THE INTERNATIONAL CRIMINAL COURT: AN EFFECTIVE MEANS OF DETERRENCE?

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In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in the struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.[2]

De Oppreso Liber [To Liberate the Oppressed][3]

I. Introduction

The preceding lines, taken from two very different organizations, demonstrate that many in the world share deep concern and personal commitment for reducing and preventing man-made humanitarian disasters. The first, a vision statement by United Nations (U.N.) Secretary General Kofi Annan, suggests the necessity of an international criminal court to punish the past conduct of oppressors. The second, the motto of the U.S. Army Special Forces, represents a belief that the present application of military force, rather than judicial punishment after the fact, is a legitimate response to rid the world of oppression. Although the respective methodologies of these two organizations vary tremendously, one judicial and the other military, history has shown that both are vital to the preservation of

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2. Press Release, Statement of Secretary-General Kofi Annan Before the International Bar Association in New York (June 12, 1997), UN. Doc. SG/SM/6257 (1997), *available at* http://www.un.org/News/Press/docs/1997/ 19970612.sgsm6257.html.

3. The regimental motto of the U.S. Army Special Forces (Green Berets). U.S. Army Total Personnel Command, Institute of Heraldry, *Branches of Service: Insignia and Plaques*, *at* http://www.perscom.army.mil/TAGD/ tioh/branches/sf.htm.

peace and security. Producing a synergistic effect when combined, both approaches are indispensable in preventing human conflict that requires a very broad-brush stroke to address the numerous facets of human behavior.[4]

Both the U.N. vision and the Special Forces motto imply that tyrants must be thwarted. The judicial approach of the U.N. provides that, through aggressive justice, potential criminals may be deterred from committing acts of aggression or massive human rights violations if they realize they cannot act with impunity. While the military approach would agree that oppressors should not be able to act without consequences, it would add that many tyrants can only be controlled with a credible threat of force.

In reality, both the law enforcement and the military responses add to the concept of system-wide deterrence. However, each modality plays a distinct role, and neither should be permitted to negatively impact the other. This article argues that the present theory, which assumes that the answers for world peace derive primarily from judicial sources, is being overemphasized to the detriment of the potential ability, and occasional requirement, to use military force. First, over-reliance on justice ignores the obvious fact that potential victims are best served if they are not allowed to become victims in the first place. Courts may be effective in handling situations after the fact, but until they possess the deterrent capabilities needed to control rogue regimes, they should not be permitted to displace or weaken the military option. Second, if a court lacks the ability to actually enforce its pronouncements, rogue regimes will simply ignore the court and will not be deterred.

The military remains the most credible and effective form of deterrence in the international arsenal of weapons to prevent war and massive human rights abuses. Within the international military community, the U.S. armed forces are better prepared than any other entity to deter aggressive regimes and their leaders. Therefore, any move by the international community to sacrifice on the alter of justice the deterrent capability of the armed forces of the United States and its allies cannot be accepted.

However well-intentioned advocates for the International Criminal Court (ICC) may be, the proposed court represents a significant threat to the national security of the United States and its allies as currently formu-

4. *See generally* THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1999) [hereinafter NATIONAL SECURITY STRATEGY].

lated. There is certainly room, and arguably a need, for a permanent international criminal court. However, the provisions of the ICC[5] simply place too many significant risks on nations and their armed forces that are equally determined to rid the world of oppression. Political prosecutions before the ICC are so probable that the forces of good may be deterred from taking on the forces of evil. Since the forces of evil will recognize the deterrent influence of such politically based prosecutions on potential responders, the leaders of these regimes may make entirely rational decisions to commit acts of aggression, knowing they can act without fear of military intervention from foreign forces.

War is not as clean as we would like it to be, and it defies precise legal scrutiny. It involves the use of force and a level of destruction that would be considered both illegal and immoral during times of peace.

> War consists largely of acts that would be criminal if performed in time of peace—killing, wounding, kidnapping, and destroying or carrying off other people's property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.[6]

However distasteful the use of military force may be, the alternative, allowing rogue regimes to act with impunity, is far more disastrous. The injury to victims of such regimes may far exceed the damage inflicted by military forces defending against oppression. Holding warriors on the battlefield to peacetime-like criminal law standards is simply unrealistic. This is particularly so if the court has the potential of rendering politically-based judgments.

This is not to suggest that rules should not exist on the battlefield. Humanity is certainly better off because of the laws of war.[7] Millions, perhaps billions, have been spared because of their effectiveness.[8] Moreover,

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5. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute].

6. United States v. von Leeb, XI TRIALS OF WAR CRIMINALS 488 (1950) (The High Command Case).

7. Telford Taylor, *War Crimes, in* WAR, MORALITY, AND THE MILITARY PROFESSION 377 (Malham M. Wakin ed., 1986).

8. *Id*. at 375.

these battlefield rules of restraint diminish the "corrosive effect of mortal combat on the participants" themselves.[9] Units adhering to the laws of war have fewer problems with good order and discipline, and when soldiers from these units return home from combat, they are more likely to do so with their societal values still intact.[10]

Humanity has a right to demand that soldiers do all they can to limit the destructive forces of combat. Soldiers must be trained to recognize the difference between proper and improper applications of force. However, it is both unrealistic and dangerous to scrutinize and judge in a court of law their every action on the battlefield.

> For the common soldier, at least, war has the feel, the spiritual texture, of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can't tell where you are, or why you're there, and the only certainty is overwhelming ambiguity . . . . You lose your sense of the definite, hence your sense of truth itself . . . .[11]

Holding the common soldier criminally culpable for even the smallest violation of the laws of war may distract the international community from the real threat to society and world peace: aggressive and oppressive regimes.

This article briefly describes current theories in war avoidance. It then focuses on the "democratic peace" and deterrence theory as the most statistically-sound paradigm for avoiding conflict. It next examines international criminal tribunals in an attempt to determine their place and effec-

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9. *Id*. at 377. Taylor explains:

> Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers.

Id.

10. *Id*.

11. TIM O'BRIEN, THE THINGS THEY CARRIED 88 (1990).

tiveness in deterring criminal state actors at the international level. Finally, it looks at the proposed International Criminal Court and asks whether the court will contribute to the concept of systemic deterrence. The article concludes that, in its currently proposed format, the court has the potential to deter the wrong parties.

This article maintains that becoming a party to the ICC would run counter to the national security interests of the United States. However, now that the United States has signed the treaty creating the court,[12] this article proposes specific changes to the treaty necessary to adequately protect U.S. interests. Although the United States would be best served if it did not ratify the treaty, at a bare minimum, these absolutely vital changes must be agreed upon by the international community prior to U.S. ratification.

II. The Prevention of Hostilities

War has been with mankind since man began recording history. In 1968, one scholar estimated that "there had been only 268 years free of war in the previous 3421 years."[13] To successfully prevent war, one must first examine its causes. Numerous theories have been suggested over the years. Theorists tend to cite one or more of the following as the causes of war:

(1) Specific disputes among nations;
(2) Absence of dispute settlement mechanisms;
(3) Ideological disputes;
(4) Ethnic and religious differences (a current emphasis);
(5) Communication failures;
(6) Proliferation of weapons and arms races;
(7) Social and economic injustice; and
(8) Imbalance of power (or paradoxically, balance of power).[14]

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12. Rome Statute, *supra* note 5. On 31 December 2000, President Clinton directed Ambassador David J. Scheffer, on behalf of the United States, to sign the treaty, which seeks to create a permanent standing International Criminal Court. Thomas E. Ricks, *U.S. Signs Treaty on War Crimes Tribunal*, WASH. POST, Jan. 1, 2001, at A01.

13. DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 4 (1995). Kagan points out that war is caused by a failure of non-aggressive states to take the actions necessary to preserve the peace, and "peace does not keep itself." *Id.* at 73-74, 212, 567.

Having determined the potential causes, workable responses to these causes must be fashioned. Professor John Norton Moore lists the most commonly accepted theories for preventing war:

(1) Diplomacy;
(2) Balance [of] power;
(3) Third-party dispute settlement;
(4) Collective security;
(5) Arms control;
(6) Functionalism;
(7) Increasing commercial interactions;
(8) Advances in military technology, thereby making war more deadly;
(9) World Federalism;
(10) Rationalism;
(11) Pacifism and non-violent sanctions;
(12) "Second track" diplomacy; and
(13) Resolving underlying "causes" (poverty, racism, ethnic differences [and others]).[15]

It is beyond the scope of this article to examine all of the causational and response theories of war. However, Professor Moore, who spent years studying the causes of war and the various theories for preventing it,[16] found that all of the above-listed theories regarding the causes of war contain some element of truth. And yet, Moore was convinced that none of these cause and avoidance theories strongly correlated with any of the available empirical data to definitively explain why wars occur.[17] He concluded: "Major wars occur as a synergy between a regime initiating an aggressive attack (typically non-democratic), and an absence of effective system-wide deterrence."[18] In other words, wars happen because of gov-

14. John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 819 (1997). Professor Moore is the Walter L. Brown Professor of Law and Director of the Center for National Security Law at the University of Virginia School of Law.

15. *Id*. at 819, 820.

16. In addition to his work at the University of Virginia, among other significant positions in government and in academia, Professor Moore served as the initial Chairman of the Board of Directors of the United States Institute of Peace created by the United States government in 1985. The Institute has funded research producing significant data and analysis that Professor Moore has used in his work.

17. Moore, *supra* note 14, at 820.

18. *Id*. at 840.

ernmental failure at the national level, and a lack of systemic deterrence at the international level.

A. The Democratic Peace

Although the idea is not new, there is now significant data supporting the international relations theory commonly referred to as the "Democratic Peace." This theory holds that democracies are not aggressive, generally, and that the use of force by democracies tends to be defensive in nature.[19] Professor Bruce Russet explains:

> [A] striking fact about the world comes to bear on any discussion of the future of international relations: in the modern international system, democracies have almost never fought each other . . . . By this reasoning, the more democracies there are in the world, the fewer potential adversaries we and other democracies will have and the wider the zone of peace.[20]

If proponents of the Democratic Peace theory, such as Professors Moore and Russet, are correct, then any long-term war avoidance strategy should

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19. IMMANUEL KANT, ETERNAL PEACE (W. Hastie trans. 1914) (1795); Moore, *supra* note 14, at 822 (citing BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993); SPENCER WEART, PEACE AMONG DEMOCRATIC AND OLIGARCHIC REPUBLICS (1994); MICHAEL DOYLE, KANT, LIBERAL LEGACIES AND FOREIGN AFFAIRS, PHIL. PUB. AFF. (1983); JAMES LEE RAY, DEMOCRACY AND INTERNATIONAL CONFLICT: AN EVALUATION OF DEMOCRATIC PEACE PROPOSITION (1994) (unpublished manuscript on file with Professor Moore); SPENCER WEART, NEVER AT WAR: WHY DEMOCRACIES WILL NOT FIGHT ONE ANOTHER (1994) (unpublished manuscript on file with Professor Moore)). Professor Moore asserts that the following principle elements are present in true democracies:

> 1) Government of the people, by the people, and for the people (e.g., periodic free elections as the method for selecting government leaders);
> 2) Some form of effective separation of powers or checks and balances;
> 3) Representative democracy and procedural and substantive limits on governmental action against the individual (the protection of human freedom and dignity);
> 4) Limited government and possibly federalism; and
> 5) Preferably review by an independent judiciary as a central mechanism for constitutional enforcement.

Moore, *supra* note 14, at 862 (citing John Norton Moore, *The Rule of Law: An Overview*, Paper Presented to the Seminar on the Rule of Law, Moscow and Leningrad, USSR (March 19-23, 1990)).

include attempts to democratize the nations of the world. Although some may view this strategy as a form of *pax Americana* or as a culturally-insensitive response, neither is the case. First, democracy is not a uniquely American concept. Second, if the empirical data supports democracy as a paradigm for war avoidance, then such a model should be followed regardless of its origins.

The data supporting the Democratic Peace theory is powerful and should be considered. For example, Professor Rudy Rummel found that if all major conflicts from 1916 to 1991 are considered, not once did a democracy fight another democracy. In contrast, there were 198 wars between non-democracies and 155 conflicts between non-democracies and democracies.[21] These statistics suggest three conclusions: first, democracies fight significant numbers of wars against non-democracies; second, if large numbers of the world's nations were to move toward democracy, there would be fewer wars; and, third, if the entire world were to democratize, there would be virtually no war. These statistics fail to explain, however, why democracies fight non-democracies, but not other democracies. As will be discussed, the explanation appears to derive from non-democratic regimes' tendency to be aggressive and democratic regimes' tendency to respond with force to such aggression.

Although a detailed explanation as to why democracies are so successful in preventing war is beyond the scope of this article, Professor Moore theorizes that the structure of democratic governmental systems themselves help prevent war. Conversely, in non-democracies there is a lack of proper incentives at the national and international levels for these regimes and their elites to shun war.[22] Some adherents of the Democratic Peace theory argue that democracies are slower to go to war because they have greater institutional restraints through the diffusion of power; some even assert that it is the democratic culture itself that leads to less aggression.[23] Professor Moore contends that non-democracies go to war owing to "government failure" in totalitarian regimes.[24] Based on the theory of "public choice,"[25] the regime elites are able to "externalize the costs" on

20. Moore, *supra* note 14, at 823 (quoting RUSSETT, *supra* note 19, at 4). Although beyond the scope of this article, it appears that if nations are serious about advancing human rights, increasing the world standard of living, strengthening national and global economies, reducing damage to the environment, and famine avoidance, democracy should become the governmental structure of choice. There is data that suggests that not only are democracies able to have a positive impact on war avoidance; they are particularly well suited to address these other issues as well. *Id.* at 826-32.

21. RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT 2 (1994).

others, while reaping all the benefits of aggression.[26] For example, if the international community elects to impose economic sanctions against an aggressor rather than resorting to armed response,[27] such an embargo may cause significant suffering among the aggressor's people, while the regime's elites continue to live comfortably.

If the leader of a totalitarian regime decides to attack a neighboring country because the neighboring country possesses valuable industries and natural resources, the tyrant can externalize the cost of the operation on the actual combatants while avoiding combat himself. Moreover, because a

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22. *See generally* Moore, *supra* note 14, at 833-38. For an excellent statement on the value of democratic structures of government, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Frankfurter, J., concurring). Justice Frankfurter wrote:

> A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.
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> To that end, they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. . . .

Youngstown, 343 U.S. at 593.

23. Moore, *supra* note 14, at 833.

24. *Id.*

25. *Id.* (citing JAMES M. BUCHANAN, POLITICS WITHOUT ROMANCE: A SKETCH OF POSITIVE PUBLIC CHOICE THEORY AND ITS NORMATIVE IMPLICATIONS IN THE THEORY OF PUBLIC CHOICE II 11-22 (James M. Buchanan & Robert D. Tollison eds., 1984).

26. *Id.* at 834.

27. Economic sanctions do not constitute armed attacks. PAUL SZASZ, THE LAW OF ECONOMIC SANCTIONS, IN THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 455 (Michael N. Schmitt & Leslie C. Green eds., 1998).

national leader in a totalitarian regime may control or own significant portions of the nation's assets, he stands to gain personally as a result of aggression, thereby converting national gains into personal ones. This holds especially true if his nation's military successfully appropriates the assets of neighboring countries. A tyrant then, might rationally determine that international conquest is more beneficial than international commerce.

In a democracy, the nation's leaders cannot completely externalize the costs of aggression on others. Those who bare the greatest cost of military actions—the nation's warriors, their families, and their supporters—could all exercise their votes to protest the leaders' actions. In addition, if a democratic government were to initiate an aggressive war to grab the industrial resources of a neighboring country, the democracy as a whole may benefit, but the democratic leaders would not. For example, if the President of the United States acts to deploy the American military against another country, he makes the same salary regardless of the number of military actions he takes, and any property the United States might acquire during these operations would not inure to him personally. Therefore, one may argue that national incentives exist in democracies to avoid aggressive acts, whereas the national incentives in non-democracies encourage aggression against other nations.

The United States fully accepts the notion that global democratization leads to peace, a reduction in human rights violations, and an increase in the standard of living.[28] Former President William J. Clinton's National Security Strategy for the year 2000 explained:

> Underpinning our international leadership is the power of our democratic ideals and values. In crafting our strategy, we recognize that the spread of democracy, human rights and respect for the rule of law not only reflects American values, it also advances both our security and prosperity. Democratic governments are more likely to cooperate with each other against common threats, encourage free trade, promote sustainable economic development, uphold the rule of law, and protect the rights of their people. Hence, the trend toward democracy and free markets throughout the world advances American interests. The United States will support this trend by remaining actively engaged in the world, bolstering democratic institutions and

28. *See generally* NATIONAL SECURITY STRATEGY, *supra* note 4.

> building the community of like-minded states. This strategy will take us into the next century.
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> . . . .
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> The United States works to strengthen democratic and free market institutions and norms in all countries, particularly those making the transition from closed to open societies. This commitment to see freedom and respect for human rights take hold is not only just, but pragmatic. Our security depends upon the protection and expansion of democracy worldwide, without which repression, corruption and instability could engulf a number of countries and threaten the stability of entire regions.[29]

The Democratic Peace theory suggests that the best long-term solution to war is world democratization. However, it is unlikely the world will convert to democracy in the foreseeable future, and there is no reason to believe that aggressive, non-democratic regimes will suddenly drop their weapons and develop a respect for the rule of law. With these principles in mind, this article next examines the fundamental solution for war avoidance: deterrence.

B. Deterrence as a Backstop

> *For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.*[30]

1. Deterrence in Theory

"The principle of deterrence is as old as history."[31] The word deterrence is derived from the Latin phrase, de terrere, which literally means "to frighten from" or to "frighten away."[32] Thus, in its original meaning, fear

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29. *Id*. at 4, 25.

30. SUN TZU: THE ART OF WAR 77 (Samuel B. Griffith trans., Oxford Univ. Press 1963) (500 B.C.).

31. BRODIE, INTRILIGATOR, & KOLKOWICZ, NATIONAL SECURITY AND INTERNATIONAL STABILITY 65 (1983); Glenn R. Butterton, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 CATH. U.L. REV. 51, 56 (1997).

was an integral part of deterrence.[33] Effective deterrence, therefore, is largely based on perceptions rather than the actual application ofr force.[34]

Deterrence "operates at the physical and mental level."[35] It is the credible threat of the use force that becomes the primary weapon in deterrence theory.[36] In fact, deterrence is most successful when actual use of force is not required. The ultimate goal of deterrence is to create a set of conditions—or a set of incentives at the international level—that dissuade a regime from resorting to aggression. However, for deterrence to be effective, it must be based on a credible threat of the use of force, and some sort of action short of the ultimate response usually must follow the threat for it to remain credible.[37]

> Deterrence, in one sense, is simply the negative aspect of political power; it is the power to dissuade as opposed to the power to coerce or compel. One deters another party from doing something by the implicit or explicit threat of applying some sanction if the forbidden act is performed, or by the promise of a reward if the act is not performed. Thus conceived, deterrence does not

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32. NORMAN METZGER, POST COLD-WAR CONFLICT DETERRENCE 114 (1997). In U.S. deterrence practice, the term "deterrence" was not generally used until the nuclear age. For example, in dealing with the Native American tribes in the eastern part of the United States, George Washington's approach was "to awe" them. BRODIE ET AL., *supra* note 31, at 102, n.5.

33. The U.S. Department of Defense defines deterrence as: "The prevention from action by fear of the consequences. Deterrence is a state of mind brought about by the existence of a credible threat of unacceptable counteraction." CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 136 (23 Mar. 1994).

34. BRODIE ET AL., *supra* note 31, at 131. Professor Robert Jervis, a contributor to this work, writes:

> In the most elemental sense, deterrence depends on perceptions . . . . One must understand how the opposite side sees the world. One actor deters another by convincing him that the expected value of a certain action is outweighed by the expected punishment. The latter is composed of two elements: the perceived cost of the punishment that the actor can inflict and the perceived probabilities that he will inflict them. Deterrence can misfire if the two sides have different beliefs about either factor.

Id.

35. Butterton, *supra* note 31, at 57.

36. *Id.*

37. FINNIS BOYLE GRISEZ, NUCLEAR DETERRENCE AND REALISM 65 (1987).

> have to depend on military force. We might speak of deterrence by the threat of trade sanctions, for example. The promise of economic aid might deter a country from military action (or any action) contrary to one's own interests . . . . In short, deterrence may follow, first, from any form of control which one has over an opponent's person and prospective "value inventory;" secondly, from the communication of a credible threat or promise to decrease or increase that inventory; and, thirdly, from the opponent's degree of confidence that one intends to fulfill the threat or promise.[38]

Deterrence theory suggests a potential aggressor will conduct a balancing test, weighing the possible risks against the possible benefits of his planned aggression.[39] As a rational actor, the aggressor will calculate the probability of suffering a net loss as a result of launching an attack or at least the probability of sustaining a higher net loss or lower net gain than by not attacking.[40] One commentator on deterrence theory postulated that there are four factors, which taken together comprise the aggressor's "risk calculus:"

> (1) The valuation of his war objectives;
> (2) The cost which he expects to suffer as a result of various possible responses by the deterror;
> (3) The probability of various responses, including no response; and
> (4) The probability of winning the objectives with each possible response.[41]

This suggests that the party attempting to deter must understand the values of the potential aggressor.[42] However, "[m]isperceptions of what the target

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38. GLENN H. SNYDER, DETERRENCE AND DEFENSE, TOWARD A THEORY OF NATIONAL SECURITY 9 (1961).

39. A.L. GEORGE & R. SMOKE, DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE 11 (1974).

40. SNYDER, *supra* note 38, at 12.

41. *Id.*

42. BRODIE ET AL., *supra* note 31, at 133. Professor Jervis points out that the aggressor might view an act believed to be a punishment by the deterror as a reward. For example, he asserts that Pol Pot would not have been intimidated by a threat to destroy his cities. After all, he was attempting to return Cambodia to a rural agrarian society. Professor Jervis further explains: "Threats to use brute force do not involve this pitfall, but they require the state to determine how its adversary evaluates the military balance—how it estimates who would win a war." *Id.*

state values and fears probably are less important causes of deterrence-failure than misperceptions of credibility."[43] Therefore, the credibility of the threat remains the most important aspect of deterrence-based responses.

A potential aggressor must believe that the responding state fully intends to carry out the threatened action. Communications to the potential aggressor of the responder's intent must be clear, and the responder cannot afford to send mixed signals that dilute the deterrent value of the threat. Furthermore, if the responding state takes actions that weaken its ability to carry out the threat, that will also reduce the credibility of the threat.

Since the power to commit aggression in totalitarian regimes lies with the regime's elites, and because they can externalize the costs of aggression or the effects of deterrence on others, it stands to reason that they ought to be the target of the deterrence efforts. To accomplish this, Professor Moore suggests:

> (1) Strengthening the use of war crimes trials;
> (2) Response—if forced to carry through with war-fighting (as with allied policy of unconditional surrender which led to the replacement of governments in Germany, Italy, and Japan);
> (3) Government derecognition (including selective loss of membership in international organizations);
> (4) Measures affecting government stature (including publicity and embarrassment);
> (5) Selective civil remedies against the regime elites and their key aides (including seizure of assets abroad, international arrest orders through Interpol, permanent prohibition against foreign travel without arrest, notification of families of victims concerning the location of regime elite travels abroad or assets vulnerable to civil suit, removal of international legal immunities, removal of statutes of limitation, etc.);
> (6) Targeting of command and control leadership during hostilities; and
> (7) International outlawry (with carefully thought out consequences and possibly with authorization of military or covert operations for seizure to stand trial).[44]

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43. *Id.* at 135. Moreover, Professor Jervis writes: "Deterrence can be undercut if the aggressor does not understand the kind of war which the status quo state is threatening to wage." For example, even though Japan knew there would be a military response to its attack on Pearl Harbor, it did not adequately predict the all-out war effort the United States responded with. *Id.* at 134.

There can be no question that a criminal tribunal has the capability of forcing a regime's elites to internalize the costs of international criminal activity. Therefore, these courts add a significant piece, but only one of many, to the system of international incentives that deter aggressive regimes.

If the world is serious about stopping aggression, non-aggressive countries must be willing to use force and must unequivocally communicate this willingness to potential aggressors. Some commentators have gone so far as to suggest that Western-style democracies have a legal and moral obligation to stand ready to deter those that seek to destroy democratic systems, especially fledgling democracies.[45] "The end—peace and just government—is legitimate. The means—the deterrent system—is probably indispensable for promoting this end."[46] Even after the fall of the Soviet Union, however, security organizations such as the North Atlantic Treaty Organization (NATO) should continue to play a crucial role in conflict prevention.[47] Similarly, "[i]n an age in which peacekeeping has almost become a synonym for U.N. operations, it is easy to forget that an original central purpose of the organization was collective security against aggression in order to end war."[48]

Effective system-wide deterrence includes non-military as well as military modalities. Admittedly, the U.S. military "is not a substitute for other forms of engagement, such as diplomatic, economic, scientific, technological, cultural and educational activities . . . ."[49] However, the military

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44. Moore, *supra* note 14, at 876-77.

45. GRISEZ, *supra* note 37, at 1.

46. *Id*. at 65.

47. RODERICK K. VON LIPSEY, BREAKING THE CYCLE: A FRAMEWORK FOR CONFLICT INTERVENTION (1997).

48. Moore, *supra* note 14, at 814 (1997). The preamble to the United Nations Charter reads in part:

> To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . and for these ends . . . to unite our strength to maintain international peace and security . . . .

Id. (quoting U.N. CHARTER pmbl.)

49. *See generally* NATIONAL SECURITY STRATEGY, *supra* note 4, at 11-12.

as a form of deterrence certainly plays a key role in U.S. national security strategy.

> Maintaining our overseas presence promotes regional stability, giving substance to our security commitments, helping to prevent the development of power vacuums and instability, and contributing to deterrence by demonstrating our determination to defend U.S., allied, and friendly interests in critical regions. Having credible combat forces forward deployed in peacetime also better positions the United States to respond to crises. Equally essential is effective global power projection, which is key to flexibility demanded of our forces and provides options for responding to potential crises and conflicts even where we have no permanent presence or a limited infrastructure in a region.[50]

2. Deterrence in Practice

> *Since war is not an act of senseless passion but is controlled by its political object, the value of this object must determine the sacrifices to be made for it in magnitude and also in duration. Once the expenditure of effort exceeds the value of the political object, the object must be renounced and peace must follow.*[51]

It is nearly impossible to imagine a democratic country like Switzerland attacking France, or the United States attacking Canada. Yet, some theories of warfare suggest there should be war between these countries because they are contiguously connected, there are huge imbalances in military power,[52] and, at least with Canada and the United States, there are significant disputes in terms of resource ownership.[53] The only theory that adequately explains the lack of warfare between these states is the Democratic Peace theory.[54] The problem with relying solely on this theory to prevent war, however, is that most of the world's governments are not true liberal democracies, and the aggression in the world is being waged by non-democracies. As discussed above, democracies are still involved in numerous armed conflicts with non-democracies. In fact, democracies have been engaged in the two most destructive wars in the twentieth cen-

50. *Id.* at 11.
51. CARL VON CLAUSEWITZ, ON WAR 95 (Michael Howard & Peter Paret trans. 1976).
52. Moore, *supra* note 14, at 819.

tury. Therefore, in and of itself, nations cannot rely solely on the Democratic Peace theory as a paradigm for avoiding war.

From the foregoing, it appears that wars result from the synergy of government failure and the absence of system-wide deterrence.[55] In such circumstances, deterrence serves as the backstop to the Democratic Peace theory for preventing war. Professor Moore describes deterrence as the "missing link" to the Democratic Peace theory of war avoidance.[56] Deterrence is very broad and is not limited to military force alone.[57] At the present time, however, effective military deterrence is "perhaps the most important single feature of the deterrent concept . . . ."[58] If military deterrence is to work, it is apparent that four elements must be present:

(1) The ability of the party attempting to deter another to respond;

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53. *See generally* Scott Phillip Little, *Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement*, 8 PACE INT'L L. REV. 127 (1996); Ted L. McDorman, *The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure*, 17 LOY. L.A. INT'L & COMP. L. REV. 477 (1995); Mike Perry, *Rights of Passage: Canadian Sovereignty and International Law in the Arctic*, 74 U. DET. MERCY L. REV. 657 (1997); Davis R. Robinson, David A. Colson & Bruce C. Rashkow, *The First ICJ Chamber Experiment: Some Perspectives on Adjudicating Before the World Court: The Gulf of Maine Case*, A.J.I.L. 578 (1985); J. Owen Saunders, *Trade Agreements and Environmental Sovereignty: Case Studies from Canada*, 35 SANTA CLARA L. REV. 1171 (1995).

54. *See generally* Moore, *supra* note 14, at 833-38.

55. *Id*. at 840.

56. *Id.*

57. *Id*. Professor Moore explains:

> By deterrence, I mean in its broadest sense both negative and positive, and including military and non-military incentives. That is, deterrence here refers to the totality of positive and negative actions influencing expectations and incentives of a potential aggressor, including: potential military responses and security arrangements, relative power, level and importance of economic relations, effectiveness of diplomatic relations, effective international organizations (or lack thereof), effective international law (or lack thereof), alliances, collective security, effects on allies, and the state of political or military alliance structure, if any, of the potential aggressor and target state, etc. Most importantly, of course, there is a critical perception and communication component to deterrence since ultimately, it is the perception of the regime elite contemplating aggression that is most critical.

Id.

(2) The will to respond on the part of the party attempting to deter the another;
(3) Effective communication of ability and will to the aggressive regime; and
(4) Perception by the aggressive regime of deterrence ability and will.

To avoid war, therefore, deterrence must fill the gap in the Democratic Peace theory when government structures fail.

Empirical data supports the conclusion that democracies enter wars where there has been a failure to deter aggressors.[59] The Korean Conflict in 1950 and the Iraqi invasion of Kuwait in 1990 are two of many examples where aggressive non-democratic regimes were not adequately deterred.[60] It can be argued that these regimes made rational choices to launch their aggressive wars due to a lack of deterrence. For Kim Il Sung, it was ambiguous whether the "defense perimeter" of the United States extended to South Korea.[61] Furthermore, Kim Il Sung believed his principal ally, the Soviet Union, would have vetoed any proposed U.N. Security Council resolution authorizing force against North Korea.[62]

Regarding the Persian Gulf War, while most believe it was a resounding success for democracy, the greater achievement would have been deterring Saddam Hussein's invasion of Kuwait in the first place.[63] There

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58. *Id.*

59. *Id.* at 847. In his article, Professor Moore explains how a lack of deterrence may have been the real cause of several twentieth century conflicts. *Id.* at 842-48. *See generally* JOACHIM REMAK, THE ORIGINS OF WORLD WAR I 1871-1914, at 89 (1967); FRITZ FISCHER, GERMANY'S AIMS IN THE FIRST WORLD WAR 89 (1967); KAGAN, *supra* note 13, at 73-74.

60. STEPHEN J. CIMBALA, MILITARY PERSUASION, DETERRENCE AND PROVOCATION IN CRISIS AND WAR 166-69 (1994).

61. *Id.* 166 n.1. United States Secretary of State, Dean Acheson gave a speech in January 1950, where he defined a number of vital U.S. interests. Korea was not specifically mentioned by Secretary Acheson. *Id.*

62. North Korean Troops launched an invasion into South Korea on 25 June 1950. The United Nations Security Council, of which the Soviet Union was a permanent member, called on North Korea to cease its aggression and authorized states to "render every assistance to the United Nations in the execution of this resolution." S.C. Res. 82, U.N. SCOR, 5th Sess. 473d mtg. at 4, U.N. Doc. S/INF/4/Rev. 1 (1950). The Soviet Union was boycotting the United Nations at the time of the resolution to protest the fact that the Nationalist Chinese were representing China. The Soviet Union would likely have vetoed the resolution but apparently erroneously believed that their abstention was tantamount to a veto. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 290 (1997).

63. KEITH B. PAYNE, DETERRENCE IN THE SECOND NUCLEAR AGE 4, 5 (1996).

is no reason to believe that Saddam could have anticipated military success if he knew the United States would come to the aid of Kuwait. He must have also understood that his military fortunes would be further reduced if France, Great Britain, and the Arab allies joined the United States. The only rational explanation for his attack on Kuwait is that Saddam did not believe the world would come to Kuwait's assistance. Indeed, historians have remarked that Saddam mistakenly concluded there would be no international military response for three reasons: first, the United States tended to favor Iraq in its war with Iran; second, Saddam incorrectly believed that he would not be opposed by other Arab states; and finally, the United States was still suffering from the "Vietnam syndrome" when it came to military action outside of Europe.[64]

A single lesson emerges from the Korean Conflict and Persian Gulf War: "[A]pproaching such actions in a deterrent rather than an after-the-fact mode and . . . focusing centrally and clearly on the deterrent effect of such actions"[65] is the best way to deal with aggression. In addition, "[d]eterrence should become the central theme in structuring U.N. actions."[66] In Iraq, ten years after the Gulf War, Saddam Hussein still refuses to respond to diplomacy.[67] Deterrence, therefore, must continue as the primary method used to deal with similar rogue regimes.

It is better to respond to potential acts of aggression and massive human rights atrocities with a "systematic, global preventative regime,"[68] than to create an after-the-fact formal enforcement mechanism. This is true for both major international armed conflicts and low-level internal struggles with international implications. "Credible military intervention by forces overwhelmingly more powerful than the combatant parties (like NATO's bombardment of Serb artillery positions in 1994 and subsequent occupation of Bosnia) has historically been the means to still low-level conflicts."[69] In recognition of this principle, President Clinton recently

64. CIMBALA, *supra* note 60, at 167-68.

65. Moore, *supra* note 14, at 862.

66. *Id.*

67. Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287 (1999).

68. *See*, MICHAEL LUND, PREVENTING VIOLENT CONFLICTS: A STRATEGY FOR PREVENTIVE DIPLOMACY (1996).

69. David S. Bloch & Elon Weinstein, *Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court*, 22 HASTINGS INT'L & COMP. L. REV. 1, 7 (1998).

apologized for the United States' lack of an aggressive and early response in Rwanda.[70]

Deterrence preserved peace during several historical events, or non-events as it were. For example, the fact that the Warsaw Pact and NATO never fought World War III can be directly attributed to the power of deterrence. According to former Secretary of Defense, Casper Weinberger:

> What has deterrence done? Again I must stress that it has worked and is working today. There has been 37 years of Peace in Europe. Despite the threat of the Soviet Army; despite the threat of the Soviet nuclear weapons, Western Europe has prospered. Its political freedoms have flourished, and its social institutions have grown stronger. Indeed, there has not been an equal period of uninterrupted peace on the European continent since the Roman Empire fell. At the risk of stating the obvious, the United States and the rest of the world have also avoided the scourge of nuclear fire. Deterrence, this is and remains our best immediate hope of keeping peace.[71]

Even some non-governmental organizations established to reduce the threat of war recognize the ultimate value of deterrence and, as a last resort, the use of force.

> The threat of use of forceful measures might seem at odds with the commission's focus on prevention of deadly conflict. But situations will arise where diplomatic responses, even where supplemented by strong economic measures, are insufficient to prevent outbreak or recurrence of major violence. The question is when, where, and how should individual nations and global and regional organizations be willing to apply forceful measures to curb incipient violence and prevent potentially much greater destruction of life and property.[72]

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70. Robert I. Rothberg, *Post-Clinton Africa: The Wait Begins*, CHRISTIAN SCI. MONITOR, Apr. 7, 1998, at 11.

71. Casper Weinberger, *Shattuck Lecture*, 307 NEW ENG. J. MED. 767 (1982). If former Secretary Weinberger had given this lecture ten years later, his support for deterrence theory would have been bolstered even more by the events that transpired in the interim, namely the successful resolution of the Cold War.

72. CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT, FINAL REPORT 59 (1997).

Recently, a deployment of peacekeepers to Macedonia may have prevented the conflict in the Former Yugoslavia from spilling over into that country as well.[73] Preventive military deployments, therefore, are also a form of preventative diplomacy.[74] The mere presence of a "thin blue line" appears to have stabilized Macedonia and protected the country from neighboring threats.[75]

"Perhaps the clearest use of a preventive deployment would be its utilization to deter external threats to a country's territory or violations of some other internationally recognized boundary."[76] Another potential use would be to deter genocide and large-scale humanitarian violations.

> In these situations, any preventive force deployed may be greatly outnumbered, both in terms of personnel and firepower, by the external threat or threats its presence is meant to deter. Yet as a recent study by the Carnegie Commission on Preventing Deadly Conflict has observed, while consisting of: "Only a 'thin blue line' of forces, as with classical peacekeeping, the deterrent lies in the fact that the Security Council has expressed its interest in the situation, all the relevant parties are under close international scrutiny, and there is at least an implication of willingness to take action if there is any resort to violence."[77]

Another tool in the creation of a international system of deterrence strategy might be the creation of a highly-trained and well-equipped U.N. Security Council fighting force.[78] A force of 5,000 troops under the auspices of the Security Council would be able to handle most small-scale contingencies and internal conflicts. A similar option would be the creation of a U.N. police force pursuant to Articles 39 through 41 of the U.N. Charter.[79] A final option would be ad hoc coalitions, similar to the one formed in the Persian Gulf War and acting pursuant to Article 106 of the U.N. Charter. Such coalitions may even be able to operate without Security Council authority.[80] All of these deterrent options may be less expen-

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73. *See generally* Stephen T. Ostrowski, *Preventive Deployment of Troops as Preventive Measures: Macedonia and Beyond*, 30 N.Y.U. J. INT'L L. & POL. 793 (1998).

74. *Id.* at 798.

75. *Id.* at 810, 831.

76. *Id.* at 840.

77. *Id.* at 843-44 (quoting CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT, FINAL REPORT 65 (Dec. 1997)).

78. Moore, *supra* note 14, at 864.

79. U.N. CHARTER arts. 39-41.

sive and far more effective than the establishment of ad hoc criminal tribunals.

Despite this potential, the U.N. and regional security organizations have not been completely successful in preventing armed conflict. Some researchers place combatant deaths in the twentieth century as high as thirty-three million.[81] As staggering as this statistic may be, non-combatants killed as a result of atrocities by their own governments may exceed 169 million during the same period.[82] Professor Moore reminds us:

> In a period of relative calm following the cold war, it is easy to forget the tragic costs of war. The widespread starvation and killing in Ethiopia and Somalia, the half a million or more Tutsis slaughtered in Rwanda, the widespread destruction of society in Lebanon and Liberia and the systematic genocide in Bosnia however, are unmistakably contemporary. Effective implementation of the goals, for which the United Nations was founded, remains a compelling need for human kind.[83]

Exacerbating these human casualty figures is the almost incalculable negative economic impact armed conflict has had on the international community.[84]

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80. *See generally* Andrew Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L. J. 773 (1993).

81. Moore, *supra* note 14, at 816 (citing RUDOLPH J. RUMMEL, THE MIRACLE THAT IS FREEDOM, THE SOLUTION TO WAR, VIOLENCE, GENOCIDE, AND POVERTY 3 (1995)).

82. *Id.* at 816 (citing RUMMEL, *supra* note 21, at 4). Professor Rummel calls this number a "partial world total." *Id.*

83. *Id.* Since the time of Professor Moore's article, additional humanitarian disasters have occurred, including the violence and misery in Kosovo, East Timor, Sudan, and Sierra Leone.

84. *Id.* at 816-17. Professor Moore writes:

> World War I multiplied the national debt of France by a factor of seven and the national debt of Britain by a factor of more than ten. The resulting famine in Germany may have killed as many as 750,000 and led to widespread economic chaos, in turn setting the stage for takeover by the Nazis and World War II. World War II may have cost $1.6 trillion; again with all future generations deprived of the compound rate of growth that would have forever created increasing wealth on this global asset base.

Id. (citing JOHN KEEGAN, THE SECOND WORLD WAR 592 (1990); GEORGE WRIGHT, THE ORDEAL OF TOTAL WAR 264 (1968)).

The United States has a vital leadership role in international peace and security.[85] No other force has the same capability to protect the world from tyrannical regimes. It does not appear that the United Nations is capable of building the political will necessary in many cases to create a credible threat to aggressor regimes. According to one expert, it would be a mistake to place all the deterrence eggs in the basket of collective security.[86] Therefore, the law must reflect the reality that the United States will provide unilateral leadership and bear the brunt of most international military operations to deter aggression.[87]

Professor Innis Claude asserts that real and effective deterrence is created by a major power taking the leadership role. For example, the successes in mounting military responses in Korea and the Persian Gulf were a result of U.S. leadership.[88] Professor Claude argues:

> I reached the conclusion some 30 years ago that the idea of creating a working collective security system had been definitively rejected, and that at most the idea might occasionally receive lip service. I have taken the view that the implementation of collective security theory is not a possibility to be taken seriously, and that the United Nations should be turned to other, more promising because more acceptable, methods of contributing to world order.[89]

III. Implementation of International Norms

A. Various Modalities of Implementation

Other than formal national or international courts, methods of enforcement of international law include the protecting power, reprisals, international military commissions, monitoring, negotiating, fact-finding,

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85. David J. Scheffer, Statement on the Status of Negotiations on the Establishment of an International Criminal Court, Rome, Italy (July 15, 1998), *available at* http://www.state.gov/www/policy_remarks/1998/ 980715_scheffer_icc.html.

86. INNIS L. CLAUDE, JR., COLLECTIVE SECURITY AFTER THE COLD WAR II, COLLECTIVE SECURITY IN EUROPE AND ASIA 7-28 (Gary L. Guertner ed., 1992).

87. United States Secretary of State Madeline Albright described the United States as the "indispensable nation" for resolving international crises. Samuel P. Untington, *The Lonely Superpower*, 78 FOREIGN AFFAIRS 37 (1999).

88. CLAUDE, *supra* note 86, at 24.

89. *Id*. at 9.

official inquiries, compensation, economic sanctions, and brute military force.[90]

Although virtually all societies have rules for when they are willing to go to war and rules regarding the conduct of warfare,[91] "in the 1980's and 1990's there has been an unprecedented degree of international attention to the application of the laws of war to contemporary conflicts."[92] A natural by-product of this increased sensitivity to the laws of war may include a perceived need for a court to enforce that law. Looking at the domestic criminal law model, the world community is under the impression that the proposed international criminal court will deter war crimes and human rights violations.[93] Moreover, in this century, the lethality of weaponry has increased and there has been an explosion of domestic armed struggles. The fact that the face of warfare is changing, and increasing numbers of civilians are victimized by armed conflict, may be leading some to assume that a permanent court is the answer.[94]

Many commentators look to the success of the post World War II war crimes prosecutions as support for the creation of a standing permanent international criminal court. However, a "questionable part of the legacy of Nuremberg is the creation of the expectations that, in general, trials are an appropriate way to handle war crimes issues."[95] Telford Taylor, a prosecutor at Nuremberg has stated:

> In terms of enforcement, whether the charge is war crimes or crimes against humanity, I think it is a mistake to expect that the device of a criminal trial is the major way in which the enforcement of those limitations and obligations is going to be achieved. As one who has taught criminal law for several years, I always try to instill in my students a basic appreciation that most law enforcement is voluntary. Therefore, in [the] international field

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90. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 19-20, 30, 35, 38, 39 (1995).

91. *See generally* FRIEDMAN, 1 THE LAW OF WAR: A DOCUMENTARY HISTORY (1972).

92. Roberts, *supra* note 90, at 11.

93. *See* Gerhard Hafner, Statement on Behalf of the European Union Delivered by Acting Head of Australian Delegation of the Whole (July 17, 1998), *available at* http://www.un.org/icc/index.htm (Speeches, July 17, 1998).

94. *See* David J. Scheffer, *International Judicial Intervention*, FOREIGN POL'Y, Mar. 1, 1996, at 34; Barbara Crossette, *Violation: An Old Scourge of War Becomes Its Latest Crime*, N.Y. TIMES, June 14, 1998, at 4:1.

95. Roberts, *supra* note 90, at 27.

> as well, the idea that trials alone (or statutes and treaties) can bring about the reforms and remedies that we hope for is misplaced reliance.[96]

During the early years of the development of the laws of war, warriors developed codes of behavior that were largely self-enforced. However, over the years, these codes of honor have been codified and elevated to the status of law. This transition of the rules from codes of honor to codified law may partially explain why scholars and diplomats tend to support the creation of formal enforcement mechanisms over traditional self-enforcement means of compliance.[97]

The natural tendency in this regard is to look to the creation of formal enforcement mechanisms such as criminal courts.[98] To be sure, there must be some sort of sanction for violations if community expectations are to rise to the level of credible legal norms.[99] However, a formal enforcement mechanism may not be the best forum for achieving the desired results. Hence the observation that the "problems faced by soldiers and decision-makers in armed conflicts have not been explored in depth."[100]

It may be argued that a standing court offers the world its best hope for deterring large-scale violations of humanitarian law and human rights abuses. While these courts have the potential to deter some illegal actors some of the time, unfortunately, they may not represent a sufficiently credible threat to deter the vast majority of aggressors. In fact, criminal courts may have the tendency to perpetuate the violence in some conflicts.

B. National and International Criminal Courts

> *War is indeed reprehensible, primitive, and threatens universal catastrophe. All true, but it cannot be conjured away by calling it the crime of an individual to be suppressed by a world community of peace loving nations.*[101]

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96. Telford Taylor, *Discussion Panel, Forty Years After Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 70 (1986).

97. Roberts, *supra* note 90, at 16.

98. *Id*. at 15.

99. Robert F. Turner, *Don't Let Saddam Escape Without Trial*, ATLANTA CONST., Aug. 31, 1991, at B2.

100. Roberts, *supra* note 90, at 16.

Traditionally, domestic courts, rather than international tribunals, were relied on as the primary formal method to enforce the laws of war. Even following World War II, "[t]here were many war crimes trials . . . mainly in national courts of the victorious powers and of the countries they had liberated."[102] However, the most famous and influential of the post-World War II war crimes trials were those before the international military tribunals at Nuremberg and Tokyo, which tried Axis war criminals. These two tribunals constitute the "major precedent for implementation of the laws of war through international trials."[103]

The most common criticisms of the post-World War II tribunals include:

> (1) The tribunals applied a body of law, some aspects of which, before 1945 had not been clearly enumerated in treaty form, or were in treaties which were not fully applicable to the events under scrutiny;
> (2) The tribunals were one-sided, as possible war crimes committed by the Allies were neither fully considered at either tribunal nor dealt with elsewhere; and
> (3) Large numbers of guilty individuals were either not prosecuted al all, or were treated too leniently.[104]

While these criticisms are well-founded, they do not demonstrate that the trials were of insignificant value.[105] Rather, the "Nuremberg and Tokyo tribunals had taken a bold step beyond the idea that states primarily were responsible for punishing their own nationals."[106] Although these tribu-

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101. EUGENE DAVIDSON, THE NUREMBERG FALLACY, WARS AND WAR CRIMES SINCE WORLD WAR II 296 (1973).

102. U.N. WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (1948).

103. Roberts, *supra* note 90, at 19-20 (citing Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Annex, arts. 6(a)-(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 280, 286-88 [hereinafter London Charter]).

104. Roberts, *supra* note 90, at 24.

105. *Id.* at 27.

106. *Id.* at 28.

nals did not perfectly administer justice, the world was better off with them than without them.

Since Nuremberg, there has been a growing call for establishing formal criminal law enforcement mechanisms at the international level, the job formerly of domestic criminal law systems.[107] "International criminal law has expanded more in the last fifty years than in the previous five-hundred."[108] However, an international court would not be without limitations:

> The idea that acts deemed to be crimes can and should be tried and punished in courts is a feature of all national legal systems; however, its application on the international plane, as a means of enforcing the laws of war, is problematic . . . . Events in some major conflicts of the past two decade confirm the difficulties of the criminal law approach."[109]

There are also "many difficulties with transposing the institutions of domestic criminal justice to the radically different terrain of international politics."[110]

There is no real debate that courts can further very noble and worthwhile goals, such as forcing the elites in corrupt regimes to bear some of the costs of massive violations of international humanitarian law. But,

> lest we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call courts we have solved major problems, we should review the fundamental goals that institutions designed to protect public order seek to fulfill. Goal clarification is especially important when our passions are engaged, as indeed they should be, upon encountering atrocities such as those of Rwanda.[111]

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107. *See* Scheffer, *supra* note 94, at 34.

108. LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW, DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 2 (1997).

109. Roberts, *supra* note 90, at 69.

110. W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics,* 6 TUL. J. INT'L & COMP. L. 5, 46 (1998).

111. M. Michael Reisman, *Institutions and Practices and Maintaining Public Order,* 6 DUKE J. COMP. & INT'L L. 175 (1995).

As seen in Rwanda, even the best laid plans to deal with the enforcement of violations of international law do not always work out as hoped for in the real world.[112]

The international community may have unrealistically high expectations for the ICC, just as it did with the International Court of Justice.[113] Treating the war criminal as a common criminal oversimplifies the complexity of the international system. It is questionable whether courts are the most effective places to deal with powerful criminal states and their leaders. The problem may be much larger than a court alone is capable of addressing.

> International law is not a criminal law system; it is more akin to constitutional law, where enforcement rests on political counterpressures and foreseeable middle- and long-term reactions. A militarily organized movement that commits atrocities is likely to lose allies, unify its enemies, waste its energy in daring strikes of dubious military or political value, and ultimately turn on itself.[114]

International law is far more complex and intricate than a domestic penal system of laws. International law also includes politics and diplomacy, necessary to maintain the state and its sovereignty as the fulcrum of the international system.[115]

> For better or for worse, we live in a world of states, and in most cases, the laws of war, like other parts of international law, must be implemented thorough traditional state mechanisms such as deliberations in governmental departments, national laws, manuals of military law, rules of engagement, government-established commissions of inquiry, and courts and courts-martial. . .

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112. *See* Ambassador Bill Richardson, Statement Before the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (June 17, 1998), *available at* http://www.un.org/icc/index.htm (Speeches, 17 June 1998).

113. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice,* 23 FORDHAM INT'L L.J. 473, 484 (1999).

114. *See* Roberts, *supra* note 90, at 69.

115. Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law,* 15 AM. U. INT'L REV. 321, 349 (2000) (citing Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law,* 60 ALB. L. REV. 571, 577 (1997) (explaining that international law deals more with issues of politics than law)).

> . When states and international organizations not directly involved in a particular conflict are moved to demand better application of humanitarian rules in that conflict, they need to be very careful about the manner in which they do so. . . . [Otherwise] their efforts may backfire.[116]

If international law is based primarily on politics and relations between states, then the best method of deterring aggression is the deterrence of the state, not the punishment of a handful of war criminals before an international tribunal.

One problem with globalizing criminal law is that the majority of conflicts in the twentieth century have been internal conflicts. The rules of international armed conflict do not always apply cleanly in these civil war-like settings. As a general rule, the full body of the laws of war apply only in international armed conflict, that is armed conflict between nation-states.[117] This is because "governments usually have been reluctant to create or sign on to a body of law which would bind their freedom of action in dealing with armed rebellion."[118] However,

> [c]ivil wars are notoriously bitter; . . . each side is likely to deny the legitimacy of the other; training in the law of war may be limited; the neat distinction between soldier and civilian frequently breaks down; and the scope for a compromise settlement of the war is usually slight. Trying to secure even a minimal level of

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116. Roberts, *supra* note 90, at 71.

117. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 2, 36 Stat. 2277, Treaty Series N. 539, [hereinafter Hague IV]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWSS]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Other than Article 3 Common to the Geneva Conventions, GWS, GWSS, GPW, and GC, the remainder of the Geneva Conventions do not apply to purely internal armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 609 [hereinafter Protocol II], specifically applies in internal armed conflicts.

118. Roberts, *supra* note 90, at 13.

> observance of rules is peculiarly difficult in such circumstances.[119]

Owing to the added complexity of internal armed conflicts and the limited reach of the laws of war therein, national courts appear to be a more workable option than international tribunals for trying war criminals—for now at least.[120]

IV. Criminal Justice Systems and International Law

A. Courts and Deterrence

Systems of criminal justice are designed to do more than merely punish violators of the law. One of their primary goals is to deter potential wrongdoers by punishing those that are unfortunate enough to get caught. In other words, penal systems also seek to specifically and generally deter individuals from participating in future illegal activities.[121] Despite this laudable goal, international criminal tribunals have had little if any deterrent effect. The Nuremberg Tribunal, the first serious international criminal tribunal, met over fifty years ago; since then, however, the world has witnessed almost 100 wars and endured thousands, perhaps even millions, of atrocities committed during those conflicts.[122]

Although many believe the proposed ICC will have a role in the prevention of war, virtually no one believes the court can do that alone.[123] One commentator has opined:

> In circumstances in which the international community is prepared to defeat an adversary, application of the criminal law model, through an international tribunal, makes sense. It directs condemnation, of violations of international law, at the defeated

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119. *Id*. at 13.

120. Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VA. J. INT'L L. 659 (1996). Martins points out that thousands have been tried in national courts for law of war violations, far more than in international tribunals.

121. Bloch & Weinstein, *supra* note 69, at 1 (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 113-14 (5th ed. 1989)).

122. *See* DAVIDSON, *supra* note 101.

123. Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 672 (1996).

> government officials and legitimizes a process of social reconstruction. In circumstances in which the international community is not prepared to defeat the party deemed in violation of international law but ultimately must negotiate a settlement with that party, the criminal law model makes no sense because it only delays the inevitable negotiation."[124]

Therefore, some believe that the ICC might actually defer reconciliation by stirring up the participants in a conflict that has ended through its attempt to punish those guilty of violating international law. Sir Graham Bower remarked:

> This Court would render a peace impossible. When the soldiers and sailors had finished fighting, when the hostilities were over and the soldiers and sailors on both sides were ready to shake hands with one another, as they are today, the lawyers would begin a war of accusation and counter accusation and recrimination. Such a war would render peace or reconciliation impossible.[125]

In fact, an over-ambitious international court could possibly create conditions that lead to war, rather than prevent it.

> The Superpowers, despite their overwhelming collection of nuclear weapons, do not have anything like complete freedom of movement. The war the United States has been fighting in Indochina, and the Russian invasions of Hungary and Czechoslovakia, have been limited by considerations of prudent risk; each superpower attempts to avoid actions that are likely to lead to major confrontation with the other . . . . Thus it may be argued that the uneasy peace that has endured between the major powers since World War II has been kept not because of, but despite Nuremberg. Had the Nuremberg principles of the illegality of aggressive war been maintained as rigorously as many of their proponents would have liked, a world war could have started in Hungary, in the Middle East, in the Far East—in fact, anywhere at all. Fortunately for the human race, statesmen tend to act with a weather eye on realities and its is by ignoring the doctrines of

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124. Reisman, *supra* note 111, at 185.

125. Wexler, *supra* note 123, at 672 (quoting INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-THIRD CONFERENCE 154 (1925)).

> Nuremberg rather than by trying to enforce them that the post-war world has lived through the cold war and then peaceful coexistence, which is another stage of the same process.[126]

The International Criminal Tribunal for Yugoslavia (ICTY) has been in existence for over seven years.[127] The existence of the tribunal, however, did "not adequately [deter] the warring factions from committing rape, torture, forced expulsion, forced displacement, genocide, murder and other war crimes."[128] In Yugoslavia, armed conflict continued to rage even after the establishment of the tribunal. In a similarly tragic vein, "[i]n Rwanda, where the victorious group is enthusiastically in favor of such a tribunal, the exercise is in danger of becoming a technique by which the ruling elites, with international blessing, purges the leadership of the opposition."[129]

Deterrence of future atrocities through vigorous prosecution is the argument most often made by supporters of the ICC.[130] Using the example of the ICTY, this assertion does not withstand scrutiny.

> This argument was regularly advanced as one of the main justifications for the creation of the ICTY. Unwilling in 1993 to take strong military action to control the bitter conflict then tearing Bosnia apart, the U.N. Security Council expressed its hope that the ICTY would "contribute to ensuring that violations of international humanitarian law" are halted and effectively addressed.[131]

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126. DAVIDSON, *supra* note 101, at 290-91.

127. S.C. Res. 827, U.N. SCOR, 48 Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute].

128. Penrose, *supra* note 115, at 325 (citing *War With Milosevic*, ECONOMIST, Apr. 3, 1999). Penrose points our that as many as one million refugees from Kosovo had been displaced during Serbian ethnic cleansing operations in March and April 1999 alone. As many as 4,000 ethnic Albanian crossed the borders of Albania, Macedonia, and Montenegro per hour. All, of course, after the tribunal had been operating for over five years. *Id.*

129. Reisman, *supra* note 111, at 185.

130. M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1-2 (1998); Mark J. Osiel, *Ever Again, Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995); *Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROB. (1996).

131. Wippman, *supra* note 113, at 477. *See also*, Carroll Bogert, *Pol Pot's Enduring Lesson*, FIN. TIMES, Mar. 16, 1998, at 16 (discussing the deterrence theory of an international criminal court).

Unfortunately, however, "the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption. Actual experience with efforts at deterrence is not encouraging."[132]

Payam Akhavan, Legal Advisor to the Office of the Prosecutor for the ICTY writes, "the evidence of the tribunal's contribution to deterrence of ongoing humanitarian law violations remains equivocal."[133] Atrocities continued, at high levels, even after the court was established and had tried its first case.[134] Moreover, the numbers actually tried for crimes in Yugoslavia are "minuscule" in comparison to the numbers of persons that took part in the atrocities.[135] Many of those indicted, many of the senior leaders, remain at large.[136] One cynical observer noted that offenders have about as much chance of being prosecuted as "winning the lottery."[137]

The majority of the participants in the atrocities in the former Yugoslavia were not ignorant with regard to the laws of war; they understood the rules and accepted the legitimacy of the rules, but did not view their actions as being wrongful.[138] The combatants believed they were in a "total war" and that the lines between civilians and combatants were blurred. They were willing to intentionally target civilians, indiscriminately use land mines, and abuse prisoners of war. They felt they were in a life and death struggle and the limits on warfare had to be suspended.[139] It is unlikely that a court could deter conflict participants with these types of motives. Even after the indictment of Slobodan Milosevic, President of the Federal Republic of Yugoslavia, the atrocities continued.[140] The concern for prosecution in Bosnia may have manifested itself when partici-

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132. Wippman, *supra* note 113, at 474.

133. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 744 (1999).

134. Wippman, *supra* note 113, at 475.

135. *Id.* at 476.

136. *Id.*

137. *Id.* at 477.

138. *Id.* (citing INTERNATIONAL COMMITTEE OF THE RED CROSS, COUNTRY REPORT ON BOSNIA-HERZEGOVINA 13 (n.d.), *available at* http://nt.oneworld.org/cfdocs/icrc/pages/reports/pdfs/bosnia.pdf).

139. Wippman, *supra* note 113, at 476-80.

140. *Id.* at 479.

pants in ethnic cleansing began wearing black ski masks, but the threat of prosecution did not prevent the atrocities themselves from continuing.[141]

B. The Current Ad Hoc International Criminal Tribunals

> *I would go so far as to say whereas the Nuremberg trials were a symbol of the allies' triumph, the Tribunals for the former Yugoslavia and Rwanda in many ways symbolize failure.*[142]

The goals of the ICTY, as announced in Security Council Resolution 808, were arguably "naively optimistic."[143] As Professor Reisman has explained: "There is no evidence that courts, by their mere existence and operation, create the minimum political order that is necessary for their operation."[144] Nonetheless, many believed the ICTY would do much to facilitate and preserve peace in the region.

> The establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.[145]

The original purpose of the ICTY was to restore the peace, not necessarily to prosecute war criminals.[146] And yet, did the court really have anything to do with the attainment of peace in the region? If there is a linkage to peace,[147] now that peace has been restored, does this mean there is no longer a need for the court and that it should shut down?[148] Ironically, like any formal court system, it was only after the real threat had ceased and peace had been restored that the lawyers and judges assigned to the tribunal were fully able to swing into action.[149] Moreover, the court will likely continue in business for years, well after the conflict has concluded .“The

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141. *Id.* at 480 (citing Raymond Whitaker & Andrew Marshall, *Massacre Ordered at Top Level in Belgrade, Says US*, INDEPENDENT, Jan. 29, 1999, at Title Page).

142. Penrose, *supra* note 115, at 329 (citing Tom Gjelten, *Conference on War Crimes Tribunals: Tribunal Justice, the Challenges, the Record, and the Prospects*, 13 AM. U. INT'L L. REV. 1541, 1556 (1998)).

143. Roberts, *supra* note 90, at 58.

144. Reisman, *supra* note 110, at 46.

145. Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 26 (1993) [hereafter Report of the Secretary General].

whole process will take years or decades, not months—a further reason why it is not necessarily wise to suggest that such a process is a preliminary to restoration of peace."[150]

Some writers have not been convinced that the ICTY has lived up to its billing. Possible reasons suggested for the inability of the ICTY to fully respond to violations of international law in the Former Yusgoslavia include:

> (1) The probable need, in efforts to end the war, to negotiate with the very people who are wanted for war crimes, and to agree to some kind of amnesty;
> (2) The problem of getting evidence which proves the guilt of specifically named individuals—a far more difficult matter than proving in a general way that war crimes occurred;
> (3) The difficulty of getting suspects arrested and brought to The Hague—the statute having, probably rightly, ruled out trials in absentia;
> (4) The difficulty of getting witnesses to come to The Hague to give evidence and protecting them thereafter; and
> (5) The difficulty of getting adequate and reliable financial resources for what must be a very extensive process of investigation and trial, especially as the U.N. General Assembly has ultimate control over funding, and is anxious about the gravita-

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146. Is it possible that such a court could find counter to the stated goal of restoring peace and security? If the court is to be effective as a means of keeping the peace, it would seem that the court would have to appear to be neutral by the warring parties. However, the appearance of neutrality it difficult to maintain if the court calls on military forces to arrest alleged war criminals belonging to one of the parties to the conflict. For example, on 10 July 1997, British troops arrested a suspected war criminal and killed another in the Bosnian town of Prijedor. As a result, there was a spat of "retaliatory hand-grenade attacks, stabbings and bombings" directed against NATO units. Chris Hedges, *Dutch Troops Seize Suspects, Wounding One*, N.Y. TIMES, Dec. 18, 1997, at A20. Actions like this might jeopardize the peace process. YVES BEIGBEDER, JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE 162-63 (1999).

147. Report of the Secretary General, *supra* note 145, para. 28. The Secretary General explained: "As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto." *Id.*

148. Reisman, *supra* note 110, at 48.

149. *Id.*

150. Roberts, *supra* note 90, at 58.

> tion of powers within the United Nations Organization toward the Security Council.[151]

1. Lack of Enforcement Mechanisms

> *Until we are certain that international crimes will be prosecuted and punished, justice will not be done . . . . This affects us not only because of our values, but also because of the amount of attention and resources that the international community must devote to the man-made tragedies.*[152]

Both the ICTY and the future ICC lack police forces to conduct investigations, arrest indictees, or run penal institutions.[153] The majority of ICTY indictees in custody have voluntarily surrendered themselves to the tribunal and were not forcibly detained.[154] Similarly, because the ICC will not have its own police force, it will be completely dependent on member states for assistance with everything from the investigation, location of evidence, procurement of witnesses, arrest of those suspected, and the recognition of its judgments.[155] The lack of a credible law enforcement agency is completely contrary to the alleged ICC goal of deterrence.

> No organization [exists] to enforce an appearance before the Court of the execution of its judgments, and it seems difficult to establish such an organization. The jurisdiction therefore is likely to be limited and brought into action in a haphazard way. There are great risks that culprits will not always be brought before the Court. On the whole this will give the impression that the jurisdiction is being exercised in an arbitrary way. Its deterring effect will thus be very doubtful, if any.[156]

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151. *Id.* at 59.

152. Penrose, *supra* note 115, at 348 (quoting Claudio Grossman, *Conference Convocation*, 13 AM. U. INT'L REV. 1383, 1386 (1998)).

153. Penrose, *supra* note 115, at 361 (citing Anne L. Quintal, *Rule 61: The "Voice of the Victims Screams" Out for Justice*, 36 COLUM. J. TRASNAT'L L. 723, 734 (1998)).

154. Penrose, *supra* note 115, at 362.

155. Wexler, *supra* note 123, at 703-04.

156. Report of the International Law Commission to the General Assembly, U.N. GAOR Supp. (No. 10), U.N. Doc. A/CN.4/SER.A/1950/Add.1; Summary Records of the 43d Meeting (1950); 1 Y.B. INT'L COMM'N 23, 34 U.N. DOC. A/CN.4/SER.A/1949 (statement by Emil Sandst, Special Rapporteur).

Criminal courts can only have the power to deter when their decisions can actually be enforced. "Unfortunately, the failure to exact retribution will further impair the goal of deterrence."[157] In Rwanda, the Hutu participants in genocide felt they were immune from prosecution solely as a result of their numbers. They believed that no formal law enforcement mechanism could possibly investigate, arrest, prosecute and confine all the participants involved in the slaughter.[158]

The Rwandan government registered a vote of "no confidence" in the International Criminal Tribunal for Rwanda (ICTR). The government also suggested that it may reconsider its commitment to the ICC, which may only amount to a "permanent version of a temporary failure."[159] When this statement was made, the Rwandan government emphasized that national courts in Rwanda had issued 20,000 indictments, had conducted 1989 trials, and had accepted 17,847 guilty pleas.[160] Over 100,000 suspects were in custody at the time of the complaint.[161] These numbers must be contrasted with the ICTR's forty-eight indictments and four completed cases at the time of the vote of no confidence.[162]

The national courts in Rwanda appear far more capable in handling the genocide in Rwanda than the international tribunal. However, if these national court results are seen as a sort of vigilante justice, then the actions of the national courts will not have a tendency to deter either. In fact, astronomically high numbers of trials, where the accused receive no due process, will not be considered "fair trials" and may well incite combatants to commit atrocities rather than deter them. The possibility of a kangaroo court trial meting out capital punishment would only serve to encourage combatants to fight to the death. The best defense in the face of such a corrupt court system is to win at any cost.

Although the current ad hoc international tribunals do not allow for the death penalty, national courts in Rwanda do. Since the tribunals have

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157. Dorinda Lea Peacock, *"It Happened and It Can Happen Again": The International Response to Genocide in Rwanda*, 22 N.C. J. INT'' LAW & COM. REG. 899, 929 (1997).

158. Laurant Bijard, *Can Justice Be Done? Massacred: 1,000,000; Tried: 0*, WORLD PRESS REV., June 1996, at 7.

159. Wippman, *supra* note 113, at 481 (citing Statement of Joseph Mutaboda to the U.N. General Assembly (Nov. 9, 1999)).

160. *Id.*

161. Ann M. Simmons, *Rwanda Mass Execution Set; Critics Decry Penalty in Genocide Case*, CHICAGO SUN TIMES, Apr. 23, 1998, at 27.

162. Wippman, *supra* note 113, at 481.

been established to handle the most serious offenders, the Rwandan government was opposed to the limitation on capital punishment for the ICTR. The Rwandan government was concerned that the most serious offenders would use the tribunal as sort of a safe haven while "lesser" offenders would be put to death by the national courts of Rwanda.[163]

2. Lack of Cooperation

> *Although the political will existed to establish a criminal tribunal for the purpose of trying individuals accused of war crimes and crimes against humanity, the political will apparently does not exist to arrest and detain such individuals to enable the Tribunals to function as designed.*[164]

There has been a serious lack of cooperation with the ICTY by nations whose cooperation is essential.[165] The United Nations Security Council directed that "all States shall cooperate fully with the International Tribunal for the Former Yugoslavia and its organs in accordance with the provisions of Resolution 827 . . . and shall comply with requests for assistance or orders issued by a Trial Chamber…"[166] However, even though Security Council actions and mandates obligate the member states, they do not necessarily flow to the "soldier, the platoon leader, or the commander in the field." [167]

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163. Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE COMP. & INT'L L. 349, 353 (1997).

164. Penrose, *supra* note 115, at 361.

165. Reisman, *supra* note 110, at 48; Noah Adams, *Relations Between the US and the International War Crimes Tribunal Becoming Strained as US is Accused of Holding Back on Cooperating with the Tribunal's Investigating of NATO* (NPR broadcast, March 24, 2000), LEXIS, News Library.

166. S.C. Res., U.N. SCOR, 50th Sess., 3607th mtg. para. 4, U.N.Doc. S/RES/1031 (1995).

167. Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia*, 7 DUKE J. COMP. & INT'L L. 411, 445-46 (1997) (quoting John T. Burton, *"War Crimes" During Military Operations Other Than War: Military Doctrine and Law 50 Years After Nuremberg and Beyond*, 149 MIL. L. REV. 199, 203-04 (1995)). "It is perfectly proper for states or NATO to decide that IFOR will not be assigned the mission to search for and arrest war criminals so long as states take action to give effect to their obligation." *Id.* The author lists and discusses several reasons why NATO may elect to not search for and arrest war criminals in Bosnia. *Id.* at 444-60.

3. Little Bang for the Buck

Although one cannot place a price tag on justice, resources are not unlimited. In terms of weighing potential responses to massive man-made humanitarian tragedies, responsible policy makers must weigh the costs of the various options available. With this in mind, the cost to result ratio of the two ad hoc tribunals will now be considered.

Since its inception in 1993, there have been ninety-seven individuals publicly indicted before the ICTY.[168] Thirty-five individuals are currently in custody, twenty-seven are at large, and four have been released pending appeal.[169] Charges against eighteen individuals have been dropped, one has been acquitted, and eight indicted individuals have died. Thirty-nine individuals are currently involved in proceedings.[170] There are sixteen individuals at the pre-trial stage, eleven have appealed and twelve are in on-going trials.[171] Five trials have been completed.[172] With a current annual budget of over $96,000,000, the total budget for the ICTY since its inception has been over $470,000,000.[173] This figure does not take into account the indirect financial support the ICTY receives from nations and NATO in the form of arrests, investigations, and intelligence.[174] Because the ICTY has no police force or investigation services of its own, this amount is probably quite high.

In Rwanda, the budget for the year 2000 was $79,753,900.[175] To date, there have been twenty-nine indictments against fifty individuals.[176] A total of forty-two individuals are in ICTR detention units, and eight individuals have been sentenced in seven judgments.[177]

Perhaps the millions of dollars expended on these tribunals could have been better spent. The victims of these horrific crimes may find some

168. The International Criminal Tribunal for the Former Yugoslavia, *ICTY Key Figures*, *at* http://www.un.org/icty/ glance/keyfig-e.htm (last modified Jan. 23, 2001).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. The International Criminal Tribunal for Rwanda, *About the Tribunal*, *at* http://www.ictr.org/ (last visited Jan. 13, 2001) (General Information, ICTR Law).

176. The International Criminal Tribunal for Rwanda, *About the Tribunal*, *at* http://www.ictr.org/ (last visited Jan. 13, 2001) (Fact Sheet, The Tribunal at a Glance).

form of compensation more advantageous than eventually seeing the perpetrators placed behind bars. The money might also be used to fund a standing U.N. police force that could respond to and even prevent man-made humanitarian disasters, as opposed to spending the money on expensive court systems after it is too late. It has been said that the use of a military or police force early on may not only have saved thousands of lives in Rwanda, but also "would have cost a fraction of the millions of dollars it took . . . to maintain the . . . refugees."[178]

Finally, the money spent on the ICTY and ICTR does little for the victims of man-made disasters in other parts of the world, such as Sierra Leone. If these courts did in fact have some power to deter other potential human rights abusers, then the money spent on these tribunals would indirectly assist the abusers' potential victims. But it is unrealistic to believe that these courts had any deterrent effect outside the scope of their limited jurisdictions.

C. The Proposed International Criminal Court

> *From now on, all potential warlords must know that, depending on how a conflict develops, there might be established an international tribunal before which those will be brought who violate the laws of war and humanitarian law . . . . Everyone must now be presumed to know the contents of the most basic provisions of international criminal law; the defense that the suspects were not aware of the law will not be permissible.*[179]

At the close of World War I, the international community of states recognized the need for a permanent international criminal court.[180] Over the course of the last fifty years, the international community has established four ad hoc international criminal tribunals to hear cases involving serious

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177. *Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in theTerritory of Rwanda to the United Nations General Assembly and the United Nations Security Council*, U.N. Doc. A/55/435-S/2000/927, 2 (2000).

178. Peacock, *supra* note 157, at 936.

179. Statement of Hans Corell, United Nations Under Secretary-General for Legal Affairs (unknown origin, n.d.), *at* http://www.un.org/law/icc/general/overview.htm.

180. *See generally* INTERNATIONAL CRIMINAL COURTS FOR THE TWENTY-FIRST CENTURY (Mark W. Janis ed., 1992); M. CHERIF BASSIOUNI, AN INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AND INTERNATIONAL CRIMINAL TRIBUNAL (1987).

violations of international law. These four tribunals included the: (1) International Military Tribunal in Nuremberg;[181] (2) International Military Tribunal for the Far East in Tokyo;[182] (3) International Criminal Tribunal for the Former Yugoslavia at the Hague;[183] and (4) International Criminal Tribunal for Rwanda sitting in Arusha, Tanzania.[184] In addition to the World War II era international tribunals, the four major Allies prosecuted alleged war criminals in their sectors of occupation in Germany pursuant to the document known as Control Council Number 10.[185] The Allies prosecuted Japanese war criminals in their zones of occupation in the Pacific as well.[186]

In 1947, the U.N. General Assembly directed the predecessor to the International Law Commission, the Committee on the Codification of International Law, to begin work on codifying the crimes tried at Nuremberg.[187] In addition to directing the codification of the Nuremberg crimes, the General Assembly also recognized the need for a standing international court to prosecute the crimes undergoing codification.[188]

On 17 July 1998, after more than fifty years of work, a statute creating an international criminal court was finalized in Rome, Italy, and was open for signature until 31 December 2000.[189] By the terms of the Rome Statute (treaty or Statute), the ICC will enter into force on the first day of the month after the sixtieth day after sixty nations ratify the treaty.[190] At the

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181. London Charter, *supra* note 103.

182. Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3; Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589.

183. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

184. S.C. Res. 955, U.N. SCOR 49th Sess., U.N. Doc. S/RES/955 (1994).

185. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, 31 Jan. 1946.

186. R. John Pritchard, *War Crimes Trials in the Far East*, *in* CAMBRIDGE ENCYCLOPEDIA OF JAPAN 107 (Richard Bowring & Peter Kornik eds., 1993).

187. G.A. Res. 174, U.N. GAOR, 2d Sess., U.N. Doc. A/519 (1947).

188. United Nations, *Rome Statute of the International Criminal Court*, *at* http://www.un.org/law/icc/ (last modified Jan. 11, 2001) (Overview) (citing G.A. Res. 260 (1948)).

189. Rome Statute, *supra* note 5, art. 125. Of course for countries that wish to become parties after 31 December 2000, accession is available. *Id*. art. 126(2).

190. *Id.* art. 126(1).

time of this writing, 139 nations, including the United States, have signed the treaty and twenty-nine have signed and ratified the document.[191]

Although the United States signed the treaty, its support for the ICC has not always been enthusiastic.[192] In a press briefing soon after the conclusion of the Rome Conference, U.S. Department of State representative James Rubin denounced the Rome Statute as "deeply flawed" and certain to "produce a flawed court." Rubin pointed out that the court would be weakened without participation by "the leading force for the rule of law . . . and the leading force . . . in the fight against war crimes and crimes against humanity;" the United States. Rubin further questioned the court because: (1) the scope of certain crimes, including aggression, were overly broad; (2) there was a possible inclusion of the use of nuclear weapons as a crime; (3) the independent prosecutor would have an ability to independently investigate crimes; (4) certain of the opt out provisions were not well thought out; and (5) the court would have jurisdiction over non-parties to the treaty.[193] Rubin described the conference as "sort of a festival . . . towards the end for people who didn't really understand the consequences of words."[194]

1. The Referral System

Perhaps the most dangerous aspect of the Rome Statute is its procedure for referring cases to the court. As will be seen, there is significant opportunity for politically-based prosecutions. This possibility subjects the United States and its allies to tremendous risk, so high, in fact, that the forces most likely to be used to prevent or stop massive humanitarian violations may actually be deterred from responding to these man-made disas-

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191. As of 12 February 2001, the statute was signed by 139 nations and ratified by twenty-nine. United Nations, *Rome Statute of the International Criminal Court* (Feb. 12, 2001) (Ratification Status), *at* http://www.un.org/ law/icc/statute/status.htm.

192. Ambassador David J. Scheffer, Address Before the Committee of Conscience Holocaust Museum, Washington, DC (Apr. 22, 1998) (Responding to Genocide and Crimes Against Humanity), *available at* http://www.state.gov/www/policy_remarks/ (1998, 4/22/98).

193. U.S. Department of State, Daily Press Briefing (July 20, 1998), *available at* http://secretary.state.gov/www/ briefings/9807/980720db.html.

194. *Id.*

ters. David Scheffer, former United States Ambassador-at-Large for War Crimes, explained:

> The United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court. Such an international court, so long contemplated and so relevant in a world burdened with mass murderers, can both deter and punish those who might escape justice in national courts. Since 1995, the question for the Clinton administration has never been whither there should be an international criminal court, but rather what kind of court it should be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security. At the same time, the United States has special exposure to political controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system.[195]

There are essentially two ways in which the ICC gains jurisdiction over a person. First, the court will have jurisdiction over crimes that occur in the territory of one of the state parties to the Statute and over crimes that occur in the territory of non-state parties where the non-state party consents to jurisdiction over the "crime in question."[196] Second, the court will have jurisdiction over nationals of state parties that violate the Statute no matter where the violation takes place.[197]

Under this jurisdictional scheme, a non-state party could launch an aggressive war into a neighboring state. If other states then responded and attacked the aggressor on the territory of the aggressor, the aggressor could consent to jurisdiction for the crimes allegedly committed by the responders in the aggressor's territory and not consent to jurisdiction for his own alleged crimes.[198] This appears to be a possibility because a non-state party can consent to a "crime in question" rather that an entire incident or conflict.[199]

Not only will traditional uses of military force, such as defense of self or others, be risky, less traditional operations such as peace operations and

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195. David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 A.J.I.L. 12 (1999).

humanitarian intervention will likely be so politically charged as to be avoided at nearly all costs. What non-state party responder would attempt to intervene on a humanitarian basis to stop genocide in a country that is a party to the ICC under the current jurisdictional regime? As Ambassador Scheffer explains:

> Equally troubling are the implications of Article 12 [of the Rome Statute] for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international peace or regional peace and security. The illogical consequence imposed by Article 12, particularly for nonparties of the treaty, will be to limit severely those lawful, but controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.[200]

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196. Rome Statute, *supra* note 5, art. 12(2)(a),(3). Article 12 reads:

> Preconditions to the exercise of jurisdiction
> 1. A State that becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute, or have accepted the jurisdiction of the Court accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.
> 3. If acceptance of a State which is not a party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction of the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Id. art. 12.

197. *Id.* art. 12(2)(b).
198. *Id.* art. 12(2),(3).
199. *Id.* art. 12(3).
200. Scheffer, *supra* note 195, at 19.

It may be asked whether it is "fair to criticize the Rome Statute as leaving peace keepers subject to unreasonable risks of being charged with crimes intended to fulfill a nation's (or rogue prosecutor's) political agenda?"[201] However, the potential for politically-based prosecutions is not just some fanciful pipe dream. Politics have certainly played a part in recent actions at the ICTY.[202] Certainly then, there is no reason to be less concerned with the possible politicization of the ICC.[203] There is a genuine concern that the prosecutor's office could become a sort of human rights advocate, responsive to any and all complaints regardless of the source or seriousness of the allegations.[204] Moreover, both judges and the prosecutor are to be elected by state parties with their inherent political objective.[205]

Under the ICC referral system, the court may exercise its jurisdiction when a case has been referred to it by a state party, by the independent prosecutor, or by the United Nations Security Council.[206] The independent prosecutor may initiate investigations "*proprio motu* on the basis of information on crimes within the jurisdiction of the Court."[207] When the prosecutor receives information regarding crimes within the jurisdiction of the court:

> The prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs or the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."[208]

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201. Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Tribunal and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 357 (1999).

202. *Id.* at 351.

203. *See* Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L. REV. 805, 833-38 (1999) (citing S. REP. NO. 103-71, at 23-24 (1993) (statement by Edwin D. Williamson) (commenting that in other forums, the United States has been unsuccessful in creating non-politicized agencies)). For example, Rodriguez points out that Cuba, Iran, and Libya all sit on the United Nations Human Rights commission. *Id.*

204. Press Release, James P. Rubin, U.S. Department of State Office of the Spokesman, U.S. Position on Self-Initiating Prosecutor at the Rome Conference on Establishment of an International Criminal Court (June 23, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps980623a.html.

205. Rome Statute, *supra* note 5, art. 36, 42(4).

There are at least two concerns with regard to this provision of the treaty. First, as to the independence of the prosecutor to investigate and bring cases to the court, this is simply too much power for one person to hold at the international level. Second, because the court will not have its own police force or investigations arm, the prosecutor will be allowed to rely on information provided by non-governmental organizations. While certainly the majority of these organizations are motivated by just and noble causes, there is room for concern that some may become so personally and politically involved, that their collection and presentation of evidence should be suspect. It is foreseeable that groups opposed to all use of military force could tie up military resources and man hours by making allegations of war crimes, no matter how frivolous.[209]

United States policy makers may find themselves before the court having to defend United States actions in the use of force against blatantly aggressive nations. A commentator offered the following example:

> If Iraq were to bring charges against U.S. forces related to [the Gulf War], it could present evidence of prima facie violations of the crime of aggression, which outlaws the "invasion or attack" or bombardment of the territory of another state, and war crimes,

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206. *Id.* art. 13(a),(b),(c). Article 13 reads:

> Exercise of jurisdiction:
> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Id. art. 13.

207. *Id.* art. 15(1).

208. *Id.* art. 15(2).

209. For an example of highly suspect allegation of war crimes during the Gulf War, see Howard Kurtz, *Gen. McCaffrey Denies Hersh Allegations*, April 18, 2000, WASH. POST, at C1. Among other allegations, Seymour Hersh, who won a Pulitzer Prize for exposing the 1968 My Lai massacre in Vietnam, claims that U.S. Army soldiers from the 24th Infantry Division commanded by retired General Barry McCraffrey shot Iraqi prisoners of war. *Id.*

> including (1) "intentionally directing attacks against the civilian population; and (2) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated."[210]

This example demonstrates the dilemma an independent prosecutor may face if he is pressured to take action against any and all uses of military force.

Because of the jurisdictional formulation of the Statute, jurisdiction over non-party state citizens is also possible. This is particularly harmful because it means that, if a state elects not to become a party to the treaty, its citizens are still in danger of being hauled before the ICC. This means that even if the United States decides against becoming a party to the treaty, U.S. citizens would continue to be in jeopardy. Ambassador David Scheffer explains that "[a] fundamental principle of international law is that only states that are a party to a treaty should be bound by its terms. Yet Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a non-party state."[211] Not only does such a system violate international law,

> [i]t is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens does not yet recognize. No other country, not even our closest allies, has anywhere near as many troops and military assets deployed globally as does the United States.[212]

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210. David, *supra* note 201, at 376 (citations omitted).

211. Scheffer, *supra* note 192, at 18 (citing Vienna Convention of the Law of Treaties, opened for signature May 23, 1969, arts. 34-38, 1155 U.N.T.S. and Rome Statute, *supra* note 5, art. 12).

212. Scheffer, *supra* note 192, at 18.

The United States suggested two possible alternative formulations for Article 12. The two options were:

> (1) to require the express approval of both the territorial state of the alleged crime and the state of nationality of the alleged perpetrator in the event either was not a party to the treaty; or
> (2) to exempt from the court's jurisdiction conduct that arises from the official actions of a non-party state acknowledged as such by the nonparty.[213]

Obviously, neither formulation was accepted.

2. The Crime of Aggression

> *I think I can anticipate what will constitute a crime of "aggression" in the eyes of this Court: it will be a crime when the United States of America takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations.*[214]

Aggression, or a crime against peace, has been recognized as an international crime since the post-World War II war crimes trials.[215] However, the crime is controversial and difficult to define. For these reasons, aggression is not a crime over which the tribunals in the FormerYugoslavia or in Rwanda have jurisdiction.[216] The ICC drafters took the highly unusual step of including aggression as a crime over which the court will have

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213. *Id.* at 20.

214. *Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong. 60 (1998) (statement of Sen. Helms).

215. Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L & TRADE 1 (1998). The "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing," is the crime of aggression. *Id.* n.3 (citing THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 111 (Bruno Simma ed., 1994); NATIONAL SECURITY LAW 85, 369-70 (John Norton Moore et al. eds., 1990); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112, 154 (1963)).

216. *See generally* Report of the Secretary General, *supra* note 145; ICTY Statute, *supra* note 127; S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994).

jurisdiction, but declined to define the crime. Because the crime of aggression has not been defined but is included as a basis for prosecution by the Rome Statute, it may ultimately be defined broadly enough to make embargoes or economic sanctions against rogue regimes a criminal act. This lack of a definition represents a serious threat to the United States and its allies in future military operations, exercises and weapons testing. Ambassador Scheffer explained:

> The final text of the treaty also includes the crime of aggression, a surprise to the United States and other governments that had struggled so hard to define it only to reach an impasse during the Rome Conference. The failure to reach a consensus definition should have required its removal from the final text. Instead, the crime appears in Article 5 as a prospective crime within the court's jurisdiction once it is defined. This political concession to the most persistent advocates of a crime of aggression without a definition and without the linkage to a prior Security Council determination that an act of aggression has occurred deeply concerns the United States. The future definition that may be sought for this crime, and ultimately determined, if at all, only by the states parties through an amendment to the treaty, could be without limit and call into question any use of military force or even economic sanctions."[217]

If the debate as to what should be covered under the crime of aggression is explored, the United States' concern that the crime has been left undefined becomes even more understandable. In 1991, the International Law Commission of the United Nations created the forerunner to the present ICC Statute, the Draft Code of Crimes against Peace and Security of Mankind (1991 Draft Code).[218] Pursuant to the 1991 Draft Code, there were four bases for charging the crime of aggression: (1) aggression; (2) threat of aggression; (3) intervention; and (4) colonial domination.[219]

Aggression was defined as: "The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations."[220] One requirement in the 1991 Draft Code that is consistent

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217. Scheffer, *supra* note 192, at 20.

218. Draft Code of Crimes against Peace and Security of Mankind: Titles and Texts of Articles Adopted by the Drafting Committee, UN Doc. A/CN.4L.459/Add.1 (1991), *revised by* UN Doc. A/CN.4/L.464/Add.4 (1991) [hereinafter 1991 Draft Code].

219. *Id.* arts. 15-18.

with U.S. national security interests is that individual responsibility for aggression could only exist if the Security Council first determined that an act of aggression had occurred. Such a formulation would go a long way in stripping the court of its ability to bring political prosecutions with regards to crimes of aggression.

> Preservation of the Security Council's pivotal role serves a vital interest of the international community. Aggression needs to be dealt with in a manner allowing for the greatest degree of negotiation, diplomacy and mediation. Judicial proceedings, in contrast, are adversarial in nature. Suppose aggression is committed, and the international criminal court promptly decided that the aggression was unlawful, and further, it determined that the Head of state was criminally responsible. In such a case, the court's decision might only harden the resolve of the country's leaders to "fight to the finish," rather than seek a graceful way to back down.[221]

However, the draft definition of the crime of aggression is very broad. The mere threat of aggression is a crime under the 1991 Draft Code: "An individual, who as a leader or organizer commits or orders the commission of a *threat of aggression* shall, on conviction thereof, be sentenced . . . ."[222] The theory behind including the mere threat of aggression as a crime is that "powerful states may make ostentatious displays of military strength to intimidate smaller, more vulnerable members of the international community."[223] However well-intentioned, criminalizing the threat of aggression creates the potential for significant politically-charged prosecutions. For example, would large-scale exercises or maneuvers be interpreted by some as a threat of aggression? What about testing nuclear weapons or new conventional weapons? Could the mere possession of nuclear weapons be viewed by some as a threat when others are prohibited from obtaining them? What about the maintenance of large standing armies and navies?

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220. *Id.* art. 15(2).
221. SUNGA, *supra* note 108, at 51.
222. 1991 Draft Code, *supra* note 218, art. 16 (emphasis added).
223. SUNGA, *supra* note 108, at 59.

The 1991 Draft Code also criminalizes intervention. The intervention theory of aggression was defined as:

> Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.[224]

The 1991 Draft Code is unclear in how to handle situations where an outside power is "invited in" to assist with internal problems, or when an outside state takes action to defend its own nationals in a country unwilling or unable to do so. Making intervention a crime may significantly impact on the international community's ability to respond where a nation is involved in the wholesale slaughter or abuse of segments of its own population. If aggression is defined to include intervention, the Statute may have the unintended consequences of shielding rogue regimes from humanitarian military responses to massive human rights violations. Arguably, United States actions in Nicaragua could have run afoul of such a broad definition of aggression.[225]

The 1991 Draft Code further criminalized colonialization as a form of aggression. Under the Draft Code, colonial domination and other forms of alien occupation exist when:

> An individual who as a leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced to . . . .[226]

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224. 1991 Draft Code, *supra* note 218, art. 17.

225. John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 44-48 (1986).

226. 1991 Draft Code, *supra* note 218, art. 18.

If the crime of aggression were to include colonial domination, is it possible that someone might assert that the United States is in violation of this article with regards to Puerto Rico or Guam?

As a result of the controversy surrounding the 1991 Draft Code, in 1996 the International Law Commission drafted the Draft Code of Crimes against Peace and Security of Mankind (1996 Draft Code).[227] Crimes in the 1991 Draft Code dropped from the 1996 Draft Code include: threat of aggression; intervention; colonial domination; apartheid; mercenary activity; terrorism; drug trafficking; and willful and severe damage to the environment.[228] The 1991 Draft Code crime of the threat of aggression was strongly opposed by the governments of Australia, the Netherlands, the United Kingdom, the United States, Switzerland, and Paraguay because it did not lend itself to a precise determination for the purposes of criminal responsibility.[229] Similarly, Australia, Belgium, Brazil, The Netherlands, Switzerland, the United Kingdom, and the United States were firmly against criminalizing intervention largely because it was far too ambiguous for criminal law purposes.[230] Australia, Denmark, Finland, Iceland, The Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States moved to remove the provision regarding colonialization.[231]

If one of the draft code definitions of the crime of aggression is ultimately adopted, the NATO decision to send ground troops into Bosnia, prior to the United Nations approval of the plan, could have met the definition of aggression.[232] Certainly then, Serbia could have alleged aggression on the part of NATO when NATO began its bombing campaign without any Security Council approval.[233] The irony of this is that NATO dispatched forces to put down the real aggressor, a regime apparently involved in massive human rights violations; however that aggressor could

227. Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Draft Articles, U.N. Doc. A/CN/.4/L.522 (1996), U.N. Doc. A/CN.4/L.527/Add.10 (1996) [hereinafter 1996 Draft Code].

228. *Compare* 1991 Draft Code, *supra* note 218, *with* 1996 Draft Code, *supra* note 227.

229. SUNGA, *supra* note 108, at 63.

230. *Id.* at 89-90.

231. *Id.* at 104.

232. David, *supra* note 201, at 382 (citing 1991 Draft Code, *supra* note 218, art. 16).

233. *Id.* at 383.

then be protected by an overly broad definition of aggression because a potential respondent may view intervention as overly risky.

Not only is an unauthorized use of force prohibited by the U.N. Charter, so is the mere threat of the use of force.[234] The United States sees North Korea as a significant threat to its ally South Korea. Relying on the twin pillars of forward deployment and power projection,[235] largely through military exercises in Korea, the United States seeks to deter North Korean aggression toward South Korea.[236] With the lack of a definition of aggression in the Statute of the ICC, it is conceivable that a politically-charged court might find that military exercises designed to deter aggression, such as Team Spirit in South Korea, unlawfully threaten the use of force against the political independence or territorial integrity of the target state, North Korea.[237]

Although agreement was not universal during the drafting of the ICC Statute, many members of the International Law Commission believed that it should be up to the Security Council, not the ICC, to determine whether a given incident rises to the level of aggression. These members felt, however, that if the Security Council made such a determination as a condition precedent to the court's jurisdiction, the court should then be able to determine whether individuals are guilty of the crime of aggression.[238]

Although aggression is potentially the most dangerous basis of jurisdiction to leave undefined; there are other crimes within the Statute that are not well defined.[239] For example, murder, rape "or any other form of sexual violence of comparable gravity," and apartheid, are some of the offenses listed as crimes against humanity.[240] Murder, rape and sexual assault may vary so significantly from nation to nation, however, it may be very hard to define when these crimes occur and when they are of such a

234. U.N. CHARTER art. 2(4).

235. NATIONAL SECURITY STRATEGY, *supra* note 4, at 11.

236. *See generally,* Matthew A. Myers, Sr., *Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?*, 162 MIL. L. REV. 132, 138 (1999).

237. *Id.*

238. *Report of the International Law Commission*, U.N. Doc. A/46/10 (1991); U.N. Doc. A/CN.4/SER.A/1991/ Add.1.

239. Rodriguez, *supra* note 203, at 825.

240. Rome Statute, *supra* note 5, art. 7(1)(a), (g).

magnitude to be within the jurisdiction of the ICC rather than a domestic court.

Apartheid is defined in the Statute as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutional regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[241] While this definition is somewhat helpful, as will be explained below, apartheid that only occurs within the borders of a non-state party could not be brought before the ICC.[242] So, although the Statute may make people feel good about themselves politically because they have criminalized certain distasteful behavior, the Statue may be without any real teeth in terms of actually enforcing human rights violations that tend to be internal in nature within the territory of non-party states. These problems are more likely to be solved by means other than courts of law, such as diplomacy and economic sanctions.

3. War Crimes

Article 8 of the Statute grants to the court jurisdiction over war crimes.[243] One benefit of the Statute is that it specifically defines what war crimes the court will have jurisdiction over. In fact, it explains what crimes can be charged in international armed conflicts,[244] and what war crimes can be charged across the conflict spectrum including internal conflicts.[245] It also defines and grants to the court the authority to try Grave Breaches of the 1949 Geneva Conventions.[246] This article is extremely beneficial in that it clearly explains not only what a war crime is, but it lays out what level of armed conflict is required in order to trigger a potential violation.

However, Article 8, as drafted, risks expansive application and interpretation. For example, in order for the court to have jurisdiction over genocide, the accused must have the requisite specific intent.[247] And for crimes against humanity, there must be widespread and systematic abuses

241. *Id.* art. 7(2)(h).
242. *See infra* notes 258-68 and accompanying text.
243. Rome Statute, *supra* note 5, art. 8.
244. *Id.* art. 8(2)(b).
245. *Id.* art. 8(2)(c), (d), (e).
246. *Id.* art. 8(2)(a).
247. *Id.* art. 6.

against the civilian population.[248] Therefore, prosecution for crimes against humanity, aggression, and genocide may tend to be limited to high level planners or persons of the most evil character. With regard to war crimes, there is no such limitation because there is no minimum threshold of violence or specific intent required. Article 8 states: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[249] This apparent limitation to serious violations is in reality no limit at all. The "in particular" language would not prevent the prosecution of a one-time relatively minor violation.

This means that technically, even a relatively insignificant crime committed by a low-level operator, rather than just crimes committed on a wide-scale basis or directed by high-level policy makers, could be tried before the court. For example, imagine that a decision is made to use riot control agents in order to rescue hostages in what planners believe to be a purely internal armed conflict. Assume that the purpose for using the riot control agent is to reduce the need to use lethal force and the risk of permanent harm to the innocent hostages. Further suppose that a young U.S. Army infantry captain orders his men to employ the agents. Later, the prosecutor argues that the conflict was not internal, but in fact international in character, making the use of riot control agents as a method of warfare illegal.[250] This might mean that the captain, whose true intentions were to use a humane technique to rescue innocent hostages at the direction of planners after a legal review by U.S. judge advocates, could be subject to prosecution if the prosecutor was politically motivated and opposed to the legitimacy of the operation from the outset. "With approximately 200,000 United States military personnel permanently stationed in forty countries around the world, there are potentially significant consequences to the United States because of this expansive definition of war crimes."[251]

Moreover, even though the crimes are listed and therefore limited, the court will be tasked with analyzing and applying the law. In applying and interpreting the laws of war, the court will resemble a supralegislature. If the court were to determine, for example, that all land mines, both smart and dumb, anti-armor as well as anti-personnel, violate the principle of

248. *Id.* art. 7.

249. *Id.* art. 8.

250. *Id.* art. 8(2)(b)(xviii); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction, January 13, 1993, 32 I.L.M. 800.

251. Rodriguez, *supra* note 203, at 825.

unnecessary suffering or represent indiscriminate attacks, the court could effectively become a sort of arms control agency, stripping countries of their ability to negotiate arms control issues. If the court were to conclude that the use of cluster bombs or depleted uranium warheads were violations of the law of war principle of humanity, the court could outlaw key weapons systems relied on by the United States in its war fighting doctrine. A handful of civilian judges then stand to be able to significantly impact warfighting doctrine on the battlefield itself, without any traditional international negotiation, diplomacy or agreement by states. The court could potentially tie the hands of the technologically strong forces by taking away their technological advantage, allowing rogue regimes and non-state actors to gain a certain symmetrical parity with organized armies. This would serve to weaken deterrence and pave the way to additional armed conflict becasue the battlefiled would be level.

If the ICC focuses on the humanitarian aspects of the laws of war and ignores military necessity, disastrous results to national security could follow. Concern that the laws of war may be loosing their pragmatic appeal has been expressed by some writers.[252] Even referring to the laws of war as international humanitarian law has the tendency to create the false impression that the laws of war are primarily concerned with humanitarianism rather than a professional code of war fighting created by warriors.[253]

> As has been recognized in many treaties and manuals on the subject, the laws of war are implemented largely through the medium of individual countries. It is usually through their government decisions, laws, courts and courts-martial, commissions of inquiry, military manuals, rules of engagement, and training and educational systems, that the provisions of international law have a bearing on cases in connection with the laws of war have been in national, not international, courts.[254]

For example, one commentator points out that had the ICC been in existence at the time of Vietnam, many Americans, including some in very high places, may have been hauled into court.[255] Some assert that the Gulf War was one of the most legalistic wars ever fought. However, others argue that the United States was involved in war crimes, allegedly attacking

252. Roberts, *supra* note 90, at 14.
253. *Id.*
254. *Id.* at 19.

civilian targets, crucial infrastructure, communications, power and water pumping stations.[256]

There is no question; all parties to a conflict should have to answer for their war crimes. However, organized armies are generally ready, willing, and able to prosecute their own war criminals. One of the dangers with the court is the potential vesting of authority to prosecute war crimes in a politically-motivated prosecutor; this creates a real danger that, no matter how well-intentioned the leaders and soldiers of the United States may be, they might find themselves before a criminal court in cases where the real bad actors are protected.

In Mogadishu, U.N. military spokesman, Major David Stockwell stated, "everyone on the ground in that vicinity was a combatant, because they meant to do us harm. In an ambush, there are no sidelines and no spectators."[257] Might a politically-motivated ICC charge all participants that killed civilians with war crimes because of their inability to distinguish combatants from non-combatants? Would this be more likely to occur if the prosecutor or world opinion did not support the overall mission?

The court's exercise of jurisdiction should not be permitted to diminish or prevent critical operations by military forces fighting agression. Of particular note, the most important means of dealing with violations of the

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255. Rodriguez, *supra* note 203, at 827 n.8 (citing *Taylor Says by Yamashita Ruling Westmorland May be Guilty*, N.Y. TIMES, Jan. 9, 1971, at A3 (noting that former Nuremberg Chief Prosecutor Telford Taylor stated that General William C. Westmoreland, a former commander of the United States forces in Vietnam, might be convicted as a war criminal if he were held to the same standard established at the Nuremberg and Tokyo trials); Seymour Hersh, *What Happened at My Lai?, in* VIETNAM AND AMERICA 410 (Marvin E. Gettleman et al. eds., 2d ed. 1995). (revealing that the United States had a threefold plan after the Tet offensive: (1) massive assaults from the air; (2) systematic destruction of villages by ground troops; and (3) the CIA-coordinated Phoenix Program of mass arrests, torture, and assassinations)). Although these writers cited by Rodriguez may not have the facts accurately presented, and although no convictions for these incidents may have resulted, it is reasonable to conclude that many Americans may have had to answer for their actions before the ICC had it existed at the time.

256. Michael Walzer, *Justice and Injustice in the Gulf War*, *in* BUT WAS IT JUST? REFLECTIONS ON MORALITY IN THE PERSIAN GULF WAR (David E. Decosse ed., 1992); RICHARD LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY, AND PRACTICE 879 (3d ed. 1995).

257. Mark Husban, *Spectators Pay High Price in Somalia Theater*, LONDON TIMES OBSERVER, Sept. 12, 1993, at 12.

laws of war in the Former Yugoslavia has probably been the threat and use of force by NATO in conjunction with the United Nations.

> Violations of the U.N.-declared "safe areas," repeated obstruction of humanitarian relief, and the atrocities and bragging accompanying the Serb capture of Srebrenica in July 1995, which led to a change in Western policy . . . . TheNATO Operation could not be expected to stop all atrocities in a peculiarly vicious war. However, perhaps it did convince the Bosnian Serbs that verbal condemnations by outside bodies could actually lead to serious military actions.[258]

It is ultimately military force, or the credible threat thereof, that is the best prevention of war crimes.

4. Genocide

While the crime of aggression may be overly broad and ambiguous, the crime of genocide is overly narrow. Similar to the Genocide Convention,[259] the Rome Statute[260] will not provide for prosecution for genocide involving the wholesale slaughter of political groups. According to the Genocide Convention, genocide is the employment of certain tactics designed to destroy, in whole or in part, "a national, ethnical, racial or religious group."[261] Following the Genocide Convention, prosecution before the ICC can only be had where the destruction involves a national, ethnical, racial or religious group.[262] For example, the slaughter of roughly 2,500,000 Cambodians by the Pol Pot regime was not genocide according to some because it was based on politically-divided groups rather than on ethnicity, religion, or nationality.[263]

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258. Roberts, *supra* note 90, at 62.

259. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

260. Rome Statute, *supra* note 5, art. 6.

261. Genocide Convention, *supra* note 259, art. 2.

262. Rome Statute, *supra* note 5, art. 6.

263. *See* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNT'L. L & CONTEMP. PROBS. 199 (1998).

A problem related to the prosecution of genocide exists in the jurisdictional regime laid out in Article 12 of the Statute. It has the tendency of shielding those involved in massive human rights violations that are not parties to the Statute. Since, as a prerequisite to jurisdiction, a given crime must occur in the territory of a state party or involve an accused of a state party;[264] a purely internal genocide would be outside the jurisdiction of the ICC. Therefore, it is unlikely that the ICC will deter any non-signatory bent on brutalizing its own people with impunity. In addition, by protecting non-party genocidal actors and leaving unprotected non-party states responding to such genocide, it is possible that the genocidal actor could consent to the prosecution of the responders before the ICC but not itself.[265]

The genocide in Rwanda was five times faster than the one in Germany, even though the Nazi's employed fairly sophisticated methods of extermination, such as gas chambers. The Hutus, on the other hand, were successful in killing between 5000 to 10,000 people per day using primarily hand held weapons.[266] As many as one million, perhaps as many as 1.5 million were killed in the genocide in Rwanda.[267] "Early intervention could have saved thousands [of Tutsis] . . . who were huddled in churches, schools, and stadiums before being killed."[268] Even though the killing was accomplished on a grand scale, because the weapons involved were primitive, the genocide could have easily been stopped with a relatively small force. And yet, the ICC will not have jurisdiction over a future Rwanda-like episode if it occurs solely within the boundaries of a non-state party.

In domestic courts, when a case involving murder ends up in the courtroom, it is too late for the victim. With genocide as with murder, it would be preferable to have enforcers of the law stop the crime before it starts or while it is in progress: instead of creating courts to allow for after-the-fact prosecutions, the international community should spend its time and resources creating forces to respond to tyrannical aggressors. In the alternative, laws should be instituted so that forces can respond to these man-made humanitarian disasters, confident that they will not later find

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264. Rome Statute, *supra* note 5, art. 12.

265. *Id.* art. 12(2),(3).

266. Bernard Muna, *Conference on War Crimes Tribunals: The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L. L. REV. 1469, 1480 (1998).

267. RAYMOND W. COPSON, REPORT ON RWANDA AND BURUNDI: BACKGROUND AND CHRONOLOGY 5 (1994) (Congressional Research Service Report).

268. Alan Destexhe, *The Third Genocide*, FOREIGN POL'Y 9 (Winter 1994-95).

themselves in court. By merely creating a credible force, the force may never have to respond because of the deterrent. This is especially true in dealing with internal genocides since more people are killed by their own governments than are in international armed conflict.[269]

5. Opting Out

> *Perhaps the most universally condemned provision of the Statute is Article 124, the so-called "opt out" provision. Article 124 provides an incentive for reluctant states to participate in the Criminal Court by permitting them to reject, for a period of up to seven years, the jurisdiction of the Court with regard to allegations of war crimes violations against it nationals.*[270]

Consider the following hypothetical. The year is 2020. Saddam Hussein is still alive and has just become a party to the Statute while the United States has not. The crime of aggression has yet to be defined. Because deterrence has once again failed, Saddam invades Kuwait. United States forces respond. A young U.S. Air Force pilot attempts to drop a bomb on an Iraqi command and control bunker in Baghdad. Unfortunately, the smart bomb guidance systems malfunction and the bomb strikes an orphanage killing close to 100 innocent Iraqi children.[271] Meanwhile, because Saddam has opted out of the war crimes article and became a party just prior to his attack, he and his troops are effectively immunized before the court for their war crimes.

Without the fear of prosecution, the Iraqi's intentionally use chemical weapons, abuse captured prisoners of war (POWs) and civilians, and commit all manner of war crimes. Eventually, the United States and its allies are able to remove Saddam from Kuwait, but now he demands that the young U.S. Air Force pilot be prosecuted for his war crime. The pilot is currently stationed at the U.S. Air Force Base in Aviano, Italy. Because

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269. Moore, *supra* note 14, at 852. If Professor Rudy Rummel is correct, over 169 million have been killed in this century primarily by their own governments. That is approximately four times the combatant death rate in combat.

270. David, *supra* note 201, at 371.

271. *See generally* Ambassador David J. Scheffer, Remarks Before the Sixth Committee of the 53d General Assembly in New York (Oct. 21, 1998) (The International Criminal Court), *available at* http://www.state.gov/www/policy_remarks/ (1998, 10/21/98).

Italy is a party to the ICC, the Italians, against the will of the United States, extradite the service member to the court.

Saddam then contemplates invading Saudi Arabia. He believes the American public is so upset about the prosecution of the Air Force officer and the immunized barbaric treatment employed by his troops against American POW's, that the Americans no longer have the will to protect Saudi Arabia. After all, grain-based fuels, such as ethanol, have come so far that the United States no longer needs Organization of Petroleum Exporting Countries crude oil. This time, Saddam guesses correctly, the Americans are deterred, and Saudi Arabia becomes the nineteenth province of Iraq.

6. Complimentarity

The court will not have jurisdiction over a case when it is being investigated or prosecuted by a state which has jurisdiction over the matter unless the state is "unwilling or unable genuinely to carry out the investigation or prosecution."[272] On its face, this provision seems to shield nations such as the United States that are involved in military operations against aggressive and rogue regimes as long as they are willing and able to take care of their own violators. However, the requirement that they be "genuinely" investigated and prosecuted gives pause for concern. Investigations of entirely frivolous allegations of improper conduct on the battlefield may be required in order to avoid being accused of not genuinely addressing potential violations of international law. How is one to know whether a case has been genuinely investigated?

7. Lack of Enforcement Mechanisms

Attempting to deter potential war criminals—through the threat of criminal prosecution after the war—is of questionable utility. A soldier in a life and death fight on a battlefield will not likely think of the ICC while under fire .In such a case, a warrior is only likely to adhere to the law that he believes to be appropriate and that has been internalized through training. Even where the laws of war are applicable and understood by both sides, the laws may largely be ignored if the combatants do not view the law as being logical or pragmatic, even where a court exists with poten-

272. Rome Statute, *supra* note 5, art. 17 (1)(a).

tial jurisdiciton. During the Iran/Iraq War from 1980 to 1988, "the laws of war were incontestably applicable though not adhered to by either side. There were violations of fundamental rules in such matters as the treatment of prisoners, the use of gas, and attacks on neutral shipping."[273] In the Gulf War:

> [one side] by and large adhered seriously to the laws of war restraints on a wide range of matters, dealing both with combat and with the treatment of prisoners and civilians under their control. In contrast, the other side, while not in principle rejecting the laws of war, did ignore them on a range of issues.[274]
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> . . . .
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> However, the failure to take any action against Iraqi leaders exposed a serious problem regarding the laws of war, namely, the difficulty of securing enforcement after clear evidence of violations.[275]

There is no reason to believe that the enforcement mechanisms will be any better with the ICC than with the ad hoc tribunals. In the former Yugoslavia, many indicted war criminals are relatively free to roam certain limited areas. This is the case even though NATO forces are operating in the area and have the authority to round them up.

> Regrettably, the Tribunal's operating charter will most likely mirror the charters of the Yugoslav and Rwandan International War Crimes Tribunals, both of which are currently in operation. In sharp contrast to the war crimes courts convened after World War II, the Yugoslav and Rwandan tribunals have been failures. Any permanent institution modeled after their precedents will most likely fail as well.
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> The Yugoslav and Rwandan war crimes courts failed for several reasons. First, they do not contribute in the slightest to regeneration of Rwandan or Yugoslavian civil society. When the tribunals cease operation, Yugoslavia and Rwanda will be no better, and quite possibly much worse, than they were before. Second,

273. Roberts, *supra* note 90, at 45-46.
274. *Id.* at 48-49.
275. *Id.* at 51-52.

> these tribunals lack the capacity to apprehend and persecute the major perpetrators of war crimes. Instead, they spend their time desultorily prosecuting prison guards and minor lieutenants, while the Great Powers dither over whether to risk capturing indicted wartime leaders. Third, the tribunals are institutionally incapable of satisfying the retributive needs of the victims of war crimes, even if one of the lead criminals falls into the tribunal's hands. The Yugoslav and Rwandan war crimes tribunals are largely a farce, and have even become mechanisms for major war criminals to escape capital punishment.[276]

Absent cooperation from the various military powers, it is less likely that individuals indicted by the ICC will be arrested, especially in areas where there are no standing "victorious" forces nearby. If Saddam were to be indicted, it is highly unlikely that military forces would be able to get close enough to arrest him without significant risk to the armed forces and innocent individuals caught in the potential crossfire.

8. Funding and Resources

"The United States has provided the lion's share of the political, financial, technical, and intelligence assistance for the two existing tribunals."[277] The U.N. has come to the realization that the ad hoc tribunals cost too much money to establish in every situation.[278] However, who will become the primary financier of the ICC if the United States does not become a party? Who will assume the mantle of leadership role in the ICC if the United States does not become a party to the court? As an additional consideration, the ICC will likely be far more costly than the ICTY or ICTR because of its worldwide jurisdiction.[279] Based on the ICTR experience, management of financial resources may be questionable as well.[280] The ICC will be, to a large extent, financed through voluntary contributions.[281] With these constraints, it is not unrealistic to believe that individ-

276. Bloch & Weinstein, *supra* note 69, at 1.

277. Wippman, *supra* note 113, at 484.

278. SUNGA, *supra* note 108, at 6.

279. Adrian Karatnycky, *Don't Worry War Criminals—New Court Won't Work*, WALL ST. J., July 27, 1998, at A15.

280. Rodriguez, *supra* note 203, at 837.

281. Rome Statute, *supra* note 5, art. 116.

ual countries may be able to exert significant influence if they were to donate large sums of money to the court.

9. Constitutional Rights

Although the potential constitutional issues with regard to United States support to the ICC are important, they are largely beyond the scope of this article. However, there are some significant domestic constitutional issues that should be examined by others. First, the Constitution grants the sole authority to try U.S. citizens to the federal and state courts.[282] Second, certain Bill of Rights protections will not be present at the ICC.[283] Third, certain procedural and structural protection found in U.S. courts may be absent as well.[284] One has to wonder whether the U.S. Senate will ever consent to the establishment of a court where citizens' constitutional protections are at risk. Arguably, even if the Constitution does not apply as a matter of law to such a court, for policy reasons, the Senate may not consent to such an arrangement. As expressed by one Senator:

> We do not take lightly the concerns of our colleagues. A politicized, anti-American international court would be extremely dangerous. We, like they, do not support the creation of a court that infringes on constitutional rights, that pursues vague charges, or that allows terrorists to sit in judgment of our citizens. We are all rightly committed to preventing the creation of any such court . . . .[285]

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282. U.S. CONST. art III, § 1.

283. *See* Rodriguez, *supra* note 203, at 815. Rodriguez explains that the treaty does not provide basic protections against unlawful searches and seizures and the right to a speedy trial. The right of confrontation, because of relaxed rules of hearsay evidence, may not exist as well. *Id.*

284. *Id.* at 816.

285. S. 123, 103d Cong. (1993). Senator Jesse Helms, chairman of the Senate Foreign Relations Committee, sought an amendment to the Department of State Authorization Act, which would have prevented monetary support for the establishment of ICC. Although the Senate defeated the amendment, they made it unmistakably clear that many in the Senate are quite concerned regarding the establishment of the ICC in its current form. *See id.*

V. Recent Threats to Proper Deterrence by International Tribunals

Primarily as a result of allegations submitted by anti-war law professors, the chief ICTY prosecutor, Carla Del Ponte looked into complaints regarding NATO's bombing campaign in Yugoslavia. She met with individuals from the Russian Duma, various non-governmental agencies, and international legal experts to discuss NATO's actions in Kosovo.[286] If the ICTY prosecutor, because of political pressure, is willing to review the actions of NATO, the only force capable of stopping the massive humanitarian violations in Kosovo, it seems clear that an ICC prosecutor would be influenced politically to do the same.[287] Senator Rod Grams reminded his colleagues that:

> A decision by the International Criminal Court to prosecute Americans for military actions wouldn't be the first time that an international court tried to undercut our pursuit of our national security interests. In 1984 the World Court ordered the U.S. to respect Nicaragua's borders and halt the mining of its harbors by the CIA. In 1986 the World Court found our country guilty of violations of international law through its support of the Contras and ordered the payment of reparation to Nicaragua. Needless to say we ignored both rulings.[288]

On 29 April 1999, the government for the Federal Republic of Yugoslavia (FRY) applied to the International Court of Justice (ICJ) requesting

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286. Charles Trudheart, *War Crimes is Looking at NATO*, WASH. POST, Dec. 29, 1999, at 20; Steven Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000; Rowan Scarborough, *U.N. Prosecutor Abandons Probe of NATO Strikes*, WASH. TIMES, Dec. 31, 1999, at 1; Jerome Socolovsky, *U.N. Prosecutor Denies Formal War Crimes Investigation of NATO*, ASSOCIATED PRESS, Dec. 30, 1999, LEXIS, News Library; *NATO's Day in Court?*, RALEIGH NEWS AND OBSERVER, Feb. 6, 2000, at A28; *White House Blasts Kosovo Inquiry*, ASSOCIATED PRESS, Dec. 30, 1999, LEXIS, News Library; *NATO Bombing Drew War Crimes Inquiry*, SAN DIEGO UNION, Dec. 31, 1999, at A22; Robert Siegel, *War Crimes Prosecutor Carla Del Ponte Will Consider Evidence of NATO Violating International Law* (NPR broadcast, Dec. 29, 1999), LEXIS, News Library; *War-Crimes Charges Show U.S. Power Has Limits*, NEWSDAY, Jan. 10, 2000, A22; *Anti-War Professors Take NATO to Court for War Crimes*, THE BULLETIN'S FRONTRUNNER, Jan. 20, 2000, LEXIS, News Library; *An International Tribunal Sees a Possibility of Allied Abuses, But its Focus is Distorted*, THE TIMES UNION, Jan. 4, 2000, at A6.

287. John T. Correll and Peter Gray, *UN Tribunal Drops Investigation of NATO for War Crimes*, A.F. MAG., Feb. 2000, at 12.

288. *Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong. (1998).

that provisional measures be taken against the United States, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Canada, Portugal, and Spain.[289] The Federal Republic of Yugoslavia was asking that the ICJ, in effect, enjoin these countries from the further use of force in FRY.[290] The cases against the United States and Spain were dismissed on 2 June 1999, for lack of jurisdiction.[291] However, with regard to Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the United Kingdom, the case was ongoing as of 23 February 2001.[292]

In its application against the United States and the other listed parties, FRY alleged that the parties named in the applications were:

> (1) Unlawfully using force by bombing in FRY;
> (2) Attacking civilian targets;
> (3) Intervening in the affairs of FRY by training, arming, financing, equipping and supplying the Kosovo Liberation Army;
> (4) Attacking cultural properties:
> (5) Causing unnecessary suffering through the use of cluster bombs;
> (6) Causing considerable environmental damage by attacking oil refineries and chemical plants;
> (7) Causing far reaching health and environmental damage though the use [of] weapons with depleted uranium;
> (8) Killing civilians, destroying enterprises, communications, health and cultural institutions and violating human rights;
> (9) Destroying bridges on international rivers, preventing the free navigation of international rivers;
> (10) Committing acts of genocide by destroying in whole or in part a national group.[293]

Although these parties were all united in attempting to stop the Former Yugoslavia in its pursuit of massive human rights violations and acts of genocide, the rescuing countries must now answer in a court of law for

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289. Legality of Use of Force (Yugo. v. Belg. et al.) (Apr. 29, 1999) *(*Application of the Federal Republic of Yugoslavia); *see* ICJ Communique 99/17 .

290. *Id.*

291. Legality of Use of Force (Yugo. v. Spain and U.S.) (June 2, 1999) (Order).

292. Press Release 2001/5, International Court of Justice (Feb. 23, 2001) (extending for one year Yugoslavia's deadline for responding to objections raised by Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the United Kingdom).

293. Legality of Use of Force (Yugo. v. Belg. et al.) (Apr. 29, 1999) *(*Application of the Federal Republic of Yugoslavia); *see* ICJ Communique 99/17.

these acts of humanitarianism. It is Slobodan Milosevic, the leader of the former Yugoslavia, that is the indicted war criminal, and yet NATO countries must now submit themselves to the judgment of a court of law. With this development, it is conceivable that NATO will simply decide that it has become too risky for nations supporting the rule of law and the protection of human rights to participate in future operations against tyrants.

VI. Deterrence in Future Warfare

Some have speculated that future wars may involve a level of brutality, savagery, and intimidation that the United States may not be fully prepared to face.[294] In what Colonel Charles Dunlap refers to as a neo-absolutist war, the enemy will likely wage a war employing tactics similar to those used by ruthless warlords such as Genghis Khan.[295] Future opponents of the United States are likely to use "asymmetrical" warfare in order to attempt to defeat the United States and its allies. Asymmetrical warfare involves exploiting the enemy's weaknesses rather than attacking in a symmetrical, force on force, methodology. This means that the use of highly unconventional tactics by an enemy employing asymmetrical warfare concepts is probable.[296]

Colonel Dunap explains that neo-absolutist conflicts will be wars "without scruples . . . [and] vicious" in nature.[297] Such wars will likely occur "between civilizations with fundamentally different psychological orientations and value sets than those of the West."[298] One commentator has speculated that:

> [America] will face [warriors] who have acquired a taste for killing, who do not behave rationally according to our definition of rationality, who are capable of atrocities that challenge the

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294. *See generally* Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. LEG. STUD. 71 (1998).

295. *Id.*

296. *Id.* at 71, 72 (citing CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT VISION 2010 (1996); WILLIAM S. COHEN, REPORT OF THE QUADRENNIAL DEFENSE REVIEW, (1997); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (1997)).

297. *Id.* at 74-74.

298. *Id.* at 71 (citing HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996)).

> descriptive powers of language, and who will sacrifice their own kind in order to survive.[299]

Warriors involved in asymmetrical warfare will likely be "brought up to fight, think fighting honorable and think killing in warfare glorious," the kind of fighter that "prefers death to dishonor and kills without pity when he gets a chance."[300]

> It is tempting, but profoundly erroneous, to over-generalize about these groups by concluding that they are wholly morally deprived. . . . Even otherwise virtuous societies (or an analog described as "Streetfighter" nations) may nevertheless participate in appalling (to us) behavior because they deem those they victimize as being outside their favored group and, hence, unworthy of humane treatment.[301]

As a result of the break down of the state in many regions of the world, the world has witnessed the disintegration of "the indigenous warrior codes that sometimes keep war this side of bestiality."[302]

Some of America's opponents in a future neo-absolutist war will likely include non-state actors such as transnational criminals and terrorists. Not only will these forces lack any historical connection with the laws of war,[303] it is unlikely that traditional laws will deter individuals motivated to the extent that they are willing to kill themselves if delivering a car bomb. Such an enemy may choose to exploit American morality and will. The North Vietnamese saw early on that America's warfighting capability was directly linked to America's "conscience."[304] In Somalia, local warriors were able to exploit American's alleged aversion to casualties, including use of the media to show dead Americans being dragged through the streets of Mogadishu. United States forces were removed from Soma-

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299. *Id.* at 75 (citing Ralph Peters, *The New Warrior Class*, PARAMETERS 24 (Summer 1994)).

300. *Id.* at 75-76 (quoting John Keegan, *Warrior's Code of No Surrender*, U.S. NEWS & WORLD REPORT, Jan. 23, 1995, at 47).

301. *Id.* at 75-76 (citing MICHAEL IGNATIEFF, THE WARRIORS HONOR 116-117 (1997); Dan Cordtz, *War in the 21st Century: The Streetfighter State*, FINANCIAL WORLD, Aug. 29, 1995, at 42).

302. *Id.* at 76 (quoting Cordtz, *supra* note 301, at 42).

303. *Id.* at 76.

304. *Id.* at 77 (quoting *How North Vietnam Won the War,* WALL STREET J, Aug. 3, 1995, at A8).

lia following the deaths of eighteen U.S. Army Rangers despite the fact that U.S. forces inflicted somewhere in the neighborhood of 1000 Somali casualties during the same battle.[305]

It is also predictable that future enemies will ring targets with non-combatants, maybe even U.S. POW's in their custody, as a cheap method of shielding targets.[306] In Iraq, Saddam housed civilians in a command and control bunker. After this became apparent, bombings in downtown Baghdad were called off.[307] Libya threatened to protect an underground chemical weapons plant with a ring of "millions of Muslims."[308] If U.S. forces attacked such a target knowing that non-combatants were present, the U.S. public might lose its will to conduct such warfare and a politically charged ICC might elect to charge U.S. service members with war crimes. Somali warlords used women and children as human shields during attacks knowing that U.S. service members might be hesitant to fire or that United States support may dwindle for the operation.[309] Such tactics may further cement world opinion in favor of an aggressor willing to employ these methods, because they are frequently seen as martyrs when killed by defending forces.

Although these predictions about future warfare may be questioned,[310] some assert that the United States is so averse to taking any casualties that it will hesitate to react in the face of aggression or massive violations of international humanitarian law, unless U.S. interests are directly at risk.[311] Two recent events serve to foster this arguably erroneous perception: the rapid withdrawal of U.S. forces following the death of U.S. Army soldiers in Somalia, and the avoidance of using ground forces in the Former Yugoslavia. Both events may give the impression to regime elites contemplating aggressive action that the United States will not

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305. *Id.* at 77.

306. *Id.* at 78.

307. *Id.* at 78 (citing WALTER J. BOYNE, BEYOND THE WILD BLUE: A HISTORY OF THE AIR FORCE 1947-1997, at 7 (1997)).

308. *Id.* at 78 (citing *Libyans to Form Shield at Suspected Arms Plant,* BALTIMORE SUN, May 17, 1996, at 14).

309. *Id.* at 78 (citing Lieutenant Colonel Thomas X. Hammes, *Don't Look Back, They're Not Behind You,* MARINE CORPS GAZETTE 72, 73 (May 1996)).

310. NORMAN METZGER, *supra* note 32, at 20 n7.

311. *Id.* at 20.

become involved as long as the potential victim does not represent a significant U.S. interest and where U.S. casualties are likely.[312]

In the future, the distinction between international and internal armed conflicts will become more blurred.[313] The use of organized armed forces may decrease, which will make it harder to discriminate between combatants and non-combatants as the laws of war require.[314] It will be more difficult to define legitimate military objectives.[315] Paradoxically, weapons will become more accurate, but at the same time it will be more difficult to separate legitimate targets from improper ones.[316] Combatants will be less likely to carry their arms openly, instead opting to blend in with the civilian populations.[317] As weapons become more accurate and more surgical in nature, acceptable levels of collateral damage are likely to drastically decline for countries with advanced technology.[318] Precision weapons, brilliant weapons, and computer attacks may all create a zero tolerance of collateral damage standard.[319] Would the ICC adopt a system of "norma-

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312. *Id.*

313. Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1074 (1998).

314. Protocol I, *supra* note 117, art. 48.

315. *Id.* art. 52.

316. *See* XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, CDDH/407/Rev. 1, 453 para. 19 (1974-77).

> The requirement that combatants distinguish themselves from non-combatants through use of a distinctive emblem dates back to the Brussels Declaration of 1874. With regard to Protocol I, according to the Rapporteur, the "exception recognized that situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself throughout his military operations and still retain any chance of success."

Id. (citation omitted). *See also* GPW, *supra* note 117, art. 4; Protocol I, *supra* note 117, art. 1.

317. Schmitt, *supra* note 313, at 1075-78.

318. Protocol I, *supra* note 117, arts. 51, 57.

319. Schmitt, *supra* note 313, at 1080.

tive relativism," where technologically advanced states have to adhere to a higher standard of care, and lower collateral damage?[320]

The use of civilians on the battlefield as weapons and communications systems technicians is likely to increase. This may mean potential liability in that the United States may be accused of trying to immunize targets with the presence of civilians.[321] What about using non-lethal weapons such as "acoustic weapons that induce vomiting, microwaves that cause the human body to heat up, and electromagnetic pulses that will cause an airplane to fall to the earth because its engine shuts down?"[322] Even though some of these weapons are far more humane than lethal uses of force, because they are new, some might consider them to be inhumane. Those without the technology will predictably protest their every use. For example, could technologically superior nations be prohibited from using lasers or land mines by the ICC?[323]

New bases for the use of force are predictable and represent a cause for concern for the participants in light of the fact that aggression has not been defined. "Humanitarian intervention is defined as 'intervention (in the narrow sense of coercive interference in the internal affairs of another state) in order to remedy mass and flagrant violations of the basic human rights of foreign nationals by their government.'"[324] Humanitarian intervention is not a new theory; it traces its roots to Hugo Grotius.[325] However, it has recently seen a resurgence in acceptance in the post-U.N. Charter world.[326] "Many scholars have stated that the U.N.'s inefficiency and its failure to respond effectively to human rights deprivations justify humanitarian intervention."[327]

> [The] overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: First, the U.N. Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a

320. *Id.* at 1087.

321. Protocol I, *supra* note 117, arts. 50-52.

322. Schmitt, *supra* note 313, at 1085.

323. *Id.*

324. Michael E. Harrington, *Operation Provide Comfort: A Perspective in International Law*, 8 CONN. J. INT'L L. 635 (1993) (quoting Jack Donnelly, *Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality, and Politics*, J. INT'L AFFAIRS 311, 314 (1984)).

> handful of genuine cases of humanitarian intervention, and on most assessments, not at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation.[328]

However, such an intervention poses significant risks because the ICC might decide that a specific intervention was a subterfuge even though approved by a regional security coalition.[329]

Responding to terrorism is certainly a difficult dilemma in the modern world. There is some concern for how the court might evaluate responses to terrorism. What will the court consider a necessary and proportional response to terrorism? What will constitute an "armed attack" triggering the right of self-defense? The Statute does not directly protect terrorists, but may have the unintended consequences of protecting them if the crime of aggression is defined in an overly broad manner. This is because,

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325. Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT'L & COMP. L.J. 365, 368 (1995). Grotius argued that if a tyrant "should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded." *Id.* (quoting HUGO GROTIOUS, DE JURE BELLI AC PACIS, ch. VII, P 2, at 584 (Francis W. Kelsey trans., 1925)). "[Hugo Grotius] told the monarchs of his day that they were not free to commit crimes and to perpetrate injustice either internally or externally. Tyrannous acts within their own state associations . . . constituted crimes from which these rulers were liable to be punished." *Id.* (quoting C. S. EDWARDS, HUGO GROTIUS: THE MIRACLE OF HOLLAND 136 (1981)). "In 1758, Emmerich de Vattel argued: 'If a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid." *Id.* (quoting EMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS 3 (Charles G. Fenwick trans., 1964)).

326. *See generally* W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794 (1995) (arguing that not only is humanitarian intervention lawful, but democracies have a duty to intervene, especially where fledgling democracies are at risk).

327. Nikolai Krylov, *supra* note 325, at 383 (citing THOMAS M. FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT (1985)).

328. *Id.* at 386 (quoting 57 BRIT. Y.B. INT'L L. 614 (1986)).

329. Absent a Chapter VII enforcement action, the United Nations is specially prohibited from engaging in acts that are "essentially within the domestic jurisdiction of any state." U.N. CHARTER art. 2(7).

although the terrorists are not specifically protected, the nations that harbor them may be.

> Modern terrorism has salient differences from traditional warfare. The actors are often not states, but rather ideological, political or ethnic factions. States have a host of international commitments and aspirations that create an incentive to avoid all-out warfare and to avoid undermining the rules of war, while a single-purpose terrorist organization may operate without mitigation. A terrorist group often calculates that it will win attention for its cause and undermine a target government by the very atrocity of its tactics. A terrorist group is less vulnerable to international sanctions, as it does not possess a membership and inchoate form, terrorist networks lie outside the web of civil responsibility that contains private and public actors in international society.[330]

Terrorists are not likely to be deterred by the ICC because the court may not have jurisdiction over the m.Even if it does, it is hard to believe that a court, through a threat of prosecution, would successfully deter a terrorist that is willing to blow himself up by using a car bomb to achieve his ultimate objective. Such a terrorist would not be deterred by the threat of prosecution, but only by the thought that his mission might be compromised if he was caught. The United States response to terrorism is fourfold:

(1) Use the tools of criminal justice;
(2) Seek treaty agreements;
(3) Disrupt terrorist structures through civil sanctions; and
(4) The prudent use of military force.[331]

With regard to the criminal law response, Professor Ruth Wedgewood has explained:

> The familiar forms of criminal justice should not disguise the fact, though, that the capture or rendition of terrorist suspects may be difficult without extraordinary means. Such cases are often too hot to handle, even for responsible governments,

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330. Ruth Wedgewood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999).

331. *Id.* at 560-63.

> because of the danger of retaliation. There are a surprising number of European governments that have been reluctant to detain suspects in cases of political terrorism, worrying that it will make them an attractive target for retaliatory actions by supporters.[332]
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> . . . .
>
> There is a patchwork of treaties relating to terrorism, but no enforcement structure to go with them.[333]
>
> . . . .
>
> [As to military force] the suggestion that military targeting decisions should, ex ante or ex post, always be subject to the review of a multilateral body is simply unrealistic . . . . There are those generally rare occasions when such information cannot be shared, at least in the short or medium term, without seriously and even fatally prejudicing protective countermeasures.[334]

Although the United States has responded with military force to terrorism, its actions have not been without controversy.[335] The U.N. Charter prohibits unauthorized threats and uses of force against the political independence and territorial integrity of another country.[336] Certainly the Charter allows for unilateral uses of force in self-defense.[337] However, self-defense is only permitted in the face of an "armed attack."[338] The difficulty with this statutory limitation is that, with hit and run terrorist tactics where the attacks may be few and far between, it can be difficult to argue that you are under "armed attack" once time has passed and there has not been a second attack.

By the time blame can be fixed, some would say the victim-nation is no longer under an armed attack and the remedy is the Security Council, not unilateral action. In attacking terrorists before they strike, many find

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332. *Id.* at 560-61.
333. *Id.* at 562.
334. *Id.* at 567.
335. Schmitt, *supra* note 313, 1070-74.
336. U.N. CHARTER art. 2(4).
337. *Id.* art. 51.
338. *See generally* Albrecht Randelzhofer, *Article 2(4), in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661, 668-74 (Bruno Simma ed., 1994).

that the language in Article 51 has preserved the customary international law doctrine of "anticipatory self-defense."[339] However, if a significant time has passed since the initial incident, it becomes difficult to argue that the need is "instant and overwhelming."[340]

The danger in all this is that a politically-motivated ICC may be sympathetic to unconventional warfare groups involved in wars against colonial powers, racist regimes, or alien occupation forces. Such a court may be supportive of national liberation groups as well. This means that a court of this persuasion could be quick to condemn military responses to terrorism.

> On August 7, 1998, virtually simultaneous car bombs were detonated at the U.S. embassies located in Nairobi, Kenya and Dar Es Salaam, Tanzania. Because of the location of these facilities in densely populated areas, the casualties were high: in Kenya thousands were injured, including over 150 fatalities; in Tanzania over eighty were injured, including over a dozen fatalities. The vast majority of casualties were African citizens. The international community condemned the bombings, and the United States government variously promised action to retaliate, to bring those responsible to justice, and to defend itself from future attacks. Identified, as the mastermind of the attacks was Saudi dissident turned terrorist, Osama bin Laden. Bin Laden had lived in Sudan before he was expelled by that country at the United States' request. Bin Laden then moved his operations to Afghanistan where he had assumed control of the training camps built by the American government to train Afghanistan's resistance during the Soviet occupation, using them as a training camp in the war against the United States.

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339. Anticipatory self-defense is self-defense that proceeds an imminent threat of attack. Most observers construed a letter—written by then U.S. Secretary of State Daniel Webster to the British government following the *Caroline Incident* in 1837—as representative of the standard. DanielWebster wrote that self-defense, prior to an actual attack, was to "be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." 2 JOHN BASSETT MOORE, A DIGEST OF THE INTERNATIONAL LAW 217 (1906). One modern commentator advocates the standard of "interceptive" self-defense. Professor Dinstein explains that, once an aggressor has gotten to the point of no return in his attack, then defense is acceptable. For example, if an enemy were to launch an air strike against a target state, as soon as the aircraft begin to leave the ground or an aircraft carrier, self-defense is permitted. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 190 (2d ed. 1994).

340. MOORE, *supra* note 339.

> On August 20, ten days after the embassy bombings, the United States launched surprise air strikes aimed at the training camps in Afghanistan, claiming the move was in self-defense. Also targeted was a pharmaceutical plant in Khartoum, Sudan, which was first identified by the U.S. as a heavily guarded secret chemical weapons factory for Iraq.[341]

In the wake of such an attack, certainly Sudan and Afghanistan could assert that the unilateral decision to use force by the United States was aggression.[342] With terrorism, unless the state can be directly linked to sponsorship of a particular group, the use of military force against a non-state actor in the territory of another nation could be seen as aggression or unlawful intervention.[343]

There are many other issues related to the modern conduct of war. For example, if the United States were to respond with military force to a crippling computer network attack against the United States where the New York Stock exchange was shut down or where air traffic controller terminals and civilian airline guidance systems went out, causing planes to crash, would the ICC agree that the United States was the victim of an armed attack? Or, would the court demand that actual kinetic energy systems be used against the Untied States before military force could be used? What if the individual that launched the attack was a nineteen-year-old civilian college student in Yugoslavia (wearing sandals and an earring in his left ear) and the United States had credible intelligence that he was state-supported and a second attack was imminent? Would he be a legitimate military target under the current laws of war?[344]

The question remains: will the court be able to handle these issues in a way that protects a nation's need to defend itself and others or will it tend to take actions that are so restrictive that legitimate responders will be

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341. David, *supra* note 201, at 384-85.

342. *Id.* at 384-85.

343. U.N. CHARTER art. 2(4). The United States considers Sudan to be a state that sponsors terrorism and is not entirely satisfied with the actions of the Taliban government in Afghanistan. *See generally* U.S. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM 1998 (1999).

344. Protocol I, *supra* note 117, arts. 49-52.

irreparably harmed? The risks are simply too great to trust United States security interests to such a judicial body.

VII. Where Does the United States Go From Here?

The ICC statutory formulation represents a serious threat to United States national security interests in that it creates a real possibility that politically-motivated individuals will seek the indictment of U.S. service members whenever U.S. armed forces are used. Individuals firmly opposed to the use of all military force will certainly seek to use the court as a tool to dissuade and deter the U.S. government. As it stands now, it is very unlikely that the United States will become a party to the ICC in its current form.[345] So the question becomes, what, as a matter of policy, should the United States do?

First, even if the United States elects not to become a party to the treaty, it must continue to remain, as it is, involved in the struggle for law relating to the ICC by participating in the drafting of elements, rules and defenses.[346] This is entirely proper because, even if the United States is not a party, as currently formulated, the court may eventually gain jurisdiction over certain U.S. service members.[347] It is to our advantage to do all we can to ensure a fair trial for our service members that might find themselves before the court by remaining involved in the fashioning of the rules and procedures.

Second, as a world leader, the United States must develop a strategy to enlist the support of its allies in combating the Statute in its current form and seeking a re-negotiation in the U.N. General Assembly.[348] The United States should focus its efforts primarily on other members of the U.N. Security Council, especially Russia and China, and secondarily on the

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345. *See generally* David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999); Scheffer, *supra* note 94, at 34; Scheffer, *supra* note 194, at 12.

346. *See* Scheffer, *supra* note 345, at 529; Scheffer, *supra* note 194, at 12.

347. *See supra* notes 210-12 and accompanying text.

348. For a recent example of a treaty being renegotiated or amended by the General Assembly, see Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Law of the Sea: Report of the Secretary General on His Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea, U.N.G.A., 49th Sess., Agenda Item 36, U.N. Doc. A/48/950 (1994).

more developed nations of the world. In reality, without significant support from the developed nations of the world, the court will be without an effective enforcement mechanism. The court will depend on the intelligence and investigative resources of member states to put together cases and arrest indicted individuals.[349] At this time, only the developed nations of the world have that capacity and willingness to cooperate at the levels required for an effective court. Although the world can proceed without the United States, based on the ICTY and ICTR experiences, it is clear that the ICC will not be successful without significant financial and indirect support, which will have to come primarily from our European allies if the United States is not a party.[350]

Although many provisions should be reconsidered, two are critical: the United States should not even consider becoming a party unless the crime of aggression is acceptably defined and Article 8 is renegotiated. In fact, if Article 5 and Article 8 are renegotiated, most of the United States' interests can be preserved. Article 5 provides the ICC with jurisdiction over the crime of aggression. There are two options that should be palatable to the United States. The first would be to take away the court's jurisdiction over the crime of aggression altogether, allowing it to focus on genocide, crimes against humanity, and war crimes. These violations alone should give the court plenty to do. The second option, and one that would reduce the potential for politically-based prosecutions for aggression, would be to require that the U.N. Security Council refer a case to the ICC before the court could proceed on a theory of aggression. This is similar to the version proposed in the 1991 Model Code.[351] It is true that, because of the veto power, many cases of aggression may go unpunished. However, this is preferable to politically-motivated prosecutions related to the use of force.

Such a construct would also have the tendency of leaving the primary responsibility of maintaining international peace and security where it belongs, with the Security Council.[352] "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[353] Any other formulation would dimin-

349. *See supra* notes 271-79 and accompanying text.
350. *Id.*
351. 1991 Draft Code, *supra* note 218.
352. U.N. CHARTER art. 39.
353. *Id.*

ish the power and authority of the Security Council. To give the power to find aggression without the participation of the Security Council is to arguably violate the U.N. Charter's "supremacy clause" in Article 103, wherein it states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[354]

The second provision that must be renegotiated is Article 8, War Crimes. It is highly unlikely that a member of the U.S. military would ever be tried before the ICC for crimes against humanity or for the crime of genocide based on a political prosecution. For a crime against humanity to exist, it must be committed as part of a "widespread and systematic" attack.[355] Although acts such as murder and rape by American soldiers in operations are certainly foreseeable, it is unlikely that they would be committed in the numbers required to rise to the level of a "widespread and systematic" attack. In all but the very most atrocious scenarios, it is hard to fathom how an American service member would be at risk of prosecution for a crime against humanity.

Genocide is a specific intent crime that requires the accused to purposely intend to destroy in whole or in part a national, ethnical, racial or religious group.[356] The specific intent required is arguably so high, that once again, it is unlikely that an American service member would be forced to answer for the crime of genocide before the court. Although the statute only requires that the intent be to destroy "part" of a protected group, it is reasonable to assume that the "part" would have to be quite substantial. In fact, the first international criminal tribunal prosecutions for genocide were the *Akayesu* and *Kambanda* judgments in the International Criminal Tribunal for Rwanda.[357]

The problem with Article 8, as it is currently drafted, is that there is no minimum baseline, in terms of the numbers or severity, that must be met in order for the court to have jurisdiction. Unlike crimes against humanity, for example, which requires widespread and systematic abuses; there is no minimum threshold requirement.[358] The renegotiation should include the

354. *Id.* art. 103.

355. Rome Statute, *supra* note 5, art. 7(1).

356. *Id.* art. 6.

357. Prosecutor v. Akayesu, No. ICTR-96-4-T (Sept. 2, 1998) (Judgment),*reprinted in* 37 I.L.M. 1399 (1998); Prosecutor v. Kambanda, No. ICTR-97-23-S (Sept. 4, 1998) (Judgment and Sentence), *reprinted in* 37 I.L.M. 1411 (1998).

establishment of a minimum threshold for war crimes. There are two significant advantages to establishing this minimum criterion. First, the ICC would not be inundated with more cases that it can possibly handle. One need only look at the record at the ICTY and ICTR to understand that the ICC will likely move at an exceptionally slow pace because of its similar limited resources.[359]

Second, looking at the record of the ICTY, the ICC will likely do all that it possibly can to appear entirely evenhanded.[360] This means that it is quite likely that the United States and its service members will be closely scrutinized, perhaps even more so than any other participant in an operation, because of the pressure that non-governmental agencies and countries opposed to United States actions are sure to place on the ICC. If a minimum threshold is established, then in most cases, the entirely frivolous or minor cases will be left domestic courts to resolve. This will serve the court's best interests with its limited resources. It also will be in the United States' best interests because, if a threshold is established, the possibility of a politically based prosecution is far less likely. Only the most egregious of incidents should be brought before the court.

In terms of a proper formulation for Article 8, War Crimes, looking to the language of Article 7, Crimes against Humanity, makes good sense. If charges of crimes against humanity can only be brought where they occur on a systematic and widespread basis, why would it not be reasonable to place the same baseline minimum on war crimes? If the rape and murder of civilians must occur on a widespread and systematic basis in order for the court to have jurisdiction over a crime against humanity, the same requirement should exist for the prosecution of crimes of war. Such a pattern of abuse would suggest a plan or policy to commit war crimes. Where such exists, even a politically-based prosecution would certainly be less objectionable.

Although, at a bare minimum, Article 5 and Article 8 should be renegotiated—other potential amendments should also be considered. Article

358. Rome Statute, *supra* note 5, art. 8.

359. *See supra* notes 167-176 and accompanying text.

360. *See generally* Lisa L. Schmandt, *Peace with Justice: Is It Possible for the Former Yugoslavia?*, 30 TEX. INT'L L.J. 335 (1995); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031 (1998); William Walker, *The Yugoslav War Crimes Tribunal: Recent Developments*, 19 WHITTIER L. REV. 303 (1997); Odio & Hoefgen, *"There Will Be no Justice Unless Women are Part of that Justice,"* 14 WIS. WOMEN'S L.J. 155 (1999).

12, Preconditions to Jurisdiction, should be amended to exclude jurisdiction over citizens of non-party states unless the sending state consents. This may mean that some non-party state defendants escape justice, but this is a better alternative than having non-parties liable to a treaty to which they are not a party.

The International Criminal Court is not a court vested with universal jurisdiction.[361]

> 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 . . . .[362]

Universal jurisdiction is based on the notion that some crimes are of such universal concern to the community of states and are of such seriousness that any state should be able to prosecute the perpetrator no mater where he or she may "wander."[363] Universal jurisdiction can be asserted where only certain international law crimes have been violated.[364]

Not only is universal jurisdiction limited to certain crimes, but universal jurisdiction can only be based on the actual presence of an offender within the state territory of the state that intends to assert universal jurisdiction.[365] For example, it would be improper for France to extradite an American to Libya for trial for crimes committed in France.[366]

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361. David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 532-33 (1999).

362. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (emphasis added) [hereinafter RESTATEMENT (THIRD)].

363. Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 60 (1981).

364. RESTATEMENT (THIRD), *supra* note 362, § 404 and commentary; Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction on International Crimes*, 87 COLUM. L. REV. 1515, 1522 (1987).

365. Feller, *Jurisdiction over Offenses with a Foreign Element*, *in* IIA TREATISE ON INTERNATIONAL CRIMINAL LAW 32-34 (M. Bassiouni & V. Nanda eds., 1973).

366. Ambassador David Scheffer, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) (International Criminal Court: The Challenge of Jurisdiction).

The argument is sometimes made that if an accused is present in a state that can assert universal jurisdiction and submit the accused to judgment within its state court system, that state also ought to extradite the individual to the ICC. It does seem to be a fair argument, where a given crime has risen to the level of universal jurisdiction, that a detaining power could transfer the individual to the ICC rather that try them in their own court where a political prosecution is even more likely.[367] However, this argument is inconsistent with the law beacuse the court is treaty-based and therefore should not be capable of exerting personal jurisdiction against citizens of non-party states.[368]

Moreover, the ICC will have the power to punish certain crimes listed in the 1977 Protocols to the 1949 Geneva Convention.[369] Because the United States and certain other nations are not parties to either Protocol, and since the Protocols are relatively new, some violations of these treaties cannot be said to have risen to the level of universal jurisdiction.[370] Therefore, the ICC, as a treaty court, should be amended to prevent jurisdiction over non-party states.

Finally, the prosecutor should not be completely independent[371] and should not be able to rely on non-governmental organizations as a basis for investigation.[372] The prosecutor should only be able to investigate crimes of aggression where the U.N. Security Council gives the prosecutor authority. With regard to other non-aggression crimes, the prosecutor

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367. An additional amendment to protect captured U.S. service members would go a long way if the court had sole jurisdiction to prosecute POWs for war crimes. Currently, detaining powers have the power to prosecute POWs for alleged pre-capture war crimes and post-capture violations of detaining power law. Because of the potential for sham trials alleging pre-capture war crimes, if the ICC had sole jurisdiction over these allegations, it is foreseeable that war's most vulnerable victims, POWs, would be protected from politically motivated prosecutions. *See* GPW, *supra* note 117, art. 85; COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413-26 (Jean S. Pictet et al. eds., 1958).

368. Scheffer, *supra* note 361, at 532-33.

369. Rome Statute, *supra* note 5, art. 8; Protocol I, *supra* note 117; Protocol II, *supra* note 117.

370. Scheffer, *supra* note 361, at 532-33. With regard to universal jurisdiction over war crimes, the four Geneva Conventions have codified the concept of universal jurisdiction over a limited type of war crime referred to as "Grave Breaches." *See* GWS, *supra* note 117, arts. 49,50; GWSS, *supra* note 117, arts. 50,51; GPW, *supra* note 117, arts. 129,130; GC, *supra* note 117, arts. 146, 147.

371. *See supra* notes 205-09 and accompanying text.

372. *See supra* note 207 and accompanying text.

should not be able to independently investigate crimes unless and until the court seizes on a particular matter for investigation.

In terms of securing a renegotiation, the United States should start with obtaining Russian and Chinese support. If these two members of the Security Council were to agree that a renegotiation was in order, then other members of the Security Council, and eventually the members of the General Assembly, might also be persuaded. Although the treaty does not allow for reservations,[373] it does allow for amendment after seven years.[374] Instead of waiting seven years, perhaps a Protocol could be drafted with the above-listed changes. Another negotiation option might be a General Assembly declaration where all parties might agree to the suggested changes.[375]

Unfortunately, a renegotiation may not be possible and so other strategies should be considered as well. If the United States elects to continue to remain a non-party, it could show a great deal of good faith if it publicly stated in the General Assembly that it would consent to ICC jurisdiction as a non-party state in any case where the United Nations Security council sent a particular case to the court pursuant to Article 13 of the Statute.[376]

The United States should begin now to enter into bilateral agreements with allies agreeing that they will not extradite each other's citizens to the ICC without the other's consent.[377] If ICC party states are unwilling to go this far in a bilateral agreement, then agreements with some sort of limit on the ally's ability to send Americans to the ICC should be sought. For example, ally states could agree that they would not extradite U.S. citizens for war crimes where the United States is prosecuting the case domestically, or, that they would only extradite U.S. citizens where the war crime involved is quite serious or part of a widespread and systematic pattern.

From a pragmatic military point of view, the ICC should also have an independent Office of the Military Advisor. If the court is to truly understand the impact its decisions may have on military operations in the field, it must have input from the profession of arms. By having standing and

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373. Rome Statute, *supra* note 5, art. 120.

374. *Id.* art. 121.

375. *See supra* note 348 and accompanying text.

376. Rome Statute, *supra* note 5, art. 13(b).

377. Article 98 of the Rome Statute specifically allows for bilateral agreements regarding waivers of immunity and consent between states. *Id.* art. 98.

independent military advisors, it is far more likely that the law will remain relevant on the battlefield.

Finally, if all else fails, the United States may want to consider not providing any military aid, in the form of weapons sales, training, and support to any country that refuses to sign a bilateral agreement prohibiting the extradition of Americans to the court.[378]

VIII. Conclusion

> Within the last fifteen years, the United States has participated in peacekeeping missions in Iraq (1990), Somalia (1992) and Haiti (1992); in joint-security operations in Grenada (1983), the Persian Gulf (1987-88) and the Balkans (1996-present); and has acted unilaterally to protect national security interests with air-strikes targeting Libya (1986), invading Panama to secure the custody of General Manuel Noriega (1989), and, most recently, through air-strikes targeting Sudan and Afghanistan, in self-defense for terrorist attacks of U.S. embassies located in Kenya and Tanzania (1998).[379]

Of course, the most recent NATO operation in Kosovo also must be added to this list.

In all of these cases, it is clear that the United States elected to use military force to defend a nation or a group of people at risk of significant abuse by an aggressive power. Unless the proposed International Criminal Court is abandoned or unless its provisions are changed, many of these types of missions may be deemed overly risky by the U.S. military and civilian leadership. The use of military force and, therefore, its credibility as a deterrent to aggression may be significantly weakened. The world is far too dangerous a place to allow that to happen.

While the International Criminal Court has real promise as a force for good in the deterring of regime elites, it cannot be established in such a

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378. Domestic legislation proposing this approach has been put forward in the U.S. Senate as the American Servicemembers' Protection Act. S. 2726; 106th Congress (1990). However, portions of this proposed statute may be unconstitutional to the extent the legislation seeks to limit a President's perogative to send troops to states that are parties and refuse to enter into bilateral agreements pursuant to Article 98 of the Rome Statute.

379. David, *supra* note 201, at 372.

manner as to strip the world of its best tool in the fight against tyranny, the armies of the democratic nations of the world. With relatively minor yet extremely significant amendments to the Rome Statute; the world can have its court and its military too. Some have suggested: "It can of course be argued that the Court will be of no use in deterring international crime, although I do not think many would agree that it would make matters worse."[380] The truth is however, the court will likely make the world a much more dangerous place because it will likely deter the forces of good, which will allow the forces of evil to act with impunity.

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380. Wexler, *supra* note 123, at 714.