Transnational State Responsibility for Violations of Human Rights

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I. INTRODUCTION

This text examines a paradox in international human rights law. Human rights are declared to be universal, yet state responsibility for their violations is limited by territoriality as well as by citizenship. Each state is responsible for human rights violations occurring in its own territory. In contrast, state responsibilities with regard to citizens of other states are vague and weak. Individuals can claim and enforce rights against their own state (in theory, at least). However, non-resident non-citizens can only claim and enforce rights against other states through their own state and under strictly defined conditions—if they can claim them at all.

International law is designed to make each state responsible for the human rights protection of its own population; this includes litigation for violations targeting another state. This text posits that broadening state responsibility to include violations of human rights in other states as well as towards citizens of other states is not only desirable and feasible, but also necessary.

Territoriality of law conflicts with the postulated universality of human rights because individuals cannot hold a state other than their own responsible for violating their rights; it is their state that should hold another responsible. This, however, seldom happens. Either the state that intervenes does so because of inequality of power (and a legal challenge involves a risk of retaliation that the previously victimized state can ill afford), or in order to promote the purposes and goals of the ruling government in this other country, but not necessarily the interests of the citizens of this state.

The limitation upon universal human rights stemming from territoriality of law is complemented by the institution of citizenship as the basis of the individual's legal relationship with a particular state. Although individual

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rights and freedoms should be recognized for all humans, differences between the rights of citizens and non-citizens are substantial, and they seem to be increasing. This text does not question legitimate differences between citizens' and non-citizens' rights. No state is—or should be—obligated to grant social, economic, or political rights to all members of humanity. However, some human rights obligations of states have been extended beyond their territorial borders. What is puzzling is which obligations have been extended extraterritorially and which ones have not. Paradoxically, a state's obligation not to deport or expel a person to a country where that person risks being tortured does not extend to an obligation not to facilitate torture in that same country.

For centuries the notion of "state sovereignty" was used as a shield by oppressive governments. Events taking place within the territorial jurisdiction of a particular state—no matter how savage or gruesome these policies and practices happened to be—were seen and treated as purely "internal affairs," and the state was answerable to no one. Since World War II, this conception of sovereignty has changed. However, the notion of sovereignty still serves to protect against some forms of state responsibility, only now it is far more likely that countries will invoke the sovereignty of *another* state in order to remove *themselves* from any and all responsibility in assisting an outlaw state. As a result, countries have been able to "do" things in the international realm that they would be prohibited from doing domestically.[1] This text looks at different facets of this paradox, reviews noteworthy incidents and cases, and critiques the apparent lack of effort to develop and strengthen transnational state responsibility, which we deem crucial for universal enforcement of nominally universal human rights.

Part II focuses on the expansion of the application and enforcement of transnational law, but also on the uncertainty of transnational state responsibility. Part III employs examples from a variety of subfields of international law in an attempt to outline the current status of transnational state responsibility. While much of this work is based on the connection between legal and territorial boundaries, and more particularly, on how territorial principles have often served to restrict responsibilities under the law, Part IV examines how the notion of citizenship also plays an important role in this area, strengthening state responsibility towards its own citizens while at the same time denying it for non-resident non-citizens. Part V examines how the International Law Commission has thus far addressed the issue of "aid and assistance" provided by one state to another state. We argue that the standard that is proposed is too high, and that it misses not only much of

1. This thought is best expressed by Lea Brilmayer, who asks: "Is there any way to explain why an action suddenly becomes legitimate when it is undertaken outside one's territory? Would support for death squads in El Salvador be any different from support for death squads in Miami?" LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 28 (1989).

what governs relations between states, but also much of what gives rise to human rights abuse in the world.

II. THE EXPANSION OF TRANSNATIONAL LAW

Prior to World War II, the relationship between the ruler(s) and the citizens of a particular country was treated as a completely "internal" matter, beyond the purview of the international community.[2] In the past half century there has been a veritable explosion of human rights instruments and mechanisms designed to protect individuals from cruel and arbitrary treatment by their own government.[3]

In some ways an equally remarkable change in international law and in the notion of state sovereignty has been the enormous growth in the transnational enforcement of human rights.[4] Adding to previous developments relating to slavery and piracy in international criminal law, some human rights violations were defined as crimes—domestically and internationally—and opened the way toward transnational enforcement. One example of this was the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid[5] which mandated judicial, legislative and administrative measures against individuals who committed apartheid, regardless of the residence or citizenship of that person. Unfortunately, the Apartheid

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2. This, of course, is not meant to suggest that these developments in law have changed state practice in any discernible way. Theo Van Boven writes that the "tension between international concern for human rights and the principle of non-intervention in domestic affairs has not been overcome." He continues:

> As a result, in spite of the fact that contemporary international law heavily bends towards the duty of the international community to respond effectively to human rights violations, the political threshold with regard to preventive diplomacy and action in the area of human rights remains high. A convenient wait-and-see attitude prevails over the readiness to have resort to preventive diplomacy and intercession.

Theo Van Boven, *Prevention of Human Rights Violations*, 13 SIM SPECIAL 91 (1991).

3. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), (entered into force Mar. 23, 1976); Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990).

4. *See generally* Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169 (1987); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37 (1990); Hari Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191 (1997).

5. International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973).

Convention was not ratified by Western states (nor by South Africa) and has fallen into oblivion since the emergence of the "new" South Africa in 1994.

A number of efforts to deal with international terrorism have also contained transnational enforcement provisions. Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft[6] allowed prosecution by the State whose aircraft was hijacked, or in whose territory the aircraft landed. In addition, it specified that no "criminal jurisdiction exercised in accordance with national law" was to be excluded.[7] Article 5 of the 1979 International Convention Against the Taking of Hostages[8] went even further than this, mandating jurisdiction if the offense occurs in the territory of the state, if the offender is a national or stateless resident, if the victim is a national of the state (when deemed appropriate), or if the offender is present in the territory of the state and not being extradited.

More recently, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9] has pushed transnational enforcement even further. Article 5 mandates jurisdiction not only when torture occurs within the territory of a country, but also when the offense is committed by a national, against a national (when deemed appropriate), or an offender is located within the State's territory if extradition does not occur.[10] The Torture Convention also permits any territorial enforcement allowed by the internal law of the state party.[11]

In short, legal grounds for the enforcement of human rights disregarding territorial boundaries have expanded, at least with regard to freedom from torture.[12] But perhaps where international law has changed very little—where state sovereignty might well look like it did a half century ago and beyond—is in terms of establishing norms and principles of transnational state responsibility. While a state is prohibited from torturing its own citizens,[13]

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6. Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, *reprinted in* 10 I.L.M. 133 (1970).

7. Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 6 at I.L.M. 134.

8. International Convention Against the Taking of Hostages, *adopted* Dec. 12, 1979, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 99, art. 5, U.N. Doc. A/34/819 (1979).

9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention].

10. *Id.* art. 5.

11. *See generally* Nigel S. Rodley, *The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance, in* NEW DIRECTIONS IN HUMAN RIGHTS (Ellen Lutz et al. eds., 1989).

12. Although not directly on point, a fascinating development in state practice, expertly catalogued by Menno Kamminga, has been the extension of diplomatic protection to non-nationals. *See* MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS (1992).

13. This, of course, is overly simplified. In addition to the prohibition not to torture, a country has a number of other duties—positive duties—as well. These have been specified by the Human Rights Committee:

> States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.

Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, Annex 5, General Comment

to remain with freedom from torture, does this same state violate international law if it assists in the torture of citizens of another state instead? Or, put another way, are states able to "do" things in the international sphere that they are prohibited from doing within their own domestic realm?

To understand the current uncertain state of international law, consider an example that we will return to several times. There are two countries—*X* and *Y*. *Y* has a very poor human rights record. Torture is routinely practiced by *Y*'s security personnel, and the Y government has been engaged in battle with a small insurgency group for a number of years. As a result of this fighting, hundreds, if not thousands, of civilians have been killed each year, usually during the course of aerial bombing attacks on villages that are thought to be insurgent strongholds.

Country *X*, on the other hand, generally respects the human rights of *its* own citizens, and it is a signatory to most of the important international human rights treaties and conventions. Notwithstanding its unblemished domestic record, *X* has long been allied with *Y* for strategic reasons. Each year a substantial portion of X's foreign aid goes to *Y*, and *X* provides military and riot-control equipment to *Y*. In addition, *Y* has purchased instruments of torture from *X*, and security personnel from *X* have trained agents of *Y* in the most "efficient" methods of torture. Agents of *X* have even been present during torture sessions in *Y*, although there have never been any allegations that these agents of *X* have themselves participated in the practice of torture.

With this scenario in mind, we ask the following question: what transnational duties does *X* have, or, in other words, is *X* in any way accountable for any of the human rights abuses carried out by its ally *Y*? We begin where international law is most firmly established. The clearest transnational duty that *X* possesses in this hypothetical is the prohibition against returning a person to a country if there is a likelihood that this person would face persecution there. Under the *nonrefoulement* principle of international refugee law,[14] even if citizens of *Y* are found to be within the territory of *X* illegally, *X* is obligated to not return these individuals to *Y* if there is a likelihood that they would face persecution or the loss of freedom there. This concept was reaffirmed by Article 3 of the Torture Convention, which mandates that "[n]o State party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture . . . ."[15] In interpreting this obligation, the Committee Against Torture (CAT) found that applicants from

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7(16), ¶ 1, U.N. Doc. A/37/40 (1982).

14. *See* Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150, 176 (entered into force Apr. 22, 1954). Article 33(1), entitled "Prohibition of expulsion or return ('refoulement')" states, "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.* at 176.

15. Torture Convention, *supra* note 9, art. 3.

countries such as Switzerland and Canada should not be returned to Zaire and Pakistan.[16] Similarly, the European Commission and Court of Human Rights has confirmed that the prohibition against torture was absolute, and governments were thereby precluded from expelling people to countries where they faced a risk of torture.[17]

What other transnational duties does X have beyond that of *nonrefoulement*? Here things begin to get murky. It is clear that under the Torture Convention *X* is obligated to either prosecute or extradite torturers (of *Y* or any other country) who happened to be within its territorial jurisdiction.[18] The problem, of course, is that in the scenario that has been posited the security forces of *X* trained agents of *Y* in various methods of torture. It seems to make little sense to say that *X* has a duty to prosecute or extradite agents of *Y* within *X*'s territorial jurisdiction who have committed torture, but at the same time ignore *X*'s actions in assisting *Y*'s efforts.

Under the provisions of the Torture Convention a person commits the offense by direct infliction, as well as by instigation, consent, or acquiescence.[19] It is clear—is it not?—that agents of X are in many ways instigating, consenting and acquiescing in Y's torture.[20] In fact, one could make a very strong argument that merely by selling torture equipment to *Y*, or simply by providing security assistance to *Y* and knowing that at least some of this money will be spent carrying out torture, the government of *X* has violated its duties under international law.

The same kind of argument can be made with respect to the counterinsurgency war that *Y* has been carrying out. *Y* is violating international law through its deliberate policy of bombing villages. Yet country *X*, although fully aware of these illegal practices, continues to provide substantial

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16. *See* Mutombo v. Switzerland, Communication No. 13/1993, *Report of the Committee Against Torture*, U.N. GAOR, 49th Sess., Supp. No. 44, Annex 5, at 45, U.N. Doc. A/49/44 (1944); Khan v. Canada, Communication No. 15/1994, *Report of the Committee Against Torture*, U.N. GAOR, 50th Sess., Supp. No. 44, Annex 5, at 46, U.N. Doc. A/49/44 (1994).

17. The European Court of Human Rights has consistently held that expulsion or deportation is precluded "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture." Ahmed v. Austria, 24 Eur. H.R. Rep. 278, 287 (1997). The Court added that freedom from torture applies to all individuals, and cannot be denied or restricted for an individual deemed "undesirable or dangerous." *Id.* at 291.

18. *See* Torture Convention, *supra* note 9, art. 1.

19. Article 1 of the Torture Convention reads in pertinent part: "For the purposes of this Convention, the term "torture" means any act . . . inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* art. 1.

20. Jordan Paust writes:

> Certainly, states can be guilty of "encouragement" of, "toleration" of, or "acquiescence" in violations of international law. The complicity of the state is proscribed whether or not other violations of international law can be "imputed" to the state. Indeed, general norms of customary international law proscribe state encouragement or toleration of terrorist and subversive acts by private persons directed against the legitimate government of another state.

Jordan J. Paust, The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility, 11 HASTINGS INT'L & COMP. L. REV. 41, 47 (1987).

amounts of military equipment to *Y*, much of which is then turned on civilian populations in *Y*. Is *X* thereby in violation of international law?

III. THE LAW OF STATE RESPONSIBILITY FOR ABUSES BEYOND TERRITORIAL BORDERS

While international law has detailed illegal human rights practices for countries within the domestic sphere, it has remained silent as to when (and under what circumstances) a state has violated international human rights law by acting abroad or by providing "aid and assistance" to another state which itself is carrying out abuses. Such a search for states' obligations is the main purpose of this text. Because there has been little progress in specifying transnational state obligations in international human rights law, we have mapped out recent developments in other branches of international law—environmental harms, and security and military operations and assistance—to identify replicable models.

A. Transnational Environmental Harms

To begin this discussion it is important to note that there is, at least on one level, some solid grounding in international law for the concept of state responsibility based on the principle that one state has a duty not to cause harm in or to the territory of another state.[21] In the *Trail Smelter*[22] case, Canada was found to be in violation of international law when emissions from an industrial plant located in British Columbia were causing environmental damage in the United States. The claims tribunal held 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, when the case is of serious consequence and the injury is established by clear and convincing evidence.[23]

Despite this precedent, the law governing transnational environmental harm remains somewhat uncertain. Indicative of this, perhaps, is the fact that no states presented claims against the former Soviet Union for the enormous levels of damage they sustained as the result of the Chernobyl nuclear power disaster.[24] And in fact the governing body of law is itself fraught

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21. *See, e.g.*, Corfu Channel, (U.K. v. Alb.), 1949 I.C.J. Pleadings, (1 Corfu Channel) 4, 22 (Sept. 30, 1949).

22. Trail Smelter Case, (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

23. *Id.* at 1965.

24. Estimates as to the number of long-term cancer deaths that resulted from the nuclear accident range from 14,000 to 475,000 worldwide. Scientists estimate that up to 600,000 people outside of the

with indecision concerning liability. Principle 22 of the 1972 Stockholm Declaration sets forth the current "standard" governing liability for transnational environmental damage: "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[25]

International law has also not been successful in controlling the environmental practices of transnational corporations (TNC). The efforts in the late 1970s and early 1980s to establish a draft Code of Conduct ultimately failed. In 1990 there was another attempt by G-77 and the United Nations Centre on Transnational Corporations (UNCTC) to revive these efforts, but this went nowhere because of opposition from the Organization for Economic Cooperation and Development (OECD) countries and the United States. In 1992, the UNCTC was closed and its activities integrated into the office of the United Nations Conference on Trade and Development (UNCTAD). In addition to these failed efforts internationally, industrialized countries have made little attempt to apply domestic restrictions to the environmental practices of their own corporations operating in other lands.[26] Where there have been some major advances in this area has been with regard to the transportation of hazardous and radioactive materials. Publicity over scandals concerning disposal of toxic chemical wastes in Africa brought this problem to the United Nations' agenda. Law occupied the forefront of all debates because the lack of *international* law enabled the evasion of strict national laws by moving the problem, together with the toxic waste, to developing countries that had no protective legislation. The crucial role of law has been described succinctly by the WHO's Regional Office for Europe: "A comprehensive system for the disposal of hazardous waste will not develop unless its basic requirements are prescribed and enforced by law."[27] The General Assembly affirmed the importance of law by urging governments to "take the necessary legal and technical measures in order to halt and prevent" illegal international traffic in and dumping of toxic wastes,[28] and rec-

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Soviet Union have been adversely affected by the nuclear fallout. In addition to the human toll, property damage throughout Europe ran to tens of billions of dollars. Devereaux E. McClathey, *Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986–1996*, 25 GA. J. INT'L & COMP. L. 659 (1996).

25. Conference on the Human Environment, at 7, U.N. Doc. A/CONF.48/14 (1972), *reprinted in* 11 I.L.M. 1416, 1420 (1972). The recent Rio Declaration uses nearly the same language. Principle 13 encourages states to "develop further international law regarding liability and compensation . . . ." Conference on Environment and Development, at 4, U.N. Doc. A/CONF.151/5 (1992), *reprinted in* 31 I.L.M. 874, 878 (1992).

26. *See* 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).

27. WORLD HEALTH ORGANIZATION, MANAGEMENT OF HAZARDOUS WASTE: POLICY GUIDELINES AND CODE OF PRACTICE 25 (M. Suess & J. Huismans eds., 1983).

28. *Responsibility of States for the Protection of the Environment: Prevention of the Illegal Traffic in, and the Dumping and Resulting Accumulation of, Toxic and Dangerous Products and Wastes Affecting Developing Countries*

ognized "the necessity of developing rules of international law, as early as practicable, on liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes."[29]

The first important step in the development of international law in this area was the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[30] The Basel Convention is important for present purposes because of the changed perception of state sovereignty that it reflects. In theory, developing countries have always had the option of refusing to import hazardous waste from the West. Thus, a traditional approach would be to say that there was no need for such a Convention, and that attempts to regulate the transnational shipment of hazardous wastes would violate the sovereignty of states (receiving states and sending states alike). But what the Basel Convention recognizes–in fact, what it is premised upon–is that a country's responsibilities do not simply end at its borders. In 1989, the fourth ACP-EEC Convention of Lomé went even further than the Basel Convention and adopted a prohibition on exports between the EEC and certain African, Caribbean and Pacific countries.[31] Furthermore, in 1990 the IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste[32] filled in one of the gaps of the Basel Convention and delegated financial and environmental responsibility to the originating country.

Notwithstanding these developments, the notion of responsibility for transnational environmental harm remains uncertain, and perhaps there is no better example of this than the case of French nuclear testing in the South Pacific. The health hazards of radioactivity have been addressed by the United Nations as early as 1955,[33] and safeguards are provided in numerous international instruments. These have continued the historical pattern of steadily lowering the permissible exposure to radioactivity in every subsequent revision,[34] thus affirming in law-making the general principle often reiterated by the WHO that any increase in the level of ionizing radiation in

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in Particular, G.A. Res. 41/212 of 20 December 1988, 1.

29. *Traffic in and Disposal, Control and Transboundary Movements of Toxic and Dangerous Products and Wastes*, G.A. Res. 42/226 of 22 December 1989, part III, 1.

30. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/IG.80/3 (1989), S.TREATY DOC No. 5, 102d Cong. 1st Sess. (1991).

31. The Fourth ACP-EEC Convention of Lomé (1989), *reprinted in* TRANSBOUNDARY MOVEMENTS AND DISPOSAL OF HAZARDOUS WASTES IN INTERNATIONAL LAW (Barbara Kwiatkowska & Alfred H.A. Soons eds., 1993).

32. IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste as Adopted by the General Conference GC (XXXIV)/Res/530 of 21 September 1990, *reprinted in* Kwiatkowska & Soons, *supra* note 31.

33. *See* B. Lindell & R.L. Dobson, *Ionizing Radiation and Health*, Public Health Papers, No. 6, World Health Organization, Geneva, 1961.

34. *See International Atomic Energy Agency, Basic Safety Standards for Radiation Protection*, Safety Series No. 9 (1967).

the atmosphere constitutes a threat to the health of present and future generations.[35]

It is against this background that France carried out a number of nuclear tests *far* away from France, geographically *and* legally speaking. A series of atmospheric tests was carried out from 1966 to 1975 and underground tests followed from 1975 to 1992. A moratorium suspended nuclear testing from 1992 to 1995, but testing was resumed in 1995 and 1996. Legal challenges to this testing failed, as discussed below.

The first series of tests was challenged before the International Court of Justice (ICJ) by Australia and New Zealand, the argument being that the deposit of radioactive fallout from these blasts and its dispersion into the airspace of those two countries violated their state sovereignty.[36] The Court, however, avoided the issue altogether. It held that in view of the unilateral declaration made by the French Government concerning its intention to terminate atmospheric tests, the claims no longer had any object, and thus no decision was called upon to be given by the ICJ.[37]

After France announced the resumption of nuclear testing in June 1995, protests and boycotts were soon supplemented by legal challenges made by potential victims. Three venues were approached—the European Commission on Human Rights, the Court of First Instance of the European Communities, and the Human Rights Committee. The European Commission declared the applications inadmissible,[38] as did the Human Rights Committee.[39] The Court of First Instance of the European Communities went into the merits to a certain extent because the applicants were seeking interim relief, namely, asking for the Commission to exercise its powers under the EAEC (European Atomic Agency Community) to refuse to assent to French nuclear tests on the grounds that they constituted "particularly dangerous experiments."[40] The Court, however, denied the *locus standi* to the applicants, claiming that they were not exposed to any more danger than any

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35. *See* Resolution WHA 19.39 (May 1966), WHO, HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD, vol. 1 WHA 26.57 (May 1973), WHO, HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD, vol. 2, 1985.

36. I.C.J. Pleadings, *Nuclear Tests*, vol. I, p. 14, ¶ 49, *quoted in* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I), 66 (1983).

37. In his dissent in the case, Judge de Castro wrote:

> If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighboring properties of noxious fumes, the consequence must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory.

Nuclear Tests, (Austl. v. Fr.), 1974 I.C.J. 253, 389 (Dec. 20) (de Castro, J., dissenting).

38. *See* Tauira v. France, App. No. 28204/95, 83-B Eur. Comm'n H.R. Dec. & Rep. 112 (1995).

39. *See* Human Rights Committee, Vaihere Bordes et al. v. France, Communication No. 645/1995, decision of 22 July 1996, *Report of the Human Rights Committee*, A/51/40, vol. II, Annex IX G.

40. Case T-219/95 R, Danielsson v. Commission, 1995 E.C.R. II-3051, 3073, 42 (Ct. First Instance 1995), *reprinted in* 17 HARV. HUM. RTS. J. 453, 458 (1996).

other residents of Polynesia.[41] In addition, it also interpreted article 34 of the EAEC as obligating the Commission to assess the effects of nuclear tests on the affected people "based on considerations of public interest."[42]

In sum, all three human rights bodies denied that individual *rights* were at stake. Even more disappointing is the fact that each of these decisions was premised on the idea that France's view of its own "national interest" necessitated nuclear tests carried out on the other side of the globe, far away from where any and all harm would take place. The denial of access to justice for the people who were exposed to the negative effects of French nuclear tests reveals just how easily such negative effects can be exported. This ease also testifies to the continuing gap between the postulated universality of human rights, on the one hand, and the territorial limitations or restrictions of governmental obligations.

B. Transnational Security Operations by State Actors

Access to information on transnational security operations is notoriously restricted and information generally only becomes available if an involved actor makes it public or if an operation visibly fails. Loch Johnson carried out a schematic analysis of the existing types of such operations along an escalation ladder in order to identify thresholds that should not be overstepped by Western governments.[43] Although many of these operations would constitute an apparent breach of international law, this obviously does not deter such practices. Instead, such operations are designed to be covert, and thus precluded from public knowledge or the reach of law. However, when such operations do enter the domain of public knowledge and thus *facts* become known, the responsibility of the state performing those acts is—or at least should be—much easier to establish.

The Human Rights Committee has held that a state party may be accountable under Article 2(1) of the 1966 Covenant on Civil and Political Rights for violations of protected rights committed by its agents in the territory of another state, whether or not this other state acquiesced in these actions or not.[44] As Guy Goodwin-Gill notes, "[i]n the view of the Committee, the phrase 'within its territory *and subject to its jurisdiction*' refers not to the place where the violation occurred, but to the relationship between the individual and the State concerned."[45]

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41. *Id.* ¶ 70.
42. *Id.* ¶ 74.
43. Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284 (1992).
44. *See* De Lopez v. Uruguay (Communication No. 52/1979), Human Rights Committee, *Selected Decisions under the Optional Protocol*, at 88–92, U.N. Doc. CCPR/C/OP/1 (1985); De Casariego v. Uruguay (Communication No. 56/1979), Human Rights Committee, *Selected Decisions under the Optional Protocol*, at 92–94, U.N. Doc. CCPR/C/OP/1 (1995).
45. GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 142 (2d ed. 1996).

The lump sum settlement that France agreed to pay New Zealand for the sinking by French agents of the "Rainbow Warrior" in New Zealand waters is another example of state responsibility for direct harm to another state.[46] Moreover, the settlement between Israel and Norway for the mistaken shooting by Mossad agents of what was thought to be a Palestinian terrorist (who, in fact, was an ordinary waiter) provides further indication of the acceptance of this notion of transnational state responsibility for (known) actions of state security officials.

Finally, at least one American court has been willing to hold liable a foreign state for actions of its agents in the United States. In *Letelier v. Chile,*[47] the District Court held the Chilean Government (along with various Chilean officials) civilly liable for the wrongful deaths of Orlando Letelier, former Chilean ambassador to the United States, and Ronni Moffit, Letelier's assistant, from a car bomb explosion in the District of Columbia. One of the exceptions to the Foreign Sovereign Immunity Act[48] is for the commission of a "tortious act" occurring in the United States. In this case it was proven that agents of the Chilean Government had made the bomb and had placed it in the automobile themselves.[49]

C. Military Operations in Other Countries

To address the question of state responsibility for military operations in other countries we examine the issue on several levels. At the domestic level, we employ two sets of examples. The first is the seeming acceptance of the notion of transnational responsibility in the context of human rights abuses and atrocities committed by blue helmets of various nationalities in Somalia. The second, by way of contrast, is the unsuccessful efforts to bring suit against the United States Government for the harms to civilians ensuing from U.S. military operations in other countries. Next, we turn to an important decision by a regional institution, the European Commission of Human Rights, which found transnational state responsibility for abuses outside a state's territorial jurisdiction during the course of military occupation of another country. Finally, we move to the level of an international body, and spend some time analyzing, interpreting and criticizing the ICJ's opinion in *Nicaragua v. United States.*[50] This case is important for a number of reasons. First, the Court readily accepted that the U.S. government was responsible

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46. *See* CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 88 (1987).

47. Letelier v. Chile, 488 F. Supp. 665 (D.D.C. 1980).

48. Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 (1994).

49. *Cf.* Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (where an American citizen, Scott Nelson, who was allegedly tortured by state agents in Saudi Arabia, was denied any recovery under United States law because the tortious conduct occurred outside the United States and Nelson was not able to meet any of the other exceptions protecting foreign sovereign immunity).

50. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Military and Paramilitary Activities].

for a number of acts of *direct* harm to Nicaragua. The ICJ had no difficulty recognizing this particular aspect of transnational state responsibility. Second, the Court also questioned whether the United States could be held responsible for acts committed by the *contras*, a paramilitary organization that received substantial amounts of assistance from the United States. This is an example of *indirect* harm, and it is noteworthy that the Court indicated that there could be instances where one state could be held responsible for the actions of another state or entity so long as the first state exercised the requisite "control" over the actions of the latter. It is the ICJ's notion of "control" with which we take issue.

1. Abuses by Blue Helmets in Somalia

The dark side of international intervention in internal armed conflict was revealed in the case of Somalia: what had been designed as the delivery of humanitarian relief (Operation Restore Hope) was eventually converted into warfare (and was dubbed Shoot-To-Feed Operation), with U.N. peacekeepers almost certainly committing war crimes. Somalia could be an object of such experiments because it has lacked an operational central government since 1991. The situation in Somalia confirmed the basic postulate that human rights protection is first and foremost national. When Siad Barre's government dissolved in January 1991, the UN personnel left with all other expatriates. UNOSOM-1 followed, consisting of "fewer than 100 lightly armed Pakistani troops [who] had to be guarded by the local militia" and were withdrawn in September 1991.[51] In December 1992, Operation Restore Hope commenced as a U.S. operation approved by the Security Council and was intended to create a secure environment for the delivery of humanitarian relief.[52] Some 28,000 soldiers from twenty-eight countries did—or did not—manage to create a secure environment for delivering humanitarian aid, depending upon whose assessment one relies. Five months later UNOSOM-2 replaced the United States led intervention, with reduced troop strength and a broadened mandate including disarming local political armies. A U.S. contingent continued outside UNOSOM, attaining notoriety for consecutive attempts to capture Aideed, and was withdrawn after U.S. casualties in September 1994. The withdrawal of the blue helmets followed in March 1995.

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51. R. Dowden, *The African Tragedy: Apathetic, Ill-Informed, Too Late*, INDEP., July 16, 1993.

52. *See* U.N. SCOR Res. 794 of 3 December 1992 [authorizing the use of all necessary means (armed force, in the U.N. jargon) to establish a secure environment for humanitarian relief operations as soon as possible. The Security Council anticipated that co-ordination between "unified command and control" of the military forces and the United Nations would be arranged through dialogues between the Secretary-General and Member States, and the Secretary-General was asked to immediately prepare plans for UNOSOM-2 to follow upon the withdrawal of the Member States' military forces].

Public attention in the U.S./U.N. intervention was revived after a series of charges were leveled that blue helmets from various countries had committed atrocities in Somalia. Under traditional notions of international law, it would be the responsibility of the Somali Government to seek redress for the harms suffered by its own citizens. Most likely as a result of the lack of an organized government in Mogadishu, the Somalis have not done so. What has ensued is noteworthy in terms of the development of transnational state responsibility. On the basis of these charges, a number of soldiers were brought before military courts and commissions of inquiry in the United States, Canada, Belgium and Italy, respectively.[53] These proceedings were unique because of such factors as the relatively small number of victims involved, as well as some of the evidence against individual soldiers, particularly that which existed on video, as well as the embarrassing fact that this was a United Nations operation. Still, these factors should not obscure the important development in transnational state responsibility that these disciplinary actions represent: soldiers of one country can be held responsible for their actions in another state.

2. United States Military Intervention

As a longstanding military superpower, the United States has engaged in a wide variety of military and quasi-military operations throughout the world. In recent years there have been several challenges to the human consequences of these actions. In *Saltany v. Reagan*,[54] a group of 55 Libyan plaintiffs brought suit against the U.S. on behalf of civilian decedents who were either killed, suffered personal injury, or whose property was destroyed during the course of U.S. military air strikes on that country on April 6, 1986, in retaliation for the bombing of a disco in West Berlin on April 5, 1986, that resulted in the deaths of two U.S. servicemen. The defendants named included the American president, various American civilian and military officials, and the United States Government[55]. The district court dismissed the case in a summary fashion, although it readily conceded that the alleged conduct would be "tortious" were it to be judged by any civil law standards.[56] The problem is that the court did not employ *any* standards. Instead, it merely pointed out that the defendants had exercised "discretion in a myriad of contexts of utmost complexity and gravity, not to

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53. *See* S. Bates, *Peacekeeping 'torturers' go on trial*, GUARDIAN WKLY., June 29, 1997; C. Endean, *Did Somalia's Saviours Become Torturers?*, EUR., June 19–25, 1997; R. Graham, *Italy to Probe Torture Claims*, FIN. TIMES, June 14–15, 1997; H. Clarke, H. & R. Rollnick, *Belgian 'Racist' Troops Row*, EUR., July 15–18, 1993; C.H. Farnsworth, *Alleged Racism in Military Jolts Canada*, INT'L HERALD TRIB., May 18, 1993; J. Hoagland, *Missteps in Somalia, But Overall the Operation is Encouraging*, INT'L HERALD TRIB., Apr. 15, 1993.

54. Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988).

55. The United Kingdom and Prime Minister Margaret Thatcher were also named as defendants. *Id.*

56. *Id.* at 322.

mention danger. And each acted, as duty required, in accordance with the orders of the commander-in-chief or a superior order."[57] Notwithstanding the death and harm to civilians from the aerial bombings, and despite the absence of hostilities between Libya and the United States, the court was particularly galled that the suit was ever brought in the first place. In remarks directed at the plaintiffs' attorney, which included former United States Attorney General Ramsey Clark, the court chastised in the following way: "The plaintiffs, purportedly citizens or residents of Libya, cannot be presumed to be familiar with the rules of law of the United States. It is otherwise, however, with their counsel. The case offered no hope whatsoever of success, and the plaintiffs' attorneys surely knew it."[58] The court continued:

> The injuries for which suit is brought are not insubstantial. It cannot, therefore, be said that the case is frivolous so much as it is audacious. The Court surmises it was brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement.[59]

Despite the perceived "audacity" of the suit, the court refused to apply Rule 11 sanctions. On appeal, this part of the district court's holding was reversed with respect to the claim against the United Kingdom.[60]

The downing of Iran Air Flight 655 over the Persian Gulf by missile fire from the USS Vincennes also gave rise to litigation in the United States. The commercial airliner had been mistaken for a military aircraft (a position which the Iranian Government refuses to accept) and shot down, killing all abroad. One such suit was *Nejad v. United States*.[61] The plaintiffs in the case were the families and economic dependents of four of the passengers. The defendants were the U.S. Government and twelve defense contractors who supplied the ship with military equipment. The district court dismissed the plaintiffs' suit, evincing the complete deference to the President and to the military that seemingly has become the norm in any litigation linked to the area of foreign affairs: "[I]t is indubitably clear that the plaintiffs' claim calls into question the Navy's decisions and actions in execution of those decisions. The conduct of such affairs are constitutionally committed to the President as Commander in Chief and to his military and naval subordinates."[62] *Koohi v. United States*[63] was based on the same set of facts with essentially the same results. A chilling aspect of *Koohi* is that the court was of the opinion that even if the USS Vincennes had *deliberately* downed the ci-

57. *Id.*
58. *Id.*
59. *Id.*
60. *See* Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989).
61. Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989).
62. *Id.* at 755.
63. Koohi v. United States, 976 F. 2d 1328 (9th Cir. 1992).

vilian airliner, the U.S. Government would still be immune from suit under the "combatant activities" exception to the Federal Torts Claims Act.[64]

The U.S. invasion of Panama has also given rise to litigation in the United States. Most pertinent to the present discussion is *McFarland v. Cheney*,[65] a suit brought on behalf of a group of Panamanian civilians who suffered personal injury, property loss, and the death of loved ones during the invasion of that country that began on December 20, 1989. Estimates of the number of civilians killed range from 200 to 10 times that number. Many of the petitioners in the case had filed administrative service claims with the U.S. Army Claims Service seeking compensation for their injuries and losses. Although civilians injured during the course of the U.S. invasion of Grenada in 1983 had been compensated in this fashion, the Army Claims Service rejected all of the Panamanian compensation claims on the grounds that the injuries had occurred during U.S. combat operations. The district court upheld this administrative finding, and its judgment was upheld on appeal. While Panama has received emergency assistance from the U.S. since the invasion, no funds have been set aside for the victims of the invasion.

Finally, there has been a least one instance where civilians in another country have sought to hold the U.S. Government responsible for indirect harms brought about and through its conduct of foreign policy. Nicaraguan civilians in *Sanchez-Espinoza v. Reagan*[66] based their suit against the U.S. Government and various federal officials on the grounds that the U.S. Government was providing material support to the *contra* rebels, who were in turn committing terrorist raids in Nicaragua. This, they argued, was in violation of international law, as well as the Fourth and Fifth amendments of the United States Constitution. While recognizing the "gravity and complexity of the plaintiffs' claims,"[67] the district court dismissed the suit on the basis of the political question doctrine, holding that to adjudicate such a suit it would have to determine the precise nature of the United States Government's involvement in the affairs of several Central American countries. The court of appeals affirmed, but on the basis of the doctrine of sovereign immunity instead. In an opinion by then-Judge Scalia, the court held:

> It would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States. Such judgments would necessarily "interfere with

64. 28 U.S.C. § 1346(b).

65. McFarland v. Cheney, 1991 WL 43262 (D.D.C. 1991), *aff'd* 971 F.2d 766 (D.C. Cir. 1992), *and cert. denied*, 506 U.S. 1053 (1993).

66. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd* 770 F.2d 202 (D.C. Cir. 1985).

67. *Id.* at 601.

the public administration," or "restrain the government from acting, or . . . compel it to act . . . .[68]

3. The European Convention

In the case of *Cyprus v. Turkey*,[69] the European Commission of Human Rights affirmed the notion of transnational responsibility in a situation where governmental authority was exercised abroad during the course of military occupation. The facts of the case are well known. Turkey's armed forces invaded Cyprus in July 1974 and the following month occupied a large part of northern Cyprus, whereupon Cyprus applied to the European Commission of Human Rights to find Turkey in violation of most of the European Convention. The issue that is most relevant for the present analysis relates to state responsibility for abuses outside Turkey's national borders. Turkey's armed forces operated in Cyprus, a separate and sovereign state. The Commission held that responsibility for abuses was not limited to national territory. Rather, states were obligated to secure human rights protection "to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad."[70]

4. The ICJ Decision in *Nicaragua v. United States*

The only time that the ICJ has directly addressed the issue of state responsibility for military/security operations in other countries was in *Nicaragua v. United States*. Nicaragua claimed that the United States had violated international law through a series of military actions in that country and the ICJ agreed. The ICJ held that the United States had acted in breach of a number of obligations under customary international law. By training, arming, equipping, financing, and supplying the *contra* rebel forces the United States had violated the obligation not to intervene in the affairs of another State. Through its actions in armed attacks at various locations in Nicaragua the United States had breached its obligation under customary international law not to use force against another State. And in laying mines in the internal or territorial waters of Nicaragua the United States was in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce. However, Nicaragua failed to convince the Court to hold the United States responsible for violations of international law committed by the *contras*, a revolutionary

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68. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985), *aff'g* 568 F. Supp. 596 (D.D.C. 1983).

69. Cyprus v. Turkey, 1975 Y.B. EUR. CONVENTION OF HUM. RTS., 82–124.

70. *Id.*

military organization that had received substantial amounts of assistance and training from the U.S. Government. The Court stated:

> The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-a-vis Nicaragua, including conduct related to the acts of the *contras*.[71]

The *Nicaragua* case is important to the present discussion for several reasons. One is that the ICJ took up the claim of transnational state responsibility, rather than dismissing it outright. And the Court did in fact find one form of transnational state responsibility: those actions carried out directly by the U.S. Government in Nicaragua that were in violation of international law. Moreover, the Court took up the issue of indirect harm, and it also recognized the possibility of holding one state responsible for supporting and assisting another in committing violations of international law (including human rights violations).

The problem with the Court's opinion, however, is that it set the legal standard for transnational state responsibility for indirect harm extraordinarily high. In fact, the opinion could be read to mean that a state will be responsible for the actions of another entity only if the first state exercises what essentially amounts to absolute control over the second state.[72] This,

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71. Military and Paramilitary Activities, *supra* note 50, ¶ 116.

72. The same result was reached by a domestic court in the United States. *See* Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929 (D.C.Cir. 1988). The plaintiffs were United States citizens and organizations representing the same who lived and worked in Nicaragua during the civil war in that country. In their complaint the plaintiffs alleged that the U.S. Government's support for the *contra* rebel forces was in violation of international law and the Fifth Amendment of the U.S. Constitution. In terms of the former, the plaintiffs attempted to rely on the judgment of the ICJ in *Nicaragua.* However, the Court of Appeals held that the ICJ opinion was without any domestic effect. The Fifth Amendment complaint was based on the argument that the U.S. was providing assistance to the *contras* who were in turn depriving the plaintiffs of their life, liberty and property without due process of law. Although the court expressed deep concern about the seriousness of the claim, it ultimately held (consistent with the opinion of the ICJ) that the link between the United States Government and the *contras* was not strong enough to impute the actions of the latter to the former.

> Appellants must demonstrate ... that the United States' involvement in this targeting is sufficient to constitute a due process violation by our government. Appellants' fifth amendment claim founders on this requirement; their complaint does not allege that the United States participated in any way in the targeting or injuries against Americans or their property in Nicaragua. Nor do they allege that such injuries are intended consequences of our government's support for the *contras*.

Id. at 945.

Compare Linder v. Calero Portocarrero, 747 F.Supp. 1452 (S.D. Fla. 1990), *aff'd and rev'd*, 963 F.2d 332 (1992). This was a suit brought on behalf of another American citizen, Benjamin Linder, also relating to events in Nicaragua. The complaint alleged that Linder, an engineer working in Nicaragua, was ambushed by *contra* forces and immobilized by wounds to his legs and arms, and that he was subsequently

however, threatens to take us back to the old and discarded notion of state sovereignty under which the state was treated as the supreme actor within its own domestic sphere. If taken literally, it would also serve as a death knell for the principle of state responsibility under discussion. And to return to our hypothetical once again, it would undoubtedly absolve X of any and all responsibility under international law for the myriad of harms carried out by its ally Y.

But perhaps this is reading far too much into the case for the simple reason that the question of *indirect* U.S. responsibility was secondary to the issue of *direct* responsibility.[73] And on this score there was an overwhelming amount of evidence that the United States was in violation of international law *for its own actions in Nicaragua*. Thus, to delve any deeper into the issue of responsibility for the actions of the *contras* would have threatened to detract from the essence of the Court's ruling that the United States was in violation of international law for a whole host of its activities and policies in Nicaragua.

But let us assume for the moment that the Court did in fact mean to announce a principle of law that the actions of one state could not be attributable or equated to that of another state unless the first state exercised a very high degree of control over the second state.[74] Leaving aside the factual question of whether the *contras* enjoyed anywhere near the kind of autonomy attributed to them by the ICJ,[75] one of the biggest problems with such a

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killed by a gunshot to his temple from a distance of less than two feet. The defendants were three *contra* organizations and four individuals. The basis of the suit was that the *contras* had specifically targeted Linder as an American citizen, and that some of the activities in furtherance of this terrorist plan had taken place in Florida, in violation of state law. The district court dismissed the suit on the basis of the political question doctrine. What is interesting is that the court based this decision on "the intimate links between the contras' activities and the political branches." *Id.* at 1469. The Court of Appeals upheld this part of the district court's opinion, but reversed on the basis that there was no civil war exception to the right to sue for tortious conduct that violates the fundamental norms of the customary laws of war.

73. This is by no means to suggest that the distinction between "direct" and "indirect" action is easy to discern. Consider the *Letelier* case, *supra* note 47. In that case it was proven that the car bomb that exploded in the District of Columbia had been set by Chilean agents. Under U.S. law, this was vitally important because the commission of a "tortious act" in the United States is one of the exceptions under the Foreign Sovereign Immunity Act. For purposes of the present discussion this would be an example of "direct" harm—Chilean agents are performing acts on American soil. It remains to be seen if the Chilean Government would be legally responsible if it had instead trained a band of American citizens to perform this action for them.

74. This assumes, of course, that it is always possible to make a distinction between "their" agents and "ours." In the real world, however, this distinction is quite often a blurry one. Consider the successful lawsuit brought against Guatemalan General Hector Gramajo under the provisions of the Alien Tort Statute and the Torture Victim Protection Act. *See* Xuncax v. Gramajo *and* Ortiz v. Gramajo, 866 F.Supp. 162 (D. Mass. 1995). Gramajo was a former Defense Minister in Guatemala. Apparently like most other high ranking Guatemalan military and political leaders, Gramajo was also on the CIA's payroll. Was he a Guatemalan agent, an American agent—or both?

75. Tom Farer has suggested that the only kind of operations that might meet the standard of "control" seemingly set by the ICJ would be something akin to the Bay of Pigs, namely where rebels are organized, trained, armed and then launched by their patron in an assault of such dimension that, if it were carried out by troops of a foreign state, there would unquestionably be an armed attack. *See* Tom

result is that "control" is treated as an either-or proposition.[76] In reality, there will be varying degrees of control[77]—and international human rights law should reflect this fact.[78]

There is a deeper problem, however. The ICJ's notion of "control" is premised on very traditional notions of state sovereignty and power relations between nation-states, where one country attempts to rule or dominate another. This approach, however, will miss most of what presently governs relations between and among states. The hypothetical posited earlier is much more of a reflection of the reality of world politics. There is no indication that when *X* provided massive levels of assistance to *Y* that it was "controlling" *Y*—or that it was ever attempting to do so in the manner in which this term is commonly thought (and the manner in which the ICJ uses the term). In fact, this comprises the most objectionable feature of *X*'s actions. *X* apparently wants to prop up a friendly regime in *Y*, perhaps one with which it can do business. Resultantly, *X* finds that providing this kind of assistance and support to *Y* serves its own self-interest. Yet, having done so, *X* attempts to completely remove itself from the manner in which the assis-

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Farer, *Drawing the Right Line*, 81 AM. J. INT'L L. 112 (1987).

76. Throughout its discussion of this matter the Court employed absolute language. For instance, from paragraph 106: "In light of the evidence and material available to it, the Court is not satisfied that *all* the operations launched by the *contra* force, at *every* stage of the conflict, reflected strategy and tactics *wholly* devised by the United States." Military and Paramilitary Activities, *supra* note 50, ¶ 106. (emphasis added).

77. Ironically enough, United States law now allows for state liability for the actions of terrorist groups on the basis of far less "control" than this. Under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 1605(a)(7), a state can be held civilly liable to a U.S. citizen for personal injury or death resulting from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking when the act "was either perpetrated by the foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant." The act does not apply to all governments that commit or support political terror, only those that have been designated as such by the U.S. State Department.

In another case, a wrongful death suit was brought against the Iranian Government by the survivors of an American citizen who was killed in a suicide bomb attack in Israel. *See* Flatlow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998). Although the Iranian Government never responded to the complaint and the court rendered a default judgment in favor of the plaintiff, the court made a number of findings of facts in issuing its order. One was to note that the plaintiff, Stephen Flatlow, and his counsel had met with the Department of State's Coordinator for Counterterrorism, Ambassador Philip Wilcox, who informed Mr. Flatlow that the State Department was satisfied that the group that had claimed responsibility for the bombing, the Shaqaqi faction of Palestine Islamic Jihad, had in fact perpetrated the bombing. In addition, Wilcox confirmed that the Islamic Republic of Iran (which had been designated as a state sponsor of terrorism pursuant to section 6(j) of the Export Administration Act of 1979, 50 U.S.C. § 2405 (j)), provides on the order of $2 million to Palestine Islamic Jihad annually.

Note the similarities and differences between the United States and Iran. In terms of the amount of aid, the United States Government provided far more to the *contras* than the Iranian Government had given to the Palestine Islamic Jihad. Moreover, there is no evidence of training by the Iranian military, while U.S. service personnel supplied ample amounts of training to the *contra* rebel forces. Also note that there is no evidence provided by the State Department that any money from the Iranian Government to Palestine Islamic Jihad was ever passed along to the Shaqaqi faction.

78. Francis Boyle has argued that the *contras* would be considered under the "control" of the U.S. military according to the Department of Army's field manual THE LAW OF LAND WARFARE (Field Manual 27-10, 1956). Francis Boyle, *Determining U.S. Responsibility for Contra Operations under International Law*, 81 AM. J. INT'L L. 86 (1987).

tance that it had provided to *Y* is used by *Y* and, more importantly, the human consequences of those practices. And international law—at least as it stands at present—allows X to do exactly that.

In addition to the need to come up with some better—and more accurate—notion of "control," it is also imperative to formulate a more accurate sense of what state responsibility entails in these matters. For example, supplying another country with foreign aid which is then used by this other country to purchase weapons of torture on the world market is qualitatively different than actually carrying out the torture.[79] That much is obvious. But a country that supplies weapons of torture to another state, knowing full well that the recipient is using this assistance to commit torture, is doing *something*: it is actually facilitating this pernicious practice. To think otherwise is simply to blink with reality. The ICJ decision in *Nicaragua* is especially objectionable because the U.S. Government's actions in supporting the *contras* was ultimately treated under the law as being indistinguishable from countries that had absolutely no connection with the *contras* whatsoever (Kenya, say). But this "either-or" approach to transnational state responsibility wildly misses much of what is actually taking place in the world.

To make this point another way, consider the efforts to control the export of weapons of mass destruction. Under Article 1 of the Biological Weapons Convention, each state party agrees to never produce, stockpile or otherwise acquire or retain biological weapons.[80] Article 3 requires each state party not to "transfer" directly or indirectly, or in any way "assist, encourage or induce" any state to manufacture or acquire any of the agents, toxins, weapons or equipment or means of delivery of weapons of mass destruction.[81] What is important to note about the duties that states undertake under the Convention is that not only are they prevented from transferring biological weapons themselves, but they are also bound to prevent entities within their jurisdiction from doing so as well.[82] But if *Nicaragua* is to be read to mean that a state is only responsible when it exercises nearly complete control over others, then countries could easily absolve themselves from responsibility by failing to exercise appropriate control over domestic entities such as corporations. But this approach would defeat the entire purpose of the Biological

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79. The ICJ essentially made such a distinction itself with respect to the claim of the use or threat of force:

> In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect to all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua . . . does not in itself amount to the use of force.

Military and Paramilitary Activities, *supra* note 50, ¶ 228.

80. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, March 26, 1975, 26 U.S.T. 583, 1015 U.N.T.S. 163.

81. *Id.* art. 3.

82. *See generally* Paul Rubenstein, *State Responsibility for Failure to Control the Export of Weapons of Mass Destruction*, 23 CAL. W. INT'L L.J. 319 (1993).

Weapons Convention. The more desirable approach is for a state to prevent the flow of biological weapons or materials to another state—whether through public or private means—and to treat failures to do so as violations under international law.

D. Military and Security Aid and the Export of Tools of Repression

In some ways the practices of states have been ahead of international law on this question of transnational accountability. States, perhaps, are beginning to understand their complicity in the policies of other countries, and many now have provisions in their own domestic law either prohibiting or restricting security and/or economic assistance to countries that engage in human rights violations. United States law serves as an example of this. Section 502B of the Foreign Assistance Act reads: "Except under circumstances specified in this Section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."[83] Enforcement of the law, however, has been much more problematic. The two largest recipients of American aid—Israel and Egypt—systematically engage in torture. Yet this has had no apparent impact on the amount of aid they receive from the United States, which continues to flow to these countries year after year, notwithstanding these widely recognized human rights violations.[84] This is not meant to suggest that these provisions under United States law have not been implemented. In fact, no country employs economic sanctions more than the United States. But the application of these laws has been inconsistent at best, and hypocritical at worst. In this regard, the United States enjoys a great deal of company.[85]

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83. The Foreign Assistance Act of 1961, § 502B, 22 U.S.C. § 2304(a)(2). *See* the International Security Assistance and Arms Export Control Act of 1976, 90 Stat. 729, 748, § 301(a), *as amended by* the International Security Assistance Act of 1978, 92 Stat. 730, 731. The escape clause that the law allows is that notwithstanding the existence of gross violations of internationally recognized human rights, assistance might still be provided to a country if the President certifies that "extraordinary circumstances" exist warranting the provision of such assistance. The Foreign Assistance Act of 1961, § 502B(a)(2), 22 U.S.C. § 2304(a)(2). The "extraordinary circumstances" language was added to section 502B(a)(2) by section 6(d)(1) of the International Security Assistance Act of 1978, 92 Stat. 730, 731. United States law also mandates a rights-aid linkage for multilateral economic assistance as well. International Financial Institutions Act, Pub. L. No. 95-118, § 701, 91 Stat. 1067, 1069 (1977) (current version at 22 U.S.C. § 262d (1982)).

84. One of the primary reasons for this is that it is by no means clear who would have standing to bring suit challenging the administration of the act. Crockett v. Reagan, 558 F.Supp. 893 (1982), *aff'd* 720 F.2d 1355 (1983), was a suit brought by a group of 29 members of Congress challenging United States military involvement in El Salvador. The district court struck down the War Powers Resolution claim on the basis that this represented a nonjusticiable political question, while the claim that aid to El Salvador violated the human rights provisions of the Foreign Assistance Act was dismissed on the basis of the equitable discretion doctrine.

85. *See generally* KATARINA TOMAŠEVSKI, BETWEEN SANCTIONS AND ELECTIONS: AID DONORS AND THEIR HUMAN RIGHTS PERFORMANCE (1997).

The Parliamentary Assembly of the Council of Europe has expressed what has now become the "typical" attitude, namely that the responsibility of countries exporting tools of repression stops at its borders. "Many arms exports may be used for the violation of human rights over which the exporting country has no control, except to refuse to export arms which could be used for domestic repression."[86] Such recommendations acknowledge that foreign support facilitates domestic repression, but the only suggested remedy is to discontinue such support in the future. Efforts to close the gap have been made by the European Parliament, which called for inclusion of repressive technologies into controls of arms exports, aiming to diminish the risk of facilitating torture abroad. Yet, the Parliament also had to acknowledge in the same resolution "the hypocrisy of governments who breach their own export controls."[87]

IV. CITIZENSHIP AND TRANSNATIONAL STATE RESPONSIBILITY

As we have seen in the previous section, the notion of territory plays a powerful role in terms of demarcating transnational state responsibility. Thus, while citizens (and even non-citizens) within a particular country generally enjoy a plethora of protection under international law against abuses committed by this state, protection for those living in other countries remains uneven and uncertain.

But sometimes when a state operates or intervenes in another country its actions not only affect foreign citizens but its own citizens as well. The question this raises is what transnational duties—if any—a state has to its own citizens. United States law is instructive. *Ramirez de Arellano v. Weinberger*[88] involved a suit brought by a U.S. citizen who alleged that during the course of military maneuvers, the United States Government had unlawfully seized and destroyed the meat packing plant he owned and operated in Honduras. The defendants, officers of the Executive branch, denied these factual allegations, and sought dismissal on a number of grounds. The district court dismissed the suit on the basis of the political question doctrine. The Court of Appeals for the District of Columbia overturned this dismissal, holding that the plaintiff was not asking the court to orchestrate American foreign policy in Central America. The court held instead that "the Executive's power to conduct foreign relations free from unwarranted supervision of the Judiciary

86. Parliamentary Assembly of the Council of Europe, Resolution 928 (1989) on arms sales and human rights of 27 September 1989, *reproduced in* U.N. Doc. E/CN.4/1990/65, at 17, ¶ 5.

87. European Parliament, Export of repressive technologies, resolution of 19 January 1995, *reprinted in* 16 HARV. HUM. RTS. J. at 74, ¶ 3.

88. Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and rem'd.*, 471 U.S. 1113 (1985) (remanded in light of the Foreign Assistance and Related Appropriations Act, 1985, and efforts by Honduras to make restitution), *rev'd.*, 788 F.2d 762 (D.C. Cir. 1986) (withdrawal of U.S. personnel fundamentally altered the balance of equities).

cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."[89] The Court continued:

> The suggestion [by the defendant] that a United States citizen who is the sole beneficial owner of viable business operations does not have constitutional rights against United States government officials' threatened complete destruction of corporate assets is preposterous. If adopted by this court, the proposition would obliterate the constitutional property rights of many United States citizens abroad and would make a mockery of decades of United States policy on transnational investments.[90]

Would the court have rendered a similar decision if the plaintiff had not been a U.S. citizen? No, that result seems very unlikely. And what would be just as unlikely is that a Honduran citizen whose meat packing plant had been confiscated by the U.S. Government would be able to receive *any* form of relief at all—against either the U.S. Government, the Honduran Government, or both.

The United States Supreme Court's decision in *U.S. v. Verdugo-Urquidez*[91] is not only interesting because of its unique mixture of matters of territory and citizenship, but also for what it might portend for transnational state responsibility—at least in terms of how this issue might come to be addressed under U.S. law. Verdugo-Urquidez was a Mexican national who was arrested by Mexican authorities and then handed over to officials of the United States for prosecution in this country for drug trafficking. Subsequent to this, his residence in Mexico was searched by U.S. Drug Enforcement Agency agents where incriminating evidence was found. The question in the case was whether the Fourth Amendment to the U.S. Constitution[92] was applicable to this search and seizure. The Court held that it was not. In an opinion by Chief Justice Rehnquist, the Court held that Fourth Amendment protection is afforded to "the People" of the United States. Relying on notions of territoriality rather than citizenship, the Court concludes that "the People" are individuals with sufficient contacts with the United States. In Rehnquist's view, Verdugo-Urquidez, who had only been in the United States for a few days (in a jail, no less), before the search of his residence, did not have the requisite connections.

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89. *Id.* at 1515.
90. *Id.* at 1515–16.
91. U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990).
92. The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. XIV.

Semantics aside, what seemed to be of utmost concern to the Court were the implications of an opposite holding on all "other" overseas operations, whether law enforcement or foreign policy related—or however one might begin to distinguish between the two.

> [T]he result of accepting his [Verdugo-Urquidez] claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries. The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches and seizures." The United States frequently employs Armed Forces outside this country . . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.[93]

A concurring opinion by Justice Kennedy highlights even further some of the distinctions of where and to whom the protections of the law should apply. Kennedy rejected out of hand the notion that the language "the People" was in any way dispositive of the issue.[94] Rather, in his view the reason why the Fourth Amendment should not apply in the search of Verdugo-Urquidez's home is that the warrant requirement would be "impracticable and anomalous"[95] under the circumstances. Where would U.S. authorities go for a warrant? Kennedy lists some of the inherent logistical problems:

> The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.[96]

Having taken this position, however, Kennedy then goes on to point out that the "rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case"[97]—strongly suggesting that this would dictate a completely different result. But if this were the case, and if the Constitution required a warrant for the search of the home of an Ameri-

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93. *Verdugo-Urquidez, supra* note 91, at 273.
94. *Id.* at 276.
95. *Id.* at 278.
96. *Id.*
97. *Id.*

can citizen in Mexico, wouldn't these same logistical problems that he catalogs still exist?

At least two lessons emerge from this case law. The first is the importance of citizenship. While transnational state responsibility with respect to non-resident non-citizens remains unclear, there seems to be little question (at least under U.S. law) of the extension of transnational state responsibility with respect to one's own citizens. At the outset we asked the question whether international law somehow allows states to "do" things in the international realm that states were prohibited from doing domestically. But another question might be whether the current status of transnational state responsibility might well allow a state to "do" things to foreign nationals that it is prohibited by law (domestic as well as international) from doing to its own citizens—no matter where these citizens are.

The second lesson, one which is underscored in Chief Justice Rehnquist's majority opinion in *Verdugo-Urquidez*, is that notwithstanding the revolution presently taking place in the transnational application of law—where any distinction between law enforcement and military operations is quite often a very thin one, and where the enforcement of law is commonly an international venture[98]—there will continue to be strong efforts (again, at least in the United States) to maintain many of the old distinctions of territoriality and state sovereignty.

V. QUESTIONS OF TRANSNATIONAL STATE RESPONSIBILITY

As we noted at the outset, in many ways the concept of state sovereignty has changed dramatically in the past half century, and because of this, the manner in which a state treats its own citizens is no longer seen as a purely "domestic affair." But the notion of state sovereignty continues to protect states from responsibility for human rights violations. In fact, state sovereignty is *the* commonly used shield when one state has committed or facilitated gross abuses in another country; what would have been a gross human rights violation had it occurred in its own territory is apparently beyond the reach of human rights law. As a result, states are seemingly able to do virtually everything in their power to facilitate mayhem in another country, yet avoid any responsibility under international law for these actions on the basis that they themselves do not actually pull the trigger, to use an apt metaphor.[99]

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98. *See generally* ETHAN NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF UNITED STATES CRIMINAL LAW ENFORCEMENT (1993).

99. *See generally* Christopher B. Jochnick & Josh Zinner, *The Day of the Dictator: Zaire's Mobutu and United States Foreign Policy*, 4 HARV. HUM. RTS. J. 139 (1991); Mark Gibney, *United States Responsibility for Gross Levels of Human Rights Violations in Guatemala From 1954–1996*, 7 J. TRANSNAT'L L. & POL. 77 (1997).

Consider the lessons that emerge from some of the examples examined earlier. The attempts by affected individuals to protect themselves against French nuclear tests showed that both regional and international human rights bodies were simply unwilling to extend access to justice, leaving these victims—and many others as well—with the sad understanding that human rights law stops short of any kind of enforcement against the export of an obvious health hazard from Europe to the Pacific. Even "successes" in this realm are limited. Consider the prosecutions in various Western states for blue helmet atrocities in Somalia. On one level such efforts are to be applauded in the sense that perpetrators of human rights abuses that take place in other countries are being called to justice. Yet, what has not been discussed—not even as a theoretical issue—is some form of access to justice for the victims of these atrocities. Instead, the victims have long been forgotten. As a final example, while the Strasbourg jurisprudence has broadened state responsibility for Turkey's abuses in northern Cyprus, what isn't clear is whether this will reach further in affirming access to a remedy for victims if and when violations occur.

We are firm in our opinion that if the universality of human rights is to obtain a legal grounding, there needs to be a clear recognition in international law that harm (and the responsibility for this harm) comes not only at the hand of domestic governments, but in the actions of other bodies as well.[100] In this regard our position differs rather noticeably from that of the International Law Commission. The commentary accompanying Article 27 of the Draft Articles on State Responsibility concerning "aid or assistance" rendered by one state to another demands an *intent* to bring about wrongdoing.[101] To quote directly from the commentary itself:

> As the article states, the aid or assistance in question must be rendered "for the commission of an internationally wrongful act", i.e., with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or

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100. Edward Herman has argued that:

> The United States has had a large negative impact on human rights in the Third World and should be regarded as a primary source of human rights violations, rather than as a world leader devoted to their elimination. This is an incomprehensible idea for most people and a virtual contradiction in the frame of conventional discourse.

Edward S. Herman, *The United States Versus Human Rights in the Third World*, 4 HARV. HUM. RTS. J. 85 (1991).

101. Article 27 reads:

> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

The Draft Articles on State Responsibility, art. 27, commentary, (1979), *reprinted in* 2 Y.B. INT'L L. COMM'N 104.

> that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be "presumed"; as the article emphasizes, it must be "established".[102]

One of the most obvious problems with this position is the difficulty, if not the impossibility, of being able to prove such intent. Beyond this, however, the intent requirement is simply too high a standard. In the real world, states will seldom, if ever, arm or equip another country with the intent of aiding or assisting the receiving state in committing an internationally wrongful act. The problem is not so much one of "intent" but "deliberative indifference" to the export of human rights violations to another country. Foreign support to the previous governments of Rwanda illustrates the necessity of elaborating and applying much clearer notions of complicity. Although the sickening events in 1994 captured worldwide attention, it is important to understand that Rwanda had experienced genocide before (albeit not on this same scale). Still, this did not in any discernible way prevent Western countries from supplying massive levels of military weapons—really, weapons of genocide. At the present time there are international and domestic trials being carried out in Rwanda. Unfortunately (but predictably) these trials are simply looking at Rwandan responsibility. There will be no attempt to investigate and hold responsible the Western countries for their actions that helped to make the genocide possible. And perhaps the final perversity is that at the same time that these trials are taking place, the whole vicious cycle continues, as countries are presently lining up to sell weapons for the next genocide in the Great Lakes region.[103]

Where we do find agreement with the International Law Commission (ILC) approach is in terms of recognizing that "complicity" is an act separate and distinct from the commission of the act itself. Or as the commentary explains:

> [T]he wrongful act of participation by complicity is not necessarily an act of the same nature as the principal internationally wrongful act to which it pertains. The conduct of a State which supplies, for example, weapons or other means to another State in order to facilitate the commission of an act of aggression or genocide by that

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102. *Id.*

103. Human Rights Watch, Arms Project, Rwanda/Zaire: Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide (1995); Stoking the Fires: Military Assistance and Arms Trafficking in Burundi (1997).

> other State does not necessarily, and in every case, constitute conduct that can also be classified as aggression or genocide.[104]

What we would add to this is that there are different levels of "facilitating" (to use the language of the ILC) violations in other countries. International law should recognize this, and it should also differentiate between varying degrees of "complicity" (to use ILC language once again).

VI. CONCLUSION

In the past half-century there have been enormous advances in the development of human rights law and the instruments to implement it. States are no longer "free" to do as they will in the domestic sphere. Instead, they are bound by provisions in international law that are aimed at protecting individuals from oppressive practices. Notwithstanding this, however, millions of people are victims of human rights abuses each year. One reason for this pathetic record is that human rights enforcement measures are nowhere near developments in the law.[105] As a consequence, states are still able to commit human rights abuses with near impunity.

But even when operating within their own domestic sphere, states seldom act alone. Rather, there is constant intercourse with other countries: weapons are purchased from foreign manufacturers; joint military maneuvers are carried out with foreign troops; security personnel are trained in other countries. While international law has tended to recognize how one state can directly harm another state, it has been slow in understanding how one state can indirectly harm, not so much another state, but the citizens of another state. Let us be clear, *this* is how states harm people in other lands: They do so by feeding oppressive governments their means of repression; they do so by turning a blind eye to the brutalities committed by their friends and allies; and finally, they do so by hiding behind the sovereignty of other nation-states.

The whole notion of human rights will be a tragic farce without a fuller understanding of transnational responsibilities. Interestingly enough, international law has already codified certain kinds of transnational duties, but this codification has occurred in the context of the enforcement of human rights violations committed in or by "other" countries. What is missing is an interpretation of the duties states take on when they assist and allow offending governments to operate—and in so doing become offending states themselves.

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104. 2 Y.B. INT'L L. COMM'N, supra note 101, at 103.

105. See generally IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS (1990).