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# The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility\*

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An inescapable link between impermissible acts of terrorism and violations of human rights exists. Because of this link, when human rights are protected, terrorism is necessarily set back.

At one level of understanding, it is clear that strategies of impermissible terrorism necessarily involve violations of human rights law.<sup>1</sup> For this reason, all forms of impermissible terrorism involve conduct that is already proscribed by international law, whether such conduct is engaged in by private individuals or an official elite, for some private or political purpose, or even in the name of the state. Indeed, the United Nations has generally condemned "all acts of terrorism . . . in all its forms, wherever and by whomever committed."<sup>2</sup> The United States Con-

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\* The following essay is based in part on a dinner speech delivered at the University of Southern California Conference on Human Rights and Terrorism, March 20, 1987, a regional meeting of the American Society of International Law.

1. See, e.g., Bazylar, *Capturing Terrorists in the 'Wild Blue Yonder': International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 WHITTIER L. REV. 685, 688 (1986); Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 194-95, 214, 216, 231, 250 (1983). See also Friedlander, *Terrorism and International Law: What is Being Done?*, 8 RUT.-CAM. L.J. 383, 387-88 (1977); Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 243-44 (1982).

2. Note by the President of the Security Council, U.N. Doc. S/17554 (Oct. 9, 1985) (on behalf of the members of the Council, also endorsing the Secretary-General's statement of Oct. 8, 1985), reprinted in 24 I.L.M. 1565 (1985); Res. 579, U.N. Doc. S/RES/579 (1985), reprinted in 25 I.L.M. 243 (1986); G.A. Res. 40/61, 40 U.N. GAOR, U.N. Doc. A/RES/40/61 (1986), reprinted in 25 I.L.M. 239 (1986); Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1, 21 (1974), reprinted in 14 REV. DE DROIT PENAL MIL. ET DE DROIT DE LA GUERRE 13 (1975). See also *1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970) [hereinafter *1970 Declaration*] ("Every State has the duty to

gress recently issued a similar proclamation.<sup>3</sup>

Additionally, one can recognize that an effective assurance of human rights and significant use of civil and criminal sanctions against their deprivation by governments and private perpetrators will bring an end to terrorism. This realization is critical to an adequate strategy for combating terrorism and it provides the key to a fuller understanding of state responsibility with respect to terrorism.

At the most general level of responsibility, all signatories to the United Nations Charter have a legal "duty to promote through joint and separate action universal respect for and observance of human rights . . ." <sup>4</sup> As the International Court of Justice recognized in 1971, a state that deprives individuals of fundamental human rights violates its basic obligations under the United Nations Charter.<sup>5</sup> In its 1979 decision on the illegality of Iranian complicity in the taking of United States hostages, the Court declared: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."<sup>6</sup>

During the trial of the same case, the United States rightly affirmed that "[t]he existence of such fundamental rights for all human beings, nationals and aliens alike, and the existence of a corresponding duty on the part of every State to respect and observe them are now reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and . . . other instruments defining basic human

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refrain from organizing, instigating, assisting or participating in . . . terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts . . ."; "no State shall organize, assist, foment, finance, incite or tolerate . . . terrorist . . . activities directed towards the violent overthrow of the regime of another State . . ."; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, paras. 191, 192, 202, 205 ("support for subversive or terrorist armed activities within another State"), 209, 292(9), *reprinted in* 25 I.L.M. 1023 (1986) [hereinafter *Nicaragua v. United States*].

3. H.R. Con. Res. 228, 99th Cong., 1st Sess. (Nov. 6 & 19, 1985), §§ 1(1), 4(b), *reprinted in* 24 I.L.M. 1562, 1563-64 (1985); International Security and Development Cooperation Act of 1985, Pub. L. 99-83 §§ 503, 505, 507-508, 558(4) (1985), *reprinted in* 24 I.L.M. 1558, 1558-59, 1562 (1985).

4. 1970 Declaration, *supra* note 2, at 121.

5. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 3, 57. Indeed, "a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." *Id.* See also *infra* text at note 7.

6. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 1, 42, *reprinted in* 19 I.L.M. 553, 573 (1980).

rights.”<sup>7</sup>

The International Court recognized as early as 1970 that “all states can be held to have a legal interest in” the “protection” of basic human rights. Such rights are “obligations *erga omnes*” (owing by each state and person to all persons)<sup>8</sup>; they are obligations to humankind and of universal interest.<sup>9</sup> When the state violates these obligations, or any other obligation under international law, there is no immunity from otherwise legitimate responsive action by or on behalf of the international community.<sup>10</sup> With respect to article 2, paragraph 7 of the United Nations Charter, such violations of international law, even those occurring entirely within a particular state’s territory, are not “matters which are essentially within the domestic jurisdiction” of a single state. Indeed, human rights violations are matters of international concern over which there is a universal jurisdictional competence.<sup>11</sup>

The authoritative 1970 Declaration on Principles of International Law confirms related principles of universal responsibility. It contains a widely recognized prescription: “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.”<sup>12</sup> A similar prescription prohibits related attempts to “organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities.”<sup>13</sup> Additionally, the United Nations Secretariat has stated that a punishable act by individuals should include the incitement, encourage-

7. Memorial of the United States before the International Court of Justice, *id.* at 71. A similar approach was taken by the U.S. in its brief in *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980), reprinted in 19 I.L.M. 585 (1980). See Paust, *Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. REV. 227, 234-37, 244 (1981).

8. Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 4, para. 32.

9. See, e.g., Paust, *supra* note 7, at 229, 233-37; Paust, *supra* note 1, at 211-15, 221-25.

10. See, e.g., Paust, *supra* note 1, at 221-47; Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA*, 8 HOUS. J. INT’L L. 49 (1985); Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT’L L. 283, 284-85, 297-302 (1986) [hereinafter *Aggression Against Authority*]; Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action*, 5 GA. J. INT’L & COMP. L. 431 (1975) [hereinafter *Possible Legal Responses*]. See also *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), reprinted in 26 I.L.M. 1375 (1987); *Forti v. Suarez-Mason* 672 F. Supp. 1531, 1544-47 (N.D. Cal. 1987).

11. See, e.g., *supra* note 10.

12. 1970 Declaration, *supra* note 2, at 121.

13. *Id.*

ment, or toleration of activities designed to spread terror among the population of another state.<sup>14</sup>

These prescriptions have grown out of specific historical incidents. For example, the assassination of King Alexander I of Yugoslavia in 1934, which precipitated the effort to create the 1937 Convention on Terrorism, led to a claim by Yugoslavia that Hungary "had been tolerating irredentist activity within its territory directed against the former." As a result, "the League [of Nations] Council adopted a resolution declaring it the duty of every state to desist from encouraging or tolerating such activity."<sup>15</sup>

These prescriptions are also supported by a long history of legal expectations, often categorized in terms of aggression or norms of intervention. In its 1986 opinion in *Nicaragua v. United States*, the International Court of Justice recognized that the 1970 Declaration "affords an indication of . . . *opinio juris* as to customary international law" with respect to each of these prescriptions.<sup>16</sup> It further recognized that the general principle of nonintervention is customary.<sup>17</sup> More specifically, the Court noted that "[t]he element of coercion, which . . . forms the very essence of prohibited intervention, is particularly obvious in the case of an intervention which uses force . . . in the indirect form of support for subversive or terrorist armed activities within another State."<sup>18</sup>

Supplementing these prescriptions is the principle of self-determination.<sup>19</sup> It is difficult for one state to support terrorist activity against persons in another state without interfering with the political process of the second state. To the extent that persons in the targeted state are denied equal participation in their political process, they are denied participation in the sharing of power and an authoritative process of "deter-

14. Paust, *supra* note 2, citing U.N. Doc. A/C.6/418, at 26 (1972).

15. B. MURTY, PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION 230-31 (1968), citing Kuhn, *The Complaint of Yugoslavia Against Hungary with Reference to the Assassination of King Alexander*, 29 AM. J. INT'L L. 87 (1935).

16. *Nicaragua v. United States*, 1986 I.C.J. 14, para. 191.

17. *Id.* at 93, para. 174; 96-97, para. 181; 100-02, paras. 191-192; 106, para. 202; 109-10, para. 209; 146, para. 292(3); 147-48.

18. *Id.* at 108, para. 205. The draft restatement recognizes that prohibitions of the threat or use of force under article 2(4) of the U.N. Charter are customary. See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 905 comment g (Tentative Draft No. 6, 1985) [hereinafter DRAFT RESTATEMENT].

19. For general guidance, see, e.g., U.N. CHARTER art. 1(2); 1970 Declaration, *supra* note 2; SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS (Y. Alexander & R. Friedlander eds. 1980); Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Reisman & B. Weston eds. 1976).

mination" by an aggregate "self."<sup>20</sup> This is necessarily true even when state-sponsored terrorism in another state supports the majority of persons in the targeted state, since the process of terrorism will deny dissenting individuals the human right to participate in the political process and in the formation of an aggregate "will of the people" of such a state.<sup>21</sup> Thus, terrorism, as a strategy to coerce others through violence,<sup>22</sup> offends not only the free choice of the whole people, but also the freedom and dignity of the individual. A state that engages in such conduct against its own people or that wilfully organizes, instigates, assists, finances, incites, participates in, or tolerates such activity from within its own borders against another state impairs the free choice of a people and violates its obligation under the United Nations Charter. It is engaged, however indirectly, in a process of political oppression that, however widespread, complete, or temporal, will involve acts of politicide, or the killing of political self-determination.<sup>23</sup>

Such a state is necessarily engaged, either directly or indirectly, as an accomplice in conduct violating the human rights of persons to freely participate in the political process and to have an authoritative government that represents the "will of the people."<sup>24</sup> Thus, such a state is violating its general obligations under the United Nations Charter to respect and observe human rights. To the extent that the state or its agents also engage in a threat or the use of force as part of such a strategy, the state is necessarily violating the United Nations Charter. Article 2, paragraph 4 of the Charter prohibits states from employing "the threat or use of force against . . . [the] political independence" of another state "or in any other manner inconsistent with the Purposes of the United Nations."<sup>25</sup> Clearly, such a threat or use of force is "inconsistent with" and thwarts both the precept of self-determination and the obligation of

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20. See, e.g., *Aggression Against Authority*, *supra* note 10, at 288-90; *Possible Legal Responses*, *supra* note 10, at 460-61.

21. See *supra* note 20. See also Paust, *Authority: From a Human Rights Perspective*, 28 AM. J. JURIS. 64 (1983).

22. For a useful, neutral definitional approach to terrorism, see Paust, *supra* note 1, at 192-94, 251; Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 700-05 (1987). Thus defined, "terrorism" means any intentional use of violence or a threat of violence against an instrumental target in order to communicate to a primary target a threat of future violence to coerce the primary target through intense fear or anxiety in connection with a demanded political outcome.

23. The only possible defense for such action would involve self-determination assistance to people under attack from their own government. See, e.g., *Aggression Against Authority*, *supra* note 10, at 287-90, 292-98.

24. See, e.g., *id.*; *supra* note 21; *Universal Declaration of Human Rights*, art. 21, G.A. Res. 217A, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948).

25. U.N. CHARTER art. 2, para. 4, reprinted in 1946-1947 U.N.Y.B. 831.

states to respect and observe human rights.<sup>26</sup>

For this reason, the 1970 Declaration on Principles of International Law affirms the Charter's prohibition of "any forcible action" by a state that "deprives peoples . . . of their right to self-determination" or that supports "terrorist acts in another state." Similarly, the 1974 Definition of Aggression by the General Assembly reaffirms "the duty of States not to use armed force to deprive peoples of their right to self-determination."<sup>27</sup> Such a use of force constitutes an aggression not only against the process of self-determination, but also against authority and human rights. When it includes strategies of terror, such a use of force constitutes one of the more egregious forms of politicide, seeking to destroy a governmental process that is based on the authority of the people as guaranteed in article 21 of the Universal Declaration of Human Rights.<sup>28</sup>

Even when a state does not itself engage in acts of terrorism or sponsor such acts directly (for example, by wilfully organizing, instigating, assisting, financing, inciting, or participating in such acts), state responsibility exists under international law for "acquiescing in" or "tolerating" terrorist activities by private individuals or groups directed against another state.<sup>29</sup> Not only was this general obligation reaffirmed in a 1986 resolution of the United Nations General Assembly on terrorism, but the General Assembly also noted the need for states to take all appropriate measures to prevent "the preparation and organization in their respective territories of acts directed against other States."<sup>30</sup>

The only formal challenge to these principles of state responsibility may have occurred in two dubious rulings of the International Court in the 1986 case of *Nicaragua v. United States*.<sup>31</sup> First, while addressing alleged violations of human rights by the *Contras*, the Court correctly noted that United States participation in *Contra* operations would not in itself prove that such violations are attributable to the United States.<sup>32</sup> However, the Court wrongly opined that for the United States to have "legal responsibility" it was necessary to prove that the United States "had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."<sup>33</sup> The Court

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26. See, e.g., *Aggression Against Authority*, *supra* note 10, at 287-89.

27. *Definition of Aggression*, G.A. Res. 3314 Annex (preamble), 29 U.N. GAOR, Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975); *supra* note 18.

28. See *supra* note 24.

29. See *supra* text accompanying notes 12-13, 18.

30. G.A. Res. 40/61, *supra* note 2, at para. 5.

31. 1986 I.C.J. 14.

32. *Id.* at 64, para. 115.

33. *Id.* at 65, para. 115; 113, para. 216; 129, para. 254.

was addressing an example of direct responsibility through effective control of armed units. It ignored the fact that even prior to Nuremberg it was recognized that a state and its actors could be held responsible for "acquiescence," "tolerance," or complicity.<sup>34</sup>

Second, while addressing implications of the acts of the United States in supplying a 1983 guerrilla manual to the *Contras*, the Court concluded that such action "encouraged the commission . . . of acts contrary to general principles of the humanitarian law" documented in the Geneva Conventions,<sup>35</sup> and noted that the United States is "under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of" the Geneva Conventions.<sup>36</sup> While the Court found that such impermissible encouragement did exist and that relevant violations of Geneva law were thus foreseeable,<sup>37</sup> it did "not find a basis for concluding" that any violations of Geneva law by the *Contras* "are imputable to the United States . . . as acts of the United States."<sup>38</sup>

While the Court was reluctant to fasten legal responsibility in the United States, it may still have been the intent of the Court to recognize a responsibility of the United States for its conduct of encouragement. 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.<sup>39</sup>

Since the early history of the United States, legislation has existed to fulfill such customary obligations. There have been, and continue to be, prosecutions of individuals for breach of neutrality laws and interrelated

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34. See generally Paust, *supra* note 1, at 227; Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. R. 99, 156-59, 166-69 (1972). See *supra* text accompanying notes 12-13, 18, 29; *infra* notes 43, 48. With respect to U.S. involvement in foreign state illegality, see Paust, *Constitutional Limitations on Extraterritorial Federal Power: Persons, Property, Due Process, and the Seizure of Evidence Abroad*, in INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 449, 467-76 (V. Nanda & M. Bassiouni eds. 1987).

35. Nicaragua v. United States, 1986 I.C.J. at 148, para. 292(9) (vote: 14-1, Judge Schwebel in favor).

36. *Id.* at 114, para. 220; 129, para. 255.

37. *Id.* at 129-30, paras. 255-256; *supra* note 35.

38. Nicaragua v. United States, 1986 I.C.J. at 148, para. 292(9).

39. See, e.g., *supra* text accompanying notes 12, 13, 15-18, 23, 30; *infra* text accompanying notes 47-49.

violations of the law of nations.<sup>40</sup> In this sense, a prosecution of Oliver North and others involved in Contragate, whether or not their acts were actually authorized by the President,<sup>41</sup> would hardly be unprecedented. When territorial rights are involved, the United States has always recognized that private violations of the law of nations can constitute an act of "aggression" and a crime against "peace."<sup>42</sup> Both in *Henfield's Case* in 1793 and in an opinion of the Attorney General in 1795, it was recognized that individuals are subject to punishment for "committing, aiding or abetting hostilities."<sup>43</sup> Thus, the selling of "war bonds" or the fur-

40. See 18 U.S.C. § 960 (1982) (formerly *id.* § 25 (1940)); notes 41-48 *infra*. See also *United States v. The Three Friends*, 166 U.S. 1, 51-3 (1897) (the Neutrality Act was enacted to assure U.S. compliance with the law of nations). See also *The Flying Fish*, 6 U.S. (2 Cranch) 170 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 40-41 (1801); *Eas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 156 (Paterson, J.: "These acts were direct and daring violations of the principles of neutrality, and highly criminal by the law of nations.") (Iredell, J.) (1795).

41. See *United States v. Black*, 685 F.2d 132 (5th Cir. 1982), *cert. denied*, 459 U.S. 1021 (1982); *Dellums v. Smith*, 577 F. Supp. 1449, 1452-53 (N.D. Cal. 1984) (federal officials covered by this section), *rev'd on other grounds*, 797 F.2d 817 (9th Cir. 1986) (plaintiffs lack standing); *United States v. Smith*, 27 F. Cas. 1192, 1228-31 (C.C.N.Y. 1806) (No. 16,342); Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1 (1983); Note, *The Iran-Contra Affair, the Neutrality Act, and the Statutory Definition of "At Peace,"* 27 VA. J. INT'L L. 343 (1987); Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955 (1982); C. Stone, "Original Intent" and Following Orders—A Framers of Constitution Set Issue Straight for Early-Day Ollie, L.A. Times, July 22, 1987, § II, at 5, col. 3. With respect to executive responsibility to obey international law and not usurp Congressional power, see Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L. Q. 719 (1982); Paust, *The President Is Bound By International Law*, 81 AM. J. INT'L L. 377 (1987).

Curiously, a pardon of Oliver North and others would only increase U.S. liability under the precept of "denial of justice" with respect to aliens injured by such breaches of neutrality law. See, e.g., *In re Janes*, 4 R. Int'l Arb. Awards 82, 87 ("especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty"), 90, 96 ("well-established principle . . . that, by pardoning a criminal, a nation assumes the responsibility for his past acts," quoting *In re Cotesworth & Powell* (G.B. v. Colom.), in J. MOORE, 2 INTERNATIONAL ARBITRATIONS 2050, 2085 (1898)) (1925); DRAFT RESTATEMENT, *supra* note 18, at § 711 reporter's note 2B, citing *In re West*, Opinions of the Commissioners 404 (Mexican-American Claims Comm'n 1926-1927) (pardon or amnesty). A pardon would seem to be legally improper. See Paust, *Contragate and the Invalidity of Pardons of Violations of International Law*, 10 HOUS. J. INT'L L. 51 (1987).

42. *Henfield's Case*, 11 F. Cas. at 1108-45 (Wilson, J., charge to grand jury and indictment), 117 (points of Rawle, dist. att'y, regarding the defendant's "aggression" on them; "actual aggression is charged"). *Accord* 1 Op. Att'y Gen. 68, 69 (1797) ("the peace of Mankind"); 1 Op. Att'y Gen. 57, 58 (1795) ("against the public peace").

43. *Henfield's Case*, 11 F. Cas. 1099 *passim*; 1 Op. Att'y Gen. 57, 58 (1795). The prohibition of involvement remains. See *supra* note 34. Given such historic prohibition, it follows that prosecution for complicity is possible under the Neutrality Act. See also 18 U.S.C. § 2; Jacob-

nishing of money for such purposes is certainly prohibited.<sup>44</sup>

In 1794 Congress passed neutrality legislation<sup>45</sup> to provide criminal sanctions for such offenses against the law of nations. In 1797 an opinion of the Attorney General also recognized that a "violation of territorial rights" is "an offense against the law of nations, and of a nature very serious in its consequences."<sup>46</sup> The Attorney General added: "That the peace of mankind may be preserved, it is the interest as well as the duty of every government to punish with becoming severity all the individuals of the state who commit this offense."<sup>47</sup> Further, Justice Wilson recognized in *Henfield's Case* that "[w]hen the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made, or should punish him. . . . If the nation refuse to do either, it renders itself in some measure an accomplice in the guilt, and becomes responsible for the injury."<sup>48</sup>

Because of its recognition of state responsibility under customary

sen v. United States, 272 F. 399 (C.C.A. Ill. 1921), *cert. denied*, 256 U.S. 703 (1921); United States v. Ram Chandra, 254 F. 635 (D.C. Cal. 1917); United States v. Tauscher, 233 F. 597 (D.C.N.Y. 1916) (conspiracy).

44. 18 U.S.C. §§ 2, 960 (1982).

45. 18 U.S.C. § 25 (1940) (current version at *id.* § 960 (1982)).

46. 1 Op. Att'y Gen. 68, 69 (1797). *See supra* note 40.

47. 1 Op. Atty. Gen. 68, 69 (1797). *See* THE FEDERALIST No. 3 (J. Jay) ("[I]t is of high importance to the peace of America that she observe the laws of nations.").

48. 11 F. Cas. at 1108. Nearly the same language is found in later arbitral awards. *See, e.g., In re Janes* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 82, 96 (1925) ("by its failure to make reparation or punish the guilty . . . rendered itself 'in some measure an accomplice in the injury' and has become 'responsible for it.'"), *quoting In re Poggioli*, Ralston Report at 869 (Italian-Venezuelan Comm'n 1903). *See id.* at 86 (recognizing that other awards had been based on "a derivative liability, assuming the character of some kind of complicity"), 87 ("complicity"), 94 ("se rend comme complice . . . se rend en quelque facon complice de l'injure et en devient responsable," *quoting* I. PRADIER-FODERE, 1 TRAITE DE DROIT INTERNATIONAL PUBLIC 336 (1885), *trans. in n.l.*: "renders itself an accomplice . . . is in a manner making himself an accessory to the injury and becomes responsible therefor"), 95 ("may be regarded as virtually a sharer in the injury and as responsible therefor" *quoting* J. MOORE, 6 INTERNATIONAL LAW DIGEST 655 (1906)). Moreover, the decision contains several references to other arbitral decisions of text-writers from the 18th to 20th centuries recognizing state responsibility for a "denial of justice" by failing to allow full reparation or to punish the guilty. *See id.* at 86-91, 94-97. On this point, *see also infra* notes 54, 63. The earliest reference is to E. DE VATTEL, 2 THE LAW OF NATIONS 161-62 (1758), whose language was quite similar to that used by Justice Wilson in *Henfield's Case*. *See id.* at 95; 11 F. Cas. at 1108. More generally, state responsibility was recognized in *United States v. Arjona* as follows:

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized.

120 U.S. 479, 484 (1887).

international law, the Continental Congress resolved in 1781 that our states should allow the United States to sue "offending citizens" in state courts.<sup>49</sup> A United States Attorney General later argued, in a case involving other violations, that although "[i]t is true, by the law of nations, if the citizens of one State do an injury to the citizens of another, the government of the offending subject ought to take every reasonable measure to cause reparation to be made by the offender, . . . if the offender is subject to the ordinary processes of law, it is believed this principle does not generally extend to oblige the government to make satisfaction. . . ."<sup>50</sup> By the time of this opinion in 1802, the Alien Tort Statute<sup>51</sup> of 1789 had been enacted in part to meet such responsibility, and an opinion of the Attorney General in 1795 had aptly recognized that with respect to private "acts of hostility committed by American citizens . . . the company or individuals who have been injured by these acts of hostility have a remedy by civil suit in the courts of the United States."<sup>52</sup> These early cases and events stand in stark contrast to many of the assumptions of Judges Edwards and Bork in the more recent *Tel-Oren* case.<sup>53</sup>

More generally, it was recognized by Alexander Hamilton in *The Federalist* that our courts must be made available to foreign litigants and that a "denial or perversion of justice" by a judicial denial of standing or remedy can subject the United States to liability.<sup>54</sup> Today, when human

49. 21 J. Cont. Cong. 1137 (1781). See 26 Op. Att'y Gen. 250, 253 (1907) ("The United States owes the duty and has the right of vindicating the treaty. It can hardly be doubted that . . . the United States may proceed by bill in equity to obtain an injunction, and . . . mandatory relief . . ."); *Penhallow v. Doane's Admin.*, 3 U.S. (3 Dall.) 54, 83 (1775) (Paterson, J.), quoting Con. Res. of Mar. 6, 1779 (Congress as opposed to states is to control by appeal and "decide on all matters and questions touching the law of nations . . . to compel a just and uniform execution of the law of nations," and not to "disable the Congress . . . from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties, of other breaches of the law of nations.").

50. 1 Op. Att'y Gen. 106, 107 (1802). See *supra* note 48; *infra* notes 54-55.

51. 28 U.S.C. § 1350 (1982).

52. 1 Op. Att'y Gen. 57, 58 (1795). See also *M'Grath v. Candalero*, 16 F. Cas. 128, 128 (D.C.D.S.C. 1794) (No. 8,810) ("If an alien sue here for a tort under the law of nations or a treaty . . . the suit will be sustained."). See *infra*, note 53.

53. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 811 (1985); J. Paust, On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts (unpublished manuscript) [hereinafter *On Human Rights*]. See Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 Hous. J. INT'L L. 81, 83-91, 94, 99 & n.123 (1981); 79 PROC., AM. SOC. INT'L L. 362-66 (1985) (remarks); *id.* at 367 (remarks of Prof. Newman); *id.* at 376 (remarks of Prof. McDougal).

54. THE FEDERALIST No. 80. See *supra* note 48; *In re Janes (U.S. v. Mex.)*, 4 R. Int'l Arb. Awards 82, 87 (1925) ("would have had an opportunity of subjecting the murderer to a

rights are at stake, as they are with respect to nearly all acts of terrorism, the nation-state has a fundamental obligation to provide a judicial forum for the private victim of impermissible terrorism and to guarantee such individuals the right of an effective remedy.<sup>55</sup> Such an obligation is tied to general human rights obligations under the United Nations Charter, as supplemented by customary law and the authoritative Universal Declaration of Human Rights.<sup>56</sup> In the case of human rights violations connected with acts of terrorism, there are additional reasons why a state's "denial of justice" and of an effective remedy in domestic courts may be inconsistent with state responsibility. In a given case, such a denial might also involve an impermissible "assistance" to, "acquiescence" in, "encouragement" of, or "toleration" of such terrorist conduct, for which there is independent state responsibility.

For these same reasons, a refusal by a state to prosecute or extradite an alleged international terrorist can implicate the same form of state responsibility. Several multilateral treaties also proscribe particular forms of terrorism and set forth independent requirements that all reasonably accused violators found within a signatory state be taken into custody and subjected to prosecution or extradition.<sup>57</sup> Further, customary international law implicates the same sort of responsibility of the state with respect to criminally sanctionable violations of customary international law.<sup>58</sup> For example, in 1971 the United Nations General Assembly affirmed "that a refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law."<sup>59</sup> The United States Attorney General had recognized as early as 1821 that with respect to "crimes against mankind" the state

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civil suit"), 94 ("refuses to repair the damage"), 95 ("must compel the offender to make amends"), 96 ("the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief," "failure to make reparation," "refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress").

55. See generally *On Human Rights*, *supra* note 53; DRAFT RESTATEMENT, *supra* note 18, at 495 comment a to § 711, 500 comment e, 506 reporter's note 2; 79 PROC., AM. SOC. INT'L LAW 362-66 (1985) (remarks).

56. U.N. CHARTER preamble, arts. 1(3), 55(c), 56; *Universal Declaration*, *supra* note 24, art. 8; *supra* note 55.

57. See, e.g., Paust, *supra* note 1, at 195 & n.15, 227-29; Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANS. L. 235, 237-40 (1987).

58. See *supra* note 57.

59. G.A. Res. 2840, 26 U.N. GAOR Supp. (No. 29) at 2, U.N. Doc. A/8429 (1971).

"in which the guilty person lives ought not . . . obstruct" the right of an injured state to punish the perpetrator.<sup>60</sup> A state need not "sponsor" such forms of criminal conduct in order to imply an independent basis for state responsibility. The general obligation to arrest and prosecute or extradite the international criminal takes on added significance when it is recognized that the 1986 resolution of the General Assembly on terrorism "[u]nequivocally [condemned] . . . , as criminal, all acts, methods and practices of terrorism wherever and by whomever committed . . . ."<sup>61</sup>

Even more broad is the formal affirmation by the Security Council in 1985 of an "obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future."<sup>62</sup> Such an obligation is clearly beyond prohibitions of state sponsorship or tolerance of hostage-taking and abduction. Even an innocent state not initially involved in the illegality can become responsible for its failure to act to secure the release of such persons or to prevent illegal conduct in the future. It does not matter how widespread or rare the illegal acts are once the state is on notice of such improprieties.

The obligation identified by the Security Council is not unlike the customary prohibition of a "denial of justice" by states in whose territory an offender is found or an offense is about to occur;<sup>63</sup> nor is it unlike the more general obligation noted previously of all states to take action in order to ensure a universal respect for and observance of fundamental human rights. (Indeed, human rights and the precept of denial of justice have often had a close interrelationship in the last two hundred years.<sup>64</sup>)

60. 1 Op. Att'y Gen. 509, 513 (1821).

61. G.A. Res. 40/61, *supra* note 2, at para. 1.

62. Res. 579, *supra* note 2, at para. 3.

63. See, e.g., Yates, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 213, 231-35 (R. Lillich ed. 1983); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 183 (1965); DRAFT RESTATEMENT, *supra* note 18, at 505-06 reporter's note 2 to § 711 (failure to protect and failure to punish); *In re Janes* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 82, 86-87, 89-91, 94-97 (1925) (failure to apprehend and punish); *In re Swinney* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 98, 100-01 (1926); *In re Quintanilla* (Mex. v. U.S.), 4 R. Int'l Arb. Awards 101, 102-03 (1926); *In re Youmans* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 110, 115 (1926); *In re Connolly* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 387, 388 (1928); *In re East* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 646, 648-50 (1930); *In re Mead* (U.S. v. Mex.), 4 R. Int'l Arab. Awards 653, 656-57 (1930). See also Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217 (1977); Wise, *Note on International Standards of Criminal Law and Administration*, in INTERNATIONAL CRIMINAL LAW 135, 152-59 (G. Mueller & E. Wise eds. 1965).

64. See, e.g., *On Human Rights*, *supra* note 53. See also Report of the Committee on

Thus, when an offender is found in its territory, a state must permit civil and criminal sanctions, or extradite the offender to a country willing and able to prosecute. When a government knows, or should know, that an offense of hostage-taking or abduction of an alien is about to occur and such a government takes no reasonably available preventive action, liability for "denial of justice" is appropriate.<sup>65</sup>

With respect to claims of denial of justice, some early decisions required evidence that local officials failed to administer the law in bad faith or wilful neglect, or that official action was so far short of international standards to be reasonably apparent.<sup>66</sup> The Security Council, however, has recognized a lower threshold for state responsibility, presumably on the basis of general international standards.<sup>67</sup> In fact, since World War II, state responsibility under the precept of "denial of justice" has been found to exist if the state fails to protect an alien from criminal acts of others when it has had an opportunity to do so through reasonably available means. As commentators affirm, the state can be responsible "if its protection of aliens is unreasonably deficient under the circumstances, [or] if it fails to take appropriate action to pursue and punish those responsible."<sup>68</sup> The United Nations has made claims against nation-states on both such grounds.<sup>69</sup>

Note also that special obligations to prevent acts of terrorism, to enact necessary implementing legislation, to promote cooperative investigation and prosecution efforts when offenses have occurred, and to render other forms of assistance are contained in several relevant treaties.<sup>70</sup> Such trends in prescription increasingly create a web of state responsibility that should prove useful in preventing some acts of terrorism

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Human Rights of the American Branch of the International Law Association, *Human Rights Law, the U.S. Constitution and Methods of Judicial Incorporation*, 1983-1984 PROC. 56; M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 739-40 (1980); Lillich, *supra* note 63, at 26-29; Fenwick, *The Progress of International Law During the Past Forty Years*, 79 RECUEIL DES COURS 1, 44 (1951).

65. See *supra* note 63. See also *In re Janes* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 82, 95 (1925) ("prevalence of lawlessness and the inertness or powerlessness of the authorities near the scene"). In *In re Quintanilla* (Mex. v. U.S.), 4 R. Int'l Arb. Awards 101 (1926), it was recognized that if prisoners or hostages are taken into governmental custody, the government must "account for them" and "can not exculpate itself" because "thereafter they have disappeared" or been found killed. *Id.* at 103.

66. See, e.g., *Neer & Neer (U.S.) v. United Mexican States*, 4 Rep. Int'l Arb. Awards 60, para. 4 (Gen. Claims Comm. 1926) Cf. *supra* notes 63, 65.

67. See *supra* text accompanying note 62.

68. Yates, *supra* note 63, at 232. See also *id.* at 231-35; *supra* notes 48, 54, 63, 65.

69. Yates, *supra* note 63, at 233-34.

70. See, e.g., *Possible Legal Responses*, *supra* note 10, at 445-52, 454-58; Paust, *supra* note 1, at 195.

and in responding to others after they have occurred. Most of these treaties stress criminal sanctions; civil sanctions are also possible and can provide a most useful addition to overall efforts to control and combat terrorism. Moreover, the obligation of nation-states to provide effective judicial remedies is customary and a part of fundamental human rights law. Civil sanctions are thus a necessary addition to governmental efforts to counter terrorism, and they can be employed by the judiciary in cases otherwise properly before the courts.

Finally, in this bicentennial year, it seems more than appropriate to recall words from Justice Wilson's charge to a grand jury at Richmond, Virginia in 1793. These words reflect expectations of the Founders concerning both state and individual responsibility:

To this universal society [of the human race] it is a duty that each nation should contribute to the welfare, the perfection and the happiness of the others . . . . The first degree of this duty is to do no injury. Among states as well as among men, justice is a sacred law . . . . On states as well as individuals the duties of humanity are strictly incumbent; what each is obliged to perform for others, from others it is entitled to receive.<sup>71</sup>

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71. *Henfield's Case*, 11 F. Cas. at 1107.