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Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court

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I. INTRODUCTION

United States courts have only incomplete and uneven jurisdiction, most acquired piecemeal and only in recent years, to prosecute genocide, war crimes and crimes against humanity committed outside our borders. Recent developments in international law and practice—especially the heightened commitment of democracies including the United States to end impunity for atrocities, and the imminent prospect of a permanent International Criminal Court (ICC) with worldwide jurisdiction—suggest the need to expand and rationalize the jurisdiction of U.S. courts to make it coextensive with that of the ICC.

It now appears all but certain that the ICC will come into being in the first years of the 21st century. A treaty to create it was approved in 1998 by a United Nations diplomatic conference in Rome, by a vote of 120 nations in favor, seven opposed and 21 abstentions.[1] Its initial jurisdiction will cover genocide, crimes against humanity and serious war crimes.[2] Sixty ratifications are required for the treaty to go into effect;[3] as of early February 2000, 139 nations (including the United States) have signed the treaty and 28 have ratified.[4]

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1. *See* United Nations: Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 998 [hereinafter ICC Statute].

2. *See* ICC Statute arts. 5-8. Article 1 provides that the ICC shall have jurisdiction over "the most serious crimes of international concern." The crime of aggression, and perhaps other crimes, may be added, but not sooner than seven years after the treaty enters into force, and then only if approved by seven-eighths of the states parties. *See id.* arts. 5.1(d), 5.2, 121, 123.

3. *See id.* art. 126.

4. A continuously updated list can be found on the web site of the nongovernmental Coalition for an ICC, at <http://www.iccnow.org>. "On December 31, 2000, President Clinton signed the treaty, largely to keep the U.S. government

The United States was one of only seven nations to vote against the treaty.[5] The ensuing debate within the United States has properly focused on whether the United States can and should ratify the treaty or, if not, whether as a non-party the United States should support or oppose the new court.[6] Largely overlooked, however, are two separate but related ques-

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involved in negotiations on the ICC, and despite what he called 'concerns about significant flaws in the treaty.'" Thomas Ricks, *U.S. Signs Treaty on War Crimes Tribunal: Pentagon, Republicans Object to Clinton Move*, THE WASH. POST, Jan. 1, 2001, at A1. Secretary of State Colin Powell has since stated that "the United States in the Bush Administration does not support the International Criminal Court. President Clinton signed the treaty, but we have no plans to send it forward to our Senate for ratification." Colin L. Powell, Secretary of State, Press Availability with U.N. Secretary General Kofi Annan, Feb. 14, 2001, *available at* <http://www.state.gov/secretary> (visited Feb. 18, 2001).

5. There is some dispute about the identities of the seven opposing countries, since the vote was not recorded. Professor Scharf reports that they were China, Iraq, Israel, Libya, Qatar, the United States and Yemen. *See* Michael Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 213 (Sarah B. Sewall & Carl Kaysen eds., 2000).

6. *See, e.g.*, Scharf, *supra* note 5; COUNCIL ON FOREIGN RELATIONS, TOWARD AN INTERNATIONAL CRIMINAL COURT? (1999); David J. Scheffer, *The United States and The International Criminal Court*, 93 AM. J. INT'L L. 12 (1999); M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, 52 J. INT'L AFF'S 795 (1999); Alfred P. Rubin, *Challenging the Conventional Wisdom: Another View of the International Criminal Court*, 52 J. INT'L AFF'S 783 (1999); Douglass Cassel, *The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step*, 6 BROWN J. WORLD AFF'S 41 (1999).

A 1999 law prohibits using U.S. funds for the ICC, or giving legal effect to ICC jurisdiction over U.S. citizens or over acts, persons or property within the United States, unless the United States becomes a party to the treaty, and bars extraditions to third countries unless they agree not to surrender U.S. citizens to the ICC. *See* 22 U.S.C.S. § 262-1(a) and note (2000), Act of Nov. 29, 1999, Pub. L. No. 106-113.

Bills proposing an "American Servicemembers' Protection Act of 2000" were introduced in both the House and Senate in 2000. *See* H.R. 4654, 106th Congress (2000); S. 2726, 106th Congress (2000). Among other provisions, they would deny military aid to States' Parties to the ICC treaty (except major U.S. allies), demand that the Security Council grant immunity from the ICC for U.S. troops participating in U.N.military activities, prohibit U.S. cooperation with the ICC, and authorize the President to use force to free U.S. personnel detained or imprisoned by the ICC. *See* H.R. 4654, 106th Cong., §§ 4-5, 7-8. The bills were opposed by the Clinton Administration on both policy and legal grounds, as encroaching on presidential powers and undermining the U.S. position in ongoing negotiations. *See, e.g.*, Ambassador David Scheffer, Statement Before the House International Relations Committee (July 26, 2000) (visited Nov. 10, 2000) <http://www.state/gov/wwwpolicy_remarks>.

On February 7, 2001, Congressman Ron Paul of Texas introduced House

tions: (1) Should the existing, incomplete jurisdiction of U.S. courts over crimes within the ICC Statute be expanded to ensure that such crimes may also be prosecuted in U.S. courts, under universal jurisdiction or other bases allowed by international law? and (2) Should the existing, incomplete codification in the United States of crimes within the ICC Statute likewise be expanded to ensure that they are also crimes under our national law?

This article suggests that the answer to both questions is yes. Regardless of whether the United States ultimately joins the ICC, U.S. courts should have the jurisdiction and codification necessary to prosecute the crimes within the ICC Statute. ICC jurisdiction is merely "complementary to national criminal jurisdictions,"[7] whether or not the nations involved are parties to the ICC. U.S. courts will need jurisdiction coextensive with that of the ICC, then, in order for the United States to be assured that it can exercise its right, even as a non-party, to take preemptive jurisdiction under the ICC Statute.[8] In addition, whether or not we join the ICC, our courts need jurisdiction and laws to ensure that those who commit genocide, crimes against humanity and serious war crimes, and who then come to or are brought to the United States, can be prosecuted here, in the event the ICC cannot or does not take jurisdiction.

The imminence of the ICC thus provides both occasion and stimulus to expand U.S. jurisdictional and criminal laws to cover those crimes within the ICC's initial mandate. Wholly apart from the ICC, however, U.S. laws should be updated to provide for universal jurisdiction to prosecute such serious crimes, if we are to make real our oft-stated commitment to bring to justice those who commit the most serious violations of international human rights and humanitarian law.[9] Our courts already have wide-

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Concurrent Resolution 23, calling on President Bush to declare that the U.S. does not intend to ratify the ICC treaty. Press Release, *Paul Introduces Resolution Opposing International Criminal Court*, Feb. 7, 2001, *available at* <http://www.house.gov/paul/press/press2001> (visited Feb. 18, 2001). *See also* U.S. Newswire, American Justice for Americans—Nationwide Petition Drive Launched to Oppose International Criminal Court, Jan. 23, 2001 *available at* LEXIS News Library.

7. ICC Statute art. 1.

8. *See* ICC Statute arts. 17.1(a)-(c), 18, 20.3.

9. *See, e.g.*, Secretary of State Madeleine Albright, Commencement Address, Georgetown Univ. School of Foreign Service, May 29, 1999, (visited Nov. 10, 2000) <http://www.secretary.state.gov/statements/1999> ("If we are to accept what Milosevic is doing, we would invite further atrocities from him and encourage others to follow his example. That's . . . . why we strongly support the International War Crimes Tribunal, which earlier this week indicted Milosevic . . . ."); *Clinton Supports International Criminal Court by Year 2000*, AGENCE FRANCE PRESSE, Sept. 22, 1997 ("'To punish those responsible for crimes against humanity—and to promote justice so that peace endures—we must maintain our strong

ranging civil jurisdiction over atrocities, regardless of where they are committed, whenever the defendant is found in our territory.[10] In criminal jurisdiction, however, we lag behind such other democracies as Australia,[11] Belgium,[12] Canada,[13] Denmark,[14] France,[15] Germany,[16]

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support for the UN's war crimes tribunals . . . ,' Clinton said."); The Cambodian Genocide Justice Act § 572(a), 22 U.S.C. § 2656 (1994) ("Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity . . . ."); *U.S. Urges War Trials for Serbs*, ST. LOUIS POST-DISPATCH, Dec. 15, 1992 ("Eagleburger called Yugoslavia 'a shocking reminder that barbarity exists within our midst and that we cannot call the new Europe either civilized or secure until we have developed stronger mechanisms for dealing with this and similar crimes.'").

10. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

11. *See* Polyukhovich v. Commonwealth (1991), 172 C.L.R. 501 (Austl.) (trial in Australia for crimes against humanity and war crimes committed against Jews in Ukraine).

12. *See* Luc Reydams, *Universal Criminal Jurisdiction: The Belgian State of Affairs*, 11 CRIM. L.F. 183 (2000); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 577 & n.121 (1995) (Belgian arrest warrant for Rwandan alleged to have massacred other Rwandans in Rwanda, issued under 1993 Belgian law establishing universal jurisdiction over war crimes); Luc Reydams, *International Decisions: Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), November 8, 1998*, 93 AM. J. INT'L L. 700, 703 (1999) (finding universal jurisdiction over crimes against humanity, under customary international law and *jus cogens*, in case involving criminal complaints against Chile's General Pinochet). In 1999 Belgium's universal jurisdiction statute was amended to cover genocide and crimes against humanity as well. *See id.* at 701 n.7 (citing *Loi Relative à la Répression des Violations Graves de Droit International Humanitaire*, MONITEUR BELGE, Mar. 23, 1999). *See also* Democratic Republic of the Congo v. Belgium, International Court of Justice Application and Request for Provisional Measures filed Oct. 17, 2000.

13. *See* Regina v. Finta [1994] 1 S.C.R. 701 (Canadian Supreme Court judgment on trial for crimes against humanity committed against Jews in Hungary); *see also* Judith Hippler Bello and Irwin Cotler, *International Decisions: Regina v. Finta*, 90 AM. J. INT'L L. 460 (1996).

14. *See* Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341 (1999) (citing Director of Public Prosecutions v. T) (Danish trial of Croatian national for war crimes committed against Bosnians in former Yugoslavia).

15. *See* ASSOCIATED PRESS, *Four File Complaints in France Against Former Haitian Dictator*, Sept. 10, 1999 (criminal complaints against former Haitian dictator Jean-Claude Duvalier, also noting expansion of French law on crimes against humanity for actions committed after 1994). In 1995, French law was amended to authorize universal jurisdiction over crimes within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, and in 1996 over crimes within the jurisdiction of the International Criminal Tribunal for Rwanda. Brigitte Stern, *International Decisions*, 93 AM. J. INT'L L. 525, 528 nn.20 & 21 (1999).

But the amendment for Yugoslavia came too late for In re Javor, 1996 Bull.crim., No. 132, at 379, French Cour de Cassation, Criminal Chamber, Mar.

Israel,[17] Italy,[18] the Netherlands,[19] Spain,[20] Switzerland[21] and the United

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26, 1996 (no jurisdiction over ethnic cleansing in Bosnia, because Genocide Convention does not provide for universal jurisdiction, customary international law on crimes against humanity is not explicit enough, Geneva Conventions not internally implemented by French law, and universal jurisdiction under the Torture Convention exists only when the accused is found in French territory), discussed in Stern, *supra*. The Rwanda amendment, however, did come in time to support jurisdiction in *In re Munyeshyaka*, 1998 Bull.crim., No. 2, at 3, French Cour de Cassation, Criminal Chamber Jan. 6, 1998. Initially the Court found no universal jurisdiction in France over the alleged genocide in Rwanda, but did find jurisdiction over torture because the accused was found in France. Then the 1996 legislation enabled an expansion of the jurisdiction over the case to cover genocide as well. *See* Stern, *supra*, at 525 & 528 n.20.

In late 1998 French lower court orders found no universal jurisdiction over crimes against humanity allegedly committed by Chile's General Pinochet, since they predated the 1994 French law on crimes against humanity. Before 1994 crimes against humanity could be prosecuted in France only for "Nazi crimes set forth in the Nuremberg Charter." Brigitte Stern, *International Decision: French Tribunal de Grande Instance (Paris)*, 93 AM. J. INT'L L. 696, 698 (1999).

16. *See* Christoph J.M. Safferling, *International Decisions: Public Prosecutor v. Djajic*, 92 AM. J. INT'L L. 528 (1998) (affirming universal jurisdiction in Germany over "grave breaches" of Geneva Convention and Protocol I to try Bosnian Serb for abetting and attempting murder in Bosnia). "Germany has taken more than three dozen cases involving [Yugoslav] individuals on its territory." O'Connell, *supra* note 14 (citing William Drodziak, *Bosnian Serb Gets Life in Massacre of Muslims*, INT'L HERALD TRIBUNE, Sept. 27-28, 1997, at 2). *See also* 5 INT'L LAW UPDATE 52 (May 1999) (German trial of Bosnian Serb for genocide in Bosnia); Frank Tiggelaar, Domovina Net, April 27, 1999 (on file with author) (German trial of Ukrainian-German, who came to Germany in 1994, for murdering inmates in Majdanek concentration camp in Poland during World War II).

17. *See* Attorney General v. Eichmann, 36 I.L.R. 277, 279, 304 (Israel S. Ct. 1962) (discussing trial in Israel of former German Nazi official for crimes against the Jewish people, crimes against humanity and war crimes committed in Europe).

18. *See* Terance Neilan, *World Briefing: Italy: Argentines Sentenced*, N.Y. TIMES, Dec. 7, 2000, at A12 (generals sentenced *in abstentia* to life imprisonment, five other officers to twenty-four years; Italy to seek extradition). *See also* Derechos Human Rights, Press Release, May 21, 1999 (on file with author) (Italian court indictment of Argentinian military members for kidnaping, murder and disappearance of Italian citizens in Argentina).

19. *See* Court Amsterdam, Order of Nov. 20, 2000 (Bouterse case), accessible at <http://www.rechtspraak.nl/gerechtshof/amsterdam> (visited Feb. 17, 2001); Marlise Simons, *Dutch Court Orders an Investigation of '82 Killings in Suriname*, N.Y. TIMES, Nov. 26, 2000, at A12. The Dutch Court found jurisdiction to investigate torture leading to death, allegedly committed by former Surinamese military leader Desi Bouterse against Surinamese citizens in Suriname, based on a retrospective application of the 1989 Dutch statute implementing the Convention Against Torture."

20. *See* National Tribunal, Criminal Chamber in Plenary, Appellate no. 173/98 - first section, sumario 1/98, Order, Madrid, 5 Nov. 1998 (confirming Spanish juris-

Kingdom,[22] in ensuring that our courts have jurisdiction to bring to trial the "enemies of all humanity."[23]

II. ADJUDICATORY JURISDICTION UNDER INTERNATIONAL LAW[24]

Customary international law permits states to exercise universal jurisdiction over genocide,[25] crimes against humanity[26] and serious war

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diction to try former Chilean head of state Augusto Pinochet for genocide, including torture, and terrorism committed against Chilean nationals in Chile). The same Spanish judge who charged General Pinochet has also issued international arrest warrants under theories of universal jurisdiction for genocide, torture and terrorism against 47 Argentine officers accused of participating in the "dirty war" in that country during 1976-83. *See* Bruce Zagaris, *Mexico Detains Argentine on Spanish Extradition Request for "Dirty War" Atrocities*, 16 INT'L HUMAN RTS. & EXTRADITION, No. 10 (Oct. 2000). At least two are now in custody, one in Spain (Miguel Angel Cavallo), *see id.*, and the other in Mexico on a Spanish request for extradition. *See* Marcela Valente, *Rights-Argentina: Justice Nabs Another Dictatorship Official*, INTERNATIONAL PRESS SERVICE, Aug. 8, 2000 (Adolfo Scilingo) *available on* LEXIS News Library; *see also* Tim Weiner, *Mexico to Extradite an Argentine Accused of Genocide to Spain*, N.Y. TIMES, Feb. 3, 2001, at A4.

21. *See* Andreas R. Ziegler, *International Decisions: In re G.*, 92 AM. J. INT'L L. 78 (1998) (Bosnian Serb prosecuted in Switzerland for war crimes committed against civilians in Bosnia-Herzegovina).

22. *See* Regina v. Bow Street Magistrate, *Ex parte* Pinochet, 2 W.L.R. 827 (H.L.1999) (confirming United Kingdom jurisdiction to prosecute or extradite to Spain former Chilean head of state Augusto Pinochet for torture committed against Chilean nationals in Chile); *see also Pursuit of Justice*, THE TIMES (London), Apr. 3, 1999 (on British prosecution of Belarussian for war crimes against Jews in Belarus during World War II).

23. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind").

24. Adjudicatory jurisdiction, or jurisdiction to prosecute, is used in this article to mean jurisdiction to subject persons who have committed certain crimes to judicial process. It differs from prescriptive jurisdiction (the authority to make law applicable) and enforcement jurisdiction (the authority to compel compliance and to remedy violations). *See generally* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

25. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter RESTATEMENT]; Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW 33, 72 & n.217 (M. Cherif Bassiouni ed., 2d ed. 1999); Randall, *supra* note 24, at 834-37; Beanal v. Freeport-McMoRan, 969 F. Supp. 362, 370 (E.D.La. 1997); Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 450-61 (1999); U.S. SENATE COMM. ON FOREIGN RELATIONS, 98th Cong., 2d Sess., REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. Exec. Rep. No. 98-50, at 12 (1984). *But see* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 346, 548 (2000); Stern, *supra* note

crimes.[27] Such crimes, in other words, are so grave and offensive to all of humanity, that they may be prosecuted by any state which obtains custody of the accused, without regard to the nationality of the perpetrator or victim, location of the crime or other specific link to the prosecuting state.[28]

As used in this article, then, "universal jurisdiction" is exercised when a state prosecutes crimes committed outside its borders, without regard to the nationality of the perpetrator or tvictim, the location of the crime or

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15 (discussing *Javor* and *Munyeshyaka*) (no universal jurisdiction over genocide prior to French legislation).

26. *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Meron, *supra* note 12, at 568; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 510-27 (1992); Regina v. Finta, *supra* note 13; Polyukhovich v. Commonwealth, *supra* note 11; Reydams *supra* note 12; Blakesley, *supra* note 25, at 71 & n.215. *But cf.* Stern, *supra* note 15 (discussing *Javor*) (no universal jurisdiction over crimes against humanity prior to French legislation). *See also Bouterse case*, *supra* note 19.

27. *See* RESTATEMENT § 702; *The Law of Land Warfare*, *in* U.S. DEPT. ARMY FIELD MANUAL 27-10, at 506(b) (1956); Regina v. Finta, *supra* note 13; Ziegler, *supra* note 21; Safferling, *supra* note 16; Randall, *supra* note 24, at 816-18 (universal jurisdiction over grave breaches of Geneva Conventions); Blakesley, *supra* note 25, at 71 & n.214. *But cf.* Stern, *supra* note 15 (discussing *Javor*) (no universal jurisdiction over violations of Geneva Conventions prior to French legislation). A case now before the International Court of Justice challenges the Belgian law asserting universal jurisdiction over "grave violations of international humanitarian law," as a violation of the sovereignty of another state under art. 2.1 of the United Nations Charter. Democratic Republic of the Congo v. Belgium, Application and Request for Provisional Measures, filed Oct. 17, 2000. The suit, which requests relief from an international arrest warrant issued by a Belgian judge against Congo's Acting Foreign Minister, complains that the Belgian law asserts jurisdiction over acts alleged to have taken place in Congo "without it being alleged that the victims are of Belgian nationality, or that the facts alleged constitute violations of the security or dignity of the Kingdom of Belgium." International Court of Justice Press Release 2000/32, Oct. 17, 2000 (visited Feb. 15, 2001) <http//:www.icj-cij.org>. On December 8, 2000, by a vote of 15-2, the ICJ denied Congo's request for provisional measures without reaching the merits. Order of Dec. 8, 2000, Request for Indication of Provisional Measures. Memorials are due May 31, 2001. Order of Dec.13, 2000.

28. *See generally* Randall, *supra* note 24; RESTATEMENT §§ 404, 423; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 304-05 (4th ed. 1990). Universal jurisdiction over extraterritorial offenses need not be, and in practice often is not, literally "universal," in the sense of covering purely domestic offenses as well. *See, e.g.*, United States v. Rezaq, 134 F.3d 1121, 1127, 1131 (D.C. Cir. 1998) (universal jurisdiction over air hijacking "outside" United States); United States v. Lin, 101 F.3d 760, 766 (D.C. Cir. 1996) (hostage taking Convention "exempts most purely domestic hostage taking"). *Compare, e.g.*, 18 U.S.C. § 1203(b)(1) (1999) (hostage taking outside United States) *with* 18 U.S.C. § 1203(b)(2) (different provisions for hostage taking inside United States).

other specific link to the prosecuting state.[29] However, if U.S. courts are to be equipped to preempt ICC jurisdiction, their jurisdiction over crimes within the ICC Statute should not be limited to crimes committed outside the United States, but should cover crimes committed inside the United States as well.[30]

In addition to universal jurisdiction, international law also recognizes the right of states to prosecute crimes committed within or directly affecting their territories ("territorial" jurisdiction)[31] or, if committed outside their territories, crimes whose perpetrator is a national of the prosecuting state ("nationality" or "personality" jurisdiction),[32] or whose victim is a national of the prosecuting state ("passive personality" jurisdiction),[33] or crimes involving an act committed outside their territory which affects their sovereign interests ("protective" or "effects" jurisdiction).[34]

III. JURISDICTION OF U.S. COURTS TO TRY ICC CRIMES[35]

The fact that international law authorizes states to exercise certain adjudicatory jurisdiction over international crimes does not mean that U.S. courts may, without more, exercise such jurisdiction. Under U.S. law our

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29. According to Professor Meron, "Indeed, the true meaning of universal jurisdiction is that international law *permits* any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim." Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 570 (1995).

30. *See infra* Part III.A.

31. *See* RESTATEMENT § 402 & cmt. b; BROWNLIE, *supra* note 28, at 300. Territorial jurisdiction can be either "subjective"—when a material element of a crime is committed within a state's territory — or "objective" — when a crime committed outside has a significant effect inside the territory, such as a shot fired from over the border. *See generally* Blakesley, *supra* note 25, at 40, 47-50 (subjective), 50-54 (objective).

32. *See* RESTATEMENT §§ 402(2), 421(2)(d)-(f); BROWNLIE, *supra* note 28, at 303; Blakesley, *supra* note 25, at 61-63.

33. *See* RESTATEMENT § 402 & cmt. g; BROWNLIE, *supra* note 28, at 303-04; *see also* S.S. Lotus [1927], P.C.I.J., Ser. A, No. 10. Passive personality jurisdiction may be limited to cases where the prosecuting state has a particularly strong interest in the crime. *See* RESTATEMENT § 402 cmt. g. While the United States traditionally opposed it, *e.g.*, Cutting case, 1887 FOR. REL. 751 (1888) (reported in John B. Moore, INTERNATIONAL LAW DIGEST 232-40 (1906)), passive personality jurisdiction is "on the ascendancy" today in Europe, and arguably in modern U.S. anti-terrorist legislation, where it is often mixed with protective jurisdiction. *See* Blakesley, *supra* note 25, at 67, 69-70; *infra* note 39 and accompanying text.

34. *See* RESTATEMENT § 402(3); BROWNLIE, *supra* note 28, at 304; JORDAN PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 1270 (1996); Blakesley, *supra* note 25, at 54-61.

35. "U.S. courts" in this article refer to civilian courts established under Article III of the Constitution, with full due process safeguards. Military courts-martial are not considered except where referred to expressly.

courts may exercise only such adjudicatory authority as is conferred upon them by U.S. law to prosecute crimes codified in U.S. law.[36] With regard to crimes within the ICC Statute, the express provisions of current U.S. law provide only partial jurisdictional and codification coverage:

- *Genocide* is codified by U.S. law, but may be prosecuted by U.S. courts only if the crime is committed in the U.S. or the offender is a U.S. national.[37]
- *Crimes against humanity* are not codified as such in the United States. However, if committed in the United States or by members of the U.S. military, most such crimes would violate domestic criminal laws or military laws against murder, aggravated assault, or the like. If committed outside the United States, crimes against humanity may be prosecuted in U.S. civil courts only if they involve torture or attempted torture,[38] or certain forms of international terrorism.[39]

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36. *See* RESTATEMENT § 404 reporters' note 1; Randall, *supra* note 24, at 796 n.66. International law principles do not, as a matter of U.S. domestic law, constrain Congress from asserting extraterritorial jurisdiction. However, U.S. courts "presume that Congress does not intend to violate principles of international law . . . [and] in the absence of an explicit Congressional directive, courts do not give extraterritorial effect to any statute that violates principles of international law." United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963)).

37. *See* 18 U.S.C. § 1091(d) (1999).

38. U.S. courts have jurisdiction over torture committed outside the United States if the alleged offender is a U.S. national or "is present in the United States, irrespective of the nationality of the victim or alleged offender." *Id.* § 2340A(b)(2).

39. U.S. courts have jurisdiction over at least the following crimes committed outside the United States, referred to in this article as "certain forms of international terrorism": destruction of aircraft, *see* 18 U.S.C. § 32 (1999); violence at international airports, *see* 18 U.S.C. § 37 (1999); threats and violence against foreign officials, official guests and internationally protected persons, *see* 18 U.S.C. §§ 112, 878, 1116 (1999); hostage taking, *see* 18 U.S.C. § 1203 (1999); piracy, *see* 18 U.S.C. § 1653 (1999); violence against ships, *see* 18 U.S.C. § 2280 (1999); violence against fixed maritime platforms, *see* 18 U.S.C. § 2281 (1999); murder of U.S. nationals when "intended to coerce, intimidate, or retaliate against a government or civilian population," 18 U.S.C. §§ 2332b(a)(1), (e), (g)(1) (1999); terrorism transcending national boundaries which seriously harms persons or property in the United States, *see* 18 U.S.C. § 2340A (1999); and air hijacking, *see* 49 U.S.C. § 46502 (1999). *See also* Blakesley, *supra* note 24, at 56-57 and nn.125-26. The bases of jurisdiction vary, as follows:

1. *Universal*: 18 U.S.C. §§ 32(b)(4); 37(b)(2); 112(e)(3); 878(d); 1116(c); 1203(b)(1)(B); 1651; 2280(b)(1)(C), (b)(2); 2281(b)(3); 49 U.S.C. 46502(b)(2)(C).

- *War crimes*: Under current law some but not all war crimes may be prosecuted by U.S. civil courts, regardless of whether committed within or outside the United States, but only when the perpetrator or victim is a U.S. national or member of the U.S. armed forces,[40] or when the perpetrator is a former service member or a civilian accompanying the military overseas.[41]

In addition, military courts appear to have universal jurisdiction over war crimes to the extent permitted by international law, with the possible exception of certain cases involving civilians. Military courts seem to clearly have jurisdiction over war crimes committed by members of the U.S. military;[42] by persons, including civilians, "in an area of actual

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2. *Nationality*: 18 U.S.C. §§ 32(b)(4); 37(b)(2); 112(e) (2); 878(d); 1116(c); 1203(b)(1)(A); 2280(b)(1)(A)(iii); 2281(b)(1)(B); 49 U.S.C. 46502(b)(2)(B).

3. *Passive Personality*: 18 U.S.C. §§ 32(b)(4); 37(b)(2); 1203(b)(1)(A); 2280(b)(1)(B); 2281(b)(2); 49 U.S.C. 46502(b)(2)(A).

4. *Protective*: 18 U.S.C. §§ 112(e)(1); 878(d); 1116(c);1203(b)(1)(C); 2280(b)(1)(A)(1), (b)(3); 2281(b)(1)(C); 2332b(a)(1), (e), (g)(1).

For decisions upholding universal jurisdiction under such statutes, *see, e.g.*, *Rezaq*, 134 F.3d at 1130-32 (universal jurisdiction over air piracy); and United States v. Yunis, 924 F.2d 1086, 1090-92 (D.C. Cir. 1991) (universal and passive personality jurisdiction over hostage taking, and universal jurisdiction over air hijacking).

40. *See* 18 U.S.C. § 2441(b) (1994 & Supp. IV 1998).

41. *See* The Military Extraterritorial Jurisdiction Act of 2000, ch. 212, 114 Stat. 2488 (2000) (to be codified as 18 U.S.C. §§ 3261-3267). The Act, which passed both chambers of Congress and cleared for Presidential signature on October 26, 2000, in effect grants federal courts jurisdiction over crimes punishable by more than one year imprisonment, committed by civilian family members, military contractors, and employees of the military or of military contractors, who accompany the military overseas, regardless of whether they are U.S. citizens, provided they are not citizens of or "ordinarily resident" in the host nation. *See* 18 U.S.C. §§ 3261(a)(1), 3267 (1)-(2). It also grants jurisdiction over former members of the military who committed crimes outside the United States while in the military, *see id.* § 3261(a)(2), (d)(1), and over military personnel who commit crimes with at least one other person not in the U.S. military, *see id.* § 3261(d)(2). The Act does not deprive military courts of concurrent jurisdiction over war crimes. *See id.* § 3261(c). For background on the Act, see Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAWYER, Aug. 2000, at 23. It is not clear whether U.S. military bases and rental property overseas fall with the "special maritime and territorial jurisdiction of the United States" for purposes of federal court jurisdiction. *Compare* U.S. v. Corey, 232 F.3d 1166 (9th Cir. 2000) (finding jurisdiction) *with* U.S. v. Gatlin, 216 F.3d 207 (2d Cir. 2000) (finding no jurisdiction).

42. Under the Uniform Code of Military Justice, general courts-martial "have jurisdiction to try any person who by the law of war is subject to trial by a

fighting"[43] or in occupied enemy territory;[44] by enemy belligerents, whether military[45] or civilian,[46] even if they are U.S. citizens;[47] and by citizens of third countries not at war with the United States, at least for "grave breaches" of the Geneva Conventions.[48] Their jurisdiction is less clear over war crimes by U.S. civilians who are not enemy belligerents, committed outside zones in which U.S. forces are in battle or occupy en-

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military tribunal . . ." 10 U.S.C. § 818 (1994 & Supp. 1998). The Manual for Courts-Martial United States (1998 ed.), R.C.M. 201(f)(1)(B) (i) is a bit more precise: "General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime against: (*a*) The law of war; . . ." *See also id.* at 202(b)("Nothing in this rule limits the power of general courts-martial to try persons under the law of war."). This jurisdiction of courts-martial does not deprive military commissions and other military tribunals of "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried" by them. 10 U.S.C. § 821 (1994 & Supp. 1998).

43. Reid v. Covert, 354 U.S. 1, 33 (1957).

44. *See* Madsen v. Kinsella, 343 U.S. 341 (1952) (affirming conviction in 1950 of an air force officer's wife, by a U.S. occupation court in the nature of a military commission, for murder in violation of the German criminal code, committed in the American Zone of Germany); *see also Reid*, 354 U.S. at 33 n.60. "The authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully." *Madsen*, 343 U.S. at 360 (citations omitted).

45. *See, e.g.*, Yamashita v. Styer, 327 U.S. 1 (1946) (post-war trial by military commission of former Japanese commander in the Philippines).

46. *See Ex Parte* Quirin, 317 U.S. 1 (1942) (trial of civilian German military spies in wartime by U.S. military commission). For the history of U.S. military commissions, *see id.* at 26-31, and *Madsen*, 343 U.S. at 346-55. They were originally established to try civilians for war crimes. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831-41 (2d ed. 1920).

47. One of the civilians accused in *Quirin* claimed to be a U.S. citizen, although this was disputed by the government. The Court ruled that citizen or not, if he was an enemy belligerent, he could be tried by military commission. *See Quirin*, 317 U.S. at 20, 37-38.

48. Soldiers or nationals of third party states who commit "grave breaches" of the Geneva Conventions in international conflicts are subject to universal jurisdiction under international law. *See generally* Meron, *supra* note 29, at 572-74, and sources cited in Blakesley, *supra* note 25, at 71 n.214. Thus U.S. military courts appear to have jurisdiction to try them. *See supra* note 42. Universal jurisdiction over other war crimes, including crimes committed in conflicts of a non-international nature, may be less clearly established by international law. *Compare* Meron, *supra* note 28, at 568-71 (non-grave breaches "may fall within universal jurisdiction") *with* O'Connell, *supra* note 14, at 341 ("universal jurisdiction only in the case of the 'grave breaches'"). The International Court of Justice may soon have an opportunity to clarify this issue, since one of the issues in the pending case filed by Congo against Belgium concerns Belgium's assertion of universal jurisdiction over violations of Geneva Protocol II, which applies in internal conflicts. *See* ICJ Press Release 2000/32, *supra* note 27.

emy territory.[49]

Thus, U.S. courts have an uneven, incoherent patchwork of jurisdiction and codification of crimes within the ICC Statute. In terms of the jurisdictional bases allowed by international law:

- *Universal* jurisdiction: U.S. courts have universal jurisdiction over torture and certain forms of international terrorism, but not over genocide, war crimes or other crimes against humanity. (In addition, military courts have nearly universal jurisdiction over crimes against the law of war.)
- *Territorial* jurisdiction: U.S. courts have jurisdiction based on the commission of the crime within U.S. territory, regardless of nationality of victim or perpetrator, in cases of genocide, but not in cases of crimes against humanity or war crimes.

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49. U.S. law arguably permits military courts to try all war crimes, wherever committed and by whomever, including civilians, to the full extent permitted by international law. Congress has granted them jurisdiction to "try any person who by the law of war is subject to trial by a military tribunal . . . ." 10 U.S.C. § 818 (2000); *see also supra* note 42. The constitutional permissibility of such sweeping jurisdiction is implied by the broad statement in *Quirin* that "section 2 of Article III and the Fifth and Sixth Amendments cannot be taken . . . to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts." *Quirin*, 317 U.S. at 40. Most recently, the Military Extraterritorial Jurisdiction Act of 2000, which mainly authorizes trials of civilians in civil courts, *see supra* note 41, preserves "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried" by military courts. 18 U.S.C. § 3261(c).

On the other hand, there is a "deeply rooted and ancient opposition in this country to the extension of military control over civilians." Reid v. Covert, 354 U.S. 1, 33 (1957). Military courts cannot try civilians for civil crimes, even insurrection during wartime, in zones where civil courts remain open. *Ex Parte* Milligan, 4 Wall. 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1946). Since *Quirin* the Supreme Court has further curtailed military court jurisdiction over civilians. Military courts are now restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops . . . ." Toth v. Quarles, 350 U.S. 11 (1955). Hence they can no longer try civilians who are former service members, for a "'crime'in the constitutional sense," such as murder, committed while in the military. *Reid*, 354 U.S. at 31-32 (citing *Toth)*. Nor can they try civilian dependents accompanying the military overseas for peacetime capital crimes, *Reid*, or for non-capital crimes, Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); nor civilian employees accompanying the military overseas, either for capital crimes, Grisham v. Hogan, 361 U.S. 278 (1960), or non-capital crimes, McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

Arguably *Reid* "is now regarded as establishing that nonmilitary personnel are never within the reach" of military courts in peacetime. *Kinsella*, 361 U.S. at 249, 252 (Harlan & Frankfurter, JJ., dissenting). Now that civil courts have jurisdiction over certain war crimes, would the Supreme Court preclude military courts from trying civilians for those war crimes? *See* note 41 *supra*. The answer remains unclear.

- *Nationality* jurisdiction: U.S. courts have jurisdiction over perpetrators who are U.S. nationals, regardless of where the crime is committed, if they commit genocide, certain war crimes, or certain forms of international terrorism, but not if they commit other war crimes or other crimes against humanity.
- *Passive personality* jurisdiction: U.S. courts have jurisdiction because the victim is a U.S. national, regardless of where the crime is committed, in cases of certain war crimes or certain forms of international terrorism, but not in cases of genocide, other war crimes or other crimes against humanity.
- *Protective* jurisdiction: U.S. courts can prosecute certain forms of international terrorism committed overseas, based on their effects on victims or property in the U.S. or on U.S. sovereignty interests. They can also prosecute crimes committed by persons accompanying U.S. forces overseas, based on the need to safeguard military security, discipline and morale.

In addition to the foregoing express jurisdiction, U.S. courts have a limited, implied extraterritorial jurisdiction. While there is a presumption against extraterritorial application of U.S. criminal law, and application overseas is not generally allowed "unless such an intent is clearly manifested" by Congress,[50] at least two exceptions could allow U.S. courts to try certain crimes committed in the course of genocide, war crimes and crimes against humanity outside our borders.

One exception applies only to protective jurisdiction: Where a criminal statute aims to protect the U.S. government from threats "not logically dependent on their locality," extraterritorial application may be implied.[51] For example, foreign nationals who bomb American embassies, thereby killing people, can be prosecuted in the United States for such crimes as destroying U.S. property,[52] causing death in the process,[53] and using explosives to commit a felony,[54] even though there is no explicit mention of extraterritoriality in the codification of such crimes.[55]

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50. United States v. Bin Laden, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993)).

51. United States v. Bowman, 260 U.S. 94, 98 (1922); United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985); *Bin Laden*, 92 F. Supp. 2d at 193-94.

52. *See* 18 U.S.C. § 844(f)(1) (1994).

53. *See id.* § 844(f)(3).

54. *See id.* § 844(h).

55. *See Bin Laden*, 92 F. Supp. 2d at 198-99. Other usually domestic crimes of violence for which extraterritorial application has been implied include, *e.g.*, murder and attempted murder of U.S. officers and employees, 18 U.S.C. § 1114, *Benitez*, *supra* note 51, 741 F.2d at 1317, and *Bin Laden*, 92 F. Supp. 2d at 202-03; conspiracy to attack U.S. property and to kill U.S. nationals in the process, 18 U.S.C. § 844(n), 92 F. Supp. 2d at 199-201; using a firearm during a crime of vio-

The other exception applies to all bases of jurisdiction under international law. It permits U.S. courts to try "ancillary" crimes committed abroad—such as attempt, conspiracy or accessory—which are "presumed to have extraterritorial effect if the underlying substantive statute is first determined to have extraterritorial effect."[56] Thus, to the extent genocide, crimes against humanity, war crimes and lesser included crimes may be tried in U.S. courts, so too, may those ancillary crimes over which the ICC also has jurisdiction.[57]

The current, *ad hoc* accumulation of U.S. jurisdiction to prosecute crimes within the ICC Statute leaves unsettling gaps and inconsistencies. For example:

- *Pol Pot*: In 1997 Cambodia briefly requested the U.N. to establish an international criminal tribunal to try Pol Pot for his slaughter of more than a million Cambodians. Since the Chinese would veto a U.N. tribunal in the Security Council, the U.S. tried to have Pol Pot put on trial in another country. But the United States had no laws granting U.S. courts jurisdiction to prosecute his crimes against humanity. The State Department was reduced to imploring Canada, Denmark, Israel and Spain, all of which have such laws, to take jurisdiction, but was turned down.[58] Pol Pot was never credibly prosecuted for his monstrous crimes.[59]
- *Saddam Hussein's Lieutenants*: In 1999 the United States reportedly pressed Austria to arrest and prosecute a senior Iraqi official who came to that country for medical treatment. But the official fled to Iraq before any arrest.[60] Suppose he had come to the United States. Our courts would have had no jurisdiction to prosecute him for

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lence, 18 U.S.C. § 924(c), 92 F. Supp. 2d at 201; killing during an attack on a federal facility with a firearm, 18 U.S.C. § 930(c), 92 F. Supp. 2d at 201-02; and destroying national defense material or premises with intent to injure the national defense, 18 U.S.C. § 2155, 92 F. Supp. 2d at 203-04.

56. *Bin Laden*, 92 F. Supp. 2d at 197 (citations omitted).

57. The ICC Statute criminalizes the following ancillary conduct when committed with respect to substantive crimes within ICC jurisdiction: Art. 25 (b) (orders, solicits or induces), (c) (aids, abets or otherwise assists), (d) (contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose, either with the aim of furthering their criminal act or purpose, or with knowledge of the group's intention to commit a crime), and (f) (attempts).

58. *See* William Schabas, *Follow-up to Rome: Preparing for Entry into Force of the International Criminal Court Statute*, 20 HUM. RTS. L.J. 157, 160 (1999); Heather Scoffield, *Canada Looks for U.N. Sanction on Pol Pot Trial*, THE HERALD (Glasgow), June 25, 1997; Stephen Marks, *Elusive Justice for the Victims of the Khmer Rouge*, 52 J. INT'L AFF. 691, 701-03 (1999).

59. *See generally* sources cited *supra* note 58.

60. *See* John Lancaster, *U.S. Steps Up Efforts to Prosecute Top Iraqis*, WASH. POST, Oct. 28, 1999, at A26.

crimes against humanity against the Iraqi people or the Kurds. Only if he could be charged for torture, certain forms of international terrorism, or for war crimes against U.S. nationals or soldiers, would U.S. civil courts have jurisdiction to prosecute him. Nor could U.S. civil courts prosecute him for war crimes against the Kuwaitis. (A military court could try him, but only for war crimes. However, an American military trial of an Iraqi officer, rightly or wrongly, would be widely viewed as lacking independence and impartiality.)

- *Genocide in Rwanda*: Foreigners who commit genocide and then come to the United States cannot be prosecuted here for genocide, no matter how many people they may have killed. Consider, for example, Elizaphan Ntakirutimana, a Rwandan clergyman allegedly responsible for massacres of Tutsis in Rwanda during 1994, who later fled to Texas where he was apprehended.[61] United States courts have no jurisdiction to prosecute him for genocide. Fortunately, the U.N. has established an *ad hoc* international tribunal for the Rwandan genocide.[62] But what if he came from Burundi, where there is also tribal violence, but no international tribunal?
- *Violence against U.S. nationals overseas*: Even if U.S. nationals are victimized by an overseas genocide, the result is the same: U.S. courts have no jurisdiction to prosecute foreigners for genocide committed overseas. If the genocide involves torture or happens to take place in a war zone, the perpetrators could be prosecuted here for torture or for some, but not all, war crimes. But if it were committed against private citizens in peacetime, and the victims were summarily executed and not tortured, U.S. courts might have no jurisdiction to prosecute for *any* crime. Thus, for example, even if the irregulars who recently killed American tourists at a nature reserve in Uganda were caught in New York, U.S. courts might have no jurisdiction to prosecute them for the murders.[63]

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61. *See generally* Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000). *See also* Deborah Tedford, *War-crime Surrender 1st in U.S.; Rwandan Pastor Accused of Genocide*, THE HOUSTON CHRONICLE, Mar. 25, 2000, at A39.

62. *See Ntakirutimana*, 184 F.3d. at 421 n.1.

63. *See Two Americans Among Eight Slain in Uganda Forest*, L.A. TIMES, Mar. 3, 1999 at A1. The killers could be prosecuted for terrorist murders of U.S. citizens, but only if it could be proved that their intent was to "coerce, intimidate, or retaliate against a government or civilian population." 18 U.S.C. § 2332b(a)(1), (e), (g)(1). Conceivably they could be prosecuted for war crimes, but prosecutors would have to establish that this area of Uganda, which was otherwise at peace, was a war zone. *See* Prosecutor v. Tadic, Int'l Crim. Trib. for former Yugoslavia Case No. IT-94-1-A, Judgment of July 15, 1999 (Appeals Chamber).

IV. THE NEED TO CLOSE THE GAP

The foregoing examples, unfortunately, can easily be multiplied. As they illustrate, there is a need to close the gap between U.S. and ICC jurisdiction to prosecute genocide, crimes against humanity and serious war crimes. For the reasons described below, this gap should be closed, regardless of whether the United States ultimately chooses to join the ICC, and independently of whether, in the meantime, the United States supports, opposes or takes a neutral posture toward the ICC.

At least in the short run, the United States will not ratify the treaty establishing the ICC.[64] Even so, the mere existence of an ICC, with or without U.S. participation, alters the legal landscape in ways that argue for granting U.S. courts universal jurisdiction over crimes within the ICC Statute.

A. Preempting ICC Jurisdiction Over U.S. Nationals

Under the Rome Statute the ICC will have jurisdiction to prosecute nationals of Non-States Parties for crimes committed on the territory of States Parties,[65] or on the territory of states which consent to the ICC's jurisdiction.[66] However, the ICC may exercise this jurisdiction only on a "complementary" basis, meaning that it must defer to national prosecutions, including those by Non-States Parties.[67]

Thus, even if the United States does not join the ICC, U.S. nationals

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64. *See supra* note 4.

65. *See* ICC Statute art. 12.2(a). Situations involving crimes by nationals of non-states parties may also be referred to the ICC by the U.N. Security Council. *See id.* art. 13 (b). However, the United States could veto referrals involving U.S. nationals.

66. ICC Statute art. 12.3 permits non-states parties to accept ICC jurisdiction "with respect to the crime in question." The United States properly objected that this might permit one-way consent, *i.e.*, a dictator could consent to ICC jurisdiction over an alleged crime by a U.S. soldier, without exposing his own actions to ICC jurisdiction. *See* Ruth Wedgwood, *Speech Three; Improve the International Criminal* Court, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT, *supra* note 6, at 69. The U.S. concern was resolved by Rule 44.2 of the Rules of Procedure and Evidence, which provides that an article 12.3 acceptance "has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply." Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Text of the Rules of Procedure and Evidence, U.N.Doc. PCNICC/2000/INF/3/Add.1, July 12, 2000 (visited Nov. 10, 2000) <http:/www.un.org/law/icc>. More broadly, the United States also objects that ICC jurisdiction over nationals of non-states parties violates international law. Professor Scharf argues persuasively that this objection is not well-founded. *See generally* Scharf, *supra* note 5.

67. *See* ICC Statute arts. 1, 17.1(a)-(c), 18, 19.2(b), 20.3.

will remain subject to ICC jurisdiction in some circumstances. However, the United States can preempt ICC jurisdiction by investigating the case itself and, if warranted, prosecuting its national.[68] If the United States investigates but then determines that no prosecution is warranted, ICC jurisdiction is still ousted, unless the ICC determines that the U.S. decision "resulted from the unwillingness or inability of the . . . [United States] genuinely to prosecute."[69] Tests for "unwillingness or inability" are strictly defined in the statute,[70] making it highly unlikely that the ICC would take jurisdiction if the United States has already done so.

The United States' ability to prosecute is thus key to avoiding exercise of ICC jurisdiction over U.S. nationals or over other cases where the United States has an interest in investigation or prosecution. But as noted above, current U.S. law does not grant U.S. courts jurisdiction to prosecute crimes against humanity (except for torture and certain forms of international terrorism) committed outside the United States. Nor do U.S. courts presently have jurisdiction to prosecute all war crimes committed against foreigners outside the United States, by U.S. nationals who are not members of the armed forces.[71] In either case, U.S. courts would be helpless to preempt ICC jurisdiction over U.S. nationals, unless U.S. law is amended to expand the jurisdiction of U.S. courts.

But how can U.S. court jurisdiction to prosecute crimes against humanity be expanded, when U.S. law does not codify crimes against humanity as crimes? Conceivably, jurisdiction could be conferred over a range of existing U.S. crimes when committed by U.S. nationals abroad.[72] But even if such extraterritorial jurisdiction were granted over a host of common crimes—a dubious extension of ordinary criminal jurisdiction—the

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68. *See id.* arts. 17.1(a)-(b), 18.

69. *Id.* art. 17.1(b).

70. *Unwillingness* can be found only if the ICC determines that the decision "was made for the purpose of shielding the person concerned from criminal responsibility," or there was an unjustified delay or lack of independence or impartiality in the proceedings, in circumstances "inconsistent with an intent to bring the person concerned to justice." *Id.* art. 17.2(a)-(c).

Inability exists only if the ICC finds a "total or substantial collapse or unavailability of [the] national judicial system, . . . " *Id.* art. 17.3.

71. *See* 18 U.S.C.S. § 2441 (b)-(c) (Law. Co-op. 1993 & Supp. 2000). For those war crimes defined in subsection (c), U.S. courts have jurisdiction over all U.S. nationals acting abroad. But as discussed below, other war crimes are not covered by subsection (c), for which U.S. nationals acting abroad, who are not members of the armed forces, are currently beyond the jurisdiction of U.S. courts.

72. Crimes against humanity under the ICC Statute involve widespread or systematic attacks directed against a civilian population, by means of murder, extermination, enslavement, deportation or forcible transfer, unlawful imprisonment, torture, rape and other sexual violence, discriminatory persecutions, enforced disappearances, apartheid, and other inhumane acts. *See* ICC Statute art. 7.1.

result would not necessarily enable U.S. courts to preempt ICC jurisdiction, because the elements of common crimes differ from those of crimes against humanity.[73] The simplest and surest way to give U.S. courts preemptive jurisdiction over ICC proceedings against U.S. nationals is to give U.S. courts jurisdiction over crimes against humanity and the other crimes defined in the ICC Statute, when committed by U.S. nationals abroad.

B. Protecting Other U.S. Interests

The foregoing would require granting U.S. courts *nationality* jurisdiction over the crimes in the ICC Statute. But there may also be other categories of crimes which the United States has an interest in prosecuting, for which current law does not afford jurisdiction. These include crimes against humanity committed in the United States, which would require *territorial* jurisdiction; genocide, crimes against humanity, and certain war crimes committed against U.S. nationals abroad, which would require *passive personality* jurisdiction; and such crimes abroad affecting U.S. sovereign interests, which would require *protective* jurisdiction.

There are also crimes which may not fit in any of these categories, although the United States may have a strong foreign policy interest in asserting jurisdiction. As suggested by the examples in the preceding section, the United States may wish to be in a position to prosecute the likes of Pol Pot, Saddam Hussein and Rwandan *genocidaires*, even for crimes not directly involving the United States or its nationals. To do so U.S. courts would require *universal* jurisdiction (which they already have for torture and certain forms of international terrorism), enabling them to try such criminals who may be found in or lawfully brought to the United States.[74]

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73. Article 17.1(a) ousts the ICC of jurisdiction when "the case" is being investigated by a state. Would a U.S. "case" for mass murder be the same as an ICC "case" for crimes against humanity? Article 18 requires that the ICC prosecutor, before beginning an investigation, notify all states which "would normally exercise jurisdiction over the crimes concerned." If the "crimes concerned" are crimes against humanity, and the United States does not codify such crimes, can it be said that the United States would "normally" exercise jurisdiction over them? Article 20.3 bars ICC trials of persons who have already been tried by another court for the "same conduct." Is the "conduct" tried in a U.S. murder case the same as that in an ICC case for crimes against humanity? The answers are not clear. *See cf. Rezaq*, 134 F.3d at 1128-30 (Maltese conviction for murder and hostage taking does not bar subsequent U.S. prosecution for air piracy because some elements of offenses differ); United States v. Rashed, 83 F. Supp. 2d 96, 103-04 (D.D.C. 1999) (Greek conviction for aircraft bombing does not bar U.S. prosecution for same acts because some elements differ).

74. Universal jurisdiction generally may be exercised by U.S. courts even though a defendant's presence in the United States is secured involuntarily. *See Rezaq*, 134 F.3d at 1130-32; *Yunis*, 924 F.2d at 1090-92. U.S. courts recognize

In short, if the United States wishes to have the option of preempting ICC jurisdiction in the full range of cases in which we may have investigative or prosecutorial interest, U.S. courts should be granted universal jurisdiction over the crimes in the ICC Statute.

Some might object that such broad universal jurisdiction could entangle the United States in unwanted foreign policy disputes. The objection, however, is unwarranted. The executive branch would retain prosecutorial discretion in each case over whether to investigate or, instead, to allow the ICC to assume jurisdiction. Universal jurisdiction of U.S. courts over ICC crimes would add flexibility, not rigidity, to U.S. foreign policy.[75]

One might further object that the international trend toward expanding universal jurisdiction exacerbates the potential for conflict between states asserting extraterritorial jurisdiction and states asserting sovereignty over crimes committed on their territory, and that the United States should avoid encouraging such a trend. But this, too, goes more to the *exercise* of universal jurisdiction than to its statutory authorization. As a matter of sound policy, the United States ought not to exercise universal jurisdiction when states with territorial or other direct links to a crime prosecute effectively and fairly, or when the ICC is able and willing to take the case. But in situations where neither other states nor the ICC can or will do the job, the United States ought to have the *option* to ensure that the likes of a Pol Pot do not escape justice.

C. Fighting Impunity

In addition to preempting ICC jurisdiction, protecting or punishing U.S. nationals, protecting U.S. territory and sovereign interests, and providing the United States added foreign policy flexibility, universal jurisdiction in U.S. courts is also important to make real the U.S. commitment to end

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exceptions where the transfer to the United States would violate a treaty, *see* United States v. Alvarez-Machain, 504 U.S. 655, 664 (1992), and possibly in "very limited" cases where the person detained is subjected to "torture, brutality, and similar outrageous conduct." *Rezaq*, 134 F.3d at 1130 (quoting *Yunis*, 924 F.2d at 1092-93 and United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975)). More broadly, in this author's view, if U.S. courts are to uphold the rule of law and human rights by prosecuting crimes within the ICC Statute, their jurisdiction should be limited to cases where a defendant's presence in the United States is secured by lawful means.

75. Two persistent critics of *civil* suits to enforce international human rights in U.S. courts, on the ground that such suits, controlled by private plaintiffs, may interfere with U.S. foreign policy, distinguish *criminal* prosecutions, controlled by the executive, which has the "duty, expertise and discretion to accommodate such foreign relations concerns." Curtis Bradley and Jack Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2158-59, 2173, 2181 (1999).

impunity for those who commit genocide, crimes against humanity and serious war crimes.[76] Like our European allies who have recently prosecuted foreign nationals found in their territories for such crimes committed in Yugoslavia and Rwanda,[77] the United States must be in a position to do its part to bring international outlaws to justice.

It might be objected that the advent of the ICC renders expanded U.S. jurisdiction over such crimes unnecessary. But not all such crimes can or should be prosecuted by the ICC:

First, the ICC's jurisdiction will be prospective only.[78] Thus, it cannot prosecute crimes committed in the 1990s, for example, no matter how horrendous and demanding of punishment.

Even for future crimes, the ICC may be unable to take jurisdiction. In cases initiated by the prosecutor or by States' Parties, its jurisdiction may be blocked by lack of consent by the state of nationality or territoriality.[79] This will make it difficult for the ICC to prosecute rulers who repress their own people, since in such cases the states of nationality and territoriality are one and the same, and the ruler will not likely consent to his own prosecution. In cases initiated by the Security Council, referral to the ICC may be vetoed.[80] Moreover, even when the ICC does gain jurisdiction, its resources will be limited. Both for this reason, and because the ICC is intended to focus on only the most serious cases, there may be situations where it prosecutes only the most senior commanders, leaving lower ranking offenders—who may nonetheless have committed heinous crimes—for prosecution by national courts.[81]

For all these reasons, the ICC cannot be expected to do the whole job of bringing to justice those who commit atrocities.

Nor can rogue regimes be counted upon to prosecute their own leaders. If impunity for the worst international crimes is to be reined in, then, the *potential* for the United States and other democracies to exercise universal

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76. *See supra* note 9.

77. *See supra* notes 12, 14, 15, 16 & 21.

78. *See* ICC Statute art. 11.

79. *See id.* arts. 12.2, 12.3.

80. *See id.* art. 13(b).

81. *See* ICC Statute art. 1 (stating that the International Criminal Court shall have power to exercise jurisdiction over "the most serious crimes of international concern"), 17.1(d) (stating that the court shall determine the case is inadmissible if it is not of "sufficient gravity"), 53.2(c) (explaining the prosecutor may conclude there is not a sufficient basis for a prosecution because, among other factors, there is not sufficient gravity). Explaining that "[i]nvestigative resources must . . . be applied . . . to high-level civilian, police and military leaders," chief prosecutor Carla del Ponte declined to try nine Serbs arrested in Kosovo before the International Criminal Tribunal for the Former Yugoslavia, adding that local courts would try cases not taken to The Hague. *U.N. War Crimes Prosecutor Sets Out Kosovo Strategy*, REUTERS, Sept. 29, 1999 (on file with author).

and other extraterritorial jurisdiction will remain an important option, notwithstanding the advent of the ICC.

Expanding U.S. court jurisdiction to provide universal jurisdiction over crimes in the ICC Statute would be consistent with recent trends, in both the United States and other democracies, to expand jurisdiction over such crimes. The United States has recently expanded its extraterritorial jurisdiction over genocide (1988),[82] torture (1994),[83] certain forms of international terrorism (1996),[84] and war crimes (1997 and 2000).[85] As noted earlier, other democracies have recently exercised universal jurisdiction over such crimes. They are now likely to expand their jurisdictional statutes even further to reach the full range of crimes in the ICC Statute.[86]

In anticipation of an ICC, then, a range of U.S. national interests, reinforced by values shared by the United States and other democracies in fighting impunity for atrocities, calls for granting U.S. courts expanded, preferably universal jurisdiction, over crimes within the ICC Statute.

V. LEGISLATIVE OPTIONS

One simple way to close the gap would be to enact a new section of the U.S. criminal code, granting federal courts universal jurisdiction over genocide, serious war crimes and crimes against humanity as defined in the ICC Statute.[87] The ICC statutory definitions should not be incorporated by reference;[88] their language should be repeated verbatim or sub-

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82. *See* Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, § 1, 102 Stat. 3045 (codified in 18 U.S.C.S. § 1091 (1994)).

83. *See* Act of Apr. 30, 1994, Pub. L. No. 103-236, Title V, Part A, § 506(a), 108 Stat. 463 (codified in 18 U.S.C.S. § 2340A (1991 & Supp. 2000)).

84. *See, e.g.*, Act of Apr. 24, 1996, Pub. L. No. 104-132, Title VII, Subtitle A, § 702(a), 110 Stat. 1291 (codified in 18 U.S.C.S. § 2332(b) (1991 & Supp. 2000)) (acts of terrorism transcending national boundaries).

85. *See* Act of Nov. 26, 1997, Pub. L. No. 105-18, Title V, § 583, 111 Stat. 2436 (codified in 18 U.S.C.S. § 2441 (1993 & Supp. 2000)). *See also supra* note 41.

86. *See* Schabas, *supra* note 58, at 157 (advising that, "in keeping with the principle of complementarity (preamble: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"), the State's legislation should enable it to exercise its domestic jurisdiction over the crimes and individuals within the jurisdiction of the Court.").

87. *See* ICC Statute arts. 6, 7, 8. Under its power conferred by article I, section 8, clause 10 of the U.S. Constitution to "define and punish . . . Offenses against the Law of Nations," Congress has authority to codify international crimes. See generally Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000). Article III, section 1 grants Congress the power to establish lower federal courts and to define their jurisdiction.

88. Incorporation by reference would arguably suffice for trials before mili-

stantially, together with the "elements of offenses" under the ICC Statute, which the United States took the lead in drafting and which have now been adopted in a form satisfactory to the United States.[89]

Some such approach is required for crimes against humanity, since they are not codified by current U.S. law. For genocide and war crimes, an alternative would be to make simple amendments to existing legislation. The following sections address both technical and policy questions for each category of crimes:

A. Genocide

An alternative approach is simply to expand the current statutory jurisdiction of U.S. courts over genocide (territorial and nationality) to make it universal.[90] Although differences would remain between the definition of the crime under U.S. law and the ICC Statute, in most cases these would not impair U.S. ability either to take preemptive jurisdiction over a case, or to prosecute genocide.[91]

B. War Crimes

An alternative approach here, too, is to expand the current statutory jurisdiction of U.S. courts over war crimes (nationality and passive personality) to make it universal.[92] Since U.S. military courts already have

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tary courts of military personnel and enemy belligerents for war crimes, *see Ex Parte* Quirin, 317 U.S. 1, 29-30 (1942), but would not meet the more exacting standards required for trials of civilians in civil courts. *See* Parker v. Levy, 417 U.S. 733, 752-57 (1974).

89. *Report of the Preparatory Commission for the International Criminal Court*, Addendum, Finalized Text of the Elements of Crimes, U.N.Doc. PCNICC/2000/INF/3/Add.2, July 6, 2000. The United States "led the negotiations on the Elements of Crimes and provided the working draft for those negotiations." Ambassador David Scheffer, Statement Before the Congressional Human Rights Caucus, Sept. 15, 2000, at 1 (visited Nov. 10, 2000) <http://www.state.gov/policy_remarks>. The United States was "pleased to join the consensus on them. . . . We strongly believe . . . [they] will stand the test of time, as they are consistent with customary international law and international standards of due process." Ambassador David Scheffer, Statement Before the Sixth Committee of the U.N.General Assembly, Oct. 18, 2000 (visited Nov. 10, 2000) <.http://www.state.gov/policy_remarks>. *See also* ICC Statute art. 9; *see generally* Schabas, *supra* note 58.

90. *See* 18 U.S.C.A. § 1091(d)(1)-(2) (1999).

91. For example, the U.S. statutory definition of genocide requires intent to destroy the target group in whole or "substantial part," *id.* § 1091(a), whereas the ICC definition states merely in whole or "in part." ICC Statute art. 6. This difference is unlikely to make much difference in practice.

92. *See* 18 U.S.C. § 2441(b) (1999).

nearly universal jurisdiction over war crimes (except possibly when committed by U.S. citizens in certain circumstances),[93] no extension of sovereignty is required to confer such jurisdiction on civilian courts as well. Moreover, because of their stronger assurances of independence and impartiality,[94] granting civilian federal courts universal jurisdiction over war crimes would be more likely to yield judgments perceived internationally as fair and just.

Expanding jurisdiction in this manner, however, would not be enough. The war crimes subject to U.S. court jurisdiction also need to be expanded. The U.S. war crimes law currently criminalizes only grave breaches of the 1949 Geneva Conventions and violations of common article 3 of those Conventions and of certain articles of the Annex to the 1907 Hague Convention IV.[95]

The law provides that U.S. courts will have jurisdiction over other war crimes — violations of the 1977 Protocols I and II to the Geneva Conventions, and of the 1996 Protocol on mines, booby-traps and other devices — only once the United States becomes a party to those Protocols.[96] However, the ICC has jurisdiction over significant provisions of Protocols I and II.[97] There is no need to make a grant of similar jurisdiction to U.S. courts dependent upon U.S. ratification, which has been opposed for other reasons.[98] The Protocol provisions adopted by the ICC Statute are largely incorporated in the customary law of war.[99] They have been further specified by the "elements of crimes" initially drafted by the United States and now adopted in a form satisfactory to the United States.[100] U.S. courts

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93. *See supra* notes 42-49.

94. *See* Reid v. Covert, 354 U.S. 1, 35-39 (1957).

95. *See* 18 U.S.C. § 2441(c) (Supp. III 1997).

96. *See id.* § 2441(c)(1), (3)-(4).

97. *See* ICC Statute art. 8 (b) (violations in international armed conflict, corresponding to Protocol I and to the Hague regulations) and 8(e) (violations in armed conflicts not of an international character, corresponding to Protocol II); *see also* Schabas, *supra* note 58, at 164-65.

98. *See* Michael Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position* (forthcoming in 63 LAW & CONTEMP. PROBS. at 27-28) (manuscript on file with author).

99. *See* Statement of the U.S. in U.N. Doc. S/PV.3217 at 15, *reprinted in* 2 VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 451 (1995) (Protocol I); Int. Crim.Trib. for former Yugoslavia, Appeals Chamber, Tadic case, Decision of 2 October 1995, IT Doc. IT-94-1-AR72, at 63 (Protocol II). *See generally* Scharf, *supra* note 98, at 26-31.

100. *See supra* note 89. One provision that caused concern was the prohibition of the "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, . . . " ICC Statute art. 8.2(b)(viii). Professor Wedgwood suggested that this be interpreted to extend "no further than the existing Geneva Conventions," in order to leave the question of

should be given universal jurisdiction over these crimes as thus defined.

C. *Crimes Against Humanity*

Crimes against humanity, on the other hand, are not currently codified in U.S. criminal law. The simplest approach is to add a new statutory provision incorporating the text of article 7 of the ICC Statute and the corresponding elements of crimes. The crimes against humanity in the ICC Statute—widespread or systematic attacks on a civilian population, by means of murder, extermination, enslavement, deportation or forcible transfer of population, unlawful imprisonment, torture, rape or sexual violence, discriminatory persecution, enforced disappearance, apartheid, or other similar inhumane acts—are not problematic for the United States.[101]

D. *Responsibility of Civilian Superiors*

To the extent expanded U.S. court jurisdiction over ICC crimes is designed to ensure that U.S. courts can take cases that might otherwise go to the ICC, it would be prudent for U.S. law, like the ICC Statute, to hold civilian superiors criminally responsible for genocide, war crimes and crimes against humanity, when committed by subordinates under their "effective authority and control, as a result of [their] failure to exercise control properly over such subordinates," where the superiors are at fault.[102] Unless the United States can prosecute civilians in such circumstances, they will be vulnerable to potential prosecution before the ICC. Since military superiors are already bound by command responsibility, no additional legislation is needed for the U.S. military.[103]

VI. CONCLUSION

Genocide, crimes against humanity and serious war crimes, wherever

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Israeli settlements to peace negotiations. Wedgwood, *supra* note 66, at 70. The final Elements of Crimes specify that "[t]he term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law." Elements of Crimes, *supra* note 89, art. 8(2)(b)(viii).

101. *See* ICC Statute art. 7.1; *see also* Scheffer, *supra* note 89.

102. ICC Statute art. 28.2 holds such superiors criminally responsible only if three further conditions are met: "(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

103. *See* U.S. DEP'T ARMY FIELD MANUAL, *supra* note 27-10, at 501 (1956).

they may be committed, offend all nations and all peoples. Beginning in the last decade of the 20th century democracies, including the United States, have increasingly assumed and acted upon commitments to ensure that perpetrators of these crimes do not escape justice. U.S. legislation to permit our courts to prosecute such offenses, even when committed outside our borders, has steadily expanded. European democracies have prosecuted foreign nationals for committing these crimes in far away places, against far away peoples.

One might anticipate that an International Criminal Court would reduce the need for national courts to take such cases. On the contrary, the ICC Statute makes the role of national courts even more important. In part this is due to national self-interest. Under the ICC Statute, whether or not the United States joins the ICC, the United States is entitled to preempt the ICC in cases over which the United States has jurisdiction. The United States cannot exercise that right, however, unless Congress grants our courts jurisdiction to hear those cases. Their present, uneven and incomplete jurisdiction falls well short of what they need.

Expanding the jurisdiction of U.S. courts in such cases serves not only national interests, but also national values. This is an instance where our interests and values happily coincide. If the United States is to make good on its shared commitment to fight impunity for these most serious international crimes, U.S. courts must have the necessary jurisdiction to do the job. Because of its own statutory and resource limitations, the ICC will not be able to bring to justice all who commit crimes within its jurisdiction— especially dictators who oppress their own people. U.S. and other national courts, then, must be available alternatives. Only then will the executive branch have the legal capacity to do its part in the fight against impunity. Only then will repressive rulers in the next century face ever higher odds of being held to account for their crimes against humanity.