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Acknowledging Our International Criminals: Henry Kissinger and East Timor

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[T]he odds against bringing human rights abusers to justice remain astonishingly high. Indeed, the absence of effective means of sanctioning abuses reveals a tragic anomaly of the post-World War II era. On the one hand, the nations of the world, all but universally, have committed themselves to a series of detailed covenants in which they have pledged to one another and to the larger international community that they will respect human rights. On the other hand, far more extensive and terrible violations of human rights have occurred than during any other period except for World War II itself.

Aryeh Neier, *War Crimes*[1]

INTRODUCTION

In a one week period of March 2003, three ostensibly unrelated events transpired that typify a central theme in United States (U.S.) foreign policy since World War II. First, in early March, the inauguration of the International Criminal Court (ICC) was heralded in The Hague.[2] However, no representative from the United States attended, an event described by some "as world justice's biggest step since an international military tribunal in Nuremberg tried Nazi leaders after World War II."[3] The reason no U.S. representative attended the groundbreaking event was because the U.S. is not a party to the tribunal. In fact, the U.S. has been attempting to undermine the tribunal by "persuading other countries to seal bilateral agreements exempting all U.S. citizens from the court's authority."[4]

Clerk to Judge Daniel Friedman, United States Court of Appeals for the Federal Circuit; J.D., Boalt Hall School of Law; B.S., Weber State University. I would like to thank my parents, Russ and Donna, whose love and support made all things possible. I would also like to thank Weston Clark, whose encouragement made this a reality and whose insightful questions, comments, and suggestions proved invaluable.

1. ARYEH NEIER, WAR CRIMES 253 (1998).

2. Abigail Levene, *U.S. Stays Away as Global Criminal Court Gets Going*, Reuters, *available at* http://www.cjcj.org/press/global_court.html (Mar. 10, 2003).

3. *Id.*

4. *Id.* It was reported in August 2002 that the Bush administration was utilizing coercive threats to obtain these exemptions. Citing provision of the antiterrorism laws, the Bush administration allegedly warned foreign diplomats that their nations could lose all U.S. military assistance if they become members of the International Criminal Court without pledging to protect Americans serving in their countries from its reach. Elizabeth Becker, *U.S. Warns World Court Could Cost Aid,*

The same day the inaugural events for the ICC were being held, a U.S. federal appeals court held that Kuwaiti, Australian, and British citizens captured in Afghanistan in the course of the U.S. "war on terror" were not entitled to challenge their detentions at the Guantanamo Bay naval base.[5] The court held that habeas corpus relief was unavailable to aliens held outside U.S. territory.[6] On grounds that appeared to strain logic, the court refused to grant the detainees the minimal right to have an independent judicial body evaluate the evidence supporting their continued incommunicado detentions.[7] The court held it lacked jurisdiction to evaluate the merits of the detainees' claims, effectively insulating their detentions from challenge in the judicial branch.[8] However, the real effect of the ruling was to give *unlimited* discretion to the president and military regarding the detention of foreign nationals captured in foreign interventions and held on foreign U.S. bases.[9]

CHATTANOOGA TIMES FREE PRESS, Aug. 11, 2002, at A1. While the administration publicly stated that the exemptions were sought to protect American soldiers from "politically motivated charges, privately the administration admitted the real concern is the "vulnerability of top civilian leaders to international legal action. Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y TIMES, Sept. 7, 2002, at A4. An unnamed senior administration official admitted, "'Henry Kissinger, that's what they really care about.'" *Id.* "'We always figured that the Kissinger precedent was behind this outrageous position, but it has taken some time for the Americans to admit it, said a senior diplomat whose country is a strong supporter of the court. *Id.*

5. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 124 S. Ct. 534 (2003); *see also* James Vicini, *U.S. Court Rejects Appeals by Afghan War Detainess*, Reuters, *available at* http://mailman.efn.org/pipermail/local_activists/2003-March/002552.html (Mar. 11, 2003). *But see* Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) (holding opposite of Al Odah), *stay granted*, 2004 U.S. LEXIS 998 (2004).

6. *Al Odah*, 321 F.3d 1134.

7 The U.S. recently announced it would relent and allow few detainees to meet with defense attorneys. Vanessa Blum, *Tactics Shift in War on Terrorism*, LEGAL INTELLIGENCER, Dec. 10, 2003, at 4. However, the Bush "administration does not back off from its position that individuals designated as enemy combatants even those who are U.S. citizens can be held indefinitely without access to legal counsel. *Id.*

8. *Id. But see Gherebi*, 352 F.3d 1278; Frank Davies, *Guantanamo Sovereignty Issue Key to Captives Fate*, MIAMI HERALD, Dec. 28, 2003, at A12 ("For the first time, federal appeals court in San Francisco recently ruled that detainees at the prison camp are entitled to constitutional rights in U.S. courts because the United States 'possesses and exercises all the attributes of sovereignty on the base."). "At last report, the 600 Guantanamo detainees were being held in what one U.S. official called the 'legal equivalent of outer space. There have been more than 30 suicide attempts at Camp X-Ray and reportedly 5% of the detainees are being treated for psychological disorders. Gerald D. Skoning, *Our 'Disappeared'* NAT'L L.J., Oct. 27 2003, at 23. "The International Red Cross said that many detainees held by the US military in Guantanamo Bay, Cuba, were suffering 'a worrying deterioration' in mental health because Washington had ignored appeals to give them legal rights. *Mental Health Fear Over Guantanamo*, BELFAST NEWSL., Oct. 11, 2003, at 17

9. The Bush administration has announced that some of the detainees will be tried by military commissions. James Meek, *The People the Law Forgot*, GUARDIAN (London), Dec. 3, 2003, at 1. But "a uniformed source with intimate knowledge of the mood among the current military defence team [indicates] that there is deep unhappiness about the commission set up. *Id.* The source described the commission's structure in unflattering terms: "'Its like you took military justice, gave it to prosecutor and said: "modify it any way you want."'" *Id.* The commission has been described by lawyer representing some of the British detainees as "'multi-headed hydra with [deputy secretary of defense] Paul Wolfowitz's face on every head.'" *Id.* This is because of

> the enormous power vested in the US deputy secretary of defence, Paul Wolfowitz, who

The court appeared unconcerned that the detentions were accidental,[10] or even worse, lacked supporting evidence and possibly violated international laws and obligations.[11]

The third event came less than a week later Before U.S. forces invaded Iraq, the Bush administration publicly identified nine Iraqi officials who it asserted "would be tried for war crimes or crimes against humanity after an American-led attack on Iraq."[12] Despite that at the time the announcement was made, international public opinion seemed to question the validity of the Bush administration's preemptive war in Iraq,[13] the administration, without irony, issued a decision to seek prosecutions based on international law against Iraqi officials. The list of Iraqi officials who were to be prosecuted was also issued without any attempt to explain the apparent contradiction between the decision to prosecute them and the the administration's contrary position with respect to the ICC.

These three events are mentioned as an introduction to the broader problem of which this Article seeks to address but a tiny part. The problem is exemplified by the almost total lack of domestic public reaction to the three events, and the absence of public outcry epitomizes the American publics's reaction to the many arguably questionable foreign policy actions of the U.S. in the past fifty-plus years.

> is the commissions appointing authority The judges seven in a capital case are appointed by Wolfowitz. Any judge can be substituted up to the moment of verdict, by Wolfowitz. The military prosecutors are chosen by Wolfowitz. The suspects they charge, and the charges they make, are determined by Wolfowitz. All defendants are entitled to military defence lawyer, from a pool chosen by Wolfowitz. The defendants are entitled to hire a civilian lawyer, but they have to pay out of their own funds, and by revealing where the funds are, they risk having them seized on suspicion of their being used for terrorist purposes, on the order of Wolfowitz. Defendants need not lose heart completely if convicted. They can appeal, to a panel of three people, appointed by Wolfowitz. When it has made its recommendation, the panel sends it for a final decision to Wolfowitz.

Id.

10. "[T]here is little doubt that some of [the] detainees captured in Afghanistan may be victims of guilt by association or being in the wrong place at the wrong time. Skoning, *supra* note 8. Clive Stafford-Smith, a defense attorney for some of the Britons held at Guantanamo Bay, told *The Guardian* that one of the commission prosecutors told him that the prosecutor "'think[s] 30% of the people in Guantanamo Bay [had] nothing to do with anything. They were just in the wrong place at the wrong time.'" Meek, *supra* note 9.

11. Amnesty International USA claims the "continued denial of access to legal counsel violate[s] U.S. obligations under international law. Victni, *supra* note 5. *See generally* Meek, *supra* note 9. The Bush administration's "first step away from international norms was to refuse to categorise the Afghanistan captives as prisoners of war. *Id.* "It calls them 'enemy combatants, a term not recognized in international law. *Id.* The position of the Bush administration was further eroded by its cynical assertions during the invasion of Iraq that U.S. soldiers were entitled to the full protection of the Geneva conventions. *See, e.g., U.S. General Says No Access to American POWs*, Reuters, *available at* http://abcnews.go.com/wire/US/reuters20030330_158.html (Mar. 30, 2003).

12. *Report: U.S. Names Iraqis to Face War Crimes Trial*, Reuters, *available at* http://www.abcnews.go.com/wire/Politics/reuters20030316_88.html (Mar. 16, 2003). For one of the officials named in the list, the administration reportedly gave as grounds for seeking the prosecution that the individual was accused of "hiding weapons of mass destruction. *Id.*

13. *See America Image Further Erodes, Europeans Want Weaker Ties But Post-War Iraq Will Be Better Off, Most Say*, The Pew Research Center, *available at* http://people-press.org/prints.php3?PageID=680 (Mar. 18, 2003).

Unfortunately, this problem has profound implications for the continued existence of the international legal system. It is a problem that is difficult to frame precisely, but one that pervades domestic public opinion about U.S. foreign policy Author Ariel Dorfman describes the problem as such:

> The history of America, and the very particular sort of empire that it became, seems to have allowed the process of the infantilization of the adult to be accompanied by images or intimations of innocence which were uniquely powerful and all its own. America has been interpreted, time and again, as the domain of innocence. In a sense, a more extraordinary feat than changing thirteen colonies into a global empire in less than two centuries is that the U.S. managed to do it without its people losing their basic intuition that they were good, clean, and wholesome. Its citizens never recognized themselves as an empire, never felt bound by the responsibility (or the moral corruption) that comes with the exercise of so much power. The Americans wanted the spoils of empire, but were not ready to assume the excruciating dilemmas that went with the knowledge of what they were imposing upon others. They desired power which can only come from being large, aggressive, and overbearing; but simultaneously only felt comfortable if other people assented to the image they had of themselves as naive, frolicsome, unable to harm a mouse. Unlimited frontiers, abundance and plenty, the feeling of being reborn at every crossroads, led to the belief that growth and power need not relinquish, let alone destroy, innocence. Whatever obstructed and contradicted this vision was painted over by a curious sort of memory that reshaped the recent and receding past into myth as it moved.[14]

In short, the problem is that Americans tend to evaluate their own nation's actions and actors with red, white, and blue-colored glasses.

It is against this tide of sentiment that this Article seeks to move. It attempts to be a counter-narrative to the deeply held but unstated belief among vast numbers of the American public that U.S. government and military officials can never be international criminals because international law really only exists to protect Americans from others. Because the majority of the American public sees the U.S. and its actors as perpetually innocent in deed and in motive, U.S. officials have had license to carry out great many actions that upon further examination might cause great consternation among the informed electorate.

This Article seeks to address a single thread of this grand tapestry of collective denial: Henry Kissinger's role in the killing of East Timorese civilians by the Indonesian military in the mid-1970s.[15] It is no doubt a topic about which a majority of Americans are completely unaware, illustrating Ariel Dorfman's point. Because the extent of Henry Kissinger's role in and responsibility for the death of innocents in East Timor is vastly larger than this Article can possibly hope to reach, the discussion is limited to a few select topics. The topics selected were chosen somewhat arbitrarily but are intended to give a basic foundation to the discussion of the broader topic, that is, holding U.S. officials like Henry Kissinger

14. ARIEL DORFMAN, THE EMPIRE'S OLD CLOTHES 201-02 (1983).

15. *See, e.g.*, CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER 90-91 (2001).

responsible for the international laws they violate.

Section I of this Article briefly addresses Henry Kissinger's history as it relates to the extent and nature of his authority during the relevant periods of time, and it recounts some recent attempts to hold him and other world leaders accountable for past transgressions of domestic and international law Section I also lays forth the currently known evidence supporting the case against Henry Kissinger with respect to his role in East Timor.

Section II begins with an overview of the possible international criminal laws, both statutory and common, that could serve as a basis for trying Henry Kissinger. The bulk of Section II focuses on the body of international law known as "crimes against humanity First, the historical evolution of the doctrine is explored; then some current case law in the field is examined. Finally, Section II attempts to apply the currently known evidence about Henry Kissinger's involvement in East Timor against the common law doctrine of "crimes against humanity

Section III attempts to define the problem of Kissinger and others like him avoiding prosecution as one of a fundamental double standard in international relations. The double standard is enforced by the overwhelming power of the United States vis-a-vis any other country or conceivable bloc of countries. Because the United States is able to project, militarily and culturally its own vision (and version) of justice on a worldwide scale, the views of the American public are uniquely and disproportionately influential in world affairs.

Further, because the American public suffers from an ability to reshape its history in order to (re)confirm its "innocent and harmless" self-conception, the myth of American innocence becomes the accepted and acceptable history and version of events. This double standard, it is argued in Section III, seems to have several important implications, many of which are unpleasant, including the possibility of further strife and the use of international law as a tool of oppression.

SECTION I: THE CRIME

> *His own lonely impunity is rank; it smells to heaven. If it is allowed to persist then we shall shamefully vindicate the ancient philosopher Anacharsis, who maintained that laws were like cobwebs: strong enough to detain only the weak, and too weak to hold the strong. In the name of innumerable victims known and unknown, it is time for justice to take a hand.*
>
> Christopher Hitchens, *The Trial of Henry Kissinger*[16]

A. Kissinger s Positions of Power

To understand why the responsibility for foreign policy actions of an entire nation may be laid at the feet of a single leader or a small cadre of leaders, it is

16. *Id.* at xi.

necessary to understand the context in which the actions transpired. More precisely, when assessing his culpability it is important to understand the positions of power held by Henry Kissinger during the relevant years.

Following the hotly contested presidential election of 1968, which saw Richard Nixon claim victory over then Vice President Hubert Humphery, Nixon made Kissinger, *as his very first* appointment, Assistant to the President for National Security Affairs (currently known as the National Security Advisor).[17] In that position, Kissinger "revised and fashioned [the National Security Council apparatus] to serve his needs and objectives."[18]

Sometime in 1969 during Nixon's first official year as president, Kissinger was also appointed as chairman of the "Forty Committee, a position he held until 1976.[19] While not a well publicized decision-making body, and one that has gone through at least three name changes since its inception, it is indeed an actual governmental body and not simply the fiction of conspiracy theorists. The Forty Committee, originally known as the "Special Group" under the Eisenhower administration, was established as a "monitoring or watchdog body to oversee covert operations."[20] President Ford described the Forty Committee as being charged with the task of reviewing "'every covert operation undertaken by our government.'"[21] In sum, "Kissinger may be at least presumed to have had direct knowledge of, and responsibility for" every major American covert operation occurring between 1969 and 1976.[22]

Completing his triumvirate of power positions, Kissinger was sworn in as the 56th Secretary of State on September 22, 1973.[23] Kissinger retained his position as National Security Advisor and his chairmanship of the Forty Committee.[24] He was the first person in U.S. history to "simultaneously [hold] the positions of National Secruity Advis[o]r and Secretary of State."[25] Although Kissinger lost his post as

17. *Id.* at 15 (emphasis in original). The National Security Advisor acts as chairman of the National Security Council, "a position where *every* important intelligence plan" must pass for approval. *Id.* at 78 (emphasis added). Prior to this appointment, Kissinger was an academic who closely allied himself with Republican Nelson Rockefeller. *Id.* at 11. How a "mediocre and opportunist academic" was able to leapfrog to the highest echelons of power is a question open to debate. *Id.* at 16. While the mere fortuity of election events or perseverance of Kissinger s character could be responsible, author Christopher Hitchens has suggested far more sinister machinations were at play in this quite incredible promotion. *Id.* at 6-16.

18. *History of the National Security Council, 1947-1997* The White House Website, *at* http://www.whitehouse.gov/nsc/history.html (last visited Nov. 12, 2003).

19. *See generally* HITCHENS, *supra* note 15, at 16-18 (providing brief history of this quasi-secret government body). *See also History of the National Security Council*, *supra* note 18.

20. HITCHENS, *supra* note 15, at 16.

21. *Id.* at 17

22. *Id.* at 18.

23. *See Henry Kissinger Biography*, Nobel -Museum, *at* http://www.nobel.se/peace/laureates/1973/kissinger-bio.html (last visited Nov. 12, 2003); *see also Henry A. Kissinger, 1973 Nobel Peace Prize Laureate*, at http://www.personal-selection.com/Kissinger.html (last visited Jan. 20, 2004).

24. HITCHENS, *supra* note 15, at 78.

25. *See History of the National Security Council*, *supra* note 18.

National Security Advisor under Ford on November 3, 1975,[26] he later admitted that the loss "in no way diminished his real power."[27] In addition to the Forty Committee, Kissinger also "chaired six NSC-related committees: the Senior Review Group (non-crisis, non-arms control matters), the Washington Special Actions Group (serious crises), the Verification Panel (arms control negotiations), the Intelligence Committee (policy for the intelligence community), and the Defense Program Review Committee (relation of the defense budget to foreign policy aims)."[28] Kissinger's accumulation of many key government positions during his tenure in office led his former aide to describe him as "no less than acting chief of state for national security."[29]

Because Kissinger arguably had more power over U.S. foreign policy decisions than anyone, save for the president himself, it would not be unreasonable to hold him responsible for any major foreign policy decision made when he held these prestigious positions. However, the case against Kissinger goes far beyond mere circumstantial evidence of knowledge and potential control. It is simply important to note that a few leaders can be responsible for the foreign policy actions of an entire country, and more importantly, deserve to stand trial for their commission. Moreover, because the trial of one powerful government official never precludes prosecutors from trying other participants later, there is no sufficient justification for failing to prosecute the most notorious culprits.

B. The Crimes of Kissinger

The allegations of the criminal activity surrounding Kissinger are not new: numerous authors have charged Kissinger, Nixon, and others in the Nixon and Ford administrations with bending and violating international and domestic law in executing their foreign policy decisions.[30] While conventional wisdom holds that Kissinger will never stand trial for both administrations' violations of international law, several recent developments have raised the (remote) possibility of bringing

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26. *Id.*

27. *Id.*

28. *Id. See also* HITCHENS, *supra* note 15, at 38.

29. HITCHENS, *supra* note 15, at 78 (internal quotation marks omitted). Kissinger's National Security Council aide Roger Morris purportedly made the statement. *Id.* Kissinger's real influence within both the Nixon and Ford administrations cannot be adequately understood by a simple recitation of his official positions; his influence over both the presidents and their policies was allegedly immense. *See generally History of the National Security Council*, *supra* note 18 (describing Kissinger as "dominating U.S. foreign policy during the Nixon Presidency, and as keeping "Ford's confidence and unlimited access"). For example, because of Ford's relative inexperience in foreign affairs, he "relied almost exclusively on Kissinger's expertise and advice. *Id.*

30. *See generally* SEYMOUR M. HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE (1983); WILLIAM SHAWCROSS, SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA (1987); ANTHONY SUMMERS, THE ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON (2000); LARRY BERMAN, NO PEACE, NO HONOR: NIXON, KISSINGER, AND BETRAYAL IN VIETNAM (2001); John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990); John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV 1093 (1990).

Henry Kissinger to justice for some of the crimes ascribed to him.

The first development was Great Britain's decision to allow General Pinochet to be extradited to Spain on torture charges and to deny him diplomatic immunity as a former head of state.[31] Although Pinochet was later released before facing the extradition because of severely declining health, the precedent justifying efforts to bring other architects of atrocity was firmly established by the British House of Lords.[32]

Since the Pinochet case, several countries and aggrieved families have taken an interest in bringing Kissinger before a court to answer for his actions. While Kissinger was vacationing in France, a magistrate summoned him on May 29 2001 to answer questions about his involvement in and knowledge of Operation Condor.[33] Kissinger left his hotel that very day surrounded by bodyguards and refused to answer the magistrate's questions;[34] the U.S. Embassy later informed the French that Kissinger was "too busy" to answer questions about his involvement.[35] The U.S. Embassy also told the French government that if they wanted to question Kissinger, they should have used diplomatic channels rather than serving a summons on the Former Secretary of State at his hotel.[36] Apparently the French magistrate had made such a request of Washington in 1999 but received no response.[37]

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31. For a full background on this case, *see* Melinda White, *Pinochet, Universal Jurisdiction, and Impunity*, 7 SW J. L. & TRADE AM. 209 (2000). Kissinger has essentially admitted that the Pinochet precedent opened the door to the possibility of other former leaders being held to answer for their prior transgressions of international law. *See* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug., 2001, at 86.

32. *See id.* at 215-16. Another development was the publication of book by Christopher Hitchens that specifically attempted to lay forth the criminal case against Henry Kissinger. In *The Trial of Henry Kissinger supra* note 15, Hitchens attempted to outline all of the major foreign policy decisions for which Kissinger could be prosecuted. While the book was light on legal analysis, his work does provide useful summary of the current state of the evidence against Kissinger. For criticisms of Hitchens's book, including its sparse legal analysis, *see* Douglass W Cassel, Jr., *Crimes in Print, Not Battle*, CHIC. DAILY L. BULL., Mar. 7, 2001, at 5; Douglass W Cassel, Jr., *Hitchens Hatchet Job*, CHIC. DAILY L. BULL., Mar. 1, 2001, at 5; Douglass W Cassel, Jr., *Grave Charges, Tough Standard*, CHIC. DAILY L. BULL., Feb. 15, 2001, at 5; Faisal I. Chaudhry, *Reviewing the International Law of Accomplice Liability: Henry Kissinger in Pinochet' Chile*, KISSINGER WATCH, Jan. 10, 2002, at 4, *available at* http://www.icai-online.org/xp_resources/icai/kw15.pdf.

33. The magistrate was investigating the alleged kidnapping and murder of five French citizens in Chile by the Pinochet regime. *See* Adam Sage, *Kissinger Summoned by French Magistrate*, TIMES (London), May 30, 2001, at 11. Recently declassified CIA documents alerted the magistrate to the possible connection of Kissinger to the crimes committed by Pinochet. *Id.* "Operation Condor was a coordinated effort in the 1970s by the secret police forces of seven South American dictatorships. The death squads of Chile, Argentina, Brazil, Uruguay, Paraguay, Ecuador, and Bolivia agreed to pool [their] resources to hunt down, torture, murder, and otherwise 'disappear' one another's dissidents. Christopher Hitchens, *The Fugitive*, NATION, June 25, 2001, at 9. Kissinger has been alleged to have heavily supported the covert murders and "disappearances" in South America, himself deeply involved in the covert operations of the CIA as chairman of the Forty Committee. *See id.*

34. Hitchens, *supra* note 33.

35. Sage, *supra* note 33.

36. Hitchens, *supra* note 33.

37. *Id.*

Just days after Kissinger received his summons in France, a judge in Argentina indicated he might also seek to depose Kissinger in another investigation regarding Operation Condor.[38] On September 10, 2001, the family of a slain Chilean military commander brought suit in federal court against Kissinger, Richard M. Helms and other Nixon-era officials for "organizing and directing a series of covert activities that resulted in [the Chilean commander's] assassination."[39] The very next day, a similar suit was filed in Chile alleging Kissinger and associates assisted dictators Augusto Pinochet of Chile and Jorge Videla of Argentina in committing crimes against humanity.[40] Thus, whatever sense of security Kissinger once had about never facing such a prosecution must be wavering.

While most of the legal action has been connected to Kissinger's role in South America, there are several other viable areas of inquiry. Beyond South America, there are Kissinger's policy actions in Indochina and the allegedly illegal bombings of Laos and Cambodia; the political assassination of a democratic leader in Bangladesh; the encouragement of a bloody division of Cyprus by Greece and Turkey; and the slaughter of 300,000 people, mostly civilians, in East Timor.[41] Ironically, Kissinger's alleged crimes in East Timor are probably the least known by the American public and yet are perhaps his most atrocious and those most supported by available evidence.

C. East Timor[42]

On December 7, 1975, Australian journalists picked up this radio broadcast from East Timor: 'The Indonesian forces are killing indiscriminately. Women and children are being shot in the streets. We are all going to be killed. This is an appeal for international help. Please do something to stop this.'"[43] The Indonesian invasion of East Timor commenced on that day resulted in a slaughter of 100,000 East Timorese in the first year alone.[44] Nearly a full third of the population, 200,000 out of a total population of just 650,000, perished in the

38. *Id.*, *see also* Marc Cooper, *Restoring Chile Past*, L.A. TIMES, June 3, 2001, at M6.

39. Bruce Zagaris, *Nixon Administration Officials Sued in Chile and U.S. for Atrocities in Operator* [sic] *Condor* 17 INT'L ENFORCEMENT L. REP. (Nov. 2001).

40. *Id.*

41. All of these incidents and the evidence of Kissinger's responsibility in them are explored in detail in HITCHENS, *supra* note 15.

42. The East Timor Action Network/US is a grassroots political organization fighting to protect human rights in East Timor. It maintains an excellent website at: http://www.etan.org (last visited Nov. 20, 2003).

43. Eric Black, *East Timor Highlights Inconsistent U.S. Policy; Indonesia Invaded the Island with Advance U.S. Knowledge, and U.S.-Supplied Weapons Were Used in the Slaughter of Tens of Thousands*, STAR TRIBUNE (Minneapolis), June 6, 1999, at 19A.

44. *Ford, Kissinger, and the Indonesian Invasion, 1975-76*, *in* NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 62 (Dec. 6, 2001) (William Burr & Michael L. Evans eds.), *at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/ (last visited Nov. 20, 2003) (internal citations omitted throughout) [hereinafter *Ford, Kissinger and the Indonesian Invasion*]; *see also* Ben Kiernan, *Dramatic U-Turn for US and Australia*, BANGKOK POST, May 19, 2002, at 1.

twenty-five year campaign.[45]

1. Background

In April of 1974, Portugal's authoritarian government was overthrown by a leftist military revolt, which consequently encouraged independence movements in the Portuguese colony of East Timor.[46] The new Portuguese government supported a gradual transition to independence for the colony [47] Tucked in the southern edge of the Indonesian archipelago, the tiny island nation was split between two factions. The first faction was an unstable coalition formed in January of 1975 between the Timorese Democratic Union (UDT), with the support of the elites and "senior Portuguese colonial administrators,"[48] and the "vaguely leftist"[49] Revolutionary Front for an Independent East Timor (Fretilin), with a constituency of the "younger Timorese and lower-level colonial officials."[50] While Fretilin had a "more progressive stance toward full independence from Portugal, the common ground between the UDT and Fretilin was the eventual decolonization and independence of East Timor.[51]

The second main faction influencing East Timor was Indonesia and its supporters within East Timor. Amid the power vacuum left by Portugal's political instability and inability to control East Timor,[52] Indonesia graciously filled the void with thoughts of annexing the tiny island nation and making it Indonesia's twenty-seventh province.[53] To this end, the Indonesian government supported the pro-integration Timorese Popular Democratic Association (Apodeti) with financial assistance and propaganda; however, the party never enjoyed much popular support.[54]

With the UDT-Fretilin alliance crumbling in the summer of 1975, Fretilin

45. Black, *supra* note 43; *see also* MICHAEL PARENTI, AGAINST EMPIRE 26-27 (1995) (discussing America's role in East Timor, Indonesia, and other countries as part of an aggressively interventionist foreign policy). Besides outright murder, many of deaths are also attributable to "starvation or disease in [the] camps where the Indonesians had incarcerated [the East Timorese] so the population could be controlled while the military tried to eliminate the remaining resistance. Black, *supra* note 43; *see* Michael Richardson, *How U.S. Averted Gaze When Indonesia Took East Timor* INT'L HERALD TRIB., May 20, 2002, at 2 ("In 1979, three years after Jakarta formally annexed East Timor as an Indonesian province, the U.S. Agency for International Development estimated that 300,000 East Timorese—nearly half the population— had been uprooted and moved into camps controlled by the Indonesian armed forces.").

46. *Ford, Kissinger and the Indonesian Invasion, supra* note 44.

47. *Id.*

48. *Id.*

49. U.S. DEP'T OF STATE, *Briefing Paper: Indonesia and Portuguese Timor* (Nov. 21, 1975), *in* NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 62 (Dec. 6, 2001) (William Burr & Michael L. Evans eds.), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/doc3a.pdf (last visited Nov. 20, 2003) [hereinafter *Briefing Paper: Indonesia and East Timor*].

50. *Ford, Kissinger, and the Indonesian Invasion, supra* note 44.

51. *Id.*

52. HITCHENS, *supra* note 15, at 91.

53. *Ford, Kissinger, and the Indonesian Invasion, supra* note 44.

54. *Id.*

sought control of the government. It evidenced its popular support by winning fifty-five percent in local elections in July of 1975.[55] After a brief military skirmish between Fretilin and UDT supporters (which was largely provoked by Indonesian propaganda),[56] Fretilin gained political and military control of nearly all of East Timor.[57] Despite having control over the country, Fretilin moderated its position on independence. Rather than demanding immediate independence, Fretilin began to advocate an approach similar to the plan of gradual independence it had developed with the UDT [58]

In October of 1975, General Suharto, the dictator of Indonesia and a close U.S. ally, began to grow weary of purely political tactics and experimented with sending "Indonesian special forces to infiltrate secretly into East Timor in an effort to provoke clashes that would provide the pretext for a full-scale invasion."[59] Because the first wave of attacks failed to provoke any response from the West, Indonesia increased the cross-border attacks by its troops "outfitted with American [military] equipment."[60] Although Fretilin petitioned the United Nations (U.N.) and requested that it call for the immediate withdrawal of the invading forces, the Indonesian attacks finally drove Fretilin to unilaterally declare independence on November 28, 1975.[61] On December 7 1975, Indonesia launched a full-scale invasion of East Timor using American supplied weapons almost exclusively [62]

2. A Note About the Evidence

It should be noted at the outset that this Article does not intend to present a full account of the evidence against Kissinger for his alleged crimes in East Timor. In fact, no author could compile such a presentation on any of the violations of law alleged against Henry Kissinger because of the sheer lack of access to the most probative evidence.[63] Upon leaving the State Department, Kissinger made an

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55. *Id.*

56. "The outbreak of civil war disrupted Portuguese plans for orderly decolonization, prompting its officials to retreat from Dili [, East Timor] to the offshore island of Atauro. In effect, Portugal abandoned East Timor. Richardson, *supra* note 45.

57. *Ford, Kissinger and the Indonesian Invasion, supra* note 44.

58. *Id.*

59. *Id.*, *see also* HITCHENS, *supra* note 15, at 91 (discussing how the "infiltration of Indonesian regular units into East Timor" was motivated to subvert the local government); Black, *supra* note 43 (noting that the "CIA reported that Indonesia had sent agents into East Timor to provoke violent incidents so it could claim- as Indonesia soon did claim- that it was intervening to quell a civil war").

60. *Ford, Kissinger and the Indonesian Invasion, supra* note 44.

61. *Id.* Fretilin made the unilateral declaration of independence "apparently in the belief that a sovereign state would have greater success in appealing for help from the United Nations. Richardson, *supra* note 45. According to Jose Ramos-Horta, Fretilin's foreign affairs spokesman at the time, "'The unilateral declaration was an act of desparation, essentially forced upon the leadership of Fretilin in the face of abandonment from everybody.'" *Id.*

62. *Ford, Kissinger, and the Indonesian Invasion, supra* note 44., *see also* HITCHENS, *supra* note 15, at 91; Black, *supra* note 43; Richardson, *supra* note 45.

63. *Ford, Kissinger, and the Indonesian Invasion, supra* note 44; *see also* HITCHENS, *supra* note 15, at xi, 3, 76. "Alistair Hodgett, Amnesty International's American media director, says his agency can do little until the government declassifies reams of information. James Ridgeway, *Manhattan*

"extraordinary bargain"[64] in which he gave his papers to the Library of Congress with the condition that they remain under seal until five years after his death.[65] Thus, what evidence still exists and has not been destroyed by Kissinger remains under lock and key and the world remains unable to uncover the crucial evidence it needs to bring this alleged international criminal to justice.[66]

Because the most penetrating evidence cannot be accessed, this Article can only hope to construct a general outline of facts surrounding Kissinger's involvement in the massacre of one-third of East Timor's population. However, the existing evidence does seem compelling enough to justify an extended investigation into the matter accompanied by the declassification of more documents on the subject.[67] Although an international body or foreign state would probably require substantial evidence before indicting a former head of state or high ranking official, the currently available evidence appears at least convincing enough to proceed with further investigation,[68] including the declassification and release of all relevant documents on the matter.[69] The key implication of observing

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Milosevic, VILLAGE VOICE, Aug. 21, 2001, at 34.

64. HITCHENS, *supra* note 15, at 76.

65. *See* Kissinger v. Reporters Comm. for Freedom of the Press, 455 U.S. 136, 141 (1980). In 1980, the United States Supreme Court effectively placed the documents held at the Library of Congress outside the reach of the American public, in whose name they were created. *See generally id.* The documents "include authentic telephone transcripts of virtually every important meeting [Kissinger] had. Scott Armstrong, *Forum Discussion: Regarding Henry Kissinger* Feb. 22, 2001, *available at* http://www.harpers.org/RegardingHenryKissinger.html.

66. HITCHENS, *supra* note 15, at xi. The impossibility of building case against Kissinger without access to these documents is amply demonstrated by the problems encountered by the Federal Bureau of Investigation in its

> ongoing investigation of General Pinochet. The FBI has been pursuing this more actively than has been publicly reported. But even public reports acknowledge that there's now enough information to indict General Pinochet in the United States. However, the best evidence is in the Library of Congress. The FBI is getting some access to that evidence, but it has to negotiate with Henry Kissinger's lawyers. These are government records needed in a criminal investigation for which the United States government has to negotiate access.

Armstrong, *supra* note 65.

67 The National Security Archive at George Washington University has been active in locating documents relating to the Indonesian invasion of East Timor and the U.S.'s role in it. Through the Freedom of Information Act, the National Security Archive was able to get two key pieces of evidence declassified by the Gerald R. Ford Library on December 6, 2001. The National Security Archive was also able to find several other crucial documents in the National Archive. All of the documents are available from its website at http://www.gwu.edu/~nsarchiv/ (last visited Jan. 20, 2004). The National Security Archive was also able to obtain two memoranda related to Kissinger's activities in South America in December 2003. *See* Duncan Campbell, *Kissinger Approved Argentinian 'Dirty War* GUARDIAN (London), Dec. 6, 2003, at 23.

68. Following 1999 outburst of violence in East Timor and the subsequent intervention by U.S. troops, human rights commission called on the U.N. to set up war crimes tribunal, and the human rights group East Timor Action Network urged the U.N. to extend the tribunal's jurisdiction to the alleged crimes by Kissinger. Ridgeway, *supra* note 63.

69. The claim that these papers cannot be released due to national security concerns rings particularly hollow. A full quarter of a century has passed since the events that gave rise to these State Department and National Security documents occurred. Any claim that the documents contain "sensitive material" must be treated with skepticism; the documents should be released, in whatever

that the most relevant and revealing evidence is under lock and key is that the "insufficient evidence" argument cannot be maintained. Until access to that evidence is allowed, any dismissal of Kissinger's culpability for a lack of evidence would be hasty and premature.

3. The Evidence Against Kissinger

It is initially important to note that President Ford and Secretary of State Kissinger actually visited General Suharto in Jakarta on December 6, 1975, the day prior to the full-scale invasion.[70] It is also important to note that Kissinger and Ford were fully apprised of the situation in East Timor and were well aware of General Suharto's intentions for the region as far back as July of 1975.[71]

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redacted form is necessary to protect the perceived national security interest, and yet still allow for full accounting of Kissinger's crimes. Moreover, as former Kissinger aide Roger Morris has aptly stated:

> In my experience very, very few of the redacted documents that are withheld from the American public or Congress or from history concern genuine matters of national security. It would be hard to estimate, but I would say 90 to 95 percent of the secrets kept by the American government are secrets of expedience and political convenience, usually attendant on the administration in power, but sometimes on the reputations of people who are still powerful, such as Henry Kissinger, so that his successors would in their own interest, of course, and as part of the club mentality that obtains here, try to prevent the release of incriminating documents. This is, as a famous governor of ours in New Mexico once said, "a whole box full of Pandoras. Once you start opening this box, culpability, as I said earlier, does not stop with Henry Kissinger. The foreign policy establishment, and by larger extension the American political establishment, has very great stake in the maintenance of these secrets. And Henry's secrets curl far beyond murder and mayhem and genocide and great crimes of state. They curl back to corporate and other collusions that are with us even today. Ultimately, what's at stake here is not the national security, but national profit. And a good deal of money was made. The foundation for the current oligarchy that prevails in American policy today foreign and domestic was laid during the Nixon years. So these are very momentous matters, but don't let anybody tell you that it's authentic national security. That's nonsense. This is self-protection. But until we change our methods of governance, you're stuck with it.

Roger Morris, *Forum Discussion: Regarding Henry Kissinger* Feb. 22, 2001, *available at* http://www.harpers.org/RegardingHenryKissinger.html.

70. *See* HITCHENS, *supra* note 15, at 91; *see also* U.S. DEP'T OF STATE, *Secretary of State Henry A. Kissinger Daily Schedule* (Dec. 5 and 6, 1975), *in* NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 62 (Dec. 6, 2001) (William Burr & Michael L. Evans eds.) *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/doc5.pdf (last visited Nov. 20, 2003); U.S. DEP'T OF State, *Memorandum from Secretary of State Henry A. Kissinger to President Ford: Your Visit to Indonesia* (Nov. Dec., 1975), *in* NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 62 (Dec. 6, 2001) (William Burr & Michael L. Evans eds.), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/doc3.pdf (last visited Nov. 20, 2003); *Briefing Paper· Indonesia and Portuguese Timor supra* note 49.

71. A recently declassified Memorandum of Conversation, detailing meeting between President Ford, General Suharto, Kissinger, and others, shows that American officials were cognizant of Indonesia's military ambitions in East Timor and expressed no reservations about the impending invasion. At July 5, 1975 meeting between General Suharto and President Ford, the following exchange occurred:

On December 6, 1975, President Ford and Secretary of State Kissinger met General Suharto in Jakarta in a brief one-day stopover following a trip to Beijing.[72]

> *Suharto*: The third point I want to raise is Portuguese decolonization. Starting with our basic principle, the new Constitution of 1945, Indonesia will not commit aggression against other countries. So Indonesia will not use force against the territory of other countries. With respect to Timor, we support carrying out decolonization through the process of self-determination. In ascertaining the views of the Timor people, there are three possibilities: independence, staying with Portugal, or to join Indonesia. With such a small territory and no resources, an independent country would hardly be viable. With Portugal it would be a big burden with Portugal so far away. If they want to integrate into Indonesia as an independent nation, that is not possible because Indonesia is one unitary state. *So the only way is to integrate into Indonesia.*
>
> *President* [Ford]: Have the Portuguese set a date yet for allowing the Timor people to make their choice [about whether to become independent, remain with Portugal, or integrate into Indonesia]?
>
> *Suharto*: There is no set date yet, but is is [sic] agreed in principle that the wishes of the people will be sought. *The problem is that those who want independence are those who are Communist-influenced. Those wanting Indonesian integration are being subjected to heavy pressure by those who are almost Communists.* I want to assert that Indonesia doesn't want to insert itself into Timor self-determination, *but* the problem is how to manage the self-determination process with majority wanting unity with Indonesia. These are some of the problems I wanted to raise on this auspicious meeting with you.
>
> *President*: I greatly appreciate the chance to learn your views. I would like to mention OPEC.

U.S. DEP'T OF STATE, *Memorandum of Conversation between Presidents Ford and Suharto* (July 5, 1975), at 6, *in* NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 62 (Dec. 6, 2001) (William Burr & Michael L. Evans eds.), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/doc1.pdf (last visited Nov. 20, 2003) (emphasis added) [hereinafter *Memorandum of Conversation between Presidents Ford and Suharto*].

Although Kissinger was not present at this exchange and only later joins the meeting, it is important because it proves three things (Kissinger was no doubt well aware of its basic content). First, that despite Suharto s official declarations that he did not intend to invade East Timor, he was clearly hedging in that direction. He outlines the possible choices for the East Timorese people and then decrees that the "only way is to integrate [East Timor] into Indonesia. *Id.* Despite Suharto's claim that the pro-integration forces were supported by a majority of the population, Kissinger and Ford must have known this was not the case following the local elections held that month that clearly demonstrated the pro-independence Fretilin party enjoyed not only a plurality but clear majority of popular support. *See* text accompanying *supra* note 61.

Second, that if Kissinger and Ford truly believed Suharto had no plans for an armed invasion in East Timor as he stated, they should have questioned Suharto's veracity after it became known to them that he was ordering armed invasions of the country in the fall of 1975. *See Ford, Kissinger and the Indonesian Invasion*, *supra* note 44; *see also* HITCHENS, *supra* note 15, at 91; Black, *supra* note 43; *supra* note 59.

Third, the explicit reason for not allowing the pro-independence movement to succeed even if it had won the majority of support in democratic elections was that Fretilin was "Communist-influenced" and "almost communist. *See Memorandum of Conversation between Presidents Ford and Suharto, supra see also Briefing Paper· Indonesia and Portuguese Timor supra* note 49 (calling Fretilin and the independence movement "vaguely leftist") Thus, the underlying reason for a possible Indonesian invasion was to overthrow duly elected government solely because of its member's *political* views.

72. *Ford, Kissinger and the Indonesian Invasion*, *supra* note 44.

It is during this meeting that Kissinger and Ford allegedly gave the "green light" to General Suharto to commence his invasion of East Timor.[73] The issues raised are central to any case against Kissinger: did Kissinger and Ford have previous, credible knowledge of the impending invasion, and, if so, what were their policy actions following disclosure of the information? For his part, Kissinger has also understood that this is a crucial issue in his defense and has taken great care to claim that he had no real knowledge about Indonesia's planned attack.[74] Kissinger has in the past said: "[East] Timor was never discussed with us when we were in Indonesia. At the airport as we were leaving, the Indonesians told us that they were going to occupy the Portuguese colony of Timor. It was literally told to us as we were leaving."[75]

However, newly uncovered State Department documents directly refute this statement. A recently declassified State Department telegram[76] containing the transcripts of the December 6, 1975 meeting between General Suharto, President Ford, and Secretary of State Kissinger specifically rebuts Kissinger's claim that he was uninformed about the planned invasion:[77]

> 39 [Suharto-] I would like to speak to you, Mr. President, about another prbelm [sic], Timor. In the latest Rome agreement the Portuguese government wanted to invite all parties to negotiate. Similar efforts were made before but Fretilin did not attend. After the Fretilin forces occupied certain points and other forces were unable to consolidate, Fretelin [sic] has declared its independence unilaterally. In consequence, other parties declared thei [sic] intention of integrating with Indonesia. If this continues it will prolong the suffering of the refugees and increase the instability in the area.

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73. *Id.* Philip Liechty, a former CIA agent in Indonesia at the time of the invasion, has commented on film that General Suharto "was explicitly given the green light to do what he did" by President Ford and Kissinger. Anthony Lewis, *Abroad at Home; The Hidden Horror* N.Y TIMES, Aug. 12, 1994, at A23.

74. On July 11 1995, Kissinger spoke at an event in New York sponsored by the Learning Annex. After his talk, he took questions from the audience. Members of the East Timor Action Network present at the event rose to question Kissinger about his policy toward East Timor. East Timor Action Network, *Ask Kissinger About East Timor· Confronting Henry Kissinger* (Aug. 1995), *at* http://etan.org/news/kissinger/ask.htm (last visited Jan. 20, 2004). The transcript is also reprinted in HITCHENS, *supra* note 15, at 93-98.

75. HITCHENS, *supra* note 15, at 94; *see also* Richardson, *supra* note 45.

76. U.S. DEP'T OF STATE, *Telegram from the American Embassy in Jakarta to Secretary of State Henry A. Kissinger* (Dec. 6, 1975), *in* NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 62, Dec. 6, 2001 (William Burr & Michael L. Evans eds.), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/doc4.pdf (last visited Nov. 20, 2003) [hereinafter *Telegram from the American Embassy in Jakarta to Secretary of State Henry A. Kissinger*].

77 Other documents also show that Kissinger had advance knowledge of the planned invasion. One in particular has been cited in *Ford, Kissinger, and the Indonesian Invasion, supra* note 44. It is State Department cable Kissinger received on December 4th or 5th "suggesting the Indonesians had plans to invade East Timor. *Id.*, *see also id.* at fn. 25. The cable itself, *Plans for Indonesian Invasion of East Timor* is still classified, but it is cited by its title and number in list of cables Kissinger received while on his trip to East Asia. The list is available at National Archives, Record Group 59, Executive Secretariat Briefing Books, 1958-76, Box 227 President Ford's Trip to the Far East (Follow-Up) Nov./Dec. 1975.

40. Ford- The four other parties have asked for integration?

41. Suharto- Yes, after the UDT, Indonesia found itself facing a fate accompli [sic]. It is now important to determine what we can do to establish peace and order for the present and the future interest of the security of the area nd [sic] Indonesia. These are some of the considerations we are now contemplating. We want your understanding if we deem it necessary to take rapid or drastic action.

42. Ford- We will understand and will not press you on the issue. We understand the problem you have and the intentions you have.

43. Kissinger- You appreciate that the use of US-made arms could create problems.

[44.] Ford- We could have technical and legal problems. You are familiar, Mr. President, with the problems we had on Cyprus although this situation is different.

45. Kissinger- It depends on how we construe it: whether it is in self defense or is a foreign operation. It is important that whatever you do succeeds quickly. We would be able to influence the reaction in America if whatever happens happens after we return. This way there would be less chance of people talking in an unauthorized way. The president will be back on Monday at 2:00 PM Jakarta time. We understand your problem and the need to move quickly but I am only saying that it would be better if it were done after we returned.

46. Ford- It would be more authoritative if we can do it in person.

47 Kissinger- Whatever you do, however, we wil [sic] try to handle in the best way possible.

48. Ford- We recognize that you have a time factor. We have merely expressed our view from our particular point of view.

49. Kissinger- If you have made plans, we will do our best to keep everyone quiet until the president returns home.

50. [Kissinger-] Do you anticipate a long guerilla war there?

51 Suharto- There willprobably [sic] be a small guerilla war. The local kings are important, however, and [sic] they are on our side. The UDT represents former government officials and Fretelin [sic] represents former soldiers. They are infected the same as is the Portuguese army with communism.[78]

78. *Telegram from the American Embassy in Jakarta to Secretary of State Henry A. Kissinger*

This is an important piece of evidence because it shows that Kissinger and Ford: (1) had knowledge of the impending invasion; (2) had the opportunity to object to an invasion they knew would involve the illegal use of American supplied military equipment; and (3) failed to express any objection or raise reservations about the invasion or about how it would be carried out.[79] It also shows Kissinger had plans to deceive the American people (and presumably Congress) about the nature of the invasion. This evidence is crucial because American law forbade the use of U.S.-supplied weapons by recipient governments for any purposes but self-defense and required State Department officials to stop all shipments of arms to any country offending this law.[80]

This last point is particularly important in the case against Henry Kissinger· first, as Secretary of State, he had the duty to uphold American law and halt arms shipments to Indonesia after he learned of its planned invasion of East Timor, a duty he clearly breached; second, it demonstrates that as a direct result of his illegal acts, potentially hundreds-of-thousands of Timorese were massacred.[81] However, Kissinger's culpable acts extend beyond mere omissions to act and in fact include affirmative acts to deceive Congress about the invasion in East Timor and about American arms shipments to Suharto s military machine.[82]

After the Indonesian invasion of East Timor, Kissinger, following the plan he laid out in the December 6, 1975 meeting with Suharto, worked diligently to continue the flow of weapons to the Indonesian military After subordinate officials in the State Department wrote a memorandum recommending that the arms shipments to Indonesia be halted pursuant to American law, and the memorandum was cabled to Kissinger while he was abroad, Kissinger, upon his return, discussed the memorandum in a meeting with other State Department officials:

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supra note 76.

79 According to the CIA, Suharto was reluctant to invade for fear of losing U.S. military aid. Black, *supra* note 43.

80. *See* HITCHENS, *supra* note 15, at 100-01; Black, *supra* note 43; *Ford, Kissinger and the Indonesian Invasion, supra* note 44; Richardson, *supra* note 45.

81. A 1977 congressional subcommittee investigating the arms shipments to Indonesia found that "U.S. supplied weapons to Indonesia roughly doubled between 1975 and 1978, the period when the killing in East Timor was at is peak. Black, *supra* note 43. While it is impossible to know if the Indonesians could have carried out their invasion without new infusion of military equipment from the U.S., it is particularly interesting to note that in the meeting of December 6, 1975, General Suharto asked for United States assistance in the construction of an M-16 rifle plant, complaining that defending his territory "requires substantial small arms. *Telegram from the American Embassy in Jakarta to Secretary of State Henry A. Kissinger supra* note 76. Kissinger responded that the United States would "favor" such a plan and President Ford indicated the United States would be "enthusiastic about such a concept. *Id.* Also, because of Indonesia's need for U.S. financial support, it was known that the U.S. could use the threat of withdrawing aid to exert substantial leverage over Indonesian policy. *See supra* note 79

82. While it is easy to confuse violations of American law and international law in this matter, this Article attempts to draw firm line between the two. It is important to stress that Kissinger's possible violations of American law do not necessarily make him culpable for international crimes. It is also important, however, to have full understanding of all of Kissinger's actions in this matter before considering the legal requirements of international criminal law.

SECRET/SENSITIVE
MEMORANDUM OF CONVERSATION

Participants: The Secretary [Henry Kissinger;] Deputy Secretary Robert Ingersoll[;] Under Secretary for Political Affairs Joseph Sisco[;] Under Secretary Carlyle Maw[;] Deputy Under Secretary Lawrence Eagleburger[;] Assistant Secretary Philip Habib[;] Monroe Leigh, Legal Advisor[;] Jerry Bremer, Notetaker[.] Date: December 18, 1975 Subject: Department Policy

The Secretary· I want to raise a little bit of hell about the Department's conduct in my absence. Until last week I thought we had a disciplined group; now we've gone to pieces completely. Take this cable on East Timor. *You know my attitude and anyone who knows my position as you do must know that I would not have approved it.* The only consequence is to put yourself on record. It is a disgrace to treat the Secretary of State this way What possible explanation is there for it? I had told you to stop it quietly. What is your place doing, Phil, to let this happen? It is incomprehensible. It is wrong in substance and in procedure. It is a disgrace. Were you here?

Habib: No.

Habib: Our assessment was that if it was going to be trouble, it would come up before your return. And I was told they decided it was desirable to go ahead with the cable.

The Secretary· Nonsense. I said do it for a few weeks and then open up again.

Habib: The cable will not leak.

The Secretary· Yes it will and it will go to Congress too and then we will have hearings on it.

Habib: I was away. I was told by cable that it had come up.

The Secretary· That means that there are two cables! And that means twenty guys have seen it.

Habib: No, I got it back channel—it was just one paragraph double talk and cryptic so I knew what it was talking about. I was told that Leigh thought that there was a legal requirement to do it.

Leigh: No, I said it could be done administratively. It was not in our interest to do it on legal grounds.

Sisco: We were told that you had decided we had to stop.

The Secretary: Just a minute, just a minute. You all know my view on this. You must have an FSO-8 [Foreign Service Officer, class eight] who knows it well. It will have a devastating impact on Indonesia. There's this masochism in the extreme here. *No one has complained that it was aggression.*

Leigh: *The Indonesians were violating an agreement with us.*

The Secretary: The Israelis when they go into Lebanon—when was the last time we protested that?

Leigh: That's a different situation.

Maw: It is self-defense.

The Secretary: *And we can't construe Communist government in the middle of Indonesia as self-defense?*

Leigh: Well

The Secretary: Then you're saying that arms can't be used for defense.

Habib: No, they can be used for the defense of Indonesia.

The Secretary: On the Timor thing, that will leak in three months and it will come out that Kissinger overruled his pristine bureaucrats and *violated the law.*

How many people in L [the legal adviser's office] know about this?

Leigh: Three.

Habib: There are at least two in my office.

The Secretary: Plus everybody in the meeting so you're talking about not less than 15 or 20. You have a responsibility to recognize that we are living in a revolutionary situation. Everything on paper will be used against me.[83]

The Secretary: It cannot be that our agreement with Indonesia says that the arms are for internal purposes only. I think you will find that it says that they are legitimately used for self-defense. There are two problems. The merits of the case which you have a duty to raise with me. The second is how to put these to me. But to put it into a cable 30 hours before I return, knowing how cables are handled in this building, guarantees that it will be a national disaster and that transcends whatever Deputy Legal Adviser George Aldrich has in his feverish mind. *I took care of it with the administrative thing by ordering Carlyle Maw to not make any new sales.* How will the situation get better in six weeks?

Habib: *They may get it cleaned up by then.*

The Secretary: The Department is falling apart and has reached the point where it disobeys clear-cut orders.

Habib: We sent the cable because we thought it was needed and we thought it needed your attention. This was ten days ago.

The Secretary: Nonsense. When did I get the cable, Jerry?

Bremer: Not before the weekend. I think perhaps on Sunday.

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83. Irony noted.

The Secretary: You had to know what my view on this was. No one who has worked with me in the last two years could not know what my view would be on Timor.

Habib: Well, let us look at it—talk to Leigh. There are still some legal requirements. I can't understand why it went out if it was not legally required.

The Secretary: Am I wrong in assuming that the Indonesians will go up in smoke if they hear about this?

Habib: Well, *it s better than a cutoff. It could be done at a low level.*

The Secretary: We have four weeks before Congress comes back. That's plenty of time.

Leigh: *The way to handle the administrative cutoff would be that we are studying the situation.*

The Secretary: And 36 hours was going to be a major problem?

Leigh: We had a meeting in Sisco's office and decided to send the message.

The Secretary: I know what the law is but how can it be in the US national interest for us to give up on Angola and kick the Indonesians in the teeth? Once it is on paper, there will be a lot of FSO-6's who can make themselves feel good who can write for the Open Forum Panel on the thing even though I will turn out to be right in the end.

Habib: The second problem on leaking of cables is different.

The Secretary: No, it's an empirical fact.

Eagleburger: Phil, it's a fact. You can't say that any NODIS [most restricted distribution cable] will leak but you can't count on three to six months later

someone asking for it in Congress. If it's part of the written record, it will be dragged out eventually

The Secretary: You have an obligation to the national interest. I don't care if we sell equipment to Indonesia or not. I get nothing from it. I get no rakeoff. But you have an obligation to figure out how to serve your country. The Foreign Service is not to serve itself. The Service stands for service to the United States and not service to the Foreign Service.

Habib: I understand that that's what this cable would do.

The Secretary: The minute you put this into the system you cannot resolve it without a finding.

Leigh: *There only one question. What do we say to Congress if we're asked?*

The Secretary: *We cut it off while we are studying it. We intend to start again in January.*[84]

This key piece of evidence is particularly damaging to Kissinger. First, it shows there was a real effort on the part of lower State Department officials to uphold American law and arms agreements, and that Kissinger was extremely upset by this effort because it directly conflicted with his stated intentions. Second, that the plan to continue supplying weapons to Indonesia, despite the results in East Timor, was a well-considered and specific policy action on his part. Third, that if the issue of use of the weapons by Indonesia became a problem, Kissinger was prepared to call the action self-defense against the "communist government" of East Timor. And finally if Congress investigated the matter, the State Department's "official position" would be that it would cut off the arms supply while it was studying the issue. In fact, the "bogus cutoff never occurred."[85]

These actions show a concerted effort on the part of Kissinger and others in

84. Mark Hertsgaard, *The Secret Life of Henry Kissinger: Minutes of 1975 Meeting with Lawrence Eagleburger* NATION, Oct. 29, 1990, at 473, *available at* http://etan.org/news/kissinger/secret.htm (last visited Jan. 19, 2004) (emphasis added).

85. Black, *supra* note 43. Despite the purported six-month review of whether Indonesia had actually broken United States law by the State Department, weapon shipments already scheduled to go to Indonesia prior to the invasion continued to flow. During the review period, the United States made "four new offers of military equipment sales to Indonesia including maintenance and spare parts for the Rockwell OV-10 Bronco aircraft, designed specifically for counterinsurgency operations and employed during the invasion in East Timor. *Ford, Kissinger, and the Indonesian Invasion*, *supra* note 44; Richardson, *supra* note 45.

the State Department to deceive Congress about the arms shipments and the invasion of East Timor, and to aid and abet the Suharto regime in its massacre there. This conspiracy to continue the arms shipments, including weapons specifically used against the Timorese population, continued after the initial invasion. Again, Kissinger was a major player in this endeavor. In a July 17 1976 State Department staff meeting, the issue of whether the United States should accept an invitation by the Indonesian government to send a diplomatic representative with a delegation of the Indonesian Parliament to East Timor arose:

> Secretary Kissinger: Why is it in our interest to [send a diplomatic representative]? I'm just trying to understand the rationale.
>
> Mr. Miller [an adviser from the Bureau of East Asian and Pacific Affairs]: Well, I don't think, sir, we think in terms of it weakening the Indonesians in Timor; but it's trying to keep, let's say, Congressional sentiment with regard to Indonesia from being rekindled—which we think is a fairly satisfactory [sic] condition.
>
> Mr. Habib: There's no need to take this action. The Indonesians are trying to get an international—and especially U.S. and other blessing [sic] – before they've done it. Let them go ahead and do what they've been doing. We have no objection. They're quite happy with the position that we have taken. *We've resumed, as you know, all of our normal relations with them; and there isn't any problem involved.*
>
> Secretary Kissinger: Not very willingly-
>
> Mr. Habib: Sir?
>
> Secretary Kissinger: Not very willingly. *Illegally and beautifully.*[86]

Again, this revealing piece of evidence helps unravel facts and assists in building the case against Kissinger. It is crucial to note that Kissinger himself admits that he and the State Department for which he was responsible broke domestic law by continuing the arms shipments to Indonesia and resuming normal relations with the murderous Suharto regime. The fact that he is beamingly proud of this accomplishment is perhaps the most despicable aspect of the entire case.

To briefly summarize the evidence against Kissinger on the issue of the Indonesian invasion of East Timor, it can at least be argued that there is a credible case against Kissinger for materially assisting General Suharto in the murder of nearly one-third of East Timor's population. He knew about the planned invasion and did nothing to stop the Indonesians from illegally using American-supplied

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86. U.S. DEP'T OF STATE, *Transcript of Staff Meeting* (June 17, 1976), *in* NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 62 (Dec. 6, 2001) (William Burr & Michael L. Evans eds.), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/doc6.pdf (last visited Nov 20, 2003) (emphasis added).

weapons to carry out the attack. Furthermore, although it was his legal duty to inform Congress of the invasion and recommend suspending arms transfers to Indonesia following the attack, he not only failed to fulfill that duty but also affirmatively assisted in executing a plan that did just the opposite. As a result of his failure to object to the planned invasion, it is arguable that tens-of-thousands perished in the ensuing attack. Moreover, as a result of his deceit to Congress and his actions continuing the arms flow to Suharto, hundreds-of-thousands of Timorese were killed. While these conclusions may be fairly debatable, what is not debatable is that there is at least a plausible question about whether the charges are accurate. While the existing evidence may or may not be adequate to support an indictment, there is clearly enough on Kissinger to justify opening the stacks of boxes containing the documents that could verify his culpability The fact that Kissinger does not want the documents declassified only seems to justify the position *a fortiori*.

SECTION II: THE CRIME DEFINED

> *While some aspects of the law relating to crimes against humanity remain ambiguous, that law core principle is both clear and widely accepted: atrocious acts committed on a mass scale against racial, religious, or political groups must be punished.*
>
> Diane F Orentlicher, *Settling Accounts*[87]

While there are several legal frameworks by which to analyze Kissinger's deeds, including the possibility of private action in domestic courts,[88] this Article focuses exclusively on the failure to bring Kissinger to justice for his alleged violations of international law. Though several possible methods of bringing perpetrators of international crimes to justice are available, this Article will only discuss customary international law and specifically the doctrine of "crimes against humanity

A. International Criminal Law

While the title of this section implies that there is a cohesive body of criminal and human rights law at the international level, this implication would be inaccurate. This area of law is better characterized as a patchwork of codified, narrowly tailored laws that protect basic human rights. Underlying this framework of positive law is customary international law, acting as an imperfect net to catch the crimes that slip through the patchwork or as an additional penalty where specific conventions are also applicable.[89] The various precedents set by the

87 Diane F Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime*, 100 YALE L.J. 2537, 2594 (1991).

88. *See* Zagaris, *supra* note 39.

89. Indeed, the *Restatement (Third) of Foreign Relations Law of the United States* explicitly

Nuremberg trials are the primary source of customary international law, more commonly referred to as "crimes against humanity."[90]

1 Human Rights Conventions[91]

Since World War II, various coalitions of the international community have agreed to adhere to a number of conventions aimed at protecting against certain human rights violations. For example, in 1951 the Convention on the Prevention and Punishment of the Crime of Genocide entered into force three years after it was adopted by the United Nation's General Assembly.[92] In 1966 the International Covenant on Civil and Political Rights followed,[93] as did the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987.[94] The United States has been laggard in approving and enforcing these conventions; it began enforcing the Genocide Convention as late as 1989 the Convention on Civil and Political Rights in 1992, and the Torture Convention in 1994.[95]

Another set of applicable positive law, at least in the context of armed conflict, is the various war crimes conventions,[96] typified by the Geneva Conventions of 1949.[97] As the names of these conventions imply, they seek to

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recognizes customary international law as source of governing law. It indicates that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones" any one of a list of enumerated crimes, including genocide, slavery, torture, racial discrimination, or any other "consistent pattern of gross violations of internationally recognized human rights. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986) (defining "Customary International Law of Human Rights"). While the statute only refers to the acts of states, it is interesting to note that the comments to the restatement indicate that there is a presumption that the section has been violated if such enumerated acts are tolerated and go unpunished by state, especially when the perpetrators are state officials. *Id.* § 702 cmt. b. However, others argue that customary international law fails to provide any recognizable legal standards and is little more than "utopian vaporings. ROBERT H. BORK, COERCING VIRTUE 18-19 (2003). Bork accuses American scholars of employing international law as a "weapon in the domestic culture war. *Id.* at 21. To Bork, "[i]nternational law is little more than organized hypocrisy. *Id.* at 29 Moreover, Bork argues that the "entire enterprise of controlling armed force by 'law' accomplishes little other than teaching disrespect for law and serving as the basis for accusations of lawlessness after the fighting begins. *Id.* at 39.

90. *See* Orentlicher, *supra* note 87, at 2585-92.

91. For a brief overview of various international human rights agreements, *see* Orentlicher, *supra* note 87 at 2563-85.

92. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951) [hereinafter "Genocide Convention"].

93. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter "Covenant on Civil and Political Rights"].

94. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 112, 23 I.L.M. 1027, *as modified* 24 I.L.M. 535 (*entered into force* Jun. 26, 1987, *for the United States* Nov. 20, 1994) [hereinafter "Torture Convention"].

95. U. S. DEP'T OF STATE, TREATIES IN FORCE 387, 392, 472 (2000), *available at* http://www.state.gov/www/global/legal_affairs/tifindex.html (last visited Nov. 20, 2003).

96. War crimes are defined as "violation[s] of international law governing war. Major Christopher Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F.L. REV. 215, 218 (2001).

97 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed

protect the defenseless, the wounded, non-combatants, and prisoners of war from grave human rights abuses by warring nations or factions.[98] While both international and domestic courts have defined "war crimes" by looking to both codified agreements and customary law,[99] and commentators have argued that the Geneva Conventions are themselves customary law,[100] this Article draws a distinction between codified war crimes[101] and crimes against humanity as defined and recognized by common law practices.[102]

Although there is significant overlap between the coverage of war crimes law and the law defining crimes against humanity, professor Aryeh Neier draws two conceptual distinctions between the twin bodies of law [103] First, "crimes against humanity" is a more encompassing concept because it takes into account crimes committed during times of peace, while the concept of "war crimes" is limited to acts committed "in times of armed conflict or occupation."[104] At the same time, the concept of "war crimes" is more encompassing because "it applies to even a single crime committed in violation of the laws of war, regardless of whether that crime was part of a widespread practice,"[105] whereas "crimes against humanity" requires each act to be committed as part of a systematic or widespread practice and often requires that the practice be motivated because of political, ethnic, or religious reasons.[106]

Though the prospect of bringing Kissinger to justice under one of the specific human rights conventions or under the numerous war crimes conventions is

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Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

98. *Id.*

99. Supernor, *supra* note 96, at 218.

100. *See generally* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L. L. 348 (1987).

101. The issue of the Geneva Conventions and their applicability has been hotly debated recently because of the United States military's treatment of captives from the war in Afghanistan. *See* Kenneth Roth, *Bush Policy Endangers American and Allied troops*, INT'L HERALD TRIB., Mar. 5, 2002, at 7· *see also supra* note 8, and accompanying text.

102. While this distinction is artificial and is used only for the purposes of bottling the concept of crimes against humanity in this Article, it is useful to narrow the focus of the concept of crimes against humanity. The risk of failing to make this distinction is the problem of unnecessary redundancy and confusion. An act becomes a crime against humanity because it was also a war crime and thus part of customary law. It is important to note, however, that the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (2) (1986) defines customary law as "a general and consistent practice of states followed by them from sense of legal obligation. It would appear from this definition that all international agreements are a part of customary law, at least insofar as they are actually "followed" in "general and consistent" manner.

103. "Crimes against humanity is simultaneously broader and a narrower concept than war crimes." NEIER, *supra* note 1, at 17

104. *Id.*

105. *Id.* However, some commentators believe that only "grave breaches" of war crimes statutes are actually prosecuted and that perhaps this distinction is illusory. *See* Supernor, *supra* note 96, at 218.

106. NEIER, *supra* note 1, at 17

intriguing, this Article will focus on crimes against humanity as defined by customary law There is an additional reason for this limited focus besides the inherent need to limit the scope of the discussion. Because Kissinger's actions and their consequences for the people of East Timor are the focus of the factual inquiry the doctrine of "crimes against humanity" appears to be a more promising avenue to explore. A reason it is promising is the nature of the tragedy itself: a massacre against a largely defenseless civilian population should not be shoehorned into war crimes law by construing it as an armed conflict. From a rhetorical and conceptual standpoint, assessing Kissinger's guilt under the rubric of "crimes against humanity" simply produces a better result. The extermination of nearly a third of a nation's population *is* a crime against humanity and its architects must be held to the utmost penalty and public scorn.[107]

2. The Inherent Tension between International Law and National Sovereignty

The natural tension between international law and national sovereignty is perhaps nowhere more apparent than in the area of human rights and criminal law The notion that past or present national leaders could be brought up on charges, real or imagined, in another country seems like a destabilizing proposition and one fraught with possibilities for abuse. However, professor Diane Orentlicher stresses that although states are given the first opportunity to try nationals within their own jurisdiction for crimes against humanity, the importance of punishing perpetrators of crimes against humanity justifies extending permissive international jurisdiction over them and "an exception to the bedrock principle of international law—respect for national sovereignty "[108]

Indeed, this principle is recognized by the *Restatement of Foreign Relations Law of the United States* in section 702, which indicates that "[a] government may be presumed to have encouraged or condoned acts [in violation of international customary law] if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators."[109] Thus, a state has the duty to prosecute acts committed by its officials or risk being in violation of customary international law itself.

Furthermore, international law affirmatively requires that states investigate and prosecute crimes against humanity In 1973, the United Nations General Assembly adopted Resolution 3074, proclaiming the "[p]rinciples of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity "[110] The first principle establishes that "crimes against humanity, wherever they are committed, shall be subject to

107 This Article does not intend to imply that war crimes law or other specific human rights conventions would not be a fruitful area of law to investigate if Kissinger were ever to be brought to justice. It simply is outside the bounds of this Article to discuss the merits of such an investigation.

108. Orentlicher, *supra* note 87, at 2593.

109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702, *supra* note 89.

110. G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30 at 78, U.N. Doc. A/9326 (1973), *available at* http://www.un.org/documents/ga/res/28/ares28.htm (last visited Nov. 20, 2003).

investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty to punishment."[111] While the second principle recognizes every state s right to try its own nationals,[112] principle five provides that where there is evidence that a certain individual is guilty of crimes against humanity, that person "*shall* be subject to trial and if found guilty to punishment."[113] Thus, while states are given the right of first refusal to try their own nationals, international law countenances international jurisdiction where a state exercises that right despite contrary evidence.[114]

Moreover, the justification for the very first prosecutions of crimes against humanity at Nuremberg also supports the view that international jurisdiction is permissible where necessary to prosecute grave human rights violations.[115] In those cases, the innovation of crimes against humanity and prosecution of them was justified on natural law grounds. The basic notion was that because crimes against humanity inherently "offended humanity itself," the right to prosecute such crimes on an international level must also inherently exist.[116] Thus, a person who commits crimes against humanity is "'an enemy of all mankind' – over whom any state [can] assert criminal jurisdiction."[117]

While the fear of international prosecution of crimes impinging on national sovereignty is no doubt a real one, the procedural safeguards explicitly written into international law should allay this fear. As long as a state follows the letter and spirit of international law and brings to justice those whose crimes are sufficiently supported by evidence, a state can assure itself that it has not broken international law, and more importantly that its national sovereignty will be the utmost respected.

3. Crimes Against Humanity

a. History

Following World War II, the Nuremberg tribunal was commenced for the purposes of trying and punishing those Nazi officials responsible for the war itself and the grave human rights catastrophe perpetrated prior to and during that conflict.[118] These prosecutions "inaugurated the branch of international law

111. *Id.* at 79.

112. *Id.*

113. *Id.* (emphasis added). Note that the word "shall" indicates the action is mandatory and not permissive.

114. *Compare id. with* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001) (supporting pure universal jurisdiction), *available at* http://www.princeton.edu/~lapa/unive_jur.pdf (last visited Nov. 20, 2003).

115. *See generally* Orentlicher, *supra* note 87, at 2555-60.

116. *Id.* at 2556.

117. *Id.* at 2557

118. *See generally id.* at 2555-60, 2587-90; Opinion and Judgment of May 7, 1997 Prosecutor v. Tadic, Case No. IT-94-1, ¶¶ 618-23 (Int'l Crim. Trib. for the former Yugoslavia 1995), *available at*

recognizing and protecting human rights."[119] These prosecutions also gave rise to a number of new and unique legal innovations, one of which was the recognition of the concept of crimes against humanity.[120] Since the Nuremberg prosecutions, "crimes against humanity" as a legal doctrine has largely languished in the dustbin of history and atrophied from disuse.[121] However, in recent years the doctrine has been revived by the international criminal tribunals authorized by the United Nations for Rwanda and Yugoslavia.[122] Because the doctrine of "crimes against humanity" is defined by customary international law, an examination of the definitions used at Nuremberg and employed by the tribunals for Yugoslavia and Rwanda is an expedient place to begin.[123]

Crimes against humanity as defined by Article 6(c) of the Nuremberg Charter, consisted of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds whether or not in violation of the domestic law of the country where perpetrated."[124] Initially, a few important issues are raised by this seemingly straightforward definition. First, crimes against humanity as the Nuremberg Charter defines them, require a war nexus.[125] Although this was a relatively minor requirement during the Nuremberg prosecutions because the world had recently emerged from the single largest conflict in the history of mankind, this requirement has substantial implications, not only for a possible prosecution of Henry Kissinger, but also for all subsequent prosecutions. Because alleged crimes against humanity in recent times have largely occurred in the context of internal civil disputes, an important question is whether the Nuremberg tribunals properly considered the future impact of the war nexus requirement. Moreover, regardless of the propriety of the nexus requirement at

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http://www.un.org/icty/tadic/trialc2/judgement/index.htm (last visited Nov. 23, 2003).

119. Orentlicher, *supra* note 87, at 2555. Critics of customary law as source of binding norms openly admit that they believe that the Nuremberg trials were not justified by international law, but amounted only to victors' justice. For example, Robert Bork asserts that the "pretense that customary international law justified the [Nuremberg] trials and punishments was just that: a pretense. BORK, *supra* note 89, at 18. For Bork, the trials at Nuremberg were nothing more than "victors determin[ing] the 'law' retroactively. *Id.* at 20. "The only 'law' that is certain and knowable in advance is that the victors will kill or imprison the leaders of the loser, writes Bork. *Id.* at 19.

120. NEIER, *supra* note 1, at 16. However, Robert Bork believes "[i]t is somewhat nauseating to hear of the law forbidding 'crimes against humanity" when it is obvious [to him] that what is involved is not law but politicized force. BORK, *supra* note 89, at 29.

121. *See* Orentlicher, *supra* note 87, at 2559-60.

122. The international criminal tribunals for Yugoslavia and Rwanda each maintain excellent websites. The URLs are http://www.un.org/icty/ and http://www.ictr.org/, respectively.

123. Customary international law is arguably molded and formed by each and every international legal proceeding, or lack thereof. For example, John Hutson, dean of the Franklin Pierce Law Center, recently wrote that the failure of the U.S. to afford the Guantanamo Bay detainees rights under the Geneva Conventions, *see supra* note 11, was itself creating customary international law precedent. John Hutson, *Status Quo Is Not an Option*, NAT'L L.J., Jan. 12, 2004, at 38.

124. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with Annexed Charter of the International Military Tribunal, Aug. 8, 1945, Art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 284 [hereinafter Nuremberg Charter].

125. Orentlicher, *supra* note 87, at 2589.

Nuremberg, a more fundamental question is whether the requirement should continue or be junked as ill considered in light of recent historical developments.[126]

The second major issue raised by the definition is the lack of a requirement that the acts be committed because of race, religion, or for political reasons. Although persecutions on the basis of these characteristics is one method of proving crimes against humanity under the definition above, it is only one alternative among many [127] However, while this was a non-issue at Nuremberg, it has become particularly salient in the context of the international criminal tribunals for Yugoslavia and Rwanda.[128]

b. Recent Developments: Yugoslavia and Rwanda[129]

In May of 1993, the U.N. Security Council passed Resolution 827 establishing a criminal tribunal for the former Yugoslavia and setting forth the jurisdiction of the Tribunal.[130] Under the articles of the Statutes establishing the Tribunal, the Tribunal is handed responsibility for prosecuting "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[131] The Tribunal is charged with investigating and prosecuting individuals in the former Yugoslavia for "[g]rave breaches of the Geneva Conventions of 1949 "[132] "[v]iolations of the laws or customs of war,"[133] genocide,[134] and crimes against humanity [135]

126. *Id.* This issue is further elaborated below. *See infra* notes 136-37, 147-49, and accompanying text.

127. *See* Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 651.

128. This issue is further discussed below. *See infra* notes 149-50, and accompanying text.

129. The statutes of the tribunals for Yugoslavia and Rwanda are particularly helpful in attempting to define the customary law underpinning crimes against humanity for several reasons. First, both Statutes were enacted within the last decade, making them relevant to modern circumstances. Second, because the doctrine of "crimes against humanity was largely ignored after the Nuremberg trials until the Statutes for these two tribunals breathed new life into it, the Statutes for the tribunals are a natural starting point for identifying any post-Nuremberg developments in the doctrine. Lastly, because each of the tribunals have been active in applying the law to numerous defendants, substantial body of jurisprudence has developed to give context to the Statutes and crimes contained therein.

130. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *amended by* S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998), *amended further by* S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/RES/1329 (2000), *amended further by* S. C. Res. 1411, U.N. SCOR, 57th Sess., 4535th mtg., U.N. Doc. S/RES/1411 (2002), *available at* http://www.un.org/icty/basic/statut/stat2000.htm (last visited Nov. 23, 2003) [hereinafter Statutes of the Tribunal for Yugoslavia].

131. Statutes of the Tribunal for Yugoslavia, at Art. 1.

132. *Id.* at Art. 2. Article 2 lists several acts in particular that are enumerated as prohibited by the Geneva Conventions. Some of the enumerated acts include: "(a) willful killing; (b) torture or inhumane treatment [and] (h) taking civilians as hostages. *Id.* at Art. 2(a)-2(h). For a brief description of the Geneva Conventions of 1949, *see supra* notes 96-101, and accompanying text.

133. Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 3. Like Article 2, Article 3 makes all violations of the laws of war actionable under the statutes but goes on to enumerate a few examples. These include use of "poisonous weapons, the destruction and attack of undefended cities, and "plunder of public or private property. *Id.* at Art. 3(a)-3(e).

134. *Id.* at Art. 4. The statutes require the acts enumerated under this article to be undertaken with

In addition to proving one or more of the above delineated crimes, the prosecutor is also required to prove "[i]ndividual criminal responsibility" pursuant to Article 7 of the Statutes.[136] Article 7 specifically addresses the problem of inferiors disclaiming responsibility because of their asserted lack of decision-making control;[137] it also addresses the mirror image of this problem: namely the responsibility of superiors for acts of subordinates.[138] Article 7 also addresses the issue of trying individuals who are government officials or heads of state.[139]

In all three cases, the Statutes of the Tribunal are liberal in casting the net of criminal responsibility, holding subordinates liable for their acts regardless of whether they were following orders from superiors, holding superiors liable for the acts of their subordinates when they knew or had reason to know about the acts, and eliminating the defense of immunity for government officials and heads of state acting in their official capacities. In construing international law broadly Article 7 of the Statutes of the Tribunal preemptively excludes most of the "standard" defenses employed in criminal trials of military and political leaders.

In the Statutes' definition of crimes against humanity, the Tribunal is granted the power and responsibility to prosecute individuals responsible for certain enumerated acts "directed against any civilian population."[140] The enumerated acts are: "(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial, and religious grounds; [and] (i) other inhumane acts."[141] Comparing the definition in the Statutes of the Tribunal for Yugoslavia to the one employed at Nuremberg, it is clear that the core of the doctrine of "crimes against humanity" has remained

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"intent to destroy a national, ethnical, racial, or religious group *Id.* at Art. 4(2). Acts that evince such intent include: "(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; [and] (d) imposing measures intended to prevent births within the group *Id.* at Art. 4(2)(a)-4(2)(e).

135. *Id.* at Art. 5.

136. *Id.* at Art. 7 Article 7 imposes criminal responsibility on any "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" set forth in the foregoing articles. *Id.* at Art. 7(1).

137 Article 7 states: "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires. *Id.* at. Art. 7(4).

138. Article 7 holds superiors criminally responsible for acts of their subordinates where the superior "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." *Id.* at Art. 7(3).

139. In one of the more groundbreaking sections of the statutes, Article 7 explains that "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. *Id.* at Art. 7(2). This subsection to the article is invaluable precedent insofar as the prosecution of Kissinger is concerned. This subsection specifically disallows the notion of immunity for acting or former heads of state or high government officials for acts undertaken in their official capacities. Following the letter and spirit of this precedent would render the defense that Kissinger was acting in his official capacity a nonstarter.

140. Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 5.

141. *Id.* at Art. 5(a)-5(i).

unchanged.

The differences, while minor, are important to recognize. First, the Statutes of the Tribunal for Yugoslavia are more detailed in their enumeration of specific acts that fall within the definition, including the acts contained in the Nuremberg definition in addition to imprisonment, torture, and rape.[142] Second, in addition to proving the accused committed one or more of the enumerated acts, Article 5 of the Statutes of the Tribunal for Yugoslavia limits criminal liability to acts "committed in armed conflict, whether international or internal in character."[143] This war nexus requirement is less burdensome than the stricter requirement at Nuremberg in that it includes internal armed conflicts (or rather "civil conflicts") within its reach.[144] However, it is important to note that the armed conflict nexus requirement survived in the Statutes of the Tribunal for Yugoslavia in some lesser form from the Nuremberg Charter's definition of "crimes against humanity "

In sum, the Statutes of the Tribunal for Yugoslavia changed the core of "crimes against humanity" jurisprudence very little from its inception at Nuremberg. Although formulated nearly fifty years apart, the similarity between the definitions lends credence to the notion that the doctrine of "crimes against humanity" is customary law The fact that after half a century the same underlying wrongs are considered to be so grave as to warrant an international response bolsters the argument that these prohibitions are universally recognized and nearly timeless in their application. The definition of "crimes against humanity" in the Statutes of the International Criminal Tribunal for Rwanda lends further credence to the continuity and universality of the doctrine.

In November of 1994, the U.N. Security Council followed its own lead and passed Resolution 955 establishing a tribunal for Rwanda.[145] After years of violent civil war and accusations of gross human rights violations,[146] the Security Council

142. *Id.* at Art. 5. *Cf.* Nuremberg Charter, *supra* note 124, at Art. 6(c).

143. Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 5.

144. The necessity of loosening this requirement in the context of the Yugoslavian conflict is evident. Because the armed conflict occurred within the borders of the former state of Yugoslavia, the Tribunal would have had no power if the Statutes had propounded war nexus requirement similar to that imposed at Nuremberg. *See supra* notes 119-20, and accompanying text. Moreover, had the conflict significantly spilled into neighboring states, it is still doubtful that such conflict would have risen to the level of international armed conflict. *See* Orentlicher, *supra* note 87, at 2589-90 (discussing the ambiguity of the war nexus requirement under the Nuremberg Charter, and detailing how the war nexus requirement could be viewed either as "an element of crimes against humanity" or "merely limitation on [the Tribunal's] jurisdiction"); *infra* notes 150-51, and accompanying text.

145. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), *amended by* S.C. Res. 978, U.N. SCOR, 50th Sess., 3504th mtg., U.N. Doc. S/RES/978 (1995), *amended further by* S.C. Res. 1165, U.N. SCOR, 53rd Sess., 3877th mtg., U.N. Doc. S/RES/1165 (1998), *amended further by* S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/RES/1329 (2000), *available at* http://www.ictr.org/ENGLISH/Resolutions/955e.htm (last visited Nov. 23, 2003) [hereinafter Statutes of the Tribunal for Rwanda]. Like the Tribunal for Yugoslavia, the Statutes of the Tribunal for Rwanda are appended to this Security Council resolution, *available at* http://www.ictr.org/ENGLISH/basicdocs/statute.html (last visited Nov. 21, 2003).

146. *See, e.g.*, Bruce W. Nelan, *A Recurring Nightmare; The Bloodletting Between Hutu and Tutsi Now Threatens to Erupt Across the Border from Rwanda*, TIME, Apr. 10, 1995, at 50.

finally sought to bring the alleged perpetrators of the acts to justice. Like the Statutes of the Tribunal for Yugoslavia, Article 1 of the Statutes of the Tribunal for Rwanda sets forth the Tribunal's primary jurisdiction: "[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in Rwanda."[147] The Statutes of the Tribunal for Rwanda also followed the same basic structure with regard to delimiting the crimes the Tribunal had authority to investigate and prosecute. The Statutes authorized the Tribunal to prosecute genocide,[148] crimes against humanity,[149] and "violations of Article 3 common to the Geneva Conventions and of Additional Protocol II."[150] The Statutes of the Tribunal for Rwanda also contain an article explicating when individual criminal responsibility can be assigned that closely tracks Article 7 of the Statutes of the Tribunal for Yugoslavia.[151]

Article 3 of the Statute of the Tribunal for Rwanda defines the Tribunal's power to prosecute individuals for crimes against humanity The Article states that "[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."[152] The enumerated acts that qualify under this Article are precisely identical to those listed under Article 5 of the Statutes of the Tribunal for Yugoslavia,[153] namely: "(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial, and religious grounds; [and] (i) other inhumane acts."[154]

Comparing the definitions of "crimes against humanity" employed by the Tribunals for Yugoslavia and Rwanda, a few important distinctions can be drawn. The first is the substitution of the phrase "as part of a widespread or systematic

147 Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 1. Article 1 limits the scope of the Tribunal's investigation to acts that occurred during the 1994 calendar year. *Id. Cf.* Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 1 (granting the Tribunal for Yugoslavia the power to prosecute all acts committed "since 1991").

148. Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 2. Article 2 tracks, nearly word for word, Article 4 of the Statutes of the Tribunal for Yugoslavia, *supra* note 130.

149 Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3.

150. *Id.* at Art. 4. Article 4 gives the Tribunal the authority to prosecute "persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 *Id.* Article 4 goes on to list several of these violations, including "violence to life" (murder and torture), hostage taking, terrorism, rape, and pillage. *Id.* at Art. 4(a)-4(h). *See* Geneva Conventions of 1949, *supra* notes 96-97, and accompanying text; *see also* Statutes of the Tribunal for Yugoslavia, *supra* notes 132-33, at Art. 2-3 (defining war crimes slightly differently and enumerating a different list of acts).

151. Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 6; *see* also Statutes of the Tribunal for Yugoslavia, *supra* note 130, Art. 7· *supra* notes 136-39, and accompanying text. The only difference between the two articles is the inclusion of feminine pronouns, to match the masculine pronouns, in the Statutes of the Tribunal for Rwanda. *See supra* note 137

152. Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3; *see also* Statutes of the Tribunal for Yugoslavia, *supra* note 130, Art. 5; *supra* notes 132-36, and accompanying text.

153. *See supra* note 141, and accompanying text.

154. Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3(a)-3(i).

attack" in the latter for the phrase "in armed conflict, whether international or internal in character" in the former.[155] This substitution is a very important difference because it affects the underlying facts that the prosecutor is required to prove to find the defendant guilty While the Statutes of the Tribunal for Yugoslavia retain a vestige of the war nexus requirement from the Nuremberg Charter,[156] the Statutes of the Tribunal for Rwanda expressly disclaim this requirement. However, while the Statutes of the Tribunal for Rwanda drop the war nexus requirement, they simultaneously add the requirement that the attack occur "on national, political, ethnic, racial or religious grounds."[157] This strict requirement is entirely absent from the Statutes of the Tribunal for Yugoslavia and the Nuremberg Charter.[158]

Comparing the three definitions of crimes against humanity from the Nuremberg Charter and the Statutes of the Tribunals for Yugoslavia and Rwanda, it is clear that there is a basic agreement about the fundamental contours of the law, namely the acts that constitute the crime. Although the acts that can give rise to prosecution for crimes against humanity have been expanded since Nuremberg, the core of the law—that "massive atrocities against persecuted groups" will not be tolerated—remains unchanged.[159] However, while the basic tenets of the law have held steady two important peripheral issues arose after Nuremberg: whether the doctrine of "crimes against humanity" should contain a war nexus requirement, and whether it should contain a requirement that the acts be motivated by the racial, religious, or political status of the persecuted group.

c. The Law Applied: Elements of the Crime

In 1995, Dusko Tadic became the first person charged with crimes against humanity since the Nuremberg trials, a span of fifty years.[160] A Serb prison guard known as "the Butcher of Prijedor, Tadic was charged with a litany of atrocious human rights violations.[161] The case generated judicial opinions that gave context

155. *Compare* Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3 *with* Statutes of the Tribunal for Yugoslavia, *supra* note 130, Art. 5.

156. Nuremberg Charter, *supra* note 124, at Art. 6(c); *supra* note 125, and accompanying text.

157 Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3

158. Statutes of the Tribunal for Yugoslavia, *supra* note 130, Art. 5; Nuremberg Charter, *supra* note 124, at Art. 6(c).

159. Orentlicher, *supra* note 87, at 2595.

160. Ed Vulliamy, *In Times of Trial*, THE GUARDIAN (London), Oct. 31, 1995, at T6.

161. *Id.* Ed Vulliamy of *The Guardian* sums up the factual allegations against Tadic:

> When the hurricane of violence came, Tadic was in the eye of the storm.
>
> Tadic, say the indictment and papers, visited Omarska [a prison camp] daily (or nightly), usually in military fatigues. He tortured, raped and beat prisoners in sessions involving 'truncheons, iron bars, rifle butts, wire cables and knives' The indictment has him jumping on prisoners' backs and, as their unconscious bodies were taken away in wheelbarrows, emptying fire extinguisher in one of their mouths. Prisoners were forced to perform oral sex on each other; many were never seen again and there are six named murder victims on the indictment. According to background papers, three were killed with metal rods and knives, whereupon a fourth was forced to bite off their testicles.

to the crimes listed in the Statutes of the Tribunal for Yugoslavia[162] and in particular, explained the legal elements necessary to hold an individual guilty of crimes against humanity under the definition set forth in those Statutes.[163]

The Trial Chamber II, with respect to crimes against humanity first noted that the Statutes require the prosecutor to prove both that the defendant committed one or more of the crimes charged in Article 5 (defining crimes against humanity)[164] and that the defendant was individually responsible under Article 7 paragraph 1.[165] The Trial Chamber II then exhaustively examined the elements of Article 5 of the Statutes, preferring to address the Article 7 issues for all of the charges, including the Article 2 (Geneva Convention)[166] and Article 3 (war crimes)[167] charges, in a separate section.[168]

Briefly, a few important points about crimes against humanity at least insofar as they are defined by the Statutes of the Tribunal for Yugoslavia, can be culled from the various opinions in the *Tadic* case.

i. The War Nexus Requirement

First, although a war nexus requirement is present in the Statutes, the requirement goes against the modern trend and is perhaps ill considered. The "when in armed conflict" requirement,[169] as defined by the Appeals Chamber on an interlocutory appeal on jurisdiction in the *Tadic* case,[170] requires "a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[171] In defining the nexus required between the act and the armed conflict, the Appeals Chamber held: "[i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."[172] However, as the Trial Chamber II observed, the requirement "deviates

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Id., *see also* Amended Indictment, Prosecutor v. Tadic, Case No. IT-94-1 (Int'l Crim. Trib. for the former Yugoslavia 1995), *available at* http://www.un.org/icty/indictment/english/tad-2ai951214e.htm (last visited Nov. 24, 2003). Tadic was found guilty of 11 of the 31 counts listed in the indictment. For brief accounting of the charges of which he was found guilty and innocent, *see* Press Release, Tadic Case: The Verdict (May 7, 1997), *available at* http://www.un.org/icty/pressreal/p190-e.htm (last visited Nov. 24, 2003)..

162. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic.

163. *Id.* at ¶¶ 557-76, 618-92.

164. Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 5.

165. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 625; *see also supra* note 136, and accompanying text.

166. *See supra* note 132, and accompanying text.

167. *See supra* note 133, and accompanying text.

168. Opinion and Judgment of May 7 1997, Prosecutor v. Tadic, at ¶¶ 661-92.

169 Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 5; *see also supra* notes 135-36, and accompanying text.

170. Decision of Oct. 2, 1995, Prosecutor v. Tadic, Case No. IT-94-1, at ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm (last visited Nov. 14, 2003); *see also supra* note 144, and accompanying text.

171. Decision of Oct. 2, 1995, Prosecutor v. Tadic, Case No. IT-94-1, at ¶ 70.

172. *Id.*

from the development of the doctrine after the [Nuremberg] Charter" and is completely omitted from the definition of crimes against humanity in the Statutes of the Tribunal for Rwanda.[173] Despite the explicit war nexus requirement in the Statutes, the Appeals Chamber noted that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."[174]

Examining the war nexus requirement from the perspective of its implications for future trials, it is arguable that the requirement is outmoded and unfit for future prosecutions of crimes against humanity In fact, under certain circumstances, application of the requirement would seem to produce paradoxical results. For example, for the requirement set forth by the Appeals Chamber to be satisfied, there must be either the use of "armed force between States or protracted armed violence" between groups within a State.[175] Therefore, to satisfy this requirement, any group which is being murdered, enslaved, or tortured[176] must acquire and use weapons against their attackers in order to be protected by international law However, if the persecuted population has no means of escalating the incident to the level of "armed conflict, then the perpetrators of grave human rights violations appear to be off the hook. This paradoxical result certainly cannot be what was intended when the law of crimes against humanity was first conceptualized.

This conclusion is bolstered by the fact that the Statutes of the Tribunal for Rwanda specifically exclude this requirement[177] and the realization that such a requirement, as interpreted by the Appeals Court in the *Tadic* case, could possibly exclude from coverage the twenty-five year long "skirmish" between Indonesian soldiers and the entire East Timorese population.[178] While this issue is further discussed below,[179] it is enough to say here that because East Timor was not an officially recognized state at the time and yet not necessarily an Indonesian territory (with the status of Portugal as colonial power in flux), this struggle may not have achieved the sacred status of "armed conflict" under a strict interpretation of the Appeals Chamber's definition.[180]

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173. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 627· *see also supra* notes 147-48, and accompanying text.

174. Decision of Oct. 2, 1995, Prosecutor v. Tadic, at ¶141. The Appeals Chamber was nevertheless compelled to require the nexus to armed conflict be proved since the Security Council, aware of the absence of the requirement under modern conceptions of customary law, explicitly required the nexus in the Statutes.

175. *Id.* at ¶70.

176. Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 5; *see also supra* note 133, and accompanying text.

177. *See supra* notes 147-48, and accompanying text.

178. *See supra* note 45, and accompanying text.

179. *See infra* notes 213-18, and accompanying text.

180. *Compare supra* notes 46-47, 52-53, 59-62, and accompanying text *with* Decision of Oct. 2, 1995, Prosecutor v. Tadic, at ¶ 70; *see also supra* note 175, and accompanying text.

ii. The Directed Against a Civilian Population Requirement

The second major issue raised by the *Tadic* case was the meaning of the "directed against a civilian population" requirement.[181] Although the requirement may on face seem simple to apply it actually has three independent elements, each of which must be addressed and satisfied.[182] The first sub-element is the requirement that the persecuted population be "civilian" in nature. The conclusion that can be drawn from the Trial Chamber II's opinions in the *Tadic* case is that the term "civilian" is to be construed broadly and should not be a difficult hurdle for the prosecutor The Trial Chamber II, borrowing from precedent, held that "a wide definition of civilian population is justified" and that "the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian."[183]

The second sub-element to be satisfied is the requirement that the attack be against a civilian *population*. The Trial Chamber II noted in the *Tadic* case that the term is meant,

> "to imply crimes of a collective nature and thus exclude single or isolated acts which do not rise to the level of crimes against humanity."[184] However, as the Trial Chamber II also noted, this definition implies a number of independent issues that must be resolved: "the acts must occur on a widespread or systematic basis, there must be some form of a governmental, organizational or group policy to commit these acts and the perpetrator must know of the context within which his actions are taken, [and] the actions [must] be taken on discriminatory grounds."[185]

The Trial Chamber II held that the first requirement "can be fulfilled if the acts occur on either a widespread basis *or* in a systematic manner."[186] It is interesting to note that reading this requirement into the term "population" actually renders the definition of crimes against humanity in the Statute of the Tribunal for Rwanda redundant in part.[187] As is mentioned above,[188] the definition of "crimes against humanity" in the Rwandan Statutes replaces the war nexus requirement

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181. Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 5; *see also supra* note 140, and accompanying text.

182. Opinion and Judgment of May 7 1997 Prosecutor v. Tadic, at ¶ 635.

183. *Id.* at ¶ 643 (internal citations omitted).

184. *Id.* at ¶ 644 (internal citation omitted).

185. *Id.*

186. *Id.* at ¶ 646 (emphasis added). Later the chamber refined the definition and explained the policy behind the requirement:

> It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against civilian "population, and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that pattern or methodical plan is evident, fulfils this requirement.

Id. at ¶ 648.

187. *See* Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3.

188. *See supra* note 147, and accompanying text.

with the requirement that the crimes be "committed as part of a widespread or systematic attack" but otherwise retains the language of the Statutes of the Tribunals for Yugoslavia, including the "civilian population" language.[189] Thus, reading a "widespread or systematic" requirement into the term "population" renders the identical language in the Rwandan Statutes redundant.

For the second requirement, that there must be a policy of some kind, the Trial Chamber II held that "such a policy need not be formalized and can be deduced from the way in which the acts occur."[190] Circumstantial evidence of a policy includes showing the acts occurred "on a widespread or systematic basis that demonstrate[d] a policy to commit those acts, whether formalized or not."[191] Therefore, meeting the above requirement of being widespread or systematic appears to create a presumption that the acts were taken pursuant to a policy [192]

The third requirement read into the term "population" by the Trial Chamber II in the *Tadic* case is that the prosecutor must prove "discriminatory intent on national, political, ethnic, racial or religious grounds."[193] Even though the discriminatory intent requirement was expressly absent from the statutory language, the Trial Chamber II, relying in part on statements by Security Council members, concluded that the requirement should nonetheless be read into the Statutes.[194] As the chamber noted, the discriminatory intent requirement was explicitly included in the Statutes of the Tribunal for Rwanda.[195]

iii. Mens Rea: The Intent Nexus Requirement

The third major issue raised by the *Tadic* case was the requirement that "the act not be unrelated to the armed conflict."[196] As the Trial Chamber II noted, this requirement involves a two-step analysis. First, the defendant's act must occur "within the context of a widespread or systematic attack on a civilian population."[197] Second, "the act must not be taken for purely personal reasons unrelated to the armed conflict."[198] "Thus if the perpetrator has knowledge, either

189. *See* Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3.

190. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 653.

191. *Id.*

192. An additional issue under this requirement is whether or not the "policy" at issue must be state policy. Drawing on American case law from the Court of Appeals for the Second Circuit, the Trial Chamber II held that "although policy must exist to commit these acts, it need not be the policy of a State. *Id.* at ¶ 655 (*citing* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)).

193. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 652.

194. *Id.*

195. *Id.*, *see also* Statutes of the Tribunal for Rwanda, *supra* note 145, at Art. 3; *supra* notes 149-50, and accompanying text

196. Opinion and Judgment of May 7, 1997 Prosecutor v. Tadic, at ¶ 656.

197. *Id.*, *see also supra* notes 176-78, and accompanying text. The Trial Chamber II held that "in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 656; *see also* Judgment and Sentence of June 1, 2000, Prosecutor v. Ruggiu, Case No. ICTR-97-32-I (Int'l Crim. Trib. for Rawanda 2000), *available at* 39 INT'L LEGAL MATERIALS 1338, 1340-41 (2000).

198. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 656. As for this second

actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, then the intent nexus requirement has been satisfied.[199]

iv. Individual Criminal Responsibility[200]

The last requirement to be proved is individual criminal responsibility as set forth in Article 7 of the Statutes of the Tribunal for Yugoslavia.[201] This requirement involves a three-step inquiry.[202] First, the prosecutor must show intent, "which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."[203] Second, the prosecutor is required to prove the defendant either directly participated or that the conduct of the accused *contributed to the commission* of the illegal act."[204] Finally the prosecutor must show the requisite "amount of assistance before one can be held culpable for involvement in a crime."[205]

As for the requirement that the prosecutor prove intent, the Trial Chamber II noted that precedent supported the conclusion that "knowledge and intent can be inferred from the circumstances."[206] It also held that "[a]lthough intent founded on inherent knowledge, proved or inferred, is required for a finding of guilt, the Trial Chamber need not find that there was a pre-arranged plan, to which the accused was a party, to engage in any specific conduct."[207]

For the second step of the inquiry, the requirement of "direct contribution," the Trial Chamber II summarized the case law and drew three general conclusions about the requirement: "direct contribution does not necessarily require the participation in the physical commission of the illegal act,"[208] "participation in the commission of the crime does not require an actual physical presence or physical assistance,"[209] and "mere presence at the scene of the crime without intent is not

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requirement, the Trial Chamber II noted "that the act cannot be taken for purely personal reasons unrelated to the armed conflict, [and] while personal motives may be present they should not be the sole motivation for the act. *Id.* at ¶ 658.

199. *Id.* at ¶ 659.

200. It is important to emphasize that the Trial Chamber II addressed the Article 7 requirements for all of the charges, including charges under Article 2 (violations of the Geneva Conventions), Article 3 (war crimes) and Article 4 (genocide), in a single section. *See supra* notes 156-60, and accompanying text.

201. Statutes of the Tribunal for Yugoslavia, *supra* note 130, at Art. 7; *see also supra* notes 136, 153, 165, and accompanying text.

202. Opinion and Judgment of May 7, 1997, Prosecutor v. Tadic, at ¶ 674.

203. *Id.*

204. *Id.* (emphasis added).

205. *Id.* at ¶ 681.

206. *Id.* at ¶ 676.

207. *Id.* at ¶ 677

208. *Id.* at ¶ 679.

209. *Id.*

enough."[210]

For the final step, determining whether the particular defendant rendered enough assistance so as to justify culpability, the Trial Chamber II specifically refused to line-draw, instead preferring to examine whether the necessary amount of participation had been proved on a case-by-case basis.[211] While no bright-line rules were proffered, a few general conclusions can be drawn from the cases the Trial Chamber II reviewed in its opinion. Briefly, acts sufficient to meet the threshold include providing material support[212] and failing to prevent others from acting.[213] The Trial Chamber II also recognized that "not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced."[214]

d. A Brief Note on Statutes of Limitation and Crimes Against Humanity

Since 1968, a U.N. convention has provided that crimes against humanity are not subject to any statute of limitations.[215] As a result, "[a] trial could take place twenty or thirty or forty years later."[216] This principle disallows those guilty of the most heinous human rights violations to hide behind the shield of time. As professor Aryeh Neier notes, the principle has been used to try more than 7,000 former Nazi officials in Germany since 1950.[217] The policy behind the principle is also sound. The notion that a person guilty of the most heinous human rights violations should go free on a technicality is preposterous. As a normative matter, a defendant should not escape punishment merely because the community of nations has been laggard in bringing him or her before a tribunal.[218]

The preceding brief examination of the law of crimes against humanity was intended to leave the reader with the notion that it is not simple to convict a defendant under the law. Therefore, when a grossly incomplete factual record more

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210. *Id.* (internal citation omitted). The Trial Chamber II discussed the *In re Tesch* case in which two businessmen were tried for war crimes for supplying Zyklon B gas to the Auschwitz concentration camp during World War II. The two men were found guilty of "supplying the means" of extermination with knowledge "that the gas was to be used for the purpose of killing human beings [, specifically allied nationals]. In re Tesch (Zyklon B case), 13 Ann. Dig. 250, 252 (British Military Ct. 1946).

211. Opinion and Judgment of May 7 1997, Prosecutor v. Tadic, at ¶ 681.

212. *See id.* at ¶ 684.

213. *Id.* at ¶ 686.

214. *Id.* at ¶ 687 A related issue is whether one act alone is sufficient for the purposes of "crimes against humanity jurisprudence. The Trial Chambers II addressed this issue and concluded that "a single act by perpetrator taken within the context of widespread or systematic attack against civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. *Id.* at. 649.

215. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 8 I.L.M. 68 (1969), *reproduced from* G.A. Res. 2391, U.N. GAOR, 23rd Sess., 1727th mtg., U.N. Doc. A/RES/2391 (1968).

216. NEIER, *supra* note 1, at 249.

217. *Id.*

218. *See id.* at 212-13. A statute of limitations not only benefits the criminal defendant, it also provides politically expedient excuse for states that refuse their treaty obligations and moral responsibility by failing to bring massive violators of human rights to justice.

or less satisfies the requirements, one can be sure that the alleged perpetrator deserves further scrutiny

B. Applying the Law: Crimes Against East Timor as Crimes Against Humanity

For purposes of examining the strength of the case against Henry Kissinger, it is useful to examine the known facts[219] against the backdrop of the law of "crimes against humanity" as it is explicated in the various opinions generated by the *Tadic* case. Since the preceding examination focused upon them and it is arguable they represent customary international law as well as any other model, the hypothetical "crimes against humanity" statutes to be applied here will be the same as those found in the Statutes of the Tribunal for Yugoslavia.[220]

1 Indonesia, East Timor, and the War Nexus Requirement

Notwithstanding whether the war nexus requirement should, as a normative matter, be a requirement for proving a violation of the law of "crimes against humanity, it is arguable that the conflict between East Timor and Indonesia would have satisfied the requirement nonetheless. It requires the use of armed force between states or between organized groups and governmental authorities within a state.[221] First, it could be said that East Timor was an independent state at the time, regardless of international recognition, for several reasons. For instance, East Timor's colonial ruler, Portugal, supported independence for the tiny island nation[222] and a majority of the East Timor's population appeared to support independence as well.[223] In the alternative, it could be argued that the East Timorese coalition supporting independence was an "organized group" within Indonesia at the time of the armed conflict.[224] Under either interpretation, the war nexus requirement would be satisfied.

However, the more important question is whether the war nexus requirement should be an element of "crimes against humanity" law as a matter of good policy As was argued above,[225] given the possibility that such a requirement could produce a paradoxical result and a severe miscarriage of justice, the better course seems to be that taken by the Statutes of the Tribunal for Rwanda, which do not require the nexus to war.[226]

219. It is worth reiterating that the U.S. government is still withholding majority of the most probative evidence. *See supra* Section I.C.2.

220. Whether Kissinger's actions appropriately satisfy the required legal elements under the Statutes will also be discussed. *See infra* Section II.B.1-II.B.4.

221. *See supra* note 171, and accompanying text.

222. *See supra* notes 47-44, and accompanying text.

223. *See supra* notes 55-58, and accompanying text.

224. *See id.*

225. *See supra* notes 168-72, and accompanying text.

226. *See supra* notes 147-49 and accompanying text.

2. Directed Against A Civilian Population: Indonesian Attacks Against East Timor

Since there is little doubt that many of the casualties during Indonesia's three decade long siege of East Timor were civilians and because the bar is set deliberately low, this element appears to be satisfied.[227]

The three issues arising under the "population" element also seem to be resolved in favor of culpability As for the first requirement that the acts be either systematic or widespread, the killing of nearly a full third of the entire population of East Timor, a sixth in the first year alone, seems to indicate the acts were both widespread and systematic.[228] The next requirement, a two-prong test demanding (1) evidence that the acts occurred pursuant to a policy and (2) a showing that the defendant knew the context within which he or she took the actions, is also easily satisfied by the available factual record [229] First, there appears to be a presumption that this element is satisfied when the widepread or systematic requirement is satisfied,[230] which it appears to be, and second, the acts were taken pursuant to a plan devised by General Suharto and known to Kissinger.[231] The final requirement, proof of discriminatory intent, can be shown by a number of statements from both Suharto and Kissinger with respect to the political affiliations of the East Timor population.[232]

A brief note about the "fighting communism" defense is in order at this juncture. Although the laws defining "crimes against humanity" do not countenance such a defense, some critics may argue that Kissinger was simply following the politically prudent course of action given the context of the Cold War. This argument, however, misses the core of the definition of crimes against humanity which encompasses all persecutions based on political affiliation.[233] It also misconstrues the facts of the case. At no point did Suharto ever claim that

227. *Compare supra* note 39, and accompanying text *and supra* note 41, and accompanying text *with supra* note 183, and accompanying text.

228. *Compare supra* notes 44-45, and accompanying text *with supra* note 186, and accompanying text.

229. *See supra* notes 190-88, and accompanying text.

230. *See supra* note 192, and accompanying text.

231. *See, e.g., supra* note 59, and accompanying text; *supra* note 71 (discussing how Kissinger and Ford were aware Suharto was hedging in the direction of invading East Timor as many as five months before the invasion); *supra* note 78, and accompanying text (revealing conversation between Kissinger, Ford, and Suharto in which Suharto announced his plans to invade East Timor the day prior to the invasion).

232. *See, e.g., supra* note 71 (showing that Suharto's spoken motive for invading East Timor was Fretilin's supposed links to communism); *supra* note 78, and accompanying text (in which Suharto again mentions Fretilin's supposed communist links as reason justifying the invasion); *supra* notes 84-85, and accompanying text (in which Kissinger justifies selling arms to Indonesia because East Timor is "Communist government").

233. *See supra* note 193, and accompanying text.

Indonesia's invasion was aimed at defending his country from an attack by East Timor, and, notwithstanding Kissinger's comments to the contrary,[234] such a claim would be fanciful given the severe disparity in military capabilities between East Timor and Indonesia. Lastly, since the State Department's own internal documents called Fretilin "vaguely leftist,"[235] the massacre of 200,000 people on the off chance that they were attempting to spread "communist instability" seems preposterous.

3. Intent Nexus Requirement: Supplying Weapons to a Murderous Regime

This element, as construed by the Trial Chamber II in the *Tadic* case, requires the actor have either actual or constructive knowledge of the widespread or systematic nature of the attacks and a purpose to contribute to these attacks.[236] Showing Henry Kissinger was aware of the widespread and systematic nature of the Indonesian attacks on East Timor is unproblematic given the extensive intelligence information he was privy to in his multiple positions of power.[237] As for the second requirement, all that need be shown is that personal motives alone did not trigger the act.[238] This requirement can be readily shown from Kissinger's and Ford's statements to Suharto on the day prior to the invasion, in which Kissinger and Ford offered to support Suharto's planned invasion in no uncertain terms.[239] It is also evidenced by statements Kissinger made to his underlings in a State Department meeting in which Kissinger openly acknowledged flouting United States law to assist the Indonesians.[240] Interestingly, Kissinger's own words show that personal motives were not behind his decision to continue the flow of weapons to Indonesia. At another point in the same State Department meeting, Kissinger, while discussing the weapons sales to Indonesia, told the other State Department officials present that he got "nothing from" the sales, he received "no rakeoff" from them.[241]

234. *See supra* notes 83-84, and accompanying text (revealing that Kissinger intended to play the "fighting communism" card if Congress decided to hold hearings on East Timor).

235. *See Briefing Paper: Indonesia and Portuguese Timor supra* note 49.

236. *See supra* notes 188-91, and accompanying text.

237. *See* discussion *supra* Part I.A; *see also supra* note 231.

238. *See supra* note 198, and accompanying text.

239. *See, e.g., supra* note 78, and accompanying text (in the reprinted transcript of the meeting between Suharto, Ford, and Kissinger, Kissinger assures Suharto that he and the administration will favorably "influence the reaction in America" to the imminent Indonesian invasion of East Timor).

240. *See, e.g., supra* notes 83-84, and accompanying text (in the reprinted Memorandum of Conversation of State Department meeting eleven days after the invasion, Kissinger chides his aides for allowing lower ranking State Department officials to go against his wishes and recommend suspension of arms to Indonesia).

241. *Id*; *see also* HITCHENS, *supra* note 15, at 106. Admittedly the claim is quite suspicious given that the accusation was never made. Echoing the sentiments of Queen Gertrude in *Hamlet*, Kissinger "doth protest too much, methinks. WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 2, line 240.

4. Individual Criminal Responsibility: Aiding and Abetting Suharto

As discussed above, satisfying this element involves a three-step inquiry [242] The initial step is a showing of knowledge of participation and intent to actively participate, and this step can be inferred from nearly all of Kissinger's acts with respect to the invasion of East Timor. First, it is clear Kissinger knew the context within which he was acting.[243] It appears equally clear that Kissinger intended to actively aid Suharto, with moral support and weapons, in carrying out the invasion.[244] For example, he participated by squelching attempts by lower ranking State Department officials to halt arms transfers to Indonesia,[245] by failing to object to Suharto's announced plans even though he knew his objection would have likely scuttled the plans entirely [246] and by attempting to deceive Congress about the matter in order to continue arms shipments to Indonesia.[247]

As for the second inquiry requiring a showing of direct contribution, the above-mentioned facts fulfill it as well. More specific evidence of substantial direct contribution is the fact that, rather than halting as they should have, U.S. weapons sales doubled after the invasion in the face of Indonesia's known weapons shortage.[248] Evidence of direct participation in the actual murder of the East Timorese, while tenuous without the best evidence, can still be shown by the fact that weapons sold to Indonesia after the invasion (and thus after the weapons sales should have been halted) were likely used in the invasion of East Timor.[249]

As for the third inquiry asking whether the actor rendered the requisite amount of assistance, several already cited facts appear to satisfy it. As the Trial Chamber II concluded in the *Tadic* case, providing material support and failing to prevent others from acting satisfies the threshold.[250] Kissinger not only provided material support in the form of weapons, but he also failed to object to the invasion when he knew doing so would have likely prevented it.

Thus, without great difficulty it seems clear that the body of facts surrounding Kissinger's involvement in the invasion of East Timor can be mapped onto the law defining crimes against humanity While some of the edges are rough and the fit may not be precise, there is no doubt a colorable claim to be made, and one that the remaining concealed evidence would no doubt shed great light upon.

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242. *See supra* Section II.A.3.c.iv.

243. *See supra* note 231.

244. Remember, Kissinger described halt of weapons sales to Indonesia, which he was firmly against, as "kick[ing] the Indonesians in the teeth. *See supra* notes 83-84, and accompanying text.

245. *Compare supra* notes 83-85, and accompanying text *with supra* notes 198-99, and accompanying text.

246. *See supra* notes 79, 81.

247. *See supra* notes 83-84, and accompanying text.

248. *See supra* note 81; *supra* note 60, and accompanying text.

249. *See supra* note 74, and accompanying text; *see also supra* note 78, and accompanying text. Remember that the Trial Chamber II in the *Tadic* case construed the "direct contribution" inquiry to *not* require participation in the physical commission of the act or physical assistance in the act. *See supra* notes 208-02; *see also* In re Tesch (Zyklon B Case), 13 Ann. Dig. 250, 252 (British Military Ct. 1946).

250. *See supra* notes 212-06, and accompanying text.

Although this author holds no illusions about Kissinger actually standing trial for crimes against humanity, the law and facts in many ways speak for themselves. It is a hotly contested conclusion, as would be expected, and it engenders a debate filled with unspoken assumptions and unconscious biases.

SECTION III: THE LESSONS LEARNED FROM THE FAILURE TO HOLD KISSINGER ACCOUNTABLE

> *[E]very society, including ours, manages to function with only the most precarious purchase on the truth of its own past. Every society has a substantial psychological investment in its heroes. To discover that its heroes were guilty of war crimes is to admit that the identities they defended were themselves tarnished. Which is why a society is often so reluctant to surrender its own to war crimes tribunals, why it is so vehemently "in denial" about facts evident to everyone outside the society. War crimes challenge collective moral identities, and when these identities are threatened, denial is actually a defense of everything one holds dear*
>
> Michael Ignatieff, *The Warrior s Honor*[251]

A. Failing to Hold Kissinger Accountable Represents a Clear Double Standard

Despite the compelling evidence and precedent to the contrary, a sober review of the current state of world affairs reveals that Henry Kissinger will never face criminal prosecution for his alleged misdeeds, much less prosecution under international law.[252] Although the crimes of Kissinger and Pinochet are intimately linked and the facts appear to support prosecutions of both,[253] there is a major difference between the crimes of the two men. One committed them under the protection of the most powerful country in the world; the other did not. It is highly unlikely any country or bloc of countries would attempt to prosecute Kissinger, or any former U.S. official, for crimes against humanity "for fear of economic and political reprisals" or worse.[254] The basic lesson to be learned from these cold, hard truths is that there is a blatant double standard in the prosecution of international criminals, "where powerful states may judge the leaders and former leaders of less

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251. MICHAEL IGNATIEFF, THE WARRIOR'S HONOR 184 (1997).

252. *See generally* Jaime Malamud Goti, *The Moral Dilemmas About Trying Pinochet in Spain*, 32 U. MIAMI INTER-AM. L. REV 1, 2-3 (2001) (discussing the remote possibility of trying United States politicians like Kissinger because of the inequality of power in the nation-state system); *see also* BORK, *supra* note 89, at 29-30 ("The degree of danger officials face will depend on the power and influence of their countries.").

253. *See* Shahram Seyedin-Noor, *The Spanish Prisoner· Understanding the Prosecution of Senator Augusto Pinochet Ugarte*, 6 U.C. DAVIS J. INT'L L. & POL'Y 41, 88-90 (2000); White, *supra* note 31, at 224-25; *supra* notes 31-32, and accompanying text.

254. Nicole Barrett, *Holding Individual Leaders Responsible for Violations of International Customary Law: The U.S. Bombardment of Laos and Cambodia*, 32 COLUM. HUM. RTS. L. REV 429, 474-75 (2001).

powerful states for crimes against humanity but not vice versa."[255] However, while many commentators simply accept the double standard as a given, an examination of the causes underlying the phenomenon is warranted. More importantly, because the American public's acquiescence allows the double standard to persist, any examination must ultimately probe the public conscience on this matter.[256]

1 The "Politics" of Holding Kissinger Accountable

For a prime example of the power of language manipulation, one need look no further than the debate over whether to hold U.S. actors criminally liable for their actions. Official U.S. denouncements of efforts to bring former U.S. leaders to justice often take the form of turning the tables and accusing the investigation of being "'political' rather than legal."[257] Of course this complaint is the exact same complaint as critics of the failure to bring Kissinger and others to justice have against the U.S.[258]

As attorney Shahram Seyedin-Noor explains, "[t]he decision to prosecute Pinochet over Kissinger or other officials in the West that at times helped orchestrate his atrocities is even more 'political' than the decision to prosecute Pinochet alone, since it manifests judgment on 'worthy' and 'unworthy' criminals."[259] Seyedin-Noor concludes, "[t]he current liberal agenda of human rights activists to prosecute 'dictators' must then be understood to function within the restrictive framework of the politically 'acceptable.'"[260] Thus, it is the decision to decline to try Kissinger and those similarly situated that is "political" and opposed to "legal.

Of course, this argument also flies in the face of the conclusions of fact and law drawn above. A decision to prosecute Kissinger, given the weight of the evidence heretofore gathered and the current state of customary international law,

255. White, *supra* note 31, at 225.

256. That the American public's support is a lynchpin for the continued vitality of the double standard may be demonstrated by way of example. While it should be beyond dispute that majority of the American public would never countenance a trial for Henry Kissinger under any circumstances, the public has no such reservations when it comes to other ruthless leaders. In December 2003, following the capture of Saddam Hussein by American forces, ninety-six percent of Americans said they believed Hussein should be put on trial. Deborah L. Acomb, *Poll Track*, NAT'L J., Dec. 20, 2003. A full seventy-two percent believed he should be tried by an international court or the U.S. military. *Id.* Notably, it does not appear that Robert Bork has publicly objected to such a trial.

257 Barrett, *supra* note 254, at 474. Typifying this sentiment, attorney Jamison G. White writes, with respect to the prospect of establishing permanent International Criminal Court and prosecuting U.S. officials in it, that such prosecutions would represent "vendetta-driven type of justice. Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of State*, 50 CASE W RES. L. REV. 127, 175 (1999). Echoing that sentiment, Robert Bork writes that "[i]nternational law is not law but politics. BORK, *supra* note 89, at 21.

258. *See* Barrett, *supra* note 254, at 474; Goti, *supra* note 252.

259. *See* Seyedin-Noor, *supra* note 253, at 88-89.

260. *Id.* at 90-91.

at least with regard to the law of crimes against humanity, appears far from political. In fact, since such a decision would appear to be justified by an objective review of the law and facts, it is the continued failure to bring Kissinger before a tribunal that appears to be "political. A cursory review of the evidence with respect to Kissinger's crimes in East Timor shows a total lack of contrary evidence or alternate explanation. And it is again worth noting that the best evidence is still under lock and key The United States may well continue to stonewall investigations and prosecutions of its own officials; what is unacceptable, however, is the claim that such prosecutions are merely "political" warfare.

2. Narcissistic Patriotism

The quotation opening this section addresses the dirty little secret of international human rights law· that the "national objectivity" necessary to carry out the system of international justice is quite possibly nothing more than illusory Every society, like every individual within that society has a vested interest in assuring that its "heroes" remain untarnished. The health of the collective psyche of every society indeed depends heavily upon the continued myth of its country and its leaders.[261] Because the stakes are so very high, the populations in most nations, including the U.S., are reluctant to even consider the possibility that their current and former leaders are international criminals.[262]

In *The Warrior s Honor* professor Michael Ignatieff discusses the various "forms of denial" that societies undertake to rationalize their failure to punish international criminals in their midst.[263] One such rationalization strategy and one which appears to be actively at play in the case of Kissinger, is the "outright refusal to accept facts as facts."[264] As Ignatieff explains, "[r]esistance to historical truth is a function of group identity· nations and peoples weave their sense of themselves into narcissistic narratives that strenuously resist correction."[265] While such a rationalization process can quite clearly be seen in the case of Kissinger, the irony of the phenomenon is inescapable. At the very moment a nation has an opportunity to cathartically purge its past and identify and hold accountable those few individuals responsible for its sins, it refuses to distance itself from the actors and their atrocious acts and thus must take collective responsibility for them.[266]

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261. *See* DORFMAN, *supra* note 14, at 201-02.

262. Writing about trials of former leaders for massive human rights abuses, Rudi Teitel explained that "what is at stake is contested national history. Ruti Teitel, *From Dictatorship to Democracy: The Role of Transitional Justice*, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 272, 281 (Harold Hongju Koh & Ronald C. Slye eds., 1999).

263. IGNATIEFF, *supra* note 251 at 184-85 (addressing the International Tribunal for the former Yugoslavia and the ethnic strife which led to that conflict).

264. *Id.* at 184.

265. *Id.* at 185.

266. *See supra* note 89; *see also supra* note 109, and accompanying text. "In his savagery toward the outside world, his heedlessness, his imperial mentality, [Kissinger] was quintessentially reflective of very powerful strains in American life, and we must not forget that. He was not apart from the main. And though we now single him out for responsibility, the responsibility, of course, ultimately is ours. Morris, *supra* note 69.

This argument is buttressed by the fact that Kissinger admittedly broke U.S. law while committing his crimes, at least with regard to East Timor. American law clearly did not sanction his actions; responsibility for the crimes committed should therefore be pinned on Kissinger and his cohorts exclusively Although the better course seems to be admitting the wrongdoings and placing responsibility upon the individuals to whom it belongs, the American public has decided that it, like the ostrich, will bury its head in the sand and refuse to believe the wrongdoings occurred in the first place.

Other forms of denial and rationalization identified by Ignatieff include "complex strategies of relativization."[267] These strategies occur when "one accepts the facts but argues that the enemy was equally culpable or that the accusing party is also to blame or that such 'excesses' are regrettable necessities in the time of war."[268] Thus, "[t]o relativize is to have it both ways: to admit the facts while denying full responsibility for them."[269] A species of this form of denial was previously addressed under the auspices of the "fighting communism" defense.[270] The basic thrust of the denial is that the crimes were in some way justified, either by the circumstances of the situation, as in self-defense, or by the geopolitical context, e.g. the Cold War.

Although these denial mechanisms do not substantiate the conclusions they generate, a review of the law and facts in many situations would reveal the conclusions to be specious. This is not to say that many people actually engage in this moment of reflection, most do not. It is this unflinching, reflexive, and unapologetic patriotism that breathes life into the denial mechanisms and allows the average American to foreclose the possibility that former leaders were not pristine. The fundamental force behind this narcissistic patriotism is that "truth is related to identity" or rather "[w]hat you believe to be true depends, in some measure, on who you believe yourself to be."[271] At the same time, "[a]ll nations depend on forgetting: on forging myths of unity and identity that allow society to forget its founding crimes."[272] Thus, there is literally a systematic purge of all adverse history from the collective consciousness which in anyway conflicts with the society's collective self-perception. Unfortunately, this portends a rather bleak future for the international legal system and the international human rights movement.

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267 IGNATIEFF supra note 251, at 184.

268. *Id.* at 185.

269. *Id.*

270. *See supra* Section I.C.3. Ignatieff explains the persuasive power of the defense: "[p]eoples who believe themselves to be victims of aggression have an understandable incapacity to believe that they too have committed atrocities. IGNATIEFF, *supra* note 251, at 176. Indeed, "[m]yths of innocence and victimhood are powerful obstacle in the way of confronting responsibility. *Id.*

271. IGNATIEFF, *supra* note 251, at 174.

272. *Id.* at 170.

B. The Implications of Failing to Evenhandedly Bring Transgressors of International Law to Justice

While there is a litany of problems associated with the identified double standard in the application of international law, three are highlighted here. And although three discrete problems are identified, it will become clear that the issues spill over onto each other and defy tidy compartmentalization.

1 Unsatisfied Expectations and Promotion of Instability

The first set of problems associated with the failure to dispense justice evenhandedly is its effects on the fulfillment of traditional notions of justice. Author T.M. Scanlon asserts that fairness and retributivist notions of justice are closely conjoined.[273] Fairness, in fact, "may seem to presuppose retributivism insofar as the idea of fairness appealed to is that punishment should go equally to those who are equally *deserving* of it."[274] Thus, the fundamental concepts of justice and punishment are undermined by unequal application of the law.

Closely related to this concept is the idea that trials and hearings "[reinforce] individual dignity rights."[275] The failure to prosecute criminals must therefore necessarily undermine victims' individual dignity Individuals who witnessed their families massacred deserve the opportunity to air their grievances and to have them adjudicated by an impartial and competent tribunal. Denial of this right subverts the logic of any system of justice, threatening its very existence.

A logical consequence of this failure to do justice is the infusion of instability into the nation-state system. "Where the world shirks its responsibility to judge crimes against humanity and where lawful punishments for irreparable wrongs are not available, a lawless response is a possible or even probable consequence."[276] Essentially, systematic disparate application of international law fosters unrest for understandable reasons. Those who are wronged expect the perpetrator to be held responsible and to be punished; this expectation is what the international system of human rights law and the numerous conventions on the subject promise. When the promise is broken, vigilante justice is the only avenue left. As professor Aryeh Neier observes, "[j]ustice provides closure; its absence not only leaves wounds open, but its very denial rubs salt in them."[277] Moreover, "peace without justice is a recipe for further conflict".[278] it produces a smoldering tinderbox of emotions that awaits an appropriate moment to exact its own version of justice. While individual denials of justice may produce individual responses, it is an inescapable conclusion

273. T.M. Scanlon, *Punishment and the Rule of Law*, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 257, 262 (Harold Hongju Koh & Ronald C. Syle eds., 1999).

274. *Id.* (emphasis in original).

275. Ruti Teitel, *From Dictatorship to Democracy: The Role of Transitional Justice*, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 272, 280 (Harold Hongju Koh & Ronald C. Slye eds., 1999).

276. NEIER, *supra* note 1, at 213.

277. *Id.* This observation is made with reservations on Neier's part. *See id.* at 213-14.

278. *Id.* at 213.

that repeated failures to enforce international human rights law sends the message that the entire system of international law is nothing but an empty promise and an unattainable ideal.

2. The Breakdown of the International System of Law

While critics of the conclusion drawn above might argue it is overdrawn—that it suffers from Chicken Little syndrome—the conclusion seems unavoidable.[279] First, one of the basic principles of law is the "observance of some minimal evenhandedness."[280] Second, an international legal system by definition requires international participation, but repeated failures of the system to fulfill its promise deter active and meaningful participation. The system then becomes stagnant and open to further abuse by powerful states, resembling the Hobbesian state of nature: the international legal order is imposed by sheer force of power.[281] As Dr. Jaime Malamud Goti well concludes, "[w]hat negatively hurts the rule of law is the discrete prosecution of just one segment of the world's state criminals, however vicious, when disregard for other equally vicious abusers is grounded in reasons as alien to our notion of retributive justice as the disparity of power in international relations."[282]

Moreover, the failure to punish the most notorious violators of international law has equally devastating effects; it "vitiates the authority of law itself."[283] In this vein, professor Diane Orentlicher argues that "[t]he fulcrum of the case for criminal punishment is that it is the *most effective* insurance against future repression."[284] Echoing this sentiment, professor Aryeh Neier observes that "when the community of nations shies away from responsibility for bringing to justice the authors of crimes against humanity, it subverts the rule of law."[285] Of course not every case of justice denied threatens to topple the system, nor does even a single

279. It is necessary to clarify the discussion at this point. This Article is not addressing a Realpolitik view of the international legal system in which international law is enforced by "a few powerful or hegemonic states. Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF HUM. RTS. L. REV. 211, 213 (1998). Instead, this Section addresses, for lack of a better term, a "pure" notion of the international legal system in which states collectively create and enforce an international system of justice. The justification for this narrowed conception of the international legal system is the fact that a system that encourages "individual states to unilaterally sanction weaker ones outside the international framework harm[s] the human rights project. *Id.*, *see also infra* Section III.B.2-III.B.3.

280. Goti, *supra* note 252, at 3.

281. *See* wa Mutua, *supra* note 279, at 213.

282. Goti, *supra* note 252, at 3. Commentator Nicole Barrett argues that "political and military muscle are not sufficient grounds to ignore legal and historical realities. Barrett, *supra* note 254, at 476.

283. Orentlicher, *supra* note 87, at 2542.

284. *Id.* (emphasis added).

285. NEIER, *supra* note 1, at 213. Author Ernesto Garzón Valdés clarifies, "[w]hen people see that criminals go unpunished, this does anything but strengthen the population s internal point of view toward, or 'dispositional subjection' to, the norms of the system. Ernesto Garzón Valdés, *Dictatorship and Punishment: A Reply to Scanlon and Teitel*, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 291, 295 (Harold Hongju Koh & Ronald C. Slye eds., 1999) (internal citation omitted).

outrageous case, but every case does chip away at the system's ability to deter future abuses.[286] The problem creates a tradeoff: the more the international legal system allows, the less potential human rights abusers are deterred. In other words, "the stability of the international system [of law] can only be enhanced by the increased enforcement of international norms."[287]

3. Use of International Law as a Tool of Oppression by Powerful Nations

Perhaps the most egregious implication of the double standard in international law application is the potential for powerful nations to manipulate the law for their own purposes.[288] Professor Makau wa Mutua argues that "[t]he current status quo in which powerful states exploit the international vacuum of enforcement left by impotent [international] bodies is unacceptable."[289] The objection is that the current system "gives a handful of powerful states yet one more weapon to use against poor peoples and their states."[290] When "the prosecution of government officials from weaker states can be used to politically manipulate and control weaker nations, international law acts to "perpetuate inequality between states."[291] If international law is nothing but an empty shell by which powerful countries further their domination of the less powerful, rather than the international legal system being merely impotent, it is being used as a tool of oppression.

This prospect is hard to swallow, but if true, presents a damning indictment of international criminal and human rights law. It also calls into question all prosecutions under these laws, including those at Nuremberg. It renders all "justice" heretofore achieved in the field of human rights law utterly suspect, and opens it to charges of "victors' justice.

More widely, "use [of] human rights as a pretext for achieving other foreign policy objectives" may very well stain the entire human rights project.[292] When "Western states employ the logic of human rights in foreign policy to advance other goals, such as opening up markets, the human rights project risks becoming yet another tool for powerful countries to dominate the weaker.[293] This prospect has led professor Michael Ignatieff to compare today's "aid workers, reporters, lawyers for war crimes tribunals, [and] human rights observers" to yesterday's "diplomats, missionaries, and commanders of imperial hill stations."[294] Although it is an unfortunate comparison, it appears to be an accurate one.

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286. "Whereas one could claim that justice is served every time human rights abuser is convicted, it is no less true that the rule of law is dubiously compatible with extremely sporadic and selective enforcement. Goti, *supra* note 252, at 3.

287 Seyedin-Noor, *supra* note 253, at 92 (though Seyedin-Noor disagrees with what he terms Orentlicher's "absolutist" approach to international law enforcement).

288. *See, e.g.*, PARENTI, *supra* note 45, at 1-5.

289. wa Mutua, *supra* note 279, at 251.

290. *Id.*

291. White, *supra* note 31, at 224.

292. wa Mutua, *supra* note 279, at 250.

293. *Id.*

294. IGNATIEFF, *supra* note 251, at 5.

Thus, the inequitable application of international law represents a failure of the highest magnitude. It not only implies a breakdown of the international legal system itself, but it also reveals the abuse of the law by powerful nations who exploit it to perpetuate and benefit from power differentials that exist in the nation-state system, and it portends unyielding international strife. While these conclusions represent extremes, they are asymptotes that international law and the nation-state system appear to be approaching.

SECTION IV: CONCLUSION

This Article has attempted to serve as a counter-narrative to the ubiquitous innocence myth that pervades domestic public opinion about U.S. foreign policy and policy-makers. Whether or not the evidence (and the evidence that could be uncovered) is sufficient to prosecute Henry Kissinger for his deeds with respect to East Timor is clearly a question open to debate. And this reluctant admission- that the question is open to debate- is the crux of the purpose of this Article.

If the proposition that there is an arguable basis for holding Henry Kissinger legally responsible for his actions in East Timor is acceptable, the overwhelming uniformity of the innocence myth is disturbed. The question remains whether the general public, that large segment of the polity that is exclusively informed by network television news, will find such a proposition palatable. The question is pressing because it resolves the broader problem of whether the double standard in public opinion that currently plagues the international system of law is intractable. If it is, there appear to be several less-than-pleasant implications, first and foremost being the slow destruction of the international legal order. As that order is slowly and increasingly flouted and disrespected by an ever-growing number of countries and leaders, the benefits engendered by that order will begin to dissipate. Among the list of terribles is greater instability as aggrieved nations and peoples resort to vigilante justice (a large proportion of which is now popularly dubbed "terrorism") to salve the wounds the international community has refused to recognize. Additionally, because the international system of law increasingly appears to have been co-opted by a few powerful nation-states, it is in danger of becoming cynically manipulated as a tool of oppression, merely another weapon in the neocolonialist arsenal.

With the dawn of the ICC,[295] the international community faces a clear crossroads. One path is that of real international participation in, and deference to, the newly created court by fostering a genuine belief that the court will succeed in dispensing justice without regard to nationality and other such irrelevant factors. The alternative is the further erosion of the international system of law and the grim prognostication described above. With the United States working tirelessly to exempt itself and its citizens from the ICC's jurisdiction,[296] the hopes are already slim the court will achieve much. Nevertheless, not all hopes are lost. With the establishment of the new court, the international community *sans* the U.S. has the

295. *See supra* note 2, and accompanying text.

296. *See supra* note 4, and accompanying text.

opportunity to establish a system of international justice acceptable to a majority of the world community If the court is successful in this endeavor, U.S. leaders will face greater pressure to join as the U.S. increasingly looks out of step with the rest of the world. However, if such an event does transpire, the crucial issue would be whether U.S. domestic public opinion would ever countenance the trial of an American soldier, much less a leader. The answer to this hypothetical touches at the very nerve center of the American self-perception and is arguably determinative of the future of the international legal system.