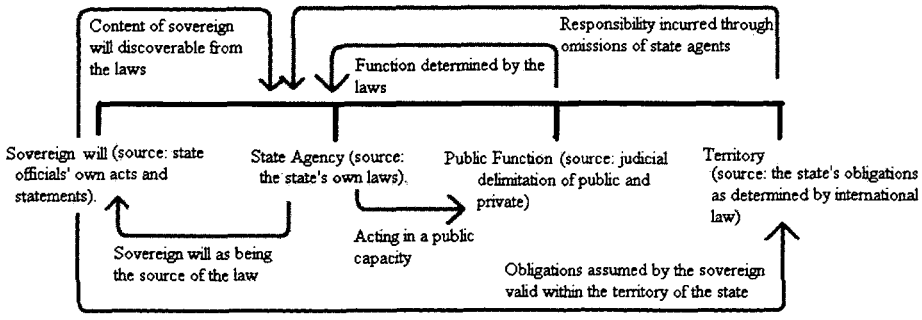
116. *See supra* notes 50-52, 66.

117. 2007 I.C.J. at 141.

118. *See supra* note 96.

119. *See* CRAWFORD, *supra* note 23, at 100.

120. The acts of public official who is acting in a "purely private capacity" (e.g., accepting bribes, or settling a personal score) will not be attributed to the state. *See* Mallén (United Mexican States v. U.S.), 4 R.I.A.A. 173, 173 (Mex.-U.S. Gen. Cl. Comm'n 1927); Yeager v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 95-96 (1937).



Some of these rhetorical moves are actually made in practice, while others only appear in this diagram as possibilities. The conceptual fuzziness of each principle of attributability is thus made clear; basically all of them can be described as the consequence of another principle. Because of the uncertain borderlines of each principle and their reducibility to one or two principles (or possible conflation to eleven rules), the end point of a judicial analysis of attributability is completely indeterminate. Rules have to be taken into account serially, one after the other, until attributability is found, as in the *Congo v. Uganda* case,[121] the *Genocide* case,[122] or the *Tehran* case.[123] The more rules we have, the wider the standard of attribution, through the mechanisms of responsibility for failure to prevent. However, the price of this clarity has been the expansion of attributability. If nothing else, taking all ILC Articles into account almost certainly results in an increased responsibility for failure to protect or punish. This is a near-objective standard of responsibility.

This does not seem to be a problem, at first sight. Setting a high standard of state responsibility seems logical and commendable both in terms of substantive and procedural law. States should be incentivized to maintain control over their territories and to enforce law and order. They should have no easy loopholes to get out of responsibility for their actions by entrusting or even acquiescing to private parties carrying out unlawful actions within their country. Furthermore, as it is not any easier to determine what hap-

121. *See* Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J.116, ¶¶ 160-65 (Dec. 19), (regarding Uganda's control over the Congo Liberation Movement (MLC)), ¶¶ 213-14 (regarding attribution of the acts of the Uganda Peoples' Defence Force (UPDF) to Uganda).

122. *See* 2007 I.C.J. 91, ¶¶ 377-78 (investigation of acknowledgement of conduct by Serbia), ¶ 385-95 (responsibility through the acts of state agents), ¶¶ 396-412 (responsibility through effective control of non-state agents), ¶¶ 425-50 (responsibility for breach of the duty to prevent and punish).

123. *See* United States Diplomatic and Consular Staff in Tehran (United States. v. Iran), 1980 I.C.J. 3, 29-33, ¶¶ 57-68 (May 24), (attribution through failure to defend the Embassy premises), ¶¶ 69-79 (attribution through endorsement of the acts committed by the rioters).

pens exactly in the cabinet rooms of other states today than it was fifty years ago, it makes sense to maintain the ruling of the ICJ on the levels of proof required to prove attributability;[124] Other states (and tribunals) should have recourse to inferences of fact and law when determining what a state is or is not responsible for.

Nevertheless, the expansion of attribution makes the whole doctrine pointless. In the final count, the rule is that anything that happens within a state's territory incurs that state's liability. If the doctrine is not taken to this extreme (though as we saw, it can easily be), then the principles of attribution have a completely indeterminate scope of application, and the possible variations inherent in their combinations only make things worse.

Neither can the principles of attribution be fashioned into a cohesive order on the basis of the substantive obligations and breaches that they are trying to link. For example, it would be perfectly understandable if the state were held to a very strict standard regarding its duties in protecting human life; a less stringent one concerning environmental harm; and a considerably lighter one in the case of protection of property.[125] Yet clearly this is not the case. The *Trail Smelter* case, concerning environmental harm, had the most stringent standard of all the cases analyzed, while in the *Genocide* case, Serbia was released of all claims except one, the failure to prevent and punish one international crime, the massacre at Srebrenica, out of the dozens analyzed by the ICJ and the hundreds committed during the war in Bosnia. The *Velasquez-Rodriguez* case attributed responsibility to the complete state for failing to prevent or punish acts of torture and state-sponsored murder; the Mexican-U.S. Claims Commissions decided in several cases[126] that unprosecuted and unpunished murders did not establish the responsibility of Mexico (or the United States).

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124. *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Sept. 30).

125. In effect, this approach has been advocated by Riccardo Pisillo-Mazzeschi, who has argued in several books and articles that strict liability applies in certain domains of the law; for example, the duty to abstain from harming aliens or foreign states via its own actions; and a lesser degree of fault liability or due diligence applies in other cases, for example to the duty to prevent environmental harm. *See* Pisillo-Mazzeschi, *supra* note 113, at 15-16; Pisillo-Mazzeschi, *supra* note 103, at 22:

> [W]e should examine the role of diligence in international practice in relation to the various *substantive areas* of State obligations in which it actually appears to have played a role, instead of assessing such role in relation to the formal categories of wrongful acts traditionally dealt with in legal literature.

However, as case-law shows, responsibility is not attributed in wider or narrower circles depending on the obligations breached, but instead upon the identity of the actor.

126. *See, e.g.*, Garcia (United Mexican States v. U.S.), 4 R.I.A.A. 119 (Mex.-U.S. Gen. Cl. Comm'n 1926); Neer (U.S. v. United Mexican States), 4 R.I.A.A. 60 (Mex.-U.S. Gen. Cl. Comm'n 1926).

The basic (and mostly unspoken) assumption in attribution that influences statehood is that governments can and should be in control of their population and territory so as to prevent internationally illicit actions. The tighter this control is, the greater a chance the government has of avoiding liability because of the acts of private persons. Thus, attribution is in contradiction with three other doctrines in international law, all of them outside of state responsibility: the doctrine of sovereign equality of states, the doctrine of non-interference with internal governance, and the emerging norm of fostering democracy and decentralization.

A. The Ideal State Structure in International Law

The ever-present possibility of requiring a firm control of national territory from any government renders strongly decentralized and federal states more liable than centralized states with strong governmental powers. While the unity of the state on the international plane is a basic principle of international law,[127] the constitution of any liberal democratic state is much more about distributing, allocating, and dispersing power than linking it together under the common denominator of "the state." This includes the doctrines of separation of powers, and, where applicable, federalism or the acknowledgement of local autonomies. In many states, the police force is under no direct control by the government.[128] The on/off quality of statehood, so prevalent in international law, does not appear in constitutional law, as the state there is already the furthest horizon of possible ordering. The creation of separate domains of power within the state requires that international law assume the unity of the state through fictions of agency and empowerment: "A federal constitution may confer treaty-making capacity and a power to enter into separate diplomatic relations on the constituent members. In the normal case, the constituent state is simply acting as a delegate or agent of the parent state."[129]

Thus, no degree of autonomy or federalism may excuse the state for a violation of international law by any of its official organs, even though by the central administration's understanding the organ in question is not "its own."[130] One example for this is

127. *See supra* notes 34-35 and accompanying text.

128. BROWNLIE, *supra* note 88, at 136 mentions the United Kingdom as an example; the same is true to an even larger degree of the United States.

129. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 74 (5th ed. 1998).

130. *E.g.*, Pellat (Fr. v. United Mexican States), 5 R.I.A.A. 534 (Mixed Cl. Comm'n 1929).

the *LaGrand* case, where the United States was held responsible for failing to prevent Arizona from executing Walter LaGrand.[131] Here, the ICJ had no choice but to "open up" the state and investigate what measures should have been done, or should be done in the future, to ensure compliance—therefore, break through the internal/external barrier and effectively penalize the state for having the wrong constitutional structure:

> [T]he United States Supreme Court rejected a separate application by Germany for a stay of execution . . . . Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it "time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved . . . ."[132]

The complete independence of the state to "form and constitute itself" and adapt its own policies and laws is effectively overruled in cases such as *LaGrand* and many others where the acts of courts, or the procedures of administrative agencies are being examined.[133] It is possible in practically any case addressing denial of justice to agree with the United States' contention in the *LaGrand* case that:

> [Germany's] submissions are inadmissible because Germany seeks to have this Court [the ICJ] "play the role of ultimate court of appeal in national criminal proceedings," a role which it is not empowered to perform. The United States maintains that many of Germany's arguments, in particular those regarding the rule of "procedural default", ask the Court "to address and correct . . . asserted violations of US law and errors of judgment by US judges" in criminal proceedings in national courts.[134]

If the U.S. were not a federal state (and also if Arizona did not have an independent Clemency Board as well as a governor not bound by the Board's opinion[135]), the President could easily have ordered the governor of Arizona to halt or at least postpone the ex-

131. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 506-08, ¶¶ 110-15 (June 27).
132. *Id.* at 508, ¶ 114 (quoting Germany v. United States, 526 U.S. 111 (1999)).
133. *See supra* note 50.
134. LaGrand, 2001 I.C.J. at 485, ¶ 50.
135. *Id.* at 478-79.

ecution of LaGrand, and thus avoid an embarrassing diplomatic fiasco.[136]

This is also true regarding the separation of powers; a state without a judiciary and an executive branch that are independent of one another can exercise full control and better "speak with one voice" than one which recognizes and implements the separation of powers. From the point of view of avoiding international responsibility, international law is most favorable to a strongly centralized state with extensive powers in regulating its citizens' actions in general and its officials in particular.

Generally, as in Albert de Lapradelle's submission, the principles of sovereign independence and freedom in internal affairs are emphasized in international legal materials dealing with the state:

> The question of the creation of the state is fundamental to international law. But how does it regulate it? By leaving to the State the care of organizing itself: it is up to the State to decide how to form and recruit itself: it is up to the State to create its own substance, and then to develop it; it is up to the State to promulgate, by its power and to the extent of its power, its laws which stem from its growth and, consequently, from its life.[137]

This view of pure freedom of self-organization within the realm of effectiveness is contrasted with another opinion, which demands that a state wishing to be recognized by the international community adopt human rights standards and a democratic form of government. Evidence for the emergence of this demand as a set rule of international law can be found in the universal non-recognition of Rhodesia as an independent state because of its declared policy

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136. Bruno Simma & Carsten Hoppe, *The* LaGrand *Case: A Story of Many Miscommunications*, *in* INTERNATIONAL LAW STORIES 371, 383, 394-95 (John E. Noyes et al. eds., 2007).

137. KOSKENNIEMI, *supra* note 1, at 273 (quoting de Lapradelle's submission in Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) (author's translation from the French original)):

> *[L]a question de la formation de l'Etat est-elle la question fondamentale du droit international. Mais comment la règle-t-il ? En laissant à l'Etat le soin de s'organiser lui-même: à lui de décider comment il se forme, et se recrute: à lui de créer sa propre substance, puis de la développer; à lui de promulguer, par la jeu de sa puissance et dans l'étendue de cette puissance, les lois qui sont celles de sa croissance et, par suite, de sa vie.*

of apartheid upon secession from Great Britain in 1965;[138] the conditions of democratic governance set forth by the United States and the European Community before it would recognize any of the Yugoslav or Soviet successor states;[139] or the United Nations' commitment to reinstate President Aristide of Haiti after a military coup in 1994.[140] Democratic governance as an international legal norm has also been supported (and criticized) by a number of distinguished international legal scholars.[141]

On the other hand, many basic rules of international law have, or easily can have antidemocratic backlashes. In James Crawford's six-item list, these are: the executive's almost exclusive power over foreign affairs; the binding force of international law over even the most democratic domestic legislation; the powers of the executive regarding international remedies; the principle of non-intervention that protects non-democratic as well as democratic regimes; the possibility for a government to bind the state indefinitely for the future; and the limits to self-determination posed by the principle of *uti possidetis*.[142]

Another one of these undemocratic, if not antidemocratic standards, unmentioned in Crawford's article on democracy and international law, is the law of attribution. Attribution definitely has an effect on the internal governance of a state, and Crawford, in his commentary to the ILC Articles, has trouble in reconciling the internal and the external viewpoints regarding state structure:

> In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, in-

138. S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965).

139. Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 123, 130-39 (Gregory H. Fox & Brad R. Roth eds., 2000).

140. S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

141. *E.g.*, DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW, *supra* note 139; Thomas M. Franck, The *Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992). A critical study is SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY (2000).

142. James Crawford, *Democracy and the Body of International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 139, at 91, 95-97.

> ternational law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g., the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[143]

The undisputed sovereignty of the state to arrange its internal administration in any way it sees fit must therefore be qualified in a similar way to the international rule on the attribution of citizenship, as derived from the *Nottebohm* case.[144] A state may devise its administrative organization in any way it pleases, but international law is not as indifferent to the effects of its self-organization as Albert de Lapradelle may claim. On the one hand, there is a strong push for more democratic states, and even for preferred treatment in international law for democracies.[145] On the other hand, a democratic state (which is divided internally and thus has more opportunities to violate international law through actions that do not reflect government policy) is in a weaker position internationally than a non-democratic one, where the state speaks with "one voice" internally as well as externally. In Christensen's words, "[o]pen societies will be increasingly at a disadvantage because they cannot escape claims of responsibility as easily as police states can."[146] The ideal state under international law, it seems, would not be "any state," but one with an administrative structure like France: democratic, yet with a strong centralized government.

B. Territoriality and Responsibility

The difficulty of attribution under public function, and the last-instance responsibility of the territorial state means that the territorial state is liable for all private actions that take place on and in

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143. CRAWFORD, *supra* note 23, at 92.

144. It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. . . . This is implied in the wider concept that nationality is within the domestic jurisdiction of the State. . . . It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.

Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 20-21 (Apr. 6).

145. *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 503-38 (1995).

146. Christenson, *supra* note 22, at 342.

that state, even if they have been planned and coordinated from elsewhere, if no other state is involved.

The double perspective of the state as territory and/or hierarchy leaves certain entities and actions in "blind spots" that make attribution very difficult, manifestly unfair, or simply impossible. The two possible types of relations between the individual committing the illegal acts and the state that assumes responsibility for these acts—participation in a command hierarchy or presence on state territory—leaves out actions where a non-state actor commits harm to another country while not being directed, supported, or specifically encouraged by her home state. If this non-state actor is outside of the state where the harm is caused, responsibility for the illegal act is not attributed to any state. If the non-state actor is inside the state where the harm is caused (and possibly another foreigner is injured, too), the territorial state will have to assume responsibility, despite ties between the author of the act and another state.

The International Criminal Tribunal for the former Yugoslavia cited numerous judgments and awards where a high threshold of attributability was set or affirmed, in the case of "individuals or groups not organized into military structures,"[147] including the Diplomatic Staff in the *Tehran* case, the *Nicaragua* case regarding the acts of operatives directly controlled by the U.S., or the Short case.[148] This line of reasoning leads directly to the conclusion that "if, as in *Nicaragua*, the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups . . . ."[149]

So in these cases, who is responsible for the illegal acts perpetrated by the rebel movements in the country? Naturally the state, on whose territory the rebel movements operate is responsible, the one which has the obligation to uphold law and order and protect foreign investments within its territory. In the *AMT v. Zaire* case,[150] there was no mention of the exact rebel group which looted AMT's manufacturing plant in Zaire/Congo[151] (or their affiliation),

147. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 132 (July 15, 1999) (emphasis omitted).

148. *Id.* ¶¶ 133-37.

149. *Id.* ¶ 138.

150. Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, 5 ICSID (W. Bank) 14 (2002), *reprinted in* 36 I.L.M. 1534 (1997).

151. The Republic of Zaire changed its name to the Democratic Republic of the Congo on May 29, 1997. EMIZET FRANÇOIS KISANGANI & F. SCOTT BOBB, HISTORICAL DICTIONARY OF THE DEMOCRATIC REPUBLIC OF THE CONGO 384 (3d ed. 2010).

but it seems unlikely that even if the group were found to had been supported by another country (as in the *Congo v. Uganda* case[152]), Congo/Zaire would have escaped responsibility by pointing to Uganda, for instance. After all, the obligation to "take all measures necessary to ensure the full enjoyment of protection and security"[153] of foreign investments in its territory was Congo/Zaire's and not Uganda's.

III. COUNTERPOINT: ATTRIBUTION IN TRANSNATIONAL CORPORATE RESPONSIBILITY

Let us now examine a counterpoint to state responsibility, the widely disputed responsibility of transnational corporations ("TNCs") under international law.[154] The TNC is not a legal concept. Unlike the municipal companies that constitute it, the TNC is not defined in any legal instrument (as opposed to "company," "national" or "investment"[155]). They are nevertheless united by a legal concept, which is the ownership of corporate stock—even though this ownership is defined and regulated by several jurisdictions. Not only are they governed by sometimes competing jurisdictions, but also no "objective" criterion can be found that would serve as the starting point for a debate about strongest ties. This lack of conceptual unity raises several questions: Is a TNC one entity or several? Does it include companies to which they have contractual ties, or only companies they own? This leads us back circularly to the lack of an accepted definition. In Vaughan Lowe's description:

> [while] human beings are present in one place at any given moment, [c]orporations are present nowhere. Their activities, through their agents, may be present everywhere; and the location of those activities may change almost instantaneously. Bank accounts may be moved to different jurisdictions; tele-sales depart-

152. Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J.116, ¶¶ 160-64 (Dec. 19).

153. *Am. Mfg. & Trading*, 36 I.L.M. at 1548.

154. *See generally* NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

155. *See generally* Treaty Between the United States and Albania Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Alb., art. I, § 1(a)-(d), Jan. 11, 1995, S. TREATY DOC. NO. 104-19; Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Czech Rep. & Slovk., art. I, § 1(a)-(c), Oct. 22, 1991, S. TREATY DOC. NO. 102-31 (showing that these treaties do not contain definitions of TNC).

> ments may be moved from the USA or the UK to India; and so on.[156]

What, then, unites a TNC, if all its parts are so malleable? Steven R. Ratner, in his in-depth essay on corporate responsibility, states that "[t]he touchstone for determining the relevance of enterprise structures for duties must be the element of control."[157] Control is more than just ownership, because it also comprises control through contractual means (for example, supplier, distributor, and franchise contracts, or voting agreements)—the constant possibilities for corporations to create more corporations, to outsource and out contract are what make control the necessary starting point instead of ownership.[158]

Control, however, is not any more easily appraised in corporate settings than sovereign will in nation-states. And just like in states, the principle of subjective control (knowledge and will) must be augmented by a formal principle of prima facie attribution and *ultra vires* responsibility, based on status and hierarchy (laws and official status for states, ownership and officer structure for corporations) for those cases where control cannot be pinpointed.

However, the analogy to the principle of state unity is much weaker in corporate contexts. Like the lizard leaving behind its tail, the corporation can usually abandon its subsidiary and rely on its separate personality: "[a]ll courts agree that 'control' arising from 100 percent stock ownership and common identity of the parent's and the subsidiary's officers and directors is insufficient" as a justification for piercing the corporate veil.[159] The required test for a successful piercing of the corporate veil is that the subsidiary be a mere "instrumentality" or an "alter ego" of the mother corporation, where the subsidiary's every action is decided in fact by the owner.[160] This test effectively negates status and leads us back to control.

Status is thus eliminated as a principle of responsibility for corporations; and because function depends on status (as shown above on page 15), so is function. A principle of corporate function, to the analogy of public function, would have to state that anyone acting in furtherance of corporate policy shall be imputed to be an

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156. Vaughan Lowe, *Corporations as International Actors and International Law Makers*, 14 ITALIAN Y.B. INT'L L. 23, 37 (2004).

157. Ratner, *supra* note 154, at 519.

158. *See* Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 311-14 (2001) (for the U.S. federal interpretation of control in corporate contexts).

159. *Id.* at 305.

160. *Id.* at 304 n.17.

agent of the corporation. This test would need a definition of corporate policy that could always be imputed to the corporation, either in a formal/subjective way (for example, anything which furthers the goals or profit of the corporation in question) or in a substantive/objective way (for example, the following acts shall always be imputed to the corporation). Furthermore, to be applicable with regard to transnational corporations, the test itself should be defined within international law or accepted and applied worldwide. If such a definition were available and in use, it might achieve the same result that Steven Ratner and Hugh Collins wish for regarding their multifaceted control test.[161] Such a test would end limited liability, and may grotesquely extend unlimited liability to acts outside the legitimate business goals of the company while guarding limited liability for ordinary business activity.[162]

The implementation of corporate policy as a principle of attribution would therefore necessitate a general harmonization of corporate law worldwide. The alternative would be for one sufficiently powerful country to implement its own corporate responsibility laws through extraterritorial jurisdiction. This has been done in part through the U.S. Alien Tort Claims Act (ATCA), which grants foreigners jurisdiction in U.S. federal courts to sue anyone for violations of "the law of nations."[163] While the ATCA extends jurisdiction to all torts under the law of nations anywhere in the world, another related doctrine, the doctrine of *forum non conveniens* gives courts the discretionary power to decide whether the litigation would be better conducted by the forum and under the law of

161. *See id.*; Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, 53 MOD. L. REV. 731, 733-34 (1990).

162. The next question would be, of course, what constitutes an act or event that is sufficiently far from legitimate business activity as to justify extending corporate liability. Would ordinary torts for example suffice? *See* Blumberg, *supra* note 158, at 306.

163. 28 U.S.C. § 1350 (2006). For case-law based on the Alien Tort Claims Act, see generally Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003). Scholarly commentary on the ATCA includes: Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 383-96 (2000) (clarifying the background and procedure of the Alien Tort Claims Act); Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361, 362-70 (2001); Gregory G. A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359 (1998); Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 457-58 (2001) (for an overview of non-U.S. examples of extraterritorial jurisdiction against TNCs); *see also* Tracy M. Schmidt, Comment, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L.J. 217, 223-32 (2005).

the place of the injury.[164] The local forum (i.e. the forum of the place of the injury) would logically be better equipped to find and evaluate evidence, and would also be a better guardian against imposition of foreign legal values onto the country of the injury. However, when the local forum cannot effectively reach the mother corporation, leaving justice to the local forum is likely a form of denial of justice, in fact.

Of course, the extraterritorial court usually justifies its decision not from a global perspective, but a national one. The question before the courts is not what would be best for the plaintiffs, but what would be best for the forum country.[165] Most corporate responsibility cases are better framed in terms of class or ideological interests rather than national interests, yet jurisdiction ordinarily requires a sufficiently substantial link to the forum state.[166] The few exceptions to this are those international crimes where universal jurisdiction is accepted. Therefore, acknowledging "corporate function" as a principle of attribution basically means universal jurisdiction for any state over TNCs, in the absence of an international court.

What about attribution through territory? TNCs of course have no territory, only an official address; even attributing them a place for jurisdiction may be problematic.[167] Nevertheless, TNCs often map themselves. TNCs' world maps emulate political world maps, but instead of the four colors necessary to ensure that no neighboring countries are shaded in the same color, these corporate world maps are made up of only two colors: one to mark countries they are present in and another (usually a lighter shade of the same color) to mark the rest of the world.[168] The state of the corporate headquarters, or the holding company, is not shown in any different way than the other companies. Thus, one can see TNCs two ways: as unified entities (indicated by one color) or as a bunch of similar but separate groups (indicated by the boundary lines). No lines or color shades are used to indicate centers and peripheries, mother companies and subsidiaries. The unified shading can be

164. Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of* Forum Non Conveniens *in* In Re Union Carbide, Alfaro, Sequihua, *and* Aguinda, 36 TEX. INT'L L.J. 299, 300-01 (2001).

165. Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest and Transnational Norms*, 103 HARV. L. REV. 1273, 1285-95 (1990).

166. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19, (Sept. 7, 1927).

167. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-12 (1935); Lowe, *supra* note 156.

168. For sample interactive digital corporate maps, see BNP Paribas, Implantations, http://maps.bnpparibas.com (last visited Sept. 25, 2010); E.ON, A.G., Interactive Map, http://www.eon.com/de/corporate/20920.jsp (last visited Sept. 25, 2010); TESCO, P.L.C., Interactive Map, http://www.tescoplc.com/plc/about_us/map/ (last visited Sept. 25, 2010).

interpreted to mean the equality of companies on the one hand, or total control on the other.[169]

TNCs' maps thus lead us back to national boundaries and nation-states' jurisdictions—and thereby, to nation-states' responsibility to protect, prevent, and punish. No territorial attribution is possible for TNCs, because territorial attribution means general attribution. Holding TNCs responsible for their subsidiaries' acts worldwide, as described above, would necessitate creating international corporate law or extending one nation's corporate laws worldwide. Creating "corporate territories" would mean even more, basically granting sovereignty to corporations along with responsibility.

These discussions of corporate responsibility present the flip side of the bias towards territoriality: responsibility over physical territory means a general, last-instance responsibility, while lack of territorially defined competences means a possibility of weaseling out of responsibility for the detriment of the territorial sovereign.

CONCLUSION

Biases are hard to prove in international law "because the relationship between center and periphery is not written in the *content* of legal rules—indeed the international regime has progressed precisely by emptying itself of substantive content which might display a bias."[170] As David Kennedy describes the practice of emancipation through international law, "[a]re we not evenhanded in its application? If not, let us be. Is it not consented to by the post-colonial world? If not, let us put it to the vote. Is the Third World still excluded from participation in its institutional application? If so, let us invite them in."[171] While an empirical demonstration of divergent practice regarding the center and the periphery in the application of certain rules or doctrines is necessary, it is not enough, for such evidence can always be brushed aside as evidence only of past imperialist tendencies.[172] What must be proven is that

169. *See* A.A. Fatouros, *Transnational Enterprise in the Law of State Responsibility*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS, *supra* note 22, at 361, 368-69 ("Instead of asserting that a TNE [transnational enterprise] has the nationality of each of the States in which it operates, one might treat the enterprise as foreign to each of these States, including its own home country.").

170. David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 100 (1999).

171. *Id.*

172. Also, such empirical evidence gathering is far from new. It basically hales back to the mid-19th century and the birth of the Calvo doctrine. One study collecting the discrepancies in the application of state responsibility between the Orient and the West is Yun-

"out of any number of equally 'possible' choices, some choices—typically conservative or *status quo* oriented choices—are *methodologically privileged* in the relevant institutions."[173] David Kennedy argues that in order to find bias, we must prove that "the doctrine's origin must have given it a structure, a virus of some sort, which continues to differentiate the center and the periphery however the doctrine mutates."[174]

The bias of territoriality is one such basic structural trait in international law. By (i) giving a unified personality to an intricate system of administrative and law-making organizations, partly hierarchical and partly independent of one another (the principle of the unity of the state); and (ii) assigning both supreme law-making power and ultimate responsibility within a specified territory to this personified state, international law creates an extremely efficient system for the assignment and management of responsibility. The efficiency of this system is even more obvious after comparison with transnational corporate responsibility, where neither principle exists, and responsibility can therefore always be left with either a contractor or subsidiary, or passed on to the territorial state.

The (territorial) nation-state has been described as a double-sided doctrine, as much a tool of protection, emancipation, and participation as the method of exclusion for those lacking a state or representation therein.[175] It has also been frequently asserted that the nation-state is a cultural phenomenon that is not suitable for non-European cultures,[176] or just for certain territories that have never effectively been united.[177] Nevertheless, while it exists, it exudes omnipotence within its carefully circumscribed boundaries, just like the colors used to indicate nation-states on political maps, which drench every city, mountain, plain, and river on the map in a uniform hue of belonging to one sovereign.

The Western Sahara opinion was a testament to the fact that not even the most careful historical analysis can provide a method for fusing the medieval system of tribes loosely tied together by feudal allegiance, military alliances, and "gifts" (personal alle-

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Tan Tu, State Responsibility for Injuries to Foreigners on Account of Mob Violence, Murder and Brigandage (1927) (unpublished Ph.D. Thesis, University. of Illinois) (on file with the Law Library, University of Illinois).

173. KOSKENNIEMI, *supra* note 1, at 610.

174. Kennedy, *supra* note 170, at 100.

175. KOSKENNIEMI, *supra* note 1, at 423-31, 444-49.

176. *See, e.g.*, Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1135-37 (1995).

177. Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1167-68 (2005).

giance and jurisdiction) with the modern system of mutually exclusive territorial states, guided by the strictly binary code of independence versus component status.[178] The imposition of values and the skewing of historical situations is thus unavoidable: "We follow the [ICJ]'s search all over Western Sahara, Burkina Faso and Mali for territorial sovereignty, only to find that territorial sovereignty has emerged in The Hague, as the very optic through which the ICJ conducts its search."[179] We are ourselves accustomed to perceiving the optic of the legislator, as well as the judge, as all-seeing, objective, central, and immutable. In the search for a just world order, we must nevertheless remind ourselves frequently to adjust our own optics to escape unworkable, simplistic and partial answers.

178. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) (compare ¶¶ 84-160 with ¶ 162).

179. Vasuki Nesiah, *Placing International Law: White Spaces on a Map*, 16 LEIDEN J. INT'L L. 1, 5 (2003).