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## The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes and Crimes Against Humanity

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# The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes and Crimes Against Humanity

Douglass Cassel

## **Abstract**

The United States was one of only seven nations to vote against the treaty. 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. Largely overlooked, however, are two separate but related questions: (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?; (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 Essay suggests that the answer to both questions is yes.

# THE ICC'S NEW LEGAL LANDSCAPE: THE NEED TO EXPAND U.S. DOMESTIC JURISDICTION TO PROSECUTE GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY

*Douglass Cassel\**

## INTRODUCTION

U.S. 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 (or “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 twenty-first century. On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (“Rome Conference”) adopted the Rome Statute of the International Criminal Court (“ICC Statute”) by a vote of 120 nations in favor, seven opposed, and twenty-one abstentions.<sup>1</sup> Its initial jurisdiction will cover genocide, crimes against humanity, and serious war crimes.<sup>2</sup> Sixty nations are required for the treaty to go

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1. UNITED NATIONS, DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT’L CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/Conf.183/9 (1998) (adopted by United Nations on July 17, 1998) (visited Jan. 13, 2000) <<http://www.un.org/icc>>; *reprinted* in 37 I.L.M. § 999 (1998) [hereinafter ICC Statute].

2. *Id.* arts. 5-8. Article 1 provides that the International Criminal Court (or “ICC”) shall have jurisdiction over “the most serious crimes of international concern.” *Id.* at art. 1. 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. *Id.* at arts. 5.1(d), 5.2, 121, and 123.

into effect;<sup>3</sup> as of this writing in late 1999, eighty-nine nations have signed the treaty.<sup>4</sup>

The United States was one of only seven nations to vote against the treaty.<sup>5</sup> 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.<sup>6</sup> Largely overlooked, however, are two separate but related questions: (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?; (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 Essay 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,"<sup>7</sup> regardless of whether the nations involved are parties to the ICC. U.S. courts will need jurisdiction co-extensive with that

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3. *Id.* at art. 126.

4. See Non-governmental Coalition for International Criminal Court ("ICC") <<http://www.iccnw.org>> (on file with the *Fordham International Law Journal*) (updating list continuously). While to date only four states (Italy, San Marino, Senegal, and Trinidad and Tobago) have ratified the treaty, this reflects the time lag between signature and completion of domestic ratification processes. *Id.*

5. There is some dispute about the identities of the seven opposing countries, since the vote was not recorded. Professor Michael 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: A Reply to Ambassador Scheffer*, in LAW AND CONTEMPORARY PROBLEMS 2 (forthcoming 2000) (manuscript on file with author).

6. See e.g., COUNCIL ON FOREIGN RELATIONS, *Toward an International Criminal Court?* (1999) (having contributions by Anne-Marie Slaughter, Kenneth Roth, John Bolton, and Ruth Wedgwood); David 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. 795 (1999); Alfred P. Rubin, *Challenging the Conventional Wisdom: Another View of the International Criminal Court*, 52 J. INT'L AFF. 783 (1999); Douglass Cassel, *The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step*, 6 BROWN J. WORLD AFF. 41 (1999); Scharf, *supra* note 5; Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, LAW & CONTEMP. PROBS. (forthcoming 2000) (draft manuscript on file with author).

7. ICC Statute, *supra* note 1, art. 1.

of the ICC, 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.<sup>8</sup> In addition, whether or not we join the ICC, U.S. 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 in the United States, 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.<sup>9</sup> Our courts already have wide-ranging *civil* jurisdiction over atrocities, regardless of where they are committed, whenever the defendant is found in our territory.<sup>10</sup> In *criminal* jurisdiction, however, we lag behind such other democracies as Australia,<sup>11</sup> Belgium,<sup>12</sup> Canada,<sup>13</sup> Den-

8. *Id.* 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 4 (May 29, 1999) <<http://www.secretary.state.gov/statements/1999>> (on file with the *Fordham International Law Journal*) ("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 support for the UN's war crimes tribunals . . ."); The Cambodian Genocide Justice Act, 22 U.S.C. 2656, pt. D, § 572 (a) (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.) (citing trial in Australia for crimes against humanity and war crimes committed against Jews in Ukraine).

12. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 577, n.121 (1995) (discussing Belgian arrest warrant for Rwandan alleged to have massacred other Rwandans in Rwanda, issued under 1993 Belgian law establishing universal jurisdiction over war crimes).

13. *Regina v. Finta* [1994] 1 S.C.R. 701 (citing Canadian Supreme Court judgment

mark,<sup>14</sup> France,<sup>15</sup> Germany,<sup>16</sup> Israel,<sup>17</sup> Italy,<sup>18</sup> Spain,<sup>19</sup> Switzerland,<sup>20</sup> and the United Kingdom,<sup>21</sup> in ensuring that our courts have jurisdiction to bring to trial the "enemies of all humanity."<sup>22</sup>

## I. ADJUDICATORY JURISDICTION UNDER INTERNATIONAL LAW<sup>23</sup>

Customary international law permits states to exercise uni-

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on trial for crimes against humanity committed against Jews in Hungary); *see also* Judith Bello & 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 Four File Complaints in France Against Former Haitian Dictator*, ASSOCIATED PRESS, Sept. 10, 1999 (discussing criminal complaints against former Haitian dictator Jean-Claude Duvalier and noting expansion of French law on crimes against humanity for actions committed after 1994).

16. *See* John R. Schmertz & Mike Meier, *German Federal Supreme Court Upholds Its Jurisdiction To Prosecute Serb National for Genocide Based on His Role in "Ethnic Cleansing" That Occurred in Bosnia and Herzegovina*, 5 INT'L LAW UPDATE 52 (May 1999) (discussing German trial of Bosnian Serb for genocide in Bosnia); Frank Tiggelaar, *Domovina Net*, April 27, 1999 (on file with author) (discussing 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* Atty. Gen. v. Eichmann, 36 I.L.R. 277, 279, 304 (Isr. S. Ct. 1962) (citing 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* Derechos Human Rights, Press Release, May 21, 1999 (on file with author) (noting Italian court indictment of Argentinean military members for kidnapping, murder, and disappearance of Italian citizens in Argentina).

19. National Tribunal, Criminal Chamber in Plenary, Appellate no. 173/98—first section, *sumario* 1/98, Order, Madrid, 5 Nov. 1998 (confirming Spanish jurisdiction to try former Chilean head of state Augusto Pinochet for genocide, including torture, and terrorism committed against Chilean nationals in Chile).

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

21. *See* Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, *Ex parte Pinochet Ugarte* (No. 3), [1999] 2 W.L.R. 827 (H.L.) (confirming U.K. jurisdiction to extradite to Spain former Chilean head of state Augusto Pinochet for torture committed against Chilean nationals in Chile); *see also Pursuit of Justice*, TIMES (London), Apr. 3, 1999 (regarding British prosecution of Belarussian for war crimes against Jews in Belarus during World War II).

22. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.").

23. Adjudicatory jurisdiction, or jurisdiction to prosecute, is used in this Essay to mean judicial jurisdiction to try persons who have committed certain crimes. It differs

versal jurisdiction over genocide,<sup>24</sup> crimes against humanity,<sup>25</sup> and serious war crimes.<sup>26</sup> Such crimes, in other words, are so grave and offensive to all of humanity, that they may be prosecuted by any state that obtains custody of the accused, without regard to the nationality of perpetrator or victim, location of the crime, or other specific link to the prosecuting state.<sup>27</sup> As used in this Essay, then, "universal jurisdiction" is exercised when a state prosecutes crimes committed outside its borders, without regard to the nationality of perpetrator or victim, location of crime, or other specific link to the prosecuting state. If U.S. courts, however, are to be equipped to preempt ICC jurisdiction, then 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.<sup>28</sup>

In addition to universal jurisdiction, international law also recognizes the right of states to prosecute crimes committed

from prescriptive jurisdiction, the authority to make law applicable, and enforcement jurisdiction, the authority to compel compliance and to remedy violations. See generally Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 *TEXAS L. REV.* 785, 786 (1988).

24. See *Beanal v. Freeport-McMoran*, 969 F. Supp. 362 (E.D. La. 1997); U.S. Senate Comm. on Foreign Relations, *Report on the International Convention on the Prevention and Punishment of the Crime of Genocide*, S. Exec. Rep. No. 98-50, at 12 (1984); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter "RS"]; Lee 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); Randall, *supra* note 23, at 834-37.

25. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 510-27 (1992); Regina v. Finta [1994] 1 S.C.R. 701; Meron, *supra* note 12, at 568; Polyukhovich v. Commonwealth, 172 C.L.R. 501 (1991) (Austl.).

26. See RS, *supra* note 24, § 702; U.S. DEPT. ARMY FIELD MANUAL 27-10, *The Law of Land Warfare*, at 506(c) (1956); Randall, *supra* note 23, at 816-18; Ziegler, *supra* note 20; Regina v. Finta, [1994] 1 S.C.R. 701 (granting universal jurisdiction over grave breaches of Geneva Conventions).

27. See generally RS, *supra* note 24, §§ 404, 423; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 304-05 (4th ed. 1990); Randall, *supra* note 23. 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 *U.S. v. Rezaq*, 134 F.3d 1121, 1127, 1131 (D.C. Cir. 1998) (granting universal jurisdiction over air hijacking "outside" United States); *U.S. 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) (taking hostage outside United States), *with id.* at (b)(2) (having different provisions for hostage taking inside United States).

28. See *infra*, part III.A.

within their territories, "territorial" jurisdiction,<sup>29</sup> or, if committed outside their territories, crimes whose perpetrator is a national of the prosecuting state "nationality" or "personality" jurisdiction,<sup>30</sup> or whose victim is a national of the prosecuting state "passive personality" jurisdiction,<sup>31</sup> or crimes involving an act committed outside their territory that affects their sovereign interests "protective" or "effects" jurisdiction.<sup>32</sup>

## II. JURISDICTION OF U.S. COURTS TO PROSECUTE ICC CRIMES<sup>33</sup>

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 courts may exercise only such adjudicatory authority as is conferred upon them by U.S. law to prosecute crimes codified in U.S. law.<sup>34</sup> With regard to crimes within the ICC Statute, current U.S. law provides 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 United States or the offender is a U.S. national.<sup>35</sup>
- *Crimes against humanity* are not codified as such in the United States. If committed in the United States, however, then such crimes would violate domestic criminal laws against murder, aggravated assault, or the like. If committed outside the United States, then crimes against humanity may be prosecuted in U.S. courts only if they

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29. See RS, *supra* note 24, § 402, cmt. b; BROWNLIE, *supra* note 27, at 300.

30. See RS, *supra* note 24, §§ 402(2), 421(2)(d)-(f); BROWNLIE, *supra* note 27, at 303.

31. See RS, *supra* note 24, § 402, cmt. g; BROWNLIE, *supra* note 27, at 303-04; 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. RS, *supra*, § 402, at cmt. g.

32. See RS, *supra* note 24, § 402(3); BROWNLIE, *supra* note 27, at 304; JORDAN PAUST ET AL., INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS 1270 (1996).

33. "U.S. courts" in this Essay refers to civilian courts established under Article III of the U.S. Constitution, with full due process safeguards. Military court-martials are not considered except where referred to expressly.

34. See RS, *supra* note 24, § 404 reporter's note; see also Randall, *supra* note 23, at 796 n.66.

35. See 18 U.S.C. § 1091(d) (1999).



involve torture or attempted torture,<sup>36</sup> or certain forms of international terrorism.<sup>37</sup>

- *War crimes:* Under current law some but not all war crimes may be prosecuted by U.S. 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.<sup>38</sup> In addition, general court-martials have universal jurisdiction over crimes against the law of war.<sup>39</sup>

U.S. courts thus 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 ter-

36. Under 18 U.S.C. § 2340A (1999), 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).

37. U.S. courts have jurisdiction over at least the following crimes committed outside the United States, referred to in this Essay as "certain forms of international terrorism," for example: destruction of aircraft, 18 U.S.C. § 32 (1999); violence at international airports, *id.* § 37; threats and violence against foreign officials, official guests and internationally protected persons, *id.* §§ 112, 878, 1116; hostage taking, *id.* § 1203; piracy, *id.* § 1653; violence against ships, *id.* § 2280; violence against fixed maritime platforms, *id.* § 2281; terrorism transcending national boundaries which seriously harms persons or property in the United States, *id.* § 2340A; and air hijacking, 49 U.S.C. § 46502 (1999). The basis of jurisdiction vary as follows:

1. *Universal:* see 18 U.S.C. §§ 32(b)(4), 37(b)(2), 112(e)(3), 878(d)(3), 1116(c)(3), 1203(b)(1)(B), 1651, 2280(b)(1)(C), 2280(b)(2), 2281(b)(3) (1999); 49 U.S.C. § 46502(b)(2)(C) (1999).

2. *Nationality:* see 18 U.S.C. §§ 32(b)(4), 37(b)(2), 112(e)(2), 878(d)(2), 1116(c)(2), 1203(b)(1)(A), 2280(b)(1)(A)(iii), 2281(b)(1)(B) (1999); 49 U.S.C. § 46502(b)(2)(B) (1999).

3. *Passive Personality:* see 18 U.S.C. §§ 32(b)(4), 37(b)(2), 1203(b)(1)(A), 2280(b)(1)(B), 2281(b)(2) (1999); 49 U.S.C. § 46502(b)(2)(A) (1999).

4. *Protective:* see 18 U.S.C. §§ 112(e)(1), 878(d)(1), 1116(c)(1), 1203(b)(1)(C), 2280(b)(1)(A)(1), 2280(b)(3), 2281(b)(1)(C), 2332b(b)(1), 2332b(e) (1999).

For decisions upholding universal jurisdiction under such statutes, see, e.g., *U.S. v. Rezaq*, 134 F.3d 1121, 1130-32 (finding universal jurisdiction over air piracy); see also *United States v. Yunis*, 924 F.2d 1086, 1090-92 (D.C. Cir. 1991) (finding universal and passive personality jurisdiction over hostage taking and universal jurisdiction over air hijacking).

38. See 18 U.S.C. § 2441(b) (1999).

39. *MANUAL FOR COURTS-MARTIAL UNITED STATES*, R.C.M. 201(f)(1)(B)(i) (1998). 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.").

rorism, but not over genocide, war crimes, or other crimes against humanity. In addition, general court-martials have 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 the nationality of the victim or perpetrator, in cases of genocide, but not in cases of crimes against humanity or war crimes.
- *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, 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 if 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 United States or on U.S. sovereignty interests.

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 United Nations 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 United States 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 U.S. Department of State was reduced to imploring Canada, Denmark, Israel, and Spain, all of which have such laws, to take jurisdiction, but was turned down.<sup>40</sup> Pol Pot was

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40. See William A. Schabas, *Follow-up to Rome: Preparing for Entry into Force of the*

never credibly prosecuted for his monstrous crimes.<sup>41</sup>

- *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.<sup>42</sup> Suppose he had come to the United States. Our courts would have had no jurisdiction to prosecute him for 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. courts have jurisdiction to prosecute him. Nor could civilian U.S. courts prosecute him for war crimes against the Kuwaitis. A general court-martial could try him, but only for war crimes. A U.S. 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, 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.<sup>43</sup> U.S. courts have no jurisdiction to prosecute him for genocide. Fortunately, the United Nations has established an *ad hoc* international tribunal for the Rwandan genocide.<sup>44</sup> 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

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*International Criminal Court Statute*, 20 HUMAN RIGHTS L.J. 157, 160 (1999); Heather Scoffield, *Canada Looks for UN Sanction on Pol Pot Trial*, HERALD (Glasgow), June 25, 1997; Stephen Marks, *Evasive Justice for the Victims of Khmer Rouge*, 52 J. INT'L AFF. 691, 701-03 (1999).

41. See generally *id.*

42. John Lancaster, *United States Steps up Efforts To Prosecute Top Iraqis*, WASH. POST, Oct. 28, 1999, at A26.

43. See *Ntakirutimana v. Reno*, 184 F.3d 419, 422 (5th Cir. 1999).

44. See *id.* at 421 n.1.

zone, then the perpetrators could be prosecuted here for torture or for some but not all war crimes. But if it were committed in peacetime, and the victims summarily executed and not tortured, then U.S. courts would have no jurisdiction to prosecute *any* crime. Thus, for example, even if the irregulars who recently killed U.S. tourists at a nature reserve in Uganda were caught in the United States, U.S. courts might have no jurisdiction to prosecute them for the murders.<sup>45</sup>

### III. 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 appears unlikely to ratify the treaty establishing the ICC.<sup>46</sup> Even so, the mere existence of an ICC, with or without US 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-state parties for crimes committed on the territory of state parties,<sup>47</sup> or on the territory of states that consent to the ICC's jurisdiction.<sup>48</sup>

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45. See *2 Americans Among 8 Slain in Uganda Forest*, L.A. TIMES, Mar. 3, 1999, at A1. Conceivably the killers 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).

46. Scheffer, *supra* note 6.

47. ICC Statute, *supra* note 1, art. 12.2(a) (1998). Situations involving crimes by nationals of non-state parties may also be referred to the ICC by the U.N. Security Council. *Id.* at art. 13 (b). The United States, however, could veto referrals involving U.S. nationals.

48. *Id.* at art. 12.3 (permitting non-state parties to accept ICC jurisdiction "with respect to the crime in question"). The United States properly objects that this permits

More broadly, the United States also objects that ICC jurisdiction over nationals of non-state parties violates international law.<sup>49</sup> Professor Michael Scharf argues persuasively that this objection is not well-founded.<sup>50</sup> The ICC, however, may exercise this jurisdiction only on a “complementary” basis, meaning that it must defer to national prosecutions, including those by non-state parties.<sup>51</sup>

Thus, even if the United States does not join the ICC, U.S. nationals will remain subject to ICC jurisdiction in some circumstances. The United States, however, can preempt ICC jurisdiction by investigating the case itself and, if warranted, prosecuting its national.<sup>52</sup> 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.”<sup>53</sup> Tests for “unwillingness or inability” are strictly defined in the ICC Statute.<sup>54</sup>

U.S. capacity 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 foreign-

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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. As of this writing, it appears likely that the ICC preparatory commission will find a way to remedy this imbalance, by permitting non-states parties to refer only “situations” to the ICC. See Ruth Wedgwood, *Speech Three: Improve the International Criminal Court, in TOWARD AN INTERNATIONAL CRIMINAL COURT?* 69 (1994).

49. Scheffer, *supra* note 6; Morris, *supra* note 6.

50. Scharf, *supra* note 5.

51. ICC Statute, *supra* note 1, arts. 1, 17.1 (a)-(c); 18; 19.2 (b); 20.3.

52. *Id.* arts. 17.1 (a) and (b); 18.

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

54. *Inability* exists only if the ICC finds a “total or substantial collapse or unavailability of [the] national judicial system . . .” *Id.* art. 17.3. It makes it highly unlikely that the ICC would take jurisdiction if the United States has already done so. *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 persons concerned to justice.” *Id.* art. 17.2(a)-(c).

ers outside the United States, by U.S. nationals who are not members of the armed forces.<sup>55</sup> 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.<sup>56</sup> But even if such extraterritorial jurisdiction were granted over a host of common crimes—a dubious extension of ordinary criminal jurisdiction—the 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.<sup>57</sup> 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 *national-*

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55. See 18 U.S.C. § 2441(b), (c) (1999). For those war crimes defined in section (c), U.S. courts have jurisdiction over all U.S. nationals acting abroad. But as discussed below, other war crimes are not covered by section (c), for which U.S. nationals acting abroad, who are not members of the armed forces, are beyond the jurisdiction of U.S. courts.

56. 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, *supra* note 1, art. 7.1.

57. *Id.* at art. 17.1(a). This article 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? See *id.* art. 17.1(a). Article 18 requires that the ICC prosecutor, before beginning an investigation, notify all states which “would normally exercise jurisdiction over the crimes concerned.” *Id.* art. 18. If the “crimes concerned” are crimes against humanity, and the United States does not codify such crimes, then can it be said that the United States would “normally” exercise jurisdiction over them? *Id.* Article 20.3 bars ICC trials of persons who have already been tried by another court for the “same conduct.” *Id.* art. 20.3. 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. Cf. *U.S. v. Rezaq*, 134 F.3d 1121, 1128-30 (1998) (stating that Maltese conviction for murder and hostage taking does not bar subsequent U.S. prosecution for air piracy, because some elements of offenses differ).

*ity* jurisdiction over the crimes in the ICC Statute. But there may also be other categories of crimes that the United States has an interest in prosecuting, for which current law does not afford jurisdiction. These categories 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 that may not fit in any of these categories, but where 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.<sup>58</sup> In short, if the United States wishes to have the option of preempting ICC jurisdiction in the full range of cases in which it 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

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58. Universal jurisdiction generally may be exercised by U.S. courts even though a defendant's presence in the U.S. is secured involuntarily. See *Rezaq*, 134 F.3d at 1130-32; *United States v. Yunis*, 924 F.2d 1086, 1090-92 (D.C. Cir. 1991). U.S. courts recognize exceptions where the transfer to the United States would violate a treaty, (*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 U.S. 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.

crimes would add flexibility, not rigidity, to U.S. foreign policy.<sup>59</sup>

### 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 impunity for those who commit genocide, crimes against humanity, and serious war crimes.<sup>60</sup> Like our European allies who have recently prosecuted foreign nationals found in their territories for such crimes committed in Yugoslavia and Rwanda,<sup>61</sup> 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.<sup>62</sup> It thus 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 state parties, its jurisdiction may be blocked by lack of consent by the state of nationality or territoriality.<sup>63</sup> This situation 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.<sup>64</sup>

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59. 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 & Jack Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2158-81 (1999).

60. *See supra* note 9.

61. *See supra* notes 12, 14, 16, 20.

62. ICC Statute, *supra* note 1, art. 11.

63. *Id.* art. 12.2, 3.

64. *Id.* art. 13 (b).



- 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.<sup>65</sup>

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 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),<sup>66</sup> torture (1994),<sup>67</sup> certain forms of international terrorism (1996),<sup>68</sup> and war crimes (1997).<sup>69</sup> 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.<sup>70</sup>

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65. *See id.* art. 1 (“the most serious crimes of international concern”); 17.1(d) (“sufficient gravity”), 53.2(c) (same). Explaining that “[i]nvestigative resources must . . . be applied . . . to high-level civilian, police and military leaders,” chief prosecutor Carla del Ponte recently 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).

66. *See* Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, § 1, 102 Stat. 3045, 18 U.S.C.S. 1091 (1999) note.

67. *See* Act of April 30, 1994, Pub. L. No. 103-236, Title V, Part A, § 506(a), 108 Stat. 463, 18 U.S.C.S. §2340A (1999) note.

68. Acts of Terrorism Transcending National Boundaries, April 24, 1996, P.L. 104-132, Title VII, Subtitle A, § 702(a), 110 Stat. 1291, 18 U.S.C.S. § 2332b (1999).

69. Act of Nov. 26, 1997, P.L. 105-18, Title V, § 583, 111 Stat. 2436, 18 U.S.C.S. §2441 (1999).

70. *See* Schabas, *supra* note 40, at 157. Schabas advises 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 respon-

In anticipation of an ICC, 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.

#### IV. 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.<sup>71</sup> The ICC statutory definitions should not be incorporated by reference; rather, their language should be repeated verbatim or substantially, together with the "elements of offenses" under the ICC Statute, once their drafting is completed by the preparatory commission and approved by the state parties.<sup>72</sup>

Some argue that such an 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.<sup>73</sup> Although differences would remain between the definition of the crime under U.S. law and the ICC Statute, in most cases these differences would not impair the U.S. ability either to take preemptive jurisdiction over a case, or to prosecute genocide.<sup>74</sup>

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sible 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.

*Id.*

71. ICC Statute, *supra* note 1, arts. 6-8.

72. *Id.* art. 9; Schabas, *supra* note 40, at 163.

73. 18 U.S.C. § 1091(d)(1), 109(d)(2) (1999).

74. For example, the U.S. statutory definition of genocide requires intent to destroy the target group in whole or "substantial part," *see id.* § 1091(a), whereas the ICC definition states merely in whole or "in part." ICC Statute, *supra* note 1, art. 6. This distinction is unlikely to make much difference in practice.

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.<sup>75</sup> Since U.S. military courts already have universal jurisdiction over war crimes,<sup>76</sup> 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, 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 the common Article 3 of those Conventions and of certain articles of the Annex to the 1907 Hague Convention IV.<sup>77</sup> 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.<sup>78</sup> The ICC, however, has jurisdiction over significant provisions of Protocols I and II.<sup>79</sup> 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.<sup>80</sup> The protocol provisions adopted by the ICC Statute are largely incorporated in the customary law of war.<sup>81</sup> They will be further specified by the “ele-

75. 18 U.S.C. § 2441(b) (1999).

76. *Id.*

77. *See id.* § 2441(c).

78. *See id.* § 2441(c)(1), (3), (4).

79. *See* ICC Statute, *supra* note 1, art. 8 (b) (stating violations in international armed conflict, corresponding to Protocol I and to Hague regulations); *see id.* art. 8 (e) (stating violations in armed conflicts not of international character, corresponding to Protocol II); Schabas, *supra* note 40, at 164-65.

80. *See* Scharf, *supra* note 5, at 28-29.

81. Statement of the United States in U.N. Doc. S/PV.3217 at 15, reproduced in 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-I-AR72, at 63 (Protocol II). As Professor Scharf concludes, “While a few of the Rome Statute’s definitions of crimes against humanity and war crimes may technically

ments of offenses" insisted upon by U.S. negotiators and which are currently being drafted for the ICC.<sup>82</sup> To the extent U.S. negotiators are satisfied with the final version of the elements,<sup>83</sup> U.S. courts should be given universal jurisdiction over these crimes as defined in the ICC Statute.

### 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 elements of offenses, once adopted, to the extent acceptable to U.S. negotiators. 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—do not appear to be problematic for the United States.<sup>84</sup>

### D. *Responsibility of Civilian Superiors*

To the extent the U.S. court jurisdiction is expanded over ICC crimes, it should be 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

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go beyond these precedents, this is but a small step in the nature of defining the content of crimes that have long been recognized as warranting universal jurisdiction." Scharf, *supra* note 5, at 32.

82. See Scheffer, *supra* note 6, at 17; Schabas, *supra* note 40, at 161, 164-66.

83. One provision that has caused concern is 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, *supra* note 1, art. 8.2 (b)(viii). Professor Wedgwood suggests that this provision should be interpreted to extend "no further than the existing Geneva Conventions" and notes that the United States has proposed language to restrict its reach to "situations where the transfer 'endangers the separate identity of the local population.'" She explains that this language will leave the question of Israeli settlements to peace negotiations between the parties. See Wedgwood, *supra* note 48, at 70.

84. ICC Statute, *supra* note 1, art. 7.1; see also Scheffer, *supra* note 6, at 16.

exercise control properly over such subordinates," where the superiors are at fault.<sup>85</sup> 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.<sup>86</sup>

### CONCLUSION

Genocide, crimes against humanity, and serious war crimes, wherever they may be committed, offend all nations and all peoples. In the last decade of the twentieth 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, regardless of whether the United States joins the ICC, the United States is entitled to take preemptive jurisdiction over cases in which it has an interest. The United States cannot exercise that right, however, unless our courts have 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

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85. ICC Statute, *supra* note 1, art. 28.2. This article 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.

*Id.*

86. See DEPARTMENT OF THE ARMY FIELD MANUAL 27-10, *supra* note 26, § 501, at 178.

scheme 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, then 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 in this way will the executive branch have the legal capacity to do its part in the fight against impunity. Only in this way will repressive rulers in the next century face ever higher odds of being held to account for their crimes against humanity.