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HOLDING INDIVIDUAL LEADERS RESPONSIBLE FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW: THE U.S. BOMBARDMENT OF CAMBODIA AND LAOS

by Nicole Barrett*

So we ended the Cambodia operation still on the long route out of Vietnam, confronting an implacable enemy and an equally implacable domestic opposition. The ultimate victims of our domestic anguish were the gentle people of Cambodia.¹

I. INTRODUCTION

There have been many terrible abuses of humanitarian law and customary international law stemming from official policy decisions that loom large in history—the Holocaust of the Jews and the dropping of the atom bombs on Hiroshima and Nagasaki during World War II, to name only two. In response to the massive destruction of World War II and in hope of preventing future wars, the international community formed the United Nations (U.N.) and began codifying longstanding principles of international law in treaty form. In 1949, the three existing Geneva Conventions that codified princi-

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1. Henry Kissinger, *White House Years* 517 (1979). Kissinger argues that Cambodians were harmed by the premature withdrawal of United States military operations from Cambodia at the orders of the U.S. Congress.

ples of “humane” warfare were revised, and a fourth, for the protection of civilians in time of war, was added.² Additional Protocol I of the Geneva Conventions, which expanded protections for war victims, particularly civilians, was also drafted in 1949, but not adopted until 1977.³ In addition, the international community drafted the Universal Declaration of Human Rights,⁴ which outlined the fundamental rights of human beings, eventually spawning the development of the international covenants of human rights and fueling the international human rights movement that followed.⁵ Although these legal principles were formally recognized, high-level government officials in numerous countries felt free to act with relative impunity as governmental immunities largely protected their actions, making leaders unaccountable for their activities and policy decisions. Further, in cases where immunities did not apply, the international community rarely pursued such violations at law.

This assumption of governmental non-accountability is now questioned by the international community and an increasing number of states. The case against General Augusto Pinochet that nearly resulted in his extradition to Spain for crimes of torture,⁶ among

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 3 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 3 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 3 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, art. 68, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 287, 330 [hereinafter Geneva Convention IV].

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Protocol I, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

4. Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. GAOR, 3d Sess., 183d plen. mtg. at 71, U.N. Doc. A/810 (1948).

5. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

6. Regina v. Bartle *ex parte* Pinochet, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.), <http://www.publications.parliament.uk/pa/ld199899/ldjudgment/jd990324/pino1.htm>.

Spanish Magistrate Baltasar Garzón requested extradition of General Pinochet from England to Spain for the murders of Spanish civilians in Chile in violation of the Convention Against Torture to which both England and Spain were signatories. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. De-

other cases, has given new hope that government officials who are perpetrators of serious crimes will no longer be protected by governmental immunity and will be brought to justice. Recent European cases against individuals, including government officials who have committed atrocities in violation of international law, support the “Pinochet precedent” and point the international legal community towards a world where prosecutions are not hindered by a lack of state consent or various immunities.⁷ In this world, acting with impunity becomes a less attractive *modus operandi* as those who previously were exempted from the rule of law realize that the practice of committing atrocities may have unpleasant ramifications, such as criminal charges, for them as individuals. Although Lord Browne-Wilkinson of the United Kingdom (U.K.) House of Lords was correct to say that “consequent upon the war crime trials after the 1939–45 World War, the international community came to recognize that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity,”⁸ the Pinochet decision itself has nudged enforcement of this liability from the historical realm of World War II into the realm of contemporary practice.

This Note seeks to answer two questions that were posed decades ago but now seem more germane, as new life has been breathed into international legal enforcement. First, did the United States/South Vietnamese aerial bombings that resulted in the deaths of approximately 350,000 Laotian civilians from 1968–1970 and 600,000 Cambodian civilians from 1969–1973 constitute a violation of customary international law? Second, can individual United States

spite Pinochet’s claims of immunity from suit, the House of Lords held that Pinochet could be extradited to Spain because violations of the Torture Convention had been established and the Convention requires that a country either extradite or prosecute offenders. The principle underlying Pinochet’s arrest by Spain is “universal jurisdiction,” which allows national courts to try individuals for certain grave crimes even if these crimes took place outside the territory of the prosecuting country. *Regina v. Bartle ex parte Pinochet*, [2000] 1 A.C. 147 (H.L. 1999).

7. See Peter Ford, *Answering for Rights Crimes*, *Christian Sci. Monitor*, Oct. 8, 1999, at 1 (noting a Belgian case against a Rwandan citizen for crimes against humanity, a German case against a Bosnian Serb for violation of the Geneva Conventions, and a Danish case against a Bosnian Muslim for war crimes under the Geneva Conventions).

8. *Regina v. Bartle ex parte Pinochet*, [2000] 1 A.C. 147 (H.L. 1999).

leaders be held responsible for these deaths under the theory of command responsibility?⁹

Before addressing these questions, I briefly address in Part II the relevant history of the U.S. bombings of Cambodia and Laos from 1969–1973. In Part III, I argue that the bombings of Cambodia and Laos constitute a violation of customary international legal principles that seek to spare civilians in time of war. I further posit that a particular method of bombing used, known as “carpet bombing,” may itself violate customary international law as well as Additional Protocol I of the Geneva Conventions. Then in Parts IV and V, I query whether individuals can be held responsible for the bombings under the theory of command responsibility and look, in particular, at National Security Advisor Henry Kissinger’s role in formulating the bombing policy. Finally, I briefly address possible statutory limitations on bringing suit, consider jurisdictional issues, and attempt to place the case in a larger political context in Parts VI and VII.

This Note is limited in scope. It does not consider the possibility of charging U.S. leaders with other crimes prosecuted at Nuremberg, such as crimes against humanity or genocide, nor does it consider the very real possibility of tortious liability for violations of the customary international law of human rights, which includes the much-discussed option of non-U.S. citizens bringing suit in U.S. courts via the Alien Tort Claims Act.¹⁰ While there are many cases to examine, given the recent push by the U.N. and the international community to establish a Cambodian tribunal, I have selected to examine the U.S. bombing of Cambodia and Laos. Further, this time period represents a critical juncture in international criminal law; the extended war in Vietnam and the abuses of power that occurred in this context posed a real test of whether enforcement of violations of international law against individuals could occur outside of the World War II context. In addition, I seek to dispel the myth that only leaders of non-democratic states commit wide-scale violations of customary international law and reinforce the view that without a permanent international criminal court, powerful nations will continue

9. While I primarily refer to U.S. aerial bombardment, the South Vietnamese were obviously involved in the bombardments as U.S. allies. In this paper, I do not investigate South Vietnamese policy decisions. However, a claim similar to that which I outline here may also exist for South Vietnamese leaders.

10. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). *See infra* note 98.

to escape accountability for their actions that violate international law.

II. THE U.S. HALF-DECADE BOMBING CAMPAIGN AGAINST TWO NEUTRAL COUNTRIES

During the Vietnam War, the United States expanded its military campaign from Vietnam to include aerial bombing campaigns against Laos and Cambodia, purportedly to cut off North Vietnamese military supply lines running through the countries, to attack hidden North Vietnamese “sanctuaries” in Cambodia, and, generally, to “push back the communist threat.”¹¹ While there were several incidents of U.S. attacks in Cambodia prior to 1969, the bombing operations were formalized in 1969. In a fourteen month period, March 1969 to May 1970, the U.S. military flew 3,630 B-52 raids against suspected Communist bases inside the Cambodian border.¹² Henry Kissinger, the National Security Advisor to U.S. President Richard Nixon, asserted before the U.S. Senate Foreign Relations Committee in 1973 that areas bombed were “unpopulated.”¹³ However, a memorandum written for the Secretary of Defense and sent to the White House by the Joint Chiefs of Staff indicates that “Breakfast” (Base Area 35) was home to approximately 1,640 Cambodian civilians, “Lunch” (Base Area 609) was populated by 198 Cambodian civilians, “Snack” (Base Area 351) had approximately 383 civilians, “Dinner” (Base Area 352) was home to approximately 770 civilians, and “Dessert” (Base Area 350) was inhabited by approximately 120 Cambodian peasants.¹⁴ The Joint Chiefs of Staff knew that the raids could not occur without endangering these Cambodians (“some Cambodian casualties would be sustained in the operation”¹⁵) and acknowledged that “the surprise effect of attacks could tend to increase casualties.”¹⁶ Operation Menu¹⁷ was the beginning of

11. See generally Kissinger, *supra* note 1.

12. See William Shawcross, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia* 28 (1987). See generally Seymour M. Hersh, *The Price of Power: Kissinger in the Nixon White House* (1983) (describing the bombing program and Kissinger’s role in its formulation).

13. Shawcross, *supra* note 12, at 29.

14. *Id.* at 28–29.

15. *Id.* at 29.

16. *Id.* at 30.

an intense four-year bombing campaign. The bombing was later extended further south and west under operations "Patio" and "Freedom Deal" to more densely populated areas. As bombings in populated areas were routinely reported as occurring in "uninhabited" places, little "bomb damage assessment" was conducted following the missions.¹⁸ The end result of the prolonged air assault on Laos and Cambodia was the death of a significant portion of the civilian populations of both countries, the scars of which remain three decades later.¹⁹

A. Laos

The United States dropped more bombs on Laos than it did worldwide during World War II.²⁰ By the end of the bombing in 1973, the U.S. had dropped 1.9 million metric tons of bombs, which is equal to ten tons per square mile or a half ton of bombs for every citizen of Laos, making Laos the most heavily bombed nation per capita in history.²¹ According to *The New York Times*, 350,000 people had been killed in Laos by the war's end, over a tenth of the population.²²

17. Operation Menu and the following bombardments are clear violations of Article 2, paragraph 4 of the U.N. Charter, which prohibits the use of force in international relations. U.N. Charter art. 2, para. 4. Claims of "collective self-defense" under Article 51 of the U.N. Charter do not apply to the cases of Laos and Cambodia as neither country carried out an "armed attack" against the United States or South Vietnam. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . ."). As a signatory to the U.N. Charter, the U.S. is bound by the Charter provisions in times of both war and peace.

18. Shawcross, *supra* note 12, at 215.

19. Sorya Sim and Youk Chang (dccam@bigpond.com.kh) at the Cambodia Documentation Center in Phnom Penh are currently working to create a record, entitled "U.S. Unaccounted Incidents in Cambodia," of Cambodian civilian deaths that occurred before the Pol Pot regime took power in 1975. The data collected includes accounts of victims. Cambodia Documentation Center, at <http://www.yale.edu/cgp> [last visited Apr. 9, 2001].

20. Edward S. Herman & Noam Chomsky, *Manufacturing Consent* 184 (1988).

21. The North Atlantic Treaty Organization (NATO) aerial bombing of Iraq may now have earned Iraq this unlucky distinction. By the end of 1999, U.S. and U.K. forces had dropped more than 1,800 bombs on Iraq. See John Donnelly & Jonathan Gorvett, *Air Campaign over Iraq Called Growing U.S. Risk*, *Boston Globe*, Nov. 11, 1999, at A2.

22. Herman & Chomsky, *supra* note 20, at 260.

Findings by a U.S. Senate committee support a conclusion that the U.S. committed war crimes in Laos. Senator Edward Kennedy, sitting at the time on the Senate Subcommittee on Refugees and Escapees, summarized the subcommittee's findings:

In Laos we are witnessing the familiar pattern of Vietnam, in the destruction of the countryside, the generations of refugees, and the occurrence of civilian war casualties. And today in Cambodia, the same pattern is being repeated. . . . Based on field reports available to the subcommittee, as well as press commentary and official reports from our government, there is reason to believe that human suffering has vastly increased as a result of this escalation and the nature of American involvement. More than our national leadership cares to admit, the intensive bombing of Laos since 1968 has dramatically increased the flow of refugees, and, inevitably, the toll of civilian casualties. . . . There are even suggestions that we have deliberately set about to remove population from Pathet Lao areas. Such a mindless use of power at this time . . . only shows a continued insensitivity of our national leadership, which is distressing to this subcommittee and millions of Americans.²³

Specific testimony to the subcommittee shows that although the U.S. government claimed that the North Vietnamese were responsible for the refugee crisis, it was the scorched-earth policy of the United States and South Vietnam that created the crisis in an attempt to force people to move into government areas.²⁴ U.S. planes attacked civilian targets such as temples, hospitals, and villages, killing scores of people and forcing the majority of the survivors to

23. *Refugee and Civilian War Casualty Problems in Laos and Cambodia: Hearing Before the Subcomm. to Investigate Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary*, 91st Cong. 1 (1970) [hereinafter *Senate Hearings*] (opening statement of Senator Kennedy).

24. "Well-informed sources said that the U.S. government is pursuing a scorched-earth policy to force people to move into government areas." *Id.* at 92 (testimony of Tammy Arbuckle, reporter for the *Washington Star*). When the Pathet Lao (North Vietnamese allies in Laos) controlled the Plain of Jars (the hotly contested area of Xieng Khuang in the north of Laos), the numbers of refugees were slight. The refugees dramatically increased because of the U.S. heavy bombing. *Id.* at 22 (statement of Senator Edward Kennedy).

flee.²⁵ Between 1965 and 1966, approximately 200,000 gallons of herbicides (including “Agent Orange,” a dioxin-powered herbicide) were indiscriminately dropped on eastern Laos by U.S. planes. From 1965 to 1970, the United States dumped more than eleven million gallons of Agent Orange over approximately 4.5 million acres of South Vietnam, Laos, and Cambodia.²⁶ As a result, the inhabitants of East Laos today suffer from increased birth defects and related illnesses.²⁷ The largest refugee catastrophe occurred after the U.S. and South Vietnam attacked the Plain of Jars (Xieng Khuang) on February 7, 1970.²⁸ Journalists reported that the number of refugees had reached approximately 793,000.²⁹ Twenty-five percent of Laos civilians were forced to become refugees during this period and virtually every in-

25. “For if the truth is to be known, more havoc and meaningless destruction, (rather than military advantage), has been wrought by what can in many cases only be characterized as indiscriminate bombing of civilian population centers.” *Id.* at 26 (testimony of Ronald Rickenbach, former refugee relief officer of Agency for International Development (AID)/Laos) (describing four specific incidents in which he witnessed U.S. planes targeting villages).

A former International Voluntary Service (IVS) volunteer reports:

[It is] after the bombing halt in N. Vietnam [1969] that refugees speak most. They say that during this period the jets came over daily, bombing day and night. They say they dropped ordinary bombs, napalm, phosphorous and anti personnel bombs. They say that American jets including F-4s and F-100s . . . bombed both villages and forests . . . and they suffered numerous civilian casualties. They say that everything was fired on, buffaloes, cows, rice-fields, schools, temples, tiny shelters outside the village, in addition to, of course, all people.

Id. at 49 (statement of Sen. Edward Kennedy, reading unnamed volunteer report).

26. Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 17 (1986).

27. *See generally id.*

28. The majority of the 200,000 refugees “are attributed to the intense fighting in Laos since February 1970 principally in the area of the Plain of Jars, Sam Tong and Long Cheng.” *Senate Hearings, supra* note 23, at 26 (testimony of James Norris, assistant to the executive director of Catholic Relief Services). “The refugee increase is especially noticeable from November and December and the big increase was after the Plain of Jars fell on the 7th of February. We have about 425,000 [refugees] a day.” *Id.* at 14 (testimony of Father Menger, Director of Catholic Relief Services).

29. Carl Strock, *The Long March*, *The New Republic*, May 9, 1970, at 13 (Laotian government “reports 543,000 refugees with another 150,000 unregistered. Now—because of the Plain of Jars bombing—another 100,000 refugees are trudging southward through the roadless mountains.”).

habitant in the contested zones in Laos had been forced to flee at some time in the face of intensive U.S. bombing.³⁰

A report based on refugee testimony—considered by a U.N. official in Laos as the most concise account of the bombing—claims:

The intensity of the [U.S.] bombings was such that no organized life was possible in the villages. The villagers moved to the outskirts and then deeper and deeper into the forest as the bombing reached its peak in 1969 when jet planes came daily and destroyed all stationary structures. Nothing was left standing. The villagers lived in trenches and holes or in caves. They only farmed at night. [Each] of the informants, without exception, had his village completely destroyed. In the last phase, bombings were aimed at the systematic destruction of the [material] basis of the civilian society.³¹

B. Cambodia

The Finnish Kampuchea Inquiry Commission estimates that, out of a total population of over seven million, six hundred thousand Cambodians died and over two million civilians became refugees as a result of the United States' indiscriminate carpet bombing of towns, villages, jungle, and countryside from 1969 through April 1973.³²

30. *Senate Hearings, supra* note 23, at 26 (testimony of Ronald Rickenbach, former refugee relief officer of AID/Laos).

31. Walter Haney, *A Survey of Civilian Fatalities Among Refugees from Xieng Khouand Province, Laos, quoted in* Herman & Chomsky, *supra* note 20, at 258.

32. Kimmo Kiljunen, *Kampuchea: Decade of the Genocide* 43 n.12 (1984) [hereinafter Kiljunen, *Decade of the Genocide*]. The Kampuchea Inquiry Commission was established in Helsinki, Finland in October 1980 to conduct a neutral study of the political, social, and economic developments and their legal implications in Kampuchea (Cambodia) in the 1970s. Five separate research groups at the Universities of Helsinki, Tampere, Turku, and Abo Akademi assisted the Commission, which worked as an autonomous research body independent of other organizations. The Commission received support from the government of Finland as well as the Nordic Institute for Asian Affairs and the Nordic Co-operation Committee for International Politics. *Id.* at xi. *See also* Kimmo Kiljunen, *Power Politics and the Tragedy of Kampuchea During the Seventies*, *Bulletin of Concerned Asian Scholars*, Apr.–Jun. 1985, at 49.

See also Ben Kiernan, *Peasants and Politics in Kampuchea 1942–1981*, at 280–84 (1982) (citing Associated Press, Bangkok, TOO9, W453 (1973) (contemporary Associated Press reports)). According to the Associated Press report, “Wells Klein, Executive Director of the American Council for Nationalities Service and a consultant to the Congressional Judiciary Committee on Refugees said, at least half of the [Cambo-

These estimates are modest compared to other sources.³³ The U.S. Congress legislated an end to the bombing by the end of June 1973, despite Kissinger's appeals to the contrary. Nixon agreed to halt the bombing by August 15, 1973, and not to increase its intensity in the interim.³⁴

Historian Ben Kiernan interviewed a number of Cambodian refugees about the U.S. bombing. A peasant named Thuon Cheng remembered the bombing of his village, Banteay Chrey in northern Kampang Cham Province, where no communist troops had ever been stationed:

In 1973 the Vietnamese stopped coming; in the same year, the village had to endure three months of intense bombardment by American B-52 planes. Bombs fell on Banteay Chrey three to six times per day, killing over one thousand people, or nearly a third of the village population, in three months.³⁵

Hong Var, resident of Sla in Takeo Province, one of the more heavily bombed areas, testified:

The peasants frequently told in detail about their horrifying experiences . . . when Sla was a target of U.S. and Lon

dian] population under non-government control [which he estimated at 2 million] must be classified as refugees or displaced persons [because of] the U.S. bombing. . . . He called the U.S. bombing the main reason for the refugee movement." *Id.* at 280.

33. Karl Jackson estimates 600,000–700,000 war-related deaths before the Khmer Rouge victory. *Cambodia: 1975–1978*, at 3 n.1 (Karl Jackson ed., 1989). Cambodia scholar Michael Vickery estimates that the Khmer Rouge was responsible for approximately 750,000 deaths, making the death toll from U.S. aerial bombardment similar in scale to the death toll during the Khmer Rouge regime. Michael Vickery, *Cambodia, 1975–1982*, at 187 (1984). *See also* Kiernan, *supra* note 32, at 282 (claiming the number of refugees was approximately 3,389,000). At least half of these refugees were displaced in 1973 alone. The refugees' plight cannot be considered a war crime, but today would be considered a crime against humanity. *See Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 7(d), U.N. Doc. A/Conf.183/9 (1998) [hereinafter *Rome Statute*] (including as a crime against humanity, population transfer committed as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack), available at <http://untreaty.un.org/English/notpubl/rome-en.htm>.

34. Shawcross, *supra* note 12, at 284. *See also* William Burr, *The Kissinger Transcripts 116* (1988) (stating that, in Kissinger's words, in 1973 the U.S. Air Force was "bombing the bejesus" out of Cambodia).

35. Kiernan, *supra* note 32, at 281.

Nol bombers. They told how they had to dig trenches, and be prepared at any time to run from the fields, put out cooking fires, and so on.³⁶

Over one hundred protests were filed by Cambodia with the United Nations from July 30, 1968 to March 9, 1970, the 27-month period preceding the March 18, 1970 overthrow of Prince Sihanouk's government.³⁷ The communications specifically charged the armed forces of the U.S. and the Republic of Vietnam with a series of aggressive actions involving violations of international law and demanded that the governments of the United States and South Vietnam immediately put an end to those operations. These communications complained of acts of aggression including attacks on villages, peasants working in their fields, and fishermen in Cambodian territorial waters.³⁸ Large numbers of deaths and injuries,³⁹ as well as widespread destruction of livestock, crops, houses, and other property, resulted from these bombing attacks.⁴⁰

36. *Id.*

37. Cambodia filed over sixty complaints of acts of aggression against the territory and civilian population of Cambodia with the U.N. Security Council between July 30, 1968 to July 3, 1969, and forty-nine complaints from July 25, 1969 to March 9, 1970. Official Index of "Letters of Protest," filed with the U.N. by Cambodia, July 30, 1968–July 3, 1969 [hereinafter Letters of Protest], reprinted in *Statement of Information, Hearings Before the House Comm. on the Judiciary, Pursuant to H. Res. 803, A Resolution Authorizing and Directing the Comm. on the Judiciary to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Exercise Its Constitutional Power to Impeach Richard M. Nixon, President of the United States of America (Book XI—Bombing of Cambodia)*, 93d Cong. 443 (1974) [hereinafter *Impeachment Hearings*].

38. *Id.* at 444. The U.S. and South Vietnam on several occasions penetrated Cambodian territorial waters, fired on Cambodian fishermen, and seized fishing junks and crewmembers.

39. *Id.* at 513 (letter S/9087 charging the U.S. with attacks against Khmer inhabitants from February 22 to March 2, 1969); *id.* at 516–17 (S/9126 charging U.S. forces with shooting of Khmer inhabitants from February 27 to March 9, 1969); *id.* at 534 (S/9250 accusing the U.S. of a machine gun attack against Cambodian villages on May 23, 1969); *id.* at 532 (S/9236 charging U.S. forces with firing against provincial guards inside the Cambodian border on April 20 and 22, 1969); *id.* at 539–40 (S/9266 charging the U.S. forces with shooting of civilians from April 19 to May 30, 1969); *id.* at 538 (S/9265 charging an attack by the U.S. against the Cambodian villages of O-Pot, O-Ret and Bu Raing on May 23, 1969).

40. *Id.* at 536–37. In letter S/9263 dated June 17, 1969, the representative of Cambodia charged the U.S. Air Force (USAF) with damage to Cambodian rubber plantations, crops, and forest resources as a result of defoliants (Agent Orange) dropped by

Even after the White House agreed with Congress not to increase bombing from July until August 15, 1973, tactical bombing of Cambodia increased by twenty-one percent.⁴¹ United States Air Force maps of the targets for these attacks show that these bombs fell on densely populated, fertile areas.⁴² The U.S. Chief of Targets sitting in Thailand⁴³ described the Cambodian bombing targets as “almost suburban in character with close-spaced villages throughout.”⁴⁴ The U.S. bombing maps have been described as “hallucinatory” as the bombs were targeted to fall on the most densely inhabited areas of the country.⁴⁵ Witnesses in Cambodia during this period report that the U.S. bombing had destroyed the fabric of Cambodian society.⁴⁶

USAF aircraft between April 19 and May 12. The letter added that the defoliants were dropped over an area comprising 85,000 hectares, including over 15,000 hectares of rubber plantations. The total damage to the Cambodian economy was estimated at \$8,684,810. *See also id.* at 529–30 (letter S/9224, making the same charge, but between April 18 and May 2, 1969).

41. Shawcross, *supra* note 12, at 297.

42. *Id.*

43. Thailand granted the United States many air bases and military installations within Thailand during the Vietnam War. Approximately 40,000 U.S. troops were stationed in Thailand, although some were camouflaged as “advisors” to the Thais under Military Assistance Command-Thailand, which was commanded by U.S. General McCowen from Bangkok. *See John Duffett, Against the Crime of Silence: Proceedings of the International War Crimes Tribunal 582 (1968).*

44. Shawcross, *supra* note 12, at 299.

45. Serge Thion, *Khmers Rouges! Matériaux pour l'histoire du communisme au Cambodge [Khmers Rouges! Materials on the History of Communism in Cambodia]* 168 (1981).

J'ai eu l'occasion d'examiner les cartes de l'armée américaine qui montrent, mois par mois, les lieux qui ont été soumis aux bombardements massifs des B-52. On aurait pu penser que ces bombardements avaient des buts proprement militaires . . . Mais le bombing pattern est hallucinante: il est concentré sur les régions les plus densément peuplées, sur les rizières de la plain centrale . . . [C]es bombardements . . . aient eu quelques menues conséquences, tant économique que politiques et même psychologiques.

[I had the opportunity to examine the American Army's maps that showed, month by month, the places that were subjected to the massive B-52 bombardments. One would think that these bombardments had proper military grounds . . . But the bombing pattern was hallucinatory: it was concentrated in the most densely populated regions, on the ricefields of the central plain . . . [T]hese

Finally, on April 12, 1975, the U.S. mission evacuated Cambodia.⁴⁷ Five days later, Phnom Penh surrendered to the Khmer Rouge.⁴⁸ The population, already devastated by years of U.S. bombardment, then became victim to the Khmer Rouge's reign of terror. After executing intellectuals and political opponents, the Khmer Rouge sent the urban population into the countryside to work the land in excruciating "work camps."⁴⁹ Over the next four years the Khmer Rouge killed 750,000 Cambodians while famine and disease claimed many more.⁵⁰

Attempts are now well underway to develop a criminal tribunal in Cambodia. The Cambodian tribunal, however, will look far different from the current tribunals administered by the United Nations for the Former Yugoslavia (ICTY) and Rwanda (ICTR), as Hun Sen, the current leader of Cambodia, refuses to permit an U.N. tribunal to lead the charge.⁵¹ Instead, Cambodia has agreed to a domestic tribunal, organized as a three-tiered special chamber within the Cambodian court system that will consist of a majority of Cambodian judges and a minority of foreign judges.⁵² Indictments will be issued by co-prosecutors, one Cambodian and one foreign, with any differences to be resolved by a pretrial chamber of both Cambodian and foreign judges. Decisions to block indictments will require agreement of a majority of the judges, including at least one foreign judge.⁵³ The

bombardments . . . had a series of consequences, as much economic and psychological as political.] (author's translation).

Id. See also Burr, *supra* note 34, at 120 (citing Records of the State Department, Policy Planning Staff Records, Director's Files, 1969-77 box 329, China Exchange 1 Jan. 1973-14 April 1973).

46. See, e.g., Herman & Chomsky, *supra* note 20, at 278-79.

47. Bureau of E. Asian & Pac. Affairs, U.S. Dep't of State, Background Notes: Cambodia, January 1996, http://www.state.gov/www/background_notes/cambodia_0196_bgn.html.

48. Kiljunen, Decade of the Genocide, *supra* note 32, at 10.

49. *Id.* at 10-17.

50. Herman & Chomsky, *supra* note 20, at 263, 383 n.32. See also Kiljunen, Decade of the Genocide, *supra* note 32, at 33.

51. Cambodia Genocide Project, Chronology of a Khmer Rouge Trial, 1994-2000, at http://www.yale.edu/cgp/tribunal/chron_v3.htm (last visited Apr. 9, 2001).

52. Human Rights Watch World Report 2001, Cambodia: Human Rights Developments 1, available at <http://www.hrw.org/wr2k1/asia/cambodia.html>.

53. *Id.*

tribunal is temporally restricted to actions which occurred between 1975 and 1979; in other words, all prosecutions will target only the Khmer Rouge. This limited jurisdiction excludes U.S. actions from review, as the tribunal will not have jurisdiction to hear pre-1975 claims.⁵⁴ Although the Cambodian National Assembly passed a new law to establish the tribunal on January 1, 2001,⁵⁵ the new law lacks provisions designed to ensure U.N. oversight and to guarantee that prosecutors have authority to indict those currently shielded by amnesty.⁵⁶

While the atrocities committed by the Khmer Rouge may be more grievous than the U.S. bombings, guilt and responsibility should not be relative. Violations of international law were committed by both the United States and the Khmer Rouge and both should be scrutinized. To allow the U.S. bombardment of Cambodia and Laos to hide behind a jurisdictional technicality serves to effectively eliminate culpability that United States leaders hold for their illegal actions and fosters future impunity. This, in turn, will ultimately hinder the tribunal's purported goal of achieving justice and providing reconciliation to Cambodian society while making the international community skeptical that such tribunals can exist without becoming victim to politics. Although the United States may be able to escape scrutiny by the restricted jurisdiction of a Cambodia Tribunal, this cannot erase the fact that the extensive bombing of Cambodia and Laos constitute clear violations of international law.

III. LEGAL STANDARD: DO THE BOMBARDMENTS OF CAMBODIA AND LAOS VIOLATE INTERNATIONAL LAW?

It is generally recognized among international legal scholars that there is an obvious and regrettable lack of specific treaty regulations for air warfare. While there are a few exceptions, such as Article 12 of the Geneva Convention on the Wounded, Sick and Shipwrecked, these are regarded as obsolete as they were not drafted to focus on air warfare that has occurred since World War II. Thus, standards for the conduct of air warfare and aerial bombardment

54. *Id.* See also Cambodia Genocide Project, *supra* note 51.

55. *Cambodian House Agrees to Establish a War Crimes Tribunal*, Int'l Enforcement Law Rep., Feb. 2001, at 85.

56. Colum Lynch, *U.N. Warns Cambodia on War Crimes Tribunal*, Wash. Post, Feb. 2, 2001, at A22.

“must be derived from general principles, extrapolated from the law affecting land or sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources.”⁵⁷ In other words, customary international law must be used to provide guidelines for air warfare during the period in question, in light of the lack of applicable treaties.⁵⁸

Jus in bello, the law of war, is one of the oldest subjects of international law and has a long history in customary international law.⁵⁹ Customary legal restraints on warfare are premised on the general doctrine that destruction and violence that are superfluous to actual military necessity are immoral and wasteful. Air bombardment is subjected to constraints both in relation to the selection of targets and to the accuracy of the bombardment itself.

By the time of the U.S. bombings in Cambodia and Laos in the late 1960s, a rule requiring that attempts be made to spare civilians was firmly entrenched as a norm of customary international law, and thus, binding on all nations. This rule is based on three related concepts: 1) distinction must be made between military targets and civilians,⁶⁰ 2) attacks must not be directed against civilians,⁶¹ and

57. U.S. Dep't of the Air Force, Air Force Pamphlet 110-31: International Law—The Conduct of Armed Conflict and Air Operations, para. 1-3(c) (1976) [hereinafter Air Force Pamphlet], *cited in* Middle East Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War* 28–29 (1991).

58. More recent incidences of aerial bombardment must look to customary international legal restraints, but have the additional advantage of the more specific Additional Protocol I to the Geneva Conventions, which came into force in 1977 (after the Laos and Cambodia bombings). Although the United States is not a party to Additional Protocol I, many of its provisions reflect customary law as discussed later in this paper. *See* Additional Protocol I, *supra* note 3.

59. Sources of the law of war are both Western and Asian. *See* Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 78 (1999) (citing L.C. Green, *The Contemporary Law of Armed Conflict* (1992) and Sun Tzu, *The Art of War* (1963), among others).

60. Instructions for the Government of Armies of the United States in the Field, *originally published as* Adjutant General's Office, War Dep't, General Orders No. 100, art. 23 (1863) [hereinafter Lieber Code]; *Protection of Civilian Populations Against Bombing from the Air in Case of War*, Resolution of the League of Nations Assembly, League of Nations O.J. Spec. Supp. 182, at 15 (1938); Geneva Convention IV, *supra* note 2; G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, at 1(c), U.N. Doc. A/7218 (1968); G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 2, U.N. Doc. A/8028 (1970); Additional Protocol I, *supra* note 3, art. 48. *See also* Dietrich Schindler & Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and*

3) attacks must advance legitimate military objectives,⁶² i.e. they must be necessary and proportional. These concepts are elaborated in numerous international conventions, U.N. General Assembly Resolutions, U.S. military law, and other significant international efforts to codify the customary norms of humanitarian law. Notably, Additional Protocol I of the Geneva Conventions, which came into force in 1977, codifies in treaty form many of these customary international legal principles.⁶³

To demonstrate a rule of customary international law, one must show the existence of 1) state practice and 2) *opinio juris*, a sense of legal obligation.⁶⁴ Generally, given the difficulty of ascertaining significant state practice in periods of hostility, manuals of military law and national legislation providing for the implementation of humanitarian law norms are accepted as among the best types of evidence of such practice.⁶⁵ The practice of states is also reflected in the adoption of international instruments such as normative declarations and, especially, multilateral treaties. *Opinio juris* refers to the existence of a state's sense of obligation to uphold a specific rule of law. *Opinio juris*, in reference to the United States, can be found in both international treaties signed by the United States as well as in the existence of parallel rules within national military law manuals. The latter demonstrates a particularly clear obligation as military manuals often not only state government policy but also establish obligations binding on members of the armed forces, violations of which are punishable under military penal codes.⁶⁶

Other Documents (1988) (containing these and many other international law agreements).

61. Lieber Code, *supra* note 60, art. 22; Resolution of the League of Nations, *supra* note 60, at I(1); Geneva Convention IV, *supra* note 2, arts. 6–7; G.A. Res. 2675, *supra* note 60, at 4–7; Additional Protocol I, *supra* note 3, art. 48.

62. Grotius, *De Jure Belli ac Pacis Libri Tres* (1625), *cited in* Frits Kalshoven, Int'l Comm. of the Red Cross, Constraints on the Waging of War 4 (1987); Geneva Convention IV, *supra* note 2, arts. 6–7; Additional Protocol I, *supra* note 3, art. 51.

63. Additional Protocol I, *supra* note 3.

64. Restatement (Third) of Foreign Relations § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

65. Theodor Meron, War Crimes Law Comes of Age 156 (1998).

66. *Id.*

The limitation of 'legitimate' aims in warfare to the weakening of the forces of the enemy is found in writings dating back to the age of European exploration. In 1625, Grotius, a renowned Dutch international legal scholar, published one of the first accounts of the concepts of distinction and proportionality.⁶⁷ Several centuries later, Francis Lieber's Code⁶⁸ provided one of the first codifications of rules protecting civilians and was later adapted for use in the Declaration of St. Petersburg of 1868. The Declaration states, "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."⁶⁹ These principles of distinguishing civilians from military targets and of establishing the necessity and proportionality of military violence form the basis of the

67. Grotius' theory of constraint is based on the notion that limited war that respects the "rule of right" is preferable to the practice of unlimited or "total" war ("in bello omnia licere quae necessaria sunt ad finem belli"). It follows, in a negative sense, that everything that does not weaken the military forces of the enemy is prohibited. Grotius, *supra* note 62, at 722 (Chapter XI, Moderation with Respect to the Right of Killing in a Lawful War). *See also id.* at 72, para. VIII ("one must take care, so far as is possible, to prevent the death of innocent persons, even by accident").

68. Francis Lieber was an influential academic and expert on the laws of war. His well-known and influential Instructions for the Government of Armies of the United States in the Field, originally published in 1863, is the first thorough attempt to codify the laws and customs of war. *See Lieber Code, supra* note 60.

The influence of the Lieber Code is vast. The Code was adapted by the Prussian army for its war with France in 1870. It was the substance of the Brussels Declaration, convened in 1874 by Emperor Alexander II of Russia to begin the codification of the law of war. The Code largely influenced the Oxford Manual of 1880, which was adopted by the Institute of International Law. Later, the Brussels declaration was used as the principle source of the 1899 and 1907 regulations annexed to the Hague Convention (No. IV) on the Laws and Customs of War on Land. By the time of the Nuremberg Tribunal in 1946, the International Military Tribunal for the Trial of German Major War Criminals found that both the Hague Conventions as well as the Lieber Code had reached the status of customary international law. Finally, a century after its writing, the Lieber Code influenced the Geneva Conventions of 1949. *See Meron, supra* note 65, at 137–39.

While asserting that a citizen of a hostile country is an enemy (art. 21), the Code recognizes that the progress of civilization has resulted in a distinction between the state and its army, and individual private citizens. Article 22 states that "the principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit." Lieber Code, *supra* note 60, art. 22.

69. Declaration of St. Petersburg, Nov. 29, 1868, *in Schindler & Toman, supra* note 60, at 101.

entire regulation of war first established in Brussels in 1874 in draft form, and later in the Hague Conventions of 1899 and 1904.⁷⁰

From 1922 to 1923, a Commission of Jurists at the Hague drafted the Rules of Aerial Warfare.⁷¹ Although these rules were never adopted as legally binding they are important “as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war.”⁷² To a great extent, they correspond to the customary rules and general principles underlying the conventions on the law of war on land and at sea; and, they further develop the protection of civilians through principles of distinction and military necessity.⁷³ The rules make explicit the fact that, even if a target can be deemed “military,” if it is situated such that civilians may be indiscriminately killed, the aircraft must abstain from bombardment.⁷⁴

70. Ruling principles guiding the means of warfare include that the right of the belligerents to adopt means of injuring the enemy is not unlimited. Brussels Conference of 1874, Project of an International Declaration Concerning the Laws and Customs of War, art. 12, in Schindler & Toman, *supra* note 60, at 25, 29; Institute of Int'l Law at Oxford, Oxford Manual of 1880, art. 4, in Schindler & Toman, *supra* note 60, at 35, 38; Hague Conventions of 1899 and 1907: The Laws and Customs of War on Land, art. 22, in Schindler & Toman, *supra* note 60, at 63, 82. Also, it is forbidden to employ arms projectiles or material of a nature to cause unnecessary suffering. Declaration of St. Petersburg (1868), in Schindler & Toman, *supra* note 60, at 101, 102; Brussels Conference of 1874, *supra*, art. 12; Oxford Manual of 1880, *supra*, art. 9(a); Hague Conventions of 1899 and 1907, *supra*, art. 23(e); Meron, *supra* note 65, at 136. *See also* Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 585–86 (1987) [hereinafter Commentary on the Additional Protocols].

71. Comm'n of Jurists at the Hague, *Rules of Aerial Warfare*, in *Official Documents*, 17 Am. J. Int'l L. Supp. 245 (1923) [hereinafter *Rules of Aerial Warfare*].

72. L. Oppenheim, *Oppenheim's International Law* 519 (7th ed. 1948).

73. *Rules of Aerial Warfare*, *supra* note 71.

74. “Aerial bombardment for the purpose of terrorizing the civilian population, or destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.” *Id.* art. 22.

(1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammuni-

In 1938, the League of Nations, at the urging of British Prime Minister Neville Chamberlain, adopted without dissent three principles as a “necessary basis for any subsequent regulation,” that proclaimed the intentional bombing of civilian populations illegal.⁷⁵ In the same year, the International Law Association,⁷⁶ at its Fortieth

tion or distinctively military supplies; lines of communication or transportations used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

Id. art. 24.

75. Resolution of the League of Nations Assembly, *supra* note 60, at 15. The Resolution states:

I. . . .

(1) The intentional bombing of civilian populations is illegal;

(2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;

(3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence;

II.

Also takes the opportunity to reaffirm that the use of chemical or bacterial methods in the conduct of war is contrary to international law, as recalled more particularly in the resolution of the General Commission of the Conference for the Reduction and Limitation of Armaments of 23 July 1932, and the resolution of the Council of 14 May 1938.

Id.

76. The International Law Association is an international non-governmental organization that was founded in Brussels in 1873. Its objectives, under its Constitution, include the “study, elucidation and advancement of international law, public and private, the study of comparative law, [and] the making of proposals for the solution of conflicts of law and for the unification of law.” Constitution of the International Law Association, at <http://www.ila-hq.org> (1998). “Its membership ranges from lawyers in private practice, academia, government and the judiciary, to non-lawyer experts from commercial, industrial and financial spheres, and representatives of bodies such as shipping and arbitration organizations and chambers of commerce.” *Id.* at <http://www.ila-hq.org/history.html>.

Conference held in Amsterdam, adopted a draft convention for the protection of civilian populations.⁷⁷

During the Second World War there was a dramatic shift in the nature of warfare due to the widespread practice of aerial bombing. The International Committee of the Red Cross states, "Although the basic principle [of protection of civilian populations] still remained unquestioned, the enormous development of the means of warfare jeopardized this principle in practice."⁷⁸ Following the war, the Charter of the International Military Tribunal (IMT) at Nuremberg looked to the Hague and 1929 Geneva Conventions and defined war crimes as:

violations of the laws or customs of war . . . [including], but not limited to, murder, ill-treatment or deportation to slave

77. Int'l Law Ass'n, Draft Convention for the Protection of Civilian Populations Against New Engines of War (1938), in Schindler & Toman, *supra* note 60, at 223, 223–25. The draft convention states:

Art. 1: The civilian population of a State shall not form the object of an act of war. . . .

Art. 2: The bombardment by whatever means of towns, ports, villages or buildings which are undefended is prohibited in all circumstances. . . .

Art. 3: The bombardment by whatever means of towns, ports, villages or buildings which are defended is prohibited at any time (whether at night or day) when objects of military character cannot be clearly recognized.

Art. 4: Aerial bombardment for the purpose of terrorizing the civilian population is expressly prohibited.

Art. 5: . . . (2) In cases where the [military] objectives are . . . so above specified that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment. . . .

Art. 6: The use of chemical, incendiary, or bacterial weapons as against any State, whether or not a party to the present Convention, and in any war, whatever its character, is prohibited. . . .

Art. 7 (a): The prohibition of the use of chemical weapons shall apply to the use, by any method whatsoever, for the purpose of injuring an adversary, of any natural or synthetic substance . . . which is harmful to the human or animal organism by reason of its being a toxic, asphyxiating, irritant or vesicant substance.

Id.

78. Commentary on the Additional Protocols, *supra* note 70, at 586.

labour or for any other purpose of civilian population of or in occupied territory . . . plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.⁷⁹

Significantly, under the IMT Charter, sixteen defendants were convicted as individuals for violations of the laws or customs of war.⁸⁰

Following the Nuremberg trials, the incorporation of humanitarian law into customary international law began to accelerate. The Fourth Geneva Convention of 1949 codified numerous protections for civilians in times of war. However, there is a debate over whether the Geneva Conventions can apply to protect the civilians of non-occupied territories against the dangers of warfare, in particular aerial bombardment. It is maintained that for a civilian to be a “protected party,” he or she must be “in the hands” of the adversary, which is not the literal case in aerial bombardment.⁸¹ However, several cases decided by the International Court of Justice (ICJ) have considered portions of the Geneva Conventions to be customary international law applicable to all hostilities. For example, in *Nicaragua v. United States*, the ICJ found that Common Article 3 was “a minimum yardstick applicable to all military conflicts.”⁸²

79. Charter of the International Military Tribunal Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8 1945, Fr.-U.K.-U.S.S.R.-U.S., art. 6(b), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288.

80. While the IMT Charter was based on the Hague and Geneva Conventions, the Charter was also a fundamental progression as it affirmed the culpability of individuals for the violations of the laws and customs of war. *See* Ratner & Abrams, *supra* note 59, at 79.

81. Kalshoven, *supra* note 62, at 42. *See* Geneva Convention IV, *supra* note 2, art. 4. Article 4 of the Fourth Geneva Convention requires that “persons protected . . . are those who, at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party to the conflict of Occupying Power of which they are not nationals.”

82. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 103–04 (June 27) (stating that Common Article 3 is customary international law). Common Article 3 of the Geneva Conventions states:

Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed (outside of combat) by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely

In other words, according to the laws of war, civilians and captured or wounded soldiers must not be harmed. Geneva Convention IV, *supra* note 2, art. 3.

The International Committee of the Red Cross in 1956 completed the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. Again reaffirming the customary international law principles of necessity and proportionality and the obligation to distinguish between civilians and military targets and spare the former, the draft was approved by the international community in principle. However, governments ultimately did not formally adopt the rules.⁸³

In addition to the grave breaches of the Geneva Conventions, the U.S. Law of Land Warfare, published in 1956, finds that firing on undefended localities or areas without military significance and causing purposeless destruction violate the law of war.⁸⁴ The Law of Land Warfare also emphasizes the importance of sparing civilian targets and avoiding unnecessary destruction.⁸⁵ Furthermore, while the U.S. military found no general prohibition on bombing combat troops and other legitimate military objectives from the air, the officer in command is required to do “all in his power” to inform the enemy of intention to bombard a particular place so that noncombatants can be removed.⁸⁶

By December 1969, the year that the bombing of Cambodia began and two months before the Plain of Jars bombardment, the U.N. General Assembly unanimously adopted General Resolution 2444, reaffirming the duty to distinguish between civilians and mili-

83. Articles 6 and 7 detail the immunity of the civilian population from attack and limit attacks to those with “military objectives.” Even military objectives, however, are prohibited from attack if they do not offer a military advantage, demonstrating that principles of necessity and proportionality must be employed in determining whether a military advantage exists. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, Int’l Comm. of the Red Cross (1956), in Schindler & Toman, *supra* note 60, at 251, 251–57. Although not adopted by governments, this draft had some influence on later attempts to define and develop the international law relating to armed conflicts.

84. U.S. Dep’t of the Army, Law of Land Warfare: Field Manual No. 27-10, at 180 (1956) [hereinafter Law of Land Warfare].

85. The Law of Land Warfare states, “the bombardment by whatever means of towns, villages, dwellings, or buildings which are undefended is prohibited” and further requires that killing, loss of life, and damage to property must be proportionate. *Id.* at 19.

86. *Id.*, § IV, para. 42, at 20.

tary targets and to refrain from targeting civilians.⁸⁷ The unanimous vote is significant as it demonstrates the existence of *opinio juris* required for a showing of customary international law. In addition, the U.S. government has explicitly stated that it considers this Resolution as declaratory of customary international law that legally governs the conduct of all hostilities, including aerial bombing.⁸⁸ Also in 1969, the Institute of International Law reiterated the principle of distinction between military and civilian targets, with a ban on targeting the latter, in a resolution intended to state the existing law. The resolution was adopted by sixty votes to one, with two abstentions.⁸⁹ The following year, on December 9, 1970, the U.N. General Assembly unanimously adopted Resolution 2675, which reiterated the principles of its earlier Resolution 2444.⁹⁰

87. The resolution states at 1(c): "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, at 1(c), U.N. Doc. A/7218 (1968). Resolution 2444 incorporated the earlier 1965 Resolution XXVIII that was adopted by the Twentieth International Conference of the Red Cross.

88. See Letter from the General Counsel, U.S. Department of Defense, to Senator Edward M. Kennedy (Sept. 22, 1968), cited in *Middle East Watch*, *supra* note 57, at 31.

89. Inst. of Int'l Law, *The Distinction Between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction* (1969), in Schindler & Toman, *supra* note 60, at 265.

(1) The obligation to respect the distinction between military objectives and non-military objects as well as between persons participating in the hostilities and members of the civilian population remains a fundamental principle of the international law in force.

(2) There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.

(3) Neither the civilian population nor any of the objects expressly protected by conventions or agreements can be considered as military objectives, nor yet

(a) the means indispensable for the survival of the civilian population.

Id.

90. General Assembly Resolution 2675 states:

It is also worthwhile to consider Additional Protocol I to the Geneva Conventions, passed in 1977, which codifies the customary international legal principle of sparing civilians and elaborates further protections.⁹¹ Although the United States has not ratified Additional Protocol I, it has recognized most of the pertinent provisions as declarative of customary international law and thus as legally bind-

(2) In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

(3) In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.

(4) Civilian populations as such should not be the object of military operations.

G.A. Res. 2675, *supra* note 60, paras. 2–4.

91. Additional Protocol I, *supra* note 3. The relevant articles prohibiting attacks on civilians are found in Part IV (starting with Article 48) of the Protocol protecting civilians, civilian populations, and civilian objects.

Article 48

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

....

Article 51

....

(2) the civilian population as such, as well as individual civilians, shall not be the object of attack.

(3) civilians are protected unless they take direct part in hostilities and indiscriminate attacks.

(4) indiscriminate attacks are prohibited.

Id. arts. 48, 51. Definite military advantage is required by art. 52(2) of Additional Protocol I as well as the Air Force Pamphlet. Air Force Pamphlet, *supra* note 57. Civilian objects are to be defined negatively as all objects which are not defined as military objectives. Thus, all objects are civilian objects unless destroying them offers a definitive military advantage. Article 57(2) of the Protocol requires that when attacking, those who attack shall “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.” Additional Protocol I, *supra* note 3, art. 57(2).

ing.⁹² For example, the U.S. government has expressly recognized Article 51 of Additional Protocol I as customary international law.⁹³ In addition, the U.S. Army, Navy, and Air Force manuals on international law applicable during armed conflict include prescriptions that often adopt the language of Additional Protocol I.⁹⁴ For example, the Air Force Pamphlet's formulation of this basic principle states, "the requirement to distinguish between combatants and civilians, and between military objectives and civilian objectives, imposes obligations on all the parties . . . to establish and maintain the distinctions."⁹⁵

Finally, the customary international law rule that civilians must be spared is explicitly stated in later cases of the ICJ. The ICJ has held that the principles of necessity and proportionality are customary international law and thus binding on all nations.⁹⁶ Further, the ICJ reiterated in the *Legality of the Threat or Use of Nuclear Weapons* opinion that "states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."⁹⁷

Thus, this survey of international and national treaties, resolutions and legal codes demonstrates that by 1969 there was a clearly established customary international law rule that civilians must be distinguished from military targets and spared. Applying

92. See Michael J. Matheson, Deputy Legal Advisor at the U.S. Department of State, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, Remarks at the 6th Annual American Red Cross—Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions (Jan. 22, 1987), in 2 *Am. U. J. Int'l L. and Pol'y* 419 (1987), cited in *Middle East Watch, supra* note 57, at 27. See also Meron, *supra* note 65, at 179 (stating that the number (155) and quality of the ratifying states enhance the character of the Protocol as an instrument largely declaratory of customary law).

93. *Middle East Watch, supra* note 57, at 426 (citing Matheson, *supra* note 92).

94. The Law of Land Warfare states that "the bombardment by whatever means of towns, villages, dwellings, or buildings which are undefended is prohibited" and further states that killing, loss of life, and damage to property must be proportionate. *Law of Land Warfare, supra* note 84, at 19.

95. See Air Force Pamphlet, *supra* note 57, para. 5-3(2)(b).

96. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 226, 256–57 (July 8).

97. *Id.* at 257.

the law to the facts, it is apparent that the U.S. did not abide by these basic rules in its bombing of Cambodia and Laos.⁹⁸

Not only did the method of bombing used in both Laos and Cambodia violate customary international legal principles in these instances, it may in fact be close to being illegal *per se* when carried out in civilian areas. This bombardment method, known generally as “area attacks,” and more specifically as “carpet bombing” (also “pattern” or “blanket” bombing), was introduced in and used selectively during World War II. This method of bombing, however, became the preferred and routine operating procedure of the U.S. Air Force in both Laos and Cambodia.⁹⁹ The “carpets” of bombs dropped in Laos and Cambodia were reported to be approximately six kilometers in

98. There are other potential theories of a case against U.S. officials for the illegal bombings. For example, one could argue that the U.S. violated the Genocide Convention which, although not signed by the U.S. until 1988, was declared by the ICJ in 1951 to be customary international law. Reservations to the Convention on Genocide (Advisory Opinion), 1951 I.C.J. 23 (May 28). The International Law Commission’s work over many decades demonstrates unquestioning agreement with this view. The argument would be that the U.S. intended, in its later bombing, to wipe out the national groups of Cambodians and Laotians. It does seem from historical accounts that although the U.S. officials claimed to be fighting “communists,” they effectively conflated this political status with the national identity of all Cambodians and Laotians, that is, they saw all Cambodians and Laotians as communists or potential communists and, as such, turned the entire nation, including all of its inhabitants, into a target to be indiscriminately and arbitrarily bombed. To make a showing of genocide, however, both the ‘intent’ element as well as the ‘protected group’ element would be difficult arguments that would face vigorous defenses.

Another possibility for Cambodian and/or Laotian victims is to bring a wrongful death tort claim for damages in a U.S. court that can establish jurisdiction over Kissinger. There is now a well-known body of case law under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (1994). The ATCA grants U.S. federal courts subject matter jurisdiction over a claim when a non-U.S. citizen, or “alien,” sues for a tort committed in violation of a U.S. treaty or other international law. Suits may also be possible under individual state laws such as the 1999 California law providing a cause of action arising out of World War II slave labor issues for suits filed until 2010. Cal. Civ. Proc. Code § 354.6 (West 2000). See *Chinese Turn to U.S. Courts to Sue Japanese Over War Crimes*, Agence France-Presse, Aug. 23, 2000, at <http://cn.orientation.com/en/business/4950075.html>; Elisabeth Rosenthal, *Wartime Slaves Use U.S. Law to Sue Japanese*, N.Y. Times, Oct. 2, 2000, at A8.

99. See Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* 143 (1970). Taylor states, “it is difficult to contest the judgment that Dresden and Nagasaki were war crimes, tolerable in retrospect only because their malignancy pales in comparison to Dachau, Auschwitz and Treblinka.” *Id.*

length and two kilometers wide.¹⁰⁰ As carpet bombing by its nature does not adhere to the principle of distinction, but rather strikes indiscriminately at an entire area, it cannot, by definition, differentiate between combatants and noncombatants, and thus violates customary international law in the frequent case when civilians and civilian objects fall victim to such attacks.¹⁰¹

Additionally, most of the U.S. B-52 bombers dropped their payloads at such heights that knowing whether the bombs would fall on military or civilian targets was virtually impossible, even if distinction between targets was attempted.¹⁰² One official survey of actual B-52 hits reports that “enemy camps,” often villages filled with civilians, “were where intelligence said they would be” in only one-half of the cases.¹⁰³ This begs the question of what happened to “the other half” where intelligence was “faulty?”¹⁰⁴ Further, the staggering tonnage of bombs dropped belies the possibility that distinction of civilians was even attempted.

This type of bombardment clearly violates Additional Protocol I, Article 51(5)(a) and (b), which prohibits both non-discrimination between civilian and military targets and further forbids the incidental loss of civilian life. Hence, a strong argument can be made that carpet bombing, such as that practiced by the U.S. in populated areas of both Laos and Cambodia, is *per se* a forbidden method of warfare.¹⁰⁵

The illegality of carpet bombing in civilian areas aside, the Laos and Cambodian bombardments are a clear violation of the cus-

100. Esbjorn Rosenblad, *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems* 126 (1979).

101. *See generally* *Crimes of War* 223 (Richard A. Falk et al. eds., 1971) (arguing that the overall American conduct of the war refused to distinguish between military and nonmilitary targets, including B-52 carpet bombing raids against undefended villages, populated areas, defoliation, and crop destruction).

102. Further, declassified U.S. Air Force B-52 “Arc Light” Targets maps have shockingly little detail—no towns or villages are marked. Shawcross, *supra* note 12, at 266–67 (maps).

103. *See* *Crimes of War*, *supra* note 101, at 412–13.

104. *Id.* at 413.

105. Japanese courts considered the legality of aerial bombardment of civilian targets in 1942. The courts upheld the Japanese law making the bombardment of civilians illegal. Several American flyers captured by the Japanese were executed pursuant to this law. *See* Taylor, *supra* note 99, at 141.

tomary principles discussed above. In both Cambodia and Laos, the number of civilian deaths suffered was enormous: 600,000 in Cambodia, or 8.57% of the entire population of seven million,¹⁰⁶ and 350,000 in Laos, over a tenth of the population.¹⁰⁷ Acknowledging that a certain amount of subjectivity is necessary in determining whether an attack was necessary or proportional in a specific situation, the end result leaves little doubt that a violation of these principles occurred. In both Laos and Cambodia, there were periods when the U.S. bombing was systematic and indiscriminate; during the worst periods of bombing, witness testimony states that the bombing was relentless, occurring every day and night for months at a time, often with few or no military targets in the vicinity.¹⁰⁸

The official U.S. justification for bombing Cambodia was the military necessity of protecting Americans in Vietnam, which Congress put into every proviso from October 1970 onwards.¹⁰⁹ In 1976, the U.S. Air Force defined “military necessity” as force that is:

- (i) . . . capable of being and is in fact regulated by the user,
- (ii) . . . necessary to achieve the submission of the adversary,
- (iii) . . . no greater than needed to achieve the prompt submission (economy of force),
- (iv) . . . not otherwise prohibited.¹¹⁰

Clearly the principle of humanity inherently limits the military necessity doctrine. The U.S. Air Force states that this principle includes “a specific prohibition against unnecessary suffering, a requirement of proportionality, and [an affirmation of] the basic immunity of civilian populations and civilians from being objects of attack during armed conflicts.”¹¹¹ Thus, whatever the asserted “military ne-

106. See *supra* note 32 and accompanying text.

107. See Herman & Chomsky, *supra* note 20, at 260; *supra* note 22 and accompanying text.

108. For information on Laos see *supra* notes 23, 26, 28–31. For information on Cambodia see *supra* notes 32, 35–37, 39, 40, 44–46.

109. Shawcross, *supra* note 12, at 292. See also *Impeachment Hearings*, *supra* note 37, at 16 (statement of Melvin Laird, Secretary of Defense); *id.* at 20 (statement of President Richard M. Nixon, Foreign Policy Report to Congress).

110. Air Force Pamphlet, *supra* note 57, para. 1-3(a)(1); see also *Law of Land Warfare*, *supra* note 84, para. 41.

111. Air Force Pamphlet, *supra* note 57, para. 1-3(a)(2).

cessity,” it cannot justify unnecessary suffering or specific civilian targeting, which clearly happened in Cambodia.

Therefore, the U.S. aerial bombardment of Laos and Cambodia from 1969–1973 are war crimes of wanton destruction of villages, civilian targets, and civilian populations. These crimes violate customary humanitarian law norms that cannot be justified by claims of military necessity.

IV. HOLDING LEADERS RESPONSIBLE FOR THEIR ORDERS: COMMAND RESPONSIBILITY

Determining responsibility for illegal policies can be difficult because there are often many actors who contribute to policy design. International law recognizes a particular form of culpability for those who order but do not directly commit a crime through the doctrine of “command responsibility.”¹¹² The most significant elaboration of this doctrine occurred at the Nuremberg Tribunals, which pinned command responsibility for war crimes in violation of customary international law on the highest Nazi and Japanese officials.¹¹³ International legal scholar Theodore Meron states that the Yamashita principle was the first authoritative articulation of the modern rule of command responsibility.¹¹⁴ In February 1946, the U.S. Supreme Court in *In re Yamashita* held a Japanese commander of armed forces responsible for the deaths of civilians in enemy occupied territory, although the commander himself did not commit the crimes.¹¹⁵ Yamashita was found to have violated his affirmative duty under international law,

112. Beth Stevens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* 78 (1996).

113. *Id.* See also Nuremberg Principle III Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1946), in *Crimes of War, supra* note 101, at 107 (“The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.”).

114. Meron, *supra* note 65, at 86. Meron has traced the treaty roots of command responsibility across several centuries.

115. 327 U.S. 1, 15–17 (1946) (holding that a superior is generally responsible for the acts of his subordinates if the superior had or should have had knowledge of such acts by subordinates, and did not take steps to prevent the acts or punish those responsible).

in particular the Hague Conventions, to take measures within his power to protect the civilian population.¹¹⁶

There are also, however, U.S. precedents that limit the command responsibility doctrine from reaching the upper echelons of U.S. leadership. The U.S. Military Tribunal convicted U.S. Army Lieutenant William Calley for the vicious murder of more than 500 civilians on 16 March 1968 at Son My (better known as My Lai), but acquitted his superior, U.S. Army Captain Medina, who had, according to Calley, ordered him to shoot all of the Vietnamese villagers that he encountered in Son My.¹¹⁷ However, a distinction can be made from the case of bombardment of Laos and Cambodia and the Son My tragedy. Son My was an isolated incident. In contrast, the bombings of Cambodia took place over a period of five years, certainly a long enough time to demonstrate the existence of a policy of carpet bombing. Therefore, because such a policy did exist, guilt is established beyond that of the individual soldiers who carried out the bombing—it falls upon the master architects of the policy who ordered the bombings to occur.¹¹⁸

Article 146 of the Fourth Geneva Convention directs states to punish “persons committing, or ordering to be committed [offenses]” that are grave breaches of the Convention.¹¹⁹ However, the 1956 U.S. Army Law of Land Warfare, binding law for all branches of the U.S. Armed Forces, moves away from this strict liability standard and articulates a due diligence standard for command responsibility. It explicitly provides that a military commander is responsible for criminal acts:

if he has actual knowledge, or should have knowledge . . . that troops or other persons subject to his control

116. *Id.* at 14–17.

117. *United States v. Calley*, 22 C.M.A. 534 (1973) (holding Calley guilty of massacre despite commanding officer’s alleged orders to kill everyone in village as a person of any level of intelligence should have realized that such orders were illegal).

118. *See Yamashita*, 327 U.S. at 26–27 (finding that the laws of war “plainly imposed . . . an affirmative duty [on commanders] to take such measures as were within [their] power and appropriate in the circumstances to protect . . . the civilian population”). *See generally* Taylor, *supra* note 99 (applying Nuremberg precedents to U.S. conduct in Vietnam, concluding that U.S. commanders violated the precedents set in Nuremberg) (book written by U.S. chief prosecutor in Nuremberg).

119. Geneva Convention IV, *supra* note 2, art. 146; Schindler & Toman, *supra* note 60, at 546–47.

are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violation thereof.¹²⁰

Additional Protocol I of the Geneva Conventions follows a similar formulation, stating that a commander is generally responsible for an act of a subordinate if the commander: 1) knew or had reason to know a subordinate was about to commit such acts, and 2) did not take necessary and reasonable measures to prevent these acts.¹²¹ Although the U.S. has not signed Additional Protocol I, the U.S. Army Law of Land Warfare has an identical provision making “knew or should have known” the standard to establish command responsibility. Applying this culpability standard, U.S. officials are responsible for actions of their subordinates that violate the Geneva Conventions if they “knew or should have known” that military forces were committing crimes and failed to take “reasonable measures” to prevent their commission.¹²² Thus, notwithstanding the potential guilt of individual soldiers who carried out the actual attacks, the theory of command responsibility places guilt on those responsible for creating and overseeing an illegal policy and can be applied in this case.

120. Law of Land Warfare, *supra* note 84, at 178–79.

121. Additional Protocol I, *supra* note 3, art. 86.

122. See Ratner & Abrams, *supra* note 59, at 119–20. Additional Protocol I’s theory of command responsibility is now reflected in recent international criminal tribunals to reach those who design policies of death and destruction. The mandate of the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, is consistent with the Geneva Conventions formulation. The Tribunal is required to follow the 1949 Geneva Conventions’ formulation and finds criminal responsibility of superiors when the superior “knew or should have known” that forces were committing crimes and failed to take “reasonable measures” to prevent their commission. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 7, U.N. Doc. S/RES/827 (1993), available at <http://www.un.org/icty/basic/statut/statute.htm>. *But see* Prosecutor v. Delalic, IT-96-21-T, para. 496 (ICTY 1998) (the “Celebici Camp” case) (holding a prison camp guard and commander responsible for atrocities at a prison camp, but finding that the general was not responsible because he did not have direct and effective control over the prison camp guard), <http://www.un.org/icty/celebici/trialc2/jugement/main.htm>. In addition, the draft charter for the International Criminal Court reflects the ICTY’s formulation of command responsibility for superiors, while establishing different rules for civilian violators. See *Rome Statute*, *supra* note 33, arts. 27, 28.

V. HENRY KISSINGER BEARS COMMAND RESPONSIBILITY
FOR THE ILLEGAL BOMBINGS OF LAOS AND CAMBODIA

Although other policy makers may also be implicated in the U.S. bombing policies,¹²³ Henry Kissinger, then National Security Advisor with full time responsibility for designing and implementing military policies for President Richard Nixon, was the chief architect of the illegal bombing policies in Cambodia and Laos. As such, Kissinger bears command responsibility for the vast Cambodian and Laotian deaths caused by U.S. aerial bombardment.

Several high-ranking members of the Nixon administration provide evidence of Kissinger's central role in formulating the U.S. bombing policies. H.R. "Bob" Haldeman, Nixon's chief of staff, affirms that Kissinger was the head U.S. policy maker for Laos, noting that "the Laos flap . . . in K[issinger]'s absence, took an enormous amount of [the] P[resident]'s time."¹²⁴ Haldeman states in his diaries that on March 20, 1970 after his second meeting with Le Duc Tho, the fifth-ranking member of North Vietnam's ruling Politburo and chief peace negotiator for the North Vietnamese, Kissinger made "an issue out of [the] State [Department's] reluctance to bomb Laos."¹²⁵ Haldeman later wrote on December 22, 1970:

Henry came up with the need to meet with the P[resident] today with Al Haig and then tomorrow with Laird and Moorer because he has to use the P[resident] to force Laird and the military to go ahead with the P[resident]'s plans, which they won't carry out without direct orders. The plans in question, involved . . . attacking enemy forces in Laos.¹²⁶

123. Other possible candidates for command responsibility include Secretary of Defense Melvin Laird, Colonel Ray Sitton, and President Richard Nixon. (Although, as Nixon is no longer alive, the only possibility for suit would be a civil action against his estate.)

124. H.R. Haldeman, *The Haldeman Diaries: Inside the Nixon White House* 135 (1994). Haldeman states in his introduction that he uses the abbreviation "P" for President Richard Nixon and "K," "HK," or "Henry" for Henry Kissinger.

125. *Id.* at 140.

126. *Id.* at 224. Haldeman refers to Colonel Alexander Haig, then Kissinger's military assistant; Melvin Laird, Secretary of Defense from January 1969 to February 1973; and Admiral Thomas Moorer, Acting Chairman of the Joint Chiefs of Staff.

On January 29, 1971, Haldeman wrote:

The P[resident] first had Henry review the plan for the Laotian move and get all the things set on that. Henry's still not sure we're going ahead with that step, but they're working on the plan for it in any event.¹²⁷

In an inquiry into the Cambodian bombings held by the U.S. Senate, the Secretary of the U.S. Air Force, Robert C. Seamans Jr., testified to the Senate Armed Services Committee that the authority for the bombing of Cambodia, "comes from the President to the Secretary of Defense, goes down through the Chairman of the Joint Chiefs of Staff, and out to the field. It is not the Secretary of the Air Force's responsibility to make this determination."¹²⁸ General Ryan, the Air Force Chief of Staff, claimed that the Air Force's directives came from the Secretary of Defense.¹²⁹ Kissinger, however, found ways to circumvent the Secretary of Defense, and granted Air Force General Abrams direct authority to order tactical air strikes without approval from Washington.¹³⁰

Kissinger confirms in his memoirs, *White House Years*, that he, Bob Haldeman, Colonel Alexander M. Haig, then Kissinger's military assistant, and Air Force Colonel Ray B. Sitton, Joint Chiefs of Staff expert on B-52 missions, developed "both a military and a diplomatic schedule" in preparation for the secret bombing of Cambodia

127. *Id.* at 240.

128. *Fiscal Year 1974 Authorization for Military Procurement, Research and Development, Construction Authorization for the Safeguard ABM, and Active Duty and Selected Reserve Strengths: Hearings Before the Senate Comm. on Armed Services*, 93d Cong. 1107-08 (1973) (testimony of Robert C. Seamans, Secretary of the U.S. Air Force).

129. *Id.* at 1159 (testimony of Gen. John D. Ryan). Senator Symington, the chair of the Senate Committee inquired:

I do not like to read in the papers that a great fleet of B-52s take off day after day against Cambodia. . . . Who made the decision to use B-52s in Cambodia in this fashion?

General Ryan: I would say the national command authorities.

Sen. Symington: Who controls that?

Gen. Ryan: The Secretary of Defense gives us our directives, Mr. Chairman.

Id.

130. Jeffrey Kimball, *Nixon's Vietnam War 207* (1998). See also Kissinger, *supra* note 1, at 492, 495-96.

on the morning of February 24, 1969.¹³¹ Aboard Air Force One in the Brussels airport, Kissinger states, “[i]n this awesome setting we worked out the guidelines for the bombing of the enemy’s sanctuaries.”¹³² Nixon was not at the planning session, but said that he would discuss the matter with Kissinger, which led Colonel Sitton to understand that Kissinger’s recommendation would carry considerable weight.¹³³

Haldeman recorded in his diaries on Monday, March 17, 1969: “Historic day. K[issinger]’s ‘Operation Breakfast’ finally came off at 2:00 PM our time. K[issinger] really excited, as was [the] P[resident].”¹³⁴ He wrote on Tuesday, March 18, 1969: “K[issinger]’s ‘Operation Breakfast’ a great success. He came beaming in with report, very productive. A lot more secondaries than had been expected.”¹³⁵

General Westmoreland, the former Commander of U.S. forces in Vietnam and later Army Chief of Staff in Washington, said that by 1969 he and his colleagues saw Kissinger as “the architect” of Vietnam policy.¹³⁶ Haldeman wrote in his diaries on April 22, 1970, that President Nixon, following Kissinger into a National Security Council meeting on Cambodia, “turned back to me with big smile and said, ‘K[issinger]’s really having fun today, he’s playing Bismarck.”¹³⁷

Hence, there is substantial evidence that Kissinger was the chief architect of the U.S. bombing policy of Cambodia and Laos.

A. Knew or Should Have Known

Kissinger knew or had reason to know of the devastating effects the U.S. bombing was having on Laotian and Cambodian civilian populations.¹³⁸ Aside from engaging in the obvious oversight du-

131. Kissinger, *supra* note 1, at 243.

132. *Id.*

133. Haldeman, *supra* note 124, at 33 (diary entry of Feb. 24, 1969).

134. *Id.* at 40–41.

135. *Id.* at 41.

136. *Id.*

137. *Id.* at 153.

138. It should be noted that the Geneva Conventions more broadly require prosecution of commanders who ordered offenses to be committed, without requiring the

ties on military operations as the National Security Advisor, Kissinger actively consolidated his power on the National Security Council (NSC) throughout 1969 and personally chaired numerous NSC committees.¹³⁹ He presided over the Washington Special Action Group, a special crisis committee and working group for planning actions; the Verification Panel, which directed arms-control strategy; the Vietnam Special Studies Group, which monitored the conduct of the war; the Defense Program Review Committee, which oversaw the Pentagon's budget; and the Forty Committee, charged with planning all foreign covert intelligence activities.

Colonel Sitton recalls that Henry Kissinger's involvement in the bombing selection deepened in late summer 1969 when Kissinger "began routinely overruling Sitton's office in its targeting recommendations for the bombings. When the military officials presented proposed bombing lists," Kissinger would alter the mission patterns and the timing of the bombing runs.¹⁴⁰ "Not only was Henry carefully screening the raids," Sitton said, "he was reading the raw intelligence," i.e., "the detailed post strike reports and bomb damage assessment photographs."¹⁴¹ However, Sitton also recalls that Kissinger requested that the secret missions avoid civilian casualties, so as not to draw protests from the Sihanouk government.¹⁴² To dispel accusations that B-52 operations were conducted sloppily with large scale and out-of-date maps, Kissinger reassures that, "[i]n fact, the targeting was controlled by the Seventh Air Force, which relied on up-to-date photography, precision radar, and infrared sensors and conducted reconnaissance both before and after every strike."¹⁴³ In light of the number of civilian deaths, Kissinger's assurance becomes a chilling admission that he knew, with some accuracy, the civilian devastation resulting from his orders.

There is also evidence that large numbers of senior government and Air Force officials did not think that Cambodia and Laos were of strategic importance or in the United States' vital interests.

more difficult prongs of "knew or had reason to know." See Ratner & Abrams, *supra* note 59, at 120; *supra* note 115 and accompanying text.

139. See Shawcross, *supra* note 12, at 102.

140. See Hersh, *supra* note 12, at 121.

141. *Id.* at 122.

142. *Id.*

143. Henry Kissinger, *Years of Upheaval* 347 (1982).

According to historian Marilyn Young, Secretary of Defense Melvin Laird, Secretary of State Rogers, and Central Intelligence Agency Director Richard Helms were opposed to attacking Cambodia.¹⁴⁴ In 1969, Secretary of Defense Laird sent a memo to the Joint Chiefs asking, “[a]re steps being taken, on a continuing basis, to minimize the risk of striking Cambodian people and structures? If so, what are the steps? Are we reasonably sure such steps are effective?”¹⁴⁵ The Chiefs responded that everything was under control. Their response, however, did indicate that they believed that Communists mingled with the Cambodian villagers to a significant extent. Later, however, they admitted publicly that they had had no means whatsoever of assessing Cambodian casualties.¹⁴⁶ Two of Kissinger’s principal aides, Roger Morris and Anthony Lake, thought the invasion was “not only useless but wrong,” and resigned in protest over the attacks on Cambodia.¹⁴⁷ When General Ryan of the Air Force was asked on May 7, 1973, by the House of Representatives whether Cambodia was of strategic importance to the United States, the General replied, “No, I do not believe so.”¹⁴⁸

Kissinger makes numerous arguments to deflect his and the U.S.’s culpability. He claims that U.S. action was requested despite the fact that there is no evidence to support this view;¹⁴⁹ that both Laos and Cambodia were victims, not of U.S. bombing, but of “geographic circumstance;”¹⁵⁰ that the North Vietnamese were to blame;¹⁵¹

144. Marilyn B. Young, *The Vietnam Wars, 1945–1990*, at 245–47 (1991).

145. Shawcross, *supra* note 12, at 93.

146. *Id.*

147. Young, *supra* note 144, at 247.

148. *Department of Defense Appropriations for 1974: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 93d Cong. 70 (1973) (testimony of Gen. John D. Ryan).

149. Kissinger claims that Prince Sihanouk of Cambodia approved the U.S. actions by nods and winks and by refusing to denounce the U.S. publicly. “Sihanouk welcomed—though he could not always avow it—American efforts to stem the Communist tide in South Vietnam. Starting in 1968, he privately invited American attacks on the Communist sanctuaries, hoping that we could drive the North Vietnamese out of his country.” Kissinger, *supra* note 143, at 340. He defended the Laos action, stating that the U.S. was “helping Laos retain its independence.” *Id.* at 18.

150. “Since the late 1950s Laos had been the victim of its geographic circumstance.” *Id.* at 18.

151. “North Vietnamese stonewalling doomed Cambodia . . . to prolonged agony.” *Id.* at 36.

that the Cambodians themselves were to blame;¹⁵² that U.S. actions were done in “self-defense”;¹⁵³ that the areas bombed were uninhabited by civilians;¹⁵⁴ and the most surreal claim of all, that northeastern Cambodia was no longer Cambodia as North Vietnamese troops had infiltrated the borders.¹⁵⁵ Moreover, 250 employees of the State Department, which included fifty Foreign Service officers, signed a letter of protest to Secretary of State Rogers. Kissinger demanded that Rogers hand over the names of the signatories, but Rogers refused.¹⁵⁶

This evidence of high level opposition to the policies concerning Cambodia and, to a lesser extent Laos, as well as false assurances that civilian targets were not under attack, supports the proposition that Kissinger knew or should have known of the deadly effects of his bombing policy. The fact that Kissinger personally read damage assessment reports strongly suggests that Kissinger knew of the effects that his policies had on civilians. As the bombing campaigns continued over a period of *years*, there is no room to claim that the policy was simply an isolated mistake. Indeed, it was a systematic policy that lasted throughout Kissinger’s tenure in which he oversaw the massive destruction and dislocation of millions of Laotian and Cambodian civilians.

152. “I wonder whether it is possible that Cambodians are occasionally seized by a suicidal madness. Here were Sihanouk and Lon Nol, who had worked in close harmony all of their lives, fighting to mutual destruction . . .” *Id.* at 16.

153. Kissinger, *supra* note 1, at 240.

154. “Cambodian officials had been excluded from their soil; they contained next to no Cambodian population.” *Id.*

155. Kissinger states that northeastern Cambodia “was no longer Cambodian in any practical sense.” *Id.*

It requires calculated advocacy, not judgment, to argue that the United States was violating the neutrality of a peaceful country when with Cambodian encouragement we, in self-defense, sporadically bombed territories in which for years no Cambodian writ had run, which were either minimally populated or totally unpopulated by civilians, and which were occupied in violation of Cambodian neutrality.

Id.

156. Young, *supra* note 144, at 247–48.

B. Necessary and Reasonable Measures to Prevent Illegal Acts

Kissinger did not take measures to prevent the illegal bombings. He actively sought to continue them in spite of his knowledge of the damage they were causing. The Joint Chiefs of Staff informed the White House as early as April of 1969 that Cambodian citizens inhabited areas to be bombed and could be harmed in the bombings.¹⁵⁷ The Joint Chiefs perceived Kissinger as taking a consistently tougher line on the bombing policy; whenever Secretary of Defense Laird attempted to cut back the rate of bombing, Kissinger resisted.¹⁵⁸ Kissinger himself confirms this in his memoirs where he bemoans Laird's and Secretary of State Bill Rogers' opposition to his B-52 bombing policy.¹⁵⁹ Kissinger considered Secretary of Defense Laird's desire to closely monitor the Cambodian bombings as "foot dragging" and intentionally bypassed Laird via direct contacts with the Joint Chiefs and the Washington Special Action Group rather than supporting Department of Defense supervision of the bombings.¹⁶⁰ Further, Kissinger admitted that he tried to persuade National Security Council member Richard Sneider that even though the early bombing missions would not have military value, they would fit into his "madman theory" of "always keeping the enemy guessing."¹⁶¹

This evidence undermines any potential defense claiming "military necessity," although it is crucial to note that military necessity cannot override customary legal protections of civilians. Further, even after the White House agreed with Congress not to augment the bombardment, the bombing of Cambodia increased twenty-one percent in July and August 1973.¹⁶² As stated earlier, Air Force maps of the targets for these attacks show that these bombs fell on the most densely inhabited areas of the country.

Therefore, both prongs of the command responsibility test are satisfied: Kissinger knew or should have known of the disastrous effects of the indiscriminate bombing campaign and, in spite of this,

157. Shawcross, *supra* note 12, at 28.

158. *See id.* at 104.

159. Kissinger, *supra* note 1, at 452–53.

160. *See* Kimball, *supra* note 130, at 207; Shawcross, *supra* note 12, at 104–05.

161. Hersh, *supra* note 12, at 60.

162. Shawcross, *supra* note 12, at 297.

did not take necessary and reasonable measures to prevent this campaign. While it is clear that Kissinger did violate customary international law, the question then becomes the feasibility of bringing charges in a court of law.

VI. PROCEDURAL HURDLES: STATUTES OF LIMITATIONS AND JURISDICTION

A. Statutes of Limitations

Twenty-five years later, Kissinger is enjoying his elder years as a well-known political pundit.¹⁶³ While the systematic bombings of Cambodia and Laos occurred nearly three decades ago, the Geneva Conventions and most other international treaties do not define a statute of limitations for war crimes violations. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, as the title suggests, prohibits statutory limitations on war crimes.¹⁶⁴ Although only forty-three countries have signed the Convention, largely due at the time to debate on the definitions of war crimes and crimes against humanity, its existence supports acknowledgment of this standard.¹⁶⁵ Thus, while mandatory non-applicability of statutes of limitations for war crimes may not presently hold customary international law status, it is clear that international law at least permits states to abolish statutory limitations if they desire.¹⁶⁶

163. In fact, despite his past criminal policies, Kissinger remains a powerful public figure, currently heading up his consulting firm Kissinger Associates that has strong political ties to Congress and appearing regularly on the political pundit circuit the world over. Recently Kissinger could be seen presenting gold medals to track and field athletes at the 2000 Olympics in Sydney, Australia. Rick Lazio, U.S. House Representative from New York, hired Kissinger to add “cachet” to his foreign policy platform in his campaign for the U.S. Senate. Randal Archibold, *Lazio Goes to Kissinger for Cachet in Foreign Policy*, N.Y. Times, Oct. 20, 2000, at B5.

164. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *adopted and opened for signature* Nov. 26, 1968, *entered into force* Nov. 11, 1970, 754 U.N.T.S. 73.

165. *Status of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 35 I.L.M. 1566 (1996) (listing signatories as of Aug. 16, 1996).

166. Note, however, that the French Cour de Cassation has already found that the non-applicability of statutory limitations to crimes against humanity is part of cus-

The fact that the statute of limitations issue was not raised in General Augusto Pinochet's defense against crimes of torture¹⁶⁷ supports the view that statutes of limitations do not apply to crimes against humanity. Further support for this proposition is demonstrated by the statute of the International Criminal Court, which specifically states that crimes under its jurisdiction, including war crimes, are not subject to a statute of limitations.¹⁶⁸

Finally, even if a statute of limitations defense is raised against a war crimes claim, courts have frequently found that equitable and legal tolling provisions apply if possibilities for prosecution do not exist.¹⁶⁹ Tolling allows for a statute of limitations to be suspended until a later date. That is, the clock does not start running from the time of the act itself, but is instead delayed to start later in time, generally when prosecution becomes feasible. A plausible argument can be made that, in light of the total decimation of legal institutions in Cambodia during the decades of Khmer Rouge rule, it has been impossible for Laotian and Cambodian victims of the

tomary international law. See Ratner & Abrams, *supra* note 59, at 126 (citing *Federation Nationale des Deportés et Internes Résistants et Patriotes v. Barbie*, 78 I.L.R. 125, 135 (Cour de Cassation 1984) (Fr.)).

167. See *Regina v. Bartle ex parte Pinochet*, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.), <http://www.publications.parliament.uk/pa/ld199899/ldjudgment/jd990324/pino1.htm>.

168. The jurisdiction of the ICC, however, will not be retroactive. The ICC will have jurisdiction only over crimes committed after the Rome Statute comes into force (following the ratification of the Statute by sixty states). The ICC will be a permanent court that will investigate and bring to justice individuals who commit the most serious violations of international humanitarian law, namely genocide, war crimes, crimes against humanity, and, once defined, aggression. The Rome Statute was adopted by 120 nations, with seven countries, including the United States, voting against the Statute, and twenty-one abstentions. Currently twenty-nine countries have ratified the Statute. See ICC Update 2000, at http://www.peacezine.org/ex_docs/ICC%20update.htm (last visited March 24, 2001). See also *Rome Statute*, *supra* note 33, art. 11. In a surprise move before leaving office, President Clinton signed the ICC treaty, leaving it to a skeptical Congress for possible ratification. President William Jefferson Clinton, Statement on Signature of the International Criminal Court Treaty (Dec. 31, 2000), http://www.state.gov/www/global/swci001231_clinton_icc.html.

169. See Ratner & Abrams, *supra* note 59, at 127 (citing *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, art. 17(2), U.N. Doc. A/47/49 (1992) (permitting suspension when remedies not available)).

bombings to bring suits against the responsible U.S. officials.¹⁷⁰ Further, it can be argued that the political and military role of the U.S. throughout the Cold War made suits against the U.S. impossible. Alternatively, states can pass new laws that either eliminate or lengthen statutes of limitations. For example, Germany, France, and Hungary have lengthened their respective statutes to allow for prosecutions in special circumstances.¹⁷¹

B. Jurisdiction

Traditionally, a state's criminal laws apply only to crimes committed in its territory or by its own nationals. International humanitarian law goes further; it requires states to seek out and punish all persons who have committed a grave breach of humanitarian law, irrespective of their nationality or the place where the offense was committed.¹⁷² This principle of universal jurisdiction is essential to guarantee that such breaches are effectively repressed. The Geneva Conventions, for example, require that states pass legislation to either prosecute or extradite those who commit violations of the Conventions, thus giving states universal jurisdiction over violations of the Conventions as outlined in Article 146.¹⁷³ States may bring violators before their own court or may hand over the accused to another state or an international criminal court whose competence has been recognized by the contracting parties.¹⁷⁴ In other words, the perpetra-

170. *Id.* (presenting the possibility that a statute of limitations would not begin to run until an independent and effective prosecutor's office and court system are established). This argument is bolstered by the Cambodian government's testimony to the U.N. Human Rights Committee in 1999 that there are today major obstacles to the establishment of a working court system. Currently, many of the judges and lawyers are Cambodians who were trained in a one year crash-course in law, as almost all legal professionals were killed during the Khmer Rouge regime. Notes of the author, Cambodian government testimony, Human Rights Committee (Geneva, July 1999).

171. Ratner & Abrams, *supra* note 59, at 126–27 (discussing the elimination of statutes of limitations in Germany in the 1960s to allow prosecution of Nazi criminals).

172. "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Geneva Convention IV, *supra* note 2, art. 146.

173. *Id.*

174. Oscar M. Uhler et al., Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 593 (Jean S. Pictet ed., 1958); *see also*

tors of grave breaches, or war crimes, must be prosecuted at all times and in all places, and states are responsible for ensuring that this is done.

Assuming that violations of war crimes are established, where could one actually prosecute a case against high-ranking ex-officials in the U.S. government? Although the legal doctrine exists, there is currently no permanent means to bring individuals to justice for massive human rights violations. Prosecutions may be brought either by the United Nations in the form of a special criminal tribunal or by the national courts of states that have universal jurisdiction over war crimes. For example, in response to the brutalities in Bosnia and Rwanda, the international community created two ad-hoc tribunals to bring perpetrators of international humanitarian law and genocide to justice.¹⁷⁵ These tribunals, however, were both costly and slow to start, hampered by the need to establish their infrastructure from scratch. Both tribunals are also limited in jurisdiction to crimes committed within specific territories during a specific time period, similar to the proposed Cambodian Tribunal.

Prosecution in national courts allows a wider range of possibilities. For example, Belgian courts can exercise jurisdiction over war crimes considered grave breaches of the Geneva Conventions committed anywhere in the world by a victim of any nationality.¹⁷⁶

G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78–79, principle 5, U.N. Doc. A/9030/Add.1 (1973) (“Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connexion, States shall co-operate on questions of extraditing such persons.”).

175. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 7, U.N. Doc. S/RES/827 (1993), available at <http://www.un.org/icty/basic/statut/stat-ute.htm>; *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighboring States*, S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994), available at <http://www.ictt.org>.

176. Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions [Law of June 16, 1993 on the repression of grave breaches of the Geneva Conventions of August 12, 1959 and Protocols I and II of June 8, 1977] (Moniteur Belge, 5 août 1993, Chapitre II.7). In February 1999, the Belgian Parliament adopted a law that adds genocide and crimes against humanity to the

Thus, prosecutors in Belgium could, if they chose, file a case in a Belgian court against a U.S. official for overseeing war crimes against Cambodian or Laotian victims. Other states, including the Netherlands,¹⁷⁷ Switzerland,¹⁷⁸ Denmark,¹⁷⁹ Australia,¹⁸⁰ and Germany¹⁸¹ have

international crimes over which Belgian courts exercise universal jurisdiction. Proposition de loi relative à la répression des violations graves du droit international humanitaire [Proposal of law relative to the repression of grave violations of international humanitarian law], Belgian Senate, 1-749/4 (1998). The Belgian law is currently being challenged as a violation of international law by the Democratic Republic of the Congo (DRC) at the International Court of Justice (ICJ) because a Belgian investigation judge (*juge d'instruction*) issued an international arrest warrant on April 11, 2000 against the current Minister of Foreign Affairs in DRC, Abdoulaye Yerodia Ndombasi, on charges of 'serious violations of international humanitarian law.' Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (oral pleadings and other case-related documents) <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited Apr. 12, 2001).

Up until now, however, the human rights prosecutions pending in Belgium, France, and Switzerland have been brought by *victims*, not by prosecutors. A real conceptual leap is envisaged by Article 27 of the ICC Statute, which presents the possibility that domestic judges rather than international tribunals can arrest a criminal head of state. Article 27 states,

official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Rome Statute, *supra* note 33, art. 27.

177. See Knezevic, HR 11 Nov. 1997 (Neth.), *unofficial translation in* 1998 Y.B. Int'l Humanitarian L. 600, 604. On November 11, 1997 the Hoge Raad (highest court of the Netherlands) held that Knezevic, a Bosnian Serb, could be tried by a Dutch Military Court for war crimes committed during the Balkan Conflict and upheld the universal jurisdiction provisions under the grave breaches regime of the four Geneva Conventions. The Hoge Raad decided that national military courts were the competent forum to hear such cases. *Id.*

178. See Case of G.G., Military Court of Cassation (1997) (Switz.) (unpublished opinion) (finding that the Swiss Military Tribunal held jurisdiction over defendant "G.G." for alleged grave breaches of the Geneva Conventions and the two Additional Protocols), http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/d7493cd8d71af083c125672400388f00?OpenDocument&ExpandSection=2#_Section2 (last visited Apr. 9, 2001). See also Andreas R. Ziegler, International Decision, In Re G. Military Tribunal, 92 Am. J. Int'l L. 78 (1998) (discussing earlier decision in the same case).

179. See Public Prosecutor v. N.N., Ostre Landsrets [High Court] 3d Div. (1994) (Den.) (finding that the Danish courts held jurisdiction over Refik Saric, a Bosnian Muslim, based on the universal jurisdiction principle of the grave breaches provisions

recently used the Geneva Conventions to prosecute war criminals for acts committed by non-nationals against non-nationals living abroad. England has similarly adopted an act easing the procedure necessary to bring a case under the Geneva Conventions.¹⁸² There are also states, such as Spain, that have a passive personality doctrine allowing prosecutions for international law violations if the victim is a national and personal jurisdiction is secured over the defendant.¹⁸³ Prosecutions such as these demonstrate the growing movement to apply international law via national legal and enforcement systems.

VII. PROSECUTING U.S. LEADERS: THE LEGAL POSSIBILITIES IN POLITICAL CONTEXT

The international legal climate is increasingly amenable to claims against leaders of politically powerful countries for abuses of international human rights. The trial and near extradition of General Pinochet, who previously seemed untouchable as Chile's self-proclaimed "Senator-for-Life," surprised legal and political circles.¹⁸⁴ Perhaps most revolutionary, the International Criminal Tribunal for

in the Geneva Conventions in conjunction with Article 8(5) of the Danish Penal Code), *translated summary at* <http://www.redress.org>. *See also Implementation of International Humanitarian Law by Denmark*, Int'l Rev. of the Red Cross No. 320, Sept. 1997, at 583.

180. *See Polyukhovich v. Australia* (1991) 101 A.L.R. 545 (Austl.) (upholding the constitutionality of the Australian Geneva Conventions Amendment Act of 1991 although acquitting Polyukhovich, a Soviet citizen from Ukraine who became an Australian citizen of charges of war crimes in the Ukraine between 1941 and 1943).

181. *See Public Prosecutor v Djajic*, BayObLG (1997) (Germ.), *excerpted in* 1998 *Neue Juristische Wochenschrift* 392 (holding that universal jurisdiction under the Fourth Geneva Convention, Articles 146 and 147, gave the Bavarian High Court an international obligation to prosecute Novislav Djajic, a Bosnian Serb, for war crimes).

182. The Geneva Conventions (Amendment) Act, 1995, c. 27 (Eng.).

183. The Pinochet case is an example. Although it was England that had personal jurisdiction over Pinochet, because the victims were Spanish and the charge of torture violated an international treaty (the Convention Against Torture), Spain found that it exercised jurisdiction to prosecute via the passive personality doctrine. *See Regina v. Bartle ex parte Pinochet*, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.), <http://www.publications.parliament.uk/pa/ld199899/ldjudgment/jd990324/pino1.htm>

184. Kissinger has said that he believes the "very complicated" issues surrounding the Pinochet rulings need further study, but he is not concerned. "I don't think the well-known people are as much in danger," he said. "I certainly don't worry." Jayson Blair, *Pinochet's Revenge: Oliver North, You'd Better Watch Out*, N.Y. Times, Mar. 26, 2000, at WK5.

the former Yugoslavia (ICTY) indicted Slobodan Milosevic for war crimes when he was the sitting president of a European sovereign state, previously unthinkable except in the case of world war.¹⁸⁵

Closer to the U.S., a group of professors from Osgoode Hall Law School filed a complaint before the Yugoslavia Tribunal outlining a criminal case naming Wesley Clark, the North Atlantic Treaty Organization's (NATO) Commander-in-Chief, and the presidents of the NATO countries as defendants. They charged that NATO's policy of targeting power generation and water systems was illegal under the Geneva Conventions. Louise Arbour, former Prosecutor for the ICTY, surprised the international community by announcing in May 1999 that she was taking the complaint seriously and proceeded to open an investigation.¹⁸⁶ Payam Akhavan, Prosecutor from the ICTY, has noticed a shift away from a political climate where leaders can act with impunity, and towards a culture of deterrence. He offered the Pentagon's response to Arbour's investigation of NATO as a telling example.¹⁸⁷ Rather than ignoring the complaint and investigation (a likely response not long ago) the Pentagon took the situation seriously. Disconcerted Pentagon officials intensely lobbied the ICTY Prosecutor's office to withdraw the investigation and, when rebuffed, submitted a formal legal defense of their actions to the Prosecutor.¹⁸⁸ On the tail of the Osgoode complaint, Jerome Zeifman, former Watergate committee counsel whose case against Richard Nixon forced the U.S. President from the White House, filed charges on June 8, 1999 at the ICTY against Bill Clinton and U.S. Secretary of Defense William Cohen for war crimes and crimes against humanity in ordering U.S. troops to participate in the NATO bombing attacks on the former Yugoslavia.¹⁸⁹

185. Details of the indictment are available at <http://www.un.org/icty/glance/milosevic.htm>.

186. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (report of investigating committee detailing the allegations), available at <http://www.pict-pcti.org/news/archive/months2000/june/ICTY.06.13.NatoFinalReport.html> (last visited Apr. 9, 2001).

187. Payam Akhavan, Legal Officer, Office of the Prosecutor, ICTY, Address at Columbia Law School (Mar. 28, 2000).

188. *Id.*

189. For a copy of the complaint, see International Ethical Alliance, at <http://www.iethical.org> (last visited Apr. 9, 2001).

However, the enforcement of customary international law is necessarily selective and, as such, is inevitably influenced by comparative power, political and economic exigencies, international politics, and degree of guilt. Further, with the U.S. an unrivaled political and economic power in the world, even placing legally suspect U.S. actors into the balance to determine relative guilt becomes a difficult task, with frequent accusations from the U.S. that the inquiry is “political” rather than legal. A case in point is the current plan to temporally restrict the Cambodia Tribunal. A U.S. Department of State official explained that the international decision to limit the tribunal’s mandate to actions occurring from 1975–1979, that is specifically restricting prosecutions to target only the Khmer Rouge and not the years of U.S. bombing, was necessary because, “once you go beyond that critical period the tribunal becomes too political . . . too complicated . . . and loses its focus . . . as accusations could be made against the U.S., China, Vietnam, or Hun Sen’s current regime in Cambodia.”¹⁹⁰

While there may be good reason for Cambodia to prioritize rooting out its internal criminals that remain in the country today, it is also apparent that the exclusion of bringing claims against the U.S. and other regimes is just as “political” a decision as ignoring the years of U.S. bombing. It is clear that the proposed selective inquiry coincides with the interests of powerful nations, yet another reminder that although the international legal regime continues to develop, there remains the nagging problem of politics intervening in high-stakes legal issues.¹⁹¹ At the same time, it is hard to imagine the U.S. agreeing to assist in the prosecution of its ex-leaders,¹⁹² and in-

190. Interview with U.S. Department of State official (Sept. 15, 2000).

191. Morten Bergsmo, Legal Officer, Office of the Prosecutor, ICTY, Address at Columbia Law School (Mar. 28, 2000). According to Bergsmo, a Cambodian war crimes tribunal dominated by the U.N. was rejected by Cambodian Prime Minister Hun Sen. Hun Sen instead plans to have a tribunal in a Cambodian court with the participation of foreign judges and legal experts. A Cambodian government official stated in July 2000 that the U.N. has agreed to limit the scope of prosecution to Khmer Rouge leaders. *Id.* See also Chronology of a Khmer Rouge Trial, 1994–2000, at http://www.yale.edu/cgp/tribunal/chron_v3.htm (detailing the prosecution of Khmer Rouge leaders) (last visited Mar. 24, 2001).

192. Avoiding scrutiny for officials’ actions continues to be a hallmark of U.S. foreign policy. A recent manifestation of this view can be seen in the U.S. warning that it would find it difficult to work with the International Criminal Court (ICC) unless Americans were uniquely exempt from the court’s jurisdiction. Not surprisingly, this view has met resistance from many countries as well as human rights groups who say

dividual countries are likely to be reluctant to support the prosecution of leaders of large powers for fear of economic and political reprisals. Further, the countries actively prosecuting these types of crimes are largely European allies of the United States, who are unlikely to jeopardize their political and economic relations to support criminal claims of non-nationals. A significant exception is a Senegalese court's February 2000 indictment of Chad's exiled former dictator, Hissène Habré, on torture charges.¹⁹³ Although this is the first time that a former African head of state has been charged with human rights violations by the court of another country, it demonstrates that prosecutions of leaders based on international human rights do occur outside of Europe. Non-European countries have also agreed to extradite perpetrators of atrocities. For example, Mexico has detained Ricardo Miguel Cavallo on Spain's request for extradition for charges of torture and participation in genocide in Argentina's 1976–1983 "dirty war."¹⁹⁴ Lastly, and legally most significant, the U.S. has the ability to block U.N. Security Council action with its veto, making it unlikely that an international criminal tribunal similar to those for Rwanda and Yugoslavia will be established for Cambodia that extends to events pre-1975.

Nevertheless, these obstacles are not insurmountable. Indeed, the first U.S. Assistant Secretary of State for Human Rights, Patricia Derain, told *The New York Times* that she could foresee the day when U.S. officials would be prosecuted for acts similar to those attributed here to Kissinger. "It would be interesting to see what would happen if Kissinger went to Cambodia, or they just put out an international warrant for his arrest."¹⁹⁵ Given the weakening of the nation-state by economic forces that transcend its boundaries, the development of international criminal law, and the increasing incorporation of international law into national legal systems, the unrestrained power of U.S. officials is not without challenge. There are

that such an exemption would undermine the justice and legitimacy of the court. Nicole Winfield, *U.S. Seeks Agreement on Exempting Americans from Court by December 31*, Associated Press Newswire, Oct. 18, 2000.

193. The Associated Press, *Senegal: Chad's Ex-dictator Indicted*, Star Trib., Feb. 4, 2000, at 8A. In July 2000, the Senegalese court dropped the charges against Habré, a move widely believed to have been politically engineered. Human Rights Watch, *International Justice*, in World Report 2001, available at <http://www.hrw.org/hrw/wr2k1/special/icc.html>.

194. Human Rights Watch, *supra* note 193.

195. Blair, *supra* note 184.

still possibilities to bring state officials responsible for human rights tragedies to justice; political and military muscle are not sufficient grounds to ignore the legal and historical realities of the all-too-often-forgotten U.S. war on Laos and Cambodia.

After World War II the international community took a giant step towards accountability when it held individual leaders responsible for gross violations of human rights. Regrettably, it took several steps backwards in the following decades by favoring governmental immunity to the Nuremberg precedent. Now, however, the international community is back on the course of accountability. The Pinochet and Habré prosecutions, the International Criminal Tribunals for Yugoslavia and Rwanda, and the rapid development of the International Criminal Court, all unthinkable a mere decade ago, demonstrate this shift. The movement for increased accountability offers hope that state officials, who grossly overstep their authority and violate international law, will be held responsible for their crimes. The success of this movement requires the international community, national governments, and individual citizens to have the courage to hold political leaders accountable for their criminal policies in an even-handed manner. As the case of Henry Kissinger shows, the U.S. and its constituents need not look far to decry the impunity of a criminal past regime and demand that justice be served.