

**Who Can Be Held Responsible for the Consequences of Aid and Loan Conditionalities?
The Global Gag Rule in Peru and its Criminal Consequences**

by
Marianne Møllmann

**Working Paper #279
March 2004**

Abstract

This paper explores the possibility of holding states or individual decision-makers (criminally) responsible for human rights violations that arise as consequences of aid and trade conditionalities. It identifies the vacuums and possibilities of current international human rights law and points out some of the strategies that have been used to overcome the prevailing impunity in this area. The paper shows that there currently is a glaring gap between the stated intentions of international cooperation and the mechanisms in place to implement these intentions, and that this gap is biggest when it comes to cases concerning the rights of traditionally marginalized groups, for example women and the poor. Looking at the Global Gag Rule in this light, the paper shows how the reinstatement of this policy in the particular context of Peru has had—or is likely to have in the near future—an exacerbating effect on an already serious public health situation.

Biography

Marianne Møllmann is a researcher and activist on women's economic, social, and cultural rights, and is currently working as the Americas researcher for the Women's Rights Division at Human Rights Watch* in New York. She was the co-coordinator of the Women's Working Group of the International Network on Economic, Social and Cultural Rights, and developed this paper in connection with her work as an international legal expert for the women's rights program of the Centro de la Mujer Peruana Flora Tristán in Lima, Peru. Marianne holds a Bachelor's degree in Political Science from Copenhagen University (1991), a Masters in Business Administration from the Ecole des Affaires de Paris (1994), and an LL.M. (Masters degree) in International Human Rights Law from Essex University (1999). The major focus of her research and activism is international accountability for human rights violations in the context of globalization, with particular attention to women's economic, social, and cultural rights.

*The views presented are those of the author alone; affiliation is for identification purposes only.

Women & International Development

206 International Center
Michigan State University
East Lansing, MI 48824-1035
Phone: 517-353-5040
Fax: 517-432-4845
E-mail: wid@msu.edu

Web Address: <http://www.isp.msu.edu/wid/>

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WHO CAN BE HELD RESPONSIBLE FOR THE CONSEQUENCES OF AID AND LOAN CONDITIONALITIES? THE GLOBAL GAG RULE IN PERU AND ITS CRIMINAL CONSEQUENCES

I. Introduction: Who is Responsible for Globalized Misery?

It is a fact hard to challenge that the rich are getting richer, and the poor poorer, worldwide (United Nations Development Programme 1996). There is, however, less consensus about the inevitability of this development; about who, if anyone, is in charge; and about whether or not ultimately the consequences of a wider income gap are “good” or “bad” or indeed have any moral weight at all. The current unipolar world order implicitly accepts the liberal market economy as a physical law impossible to alter. As a consequence of this logic, the increasing inequality between individuals and peoples with regard to access to basic life goods and fulfillment of human rights is often portrayed as inevitable and even morally desirable (McMurtry 1998). However, dissenting voices object to both the inevitability and the desirability of increasing inequality. Where capitalist market logic has it that accumulated wealth in the few must trickle down to the many in the shape of productive investments that create jobs for the unemployed—indeed, that a neoliberal economy is the only road to development—empirical evidence from several decades of implementing this logic points to the contrary (see, for example, Reich 1992). Moreover, “few developments are simply automatic” and “it would be a mistake to ignore the active project which is underway to shape and construct the new global order” (Rittich 2000:231).

However that may be, the gravest concern with regard to this new global order, from the perspective of protecting human rights, is not the overwhelming evidence that the liberal market economy, based on the uncompromisable principle of private property, is both theoretically and empirically contrary to the concept of human rights (McMurtry 1998:41-56, 73). It is, rather, that no one seemingly can be held responsible for the “new” types of human rights violations emerging from this new order. Even as international law moves toward more targeted accountability for traditional human rights violations by adopting and ratifying procedures that bring some victims closer to real remedies (*Rome Statute* 1998; *Optional Protocol* 1999), impunity continues for abuses perpetrated by multinational corporations, international lending institutions, and indirectly through aid and trade conditionalities* imposed by foreign states or organizations. Indeed, many of these situations would not even classify as human rights violations in a traditional reading of international law, which is based on the concept of sovereign and equal nation-states, where the only perpetrator of human rights violations is the state (or quasi-state organization) under whose jurisdiction or control the victim finds him or herself.

While caution is warranted in the expansive interpretation of any law so as not to dilute its effectiveness, it is legitimate to question the relevance of traditional international human rights law in a world where the nation-state arguably is no longer the only nor the most powerful player in the global order. For example, in the context of human rights law, how do we classify situations of massive environmental damage due to industrial investment? All individuals, we know, have a right to self determination and control over natural resources (*ICCPR* 1966; *ICESCR* 1966), so when a democratically elected government invites foreign direct investment in the form of, for example, mining, and at the same time does not enforce international and national standards of

* All underlined terms can be found in a glossary at the end of the paper.

environmental protection, this might be seen as a collective exercise of this right to self-determination. However, governments of developing countries may feel compelled to lower environmental protection standards in order to attract investment and compete with other countries as a welcoming business environment. When development is at stake, the extent to which a government or indeed an individual or community is “free” to exercise their rights is therefore limited.

And what can we call the situation of the hundreds of thousands of women who die annually as a result of unsafe abortions in countries where abortions stay illegal while responsible family planning services are scarce or non-existent due to pressure from conservative aid agencies or religious groups? The United Nations’ Human Rights Committee has declared restrictive abortion laws a violation of the right to life and freedom from torture (Human Rights Committee 2000:para 20). Yet, can a national government be held solely responsible for maintaining an oppressive legal regime, when aid agencies and religious groups with bigger pockets and farther from the women have encouraged that government’s policies through aid packages with policy conditions?

And how about involuntary resettlement as the result of development projects? Forced evictions are considered *prima facie* incompatible with the right to adequate housing (Committee on Economic, Social and Cultural Rights 1991:para 18). Yet in the conception of many large-scale development projects, the resulting evictions are given only passing mention and the ultimate consequences on population, habitat, and wildlife not even considered (Clark 2002:210). It may be easy, in these circumstances, to identify the violation of the basic conditions necessary to lead a dignified life—which supposedly is at the core of the human rights concept. It is less obvious who can be held responsible for these violations, and indeed how to introduce some measure of accountability into a situation that is so obviously wrong.

The questions arising from these situations are thus both conceptual and remedial. Are we talking about human rights violations at all? If not, should these situations be classified as such through a redefinition of traditional international law? And—independently of our response to the conceptual concern—what are the domestic and international remedies available to the victims? Several authors have tackled these questions from a variety of perspectives. Terry Collingsworth (2002) and Dana Clark (2002) both recently approached the remedial part of the problem.

Collingsworth (2002) argues persuasively for the establishment in U.S. jurisprudence of the Nuremberg principle of civil responsibility for aiding and abetting in crimes against the laws of nations, so that the Alien Tort Claims Act (28 USC § 1350) can be used to convict U.S. based multinational corporations for the human rights abuses they more or less directly cause to happen in countries such as Burma (Myanmar), Colombia, Indonesia, Ecuador, Guatemala, and elsewhere. In his argument, whether or not the abuses are defined as human rights violations in international law is irrelevant, since the cases depend on U.S. domestic code. In traditional international human rights law, the state in which the abuse took place would be responsible for not providing adequate protection. Collingsworth argues implicitly that this logic is obsolete; those motivated by profit rather than malevolence should not be allowed to tacitly consent to the crimes that enhance their profits without being held accountable.

With regard to the consequences of development projects initiated by the World Bank, Dana Clark (2002) notes that despite a change in World Bank discourse and policies to include a concern for

economic, social, and cultural human rights, and despite the setting up of a permanent Inspection Panel in 1993 to monitor policy implementation, impunity prevails for adverse human rights consequences of World Bank projects. Key weaknesses of the Inspection Panel include its lack of oversight authority over the implementation of its own remedial measures, and the resistance to the Panel within the World Bank itself (Clark 2002:218, 220). It should be added that the Inspection Panel does not establish accountability for human rights violations, but rather for the failure to apply World Bank policies. The Panel is, therefore, only successful as a human rights accountability mechanism insofar as Bank policies are consistent with internationally recognized human rights norms, independently of the Panel's power to implement its own action plans.

From the beginning of the 1990s, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Protection of Human Rights, hereinafter the Sub-Commission) has shown particular concern with the conceptual part of the accountability problem and with the impunity of perpetrators of human rights violations. In 1997, Mr. El Hadji Guissé (1997), the Special Rapporteur to the *Sub-Commission* on the impunity of perpetrators of economic, social, and cultural rights violations (hereinafter Special Rapporteur) issued a report that purported to overcome some of the problems inherent in the situations we have mentioned above, by defining certain abuses, such as structural adjustment programs, as crimes against humanity.

This definition of particularly grave violations of economic, social, and cultural rights as crimes against humanity is both the premise and the conclusion of the report. Thus, the report bases its treatment of issues such as jurisdiction, identification of victims and perpetrators, and applicable remedies on the definition of grave violations of economic, social, and cultural rights as crimes against humanity, while citing as a central final recommendation that "violations of economic, social, and cultural rights could be declared international crimes that are consequently subject to the principles of universal jurisdiction and imprescriptibility" (Guissé 1997:para 142(b)). While this approach may be considered somewhat tautological, current international law certainly gives no reason to *exclude* grave violations of economic, social, and cultural rights in the definition of crimes against humanity and genocide. Moreover, as the Special Rapporteur indicates, crimes against humanity carry individual criminal responsibility and are generally thought to be subject to universal jurisdiction. The proposition of the Special Rapporteur would overcome, to a certain extent, both the conceptual and the remedial problems in identifying the responsible entity and provide some recourse for victims of the consequences of those international practices that are seen to give rise to serious violations: "debt, structural adjustment programs, deterioration of terms of trade, corruption, laundry of drug money, the fraudulent activities of transnational corporations, etc." (Guissé 1997:para 31).

Unfortunately, the Special Rapporteur does not address the difficulties inherent in the litigation of crimes against humanity, such as the definition of the context element, and the burden and standard of proof required. He also does not deal with the political problems his approach invariably would encounter, since it would challenge traditional conceptions of human rights law and run counter to powerful organization and state interests. If World Bank staff "resent limitations placed on their discretion and are embarrassed by the Inspection Panel's findings of policy violations and harm" (Clark 2002:221), they are unlikely to want to be charged with crimes against humanity. If current liberal market theory, as promoted by developed and developing countries' governments alike¹, opposes coercive assistance to the unemployed through taxes as an unhealthy intervention in the market mechanism, they will probably not be persuaded that mass starvation as a consequence of

trade conditions merits criminal responsibility on the part of those devising the trade policies. If, at the imposition of aid restrictions for family planning work, the U.S. Government takes care to publicly declare that “the President’s clear intention is that any restrictions do not limit organizations from treating injuries or illnesses caused by legal or illegal abortions” (Office of the White House Press Secretary 2001b), it is unlikely to believe itself responsible for any adverse consequences of the restrictions, however predictable.

This situation provides the context for the present paper. By addressing the question of accountability for the consequences of trade and aid conditionalities through the lens of human rights law, we shall attempt to identify the gaps and possibilities this perspective presents. As a concrete example of aid conditionalities with transnational consequences, the present paper shall analyze the human rights consequences of the reinstatement of the Mexico City Policy, also known as the Global Gag Rule, in Peru. This policy imposes conditions on organizations that wish to receive U.S. Government funds, limiting their activities related to abortion, including lobbying and advocacy to decriminalize abortion. In analyzing the consequences of this policy, the paper shall approximate them to the internationally accepted definition of crimes against humanity, and ask a question central to many situations of impunity today: if people suffer “as surely and destructively as if an invading army had [acted against them] deliberately as a punitive raid” (McMurtry 1998:9), then why is that not a crime?

II. International Aid and the Responsibility of States

In a first approximation to the question at hand, we shall look at the international legal obligation, if any, to provide international assistance. It is clear that if aid is seen to be a legal obligation of developed countries and developing countries therefore have a right to receive it, most conditionalities would be illegal regardless of their consequences.

The United Nations *Charter*, which since 1945 has constituted the principal framework for all international cooperation, establishes as the purpose of all international relations, *inter alia*, the respect for human rights and fundamental freedoms (U.N. 1945:Article 1(3)). In Articles 55 and 56 of the *Charter*, U.N. members commit themselves firmly to international cooperation for the promotion of the same rights, while Article 103 stipulates that any conflict between the obligations of U.N. Member States under the *Charter* and any other international obligations must be resolved to the advantage of the *Charter*, i.e. *Charter* obligations prevail in all circumstances. It follows that in the U.N. logic, the protection of human rights must be given priority in all types of “international cooperation,” even those not mentioned explicitly in the *Charter*—for example, structural adjustment policies, trade, and aid relations—and that these non-specified types of cooperation cannot be used as a justification for the violation or late satisfaction of a specific human right.

In the specific context of aid, the U.N. Commission on Human Rights has issued several guidelines for international cooperation, one of which is to “give priority in the implementation [of policies] to humane conditions, in particular to living standards, health, food, education, and employment” (Commission on Human Rights 1994). It should be emphasized that these “humane conditions” in fact are human rights, as protected by the *International Covenant on Economic, Social and Cultural Rights (ICESCR 1966)* Articles 11, 12, 13, and 6, respectively, and that the prioritization of these conditions therefore, in effect, is an obligation under the *U.N. Charter*.

Given the normative clarity of the *U.N. Charter* in this respect, it is perhaps surprising that conformity with human rights does not necessarily figure as a central priority in the mandates and policies of donor and development institutions. This apparent mystery is conceptually closely related to questions regarding sovereign equality and distributive justice.

A concern for “sovereign equality” is, on the face of it, what has kept the World Bank from establishing policies on civil and political rights, as these would be seen as interfering with the political arena—traditionally a taboo area for the Bank (Shihata 1997:638)—though this discourse seems to be changing. Recent situations “illustrate the ability, more frequently denied than exercised, of the World Bank to effectively use its leverage to interfere in human rights situations in borrowing countries” (Clark 2002:211). Moreover, good governance, the rule of law and the fight against corruption are now seen as essential to development both by the Bank and by the international community as a whole (International Conference on Financing for Development 2002). Though this concern does not override the concern for sovereign equality as established in the *U.N. Charter* Article 2(1), it does make some attempt at overcoming the false assumption that economic and policy matters should and indeed can be kept separately.

The question of distributive justice cuts to the heart of the matter: is it a universal legal or “semi-legal” obligation for richer countries to provide economic and technical assistance to poorer countries? Do poorer countries have a right to receive this assistance? If not, how can a poorer country endeavor to “deserve” assistance?

These questions find no clear answers in conventional international law. The 1989 *Convention on the Rights of the Child* (hereinafter *CRC*) makes it explicitly clear (*CRC* 1989:Article 4) that the state is to use all available resources in its endeavors to fulfill the rights contained in the treaties, including, when needed, resources from international cooperation. The *International Covenant on Economic, Social and Cultural Rights (ICESCR)* speaks of the *reception* of international cooperation as an obligation of the State party: the State Parties “undertake...to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (*ICESCR* 1966:Article 2(1)). In both cases, the state in need of resources has an obligation to obtain international assistance, which—in order not to make an absurdity of the measure—would seem to involve an implicit obligation to provide this assistance. This, of course, does not create a general legal obligation to provide international assistance, nor does it clarify who exactly must receive and who provide this assistance.

Some scholars have argued that a general duty to cooperate in the international community arises from the *U.N. Charter*’s Preamble, its Article 55, and the creation of the Economic and Social Council, crystallizing in the second U.N. Conference on Trade and Development and leading to a principle of “non-reciprocity” in international relations (Onyejekwe 1995:433). However, while the *U.N. Charter* does speak of international cooperation and promotion of higher living standards, it also proclaims the principle of sovereign equality (Article 2(1)) and equal rights (Article 1(2)), which would seem to be contrary to non-reciprocity.

Moreover, not even the 1986 *Declaration on the Right to Development*, which proclaims a general duty to cooperate to ensure development and create international conditions for sustainable

development (1986:Articles 3(1) and 3), speaks of non-reciprocal rights to receive development aid. Indeed, the Declaration bases its vision of a “new international economic order” on the same pillars of sovereign equality and international cooperation as the *U.N. Charter* (Article 3(3)), and when it comes to the sharing of resources, the Declaration limits itself to state that “international cooperation is essential” (Article 4(2)).

Some later documents have spoken of “shared responsibility” (*United Nations Millennium Declaration* 2000:para 6) or “common but differentiated responsibility” (United Nations Conference on Environment and Development 1992:Principle 7) yet do not announce a “right” to international assistance or a general duty to provide it. The General Assembly of the United Nations has established, on several occasions, desirable goals in terms of the percentage of their Gross Domestic Product (GDP) developed countries ought to donate in aid to developing countries. However, the goals are phrased in terms of what morally ought to be and not what legally must occur, and the recent negotiations leading up to the adoption of the so-called *Monterrey Consensus Declaration* (International Conference on Financing for Development 2002) show that the consensus proclaimed does not necessarily include specific levels of development aid as expressed in percentage of GDP. On this occasion, countries with higher GDP levels, such as the United States and Japan, were eager to substitute calls for compliance with U.N. GDP percentage goals with congratulatory notes to those countries that in absolute terms had provided more assistance. Had this proposal been accepted, the efforts of smaller countries such as Norway, which have actually complied with the U.N. standards, would have been disregarded while the efforts of countries who consistently do not live up to U.N. standards would have been emphasized. Even so, the final declaration does reiterate the call to developed countries “to make concrete efforts towards the target of 0.7 percent of gross national product (GNP) as [Overseas Development Aid] ODA to developing countries” (International Conference on Financing for Development 2002:para 42).

While the international community tends to leave to donor countries the direction of aid they provide, special consideration must be given to the so-called least developed countries. In this manner, the *Monterrey Consensus Declaration* urges developed countries to make efforts to ensure that 0.15 to 0.20 of their GDP go for development aid to least developed countries (International Conference on Financing for Development 2002:para 42).

We can thus conclude that a certain level of assistance is morally expected from all developed nations, though no clear legal obligation exists in international law, as it stands. The moral expectation is higher with regard to aid directed at least developed countries. At the same time, developing countries have an obligation to seek aid where possible, though they have no certain right to obtain it. In this manner, seen from the perspective of distributive justice, international law on the subject of international aid is at best soft and at worst non-existent.

In other words, it is not clear in current international law *if* international aid must be conceded. This, however, has no implications on a potentially universal answer to the question of *how* international aid and loans should be conceded. Does the country providing the international aid have legal responsibility with regard to the consequences and employment of the aid? To this question we now turn.

III. Accountability for Extra-jurisdictional or Transnational Action

The main characteristics of the human rights violations that result from the imposition of aid conditionalities are that they are transnational, indirect, possibly unintended, and maybe unpredictable. All of these factors are relevant to their treatment under international law in general, though none more so than the transnational nature of the consequences, i.e. the fact that conditionalities consist of an act (in this case indirect) carried out in or by one country with consequences in another. The thought behind classical human rights law is that individuals must be protected (only) against the abuse of the state in which they reside, and that it is this state's obligation to protect (only) individuals under its jurisdiction against abuse by its own and other agents.

In the 1970s, during discussions regarding the New International Economic Order, there was talk about establishing an overall principle of transnational state responsibility for social rights fulfillment (New International Economic Order International Meeting of Experts 1979:Principle 4). However, neither the Order nor the Principle was ever established. An optimistic reading of the status of international law regarding extra-jurisdictional (or transnational) responsibility for an action might thus be that the law is “emerging.” A more realistic notion would be that it is unclear. Since the standing of the law is pertinent to determining whether or not the international system establishes some sort of accountability system for the consequences of conditionalities, we shall approximate the status and scope of transnational responsibility through an analysis of four related situations.

First, we shall look at transnational state responsibility for direct and indirect actions. Then we shall turn to transnational individual criminal responsibility, looking at the possibility of establishing liability for direct or indirect action. Examples of each of these situations abound, but the following matrix may give an idea of the kind of practical questions for which we seek answers through this approximation:

Approximating legal accountability for transnational human rights violations	State Responsibility	Individual Criminal Responsibility
Direct Action	Can the issuing country of NATO or U.N. troops be held responsible for rapes committed while in another country?	Can the director of the U.S. Peace Corps be held responsible for mass non-consensual sterilizations the organization carried out in Latin America?
Indirect Action	Can the imposing countries be held responsible for the deprivation in Iraq during the extensive embargo?	Can then-Secretary of State Henry Kissinger be held responsible for the torture and abuse carried out during the U.S. supported 1973 coup in Chile?

III.a. State Accountability

Before analyzing substantively state action, whether direct or indirect, we should clarify that our concern here is with accountability—that is, whether or not the state can be held responsible—rather than the issue of state responsibility itself. In other words, we are not concerned with whether or not the state might be seen to be responsible for a certain situation under international law, but rather with whether or not international law can do something about it—i.e. hold the state responsible before a court or through another accountability measure. Rosalyn Higgins has cast much light on the often confused issues concerning the treatment of state responsibility in international law, showing that the only truly relevant questions to an examination of state responsibility “should be limited to questions of attributability and to what, so far as the elements of liability is concerned, is specific to the law of responsibility” (1994:163). In other words, the law of state responsibility is about resolving *whose* actions a state can be held responsible for, and *what* the required elements of that responsibility are. Her conclusions are convincing and most pertinent in the context of this paper.

First of all, she notes that the International Law Commission during its forty years of work on state responsibility has tended toward a result-based responsibility, noting that fault or *culpa* is unnecessary to incur state responsibility, though it might absolve the state of liability for the harms caused. Secondly, and as a direct consequence of her first conclusion, Higgins finds no reason to treat internationally lawful acts differently from internationally unlawful acts in terms of responsibility, arguing thus: “If what is required for something to fall within the law of state responsibility is an internationally wrongful act, then what is internationally wrongful is *allowing* (even without *culpa*) *the harm to occur*. A nuclear plant is a lawful activity; but failure to meet a[n established] standard of care, with resultant harm—that is the internationally wrongful act, for which state responsibility attaches” (1994:165, emphasis in original). Higgins notes that the established standard of care to be met depends on the primary obligation itself. Thus, “the law of state responsibility most usually requires due diligence rather than its own *culpa* as the test of attributed responsibility,” though there is a “growing contemporary tendency for certain categories of obligations to entail ‘strict liability’—that is to say, responsibility by reference to events, with *culpa* as much an irrelevance as the due-diligence test” (Higgins 1994:161). In short, a state does not have to have an intention to do harm to be responsible for its agents’ injurious acts, whether legal or illegal. Finally, Higgins submits that all questions regarding potential state immunity fall more to the question of whether or not the state can be *held* responsible, than whether or not the state *is* responsible. Thus, a state may enjoy sovereign immunity for acts it is clearly responsible for.

With this clarification in mind, we are ready to examine the more substantial question of whether or not international law establishes an accountability mechanism for states responsible for transnational human rights violations resulting from direct or indirect action.

III.b. Can States Be Held Responsible for Transnational Direct Action?

It seems counter-intuitive that states should be held responsible for human rights violations carried out on their own territory but not responsible for the same actions when carried out by their agents abroad. However, international jurisprudence is unclear on this point, perhaps as a consequence of the confusions in this area laid out by Higgins.

The Human Rights Committee of the United Nations, the Inter American Commission on Human Rights of the Organization of American States, and to a certain extent the European Commission on Human Rights of the European Council have all found that states may be responsible for violations of human rights carried out by their agents in the territory of another state, in some cases even without the issuing state's acquiescence, and that this responsibility results in some measure of accountability toward the victims (Human Rights Committee 1981:para 12; Inter American Commission on Human Rights 1994; and European Commission on Human Rights 1976). There would seem, therefore, to be acceptance in the international community for some insistence on the active nationality principle. This means that states have a duty to prosecute their nationals for potential human rights violations committed anywhere in the world. Particularly since the *Rome Statute of the International Criminal Court* entered into force, this principle is generally accepted by states with regard to genocide, crimes against humanity, and other international crimes.

The reasoning of the Human Rights Committee in *De Lopez v. Uruguay* is interesting, since it extends this broad vision of the active nationality principle to all the rights covered by the *International Covenant on Civil and Political Rights (ICCPR 1966)*. Based on the clause contained in Article 5 of this Covenant, the Committee argues that "it would be unconscionable to so interpret the responsibility [to protect individuals subject to the jurisdiction of any given state] as to permit a State party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory" (Human Rights Committee 1981:para 12(3)). However, the Committee focuses on the question of responsibility and not on the issue of state accountability, operating, as it is, under the assumption that State parties to the *ICCPR* are obligated to provide judicial recourse for human rights violations under their responsibility.

The European Court on Human Rights has been less adamant about state obligation to prosecute. It has invoked the principle of sovereign immunity to protect state agents against prosecution when the acts were committed under foreign jurisdiction. Thus, in the case of *McElhinney v. Ireland*, the Court finds, effectively, that no legal remedy is warranted for the alleged abuse against Mr. McElhinney by a British soldier on Irish territory, as the soldier is exempt from the jurisdiction of the Irish courts under the principle of sovereign immunity (European Court of Human Rights 2001). Nevertheless, the opinion is not unanimous. In a dissenting opinion, judges Caflish, Barreto, and Vajic ask the relevant question: "Why...should a State not be accountable, before the courts of another State, for injury and damage inflicted by its agents on individuals or their property on the territory of that other State, just as it would be if the tort had been caused, not by an agent of that other State, but by an individual?" The judges point out that sovereign immunity no longer is an absolute concept, and that international and domestic law accepts and even proscribes many exceptions to the rule. The main exception, generally accepted, is for situations where foreign agents are charged with death, personal injury, or damage to or loss of property as the result of an action or omission committed in the territory of another state². In 1994, the International Law Association extended this exception to include actions that occur only "partly" in the foreign state, or even acts committed by State A agents on their own territory with direct effects in State B (1994:Article III(F)).

The split opinion of the European Court of Human Rights indicates that judicial and quasi-judicial entities still are reluctant to prioritize human rights over sovereignty concerns, despite the common sense rulings of the Human Rights Committee that states should not be allowed to do on foreign territory what they are not allowed to do on their own. This is also illustrated by the discussions

concerning the development of a Draft Optional Protocol to the *ICESCR*. During its elaborations on this project, the U.N. Committee on Economic, Social and Cultural Rights (1996) decided against allowing communications of potential abuse by third parties, such as multinational corporations, foreign states, and intergovernmental institutions, possibly because the Committee felt this would not be a true reflection of current international law³. Indeed, none of the individual complaint mechanisms currently in place include the possibility to issue a complaint against a state other than the one under whose jurisdiction the author of the complaint resided at the time of the violation.

The application of general rules to all, regardless the whereabouts of the presumed author and victims of the crime, is thus limited to those areas that have been previously agreed to through conventional or customary law and sometimes not even that. Even if the *U.N. Charter* directs all members of the international community to respect and promote human rights, this directive is hardly “applied” extra-jurisdictionally in a consistent manner, nor would such an application easily be accepted. Indeed, the lack of remedies for transboundary abuses not covered by traditional international human rights and humanitarian law is at the root of the impunity problems mentioned in the introduction to this paper. More to the point, most of the situations in which international law has been applied extra-jurisdictionally have centered on crimes or abuses committed by someone other than the intervening state or entity. The “duty” to intervene thus only has been invoked by states when “saving” victims from others’ violations of international law, and not from the consequences of their own actions or omissions; even in those situations, there is hardly a consensus regarding a “duty” to intervene.

III.c. Can States Be Held Responsible for Transnational Indirect Action?

International human rights law has for several decades accepted the existence of state responsibility for the consequences, on its own territory, of both direct action and failure to act. In *Velázquez-Rodríguez v. Honduras*, the Inter American Court of Human Rights holds that “the State has a legal duty to take reasonable steps to prevent human rights violations,” (1988:para 174-5) implying that the failure to prevent a violation is as much a breach of the state’s obligations as any direct violation. Similarly, in *X and Y v. Netherlands*, the European Court of Human Rights (1985) holds that the authorities have an obligation to take positive measures to prevent private persons from interfering with the rights of others, noting again that the state has both negative and positive obligations: it must refrain from carrying out violations directly, and it must prevent violations from happening.

In the case of aid and trade conditionalities, we are talking of indirect action and not necessarily failure to act. We note that the distinction between indirect action and failure to act is irrelevant to defining a state’s behavior as incompatible with human rights law, since the behavior in question—a failure to prevent abuses by third persons—is violatory because of its consequences, not because of the act itself. The consequences might be violatory whether they stem from indirect action or no action at all. In other words, the indirect character of conditionalities, for example, does not in and of itself exonerate the issuing state from responsibility of their consequences.

These arguments are, however, more relevant to the determination of state responsibility than to state accountability. The causality between an action, an omission, or an indirect action, and its injurious consequences may be very clear, though there is no manner to hold the responsible state accountable or bring it to justice.

This would seem to be the case, for example, with France's nuclear test bombings in the South Pacific. Cases were brought to hold France responsible for the adverse health and environmental consequences of these bombings, both during the first set of tests in the 1970s and the resumed bombings in the 1990s, though no suits were successful. In the 1970s, the cases were dismissed on the grounds that they were moot, since France had declared its intention to stop the bombings. When the tests were resumed in the 1990s, they were challenged before several instances⁴ that all denied that individual rights were at stake, basing their rulings on traditional readings of the term "victim" (Gibney, Tomaševski and Vedsted-Hansen 1999:277). In a unanimous decision, the European Commission on Human Rights (1995) argued that the claimants could not be said to be victims under the terms of the European Convention, since they could not show that any of their individual rights had been infringed or were under imminent danger of being infringed upon. The case was therefore deemed inadmissible, and the merits were never analyzed.

The Human Rights Committee followed a similar reasoning, also declaring the case inadmissible (1996:paras 5.5-5.6). The Committee nevertheless found it relevant in the same report to refer to its General Comment No. 14 (1984) on nuclear weapons and the right to life, in which, more than a decade before the 1990 testings, it had asserted that "it is evident that the designing, *testing*, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today" (para. 4, our emphasis). It is unclear how the Committee would purport to protect this aspect of the right to life—short of claims post-death—unless some flexibility is allowed in the concept of "victim." In certain cases of generalized environmental damage, it might thus be necessary to allow for cases brought on behalf of larger populations—not individual victims—where the abuse or violation occurs over a longer period, with a considerable time lag between exposure to the harmful material and the registered negative health results.

There seem to be several other barriers in international and national jurisprudence to holding states responsible for indirect action. The International Court of Justice has addressed the issue of prerequisite conditions for state accountability for indirect action in *Nicaragua v. United States*, where it held that the United States could not be held responsible for human rights violations carried out by the *contra* rebels on Nicaraguan territory, though the Court did find the United States responsible for directly financing, equipping, and supplying the *contra* forces (1986:para 116). In this connection, the Court debated what conditions would have to be fulfilled in order to find one state responsible for indirectly causing harm in another state's territory, and concluded that unless the *contras* were *de facto* U.S. troops, there could be no indirect responsibility. In its dismissal of this part of claimants' argument, the Court noted that "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" (para 106). If accepted, this standard would seem to imply that the concept of indirect state responsibility does not exist at all, since the responsibility and control would, in fact, have to be more or less direct ("effective" in the Court's words) to incur legal consequences. Nevertheless, such a conclusion would make a mockery of the Court's own division of the United States' behavior into concerns with direct and indirect action. It is therefore possible—as Mark Gibney, Katarina Tomaševski, and Jens Vedsted-Hansen suggest—that the Court dismissed the claim for indirect responsibility "for the simple reason that [it] was secondary to the issue of direct responsibility" and "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" (1999:285).

As Gibney, Tomaševski and Vedsted-Hansen suggest, the most objectionable part of any particular policy is not the direct action but rather the issuing state's often occult reasons for wishing or ignoring the derived (and foreseeable) adverse consequences. Consider the U.S. embargo against any kind of trade with Cuba. If we disregard for the sake of this article the highly relevant question as to the inherent illegality of a third country embargo, objections to the embargo must rightfully center on the potential human rights consequences in Cuba—consequences that cannot have been unforeseen by the U.S. Congress and federal agencies—though the embargo itself is about commercial relations.

Moreover, the notion that a state either does or does not have control over the consequences of its action in another state's territory does not reflect the current shape of international interaction. Indeed, this kind of "black-and-white" thinking likely will ensure that impunity persists for harmful cross-border actions. The closest that established international law gets to resolving this question of where and how to hold foreign states responsible for human rights abuses committed in other countries is perhaps in international humanitarian law, which applies exclusively to abuses during war situations. This might be an indication that the international community has not moved beyond early 20th century perceptions of when and how one state may have enough access to influence events in another state's territory to warrant international rule-making on the issue. Obviously, these perceptions that only an invading state or occupying power may have a negative impact on another state's territory no longer hold true. Citizens in State A are just as likely, if not more, to suffer deprivations as the consequence of international trade policy, commercial boycotts, generalized environmental damage, and any conditionalities imposed by State B, as they are to be victims of war. If the logic of international humanitarian law is that states have a duty to avoid criminal acts toward civilians in all territories—their own as well as those they might have gained access to by force—there can be no valid reason for limiting these duties to war situations in a world where access and influence can be forced by financial means as easily as by arms.

Indeed, the conclusion of our deliberations so far must be that there is a serious gap in international law. Let us say Higgins' notion is correct, that state responsibility under international law is incurred for the injurious consequences of any act, whether legal or illegal, direct or indirect, where the injurious consequences are seen as a breach of an international obligation, and there is no reason to object to this notion. Let us also accept as a reality increased transnational activity and influence, a fact hard to contest. Our conclusion must be to question seriously an international system that apparently consciously labels states as responsible for injurious acts but at the same time leaves them free to continue carrying out these acts as long as the consequences occur on foreign territory. If we assume further that all states act in good faith—the basis for international cooperation—and that they only take upon themselves obligations they actually mean to fulfill, then we must also assume they wish for effective remedies for breach of obligations attributable to one among them, including themselves. The corollary of this line of thought is that if the national level holds no effective remedy for such breaches, then international remedies must be made available.

However, international remedies are clearly *not* available for the kind of situations described. The central question is why. Collingsworth notes that the fundamental inequity between enforceable transnational commercial agreements and largely voluntary transnational human rights norms "can

only be explained by the great disparity of power between commercially oriented governments and their allies in the business community, and the relatively unorganized groups that advocate for workers and other social interests” (2002:186). One might add that women’s interests seem to be at the bottom of this power scale, with women and girl children suffering systematic discrimination and abolition of their most basic rights in many countries worldwide, without this registering as a prime concern with the majority of those advocating for social interests and human rights. However, if we follow the logic laid out above, we need to ask not only who has the power to further and protect their interests at all costs, but also whether states really do act in good faith and whether they assume obligations they cannot or will not fulfill? We shall return to this in the context of the Global Gag Rule and its consequences in Peru. Meanwhile, we need to explore the possibility of holding individuals accountable for transnational direct action.

III.d. Can Individuals Be Held Criminally Responsible for Transnational Direct Action?

Until now, the principal manner of extra-jurisdictional accountability for individual direct criminal action has been the invocation of universal jurisdiction. As already mentioned, those human rights violations considered grave enough to be international crimes are subject to universal jurisdiction and thus to transnationally applied individual criminal responsibility. Universal jurisdiction is the juridical concept that individuals who commit the most severe human rights violations can be brought to justice wherever they are found. This concept is not new. It formed a central part of the principles underlying the International Military Tribunal of Nuremberg after World War II, and was later recognized as part of international law through U.N. General Assembly Resolution 95(I) in 1946. The concept has also been an accepted part of U.S. jurisprudence since the 1970s, and it allowed Israel to try Adolf Eichmann in Jerusalem in 1961 (Roth 2001). Recently, the principle of universal jurisdiction formed part of the basis for the Spanish Special Court’s petition to the United Kingdom to extradite Chilean ex-dictator Augusto Pinochet for trial in Spain.

Universal jurisdiction is generally held to apply to violations of peremptory norms or *ius cogens*. The Vienna Convention on the Law of Treaties (1969) defines a “peremptory norm” in its Article 53 as follows: “a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” We note that in the definition of peremptory norms, the injured party under general international law is a state or rather the international community of states; from the international legal perspective, it is the general conscience of man that is grievously offended, not the individuals suffering the specific violation.

In the *Barcelona Traction case* in 1970, the International Court of Justice explained that a state’s obligations to protect individuals against this kind of crime are not unlimited: “on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality” (1970: para 91). The Court was referring to the fact that most international human rights treaties only result in state obligations toward those individuals that live within their territory or who are nationals of a particular state. The International Court of Justice did not specify how or if the international community as a whole would protect those individuals not protected by the capacity conferred by the human rights treaties, i.e. nationals of one country living in another’s territory, the stateless, and others falling outside the scope of existing treaties.

Peremptory norms are today understood to include the prohibition of torture, genocide, and crimes against humanity (Bassiouni 1996:63, 68). This notion is ratified by the entry into force of the *Rome Statute of the International Criminal Court* in 2002, which for the first time in history establishes a permanent international forum for claims against individuals presumed responsible for the most serious violations of international law. These violations are considered most serious either because they are in and of themselves heinous, such as genocide and war crimes, or because they are carried out on a systematic or mass scale, such as crimes against humanity (*Rome Statute* 1998:Article 5).

The list of the crimes subject to universal jurisdiction by international consensus as established in customary norms has expanded over the years. With the *Rome Statute of the International Criminal Court*, these norms have crystallized into conventional law, and it is thus safe to say that universal jurisdiction applies at least to those crimes covered by the Statute, that is crimes against humanity, war crimes, and the crime of genocide.

Some domestic laws contain civil remedies for actions considered criminal under international law. As we have seen, such actions incur individual responsibility, and the remedies and mechanisms are therefore directed at correcting individual behavior, and at preventing grave harm, i.e. harm serious enough to be considered criminal. In the United States, for example, the Alien Tort Claims Act and the Torture Victim Protection Act were used in 1993 to bring cases against Radovan Karadzic by Bosnian Muslim and Croat survivors residing in New York (MacKinnon 1999). The Alien Tort Claims Act has also been used to bring cases against corporate defendants that were seen to have participated somehow in human rights violations as part of business operations in partnership with repressive governments (Collingsworth 2002:188). As already noted in the introduction to this paper, the successful use of the Alien Tort Claims Act in this connection is dependent upon U.S. courts accepting, aiding and abetting, or even just ignoring abuses, as equally tortuous as actually carrying out an act. Until recently, the courts have held just the opposite, noting—in line with the thinking of the International Court of Justice in the *Nicaragua Case*—that liability is incurred only when a company (or individual) has “actual” control over the injurious acts (Collingsworth 2002:189)⁵. Actual control in this case would imply a particularly high standard of proximate cause, beyond that needed for proving the intentional element for aiding and abetting in international criminal law. Since then, the U.S. Court of Appeals for the Ninth District (2001:[9], [13]) has held that aiding and abetting, as defined in international criminal law, is indeed relevant to the torts covered by the Alien Tort Claims Act, and noted that in the *Unocal Case*, it had been sufficiently proven that Unocal was *indirectly* involved in the commission of the alleged crimes. Specifically the Court held that Unocal aided and abetted the Myanmar military in carrying out human rights abuses in connection with its oil pipeline project, since the company provided moral support and encouragement to the military with the knowledge that this support could and did lead to human rights violations.

The situation in the *Unocal Case* is different from the *Nicaragua Case* in many ways, not least because we are dealing with a civil tort case and not an inter-state complaint: the former being a domestic lawsuit between individuals and a company concerning tort, the latter an international dispute between states concerning the right interpretation of international law. However, international criminal law standards for aiding and abetting are quite similar to domestic U.S. civil law (tort) standards for the same offense, and the latest Unocal ruling is therefore quite relevant to holding individuals responsible for transnational human rights violations.

Moreover, our earlier question as to the viability of an “effective” or “actual” control test is still very much relevant. If effective or active control over the injurious act is necessary to incur liability, then only actors who are physically present or explicitly order or desire the act to be carried out are seen to be at fault. The consequence of this line of argument would be that all other potential actors are equally innocent, which in the *Unocal Case* would have compared the actions of Unocal with those of any other oil company. However, Unocal actually and undisputedly used forced labor to build a billion dollar oil pipeline in Myanmar (Burma), whereas other oil companies did not. Put this way, submitting that the consequences of the two companies’ actions and omissions related to Myanmar are comparable in human rights terms is clearly nonsense, which the Appeal Court implicitly showed in 2001.

III.e. Can an Individual Be Held Criminally Responsible for Transnational Indirect Action?

We now turn to the treatment of individual indirect acts as criminal, and the potential transnational accountability they might incur. In their point-for-point analysis of the current state of international law governing crimes against humanity, Kai Ambos and Steffen Wirth (2002) note that there basically are two possible reasons why the international community may treat a behavior (crime) as a matter of international law: “Firstly, a crime can obtain an international character since it cannot be prosecuted effectively on a national level and there is a common interest of states to prosecute.... The second reason is the extreme gravity of certain crimes, which is usually accompanied by the unwillingness or inability of national criminal systems to prosecute them” (2002:13). In other words, an act is considered criminal by the international community in order to overcome practical impunity—the lack of a domestic venue to try those responsible—and to acknowledge its serious nature. Conceptually, it is important to hold onto this notion of gravity and seriousness in the definition of an international crime, and to separate it from the arguably quite narrow list of international crimes that have been deemed worthy of inclusion in international treaties that purport to overcome impunity, such as the 1998 *Rome Statute*. For example, female circumcision, hate crimes, and the feminization of poverty might be grave and serious violations of international human rights norms, though none of them so far have reached an unequivocal status as an international crime, which the international community has a “common interest to prosecute.” Nevertheless, there is no conceptual reason to exclude these issues from a list of acts serious enough to be considered criminal by international law, other than the fact that so far the international community has not been able to consensualize their disapproval.

Failure to act or indirect action does carry individual criminal responsibility under international law in certain circumstances. Ambos and Wirth (2002) point out that the accepted definitions of crimes against humanity require an act to be part of a widespread *or* systematic practice, and not widespread *and* systematic practice, and that it must happen in the context of a policy. Ambos and Wirth argue that the only way to account for the possibility of widespread but unsystematic—i.e. unplanned and unorganized—crimes as part of a policy “is to accept that a policy can also consist in the deliberate denial of protection for the victims of widespread but unsystematic crimes, i.e. the tolerance of such crimes.” The classic example of a widespread but unsystematic practice would be a general collapse of law and order, resulting in serious widespread harm. In such cases, argue Ambos and Wirth, “the government would be content that someone else is doing the ‘dirty work’” (2002:31), meaning that the harm caused by the general collapse in law and order was really the government’s intention in the first place. Moreover, the *ad hoc* International Criminal Tribunals have provided jurisprudence that specifically defines the international crime of aiding and abetting

as “all acts of assistance in the form of either physical or moral support” that “substantially contribute to the commission of the crime” (International Criminal Tribunal on Rwanda 2000:126). In this connection, a “substantial contribution” means that “the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [aider and abettor] in fact assumed” (International Criminal Tribunal on the Former Yugoslavia 1997:688). That is, indirect action may also be deemed an international crime and thus subject to universal jurisdiction.

A relevant question in this connection is whether or not this conclusion transfers to indirect actions and omissions in the context of international concessions and loans, aiding and abetting crimes through religious or other incitement, or even weapons sales and military training. The common sense answer would be in the affirmative: he or she who authored the manual for assassinations used by the Guatemalan military (Anonymous U.S. Government, n.d.) may not be responsible in the same manner as those who carried out the actual assassinations, but some responsibility and accountability surely should remain. Likewise, those public figures using their influence to spread opinions equating family planning with mortal sin may not be solely responsible for the soaring incidences of teenage pregnancies and unsafe abortions, but it would certainly be difficult to call their behavior unrelated. The international law answer to the accountability issue with regard to indirect action through aid and loan conditionality is slightly less straight-forward, as it attempts to deal with the issue of just how “related” a behavior has to be to a direct infringement in order to be judged criminal by itself.

The general definition of a crime against humanity is any of a number of specified “inhumane acts...causing great suffering, or serious injury to body or to mental or physical health” (*Rome Statute* 1998:Article 7.1.k) “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (*Rome Statute* 1998:Article 7.1). The international crime of aiding and abetting, as we have seen, requires substantial contribution to the commission of a crime, as well as some notion of knowledge or intent. “Knowledge” in this case does not have to mean that the aider and abettor intended to commit a crime, but rather that he or she knew that the supportive actions or moral support would assist the perpetrator in his or her crimes (International Criminal Tribunal on the Former Yugoslavia 1998:para 245).

What would be at stake in the current context is probably not whether aid and loan conditionalities (or weapons sales and incitement to hate crimes) may cause great suffering, but rather if the conditionalities would be seen to fall under the other definitions in the law: are they widespread or systematic; might they be considered “inhumane acts;” could they constitute an attack against a civilian population; and are they intended, either as crimes directly or as “moral support” in the aiding and abetting sense. We shall deal with each part in turn.

We have already seen that the condition that an act be committed as part of a widespread *or* systematic attack necessarily includes indirect action and policies to ignore violations. In general, conditionality is, of course, both systematic *and* widespread, as phrased in general broad terms applying to the full aid or loan package. This, however, does not eliminate the important conclusion that indirect action falls within the definition of crimes against humanity.

With regard to whether or not the conditionalities can be seen to constitute an “inhumane act,” the *Rome Statute* indicates implicitly as a guideline for the definition of crimes against humanity the inhumanness of the acts specified under Article 7: murder, extermination, enslavement, deportation

or forcible transfer, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution of a specific group in connection with the crimes defined in the Article, enforced disappearances, and the crime of apartheid. “Inhumane” in the meaning of the *Rome Statute*, would thus seem to apply to acts considered criminal in and of themselves, and to attempts at harming the integrity of an individual human being by forcefully restricting the physical liberty or physical and mental well-being of that human being in an extreme manner. Ambos and Wirth (2002:14) widen the definition slightly, arguing that crimes against humanity cover the “most severe violations” of human rights, which they define as violations of “dignity, life, and freedom.” This notion could be fulfilled by deliberately neglecting to provide the assistance on which a group might be reasonably expected to depend upon to survive, or by deliberately relegating a group to an existence as second-class citizens, unreasonably dependent upon others for their means of existence. The generalized discriminating treatment of women under the Taliban regime in Afghanistan comes to mind. An act might also be considered inhumane if its foreseeable consequences were dire enough. For example, it would seem difficult to argue that the forced displacement of a large part of the population as the result of a development project was less inhumane than the displacement of the same population as a result of war. Finally, the enforcement of certain laws might be seen as inhumane if these laws required individuals to behave in a manner contrary to their nature. For example, the Constitutional Court in Colombia held in 2001 that the law cannot reasonably expect a woman who has been raped to carry her pregnancy to term. Why? Because it is natural—that is, humane—for a woman in that situation to feel a psychological need to terminate her pregnancy. Thus, enforcing the law criminalizing abortion would, held the Court, not be consistent with constitutional protections of human rights.

None of these situations may be seen to involve crimes against humanity under current international law, but it is hard to see what the policy or legal reason would be for not considering these situations criminal. The indirect or seemingly benign nature of an act does not necessarily take away from its inhumane nature, and this inhumane nature is therefore best judged by a consideration of the foreseeable consequences of the act.

In this report, it is clear that the law makes no specific distinction between an act and its consequences in remedial terms. Thus, the 1998 *Rome Statute* defines as a crime against humanity any inhumane act “intentionally causing great suffering, or serious injury to body or to mental or physical health.” The act itself might, in some circumstances, not be illegal, though it would only be considered a crime against humanity if it could be seen as inhumane, if it were applied intentionally for the purpose of causing great harm, and if it indeed caused such harm.

We now turn to the question of whether the consequences of conditionalities constitute an attack on a civilian population. The operative part of our concern is “attack.” Under international law, an attack does not necessarily have to involve arms. The *Fourth Geneva Convention* specifies that women should not be subject to attacks against their honor, defining such attacks as including enforced prostitution (*Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 1948:Article 27). The *U.N. Charter* specifies that the right of self-defense applies to cases of *armed* attacks, not just any attacks (1945:Article 51). Indeed, the *Elements of the Crimes* adopted by the Sixth Preparatory Commission for the International Criminal Court indicates that “the acts [constituting a crime against humanity] need not constitute a military attack” (Preparatory Commission for the International Criminal Court 2000:9). This notion is clarified by the

jurisprudence of the International Criminal Tribunal on Rwanda, which in the *Akayesu Case* (1998) noted that “an attack may...be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Art. 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner” (para 581). This definition is respected in the *Rutaganda Case* (International Criminal Tribunal on Rwanda 1999:para 70) and the *Musena Case* (International Criminal Tribunal on Rwanda 2000:para 205), indicating that the acts that may comprise an attack are not necessarily the same as those that may constitute a crime against humanity. In the context of aid and loan conditionalities, the important notion is that an attack may take the shape of “exerting pressure on the population to act in a particular manner.” In this connection, it should be clear that the act of exerting pressure is not merely inviting a certain behavior, but rather it implies a certain level of coercion, whether through positive or negative reinforcement. It should also be clear that this kind of pressure can be exercised transnationally, that is, from agents in State A toward agents in State B. Ambos and Wirth (2002:32) indicate, as a caveat, that to be held responsible for indirect (non) action, “the entity must...be under a legal obligation, based for example on international human rights law, to provide protection against the attack.” It would be difficult to read Articles 55 and 56 of the *U.N. Charter* in any other way than to prescribe international cooperation and action that, at the very least, do not exacerbate a situation of human rights violations.

The *Rome Statute* specifies that a person may only be held criminally responsible and liable for punishment “if the material elements [of the action] are committed with intent and knowledge” (1998:Article 30). This definition indicates implicitly that the direction of the action is more relevant to its constituting a crime than the force: unless the attack is carried out knowingly, e.g. with a conscious direction, there is no crime. Knowledge, in this connection, is defined to mean “awareness that a circumstance exists or a consequence will occur in the ordinary course of events,” and intent that “the person means to engage in the conduct” and to “cause that consequence or is aware that it will occur in the ordinary course of events” (1998:Article 30). This notion is further explained in the *Elements of the Crimes*, which specifies that the intent clause does not require that the perpetrator have “knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization [but] that this mental element is satisfied if the perpetrator intended to further such an attack” (Preparatory Commission for the International Criminal Court 2000:9). In the case of aiding and abetting, the International Criminal Tribunal on the Former Yugoslavia held that “it is not necessary for the accomplice to share the *mens rea* [state of mind] of the perpetrator, in the sense of positive intention to commit the crime” (1998:245).

The consequences of conditionalities are by definition by-products of policies seemingly directed at other goals. For example, cuts in preventative health care imposed by the International Monetary Fund (IMF) as part of its fiscal responsibility conditionalities may not have as a direct intention to cause death and physical suffering. This, however, does not take away from the fact that “Oxfam International estimates that, in the Philippines alone, [these cuts] will result in 29,000 deaths from malaria and an increase of 90,000 in the number of untreated tuberculosis cases” (Hahnel 1999:ix). Surely, if Oxfam International can put together an estimate of the inhumane results of the fiscal cuts, the International Monetary Fund can too. In other words, either the IMF is aware of the consequences of the pressure it is exerting on the Philippine population (that is, the “attack” it is carrying out), thus satisfying the minimum threshold for proof of “intent” (the awareness that the consequence would happen in the ordinary course of events) or “constructive knowledge” (proven

awareness of a reasonable link between one's own actions and the commission of a crime). Or alternatively, the IMF officials imposing the conditionalities have not bothered to calculate the results of their actions or employ minimum standards of due diligence. Either way, those responsible surely merit standing trial or, at the very least, getting fired.

The thoughts regarding the Alien Tort Claims Act mentioned above, under our treatment of individual direct action, are relevant in an analysis of the accountability for individual indirect action as well. For example, corporate decisions to outsource production to countries where illegal acts (not carried out directly by the foreign investor) keep costs at a minimum have also subjected U.S. based companies to civil suits. Collingsworth (2002) highlights the example of a Coca-Cola bottling plant in Colombia, where union leaders were threatened and even killed on plant property by paramilitary troops invited onto the territory by the plant management. Coca-Cola's response to the suit brought under the Alien Tort Claims Act in the United States was that the bottling plant was not under its control, and that the company could not be held liable in the United States for the (uncontested criminal) acts carried out in Colombia (Collingsworth 2002:192). It is noteworthy that Coca-Cola did not change production from this plant or from Colombia altogether, indicating that the violence against labor leaders in Colombia in general, and in its bottling plant in particular, cannot have been terribly upsetting to the company's decision-makers.

IV. Policy Incentive, Intent, and Control: Setting Limits and Ensuring Accountability

Before we attempt to answer questions related to transnational accountability for the human rights consequences of the Global Gag Rule in Peru, we need to briefly address some of the loose ends from our discussion so far. We have argued, broadly, that international human rights law leaves many victims of human rights violations unprotected, in particular those affected by aid and trade conditionalities. In this context, we have hinted at the need to expand, redefine, or re-direct the interpretation of traditional human rights law and international criminal law concepts. We have, however, not looked at the consequences any extension of the scope of the law may have on international cooperation itself. Would decision-makers lose the incentive to provide international aid, if they could be held responsible for adverse consequences of that aid? How can the law ensure that the policy incentive is to provide aid while guaranteeing accountability for the consequences?

We shall assume that developed countries currently have *some* incentive to provide aid to developing countries, an assumption that is supported by the fact that international cooperation exists even though it is not, as we have seen, a legal obligation. The central question then becomes what effects an added accountability factor might have on this incentive. Experience from attempts to create international legislation that deals with liability—with regard to transboundary environmental damage caused by otherwise legal acts—shows that states have been reluctant to accept any liability for injurious consequences of their acts, lest they be saddled with the full bill for the “clean-up.” They might, however, accept partial responsibility and pay partial compensation if international law presented this as an option (Gehring and Jachtenfuchs 1993:92). This insight helps us address the question at hand: assuming there is *prima facie* incentive to provide aid and assistance, any disincentive caused by the enforcement of human rights accountability might be overcome by establishing a “sliding scale” of levels of intent and knowledge that effectively determine the level of liability incurred. This would not be unlike the various definitions of “mental state” in domestic law, which contributes to determining the nature of a crime. For example, there is a difference in domestic law between a person who causes harm by failing to act where there is a

duty to act (defined as “negligence”) and a person who causes harm by showing deliberate disregard for a known risk (defined as “recklessness”). In the case of international aid and trade conditionalities, we could say that there is a difference between failing to comply with the goals set by the United Nations to provide 0.7% of the GDP in international cooperation (see above, p. 7), and disregarding reports indicating that the imposition of certain conditionalities are likely to cause human rights violations, as in the case of the IMF in the Philippines (see above, p. 20). The latter obviously implies a more intense level of involvement, and any legal treatment of the consequences should indicate that difference.

We should now be at least somewhat better equipped to answer questions related to transnational accountability for the human rights consequences of the Global Gag Rule in Peru.

V. An Aid Conditionality and Its Adverse Consequences: The Global Gag Rule

“Global Gag Rule” is the popular name given to the Mexico City Policy, first enacted by the Reagan administration in 1984 during the International Conference of Population in Mexico City. The Policy restricts U.S. population aid by terminating U.S. Agency for International Development (USAID) funds for any non-U.S. based non-governmental organization involved in voluntary abortion activities, even if these activities are undertaken with non-U.S. funds. It is important to note that U.S. funds have not been used for abortion or voluntary sterilization activities overseas since the 1973 enactment of the so-called Helms Amendment, and that this amendment continues to be in force.

The Mexico City Policy has been dubbed the “Global Gag Rule” since it defines voluntary abortion activities as including lobbying or information activities and thus attempts to limit the dissemination capacity of the recipient organization (“gags” the organizations) with regard to the issue of abortion⁶. The Mexico City Policy restrictions were repealed by the Clinton administration in 1993 but were reintroduced by the U.S. Congress in the Foreign Aid Appropriations Act for the Financial Year 2000 (United States Congress FY2000 Appropriations Act). The FY2000 Appropriations Act allowed President Clinton to waive some restrictions, however, in exchange for a reduction in the overall population assistance funding.

In 2000, the U.S. Congress increased overall population assistance funding in the Foreign Aid Appropriations Act for the Financial Year 2001 (United States Congress FY2001 Appropriations Act) with no reference to the Mexico City Policy. However, the Act prevented USAID from obligating any funds for population purposes until February 15, 2001, creating space for the incoming President Bush to implement a policy on aid restrictions in this regard. This is exactly what the new President did. On January 22, 2001, George W. Bush issued a Memorandum to the Administrator of USAID, directing him to reinstate the Mexico City Policy (Office of the White House Press Secretary 2001a). Two months later, on March 28, 2001, the U.S. President issued another Presidential Memorandum that sets forth the Mexico City Policy as a White House Policy rather than an Agency contract information bulletin—which converts an internal agency policy into a government level policy—and specifies the conditionality paragraphs prohibiting certain acts to be included in USAID contracts (Presidential Documents 2001:17301-17313).

The Mexico City Policy prohibits furnishing population or family planning assistance to any foreign-based non-governmental organization that “performs or actively promotes abortion as a

method of family planning in USAID-recipient countries or that provides financial support to any other foreign non-governmental organization that provides such services” (Presidential Documents 2001:17303, 17308).

In this report, abortion is defined as a method of family planning “when it is for the purpose of spacing births [which] includes, but is not limited to, abortion performed for the physical or mental health of the mother, [and] does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortion following rape or incest (since abortion under these circumstances is not a family planning act)” (Presidential Documents 2001:17306, 17311). The policy establishes the act of “performing abortions” as “to operate a facility where abortions are performed as a method of family planning” excluding “the treatment of injuries caused by legal or illegal abortions” (Presidential Documents 2001:17306, 17311). Finally, the Mexico City Policy indicates its understanding of “active promotion of abortion as a method of family planning” as:

To actively promote abortion means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning [which] includes, but is not limited to, the following: operating a family planning counseling service, that includes...providing advice and information regarding the benefits and availability of abortion as a method of family planning; providing advice that abortion is an available option in the event that other methods of family planning are not used or are not successful or encouraging women to consider abortion...; lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and conducting a public information campaign in USAID-recipient countries regarding the benefits and/or availability of abortion as a method of family planning (Presidential Documents 2001:17306).

The Global Gag Rule establishes elaborate rules that non-governmental organizations must follow in order to prove to USAID that they are in compliance with the policy, including providing detailed materials on all services carried out, and allowing USAID oversight of activities at any time (Presidential Documents 2001:17304). The Policy directs USAID to carry out independent investigations to check the recipients’ compliance (17306) and indicates that any organization violating the rule must refund, in full, the assistance given to it under the terms of the policy (17304).

The general stated intention behind the reinstatement of the Global Gag Rule is that “taxpayer’s funds...should not be given to foreign non-governmental organizations that perform abortions or actively promote abortions as a method of family planning” (Presidential Documents 2001:17303). The press statement that accompanied the January 22 reenactment of the Mexico City Policy noted that “The President’s clear intention is that any restrictions do not limit organizations from treating injuries or illnesses caused by legal or illegal abortions, for example, post abortion care” (Office of the White House Press Secretary 2001b).

This notion has been further detailed in press briefings or statements issued by the Bush Administration. Thus, on January 23, 2001, the spokesperson for the U.S. Department of State, Mr.

Richard Boucher (2001), noted that the central issue addressed by the reinstated policy was the “fungibility of funding:”

If we provide money to an organization, in the Clinton Administration they said, well, that can be used only for the purposes of voluntary family planning, not to support or promote abortions. People on the other side have said, but money is fungible; if you fund this side of the organization they have more money to do whatever they do with regard to promoting abortion.

The intention of the policy thus is to limit the action of the foreign based non-governmental organizations recipients by depriving them of all U.S. government funds if they carry out certain acts deemed undesirable by the U.S. Administration.

As we have seen in the context of international criminal law, the definition of an “intention” behind the implementation or furthering of a policy may mean the mere awareness that a certain consequence will occur in the normal occurrence of events. At the January 23, 2001, briefing referred to above, Mr. Boucher (2001) noted that some 450 non-U.S. based organizations would be affected by the policy, but that it would be impossible at that point to say how many of these organizations currently were engaged in activities that would be deemed incompatible with the Global Gag Rule. No later statement by the Bush Administration has clarified this point, indicating that the Bush Administration either has no awareness of the consequences of the policy or does not want to share this awareness with the public.

It must, however, be inferred from the general intention behind the policy that the Bush Administration expected its actions to have generalized or widespread consequences, since its reimposition otherwise would make little sense. Indeed, if the Global Gag Rule could not be expected to produce drastic results, it would have lost its effectiveness as a foreign relations tool, as it would not bring about any change in the behavior of those targeted. The intention therefore would have to be to cause an effect on most of the 450 entities. In the following, we shall see that the effects of the Global Gag Rule, at least in Peru, indeed go beyond just the gagged organizations.

V.a. Family Planning and Abortion in Peru

Abortion is illegal in Peru by legislation and—after the 2002 Constitutional Reform debate—by Constitutional decree. The law provides for few exceptions, notably situations where the pregnant woman’s life or health are seriously in danger if the abortion is not performed. In reality, few legal abortions are carried out, whereas 350,000 Peruvian women annually submit to illegal and often unsafe abortions (Ferrando 2002:26). Complications as a result of unsafe abortions, particularly hemorrhaging, are among the top reasons for the exceptionally high maternal mortality rate in Peru (United Nations Population Fund 2001). The law requires doctors to turn over to the authorities women they suspect of having gone through an illegal abortion (Peruvian Congress 1997:Article 30).

Family planning and reproductive health care in Peru have gone through a number of changes over the past few years, without counting the pressure added by the Global Gag Rule. The main changes include the introduction of user payment for voluntary sterilization and vasectomy, general limitation in public family planning spending, lack of distribution of approved contraceptives, and

cuts in the public budget for family planning and reproductive health. This contrasts sharply with the policy implemented in the latter part of the 1990s, after the Peruvian Congress approved free family planning for all in 1995 (Guzman 2002). The United Nations Population Fund (2001) estimates that only 41% of all married women in Peru use modern contraceptives.

The official family planning program in Peru has discontinued the provision of female and male surgical contraception (sterilization or vasectomy) due to serious quality and human rights concerns, notably the lack of informed advice and consent during the implementation of the program under the former authoritarian regime. In July 2001, the transitional government authorized, through ministerial resolution, the use of oral emergency contraception (the “morning after pill”) as part of the public family planning program. However, the current Health Minister has decided not to implement this resolution, not from any concern with service quality or human rights, but rather because he morally objects to the pills and believes they are abortive. The family planning directive thus provides for oral emergency contraception to be distributed, though in reality this service is not provided. Several non-governmental organizations have objected to this, and in October 2002, the Ombudsman’s office published a resolution in which it demands that the Minister account for his office not complying with the directive (Villanueva 2002).

In this restrictive situation, few non-governmental organizations carry out abortions, though some provide post-abortion care. Others still attempt to change the current legislation to include further exceptions—for abortions in cases of rape or incest, for example—or to decriminalize abortion altogether.

V.b. The Global Gag Rule in Peru and its Criminal Consequences

Peru is one of the top recipient countries in Latin America of population and family planning assistance from USAID. Since the limited number of legal abortions are generally carried out by state providers, the work carried out by non-governmental organizations that is relevant to the restrictions of the Mexico City Policy centers around lobbying, public education, and media campaigns to legalize or decriminalize abortion. However, as we shall see, all of these activities, as well as many others, may be affected by the Rule.

The most diffuse effect of the Global Gag Rule in Peru is as a legitimizing factor for current restrictive government policy on abortion and family planning. In a country where the government prides itself on its good relationship with the current resident of the White House, in particular, and the U.S. Administration and Congress, in general, the knowledge that restrictive family planning policies are viewed positively by the Northern neighbor has no small effect. Since the Global Gag Rule re-entered into force during a time of change in government in Peru, it may be hard to tell the effects of the Rule from the effects of the government’s changes in family planning and health care policy. However, according to health professionals, non-USAID aid workers, and non-governmental representatives working in the area of family planning and women’s health, the effects of the two have been mutually reinforcing.

Objectively speaking, there are these two sources that affect people’s rights. Internally, it has do with sectors in the government, in this case those who head up the Ministry of Health, and sectors in Congress that are known to have a conservative political affiliation in these topics, and they coincide with the policies

produced by the North American government with the change from Democrats to Republicans (Castro 2002).

This group [in the government] is very alert to the fact that the [Mexico City] Policy exists, and what they can use it for (Zamora 2002).

It has been like a support, they [the Peruvian government] see it like a base to lean on where they can construct their new conception of what reproductive health is. They totally agree with it. They agree so much with it that they aren't offering oral emergency contraception at the moment, even though that is an approved thing, right, because they see it as pro-abortion (Anonymous NGO representative 2002a).

The tough stance on family planning in the Bush Administration's foreign policy has been used, in Peru, as an excuse to equate all family planning with abortion or quasi-abortion. The main casualty of this has been the discontinuation of the provision of oral emergency contraceptives, despite scientific evidence that the morning after pill is not abortive. In the words of one health professional, the government has taken this as an opportunity to "divide family planning into mini-abortions and macro-abortions," with total disregard for the lack of scientific and commonsense backing for this (Castro 2002).

For example, the emergency contraception pills that would be an excellent preventive measure, they want to put it in the same sack as the topic of abortion. It is absolutely absurd, scientifically absurd. However, this Policy is permitting them to have this attitude (Sebastiani 2002).

What this has done is to say: since abortion is as bad as family planning, many methods are abortive, then there is this sort of perverse conclusion with little reflection. This has been the most perverse effect for me. Because in less informed, less cultured societies, the population is not able to distinguish between abortion and contraception, it is seen as part of the same package. And the church has an interest in its being seen like that (Aramburu 2002).

A more direct effect of the Mexico City Policy could be denominated "self-gagging." Though the Policy actually excludes—i.e. does not restrict—lobbying on and provision of post-abortion care, public stances on non-abortive family planning measures—such as oral emergency contraception—and public education campaigns related to abortion in cases of rape or incest, all of these activities have suffered to some extent since the reenactment of the Global Gag Rule.

Many non-governmental workers and professionals are not even aware of the less restrictive provisions in the Policy, notably because the law has never been relayed to them in its totality. USAID officials and middlemen are quoted to relay the law as prohibiting all activities related to abortion.

The sentence is this: you cannot use AID funds for any activity related to abortion. That is the sentence. In other words, they don't say you can do this, you can't do the other, so the way it is rephrased to us, the service providers, with that sentence,

if it stays like that, it [referring to activities permitted by the Gag Rule] will keep diminishing (Sebastiani 2002).

USAID has published a guide that explains the specifics of the Mexico City Policy, but it is in English and sometimes does not get explained to the recipients. Moreover, there is no explicit policy implemented by USAID to make sure recipients understand. Therefore, whether or not recipients realize that they may “treat injuries or illnesses caused by legal or illegal abortions, for example, post abortion care”—as the U.S. Administration professed was its intention—depends on the individual implementing the Policy.

She leaves the document for me [including all the Gag Rule specifications]. And the document is in English, to start with....At the moment of signing the agreement the clause comes up, very small, it's a three-line clause that is so general and so concrete at the same time that you never know....When you read the clause it says all action that is oriented toward promoting abortion (Anonymous NGO representative 2002c).

We have a format where there is very little detail on what is in the restriction. But there is an accompanying guide with all the limitations. So if a person is left with only the initial information, it is minimal, there is no detail....For me personally, I want people to know details [and so I give specific instructions about the restrictions, but] I have not gotten any instructions with regard to this [from USAID]....It probably depends on the person [delivering the instructions whether or not they are detailed] (Anonymous NGO representative 2002b).

In one situation reported, pressure was even brought to bear by USAID officials to prevent a USAID recipient from carrying out an activity explicitly permitted by the Mexico City Policy, in this case support for oral emergency contraceptives (Coe 2002).

The tendency is for NGO directors to know and understand most details of the Policy, though generally not all. However, those actually carrying out the work on the ground feel restricted beyond what, strictly speaking, might be called for by the Rule. As the Global Gag Rule includes a commitment to pay back all USAID funds if the Rule is breached, and as USAID may determine such a breach to have happened unilaterally with no appeal right for the NGO, it is understandable that caution is applied by the NGOs. What is less understandable is the seemingly blatant lack of concern on the part of the U.S. government—in this case, USAID—to make sure the Rule is understood in all its facets, and that essential family planning and post-abortion care services are carried out uninterrupted. In a country where the maternal mortality rate is soaring, this is serious.

Moreover, the Rule seems to be imposed in a manner inconsistent with the stated intentions of the U.S. government. Why, for example, are recipients and potential recipients seemingly not briefed thoroughly on the content of the Rule? And why are they not allowed or even encouraged to carry out activities not covered by the Rule restrictions?

The “self-gagging” is perhaps most notable in the area of lobbying for changes in the restrictive abortion legislation in Peru. This has obvious consequences for the exercise of two central human rights: freedom of expression and participation in a democratic society. However, the human rights

consequence of the thus stifled public debate is more dire than this. Several NGO officials, professionals, and even some government officials noted that the serious public health and human rights problems caused by the high number of illegal and unsafe abortions will never be solved in the current climate of limited and skewed public debate on the topic of abortion. By limiting or potentially limiting the actors willing and able to initiate such a public debate, the Global Gag Rule has caused, indirectly, an already problematic and violatory situation to continue.

The fact that there are less groups doing advocacy, or less groups creating a counter balance against pro-life [activists], this can lead to modifications. In fact, if it keeps going this way, they have already lost the Constitution (Zamora 2002).

The problem is created because there are 350,000 abortions, the problem already exists. Three hundred and fifty thousand clandestine abortions a year, that's the problem. So how do I think this Rule affects that? Well, in the sense that there are institutions that cannot even discuss this problem and eventually propose legal reforms that might contribute to solve the problem (Villanueva 2002).

A final, but not unimportant, human rights consequence of the Global Gag Rule is its discriminatory effects, both internally and transnationally. As already noted, the self-gagging effect has contributed to maintaining a situation where abortion is largely illegal and therefore unsafe, in particular for those who cannot pay. In Peru, as in most countries where abortion is illegal, those able to travel abroad or to pay between \$300 and \$1000 for an illegal but safe private abortion generally do not die from hemorrhaging. The discriminatory effect of maintaining a restrictive family planning policy should be obvious in a country where the vast majority of women do not make even the official average monthly salary of \$170.

Women in general cannot or will not be able to exercise their right to free choice. And most of all, poor women will be affected [by the Gag Rule] because they don't have the economic capacity to have access to paid services (Flórez-Arestegui 2002).

Less and less people die from unsafe abortions, but the people who die the most are poor people. Because the quality of the abortion depends on the amount of money you can pay. As simple as that (Aramburu 2002).

Likewise, the Global Gag Rule imposes rules and restrictions on foreign NGOs that would not and could not legally be accepted in the United States. Despite intents to undermine the *Roe v. Wade* precedent, the United States Supreme Court has insisted on the right to abortion as an integral part of a woman's right to physical self-determination. Moreover, it is highly unlikely that the same Court would find the kind of limitations to the right to freedom of expression contained in the Mexico City Policy constitutional. The notion that the U.S. government can impose on others what it would not or could not impose on its own nationals borders on neo-imperialism, a notion not lost on NGO representatives and health professionals in Peru.

Let me tell you, it is an imperialist policy, let me put it like that. Imperialist and awful (Aramburu 2002).

In reality, I think it affects states with regard to their freedom to define their own policies (Parra 2002).

Perhaps more to the point in the context of this paper, the imposition of the Global Gag Rule reinforces the already vast human rights differences between the North and South, in direct contradiction with *U.N. Charter* prescriptions to further human rights through international cooperation.

The Global Gag Rule certainly seems to qualify as “exerting pressure” on the Peruvian population and providing “moral support” to a restrictive government in breach of its international human rights obligations (Human Rights Committee 2000). There is little doubt that the consequences, however indirect, foreseeably have the potential to cause or to maintain a situation of great suffering, and that USAID as an institution has done little to ensure these consequences are minimalized. Is this inhumane? This is perhaps a subjective question. However, as we have seen, the Constitutional Court in Colombia (2001) resolved in favor of not enforcing the prohibition of abortion for women whose pregnancies were the result of rape. It is hard to see how stifling free debate in Peru to maintain equally inhumane laws can be seen as anything but inhumane. Likewise, it is hard to see how the consequences of the Global Gag Rule can be qualified as anything but criminal.

VI. Conclusion: Transnational Accountability—A Need for a Minimum of Coherence between Stated Intentions and the Law

This paper should have made it clear that current international law is far from consistent in its approach to transnational accountability. There seems to be some consensus to provide international recourse for transnational direct action, in particular in the context of international humanitarian law, though efforts to overcome impunity might be frustrated by traditional definitions of sovereign immunity, control, victim, or national security interests. At the same time, there seems to be a growing notion that indirect, non-military, and non-violent acts may carry criminal consequences, and that those responsible, whether states or individuals, should be held accountable. In reality, however, international courts generally have not translated this common sense reading of the spirit of human rights law into dictums consistent with the current reality of international cooperation. The result is that many consequences of transnational actions, however disastrous or significant, remain without remedies and leave those responsible in impunity. The Global Gag Rule in Peru is an excellent example: the U.S. government imposes aid conditionalities that undoubtedly contribute to maintaining a situation of great suffering. Yet, the women who suffer as a result—whether because they no longer receive reproductive health care as a result of lost funding for reproductive health service providers or because they undergo illegal and unsafe abortions when aid conditionalities have contributed to maintaining an abusively restrictive legal regime—have no real legal recourse.

This lack of coherence between the stated intentions of international cooperation and the mechanisms in place to implement them is particularly glaring in cases concerning the rights of traditionally marginalized groups, such as women and the poor. Again, the Global Gag Rule presents a good example. Supposedly, international cooperation is to foster democracy, equality, and respect for human dignity. The aid conditionalities imposed through the Global Gag Rule ignore all of these by limiting free speech and further subjecting women to inhumane treatment as a

result of their reproductive capacity. While the Peruvian government certainly can and should be held responsible for its part, there is no mechanism to stop the U.S. government from imposing aid conditionalities with harmful consequences. There is, however, no policy or legal reason this situation should continue. As this paper hopes to show, forced evictions, imposed situations of hunger, and deliberate lack of access to proper family planning and health care all may and should carry individual criminal responsibility when the consequences are dire enough to conform to a common sense reading of the international law definition of an international crime. Surely, a minimum of coherence between the notions of human rights primacy proclaimed in the *U.N. Charter* and the accountability measures available to implement them is not too much to ask of the international community of states.

In this connection, it will be important to carry out further study on the manner in which “sliding scale” liability can be codified, so as to create concrete guidelines for judges and courts to distinguish between the equivalent of “negligent,” “reckless,” and criminal states and individuals. Domestic tort law and related jurisprudence may provide good guidance for this work. Meanwhile, states and individual decision-makers on the international level might want to revisit the reason human rights and protective obligations exist in the first place: human beings.

When you talk about public health, you talk about percentages, you talk about 300,000 abortions a year in Peru, and you tend to forget that behind these numbers there are people. So maybe they don't know that they can't get proper care because of the Mexico City Policy, because of the Global Gag Rule, they don't know. All they know is that, as a society, we have not responded to a need (Sebastiani 2002).

Acknowledgments

In doing the research on which the empirical part of this paper draws, I had support from the Ford Foundation through the Centro de la Mujer Peruana Flora Tristán in Lima, in a joint project with the Center on Reproductive Law and Policy (CRLP, now the Center for Reproductive Rights, CRR) in New York. I am grateful to all three organizations for the opportunity to carry out this research, and for the possibility to incorporate some of the results in this paper.

Several individuals have helped in the shaping of the ideas included in this paper, all of whom have been instrumental in the development of the arguments exposed. In this connection, I would especially like to thank Jan Perlin for central insights and extensive comments on an early draft, and Michael Willis for equally central observations on a later version. Thanks are also owed to the staff of the Women's Caucus for Gender Justice, especially Pam Spees and Vahida Nainar, who showed interest, expressed encouragement, and gave me a much needed opportunity to present and discuss the central arguments in this paper with a wide range of colleagues at the occasion of the Assembly of States Parties to the International Criminal Court in September 2002.

Finally, my partner Eduardo González Cueva has read through all the early versions of the draft, always contributing with valuable advice and healthy skepticism. Eduardo's constant encouragement has been instrumental to the paper's getting written at all.

Notes

1. Notwithstanding the implied and erroneous value judgment implicit in the terms "developed" and "developing" countries, we shall, in want of better expressions, use these terms in this paper to cover the difference between what has sometimes been called "the Global North" and "the Global South" or "the First World" and "the Third World." The expressions are meant for identification purposes only.
2. United Kingdom 1978 State Immunity Act, Section 5; United States 1976 Foreign Sovereign Immunities Act, Section 1605(a) (5); Australia 1986 Foreign States Immunities Act, Section 13; 1972 European Convention on State Immunity, Art. 11; and International Law Commission Draft Articles on Jurisdictional Immunities of States and Their Property, Art. 12.
3. International law is not static. See Glossary "accept", and "emerging law."
4. Referring to the European Commission on Human Rights, the Court of First Instance of the European Communities, and the Human Rights Committee.
5. Referring to the Central District of California's judgment in the Unocal case.
6. In the following, we shall use "Global Gag Rule" and "Mexico City Policy" interchangeably to refer to this policy.

Glossary

Accept. In the context of international law, “accept” refers to the fact that the international community of states has agreed tacitly or explicitly on treating a certain concept as “law.” See below: “Emerging law.”

Aiding and abetting. The international crime of “aiding and abetting” is similar to the notion of being an “accomplice” or “inciting” others to commit crimes found in some domestic penal codes. The central idea is that the person or entity “aiding and abetting” does not actually carry out the crime but either encourages, helps, or allows the author of the crime in his or her criminal endeavors.

Commission on Human Rights. The United Nations Commission on Human Rights is a U.N. body, consisting of 53 state representatives, that meets every year for six weeks in Geneva to consider a variety of human rights situations. Since the Commission consists of state representatives—and not of independent experts, as in the case of the Human Rights Committee—the resolutions and reports adopted can be seen as some indication of the international community’s official position on the human rights questions considered. The Commission sets up working groups and experts (called “Special Rapporteurs”) on specific topics or countries that in their view require more in-depth work or continued monitoring.

Conditionality. A conditionality is a condition placed on foreign aid or loans. The structural adjustment policies of the International Monetary Fund are often referred to as policy conditionalities, as they condition loan and financial rescue programs on the imposition of certain policies: unless a country imposes these policies, it will receive no help. Conditionalities are not necessarily contrary to human rights or international law; Marianne Møllmann (2002).

Context element. In international law, a conduct is defined as a “crime” partially through an analysis of the context in which it occurs. Traditionally, for example, crimes against humanity only happened in the context of war. However, the “context element” of a crime against humanity has since evolved. The most up-to-date accepted definition can now be found in the 1998 *Rome Statute of the International Criminal Court*, where it is noted that a crime against humanity must occur in a widespread or systematic manner. A conduct that otherwise would seem to comply with the definition of crime against humanity but which does not occur in the context of a widespread or systematic practice is therefore not a crime against humanity according to international law.

Crimes against the laws of nations. The Alien Tort Claims Act allows foreigners to file civil suits in U.S. domestic courts for “crimes against the laws of nations.” The “laws of nations” is another way of saying “international law,” and so the ATCA opens the way for civil suits of violations of international law that are so grave they might be considered crimes. The notion could, therefore, be seen as somewhat broader than the list of “international crimes” in the 1998 *Rome Statute*.

Distributive justice. Distributive justice refers to the process of redistribution of resources in a “just” or “fair” manner. It is beyond the scope of this paper to discuss the definition of this “justice” or “fairness.”

Emerging law. International law is created through various processes, one of which consists of states carrying out a particular practice because they believe they are required to do so by international law. Such practice may only come to be seen as law after a certain time—during which the law is said to be “emerging.”

European Commission on Human Rights. The European Commission on Human Rights is part of the human rights protection system set up by the Council of Europe (not to be confused with the European Union). The Commission used to be a separate institution from the European Court but now functions as a preliminary step to treatment by the Court.

European Court on Human Rights. The European Court on Human Rights is the judicial organ set up to receive individual complaints for alleged violations of the European Convention on Human Rights and subsequent human rights Protocols of the European Council. The Court consists of a number of judges equivalent to the number of member states in the European Council, currently forty-four.

Human Rights Committee. The 1966 *International Covenant on Civil and Political Rights* establishes a committee of independent experts (the “Human Rights Committee”) that will oversee and monitor the implementation of the Covenant. The Human Rights Committee receives individual complaints from persons who claim to be the victims of a violation of one of the rights protected in the Covenant, and in this capacity the Committee functions almost as a court (it is “quasi-judicial”) and issues statements that are the equivalent of court rulings.

Inter-American Commission on Human Rights. The Inter-American Commission on Human Rights is the part of the system set up to monitor the human rights conventions created in the region of the Organizations of American States (OAS). The Commission is the first recipient of individual complaints for alleged violations of these conventions. The Commission is based in Washington, D.C.

Inter American Court on Human Rights. The Inter American Court on Human Rights receives cases that have not been resolved by the Inter-American Commission on Human Rights, as well as cases and questions received directly from member states to the OAS. The Court is based in San José, Costa Rica.

Non-reciprocity. In the context of international law, non-reciprocity refers to situations where unilateral action is permitted or even warranted. In other words, States have different rights and obligations, often as a result of their different levels of economic development.

Reciprocity. Reciprocity is a basic principle of international law, and refers to the notion of two sovereign and equal states entering into a mutually binding agreement, whereby both states have the same rights and obligations. Some scholars see international human rights law as regular international law, creating “reciprocal” obligations between states that have agreed to binding human rights norms. Others see international human rights law as a different kind of international law that is binding on all states regardless their “reciprocal” agreements.

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