



## U.S. STATE RESPONSIBILITY *Á LA TRAIL SMELTER*: ARMS TRAFFICKING AND TRANSBOUNDARY HARM TO MEXICO

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*ABSTRACT.* Both President Obama and Secretary Clinton have stated that the United States accepts shared responsibility with Mexico for the Mexican drug war. The question this article will attempt to answer is whether shared responsibility for illegal arms trafficking from the United States into Mexico reaches beyond the world of political rhetoric. In attempting to examine whether there is a basis in international law for holding the United States responsible for arms trafficking into Mexico, this article will examine the international arbitration case of *Trail Smelter* for the principle it is credited with establishing: the prohibition against transboundary harm. It will explore whether the prohibition against transboundary harm can be applied to arms trafficking from the U.S. into Mexico by exploring the obligation to prevent harm to foreigners in the International Court of Justice case “*Military and Paramilitary Activities in and against Nicaragua*”, which noted the duty of states to prevent the use of their territory for the purposes of illegal arms trafficking into other States. Finally, it concludes that the United States may be responsible under the doctrine of international state responsibility *à la Trail Smelter* for transboundary harm in Mexico’s territory for 1) its failure to have an adequate legal structure in place that is capable of allowing it to meet its due diligence duty to prevent transboundary harm, and 2) for its failure to meet the standard of due diligence in preventing the arms trafficking.

**KEY WORDS:** *Transboundary harm, Mexican drug war, trail smelter, arms trafficking, State responsibility.*

**RESUMEN.** Tanto el presidente Obama como la secretaria Clinton han declarado que Estados Unidos acepta responsabilidad compartida con México en la guerra contra las drogas en México. La pregunta que este artículo intentará

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*responder es si ¿la responsabilidad compartida del tráfico ilegal de armas desde Estados Unidos a México va más allá del mundo de la retórica política? Al tratar de examinar si existe una base en el derecho internacional para declarar a Estados Unidos responsable del tráfico de armas hacia México, este artículo examinará el caso de arbitraje internacional “Trail Smelter” en búsqueda del principio que presuntamente estableció: la prohibición de daños transfronterizos. Este artículo explorará si la prohibición de daños transfronterizos se puede aplicar al tráfico de armas desde Estados Unidos a México mediante la exploración de la obligación de prevenir el daño a extranjeros y el caso de la Corte Internacional de Justicia, “Actividades Militares y Paramilitares en y contra Nicaragua”, donde se mencionó el deber de los Estados de prevenir el uso de su territorio con el propósito de traficar ilegalmente armas a otros Estados. Por último, este artículo concluye que Estados Unidos puede ser responsable bajo la doctrina de la responsabilidad internacional à la Trail Smelter por el daño transfronterizo en el territorio de México, lo cual constituye una violación de la soberanía de México, por: 1) no tener en vigor una estructura jurídica capaz de permitirle cumplir con su deber de debida diligencia para prevenir un daño transfronterizo, y 2) por su incumplimiento del estándar de diligencia debida para prevenir el tráfico de armas.*

PALABRAS CLAVE: *Daño trasfronterizo, guerra contra el narcotráfico, Trail Smelter, tráfico de armas, responsabilidad estatal.*

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## I. INTRODUCTION

President Calderón of Mexico began his military attack on the drug cartels in December 2006.<sup>1</sup> The attack consisted of deploying thousands of military personnel and federal police throughout Mexico.<sup>2</sup> The immediate result of the military strategy was a rise in social violence instigated by drug cartels and a sharp increase in human rights abuses. From the declaration of the drug war in 2006 until 2010, there were 35,000 drug war-related killings in Mexico;<sup>3</sup> and the number has continued to rise.

In northern Mexico, violence has left entire towns abandoned, with the local government and residents fleeing to nearby cities in search of refuge from warring drug lords.<sup>4</sup> An internally displaced person from one abandoned town told a reporter: “It’s like we’re in the Wild West [...] We have no mayor, no police, no transit system. We have been left to fend for ourselves.”<sup>5</sup>

In cities such as Ciudad Mier, Tamaulipas, the town has been left without access to water, gas or electricity at times because warring drug lords have attacked water treatment facilities, gas stations, and electric transformers.<sup>6</sup> Sadly, the situation of Ciudad Mier is not unique.

By November 2010, Mexico had lost control of ninety percent of the state of Tamaulipas.<sup>7</sup> And unfortunately, Tamaulipas is just one example of a growing number of Mexican states, including Chihuahua and Michoacán, where the Mexican government is no longer in control of large portions of its own territory.<sup>8</sup>

While President Calderón has rejected the suggestion that Mexico might be a failed state, the President and his administration have come to acknowledge the power of drug cartels in Mexico:

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<sup>1</sup> Marc Lacey, *In Drug War, Mexico Fights Cartel and Itself*, N.Y. TIMES, Mar. 29, 2009, <http://www.nytimes.com/2009/03/30/world/americas/30mexico.html?pagewanted=all> (last visited Mar. 18, 2010). See also Colby Goodman and Michel Marizco, *U.S. Firearms Trafficking to Mexico: New Data and Insights Illuminate Key Trends and Challenges*, in SHARED RESPONSIBILITY: U.S.-MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 168 (Eric L. Olson *et al.* eds., 2010), available at <http://wilsoncenter.org/topics/pubs/Chapter%204%20Reuter.pdf> (stating the number of drug war-related deaths in 2010 had reached 28,000).

<sup>2</sup> UNIFORM IMPUNITY, MEXICO’S MISUSE OF MILITARY JUSTICE TO PROSECUTE ABUSES IN COUNTERNARCOTICS AND PUBLIC SECURITY OPERATIONS, HUMAN RIGHTS WATCH 2 (April 2009).

<sup>3</sup> Mary Beth Sheridan, *Mexico confirms use of US drones in drug war*, WASH. POST., Mar. 16, 2011, [http://www.washingtonpost.com/world/mexico-confirms-seeking-us-drone-help-in-drug-war/2011/03/16/ABbSEZg\\_story.html](http://www.washingtonpost.com/world/mexico-confirms-seeking-us-drone-help-in-drug-war/2011/03/16/ABbSEZg_story.html) (last visited Mar. 19, 2011).

<sup>4</sup> Miguel Alemán, *Northern Mexico’s State of Anarchy: Residents Abandon a Border Town as Vicious Drug Cartels Got to War*, LATIN AM. NEWS, Nov. 20, 2010, [http://online.wsj.com/article/SB10001424052748704104104575622840256881122.html?mod=wsj\\_share\\_facebook](http://online.wsj.com/article/SB10001424052748704104104575622840256881122.html?mod=wsj_share_facebook) (last visited Mar. 19, 2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

[H]e and his aides have spoken frankly of the cartels' attempts to set up a state within a state, levying taxes, throwing up roadblocks and enforcing their own perverse codes of behavior. The Mexican government has identified 233 "zones of impunity" across the country, where crime is largely uncontrolled, a figure that is down from 2, 204 zones a year ago.<sup>9</sup>

Much of the harms caused to Mexican citizens, the military and police officers are a result of U.S. weapons illegally brought into Mexico from the United States. "Our inability to prevent weapons from being illegally smuggled across the border to arm these criminals causes the deaths of police officers, soldiers and civilians,"<sup>10</sup> stated the Secretary of State to the Obama Administration, Hillary Clinton, on an official trip to Mexico City in March 2009. In the words of Obama: "This war is being waged with guns purchased not here [in Mexico] but in the United States [...] more than 90 percent of the guns recovered in Mexico come from the United States, many from gun shops that lay in our shared border [...] So we have responsibilities as well."<sup>11</sup>

Both President Obama and Secretary Clinton have stated that the United States accepts shared responsibility with Mexico for the drug war.<sup>12</sup> This is in line with the 2009 United Nations Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem (UNODC Declaration).<sup>13</sup> At the core of the UNDOC Declaration is the principle of shared responsibility among nations in the fight against drug trafficking.<sup>14</sup> The question this article will at-

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<sup>9</sup> Lacey, *supra* note 1.

<sup>10</sup> Mark Landler, *Clinton Says U.S. Feeds Mexico Drug Trade*, N.Y. TIMES, Mar. 25, 2009, available at [http://www.nytimes.com/2009/03/26/world/americas/26mexico.html?\\_r=1](http://www.nytimes.com/2009/03/26/world/americas/26mexico.html?_r=1) (last visited Mar. 21, 2011).

<sup>11</sup> *Obama Claims 90 percent of Guns Recovered in Mexico Come from U.S.*, ST. PETERSBURG TIMES, Apr. 16, 2009, <http://www.politifact.com/truth-o-meter/statements/2009/apr/16/barack-obama/Obama-claims-90-percent-guns-used-Mexico/> (last visited April 3, 2011).

<sup>12</sup> *U.S., Mexico Reconfirm Shared Responsibility in Drug War*, LATIN AMERICAN HERALD TRIB. <http://laht.com/article.asp?ArticleId=354222&CategoryId=14091> (last visited Mar. 21, 2011) and Jose de la Isla, *Mexican President Helps Obama Shape Policy*, THE EAST VALLEY TRIBUNE.COM, Mar. 23, 2011, [http://www.eastvalleytribune.com/opinion/columnists/article\\_e316068e-5585-11e0-876d-001cc4c03286.html](http://www.eastvalleytribune.com/opinion/columnists/article_e316068e-5585-11e0-876d-001cc4c03286.html) (last visited April 17, 2011).

<sup>13</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, POLITICAL DECLARATION AND PLAN OF ACTION ON INTERNATIONAL COOPERATION TOWARDS AN INTEGRATED AND BALANCED STRATEGY TO COUNTER THE WORLD DRUG PROBLEM 42 (Mar. 11-12, 2009).

<sup>14</sup> *Id.* Article 2 (b). "Address the need for a comprehensive, multisectoral and balanced approach involving demand reduction and supply reduction, each reinforcing the other, together with the appropriate application of the principle of shared responsibility, while stressing the need for services responsible for prevention, including law enforcement agencies, and ensuring that those measures are mainstreamed in publicly and privately provided health, education, rural development, agriculture and social services."

tempt to answer is whether shared responsibility extends beyond the world of “mere political rhetoric.”<sup>15</sup>

In an attempt to examine whether there is a basis in international law for holding the United States responsible for illegal gun trafficking into Mexico, this article first examines the *Trail Smelter* international arbitration case<sup>16</sup> for the principle it is credited with establishing: the prohibition against transboundary harm.<sup>17</sup> Second, this article explores the theory of State liability, coming to the conclusion that in its current state of development the scope of the theory is too limited to provide a basis for U.S. responsibility for illegal arms trafficking into Mexico. Third, I re-examine the *Trail Smelter* case to see if it provides an alternative theory to State liability. This section concludes that *Trail Smelter* and the resulting declarations and environmental law treaties, along with the International Court of Justice decision in the *Corfu Channel Case*,<sup>18</sup> provide an adequate basis for a general principle that prohibits transboundary harm.

In Sections IV and V this article looks at other specific expressions of this general responsibility to prevent transboundary harm within international law. Specifically, the fourth section discusses the obligation to prevent harm to foreigners in their territories.<sup>19</sup> Here harm to a foreign national is equivalent to harm to the national’s foreign State,<sup>20</sup> making it possible to conclude that the obligation to prevent harm to a foreign national was in fact an obligation to prevent a form of transboundary harm. Fifth, this article reviews a final form of the obligation to prevent transboundary harm found in the International Court of Justice case of *Military and Paramilitary Activities in and against Nicaragua*,<sup>21</sup> which notes States’s obligation to prevent the use of their territories for the purpose of illegal arms trafficking into other States.

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<sup>15</sup> See Jorrit Kamminga, *Towards Shared Responsibility? The United States, Latin America and the Drug Trade*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, <http://blogs.lse.ac.uk/ideas/2011/03/shared-responsibility/> (last visited April 17, 2011) (positing that shared responsibility does in fact reach beyond the world of “mere political rhetoric”).

<sup>16</sup> *Trail Smelter Arbitration (U.S. v. Can.)* 3 R.I.A.A. 1905, 1913 (U.S.-CA Arbitral Tribunal 1938/41) [hereinafter *Trail Smelter*], available at [http://untreaty.un.org/cod/riaa/cases/vol\\_III/1905-1982.pdf](http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf).

<sup>17</sup> DR. OWEN MCINTYRE, CONSULTANT REPORT: ENHANCING TRANSBOUNDARY COOPERATION IN WATER MANAGEMENT IN THE PRESPIA LAKES BASIN, UNITED NATIONS DEVELOPMENT PROGRAM 11 (Oct. 29, 2008).

<sup>18</sup> *Corfu Channel Case (Alb. vs. Gr. Brit. & N. Ir.)*, 1949 I.C.J. 4, 23,36 (Apr. 9).

<sup>19</sup> Robert P. Barnidge, Jr., *The Due Diligence Principle under International Law*, 8 INT. COMMUNITY L. REV. 81, 99 (2006).

<sup>20</sup> See George T. Yates III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 214 (Richard B. Lillich, ed. 1983).

<sup>21</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, 83 (June 27) at para. 154 [hereinafter *Nicaragua Case*].

Sixth and finally, this article applies case law to the current arms trafficking situation between the United States and Mexico and concludes that the United States may be responsible under the doctrine of International State responsibility *à la Trail Smelter* for transboundary harm in Mexico's territory. This is a violation of Mexico's sovereignty because 1) it is questionable whether the United States has an adequate legal structure in place capable of allowing it to fulfill its due diligence obligations to prevent transboundary harm and 2) the United States has failed to meet the standard of due diligence in preventing arms trafficking into the territory of Mexico.

## II. THE TRAIL SMELTER ARBITRATION

The Trail Smelter case concerned the town of Trail in British Columbia, Canada, about seven miles from the US-Canada border.<sup>22</sup> In the town of Trail, the Consolidated Mining and Smelting Company smelted large quantities of zinc and lead,<sup>23</sup> producing smoke in the form of a toxic concentrated sulfur dioxide which descended on the surrounding forests and crops "leaving a virtual moonscape in its wake."<sup>24</sup> Between 1917 and 1924, local Canadian farmers and residents engaged in a legal battle with the Consolidated Mining and Smelting Company, which resulted in an arbitral settlement of \$60,000 USD to sixty farmers, but did not prohibit the company from continuing to pollute the environment.<sup>25</sup>

The sustained pollution began to flow down the valley and across the U.S.-Canada border, affecting the "gardens, field crops, grazing lands, orchards, and timber lots" of the residents of Stevens County, Washington, in the United States.<sup>26</sup> These residents, like those of Trail, sought to resolve their claims with the company.

When negotiations between the U.S. residents and Consolidated Mining and Smelting Company broke down, the U.S. and Canadian governments intervened, engaging in diplomatic exchanges and eventually sending the matter to the International Joint Commission (IJC),<sup>27</sup> set up by the 1909 Boundary Waters Treaty between the United States and Canada.<sup>28</sup> As with the earlier is-

<sup>22</sup> Trail Smelter, *supra* note 16, at 1913.

<sup>23</sup> Allum, in TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 14 (Rebecca Bratspies & Russell A. Miller eds., 2006) [hereinafter McCaffrey, in TRANSBOUNDARY HARM]; Trail Smelter, *supra* note 17, at 1907, 1913.

<sup>24</sup> Allum, in TRANSBOUNDARY HARM, *supra* note 23, at 14.

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* The International Joint Commission aims at resolving issues arising from the actions of United States and Canada in lake and river systems along the border that may be affecting the other state. See The International Joint Commission, who are we, available at [http://www.ijc.org/en/background/ijc\\_cmi\\_nature.htm#What](http://www.ijc.org/en/background/ijc_cmi_nature.htm#What) (last visited on Feb. 11, 2012).

<sup>28</sup> Stephan C. McCaffrey, *Of Paradoxes, Precedents, and Progeny: The Trail Smelter Arbitration* 65

sue between the residents of Trail and the smelting company, the IJC ordered compensation, but refused to enjoin the smelter's activity.<sup>29</sup> The U.S. residents were not appeased.

Further diplomatic engagement produced the Convention of Ottawa of April 15, 1935 and the *ad hoc* international arbitral tribunal.<sup>30</sup> Pursuant to the Convention, the Consolidated Mining and Smelting Company agreed to pay \$350,000 USD for damages accrued before January 1, 1932, and agreed that all other claims would be sent to the Tribunal.<sup>31</sup> The Tribunal released its final decision in 1941, imposing environmental regulations on the company.<sup>32</sup> Resolution of the claims had taken fifteen years.<sup>33</sup>

The Trail Smelter Arbitral Tribunal's decision is regarded as a foundational case of environmental law<sup>34</sup> and the case provided the basis for the emerging theory of International State liability<sup>35</sup> in its famous dicta: "Under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing injury."<sup>36</sup>

The Trail Smelter precedent was important for several reasons. First, it held that an activity that was lawful, like smelting, might lead to liability to pay compensation for any damages incurred. Second, the Tribunal did not order that the smelter cease its activities pursuant to the obligation of cessation under the international law of State responsibility.<sup>37</sup> Instead, the smelter was allowed to continue its activities pursuant to regulations imposed by the Tribunal to minimize future harm to the victims.<sup>38</sup> Third, the Tribunal held

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*Years Later*, in TRANSBOUNDARY HARM, *supra* note 23, at 37. The 1900 Boundary Waters Treaty "provides the principles and mechanisms to help resolve disputes and to prevent future ones, primarily those concerning water quantity and water quality along the boundary between Canada and the United States." See International Joint Commission, Treaties and agreements, available at <http://www.ijc.org/rel/agree/water.html> (last visited on Feb. 11, 2012).

<sup>29</sup> Stephan C. McCaffrey, *Of Paradoxes, Precedents, and Progeny: The Trail Smelter Arbitration 65 Years Later*, in TRANSBOUNDARY HARM, *supra* note 23, at 37.

<sup>30</sup> *Id.*

<sup>31</sup> Allum, in TRANSBOUNDARY HARM, *supra* note 23, at 16.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 15.

<sup>34</sup> Jay Ellis, *Has International Law Outgrown Trail Smelter?*, in TRANSBOUNDARY HARM, *supra* note 23, at 56.

<sup>35</sup> Pierre-Marie Dupuy & Christina Hoss, *Trail Smelter and Terrorism: International Mechanisms to Combat Transboundary Harm*, in TRANSBOUNDARY HARM, *supra* note 23, at 56.

<sup>36</sup> Trail Smelter, *id.* note 17, at 1965.

<sup>37</sup> General Assembly, *Report of the International Law Commission* 53 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001), at Article 30: "The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

<sup>38</sup> Trail Smelter, *id.* note 17, at 1974-78.

that a sovereign State, Canada, was liable to compensate the injured victims, as opposed to the actual wrongdoers, the operators of the smelter.

In fact, there was little international precedent to support the principle of State responsibility announced by the Trail Smelter Tribunal.<sup>39</sup> The Tribunal itself stated as much: “No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But here also, no decision of an international tribunal has been cited or found.”<sup>40</sup>

Despite finding no case of air pollution in international law, the Tribunal used U.S. environmental law to reach its decision, claiming that American environmental law conformed to international law in the field:<sup>41</sup>

The first problem which arises is whether the question should be answered on the basis of the law followed in the United States or on the basis of international law. The Tribunal, however, finds that this problem need not be solved here as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law.<sup>42</sup>

In using U.S. law that dealt with the “quasi-sovereign rights of the States of the Union”, the Tribunal analogized the national boundaries between states in the United States to the international boundary between the United States and Canada. While perhaps the unique relationship between the United States and Canada resembled the relationship existing at the time among U.S. states, such an analogy surely failed at the time, and still fails, to account for the circumstances associated with most international boundaries that do not share this same uniquely amicable relationship.<sup>43</sup>

Despite all this, the Tribunal’s decision was not unfounded. The Tribunal cited a principle of international law and various cases in support of its decision:

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<sup>39</sup> Ellis, *in* TRANSBOUNDARY HARM, *supra* note 34, at 57.

<sup>40</sup> Trail Smelter, *supra* note 16, at 1965.

<sup>41</sup> McCaffrey, *in* TRANSBOUNDARY HARM, *supra* note 29, at 36.

<sup>42</sup> Trail Smelter, *supra* note 16, at 1963.

<sup>43</sup> Ellis, *in* TRANSBOUNDARY HARM, *supra* note 34, at 49; *see also*, John E. Read, *Pollution by Analogy*, *in* TRANSBOUNDARY HARM, *supra* note 23, at 47-49. States are generally not so willing to surrender their own interests. For example, Article 38 of the Statute of the International Court of Justice provides that “if the parties agree the Court may decide a case *ex aequo et bono*.” Statute of the Court, 1940 I.C.J. Statute and Rules of the Court, *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited Jan. 24, 2012). In other words, the case can be decided not on the basis of international law, but on the basis of what is just and fair to the parties. American Law and Legal Information, Free Encyclopedia, <http://law.jrank.org/pages/15213/ex-acquo-et-bono.html> (last visited Mar. 25, 2011). To date, no ICJ decision has ever been made on this basis. *Id.*

As Professor Eagleton puts in (*Responsibility of States in International Law*, 1928, p. 80): “A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.” A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal [...] International decisions, in various matters, from the *Alabama* case onward, and also earlier ones, are based on the same general principle [...].<sup>44</sup>

In the decades since, *Trail Smelter* has taken on mythical proportions: “Every discussion of the general international law relating to pollution starts, and must end, with a mention of the Trail Smelter Arbitration.”<sup>45</sup> So great was the influence of Trail Smelter, that in 1978, the International Law Commission began a project to create Draft Articles on International State Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, which relied heavily on the *Trail Smelter* Case.<sup>46</sup>

### III. THE INTERNATIONAL LAW COMMISSION’S DRAFT ARTICLES ON INTERNATIONAL STATE LIABILITY: INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

The project began as a result of the Commission’s project codifying the law of State responsibility.<sup>47</sup> In 1969 and 1973, discussions inside the Commission indicated a belief that in certain cases States might be responsible for the harmful consequences of their otherwise lawful acts, despite no breach of obligations owed to other States, and thus no resulting State responsibility.<sup>48</sup> There was also the concern that technologies used in industry and business activities might cause transboundary harm despite the State’s due diligence.<sup>49</sup> In these circumstances, in which the activity is legal and the State has com-

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<sup>44</sup> Trail Smelter, *supra* note 16, at 1963.

<sup>45</sup> Read, *in* TRANSBOUNDARY HARM, *supra* note 23, at 45.

<sup>46</sup> Ellis, *in* TRANSBOUNDARY HARM, *supra* note 34, at 56. The International Law Commission is formed by independent experts of international law; it was created by the United Nations General Assembly, and its object is “the promotion of the progressive development of international law and its codification.” Statute of the International Law Commission, Article 1, G.A. Res. 174 (III), annex, U.N. Doc. A/RES/174(II) (Nov. 21, 1947).

<sup>47</sup> Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?*, 39 INT’L COMP. L. Q. 1, 2 (1990) [hereinafter Boyle, *State Responsibility*].

<sup>48</sup> *Id.* at 2.

<sup>49</sup> Alan Boyle, *Liability for Injurious Consequences of Acts Not Prohibited by International Law*, *in* OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY 98 (James Crawford *et al.* eds., 2010).

plied with the standard of due diligence, the loss would unfairly lie with the victim.<sup>50</sup>

To avoid dealing with questions of wrongfulness and limiting the scope of the *Draft Liability Articles* to only “lawful acts,” the International Law Commission titled the *Draft Liability Articles* using the words “acts not prohibited by international law.”<sup>51</sup> In this way, the regime was meant to overlap with circumstances that might give rise to responsibility as well.<sup>52</sup> In other words, liability was not envisioned to entail a lack of responsibility for those same activities in every circumstance.<sup>53</sup> The two regimes might even complement each other.<sup>54</sup> Unlike the *Draft Articles on State Responsibility*, the *Draft Articles on State Liability* were originally meant to codify primary obligations.<sup>55</sup> While primary obligations are directly imposed on States, secondary obligations flow from a breach of primary obligations. Secondary obligations are more akin to the procedural consequences of a breach of a substantive or primary obligation.<sup>56</sup> State liability and State responsibility can therefore coexist where State liability is seen as establishing the special primary obligations, the violation of which may incur secondary consequences prescribed by the doctrine of State responsibility.<sup>57</sup> As will be discussed below, the final *Draft Liability Articles* would codify both primary and secondary norms.

The *Draft Liability Articles*, as originally envisioned by the first Rapporteur, Quentin-Baxter, were primary obligations that did not necessarily incur secondary obligations for any breaches.<sup>58</sup> According to Quentin-Baxter, States had the duty to prevent harm and cooperate with other States on the risk of transboundary harm associated with activities occurring in their territories or under their control.<sup>59</sup> The States were also obligated to engage in negotiations with the goal of balancing interests, such as regarding the “importance of the activity, its economic viability, [and] the probability and seriousness of loss or

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<sup>50</sup> *Id.* at 98.

<sup>51</sup> Boyle, *State responsibility*, *supra* note 47, at 12.

<sup>52</sup> *Id.*

<sup>53</sup> Michael Montjoie, *The Concept of Liability in the Absence of an Internationally Wrongful Act*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49 at 505.

<sup>54</sup> Boyle, *supra* note 47, at 16.

<sup>55</sup> JULIO BARBOZA, INTERNATIONAL LIABILITY FOR THE INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW AND PROTECTION OF THE ENVIRONMENT, in ACADEMIE DE DROIT INTERNATIONAL: RECUEIL DES COURS VOL. 247, 310-11 (1995).

<sup>56</sup> Alain Pellet, *The ILC's articles on State responsibility for internationally wrongful acts and related texts*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49, at 76.

<sup>57</sup> Montjoie, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49, at 505.

<sup>58</sup> Boyle, *State Responsibility*, *id.* note 48, at 11.

<sup>59</sup> *Id.* at 5.

injury.”<sup>60</sup> However, in Quentin-Baxter’s view, failure to fulfill these obligations did not give rise to liability; rather only harm resulting from these activities gave rise to a right of action.<sup>61</sup> However, even here, the payment of compensation was not seen as an absolute obligation.<sup>62</sup>

In sum, what the schematic outline sought was a world in which nothing was either prohibited or made obligatory and everything was negotiable. Underlying this was the perception that the sovereign equality of States precluded claims of absolute freedom of conduct and absolute freedom from harm, and that the burdens of socially desirable activities had to be shared equally.<sup>63</sup>

The second rapporteur, Julio Barboza, took a different approach to the *Draft Liability Articles*. He focused on strict liability rather than on breach of the duty of due diligence.<sup>64</sup> This focus takes into account a situation in which a State has met the standard of due diligence, but nonetheless an accident occurs and harms a neighboring State. For some, this is considered perhaps the most important contribution of State liability to the development of the general law of State responsibility.<sup>65</sup>

Barboza also held that for liability to ensue the risk posed by the activity must reach a level that is “appreciable” and the harm must reach a level that is “appreciably detrimental.”<sup>66</sup> Like Quentin-Baxter, in Barboza’s perspective full reparations were not envisioned in liability since the key lay in balancing the benefit of the lawful act and the disadvantage of the harm.<sup>67</sup>

Barboza also did not take Quentin-Baxter’s view that primary obligations could be breached without ensuing secondary obligations as a consequence of breach, such as the duty to pay damages.<sup>68</sup> While Barboza’s view is more consistent with the traditional law of State responsibility, this consistency risks making State liability insufficiently different from State responsibility for it to be necessary.<sup>69</sup> Critics of the *Draft Liability Articles* claim that State responsibility is entirely capable of dealing with the issue of transboundary harm and charge that the distinction between lawful and unlawful activities is useless.<sup>70</sup> The *Trail Smelter* and *Corfu Channel* cases demonstrate that State responsibility, and specifically the duty of due diligence, can deal with activities

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 5-6.

<sup>64</sup> *Id.* at 6-7.

<sup>65</sup> *Id.* at 16.

<sup>66</sup> *Id.* at 7.

<sup>67</sup> Barboza, *supra* note 55, at 314.

<sup>68</sup> Boyle, *State Responsibility*, *supra* note 47, at 11.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 13.

that are technically lawful. The International Law Commission [hereinafter ILC] initially reasoned that State responsibility was insufficient to deal with transboundary harm because State responsibility calls for the cessation of the activity and full compensation.<sup>71</sup> However, some critics take issue with this reasoning:

The weakness in [the International Law Commission's] argument lies in assuming that prohibition is the inevitable result of responsibility for wrongful acts and that a balancing of the benefits and burdens of socially useful activities is not possible in this context.

[...]

[...]

[This] reasoning in distinguishing this topic from State responsibility looks beset with conceptual and terminological confusion, and rests on dubious assumptions about prohibition as an inevitable consequence of wrongfulness.<sup>72</sup>

Whether or not responsibility is fully capable of refraining from calling for cessation of the harmful activity causing injury and refraining from requiring full compensation is as of yet an unsettled point of law.<sup>73</sup> While *Trail Smelter* is an example of the application of State responsibility, the circumstances surrounding the *Trail Smelter* case were specific to the special relationship between the United States and Canada, were both parties wished for the arbitral tribunal to balance the interests on both sides of the issue.

Another point of criticism of the International Law Commission's work on the *Draft Liability Articles* was that the ILC was at best creating, or at worst replicating, primary rules of environmental law:

In effect, the ILC appeared to believe that no primary obligations of protection from transboundary harm existed: it seemed unable to grasp that international law might, as in Part XII of the 1982 UN Convention on the Law of the Sea, impose obligations of regulation, diligent control, and prevention of harm even on lawful activities without either prohibiting the activity or excluding the possibility of responsibility for the breach. Even in 1978, the ILC's view of the law seemed extraordinary.<sup>74</sup>

This brings the discussion to the topic of the scope of the International Law Commission's project. When the topic was initially taken up by the Commission it was not specifically limited to environmental law.<sup>75</sup> The Commission sought to codify general rules that might reach economic and mon-

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<sup>71</sup> *Id* at 13-14.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 14.

<sup>74</sup> Boyle, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49, at 75.

<sup>75</sup> Boyle, *State Responsibility*, *supra* note 47, at 3.

etary harms as well.<sup>76</sup> In his contribution to *Recueil des Cours: Académie de Droit International*, Barboza wrote:

[W]e believe that the existence of such a due diligence obligation as is found to emerge from the previously cited authorities [*Trail Smelter*, *Corfu Channel*, *Island of Palmas*, *Lake Lanoux*, the *1972 Stockholm Declaration*, and various multilateral and bilateral treaties] is grounded on a principle of customary international law of a general character prohibiting the noxious use of a State's territory, as emerges particularly from the *Corfu Channel* case, where the rule is formulated in general terms not confined to a particular use of the territory or to environmental interferences.<sup>77</sup>

This general principle of law prohibiting transboundary harm, however, was not to be codified into the *Draft Liability Articles*.

As the Commission's work progressed, it felt it lacked a basis for establishing and codifying principles in the sphere of economics as most the precedent for the project was in the area of environmental law and dealt with physical harm.<sup>78</sup> Additionally, the Commission felt there was a need to make the scope of the *Draft Liability Articles* more manageable,<sup>79</sup> perhaps so as not to leave States open to potentially unlimited liability. The draft articles were limited to harms with "physical consequences,"<sup>80</sup> specifically excluding transboundary harm that resulted from monetary or socioeconomic State policies or similar areas.<sup>81</sup>

As a result, the project focused on environmental harm. Criticism of the *Draft Liability Articles* argued that they had become merely an exercise in codifying and developing parts of environmental law with overlap in the area of State responsibility for breach of these duties.<sup>82</sup> For example, International Law Professor Alan E. Boyle commented, "[W]e are now dealing with primary environmental obligations, well established in customary law, in terms wholly consistent with the Commission's conception of responsibility for wrongful acts."<sup>83</sup>

Eventually, the *Draft Liability Articles* were further limited to address only the physical consequences of hazardous activities.<sup>84</sup> They were also divided into

<sup>76</sup> *Id.*

<sup>77</sup> Barboza, *supra* note 55, at 327.

<sup>78</sup> *Id.*

<sup>79</sup> International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities), 2001 v.II pt.2 U.N.Y.B. Int'l L. Comm'n 144, 151 (2001).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Boyle, *State Responsibility*, *supra* note 47, at 4.

<sup>83</sup> *Id.* at 11.

<sup>84</sup> U.N GAOR, International Law Commission, *Report of Draft Articles on the Prevention of*

two different projects, resulting in the *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, which primarily dealt with primary norms and were adopted in 2001<sup>85</sup> and the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, which mainly dealt with secondary norms and were adopted in 2006.<sup>86</sup> In their final form, the *Draft Articles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities* place liability for transboundary harm not on the State where the harm originated, but on the operator of the activity causing the harm.<sup>87</sup> The limited scope of the final *Draft Liability Articles* makes them inapplicable to harms not arising from physically hazardous activities. For this reason, the *Draft Articles* do not apply to the US-Mexico arms trafficking situation because the harm is not a result of environmental damage nor is the harm physical. Given that States were reluctant to accept the *Draft Liability Articles* because they “might lead to an obligation to make unlimited reparation of all harm caused by activities not prohibited by international law,”<sup>88</sup> States are unlikely to be amenable to an argument for expansion of the *Draft Liability Articles* in the near future. Therefore, the limited scope of the codified *Draft Liability Articles* makes them inadequate for purposes of positing a more general prohibition of transboundary harm. The next section re-examines the Trail Smelter precedent for an alternative theory to State liability.

#### IV. RE-EXAMINING TRAIL SMELTER, ITS PROGENY, AND THE *CORFU CHANNEL* CASE FOR A GENERAL PROHIBITION OF TRANSBOUNDARY HARM THAT UTILIZES A STANDARD OF DUE DILIGENCE

The principle arising out of *Trail Smelter* however does not bear the same limitations as the final *Draft Liability Articles*. Though the *Draft Liability Articles* rely heavily on the *Trail Smelter* Arbitral Tribunal decision, *Trail Smelter* was a decision clearly based on the doctrine of State responsibility, since the doctrine of State liability did not exist at the time. Though the *Trail Smelter* Arbitral Tribunal did not present its decision as such, it is possible to reach the conclusion that the Court’s decision was based on the duty to prevent trans-

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*Transboundary Harm from Hazardous Activities*, in the Work of its Fifty-fifth Session, Supp. No. 10. (A/56/10) (2001) [hereinafter *Draft Liability Articles, Prevention*], available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_7\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf) (last visited Jan. 24, 2012).

<sup>85</sup> *Draft Liability Articles, Prevention*, *supra* note 84.

<sup>86</sup> *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, 2006 v.II pt.2 U.N.Y.B. Int’l L. Comm’n (A/61/10) (2006) [hereinafter *Draft Liability Articles, Allocation*], available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_10\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_10_2006.pdf) (last visited Feb. 11, 2012).

<sup>87</sup> *Id.*

<sup>88</sup> Montjoie, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49, at 512.

boundary harm and utilized the principle of due diligence. Much like the balancing test that occurs pursuant to the test of due diligence,<sup>89</sup> the *Trail Smelter* Arbitral Tribunal's decision was based on an attempt to balance the interests of the two State parties, the United States and Canada.<sup>90</sup> "The Tribunal has given consideration to the desire of the High Contracting Parties 'to reach a solution just to all parties concerned,'" stated the Tribunal about its own decision.<sup>91</sup> In performing the balancing test, the Arbitral Tribunal balanced "the interests of, in the Tribunal's phrases, 'the agricultural community' with the interest of industry."<sup>92</sup>

It is important to understand how due diligence operates. The obligation at hand is the duty to prevent transboundary harm. Due diligence is the standard or test of reasonableness to which States are held<sup>93</sup> in measuring a State's compliance with that obligation. Due diligence may also be described as a test of "appropriateness" or "proportionality."<sup>94</sup> In analyzing whether a State has met its obligation to act with due diligence, a court must consider whether the State's "conduct [...] is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance."<sup>95</sup> In addition, as occurred in the *Trail Smelter* case, "a balance must be struck, 'in light of circumstances, between competing interests which vary in weight from case to case.'"<sup>96</sup>

In the decades since, *Trail Smelter*, and with it the duty to prevent transboundary environmental harm and the test of due diligence, has taken on classic proportions.<sup>97</sup> Its influence can be found in Principle 21 of the Stock-

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<sup>89</sup> ROBERT P. BARNIDGE, JR. *NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE* 143 (2008) [hereinafter BARNIDGE, *NON-STATE ACTORS AND TERRORISM*].

<sup>90</sup> Read, in *TRANSBOUNDARY HARM*, *supra* note 23, at 52 ("There can be no doubt that the final decision of the Tribunal embodied practical results sought by the two governments. The *compromis* had explicitly directed the Tribunal to 'give consideration to the desire of High Contracting parties to reach a solution just to all parties concerned.' This platitude was interpreted by the Tribunal to indicate that the parties would not stand on absolute rights as sovereigns, but were concerned with balancing the interests of, in the Tribunal's phrases, 'the agricultural community' with the interest of industry") and Ellis, in *TRANSBOUNDARY HARM*, *supra* note 23, at 57.

<sup>91</sup> *Trail Smelter*, *supra* note 16, at 1963.

<sup>92</sup> Ellis, in *TRANSBOUNDARY HARM*, *supra* note 23, at 57.

<sup>93</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 861 (6th ed. 2008).

<sup>94</sup> *Id.*

<sup>95</sup> BARNIDGE, *NON-STATE ACTORS AND TERRORISM*, *supra* note 89, at 104 (quoting International Law Commission, Commentaries, Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission on the Work of its Fifty-Third Session 337, 394, U.N. Doc. A/56/10 Supp. No. 10 (2001)).

<sup>96</sup> Barnidge, *NON-STATE ACTORS AND TERRORISM*, *supra* note 89, at 143 (quoting H. L. A. HART, *THE CONCEPT OF LAW* 135 (2nd ed. 1994)).

<sup>97</sup> See, in *TRANSBOUNDARY HARM*, *supra* note 23, at 45.

holm Declaration,<sup>98</sup> which declares that States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the national jurisdiction.<sup>99</sup> The obligation to prevent transboundary harm has also been established in various multilateral treaties, including the Law of the Sea Convention,<sup>100</sup> the Convention on Biological Diversity,<sup>101</sup> and the Convention on Environmental Impact Assessment in a Transboundary Context,<sup>102</sup> among others. Additionally, there are several bi-lateral treaties that use the same principle, including the U.S.-Mexico La Paz Agreement to Co-operate in the Solution of Environmental Problems in the Border Area, which states in pertinent part: “The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.”<sup>103</sup> Finally, the United Nations

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<sup>98</sup> Ellis, *in* TRANSBOUNDARY HARM, *supra* note 23, at 56 (“Principle 21 of the Stockholm Declaration, which has itself taken on almost mythical proportions, is generally regarded as a reflection or restatement of the Trail Smelter holding [...]” Principle 21 of the Stockholm Declaration states: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the national jurisdiction.” Declaration of Principles for the Preservation and Enhancement of the Human Environment, Principle 21, UN Doc A/Conf.48/PC.17) [hereinafter Stockholm Declaration Principle 21], *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>. (last visited Feb. 11, 2012).

<sup>99</sup> Stockholm Declaration Principle 21, *supra* note 98.

<sup>100</sup> U.N. Convention on the Law of the Sea, Article 194(2), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397: “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

<sup>101</sup> Convention on Biological Diversity Principle 3, *opened for signature* on June 5, 1992, 1760 U.N.T.S. 79 (“States have, in accordance with the Charter of the United Nations and the principles of international law [...] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”). *See also* Convention on Biological Diversity Principle 14, *opened for signature* on June 5, 1992, 1760 U.N.T.S. 79: “In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage [...]”

<sup>102</sup> Convention on Environmental Impact Assessment in a Transboundary Context, Article 2(1), *opened for signature* on February 25, 1991, 1989 U.N.T.S. 309. (“The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.”)

<sup>103</sup> Agreement to Cooperate in the Solution of Environmental Problems in the Border Area art. 2, U.S.-Mex., Aug. 14, 1983, T.I.A.S. 10827.

General Assembly itself has declared “[t]hat in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction.”<sup>104</sup>

A slew of other international environmental law cases touch on Trail Smelter-like responsibility. In the *Lake Lanoux Arbitration*<sup>105</sup> involving a claim by Spain that contested France’s right to undertake development of Lake Lanoux,<sup>106</sup> the Arbitral Tribunal stated in *dictum* that “there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State.”<sup>107</sup> In the *Island of Palmas Arbitration*, the Arbitral Tribunal stated:

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.<sup>108</sup>

In the *Nuclear Test Case*<sup>109</sup> Australia sued France for conducting nuclear tests in French Polynesia that released radioactive matter into the atmosphere,<sup>110</sup> claiming that these tests caused deposits of radioactive material on its territory.<sup>111</sup> Australia requested the ICJ declare that France was prohibited from carrying out further nuclear testing<sup>112</sup> as nuclear testing in the area was inconsistent with the rules of international law.<sup>113</sup> The ICJ avoided the legal issues by holding that because France had unilaterally stated its intention to stop conducting nuclear tests it was legally bound by its own declaration and therefore the Court had no need to address the merits.<sup>114</sup> In the ICJ’s *Advisory Opinion on the Legality or Threat of Use of Nuclear Weapons*, the ICJ once again

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<sup>104</sup> Barboza, *supra* note 55, at 325 (citing Cooperation between the States in the Field of the Environment, U.N. G.A. Res. 2995 (XXVII), U.N.G.A.O.R., 27th Sess. (Dec. 15, 1972)).

<sup>105</sup> Lac Lanoux Arbitration (Fr. vs. Spain) 12 R.I.A.A. (1957), available at <http://www.lfip.org/laws666/lakelanoux.htm> (last visited Feb. 11, 2012).

<sup>106</sup> *Id.*

<sup>107</sup> McINTYRE, *supra* note 17, at 11 (citing Lac Lanoux Arbitration (Fr. vs. Spain) 12 U.N.R.I.A.A. (1957)).

<sup>108</sup> Barboza, *supra* note 55, at 320 (citing Island of Palmas case (Neth. vs. U.S.) 1928 2 U.N.R.I.A.A. 839 (1928)).

<sup>109</sup> There were two nuclear tests cases. Australia’s suit against France is discussed here and cited to, but New Zealand’s case against France treating the same subject matter had substantially the same outcome.

<sup>110</sup> Nuclear Tests Case (Austl. vs. Fr.), 1974 I.C.J. 99, 258 (Dec. 20), available at <http://www.icj-cij.org/docket/files/58/6093.pdf> (last visited Feb. 11, 2012).

<sup>111</sup> *Id.* at 258.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 256.

<sup>114</sup> *Id.* at 270-272.

had a chance to pass upon the issue of whether international law prohibited the use of nuclear weapons. While the Court held that the state of international law was uncertain as to the legality of the use of nuclear weapons as a means of self-defense, it stated that “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law”<sup>115</sup> and held that this principle had to be taken into account in assessing whether military actions were necessary and proportional.<sup>116</sup> The case decision makes it clear that the principle of due diligence as regards environmental transboundary harm is now a principle of international law.

In addition to the *Trail Smelter* decision and the previously cited authorities, all of which deal with issues of an environmental nature, the International Court of Justice has pronounced on similar principles of law in an unrelated context. Namely, in the *Corfu Channel* case, the Court held that the People’s Republic of Albania was responsible for damage that occurred to British navy ships when they struck landmines in the Corfu channel along the Albanian coast, killing forty-four men and injuring forty-two.<sup>117</sup> The Court held that Albania was responsible for the incident because it failed to warn of the presence of the minefield.<sup>118</sup> The Court imputed knowledge of the minefield to Albania, reasoning that any landmine laying activities would have been witnessed from the Albanian lookout posts on the coast.<sup>119</sup> In coming to this conclusion, the Court referred to the principle of international law holding that every State has the obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”<sup>120</sup>

Here, the principle announced by the Court is freestanding, no longer confined to the environment or any other particular use of the land.<sup>121</sup> Together, the *Corfu Channel* case and the *Trail Smelter* case have strengthened States’ international obligation to meet the standard of due diligence in preventing harms occurring within a State’s own territory from affecting another sovereign State.<sup>122</sup> This article proposes that from the *Trail Smelter case* and its progeny of declarations and treaties, and from the *Corfu Channel* case, a general prohibition of transboundary harm can be seen to emerge, unrelated to the environment. This author is not alone in positing a general duty to prevent transboundary harm conditioned by a standard of due diligence. In

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<sup>115</sup> Legality or Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at 29 (Jul. 8).

<sup>116</sup> *Id.* at 30.

<sup>117</sup> *Corfu Channel Case* (Alb. vs. Gr. Brit. & N. Ir.), 1949 I.C.J. 4, 23,36 (Apr. 9).

<sup>118</sup> *Id.* at 22.

<sup>119</sup> *Id.* at 18-22.

<sup>120</sup> *Id.* at 22.

<sup>121</sup> Barboza, *supra* note 55, at 327.

<sup>122</sup> Dupuy & Hoss, *in* TRANSBOUNDARY HARM *IN*, *supra* note 23, at 226.

his discussion of the *Draft Liability Articles*, the Special Rapporteur for the *State Liability Draft Articles*, Julio Barboza posits as much:

The former evidence [the *Trail Smelter* line of cases and its progeny of bilateral and multilateral treaties as well as the *Corfu Channel Case*] seems to indicate that there is a *general prohibition* of “knowingly” using or permitting the use of a State’s territory contrary to the rights of other States, as the *Corfu Channel* decision very rightly established —and before that did the Tribunal of the *Trail Smelter* case— and that causing transboundary harm is contrary to the well-established right of territorial sovereignty of States.<sup>123</sup>

The principle can also be expressed by way of the maxim *sic utere tuo, ut alienum non laedas*,<sup>124</sup> which means “so behave that you do not harm others” or “use your power so as not to injure your neighbors.”<sup>125</sup> This maxim “has been used to describe the duty of States to exercise their sovereignty in such a way, so as not to cause damage to the territory of other States.”<sup>126</sup>

This principle obligates all States to use due diligence to prevent transboundary harm. The obligation, like all obligations, has a relationship to a corresponding right to be free from transboundary harm.<sup>127</sup> Here, as applied to the drug war, both Mexico and the United States have the obligation to prevent transboundary harm and both States have the right to be free from transboundary harm. Of course, neither the obligation to prevent nor the right to be free from transboundary harm is absolute; the relevant test is due diligence of the State.

#### V. SPECIFIC EXPRESSIONS OF THE DUTY TO PREVENT TRANSBOUNDARY HARM —THE DUTY TO PROTECT FOREIGN NATIONALS

The origins of the duty to prevent transboundary harm are difficult to trace. Most commentators would trace the origins of the principle prohibiting transboundary harm to the *Trail Smelter* case.<sup>128</sup> However, it is possible to

<sup>123</sup> Barboza, *supra* note 55, at 330.

<sup>124</sup> McINTYRE, *supra* note 17, at 11.

<sup>125</sup> Law Forum, Swarb.co.uk, <http://www.swarb.co.uk/lawb/genLegalLatin.shtml> (last visited Mar. 26, 2011).

<sup>126</sup> Geert van Calster, The Law(s) of Sustainable Development, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1147544](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147544) (last visited Mar. 26, 2010).

<sup>127</sup> ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 134 (New York, Oxford University Press, 2002) (“If *x* has a right as against *y* then *y* has a corresponding duty to *x*, and vice versa.”). See also HANS KELSEN, GENERAL THEORY OF LAW AND STATE 75 (1945).

<sup>128</sup> See McINTYRE, *supra* note 17, at 11 (stating that the emergence of the maxim *sic utere tuo, ut alienum non laedas* can be traced to the *Trail Smelter* arbitration). See also Barboza, *supra* note 55, at 330 (“The former evidence seems to indicate that there is a *general prohibition* of ‘knowingly’ using or permitting the use of a State’s territory contrary to the rights of other States, as the

draw the conclusion that the duty to prohibit transboundary harm existed long before *Trail Smelter*, as evidenced in the duty of States to protect foreigners and foreign diplomats.

Before the advent of international human rights law, States generally were free to treat persons found within their own territories as they preferred.<sup>129</sup> The exception to this proposition was that States were required to exercise due diligence in respect to the duty to protect foreign nationals found in their territories.<sup>130</sup> This duty to protect foreign nationals has existed “ever since the appearance of classical writings upon international law.”<sup>131</sup> As stated by Alwyn V. Freeman, author of the treatise *The International Responsibility of States for Denial of Justice*, “it has been universally accepted that, whether or not a State was bound to receive foreign subjects upon its soil, once they were received an obligation arose to protect them from harm and to punish wrongs committed against them.”<sup>132</sup>

The duty to protect foreigners involved two obligations: the first obligation was the obligation to prevent harm from befalling foreigners and foreign diplomats. The second was the obligation to punish the perpetrators of the harm.<sup>133</sup> With respect to this first obligation, the duty to prevent harm to foreigners, the State’s obligation extended even to the actions of private persons<sup>134</sup> and consisted of two requirements.<sup>135</sup> The first requirement was that the States possess the necessary infrastructure “to guarantee respect for the international norm on prevention.”<sup>136</sup> This requirement constitutes an obligation of result, which imposes a duty, but does not compel the State to accomplish it by using a specific approach.<sup>137</sup> In addition, this first prong of the duty is not conditioned by the test of due diligence.<sup>138</sup> The second requirement was that States were obligated to use their infrastructure to prevent harm to

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*Corfu Channel* decision very rightly established—and before that did the Tribunal of the *Trail Smelter* case—and that causing transboundary harm is contrary to the well-established right of territorial sovereignty of States.”)

<sup>129</sup> THOMAS WEISS ET AL., *THE UNITED NATIONS AND CHANGING WORLD POLITICS* 105 (7th ed., Boulder, Westview Press, 2010).

<sup>130</sup> Barnidge, *supra* note 19, at 99.

<sup>131</sup> ALWYN V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 367 (Longmans, Green and Co., 1938).

<sup>132</sup> *Id.*

<sup>133</sup> Riccardo Pisillo-Mazzeschi, *Due Diligence and International Responsibility of States*, 32 G.Y.I.L. 9, 26 (1992).

<sup>134</sup> *Id.* at 25.

<sup>135</sup> *Id.* at 26.

<sup>136</sup> *Id.*

<sup>137</sup> Constantin P. Economides, *Content of the obligation: obligations of means and obligations of results*, in *OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 49, at 37.

<sup>138</sup> Pisillo-Mazzeschi, *supra* note 133, at 27.

foreigners with the necessary diligence required by the circumstances.<sup>139</sup> The standard of due diligence conditioned this second requirement so that the State was not responsible to absolutely prevent all actions that might harm foreigners, but was merely obligated to exercise due diligence in attempting to prevent potentially harmful activities.<sup>140</sup>

The claim under international law for a failure to prevent harm to foreigners existed only when two conditions were met: first, the injured foreigner had to exhaust all local remedies, and second, the State of which the injured foreigner was a citizen had to agree to take up the claim on the foreigner's behalf, and in so doing, become the injured party.<sup>141</sup> Where a foreigner was harmed, the legal injury was to the foreign State of which the individual was a citizen, and this State could assert a legal claim.<sup>142</sup> In fact, the foreigner was not considered an injured person at all from the point of view of the law of diplomatic protection.<sup>143</sup> Any reparations due were the property of the harmed State and not the harmed individual.<sup>144</sup> In this sense, the harmed foreign national was analogous to an extension of the foreign sovereign's territory; harm to the national was equivalent to harm to the State itself.<sup>145</sup>

The duty to prevent harm to foreign nationals and the principle that emerges from the *Trail Smelter* and *Corfu Channel* cases (that activities occurring in a State's territory ought not to cause harm to the territory of another State) can be considered as arising from the same principle when foreign nationals are understood to be an extension of the foreign State's territory; they both constitute a form of transboundary harm to another State's territory. Just as is the case with transboundary harm in the context of environmental law, the standard of due diligence is the measure used to gauge whether State A has met its obligation to foreign State B as regards its duty to prevent harm from coming to foreigners from State B.

In this way, it is possible to reach the conclusion that the rules surrounding the obligation to protect foreign nationals contained one of the first international law prohibitions of transboundary harm, pre-dating the *Trail Smelter* and *Corfu Channel* cases. Both the rules surrounding the duty to prevent harm to foreigners and those prohibiting transboundary harm can be understood as an international form of tort law. As stated by George T. Yates III, named

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> George T. Yates III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 214 (Richard B. Lillich, ed. 1983).

<sup>142</sup> *See* Janes (U.S. v. Mex.), 4 R.I.A.A. 86 (1926).

<sup>143</sup> Christian Tomuschat, *Individuals*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49, at 985.

<sup>144</sup> Phoebe Okowa, *Issues of admissibility and the law on international responsibility*, in INTERNATIONAL LAW 472, 477 (Malcolm D. Evans ed., 3rd ed., 2010).

<sup>145</sup> *See* Janes (U.S. v. Mex.), 4 R.I.A.A. 86 (1926).

to the 2007 Panel of Experts on the Treatment of Foreign Law at the Hague Conference on Private International Law,<sup>146</sup> “[a] State can no more act with utter impunity than an individual, especially in today’s increasingly interdependent world.”<sup>147</sup>

VI. SPECIFIC EXPRESSIONS OF THE DUTY TO PREVENT TRANSBOUNDARY  
HARM — ORGANIZED ACTS OF ARMED FORCE AGAINST OTHER STATES  
AND ILLEGAL ARMS TRAFFICKING

Most recently, the obligation to prevent transboundary harm has found a new incarnation in the duty of a State to prevent the use of its territory for “organized acts of armed force against other States.”<sup>148</sup> In a dissenting opinion Judge Thomas Moore appeared to mention this duty when he posited, “[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.”<sup>149</sup> Additionally, in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations) the General Assembly recognized that States have: “[...] the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or *acquiescing* in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”<sup>150</sup>

This provision of the Declaration on Friendly Relations is considered customary international law.<sup>151</sup>

The International Court of Justice [hereinafter ICJ] dealt with the issue of the actions of rebels in one State against another State in the *Armed Activities on the Territory of the Congo* case.<sup>152</sup> The issue was whether Uganda had a right to self-defense against the actions of rebels in Congo (formerly Zaire). Uganda

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<sup>146</sup> Orrick, Biography, <http://www.orrick.com/lawyers/Bio.asp?ID=162853> (last visited April 2, 2011).

<sup>147</sup> Yates III, *supra* note 141, at 213.

<sup>148</sup> Pisillo-Mazzeschi, *supra* note 133, at 35-36.

<sup>149</sup> S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. para. 269 (ser. A) No. 10 (Sept. 7) (Moore, J., dissenting) (referring to the implications this principle might have for the court’s opinion on jurisdiction over ships on the high seas).

<sup>150</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, para. 1, G.A. Res. 2625(XXV), annex, U.N. Doc. A/9890 (Oct. 14, 1970) (emphasis added) [hereinafter Declaration on Friendly Relations].

<sup>151</sup> *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda) I.C.J. Reports 2005, para. 300 (Dec. 19, 2005).

<sup>152</sup> *Id.*

argued that Congo was breaching its “duty of vigilance by tolerating” the rebel groups which were conducting armed cross-border operations.<sup>153</sup> Basing its decision in part on the Declaration on Friendly Relations, the ICJ implicitly accepted that such a duty exists, but held that “in the light of the evidence before it, the Court [could not] conclude that the absence of action by Zaire’s Government against the rebel groups in the border area [was] tantamount to ‘tolerating’ or ‘acquiescing’ in their activities.”<sup>154</sup>

Another famous case dealing with the duty to prevent organized acts of armed force against other states is the ICJ decision in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua* (the *Nicaragua Case*).<sup>155</sup> The Nicaragua case is interesting because it can be understood as a case that furthered the duty to prevent organized acts of armed forces into a more specialized duty to prevent illegal arms trafficking regardless of whether the illegal arms trafficking was part of an armed attack.

The United States alleged that its actions supporting the Contras constituted collective self-defense of Nicaragua’s neighboring countries and that Nicaragua’s support of illegal arms trafficking into El Salvador constituted an armed attack against El Salvador, giving it the right of self-defense.<sup>156</sup> Although the United States alleged the fact, Nicaragua denied it was allowing arms traffic through its territory into El Salvador: “[i]n the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador.”<sup>157</sup> The ICJ looked beyond the issue of whether there had been an armed attack by Nicaragua on El Salvador; instead of focusing on Nicaragua’s duty to abstain from this behavior, the ICJ focused on Nicaragua’s duty to prevent arms trafficking,<sup>158</sup> holding that Nicaragua was not responsible for the flow of arms into El Salvador.<sup>159</sup> The ICJ’s reasoning implicitly accepted that a State has a due diligence obligation to prevent arms trafficking into another State as part of its duty to not tolerate the use of its territory for hostile military operations against another State:

[I]f the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 300-301.

<sup>155</sup> Pisillo-Mazzeschi, *supra* note 133, at 36.

<sup>156</sup> Nicaragua Case, *supra* note 21, at 35.

<sup>157</sup> *Id.* para. 131, 154.

<sup>158</sup> Pisillo-Mazzeschi, *supra* note 133, at 33 (“[W]hile the ICJ clearly brought the United States’ conduct of *support* to the contras within the framework of a negative duty to abstain, it instead put the Nicaraguan conduct of *tolerance*, with regard to arms traffic, in the framework of a positive duty to protect, conditioned by the due diligence rule.”).

<sup>159</sup> Nicaragua case, *supra* note 21, para. 160.

of diligence than is achieved by even the combined efforts of the other three States [...].<sup>160</sup>

In coming to its conclusion that Nicaragua had not breached its obligation to prevent arms trafficking into El Salvador, the ICJ considered that it had not been proven that arms trafficking through the territory of Nicaragua and into El Salvador had occurred after 1981.<sup>161</sup> The ICJ also reasoned that if such arms trafficking had in fact existed, it was of such a small degree that, “it could also have been carried on unbeknown to the Government of Nicaragua.”<sup>162</sup> The ICJ noted that prior to 1981, “Nicaragua had taken immediate steps to put a stop to [the arms trafficking] once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located.”<sup>163</sup> In other words, the ICJ took into account Nicaragua’s cooperation and good faith in attempting to prevent transboundary harm in assessing whether or not Nicaragua had met its duty of due diligence.

Finally, the ICJ also considered that Nicaragua was a country of limited resources as compared to the United States, a country which had also been unsuccessful in stopping the arms trafficking that it alleged existed.<sup>164</sup> If the United States could not stop the arms trafficking, Nicaragua could not be expected to stop it either, the ICJ reasoned.<sup>165</sup> In other words, a country of greater resources, such as the United States, has to meet higher expectations and therefore has a greater due diligence burden than a country of fewer resources.

While the allegations in the *Nicaragua Case* were that Nicaragua was directly involved in supplying arms into El Salvador and actual military aggression against El Salvador,<sup>166</sup> the ICJ’s reasoning noted above suggests that even if Nicaragua had merely tolerated the flow of arms into El Salvador, or acted with anything less than a standard of due diligence to prevent the flow of arms into El Salvador, it would have been in violation of international law. While the situation in El Salvador was characterized as one of civil war,<sup>167</sup> it is possible to extend the reasoning of the *Nicaragua Case* to stand for the proposition that there is a duty to prevent the flow of arms into another State’s territory for the use of military operations against that State even where the situation in the victim State is distinguishable from a civil war. Professor Pisil-

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<sup>160</sup> Pisillo-Mazzeschi, *supra* note 133, at 36 (quoting the Nicaragua case, *supra* note 22, para. 157).

<sup>161</sup> Nicaragua case, *supra* note 21, at 160.

<sup>162</sup> *Id.* at 156.

<sup>163</sup> *Id.* at 159.

<sup>164</sup> *Id.* at 157.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 126.

<sup>167</sup> *Id.* at 147.

lo-Mazzeschi supports this approach, stating: “[T]he principle that the State must not tolerate the use of its territory for hostile military operations against another State soon goes beyond the boundaries of the law of neutrality, and extends also to situations in which a state of war does not exist [...]”<sup>168</sup>

Extension of the *Nicaragua* case is especially important in situations like the drug war in Mexico, where the victim State is involved in deep civil strife and the flow of arms into its territory is being used to support a war against government forces and greatly contributes to its instability. It might even be argued that the situation in Mexico so resembles a civil war that the reasoning in the *Nicaragua* case might be applicable to the situation in Mexico regardless of such an extension in the law. However, whether or not the situation in Mexico constitutes an internal armed conflict is beyond the scope of this paper. This article instead argues that the obligation to prevent arms trafficking outside the context of a civil war is supported by international instruments and human rights concerns.

For example, Article 5 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (Firearms Protocol), states in pertinent part:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:

[...]

(b) Illicit trafficking in firearms, their parts and components and ammunition;<sup>169</sup>

While the United States is not a party to the firearms protocol as of yet, it was adopted by General Assembly Resolution 55/255 on May 31, 2001, and entered into force on July 3, 2005.<sup>170</sup> Additionally, the United Nations General Assembly has recognized that “the proliferation and illicit circulation of and traffic in small arms impede development, constitute a threat to populations and to national and regional security and are a factor contributing to the de-

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<sup>168</sup> Pisillo-Mazzeschi, *supra* note 133, at 35. It should be noted for clarity that Professor Pisillo-Mazzeschi has only expressed support for the principle that would prohibit a State from tolerating organized acts of armed force against other States from occurring in its territory.

<sup>169</sup> Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, Article 5, May 31, 2001 2326 U.N.T.S. 208 [hereinafter *Firearms Protocol*], available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC/0%20Convention/TOCebook-e.pdf>.

<sup>170</sup> *Firearms Protocol*, United Nations Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-c&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en) (last visited April 19, 2011).

stabilization of States.”<sup>171</sup> Prior to 1994, the General Assembly of the United Nations adopted a resolution relating to the illicit traffic of arms in general. For example, it “urge[d] Member States to exercise effective control over [...] their arms imports and exports to prevent them from getting into the hands of parties engaged in the illicit arms trade.”<sup>172</sup> The General Assembly started discussing the more specific issue of *small* arms in 1994.<sup>173</sup> In 1995, the General Assembly: “[i]nvite[d] Member States to implement national control measures in order to check the illicit circulation of small arms, in particular by curbing the illegal export of such arms.”<sup>174</sup> While the General Assembly did not adopt a resolution on the topic of small arms in 1996<sup>175</sup> or 1997,<sup>176</sup> in 1998, it once again adopted a resolution on the matter, in which the General Assembly “[i]nvite[d] Member States in a position to do so to provide the necessary assistance, bilaterally, regionally and through multilateral channels, such as the United Nations, in support of the implementation of measures associated with combating illicit trafficking in and illicit circulation of small arms.”<sup>177</sup> In 1999<sup>178</sup> and 2000,<sup>179</sup> the General Assembly once again adopted similar resolutions using comparable language to that of the 1998 resolution. In 2000, the General Assembly also “recommend[ed] the involvement of organizations and associations of civil society in efforts to combat the illicit circulation of small arms in the context of the national commissions and their participation in the implementation of the moratorium on the importation, exportation and manufacture of small arms.”<sup>180</sup> In 2001, the General Assembly adopted a resolution that “[e]ncourage[d] cooperation between State organs, international organizations and civil society in combating the illicit traffic in small arms and supporting the collection of small arms in the subregions.”<sup>181</sup> This language was used in additional United Nation (hereinafter U.N.) General Assembly resolutions between 2002 and 2011.<sup>182</sup>

<sup>171</sup> Assistance to States for Curbing the Illicit Traffic in Small Arms, G.A. Res. 56/24 (U), Preamble, U.N. Doc. A/RES/56/24 (Nov. 29, 2001); G.A. Res. 52/38 (C), Preamble, U.N. Doc. A/RES/52/38 (Dec. 9, 1997).

<sup>172</sup> G.A. Res. 46/36 (H), para. 3, U.N. Doc. A/RES/46/36 (Dec. 6, 1991).

<sup>173</sup> G.A. Res. 49/75 (G), U.N. Doc. A/RES/49/75 (Dec. 15, 1994).

<sup>174</sup> G.A. Res. 50/70 (H), para. 5 U.N. Doc. A/RES/50/70 (Dec. 12, 1995).

<sup>175</sup> G.A. Res. 51/45 (L), U.N. Doc. A/RES/51/45 (Dec. 10, 1996).

<sup>176</sup> G.A. Res. 52/38 (C & J), U.N. Doc. A/RES/52/38 (Dec. 9, 1997).

<sup>177</sup> G.A. Res. 53/77 (T), para. 3, U.N. Doc. A/RES/53/77 (Dec. 4, 1998).

<sup>178</sup> G.A. Res. 54/54 (R), para. 4, U.N. Doc. A/RES/54/54 (Dec. 1, 1999).

<sup>179</sup> G.A. Res. 55/33 (Q), para. 4, U.N. Doc. A/RES/55/33 (Nov. 20, 2000).

<sup>180</sup> G.A. Res. 55/33 (F), para. 4, U.N. Doc. A/RES/55/33 (Nov. 20, 2000).

<sup>181</sup> G.A. Res. 56/24 (U), para. 6, U.N. Doc. A/RES/56/24 (Nov. 29, 2001).

<sup>182</sup> G.A. Res. 56/24(P), para. 6 U.N. A/RES/56/24P (Jan. 10, 2002); G.A. Res. 59/74, para. 5 U.N. A/RES/59/74 (Dec. 10, 2004); G.A. Res. 61/71, para. 4 U.N. A/RES/61/71 (Jan. 3, 2007); G.A. Res. 62/22, para. 6 U.N. A/RES/62/22 (Jan. 8, 2008); G.A. Res. 63/66, para. 6 U.N. A/RES/63/66 (Jan. 12, 2009); G.A. Res. 64/30, para. 6 U.N. A/RES/64/30 (Jan.

In addition, in her final report to the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Special Rapporteur on Small Arms Barbara Frey made the following recommendations:

Under the due diligence standard, international human rights bodies should require States to enforce a minimum licensing standard designed to prevent small arms from being used by private actors to violate human rights. Other effective measures consistent with due diligence include the prohibition of civilian possession of weapons designed for military use; the sponsoring of effective amnesty programmes to decrease the number of weapons in active use; requirement of marking and tracing information by manufacturers; and incorporation of a gender perspective in policies regarding small arms. States have an affirmative duty under international human rights law to protect groups that are most vulnerable to small arms misuse, including victims of domestic violence.<sup>183</sup>

These Conventions, Resolutions and Recommendations support the extension of the due diligence obligation to prevent transboundary harm to the act of arms trafficking, even outside the context of a civil war. Additionally, the duty to prevent armed trafficking is in accordance with existing obligations for the United States pursuant to the U.N. Convention against Transnational Organized Crime,<sup>184</sup> which requires States to enact legislation criminalizing acts “facilitating [...] the commission of serious crime involving an organized criminal group.”<sup>185</sup>

## VII. APPLICATION OF THE PROPOSED DUTY TO PREVENT TRANSBOUNDARY HARM TO MEXICO AND THE UNITED STATES

This article has proposed that there is a general principle prohibiting transboundary harm even outside environmental law. There may be various possible applications of the duty to prevent transboundary harm to the activities affecting the United States and Mexico. This article explores only one pos-

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12, 2010); G.A. Res. 65/50, para. 6 U.N. A/RES/65/50 (Jan. 11, 2011). See also G.A. Res. 56/24(V), para. 6 U.N. A/RES/56/24V (Jan. 10, 2002); G.A. Res. 58/241, para. 12 U.N. A/RES/58/241 (Dec. 23, 2003); G.A. Res. 59/459, para. 7, U.N. A/RES/59/459 (Dec. 10, 2004); G.A. Res. 60/81, para. 5, U.N. A/RES/60/81 (Jan. 11, 2006); G.A. Res. 65/64, para. 16, U.N. A/RES/65/64 (Jan. 13, 2011); G.A. Res. 65/64, para. 26, U.N. A/RES/65/64 (Jan. 13, 2011).

<sup>183</sup> Sub-Comm’n on the Promotion and Protection of Human Rights, Special Rapporteur on Small Arms, *Final report on Specific Human Rights Issues: Prevention of human rights violations committed with small arms and light weapons*, para. 42-43, U.N. Doc. A/HRC/Sub.1/58/27 (2006) (by Barbara Frey, Special Rapporteur) [hereinafter Frey, Final Report].

<sup>184</sup> United Nations Convention against Transnational Organized Crime, Dec. 13, 2000 2225 U.N.T.S. 209, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-12&chapter=18&lang=en) (last visited Feb. 11, 2012).

<sup>185</sup> *Id.* at Article 5.

sibility: arms trafficking from the United States into Mexico, drawing heavily on the extension of the *Nicaragua* case argued above that would prohibit arms trafficking from one State into another State for use against that State in times of great civil strife.<sup>186</sup>

The U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has reported that ninety percent of the illegal weapons seized in Mexico are traceable to the United States.<sup>187</sup> A more recent report by U.S. Senators Dianne Feinstein, Charles Schumer and Sheldon Whitehouse to the U.S. Senate Caucus on International Narcotics Control found that seventy percent of the illegal weapons seized in Mexico were traceable to the United States.<sup>188</sup> Whether the percentage is seventy percent or ninety percent, illegal weapons trafficking from the United States into Mexico is clearly occurring.

While the sale of AK-47 semi-automatic weapons used to be illegal in the United States pursuant to the Federal Assault Weapons Ban, the U.S. Congress allowed the ban to expire in 2004.<sup>189</sup> Consequently, one of the two most trafficked weapons recovered in Mexico in the last three years has been the AK-47 semi-automatic, with the AR-15 semi-automatic clone following close behind.<sup>190</sup> Recovery of U.S. sold AK-47s, AR-15s and other “high capacity long guns” has increased from twenty percent in 2004 to forty-eight percent in 2009.<sup>191</sup>

Mexican President Calderón has publicly expressed his disapproval of the fact that the United States allowed the assault weapons ban to expire, stating in a recent interview that “[i]f the United States would reestablish the law that President Clinton established [arms sales and arms trafficking] would decrease.”<sup>192</sup> Despite such public requests, the United States has not reenacted the ban.

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<sup>186</sup> While the *Nicaragua* case implicitly accepted a due diligence obligation to prevent illegal arms trafficking from one State’s territory into another State in the context of a civil war, this article argues for an extension of the *Nicaragua* holding as supported by various treaties, conventions and resolutions mentioned above.

<sup>187</sup> Lisa Guaqueta, *Arms Trafficking at the U.S.- Mexico Border*, FPIF, Mar. 26, 2010, [http://www.fpiif.org/articles/arms\\_trafficking\\_at\\_the\\_us-mexico\\_border](http://www.fpiif.org/articles/arms_trafficking_at_the_us-mexico_border) (last visited: Mar. 19, 2011).

<sup>188</sup> DIANNE FEINSTEIN ET AL., HALTING U.S. FIREARMS TRAFFICKING TO MEXICO TO THE UNITED STATES SENATE CAUCUS ON INTERNATIONAL NARCOTICS CONTROL 6 (2011).

<sup>189</sup> Brady Campaign to Prevent Violence, <http://www.bradiycampaign.org/legislation/msassaultweapons> (last visited Mar. 19, 2011). President Calderón has stated that, “If the United States would reestablish the law that President Clinton established [arms sales and traffic] would decrease.” Javier Moreno, *Entrevista al Presidente de México: Para ganar una batalla, tienes que ir a por ella*, Mar. 27, 2011, [http://www.elpais.com/articulo/reportajes/ganar/batalla/tienes/ir/elpepusodmg/20110327elpdmgrep\\_1/Tes](http://www.elpais.com/articulo/reportajes/ganar/batalla/tienes/ir/elpepusodmg/20110327elpdmgrep_1/Tes) (last visited: April 4, 2011).

<sup>190</sup> *Id.*

<sup>191</sup> BREITBART.COM, *Obama Administration May Give ATF New Power to Fight Trafficking of U.S. Guns to Mexico*, Jan. 22, 2011 [hereinafter BREITBART], <http://www.breitbart.com/article.php?id=xprnw.20110122.DC34434> (last visited April 3, 2011).

<sup>192</sup> Moreno, *supra* note 189.

Finally, an estimated ten percent of all U.S. gun dealers are located on the U.S.-Mexico border<sup>193</sup> and serve as major sources of the guns that are subsequently trafficked into Mexico.<sup>194</sup> A 2010 analysis showed that three out of four (seventy-five percent) of the recovered long guns were sold in the four U.S. border states.<sup>195</sup> Even controlling for population, Arizona, New Mexico and Texas have gun export rates that are 169% higher than other U.S. states and three times the gun export rate of California.<sup>196</sup> The differences in the rates of gun exports to Mexico among these border states may very well be due to gun regulations.<sup>197</sup> The state with the lowest gun export rate to Mexico, California, has several regulations that the other states do not have.<sup>198</sup> ATF agents have been quoted as saying that “Arizona’s and Texas’ laws make it easy to buy guns for smuggling to the cartels, while California’s do not.”<sup>199</sup>

Similarly, a December 2008 report from Mayors against Illegal Guns found that five types of state laws were associated with lower rates at which a state exported crime guns to other states.

California has four of those laws: requiring background checks for all handgun sales at gun shows, requiring purchase permits in advance of handgun sales, allowing local jurisdictions to regulate firearms, and allowing inspection of gun dealers.

None of the other three border states, in contrast, had enacted any of the laws that were associated with lower crime gun export rates, and they have not enacted any of those laws since that report was published.<sup>200</sup>

Additionally, other studies have been conducted that conclude that California’s gun laws are much more rigorous than the laws of the three other border states.<sup>201</sup>

The *Nicaragua case* discussed above can be understood to stand for the suggestion that there is a duty to prevent arms trafficking in one’s territory that

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<sup>193</sup> Daniela Pastrana & Aprille Muscara, *Little Spillover of “Narco-Deaths”*, IPS, Mar. 19, 2011, <http://ipsnews.net/news.asp?idnews=54914> (last visited Mar. 19, 2011).

<sup>194</sup> Colby Goodman and Michel Marizco, *U.S. Firearms Trafficking To Mexico: New Data and Insights Illuminate Key Trends And Challenges*, in SHARED RESPONSIBILITY: U.S.-MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 170 (Eric L. Olson *et al.* eds., 2010), available at <http://www.wilsoncenter.org/sites/default/files/Shared%20Responsibility--Olson,%20Shirk,%20Selec.pdf> (last visited on Feb. 11, 2012).

<sup>195</sup> BREITBART, *supra* note 191.

<sup>196</sup> MAYORS AGAINST ILLEGAL GUNS, ISSUE BRIEF: THE MOVEMENT OF ILLEGAL GUNS ACROSS THE U.S.-MEXICO BORDER 3 (Sept. 2010), available at [http://www.mayorsagainstillegalguns.org/downloads/pdf/issue\\_brief\\_mexico\\_2010.pdf](http://www.mayorsagainstillegalguns.org/downloads/pdf/issue_brief_mexico_2010.pdf) (last visited Jan. 26, 2012).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

flows into the territory of another State, particularly where the arms trafficking is part of “hostile military operations” or “an organized act of armed force” against the victim State. In this sense, this article has argued for an extension of the law in cases in which the victim State is experiencing deep civil strife. If the Inter-American Commission, or a court of law, were to examine the US- Mexico situation, it would need to take various factors into consideration.

As discussed earlier, when measuring whether a State has met the test of due diligence as regards the obligation to prevent transboundary harm, the first requirement is that the State possess the necessary infrastructure to guarantee its ability to meet the standard of due diligence.<sup>202</sup> This requirement does not compel the State to accomplish this goal using a specific approach.<sup>203</sup> Additionally, this first prong of the duty to prevent is not conditioned by due diligence.<sup>204</sup> Questions around this first prong would explore whether the United States has the appropriate legislation and enforcement apparatus to enable it to meet its duty of due diligence under the second prong. While this article does not set out to prove that the United States legislative infrastructure fails the first prong of this test, the facts described above suggest that there are significant questions around whether the United States’s legislative infrastructure is such that it is able to meet the first prong of the test. While it is true that no specific legislative approach is required and the United States has the freedom to choose how it would set up its infrastructure,<sup>205</sup> whatever infrastructure it does establish must allow it to meet its due diligence requirement under the second prong of the test. As discussed earlier pursuant to the second prong of the duty to prevent transboundary harm, States are obliged to use their infrastructure with the necessary diligence required by the circumstances.<sup>206</sup>

In addressing this second prong and whether the facts as set out prove that the United States has failed to meet the standard of due diligence in terms of its duty to prevent the trafficking of arms in its territory from crossing into Mexico, the various factors that should be considered have been previously discussed. As in the *Trail Smelter* case, the interests of the two State parties, here the United States and Mexico, should be balanced.<sup>207</sup> This includes tak-

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<sup>202</sup> Pisillo-Mazzeschi, *supra* note 133, at 26.

<sup>203</sup> Economides, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49, at 371.

<sup>204</sup> Pisillo-Mazzeschi, *supra* note 133, at 27.

<sup>205</sup> Economides, in OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 49, at 371.

<sup>206</sup> *Id.*

<sup>207</sup> Read, in TRANSBOUNDARY HARM, *supra* note 43, at 24 (“There can be no doubt that the final decision of the Tribunal embodied practical results sought by the two governments. The *compromis* had explicitly directed the Tribunal to ‘give consideration to the desire of High Contracting parties to reach a solution just to all parties concerned.’ This platitude was

ing into account “conduct that is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance.”<sup>208</sup> In addition, as occurred in the *Trail Smelter* case, “a balance must be struck, ‘in light of circumstances, between competing interests which vary in weight from case to case.’”<sup>209</sup>

The interests to be considered on the side of the United States might be the economic gain from the sale of small arms and the United States’ interest in allowing its citizens to lawfully own guns. It is important to note that international law is not concerned with U.S. citizens’ right to own arms as stated in the Second Amendment of the U.S. Constitution. That being said, the right of self-defense is a principle recognized in international law.<sup>210</sup> However, in her final report to the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Special Rapporteur on Small Arms Barbara Frey clarified that “[t]he principle of self-defence does not negate the due diligence responsibility of States to keep weapons out of the hands of those most likely to misuse them.”<sup>211</sup> Therefore, the United States’ right to make economic gain from the sale of weapons and its right to permit its citizens to own arms so that they might exercise their right to self-defense stands on one side of the balance, limited by the due diligence obligation to avoid out arms falling into the hands of those most likely to improperly using them and by the obligation to prevent transboundary harm.

On the other side of the balance is Mexico’s right to be free from transboundary harm, specifically from the illegal traffic of guns across its border and into its territory for use against the State, its military, the police and its people. Moreover, when considering the amount of diligence needed under

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interpreted by the Tribunal to indicate that the parties would not stand on absolute rights as sovereigns, but were concerned with balancing the interests of, in the Tribunal’s phrases, ‘the agricultural community’ with the interest of industry.’”) and Ellis, in *TRANSBOUNDARY HARM*, *supra* note 23, at 57.

<sup>208</sup> BARNIDGE, *NON-STATE ACTORS AND TERRORISM*, *supra* note 89, at 104 (quoting International Law Commission, Commentaries, Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission on the Work of its Fifty-Third Session 337, 394, U.N. Doc. A/56/10 Supp. No. 10 (2001)).

<sup>209</sup> Barnidge, *NON-STATE ACTORS AND TERRORISM*, *supra* note 89, at 143 (quoting H. L. A. HART, *THE CONCEPT OF LAW* 135 (2nd ed., 1994)).

<sup>210</sup> *But see* Frey, Final Report, *supra* note 193 (“The principle of self-defence, as an internationally recognized exemption from criminal responsibility, is not inconsistent with the due diligence responsibilities of States to regulate civilian possession of small arms. There is no independent or supervening right in international human rights law of self-defence that would require States to provide civilians with access to small arms; nor does the principle of self-defence diminish the State’s responsibility to use due diligence to keep weapons out of the hands of those most likely to misuse them. Rather, States should exercise their due diligence responsibilities in the context of self-defence law, including the likelihood that those possessing firearms will act only out of necessity and with proportionality.”).

<sup>211</sup> Frey, Final Report, *supra* note 193.

the circumstances, one factor is the United States's ability to meet its due diligence obligations. Generally speaking, the measure required by due diligence depends on the State's resources.<sup>212</sup>

In fact, it may well constitute an autonomous principle that emerges from the different degree of responsibility or liability of each State, which should be proportionate to its technological and economic degree of development. It is obvious that the obligations, particularly those of prevention, will be more demanding on a highly industrialized country than on one of a low technological level.<sup>213</sup>

Given that the United States is a highly industrialized country with high levels of technological and economic development, its due diligence obligation as regards the duty to prevent arms trafficking in its territory will be more demanding than the obligations many less developed countries might be expected to meet. Certainly, the United States will have to meet a higher standard of due diligence than Nicaragua was expected to meet in the *Nicaragua* case.

Additionally, the special circumstances of extreme levels of violence in Mexico and the fact that U.S. sold weapons are being used to kill not only Mexican military and police, but innocent civilians should also be taken into account. The U.N. Special Rapporteur for Small Arms has asserted that “[t]he State has particularly acute obligations to protect vulnerable groups [...] from abuses with small arms.”<sup>214</sup> The civilians caught in the cross-fire of Mexico's drug war might very well be considered a vulnerable group meriting special obligations of protection.

Finally, in her report, the Special Rapporteur asserted that the non-derogable right to life of the International Covenant on Civil and Political Rights placed “absolute limitations on States actions involving weapons.”<sup>215</sup> The report also asserted that States are required to “take effective measures to prevent the transfer of small arms into situations where they are likely to be used to commit serious human rights abuses.”<sup>216</sup>

Taking all of these circumstances into account, it can be argued that the United States' interest in arms sales and its interest in allowing its citizens to bear arms should yield in the face of Mexico's right to have its territory free of injury caused by the trafficking of guns from the United States into Mexico. A detailed argument relevant to the facts, however, is beyond the scope of this paper.

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<sup>212</sup> Timo Koivurova, *Due Diligence*, THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007), <http://www.mpepil.com> (last visited April 4, 2011).

<sup>213</sup> Barboza, *supra* note 56, at 363-364.

<sup>214</sup> Frey, Final Report, *supra* note 193.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

From a policy perspective, the remedy available in *Trail Smelter* is advantageous in the context of the drug war because it requires the party causing the harm, the consumer State, to bear a greater proportion of the real costs of its consumer activities, rather than merely externalizing the said costs.<sup>217</sup> The consumer State is in a better position than the producer State to prevent the harms flowing from the drug war and to ensure that human beings are not victimized by its consumer activities. Since cooperation is key, the potential for responsibility may motivate the consumer State to partner with the producer State to develop and implement novel strategies to deal with the drug war. This cooperation is especially crucial when, as is generally the case, the producer State is less economically healthy and easily destabilized by the illegal activity.

### VIII. CONCLUSION

This article has proposed that there is a general principle prohibiting transboundary harm even outside environmental law. This obligation emerges from the *Trail Smelter* case, its resulting treaties and declarations, and the *Corfu Channel* Case. Various expressions of the duty to prevent transboundary harm can be found in the obligation to protect foreign nationals, the *Armed Activities on the Territory of the Congo* case and the *Nicaragua* case.<sup>218</sup> There may be various possible applications of the duty to prevent transboundary harm to the transboundary activities affecting the United States and Mexico.

State [responsibility] [...] *à la Trail Smelter*, for drug trafficking harms [to private individuals of other states might be configured in multiple ways [...] Producer States could be liable for introducing harmful substances into consumer State markets. Consumer states could be liable for drug enforcement externalities (*i.e.*, for harms from its export of security and eradication activities). Consumer States could also be liable for being the source of the demand that motivates producer State supply activities. Or, from the perspective of decriminalization proponents, consumer States could be liable for their restrictive regulations to the extent these, by raising the market price, shift the production calculus in producer States relative to substitute crops and exports (*e.g.*, food and textiles).<sup>219</sup>

This article has explored only one possibility: arms trafficking from the United States into Mexico, drawing heavily on the *Nicaragua* case, and has

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<sup>217</sup> Judith Wise & Eric L. Jensen, in *TRANSBOUNDARY HARM*, *supra* note 23, at 282.

<sup>218</sup> Academics from common law countries might understand this general principle prohibiting transboundary harm to be the equivalent of a kind of international tort law, an area of law that does not exist as such in the civil law system.

<sup>219</sup> Wise & Jensen, in *TRANSBOUNDARY HARM*, *supra* note 23, at 283.

argued for an extension of this case that would prohibit arms trafficking from one State into another State in the context of civil strife.<sup>220</sup>

It has been said that *Trail Smelter* was a case that was “first and foremost a case about the limits of sovereignty.”<sup>221</sup> “The dispute arose from the exercise of sovereign rights: Canada’s right to carry out lawful activities in its own territory (to smelt ore), and the U.S. right to determine what acts may take place within its territory (to harvest apples without interference from Canadian smelter smoke).”<sup>222</sup> Indeed, concerns about sovereignty are at the root of the prohibition of transboundary harm. The *Corfu Channel* case, which was essentially a conflict over where Albanian territory ended and international waters began, is another example of the issues of sovereignty that underlie the prohibition of transboundary harm. Here, arms trafficking into Mexican territory is no different; any resulting transboundary harm from such trafficking can be considered a violation of Mexico’s sovereignty. The preamble to the Convention on Friendly Relations states that it “[reaffirms], in accordance with the U.N. Charter, the basic importance of sovereign equality and stress[es] that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations.”<sup>223</sup> A violation of another State’s sovereignty is of paramount concern in international law.

This article aimed to answer the question of whether the U.S. President Barack Obama’s and U.S. Secretary of State Hillary Clinton’s statements to the effect that the United States shared responsibility with Mexico for the U.S. drug war went beyond the world of mere political rhetoric. While there are theoretically many different aspects of the US-Mexico drug war that can be analyzed, this article has sought to analyze only one facet: U.S. responsibility for arms trafficking into Mexico. This article concludes that the United States may be in violation of its due diligence duty to prevent transboundary harm for 1) its failure to have an adequate legal structure in place that is capable of allowing it to meet its due diligence duty to prevent transboundary harm in prong two and 2) for its failure to meet the standard of due diligence in preventing the arms trafficking. While it is true that the United States may use whatever mechanisms it sees fit to meet the first prong of its obligation to prevent transboundary harm, whatever infrastructure it chooses to put in place in the way of legislation must enable it to meet its due diligence obligation pursuant to the second prong.

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<sup>220</sup> While the Nicaragua case implicitly accepted a due diligence obligation to prevent illegal arms trafficking from one State’s territory into another State in the context of a civil war, this article has argued for an extension of the *Nicaragua* holding as supported by various treaties, conventions and resolutions mentioned above.

<sup>221</sup> Austen L. Parrish, *Sovereignty’s Continuing Importance: Traces of Trail Smelter in the International Law Governing Hazardous Waste Transport*, in TRANSBOUNDARY HARM, *supra* note 23, at 183.

<sup>222</sup> *Id.* at 184.

<sup>223</sup> Declaration on Friendly Relations, *supra* note 160.

Finally, as regards the second prong of the due diligence test, like in the *Nicaragua* case, where Nicaragua's cooperation and good faith with the United States in stopping arms trafficking into El Salvador was key to the ICJ's reasoning that Nicaragua had met its duty of due diligence, the United States's cooperation with Mexico is key as well. The United States has invested considerable resources into the Merida Initiative through which the United States funds, trains, equips and provides technical assistance to Mexico's military in the war on drugs.<sup>224</sup> The Merida Initiative, like past U.S. aid to producer States such as Colombia, Bolivia and Peru, has been directed at military intervention.<sup>225</sup> This type of cooperation is in the economic interest of the United States, which is the top global arms exporter in the world, holding 31% of the global arms export industry in 2007.<sup>226</sup> However, there are other ways in which the United States might cooperate with Mexico beyond military intervention, such as limiting the sale of guns along the US-Mexico border, or at least the sale of military style semi-automatic weapons.<sup>227</sup> The United States might also consider cooperating with Mexico in creating more checkpoints along the roads leading to Mexico to help Mexico stop trafficking guns into its territory.

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<sup>224</sup> Rafael Azul & Kevin Kearney, *Mexico's "war on drugs" employs army torture and police-state tactics*, WSWS.ORG, May 25, 2009, <http://www.wsws.org/articles/2009/may2009/mexi-m25.shtml> (last visited Mar. 19, 2011). Notably, the bill was passed only after stripping conditions guaranteeing human rights due to complaints from Mexican officials that the conditions violated their sovereignty. Manuel Roig-Franzia, *Anti-Drug Assistance Approved for Mexico*, WASH. POST, Jun. 28, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062703229.html?nav=emailpage> (last visited Mar. 19, 2011). Some human rights conditions remain however, though they are not necessarily enforced: "Under the Merida Initiative, the State Department is supposed to withhold 15% of anti-drug aid unless Mexico meets four conditions: ensuring that soldiers accused of human rights abuses are prosecuted in civil courts, improving the accountability of the Federal Police, enforcing a ban on torture, and consulting with civil groups about the anti-drug strategy."

Chris Hawley, *U.S. punishes Mexico for human rights abuses*, USA TODAY, Sept. 3, 2010, [http://www.usatoday.com/news/world/2010-09-03-mexico-rights-abuses\\_N.htm](http://www.usatoday.com/news/world/2010-09-03-mexico-rights-abuses_N.htm) (last visited: Mar. 19, 2011).

<sup>225</sup> U.S. DEPT. OF STATE, U.S. SUPPORT FOR COLOMBIA: FACT SHEET RELEASED BY THE BUREAU OF WESTERN HEMISPHERE AFFAIRS (Mar. 28, 2000), [http://www.state.gov/www/regions/wha/colombia/fs\\_000328\\_plancolombia.html](http://www.state.gov/www/regions/wha/colombia/fs_000328_plancolombia.html) (last visited Mar. 21, 2011).

<sup>226</sup> *Top Four Arms Exporters: United States, Russia, Germany, and France*, *Atlantic Review*, TRANS-ATLANTIC AFFAIRS, May 16, 2008, <http://atlanticreview.org/archives/1078-Top-Four-Arms-Exporters-USA,-Russia,-Germany-and-France.html> (last visited Apr. 23, 2011).

<sup>227</sup> The most recent effort by the Obama Administration to crack down on illegal weapons trafficking into Mexico does not actually restrict guns sales, but merely requires "gun stores to notify the Bureau of Alcohol, Tobacco, and Firearms (ATF) when they sell two or more semi-automatic, magazine-loading weapons to an individual within a period of five business days." Geoffrey Ramsey, *US to crack down on arms trafficking over Mexico border*, THE CHRISTIAN SCIENCE MONITOR, July 14, 2011.

In the face of the drug war that Mexico is fighting in its own territory, one might expect the United States to increase federal drug and weapons prosecutions along the border. In fact, it has done just the opposite. In April 2011, the Justice Department's data showed only 484 new weapons prosecutions, the fewest prosecutions since January 2001, and a decrease of 7.9% since January 2010 and of 28.8% since January 2006.<sup>228</sup> Attorney General Terry Goddard of Arizona has referred to the USAO's failure to prosecute weapons and drug crimes as "a national abdication by the Justice Department." California Representative Zoe Lofgren has received calls from federal agents complaining: "They've pulled so many U.S. attorneys off drug crimes and organized crime caseloads that federal agents are trying to get help from local district attorneys because they can't wait six weeks for a wiretap order."<sup>229</sup> In a January 2009 article, the NY Times reported that U.S. Attorneys on the US-Mexico border generally refuse to prosecute suspects found with 500 pounds of marijuana or less. As a result, law enforcement authorities report that drug traffickers are breaking up their loads to avoid stiffer federal penalties.<sup>230</sup> In light of the drug war in Mexico, abdication of weapons prosecutions, drug prosecutions and money laundering prosecutions seems hard to justify. Together with the United States' refusal to change its gun laws, these facts cast doubt on the United States' good faith cooperation with Mexico in fighting the drug war.

President Obama may therefore be correct in stating that the United States shares responsibility with Mexico in regards to the U.S.-Mexico drug war. Because this statement may go beyond mere political rhetoric and into the realm of international legal responsibility, the United States should make every effort to cooperate with Mexico in reducing arms trafficking from the United States into Mexico in order to meet its obligation to prevent transboundary harm. Whether this means the United States must enact new legislation, adjust enforcement mechanisms, and/or increase cooperation with Mexico is not clear. These are questions the U.S. government should explore as its potential responsibility exists regardless of whether Mexico decides to invoke it.<sup>231</sup>

Were Mexico to invoke U.S. responsibility, it need only follow Article 1 of the Charter of the United Nations, which states that: "The parties to any

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<sup>228</sup> Transactional Records Access Clearinghouse: Weapons Prosecutions Decline to Lowest Level in a Decade, SYRACUSE UNIVERSITY, April 11, 2011, available at <http://trac.syr.edu/tracreports/crim/249/> (last visited Feb. 11, 2012).

<sup>229</sup> Solomon Moore, *Push on Immigration Crimes is Said to Shift Focus*, N.Y. TIMES, Jan. 11, 2009, [http://www.nytimes.com/2009/01/12/us/12prosecute.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2009/01/12/us/12prosecute.html?pagewanted=1&_r=1) (last visited Nov. 7, 2010).

<sup>230</sup> *Id.*

<sup>231</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 2001, vol. II, Part Two, at 116.

dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>232</sup> The dispute resolution methods included in the U.N. Charter are helpful regardless of whether armed trafficking from the United States into Mexico endangers international peace and security.

Consequently, Mexico may politically pressure the United States through the U.N. General Assembly to comply with its due diligence obligations, may bring the case before the International Court of Justice,<sup>233</sup> or may choose to take countermeasures against the United States.<sup>234</sup>

As with any other violation of international law, the potential lack of due diligence as regards the United States's failure to control the arms trafficking into Mexico would involve an obligation to make reparations.<sup>235</sup> Generally speaking, reparations should take the form of restitution, compensation and satisfaction, either singly or in combination, depending on the particularities of the case.<sup>236</sup> The most important reparations in this case would be those of cessation and guarantees of non-repetition of the arms trafficking from the United States into Mexico.

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<sup>232</sup> U.N. Charter, Article 33, para. 1.

<sup>233</sup> Since the U.S. does not accept the compulsory jurisdiction of the ICJ, Mexico would have to find another source of jurisdiction such as a treaty or agreement with the United States to bring the case before the ICJ. The finding of such a source is beyond the scope of this article.

<sup>234</sup> Articles on Responsibility of States for Internationally Wrongful Acts, Articles 49-54, G.A. Res. 56/83 annex, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)

<sup>235</sup> *The Factory at Chorzów (Ger. v. Pol.) (merits)* 1927 P.C.I.J. (ser. A) No. 17, 29 (Sep. 13, 1928).

<sup>236</sup> Articles on Responsibility of States for Internationally Wrongful Acts, Article 34, G.A. Res. 56/83 annex, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

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