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SYMPOSIUM: UNIVERSAL JURISDICTION: MYTHS, REALITIES, AND PROSPECTS: Will or Should the United States Ever Prosecute War Criminals?: A Need For Greater Expansion in the Areas of Both Criminal and Civil Liability

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SUMMARY:

... These limitations fall short of the obligations imposed by the Geneva Conventions to exercise universal jurisdiction over all war criminals. ... Several key allies of the United States including Israel, United Kingdom, Canada, Australia and Ireland have conducted prosecutions based on universal jurisdiction, though limited they might be by certain restrictions such as time (World War II). ... As a result of the dual criminality provision it was necessary to equate the war crime or crime against humanity to a crime under Canadian law. ... These changes include providing for: (a) universal jurisdiction over all war crimes and genocide; (b) the non-application of the death penalty in instances where the U.S. is seeking the extradition of a suspected war criminal from a state that opposes the imposition of the death penalty; and (c) the ability of Americans to pursue civil remedies against suspected war criminals. ... The WCA provides for the imposition of the death penalty should death result to the victim of a war crime. ... However, as is well known, most nations of the world oppose the death penalty and would refuse to extradite a suspected war criminal to the U.S. for trial based on, among other reasons, the possibility that the individual might be sentenced to death and, in the interim, languish on death row for many years. ...

TEXT-1:

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I. Introduction

On August 21, 1996, the United States expanded its jurisdictional human rights grasp by enacting the War Crimes Act of 1996 (WCA).ⁿ¹ Nearly fifty years after the passage of the Geneva Conventions, the U.S. finally took the first step towards upholding its international obligation to enact implementing legislation. Thus, for the past four years the U.S. has been poised to criminally prosecute select war criminals. Though poised, it has yet to pounce, even once, on a violator deserving of punishment. [*448]

While the WCA was a commendable first step, it unnecessarily restricts prosecutorial authority to offenses committed on U.S. territory, regardless of the nationality of the perpetrator, or to war crimes committed by or against nationals of the United States no matter where they might be located at the time of the offense. These limitations fall short of the obligations imposed by the Geneva Conventions to exercise universal jurisdiction over all war criminals. Although the last decade brought the most significant increase in the prevention, prosecution and deterrence of war crimes since the Nuremberg trials in the aftermath of World War II, the U.S. must strive to better promote the fundamental tenets of international humanitarian law. Additional steps need to be taken to ensure that the U.S. meets and, where appropriate, even exceeds its international obligations.

Specifically, the WCA must be amended to permit the exercise of universal jurisdiction. The restriction of the United States' ability to prosecute only certain war criminals on the basis of territoriality or nationality of the victim/offender may have the obscene affect of allowing murderers to live free and comfortable throughout the U.S.. The possibility exists that a next door neighbor may be discovered to be a former dictator who was responsible for engineering the slaughter of millions of innocent victims or the torturer who personally supervised and perpetrated the deaths of his political enemies. Despite the strength possessed by the U.S. government as the sole superpower in the world, it would be powerless to prosecute such a person on even one count of murder.

The only recourse available within the limited authority of the U.S., even were the person Adolph Hitler, would be to seek the extradition or deportation of the individual; a process that could take years and have the even more perverse result of permitting a murderer to live out his life in luxury in another country. This has oftentimes been the result of the United States' judicial proceedings brought against suspected Nazi war criminals living quietly in the U.S., and it must not be allowed to continue in this manner should future war criminals seek refuge in this country. n2 [*449]

This article provides a brief history and analysis of the exercise of universal jurisdiction and discusses the passage of the WCA and its aftermath. The conclusion is inescapable: the assertion of universal jurisdiction over all war criminals is not only appropriate as a matter of United States' domestic law and public policy, but it is the United States' obligation under international law. Finally, the article suggests certain modifications that should be incorporated into future revisions of the WCA in order to strengthen its effectiveness.

II. UNIVERSAL JURISDICTION OVER WAR CRIMES IS HISTORICALLY WELL-SETTLED

"The history of universal jurisdiction stems from the customary international practices regarding pirates and brigands in the 1600s; even 'before International Law in the modern sense of the term was in existence. . . ." n3 Indeed, over 380 years ago the father of international law, Hugo Grotius, gave his approval to the concept of the right of states to try crimes committed outside their territorial jurisdiction when those crimes violated the law of nature or the law of nations:

Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have Authority over others, but as they are in Subjection to none. For . . . it is so much more honourable, to [*450] revenge other Peoples Injuries rather than their own . . . Kings, beside the Charge of their particular Dominions, have upon them the care of human Society in general. n4

Since 1935, universal jurisdiction has been increasingly accepted when it was included as a basis for jurisdiction in a draft convention that outlined a state's jurisdiction in criminal cases involving a foreign element. n5 The modern principle of universal jurisdiction recognizes the interest that each state has in exercising jurisdiction over offenses which have been internationally condemned. n6 Of the few international crimes that it is agreed assertion of universal jurisdiction by states is permitted, war crimes, without question, fall within that category. n7 Both during and in the aftermath of World War II, various resolutions were adopted revealing the desire of the international community to bring war criminals to justice by conducting prosecutions before national courts. n8 Throughout the decades following World War II, the United Nations continually reaffirmed the desire to ensure the ability of states to prosecute war criminals. n9 For example, it was affirmed that a refusal "to cooperate in the arrest, extradition, trial and punishment" of alleged war criminals was contrary to the

United Nations Charter "and to generally recognized norms of international [*451] law." n10

As acknowledged by the Restatement (Third) on the Foreign Relations Law of the United States, "a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . ." n11

III. THE FOUR GENEVA CONVENTIONS OF 1949 REQUIRE THE UNITED STATES TO EXERCISE UNIVERSAL JURISDICTION

Although few of the international criminal law conventions adopted during the last two centuries contain references that can be interpreted as requiring or even permitting universal jurisdiction, those that do have either been specifically ratified by the U.S. or have become customary international law, thereby binding the U.S. by implication. Most prominent are the conventions which are the specific focus of the WCA—the four Geneva Conventions of 1949. n12 Each of the Conventions identically provide that each "party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." n13 [*452]

The four Geneva Conventions were entered into force on October 21, 1950, and the U.S. became a party on February 2, 1956. As a result, the U.S. unquestionably obligated itself to assert universal jurisdiction with respect to violations of the four Conventions, notwithstanding the fact that it took forty years before the U.S. took the first steps to implement its obligation. n14

Of course, adoption of this principle should not be interpreted to mean the U.S. is obligated to commence a prosecution each and every time a suspected war criminal is found within its territory. The U.S. can always seek to extradite the individual should another state request custody or the U.S. can deport the individual should another state indicate its willingness to accept custody. n15 However, no state may be willing to assume either role and, therefore, without universal jurisdiction a crime may go unpunished. n16

Some might consider the passage of the WCA as a "feel good" law proposed to satisfy the visionaries who promote adherence to international law. After all, it appears highly unlikely that war crimes will occur in the [*453] U.S. in the near future. Nor, fortunately, is it highly probable that many Americans will commit future war crimes. If anything, it is more likely that an American may find themselves a victim of a war crime committed somewhere else in the world. However, the most common scenario is that of a suspected war criminal from another country found residing in the U.S. who is accused of killing a non-U.S. national. This example remains unaddressed by the WCA, perhaps because of a political lack of will or, in part, due to the understandable tremendous cost of resources that will come to bear by bringing such a prosecution. Of course, the selfinterests of the state are not what is at issue; it is the interests promoted by the international community as a whole that justice must prevail. n17 Without adopting the full intended scope of universal jurisdiction, the U.S. will be powerless to punish these individuals and must resort to extradition or deportation. n18 [*454]

IV. THE UNITED STATES HAS SUPPORTED THE PRINCIPLE OF UNIVERSAL JURISDICTION IN BOTH INTERNATIONAL AND DOMESTIC SETTINGS

A. The United States Has Ratified Several International Conventions That Impose Universal Jurisdiction

Since World War II, the U.S. has ratified several international criminal conventions that require the exercising of universal jurisdiction. This demonstrates the U.S. government's acceptance of the notion of universal jurisdiction. For example, the 1982 United Nations Convention on the Law of the Sea at article 105, n19 which is identical to article 19 of the 1958 Convention on the High Seas, n20 provides that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith. n21

The international conventions on torture, n22 hostage taking, n23 hijacking and sabotage of aircraft n24 and crimes against internationally protected persons [*455] n25 all contain provisions, with minor variations, requiring the assertion of universal jurisdiction. n26 For example, article 8(a) of the 1979 Convention Against the Taking of Hostages states:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of the State. n27

Although the Genocide Convention n28 maintains its explicit jurisdictional basis on the territoriality principle, n29 the crime of genocide may be prosecuted based on universal jurisdiction as a matter of customary international law. Support for this proposition includes the Eichmann Case n30 and the Restatement (Third) of the Foreign Relations Law of the United States. n31 The U.S. implemented its obligations under the Genocide Convention by its enactment of the Genocide Convention Implementation Act of 1987 (the Proxmire Act). n32 The Proxmire Act, however, restricted itself to the territoriality and nationality principles of jurisdiction. [*456]

B. United States Courts Have Recognized The Application Of Universal Jurisdiction

During the 1980s, several federal courts, both in the criminal and civil context, recognized or acknowledged the authority of the U.S. to exercise universal jurisdiction over certain acts of terrorism, torture and war crimes. n33 For example, in *United States v. Layton*, n34 which involved the prosecution of an individual for the terrorist shooting of a U.S. Congressman in Guyana, the Court held that "nations have begun to extend universal jurisdiction to . . . crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy . . ." n35

Of course, the penultimate example of universal jurisdiction is that of the International Military Tribunal (IMT) established by the United States, Great Britain, France and the Soviet Union following the victory over Nazi Germany. n36 Yet "while many sources view the IMT's proceedings as being partly based on the universality principle, the IMT's judgment and records actually evidence little or no explicit reliance on universal jurisdiction." [*457] n37 However, the subsequent war crimes trials held by U.S. military tribunals reveal explicit references to universal jurisdiction. n38 Consider the following statements by several U.S. military courts sitting in judgment of suspected Nazi war criminals:

An international crime is . . . an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances . . . n39

* * *

[Jurisdiction exists regardless of the nationalities of the defendants and their victims and] of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished . . . n40

* * *

A war crime . . . is not a crime against the law or criminal code of any individual nation, but a crime against the jus gentium. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the locus criminis has jurisdiction and that only the lex loci can be applied, are therefore without any foundation. n41

V. THE INTERNATIONAL COMMUNITY IS WITNESSING A GROWING TREND TOWARDS EXERCISING UNIVERSAL JURISDICTION

Several key allies of the United States including Israel, United Kingdom, [*458] Canada, Australia and Ireland have conducted prosecutions based on universal jurisdiction, though limited they might be by certain restrictions such as time (World War II). However, during the last decade a growing number of States have enacted legislation specifically permitting the prosecution of future war crimes. These actions demonstrate the trend toward ensuring that perpetrators of war crimes not go unpunished, regardless of where the underlying act may have taken place or to whom it occurred. n42

A. Israel

The trial of Adolph Eichmann under Israel's Nazis and Nazi Collaborators (Punishment) Act n43 sets forth a clear example of a State's reliance on the universality principle for prosecution of a war criminal. The Israeli district court rationalized its decision on the basis that:

The abhorrent crimes defined in this Law are crimes not under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. n44

[*459]

B. United Kingdom

In the Almedo Trial n45 of 1945, the British based its prosecution of German defendants, in part, on universal jurisdiction under which "every independent State has under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed . . ." n46 The following year, a British military court in the Zyklon B Case n47 also based its case in part on the universal jurisdiction of states to prosecute war criminals.

The United Kingdom enacted legislation in 1991 that established jurisdiction for "murder, manslaughter or culpable homicide committed in violation of the laws and customs of war in German or German-held territory between 1 September 1939 and 5 June 1945." n48 In 1996, Britain passed additional implementing legislation pertaining to the Geneva Conventions. n49

After several years of existence, the British statute continues to have the same function it had at its passage: the symbolic condemnation of war crimes as acts that must never be forgotten lest they be repeated. Unfortunately, the limited scope of the act will not allow it to deal with those who truly deserve punishment. n50

C. Australia

The Australian War Crimes Amendment of 1988 n51 permits prosecution of Nazi war criminals who committed crimes between September 1, 1939 and May 8, 1945. n52 The Australian definition of war crimes encompasses [*460] both war crimes and crimes against humanity as they are defined in the IMT. Although the Act was limited in time to the World War II period, it nevertheless is based on the universality principle as it applies to crimes committed outside of Australia, and by and against people with no connection to Australia.

In 1991, Australia enacted additional implementing legislation with respect to the Geneva Conventions.

D. Canada

In 1987, Canada passed an Act to Amend the Criminal Code, the Immigration Act of 1976 and the Citizenship Act n53 which provided that any person who commits a war crime or crime against humanity "shall be deemed to have committed that crime in Canada at the time of the act or omission, if the crime, if committed in Canada, would constitute an offence against the laws of Canada in force at that time." n54 Although the statute was enacted amid new cries to prosecute Nazi war criminals, the language of the statute also provides deterrent value for it allows for the prosecution of past, present and future war criminals. n55

The new provisions did not create new offenses of war crimes and crimes against humanity in Canada. Rather, they conferred jurisdiction on Canadian courts to try persons whose acts amounted to war crimes or crimes against humanity as those terms were defined and which also constituted offenses against Canadian law. As a result of the dual criminality [*461] provision it was necessary to equate the war crime or crime against humanity to a crime under Canadian law. The person would be charged with the Canadian offense. The definitions in the Code paralleled very closely the classic definitions of war crimes and crimes against humanity in the Nuremberg Charter. Other features of the legislation deserve mention. The provisions applied to all persons in Canada. No exceptions were made for members of the Canadian armed forces. The provisions were not restricted to any particular period of time. They applied retrospectively and prospectively to World War II war crimes and crimes against humanity and to similar crimes committed in more recent times, in

conflicts such as those in Vietnam, Cambodia, Afghanistan, Nicaragua, Sri Lanka, Bosnia-Herzegovina and Rwanda, to mention a few. They are the most comprehensive and wideranging provisions enacted by a state in recent times, far wider than comparable provisions enacted in 1989 by Australia and in 1991 by Great Britain. The bases of jurisdiction are the nationality principle, the passive personality principle and the universality principle. n56

By the mid-1990s, after several high-profile failed prosecutions, Canada "shifted from criminal prosecutions to proceedings to denaturalize and deport suspected Nazi war criminals for violations of the Citizenship Act and Immigration Act." n57 Based on his first-hand experiences, a former Canadian war crimes prosecutor concluded:

The exceptionally high threshold set by the Supreme Court for prosecutions for war crimes and crimes against humanity, and to its interpretation of the defenses available to an accused, are a serious bar to the success of future prosecutions for war crimes and crimes against humanity in Canada, even in a modern context. It demonstrates the ineffectiveness of governments attempting to prosecute international crimes at the national level, since they have no control over how the courts in a particular country will interpret the legislation and principles of international criminal law. n58

E. Other Examples

Germany has taken partial steps towards implementing universal jurisdiction through revision of its criminal code. n59 Although the statute specifically refers to genocide and fails to explicitly reference war crimes, it "includes war crimes by conferring jurisdiction upon the German courts for crimes which, by virtue of an international convention to which Germany [*462] is a party, lays down extraterritorial jurisdiction." n60

Belgium adopted universal jurisdiction through its 1993 war crimes statute. n61 Interestingly, Belgium appears to be the one state that has accepted the mandate imposed by the Geneva Conventions wholeheartedly, even going beyond what has been interpreted as traditionally required.

It contains a detailed description of the grave breaches in the Geneva Conventions of 1949 and the additional protocols, but goes beyond these texts by assimilating national and noninternational conflicts. Thus, all the grave breaches, enumerated in the Conventions and the Protocol are considered war crimes in Belgium, even when committed in a non-international armed conflict. Furthermore, it creates universal jurisdiction and imprescriptibility for the said crimes. To the extent to which the Belgian statutes stretch the concept "war crimes" beyond its traditional limits, the concepts of universal jurisdiction and imprescriptibility are stretched as well. For example, the new Belgian statute is applicable to Rwandans who, on Rwandese territory, have committed war crimes against their fellowcitizens. n62

VI. THE WAR CRIMES ACT OF 1996

The legislation that ultimately became the WCA began with a proposal from a former American prisoner of war during the Vietnam conflict. n63 Finally, after more than the forty years since the U.S. Senate had ratified the Geneva Conventions, the U.S. House of Representatives was considering adopting implementing legislation. n64 As introduced by the Chairman of the House Judiciary's Subcommittee on Immigration and Claims, Congressman [*463] Lamar Smith (R-TX):

H.R. 2587 is designed to implement the Geneva Conventions and to protect Americans. It would add a provision to title 18 of the U.S. Code providing that whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions where the victim of such a breach is a member of the Armed Forces of the United States or a citizen of the United States shall be fined or imprisoned or both, and if death results to the victim, shall also be subject to the penalty of death. n65

A hearing on the proposed bill was held on June 12, 1996. Representatives of the Departments of State and Defense, as well as leading academics and practitioners offered testimony in support of the legislation. n66 More than that, however, each of the witnesses—including the Executive Branch representatives appearing before the Subcommittee proposed expanding the bill to permit the exercise of universal jurisdiction over war crimes as originally contemplated by the Geneva Conventions. n67 Ultimately, the final version – ostensibly because of political concerns – failed to adopt these proposals.

n68 [*464]

VII. SUGGESTED MODIFICATIONS TO THE WAR CRIMES ACT OF 1996

Although the WCA served as a well-intended step towards fulfilling the international obligations of the U.S., additional modifications are needed to further strengthen the ability of the U.S. to enforce international law. These changes include providing for: (a) universal jurisdiction over all war crimes and genocide; (b) the non-application of the death penalty in instances where the U.S. is seeking the extradition of a suspected war criminal from a state that opposes the imposition of the death penalty; and (c) the ability of Americans to pursue civil remedies against suspected war criminals.

A. Universal Jurisdiction Should Be Provided For All War Crimes and Genocide

As more fully explained above, the provisions of the Geneva Conventions impose an obligation on the U.S. to assert universal jurisdiction over war criminals. Despite a movement within the 105th Congress to further expand the statute to cover violations of common article 3 of the Geneva Conventions and articles 23, 25, 27 and 28 of the Hague Convention of 1907 Respecting the Laws and Customs of War, this effort still falls short. n69 Even were this amendment to be enacted, an unacceptable gap would still remain, providing the true enemies of mankind, those who commit genocide, a safe haven in the U.S..

Under the Proxmire Act, the United States claims the right to try persons for committing genocide and related acts only on the basis of the nationality and territoriality principles of jurisdiction. Thus, as the law now stands, alleged perpetrators of genocide such as Radovan Karadzic or Ratko Mladic could not be prosecuted in the U.S. for their atrocities. However, despite the fact that the Genocide Convention does not obligate nations to assert universal jurisdiction, crimes of genocide can be prosecuted based on universality principles as a matter of customary international law.

Should the WCA ever be amended to appropriately uphold the obligations imposed by the Geneva Conventions, an opportunity would exist to proceed one step further and include genocide within the prosecutorial [*465] framework of the legislation. It would seem absurd to provide universal jurisdiction with respect to war crimes, yet maintain the jurisdictional limitations imposed by the Proxmire Act on crimes of genocide. Were this anomaly to be maintained, the U.S. could prosecute war criminals such as Dusko Tadic, n70 but would be forced to turn a blind eye to the leaders who implemented the genocidal policies. n71

B. Non-Application Of The Death Penalty In Certain Instances

The WCA provides for the imposition of the death penalty should death result to the victim of a war crime. In the U.S., imposition of the death penalty is commonly included as a possible penalty in offenses that would be deemed analogous to this statute. n72 However, as is well known, most nations of the world oppose the death penalty and would refuse to extradite a suspected war criminal to the U.S. for trial based on, among other reasons, the possibility that the individual might be sentenced to death and, in the interim, languish on death row for many years. n73

Imagine a situation where an American, whether a civilian or a member of our armed forces, was killed as a result of a war crime committed in another country and a prime suspect is in the custody of a foreign power. Here exists a scenario where the United States' interests to prosecute the individual are obviously heightened. Yet because of the possibility that the death penalty may be imposed as a sentence, the custodial state may well refuse to extradite the accused. American justice will not be adequately [*466] served in a case of this type.

Therefore, the statute should be amended to provide that in instances where the U.S. seeks the extradition of an individual suspected of committing a war crime from a state whose laws prohibit the extradition of an individual due to the possible sentence of death, the death penalty will not be applied in such cases. It would seem that the interests of the U.S. lie in seeing the individual prosecuted to the fullest extent possible in the American criminal justice system, even if that means the nonapplication of the death penalty, rather than seeing the individual receive a lesser sentence or none at all in the custodial state.

C. Civil Remedies Must Be Created For The American Victims Of War Crimes

In prosecuting alleged violators of horrific crimes, the victims and their families who have suffered terribly are often forgotten or neglected. It should be recognized that there exists twin pillars to attaining justice: the punishment of the perpetrator and the securing of compensation for the victim and/or their family. Oftentimes, in fact, attempts to obtain the latter are the closest one will ever get to attaining the former. Criminal prosecutions are discretionary by nature. The difficulties in securing a prosecution for a war crime are further compounded by the fact that the foreign perpetrator may

have committed the act thousands of miles from the shores of the United States. Evidence and witnesses may be almost impossible to secure. Not to mention the difficulties that may arise due to differences in language and cultures. Perhaps more confounding may be the fact that the act was sanctioned by the government of the perpetrator.

Over the last twenty years, the need for the existence of parallel remedies has surfaced many times. Human rights violators have frequently sought to secure an anonymous safe haven and life of enjoyment in the U.S. after committing horrific acts upon innocent victims for which no punishment was exacted. Although the U.S. government will not—and at this time cannot prosecute these violators, fortunately, the U.S. civil judicial system has permitted the victims to strike back. n74

In April 1996, victims were afforded a new legal weapon against certain foreign governments that commit condemnable acts with the passage of the "Antiterrorism and Effective Death Penalty Act of 1996." n75 The Act amended the Foreign Sovereign Immunities Act of 1976, n76 and now permits [*467] victims of aircraft sabotage, torture, hostage-taking and extrajudicial killing to sue those foreign governments responsible for their losses. n77

With the passage of the WCA and the prospect that alleged war criminals might one day be prosecuted in the U.S. for acts committed abroad, this sea change may have the perverse effect of providing alien victims and their families with greater rights than their American counterparts. Aliens that have suffered injury as a result of a war crime committed abroad may initiate a civil action against their perpetrator when the individual is found within the U.S. under the Alien Tort Statute, n78 which provides district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." n79 In recent years, several successful actions have been instituted in the U.S. against foreign perpetrators of torture, war crimes and genocide by their foreign victims and/or surviving family members. n80

Of course, war crimes violate both the law of nations and treaties of the U.S., therefore providing aliens with a civil remedy should the alleged war criminal be brought to or found within the United States. However, no such right exists for American victims or their families. Although American victims can seek civil remedies under the Torture Victim Protection [*468] Act of 1991, n81 the Act only encompasses acts of torture or extra-judicial killing thereby excluding many other acts that fall within the definition of war crimes. As it was obviously never the intent to grant aliens greater rights than American victims of war crimes, the WCA should be appropriately amended.

VIII. CONCLUSION

The cries of "Never Forget" that arose from the ashes of the six million murdered Jews in the Holocaust are sadly being drowned out by the millions of innocents still falling victim to war crimes and acts of genocide throughout the world today. In ensuring that we "Never Forget" those who have been victimized by such atrocities, we must strive to "Always Prosecute" those who caused such unjustified and inexcusable suffering. The WCA was a first step, but the battle wages on and there is more that can be done. The suggested revisions proposed in this article can serve to accomplish just that and perhaps send a message to those who have already committed, or are contemplating committing, such atrocities that the U.S. will never allow its territory to serve as a safe haven for them.

Although the foundations for a permanent international criminal court have now been created, n82 this fact does not relieve national jurisdictions from the responsibility of prosecuting suspected war criminals. The U.S. in particular, given its unfortunate lack of political will to adopt the ICC Treaty, n83 must continue to take all possible steps to lead the international community towards an end to this madness or, at the very least, to ensure that justice rises from the aftermath. [*469]

APPENDIX 1

18 U.S.C. 2401. War Crimes

Sec. 2401. War crimes

(a) OFFENSE—Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection

(b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES—The circumstances referred to in subsection (a) are that the person committing such breach

or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) DEFINITIONS—As used in this section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.'

FOOTNOTES:

n1 Pub. L. No. 104-192 (codified at *18 U.S.C. § § 2401, 2441* (1996)).

n2 Professor Jordan Paust has justifiably criticized the United State's policy:

Denaturalizing and deporting alleged Nazi war criminals or, in a few cases, extraditing them was on balance misguided and a national disgrace. Not only is such an abnegative policy generally violative of international law, but it is also generally subversive of global efforts, however halting and incomplete, to seek out and bring to trial all persons reasonably accused of having committed war crimes . . . mere deportation and exclusion of aliens is hardly responsive to this nation's and the President's peremptory duty to seek out and initiate prosecution of all persons reasonably accused of war crimes or, alternatively – as the only viable alternative – to extradite them for the purpose of prosecution elsewhere.

Jordan Paust, *International Law As Law of The United States* 408 (1996) [hereinafter Paust, *International Law*].

n3 M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 513 (1992).

Universal jurisdiction makes all states on the globe competent to judge war criminals, and the indirect enforcement scheme based on the maxim *aut dedere aut judicare* should be a solution for those cases in which states were not willing to prosecute. There will normally be at least two states which are directly confronted with the war criminal and thus obliged to take action—either the state where the suspect is found, or the state to which he is extradited.

Christine Van den Wyngaert, *War Crimes, Genocide and Crimes Against Humanity – Are States Taking National Prosecutions Seriously?*, in *International Criminal Law* 229 (2d ed. 1999). See generally M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare, The Duty To Extradite Or Prosecute In International Law* (1995).

n4 Hugo Grotius, *De Jure Belli Ac Pacis*, Book II, Chap. XX (1624).

n5 Harvard Research in Int'l Law, *Jurisdiction with Respect to Crime*, 29 *A.J.I.L.* 435 (*Supp.* 1935).

n6 L. Leblanc, *The United States And The Genocide Convention* 180 (1991).

n7 See, e.g., Barry E. Carter & Phillip R. Trimble, *International Law* 735 (2d ed. 1995); Lung-chu Chen, *An Introduction To Contemporary International Law* 239 (1989); J.G. Starke, *Introduction To International Law* 234 (1989); Ian Brownlie, *Principles of Public International Law* 304-05 (1979).

n8 See *Punishment for War Crimes; The Inter-allied Declaration on the Punishment of War Crimes*, signed on Jan. 13, 1942, at Saint James Palace, London. H.M., Stationary Office, London, 1942; *Moscow Declaration on Atrocities*, Oct. 30, 1943, Information Paper n.1, United Nations Information Organisation (London), reprinted in *AM. J. INT'L L.* 5 (1994); *London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 82 U.N.T.S. 279 (Nuremberg); Law No. 10 of the Control Council for Germany, Dec. 20, 1945, Official Gazette of the Control Council for Germany, 1946, n.3.

n9 See *Resolution of the Extradition and Punishment of War Criminals*, 1946 U.N.Y.B. 66; *Convention on the NonApplicability of Limitations to War Crimes and Crimes Against Humanity*, adopted by Resolution 2391 (XXIII) of the United Nations General Assembly on 26 Nov. 1968, 8 *I.L.M.* 68 (1969); Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 *Van. J. Transnat'l. L.* 1, 25-26 nn.92-93 (1978).

n10 G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8429 (1971); G.A. Res. 3074, U.N. GAOR, 28th Sess. Supp. No. 30, at 78, U.N. Doc. A/9030 (1973); G.A. Res. 96, U.N. Doc. A/64, at 188 (1946).

n11 See *Restatement (Third) On The Foreign Relations Law of The United States § 404* (1987) (emphasis added) (hereinafter *Restatement*). See also Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law*, 11 *Hous. J. Int'l. L.* 337, 340 (1989) [hereinafter *Universality*] (universal enforcement recognized for "crimes against mankind," "crimes against the whole world," the "enemies of the whole human family" and those persons who are "hostes humani generis").

n12 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 *U.S.T.* 3114, 75 U.N.T.S. 31 [hereinafter *Geneva Convention I*]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 *U.S.T.* 3217, 75 U.N.T.S. 85 [hereinafter *Geneva Convention II*]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 *U.S.T.* 3316, 75 U.N.T.S. 135 [hereinafter *Geneva Convention III*]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 *U.S.T.* 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention IV*].

n13 Geneva Convention I, *supra* note 12, art. 49, 6 *U.S.T.* at 3146, 75 U.N.T.S. at 62 (emphasis added); Geneva Convention II, *supra* note 12, art. 50, 6 *U.S.T.* at 3250, 75 U.N.T.S. at 116 (emphasis added); Geneva Convention III, *supra* note 12, art. 129, 6 *U.S.T.* at 3418, 75 U.N.T.S. at 236 (emphasis added); Geneva Convention IV, *supra* note 12, art. 146, 6 *U.S.T.* at 3616, 75 U.N.T.S. at 386 (emphasis added).

n14 Although the delay in adopting implementing legislation is inexcusable, the United States was by no means alone in its inaction. For example, Canada, in fact, did not adopt implementing legislation until 1965, after it had ratified the four Geneva Conventions. See Christopher A. Amerasinghe, *The Canadian Experience*, in *International Criminal Law*, Vol. III, 243, 248 (2d. ed. 1997). Following the creation of the Geneva Conventions:

States seemed, until recently, to have lost interest in adjudicating war crimes when it came to adopting domestic statutes implementing the Geneva Conventions. Whereas these conventions, in general terms, obliged states to provide legislation to enable them to prosecute and punish war criminals, few states adapted their legislation in such a way that traditional barriers to such prosecutions would be removed. For example, hardly any common law jurisdictions introduced universal jurisdiction, allowing their courts to try war criminals that were not their nationals and that had committed their crimes outside their territorial boundaries.

Van den Wyngaert, *supra* note 3, at 230. This reluctance fortunately began to change in the 1980s, primarily due to the realization that individuals who committed atrocities during World War II were peacefully living in the territories of the victorious Allied Powers.

n15 A state that captures a perpetrator of war crimes either may "surrender the alleged criminal to the state where the offense was committed, or . . . retain the alleged criminal for trial under its own legal processes." In *re List*, 11 *Trials of War Criminals* (1946-1949) at 1242 (U.S. Mil. Trib.-Nuremberg 1948).

n16 "There is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity." Willard B. Cowls, *Universality of Jurisdiction over War Crimes*, 33 *Calif. L. Rev.* 177, 194 (1945).

n17 One commentator has noted that:

It is of interest more generally that universal jurisdiction, that competence of states recognized under international law which is necessarily interrelated with enforcement duties, provides jurisdiction to enforce sanctions against crimes that have an independent basis in international law. Universal jurisdiction is thus technically a jurisdictional competence to enforce, and enforcement is actually made on behalf of the international community.

Paust, *International Law*, supra note 2, at 407.

n18 This has prompted one commentator to note that:

By deporting war criminals or criminals against humanity, the United States expresses its moral disapproval of their crimes, but does little to deter them. Neither does it discourage a fugitive criminal from seeking a safe haven in this country, especially when, if he were caught, he could at best choose the country to which he would be deported and at worst delay his deportation or extradition through long judicial processes.

J. Martin Wagner, Note, *U.S. Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience*, 29 *Va. J. Int'l. L.* 887, 934-35 (1989). Professor Paust has argued that :

The United States has the competence under federal law to prosecute any war crime either in a federal district court or in an ad hoc military commission, the latter at least in time of war until peace is formalized. Thus, former Nazi war criminals can be prosecuted in the United States if the executive branch has the political will to prosecute.

Paust, *International Law*, supra note 2, at 409. See also Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 *Case W. Res. J. Int'l L.* 283, 301-02 (1986) [hereinafter *Aggression*]; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 *Tex. L. Rev.* 6 (1971) [hereinafter *After My Lai*], reprinted in *The Vietnam War and International Law*, Vol. 4, 447 (Richard A. Falk ed. 1976).

n19 See United Nations Convention on the Law of the Sea, done in Montego Bay, Dec. 10 1982, reprinted in *The Law of the Sea*, U.N. Doc. A/CONF. 62/122.

n20 See Convention on the High Seas, Apr. 29, 1958, 13 *U.S.T.* 2312, 450 U.N.T.S. 82.

n21 Supra note 19 and accompanying text.

n22 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, reprinted in 23 *I.L.M.* 1027 (1984), as modified, 24 *I.L.M.* 535 (1985).

n23 See International Convention Against the Taking of Hostages, Dec. 4, 1979, U.N. G.A. Res. 34/146, 34 U.N. GAOR Supp. No. 39, U.N. Doc. A/C.6/34 L.23, reprinted in 18 *I.L.M.* 1456 (1979), art. 8(1).

n24 See Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 22 *U.S.T.* 1641, 860 U.N.T.S. 105, reprinted in 10 *I.L.M.* 133, 134 (1971), art. 7; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 *U.S.T.* 565, 974 U.N.T.S. 177, reprinted in 10 *I.L.M.* 1151, 1154, at art. 7 (1971).

n25 See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 *U.S.T.* 1975, 1035 U.N.T.S. 167, G.A. Res. 3166, U.N. GAOR 27th Sess., Supp. No. 10, U.N. Doc. A/Res/3166, at art. 7 (1974).

n26 See also Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, 1015 U.N.T.S. 243, G.A. Res. 3068, U.N. GAOR 28th Sess., Supp. No. 30 at 75, U.N. Doc. A/Res/3068 (1973), reprinted in 13 *I.L.M.* 50 (1974). This Convention also has a similar provision, although universal jurisdiction is permissive rather than mandatory. Persons charged with the crime of apartheid "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal. . . ." *Id.* art. 5, at 54. However, the United States is not a party to this Convention. See *id.* at 50.

n27 Supra note 23 and accompanying text.

n28 See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

n29 "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction. . . ." *Id.* at art. 6.

n30 "The reference in Article 6 to territorial jurisdiction . . . is not exhaustive. Every sovereign State may exercise its existing powers within the limits of customary international law . . ." *Att. Gen. of Israel v. Eichmann*, 36 *I.L.R.* 18, 39 (*Isr. Dist. Ct. Jm.* 1961), *aff'd*, 36 *I.L.R.* 277, 342 (*Isr. S. Ct.* 1962).

n31 Restatement, *supra* note 11, § 404.

n32 See 18 *U.S.C.* § 1091 (1994).

n33 See *Tel-Oren v. Libyan Arab Republic*, 726 *F.2d* 774, 781, 788 (*D.C. Cir.* 1984) (*per curiam*) (Edwards, J., concurring) (voting to dismiss the action, but making several references to domestic jurisdiction over extraterritorial offenses under the universality principle), *cert. denied*, 470 *U.S.* 1003 (1985); *Filartiga v. Pena-Irala*, 630 *F.2d* 876, 890 (*2nd Cir.* 1980) (analogizing the defendant, a Paraguayan official accused of committing torture, to a pirate and slave trader); *United States v. Yunis*, 681 *F. Supp.* 896 (*D.D.C.* 1988) (jurisdiction proper over defendant prosecuted for hijacking and destruction of civilian aircraft under, *inter alia*, universal jurisdiction); *Von Dardel v. Union of Soviet Socialist Republics*, 623 *F. Supp.* 246, 254 (*D.D.C.* 1985) (referring to the "concept of extraordinary judicial jurisdiction over acts in violation of significant international standards . . . embodied in the principle of 'universal' violations of international law."), *vacated*, 736 *F. Supp.* 1 (*D.D.C.* 1990); *In re Demjanjuk*, 612 *F. Supp.* 544, 555 (*N.D.C. Ohio*) (holding that Israel's jurisdiction to prosecute alleged Nazi guard "conforms with the international law principle of 'universal jurisdiction'."), *aff'd sub nom. Demjanjuk v. Petrovsky*, 776 *F.2d* 571 (*6th Cir.* 1985), *cert. denied*, 475 *U.S.* 1016 (1986); *United States v. Layton*, 509 *F. Supp.* 212, 223 (*N.D. Cal.*) (recognizing universal jurisdiction to define and punish terrorist attacks against internationally protected persons), *appeal dismissed*, 645 *F.2d* 681 (*9th Cir.* 1981), *cert. denied*, 452 *U.S.* 972 (1981). See also Alien Tort Statute, 28 *U.S.C.* § 1350 (1988) (allowing U.S. courts to assert universal jurisdiction over aliens who have violated the law of nations).

n34 509 *F. Supp.* 212 (*N.D. Cal.*), *appeal dismissed*, 645 *F.2d* 681 (*9th Cir.* 1981), *cert. denied*, 452 *U.S.* 972 (1981).

n35 *Id.* at 223.

n36 The Allies established the IMT through the London Agreement, Aug. 8, 1945, 59 *Stat.* 1544, 82 *U.N.T.S.* 280, which later annexed the Charter of the International Military Tribunal, 59 *Stat.* 1546, 82 *U.N.T.S.* 284.

n37 Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 *Tex. L. Rev.* 785, 807 (1988).

n38 At least one scholar has stated that the postwar tribunals established "war crimes charges as the chief example of the modern application of the universality principle." Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trails of American Airmen*, 15 *Loy. L. Rev.* 43, 53 (1968). See also *Demjanjuk*, 776 *F.2d* 571, at 582 (stating "it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdictions."), *cert. denied*, 475 *U.S.* 1016 (1986).

n39 *United States v. Wilhelm List*, 11 *Trials of War Criminals Before the Nuremberg Military Tribunals* 757, 1241 (1948).

n40 *The Hadamar Trial*, 1 *L. Rep. Trials War Crimes*, 46, 53 (*U.S. Mil. Comm'n, Wiesbaden F.R.G.* 1945).

n41 *Trial of Lothar Eisentrager*, 14 *L. Rep. Trials of War Crimes* 8, 15 (*U.S. Mil. Comm'n, Shanghai* 1947).

n42 This is not to say that punishing war criminals has found acceptance throughout the world, or necessarily emerged as an easy prospect. At least with respect to war crimes committed during the Holocaust, several states have encountered difficulties regarding the statute of limitations. "In August 1996, an Italian court acquitted Priebe, a former SS captain who in a televised interview admitted to the massacre of 335 civilians in Italy in 1944. The acquittal was based on the Italian statute of limitations. And, in the extradition proceedings in Argentina, statutory limitations had likewise been the crucial question." Van den Wyngaert, *supra* note 3, at 228-29. This is primarily a problem in civil law jurisdiction as common law jurisdictions typically do not impose a statutory limitation on capital crimes such as murder. Over the years steps have been taken in order to overcome the civil law problem. See generally *United Nations Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity*, adopted by Resolution 2391 (XXIII) of the United Nations General Assembly on 26 Nov. 1968, 8 *I.L.M.* 68 (1969); *European Convention on the Non-applicability of Limitations to Crimes against Humanity and War Statutory Crimes*, Jan. 25, 1974, E.T.S. No. 82, reprinted

in *13 I.L.M. 540 (1974)*.

n43 Nazis and Nazis Collaborators Punishment Act, Law No. 64, 4 Laws of the State of Israel 154 (5710-1949/50), reprinted in United Nations, 1950 Y.B. Eur. Conv. on H.R. 163.

n44 Att. General of Isr. v. Eichmann, *36 I.L.R. 18, 26* (Isr. Dist. Ct.-Jerusalem 1961), aff'd, *36 I.L.R. 277 (Isr. S. Ct. 1962)*.

n45 1 L. Rep. Trials War Crimes 35 (British Mil. Ct. for the Trials of War Criminals, Almedo, Neth. 1945).

n46 The Hadmar Trial, *supra* note 40, at 53.

n47 1 L. Rep. Trials War Crimes 93 (British Mil. Ct. for the Trials of War Criminals, Hamburg 1946).

n48 Jane L. Garwood-Cutler, The British Experience, in *International Criminal Law III* 325; War Crimes Act 1991, Public General Acts and Measures of 1991 at I-83 (section numbers omitted); see also Eva Steiner, Prosecuting War Crimes in England and in France, *Crim. L. Rev.* 180-188 (1991); A.T. Richardson, War Crimes Act 1991, *Mod. L. Rev.* 73-95 (1992).

n49 Ireland has also passed implementing legislation.

n50 See Garwood-Cutler, *supra* note 48, at 329.

n51 Australian War Crimes Amendment Act, 1988, 1989 Aust. Acts 926 (Act No. 3, of 1989, assented to Jan. 25, 1989). See generally 119 Parl. Deb., S. 497 (1987); 157 Parl. Deb., H.R. 1613 (1987).

n52 Australian War Crimes Amendment Act, 1988, § 9. The Act amended the provisions of the War Crimes Act of 1945, which allowed "war crimes to take place in military courts in respect of crimes committed in the Pacific region during the Second World War by the Japanese." Graham T. Blewitt, The Australian Experience, in *International Criminal Law* 304 (M. Cherif Bassiouni, 2d ed., 1999).

n53 See Act to Amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act, S.C. 1987, ch. 37, Can. Stat. 1107.

n54 *Id.* § 1.91, 1987 Can. Stat. at 1109. The Act states:

The provisions pertaining to the Immigration Act, prohibited the entry into Canada of persons who had committed an act which constituted a war crime or crime against humanity as those terms were defined in the Criminal Code and which would have constituted an offense against the laws of Canada at the time of the act or omission. The Citizenship Act was amended to prohibit the granting of citizenship to a person who was under investigation for, was charged with, was on trial for, or was a party to an appeal relating to, or was convicted of an offense which constituted a war crime or crime against humanity as those terms were defined in the Criminal Code.

Amerasinghe, *supra* note 14, at 256; see also L.C. Green, Canadian Law, War Crimes and Crimes Against Humanity, *Brit. Y.B. Int'l L.* 217-235 (1988).

n55 This was not Canada's first statute permitting the prosecution of war crimes. In fact, just after World War II the War Crimes Act was passed by Parliament in 1946. See War Crimes Act, 1946, S.C. 1946, c. 73. However, not long after passage, and having only tried four persons, the Canadians ceased prosecutions under the Act, although it is still in force today. See Amerasinghe, *supra* note 14, at 246.

n56 See *id.* at 258.

n57 *Id.* at 271.

n58 *Id.* at 272.

n59 See Strafgesetzbuch, § 478, at para. 1 (Fred B. Rothman & Co. 1966) (F.R.G.).

n60 Van den Wyngaert, *supra* note 3, at 231 n.25 (discussing the 1962 older version of the Strafgesetzbuch, or penal code of the Federal Republic of Germany, at § 6).

n61 See Statute of 16 June 1993 on the Suppression of the Grave Breaches of the International Conventions of Geneva of Aug. 12, 1949 and of the Additional Protocols I and II to these Conventions of June 7, 1977, *Moniteur-Staatsblad*, Aug. 5, 1993.

n62 See Van den Wyngaert, *supra* note 3, at 232 (citations omitted).

n63 See War Crimes Act of 1995; Hearings on H.R. 2587 Before the Subcomm. On Immigration and Claims of the Comm. on the Judiciary, 154th Cong., 2d. Sess. 7-8 (1996) (Statement of Captain Michael P. Cronin) (hereinafter Hearings).

n64 See Hearings, *supra* note 63, at 2 (statement of Congressman Lamar Smith). As a result of this gap, Congressman Lamar Smith noted that there existed a large number of nonprosecutable crimes. See *id.* These included "situations where American prisoners of war are killed or forced to serve in the army of their captors or where American doctors on missions of mercy in foreign war zones are kidnapped or murdered. War Crimes are not a thing of the past, and Americans can all too easily fall victim to them." *Id.* (quoting statement of Congressman Lamar Smith).

n65 *Id.*

n66 See Hearings, *supra* note 63, at III. The witnesses included Michael J. Matheson, Principal Deputy Legal Adviser, Department of State, the late John H. McNeil, Senior Deputy General Counsel (International Affairs and Intelligence), Office of General Counsel, Department of Defense, Honorable Robinson O. Everett, Professor of Law, Duke University School of Law and Senior Judge, U.S. Court of Military Appeals for the Armed Forces, Monroe Leigh, Steptoe & Johnson and former Legal Adviser, Department of State, and the author. Professor Alfred P. Rubin of the Fletcher School of Law and Diplomacy submitted written testimony opposing the legislation.

n67 See Hearings, *supra* note 63, and accompanying text. The Subcommittee was informed by the representative of the Department of State that when the Congress first considered implementation of the Geneva Conventions, "the Executive Branch advised that implementing legislation was not required, since offenders could be prosecuted under federal and state penal statutes (in the case of crimes within United States jurisdiction) or the Uniform Code of Military Justice (with respect to crimes committed abroad). However, over the years, U.S. courts have handed down a series of decisions which cast doubt on the constitutionality of the exercise by military tribunals of criminal jurisdiction over the acts abroad of various categories of persons who are not in active military service." Hearings, *supra* note 63, at 11-12 (Statement of Michael J. Matheson). Of course, those in military service are fully capable of being prosecuted by the United States, even if their crimes are committed against civilians. The court-martial and conviction of Lieutenant William Calley for commission of war crimes against Vietnamese civilians during the Vietnam War is a perfect example. See *United States v. Calley*, 46 CMR 1131 (1973), *aff'd*, 22 USCMA 534, 48 CMR (1973).

n68 For the full text of the adopted version of the bill, see app. 1.

n69 See H.R. 1348, 105th Cong. (1997). On April 16, 1997, Congressman Walter Jones, the original sponsor of the War Crimes Act of 1996, introduced H.R. 1348 or the "Expanded War Crimes Act of 1997." The measure passed the House of Representatives on July 28, 1997 and was referred to the Senate Committee on the Judiciary.

n70 See generally *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, (May 7, 1997).

n71 In response to the suggestion by the author to amend the Proxmire Act, the United States Department of State informed Congressman Bill McCollum that "United States law currently provides authority even beyond that required by the U.N. Convention on the Prevention and Punishment of the Crime of Genocide." Hearings, *supra* note 63, at 46 (letter dated July 15, 1996 from Barbara Larkin, Acting Assistant Secretary, Legislative Affairs). The Proxmire Act permits the United States to prosecute Americans who commit acts of genocide abroad while the Convention only requires assertion of jurisdiction based on the principle of territoriality. See *id.* Therefore, the State Department concluded that "although expansion of jurisdiction over genocide committed outside the United States by non-U.S. nationals warrants further serious consideration, in view of the short legislative calendar remaining in this Congress, the Department of State would not propose such expansion at this time." *Id.* at 47.

n72 See, e.g., Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1202, 100 Stat. 853 (1986), codified at 18 U.S.C. § 2331 et seq. (citing certain terrorism offenses).

n73 For example, in 1989, the European Court of Human Rights refused to extradite an accused murderer to the United States because the court found the prospect of eight years on death row, due to the nature of appeals in this country, should

he be sentenced to death, would be "inhuman or degrading treatment or punishment." The Soering Case, 28 *I.L.M.* 1063 (1989).

n74 See, e.g., *Filartiga v. Pena-Irala*, 630 *F.2d* 876 (2nd Cir. 1980) (Action against Paraguayan official accused of torture).

n75 H.R. Rep. No. 518 (1996). The legislation came about primarily through efforts to assist the families of the victims of the terrorist bombing of Pan Am Flight 103.

n76 28 *U.S.C.* § 1602 et seq. (1988).

n77 The amendment created § 1605(a)(7) of Title 28 of the United States Code and permits jurisdiction for lawsuits against terrorist states. Prior to the passage of this amendment, cases against foreign states for terrorist acts or other violations of the law of nations committed outside of the territory of the United States against Americans were dismissed for lack of jurisdiction. See, e.g., *Cicippio v. Islamic Republic of Iran*, 30 *F.3d* 164 (*D.C. Cir.* 1994), cert. denied, 513 *U.S.* 1078 (1995) (holding that no jurisdiction existed over Iran for holding Americans hostage); *Smith v. The Socialist People's Libyan Arab Jamahiriya*, 886 *F. Supp.* 306 (*E.D.N.Y.* 1995) (Victims of Pan Am Flight 103 were without jurisdiction to seek civil remedies against Libya), aff'd, 101 *F.3d* 239 (2d Cir. 1996), cert. denied, 17 *U.S.* 394 (1997). Following the passage of the 1996 FSIA amendments these same victims refilled their lawsuits and overcame the jurisdictional impediment that previously existed. See, e.g., *Rein v. Libya*, 995 *F. Supp.* 325 (*E.D.N.Y.* 1998). Other victims also pursued remedies, and many were successful, albeit through default judgments, in recovering damages. See, e.g., *Alejandre v. Republic of Cuba*, 996 *F. Supp.* 1239 (*S.D. Fla.* 1997).

n78 See Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified at 28 *U.S.C.* § 1350 (1988)).

n79 *Id.*

n80 See, e.g., *Doe v. Karadzic*, 70 *F.3d* 232 (2nd Cir. 1995) (action against Serbian leader for genocide, war crimes and crimes against humanity); *Filartiga v. Pena-Irala*, 630 *F.2d* 876 (2d Cir. N.Y. 1980) (action against Paraguayan official accused of torture); *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (*S.D.N.Y.* April 9, 1996) (action against Rwandan political leader for massacre of thousands).

n81 Pub. L. No. 102-2567, 106 Stat. 73 (1992), codified at 28 *U.S.C.A.* § 1350.

n82 See generally Cheryl Wittenauer, Nations Haggles Over Criminal Court, Associated Press, Mar. 1, 2001; Jerome Socolovsky, Landmark War Crimes Trial Ends, Associated Press, Jan. 26, 2000; Key Dates in Dusan Tadic Trial, Associated Press, Jan. 26, 2000; Laurence Arnold, Terrorism Victims Seeking Damages, Associated Press, Oct. 27, 1999; David Ho, U.S. To Pay Victims of Terrorism, Associated Press, Oct. 22, 2000; David Pace, Terrorism Victims Shun Damage Limits, Associated Press, Nov. 22, 2000; Rachel La Corte, Miami Families Awarded Cuban Assets, Associated Press, Feb. 14, 2001; David Ho, Former Hostage Suing Iran Testifies, Associated Press, Feb. 14, 2001; Laurie Asseo, Ex-Iranian Hostage Awarded \$341M, Associated Press, Mar. 25, 2000; Tom Raum, Anderson Files Lawsuit Against Iran, Associated Press, Feb. 15, 2000.

n83 See *id.*

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