

Re-Conceptualising Human Rights

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1. Introduction

As this memorial will attest, Katarina Tomaševski was not only an extraordinary human rights scholar and activist, but a person who was both deeply loved and admired. I will not pretend to be unbiased on either score. But perhaps I am more biased in stating that I believe that one of her most significant contributions to the field of human rights was a 1999 article that she, Jens Vedsted-Hansen and I published in the *Harvard Journal of Human Rights* entitled “Transnational State Responsibility for Violations of Human Rights”.¹ The reason for making this claim is that this article represented one of the first attempts to re-conceptualise the scope of a state’s human rights obligations. Before this, and perhaps at times even now, human rights obligations were viewed as being territorial in nature. As a result of this approach, when a state acted outside its own borders it was not clear what law, if any, governs.

What we argued for was a much different conceptualisation of human rights, one in which a state’s obligations to protect “universal” human rights did not suddenly end due to territorial considerations, especially since the state itself was engaged in activities that had human rights consequences for individuals living in other countries. This is not to suggest that states have the same human rights obligations outside their territorial borders as they do within their own domestic sphere because they do not – and they should not. However, our article was one of the first to point out that a territorially-based approach to human rights would oftentimes lead to results that were antithetical to human rights more broadly.

This fight is still being waged. On the one hand, there has been a growing international movement to recognise the extension of states’ human rights responsibilities and I will report on the activities of the Extraterritorial Obligations (ETO) Consortium, which is a unique blend of non-governmental organisations and academics. On the other hand, international law has remained slow to recognise the changes brought on by globalisation, and the manner in which the protection of human rights will not only be affected by domestic practices but by states’ international (or extraterritorial or transnational) actions as well. Still, there have been some notable advances in this realm and it is these that I am sure Katarina would want me to focus on.

2. Drawing a Line

Those who never had the pleasure of knowing Katarina might find it odd that this project began at a small dinner at her wonderful Copenhagen apartment, but Katarina often combined the personal with the political. As usual, there was great food and wine – and even better company. And just when the evening appeared to winding down (or so Jens

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¹ M. Gibney, K. Tomaševski and J. Vedsted-Hansen, ‘Transnational State Responsibility for Violations of Human Rights’, 12 *Harvard Human Rights Journal* (1999) p. 267.

and I both thought), Katarina came out of her office with a set of index cards and announced that it was time for us to start working, which is exactly what we did.

What intrigued the three of us were the great inconsistencies in international law in terms of assigning state responsibility. On one index card I drew a simple line and what was listed above this line were situations where a state was (seemingly) responsible for committing an internationally wrongful act, and below the line were examples where a state was (seemingly) not responsible. To be more concrete, a state that sends a person back to a country where there is some likelihood that this individual will be tortured has committed an internationally wrongful act (above the line), while a state that sends torture equipment to another country has not violated international law (below the line). To take this even further, in the first example a state could be responsible for committing an internationally wrongful act even if the individual who was returned is subsequently never harmed. According to the landmark decision by the European Court of Human Rights in the *Soering* case,² the sending state's "wrong" is in placing an individual in a situation where this individual might be tortured, and this occurs the moment the return is effectuated. Thus, what does not matter, at least in terms of assigning state responsibility, is whether the receiving state actually does torture this person or not.

Turning to the second example, one of the things that struck us as being quite odd is that the degree of knowledge that the sending state possessed did not seem to matter. At least under our reading of international law, a state could lawfully send torture equipment to another state even if it had full and complete knowledge that the material that it was sending was being used for these egregious purposes. Thus, in addition to compiling a list of various state practices, we also tried to understand how and why some things happened to be above the line while other things happened to be below it.

One of the conclusions that we drew was that state sovereignty continues to bedevil the protection of human rights, but not in the manner that it had previously. Most readers will know that the notion of state sovereignty long served as one of the biggest obstacles in the protection of human rights, especially in the period before the end of World War II, as states would repeatedly respond to any kind of international criticism or even inquiry of their barbarous practices by declaring that such practices were "domestic matters" that were protected under the principle of state sovereignty.

International human rights law has changed all this, and although some states continue to make the "sovereignty" claim, this seldom holds any kind of weight. Yet, states continue to hide behind state sovereignty; only now it is almost always the sovereignty of some *other* state that is invoked and not a state's own. Thus, in the torture equipment example referred to earlier, one of the best explanations for why the sending state bears no responsibility is that the sovereignty of the receiving state seems to negate this. In that way, the rationale that seems to be employed is that it is the receiving state that decides to purchase this equipment and then whether to use it or not. In that way, the entire "wrong" is placed on this one state.

We took issue with this approach and challenged the idea that the sending state should thereby be absolved of any and all responsibility. In our view, there are two different wrongs: one by the sending state and then another wrong by the state that subsequently used this equipment. Contrast the result involving torture equipment with the example where a state sends an individual to a country where his life or well being

² *Soering v. United Kingdom*, App. No. 1438/88, 161 *Eur. Ct. H.R.* (ser. A) 1991.

might be threatened. In this other case, the law does not allow the sending state to remove itself for its own wrongdoing by claiming that any and all harms will be carried out by foreign agents and on foreign soil. Instead, the sending state is responsible for its own wrong, which is separate and distinct from whatever wrong that the receiving state might (but might not) commit itself.

Yet, as we see in a moment, state sovereignty does not explain everything. Thus, even in situations where a state engages in certain kinds of objectionable practices (objectionable in terms of protecting human rights) with non-state actors, international law has been hesitant to assign state responsibility when a state acts outside its own territorial borders. Ironically enough, international law struggles to assign responsibility when states act internationally.

In the article we spend a great deal of time analysing the decision of the International Court of Justice in the case of *Nicaragua v. United States*,³ where the Court ruled against the US for wrongs carried out directly by US agents in Nicaragua such as mining that country's harbours, but not for the indirect wrongs committed by its *contra* allies. In terms of the latter, the Court held that the United States had not exercised the requisite "effective control" over the *contras* in order to hold the US responsible for the human rights violations committed by a group that had received substantial levels of economic, political and military support from the United States.

Katarina insisted that it was important to emphasise the positive features of this ruling. As she repeatedly pointed out, the International Court of Justice (ICJ) did find the United States responsible for the commission of direct wrongs. In terms of indirect harm, Katarina thought it was significant that the Court even addressed this claim, and that the disappointing result on this issue might be explained on the basis of the ICJ's ruling against the US relating to direct harm.

Still, we not only believed that this part of the Court's ruling was wrongly decided, but we took issue with the manner in which the Court approached the issue of state responsibility more generally. We presented two major criticisms. The first is that the ICJ treated state responsibility in an either-or fashion: either a state is fully responsible or it is not responsible in any manner. In this way, in holding that the US was not responsible for any of the human rights violations committed by its *contra* allies, the Court was treating the United States no differently than countries that had absolutely no connection with the *contras* or with Nicaragua more generally.

The second problem was the Court's "effective control" standard. For one thing, there is simply no theoretical justification for how the ICJ came up with this test in the first place. In addition, although the Court referred to this as an "effective control" standard, a more accurate depiction would be one nearing "absolute control". The following language from the ICJ's ruling provides a good indication of the degree of control that the Court apparently believes is necessary before a state can be deemed to be responsible for the atrocities committed by paramilitary groups in other countries that it has allied itself with:

³ *Military and Paramilitary Activities (Nicaragua v. United States)*, 1986 I.C.J. 14 (June 27).

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.⁴

Our argument was quite straightforward. In our view, “responsibility” needs to be much more subtle and much more nuanced than the approach taken by the ICJ in *Nicaragua*. Simply stated, state responsibility should reflect the degree to which a state has contributed to the commission of an internationally wrongful act.

3. Extraterritorial Obligations: The Development of International Law

At the time the article was published (1999), the law on state responsibility was in the state of flux, or at least appeared to be. At that time, the UN International Law Commission was still in the process of completing nearly four decades of work on this issue. Finally, in 2001 the International Law Commission (ILC) forwarded its (Draft) Articles to the UN General Assembly,⁵ which took “note” of the Articles, although it remains unclear exactly what this means.

In our article we were quite critical of how the (Draft) Articles addressed the issue of “aiding or assisting”, which at that time was in Article 27⁶ (now Article 16). One of the things we took issue with was that although there was no mention of “intent” in Article 27 itself, the accompanying Commentary concluded that this requirement was present.⁷ To be sure, the language in Article 16 is quite different from what had been in the original Article 27.⁸ However, in other respects the law appears unchanged. And although the new Article 16 also makes no mention of “intent”, the accompanying Commentary reads such a requirement into the Article once again.⁹

There are, however, other indications that international law is in the process of changing, albeit ever so slowly. No doubt, the best example of this change – but also the

⁴ *Nicaragua v. United States*, para. 106 (emphases supplied).

⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002).

⁶ Article 27 had previously read: “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.”

⁷ The Commentary to Article 27 makes this point clearer: “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 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 emphasises, it must be ‘established’.”

⁸ Article 16 (Aid or assistance in the commission of an internationally wrongful act) provides: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: a) That State does so with knowledge of the circumstances of the internationally wrongful act; and b) The act would be internationally wrongful if committed by that State.”

⁹ The Commentary to Article 16 provides: “A state is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.”

continuity of international law – is to be found in the ICJ’s 2007 ruling in *Bosnia v. Serbia*,¹⁰ which revisits many of the same kinds of issues that had been raised in the *Nicaragua* case.

The backdrop for this case was the attempt by Bosnia and Herzegovina to break away from the former Yugoslavia (Serbia) in order to establish its own independent state. The ensuing war pitted Bosnia forces against a range of Bosnian Serb paramilitary groups that were closely allied with the Serbian government. The horrible conflict that engulfed this region in the early 1990s resulted in the deaths of an estimated 200,000 civilians and the displacement of upwards of two million people.

In 1993, Bosnia and Herzegovina brought a claim against Serbia and Montenegro alleging responsibility for gross and systematic violations of human rights, including genocide. Based on jurisdictional grounds, genocide was the only claim addressed by the ICJ.¹¹ Article I of the Genocide Convention provides: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”¹²

Similar to *Nicaragua*, there are both positive and negative features to this ruling, but to stay in the spirit of Katarina’s approach to international law, I will be more positive about the Court’s ruling than I have been previously.¹³ Thus, perhaps the most notable achievement of all is that the Court addressed this issue in the first place. Prior to this, some had made the argument (including the Serb government itself) that the Genocide Convention only applies to the criminal prosecution of individuals, but that it had no bearing on the behaviour of states. The ICJ rejected this position and it held that the Convention could be applied to both.

What was equally important was the Court’s approach to the broader issue of state responsibility itself. Based on a literal reading of Article I, an argument could be made that the only duty (or duties) that state parties have is “to prevent and to punish” genocide. Although the Court ultimately did address these issues, what is quite noteworthy is that it devoted most of its ruling to whether Serbia had committed genocide itself (through its Bosnian Serb allies), and then whether Serbia was responsible for “aiding and assisting” genocide. More than this, the ICJ held that an analysis of these issues was antecedent to whether a state had met its obligations “to prevent” and “to punish” genocide.

As a preliminary matter, the Court had to establish that genocide had taken place. Here, it relied heavily on the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and it concluded that genocide had occurred – but only during a short period of time immediately following the fall of Srebrenica. The next question was whether Serbia was “responsible” for this genocide.

¹⁰ *Bosnia v. Serbia*, ICJ Reports 2007.

¹¹ The case was brought under Article IX, which provides: “Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III [conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide, and complicity in genocide], shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

¹² Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

¹³ M. Gibney, ‘Genocide and State Responsibility’, 7 *Human Rights Law Review* (2007) pp. 760–773.

How and where the ICJ looked for the governing law on state responsibility is important to note. Rather than making any attempt to discern “responsibility” from the treaty itself, the Court immediately turned to the ILC’s (Draft) Articles on State Responsibility. It began its analysis of state responsibility by examining whether under Article 4 Bosnian Serb forces could be considered as “state organs” of the Serbian government so that the actions of the former could be attributed to the latter.¹⁴ It concluded that they were not, on the basis that there was no evidence that these forces had a “complete dependence” on the Serbian state. The Court then examined whether the Bosnian Serb forces were acting under the “direction and control” of Serbian officials.¹⁵ In addressing this matter, the ICJ invoked its *Nicaragua* standard and held that in order to hold Serbia responsible for the acts of genocide carried out by the Bosnian Serb military forces there must be conclusive proof that Serbia had exercised “effective control” with respect to each operation in which the alleged violations occurred, and “not generally in respect of the overall operations taken by the persons or groups of persons having committed the violations”.¹⁶ Making reference to what it perceived as “differences” between the Bosnian Serbs and the Serbian government, the Court ruled that this requisite level of “effective control” had not been achieved.

The final issue was whether Serbia had “aided and assisted” or was “complicit” in this genocide, and here the Court turned to Article 16. In addressing this issue, the ICJ first referred back to the Genocide Convention and noted that under Article III not only is genocide itself a punishable crime, but so is *conspiracy* to commit genocide, *directing and inciting* genocide, *attempts* to commit genocide, and, finally, *complicity* in genocide. The Court then proceeded to equate “complicity” in Article III of the Genocide Convention with “aiding and assisting” under Article 16 of the (Draft) Articles on State Responsibility. After this, it ruled that in order to be responsible for aiding and assisting in genocide, the sending state had to have full knowledge of the genocidal intent of the receiving entity and, presumably, take measures in furtherance of this genocidal goal. According to the Court’s interpretation of events, this had not been established “beyond any doubt”.

In sum, although the Genocide Convention only makes mention of state parties having a duty to prevent and to punish genocide, the Court seemingly sought to establish the principle that there are varying degrees of state responsibility for genocide, with the commission of genocide at its apex. In doing this, the Court should be applauded because such an analysis provides a much more nuanced and accurate portrayal of the wrongdoing involved.

However, the Court’s analysis can be faulted in two ways. The first involves the standards themselves. In determining whether the Bosnian Serb paramilitary forces were acting as Serbian “state organs”, the Court demanded that these groups would have to be completely dependent on the Serbian government. With respect to whether these forces were operating under the “direction and control” of the Serbian state, the ICJ once again

¹⁴ Article 4 provides: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions [...]”

¹⁵ Article 8 provides: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.”

¹⁶ *Bosnia v. Serbia*, para. 400.

employed the extraordinarily stringent “effective control” test. And finally, in terms of the issue of “aiding and assisting,” the Court required that the Serb state have full knowledge of the Bosnian Serb’s genocidal intent and, presumably, that it shared this intent and that the aid and assistance it provided was in furtherance of this goal.

The point is that under these standards, there will be few (if any) situations where a state will be in any way “responsible” for genocide that takes place in another country. Moreover, although the Court made some reference to the seriousness of the crime involved as a way of justifying these heightened standards, there is no indication that these would not apply to all areas of human rights.

There is, however, another problem with the ICJ’s standards and it is that they are not complete. In particular, the ICJ never considered, let alone addressed, whether Serbia could be responsible for genocide based on a standard of recklessness, or something comparable to this. What is incontrovertible is that the Serbian government had provided massive levels of military, economic and political support to various Bosnian Serb paramilitary organisations that were known to be dangerous at best – and genocidal at worst. One may (or may not) agree that there is not enough evidence to hold Serbia responsible for committing genocide, or that it had aided and assisted in genocide. But what the Court simply fails to address is why it did not apply any other standards of responsibility. What the ICJ could have done is send a very clear message that it is imperative that states be cognizant of the regimes and entities that they provide material support to. The problem is that by not addressing a matter such as this, the Court’s ruling could easily be read to mean that states have license to act as carelessly and as recklessly as they choose. The simple explanation for why the Court did not consider such a standard is that there seemingly is no “recklessness” standard in the (Draft) Articles. However, this might well indicate that, among other things, the ICJ was simply too wedded to the International Law Commission’s (Draft) Articles.

Although the Court’s commission/complicity analysis is both surprising and disappointing, its treatment of whether Serbia has met its obligation under the Convention to “prevent” genocide is, in many ways, just the opposite.¹⁷ In determining that Serbia had violated its obligation to “prevent” genocide in Bosnia, the Court spent a considerable period of time explaining what this responsibility was based upon. First, the ICJ specified that the obligation to “prevent” genocide was an obligation of conduct and not of result, and that state parties had to take “all measures” to prevent genocide that were within their power that might contribute toward this end – whether these efforts ultimately were ever successful or not. Second, the ICJ interpreted the Convention as demanding that state parties exercise “due diligence” that is based on state capacity. For the ICJ, what was paramount was the ability of a state “to influence effectively the actions of persons likely to commit, or already committing, genocide”.¹⁸ The Court continues:

This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.¹⁹

¹⁷ The ICJ also found that Serbia had not met its obligation “to punish”, based on the government’s lack of cooperation with the ICTY.

¹⁸ *Bosnia v. Serbia*, para. 430.

¹⁹ *Ibid.*

What this means is that different states will have different responsibilities based upon differences in circumstances. All, however, have a legal duty to contribute as much as they can towards the elimination of the substantive evil (genocide). Finally, in contrast to its approach to the issue of “aiding and assisting” where the ICJ had ruled that in order to be “responsible” sending states had to be fully aware of the genocidal intent of the recipient, in the context of the duty to “prevent”, the Court did not demand anything close to such certainty. Instead, the ICJ ruled that state responsibility arose whenever there was a “serious risk” of genocide occurring. According to the Court:

The FRY leadership, and President Milosevic above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted [...] it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica [...] which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the [Bosnian Serb forces].²⁰

In extolling the virtues of the “influence” standard, this is not to suggest that there are no shortcomings in the Court’s approach. The most notable flaw is the suggestion that geographic proximity should necessarily play an important role in determining state responsibility. Still, the Court’s analysis of the duty to “prevent” was vastly superior to the way in which it treated the “aiding and assisting” issue. The problem then becomes how to reconcile the co-existence of these two standards. According to the Court, there are important distinctions. In its view, “aiding and assisting” constitutes an act of commission, while the duty to “prevent” constitutes an act of omission. However, the problem is that the Court assigns the opposite standards that one would otherwise expect. That is, in the context of “aiding and assisting” in order to find that a state is responsible what must be proven “beyond any doubt” is that the sending state possessed full knowledge of the genocidal intent of the recipient. However, in terms of the duty to prevent all that has to be shown is that an outside state was somehow aware that there was a “serious danger” that genocide might take place. The point is that under general legal standards, these two would generally be reversed.²¹

Despite several shortcomings in its approach, the *Bosnia v. Serbia* decision represents a major advance in terms of our conceptualisation and understanding of state responsibility. What the ruling has done is to establish the notion that it is important to articulate different degrees of state responsibility for genocide, and presumably this principle could be applied to all other types of human rights violations as well. Thus, committing genocide is a more serious wrong than aiding and assisting in genocide, and

²⁰ *Ibid.*, para. 438.

²¹ A. Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’, 18 *European Journal of International Law* (2007) pp. 695–713.

both are more serious than a failure to prevent or the failure to punish genocide. To those only versed in domestic law, this result will not appear to be particularly noteworthy or exciting. After all, these kinds of distinctions in terms of degrees of responsibility serve as the very basis for all (or nearly all) systems of domestic law. Still, because these distinctions are generally not made under international human rights law, it is important that a judicial body such as the ICJ has attempted to fill this void, and in doing so has helped to give more meaning to the notion of state responsibility.

4. Other Developments

International adjudicatory bodies do not have a monopoly on the development of international law, and one of the things that would have pleased Katarina to no end has been the creation of the Extraterritorial Obligations Consortium, which represents a wonderful conglomeration of non-governmental organisations, academics and representatives from the United Nations as well.²²

Perhaps more than anything else, the Consortium's ultimate goal is to help "turn on the light" in terms of how human rights are conceptualised. For decades, a territorial approach has been accepted as being "natural". Yet, what this misses is that although the territorial state certainly has the primary obligation to protect human rights within its own domestic borders, this does not mean that other states do not have some subsidiary or complementary obligations when human rights are not protected. This can clearly be seen in *Bosnia v. Serbia*. Each state is responsible for ensuring that genocide does not take place within its domestic borders. However, if genocide does occur in another country, each state party has an obligation to do all that it can to stop it. This is what the Genocide Convention explicitly demands of state parties, but this is what all international human rights law demands as well.²³

Although the ETO Consortium has purposely limited itself to the realm of economic, social and cultural rights, its approach applies equally to civil and political rights as well. Much in the manner of our line-drawing exercise in Katarina's apartment, one of the first tasks of the ETO Consortium has been to develop a series of case studies that analyse concrete situations where the actions and policies of one state have an effect on the protection of human rights in other states. These case studies will help inform the development of ETO principles, which are intended to guide state practice. As of this writing, these principles are currently being drafted, and they will be signed by the ETO Consortium and by several international law experts in Maastricht in September 2011.

If she were alive, Katarina would have been present at this meeting. However, she will be present in another way, and it is through the important role that she has played in helping to re-conceptualise a different vision of human rights.

²² The list of ETO Consortium members includes: FIAN, Bread for the World, Amnesty International, Human Rights Watch, 3-D, CELS, COHRE, ESCR-Net, Habitat International Coalition, International Commission of Jurists, Rights and Democracy, and the Social and Economic Rights Action Centre.

²³ M. Gibney, *International Human Rights Law: Returning to Universal Principles* (Rowman & Littlefield, Lanham, MD, 2008).