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ARTICLES

BOOK REVIEW

BOOK NOTE

ACKNOWLEDGING OUR INTERNATIONAL CRIMINALS: HENRY KISSINGER AND EAST TIMOR

BRANDON MARK

[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.

WHISTLEBLOWING IN A FOREIGN KEY THE CONSISTENCY OF ETHICS REGULATION UNDER SARBANES-OXLEY WITH THE WTO GATS PROVISIONS

Stewart M. Young

INTRODUCTION

Over the past two years, the United States has been hit hard by a number of scandals involving public companies, including mismanagement and ethical violations by company management and lawyers alike. Certain company names are now synonymous with ethical issues and inept management, including such giants as Enron, Tyco, WorldCom and Adelphia.[1] Due to the problems created by the bankruptcy and the scandal-plagued management of these companies, the public is calling for greater transparency and reporting, a better system of director oversight, and a higher degree of separation between compensation given to managers and the board, on the one hand, and actual performance of the company, on the other.[2] There is a sense within the general community that the balance sheets of companies need to reflect fairly and accurately the actual state of the companies' financial situation. The public is simply tired of managers ruining public companies while they profit at the expense of the shareholders. Elected

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J.D. Candidate, Stanford Law School, 2004; M.A., Waseda University, 2002; B.A., Princeton University, 2000. I would like to thank Professor Richard Morningstar for providing the impetus for this Article (as well as inspiring thoughts and ideas), Professor William Simon for providing insightful comments (and the vehicle for which I came up with this Article topic—smack dab in the middle of taking his Professional Ethics final exam), and Michael Young for editorial suggestions, input and excellent advice. This Article is dedicated to my family, and especially to my mother, Suzan Young for all of her support and love.

1. *See, e.g.*, David Henry & Mike McNamee, *Bloodied and Bowed*, BUS. WK., Jan. 20, 2003, at 56 (talking about the accounting failures that damaged the profession; specifically naming Enron and WorldCom as two of those audit failures); *See also* Special Report, *The Enron Scandal*, BUS. WK. (Jan. 28, 2002) *at* http://www.businessweek.com/magazine/toc/02_04/B3767enron.htm (discussing the Enron scandal in great detail with numerous articles); Harry Berkowitz, *Scandal Bad News for Cable Industry*, NEWSDAY (July 25, 2002), *at* http://www.newsday.com/technology/nybzcab252798410jul25,0,4951853.story?coll=ny-technology-print (discussing the Adelphia Scandal); Robert Reno, *There were plenty of Warning Signs in Tyco Scandal*, SALT LAKE TRIB. (Jun. 11, 2002), *at* http://www.sltrib.com/2002/jun/06112002/commenta/744411.htm (discussing the Tyco scandal) (all visited on Jan. 2, 2003).

2. *See* Business with CNBC, *Corporate Scandals*, MSNBC (September 11, 2003), *at* http://www.msnbc.com/news/corpscandal_front.asp?0dm=N2AJB&cp1=1 (for brief view of the public reactions to these many scandals, news websites have created "scandal pages" for the public to see the latest news on each scandal).

officials are responding to this public outcry with a number of different reform proposals, emphasizing the responsibilities management of public companies owe, both to shareholders and the public at large. Included in these reforms are ethical standards for attorneys who have public companies as clients.[3] These new ethical standards will apply to any lawyer representing companies listed on the American stock exchanges and will be imposed on domestic and foreign lawyers alike.[4] Additionally, foreign firms giving advice to foreign companies attempting to be listed on American stock exchanges would also be subject to the same ethical standards.[5]

The principal legal manifestation of these heightened concerns is found in the Sarbanes-Oxley Act of 2002.[6] Congress passed the Sarbanes-Oxley Act to assuage the public's concern over the recent management and accounting scandals, hoping that the reforms in the Act would create a better atmosphere for transparency and ethical reporting.[7] The Sarbanes-Oxley Act bestows the SEC with the authority to impose ethical standards on attorneys practicing before it, while the Sarbanes-Oxley Act itself spells out the minimum standards that would be acceptable to Congress.[8] The details of those standards are to be elaborated by the SEC and then enforced by that agency [9] Thus, a dichotomy exists between the standards stated in the Sarbanes-Oxley Act and the proposed rules offered by the SEC for comment.

The overall purpose of this Article will be to examine the consistency of the legal regime established by the Sarbanes-Oxley Act, and the ethical regulations proposed by the SEC, in relation to the legal services portion of the World Trade Organization s (WTO) General Agreement on Trades in Services (GATS). Part I will discuss the GATS and its effect on the legal services market in general. Part II will then examine an overview of how the ethics requirements stated in the United States Schedule of Commitments to GATS are treated and how those ethics requirements are locked in by GATS and the WTO. Part III will examine the new ethical responsibility requirements imposed by the Sarbanes-Oxley Act of 2002 and the subsequent rules proposed by the Securities and Exchange Commission (SEC) regarding ethical reporting and "noisy withdrawal."[10] Part IV will

3. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. §§ 205.4, 205.5 (2003) [hereinafter Standards of Professional Conduct for Attorneys].

4. *Id.* at § 205.1

5. *Id.* at §§ 205.2, 205.3.

6. Sarbanes-Oxley Act of 2002, Jan. 23, 2002, Pub. L. No. 107-204, 116 Stat. 745 available at http://news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf [hereinafter Sarbanes-Oxley Act].

7 One of the goals of the Act, "according to the co-sponsors, was to prevent lawyers from sitting idly by while, with their knowledge, their clients committed fraud. In their view, such inaction, or worse, made it possible for corporate managers to perpetrate the Enron and WorldCom scandals. David Becker and Melissa Johns, Professional Responsibility: New Ethical Duties for Lawyers under the Sarbanes-Oxley Act, 16 Insights: The Corp. & Sec. L. Advisor 11, Nov. 2002, at 2.

8. *See* Sarbanes-Oxley Act, *supra* note 6, at § 307

9. *See* Standards of Professional Conduct for Attorneys, *supra* note 3.

10. Tamara Loomis, Lawyer Rules Proposed by SEC, N.Y Law Journal, Nov. 7, 2002, WL 11/7/2002 N.Y L.J. 1("Noisy withdrawal" is known as the action that "lawyer not only. .inform the

demonstrate that the new ethical requirements imposed by the Sarbanes-Oxley Act and the SEC are not consistent with the United States' obligations under GATS regarding legal services. This Article will also discuss possible approaches to reconciling the proposed rules with GATS and action that might be taken by WTO member countries, including under the dispute resolution provisions of the WTO agreements. The ultimate conclusion of this Article is that the SEC proposed standards as applied to non-domestic law firms are potentially irreconcilable with GATS, and likely to create friction between the United States and a number of our trading partners. The most important purposes of this Article are to analyze the inconsistency of the Sarbanes-Oxley Act and the proposed SEC rules with GATS. Second, this Article can be read as a case study for the domestic imposition of ethical standards on the trade in services and legal services field in general. Third, this Article will potentially add fuel to the fire for implementing international ethical standards in certain global service industries, including the legal services field in particular.

I. GATS AND THE LEGAL SERVICES MARKET IN GENERAL

A. The WTO Overview

The WTO was created in 1995 as the only global organization dealing with trade among nations.[11] It includes in its membership 146 countries (as of April 4, 2003) and addresses trade issues in a number of different areas.[12] The WTO acts as a forum for negotiating trade agreements, administers WTO trade agreements, monitors national trade policies and handles trade disputes between member nations.[13] Over the past years the WTO has gained prominence and importance as the organization continues to shape the law of international trade and reshapes the notion of citizen participation in international organization through its sometimes raucous membership meetings.[14] The recent accession of China to the WTO certainly enhances the influence of the WTO, extending its reach even beyond solely capitalistic economies.[15] As many other nations, including Russia, Belarus and the Maldives seek to enter the WTO, its influence upon the international community and trade matters, as well as its capacity to guide and control

board of directors of evidence of misconduct, but also to quit and disaffirm documents submitted to the SEC.").

11. World Trade Organization, *What is the WTO*, *at* http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited on Sept. 13, 2003) (all of this basic information on the WTO can be found on the WTO website).

12. *Id.*

13. *Id.*

14. A number of different appellate body decisions have appeared in the news media, but the Seattle Riots in 1999 drew the most attention to the WTO in recent memory.

15. World Trade Organization, *WTO News: 2001 Press Release, WTO Successfully Concludes Negotiations on China's Entry* (Sept. 17, 2001), *at* http://www.wto.org/english/news_e/pres01_e/pr243_e.htm (last visited on Dec. 10, 2002).

international and economic relations, will grow even greater.[16]

In the wake of World War II, the term "international community" was not invested with quite the same meaning that it has assumed today At that time, the leaders of a small handful of nations drew up blueprints for a number of international organizations, around which the international community would coalesce and through which it would develop.[17] These leaders initially proposed the creation of three international economic organizations: The World Bank, the International Monetary Fund (IMF), and the International Trade Organization, all part of the "Bretton Woods" international economic cooperative movement.[18] Prior to the ratification of the International Trade Organization, portions of the Protocol of Provisional Application from the International Trade Organization Charter were taken and ratified by a number of countries.[19] However, the Charter implementing the International Trade Organization was never ratified, and the initial ratified portions became known as the General Agreement on Tariffs and Trade (GATT).[20] The WTO was created in 1995 through the action of a majority of the GATT party countries, resulting in the termination of GATT [21]

B. The Creation of GATS

In addition to creating the WTO, the Uruguay Round[22] accomplished two other very important things. First, it brought under one umbrella all previously existing multilateral global agreements and codes—bringing all of these under one umbrella organization and structure.[23] Second, it significantly expanded the areas in which the countries reached agreements regarding trade related matters.[24] Among these expansions included the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[25] the Agreement on Trade-Related

16. *See e.g.*, World Trade Organization, *Press Release, Continued Structural Reforms Could Improve Economy Efficiency* (Jan. 17 2003), *at* http://www.wto.org/english/tratop_ /tpr_e/tp209_e.htm (commenting on the Maldives economy) (last visited Jan. 23, 2003); *See also,* World Trade Organization, *WTO News: 2002 News Items, Working Party on the Accession of the Russian Federation* (Dec. 18, 2002), *at* http://www.wto.org/english/news_e/news02_e/ accession_russian_18dec02_e.htm (last visited on Jan. 7, 2003).

17 *See* JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO 21 (2001).

18. World Trade Organization, *GATT A Brief History, at* http://www.wto.org/english/thewto e /whatis_e/eol/e/wto01/wto1_6.htm (offering brief historical insights into the predecessor agreement of the WTO) (last visited on Dec. 5, 2002) [hereinafter *GATT History*].

19. *Id.*

20. *See* JACKSON, *supra* note 17, at 20.

21. *GATT History, supra* note 18. *See also* JACKSON, *supra* note 17, at 399.

22. The Uruguay Round was a series of negotiations undertaken to review the text of GATT, and develop improvements through understandings on GATT Articles. *See* World Trade Organization, *UR: Some Key Facts, at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto01/wto1_32.htm#note1.

23. This is referred to as the "single package" negotiation approach, in which the Uruguay Round resulted in one entire package for members to accept or reject, as well as establishing an entirely new treaty that nations would join. JACKSON, *supra* note 17, at 375. It also established the "new twenty-seven-Article Dispute Settlement Understanding (DSU). *Id.* at 376

24. *Id.* at 375-76.

25. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994,

Investment Measures (TRIMS)[26] and the General Agreement on Trade in Services (GATS).[27] GATS would be the official trade agreement governing international trade in services among WTO members. Since the service industry accounts for over eighty percent of GDP *and* employment in the United States, industries subject to GATS have a unique position in the economy.[28] Additionally cross-border transactions of trade in services accounts for more than twenty-two percent of worldwide trade, illustrating the large arena in which GATS could potentially affect in international trade.[29] Because of the increasing importance that trade in services plays within international trade and the large monetary value of such services, GATS can have potential impact on the restrictions and regulations that member countries place upon its service industries.

The world is changing, and according to Sheldon Novick, the great American legal scholar Oliver Wendell Holmes felt that "change should be made consciously even scientifically to accommodate new purposes."[30] Historically speaking, the GATT did not deal with trade in services, but only dealt with trade in goods.[31] It did that in part because trade in goods was more straightforward and easier to regulate than international trade in services.[32] Additionally trade restrictions in goods generally took the form of tariffs and quotas, both of which are much more straightforward and simple to deal with than the various domestic rules and regulations related to the provision of services. In addition, as trade in goods between countries increased under the GATT regime, so did trade in services.[33] The importance of trade in services became more apparent, as did the need to introduce some order to domestic regulation of services. Accordingly, GATT member countries began to call for limitations on new restrictions and the liberalization of current restrictions on trade in services.[34] By 1995, the Uruguay negotiations concluded an agreement governing international trade in services, thereby cementing the importance of GATS among WTO members.[35]

Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], ANNEX 1C, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Jan. 23, 2003) [hereinafter TRIPS].

26. Agreement on Trade-Related Investment Measures, Jan. 1, 1995, WTO Agreement, ANNEX 1, *available at* http://www.wto.org/english/docs_e/legal_e/18-trims.pdf (last visited Jan. 23, 2003) [hereinafter TRIMS].

27 General Agreement on Trade in Services, Jan. 1, 1995, WTO Agreement, ANNEX 1B, *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Jan. 23, 2003) [hereinafter GATS].

28. Office of the United States Trade Representative, *WTO Services Trade Negotiations, at* http://www.ustr.gov/sectors/services/gat.htm (last visited Oct. 3, 2003).

29. *Id.*

30. SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 156 (Dell Publishing 1990) (1989).

31. *See generally* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969), chapter 20 ("the GATT only applies to trade in goods.").

32. *Id.*

33. *Id.*

34. *Id.*

35. JACKSON, *supra* note 17, at 402 (GATS was included in Annex 1B, part of Annex I "Multilateral Trade Agreements" that were the results of the Uruguay Round).

The GATS includes the regulation of a number of different services, especially including trade in legal services for cross-border transactions of WTO member countries.[36] This agreement explains the general terms for trade in services, including such services as accounting, financial services, air transport, maritime transport and legal services, and it specifically spells out the goal that countries are to liberalize their regulations of those services.[37] The GATS document is a multilateral framework of principles regarding these specific services that cross the borders of member nations of the WTO, and it also sets out guidelines for liberalizing the regulation and licensing of foreign-based service professionals seeking the opportunity to practice in other countries.[38] As such, the Uruguay Round negotiations set up a framework that could be expanded, dealing with the trade in services occurring on an international level with an eye towards ensuring that member countries follow certain principles.[39]

There is a fundamental difference between goods and services. For trade in goods, one does not recognize any legitimate quota or tariff. But, with trade in services, one does recognize the legitimate need for regulations. There is a legitimate purpose to restricting trade in services to maintain proper quality for those services domestically while there is also a legitimate need to liberalize the trade of these services as well. GATS is a mesh of these two legitimate needs; allowing countries on the one hand to keep their legitimate restrictions and regulations on certain industries, while also creating an atmosphere of liberalization of trade in those industries through an international agreement. For the purposes of this Article, the most important aspect of the GATS is the standards it sets for the trade in legal services. But, a corollary to the imposition of those standards is the acknowledgement that member countries may legitimately impose ethical standards or reporting rules for any service provider that does business in their country Of course these two concepts can come into conflict, if those ethical standards or reporting requirements create an unfair burden to international trade in services. But precisely what is unfair is the question. The Sarbanes-Oxley Act of 2002 presents a very good prism to address that precise question.

The Sarbanes-Oxley Act of 2002, passed by the United States Congress, creates affirmative duties for legal service providers domestically, as well as imposing those duties on legal service firms that are not based within the United States.[40] Accordingly the Sarbanes-Oxley Act and the proposed SEC ethics rules are potentially adverse to both GATS and the reasons behind its implementation. As such, member countries with domestic legal service providers who will be affected by the new law would arguably have a valid claim against the United States and could bring such a claim to the WTO dispute resolution body

The GATS began by urging member states to liberalize trade in legal services

36. *See* GATS, *supra* note 27 *at* 297
37. *See generally* GATS, *supra* note 27.
38. *Id.*
39. *See generally GATT History*, *supra* note 18.
40. Sarbanes-Oxley Act, *supra* note 6, at § 307

in accordance with the treaty, as well as to liberalize the restrictions and regulations surrounding licensing of services more generally.[41] For purposes of this Article, perhaps the most important goal of GATS is to reduce restrictions that might unfairly disadvantage foreign service providers who offer services domestically An example would be a reduction in restrictions and licensing requirements for foreign-trained lawyers who would like to offer services to clients in the United States. At the same time, the WTO recognizes through GATS that, in important respects, services differ from goods in fundamental ways. Most crucially, some degree of regulation is necessary to ensure service providers have some minimal degree of professional competence and provide services at some minimum level of acceptable quality In addition, regulations may be necessary to reduce the possibility of undisclosed or inappropriate bias or self-interest in the provision of these services. Accordingly, the preamble of the GATS states that the WTO "recognize[es] the right of Members to regulate, and introduce new regulations, on the supply of services within their territories in order to meet national policy objectives "[42] One of the key features of the WTO is that the organization does not strive to force member countries to implement WTO policies that clash with the legitimate goals of those member countries.

At the same time, however, member countries must possess legitimate and genuine national policy objectives if such a country desires to implement procedures or regulations that are adverse to the WTO's overall trade liberalization objective. WTO members are not allowed to institute harmful regulations or restrictions unless there are legitimate purposes to those restrictions.[43] The WTO's goal is to liberalize and effectuate greater trade among member nations, which means that WTO members that pass restrictions on international trade are in direct conflict with WTO goals.[44] As such, the WTO seeks to ensure that member nations do not attempt to hinder international trade unless the WTO member has legitimate and genuine objectives (known as a national policy objective within the wording of GATS).[45]

Additionally, GATS expressly places "developing countries" in a special category that will entitle them to special treatment in the implementation of their national policy objectives.[46] The WTO's accommodation of developing countries is important to note within GATS and the WTO's activities in general. The nature and degree of preferential treatment that developing countries should receive in international organizations remains the subject of raging debate within the WTO. It is clear that the drafters of GATS recognized developing countries should receive some accommodation.[47] At the same time, the fact that special

41. *See* GATS, *supra* note 27 at 285.

42. *Id.*

43. *See generally* GATS, *supra* note 27.

44. World Trade Organization, *The World Trade Organization, at* http://www.wto.org /english/res_e/doload_e/inbr_e.pdf (last visited Jan. 23, 2003) ("[WTO Agreements] bind governments to keep their trade policies within agreed limits to everybody's benefit.").

45. GATS, *supra* note 27 at 298.

46. *Id.*

47 *Id.* at 285 ("Recognizing the right of Members to regulate, and to introduce new

accommodations were expressly made for developing countries arguably means that, in the absence of such language for developed countries like the United States, such countries should be subject to more rigorous discipline.[48] The United States will be the principle focus of this Article.

C. The GATS Framework and Schedule of Commitments

The GATS is comprised of six parts and eight annexes and has been signed by 146 countries (as of April 4, 2003).[49] The definitions spelled out in GATS cover a broad spectrum of trade in services. It states that "'services' includes any service in any sector except services supplied in the exercise of governmental authority."[50] The WTO Secretariat explains that the objective of GATS includes "progressive liberalization of trade in services, promoting economic growth and development, and increasing participation of developing countries."[51] One of the key aspects of GATS is that it seeks to create a "new definition of trade" covering "not only the supply of services across national borders but also transactions that involve the cross-border movement of factors of production (capital and labour)."[52]

GATS covers all services that involve cross-border transactions, including services like telecommunications, distribution, energy services, financial services, legal services and accounting services industries, to name just a few [53] GATS does not require all WTO members to cover all services because member countries are able to opt certain service industries into GATS or opt them out.[54] Therefore, member countries can choose which services they want to be subject to GATS, rather than having all service industries of that WTO member subject to GATS. Although GATS is supposed to regulate WTO member countries so that they refrain from placing barriers to trade in services, it does not provide such protections to all services.[55] According to the Schedule of Commitments, WTO member countries are able to determine which services in their country will be covered by GATS.[56] Although there are a number of recognized services that many WTO members have included within their Schedule of Commitments, any

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regulations. .given asymmetries with respect to the degree of development of services regulations in different countries, [and recognizing] the particular need of developing countries to exercise this right.").

48. *See generally* GATS, *supra* note 27.

49. World Trade Organization, *supra* note 11.

50. GATS, *supra* note 27 at 286. Examples of services supplied in exercise of government authority would be the military, police, civil and criminal justice systems, etc.

51. *The World Trade Organization: A Training Package*, WTO WEBSITE, *at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/default.htm (Following under the subtitle GATS Objectives) (last visited Oct. 3, 2003).

52. *See* World Trade Organization, *GATS. Main Characteristics*, at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06_9.htm#note2 (last visited Jan. 23, 2003).

53. *See generally* GATS, *supra* note 27

54. *See generally id.*

55. *See generally id.*

56. *See generally* World Trade Organization, *WTO Legal Texts: Countries Schedules of Commitments, at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Jan. 23, 2003).

country is allowed to omit services that it does not want covered by GATS.[57] Thus, it is often the case that GATS does not apply across the board to the same services for all WTO members because some members have decided not to subject some of their service industries to GATS.

Under GATS, there are seven key provisions that greatly affect trade in legal services and the regulation of legal services within WTO members. "These seven provisions include: (1) the requirements of transparency, (2) most favored-nation (MFN) treatment, (3) domestic regulation, (4) recognition, (5) progressive liberalization, all of which are generally-applicable, and (6) the market access; and (7) national treatment provisions, which apply only to 'scheduled' services."[58] These seven provisions apply to the United States under its Schedule of Commitments, and this Schedule also lists legal services as one of the service industries applied to GATS. The "recognition" provision of GATS provides that members are required to increasingly liberalize their regulations governing the ability of foreign legal service providers to practice within that member country [59]

GATS' regulation of trade in services, and specific regulation of the legal services industry, relies on the actions of WTO members. All twenty-nine articles of GATS apply to the regulation of cross-border legal services for a WTO member only if that member lists that category of service on their Schedule.[60] The twenty-nine articles include; Most-Favored Nation Treatment, Business Practices, Subsidies, Recognition, Labour Markets Integration Agreements, National Treatment, Market Access, Negotiations and Schedules of Specific Commitments, Modification and Dispute Settlement and Enforcement, among others.[61] Thus, the Agreement spells out a number of different terms and obligations regarding the regulation of a listed services industry Once a WTO member lists a service industry in its Schedule of Commitments (governed by Article XX) then that service industry becomes subject to the provisions in GATS.[62] The member nation will then have to follow its GATS commitments for those service industries that it has listed on its Schedule.[63]

To satisfy the need of member governments for legitimate domestic regulation on its service industry, the member is allowed to list the current regulations on that particular industry in its Schedule. During the process of implementing GATS, most countries listed legal services as a covered service under their schedules, meaning that GATS applies to the legal services industry of that country In those same schedules, however, "most countries listed their current regulations in their Schedules" and the "consequence of listing a current law is that the current law need not comply with those aspects of the GATS that

57. *See generally id.*

58. Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1006 (2001).

59. *See* GATS, *supra* note 27 at art. VII.

60. *See* Terry, *supra* note 58, at 1000.

61. *See* GATS, *supra* note 27, at Table of Contents.

62. *See id.* at art. XX.

63. *See id.*

apply to 'scheduled' services."[64] Listing a category of service within one's Schedule will mean that future laws and regulations that are implemented by that WTO member must comply with GATS.[65] However, once a member lists its current regulations in its Schedule to GATS, those listed regulations become the standard by which future regulations are judged. If future regulations proposed by a party country are more restrictive than the regulations listed in the member's Schedule, then the member's future regulations are directly adverse to GATS. However, if any future regulations are not more restrictive than the regulations listed in the member's Schedule, then the member's regulations are reconcilable with GATS. Additionally even if the current regulations are more restrictive and strike against the principles of GATS, these regulations are "grandfathered in" as the existing set of regulations as long as these regulations are initially listed on the member's Schedule of Commitments.[66] One could call these "status quo" provisions on legal services, because the member's Schedule of Commitments usually lists the current regulations of legal services at the time the member signed GATS. As such, any subsequent regulations that are more restrictive or introduce greater regulation of legal services than those listed on the member's initial Schedule are in direct conflict with GATS.

D. GATS Regulation of Legal Services

Looking at one problem for the regulating language within GATS is that the definitions of certain professions in service industries often vary around the world. An example of this is that the definition of "legal services" and "attorney" in each of the WTO member countries can differ greatly[67] Any attempt to liberalize regulations governing cross-border legal services and attorney licensing would come into conflict with those different definitions.

Another worry would be that liberalizing regulations governing cross-border legal service transactions might also have an affect on the ethical regulations of legal services in respective WTO member countries. For example, in Japan the definition and licensing of an "attorney, as well as the legal services that are often provided by people other than licensed lawyers in Japan, differs markedly from the same definitions in the United States.[68] Thus, because each WTO member does have its own licensing system and standards, including its own ethical standards and regulations, a treaty such as GATS might be an ineffective instrument to promote liberalization of cross-border trade of legal services. If the WTO

64. Terry, *supra* note 58, at 1004.

65. *Id.* at 1005.

66. *Id.*

67. *See, e.g.*, Michael K. Young & Constance Hamilton, *The Legal Profession of Japan, in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS (Curtis J. Milhaupt et al. eds., 2001).

68. For a detailed analysis of the Japanese legal industry, see *id.* Some of these differences include the provision of legal services in Japan by certain occupations who have not passed the bar or are certified as "lawyers (*bengoshi*)" while still providing services that would only be provided by licensed lawyers in the United States. *Id.* at 44, 48-50.

rigorously follows GATS and enforces member conduct, one result might be slowly reformed (and potentially soft) ethics regulations in all of the countries subject to GATS regulations. Such a thing could be disastrous for the legal industry in general. On the other hand, if the WTO rigorously enforced GATS then it might slowly standardize professional responsibility rules with stricter standards, thereby affecting a higher degree of ethical rules and responsibilities for the legal industry

II. LEGAL ETHICS REQUIREMENTS IN THE US SCHEDULE OF COMMITMENTS TO GATS

A. U.S. Schedule of Commitments in Brief

The United States Schedule of Commitments under the GATS describes the specific licensing and ethical requirements for legal services that are applicable to GATS.[69] Within that document, numerous U.S. states have specified the requirements for foreign lawyers to engage in legal services in their respective jurisdiction. A number of U.S. states also specify their existing professional ethics rules in the Schedule of Commitments and require foreign lawyers to follow those rules if they practice law in that state.[70] However, thirty-five U.S. states do not list their specific rules, simply making passing reference to their professional responsibility rules or other regulations under the Schedule of Commitments.[71] For those U.S. states that do specify their professional ethics requirements and licensing rules (the "bound states"), the Schedule sets forth that each foreign licensed supplier is subject to the Professional Rules of Conduct for that respective state.[72] Although a majority of the fifteen "bound states" in the Schedule (including New York, Texas, California and the District of Columbia)[73] each have different rules of professional conduct for their licensed lawyers to follow, the general scope of the professional ethics rules are very similar from state to state. Thus, while each state might adhere to a different set of rules, the overall theme of the rules of professional conduct are strikingly similar.

As stated earlier, the Schedule of Commitments submitted by each WTO member lists the status quo restrictions allowed for each member, and, therefore,

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69. *U.S. Schedule of Commitments Under the General Agreement on Trade in Services*, U.S. INTERNATIONAL TRADE COMMISSION (May 1997) *available at* ftp://ftp.usitc.gov/pub/reports/studies/GATS97.pdf (last visited on Oct. 4, 2003) [hereinafter *U.S. Schedule of Commitments*].

70. *See id.* at 35.

71. *Id.*

72. Each statement for the U.S. states that do have specific commitments posits that the foreign licensed supplier is to be subject to whatever state rules or code of conduct that all lawyers licensed in the respective state are subject. Thus, if a state follows the ABA Rules of Conduct in that state, then the foreign licensed lawyer is to be subject to those Rules of Conduct. The states that are specifically cited in the Schedule of Commitments with specific binding commitments are: Alaska, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Texas and Washington. *Id.* at 17-33.

73. *Id.*

new regulations implemented by members that more strictly regulate or restrict the international trade of legal services come into conflict with GATS. To ensure that member countries are aware of the respective regulations, GATS requires transparency in the Schedule of Commitments that requires member countries to publish all regulations that affect trade in Schedule services.[74] This action alone eliminates secret rules or regulations by WTO members, because all licensing regulations and professional responsibility rules governing the legal services industry (and other industries) are placed in the open for all to see.[75] Thus, even if GATS does not necessarily affect a massive liberalization of the cross-border legal service industry, it does ensure that WTO member regulations on legal services are published and available to the public and to other countries.

One theme discussed above is the argument that the GATS ability to regulate trade in services with enforcement through the WTO might have the effect of standardizing certain practices and standards for services industries. GATS enforcement by the WTO and WTO members could alter the ethical conduct rules or ethical standards for certain services such as the legal service industry For the United States, this is especially important because the legal profession is not governed by a national board, but by each respective state (and that state's bar association).[76] This legal services regulation occurs in fifty-four jurisdictions in the United States, each jurisdiction with its own rules and regulations regarding the licensing, practice and disciplining of lawyers.[77] These different jurisdictions, while receiving some input from associations such as the American Bar Association, all have their own disciplinary rules and ethical standards by which lawyers admitted within the that state are required to practice.[78] Thus, when the United States submitted its Schedule of Commitments, it listed state-by-state (for fifteen states) which professional rules foreign-licensed attorneys needed to follow in order to practice in those states.[79] Following these specific professional rules would ensure that foreign-licensed lawyers would not be sanctioned by the requisite state's bar association and would ensure that the lawyer would be allowed to practice law in that state.

B. State Licensing of Attorneys in the United States

Since one of the goals of GATS is to effect liberalization in trade in services, the structure of the United States attorney licensing system will be implicitly contrary to such liberalization. State bar associations and the state Supreme Courts, rather than the federal government, controls attorney licensing.[80] Unlike

74. *See* Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?* 20 HAMLINE L. REV 667 673 (1997).

75. *Id.*

76. *See id.* at 677

77. *Id.*

78. GEOFFREY C. HAZARD, JR., SUSAN P KONIAK, & ROGER C. CRAMTON, THE LAW AND ETHICS OF LAWYERING 13-18 (3d ed. 1999).

79. *See U.S. Schedule of Commitments, supra* note 69-73.

80. *See* Burr, *supra* note 74, at 677.

other WTO member countries, each state bar controls the licensing qualifications and professional responsibility rules for each lawyer practicing in that state. If the lawyer is to be subject to ethics rules or is in violation of certain practices, then the state bar association has authority to take actions against such a lawyer.[81] Harmonization of U.S. regulation of the legal profession would be difficult to achieve because of the fifty-four jurisdictions that have fifty-four different codes and rules governing the conduct of attorneys. Granted, many of these rules and codes are strikingly similar, but the United States incorporated those rules and codes into its Schedule of Commitments. Since GATS is an agreement between the United States and other member nations, those other member nations would expect that the United States would conform with its commitments under GATS and move towards gradual liberalization of the legal services industry But it is not even clear that the United States would be able to control the actions of all fifty-four jurisdictions, and also not entirely clear that the federal government has the authority to impose less restrictive regulations on attorneys than the state bar associations and state Supreme Courts. This complicates the liberalization process of legal services in the United States because the federal government has historically not had the power and authority to effect such changes.[82] Ironically, in the case that is being analyzed it is not that the federal government is trying to liberalize professional responsibility rules for attorneys practicing in the United States, it is that the federal government is trying to impose greater restrictions on attorneys which conflicts with the U.S. Schedule of Commitments.

As stated previously, the multi-jurisdictional bar association approach to regulating the conduct of lawyers in the United States differs from most other WTO members. Because there is no central authority in charge of licensing and regulating the legal profession within the United States, the status quo regulations of the states apply through the Schedule of Commitments submitted by the United States Trade Representative (USTR).[83] With a number of state professional responsibility codes listed on the Schedule of Commitments, one could argue that allowing such a convoluted system of legal services regulation appears adverse to the liberalization of trade in services on an international level. One scholar notes "the United States, the leader in pushing for open legal services markets, has one of the most complicated and difficult systems for foreign lawyers. While the United States seeks to establish international standards applicable to the practice of law, internally it has fifty-four jurisdictions with fifty-four sets of requirements to practice law."[84] This means that the United States itself has fifty-four sets of ethical regulations depending on what professional responsibility rules each state bar association utilizes.

To practice law anywhere, it is crucially important for a lawyer to understand the local rules of conduct and professional responsibility Given increasing

81. *See id.*

82. *See id.* at 677-78.

83. *See 1999 USTR Annual Report March 2000: Committee on Specific Commitments, available at* http://www.ustr.gov/wto/99ustrrpt/ustr99_speccomm.pdf (last visited Jan. 23, 2003).

84. Burr, *supra* note 74, at 678.

internationalization of legal practice, some advocate an international licensing board for lawyers or an international legal code of conduct.[85] For instance, some suggest using the CCBE Code of Conduct in the European Community as a common code of conduct for legal professionals in order to create an international professional responsibility code.[86] But the United States has yet to adopt a uniform standard among the fifty-four separate jurisdictions that govern attorney licensing and professional responsibility codes, much less an international code of conduct. Even practice before the federal courts is generally governed by state credentials and the state's reprimands and decisions apply equally to federal practice (except with respect to practice with the United States Patent and Trademark Office, which has a separate credential system).[87]

Because the GATS Schedule of Commitments submitted by the United States explicitly states that the state codes of conduct that a foreign licensed legal professional must follow in each state, any changes to the code or regulations that currently exist in each state (or in the United States) must be in the direction of less restriction or regulation.[88] If any jurisdiction imposes more rigorous standards or regulations, including a heightened professional responsibility code, then those rules and standards presumably come into direct conflict with GATS. But that is exactly what the Sarbanes-Oxley Act has done, hence creating the conflict with the GATS.

III. NEW ETHICS REQUIREMENTS IMPOSED BY THE SARBANES-OXLEY ACT AND PROPOSED SEC RULES

A. Introducing Structural Changes for Ethics Rules in the U.S. Legal Field

The conflict between the GATS and the Sarbanes-Oxley Act most clearly manifests itself in regards to the duty of confidentiality most attorneys owe generally to their clients. In virtually all professional responsibility codes, the duty of confidentiality is centrally important to the ethics of the legal services profession. Even in the United States, most professional responsibility classes in law school spend a great deal of time grappling with the subtle issues of client confidentiality and the attorney-client relationship.[89]

In light of recent events surrounding public companies and associated ethical problems, including those who provided accounting and legal services for troubled companies, the U.S. Congress saw fit to implement new policies and regulations for public companies. Both the SEC and Congress took steps to increase the

85. *Id.* at 686-88.

86. *Id.* at 687.

87. *See generally* http://www.uspto.gov (last visited Jan. 23, 2003).

88. *See* GATS, *supra* note 27, at art. VI.

89. Having just finished class on Professional Responsibility, our section spent couple of weeks out of 12-week semester dealing with confidentiality issues. In other sections of professional responsibility not centered on confidentiality duties, those duties would still tend to come up in certain unrelated cases as well.

transparency of companies listed on any of the stock exchanges in the United States.[90] Additionally, Congress charged the SEC with introducing new regulations and rules in order to alleviate the public's concern that public companies would continue to take advantage of accounting and reporting loopholes without adequate oversight and disclosure.[91] In addition to charging the SEC with reporting and management reforms, Congress gave broad power to the SEC to install professional responsibilities rules.[92] This includes the authority to impose "federal regulation over portions of the legal profession that had traditionally been the domain of State courts and bar associations."[93] One argument for implementing rules governing both managers *and* attorneys that work with public companies is that many of the transactions and deals resulting in fraudulent activity could not take place without attorney complicity.[94] An additional argument is that even if attorneys do not help in the structuring of fraudulent deals, they will still be aware of potentially fraudulent deals when structuring the legal parts of the transactions.[95] Therefore, creating deterrence rules for managers and strengthening the responsibility codes for attorneys will create an atmosphere of awareness to potential SEC violations.

Congress allowed the SEC to go even further than just implementing new transparency rules and a heightened professional responsibility code for attorneys. Congress passed the Sarbanes-Oxley Act that laid out certain minimum standards of attorney conduct, including "up the ladder" structural reporting by lawyers.[96] However, the act did not specifically spell out the powers of the SEC to implement regulations, thereby allowing for broad interpretation of the SEC's mandate to implement regulations on attorneys. Most professional responsibility codes have some disclosure requirements in the event of certain kinds of violations of the law.[97] But, these new SEC proposals would go much further in scope and duty than any previous professional responsibility code, thus arguably becoming more restrictive and, in the bargain, a potential of the U.S. commitment to GATS. In addition, rather than leaving the creation of professional responsibility standards to the states, Congress and the SEC mandate the standards of responsibility and the actions that are to be taken once an attorney notices these conduct violations.[98] The federal government has not generally regulated the practice of attorneys, but allowing the federal government to engage in such a practice now would be a structural change to traditional practices in the United States. If the federal government were merely imposing a structural change in regard to the regulation of lawyers (moving from state bar association restrictions to restrictions also

90. *See generally*, Sarbanes-Oxley Act, *supra* note 6.

91. *See id.*

92. *Id.* at § 307.

93. Joseph A. Grundfest, *Punctuated Equilibria in the Evolution of United States Securities Regulation*, 8 STAN. J. L., BUS. & FIN. 1, 2 (2002).

94. *See id.* at 4-5.

95. *See generally id.*

96. *See* Sarbanes-Oxley Act, *supra* note 6.

97. *See* HAZARD, KONIAK & CRAMTON, *supra* note 78.

98. *See generally id.*

imposed by the federal government), then such a change might not be such a large issue according to U.S. commitments to GATS.[99] However, in this case, the federal government is attempting to change the structure that restricts practicing attorneys (by allowing the federal government to impose new professional responsibility rules) *and* attempting to change the substance of those former professional responsibility codes. Since the federal government is trying to impose an entirely new set of burdens on attorneys through new regulations *and* a new structural system, it would seem that the U.S. legal services industry is not being liberalized, especially for foreign lawyers. And this is precisely what the United States agreed not to attempt when it submitted its Schedule of Commitments under GATS.

B. Requirements Imposed by Sarbanes-Oxley and the Proposed SEC Rules on ALL Lawyers

By its terms, the Sarbanes-Oxley Act extends to all lawyers practicing in the United States.[100] It goes even further, regulating the conduct of any lawyer—foreign or domestic—who advises a company that lists itself on a U.S. stock exchange, wherever that lawyer is located when he gives that advice.[101] The potential for restricting legal practice is clear. According to one source, "many have voiced concern that the newly enacted Sarbanes-Oxley Act would inhibit counsel's ability to adequately advise and represent their corporate clients in the event of real or suspected securities violations."[102]

Section 307 of the Sarbanes-Oxley Act governs lawyers. Entitled "Rules of Professional Responsibility for Attorneys, that section sets out the method whereby rules are to be created that require attorneys to report potential violations of securities laws or breach of fiduciary duty [103] The Act stipulates that:

> [t]he Commission [SEC] shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—
>
> (1) requiring an attorney to report evidence of material violation of securities law or breach of fiduciary duty or similar violation by the company or an agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

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99. While this change may not pose problem with GATS this Article does not address any potential Constitutional implications or other complications of such a change.

100. *See* Sarbanes-Oxley Act, *supra* note 6.

101. The wording of the Act does not state whether it would only be for U.S. attorneys or not, because it merely uses the word "attorney" in the Act. *See id.*

102. Leslie Wharton, *Hazards for Attorney-Client Relationship*, N.Y LAW JOURNAL. CORPORATE COUNSEL, Nov. 18, 2002, at S1, WL 11/18/2002 NYLJ S1.

103. *See* Sarbanes-Oxley Act, *supra* note 6, at § 307

> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.[104]

Thus, the SEC is invested with power to implement professional responsibility standards for attorneys who offer legal services to public companies. The term "appearing and practicing before"[105] the SEC is not clear, which means that the Act could apply to foreign lawyers that deal with publicly listed companies in the United States. It could also apply to foreign lawyers that are giving advice to local companies desiring to be listed on American stock exchanges. The term is ambiguous and has the potential to apply to a wide variety of attorneys both domestically and internationally

The Sarbanes-Oxley Act also vests enforcement power in the SEC. Section 3 states:

> In general, a violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board [Public Accounting Oversight Board established in section 101 of the Act] shall be treated for all purposes in the same manner as a violation of the Securities and Exchange Act of 1934. .or the rules and regulations issued thereunder. [106]

The Sarbanes-Oxley Act thereby sets out broad powers to the SEC and the newly established Public Accounting Oversight Board to implement and enforce standards. The enforcement of standards includes newly minted SEC professional responsibility standards which have the potential to encroach on perhaps the most important professional responsibility· the attorney-client privilege.

The threat to the attorney client privilege is clear. The Act requires attorneys to disclose certain attorney-client communications to the auditing board or the board of directors if proper action is not taken.[107] Many argue that those disclosures would normally be an express violation of the state codes of professional responsibility [108] "Unless the SEC expressly provides in its rulemaking that the attorney-client privilege applies to communications made pursuant to [Sarbanes-Oxley Act] §307 it is conceivable that courts will deny that the privilege applies to §307 communications on policy grounds."[109] One argument that can be made is that this is not a violation of the attorney-client

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104. *Id.* The Act states that this rule to be enacted by the SEC must be done not later than 180 days after the date of enactment of this Act, which is by January 26, 2003. *Id.*

105. *Id.*

106. *Id.* at § 3. The Act goes on to state the enforcement mechanism, including investigations, injunctions and prosecution of offenses and also states that nothing in the Act will limit or impair the Commission authority. *Id.*

107. *Id.* at § 307

108. *See generally* Wharton, *supra* note 102.

109. *Id.*

privilege because the client is the corporation. Since the privilege attaches only to the corporation, then forced communications to the CEO, the CLO or the auditing board would only be an extension of the privilege to the corporation.[110] However, SEC-proposed rule 205 expands or eliminates that duty of confidentiality when it requires attorneys to continue "up-the-ladder" and report suspected violations to the SEC.[111]

Of course, some degree of regulation by the SEC is entirely permissible under the GATS because such regulation pre-dates the GATS and is thus grandfathered in the US listing of the Schedule of Commitments. Before the SEC announced proposed rules on November 6, 2002 to implement Sarbanes-Oxley Act §307 [112] the SEC already possessed rules that called for the enforcement of ethical standards for attorneys dealing with stock exchange-listed clients.[113] Originally the SEC adopted Rule 102(e) as a "rule that permits the Commission to initiate disciplinary proceedings against attorneys who lack integrity or competence, engage in improper conduct, or who are determined to have violated provisions of the federal securities laws."[114] The implementation of this rule has not been without controversy. Legal challenges to Rule 102(e) abound, and the SEC itself recognizes that such use of the rule has been greatly debated over the past years.[115] Rule 102(e) does permit the SEC to bring disciplinary proceedings against lawyers who have violated certain standards, but its application has been inconsistent and ultimately difficult to apply evenly [116] Prior to the passage of the Sarbanes-Oxley Act, the SEC's success in using Rule 102(e) varied in decisions of federal courts, and has proven controversial among commentators as well.[117]

Interestingly the legal rules *required* by the Sarbanes-Oxley Act itself may not violate most state's concept of attorney-client privilege. The Sarbanes-Oxley rules only require public company counsel to report potential wrongdoing to the Chief Legal Officer (CLO) or the Chief Executive Officer (CEO) and then to the auditing board if the reported wrongdoing is not remedied by the CEO or CLO.[118]

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110. By inhibiting the application of the attorney-client privilege for communications pursuant to §307, the SEC might not effectively accomplish the transparency that it will seek. Because lawyers and their clients will know that their communications will not be privileged, one worry is that some lawyers will not seek out the requisite information and potential violations that must be reported under §307

111. *See* Implementation of Standards of Professional Conduct for Attorneys, Proposed Rule Release Nos. 33-8150; 34-46868; IC-258929, Fed. Sec. L. Rep. (CCH) ¶ 71670 (Dec. 2, 2002), *available at* 2002 WL 31676577 [hereinafter Implementation of Standards of Professional Conduct].

112. Wharton, *supra* note 102.

113. *See* Implementation of Standards of Professional Conduct, *supra* note 111, at ¶ 71,671.

114. *Id.*

115. *Id.* ("The Commission's use of Rule 102(e) has proven to be controversial, and until enactment of the [Sarbanes-Oxley] Act, the Commission has never had express statutory authority to promulgate rule establishing standards of conduct for attorneys representing issuers.").

116. *Id.* at ¶ 71,671 fn. 13. ("Rule 102(e) does not establish professional standards. Rather, the rule enables the Commission to discipline professionals who have engaged in improper conduct by failing to satisfy the rules, regulations or standards to which they to which they are already subject, including state ethical rules governing attorney conduct. ").

117. *See e.g.*, Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994); Davy v. SEC, 792 F.2d 1418 (9th Cir. 1986); Touche Ross v. SEC, 609 F.2d 570 (2d Cir. 1979).

118.Sarbanes-Oxley Act, *supra* note 6, at § 307

Since the attorney's "client" might be considered the corporation, but not the individuals within it, such reporting may not be a violation of any attorney-client confidence. After all, the attorney is merely reporting to higher-ups within the corporation—the corporation being the client.

However, the proposed rules by the SEC go much further, requiring public company counsel to report suspected wrongdoing outside the corporation—to the SEC—if the wrongdoing is not rectified by the CLO, the CEO, or the audit board.[119] "[T]he proposed rule [by the SEC] extends beyond the Sarbanes-Oxley Act by requiring counsel, under some circumstances, to act as whistleblowers through the 'noisy withdrawal' of a submission to the SEC tainted by 'material violations.'"[120] In proposed Rule 205, the SEC is attempting to respond "to Congress' mandate that the Commission adopt an effective 'up the ladder' reporting system. .[and] the proposed rule would adopt an expansive view of who is appearing and practicing before the Commission."[121] In fact, however, proposed Rule 205 "incorporates several corollary provisions that are not explicitly required by [Sarbanes-Oxley Act] Section 307 including provisions that permit or require attorneys to effect "noisy withdrawal, to notify the SEC when that "noisy withdrawal" is effected, and "to permit attorneys to report evidence of material violations to the Commission."[122] Thus the SEC's own proposed Rule 205 extends well beyond the minimum standards that are contained in the text of the Sarbanes-Oxley Act.

C. Reaction from Attorneys and Bar Associations to the Proposed Rules

Many attorneys, as well as bar associations, including the American Bar Association, have expressed their dissatisfaction with the proposed SEC rules, especially proposed Rule 205.[123] Even before passage of the Sarbanes-Oxley Act, the American Bar Association (ABA) attempted to derail the legislation with its own proposals for state-level disclosure rules.[124] However, this attempt failed and the proposal by the ABA had little impact on the Sarbanes-Oxley legislation.

Ironically, however, the ABA suggestions were not without effect. The SEC stated that its proposed rules incorporate some additional provisions derived from legal commentators and from the ABA proposals themselves.[125] Besides the

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119. Implementation of Standards of Professional Conduct, *supra* note 111, at ¶¶ 71688-89 ("Notice to the Commission where this is no appropriate response within a reasonable time.").

120. Wharton, *supra* note 102. This article also describes the crime-fraud exception as potentially being stifled by the Sarbanes-Oxley Act when dealing with reporting between counsel and the CEO, CLO or auditing board of the company.

121. Implementation of Standards of Professional Conduct, *supra* note 111, at ¶ 71,673.

122. *Wharton*, *supra* note 102. The commentary on the proposed rule 205 states that the "Commission does not intend to supplant state ethics laws unnecessarily, and that "[a]t the same time the Commission does not want the rule to impair zealous advocacy, which is essential to the Commission's processes. Implementation of Standards of Professional Conduct, *supra* note 111, at ¶ 71,673.

123. Loomis, *supra* note 10.

124. *Id.*

125. *Id.*

"noisy withdrawal" rule, another proposal by the SEC "would expand a lawyer's disclosure obligations to encompass not just those instances in which he 'knows' wrongdoing has occurred, but also when he [or she] reasonably believes' it has or is about to occur."[126] This moves away from a requirement of actual knowledge of the violation to a more objective standard of "reasonable belief."[127] The extension of the SEC proposal from actual knowledge of a violation to "reasonable belief" of a violation is an even greater extension of attorney reporting than previously anticipated by the ABA and many legal commentators. In addition, the ABA has repeatedly rejected the "noisy withdrawal" rule because it would compromise in the most fundamental way the attorney-client privilege and client relationship in general.[128]

From a GATS perspective, the most crucial point is that the SEC proposed rule of "noisy withdrawal" would place greater restrictions and duties on attorneys than current state ethics rules and regulations. "While attorneys are generally prohibited from assisting a client' s fraudulent conduct, current ethical rules rarely require or even permit a lawyer to disclose a client's past or present conduct to a third party, let alone a federal enforcement agency."[129] Commentators worry that "the proposed rules appear quite expansive and may impose these new ethical requirements on any legal professional whose services contribute to the Securities Act or Exchange Act reports of a public company."[130] Thus, not only would an attorney dealing with SEC-related issues be required to play the role of watchdog, but in that role the attorney would also be subject an SEC enforcement action. The SEC's proposed regulations would force attorneys giving any advice or counsel to publicly-listed companies to abide by the SEC ethics rules, pre-empting state bar association rules and greatly expanding ethical duties, often in direct violation of those state rules. Additionally, the SEC itself states that "Part 205 would cover lawyers who are licensed in foreign jurisdictions, although only to the extent they 'appear and practice' before the Commission in the representation of issuers."[131] The overall result of the SEC's proposed rules is that state bar association ethics rules will not carry the same weight for lawyers who are involved with publicly listed companies, and therefore there will be a *de facto* expansion of regulation of lawyers and the legal services industry in general.

IV SARBANES-OXLEY AND SEC RULE INCONSISTENCY WITH US GATS COMMITMENTS

The overall goal of the GATS is to liberalize trade in services for cross-border

126. *Id.*

127. *Id.*

128. *Id.*

129. Dan A. Bailey, J. David Washburn & Quentin Collin Faust, *Navigating the Minefield of the SEC' Ethics Reform Measures*, 6 WALL ST. LAWYER 1 (Nov. 2000), WL 6 No. 6 GLWSLAW 1. It continues about this ethics concern, stating that "[t]his principle derives from and is firmly embedded within the attorney/client privilege and the important justifications for that privilege. *Id.*

130. *Id.*

131. Implementation of Standards of Professional Conduct, *supra* note 111, at ¶ 71677

transactions, as well as to increase the flexibility for providers of services that cross international borders.[132] The affect of the Sarbanes-Oxley Act and the proposed SEC rules on foreign legal services has the potential to disrupt those services and to introduce higher regulatory measures than previously imposed on foreign lawyers. The SEC has received numerous comments from law firms, legal services personnel and bar associations to that effect during its public comment period that ended on December 18, 2002.[133] Included among these are many comments from foreign law firms and from United States citizens practicing law in foreign countries.[134] Although the state bar association and domestic law firm comments generally complain that the proposed SEC rules that include "noisy withdrawal" are too strict for attorneys to follow in good conscience, the comments from the foreign law firms are even more forceful against the prospect of SEC enforcement of ethical rules on foreign attorneys. The SEC proposed rules that seek to have attorneys engage in reporting to the SEC for "noisy withdrawal" potentially impinges on the legal ethical norms of other countries, and the comments specifically state that SEC enforcement of such ethical norms would be adverse to the norms of certain countries.[135]

A. Problems with Implementing the SEC Proposed Rules

With respect to implementation and enforcement of attorney ethical regulations by the SEC, two problems are particularly worth highlighting. The first problem is that the SEC will impose these ethics rules on both domestic and foreign attorneys who advise listed companies. Foreign lawyers will be subject both to their own ethical regulations in their own country and to the SEC regulations, and these two sets of regulations might well conflict with each other.

The second problem is that the heightened SEC regulations will implicitly conflict with the U.S. Schedule of Commitments under GATS. Once the Schedule of Commitments is published by the United States, then the United States is under an obligation to the WTO and WTO member countries to abide by its published regulations and not to impose more restrictive regulations or rules.[136] There are some exceptions to this, including exceptions for national policy objectives, but generally the United States and all other member countries that are parties to the GATS are obligated to adhere to their licensing rules and regulations for trade in services. As such, they will be obligated to adhere to their listing on their

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132. *See* GATS, *supra* note 27, at Preamble.

133. *See Comments on Proposed Rule: Implementation of Standards of Professional Responsibility*, U.S. SECURITIES AND EXCHANGE COMMISSION, No. 33-8150, *at* http://www.sec.gov/rules/proposed/s74502.shtml (last visited Oct. 6, 2003).

134. For example, the managing partners from the Tokyo offices of Sullivan & Cromwell, Simpson & Thatcher and Davis, Polk wrote combined letter to the SEC. There are also number from recognized Japanese firms (Nagashima Ohno, Anderson Mori, etc) and from other parts of the globe, including New Zealand, Venezuela and China. *Id.*

135. Letter from 77 Law Firms to Jonathan G. Katz, Secretary, SEC (Dec. 18, 2002), *at* http://www.sec.gov/rules/proposed/s74502/77lawfirms1.htm (last visited Jan. 23, 2003).

136. *See generally* GATS, *supra* note 27

respective Schedule of Commitments. Thus, proposed SEC Rule 205 calls for both "noisy withdrawal" and a "reasonable belief" requirement for reporting violations, these two additions to the professional responsibility rules of lawyers in the United States will exceed the parameters of current ethics rules. More importantly the expansion of such rules will exceed the professional responsibility requirements that are listed in the U.S. Schedule of Commitments. It is therefore difficult to reconcile proposed SEC Rule 205 and the Sarbanes-Oxley Act under the United States commitment to GATS, and it becomes likely that the United States' actions are irreconcilable according to the GATS.

Foreign lawyers will encounter potentially very serious problems when trying to comply with both the SEC's proposed rules and the regulations governing their respective countries. The number of attorneys that will be affected will be large. For instance, "[a]t December 31, 2001, 1,344 companies from 59 countries were reporting issuers under the Exchange Act."[137] Given the sheer size and dynamism of U.S. capital markets, the number of foreign companies issuing securities under the SEC guidelines continues to increase. While most of these listed foreign companies have U.S. counsel, most also utilize local lawyers to receive advice and to act as local counsel. This is because local advice is generally much cheaper. Moreover, foreign company officials have a higher level of comfort when dealing with attorneys from their country Under the SEC guidelines and the proposed rules, even though local foreign lawyers may only be offering scant legal advice or only facilitating introductions to other American law firms, these local foreign lawyers would still appear to be subject to the proposed SEC rules. At the same time, these local foreign lawyers will be subject to the professional regulatory regimes in their own countries, including certain regimes that differ widely than those in the United States.[138] Requiring foreign local lawyers to follow SEC regulations that are adverse to domestic professional regulatory licensing rules may create serious conflict with U.S. representations and commitments under the GATS. The SEC seeks to protect the investing public from faulty disclosure, but requiring greater professional responsibility restrictions that conflict with foreign local regulations also may create disincentives for foreign countries to register their securities.[139]

An example of local foreign lawyers being subject to two conflicting professional responsibility regulations comes from the comments of several different Japanese law firms. A number of Japanese firms (Mori Sogo, Anderson Mori, Nagashima Ohno, etc.) advise Japanese companies on securities listings and

137 Letter from 77 Law Firms to Jonathan G. Katz, *supra* note 135, at sec. 1.

138. *Id.* ("Non-U.S. issuers and their external and internal local lawyers usually rely on U.S. counsel as to the interpretation and application of U.S. securities law matters.").

139. *Id.* The argument is that foreign companies would rather not subject themselves or their lawyers to even greater professional responsibility duties than already subject to in their own country, and therefore would not register the securities of those companies, which would not be benefit to investors in the long run. Since market forces are important in determining whether investors will buy securities, one of the goals of the SEC should be to increase the options that are available to investors. This should be within reason, however, and the Sarbanes-Oxley proposal on its face appears to be enough to deter serious violations.

securities practices within the United States.[140] Many of the lawyers in such firms have been trained professionally in Japan and the United States. A large number of licensed attorneys in Japan have received some legal training in the United States, usually through the L.L.M. program of a major law school, and are often members in good standing in state bars, usually New York, California, or Illinois.[141] But they are also registered by the Japanese Bar Association to practice in Japan, subject to the same rules and regulations governing the practice of law in that country.[142] According to several Japanese law firms, the proposed SEC rules would be a direct violation of the duty of confidentiality under Japan Bar Association rules. The comments from the law firm of Nagashima Ohno, one of Japan's largest and most respected law firms, state:

> The obligation to report to the Commission would, in most instances, result in a breach of Article 23 of Chapter IV of the Practicing Attorney Law of Japan. Article 23 provides that: A practicing attorney or a person who was previously a practicing attorney shall have the right and duty to maintain the secrecy of any facts which he came to know in the performance of his profession; provided, however, that this shall not apply when otherwise provided for by any statute. Article 23 imposes a duty of confidentiality on all Japanese Attorneys requiring them to maintain the confidentiality of information obtained in the course of their duties unless otherwise required under a Japanese statute.. The Proposed Rule, if adopted in the proposed form, would require the Japanese Attorneys to disaffirm to the Commission any opinion, document, affirmation, representation, characterization. .such disaffirmation is tantamount as a practical matter to the specific disclosure of a violation. .in which case the Japanese Attorneys who so disaffirmed will be construed to commit a violation of the confidentiality obligation imposed under Article 23 of Chapter IV of the Practicing Attorney Law of Japan.[143]

That law firm's letter to the SEC also states that "noisy withdrawal" to the SEC would also breach Japan's Article 23 because it would be tantamount to a disclosure of a violation without the specific disclosure of that violation.[144] Other public comments from Japanese law firms echo these same concerns about the

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140. *See* Letter from Tokyo Branch Offices of Three U.S. Law Firms to Jonathan G. Katz, Secretary, SEC (Dec. 20, 2002) *available at* http://www.sec.gov/rules/proposed/s74502/tokyo-offcs.htm; Letter from Nishimura and Partners to Jonathan G. Katz, Secretary, SEC (Dec. 18, 2002) *available at* http://www.sec.gov/rules/proposed/s74502/nishimura.htm; Letter from to Isao Shindo, Anderson Mori to Jonathan G. Katz, Secretary, SEC (Dec. 18, 2002) *available at* http://www.sec.gov/rules/proposed/s74502/ishindo1.htm; Letterfrom Tomotsune & Kimura to Jonathan G. Katz, Secretary, SEC (Dec. 18, 2002) *available at* http://www.sec.gov/rules/proposed/s74502/tomotsune1.htm; Letter from Tohru Motobayashi, President, Japan Federation of Bar Associations to Jonathan G. Katz, Secretary, SEC (Dec. 14, 2002) *available at* http://www.sec.gov/rules/proposed/s74502/tmotobayashi1.htm (all links last visited Jan. 23, 2003).

141. *Id.*

142. *See generally supra* note 140

143. Letter from Nagashima, Ohno & Tsuneshima to Jonathan G. Katz, Secretary, SEC (Dec. 18, 2002) *available at* http://www.sec.gov/rules/proposed/s74502/nagashima1.htm (last visited Jan. 23, 2003).

144. *Id.*

SEC regulations impinging directly on Japanese bar association ethics requirements.[145]

B. Conflicts Between SEC Rule 205 and U.S. Commitments to GATS

Looking at the SEC's proposed Rule 205 in the context of the U.S. Schedule of Commitments and its obligations under GATS, an inherent conflict arises. The Schedule of Commitments explains the professional responsibility codes that are to be followed by foreign lawyers that practice in each respective state.[146] Once these professional responsibility codes are offered in the Schedule of Commitments, then any provision that is more restrictive than the current one is in direct conflict with GATS itself. No professional responsibility code approves of "noisy withdrawal" or the "reasonable belief" standard that the SEC currently advocates in proposed rule 205.[147] Therefore, if the SEC actually includes the "noisy withdrawal" and the "reasonable belief" requirements in Rule 205, it would be enacting regulations and rules that are stricter than those included in the U.S. Schedule of Commitments to GATS.[148] Such a scenario conflicts inherently with GATS, and the United States would be in direct violation of GATS if it allows the SEC to install stricter professional responsibility rules on all lawyers that practice with public companies.

Additionally Congress' passage of the Sarbanes-Oxley Act and its bestowing of authority on the SEC to regulate attorneys and pass professional responsibility rules conflicts with GATS in another way State bar associations and the state Supreme Courts have generally been the institutions that traditionally regulate practicing attorneys in the United States.[149] By giving the SEC the power to introduce professional responsibility rules for practicing attorneys, Congress shifted the power to regulate attorneys from the states (through the state bar associations and state Supreme Courts) to the federal government (and into the hands of the SEC). This clashes with GATS because it shifts the actual entity making the regulations and restrictions on attorneys and thereby alters the system that the United States submitted in its Schedule of Commitments. By altering a portion of the professional responsibility structure for attorneys practicing in the United States with the introduction of more restrictive regulations, the Sarbanes-Oxley Act Section 307 conflicts with the principles of GATS and the Schedule of Commitments submitted by the United States a number of years ago.[150]

C. Remedies to the Inherent Conflicts between SEC Proposed Rules and GATS

There are provisions that would allow the United States to still pass the Sarbanes-Oxley Act and allow the SEC to implement stricter professional

145. *See supra* notes 140-144 and accompanying text.

146. *U.S. Schedule of Commitments*, *supra* note 69 and accompanying text.

147 *Id.*

148. *Id.*

149. *See* HAZARD, KONIAK, CRAMTON, *supra* note 78, at 13-18; *see also* Grundfest, *supra* note 93, at 2.

150. *Id.*

responsibility standards. GATS recognizes the importance of national policy objectives, stating that "[t]he process of liberalization [of service industries] shall take place with due respect for national policy objectives."[151] Understandably, the United States could claim that restricting and regulating the professional responsibilities of attorneys practicing with listed companies is a legitimate national policy objective. Additionally, to reconcile the Sarbanes-Oxley Act and the SEC proposals with GATS, the United States is able to modify its Schedule of Commitments under Article XXI of GATS.[152] The United States would need to follow the procedures laid out in Article XXI of GATS by: (1) notifying its intent to modify or withdraw the Commitment to the legal services industry three months before it intends to modify or withdraw its Schedule and (2) undergoing negotiations with other WTO members to agree to a compensatory arrangement at the request of any affected WTO member.[153]

If an agreement is reached by the United States and any affected WTO member, then that would be the end of the matter and the United States would then modify its Schedule of Commitments to reflect the proposed SEC rules. If an agreement is not reached, however, then the affected country would be able to request arbitration on the matter according to Article XXI section 3(a).[154] Once the arbitration is completed, or if the affected member does not request arbitration, then the United States would be free to modify and alter its Schedule of Commitments by including the Sarbanes-Oxley Act and the SEC proposed rules in its Schedule. Thus, to ensure that the SEC-proposed professional responsibility rules are in compliance with GATS, the United States will have to use the modification procedures listed in GATS and will have to negotiate with any affected WTO member or undergo arbitration proceedings with that affected member.

One might argue that applying the Sarbanes-Oxley Act and the SEC professional responsibility rules solely to U.S.-practicing lawyers would thereby not conflict with GATS or foreign professional responsibility rules; however, the act of applying enhanced professional responsibility rules only to U.S. lawyers would still violate the spirit of GATS. The goal of GATS is to achieve "progressively higher levels of liberalization of trade in services" for all WTO members.[155] Expanding the professional responsibility rules to apply only to U.S. lawyers would not liberalize trade in services in general.[156] Applying the SEC rules only to U.S. lawyers would create a large foreign constituency of legal services personnel who are not subject to the same disclosure and reporting requirements as lawyers in the United States. Requiring stricter professional responsibility standards on U.S. lawyers, while not subjecting foreign lawyers to such a requirement, would be unfair to U.S. lawyers who would be subject to the

151. GATS, *supra* note 27, at art. XIX, sec. 2.
152. *Id.* at art. XXI.
153. *Id.* at art. XXI, secs. 1(b) and 2(a).
154. *Id.*, at art. XXI, secs. 3(a) and (b).
155. *See* GATS, *supra* note 26, at Preamble.
156. *Id.*

higher standards. This would place U.S. lawyers at a potential disadvantage vis-à-vis foreign attorneys because companies might hire foreign attorneys for their transactions in order to avoid the reporting and disclosure requirements imposed by the SEC. By mandating that the proposed SEC rules only apply to U.S. attorneys, the SEC would create an unfair system for those lawyers and likely would not be able to impose such a system against intense lobbying efforts by U.S. attorneys and bar associations.

CONCLUSION

The Sarbanes-Oxley Act and the proposed SEC rules directly conflict with the U.S. Schedule of Commitments and the U.S. commitment to GATS. To get around this conflict, the United States could follow the procedures for modification of its Schedule, but it has failed to do so within the requisite time period. As of this completion of this Article, the SEC is still in the midst of deciding which proposed rules it will implement. If it does decide to apply SEC proposed Rule 205 requiring "noisy withdrawal" and a "reasonable belief" standard, then the actions by the United States will be in direct conflict with its commitment to the General Agreement on Trade in Services. Although the GATS does not preempt WTO member's sovereignty to pass regulations on service industries, proposed Rule 205 would conflict with the United States' own Schedule of Commitments, which would be a violation of GATS. Therefore, unless the United States takes proper actions to rectify proposed Rule 205's conflict with GATS, it will ultimately be vulnerable to complaints by adversely affected WTO member nations. Such complaints could ultimately lead to dispute resolution action taken by those WTO member countries, potentially exposing the United States to adverse liability through an unfavorable ruling. Thus, prior to reforming the professional responsibility code of attorneys that appear or practice before the SEC, the United States must observe its commitment to GATS by following the procedures for modifying its current Schedule. Action in this manner would add more legitimacy to the GATS and the WTO in general, while still allowing the United States to implement greater reforms for its overall purposes.

ADDENDUM

After the completion of this Article, the SEC adopted its proposed rules on January 23, 2003. These adopted rules "would require lawyers to take concerns about violations of securities laws to top executives at the companies they advise and, if necessary to corporate boards."[157] Additionally, the SEC stopped short of adopting the full version of proposed Rule 205, which required lawyers to report their concerns directly to the SEC if top executives and the board did not respond to warning by a lawyer. The final version of the SEC rules also "adopted a

157 Jonathan D. Glater, *S.E.C. Adopts New Rules for Lawyers and Funds*, N.Y TIMES, Jan. 24, 2002, at C1, *available at* http://www.nytimes.com/2003/01/24/business/24SEC.html (last visited Jan. 23, 2003).

complex definition explaining when a lawyer must report evidence of fraud to management."[158] Additionally the SEC "approved an extension of the comment period on the 'noisy withdrawal' provisions of the original proposed rule and publication for comment of an alternative proposal."[159] Along with the extension of this period for public comment, the SEC proposed an altered version of "noisy withdrawal" that would require the listed company to notify the SEC when a lawyer withdraws from representation of that company Lastly, the SEC rules provided "that foreign attorneys who are not admitted in the United States, and who do not advise clients regarding U.S. law, would not be covered by the rule, while foreign attorneys who provide legal advice regarding U.S. law would be covered to the extent they are appearing and practicing before the Commission."[160]

The ideas expressed in this Article are still pertinent (despite the fact that the newly adopted SEC rules are less restrictive than its proposed rules) and offer a unique view on how the Sarbanes-Oxley Act and certain SEC proposals potentially conflict with U.S. commitments under GATS. Since the "noisy withdrawal" requirement is still in its public comment period, then it will still be in conflict with the U.S. commitment to GATS if such restrictive regulations are adopted by the SEC. A corollary to this is that if the United States exhibits a commitment to GATS by following the procedures for modifications to its submitted Schedule, such a move will strengthen the legitimacy of GATS and the WTO as well. Ultimately, this will also strengthen the U.S. commitment to the WTO and to the liberalization of international trade and exchange of services between WTO member countries. By following the rules set out to modify GATS, the United States would exhibit its commitment to the development of international institutions and a developing international legal regime.

158. *Id.*

159. *SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act*, SEC PRESS RELEASE 2003-13, *available at* http://www.sec.gov/news/press/2003-13.htm (last visited Jan. 23, 2003).

160. *Id.*

IMMIGRATION LEGISLATION PURSUANT TO THREATS TO US NATIONAL SECURITY

*Ruchir Patel**

This article will examine the United States' immigration legislation in the face of threats to national security Throughout history foreign enemies have threatened the American way of life, from the Germans in World War I, to the spread of Communism, to the current threat of terrorism. As history has demonstrated, the U.S. has taken drastic measures to protect its citizens. This paper will consider those actions and evaluate the PATRIOT Act's adequacy in resolving the present threat to national security Further, this paper will propose reforms to certain immigration provisions of the PATRIOT Act.

BACKGROUND

The United States Constitution grants Congress the power to "establish a uniform Rule of Naturalization"[1] and grants the Executive Branch the inherent sovereign authority to regulate immigration.[2] Aliens seeking entrance into the United States have no claim of right;[3] rather admission is a privilege granted by the sovereign nation upon such terms as it prescribes.[4]

The United States relies upon immigration policies to protect itself against subversives.[5] U.S. history includes spies, saboteurs, anarchists, and terrorists as parts of this subversive class. It has feared immigrants who seek to destroy the government rather than strive for the shelter of its freedoms.[6]

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1. U.S. Const. art. I, § 8, cl. 4.

2. Excludable Aliens, 8 U.S.C. § 1182(a)(27)(2001) (Grants the Attorney General the power to exclude any alien seeking admission into the United States "to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.")

3. U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); *Accord* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

4. *Id.*

5. *See generally* Alexander Wohl, Comment, *Free Speech and the Right of Entry Into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act*, 4 AM. U. J. INT'L. L. & POL'Y. 443, 447-459 (1989) (Increasing numbers of immigrants coupled with international unrest during the World War I, World War II, and Cold War Eras, led the United States government to enact stringent immigration policies in an attempt to ward off perceived threats to national security).

6. *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN

The protective immigration policies that the United States has legislated and implemented have been in response to fear, whether it is in response to a physical attack on the country, or an attack on its culture, political beliefs, or freedoms.[7] When immigrants threaten the American way of life, Americans respond by uniting and displaying a strong sense of nativism.[8] Nativism is a concept deeply rooted in American history, dating as far back as the late 1830's.[9] Nativism is defined as an intense opposition to a specific minority on the ground of its foreign ("un-American") connections.[10] Nativism was the energizing force behind the modern day theory of nationalism.[11] Nativistic activities were evidenced throughout U.S. history resulting in immigration reform during World War I, World War II, and against the fear of Communism.[12]

HISTORICAL LEGISLATIVE RESPONSE

World War I

During World War I, there was an increased concern over subversives and radical aliens, and legislation against those persons was strengthened.[13] Dissident immigrants were imprisoned for their anti-war campaigns.[14] Under wartime conditions, Congress passed the so-called Anarchists Act of October 16, 1918, which ordered the deportation of alien anarchists residing within the United States and made it a felony punishable by imprisonment for those deported to reenter or attempt to reenter the country.[15] This Act was amended by the June 5, 1920 Act which included in the anarchist class aliens who advocate "the unlawful damage, injury or destruction of property, or sabotage."[16] As an effect of the war and the wartime legislation, there was anti-German sentiment pervading throughout the United States.[17] The Justice Department gathered German aliens into internment camps under the President's summary powers.[18] The total number of arrested aliens rose from 1200 to 6300 by the end of 1918.[19] Further, the regulations governing the remaining Germans were tightened, requiring them to register and

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NATIVISM 1860-1925, (Atheneum 1963).

7. *See* David Cole, *Terrorizing Immigrants in the Name of Fighting Terrorism*, 29 HUM. RTS. 11 (Winter 2002).

8. *See* Wohl, *supra* note 5.

9. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (1963).

10. *Id.* at 4.

11. *Id.*

12. *See* Cole, *supra* note 7, at 11.

13. *See* Wohl, *supra* note 5, at 449.

14. Cole, *supra* note 7, at 11.

15. E.P HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 424, 1798-1965 (U. Penn. Press 1981).

16. *Id.* at 424 (quoting Act of June 5, 1920, 41 Stat. 1008).

17 HIGHAM, *supra* note 9, at 196-98.

18. *Id.* at 210.

19. *Id.*

"forbidding them to move without official permission."[20]

The climate of repression established during World War I continued against Communists even after the conclusion of the war.[21] In 1919 the U.S. government responded to a politically motivated bombing of Attorney General Palmer's home by rounding up alien members of the two communist parties.[22] Approximately three thousand aliens were held for deportation in response to this threat on the U.S.[23]

World War II

Another example of the U.S. government taking action against potentially threatening immigrants occurred during World War II.[24] The approach of the war gave a strong impetus to establish a system for alien registration.[25] The Alien Registration Act of 1940 dealt with subversion and deportation for numerous offenses as well as registration requirements, including fingerprinting of an alien in advance of issuance of a U.S. visa.[26]

In addition to the Alien Registration Act of 1940, the federal government interned over 110,000 persons, mostly Japanese immigrants.[27] In an executive order delivered on February 19 1942, President Roosevelt authorized the internment of persons who may have posed a threat to national security or the war effort.[28] This order came as part of a response following an attack on the U.S. by Japanese forces.[29]

Communism

Following World War II, the continued fight against Communism reached its peak in the McCarthy Era.[30] This anti-communist sentiment led to the passage of the McCarran-Walter Act of 1952, which introduced an ideological criterion for admission: immigrants and visitors to the U.S. could be denied entry on the basis of their political ideology (e.g., if they were communists).[31] This Act expanded the definition of the subversive classes that were subject to exclusion and

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20. *Id.*

21. *See* Wohl, *supra* note 5, at 450.

22. *Id.* at 230; *See also* Cole, *supra* note 7.

23. HIGHAM, *supra* note 9, at 231.

24. *See* Cole, *supra* note 7; *See* Wohl, *supra*, note 5, at 451.

25. HUTCHINSON, *supra* note 165, at 541.

26. *Id.*, *See also* Alien Registration Act, 1940, ch. 439, 54 Stat. 670, tit. III *repealed by* Pub. L. No. 414, § 403, 66 Stat. 279, 280.

27 Cole, *supra* note 7

28. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) [hereinafter Executive Order].

29. The order came following the Japanese surprise attack on Pearl Harbor, which resulted in the death of over 1,000 U.S. soldiers.

30. *See* Wohl, *supra* note 5, at 451.

31. *See* Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163, 184-186 (1952) [hereinafter McCarran-Walter Act] (regulating the exclusion and deportation of non-citizens who advocated communism or other proscribed beliefs).

deportation.[32] In essence, it became against national policy to be a member of the Communist Party and to advocate proscribed beliefs.[33]

Present Day Threat: Terrorism

Such examples demonstrate that U.S. historical immigration actions were often in response to a perceived or actual threat by immigrants.[34] Present day immigration legislation stems not from war, or fear of Communism, but from terrorism, one of the threats included in the class of subversives.[35] Terrorism is defined as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. On September 11, 2001, terrorists attacked the United States and killed over 6000 people. Nineteen terrorists hijacked four commercial airlines in the U.S., and used them as bombs by flying two planes into the World Trade Centers, one into the Pentagon, and the fourth crashing into Pennsylvania.[36] All nineteen hijackers were foreigners, and at least sixteen entered the U.S. through ports of entry, with a tourist or student visa; some of those visas having expired before September 11, 2001.[37]

September 11, 2001 highlighted the frightening reality of terrorist threats and the gross inadequacy of the then current immigration system.[38] Though September 11th was the most devastating attack on US soil by a terrorist attack, it was not the first.[39] The U.S. government had prior knowledge and exposure to terrorist attacks as evidenced during the 1995 Oklahoma City bombing, and the nerve gas attack on the Tokyo subway system.[40] These events raised concern and placed increased pressure for government action. Congress responded by legislating the 1996 Antiterrorism and Effective Death Penalty Act, which provided for new definitions and enhanced penalties for terrorist crimes.[41] Congress further enacted the Defense Against Weapons of Mass Destruction Act of 1996 to address threats of biological, chemical, and nuclear weapons.[42] After these base programs were established, the focus was on "refining terrorism preparedness."[43] Reports

32. HUTCHINSON, *supra* note 15, at 311.

33. *See* McCarran-Walter Act, *supra* note 31.

34. *See* Wohl, *supra* note 5, at 451.

35. Cole, *supra* note 7

36. Philip Martin & Susan Martin, *Immigration and Terrorism: Policy Reform Challenges*, 8 Migration News 10 ¶ 1 (2001), *at* http://www.migration.ucdavis.edu/mn/more.php?id=2462_0 2_0.

37. *Id.* at ¶ 2.

38. *Id.* at ¶ 6.

39. *See* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMON SENSE STRATEGY FOR A DEMOCRATIC SOCIETY 1-2 (MIT Press 2000).

40. *Id.*

41. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see generally* H.R. CONF REP NO. 104-518 (1996).

42. *See* Pub. L. No. 104-201, § 1401, 110 Stat. 2422, 2714 (1996); *see generally* H.R. CONF REP NO. 104-724 at 824-29 (1996).

43. Michael T McCarthy, *Recent Development: USA Patriot Act*, 39 HARV J. ON LEGIS. 435, 437 (Summer 2002).

indicated that the federal agencies' approach to combating terrorism was fragmented with very little coordination and cooperation.[44] Further exacerbating the problem was the fact that the intelligence community and law enforcement had inadequate resources to gather intelligence, infiltrate terrorist groups, and prevent attacks.[45] These reports led Congress to hold hearings on how to rectify the situation, but increased concerns over civil liberties issues resulted in little action.[46] Therefore, prior to September 11th the problems with the immigration system concerning terrorism were realized but there was no implementation to directly address them.[47]

The September 11th attacks became the catalyst in turning those abstract flaws in "terrorism preparedness" into stringent regulations. The attacks highlighted a major problem in the system of intelligence sharing between the intelligence agencies and law enforcement. These problems ultimately led to the inability of the Intelligence Community to prevent the September 11th attacks.[48] Two of the September 11th terrorists were affiliated with Al-Qaeda, and were under surveillance prior to 9/11 by the CIA.[49] The NSA also independently had knowledge of the terrorists' connections to Al-Qaeda.[50] Despite this critical information, the CIA did not report these findings to watch list databases, such as TIPOFF[51] nor did it directly notify the FBI or the INS in time to prevent their entry into the United States.[52] Coupled with this was the FBI's inability to obtain a search warrant for the computer of accused terrorist Habib Zacarius Massaoui[53] who was known to be a member of al-Qaeda.[54]

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44. *Id.*

45. *See generally* ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, First Annual Report to the President and the Congress (Dec. 15, 1999) and Second Annual Report to the President and Congress (Dec. 14, 2000), *available at* http://www.rand.org/nsrd/terrpanel/; *see also* National Commission on Terrorism, *Countering the Changing Threat of International Terrorism*, *available at* http://www.access.gpo.gov/nct/index.html.

46. Jake Tapper, *Don't Blame It On Reno*, Jan. 2, 2002, at ¶ 2-3, *at* http://archive.salon.com/politics/feature/2002/01/02/reno/index_np.html.

47. *Id.*

48. *Id.*

49. *September 11th and the Imperative of Reform in the U.S. Intelligence Community*, (Dec. 10, 2002) (additional views of Senator Richard C. Shelby, Vice Chairman, Senate Select Committee on Intelligence), *available at* http://intelligence.senate.gov/shelby.pdf [hereinafter Shelby].

50. *Id.* at 26.

51. *Id.* at 25. (The TIPOFF program was instituted for the purpose of using biographic information drawn from intelligence products for watch-listing purposes. In August 2002, the entire TIPOFF database was made available to authorized users from the Intelligence Community and law enforcement agencies. TIPOFF contains names of suspected terrorists who are either members of foreign terrorist organizations, known hijackers, car-bombers, assassins, or hostage-takers. Currently, efforts are under way to transform the TIPOFF watch-list into National Watch-list Center).

52. McCarthy, *supra* note 43, at 438.

53. James V Grimaldi, *With Perfect Hindsight, Some Question Decision Not to Seek Surveillance of Curious Flight Student*, WASH. POST, Oct. 8, 2001, at E13. [Moussaoui was detained by the FBI in Aug. of 2001 after his enrollment in flight school and asking for lessons on a 747 simulator on how to only fly horizontally, with no interest in takeoffs or landings].

54. *World News Tonight: FBI missed significance of Habib Moussaoui asking for flying lessons in*

The connection between these events is that both could have been prevented if the various intelligence agencies coordinated their actions and shared their respective information.

USA PATRIOT ACT

Intelligence

Current Problem of Information Sharing

The General Accounting Office (GAO) of the federal government recently assessed the "information sharing within and between federal, state and local agencies, and concluded that there existed tremendous communication problems.[55] The GAO reported that each agency (FBI, CIA, NSA, and the other intelligence agencies) had a distinct organizational culture, and there have historically been walls separating their co-existence.[56] Further, the GAO identified three principal problems that the agencies must resolve if they are to succeed in their war against terrorism: fragmentation, technological impediments, and ineffective collaboration.[57] All three of these are illustrated in one specific example: the Federal Aviation Administration (FAA) had information on a reputed terrorist, but due to the technological impediments and the inability to collaborate, this information was not directly shared with the Intelligence Community [58]

The U.S.'s primary response to the 9/11 terrorist attacks has been the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT).[59] The Act was signed into law on October 26, 2001, and substantive provisions of the Act focus on intelligence gathering, intelligence sharing, and strengthening immigration enforcement against suspected terrorists.[60]

Surveillance

As a result of this lack of investigative information collaboration, the USA

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747 flight simulator (ABC News broadcast, Sept. 15, 2001).

55. *Counter Terrorism Information Sharing With Other Federal Agencies and With State and Local Governments and the Private Sector* 20 (Oct. 1, 2002) (reported by Eleanor Hill, Staff Director, Joint Inquiry Staff), *available at* http://www.fas.org/irp/congress/202_hr/10102hill.html [hereinafter Hill].

56. *Id.* (specifically identifies legal walls, classification walls, and bureaucratic walls existing between the agencies).

57. *Id.* (Success is defined as national, state, and local governments working collaboratively with each other and with the federal intelligence agencies).

58. *Id.* (Terrorist bomber Ahmed Ressam had been arrested while trying to enter the U.S. from Canada with intentions of bombing Los Angeles International Airport).

59. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

60. *Id.* at 1005.

PATRIOT Act included provisions to revise the law enforcement/Intelligence Community coordination.[61] The first step was to expand the government's ability to conduct surveillance[62] by authorizing wiretaps for surveillance.[63] It also granted authority for the expansion of roving wiretaps[64] under the Foreign Intelligence Surveillance Act of 1978 (FISA).[65] The PATRIOT Act made amendments to the FSIA making it more effective in terrorist investigations by granting authority for pen registers, trap and trace devices.[66] This permitted the government to employ surveillance technology that could monitor email, and other types of Internet communications.[67] Additionally, the PATRIOT Act amended the FSIA by replacing "purpose" with "significant purpose" thereby allowing law enforcement officers to obtain FISA warrants for gathering intelligence with the intent of using it for criminal matters.[68]

Information Sharing

The second part of the intelligence provisions deal with the sharing of this gathered information within the Intelligence Committee and with the Immigration Enforcement Agencies.[69] Sections 203 and 905 will aid the Intelligence Community and law enforcement in their cooperative efforts to combat terrorism.[70] Prior to the PATRIOT Act, a prosecutor was precluded from disclosing to law enforcement, intelligence officers, or any other official any information from federal grand jury proceedings, electronic, wire and oral communications that were intercepted.[71] The PATRIOT Act established guidelines permitting and even at times requiring the sharing of this information with the Intelligence Community [72]

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61. Shelby, *supra* note 49, at 53.

62. *See* USA Patriot Act, *supra* note 59.

63. *Id.* at § 201. (Congress limited these wiretaps under Title III to only antiterrorist activity).

64. *Id.* at § 206. (A roving wiretap enables government officers to monitor suspected terrorist's communications regardless of his location at time of communication).

65. *Id.* (FSIA was implemented in response to increasing national security threats from abroad, it broadened the executive branch's Title III search and seizure powers to foreign enemies); *see also* Mike Dowley, Note, *Government Surveillance Powers Under the USA PATRIOT Act: Is It Possible to Protect National Security and Privacy at the Same Time? A Constitutional Tug-of-War* 36 SUFFOLK U. L. REV. 165, 173 (2002).

66. USA Patriot Act, *supra* note 59, at § 214; McCarthy, *supra* note 43, at 445. (Pen registers and trap and trace devices can record the time, date, and telephone numbers of outgoing and incoming calls).

67 USA Patriot Act, *supra* note 59, at § 214; Dowley, *supra* note 65, at 178.

68. USA Patriot Act, *supra* note 59, at § 218; McCarthy, *supra* note 43, at 444.

69. *See* USA Patriot Act, *supra* note 59

70. *Id.* at §§ 203, 905.

71. Press Release, Department of Justice, *Attorney General Announces New Guidelines to Share Information Between Federal Law Enforcement and the U.S. Intelligence Community* (Sept. 23, 2002), *available at* www.usdoj.gov/opa/pr/2002/September/02_ag_541.htm (Prosecutors were not permitted to disclose this information even if it indicated plan for future terrorist attack).

72. USA Patriot Act, *supra* note 59, at § 203(b)(d) (modifies grand jury secrecy roles of the Fed. R. Crim. P 6(e)(3)(c)). (These provisions enable the FBI, CIA, and other intelligence agencies to share information related to terrorism freely, and without regard to where and how the information was gathered); *see also* McCarthy, *supra* note 43, at 442. The required sharing of information is predicated

This legislation has taken a leap towards dismantling the "walls" between the intelligence agencies. Through communication and cooperation, information sharing will lead to higher success rates of infiltrating terrorist organizations, apprehending suspected terrorists, and preventing future attacks.

Civil Liberties Concerns

The Constitution provides the government with the necessary powers to protect the country from significant threats to national security [73] In this quest, legislation and executive orders have been passed which oppress civil liberties without regard for Constitutional consequences.[74] In the present fight against terrorism, the government should compare the PATRIOT Act against historical immigration legislation to ensure America's freedoms.[75]

During World War I, the government curtailed anti-war speech.[76] While entering into World War II, it suspended the Japanese citizens' liberties in the name of national security [77] In *Hirabayashi v. U.S.*,[78] the Supreme Court "upheld the constitutionality of a curfew imposed only upon Japanese-Americans" living in or near military areas.[79] A year later, in *Korematsu v. U.S.*, the Court further undermined the Japanese citizens' civil liberties by upholding the forced relocation of some Japanese-Americans to internment camps.[80] The Court's justification rested once again on national security and deference to certain military orders as a *wartime necessary evil*.[81]

Following World War II, America concentrated on its new enemy the Communists.[82] Citizens who were organizing, teaching, or advocating the overthrow of the United States government were convicted.[83] The Supreme Court upheld these convictions on the ground that free speech is not "unlimited and unqualified" when it presents a sufficient threat to America.[84]

The present day threat to national security is terrorism, and the government has passed the USA PATRIOT Act of 2001 to combat this danger.[85] Some critics have argued that this Act contains provisions that infringe on citizens' civil

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in Title IX § 905 of the Act which includes such provision subject to the Attorney General's establishment of standards and procedures for such sharing; *see* Shelby, *supra* note 49, at 59.

73. U.S. CONST., *supra* note 1.

74. *See* Dowley, *supra* note 65, at 174; *see also* Deborah Kristensen, *Finding the Right Balance: American Civil Liberties in Time of War* ADVOC., Dec. 2001 at 20-21.

75. *See* Dowley, *supra* note 65, at 174.

76. HUTCHINSON, *supra* note 15, at 424-425.

77 Executive Order, *supra* note 28.

78. Hirabayashi v. U.S., 320 U.S. 81 (1943).

79 Dowley, *supra* note 65, at 175.

80. Korematsu v. U.S., 323 U.S. 214, 218-219 (1944).

81. *Id.* at 220.

82. McCarran-Walter Act, *supra* note 31, at 184-185.

83. *See* Dennis v. U.S., 341 U.S. 494 (1951).

84. *Id.* at 503; *see also* Dowley, *supra* note 65, at 176.

85. *See* USA Patriot Act, *supra* note 59.

liberties.[86] While the majority of the immigration legislation, from increased border patrol, to broadening the definition of engaging terrorist activity to expanding grounds for deportation and admissibility have been relatively unscathed by controversy, the Act's surveillance provisions have been hotly criticized.[87] Detractors of the PATRIOT Act argue a violation of the Fourth Amendment regarding its search and seizure provisions.[88] However, the Supreme Court ruled in *Warden v. Hayden* that there are exceptions to the probable cause and warrant requirements.[89] These exceptions include times of "exigent circumstances" where following such procedures is impractical and inapposite to policy [90]

Another highly attacked provision of the Act is § 213 which authorizes "sneak and peek" warrants.[91] This provision allows officials to conduct a search without informing the suspect until after completion.[92] This section further authorizes the delayed notification of electronic or physical searches if the government can prove that such notification may jeopardize the investigation.[93]

Though certain civil liberties may be compromised for the sake of national security, steps can be taken to ensure that the government's expansive and intrusive tools are not abused. [94] The foremost solution is to direct courts to narrowly construe the provisions of the PATRIOT Act, while keeping in mind the legislative intent and national security concerns.[95]

Immigration Enforcement Provisions

Title IV of the USA PATRIOT Act is targeted towards protecting the border. Specifically subtitle A of § 402 "authorizes a tripling of the number of Border Patrol personnel, Customs personnel, and immigration inspectors" along the Northern (Canadian) border.[96] It also calls for increased funding for new technology [97] These technological innovations include granting the Immigration and Naturalization Service (INS) and the State Department access to the FBI's

86. Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C.J. INT'L L. & COM. REG. 1-2 (2002).

87. *Id.* (The American Civil Liberties Union (ACLU) argues that this legislation unnecessarily sacrifices civil liberties by denying due process).

88. *Id.* at 8.

89. Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

90. *Id.*

91. *See* USA Patriot Act, *supra* note 59, at § 213; Dowley, *supra* note 65, at 181.

92. Dowley, *supra* note 65, at 181.

93. *Id.*, USA Patriot Act, *supra* note 59, at § 213.

94. Dowley, *supra* note 65, at 183.

95. *Id.* at 182; *see also* Edward P Ryan, Jr., *Anti-Terror Bill Threatens Liberties*, MASS. LAW WKLY. (Nov. 13, 2001) at ¶ 25, *available at* http://www.masslaw.com/ryanview.htm.

96. Rosemary Jenks, *The USA PATRIOT Act of 2001: A Summary of the Anti-Terrorism Law's Immigration-Related Provisions*, Center for Immigration Studies, 2 (Dec. 2001), *at* http://www.cis.org/articles/2001/back1501.html.

97. *Id.*

NCIC files for checking the criminal history of visa applicants.[98]

Additionally, the USA PATRIOT Act broadened the definition of "engage in terrorist activity" and expanded the categories of non-citizens barred from entry and increased their susceptibility to deportation for terrorist activities.[99] The PATRIOT Act defines a terrorist organization as two or more persons engaged in a terrorist activity.[100] It further defines "engage in terrorist activity" to include involvement in inciting to commit a terrorist activity, "to prepare or plan" any such activity "to gather information on potential targets, to ask for financial support for terrorist activities, to commit an act that is materially related to support terrorists,[101] or to use or threaten to use weapons for violence against persons or property.[102] Once a person or group is designated as being involved with terrorist activities, they are deportable for soliciting people to join it, fundraising for it, or providing support for it.[103]

Prior to the PATRIOT Act, only non-citizens engaging in or supporting terrorist activities were deportable.[104] The PATRIOT Act amends that definition to make them deportable for any connection to a terrorist organization.[105]

Section 411 deals with detaining suspected terrorists.[106] The PATRIOT Act grants the Attorney General the authority to certify aliens as terrorists and detain them if he has "reasonable grounds to believe" that they are involved in unlawful terrorist activities.[107] Detainment periods can now run up to six months if their removal is unlikely in the near future and their release may threaten national security or public safety.[108] Prior to September 11, aliens who were perceived to be a threat to national security were placed in removal proceedings and detained as long as the proceedings lasted.[109] However, the alien was allowed to present evidence to the contrary to an immigration judge and seek his release.[110] Under the new, more stringent provisions, INS prosecutors can file an appeal to a release order and keep the alien detained.[111] In addition, the INS amended a regulation

98. USA Patriot Act tit. IV § 401-405, *supra* note 59; *see also* Memorandum from the Commissioner of the Immigration and Naturalization Service to the Regional Directors and Regional Counsel 2 (Oct. 31, 2001) (on file with the United States Dept. of Justice, Immigration and Naturalization Service) [hereinafter Memo], *available at* http://www.bcis.gov/graphics.

99. Arthur C. Helton & Dessie Zagorcheva, *Globalization, Terror, & the Movements of People*, 36 INT'L LAW 91, 96 (Spring 2002); *see also* Memo, *supra* note 98, at 2-3; USA Patriot Act, *supra* note 59, at § 411

100. Cole, *supra* note 7, at 12.

101. Helton & Zagorcheva, *supra* note 99, at 96.

102. Cole, *supra* note 7, at 11-12.

103. Helton & Zagorcheva, *supra* note 99 at 96.

104. Cole, *supra* note 7, at 11; *see also* USA Patriot Act, *supra* note 59, at § 411.

105. Cole, *supra* note 7, at 11; *see also* USA Patriot Act, *supra* note 59, at § 411(a)(1)(G).

106. USA Patriot Act, *supra* note 59, at § 411.

107 Helton & Zagorcheva, *supra* note 99, at 96.

108. Jenks, *supra* note 96, at 3.

109 Cole, *supra* note 7, at 12.

110. *Id.* at 12-13.

111. *Id.* at 13.

governing the detention of aliens without formal charges.[112] While the prior regulation required the INS to file charges within twenty-four hours of detainment, the new regulation extends this detainment period to forty-eight hours, and for an unspecified "reasonable" period beyond forty-eight hours in times of emergency.[113] This new legislation was passed to protect the country from those who plan activities that could "endanger the welfare, safety, or security" of the US.[114]

Summary Effects of Amendments on Inadmissibility and Removal Compared to Prior Legislation

The PATRIOT ACT enhances the government's authority to deport or deny admission to alien terrorists.[115] Under the prior law, members of terrorist organizations were denied entry into the United States only if their organization was designated as one of the twenty-eight terrorist organizations under § 219 of the INA.[116] Under the new provisions, any persons or organizations may be inadmissible if the Secretary of State has determined them to be a political or social group who publicly endorses terrorist acts which undermines the U.S.'s efforts to thwart or eliminate terrorism.[117] Further, previous legislation held inadmissible only those aliens designated as members of § 219 who "knew or should have known the organization was a terrorist organization."[118] The new laws expand inadmissibility to members of both § 219 designated organizations and to "any terrorist organization that the alien knows or should know is a terrorist organization."[119]

Under prior law aliens who engaged in terrorist activities were deportable and inadmissible, and legislation limited the term "engaged in terrorist activity" to soliciting funds or members for a terrorist organization.[120] However, it did not include a working definition of a terrorist organization.[121] It did not clarify whether an alien's solicitation of funds or members for a terrorist organization constituted "engaging in a terrorist activity" if the alien lacked the intent to further a terrorist activity and/or did not have knowledge he was involved in a terrorist organization.[122]

The new law amends these deficiencies. First, it defines that a terrorist organization can be established by: (1) designation by the Secretary of State under

112. *Id.* at 12.
113. *Id.*
114. USA Patriot Act, *supra* note 59, at § 411(a)(1)(G).
115. *Id.* at § 411(b)(2).
116. Memo, *supra* note 98, at 4. (The Immigration and Naturalization Act § 219 designates certain organizations that are affiliated with terrorist activities).
117. *Id.*
118. *Id.* at 4-5.
119. *Id.* at 5.
120. *Id.*
121. *Id.*
122. *Id.*

§ 219· (2) after a finding that the organization (a) commits or threatens to commit a terrorist activity (b) plans or prepares for terrorist activity, (c) gathers information on potential targets for terrorist activity, or (d) gathers material support to further terrorist activities; or (3) by being a group of two or more people that (a) commits or threatens to commit a terrorist activity (b) plans or prepares for terrorist activity, (c) gathers information on potential targets for terrorist activity, or (d) gathers material support to further a terrorist activity [123]

Next, the law is broadened to include an alien's solicitation of funds or members for a terrorist organization, even if not intending to further terrorist activity and/or not having knowledge of the terrorist organization as constituting "engaging in a terrorist activity "[124]

Third, the law expands the grounds for deportation and inadmissibility Now the government is not required to prove that an alien had a specific intent to support a terrorist activity in order to deport him or to declare him inadmissible.[125] Regardless of intent, if an alien is found to have supported a designated or identified terrorist organization, he is inadmissible and/or deportable.[126]

Finally the new laws expand the definition of "engaged in terrorist activity" and "terrorist organization. [127] This change results in an increase of the classes of aliens who become ineligible for other forms of relief or protection under the immigration laws.[128] The effected parties are those seeking an adjustment of status, a release pending deportation, and withholding of removal.[129]

ADEQUACY OF THE USA PATRIOT ACT

Though the USA PATRIOT Act implements legislation towards protecting the United States from terrorism, the question remains whether it is adequate to actually reduce or eliminate the threat. Comparing previous U.S. legislation following a threat to the culture, freedoms, and political ideologies of this country, the PATRIOT Act is not sweeping legislation. More aggressive reforms that the PATRIOT Act did not address should have been considered.

The question raised must be whether this new legislation (the USA PATRIOT Act) meets the immigration problems of today and adequately represents the immigration policy that is now necessary

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 6.
128. *Id.*
129. *Id.*

IMMIGRATION REFORM

Beyond the USA PATRIOT Act

A recent study conducted by the Center for Immigration Studies reported how foreign terrorists entered the United States.[130] The research revealed that foreign terrorists have employed nearly every possible means for admission. For example, some have come as tourists, students, and business travelers. Others have entered as legal permanent residents and become naturalized United States citizens, while others have simply crossed the border illegally or used false documentation.[131]

Further immigration enforcement problems were revealed by the fact that terrorists have illegally crossed the border, used false documentation to enter the U.S., and those who have entered legally have overstayed without any consequences by the INS.[132] The INS's failure in fulfilling its duties was clearly highlighted when they approved visa extensions for two of the September 11th hijackers six months following their deaths.[133] The attacks also revealed other deficiencies in the INS system and together these brought about further support for drastic changes.

The 2000 Census Bureau reported 114,818 illegal Middle Eastern men and women in the US.[134] The Census also reported that there are approximately 8.7 million illegal immigrants, twice that of 1990.[135] Immigration officials, such as Steven Camorata, are concerned not only with the high number of people who are residing illegally but "also with the potential terrorist attack that could result from a lax immigration policy."[136] The immigrant population now makes up 11 1% of the nation's population, an increase of 57% since 1990.[137] The INS now conducts more enforcement operations that result in greater arrests than any other law enforcement agency in the world; this is done despite an undermanned staff and an aging computer system.[138] September 11th brought all of these problems to the

130. Panel Discussion Transcript, *How Have Terrorists Entered the U.S.?* Center for Immigration Studies 1 (2002), *available at* http://www.cis.org/articles/2002/terrorpr.html [hereinafter Panel] (Port of entry is a technical term where legal admission occurs through inspection).

131. *Id.*

132. *Id.*

133. *See* Alex Johnson, *INS Extends Visas for Sept. 11 Terrorist Pilots*, MSNBC, Mar. 12, 2002, *available at* http://www.usbc.org/info/everything2002/0302terrorextension.htm.

134. Christopher Marquis, *Census Bureau Estimates 115,000 Middle Eastern Immigrants Are in U.S. Illegally*, N.Y TIMES, Jan. 23, 2002, at A10.

135. *See id.*

136. Catherine E. Otto, Comment, *Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States*, 28 N.C. J. INT' L L. & COM. REG. 477 479 (Winter 2002); *see also* Chitra Ragavan, *Coming to America: An Already Burdened Immigration System Faces the New Demands of Post 9/11 World*, US NEWS & WORLD REP Feb. 18, 2002, at 16; *see also* Bill Gertz, *5,000 in US Suspected of Ties to al Qaeda*, WASH. TIMES, July 11, 2002, at A1.

137 Stephen Dinan, *Immigration Growth of 1990's at Highest Rate in 150 Years*, WASH. TIMES, June 5, 2002, at A3.

138. Ragavan, *supra* note 136, at 16 (Yearly estimates are 50,000 criminal investigations, greater

surface and the federal government acknowledged that in its current state, the INS could not meet its demands.[139]

Subsequently, the PATRIOT Act concentrated some of its most important immigration provisions on intelligence sharing which will ultimately enhance the resources available to the Border Patrol and the Consulate officers to effectively address these problems.

Border Patrol

One of the major areas identified as a port of entry for foreign terrorists is the United States' border.[140] Controlling the border is an integral step in countering terrorism; if terrorists cannot enter the country, they cannot commit an attack. The Immigration Border Patrol is "the guardian of the frontier[,]" as it provides the first line of defense against entry [141] The Border Patrol's primary responsibility is to prevent the surreptitious entry of aliens through land or the coastal boundaries.[142] The Border Patrol is also responsible for preventing the smuggling of aliens into the United States, and to apprehend those who have immigrated illegally [143]

In 2000, the Border Patrol apprehended 1.6 million persons for unauthorized entry, but a large, undetermined number of aliens eluded the Border Patrol and entered the country [144] These enormous numbers detail the magnitude of the problem. One possible solution is to increase the manpower and infrastructure at the borders.[145] A 2000 report indicated a total of 9,000 agents, and only 1,700 agents on duty on any given shift at the southern border, which is an average of less than one agent per one mile.[146]

Another striking example of the U.S.'s lax immigration enforcement concerned the U.S.-Canadian border. Many terrorist cells operating in the U.S. have bases in Canada.[147] Prior to September 11th Millennium bomber Ahmed Ressam was arrested as he tried to cross the U.S.-Canadian border with ingredients for a homemade bomb to attack Los Angeles International Airport.[148] This arrest sparked discussion about possible solutions to the unguarded border, but no

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than 1,000 arrests, 300,000 court cases, and 175, 000 deportation hearings resulting in 1,200 deportations weekly).

139. Otto, *supra* note 136, at 485.

140. Panel, *supra* note 130.

141. Maro T Noto, *Travel & Domestic Control,* 367 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCES (Sept. 1996).

142. *Id.*

143. *Id.*

144. Martin & Martin, *supra* note 36, at 4.

145. Mark Krikorian & Steven A. Camarota, *Immigration and Terrorism: What Is To Be Done? Center for Immigration Studies,* 7 (Nov. 2001), at http://www.cis.org/articles/2001/back1601.html.

146. Steven A. Camarota, *Immigration and Terrorism: Testimony Prepared for U.S. Senate Committee on the Judiciary,* 9 (Oct. 2001), at http:www//cis.org/articles/2001/sactestimony1001.html.

147. *See* Scripps Howard News Service, *Porous Border a Terror Concern,* CINCINNATI POST, Sept. 29, 2001, *available at:* http://www.cincypost.com/2001/sep/29/border092901.html.

148. Jonathan Dube, et.al., *Massive Manhunt Under Way,* ABC NEWS, *available at:* http://www.abcnews.go.com/sections/us/DailyNews/canada991220.html.

decisive action was implemented.[149] After September 11th investigators reported that as many as five of the nineteen terrorists slipped across the Canadian border, including the cell's ringleader, Mohammad Atta.[150] September 11th sparked further inquiry into the border problems, revealing staggering statistics. There are an estimated 3 million foreigners who overstayed their visas, but there is a lack of personnel to adequately patrol the border and track down these persons.[151] This prompted Congress and the President to take a closer look at how to secure the border, which is addressed by the PATRIOT Act.

A straightforward solution to this problem would be to increase the number of patrolling agents and inspection points.[152] The PATRIOT Act addresses this concern by authorizing the tripling of Border Patrol Agents.[153] However, this increase in the number of agents is only the first step. The Act should have gone into further detail outlining improved training guidelines and timelines for implementation.

In attempting to implement the increase in Border Personnel, the PATRIOT Act led to the enactment of the Border Security Act of 2002,[154] effectively giving "teeth" to the PATRIOT Act's provisions. Primary benefits of the Act are on the Border Patrol, visa issuance, and foreign student and exchange programs.

First, there is an appropriation of $150 million to the INS and Customs Service towards implementing an interagency electronic database, machine-readable visas with biometric identifiers, and a computer system for monitoring foreign students.[155] Currently there are three technological endeavors: (1) the Enterprise Architecture, (2) the Student Exchange Architecture Information System (SEVIS), and (3) the Data Management Improvement of 2000.[156] The integration of these databases will provide federal law enforcement and intelligence agencies with relevant information to deportation proceedings and visa issues.[157] This will directly aid the increased Border Patrol agents and all other law enforcement and intelligence personnel to identify and investigate suspected

149. Dean Patton, *Along U.S. Border, Problems Rise*, CHRISTIAN SCIENCE MONITOR, Sept. 22, 2000, *available at:* http://www.search.csmonitor.com/durable/2000/09/22/p3s1.htm.

150. *See* Scripps Howard News Service, *supra* note 147.

151. Cheryl N. Thompson, *Reorganization, Anti-Terrorism Effort Keeping INS Chief Busy*, WASH. POST, Jan. 21, 2002, at A15.

152. Krikorian & Camarota, *supra* note 145, at 7.

153. *See* USA Patriot Act, *supra* note 59 at § 402.

154. *See* Border Security Act of 2002, Pub. L. No. 107-173, 102, 116 Stat. 543, 546 (2002) (codified as amended at 8 U.S.C.A. 1712).

155. *Id.*

156. *See* Bureau of Citizenship and Immigration Services (formerly US Dept. of Justice Immig. & Nat. Service), Oct. 2002, at 8, *available at* http://www.bcis.gov. (The Enterprise Architecture was mandated in 2000 and it is "the long-term, strategically oriented approach to accomplishing the information driven aspects of the INS mission. The SEVIS provides information on student visas. The Data Management Improvement Act was enacted to develop an integrated, automated entry-exit data collection system. Further, the immigration inspectors' now have access to the National Crime Information Center (NCIC) to identify criminal aliens prior to their arrival).

157 Otto, *supra* note 136, at 499.

terrorists.[158]

US Consulate and Visa Issues

Consular Affairs

All of the September 11th 2001 hijackers presented apparently valid travel documentation at U.S. ports of entry [159] Therefore, it is imperative to have closer scrutiny of who is granted access to enter the country (in terms of visa issuance to foreigners abroad, and inspection of foreign nationals at U.S. ports of entry).[160] Inspection controls function to protect the national interest.[161] It involves the examination of persons seeking entrance into the United States from foreign territories through ports of entry [162] The United State's inspection policies are to screen out undesirable aliens who may be involved in criminal or subversive activities or other objectionable conduct.[163]

Entry into the United States is a privilege and not a right, and is granted at the discretion of the members of the Consular Affairs.[164] Currently the Consular Affairs lack the manpower and tools to meet the tremendous load of applications. In 2000, almost 10 million foreigners applied for visas, for which there were only some 1100 consular officers, many young professionals just beginning their foreign services careers.[165] This results in consulate officers having very limited time to review each application.[166] In a recent panel discussion on immigration and terrorism, a former foreign services agent stated that approximately only one-fifth of all non-immigrant visa applicants are interviewed. To further exacerbate the problem, the State Department is moving towards "drop boxes, group applications via travel agencies and other ways to avoid having to actually look at people who are asking for permission to enter."[167] Adding to this challenge is the defective evaluation system whereby visa officers are assessed by the number of interviews they conduct daily [168]

One solution is to implement a biometric identification system. The initial need to include biometric identifiers in border security enforcement was realized as a result of the September 11th attacks, and a further push was spurred by the confusion in identifying Richard Reid, a Briton attempting to smuggle a shoe-

158. Mark Bixler, *War on Terrorism: Tracking Foreign Students Gains Renewed Interest Once Stalled Project in Atlanta Being Developed by INS*, ATLANTA J. & CONST., Jan. 7, 2002, at A5.
159. Martin & Martin, *supra* note 36, at 1.
160. *Id.* at 3.
161. Noto, *supra* note 141, at 78.
162. *Id.*
163. *Id.*
164. Martin & Martin, *supra* note 36, at 2.
165. *Id.*
166. *Id.* at 2-3.
167 Panel, *supra* note 130, at 4.
168. *Camarota*, *supra* note 146.

bomb onto an airplane destined for Miami.[169]

The first biometric identification system, named "IDENT was piloted in 1995 in California.[170] It contained a database with thousands of criminal records.[171] By 1996, IDENT was implemented at thirty-four sites along the U.S. Mexican border.[172] The results were astounding; within the first few months over 3,000 criminal aliens who were attempting entry into the U.S. were identified.[173] Implementing a system similar to IDENT (one which compares the individual features of a visa applicant to those who actually appear at ports of entry by using unique technologies such as fingerprinting, retinal scans, or hand geometry[174]) could have a significant effect on stopping terrorists at U.S. borders. The Border Security Act of 2002 requires biometric identifiers on all visas and passports that American consulates issue to foreign travelers.[175]

Such a system would create an electronic file on each issued visa applicant that would be available to inspectors at the U.S. ports of entry prior to an alien's arrival. This information and technology can then be employed by the INS to develop and implement an entry/exit system to track aliens as they enter and exit the country

Entry/Exit System

However, even with increased officers, the right tools are needed to keep the terrorists out. The Consular Lookout and Support System (CLASS) currently is the primary tool in flagging terrorists.[176] CLASS is a "watch list" of suspicious people who should be inadmissible.[177] However, this system is flawed since it is based solely on names and not on a "biometric identifier" such as a fingerprint, resulting in terrorists sneaking into the country [178]

The PARTIOT Act addresses this issue by requiring the Department of Justice and FBI to provide the INS and the State Department information from its National Crime Information Center (NCIC). The Act also included a provision to assess the possibility of enhancing the FBI's Integrated Automated Fingerprint

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169. *See* Jonathan Peterson, *Digital Images Will Verify Identity of Visitors to US*, L.A. TIMES, Jan. 2, 2002. (Reid attempted to smuggle a bomb onto a Miami-bound airplane).

170. *See* BUREAU OF CITIZENSHIP & IMMIGRATION SERVICES, *Inspector General Report on Resendez-Ramirez/INDENT* Mar. 20, 2000, *available at:* http://www.immigration.gov/graphics/publicaffairs/statements/igstate.htm.

171. *Id.*

172. Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, 14 GEO. IMMIGR. L. J. 215, 220 (1999).

173. *Id.*

174. *Id.*

175. *See* Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 303(b)(1), 116 Stat. 543, 553 (codified as amended at 8 U.S.C.S. 1732); *see also* Otto, *supra* note 136, at 501-02.

176. Krikorian & Camarota, *supra* note 145, at 3.

177. *Id.*

178. *Id.*

Identification System.[179] This is a promising start, but to be effective, the process should begin with the visa applicant's fingerprints being digitally scanned into an integrated system which all other agencies have access.[180] There should be a single file for each applicant that is checked against all "watch lists, and that file should stay with them until they leave, when their fingerprints should be once again scanned.[181] This would create an entry/exit system which would provide adequate checks on when a person entered the country, exited the country, and when they were supposed to leave. It would also serve other purposes: such as providing an effective way of excluding aliens on the "watch list"· it would solidify the identification system, ensuring that the person who entered the country was the same one issued the visa; it would further prevent fraud by making it nearly impossible for a person to go from consulate to consulate using different identities; and it would deter would be terrorists who would be reluctant to give their fingerprints.[182]

This entry/exit system could also be implemented for tracking foreigners in the United States on student visas. In 2000, about 284,000 foreigners received student visas.[183] The major concerns for consulate officers in determining whether to issue a visa is the foreigner's financial status (whether the foreigner has sufficient funds to live and study in the U.S.) and their likelihood of returning to their native country.[184] Prior to September 11th 2001, legislation had been passed but not enforced regarding the tracking of foreign students.[185] Universities were supposed to cooperate with the State Department and the INS with details of a foreign student's activities (such as registration of classes, attendance, grades, etc.); however few schools complied and most blocked its implementation.[186]

Foreign Student and Exchange Visitors

The need for improvement in the INS's tracking ability of foreign students became apparent post September 11th when evidence revealed that two of the hijackers were living in the U.S. on student visas. One of the terrorists, Hani Hamjour, had apparently entered the U.S. on an F-1 student visa in December 2000.[187] He however never attended school, nor did the school notify the INS of his absence.[188] The other hijacker, Mommad Atta, who was believed to be the leader, was granted permission to switch his visa status to that of a student because he was taking flying lessons.[189] These examples illustrate the necessity for

179. USA Patriot Act, Pub. *supra* note 59, at §§ 403, 405, 15 Stat. 272, 343 (2001).

180. Krikorian & Camarota, *supra* note 145, at 12.

181. *Id.*

182. *Id.* at 4.

183. Martin & Martin, *supra* note 36 at 5.

184. *Id.*

185. *Id.*

186. *Id.*

187 Federation for American Immigration Reform, Issue Brief: World Trade Center and Pentagon Terrorists' Identity and Immigration Status, *available at*: http://www.fairus.org/html/04178101.htm.

188. *See* Ragavan, *supra* note 136.

189. *See id.*

tracking foreigners on student visas. Another problem was the lack of cooperation from schools to provide and report information of these students to the appropriate authorities.[190] Post September 11th has shown a strong willingness from these institutions to comply with the reporting requirements. However, even with school reports of a student's absence, the INS previously did not have a system in place to effectively track these missing students.[191]

Following September 11th (since it was found that some of the terrorists entered the U.S. on student visas), the Student and Exchange Visitor Program tracking system is expected to be fully functional with the cooperation of all universities.[192] A further, but more extreme approach could be to revive the 1940 Alien Registration Act, requiring all non-citizens living in the U.S. to annually register their residential address with the State Department and INS.[193] Such a policy could be easily implemented if the foreigner's fingerprints and other relevant information are already in an automated, integrated file, where they could be tracked. These methods of an entry/exit system, fingerprinting, and the registration requirements could serve as a deterrence for future terrorists from another route of entry into U.S., and would help in the identification and monitoring of current foreigners who may be suspected of terrorist activities.

Since the enactment of the PATRIOT Act, the INS has recently admitted that it still does not know the number of foreign students who have overstayed their visas, nor have they been successful in tracking these over-stayers.[194] Additionally, of the 547,000 student visas in the U.S., officials report that they do not know if these people are actually attending school.[195]

These alarming statistics provide further support for the need to implement the biometric identifiers with alacrity One criticism of the biometric identification system is the fear that it will lead to a national identification (ID) cards that may impinge on privacy rights.[196] There have been scattered reactions on this issue, and further research must be conducted through detailed surveys with legal experts to determine its legality and its potential effects on U.S. citizens. Until then, the government stands by its position that the "U.S. must make every effort to reduce the possibility of terrorist attacks in the future[,]"[197] and implementing a biometric identification system is a critical step in revamping the immigration system to achieve this result.

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190. Martin & Martin, *supra* note 36 at 5.

191. *Id.*

192. *Id.*

193. Krikorian & Camarota, *supra* note 145, at 9.

194. *See* Ragavan, *supra* note 136.

195. Kate Zernicke and Christopher Drew, *Efforts to Track Foreign Students Are Said to Lag*, N.Y TIMES, Jan. 28, 2002, at A1.

196. Robert O'Harrow, Jr. and Jonathan Krim, *National ID Card Gaining Support*, WASH. POST, Dec. 17 2001 at A1.

197. *See* Otto, *supra* note 136, at 517 (quoting Commissioner Ziglar).

Targeting Specific Countries

A review of U.S. immigration policy demonstrates evidence of racial discrimination in certain times of U.S. history. Clearly Immigration and Naturalization has been unfairly denied to members of certain ethnic groups.[198]

The Chinese Exclusion Act barred Chinese peoples from 1882 until the Act was repealed in 1943.[199] Similarly, the Asiatic Barred Zone clause of the 1917 Act excluded southeastern Asians except the Japanese.[200] The Japanese suffered from a limited immigration policy since the 1907 Gentleman's Agreement.[201] These were explicit legislative acts, but legislative history also shows exclusion of certain immigrant groups without formal legislation, as was evidenced during World War I and World War II against the Germans, Communists, and the Japanese.[202]

If one were to apply precedent to the current problem of terrorism, there is a strong argument for more thorough screening for applicants from certain countries, and an extreme argument to exclude all enemies of the United States. The USA PATRIOT ACT now grants the INS the authority to "prohibit[] the admission of an alien from a country designated to be a state sponsor of international terrorism (as defined by [the PATRIOT] Act) unless the Secretary of State has determined that such individual does not pose a risk or security threat to the U.S."[203] However, it does not extend this restriction to those countries that are not designated as state sponsors of terrorism; it only provides legislation to deny entry to individuals from any state that may be associated with terrorism.[204] Further steps should be taken to safeguard against the entry of terrorists on U.S. soil.

Increased Screening

The PATRIOT Act is not the first attempt to combat terrorism. In 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was passed.[205] The AEDPA resulted in the increased screening of certain groups suspected of terrorism.[206] The Immigration and Nationality Act (INA) granted officers broad power to interrogate suspected aliens as to their right to remain in the U.S.[207] The

198. *See* Chinese Exclusion Act, ch. 126, 22 Stat. 214 (1882), 47th Cong; Immigration Act of Feb. 5, 1917, ch. 29, Pub. L. No. 301, 39 Stat. 874; Alan M. Kraut, *Records of the Immigration and Naturalization Service*, Nov. 1995, *available at*: http://www.lexisnexis.com/academic/guides/immigration/ins/insa1.asp.

199. *See* Chinese Exclusion Act, *supra* note 198.

200. *See* Immigration Act, *supra* note 198.

201. *See* Kraut, *supra* note 198.

202. Regarding the Palmer Raids, Japanese internment camps, and the stifling of speech of any anti-American sentiment.

203. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-73, § 306, 116 Stat. 543 (2002) (codified as amended at 8 U.S.C.A. 1735).

204. *See* Memo, *supra* note 98, at 4-5.

205. Adrienne R. Bellino, *Changing Immigration for Arabs With Anti-Terrorism Legislation: September 11th Was Not the Catalyst*, 16 TEMP INT'L & COMP L. J. 123-24 (Spring 2002).

206. *Id.*

207. *Id.* at 129.

USA PATRIOT Act perpetuates this by granting visa officers, the Attorney General, and other INS agents broad power to check suspected alien terrorist.

However, visa officers should be granted more responsibility and power as they are the first step in keeping alien terrorists out of the U.S. They should be empowered to deny admission to people who are enemies of America, but have not yet engaged in terrorist activities.[208] There are citizens from countries whose government do not sponsor terrorism, yet who have come here and engaged in terrorist activities.[209] Applicants from such countries should be subject to much stricter screening, including an exhaustive security clearance.[210] In addition, visa issuance should be restricted to U.S. consulates in their home country not consulates outside of their home state.[211] There is nothing unprecedented about these actions of country specific temporary visa policies.[212] Despite some objections to this proposal, it is important to remember that immigration into the United States is a privilege and not a right, subject to the provisions prescribed by the country

CONCLUSION

The surveillance and information sharing provisions of the PATRIOT Act provide a strong base to rectify the current problems of the system. However, the immigration enforcement legislation lacks sufficient mandates to adequately combat the threat of terrorism. To effectively reform immigration policy, changes have to be flexible and broadly based with regards to a wide range of considerations on both the national and international fronts, and in harmony with other elements of national policy The current national threat of terrorism must be dealt with immigration reform that significantly enhances national security Though the reforms implemented during World War I, World War II, and against the Communists (from internment, to registration, to stifling free speech) are outdated, extreme, and egregious more aggressive measures (through increased information gathering and sharing and implementing a biometric identification system) may need to be considered to effectively combat terrorism.

One concern about the implementation of these modifications is their potential effect on intelligence gathering. While legislative acts that expand the government's ability to conduct surveillance from roving wiretaps to internet communications, to expanding the immigration enforcement capabilities through increased screening and biometric identification, may lead to short-term success in capturing terrorists, they may have negative effects in the long-term. Some experts believe that intelligence gathering is based on the "penetration of trust" between

208. Krikorian & Camarota, *supra* note 145, at 4.

209. *Id.*

210. *Id.*

211. *Id.* (This is because an American visa officer stationed in a particular country is more familiar to identify and deal with problems concerning an applicant from that area than are other officers stationed elsewhere).

212. Camarota, *supra* note 146.

parties, and these provisions may lead to distrust, ultimately making penetration of future attacks extremely difficult.[213] The standard seems to be based on a reasonable person argument, where it is logical that those who we need information from will not be willing to cooperate if they are the same people we are targeting. This raises the issue of proportionality and the government must determine how stringently these provisions should be administered. There must be a balance achieved between alleviating the current fear and threat of terrorism and sustaining covert relations to prevent future attacks.

While it may be too soon to reach definitive conclusions as to the effectiveness of the PATRIOT Act, preliminary results show improvement in the immigration system as a whole. The intelligence gathering and sharing provisions have led to the capture of Khalid Shaikh Mohammed, believed to be one of the top five leaders of al-Qaeda. Mohammed was captured in Pakistan, and has been identified as the "mastermind" behind the September 11th attacks.[214] He has also been linked to terrorist plots in Europe and Asia. In addition, over 400 al-Qaeda members have been detained worldwide, including an al-Qaeda field operations commander and the head of a hijacker's cell in Germany [215]

It is hopeful that similar results will be seen with the implementation of the enhanced law enforcement provisions (the increase in Border Patrol personnel, the implementation of the biometric identification system, and the entry/exit system), but not at the expense of future intelligence gathering. With the changes in the INS's function and its move into the Department of Homeland Security, quantifiable results may not be seen for a few years, but the changes in place seem to be a step in the right direction. As long as the fight against terrorism remains a top priority, Congress is likely to legislate and implement the necessary resources to achieve its goal of eliminating terrorism and protecting the American people.

213. Interview with Prof. Keely (quoting Vince Canistraro at the 26th Am. Legal Conf. at the Center for Migration Studies in New York), 2003.

214. Bill Gertz, *Bin Laden Aide Mastermind of Terror Plots*, WASH. TIMES, Mar. 2, 2003, at A1.

215. *See* Muazzam Gill, *Weighing Big Catch in War on Terrorism*, WASH. TIMES, Mar. 23, 2003, at B4.

DUAL-USE FREE TRADE AGREEMENTS: THE CONTEMPORARY ALTERNATIVE TO HIGH-TECH EXPORT CONTROLS

*Michael D. Klaus**

I. INTRODUCTION

In the modern global economy, U.S. export controls crafted during the height of the Cold War[1] are failing to forestall the transfer of advanced dual-use technology[2] to potential adversaries: China secured the necessary equipment to construct semiconductor manufacturing facilities capable of revolutionizing the People's Liberation Army,[3] Russia deployed an extensive fleet of intelligence satellites using its own technology,[4] and with sufficient financial resources, countless other foreign militaries are capable of building competitive communicants, remote sensing, and navigation satellites without U.S.

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1. The U.S. continues to regulate exports of goods and technologies with military applications under the Export Administration Regulations (EAR) of The Export Administration Act (EAA) of 1979 (50 U.S.C. app. § 2401). *See generally* R. Aylan Broadbent, *U.S. Exports Controls on Dual-Use Goods and Technologies: Is the High-Tech Industry Suffering?* 8 CURRENTS: INT'L TRADE L.J. 49 (1999). *See also infra* Part II(B).

2. Dual-use technology is technology that can be used for commercial or military purposes. Examples include carbon fibers (used in skis, golf clubs, and ballistic missiles), maraging steel (used for centrifuge rotors that enrich uranium for nuclear weapons), corrosion resistant valves (the essential components in plants that enrich uranium to nuclear weapon grade, which are also widely used in oil and gas industries), and semiconductors (computer chips used in virtually all commercial electronics and military technologies). *See Hearings on U.S.-China Commission Export Controls and China*, 107th Cong. 1071-77 (Jan. 17, 2002) [hereinafter *Hearings on US-China*] (prepared Statement of Gary Milhollin, Director, Wisconsin Project on Nuclear Arms Control), *in* COMPILATION OF HEARINGS HELD BEFORE THE U.S. CHINA SECURITY REVIEW COMMISSION (2002).

3. *See* U.S. DEP'T OF DEF ANN. REP ON THE MILITARY POWER OF THE P.R.C. 39-42 (2003), *available at* http://www.defenselink.mil/pubs/20030730chinaex.pdf (last visited Nov. 18, 2003) [hereinafter ANNUAL REPORT]; *Export Controls: Rapid Advances in China Semiconductor Industry Underscore Need for Fundamental U.S. Policy Review*, U.S. GEN. ACCT. OFF ANN. REP TO THE RANKING MINORITY LEADER MEMBER, COMMITTEE ON GOVERNMENTAL AFF U.S. SENATE (2002), *available at* http://www.gao.gov/new.items/d02620.pdf (last visited July 30, 2003) [hereinafter *Export Controls*]; Michael Klaus, *Red Chips: Implications of the Semiconductor Industry Relocation to China*, 29 ASIAN AFF AN AM. REV. 237 (2003).

4. *See* JAMES A. LEWIS, PRESERVING AMERICA'S STRENGTH IN SATELLITE TECHNOLOGY: A REPORT OF THE CSIS SATELLITE COMMISSION 5 (2002).

components.[5] Since the U.S. no longer maintains a monopoly on the world's most sophisticated technologies,[6] unilateral restrictions on high-tech exports are more prone to impairing U.S. corporations than protecting national security.[7] Despite intense lobbying campaigns of industry representatives,[8] Congress has repeatedly eschewed substantive revisions to U.S. export administration regulations,[9] thereby prolonging the futile effort to impede the technological advancements of distrusted foreign nations by restricting U.S. exports.

China's astonishing technological and military advancements lie at the center of the export control debate as U.S. exporters demanding opportunities to sell advanced technology to China's explosive high-tech industries clash with policy analysts apprehensively forecasting strategic concerns in the Taiwan Strait.[10] Favoring the dynamic national security concerns, the U.S. restricts exports of dual-use technology (technology that can be used for commercial or military purposes) to China under U.S. Export Administration Regulations,[11] although few other governments impose such cumbersome rules.[12] Consequently, foreign corporations are securing lucrative high-tech contracts, U.S. exporters are losing billions in sales,[13] and China is rapidly acquiring the advanced technology that it desires to build a formidable modern military [14]

While export controls defy the fundamental tenets of the global marketplace, ongoing negotiations for free trade agreements (FTAs)[15] with Chile, Singapore, and Latin America embrace the global competition that is rendering export controls obsolete.[16] The Bush administration's ambitious campaign to negotiate

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5. *Id.* at 14.

6. *See infra* Part III(A).

7. *See, e.g., Hearings on US-China, supra* note 2, at 1019-24 (Prepared Statement of James Lewis, Director, Technology Policy, Center for Strategic and International Studies).

8. *See AIA, EIA, NDIA Call on Bush to More Rapidly Reform Export System*, DEF DAILY INT'L, Feb. 8, 2002, at 1.

9. *See, e.g.,* Jim Puzzanghera, *Tech Leaders Vow to Push for Eased Export Controls*, KNIGHT RIDDER TRIB. BUS. NEWS, May 28, 2003, at 1. *See also infra* note 55 and accompanying text.

10. *See generally* ANNUAL REPORT, *supra* note 3, at 43-50.

11. *See infra* Part II(B).

12. *See* Christopher F Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post Cold War, Post 9/11 Era*, 25 HOUS. J. INT'L L 441 (2003). *See also infra* Part III(A).

13. *See infra* Part III(B).

14. Enabled by modern technology, China has 450 short-range ballistic missiles aimed at Taiwan and is adding seventy-five more each year. *See* ANNUAL REPORT, *supra* note 3, at 5.

15. Under free trade agreements (FTAs), "member countries agree to eliminate tariffs and non-tariff barriers on trade in goods within the FTA, but each country maintains its own trade policies, including tariffs on trade outside the region. William H. Cooper, *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 2 (2002), *available at* http://www.usembassycanada.gov/content/can_usa/freetrade_crs_040902.pdf (last visited Nov. 23, 2003).

16. The U.S. signed an FTA with Singapore in May 2003 and with Chile in June 2003. Negotiations are ongoing with Australia, Morocco, Bahrain, Guatemala, Honduras, El Salvador, and Costa Rica, among others. *See, e.g.*, Daniel T. Griswold, *Free Trade Agreements: Steppingstones to More Open World*, Center for Trade Policy Studies, Trade Briefing Paper no. 18, at 2 (July 10, 2003), *at* http://www.freetrade.org/pubs/briefs/tbp-018.pdf (last visited Nov. 18, 2003).

FTAs hails the economic and political benefits for parties to the agreements,[17] but on a global scale, the effects of U.S. free trade agreements on China's developing high-tech sectors must also be considered. Judging by the aftermath of the U.S. Jordan free trade agreement signed in 2001,[18] as an economic matter, budding high-tech centers in countries with which the U.S. has a free trade agreement attract immediate investments from U.S. companies and once U.S. investment facilitates further development, foreign investment follows.[19] Unlike existing export controls, the secondary result of such a strategic free trade agreement is that increased competition in technology markets siphons some dual-use technology investments from China, thus mitigating the national security risks of burgeoning technology bases in the control of a potential foe without undermining U.S. economic interests.[20]

To establish a practical frame for the defense trade policy debate, this article begins by presenting the extraordinary growth of China's semiconductor industry and the military applications of China's emerging technologies. After evaluating the relevant technology Part Two outlines the history of U.S. export controls under the Export Administration Act and surveys the persisting fears concerning China's unprecedented military advances. Finally, Part Two discusses attempts to control dual-use technology exports on an international level during the Cold War era via the Coordinating Committee for Multilateral Export Controls (CoCom) and during the post-Cold War era through the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Technologies.

Part Three provides anecdotal evidence of the failures of high-tech export controls and analyzes the institutional weaknesses of international agreements designed to impede dual-use technology transfers. Extending the case study of China, the section illustrates the ease at which two of China's largest semiconductor foundries procured the equipment necessary to produce sensitive technology from foreign sources. Additionally, Part Three assesses the lack of enforcement power of the Wassenaar Arrangement and evaluates the practices of foreign governments in monitoring high-tech exports. Part Three concludes by presenting the economic losses of obstructive dual-use export controls for U.S. technology corporations seeking to capitalize on China's expanding business opportunities.

Once the futility of export controls is delineated, Part Four considers the strategic possibilities and implications of free trade agreements. The section begins by reviewing the strategic trade theories underlying FTA negotiations; by eliminating barriers to trade between contracting parties, FTAs divert investment from the most efficient countries to less efficient countries.[21] In instances in which

17. *Id.*

18. *See generally infra* Part IV(D).

19. *See* Amjad Baker, *Intel Plans Investments in Jordan IT Sector* AL-BAWABA (Jordan), June 18, 2001, *available at* http://www.intaj.net/news/readnews.cfm?id=136 (last visited Nov. 18, 2003). *See also infra* Part IV(D)(1).

20. *See infra* Part IV(A).

21. Griswold, *supra* note 16, at 1.

it is politically desirable, the U.S. can manipulate FTAs to support market reforms in developing countries and construct a template for broader trade agreements.[22] To broaden the strategic trade theories, the section cites evidence from the North American Free Trade Agreement (NAFTA) and the U.S.-Jordan Free Trade Agreement to posit that when FTAs guide dual-use technology investments, FTAs also advance national security interests. Finally, in Part Five, a conclusion is reached that an entirely new paradigm for defense trade policy must replace insular appeals for export control reforms. By accommodating and leveraging the global competition inherent in today's marketplace, FTAs protect U.S. corporate interests and serve as a valuable tool for addressing the national security concerns of China's technology-driven military modernization.

II. EXPORT CONTROLS ON DUAL-USE TECHNOLOGY

A. China s Explosive High Tech Industry

The rapid growth in China's semiconductor (computer chip) industry[23] elicits widespread trepidation and affords a practical basis for critiquing the role of export controls in managing national security concerns.[24] As global economic integration facilitates access to foreign markets, technology companies such as Motorola, Dell, and Texas Instruments are increasingly outsourcing manufacturing of semiconductors to foundries,[25] which produce semiconductors on a contract basis and allow their customers to concentrate on research and development.[26] Offered generous tax incentives and government-funded technology parks,[27] international investors are flocking to China to establish semiconductor foundries that can serve the needs of manufacturers of devices ranging from helpful hearing aids to

22. *Id.* at 5.

23. *See generally Hearings on US-China, supra* note 2, at 1028-34 (prepared statement of George Scalise, President, Semiconductor Industry Association) ("[I]nevitably, China will be the center of semiconductor manufacturing."). Bryan Lee, *Chartered Eyes Stronger Presence in China*, STRAIT TIMES (Singapore), Feb. 22, 2003, LEXIS, News Library, Strait Times (Singapore) File (China's chip production is expected to increase by 40% annually, while the industry annual growth rate is 10%.). *See generally* Klaus, *supra* note 3, at 238-242.

24. *See Hearings on US-China, supra* note 2, at 955 (prepared statement of James J. Jochum, Assistant Secretary of Commerce for Export Administration) ("China, itself, can be viewed as microcosm of the challenges we face as export control officials.").

25. The foundry market is expected to grow at a 20% annual rate with sales growing from $7.5 billion in 2002 to $32 billion by 2010. Mark LaPedus & Brian Fuller, *Fab Costs, Capacity Glut Seen Pointing to Consolidation Shakeout Looms for Foundries*, ELEC. ENG. TIMES, Mar. 17, 2003, at 1, LEXIS, News Library Electronic Engineering Times File. *See also TI to Buy More Chinese Made Products*, CHINA DAILY, Dec. 5, 2002, *available at* LEXIS, News Library, All News File.

26. *See generally Hearings on US-China, supra* note 2, at 1029-31 (prepared statement of George Scalise, President, Semiconductor Industry Association).

27. *See* JOSEPH I. LIEBERMAN, WHITE PAPER: NATIONAL SECURITY ASPECTS OF THE GLOBAL MIGRATION OF THE U.S. SEMICONDUCTOR INDUSTRY 4 (June 2003), *available at* http://www.senate.gov/~lieberman/semi.pdf (last visited Nov. 23, 2003). *See also Export Controls, supra* note 3, at 3.

alarming laser-guided missiles.[28] In turn, the semiconductor foundries throughout East Asia rely heavily upon U.S. semiconductor equipment to produce the chips, as U.S. companies supply 55% of the world's semiconductor equipment and possess the most advanced technologies.[29]

While foreign investment pours into their technology parks, Chinese leaders tout the "importance of developing "independent, proprietary high-technology capabilities as a means to boost China's economic and military prowess to counter 'hegemonic' actions of the United States."[30] Since semiconductors have direct military applications, Roger Cliff from Rand Corporation speculates, "China's grand strategy is to develop a world-class electronics industry and draw on it for military applications if needed."[31] Indeed, the semiconductor industry is designated as a "pillar industry" in China's Tenth Five-Year Plan (2001-2005).[32] Under the Plan, the Chinese government pledges to invest US$18 billion in the sector and aspires to attract $10 billion from foreign corporations in order to construct twenty-five new semiconductor plants by 2005.[33] Additionally in the past decade, China's State Development Planning Commission (SDPC) has granted $725 million to eighty-four state-sponsored research centers[34] in an effort to expand Shanghai's semiconductor output from $2 billion in 2000 to $24 billion in 2010.[35]

Seeking electronic components capable of executing multiple functions, the military established the foundation for today's advanced semiconductors in 1959 with the invention of the integrated circuit (IC).[36] Since that time, applications for semiconductors have expanded far beyond the domain of the military.[37] semiconductors are considered the 'crude oil' of the twenty-first century, fueling

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28. *Export Controls*, *supra* note 3, at 9 ("[China's] improvements in semiconductor manufacturing capability are the direct result of the involvement of European, Japanese, and U.S. integrated circuit manufacturers in China, typically through joint ventures or wholly foreign owned manufacturing facilities.").

29. *See generally Hearings on US-China*, *supra* note 2, at 1119 (prepared statement of the Semiconductor Equipment and Materials International).

30. The U.S.-China Economic & Security Review Commission, *Report to Congress of the U.S. China Security Commission: The National Security Implications of the Economic Relationship Between the United States and* China, U.S.-CHINA ECON. & SEC. REV.COMMISS. ANN. REP ch. 2 (July 2002), *available at* http://www.uscc.gov/anrp.htm (last visited Jan. 30, 2004).

31. George Leopold, *New China, Old Worries*, ELEC. ENG. TIMES, Apr. 1, 2002, at 1, LEXIS, News Library, Electronic Engineering Times File.

32. *See Shanghai Government Vows USD 9 Billion Investment in IC Sector over Next Five Years*, CHINA IT & TELECOM REP Mar. 29, 2002, *available at* LEXIS, News Library, All News File.

33. *Id.*

34. *China Implements Hi-tech Plans to Boost Industry*, XINHUA GEN. NEWS SERVICE, Oct. 7, 2001, *available at* LEXIS, News Library, XINHUA File.

35. *See, e.g.*, *Hearings on US-China*, *supra* note 2, at 1026 (prepared statement of Daryl Hatano, Vice President, Semiconductor Industry Association).

36. *See* Micron Technology, Inc., Semiconductor History, *at* http://www.micron.com/k12/semiconductors/history.html (last visited Nov. 25, 2003) [hereinafter Micron Technologies, Inc.].

37 Thirty years ago, U.S. semiconductor companies were primarily defense contractors; military systems and commercial IT products now rely on the same producers. *See generally Hearings on US-China*, *supra* note 2, at 1029 (prepared statement of George Scalise, President, Semiconductor Industry Association).

everything from cheap toys to military surveillance satellites.[38] Before the U.S. China Economic and Security Review Commission,[39] an industry expert testified, "the ability to produce integrated circuits is now a widespread commercial prospect, with military meeting its needs through off-the-shelf procurement rather than through designing chips for special military applications."[40]

Although China (and other potentially hostile regimes) would be able to produce adequate military technology with readily available, past-generation semiconductors,[41] the cutting edge 0.13-micron semiconductors[42] manufactured in China's leading foundries are essential for critical defense technology such as synthetic aperture radar, electronic warfare, and image compression and processing.[43] On a broader scale, policy analysts predict, "advantages will go to states that have a strong commercial technology sector and develop effective ways to link these capabilities to their national defense industrial base."[44] Observing China's ominous military modernization,[45] in the U.S. and Taiwan, anxiety abounds[46] as the tiny circuitry of 12-inch, sub-0.18-micron semiconductor chips[47] manufactured in China's foundries propels technology into the next generation and

38. Micron Technology, Inc., *supra* note 36.

39. The U.S.-China Economic and Security Review Commission was created in 2000 by the Floyd D. Spence National Defense Authorization Act for 2001 § 1238, Pub. L. No. 106-398, 114 Stat. 1654A-334 (2000) (22 U.S.C. § 7002 (2001)) to "monitor, investigate, and to report to Congress an annual report on the national security implications of the bilateral trade and economic relationship between the United States and the People's Republic of China, and to provide recommendations, where appropriate, to Congress for legislative and administration action. U.S.-China Security Review Commission, *United States-China Economic and Security Review Commission Charter available at* http://www.uscc.gov/act.htm (last visited July 30, 2003).

40. *Hearings on US-China, supra* note 2, at 1121 (prepared statement of the Semiconductor Equipment and Materials International).

41. For instance, the U.S. Air Force's new F-22 tactical fighters use 0.8-micron chips, technology which is four generations behind current industry standards. *Export Controls, supra* note 3, at 16.

42. In 2002, the width of state-of-the-art semiconductors was 0.13 microns (the width of human hair is about 100 microns). The industry plans to deliver 0.09 micron chips in 2004, and Intel already produced such technology. The primary benefit of the decrease in width is the ability to add more transistors to the chip, thus improving processing speed and overall performance. *See* SEMICONDUCTOR INDUSTRY ASSOCIATION, THE INTERNATIONAL TECHNOLOGY ROADMAP FOR SEMICONDUCTORS 31-32 (2001), *available at* http://public.itrs.net/ (last visited July 30, 2003). *See also* John Dodge, *Let' Get Small*, BIO-IT WORLD, Aug. 13, 2002, *available at* http://www.bio-itworld.com/archive/081302/horizons_small.html (last visited July 30, 2003). *See also Export Controls, supra* note 3, at 13-20.

43. *See* LIEBERMAN, *supra* note 27, at 1.

44. CTR. FOR STRATEGIC & INT'L STUDIES, *Computer Technology and National Security, in* COMPUTER EXPORTS AND NATIONAL SECURITY IN A GLOBAL ERA – NEW TOOLS FOR A NEW CENTURY 1 (2001), *available at* http://www.csis.org/tech/pubs/0106b_Lewis.pdf (last visited July 2, 2003). In China, the majority of its semiconductor foundries are partnerships between foreign investors and the Chinese government. *See Export Controls, supra* note 3, at 12.

45. *See generally* ANNUAL REPORT, *supra* note 3.

46. *See, e.g.*, LIEBERMAN, *supra* note 27, at 10 ("We are being confronted by one of the greatest transfers of critical defense technologies ever organized by another government.").

47 12-inch refers to the diameter of the computer chips, while 0.18 micron refers to the width of the chip. In 2001, 0.18-micron was considered to be state-of-the-art, and three Chinese foundries are now capable of meeting such specifications. *See, e.g., Export Controls, supra* note 3, at 10.

transforms commercial and military capabilities.[48]

B. U.S. Export Administration Regulations

> *Where there is real and credible evidence that the export of dual-use items threatens our national security, we must act to combat that threat. No company wants to see its name in the headlines of the Los Angeles Times or some other newspaper as the source of some critical item or technology that facilitated an act of terrorism.*
>
> -Kenneth Juster, U.S. Under Secretary of Commerce for Export Administration[49]

To "minimize transfers of technology that could contribute to potentially threatening modernization efforts, the U.S. requires licenses for exports of goods with conceivable military applications.[50] At the conclusion of World War II, Congress enacted the Export Control Act (ECA) of 1949 which directed the Commerce Department to impose export controls on goods in short supply or goods affecting national security and foreign policy.[51] After the ECA expired in 1969 the Export Administration Act of 1969 filled the void, and the act was eventually updated and amended to become the Export Administration Act (EAA) of 1979.[52] The EAA expired on August 20, 1994 and without a permanent EAA, President Clinton invoked his authority under the International Emergency Economic Powers Act[53] to reauthorize the Export Administration Regulations (EAR) of the EAA.[54] Since Clinton's initial Executive Order, there have been seven failed attempts to enact a permanent EAA, obliging the President to annually invoke emergency orders and reauthorize export administration regulations that are based on statutory authority that "has not been comprehensively revised or overhauled in [twenty-three] years."[55]

As stipulated in the statutory authority of the EAR, export control policies are

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48. *See generally Export Controls*, *supra* note 3.

49. *BIS Chief Juster Reveals Export Control and Security Priorities for 2003*, MANAGING EXPORTS, July 2002, *available at* http://www.bxa.doc.gov/news/2002/KJusterUWKeynoteCA04_16_02.htm (last visited Nov. 30, 2003).

50. *Hearings on US-China*, *supra* note 2, at 950 (prepared statement of Lisa Bronson, Deputy Under Secretary of Defense for Technology Security Policy and Counter proliferation).

51. U.S. Bureau of Industry and Security, History of Export Controls, *at* http://bxa.fedworld.gov/mission.html (last visited Aug. 6, 2003).

52. The Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503 (50 U.S.C. app. § 2401).

53. 50 U.S.C. § 1702.

54. Exec. Order No. 12,924, 59 Fed. Reg. 162 (Aug. 19, 1994).

55. Most recently, the proposed Export Administration Act of 2003, H.R. 55, 108th Cong. (2003) (the House version of S. 149, 107th Cong. (2001)), which aimed to streamline the export control review process and decontrol items readily available from foreign sources, was introduced on January 7, 2003. Since being referred to the House Committee on International Relations, no action has been taken on H.R. 55. *See generally* Kenneth I. Juster, Under Secretary of Commerce, Bureau of Industry and Security, Keynote Address (Oct. 10, 2002), *available at* http://www.bxa.doc.gov/news/2002/ken2u@update02.htm (last visited July 30, 2003) [hereinafter Juster].

intended to encourage free trade with all countries, "except those with which such trade has been determined by the President to be against the national interest."[56] Exercising his power to delegate responsibilities for such determinations, [57] the President entrusts the Commerce Department's Bureau of Industry and Security (formerly known as the Bureau of Export Administration) to administer and enforce export controls.[58] In accordance with Executive Order 12,981,[59] the Bureau of Industry and Security then consults with the Departments of State, Defense, and Energy, and the Arms Control and Disarmament Agency upon receiving applications for export licenses.[60] As a full partner in the interagency export license review process,[61] the Department of Defense in particular is reputed to favor national security interests over the commercial interests of U.S. exporters when considering export licenses.[62] According to Lisa Bronson, Deputy Under Secretary of Defense for Technology Security Policy and Counterproliferation, as it relates to China, export licenses are denied only if they make a "direct and significant" or "material" contribution to China's military capabilities.[63] Nonetheless, in the likely scenario of a conflict between economic and national security interests, Vann H. Van Diepen, Acting Deputy Assistant Secretary of State for Nonproliferation, affirms, "export controls must uphold U.S. national security and foreign policy."[64]

Acting without strict guidelines for permissible exports, the governmental agencies approve or disapprove export licenses on a case-by-case basis.[65] Although export controls regulate exports of dual-use technologies to every country in the world, the level of control that is exerted depends, in part, on destination of the export.[66] Accordingly few licenses are required when exporting a dual-use good to a NATO ally that is also a member of a nonproliferation regime, while a virtual embargo is imposed on exports to Iraq, Libya, and Iran. [67] Meanwhile, most

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56. 50 U.S.C. § 2402(1) (2003).

57 50 U.S.C. § 2403(e) (2003).

58. *See* U.S. Bureau of Industry and Security, Policies and Regulations, *at* http://www.bxa.doc.gov/policiesandregulations/index.htm#ear (last visited July 10, 2003).

59. Exec. Order No. 12,981, 60 Fed. Reg. 236 (Dec. 5, 1995).

60. *See* Corr, *supra* note 12, at 469-71.

61. *See Hearings on US-China, supra* note 2, at 949 (prepared statement of Lisa Bronson, Deputy Under Secretary of Defense for Technology Security Policy and Counter proliferation)..

62. *See* Corr, *supra* note 12, at 470 ("As may be expected, the Defense Department takes a conservative, security-oriented posture, and is much less concerned with the effect of license denials on U.S. exporters.").

63. *Hearings on US-China, supra* note 2, at 950 (prepared statement of Lisa Bronson, Deputy Under Secretary of Defense for Technology Security Policy and Counter proliferation). *See also* 15 C.F.R. § 742.4(b)(2) (2003).

64. *Hearings on US-China, supra* note 2, at 1034 (prepared statement of Vann H. Van Diepen, Acting Deputy Assistant Secretary of State for Nonproliferation) ("[I]nevitably, China will be the center of semiconductor manufacturing.").

65. *Hearings on US-China, supra* note 2, at 949 (prepared statement of Lisa Bronson, Deputy Under Secretary of Defense for Technology Security Policy and Counter proliferation).

66. *See Hearings on US-China, supra* note 2, at 956 (prepared statement of James J. Jochum, Assistant Secretary of Commerce for Export Administration).

67. *Id.*

exports to China require licenses.[68] As mandated by the EAR, the Bureau of Industry and Security also considers foreign availability of the relevant good when reviewing applications for export licenses.[69] However, even if the technology is widely available from foreign competitors, the approval of an export license is still not a guarantee. Following the ambiguous case-by-case policy, Lisa Bronson maintains, "no single factor is going to be the only reason that we make a decision on a license."[70]

As part of the interagency review process, when a U.S. corporation applies for an export license to sell dual-use technology to a Chinese company Commerce officials endeavor to determine whether sales to the particular Chinese importer would endanger national security.[71] As of 2001, nineteen entities in China were considered national security threats and thus exports to those entities are prohibited,[72] while licenses to export to non-banned entities are granted on the aforementioned case-by-case basis. To gain greater insight into the risks posed by specific Chinese importers, the Bureau of Industry and Security negotiated an end-use visit arrangement with China in July 1998.[73] With China's consent, the Bureau of Industry and Security conducted forty-two end-use checks in China in 2001,[74] but there are still over 700 outstanding checks.[75] The Chinese government ultimately retains the authority to determine whether the Commerce Department is permitted to conduct on-site end-use checks so it nearly impossible to accurately determine whether an exported good will be applied to civilian or military use.[76]

To accommodate technological advances in the early 1990s, the U.S. relaxed high-tech export controls in 1995, believing that it would boost the domestic economy, which in turn would enhance national security.[77] Since then, the direction of export control polices has reversed course, and regulations on dual-use exports have become more restrictive.[78] Beginning in October 1998, Congress recognized that the military's role in the interagency export license review process had been "significantly and improperly reduced over the years, and a new Pentagon position was created to specifically monitor transfers of dual-use

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68. *Id.*

69. 50 U.S.C. § 2403(c) (2003). *See also* 15 C.F.R. § 768.1 (2003).

70. *See Hearings on US-China, supra* note 2, at 981 (Panel I Discussion and Questions and Answers).

71. *See, e.g., Export Controls, supra* note 3, at 23.

72. *See Hearings on US-China, supra* note 2, at 964 (Panel I Discussion and Questions and Answers).

73. *See Hearings on US-China, supra* note 2, at 985 (prepared statement of Michael J. Garcia, Assistant Secretary, Office of Export Enforcement, Department of Commerce).

74. *Id.*

75. *Export Controls, supra* note 3, at 28.

76. *See Hearings on US-China, supra* note 2, at 985-86 (prepared statement of Michael J. Garcia, Assistant Secretary, Office of Export Enforcement, Department of Commerce).

77. *See* Jeff Gerth and Eric Schmitt, *Chinese Said to Reap Gains of U.S. Export Policy Shift*, N.Y TIMES, Oct. 19, 1998, at A1 (stating that after amendments in 1995, more than $1.9 billion in annual trade with China that was previously under government scrutiny was removed, and after the policy change $3 billion in dual-use semiconductor technology was exported to China from 1995-1998).

78. *See* Corr, *supra* note 12. *See also* Leopold, *supra* note 31, at 92.

technology into China.[79] Startled by reports that exported technology was abetting Chinese military modernization, former CIA director James Woolsey bemoaned, "what's particularly troubling is that the massive decontrol in the last few years of the export of dual-use technology in general, and specifically to China, has made it almost impossible for the U.S. to monitor where such technology has gone much less exercise control over it."[80] Similar concerns resurfaced during the government's Spring 2003 review of defense trade policy [81] Regarding China as a potential future adversary with a military that is being strengthened by sophisticated semiconductors and international investors, Rep. Dana Rohrabacher (R-CA) argued, "we need to put heavy restrictions on those countries that could be potential enemies, like communist China."[82]

In spite of Export Administration Regulations, between 1988 and 1998, the Commerce Department approved over $15 billion in dual-use exports to China, some of which "went directly to China's leading nuclear, missile, and military sites – the main vertebrae in China's strategic backbone."[83] In 2001, the Bureau of Industry and Security received over 1,300 applications from U.S. exporters seeking to sell more dual-use technology to China; of those applications, 936 were approved, thirty were denied, and 325 were returned to the applicants for more information.[84] Although over 70% of dual-use export license applications are initially approved, the bureaucratic regulations inhibit the business plans of all potential exporters of ephemeral technology· the average processing time for an application to export a dual-use good to China was seventy-two days in 2002.[85] Adding to the burdens for U.S. exporters, approved licenses ordinarily contain numerous restrictions for the exporters, such as prohibiting re-exporting the item or using the item in a manner not specified in the license application.[86]

C. Multilateral Export Control Agreements

In addition to domestic dual-use export restrictions, throughout the Cold War, the U.S. and its allies vigilantly enforced the rules of the Coordinating Committee for Multilateral Export Controls (CoCom), which blocked transfers of dual-use technologies to the Communist Bloc.[87]

Since all members encountered a common threat (the Warsaw Pact and

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79. Gerth and Schmitt, *supra* note 77 at A14.

80. *Id.*

81. *See* Dennis Kennelly & Ben Stone, *Bush Team Reviewing Defense Trade Policy*, NAT'L DEF Apr. 1, 2003, at 48.

82. Puzzanghera, *supra* note 9, at 1.

83. *Hearings on US-China, supra* note 2, at 1072 (prepared Statement of Gary Milhollin, Director, Wisconsin Project on Nuclear Arms Control).

84. *Hearings on US-China, supra* note 2, at 957 (prepared statement of James J. Jochum, Assistant Secretary of Commerce for Export Administration).

85. Juster, *supra* note 55.

86. *See, e.g., Hearings on US-China, supra* note 2, at 957 (prepared statement of James J. Jochum, Assistant Secretary of Commerce for Export Administration).

87. *See, e.g.*, Corr, *supra* note 12, at 450-455.

China) and a common objective (undermining the Warsaw Pact and hindering Chinese technological advancement) CoCom was relatively successful in achieving its goals.[88] As the Cold War ended and the perceived security threats subsided, however, the U.S. and Europe curtailed export controls, and CoCom was officially disbanded in March 1994.[89]

After CoCom dissolved, the 1996 Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Technologies attempted to fill the void and "contribute to regional and international security and stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies."[90] Signed by thirty-three countries including Japan and most of Western Europe, parties to the Arrangement pledged to impose strict export controls to limit transfers of sensitive dual-use goods and technologies for military end-use.[91] However, unlike CoCom, the Wassenaar Arrangement is not legally binding, so countries are permitted to devise independent export administration policies without breaching international law [92]

Using the Wassenaar Arrangement's open forum for coordinating international exports of dual-use technology, members agree to report denials of export licenses to other members within sixty days.[93] Once countries are notified that another country denied a certain export, under Wassenaar Arrangement provisions, countries are still allowed to approve a license for an identical item and thus 'undercut' the original country that denied the license.[94] The only restriction on 'undercutting' is that if a country approves an export that was prevented by another country within three years, the country granting the export license must inform all other members within sixty days of the issuance of the license.[95] Rather than promoting international security, the result of such reporting mechanisms can be counterproductive; the country denying an export license essentially notifies all other members of a sales opportunity [96]

Contrary to CoCom, the Wassenaar Arrangement is also not specifically

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88. *See generally* DEFENSE SCIENCE BOARD (DSB) TASK FORCE ON GLOBALIZATION AND SECURITY, FINAL REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON GLOBALIZATION AND SECURITY 26 (1999), *available at* http://www.acq.osd.mil/dsb/globalization.pdf (last visited June 10, 2003) [hereinafter DSB FINAL REPORT].

89. *See, e.g.*, Wassenaar Arrangement Secretariat, History of the Wassenaar Arrangement, *at* http://www.wassenaar.org/docs/History.html (last visited Aug. 1, 2003).

90. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, July 12, 1996, art. I(1), *available at* http://www.wassenaar.org/docs/IE96.html (last visited Nov. 30, 2003) [hereinafter The Wassenaar Arrangement].

91. *Id.* at art. I(3).

92. *Id.* at art. II(4); *See also* Broadbent, *supra* note 1, at 50.

93. The Wassenaar Arrangement, *supra* note 90, at art. V(3); *See also Hearings on US-China, supra* note 2, at 969-70 (Panel I Discussion and Questions and Answers).

94. The Wassenaar Arrangement, *supra* note 90, at art. II(4) ("Notification of a denial will not impose an obligation on other Participating States to deny similar transfers.").

95. *Id.*

96. Jamil Jaffer, *Strengthening the Wassenaar Export Control Regime*, 3 CHI. J. INT'L L. 519, 522 (2002).

directed to prevent technology transfers to certain regimes,[97] and the Arrangement is thus weakened by the "absence of a single large threat and lack of agreement over the nature and seriousness of the smaller threats."[98] Even if member countries recognize the military value of certain dual-use technologies, those countries are not obligated to acknowledge the international security threat posed by exporting the item to a country such as China.[99] According to the U.S. General Accounting Office, "The U.S. is the only member that considers the relationship between semiconductor manufacturing and military end uses sufficiently critical and considers China's acquisition of this technology a potential threat to regional or international security."[100] Furthermore, while the Bureau of Industry and Security maintains a list of entities for which no dual-use exports are permitted,[101] the Wassenaar Arrangement does not contain such lists and "it is the sovereign decision of each country as to whether or not it makes a particular export."[102]

Ultimately, as the U.S. Bureau of Industry and Security admits, the Wassenaar Arrangement merely "provides a venue in which governments can consider collectively the implications of various transfers on their international and regional security interests."[103] Given its lack of enforceable provisions and flawed reporting mechanisms, the Wassenaar Arrangement is at best a "chat society,"[104] and at worst, it is a preposterous system by which countries apprise other members of willing buyers to which they refused to sell.[105]

III. THE MODERN PLIGHT OF EXPORT CONTROLS

A. International Undercutting

> *While the United States still has a large semiconductor production equipment base, China can obtain all major types of semiconductor equipment from non-U.S. sources in Japan and Europe.*
>
> -George Scalise, President, Semiconductor Industry Association[106]

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97. *See Hearings on US-China, supra* note 2, at 968 (Panel I Discussion and Questions and Answers).

98. DSB FINAL REPORT, *supra* note 88, at 26.

99. *See Export Controls, supra* note 3, at 19.

100. *Id.* at 17.

101. *See supra* text accompanying note 72.

102. *Hearings on US-China, supra* note 2, at 970, 973 (Panel I Discussion and Questions and Answers). *See also* The Wassenaar Arrangement, *supra* note 90, art. II(3).

103. U.S. Bureau of Industry and Security, Wassenaar FAQs, § 8, *at* http://www.bis.doc.gov/wassenaar/WASSFAQs.
html (last visited Aug. 7, 2003).

104. Richard Read, *U.S. Trade, Security Interests Clash over Technology Exports to China*, THE OREGONIAN, Feb. 3, 2003, at A7, *available at* LEXIS, News Library, OREGNN File.

105. *See supra* text accompanying note 96.

106. *See generally Hearings on US-China, supra* note 2, at 1032 (prepared statement of George

Besides U.S. corporations, Japanese and European competitors produce and sell the equipment, chemicals, gases, and films necessary for producing advanced semiconductors.[107] Boosted by international investors and suppliers and an accelerating demand from technology companies,[108] six new semiconductor foundries in China are expected to begin producing 0.18-micron chips in 2003 and two others are progressing toward the production of 0.13-micron chips,[109] although U.S. exporters report a ban on transfers to China of the equipment necessary for producing those chips.[110] Two of China's leading foundries, SMIC and GSMC,[111] openly flaunt technology that is reportedly prohibited or delayed by U.S. export controls epitomizing the ineffectiveness of restrictions on U.S. exporters.[112]

According to Shanghai's Semiconductor Manufacturing International Corporation (SMIC), swiftly acquiring cutting-edge processing systems is not an obstacle in the production of advanced chips.[113] SMIC CEO Richard Chang reveals, "our solution is to import a lot of equipment from Europe. .the export license usually takes from one week to two weeks for a European government. For the USA, it's case by case. Sometimes it's three months, but the longest we have experienced is six months."[114] After its attempt to import equipment from Applied Materials Inc. (Santa Clara, California) was thwarted by U.S. export controls in 2001, SMIC simply imported the identical technology from a company in Sweden to construct its first plant.[115] In 2002, to produce its next generation 0.13-micron chips, SMIC imported equipment from ASML Co. of the Netherlands.[116] Most recently, German company Infineon Technologies reached an agreement with SMIC to transfer its 0.11-micron technology and expertise to SMIC in exchange for an agreement from SMIC to only use the equipment to produce chips for

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Scalise, President, Semiconductor Industry Association).

107. *See Id.* at 1032-1033.

108. The China market for semiconductor equipment was $4 billion in 2001 and an estimated $7 billion in 2003. By 2010, China is expected to become the second largest market for semiconductors. *See, e.g., Hearings on US-China, supra* note 2, at 1121 (prepared statement of the Semiconductor Equipment and Materials International).

109. *See* LaPedus and Fuller, *supra* note 25, at 4. *See also SMIC to Complete 12" Silicon Wafer Plants in Shanghai and Beijing*, SINOCAST, Apr. 9, 2003, *available at* LEXIS, News Library, CURNWS File.

110. *See TI To Buy More Chinese-Made Products, supra* note 25. *See also Export Controls, supra* note 3, at 3 (discussing U.S. efforts to keep China two generations behind industry standards); *See also* Semiconductor Equipment and Materials International, *supra* note 29, at 1121.

111. SMIC and GSMC are China's newest and most advanced semiconductor foundries, and both are wholly foreign owned. *See Export Controls, supra* note 3, at 12.

112. Mike Clendenin, *China Foundry Turns to Europe for Advanced Chip Gear* ELEC. ENG. TIMES, Dec. 6, 2001, at 1, *available at* http://www.eetimes.com/semi/news/OEG20011206S0044 (last visited Aug. 25, 2003).

113. *Export Controls, supra* note 3, at 12.

114. Mike Clendenin, *supra* note 112, at 1.

115. *See* Read, *supra* note 104. *See also Hearings on US-China, supra* note 2, at 1122 (prepared statement of the Semiconductor Equipment and Materials International) (discussing SMIC's plans to buy 50% of its equipment from U.S. sources, which were amended due to the bureaucratic delays experienced by U.S. exporters).

116. *SMIC Unveils 0.13-Micron Chip Technology*, TAIWAN ECON. NEWS, Dec. 17, 2002, *available at* LEXIS, News Library, ALLASI File.

Infineon.[117] Monitoring the success of SMIC's initial facilities, the Chinese government recently asked SMIC to construct a facility in Beijing and to complete it within thirteen months.[118]

In addition to SMIC, Grace Semiconductor Manufacturing Corporation (GSMC) is rapidly developing advanced semiconductor manufacturing capabilities.[119] Overlooking U.S. suppliers encumbered by archaic export controls, GSMC Vice Chairman Nasa Tsai divulges, "think how bad the Japanese economy is they love to sell."[120] Facing domestic economic pressures, Japan amended its export regulations in 2001 to ease constraints on shipments of 0.18-micron technology to China.[121] Relying on semiconductor manufacturing equipment imported from Oki Electric Industry of Japan, GSMC is currently capable of producing for 0.15-micron chips and plans to begin producing 0.13-micron chips in 2004.[122]

The unimpeded growth of SMIC and GSMC exemplifies the futility of unilateral U.S. export controls; James Lewis of the Center for Strategic and International Studies (CSIS) observes, "all other major suppliers – the Netherlands, Germany and Japan – have told the U.S. that they will not block equipment sales to China, and "they have repeatedly questioned the contribution of semiconductor manufacturing equipment to military capabilities and proliferation and ask whether there is still any strategic rationale for controlling these items."[123] In addition to their skepticism regarding the dangers posed by dual-use exports, European and Asian governments harbor far less suspicion of China's military modernization than U.S. officials.[124] Illustrating the irrelevance of U.S. export controls in the twenty-first century, in the mid 1990s, Russia, China, India, and Israel routinely complained to the State Department that U.S. export controls unfairly damaged their economies; now such complaints are rare, implying that countries can easily acquire computing power elsewhere.[125]

B. U.S. Economic Losses

When U.S. companies such as Applied Materials Inc., the world's largest

117. *Infineon to Transfer 0.11-Micron Technology to SMIC*, SINOCAST, Apr. 2, 2003, *available at* LEXIS, News Library, ALLASI File.

118. Loh Hui Yin, *SMIC's Technology, Speed Impress China*, BUS. TIMES (Singapore), Feb. 10, 2003, *available at* LEXIS, News Library, ALLASI File.

119 Craig Smith, *China Finds Ways to Beat Chip Limits*, N.Y TIMES, May 6, 2002, at C4.

120. *Id.*

121. *See* Mike Clendenin, *China's Fabs Eye A Rule Change*, ELEC. ENG. TIMES, Aug. 27, 2001, at 96.

122. Jack Robertson, *China Fab to Launch with Advanced Technology*, ELEC. ENG. TIMES, Oct. 29, 2002, at 1.

123. Lewis, *supra* note 7, at 1022.

124. *See generally Hearings on US-China, supra* note 2, at 1042 (prepared statement of Kathleen A. Walsh, Senior Associate, Henry L. Stimson Center).

125. *See generally Hearings on US-China, supra* note 2, at 1117-18 (prepared statement of James Lewis, Director, Technology Policy, Center for Strategic and International Studies).

producer of semiconductor equipment,[126] are undercut by foreign suppliers, besides failing to prevent China from developing advanced technologies, the policies undermine U.S. economic interests.[127] Mocking superannuated U.S. export controls on semiconductor manufacturing equipment, SMIC executive Joseph Xie explains, "we love to do business with the U.S., but we can't wait forever Europe and Japan are getting the business."[128] With Asia accounting for 60% of sales from U.S. semiconductor equipment suppliers and China becoming Asia's largest recipient of new semiconductor manufacturing investment,[129] U.S. exporters of the equipment are disadvantaged relative to their foreign competitors.

When the U.S. vigorously scrutinized dual-use exports during the Cold War, U.S. companies generally accepted the restrictions, since few developed countries possessed advanced technologies,[130] and the U.S. maintained a large commercial and technological edge over the countries that did possess those technologies.[131] Moreover, the military applicability of technology was generally unmistakable in the 1970s, and therefore military goods could be differentiated from commercial goods.[132] Now, almost all IT products can be considered dual-use goods. A semiconductor equipment manufacturers association insists, "semiconductor manufacturing equipment and materials are indistinguishable from other types of generic manufacturing equipment whose export would be restricted only as part of a comprehensive economic embargo, not for reasons of national security."[133]

Since the U.S. Commerce Department operates on a more restrictive export control system than foreign governments,[134] and China is thus able to acquire advanced dual-use technology from foreign sources, high-tech executives argue that the only effect of U.S. controls is that it "interferes with our companies' ability to succeed internationally."[135] Without substantial changes to streamline the interagency process for reviewing dual-use export licenses, the Semiconductor Industry Association worries, "U.S. companies will increasingly fall behind in this crucial market, and, by extension, the global market."[136] Forecasting similar dire

126. *Export Controls*, *supra* note 3, at 13.

127. *See supra* text accompanying notes 120-21.

128. Smith, *supra* note 119, at C4.

129. *See also Hearings on US-China*, *supra* note 2, at 1119, 1121-22 (prepared statement of the Semiconductor Equipment and Materials International).

130. *See generally Export Controls*, *supra* note 3, at 5-6 ("U.S. Companies created and dominated the semiconductor equipment and materials industries until the early 1980s, when Japan increased investment and Japanese companies gained a greater market share in several critical equipment and materials industries.").

131. Corr, *supra* note 12, at 452.

132. *See generally Hearings on US-China*, *supra* note 2, at 1031 (prepared statement of George Scalise, President, Semiconductor Industry Association) ("Most IT products are purely civilian items, which cannot, for these purposes, be distinguished from civilian applications such as automobiles.").

133. *See generally Hearings on US-China*, *supra* note 2, at 1121 (prepared statement of Semiconductor Equipment and Materials International).

134. *See supra* text accompanying note 120. *See also* Walsh, *supra* note 124.

135. Gerth and Schmitt, *supra* note 77, at A14.

136. *See generally Hearings on US-China*, *supra* note 2, at 1034 (prepared statement of George Scalise, President, Semiconductor Industry Association). *See also* Clendenin, *supra* note 121.

long term consequences of export controls on dual-use technology, Denis Simon of the Rensselaer Polytechnic Institute in New York reckons, "the last thing we want to do is treat China as a technological adversary and have them get technology from elsewhere, and then find we're locked out of that system."[137]

In 2001, China accounted for 1,300 of the 11,000 export applications submitted to the Commerce Department,[138] and virtually all of the applications were for dual-use goods.[139] Since corporations are unlikely to apply for an export license unless they are confident that their request will be approved,[140] between 1997 and 2000, the dollar value of denied export licenses was only 0.4-0.5% of the total value of the semiconductor equipment exported to China.[141] Nonetheless, economic losses from denied licenses represent only a fraction of the cost to U.S. corporations, since processing delays also compel Chinese companies to import technology from non-U.S. sources.[142] According to studies conducted by the Institute for International Economics and the U.S. Import-Export Bank, the total annual cost of unnecessary domestic export controls for the U.S. economy is somewhere between $10 billion and $40 billion.[143]

IV PROSPECTS AND IMPLICATIONS OF STRATEGIC FREE TRADE AGREEMENTS

A. Trade and Investment Diversion Theory

> *Free-trade agreements deviate from the multilateral principle of nondiscrimination, and they can divert trade from more efficient to less efficient but favored import producers.*
>
> -Daniel Griswold, Cato Institute[144]

Bilateral free trade agreements disregard the nondiscrimination principles of the World Trade Organization (WTO),[145] but provisions of the WTO Charter grant exceptions for WTO members to negotiate bilateral agreements that explicitly favor some countries over others. Establishing the "most favored nation"

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137 Read, *supra* note 104.

138. *See generally Hearings on US-China, supra* note 2, at 965 (Panel I Discussions and Questions and Answers).

139. *See, e.g.*, Leopold, *supra* note 31, at 92.

140. *See, e.g., Export Controls, supra* note 3, at 27

141. *Id.* Between 1997 and 2000, the U.S. Government reviewed almost $1.6 billion in semiconductor manufacturing equipment and materials licenses.

142. *See supra* text accompanying notes 118-21. *See also Hearings on US-China, supra* note 2, at 1122 (prepared statement of Semiconductor Equipment and Materials International).

143. Broadbent, *supra* note 1, at 51.

144. Griswold, *supra* note 16, at 1.

145. *See* UPALI Wickramasinghe, *Preferential Trade Agreements and the WTO* (Paper prepared for the Conference on *Follow up to UNCTAD X South Asian Perspective*, August 1-4, 2000) *available at* http://www.lawnet.lk/articles/
pdf/article6.pdf (last visited July 10, 2003).

(MFN)[146] principle, Article I of the WTO Charter (the General Agreement on Tariffs and Trade 1947 as amended in 1994) stipulates, "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[147] However, Article XXIV(5) contains an exception for countries to form free trade agreements and thus violate the MFN principle provided that the agreements a) do not raise barriers to trade for non-contracting parties, b) barriers to trade between contracting parties do not become more restrictive, and c) interim agreements for FTAs include a plan for forming FTAs "within a reasonable length of time."[148] Between 1948 and the Uruguay Round of 1994, WTO members negotiated only 124 free trade agreements under the Article XXIV exception.[149] Interest in FTAs sharply accelerated after the Uruguay Round, however, as over 130 such agreements have been announced since 1995, an average of over 15 per year.[150]

Although FTAs are legally compatible with the WTO Charter, economists challenge the WTO's sanguine assumption that FTAs promote global economic welfare.[151] In his seminal analysis of customs unions in 1950,[152] economist Jacob Viner hypothesized that the global economic outcome of FTAs is dependent on whether beneficial "trade creation" or inefficient "trade diversion" prevails.[153] First, Viner recognized the constructive possibilities of trade creation; by eliminating trade barriers and thus removing market distortions, the agreements promote a shift in the locus of production from high cost points to low cost points within the trade area.[154] At the same time, Viner warned of the negative, inefficient effects of trade diversion that arise when the reduced trade barriers prompt one party to the agreement to import from the other party rather than a more efficient

146. *Id.* Since GATT was designed as an economic arrangement, the Charter sought to de-politicize trade by ensuring non-discriminatory trade policies among members.

147 General Agreement on Tariffs and Trade, Oct. 30, 1947 art. I(1), T.I.A.S. No. 1700, 50 U.N.T.S. 188, art. I(1).

148. *Id.* art. XXIV(5). *See also* Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism*, 42 HARV INT'L L. J. 419 (2001).

149. Wickramasinghe, *supra* note 145, at 3. During the Uruguay Round (UR), the WTO recognized the value of FTAs in advancing the free trade principles of the WTO and reaffirmed that FTAs must not damage parties outside of the agreement.

150. Griswold, *supra* note 16, at 3.

151. Wickramasinghe, *supra* note 145, at 5. (Reaffirming the WTO's position, 1995 Secretariat study contends, "Regional and multilateral integration initiatives are compliments rather than alternatives in the pursuit of more open trade.").

152. Customs unions are slightly different than free trade agreements in that members conduct free trade between themselves and maintain common tariffs to parties outside of the agreement, while FTAs allow parties to establish their own trade policies regarding tariffs for countries not included in the agreement. *See, e.g.*, Cooper, *supra* note 15, at 2.

153. *See generally* JACOB VINER, THE CUSTOMS UNIONS ISSUE (1950), *reprinted in* TRADING BLOCS: ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS 105 (Jagdish Bhagwati et al. eds., 1999).

154. *Id.* at 107

third party [155] Given the complexity of specific agreements, studies attempting to determine whether trade creation or trade diversion dominates have generally yielded inclusive results or groundless speculation.[156] Despite Viner's venerated trade creation/trade diversion theory, which suggests that preferential free trade agreements among WTO members are sometimes inefficient for the global economy "from a political viewpoint, whether a regional trade bloc results in a net economic benefit to the world economy may be of little consequence."[157]

Overlooking the potential negative global consequences of trade diversion, countries eyeing the political and economic gains of trade creation are driving the proliferation of FTAs.

Even if inefficient global trade diversion results, FTAs advance American economic interests by creating a level playing field for U.S. exporters that are disadvantaged by FTAs that do not include the United States.[158] For instance, proponents of the U.S.-Chile FTA[159] argue that U.S. exporters are disadvantaged relative to Canadian exporters that do not encounter tariffs under the Canada-Chile FTA.[160] From a homeland security perspective, since September 11, the Bush administration has regarded FTAs and the formation of open markets as the optimal long-term strategy for combating international terrorism.[161] Adding to the myriad potential domestic economic and political gains of trade creation, FTAs spur market-based reforms in developing countries and thereby open markets for U.S. firms,[162] establish a template for broader free trade negotiations,[163] and provide a "safety valve" for the multilateral trade negotiations of the WTO that often become "long, tortuous, and uncertain."[164]

Although trade diversion is considered an inefficient outcome of free trade agreements for the global economic system, for national security reasons, countries accrue domestic benefits when FTAs divert trade from the most efficient producers.[165] Given the enormous construction costs of semiconductor

155. *Id. See also* Cooper, *supra* note 15, at 9

156. Richard H. Steinberg, *Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreement*, 29 STAN. J INT'L L. 315, 321 (1993).

157. *Id.* at 322.

158. *See* Griswold, *supra* note 16, at 5.

159 The U.S.-Chile FTA was signed in June 2002 and, once implemented, will eliminate bilateral trading barriers between the U.S. and Chile. *See* U.S. Trade Representative, United States and Chile Sign Historic Free Trade Agreement (June 6, 2003), *at* http://www.ustr.gov/releases/2003/06/03-37.pdf (last visited July 30, 2003).

160. *See* Cooper, *supra* note 15, at 3. *See also* Canada-Chile Free Trade Agreement, Dec. 5, 1996, Can.-Chile, 36 I.L.M. 1067 (1997).

161. *See, e.g., Security Issues Fuel U.S. Drive for Free Trade Agreements*, AFR. NEWS, Apr. 2, 2003, *available at* LEXIS, News Library, CURNWS File.

162. *See, e.g.*, Griswold, *supra* note 16, at 6.

163. *See Id.* at 5. *See also* Cooper, *supra* note 15, at 6.

164. Griswold, *supra* note 16, at 4. *See also* Cooper, *supra* note 15, at 4.

165. According to David Ricardo's famous theory of comparative advantage, global economic efficiency is maximized when each country produces the product in which it has comparative advantage. With trade liberalization and free trade between all countries, all participants theoretically improve economic efficiency and consumer welfare. *See, e.g.*, Steinberg, *supra* note 156, at 319.

manufacturing facilities and the industry's unpredictable market trends, U.S. computer and electronics companies will likely continue outsourcing manufacturing to foundries that mass-produce computer chips.[166] However, by manipulating the flow of foreign direct investment and trade via FTAs,[167] the U.S. could theoretically influence China's attractiveness as a base for semiconductor production. Insofar as developing countries "signal to the rest of the world that they are serious about embracing global competition" when they sign an FTA with the U.S.,[168] FTAs cultivate stable economic policies and construct substitutes for international investors seeking to build foundries that can support the world's technology corporations. According to a survey conducted by the Bureau of Business Research at American International College, "political stability is the most important factor American companies consider when locating operations abroad."[169] Currently the political instability and economic uncertainty that pervades much of the developing world discourages foreign investment,[170] while China's ambitious, state-based economic plans engender confidence in foreign investors.[171]

Besides diverting foreign investment by supporting market reforms and stabilizing political agendas in developing countries, FTAs restructure U.S. tariff schedules and consequently provide incentives for U.S. companies to import from some countries over others. Since the U.S. accounts for approximately only 20% of China's exports,[172] the effect of revamping tariffs on China's high-tech exporting centers would likely not be as great as the effect of promoting political stability elsewhere.[173] Nonetheless, when tariffs on high-tech goods imported from FTA partners are eliminated, it enhances the attractiveness of importing from the FTA partner relative to China, even if China is the world's most efficient producer of the imported good.[174] In the long run, the political and economic effects of

166. Building a new foundry costs up to $2 billion (semiconductor equipment accounts for 80% of the cost). U.S. technology companies reduce costs and thus become more competitive in the global market by outsourcing, and U.S. equipment suppliers gain access to markets with reduced export restrictions. *See generally Hearings on US-China, supra* note 2, at 1121-22 (prepared statement of Semiconductor Equipment and Materials International).

167. *Cf.* Matthew W Barrier, *Regionalization: The Choice of a New Millennium*, 9 CURRENTS: INT'L TRADE L.J. 25 (2000) (Free trade agreements have been "[o]ne of the principal factors that has accelerated the globalization or transnational extension of FDI markets.").

168. Griswold, *supra* note 16, at 5.

169. *In Locating Overseas, Stability Tops List*, 87 CHRISTIAN SCI. MONITOR 8 (1995).

170. *See, e.g.*, Carlos Lozada, *Latin America*, FOREIGN POL'Y, Mar.-Apr. 2003, at 18.

171. *See, e.g.*, LIEBERMAN, *supra* note 27, at 3. *See also Export Controls, supra* note 3, at 11.

172. U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2002), *available at* http://www.cia.gov/cia/publications/factbook/geos/ch.html#Econ (last visited July 20, 2003).

173. Investors consider many factors besides tariffs, such as political stability, economic stability, labor force, and environmental conditions. *See generally* Edward Crenshaw, *Foreign Investment as Dependent Variable: Determinants of Foreign Investment and Capital Penetration in Developing Nations, 1967-1978*, 69 SOC. FORCES 1169 (1991).

174. According to NAFTA rules of origin, for example, for an item to become duty-free, a minimum percentage of the content must be produced in the FTA region, with the exact percentage depending on the type of good. The alternative to meeting rules of origin requirements is for exporters is to accept MFN provisions without meeting the rules of NAFTA. In 2000, the average tariff on

FTAs with developing countries may induce foreign investors to establish high-tech manufacturing bases in a country with which the U.S. has an FTA rather than a potential adversary With high-tech investments reaching strategic FTA partners, advanced technology would not be as accessible to militaries of countries targeted by dual-use technology export controls,[175] and U.S. technology corporations would not be hindered by unilateral export controls that favor their foreign competitors.[176]

B. Diversionary Effects of NAFTA

As an extension to the 1988 free trade agreement with Canada,[177] in 1993 Congress approved the North American Free Trade Agreement (NAFTA) that will eliminate tariffs on trade among the United States, Canada, and Mexico by 2008.[178] As East Asian government officials express concern that trade and investment is being diverted from Asia to Mexico, United States Trade Representative (USTR)[179] Robert Zoellick proclaims, "We are creating competition in liberalization with the United States at the center of a network of initiatives."[180] Bolstered by NAFTA, Mexico is indeed institutionalizing its market reforms, but high-tech investment diversion is minimal, given Mexico's relatively unskilled labor pool and underdeveloped infrastructure.[181] Nonetheless, Mexico's actions since NAFTA s implementation on January 1, 1994 underscore the potential for FTAs to generate the economic and political stability that foreign investors demand.[182]

By reinforcing Mexico's dedication to market reforms, NAFTA creates a more predictable business environment, reduces investment risk, and ultimately encourages foreign direct investment.[183] After decades of restricting foreign access

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NAFTA goods was 0.28% compared to the U.S. average MFN tariff of 4.08%. *See generally* OLIVIER CADOT, ET AL., WORLD BANK, ASSESSING THE EFFECT OF NAFTA'S RULES OF ORIGIN 9-15 (2002).

175. China's modernization program, in particular, depends on attracting foreign investment to develop "pockets of excellence, where advances in technology are leveraged for benefits in potential military conflicts. *Hearings on US-China, supra* note 2, at 949 (prepared statement of Lisa Bronson, Deputy Under Secretary of Defense for Technology Security Policy and Counter proliferation).

176. *See, e.g., Hearings on US-China, supra* note 2, at 1028 (prepared statement of George Scalise, President, Semiconductor Industry Association). *See also supra* text accompanying note 120.

177 Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (entered into force Jan. 1, 1989).

178. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) Annex 302.2.

179. The USTR is the principal trade negotiator and policy advisor of the United States and is responsible for developing trade policy to benefit economic growth. U.S. Trade Representative, *About USTR, at* http://www.ustr.gov/about-ustr/index.shtml (last visited Aug. 11, 2003).

180. USTR Robert B. Zoellick, Speech on NAFTA Before the National Foreign Trade Council 8 (July 26, 2001), transcript available at http://www.ustr.gov/speech-test/zoellick/zoellick_7.PDF (last visited July 10, 2003) [hereinafter Zoellick].

181. *See generally* Kathryn L. McCall, *What is Asia Afraid Of? The Diversionary Effect of NAFTA Rules of Origin on Trade Between the United States and Asia*, 25 CAL. W INT'L L.J. 389, 415 (1995).

182. *See* Griswold, *supra* note 16, at 5.

183. *See* Chiang-feng Lin, *Investment in Mexico: A Springboard Toward the NAFTA Market An Asian Perspective*, 22 N.C. J. INT'L L. & COM. REG. 73, 118 (1996).

to domestic markets, Mexico initiated a series of economic reforms between 1988 and 1994 during the presidency of Carlos Salinas de Gortari.[184] As a U.S. educated economist, Salinas' central economic strategy involved attracting foreign investment and, after failing to secure Japanese and European investment, he recognized that the U.S. was the most promising source of such investment.[185] To advance his free market ideology during his term, Salinas eliminated the budget deficit, privatized Mexico's banks, eliminated trade barriers ahead of GATT timelines, and signed NAFTA.[186]

Only a few weeks after Ernesto Zedillo succeeded Salinas as president in December 1994, an economic and political crisis erupted, challenging Mexico's novel commitment to maintaining an open economy.[187] With banks already floundering due to dangerously low reserves,[188] the assassination of presidential candidate Luis Donaldo Colosio extended the financial quagmire to the political arena, and $10 billion gushed out of Mexico's economy within four weeks.[189] When Zedillo reacted by allowing the peso to devalue on December 20, 1994[190] an additional $70 billion was transferred out of Mexico over the following twenty months, triggering alarm and panic among foreign investors and political leaders.[191] Investors recalled that when Mexico encountered an economic crisis in 1981,[192] the government reacted by imposing protectionist tariffs of 100% on American goods and enforcing strict licensing regulations.[193] During the 1994-1995 crisis, however, there was "every indication that the country would not help itself by trying to reverse gears and return to the government-controlled economy that [had] already failed in generating prosperity and healthy distribution of income."[194] Rather than resorting to the protectionist measures of the past, Mexico negotiated a $51 billion support package from the U.S. and international financial institutions, allowed its exchange rate to float to promote macroeconomic stability and imposed strict reserve rate requirement on banks.[195] After eighteen months,

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184. Mexico's 1917 constitution limited foreign ownership of Mexican resources, Mexico nationalized U.S. owned railroads and oil wells in the 1930s, and along with most of the region in the "lost decade" of the 1980s, Mexico futilely attempted to protect inefficient industries. PETER WINN, AMERICAS: THE CHANGING FACE OF LATIN AMERICA AND THE CARIBBEAN 488 (2d ed. 1999).

185. *Id.*

186. *See, e.g.*, Sergio Sarmiento, *Mexico Inevitable Transformation*, 20 WASH. Q. Autumn 1997, at 130.

187. *Id.* at 131.

188. *See generally* Francisco Gil-Diaz, *The Origins of Mexico 1994 Financial Crisis*, 17 CATO J., Winter 1998, *at* http://www.cato.org/pubs/journal/cj17n3-14.html (last visited Nov. 18, 2003).

189 Sarmiento, *supra* note 186, at 131.

190. After the peso was devalued, inflation and interest rates skyrocketed, thereby exacerbating the economic mayhem. *See* Gil-Diaz, *supra* note 188.

191. Sarmiento, *supra* note 186, at 132.

192. After the oil boom ended in the 1980s, Mexico was left with one of the largest foreign debts in the world. By 1982, Mexico could not pay its foreign debts, causing foreign loans to cease and the economy to collapse. WINN, *supra* note 184, at 220.

193. U.S. Trade Representative, *NAFTA Overview*, ¶ 4, *at* http://www.ustr.gov/regions/whemisphere/overview.shtml (last visited Nov. 21, 2003).

194. Sarmiento, *supra* note 186, at 137. *See also* Griswold, *supra* note 16, at 5.

195. *See* World Bank, *Crisis Management: Mexico 1994-1995* (2001), *at*

Mexico resumed its pattern of economic growth,[196] and Ernesto Zedillo recognized, "NAFTA has been crucial in transforming Mexico into one of the world's biggest exporting powers."[197]

Aside from fostering economic stability and a more secure investment environment, as a comparison between the 1981 and 1994 financial crises illustrates, NAFTA's reductions in tariffs make Mexico a more attractive place from which to export to the United States.[198] When negotiations for NAFTA were promulgated in 1991, East Asian leaders immediately recognized that that agreement handicaps firms outside of the U.S., Canada, and Mexico.[199] Since NAFTA promotes diversion of trade and investment from East Asia, political leaders forecasted decay for the export-driven East Asian economies;[200] most notably, the Association of East Asian Nations (ASEAN)[201] estimated that NAFTA would induce a $2 billion drop in ASEAN exports to the United States.[202] Since investors would have an incentive to relocate factories to Mexico, Japan's Ministry of International Trade and Industry projected an annual diversion of $10 billion in foreign direct investment from East Asia to Mexico for 1995-2001.[203]

Given the complexity of NAFTA, as it addresses not only trade but also technical standards, environmental issues, labor rights, and intellectual property,[204] economic studies of trade and investment diversion are imperfect and would depend on untenable counterfactual theories.[205] For producers of sensitive advanced technologies, however, Mexico's substandard technological infrastructure may erode the incentive to transfer investment from East Asia to Mexico.[206] Between 1998 and 2002, U.S. imports of semiconductors from Mexico remained steady at around $900 million, while U.S. imports of semiconductors from China rose from $486 million to $729 million.[207] On a macro scale, meanwhile, total imports from Mexico rose from $95 billion to $135 billion between 1998 and 2002,[208] and annual FDI inflows into Mexico averaged $11.7

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http://www1.worldbank.org/finance/ assets/images/Crisis_Man.pdf (last visited Nov. 21, 2003).

196. *Id.*

197 Zoellick, *supra* note 180, at 5.

198. *See, e.g.*, McCall, *supra* note 181, at 411.

199. *See* Jisu Kim, *Impact of the North American Free Trade Agreement on East Asia: A Korean Perspective*, 8 AM. U. J. INT'L L. & POL'Y 681, 888 (1993).

200. McCall, *supra* note 181, at 390.

201. The Association of Southeast Asian Nations (ASEAN) is a group of ten Asian countries that aims to accelerate economic growth and promote regional peace and stability through political dialogue and cooperation. ASEAN Secretariat, *Overview: Association of Southeast Asian Nations*, *at* http://www.aseansec.org/64.htm (last visited July 30, 2003).

202. McCall, *supra* note 181, at 413.

203. *Id.* at 413.

204. *See* Steinberg, *supra* note 156, at 321.

205. *See* Gary Hufbauer and Jacqueline McFadyn, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Judging NAFTA*, 23 CAN.-U.S. L. J. 15, 14-15 (1997).

206. *See* McCall, *supra* note 181, at 415.

207. *U.S. Census Bureau Foreign Trade Statistics: U.S. Imports from Mexico 1998-2002, available at* http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c2010.html (last visited Jan. 26, 2004) [hereinafter *U.S. Imports from Mexico*].

208. *U.S. Census Bureau Foreign Trade Statistics: U.S. Imports from China 1998-2002, available*

billion from 1994 to 2002, which is over three times the average annual amount of Mexico's FDI during the seven years prior to the agreement.[209]

While it remains possible that Mexico would have tripled its annual FDI inflows without NAFTA and that very little of that investment was diverted from China's expanding economy, NAFTA is succeeding in bolstering Mexico's evolving market oriented policies and supporting the efficient use of Mexico's capital resources.[210] As USTR Robert Zoellick observes, NAFTA is effective in "creating a more stable and predictable environment for investment and leading foreign capital toward more productive and efficient uses."[211] Over time, such foreign investment is expected to upgrade Mexico's infrastructure and industries, and, in turn, boost Mexico's educational system to equip the country's workforce with the technological skills necessary for competing in the high-tech global economy.[212]

C. The U.S. Jordan Free Trade Agreement

> *With a commitment to free trade legislation and a competitive and open trading environment, we have an unbeatable proposition for investors.*
>
> -Dr. Bassem Awadallah, Jordan Minister of Planning[213]

While NAFTA, with its inclusion of Mexico, is likely diverting investment in low-skilled manufacturing,[214] the U.S.-Jordan Free Trade Agreement promises to also divert high tech investments.[215] Signed on October 24, 2000 and enacted on December 17 2001, the U.S.-Jordan FTA rewards Jordanian King Abdullah II's commitment to developing a high-tech economy and stimulates foreign investment in Jordan's budding technology sectors by eliminating tariff and non-tariffs barriers to bilateral trade in virtually all industrial goods and agricultural products

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at http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c5700.html (last visited Jan. 26, 2004).

209. *U.S. Imports from Mexico*, *supra* note 208.

210. After NAFTA, Mexico was inspired to sign its own free trade agreements with Chile, the European Union, Israel, Bolivia, Columbia, Venezuela, Nicaragua, El Salvador, Guatemala, Honduras, Costa Rica, and Uruguay. *See generally* Secretary of Economics, National Development Plan 2001-2006, *at* http://www.economia.gov.mx/?P=1317 (last visited Nov. 9, 2003). *See also supra* text accompanying notes 207-9 (More efficient use of capital resources is illustrated by the reaction to the 1994-1995 economic crisis.).

211. Zoellick, *supra* note 180, at ¶ 6.

212. Peter F Romero, Assistant Secretary for Western Hemisphere Affairs, Remarks to Inter-American Development Bank Santiago, Chile (Mar. 19, 2001) transcript available at http://www.state.gov/p/wha/rls/rm/2001/1785.htm

213. *Experts Assert 'Enormous Potential for Investment in Jordan*, AME INFO – ME COMPANY NEWSWIRE, Jan. 20, 2003, *available at* LEXIS, News Library, CURNWS File.

214. *See, e.g.*, McCall, *supra* note 181, at 415.

215. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of Free Trade Area, Oct. 24, 2000, U.S.-Jordan, 2000 U.S.T. LEXIS 160 [hereinafter U.S.-Jordan Free Trade Agreement].

within 10 years.[216] As it draws investment into Jordan, the FTA supports Jordanian King Abdullah II's fundamental strategic goal to "shift Jordan's economy from one of dependence on foreign aid to one of self-reliance."[217]

Building on the economic reforms of his father King Hussein, since assuming the throne in 1999, King Abdullah II has aggressively trumpeted an economic strategy that focuses on "integration of the private sector into the industrial policymaking framework, export expansion through increased competitiveness, and the facilitation of private sector driven growth, which [ensures] that Jordan's legal and regulatory policies [match] requirements for global economic participation."[218] By opening most sectors to 100% foreign ownership, reducing inflation from 25.6% in 1989 to 1.8% in 2001, and implementing strategies to support Jordan's nascent technology sectors, Jordan is creating "the necessary environment to allow [Jordan's] businesses and citizens to utilize [the] international agreements in the new knowledge-based global economy."[219] At a January 2003 economic conference, Director of the Economic and Development Division of Jordan's Royal Hashemite Court Dr. Khaled Al Wazani assured investors, "today's message is clear Jordan is open for business."[220]

Since opening markets to U.S. investors, Jordan has attracted capital and technological expertise from powerful U.S. high-tech corporations. Recognizing the enormous potential in Jordan, Intel CEO Craig Barrett sponsored an Internet laboratory at the University of Jordan in October 2002[221] and urged the Kingdom to become "the model for the whole region in the IT sector."[222] Similarly, Cisco announced a $1 million investment in Jordan's High Tech Fund to expand the "Connecting Jordanians" program, which aims to connect every Jordanian school, college, university, and IT community center on a high-speed broadband network by 2005.[223] Additionally Oracle donated $2 million in software to Jordanian universities.[224] Finally, Sun Microsystems unveiled plans to establish a "business incubator" with Cisco, Oracle, and local investors to educate and support emerging

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216. *Id.* at Annex 2.1.

217 King Abdullah II, *Heir Jordan: One State Story of Economic Transformation*, 24 HARV INT'L REV Winter 2003, at 17

218. *Id.* at 15. *See also* EMBASSY OF JORDAN, POLITICAL AND SOCIO-ECONOMIC DEVELOPMENT: BUILDING A NEW MODEL, *at* http://www.jordanembassyus.org/new/aboutjordan/er2.shtml (last visited July 30, 2003).

219 Abdullah II, *supra* note 217, at 15-17 (for example, in 1999 Jordan launched the REACT Initiative: Regulatory Framework, Enabling Environment, Advancement Programs, Capital and Finance, Human Resource Development).

220. *Experts Assert 'Enormous Potential for Investment in Jordan, supra* note 213.

221. John Mason, *Intel Brings its Cool Silicon to the Hot Sands of Jordan*, ELECTRONIC ENGINEERING TIMES, Oct. 7, 2002, at 26.

222. Baker, *supra* note 19 *See also Intel Says Jordan IT Sector Holds Promise*, REUTERS, June 17, 2001, *available at* http://www.intaj.net/news/readnews.cfm?id=137 (last visited July 8, 2003).

223. Francesca Cinaci, *Jordan's First IT Forum Ends with Challenging 'to do List*, JORDAN TIMES, Mar. 26, 2000, *available at* http://www.jordanembassyus.org/03262000002.htm (last visited July 8, 2003).

224. *Id.*

Jordanian technology companies.[225]

As U.S. corporations eagerly contribute to Jordan's high-tech aspirations, Jordan's high-tech sectors are also enticing non-U.S. international investors. In February 2003, Jordan and Switzerland launched the Swiss-Jordanian Business-to-Business platform "Trado, a platform that facilitates trade between the IT sectors of Jordan and Switzerland by creating a website for business contacts.[226] Additionally, in January 2003 King Abdullah II welcomed Volker Jung, President of the Board of Directors of German technology company Seimens, to explore investment opportunities in telecommunications, information technology, and energy [227] During his visit, Jung praised King Abdullah II's dedication to the IT sector and his innovative educational reforms.[228]

With Jordan's bold economic reforms and the incentive of a free trade agreement, total U.S. imports from Jordan skyrocketed from $16 million in 1998 to $412 million in 2002 and imports of semiconductors crept from $0 in 2001 to $39,000 in 2002.[229] Underscoring the success of Jordan's investment initiatives, after attracting $60 million in foreign direct investment in 2001, the Kingdom is now projecting FDI inflows of $150 million in 2004.[230] Summarizing Jordan's extraordinary growth in trade and investment, in June 2003, USTR Robert Zoellick declared, "Jordan is an excellent example of how trade can drive economic reforms and growth, creating jobs, prosperity, and hope."[231]

D. Prospects of Additional Free Trade Agreements

1 The U.S.-Singapore Free Trade Agreement

On January 15, 2003, the USTR concluded negotiations on a free trade agreement with Singapore,[232] a city-state that is precipitously losing high-tech investors to China's explosive markets. Typifying the abrupt decline of Singapore's semiconductor sector, after importing $3.31 billion in semiconductors

225. *Id.* The consulting services are available for companies fewer than four years old with fewer than 50 employees. Services are free for the first year with an annual fee thereafter.

226. Information Technology Association of Jordan, *Trado Launch Culminates the Jordan-Swiss IT Partnership* (Feb. 2, 2003), *at* http://www.intaj.net/news/readnews.cfm?id=633 (last visited July 8, 2003).

227. *Jordan's King Holds Talks with Siemens Chief*, BBC MONITORING MID. E. POL., Jan. 5, 2003, *available at* LEXIS, News Library, BBCMIR File.

228. *Id.*

229. *U.S. Census Bureau Foreign Trade Statistics: U.S. Imports from Jordan 1998-2002, available at* http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c5110.html (last visited Jan. 26, 2004).

230. Mason, *supra* note 222, at 26.

231. Jeffrey Sparshott, *Free Trade Seen as Boon to MidEast*, WASH. TIMES, June 21, 2003, at C11.

232. United States-Singapore Free Trade Agreement, May 6, 2003, U.S.-Sing., *available at* http://www.mti.gov.sg/public/PDF/CMT/FTA USSFTA_Agreement_Final.pdf (last visited July 2, 2003);
See e.g., U.S. TRADE REPRESENTATIVE, QUICK FACTS: THE U.S.-SINGAPORE FREE TRADE AGREEMENT (2003), *at* http://www.ustr.gov/new/fta/Singapore/final/factsheet.pdf (last visited July 2, 2003).

from Singapore in 2000, the U.S. only imported $1.27 billion in semiconductors in 2002.[233] By eliminating most tariffs immediately upon entry into force, phasing out the remaining tariffs over three to ten years, and committing Singapore to enact a law regulating anti-competitive business practices, [234] the USTR expects the FTA to fortify Singapore's faltering high-tech sectors and "provide a secure, predictable legal framework for U.S. investors operating in Singapore."[235]

While Hong Kong is allowing its high-tech production facilities to migrate to Mainland China, Singapore is battling valiantly to avoid a "manufacturing exodus."[236] In an attempt to retain its fourteen semiconductor manufacturing plants and facilitate the construction of new factories, in 2001 the government began implementing a proactive economic strategy that includes setting aside sixty hectares of land in northern Singapore for semiconductor factories and constructing a new facility to produce high-grade purified water for the plants.[237] The allure of China's market continues to threaten such ambitions, however in March 2003, Singapore's Chartered Semiconductor Manufacturing Corporation announced that it is closing its oldest plant in Singapore and exploring investment opportunities in China to produce cutting-edge chips.[238]

For a government and economy that is highly dependent on foreign investors for capital and technology the economic tide could be disastrous; Singapore's post-independence political-economic strategy has relied on the state's ability to leverage its full-service industrial parks to attract export processing plants of foreign high-tech corporations.[239] The prospect of exporting goods from those industrial parks to the United States tariff-free would invariably enhance the attractiveness of investing in Singapore. Already, Barry Sim of Singapore's Economic Development Board (EDB), a government agency that promotes foreign investment, maintains, "we have all the elements of a global semiconductor industry in place in Singapore. .chip-making is suitable for Singapore because it isn't labor intensive, and it requires highly skilled and educated workers. [240] The FTA with the United States will add one more attractive element to Singapore' semiconductor industry and support the small city-state that "not only practices free trade but ardently promotes its within every audience of its economic

233. *U.S. Census Bureau Foreign Trade Statistics: U.S. Imports from Singapore 1998-2002, available at* http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c5590.html (last visited Jan. 26, 2004).

234. United States-Singapore Free Trade Agreement, *supra* note 232, art. 2.2, art. 12.1(1), art. 12.2(1).

235. U.S. TRADE REPRESENTATIVE, FREE TRADE WITH SINGAPORE: AMERICA'S FIRST FREE TRADE AGREEMENT WITH ASIA 4 (2002), *at* http://www.ustr.gov/regions/asia-pacific/2002-12-13-singapore_facts.pdf (last visited July 18, 2003).

236. *See* Bruce Einhorn, *Singapore Sticks With its Chip Program*, BUS. WK. ONLINE, Nov. 5, 2001, LEXIS, News Library, BWONL File.

237. *Id.*

238. *See* Lee, *supra* note 23.

239. *See* Christopher M. Dent, *Singapore Foreign Economic Policy: The Pursuit of Economic Security*, 23 CONTEMPORARY SE. ASIA. J. INT'L & STRATEGIC AFF ¶ 8 (2001), *at* Academic Search Premier.

240. Einhorn, *supra* note 236.

diplomacy."[241]

2. The U.S.-Central American Free Trade Agreement (CAFTA)

While the U.S.-Singapore FTA could revitalize Singapore's fleeing semiconductor manufacturing industry negotiations for a trade agreement with Central America could boost nascent high-tech sectors in a manner paralleling the U.S.-Jordan FTA. On January 8, 2003, USTR Robert Zoellick announced the commencement of negotiations on a free trade agreement with five Central American countries: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.[242] At a press conference, Zoellick pronounced, "This FTA will reinforce free-market reforms in the region. The growth stimulated by trade and the openness of an agreement will help deepen democracy, the rule of law, and sustainable development."[243]

The five Central American countries in the envisaged U.S.-Central American Free Trade Agreement (CAFTA) have been liberalizing their economies over the past ten years, and now none of those countries imposes a tariff higher than 10%.[244] After the region was devastated by civil wars and economic mayhem in the 1980s, the five Central American members are all embryonic democracies that are rapidly expanding their economic freedoms.[245] An FTA would reward the region's political and economic progress,[246] advance further reforms, and allay the region's escalating skepticism of the market economy and the non-interventive state.[247]

Among the Central American high-tech industries included in the proposed U.S.-CAFTA, Costa Rica's developing industries exhibit the most potential for attracting high-tech foreign investment. After imposing tariffs on computers of 133%, Costa Rica's government slashed tariffs on high-tech products to 10% in the mid 1980s.[248] Since then, Intel Corporation opened a $370 million semiconductor manufacturing facility in San Jose, Costa Rica, and Intel's Pentium computer chips have passed coffee and bananas as Costa Rica's leading export.[249] Following

241. Dent, *supra* note 239.

242. U.S. TRADE REPRESENTATIVE, UNITED STATES AND CENTRAL AMERICAN NATIONS LAUNCH FREE TRADE AGREEMENT NEGOTIATIONS (Jan. 8, 2003), *at* http://www.ustr.gov/releases/2003/01/03-01.htm (last visited July 24, 2003).

243. *Id.*

244. *How to Trade Up*, THE ECONOMIST, Feb. 15, 2003, at 36.

245. Griswold, *supra* note 16, at 12. *See also* U.S. TRADE REPRESENTATIVE, FREE TRADE WITH CENTRAL AMERICA 1 (2003), *at* http://www.ustr.gov/regions/whemisphere/camerica/2003-01-08-cafta-facts.PDF (last visited July 31, 2003) ("Oppression, violence, and dictators on both the left and right have given way to commitment to democracy in Latin America.").

246. Griswold, *supra* note 16, at 12.

247. *Cf.* WINN, *supra* note 184, at 603 (In Latin America, "there are growing doubts that the neoliberal market economy and non-interventive state are capable of redressing fundamental problems of inequality and environmental degradation.").

248. *See* Geri Smith, *Who Says the Chips Are Down? Despite A Slump, Costa Rica Sees a Bright Future in Technology*, BUS. WK. INT'L EDITIONS: LATIN AMERICA, Sept. 3, 2001, at 26.

249. *Id.* Intel's investment is so substantial that national income accounts in Costa Rica are

Intel's leadership, over 140 locally owned software development companies have arisen in Costa Rica, and those companies now export $50 million in high-tech goods.[250] Validating the advancements in Costa Rica's high-tech industries, in 2002 the U.S. imported $448 million in semiconductors from Costa Rica, up from a mere $41 million in 1998.[251] Reiterating his country's commitment to supporting international investors and upholding a dedication to global trade, after an economic downturn in 2001, General Director of the Costa Rican Investment Board Anabel Gonzalez conceded, "the only way for a small economy like ours to advance is to integrate with the world economy for better or worse."[252] An FTA with the United States would foster Costa Rica's integration with the world economy and present incentives for more international investors to employ Costa Rica high-tech industries.

V CONCLUSION: DUAL USE FTAS

Nations are deeply interested in the use of information technologies to gain asymmetric advantage over the U.S. Export controls do nothing to help manage this risk, as they cannot catch the technologies involved.

-Center for Strategic and International Studies (CSIS) Panel Report[253]

China's state-sponsored technological ascendancy continues to vex defense officials in the twenty-first century [254] but U.S. export controls are incapable of counteracting the investment incentives proffered by China's government.[255] Fundamentally the unilateral policy framework underlying export controls established during the Cold War is inappropriate for an economy that demands a global perspective, and China is easily overcoming the burden of U.S. export controls to develop a thriving semiconductor production base upon which it can modernize the People's Liberation Army and attain an asymmetric edge in military conflict.[256] In today's global economy, there are few, if any dual-use technologies

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sometimes calculated with and without Intel. *See also* Lozada, *supra* note 170, at 20.

250. Smith, *supra* note 248.

251. *U.S. Census Bureau Foreign Trade Statistics: U.S. Imports from Costa Rica from 1998-2002, available at* http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c2230.html (last visited Jan. 26, 2004).

252. Smith, *supra* note 248.

253. CTR. FOR STRATEGIC & INT'L STUDIES, *supra* note 44, at 5.

254. *See supra* text accompanying note 44; *see also* Leopold, *supra* note 31.

255. *See* LIEBERMAN *supra* note 27; *see also Export Controls*, *supra* note 3, at 15 (discussing China's manufacturing capabilities, including the ability to produce custom-made integrated circuits that are not subject to foreign export controls).

256. *See generally Export Controls*, *supra* note 3 (describing how development of advanced semiconductor facilities improves China's military industrial base by enabling China, for example, to enhance current and future weapons systems); *see also* CTR. FOR STRATEGIC & INT'L STUDIES, *supra* note 44, at 5 (stating that export controls fail to manage the risk presented to United States national security by other nations interested in using information technology to gain an advantage over the United States).

in which the U.S. is the sole possessor, necessitating an entirely new paradigm for defense trade policy [257] Whereas global competition defeats myopic attempts to mitigate national security risks through dual-use export controls, FTAs afford the opportunity to leverage that competition to nourish viable substitutes for international high-tech investors in strategically chosen regions.

By undercutting U.S. export controls and sanctioning sales of advanced semiconductor manufacturing equipment to China, the policies of foreign governments have "rendered many U.S. controls on exports to China essentially unilateral, thus neutralizing their utility as constraints on Chinese acquisition of dual-use technology"[258] Since those archaic export controls are essentially unilateral, besides failing to moderate national security concerns, they provide competitive advantages for non-U.S. companies that are not subject to draconian high-tech export controls. Ultimately, the dual-use export control system that once succeeded during the Cold War, is now not only detrimental to U.S. technological corporate interests, but it is also ineffective for addressing national security concerns.

While U.S. export controls fail to deter foreign investors from establishing sophisticated semiconductor production facilities in China,[259] free trade agreements foster the growth of alternate destinations for their investment. After NAFTA, Mexico tripled its annual FDI inflows,[260] and after the U.S.-Jordan FTA, Jordan tripled its projected inflows of FDI.[261] Whether the foreign investment flowing into Mexico and Jordan would have otherwise reached China to augment the Chinese government's modernization efforts is impossible to prove through economic analysis,[262] but the existence of an FTA undoubtedly engenders investor confidence in those countries.[263] The negotiated U.S.-Singapore FTA could deliver similar results and resuscitate Singapore's semiconductor industry by offering investors an incentive for constructing export centers in Singapore rather than China.[264] Similarly the proposed FTA with Costa Rica would buttress Costa Rica's nascent high-tech industry and thereby nourish another alternate for international high-tech investors.[265]

In contrast to the defunct unilateral perspective of export controls, by negotiating and implementing FTAs with strategically chosen partners, the U.S. operates on the now relevant global perspective to elevate competition for China's

257. *See supra* Part III(A) (discussing various Japanese and European companies that have supplied China with materials necessary to produce advanced semiconductors); *see also supra* text accompanying notes 129.

258. *See supra* Part IV(A).

259. DSB FINAL REPORT, *supra* note 88 at 26.

260. *See Export Controls*, *supra* note 3 at 12. (Providing statistics concerning the ownership of China's existing semiconductor foundries. All existing foundries are either partnership between foreign investors and the Chinese government or 100% foreign owned.).

261. *Id.*

262. Mason *supra* note 221.

263. *See* Steinberg, *supra* note 156, at 320-322.

264. *See supra* text accompanying note 173; *See supra* Part IV(D)(1).

265. *See supra* Part IV(D)(2).

burgeoning semiconductor sector and promote substitutes for international investors. As a foreign trade policy, FTAs thus appropriately protect the economic interests of U.S. corporations[266] and simultaneously divert the foreign investment upon which China's military transformation depends.[267]

266. *See supra* text accompanying notes 165 166.

267. *See supra* text accompanying notes 28 and 175.

NGO'S WITH AN ATTITUDE AND BAYONETS:

A CONSIDERATION OF TRANSNATIONAL CRIMINAL ORGANIZATIONS[1]

REVIEWED BY JOHN D. BECKER

RENSSELER LEE ET AL., TRANSNATIONAL CRIME IN THE AMERICAS: AN INTER-AMERICAN DIALOGUE BOOK, Edited by Tom Farer, Routledge, New York (1999).

JEFFREY ROBINSON, THE MERGER: THE CONGLOMERATION OF INTERNATIONAL ORGANIZED CRIME, Overlook Press, New York (2000).

Behind international terrorism, transnational crime presents one of the most significant threats to governments across the globe, and for many of the same reasons. Transnational crime extends beyond borders and in doing so exceeds the legal jurisdictions of sovereign nations. Transnational criminal organizations make use of advanced technologies, including communications, computer networks, and all available modes of transportation, in a manner analogous to multinational corporations. They have access to and utilize a wide variety of weapons and weapon technologies in the pursuit of illegal ends. And finally, transnational criminal organizations impact governmental institutions, social organizations, and the economic foundations of our society

Yet, the threat presented by transnational crime has been little studied or analyzed. Lack of analysis in turn has left policy makers with few options for establishing effective responses to the problem. The need for careful analysis of concrete situations and available financial, human, and institutional resources is readily apparent.

Transnational Crime in the Americas, edited by Tom Farer, seeks to fill that void, at least in regards to the Americas. Organized into ten chapters and a conclusion, this regionally-focused text starts by looking generally at the organized crime phenomena: its incident, functions, severity, and morphology Next, consideration is given to its relative importance among candidates for inclusion on the national security agenda, as well as dissecting its connection to the offshore

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1. RENSSELER LEE ET AL., TRANSNATIONAL CRIME IN THE AMERICAS xvi (Tom Farer ed., Routledge 1999). Farer's metaphor is an apt and succinct one and one I seized for the title of this paper.

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economy and a comparison of U.S. and European perceptions and responses to the problem of transnational crime. Finally, detailed case studies are used to clarify the phenomena itself, its relationship to the politics and economies of various states, and the effects of implementing possible anticrime strategies. The policy implications of all of this data, specifically how measures short of war might apply here, are sorted out in Farer's conclusion.[2]

Rensseler Lee's opening chapter, titled *Transnational Organized Crime: An Overview*, is a concise introduction to the topic. Lee sees organized crime as being defined by three characteristics: 1) continuity of operations, 2) practice of corruption, and 3) a capability to inflict violence.[3] He also recognizes that the post-Cold War environment has promoted organized crime, particularly in fractured states with weak central governments, like in parts of Latin America and Asia. Within the context of a changed world, transnational criminal organizations represent difficult targets for law enforcement agencies.

Lee notes that the U.S. response to this challenge has been to focus on the more identifiable and comfortable target—narcotics production and illicit sales. Counterorganization and military interventions have become the preferred means to hit and destroy this target. But the problem is that drugs don't equate to transnational organized crime *per se*. There is much more out there that nation-states have to deal with—money laundering, gambling, prostitution, and other traditional crimes—plus new threats to government institutions, like illegitimate political actions, smuggling and sales of weapons of mass destruction, and legal-illegal economic endeavors.[4]

By focusing on drug intervention, the United States is missing the mark on transnational crime. In turn, it is being wasteful of limited resources and unproductive in overall strategy Lee suggests a reappraisal of U.S. drug policy weighing the potential costs, benefits, and trade-offs of different counternarcotics policies and different regulatory schemes. Doing so could result in a better anticrime effort and free up resources for the targeting of transnational criminal organizations.[5]

The next three articles deal with some of the economic concerns involved with transnational crime. Gregory Treverton's piece, *International Organized Crime, National Security, and the Market State*, considers how much the international system has changed since the end of the Cold War, as well as how

2. *Id.* at xvi. Short of the former Soviet Union, Farer notes that transnational crime is most prevalent in the Americas. This is due, in large measure, to drug trafficking and its concomitant money laundering, gun running, and violent crimes. The biggest danger is that drug politics, rather than transnational organized crime, becomes the focus of government and intergovernmental responses.

3. *Id.* at 1.Lee' discussion includes recognition that the post-Cold War environment has promoted organized crime, particularly in fractured states with weak central governments, like in parts of Latin America and Asia.

4. *Id.* at 6-25. Lee documents this breath and variety of nontraditional criminal activity quite thoroughly.

5. *Id* at 35. In the broader view, transnational crime threats present a clear and present danger to international stability.

much America has changed. The biggest change, he argues, is the emergence of the market state.[6] By that, Treverton is referring to a more economically-oriented, less Westphalia-like state.

In a market state world, international organizations are devalued, law is devalued, and dramatic changes occur in private (versus public) responsibilities. Additionally, national security concerns shift to consider both old threats—like rogue states and terrorism—and new threats. New threats are termed "threats without threateners" and include such things as global warming and transnational organized crime. Threats without threateners can destabilize friendly governments, risk wider spread violence, affect the economic well-being of citizens, or sharply offend cherished values. As a result, Treverton thinks that international organized crime will challenge U.S. institutions and conceptions of governance.[7]

Jack Blum's article, *Offshore Money*, argues that international organized crime and large-scale narcotics trafficking depend upon the money laundering and banking services provided by the world of offshore banking and finance.[8] Blum notes that law enforcement agencies, financial regulators, and government revenue sources are all affected by this alternative economic system. Indeed, offshore money has both American and global impacts.

The problem is that the international legal system is decades behind the development of the international financial system. Accordingly taking timely action is difficult. The potential for fraud, abuse, even destabilization of the world economy is significant. Blum suggests dramatic measures are needed, including abolishing international business corporations (IBC's), requiring all corporations to have responsible officers and boards of directors, and eliminating bank secrecy laws that protect criminal activity [9]

The final economic concern is addressed in Peter Andreas's *Smuggling Wars: Law Enforcement and Law Evasion in a Changing World.* He notes the bifurcated trend of nation-states to both police prohibited activities, like drug, people, and dirty money smuggling, and open their borders for the movement of goods, people, and money in the face of globalization.[10] Andreas's analysis highlights the paradoxical, double-edged, and even interdependent relationship between the business of smuggling and the business of trying to thwart it.[11] His conclusion is that the game of smuggling and anti-smuggling efforts goes on and on and

6. *Id* at 47. Treverton develops a 2010 scenario to illustrate this market state world. 42.

7. *Id.* at 55-56. Treverton concludes by suggesting two implications derive from his analysis: 1) international concern with organized crime will grow but international capacity to deal with it will diminish, and 2) destabilization will affect countries important to the U.S.—whether they spirals down or reshape themselves depends—only time will tell.

8. *Id.* at 57

9. *Id* at 82-83. The problem with Blum's recommendations is that they also impact on legitimate, transnational and international corporations.

10. *Id.* at 85.

11. *Id.* at 86.

ultimately becomes an end in its own.[12]

One perspective position and four case studies follow in next four chapters. In *Transnational Criminal Enterprise: The Europe Perspective*, Elizabeth Joyce looks at transnational crime through an EU lens. Joyce starts by acknowledging the European experience has been different than the American, in large measure due to its multiple states and multiple borders. This different perception has lead to a view that sees transnational crime as less a security concern than a law enforcement concern. But she notes that the view is shifting to a more U.S.-like view, in large measure because of five phenomena and their connection to organized crime: terrorism, increased drug trafficking, the effects of the political and economic transformation of former Eastern Europe and the former Soviet Union, rampant EU fraud, and illegal immigration.[13] Joyce concludes by noting that Europe may prove a helpful case for the United States and the states in the Western Hemisphere, with recognition to the problems that international law enforcement poses for national sovereignty

Francisco Thoumi narrows the focus of transnational crime by looking at a particular case: *The Impact of the Illegal Drug Industry on Columbia.* His thorough treatment suggests that the economic impact of the industry has been important but not overwhelming. Politically and socially, the drug industry has been more dramatic, impacting Columbian society and politics. The overall effect is more evolutionary, given the poorly-defined causal relationship between drugs and social problems and crisis.[14]

In *The Decentralization Imperative and Caribbean Criminal Enterprises*, Anthony Maingot argues that size matters in transnational crime and in small Caribbean polities and civilities, their respective sizes impacts their ability to act and react.[15] He notes that the degree of centralized organization, in turn, can affect the roles that Caribbean governments play in involvement with the United States. Specifically Maingot looks at the islands of Trinidad and Tobago, Jamaica, Honduras, San Andreas Providencia, Dominican Republic and their linkage as roads to and from the United States.[16]

In another case study *Transnational Criminal Organizations in Bolivia*, Eduardo Gamarra considers family-based drug enterprises and their relationships with the police, the military and other criminal organizations and government regimes. Key among his findings is that Bolivia's TCO's (Transnational Criminal Organizations) have restructured, retooled and accommodated changing circumstances dictated by the changing marketplace, more effective law enforcement efforts, or transformations in the domestic political scene. Having flourished under military dictatorships, Gamarra sees TCO's doing likewise in the

12. *Id.* at 95-96. Like offshore money, the conclusion one comes to is that smuggling and efforts to stop it are constant or given in the international system.

13. *Id.* at 102.

14. *Id.* at 136-137

15. *Id.* at 145, 147,

16. *Id.* at 164-165.

transition to democracies.[17]

The last case study is Peter Smith's *Semiorganized International Crime: Drug Trafficking in Mexico.* Smith notes that drug trafficking has a negative impact on U.S-Mexico relations. He analyzes this criminal activity and considers where it is heading and what can be done about it. In his analysis, Smith looks at the 1970's to 1990's transformation of *narcotrafico,* the economic and political implications of dug trafficking with Mexico, the impact of the drug issue on U.S.-Mexican relationships, and the range of public policy options available to Mexico.[18] He concludes that Mexico's position is unlikely to change unless either U.S. drug policy changes or the Colombian traffickers abandon Mexico (of which there is already some evidence).

The book concludes with two final essays: *Bad Business: A Commentary on the Criminology of Organized Crime in the Unites States,* by Alan Block and *Fighting Transnational Organized Crime: Measures Short of War* by the editor, Tom Farer.

Block's pessimistic point is simple: it is foolish to believe that any group of countries, much less one country, even the United States can control international crime. Criminal syndicates respond to what Block calls an opportunity structure—demands for services and products that legitimate society does not provide—and have found and will continue to find ways to satisfy that demand.[19]

Farer's analysis returns us to the macro-level with which Lee opens the book; his concern is once again with states and how TCO's affect both the licit and elicit economies, as well as how TCO's present various threats to national security The growing connection between TCO's and legitimate business is significant in that it blurs the lines of legality (and one expects morality).[20] Farer also sees actions like TCO-driven computer fraud, financial scams, car theft, illegal immigration, arms and drug smuggling, as making up the TCO phenomenon. And the TCO phenomenon is what we should be concerned with, as opposed to the present harms and dangers connected to particular lines of TCO enterprise.

The reason for this is simple: the impact of globalization on political, social, and cultural mores provides increased opportunities and influences for TCO's. Farer notes that it is only by establishing similar legitimate regulatory and enforcement structures, that will battle be done with the TCO's.[21]

He suggests that the solution of how to deal with TCO's, or at least how the United States deals with them, will be found at the intersection of answers to five questions: 1) What is the problem? 2) What are the U.S. goals in relation to the problem? 3) What is the price the United States will pay, at least in the foreseeable

17. *Id.* at 172.

18. *Id.* at 193-194. It is interesting to see in the aggregate how much, if any impact, Vincentes Fox has on this analysis, if any.

19. *Id.* Block pushes Smith's helplessness analysis to the extreme; we are stuck with what we have and no level of intervention, even by an organization like the United Nations will make any difference.

20. *Id* at 249-252.

21. *Id* at 268.

future, to achieve these goals? 4) What are the chances of marshalling the required degree of support from the U.S. public and other states? And 5) Assuming the maximum investment of human and material resources, is it possible to solve the problem, and if so, for how long?[22]

What that translates into is the following definition of a victory over transnational crime: the decimation of existing criminal organizations, the crippling of their networks and logistical systems, and continuing repression sufficient to prevent the restoration of TCO's to their present level of participation in the global and certain national societies.

Clearly this sounds like war and Farer notes that is exactly what the pursuit of victory entails. If transnational crime is the new threat (or at least one of the major new threats) which replaces communism in the Cold War, the only way to fight it is as a war is fought. He argues that the best, and preferred, way is through the means of low-intensity conflict. This could include a range of options from legalization of drugs, thus cutting off the source of profits for TCO's, to interdiction against the sources and supplies of TCO's goods and services, to liquidating the leadership of TCO's, to going for the money of TCO's, including offshore sources.[23]

Farer ends by noting that the challenges of fighting a low-intensity conflict against transnational organized crime are many They are better handled by the previously mentioned new international law enforcement agencies but until they are developed, make-shift solutions are the only solution. It is also important to remember that transnational crime is only one of the threats posed to national security of the United States (and other nation-states) in the post-Cold War world.

It is clear that this is not the first time that war has been waged against a particular form of crime in the United States. Two examples come to mind. The first was the war against prohibition in the 1920's. The second was the war against drugs, starting during the Reagan administration. Both of these wars were forms of low-intensity conflicts. It appears the difference between these earlier wars is not necessarily scale but rather one of scope. That scope is discussed in fuller detail in Jeffrey Robinson's *The Merger: The Conglomeration of International Organized Crime.*

In fifteen chapters, with a short prologue and epilogue, Robinson's work sketches out a detailed account of the complexity of organized crime in today's world. This international organized crime network connects the Sicilian mafia with the Chinese Triads to the Russian, Hungarian, and Czech maffiyas, and onto the Columbian drugs cartels, to name but a few of the key players. What links these criminal gangs together are the same things that connect multinational corporations: digital communication, world markets, and the Internet.[24]

Robinson's book is full of vignettes and illustrations of how modern criminal

22. *Id.* at 275.

23. *Id.* at 276-282. Farer suggests that all of these strategies and tactics could fall under the umbrella of low-intensity conflict, but with restraint, respect, and sensitivity.

24. JEFFREY ROBINSON, THE MERGER inside coverslip (Overlook Press 2000)..

gangs increasingly operate as quasi-multinational corporations. The world, if you will, is smaller. For example, Russian gangs run prostitution rackets in Paris, cooperate with Columbia cartels to launder money through *bureaux de change* and are believed to have invested with some Italian gangs in business along the Riviera. Asian organized criminals are using their traditional base in Holland to ship amphetamines to groups in Australia, which include Lebanese, 'Ndraghenta and Romanian. Czech mobsters have forged alliances with criminals in the Middle East to assure a constant supply of heroin, which they then move through Austria into Germany, France, and increasingly Britain. Some of these same Middle Eastern criminals—usually Lebanese—have become middlemen, linking Eastern European criminals with Balkan drug-trafficking organization.[25]

In effect, what this has done is remapped the world. No longer are borders barriers and no longer do nationalities and localities define who is who or where is where.

In addition to the centrality of smuggling operations, drug trafficking, and gun running discussed early, Robinson sees counterfeiting as being a major endeavor and profit-maker for transnational crime. Compounding the problem is business overlap, and with it, difficulty in sorting out what exactly is what. Illegal aliens are smuggled into the United States, and in order to pay off their debt for entry, work in sweatshops for associated gangs that are engaged in producing pirated software and music CDs. And in a raid of that factory, police also found large caches of loaded weapons, dynamite, and C-4 plastic explosives.[26]

And yet, they (TCO's) have the advantage here, Robinson argues, "as long as we live in a world where a seventeenth-century philosophy of sovereignty is reinforced with an eighteenth-century judicial model, defended by a nineteenth-century concept of law enforcement that is still trying to come to terms with twentieth-century technology, the twenty-first century will belong to transnational criminals."[27]

Even worse, he argues, the future of crime will involve more and more connections between transnational criminals and legitimate businesses. For example, in the new millennium, Robinson can foresee a scenario where the main targets of TCO's will be a global bank, which uses a electronic data interchange (where certain services, like billing and invoicing, is outsourced to specialist companies overseas. They could establish it legitimately, growing a base of customers over several years, gaining their trust and confidence, and then, suddenly empty out all the accounts, and resulting not in significant losses to their bilked customers but also seriously crippling part of the banking industry and certain economic sectors.[28]

The only solution, for Robinson, is for states to overcome the sovereignty

25. *Id.* at 180. The intercontinental connections that Robinson brings out eventually numb the reader, with example after example, construed after a nice, developed history of that phenomena.

26. *Id.* at 232.

27. *Id.* at 19.

28. *Id.* at 336.

problem and work together by instituting transnational criminal law enforcement organizations. This is because crime is no longer a local issue. And nations must get beyond the written agreements and the rhetoric to the nuts and bolts of viable and effective means to combat TCO's.[29]

There are a couple of areas which deserve more attention in light of the events of September 11, 2001 and are not really mentioned in these texts. First, a major danger with TCO's can be found in the business analogy of mergers,[30] and specifically mergers with terrorists organizations.

In many ways, TCO's resemble terrorist organizations like Al-Qaeda. They possess the same technologies—computers, cell and satellite phone, and other electronic business devices—and often similar financial resources, as well as possessing lack of restraints (or concern) about using violent means to achieve illegal or immoral ends. One can imagine—and I suspect it is already happening—transnational criminal organizations finding and providing weapons to terrorist organizations. In extreme cases, this might include weapons of mass destruction. The cost-benefit analysis to the TCO might not only include the immediate profits of the sale, but also the improved image as a viable resource for other terrorist groups and access to other markets in terrorist controlled or dominated areas.

Second, as noted in the texts, the transparency which exists between nation-states in Europe is promoting TCO's and the levels of criminal activity worldwide. At the same time, the EU is serving as a model for other economic development and unions. East Asia is moving in that direction and even the current Bush administration is discussing the possibility of one in the Middle East. Likewise, one can imagine economic unions in Latin America and Africa—ranging from some type of NAFTA arrangement to a fully extended EU treaty agreement. At the far extreme, a borderless worldwide economic arrangement would promote not only economic growth but also the growth of criminal activity.

Third, the question becomes how and by what means does the present world order deal with TCO's in their new and emerging roles? As Farer and Robinson note, the only real answer is to raise and resource similarly structured anti-TCO's. The problems, of course, are many As indicated by the United States's recent refusal to participate in the International Criminal Court, as well as by its repudiation of a major U.N. role in post-war Iraq, it is unlikely support will be found for other international organizational solutions. And in a unipolar-dominated world, such support is vital to the success of any long-range, workable solutions.

Similarly, any international, interdependent anti-crime organization would need the support of other major powers, like the European Union, Russia, China, and India. In other words, a U.N.-like effort, as seen in the Korean and Persian Gulf wars would be required. If as Farer suggests this is really a war—a global war—it requires the resources of a war—moral, political, and strategic as well as

29. *Id.* at 337-345. Robinson's epilogue reaches many of the same conclusions that Farer's text does, but interestingly doesn't include that work in his own bibliography.

30. No pun intended with Robinson's book title.

military ones.

Overall, *Transnational Crime in the Americas* is a useful and thorough introduction to the topic of transnational crime and transnational criminal organizations. Prepared prior to 9-11, it still is relevant to conceptualizing the future impacts of TCO's in an increasingly interdependent and interconnected world. *The Merger* in turn, provides insightful details and accounts of TCO operations globally and contextualizes those organizations. Similarly, *The Merger* provides illustrative examples that flesh out the academic arguments discussed earlier.

Together these two texts provide a solid sketch of transnational crimes and TCO's, as well as the various ways in which they are impacting our world and national security concerns.

VAUGHN LOWE ET AL., INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES, edited by Alan Boyle and David Freestone, Oxford University Press, New York (1999); ISBN: 0-19-924807-9: 377 pp. (paperback).

International Law and Sustainable Development: Past Achievements and Future Challenges is a collection of essays focusing on sustainable development and its emergence as an increasingly significant issue in the international arena. The editors begin the work with an introduction on sustainable development, trying to find a viable definition and relaying its upcoming significance in international law. Because sustainable development is a new and still emerging term, it is difficult to define in any concrete description. Nonetheless, sustainable development primarily deals with environmental protections; however, as the editor notes, "not all aspects of the law relating to sustainable development are necessarily relevant to the protection of the environment, nor do all aspects of international environmental law concern sustainable development."[1] Sustainable development also touches upon issues of animal rights, human rights, and general international law. The 1992 Rio Declaration on Environment and Development, modeled after the Stockholm Declaration of 1972, is the leading international authority on sustainable development. It signals, "a system of international environmental law has emerged, rather than simply more international law rules about the environment."[2]

Although sustainable development lacks any concrete definition, it does consist of several identified elements, which are described in the essays contained in the book. While all of the articles focus on sustainable development, they also recognize that sustainable development affects and is affected by a number of other areas of law. The articles delve into international sustainable development concerns and include International Court of Justice (ICJ) cases, fishery law, and international environmental law. Perhaps because of the intermingling of legal topics within the realm of sustainable development, there is no agreement on how much emphasis should be placed on forcing a nation to develop in a manner that would sustain the environment or, on the other hand, allowing it to develop freely One author insightfully points out that the task of finding the appropriate norm is a daunting one and there is little hope of drawing any conclusions.[3] Although sustainable development remains an illusory term, it is becoming more concrete as

1. VAUGHAN LOWE ET AL., INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES, 6 (Alan Boyle & David Freestone eds., 1999).

2. *Id.* at 5.

3. *Id.* at 25.

more scholars and legal authority, including the International Law Commission, the International Court of Justice, and various UN committees, are recognizing its importance.

The impact of sustainable development on current bodies of law has been great. In the area of fishery law, for example, the past freedom of fishing on the high seas has been greatly reduced in the hopes that the preservation and conservation of fishing resources will provide for a better future for all involved.[4] Although much of this book is dedicated to the effect of sustainable development on fishery law, other essays touch upon the relationship between sustainable development and ecosystems, marine life and resources, cetaceans, and pollutants. Each of the articles has one common theme: preservation and conservation. Preservation and conservation are two concepts that embody the basic foundations of sustainable development. Inter-generational and intra-generational equity are two subjects that compose the substantive elements of sustainable development and focus on both preservation and conservation of natural resources in the present and the future. Inter-generational equity deals with the relationship between one generation and the next while intra-generational equity deals with existing concerns.

Finally, the book concludes that sustainable development will most likely be the foremost theme in international law in the 21st century While a great deal has already been done in the name of sustainable development, further action is, no doubt, forthcoming. Not only are new laws being fashioned, but existing laws are also being modified to incorporate ideas encompassed in the subject matter of sustainable development. Of course, there is still the problem of implementation. While many laws are currently in force, several have not yet been ratified and the international arena must await their effect. Another major problem that must be dealt with when considering sustainable development is the financing of such preservation and conservation. Although international organizations have formed to help with financing, individual nations are also expected to provide for their own funding in the implementation of sustainable development. The overall challenge can be summarized as the "internalization of these values into national resource assessment and decision making."[5] This book presents this challenge and demonstrates the "wealth of new concepts, institutions, and opportunities" that are a result of sustainable development.[6]

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4. *Id.* at 133.
5. *Id.* at 364.
6. *Id.*

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