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GROTIUS REPUDIATED: THE AMERICAN[†] OBJECTIONS TO THE INTERNATIONAL CRIMINAL COURT AND THE COMMITMENT TO INTERNATIONAL LAW

Marcella David*

"We no longer live in a world where narrow conceptions of jurisdiction and sovereignty can stand in the way of an effective system of international cooperation for the prevention and control of international and transnational criminality."¹ In July 1998, in recognition of this incontrovertible proposition, 120 states took the first steps towards the creation of an international court with jurisdiction over the most serious of international crime—aggression, genocide, crimes against humanity, and war crimes—by adopting the Rome Statute for the International Criminal Court (the "Statute" or the "Rome Statute").

While the United States supported and participated in the drafting process and final conference, it has announced its intent not to participate in the International Criminal Court (the "Court," the "Criminal Court," or the ICC), and moreover, to actively discourage other states from ratifying the Statute. The United States' objections focus on ostensible legal deficiencies in the Statute, which it argues will lead to absurd results, trivialize the work of the proposed court, and lead to reduced participation in international peacekeeping missions. Nationals of the United States, it is asserted, are peculiarly at risk of being subjected to frivolous and politically motivated charges precisely because of American involvement in matters of international security.

This article analyzes the American objections to the Statute. Part I describes the historical precedents for a permanent international criminal court and the drafting process undertaken. Part I concludes with a summary of the sections of the Statute which are implicated by the

† I repeat here the eloquent "apology" of Louis Henkin: "I use the adjective 'American' with apologies to inhabitants of other American Republics because it is often awkward to use 'United States' as an adjective." Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25 n.1 (Theodor Meron ed., 1984).

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1. M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 33-34 (1991).

American objections. These statutory sections include the Statute's definitions of crimes, the role of the Prosecutor, the Court's anticipated relationship with the U.N. Security Council, and the Court's anticipated jurisdiction over states not party to the Statute. Part II selects three recent or current instances where the United States has used armed force, and analyzes the claims that might reasonably arise from the application of the Statute's definitions of the relevant crimes. Part III assesses the risks to the United States' interests arising from these claims.

In conformity with the developing ideals of interstate responsibility, the uncertainty of the law and the nature of the attendant risks of prosecution are not of a quality that would foreclose U.S. participation in the Criminal Court. When the U.S. acts pursuant to Security Council authorization its nationals will be largely immune from prosecution in the Criminal Court; accordingly, the U.S. may not legitimately challenge the Court on grounds that the exercise of the Court's jurisdiction will conflict with either the United States' pre-existing duties under the United Nations Charter or settled principles of international law. To the extent that the U.S. officials or servicemen might indeed be forced to defend against allegations of serious crimes, these U.S. officials or servicemen will be most at risk when the U.S. is acting unilaterally, or with respect to claims of aggression or war crimes violations in instances where the scope of the reach of the applicable norm is not yet settled.

INTRODUCTION

In 1625 Hugo Grotius put to paper the first comprehensive statement of public international law, *De Jure Belli ac Pacis*.² Considered by many to be the "father of international law,"³ Grotius undertook the task of proving the existence of the law of nations:⁴ he posited that "restraint and decency could be grounded in law despite the realities of the new age of statist diplomacy."⁵ Grotius' work is well-recognized and his ide-

2. Although other scholars had previously addressed certain topics in international law, Grotius' effort was the "first comprehensive and systematic treatise" in the field. Hersch Lauterpact, *The Grotian Tradition in International Law*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 10 (Richard Falk et al. eds., 1985).

3. *Introduction to INTERNATIONAL LAW*, *supra* note 2, at 7. To which Hersch Lauterpact adds: "one of the greatest international figures of his age—a prodigy, almost a miracle of learning." Lauterpact, *supra* note 2, at 10.

4. Lauterpact, *supra* note 2, at 12–13.

5. Richard Falk, *The Grotian Quest*, in *INTERNATIONAL LAW*, *supra* note 2, at 38; *but see* B. Röling, *Introduction to THE TOKYO WAR CRIMES TRIAL* 23 (C. Hosoye et al., eds. 1986) (asserting that Grotius' concept of just war "[c]lothed in elegant language and in-

als have been incorporated into international relations; yet almost consistently in the nearly 400 years which have elapsed since the publication of *De Jure Belli ac Pacis*, a debate has raged over the legitimacy of Grotius' exercise. The debate concerns the fundamental principles of the discipline of international law: is there truly such a thing as international law—that is to say a set of identifiable and enforceable imperatives? Or is that which is deemed “law” merely a collection of moral suggestions that nations are free to adhere to or ignore pursuant to nation-specific political, economic, and security interests?⁶ Crucial to the debate are instances of collective non-enforcement of established norms. When powerful nations, focusing only on the “bad action” of marginal, pariah, or enemy states, ignore violations of other similarly situated states or the violations of their less-powerful allies, the claim is made that nations are not governed by law at all, but rather by the political interests of the most powerful states.

Many reject the strict law/politics dichotomy⁷ and recognize that the international community is governed by a combination of the two whereby the enforcement of normative imperatives is tempered by individual political objectives.⁸ However this answer is unacceptable to

spired, it seemed, only by a yearning for justice . . . in fact provided the state with the rationale for starting any war it desired with a clear conscience”).

6. In Henkin's view an overemphasis and misapprehension of the nature of state sovereignty have hindered the normative development of international law. Arguing the necessity of analyzing and “decomposing” the concept of sovereignty, Henkin posits that the “essential characteristics and indicia of Statehood” are “independence, equality, autonomy, ‘personhood,’ territorial authority, integrity and inviolability, impermeability and ‘privacy.’” Louis Henkin, *International Law: Politics, Values and Function*, 216 RECEUIL DES COURS 24 (1989-IV), quoted in LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 15–16 (3d ed. 1993); cf. *Introduction to INTERNATIONAL LAW*, supra note 2, at 5 (“the primacy of the state, perceiving and acting on the basis of its particular interests (rather than on the basis of shared interests or the public good), places very strong limits on what can be achieved by a ‘law’ that transcends the particular.”).

7. This debate is sometimes cast as a law/“power” dichotomy, where “power” denotes “the ability of a State to impose its will on others or, more broadly, to control outcomes contested by others.” OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 5 (1991). In this article I prefer the term “politics” which encompasses not only authority but motive, and is thereby more precise.

8. As scholar Oscar Schachter posits:

Since we cannot deny the crucial role of power in the relations of States, we should seek to understand its specific impact on the international legal system. Plainly, international law is not an ideal construct, created and given effect solely in terms of its internal logic. Nor can it be understood only as an instrument to serve human needs and aims (though it is that too). International law must also be seen as the product of historical experience in which power and the “relation of forces” are determinants. Those states with power . . . will have a disproportionate and often decisive influence in determining the content of rules and their application in practice. Because this is the case, international law, in a broad sense, both reflects and sustains the existing political order and distribution of power.

either camp in those instances where the stakes are highest—where the perceived need for strict adherence to normative values and the perceived need for sovereign flexibility are both at their peak: in times of war. Under those circumstances the failure to adhere to accepted standards not only challenges certain central tenets of contemporary international order, but may also cause human suffering on a massive scale.⁹ Yet it is in those circumstances, where national security interests

Id. at 6. Schacter concludes, however, that the assumption that international law has no meaning because powerful states often “flout” international law, is overly “simpl[istic].” *Id.* By focusing on the “functions and significance” of international law instead of its “violations,” Schacter concludes that international law is a vital part of state behavior. *Id.* at 6–7.

9. It is no coincidence that the impetus for Grotius’ work were the horrors of the Thirty Year’s War (1618–48), then in its tenth year:

Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of. I observed that men rush to arms for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.

HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 20 (Kelsey trans. 1913) (1625), *quoted in* Mark W. Janis, *The Utility of International Criminal Courts*, 12 *CONN. J. INT’L L.* 161, 162 (1997); *see also* Falk, *supra* note 5, at 38 (describing the influence of the war on Grotius). This legalistic and moralistic reaction to war (“never again”) has been repeated throughout the ages. The Peace at Westphalia, celebrated as the beginning of the modern system of international law, followed the Thirty Years War, and promised a new age of international cooperation. *Id.* Similarly, the years following the end of World War I (1914–18) saw the formation of the League of Nations, the signing of the Kellogg-Briand Pact renouncing war as an instrument of national policy, and the promulgation of several treaties regarding the conduct of war and the treatment of captured soldiers. *See generally* LEAGUE OF NATIONS COVENANT; *see also* Daniel Smith, *The Struggle for an Enduring Peace, in* WOODROW WILSON AND THE PARIS PEACE CONFERENCE 3 (N. Gordon Levin, Jr. ed., 1972) (describing the influence of World War I on American President Woodrow Wilson’s commitment to the League of Nations); Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, T.S. No. 796 [hereinafter Kellogg-Briand Pact]; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T.S. 571; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, June 19, 1931, 118 L.N.T.S. 303; *see generally* JOHN SPENCER BASSET, *THE LEAGUE OF NATIONS: A CHAPTER IN WORLD POLITICS* (1928); MANFRED LACHS, *WAR CRIMES: AN ATTEMPT TO DEFINE THE ISSUES* 5–6 (1945) (listing major agreements about the conduct of warfare). The United Nations was founded as a response to the horrors of World War II. *See* U.N. CHARTER preamble (expressing determination to “save succeeding generations from the scourge of war”). The post-war period also saw the promulgation of four Geneva Conventions related to the conduct of war as well as treaties related to refugees and genocide. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 8; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Convention Relating to the Status of Refu-

are at stake—indeed, where national survival might be at stake—that states are most likely to deviate from accepted norms of conduct.¹⁰ For these reasons, the moral suasion of the international law of war is often presented as the litmus test of the validity of international law generally.

The vast body of law pertaining to warfare has several facets, including acceptable justifications for the resort to armed force (“*jus ad bello*”), as well as the conduct of war and the protection of civilians during war (collectively, “*jus in bello*”).¹¹ Closely affiliated with the law

gees, July 28, 1951, 189 U.N.T.S. 150; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

10.

War . . . is an act of force to compel our enemy to do our will . . . Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it . . . To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.

CARL VON CLAUSEWITZ, ON WAR, *quoted in* Michael Howard, *Temperamenta Belli: Can War Be Controlled?*, in *RESTRAINTS ON WAR* 1 (Michael Howard ed., 1979); *see also* TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 33 (1970) (describing the tension between military necessity and humanitarian concerns as “the great dilemma” of international law); PAUL CHRISTOPHER, THE ETHICS OF WAR 3 (1994) (describing *inter arma silent ledges* as meaning “one can’t reasonably expect to violate the rule of law in pursuit of selfish interests and later seek protection under the law when those who were violated fought back”); *cf.* Bryan Ranft, *Restraints on War at Sea before 1945*, in *RESTRAINTS ON WAR*, *supra*, at 52–54 (noting Germany’s abandonment of any restraint on attacking neutral shipping in the latter stages of World War I and World War II when her position became more vulnerable and defeat seemed likely.); *but see* Tami Davis Biddle, *Air Power*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 157 (Michael Howard et al. eds., 1994) (suggesting U.S. national survival was not at stake when bombs were dropped on Hiroshima and Nagasaki); KOSTA TSIPIIS, ARSENAL: UNDERSTANDING WEAPONS IN THE NUCLEAR AGE 25–27 (1983) (scientist’s questioning of whether bombs were necessary).

11. *See* CHRISTOPHER, *supra* note 10, at 3 (“*jus ad bello* concerns the conditions that make the use of war permissible and is primarily a political responsibility [while] *jus in bello* concerns the rules governing how a war should be conducted and is largely a military responsibility”).

The *jus in bello* itself has two principal subdivisions which are conventionally, although not strictly accurately, categorized as ‘Geneva’, i.e. international humanitarian, and ‘Hague’ law. ‘Hague’ law is primarily concerned with means, methods and weaponry of warfare in contrast with the overtly ‘humanitarian’ concerns of ‘Geneva’ law. These formal divisions are useful for purposes of exposition and study and are broadly descriptive but are not to be taken as absolutes.

HILARE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 1–2 (1990). For a detailed discussion of the history of the development of *jus in bello* and *jus ad bello* before the promulgation of the Geneva Conventions of 1949, *see* Geoffrey Best, *Restraints on War by Land before 1945*, in *RESTRAINTS ON WAR*, *supra* note 10, at 17–37; RANFT, *supra* note 10, at 39–56; Donald C. Watt, *Restraints on War in the Air Before 1945*, in *RESTRAINTS ON WAR*, *supra* note 10, at 57–77; *see generally* MCCOUBREY, *supra*; *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (Michael Howard et al. eds. 1994) (describing development of the laws of war).

of war is the prohibition of genocide.¹² There is general consensus as to the broad parameters of these norms: aggressive war is prohibited;¹³ however, self-defense is permitted.¹⁴ Certain weapons, because of their devastating physical effect, uncontrolled scope or environmental im-

12. The most comprehensive agreement pertaining to the crime of genocide is the Genocide Convention, *supra* note 9. Genocide is a crime typically associated with war in part because of the Holocaust's nexus to World War II and in part because of current examples of war waged for the purpose of excluding persons of certain ethnic and religious identities from national territory. However, the definition of genocide, as well as past practice, demonstrates that genocide may occur in otherwise peaceful circumstances. Genocide is defined in the Convention as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the Group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra* note 9, art. II. These violations are actionable "whether committed in time of peace or in time of war." *Id.* art. I. Indeed, the fear that U.S. policies of segregation would be deemed violative of these provisions was a prime justification for the Senate's failure to approve ratification of the Convention until 1988, and then only with numerous reservations and understandings. *See* U.S. Reservations and Understandings to the Genocide Convention, CONG. REC. S1355-01 (daily ed. Feb. 19, 1986), *reprinted in* 28 I.L.M. 782 (1989); *see generally* NATALIE KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 37-63 (1990) (discussing Senate and other domestic opposition to the Genocide Convention); JORDAN PAUST ET AL., INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS 1104-12 (collecting materials explicating U.S. legislators' objections to the Genocide Convention, and the eventual reservations). Other examples of possible peacetime violations of the Genocide Convention include the U.S. government-sponsored experiments in Tuskegee, Alabama, during which doctors withheld diagnosis and treatment of syphilis from poor black patients as part of a medical experiment, and various South African Apartheid policies, including the removal of fair-complected children from darker parents and placing the former with persons of similar skin tone. *See generally* JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT (1981) (describing experiment and arguments that it constituted genocide); JOHN DUGARD, UPDATE SOUTH AFRICA: TIME RUNNING OUT (1992) (describing policies of Apartheid).

13. *See, e.g.*, Kellogg-Briand Pact, *supra* note 9 (eschewing war as an instrument of national policy in favor of "peaceful and orderly process"); Resolution on the Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975) (calling upon states to renounce aggression, defined as including "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State"); U.N. CHARTER art. 2, para. 4 (calling upon Member states to refrain from the use or threatened use of force in international relations). *See generally* PAUST, *supra* note 12, at 861-966 (collecting materials explicating the development of the law regarding crimes against peace).

14. *See* U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of an individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

pact, are not to be used.¹⁵ Opposing forces, once captured, are guaranteed minimum standards of safety and comfort.¹⁶ Civilians are to be protected from undue harm, and the targeting of specific segments of a population for annihilation or exclusion is prohibited.¹⁷ A poll of the heads of national governments would elicit statements in agreement

15. Beginning in the nineteenth century and continuing today, modern rules have been developed setting limits on the acceptable methods of warfare. Over time more modern weaponry, including long-range explosives, toxic and aerial weapons, and later, atomic, nuclear and biological weapons, were developed; as these weapons radically altered the nature of battles, conventions were adapted or adopted to respond to those changes. See YVONNE VAN DONGEN, *THE PROTECTION OF CIVILIAN POPULATIONS IN TIME OF ARMED CONFLICT* 21 (1991) ("The means of destruction had become far more numerous than ever before; therefore, the need for more precise ideas on limitations became urgent."); see also post-World War II treaties cited *supra* note 9. The environmental impact of these weapons, as well as the environmental damage associated with conventional warfare has been the subject of international agreements since the 1970s. See, e.g., Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151; Protocol Additional (No. I) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 18, 1977, art. 55, 1125 U.N.T.S. 3 [hereinafter Protocol No. I] ("Care shall be taken in warfare to protect the natural environment against wide-spread, long-term and severe damage.").

16. Nations promulgated both domestic codes and international rules relating to the treatment of enemy soldiers, both on the field of battle and upon capture or death. See VAN DONGEN, *supra* note 15, at 22 ("Between 1581 and 1864, up to 294 treaties for the ameliorization of wounded soldiers had been concluded between European governments."). Perhaps the most famous of these early efforts was the U.S. War Department's "Instructions for the Government of Armies of the United States in the Field," the so-called "Leiber Code" or "Field Code," written by Francis Leiber and promulgated by President Abraham Lincoln in 1863. See TAYLOR, *supra* note 10, at 21.

17. Humanitarian protections intended to minimize harm to civilians have become an increasingly important focus of the international community in the twentieth century. Such humanitarian provisions were included in the Hague Convention of 1907, which prohibited "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended." Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 25, 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. T.S. 227 (entered into force Jan. 26, 1910). That convention also required combatants to take "all necessary steps . . . to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments [and] hospitals" not then being used for military purposes. *Id.* art. 27; see also *id.* art. 26 (requiring commanding officers to "do all in his power" to alert the relevant authorities before commencing a bombardment that is not an assault); *id.* art. 28 ("The pillage of a town or place, even when taken by assault, is prohibited."). Since the end of World War II the treatment of civilians in both international and internal conflicts has remained a high priority. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol No. I, *supra* note 15; Protocol Additional (No. II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609; Resolution of the Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1970). See generally PAUST, *supra* note 12, at 1027-1113 (collecting materials explicating crimes against humanity and genocide).

with these principles¹⁸—albeit subject to wildly varying interpretations of their application.¹⁹ Notwithstanding this stated commitment to the

18. Evidence of national consensus can be gleaned from a variety of sources, including the high levels of state participation in these agreements, wide-spread support for certain U.N. General Assembly resolutions and Security Council resolutions in response to particular crises.

19. See EUGENE DAVIDSON, *THE NUREMBERG-FALLACY: WARS AND WAR CRIMES SINCE WORLD WAR II* 16 (1973) (noting that “aggression, as such, remains universally condemned even if the powers are seldom agreed on when it occurs”). Perhaps the most significant interpretative questions arise from justifications of self-defense. For example, since 1980 the United States has resorted to armed force on numerous occasions, including military action in Grenada (1983, defense of nationals), Libya (1986, to deter terrorism), Panama (1989, in response to declaration of “war” by Noriega), in support of contras in Nicaragua (1981–86, collective self-defense), Iraq (collective self-defense), and most recently, the targeting of missiles at targets in Sudan and Afghanistan (1998, to deter terrorism). In each instance American officials relied on some variant of individual or collective self-defense as justification for its military action. See Patrick Kelly, *Congressmen Question U.S. Presence in Grenada*, U.P.I., Oct. 26, 1983, available in LEXIS, News Library, Wires File (citing Pres. Ronald Reagan as defending the invasion as necessary to save the lives of 1,000 Americans located in Grenada at the time of a coup); *Noriega in Hiding: 12 Americans Die as U.S. Troops Topple Regime*, L.A. TIMES, Dec. 20, 1989, at A1 (quoting Pres. George Bush as arguing that Noriega had created “an imminent danger” to American citizens living in Panama); *World Court: U.S. Aid to Contras Illegal*, CHI. TRIB., June 28, 1986, at 1–2 (describing World Court judgment rejecting American arguments that intervention in Nicaragua was justifiable collective self-defense); *Missed Signals in the Middle East*, WASH. POST MAG., Mar. 17, 1991, available in LEXIS, News Library, Papers File (quoting the U.S. State Department spokesman as affirming U.S. commitment to “collective self-defense”); *Excerpts from Clinton’s White House Statement Yesterday*, N.Y. DAILY NEWS, Aug. 21, 1998, available in LEXIS, News Library, Papers File (quoting Pres. Clinton, in response to the bombings of Sudan and Afghanistan, as promising that Americans would defend “our people, our interest and our values”). One scholar asserts that “the need to identify the enemy as the aggressor is not new” and notes that the cloak of self-defense was regularly assumed by ancient Roman leaders. DAVIDSON, *supra* note 19, at 9–10. However, that justification was rejected by many notable international scholars in the majority of the above-noted cases, and in some instances by the international community. See, e.g., Christopher Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT’L L. 131, 133 (1984) (“Did the United States have the lawful right to intervene militarily, alone or in concert, into the domestic political affairs of Grenada? Upon close inspection, one must strain hard to find satisfactory or even acceptable justification under international law for the U.S. action.”); Oscar Schacter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984) (concluding there was, at best, justification for rescue efforts); Ved Nanda, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT’L L. 494 (1990) (concluding self-defense argument invalid in Panama); but see Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516 (1990) (arguing that positive implications for human rights would result from the American Invasion). The notable exception is the Gulf War of 1991—which, not coincidentally was the only instance in which the U.S. sought prior approval of the U.N. Security Council. See S.C. Res. 678, U.N. Doc. S/RES/678 (1990). Although pundits, scholars, and national leaders alike have questioned the motives of the U.S. administration’s 1990–91 actions in the Gulf, the method of military engagement in 1991 and the United States’ continuing resort to military force, few question the legal sufficiency of the original invocation of collective self-defense.

norms of international peace and security, the years since the founding of the U.N. have seen recourse to armed force on innumerable occasions.²⁰ States freely utilize armed force when they believe that the use of force advances national interests and that the rest of the international community will either be indifferent to their use of force or collectively unable to respond.²¹ Indeed, this ambivalence towards the appropriateness of the resort to armed force is incorporated into the very fabric of the U.N., which entrusts security interests to the Security Council, a political body largely subject to the whims of its five permanent members (the "P5").²² As a result of the individual political interests of the P5 during the Cold War period of Security Council dormancy, innumerable instances implicating international peace and security went unaddressed by the Council because of the potential impact on individual geopolitical interests. Yet this seeming indifference is contrary to the legacy that serves as a basis for the United Nations.

20. Justifications have included self-defense, self-determination, defense of democracy, combating of terrorism and drug trafficking, and restoration or protection of a recognized national government.

21. This ambivalent commitment to the tenets of international peace has recently been compounded by an equivocal judgment by the International Court of Justice which has left open to states the possibility of resort to nuclear weapons "in an extreme circumstance of self-defense, in which the very survival of a State would be at stake." Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 36 (July 8), *reprinted in* 35 I.L.M. 809, 831 (1996) [hereinafter *Nuclear Weapons*]; *see also* Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 *TRANSNAT'L. L. & CONTEMP. PROBS.* 333, 350 (1997) (noting that although the ICJ opinion gave "definite encouragement" to the campaign to "rid the world of nuclear weaponry," the opinion may also "reinforc[e] cynical views that international law is of marginal relevance with respect to the shaping of national policy in matters of peace and security, especially when the constraints of law challenge major geopolitical positions").

22. The five permanent members of the U.N. Security Council, sometimes referred to as the "P5," are China, France, Russia, the United Kingdom, and United States. U.N. CHARTER art. 23, para. 1. Because Security Council action taken in response to threatened or actual breach of international peace and security requires the agreement of the P5, each exercises "veto power" with regard to these important measures. *See* U.N. CHARTER arts. 26, paras. 2–3; *see generally* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 447–55 (Bruno Simma et al. eds., 1994) (describing the operation of the Security Council). From the beginnings of its operations the Council has been subject to the pressures of geopolitics, most notably the Cold War. *See id.* (discussing Council stalemate and the ascendancy of the General Assembly during that period). Even in this post-Cold War age of cooperation Security Council action is viewed as primarily political in nature. *See* Order with Regard to Request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14), *reprinted in* 31 I.L.M. 662, 665 (1992) [hereinafter *Montreal Convention on Lockerbie*] (dissenting opinion of Judge Bedjaoui) (distinguishing between political solutions promulgated by the Security Council and legal determinations of the International Court of Justice).

PART I—FORMULATION OF STANDARDS FOR THE VINDICATION OF
INTERNATIONAL JUSTICE

The Nuremberg Legacy

There have been moments when the international community has exercised its political will to condemn actors for violating essential norms pertaining to the waging of war. The most significant and most successful effort was the establishment of the Nuremberg Tribunal following World War II, in which members of the Nazi command structure were held individually accountable for crimes against peace, war crimes, and crimes against humanity.²³ As a result of the trials in Nuremberg nineteen German military and political leaders were found guilty for their actions in waging and pursuing the war.²⁴ Similar judg-

23. See Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, The Government of the United States of America, The Provisional Government of the French Republic, and the Government of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, Mar. 15, 1951, 82 U.N.T.S. 279 (1945) [hereinafter Nuremberg Charter]. The Nuremberg Charter defined these crimes as:

CRIMES AGAINST PEACE: namely, 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;

WAR CRIMES: namely, violation of the laws or customs of war. Such violations shall include . . . murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id. art. 6; cf. TAYLOR, *supra* note 10, at 81–82 (describing the history of war crimes tribunals); Bryan MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L. L. 1, 3–10 (1998). Nuremberg is wrongly remembered as the first effort to try purported war criminals. There are actually numerous prior examples of war crimes trials, including a concerted effort to try German officers for illegal conduct taken during World War I. See generally JAMES WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982).

24. See ROBERT H. JACKSON, THE NÜRNBERG CASE xii–xiii (1971). Three defendants were acquitted of all charges. The trial, prosecuted by counsel representing the four Allied superpowers, lasted 216 days, and included testimony of thirty-three witnesses for the prosecution and innumerable documents. Of the nineteen convicted, twelve were sentenced to death, three to life imprisonment, and the remainder for lesser prison terms. See *id.* In addi-

ments were handed down against high-ranking Japanese officials during the less well-known Tokyo Tribunal.²⁵ The relentless pursuit of World War II war criminals continues to this day;²⁶ these past and present efforts have played an important role in advancing the normative development of the international law of war and genocide and have contributed to a popular cultural understanding of the risks and appropriate limits on the conduct of war. As a result, in the wake of more recent conflicts, there has been significant popular and international support for the establishment of war crimes tribunals, leading to the U.N. Security Council's establishment of the International Criminal Tribunal for the Former Yugoslavia ("Yugoslavia Tribunal") and the International Criminal Tribunal for Rwanda ("Rwanda Tribunal").

tion, the Allied superpowers held war crimes proceedings in their various spheres of control, trying over 20,000 defendants on war crimes charges. *See* MacPherson, *supra* note 23, at 8–9.

25. *See* Douglas MacArthur, *Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946*, 4 *Bevans* 20 (1968) (proclamation by the occupation chief, Douglas MacArthur, establishing the International Military Tribunal for the Far East, an extension of the Nuremberg Charter); *see generally* Preface, in *THE TOKYO WAR CRIMES TRIAL*, *supra* note 5, at 7–10 (describing the Tokyo trials and results).

26. *See* Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1974). Spearheaded by the life-long efforts of the self-proclaimed "Nazi hunters" worldwide, Nazis who successfully obtained refuge in the Americas and elsewhere have been exposed and, in some instances, returned to Europe or Israel for trial. *See, e.g.,* *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985) (affirming extradition order releasing a former Ukrainian national to stand trial for crimes against humanity in Israel). Indeed, resorting to methods of self-help, Israel employed kidnapping to secure jurisdiction over Holocaust mastermind Adolph Eichman. *See* PETER PAPADATOS, *THE EICHMAN TRIAL* 53–62 (1964) (describing kidnapping, international reaction to kidnapping, and legal consequences arising therefrom under international and Israeli domestic law). In connection with recent trials of suspected Nazi collaborators, international debates have arisen about the appropriateness of conducting trials of this nature some fifty years after the fact. *See, e.g.,* *Demjanjuk v. Petrovsky*, 110 F.3d 338 (6th Cir. 1993) (determining that government lawyers pressing for extradition of Demjanjuk had perpetrated a fraud upon the court by withholding evidence highlighting the flaws of the identification witnesses relied upon); *see generally* YORAM SHEFTEL, *THE DEMJANJUK AFFAIR* (1994) (defense counsel's conclusion that the Israeli justice system was purposefully subverted in an effort to make a political and moral statement). Others continue to press for trials, both as part of a modern push for international remembrance, justice, and deterrence, and as recognition of the shared guilt of collaborators or those who acquiesced. *See, e.g.,* DAVID MATAS, *JUSTICE DELAYED: NAZI WAR CRIMINALS IN CANADA* 259 (1988) (citing "[t]he urgent need to deal with Nazi war criminals living in Canada"); SIMON WIESENTHAL, *THE MURDERERS AMONG US* (Joseph Wechsberg ed., 1967) (chronicling the long-standing commitment of Wiesenthal, the "Eichmann-hunter" to bring Nazi war criminals to justice; Wiesenthal set up several centers which to this day collect information on Nazi war crimes); *see generally* MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 294 (1997) (discussing the procedural and fairness issues connected with criminal prosecutions of this type and concluding that, with appropriate safeguards, such prosecutions may be compatible with the goals of "cultivating liberal memory and solidarity").

These *ad hoc* tribunals have jurisdiction to investigate possible war crimes committed by Bosnian Serb, Muslim, and Croatian forces in the former Yugoslavia and the crime of genocide in Rwanda.²⁷

Though significant, each of these previous efforts to assign criminal liability for violations of the law of war both *jus ad bello* and *jus in bello* has been deemed insufficient, primarily due to their dependence on *ad hoc* arrangements. The Nuremberg Tribunal and its progeny have long been denounced by some as an example of “victors’ justice.”²⁸ Although the principles of the Nuremberg Tribunal were later affirmed by the General Assembly,²⁹ the Tribunal was a creation of the victorious Allied superpowers.³⁰ Allied conduct during the war was never subjected to international scrutiny for conformance with established standards of *jus in bello*. Accordingly, even though the controversial

27. See S.C. Res. 827, U.N. Doc. S/RES/827 (1993) (establishing an “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia” since 1991); Statute of the International Tribunal (For the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993); S.C. Res. 955, U.N. Doc. S/RES/955 (1994) (establishing the “International Tribunal for Rwanda”); see generally MacPherson, *supra* note 23, at 13–14 (describing the impetus which led to the creation of the “far superior” Yugoslavia and Rwanda Tribunals); but see Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT’L & COMP. L.J. 167 (1997) (opining that absent the outrage and sympathy of the public, inspired by graphic media coverage, there would have been insufficient political will at the Security Council to create the tribunals).

28. Robert Jackson, Chief U.S. Prosecutor at the Nuremberg Tribunal, in his opening statement at the proceedings, acknowledged that “the nature of these crimes is such that both prosecution and judgment must be by the victor nations over vanquished foes. . . . Either the victors must judge the vanquished or we must leave the defeated to judge themselves.” JACKSON, *supra* note 24, at 33; see also DAVIDSON, *supra* note 19, at 285 (“The trials were fatally flawed from the beginning, from before the beginning; they were trials of the vanquished brought before the courts of the victors.”); *Hirota v. MacArthur*, 338 U.S. 197 (1949) (concluding that Tokyo Tribunal “did not . . . sit as a judicial tribunal,” but rather “solely [as] an instrument of political power”); cf. TAYLOR, *supra* note 10, at 81–84 (questioning the legality of some of the crimes listed in the indictment as valid principles of international law); J.H. MORGAN, *THE GREAT ASSIZE* 19 (1948) (same).

One might argue that the true test of the legitimacy of the war crimes tribunals following World War II as principled application of law and not “victors’ justice” would be the willingness of the Allied superpowers to submit to being judged by the same standards, or, to paraphrase Justice Jackson, what happens when “we leave the victors to judge themselves?” Many would argue that the Nuremberg Charter fails to pass the test of universal application. See generally TAYLOR, *supra* note 10 (arguing that the U.S. committed war crimes in Vietnam).

29. See Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., at 1144, U.N. Doc. A/236 (1946).

30. Notably, only Americans, Britons, French, and Russians sat as judges on the Tribunal; a broader international panel judged the Tokyo trials. See *Preface to THE TOKYO WAR CRIMES TRIAL*, *supra* note 5, at 7 (describing the national composition of the panels).

and devastating fire-bombing of Dresden,³¹ the catastrophic bombing of Tokyo, and the use of atomic weapons on the civilian population centers of Hiroshima and Nagasaki³² arguably fell within the Allied definition of war crimes—the “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”³³—the Allies determined by fiat not only the definition of war crimes, but also the scope of the prosecution.³⁴

Fifty years after this disquieting beginning, the new *ad hoc* international war crimes tribunals investigating possible violations in Bosnia-Herzegovina and Rwanda were established. These most recent examples would seem to escape the criticism of victor’s justice, since the tribunals were established by nations uninvolved in the principal dispute.³⁵ However, viewed against the history of the preceding fifty years, the creation of the Yugoslavia and Rwanda tribunals highlights other concerns about the *ad hoc* appointment of criminal tribunals: that they produce uneven justice, unequal justice, and politicized justice.

The complaint of uneven justice speaks to the problems of selectivity. Since the Nuremberg trials concluded, supposedly ringing in a new

31. See Biddle, *supra* note 10, at 140, 154 (describing fire-bombing).

32. For a description of the loss of life, physical and psychological injuries, and societal damage which resulted from the bombings, see HIROSHIMA AND NAGASAKI: THE PHYSICAL, MEDICAL AND SOCIAL EFFECTS OF THE ATOMIC BOMBINGS (Eisei Ishikawa et al. trans., 1981) (report authored by the Commission for the Compilation of Materials on Damage Caused by the Atomic Bombs in Hiroshima and Nagasaki). It is difficult to quantify the overall fatalities of the bombings, since long-term mortality rates were also affected by the exposure to radiation. See *id.* at 237–43. Early figures put the number of civilian casualties at 118,661 and 73,884, respectively. See *id.* at 113–14 (providing statistics of Hiroshima fatalities as of August, 10, 1946; Nagasaki fatalities as of Dec. 31, 1945).

33. See Nuremberg Charter, *supra* note 23, art. 6 (providing a definition of “war crimes”).

34. By the terms of its Charter, the jurisdiction of the Nuremberg Tribunal was limited to “German atrocities in Occupied Europe” committed by “German officers and men and members of the Nazi Party.” *Id.* preamble; see also *id.* art. 6 (referring to the trial and punishment of the major war criminals of the European Axis countries”); cf. Proclamation, *supra* note 25 (establishing Tokyo Tribunal to review crimes by Japanese political and military leaders); Ōnuma Yasuaki, *The Tokyo Trial: Between Law and Politics*, in THE TOKYO WAR CRIMES TRIAL, *supra* note 5, at 45–46 (discussing the failure of the Tribunal to address the bombings of Hiroshima and Nagasaki and concluding this “unfairness” contributed to Japanese cynicism about the trial).

35. It must be acknowledged that the members of the Security Council do have political and strategic interests which may be furthered by the decisions of the Yugoslavia and Rwanda tribunals. Indeed, Serbian leaders have complained that the investigation of possible war crimes and the conduct of the Yugoslavia Tribunal has been tainted by a pro-West, anti-Serbian agenda. See, e.g., Dean Murphy, *NATO’s Image among Bosnian Serbs Darkens*, L.A. TIMES, Feb. 14, 1996 at A4 (describing negative reaction of Bosnian Serbs to the arrest of two indicted officers).

world order characterized by world peace and respect for human rights,³⁶ it is estimated that over 250 instances of armed force have occurred, including both open invasions and covert operations.³⁷ In addition to war crimes and crimes against peace, genocidal campaigns during this era caused the loss of millions of lives in Tibet, Cambodia, Guatemala, Burundi, Indonesia, Paraguay, and within the Soviet Union.³⁸ Yet the international community lacked the political will to address these grave violations of international law.³⁹ As a result, and however just or “unjustly,”⁴⁰ many criticize efforts to bring those guilty of war crimes to justice as motivated by “political considerations . . . rather than any objective analysis of their usefulness in promoting justice.”⁴¹ The concern is not for those brought to trial; rather, the lack of political will to install war crimes tribunals in such circumstances is seen by some as a reflection of the international devaluation of some victims on racial, political, or other grounds. In addition, selectivity of this type undermines any

36. See, e.g., Henry King, Jr., *The Meaning of Nuremberg*, 30 CASE W. RES. J. INT’L L. 143, 147 (1998) (detailing the lessons of Nuremberg including the lessons that “wanton aggression cannot be permitted” and the importance of recognizing individual rights).

37. See generally DAVIDSON, *supra* note 19 (detailing major instances of armed force occurring between 1945 and 1973).

38. See Barbara Harff, *Recognizing Genocides and Politicides*, in GENOCIDE WATCH 27, 31–36 tbl. 31 (Helen Fein ed., 1992) (collecting incidences of genocide and politicide since World War II); GENOCIDE AND DEMOCRACY IN CAMBODIA (Ben Kiernan ed., 1993) (describing genocide and its political and legal implications); cf. Kurt Jonassohn, *What is Genocide?*, in GENOCIDE WATCH, *supra*, at 17 (arguing that deficiencies in the Genocide Convention’s definition of genocide render it inadequate because it fails to cover important instances of genocide which have occurred since its entry into force).

39. Perhaps most ironic is the international community’s belated denunciation of Iraq’s President Saddam Hussein as a “Hitler.” See David Hoffman, *George Bush: The Statesman, the Pol and War*, WASH. POST, Dec. 30, 1990, at C1–C2 (quoting Bush as declaring Saddam Hussein to be a “dictator ‘worse than Hitler’”). Yet in 1988, when news reports publicized Hussein’s use of chemical weapons against northern villages populated by the Kurdish minority, the international reaction was muted. See David Little, *Speech: Protecting Human Rights During and After Conflict: The Role of The United Nations*, 4 TULSA J. COMP. & INT’L L. 87, 89 (1996) (noting there was “hardly a squeak from the UN” in response to that and other humanitarian violations).

40. Statement by the United Nations Secretary-General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court (18 July, 1998) (visited Aug. 11, 1998) <<http://www.un.org/icc/speeches/718sg.htm>> (accusations that victor’s justice prevails and not international law are made “however unjustly, when courts are set up only *ad hoc*”).

41. MacPherson, *supra* note 23, at 26; cf. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 738, 765–95 (1998) (former prosecutor describes the concededly difficult, but genuine quest for “truth” in the former Yugoslavia); but see Mutua, *supra* note 27 (providing a devastating assessment of the political and legal limitations on the Nuremberg, Tokyo, Yugoslavia and Rwanda Tribunals).

deterrence effect which consistent, universal, and rigorous prosecution might have on preventing future violations.⁴²

A complaint closely linked to that of unevenness is that of inequality. The complaint of inequality is reminiscent of the complaint of "victors' justice" and is distinguished from the concerns of unevenness in that inequality focuses on the ability of powerful nations to avoid subjecting their own actions to international scrutiny.⁴³ This is particularly true to the extent that *ad hoc* tribunals are dependant upon the Security Council for their mandate; the judicious use of the veto power held by the permanent members has prevented the U.N. from effectively responding to any acts of aggression committed by the permanent members or their close allies.⁴⁴

Finally, the recent example of the Yugoslavia Tribunal exemplifies a new concern: the influence of politics on the decision to prosecute individuals for war crimes violations and crimes against humanity. Considered directly responsible for many of the atrocities committed by their forces, the indicted Bosnian Serb leaders, Radovan Karadzic and General Ratko Mladic,⁴⁵ negotiated practical, if not legal, immunity from prosecution as a condition to the peace accords.⁴⁶ While the new Bosnian government committed itself to cooperate with the Yugoslavia Tribunal's efforts to investigate and prosecute war crimes,⁴⁷ the government has refused to surrender them for trial, and NATO forces have been reluctant to apprehend them.⁴⁸ It has long been acknowledged that

42. See MacPherson, *supra* note 23, at 24.

43. See *id.* at 18.

44. See generally DAVIDSON, *supra* note 19.

45. Both have been indicted by the Yugoslav Tribunal for actions taken during the War. See International Criminal Tribunal for the Former Yugoslavia: International Arrest Warrants and Orders for Surrender for Radovan Karadzic and Ratko Mladic, July 11, 1996, 36 I.L.M. 92 (1997).

46. There is nothing startling or unusual about this proposition:

The grim reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are the ones who committed, ordered or allowed terrible crimes to be committed. Thus, the choice presented to negotiators is whether to have peace or justice. Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time. The choice is, however, frequently fallacious and the dichotomy may be tragically deceptive.

M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 12 (1996).

47. See General Framework for Peace in Bosnia and Herzegovina with Annexes, art. IX, 35 I.L.M. 75, 118 (1996) ("The Parties shall cooperate fully . . . in the investigation and prosecution of war crimes, and other violations of international humanitarian law."); see also *id.* at 118, Annex 4; BOSN. & HERZ. CONST. art II, § 8 (requiring cooperation).

48. See Ray Mosley, *War Criminals May Go Free: NATO Not Expected to Pursue Bosnia Suspects*, CHI. TRIB., Dec. 31, 1995, at A1. One year after the peace accords Chief Prosecutor Richard Goldstone identified the arrest of the indictees living in the former

an independent permanent structure is required to address these and other concerns.⁴⁹

The International Criminal Court

Many of these concerns were recognized soon after the conclusion of the Nuremberg Tribunal. Soon after the U.N.'s founding, the United Nations General Assembly commissioned the U.N.'s International Law Commission with the task of considering how best to permanently address "Offenses Against the Peace and Security of Mankind."⁵⁰ Based on the Commission's findings, the General Assembly next established a Committee to consider the establishment of a standing international criminal court, the Committee on International Criminal Justice.⁵¹ The Committee's immediate efforts resulted in the promulgation of a draft Court statute in 1951, as revised in 1953;⁵² however, Cold-War politics and other international pressures, which often undermined the effectiveness of the U.N. from the mid-fifties to the mid-eighties, effectively terminated the efforts of the General Assembly to further develop plans for a standing international court with criminal competence.

Yugoslavia as "the most important problem still facing the Yugoslav Tribunal." Justice Richard Goldstone, *Conference Lunch Address*, 7 *TRANSNAT'L. & CONTEMP. PROBS.* 1, 7 (1997); see also Akhavan, *supra* note 41, at 795-813 (calling for the international community to "make the sacrifices necessary to arrest indicted persons" and discussing several policy changes that might result in arrests). Later orders committed NATO forces to arresting war criminals, but notwithstanding that policy arrests of Karadzic and Mladic seem unlikely; but see Theodor Meron, *War Crimes Law Comes of Age*, 92 *AM. J. INT'L L.* 462, 463 (1998) (asserting that the arrest of these and other principle figures "remains a distinct possibility"); see also Steven Erlanger, *Bosnian Serb General is Arrested by Allied Force in Genocide Case*, *N.Y. TIMES*, Dec. 3, 1998, at A1 (describing arrest of Maj. Gen. Radislav Krstic, highest-ranking official arrested to date and allegedly involved in 1995 Srebrenica massacre). The recent detention of former Chilean leader Augusto Pinochet in London for possible extradition to Spain on charges amounting to crimes against humanity might indicate other means of effecting the arrest of Karadzic, Mladic and others. See Ray Moseley, *British Lords to Try Again on Pinochet*, *CHI. TRIB.*, Jan. 16, 1999, at A4 (describing proceedings convened to review the extradition request).

49. The urgency is no different now than it was before the creation of the Yugoslavia and Rwanda Tribunals. Because of financial and political costs, some believe that it is unlikely that the Security Council will soon resort to such an *ad hoc* arrangement again. See Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 *COLUM. HUM. RTS. L. REV.* 291, 293 (1998) (citing Security Council "fatigue"); cf. Mutua, *supra* note 27, at 174 (arguing that the Council never had any independent desire to create the Yugoslavia and Rwanda Tribunals, and that it did so only because of popular pressure incited by media coverage).

50. See G.A. Res. 260, U.N. GAOR, 3d. Sess., U.N. Doc. A/810 (1948); see also MacPherson, *supra* note 23, at 11; M. Cherif Bassiouni, *Establishment of a Permanent ICC, Historical Survey: 1919-1998*, in III *INTERNATIONAL CRIMINAL COURT* (on file with author).

51. See G.A. Res. 489, U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (1950); see also MacPherson, *supra* note 23, at 11.

52. See MacPherson, *supra* note 23, at 11.

In 1989 the work of the Commission in drafting a statute began anew.⁵³ At the same time, with the easing of the Cold War and the disintegration of the Soviet Union came the chaos resulting from the disintegration of the Yugoslavian Republic. The probable war crimes committed during that conflict and others,⁵⁴ spurred renewed interest in the creation of a criminal court.⁵⁵ A new draft statute was produced in 1993, which eventually led to the creation by the General Assembly in 1995 of the Preparatory Committee on the Establishment of an International Criminal Court ("Preparatory Committee").⁵⁶ The ultimate goal of the Preparatory Committee was to develop a draft that would serve as a basis for a convention to be considered during a diplomatic conference.⁵⁷ Approval for the conference was forthcoming, and soon after the conclusion of the eighth session of the Preparatory Committee in April 1998,⁵⁸ a five-week conference was convened in Rome to consider the

53. See *id.* at 14.

54. In the wake of the 1990 Gulf War, calls were made for criminal charges to be levied against Iraqi President Saddam Hussein, including crimes of aggression and charges relating to his treatment of foreign citizens and crimes against the environment. See, e.g., United States Department of Defense Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War, Apr. 10, 1992, 31 I.L.M. 612, 644 (1992) [hereinafter DOD Iraq Report] (alleging various war crimes violations by Iraq and calling for a strategy to punish Iraq for them); Louis Beres, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights under International Law*, 16 HASTINGS INT'L & COMP. L. REV. 41, 65 (1992) (arguing that America and Israel have the "legal and moral" basis to prosecute Iraq for "Nuremberg-type" crimes committed by Iraq).

55. During the interim period between 1953 and the 1990s, some nations did pursue the idea of an international criminal court to respond to the problems of international drug trafficking. See MacPherson *supra* note 23, at 12–13. Moreover, as a response to the increased problems of international terrorism and, in particular, terrorism aimed at civilian aircraft, a variety of international agreements address international cooperation in apprehending and bringing to justice perpetrators of such acts. See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation signed at Montreal on 23 September 1971, 24 U.S.T. 567.

56. See MacPherson, *supra* note 23, at 14; Christopher Keith Hall, *The First Two Sessions of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177 (1997).

57. See MacPherson, *supra* note 23, at 14; Hall, *supra* note 56, at 177–78; Garth Meintjes, *Introduction to Symposium: Prosecuting International Crimes: an Inside View*, 7 TRANSNAT'L L. & CONTEMP. PROBS. i (1997) (describing recent history). In this intensive drafting phase the Preparatory Committee was authorized to receive the input of non-governmental organizations, NGO, played a significant role in the Committee's sessions and at the eventual diplomatic conference.

58. For reports on the work accomplished during the first five sessions of the Preparatory Committee, see generally Hall, *supra* note 56; Christopher Keith Hall, *The Third and Fourth Sessions of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124 (1998); Christopher Keith Hall, *The Fifth Session of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 331 (1998); NOVELLES ÉTUDES PÉNALES: THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997–98 PREPARATORY COMMITTEE (1999)

draft statute.⁵⁹ On July 17, 1998, the final day of the conference, the Rome Statute of the International Criminal Court was adopted by an overwhelming majority of the nations participating in the conference:⁶⁰ the Statute earned the support of 120 nations, with seven states voting against the Statute, and twenty-one states abstaining.⁶¹

At the request of the United States, the vote was non-recorded;⁶² however, the U.S. State Department has acknowledged its opposition to the Statute.⁶³ Those familiar with past American positions on submitting its actions to the scrutiny of international tribunals⁶⁴ and its past privileging of American national security interests⁶⁵ will find the U.S. position disappointing, but not surprising. What are the perceived and actual risks to American interests if the Rome Statute, as most predict, is ratified by the requisite number of states and the Criminal Court begins operations?

The United States' Objections

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," which would further be "weakened" without the participation of the United States—"the leading force for the rule of law and the leading

(describing sessions, draft statute and identifying outstanding legal issues). In addition to the important legal questions raised, the creation of the complex judicial and investigatory structure anticipated by the Rome Statute also requires a searching examination of logistical and financial considerations. For an example of some of those calculations, see Thomas Warrick, *Organization of the International Criminal Court: Administrative and Financial Issues*, 25 DENV. J. INT'L L. & POL'Y 333 (1997).

59. See G.A. Res. 52/160, U.N. Doc. A/RES/52/160 (1997) (calling for conference); see also U.N. Press Release (July 17, 1998), available in <<http://www.un.org/icc/pressrel/summary.htm>>; Bassiouni, *supra* note 50.

60. See U.N. Press Release, *supra* note 59.

61. *Id.*

62. *Id.*

63. See U.S. Department of State, Daily Press Briefing (July 20, 1998), available in <<http://secretary.state.gov/www/briefings/9807/980720odb.html>> [hereinafter July 20 Press Briefing]; see also David Scheffer, *America's Stake in Peace, Security and Justice*, AM. SOC. INT'L L. NEWSL., Sept.-Oct. 1998, at 1 (comments by U.S. Ambassador-at-Large for War Crimes Issues critiquing the Rome Statute as flawed).

64. For a useful discussion of measures the United States took first to avoid and later to ignore the jurisdiction of the International Court of Justice, see BARRY CARTER & PHILLIP TRIMBLE, *INTERNATIONAL LAW* 310-26 (2d ed. 1995) (describing U.S. actions with regard to litigation with Nicaragua).

65. In the past two years, during the international crises stemming from Iraq's refusal to cooperate with U.N. weapons inspections efforts, the Administration has indicated increasing willingness to use military force in response—even in the face of concerted international disagreement.

force . . . in the fight against war crimes and crimes against humanity.”⁶⁶ Denouncing the motives and understanding of the drafters,⁶⁷ Rubin identified a few “basic” yet critical flaws⁶⁸ that would prevent the U.S. from participating in the proposed court.⁶⁹ First, the U.S. complained about the overly broad scope of the crimes covered, including the anticipated inclusion of the crime of aggression, the possible (albeit more remote) inclusion of the use of nuclear weapons as a crime, and the refusal to permit reservations.⁷⁰ Second, the U.S. objected to the

66. See July 20 Press Briefing, *supra* note 63.

67. Rubin described the conference as “sort of a festival . . . towards the end for people who didn’t really understand the consequences of words.” *Id.* Others have been more sympathetic to the task undertaken by the drafters. For example, the Norwegian delegation acknowledged “[t]he challenge was how to accommodate the views of 160 different countries and create a Court credible in the eyes of the world. The answer is a global solution, a historic compromise.” *Statement of Norwegian Delegation*, U.N. Press Release (July 17, 1998), available in <<http://www.un.org/icc/pressrel/lrom22.htm>>.

A colleague put it this way: the rest of the world is approaching the development of international law as a legislative process, while the U.S. continues to act as though it is negotiating a contract. One exercise is collaborative and requires compromise; the other—particularly when one has the bargaining power the United States historically has enjoyed—is not. Until America understands this fundamental shift in the nature of the exercise, it is bound to be frustrated and disappointed. (These comments are heavily paraphrased from a conversation with Garth Meintjes on Nov. 5, 1998).

68. In his comments, Rubin emphasized three “basic” flaws, and discussed several other “issues”; these have been combined and rearranged somewhat to comport with the organization of this article. See July 20 Press Briefing, *supra* note 63.

69. There is some irony connected with this last assertion. The chances for American participation were never great; even before the Conference several prominent American Senators and military officials expressed their objections to the Statute. The United States has failed to ratify most contemporary human rights treaties and many of the *jus in bello* treaties and protocols from which the Rome Statute derives its definitions of war crimes. Moreover, the United States has consistently resisted the jurisdiction of international tribunals, and indeed withdrew from the compulsory jurisdiction of the International Court of Justice when that tribunal agreed to hear Nicaragua’s claims that the U.S. support of the Contras constituted a violation of international law. See *supra* note 64.

70. Rubin identified these, along with the inclusion of the crime “transferring population into an occupied territory” as “last minute bone[s] thrown in”:

[i]ncluding the inclusion of the crime of aggression, despite the drafters’ failure to define that crime; the drafters’ unwillingness to permit reservations to the treaty; the possibility that nuclear weapons may someday be included in such a way . . .

July 20 Press Briefing, *supra* note 63; see also ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, art. 5(2) & 120, U.N. Doc. A/CONF.183/9 [hereinafter ROME STATUTE] (leaving open the definition of aggression and prohibiting reservations, respectively). The refusal to permit reservations forecloses the recent American practice of ratifying subject to “reservations understandings and declarations” which severely limit the reach of the document. The implication of Rubin’s linkage of criticism of non-reservations provisions to criticisms related to defining aggression and the treatment of nuclear weapons under the Statute suggests that the U.S. considers its ability to limit the crimes for which its nationals will be subject to the Court’s jurisdiction essential to U.S. participation in the Statute.

prosecutor's ability to investigate crimes about which no state party has complained.⁷¹ Third, the U.S. criticized the defeat of an opt-out provision that would have permitted countries to ratify the treaty with the expectation that for the first ten years the court's jurisdiction would only be effective over the crime of genocide, so as to permit those nations with "international peace keeping responsibilities and security obligations . . . to see the court in action."⁷² Perhaps most stridently the U.S. objected to the Court's exercise of jurisdiction over crimes committed by nationals of states not party to the treaty; the U.S. declared that "[n]ever before" had a treaty asserted jurisdiction over states not party to it, in violation of "the most fundamental principal [sic] of treaty law."⁷³ The U.S. further complained, albeit somewhat inconsistently, that working in conjunction with the seven-year opt-out provision the exercise of jurisdiction over the nationals of non-parties would shield nationals of ratifying states from accountability for war crimes violations, while leaving the nationals of non-ratifying states open to possible punishment.⁷⁴

71.

[T]he treaty includes a provision allowing the court's prosecutor to initiate investigations even when no state party seeks such an investigation. This means that despite our best efforts, the court will be deluged with complaints from well-meaning individuals in organizations that will want the court to address every wrong in the world. This will turn the court into a human rights ombudsman and limit its ability to investigate the most serious crimes. It will also leave the court open to frivolous and politically motivated complaints.

July 20 Press Briefing, *supra* note 63.

72. *Id.* Curiously, at the press conference no one questioned the somewhat startling proposition that the very nations most expected to use armed force, those with international peace keeping and security obligations, *should* be excused from accountability for violating *jus in bello*; nor did anyone question the relative merits of the defeated ten year opt-out provision over the included seven year opt-out provision.

73. Based on research done "[that] morning," Rubin declared:

Never before has a treaty in international law . . . put itself over those who have not been included in it. The nation state is the fundamental unit in the international system, and international law . . . has not before seen a treaty try to impose itself on those who have not signed it.

Id. Rubin's information was regrettably incomplete: he neglected to consider the circumstances of the precursor to the Rome Statute, the Nuremberg Charter, the treaty in which Allied forces agreed to subject Axis nationals to the jurisdiction of the Nuremberg Tribunal. Moreover, this objection is inconsistent with settled principles of extra-territorial criminal jurisdiction, often invoked by the United States itself to justify the prosecution of persons who have committed crimes against the United States or U.S. nationals. For a fuller discussion of this and other issues, see *infra* Part I.G.

74. See ROME STATUTE art. 124 (providing for seven-year "transitional period" suspending war crimes jurisdiction for States Parties at their option). Since the U.S. was one of the strongest proponents of the inclusion of an opt-out provision, it seems somewhat incon-

These specific objections all identify possible defects in the Statute itself. However, underlying these concerns are larger practical and political questions identified by the U.S. delegation. First, whether the proposed Criminal Court will undermine the authority of the Security Council, by either contradicting Council determinations of the existence of a threat to international peace and security, or confusing matters by addressing a conflict when the Council is already involved and where an authoritative unitary response will best reduce international tension. Equally emphasized is the concern that members of the U.S. armed forces, in fulfilling their wide-ranging peacekeeping and security obligations, would be subject to frivolous, politically motivated charges. One could easily imagine such a scenario: American servicemen on duty in the 1990–1991 Persian Gulf conflict or in the operations in Somalia would be subject to frivolous charges raised in the Court by Iraqi President Saddam Hussein or Somali leader General Aidid solely to deflect international criticism from their own egregious behavior. Then, in order to avoid the possibility of ‘malicious prosecution’ of this nature,⁷⁵ the U.S. reduces its commitment to participate in crucial international peacekeeping missions, thereby increasing the risk of global instability and war.

There are many ways to evaluate the U.S. objections and whether or not they represent a significant and unacceptable threat to U.S. national security interests and indeed, international security interests. First, is it 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? If so, would the risk of such politically motivated charges act as a powerful disincentive to participation in peacekeeping missions? Second, what are the legal implications of the U.S. objections, and what are the possible consequences they will have on international peace and security? Before turning to these questions it is first necessary to understand the way in which the Statute approaches the important underlying questions of jurisdiction.

sistent that the U.S. should complain about the undesirable effects flowing from the inclusion of such a clause.

75. Although it captures the tenor of the U.S. objection, the term malicious prosecution is used here with some caution. The common definition of malicious prosecution requires the charges be brought without any foundation. By contrast, the charge the United States makes, that it will be subject to “purely political” criminal charges, does not question the validity of the charges, but rather the motivation of the state or Prosecutor in electing to pursue the claims.

The Rome Statute for the International Criminal Court

The statute adopted in Rome sets up a comprehensive structure intended to secure the international vindication of serious international crimes. The Statute has thirteen parts, and sets up an integrated means of addressing international crimes. It combines investigatory and prosecutorial functions in the office of the Prosecutor, and establishes three judicial bodies in the form of a Pre-Trial Division, Trial Division, and Appeals Division. In addition, the Statute anticipates legislative functions to be fulfilled by the Assembly of States Parties, which will have the authority to refine certain functions of the Court and, further, to refine the definitions of crimes and hence the jurisdictional reach of the Court.⁷⁶ The powers of the Court include arrest, and, upon conviction, imprisonment, and imposition of fines and forfeiture of the property of individuals; it does not provide for state responsibility.

The aspects of the Statute deemed objectionable by the United States primarily relate to core principles of various aspects of the Court's jurisdiction: the scope of crimes that will fall within the jurisdiction of the Court; the jurisdiction afforded to the Court's Prosecutor; the relative jurisdictional authority of the Criminal Court and the U.N. Security Council; and the Criminal Court's jurisdictional authority over non-signatories to the treaty.⁷⁷ This description of the Statute will focus on those aspects of the proposed Court that directly bear on these concerns.⁷⁸ Where appropriate, the American objections to specific provisions of the Statute will be addressed.

A. Crimes Falling under the Court's Jurisdiction: Aggression

The list of crimes falling under the purview of the Court is reminiscent of the charges heard by the Nuremberg and Tokyo tribunals. Designated "the most serious crimes of concern to the international community as a whole,"⁷⁹ the Court's anticipated jurisdiction includes the crime of aggression, the crime of genocide, crimes against humanity, and war crimes.⁸⁰

76. Another important task anticipated by the Statute is the development of "elements of crimes." *ROME STATUTE* art. 9.

77. *See infra* Part I.G. (describing the U.S. objections).

78. As a consequence, omitted from this description will be a discussion of the requirements for state cooperation in trial and enforcement; procedural aspects, including trial and appellate procedures; and available penalties. *See ROME STATUTE* pts. 6-13.

79. *Id.* art. 5; *see also id.* art. 17 (providing that cases lacking "sufficient gravity" to be held inadmissible by the Court).

80. *Id.* art. 5.

Most controversially, the Court is granted prospective jurisdiction over crimes of “aggression” (violations of *jus ad bello*), pending further agreement by the parties as to the definition of aggression and the scope of the Court’s jurisdiction over that crime.⁸¹ The case for including the crime of aggression is historically and legally compelling. Historically, aggression was a crime recognized in the Nuremberg Charter.⁸² Moreover, the inclusion of “aggression” recognizes the continuing efforts of the international community to outlaw crimes against peace: the Kellogg-Briand Pact, the U.N. Charter, certain regional agreements and key General Assembly resolutions all outlaw aggression, identifying it as the fundamental threat to international peace and security, international stability, and international human rights.⁸³ Finally, as the Nuremberg Charter implicitly acknowledges, it is difficult to separate the question of *how* armed force has been used (*jus in bello*) from *why* it was used (*jus ad bello*);⁸⁴ thus, providing the Court with jurisdiction to consider both aspects of the law of war is an appropriate solution. Most states today would recognize the prohibition against aggression as variously a norm, *jus cogens* or *obligatio erga omnes*,⁸⁵ deserving of inclusion in the Rome Statute; however, today, as in the post-World War II era, there is little agreement as to how the crime of aggression should be defined⁸⁶ and perhaps more importantly, *who* will determine whether the crime of aggression has been committed—hence, the deferment of the issue to later proceedings.⁸⁷

81. *Id.* arts. 5, 121 & 123.

82. See Matthew Lippman, *Nuremberg: Forty-Five Years Later*, 7 CONN. J. INT’L L. 1, 30–32 (1991) (describing the inclusion of the crime “crimes against peace” in the Nuremberg Charter).

83. See *supra* note 13 (discussing these documents).

84. Notably, the Nuremberg Charter’s definition of war crimes turns on the principle of “military necessity,” which in turn may speak to the legitimacy of the military effort. See *supra* note 23 (setting forth the Nuremberg Charter definitions of crimes).

85. See M. Cherif Bassiouni, *International Crimes Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).

86. See Lippman, *supra* note 82, at 30 (“The [Nuremberg] drafting conference . . . was unable to agree on a precise definition of war of aggression which constituted a Crime Against Peace.”); see also Stephen McCaffrey, *The Fortieth Session of the International Law Commission*, 83 AM. J. INT’L L. 150, 153 (1989) (noting that the ILC undertook to define aggression without acknowledging the controversy over defining aggression had effectively derailed the work of the ILC in 1954); *id.* (describing the disagreement embodied in General Assembly Resolution 3314, Definition of Aggression (1974)); Pejic, *supra* note 49, at 312 (describing the dispute about the decision to include aggression during the later drafting stages).

87. It is perhaps in this regard that American interests are most at risk. Pursuant to articles 121 & 123 of the Statute, see *supra* note 81 and accompanying text, the process anticipated for adopting a definition of aggression will only be open to parties to the treaty. According to the announced intent of the United States, this will prohibit direct American participation in the continuing development of this norm; however, as a member of the

In the draft statute considered during the Rome Conference, three different definitions of the crime of aggression, each proposed definition including several variations, were submitted for consideration.⁸⁸ The fact that none was adopted may be in part a reflection of the varying degrees of deference afforded the Security Council in each definition. The first option advanced language designed to preserve the roles of the United Nations and the Security Council in matters related to threats to international peace and security.⁸⁹ In its most benign form the variations denominated "Option 1" deemed the crime of aggression to be the planning, preparation, ordering, initiation, or carrying out of "an armed attack . . . against the . . . territorial integrity . . . of another State."⁹⁰ In its most extreme variant, this definition condemned only "war[s] of aggression . . . in contravention of the Charter of the United Nations as determined by the Security Council,"⁹¹ thereby rendering the Court subject to the authority of the Council for the purposes of trying cases in which aggression has been alleged. Like the Nuremberg Charter which it resembles, Option 1 focused on generally accepted principles of international law, eschewing specific definitions in favor of broad prohibitions.⁹²

The second proposed definition, Option 2, focused instead on certain acts "of sufficient gravity," which, when measured against an objective scale, constitute aggression.⁹³ This formulation consequently includes a non-exclusive list of potentially illegal acts which "threaten or violate the sovereignty, territorial integrity, or political independence of a state;"⁹⁴ included in this list is invasion, bombardment, occupation,

United Nations, the United States may participate in one of the anticipated processes for recommending definitions for adoption or other amendments to the treaty. See ROME STATUTE art. 123 (providing that the Secretary General shall, after an interval of seven years, and may, at other times, upon the request of a state party, convene a Review Conference open to the Assembly of States Parties); see also ROME STATUTE art. 112 (establishing Assembly of States Parties, the representational, non-judicial organ of the ICC).

88. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Apr. 14, 1998, U.N. Doc. A/CONF.183/2/add.1 (1998) [Hereinafter Draft Statute] (containing the Draft Statute for the International Criminal Court).

89. See *id.* at 12–14. The text of the proposed definitions of "aggression" are found as an appendix to this article.

90. *Id.* at 12; see Option 1 of Appendix A.

91. *Id.* An intermediate variant would have left the determination of what constitutes a violation of the Charter up to the Court.

92. The Nuremberg Charter defined crimes against peace as aggression "in violation of international treaties, agreements or assurances." See *supra* note 23 (excerpting the provisions of the Charter).

93. Draft Statute, *supra* note 88, at 13; see Option 2 of Appendix A.

94. *Id.*

blockades, and other recognized belligerent acts. In relying on these objective indicators, Option 2 borrowed heavily from a past U.N. attempt to define aggression, General Assembly Resolution 3314, Resolution on the Definition of Aggression.⁹⁵ An important consequence of defining aggression objectively is that it permits a measure of independence from Security Council determinations.⁹⁶

The third proposed definition, like Option 2, targeted actions threatening to the sovereignty, territorial integrity, or political independence of the state. Like proposed Option 1, Option 3 in its most extreme version defers to the determinations of the Security Council. However, Option 3 takes a more subjective approach to defining aggression by looking to the motives behind the attack and condemning "armed attack . . . undertaken in . . . contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]"⁹⁷

When the parties to the Statute again turn their attention to this troubling definitional question, it is likely the debate will center on two issues: (1) the appropriate role of the Security Council in determining that the crime of aggression has occurred and (2) the relative merits of relying on an objective set of factors over a more subjective standard. For the purposes of analysis in this article, the crime of "aggression" will be assumed to be defined in accordance with Option 2, which has the benefit, due to its derivation from General Assembly Resolution 3314, of being long-standing and having previously garnered the support of a majority of U.N. members.

B. Other Crimes Falling under the Court's Jurisdiction

Unlike the crime of aggression, the crimes of genocide, crimes against humanity, and war crimes are defined in the Statute.⁹⁸ Those definitions are drawn heavily from definitions of those crimes as established in prior specific conventions and other international agreements.⁹⁹

95. See *supra* note 13.

96. See *id.*; see also McCaffrey, *supra* note 86, at 159–60 (describing the policy concerns behind the adoption of the resolution). As a practical matter, in 1974, the height of the Security Council's Cold War stalemate, the General Assembly might have been more frustrated by the Council's inaction.

97. Draft Statute, *supra* note 88, at 14; see Option 3 of Appendix A.

98. See ROME STATUTE arts. 6–8.

99. Compare ROME STATUTE art. 6 (definition of genocide) with Genocide Convention, *supra* note 9, art. II (definition of genocide); see also ROME STATUTE art. 8 (including in the definition of war crimes "[g]rave breaches of the Geneva Conventions of 12 August 1949" and explicitly incorporating many of those provisions).

However, many innovations are incorporated into the Statute's definitions of crimes. Notably, forced pregnancy is included as both a crime against humanity and a war crime.¹⁰⁰ This dual inclusion reflects, in part, reactions to the experiences of the Bosnian conflict.¹⁰¹ In a similar reflection of past international concern, apartheid is included as a crime against humanity.¹⁰² In a somewhat controversial measure, the definition of "serious" war crimes¹⁰³ also includes "[t]he transfer . . . by the Occupying Power of parts of its own civilian population into the territory it occupies."¹⁰⁴ The inclusion of this language is viewed as responding to, in large part, the continuing Israeli occupation of the West Bank and Gaza Strip.¹⁰⁵

C. Limitations on the Court's Jurisdiction

Despite the far-reaching scope of these definitions, in all respects the jurisdiction of the Court is potentially circumscribed. One ground for dismissal of a case as inadmissible is that "[t]he case is not of sufficient gravity to justify further action by the Court,"¹⁰⁶ a ground which expressly recognizes that some crimes are just not "worth" prosecuting—at least, not by the Criminal Court.¹⁰⁷ One important limitation, relating to intent, is incorporated in the definitions of the particular crimes. For example, the definition of genocide requires the specific

100. See ROME STATUTE arts. 7(1)(g), 8(2)(b)(xxii) (criminalizing rape, sexual slavery, enforced prostitution, and forced pregnancy).

101. See Meron, *supra* note 48, at 464 (describing the Yugoslavia Tribunal's contributions towards the recognition of sexual violence as a crime against humanity). Neither the systematic use of sexual violence against women as a strategy of war, nor the condoning of soldiers' sexual abuse of women by military authorities is a new problem; rape is broadly prohibited by the 1949 Geneva Conventions. Indeed, during the course of World War II widespread abuse of Chinese women was perpetrated by the Japanese military. See generally YUKI TANAKA, HIDDEN HORRORS, JAPANESE WAR CRIMES IN WORLD WAR II 92–110 (1996) (describing establishment of comfort houses); COMFORT WOMEN: AN UNFINISHED ORDEAL—REPORT OF A MISSION BY THE INTERNATIONAL COMMISSION OF JURISTS (Ustina Dolgopol & Snehal Paranjape eds., 1994) (same). However, while the victorious Allied command was aware of these crimes, they were not among the crimes prosecuted during the Tokyo Tribunal. *Id.*

102. See ROME STATUTE art. 7(1)(j).

103. The Statute maintains a distinction between "grave" and "serious" war crimes.

104. ROME STATUTE art. 8(2)(b)(viii).

105. See Statement by Judge Eli Nathan, Head of the Delegation of Israel (July 17, 1998), available at <<http://www.un.org/icc/speeches/717isr.htm>> (expressing doubt that this crime "really ranks among the most *heinous and serious* war crimes" and asserting the Conference had been subverted for the purposes of Middle East politics).

106. ROME STATUTE art. 17(1)(d).

107. The fact that the crime is not sufficiently grave to warrant prosecution in the Criminal Court would not foreclose prosecution in national courts under the principles of universal or extraterritorial jurisdiction.

intent "to destroy, in whole or in part," a protected group,¹⁰⁸ while the definition of crimes against humanity requires a showing that the accused engaged in a "widespread or systematic attack directed against [a] civilian population, with knowledge of the attack."¹⁰⁹ The Court's jurisdiction over war crimes similarly requires the crimes be committed "as part of a plan or policy or as part of a large-scale commission of crimes."¹¹⁰ It is possible that in applying these norms the Court will adopt an approach similar to that taken by the Yugoslavia Tribunal, which has held that liability may arise from a sole occurrence, if that action is linked to a broader course of conduct.¹¹¹ If that interpretation is adopted, there may be responsibility under the Statute for a single heinous act which is part of a broad campaign even if the purpose of the campaign is not to target civilians. However, as stated, the intent requirements of the definitions of genocide, war crimes, and crimes against humanity may potentially restrict the prosecution of those crimes to those arising from purposeful action and resulting in catastrophic damage. If so, the Court may interpret the Statute as rejecting the notion that single or sporadic episodes resulting in significant civilian casualties and damage should be subject to the scrutiny of the international community and as rejecting new thinking that mass suffering caused indirectly, for example by a state's economic policies, should also be considered genocide.

The Statute's definition of war crimes is further limited by the requirement that certain crimes occur during an "international armed conflict."¹¹² This limitation will potentially deprive the Court of jurisdiction in circumstances where the use of armed force does not amount to "armed conflict." When civilian casualties result, some of these circumstances might constitute a crime against humanity, permitting review under that provision. Moreover, the expansive invocation of the right to self-defense, based on liberal interpretation of what constitutes armed attack¹¹³ might serve as a basis for similarly liberalizing the definition of international armed conflict.

108. Protected groups include national, ethnical, racial, or religious groups. *ROME STATUTE* art. 6.

109. *Id.* art. 7(1).

110. *Id.* art. 8(1).

111. See Meron, *supra* note 48, at 464–65 (discussing this and related aspects of the Yugoslavia Tribunal's decision concerning the scope of the charge crime against humanity).

112. *ROME STATUTE* art. 8(b); see also *id.* art 8(2)(a) (referring to the Geneva Conventions of 1949 which include a similar limitation).

113. See *supra* note 19.

D. States' Complementary Jurisdiction over International Crimes¹¹⁴

The jurisdictional reach of the Court is also tempered by the incorporation of the principle of complementary jurisdiction. The Statute recognizes—indeed, “emphasiz[es]”—that the Criminal Court is intended to be “complementary to national criminal jurisdictions.”¹¹⁵ Accordingly, a matter is to be deemed by the Court as inadmissible if it is “being investigated or prosecuted by a State which has jurisdiction over it,”¹¹⁶ if the state is able and genuinely willing to proceed.¹¹⁷ Matters are also inadmissible in circumstances where a state with jurisdiction has investigated the crimes, but has elected *not* to prosecute, “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”¹¹⁸ Thus, if it appears a state is exercising jurisdiction merely in an attempt to shield the accused, or if it appears that the proceedings are neither independent nor impartial, the Court will exercise jurisdiction regardless of state participation.¹¹⁹ In this way, states—

114. This principle has also been referred to as “complementarity” during the drafting process. See, e.g., M. Cherif Bassiouni, *Observations Concerning the 1997–98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 411–12, ¶¶ 28–32 (1997). The contrary principle of primacy was incorporated in the Yugoslavia and Rwanda Tribunals' statutes. See Bartram Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 386 (1998). Indeed in the case of the Tadic prosecution, the Yugoslavia Tribunal assumed jurisdiction after German courts had initiated proceedings against Tadic in its domestic courts. *Id.* at 403.

115. ROME STATUTE preamble. This aspiration could be considered naive: “[p]ractice has shown . . . that governments are rarely willing to hold their own citizens accountable, especially when the individuals involved occupy positions of political or military authority.” Pejic, *supra* note 49, at 292–93 (1998).

116. ROME STATUTE art. 17(a). Article 12 suggests that states with jurisdiction include both those where “the conduct in question occurred” and “the state of which the person accused of the crime is a national.” *Id.* art. 12.

117. Indeed, the willingness of a state with jurisdiction to undertake an investigation is sufficient to halt any investigation by the Court's Prosecutor. See *infra* note Part I.E. (describing duties of the prosecutor). A related, significant question concerning the willingness, yet apparent inability, of a state to proceed is provided by the example of the Rwanda Tribunal. Important to the national populace is the willingness of Rwandan courts to judge the actions of Rwandan war criminals is acknowledged by the Statute for the Rwanda Tribunal; however, in practice, the Rwandan judicial and criminal justice systems have been overwhelmed by the number of trials, resulting in backlogs and uneven justice. See Madeline Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349 (1997) (discussing the complexities of the joint jurisdictional arrangement); but see Jose Alvarez, *Crimes of States/Crimes of Hate: Lesson from Rwanda*, 24 YALE J. INT'L (forthcoming 1999) (noting the drawbacks to the Tribunal's exercise of jurisdiction notwithstanding the challenges faced by Rwandan domestic courts).

118. ROME STATUTE art. 17(b). See generally Brown, *supra* note 114 (describing the principles of complementary jurisdiction).

119. Cf. ROME STATUTE art. 20(3) (prohibiting retrial by the Court on double jeopardy grounds of cases pursued in national courts unless the national case was intended to shield the accused, or was not conducted in an impartial and independent fashion). The Statute also provides for superseding Court jurisdiction when a state with jurisdiction is undertaking an

including states not party to the Statute¹²⁰—are encouraged to police themselves rigorously, thereby avoiding scrutiny in an international forum.¹²¹

E. *The Role of the Court's Prosecutor*¹²²

Equally significant as the *definitions* of crimes over which the Court has jurisdiction are the *means* by which crimes are brought before the Court. The primary conduit to the proposed Criminal Court is the Court's prosecutor, to whom the Statute grants significant powers to investigate potential crimes.¹²³ States may refer matters to the Prosecutor if the state believes "a situation [exists] in which one or more crimes within the jurisdiction of the Court appear to have been committed."¹²⁴ In addition, the Security Council may refer a matter to the Prosecutor,¹²⁵ or the Prosecutor may initiate investigations *proprio motu* ("on her own motion") on the basis of information provided by non-state party sources.¹²⁶

Before proceeding with a full investigation, the Prosecutor in all circumstances is required to judge the validity of the information and the seriousness of the charge; in order to proceed there must exist "a reasonable basis to believe that a crime within the jurisdiction of the

overzealous or vindictive prosecution, in violation of recognized individual rights. *Id.* art. 20(3)(b) (stating that the Court may retry in instances when the national proceeding were not conducted "in accordance with the norms of due process recognized by international law"). The Statute includes no express provision as to how to reconcile inconsistent results.

120. *See infra* Part I.G. (describing Court jurisdiction over states not party to the Statute).

121. A further complication is provided by Article 90, which resolves competing claims of jurisdiction. A state, which seeks vigorously to prosecute an international crime which falls under the Court's jurisdiction but which does not already have custody of the accused, may be required to defer to the Court's jurisdiction. *See* ROME STATUTE art. 90. If the state with custody is a party to the Statute, a complicated priority system is to be used to determine whether the accused must be released to the requesting state or the Court. This system should take into account the status of any international extradition treaties between the states, the dates of the competing requests, and the strength of the requesting state's interest in the crime committed. *See id.* arts. 90(4) & 90(6).

122. As M. Cherif Bassiouni points out, from the perspective of the Anglo-American legal tradition, the International Criminal Court is inaptly named; the Rome Statute establishes a more complex structure, including a Prosecutor as well as several different courts, and is more accurately considered a "tribunal." *See* Bassiouni, *supra* note 114, at 410, ¶ 27.

123. ROME STATUTE art. 13. The powerful gatekeeping functions of the Prosecutor require the Prosecutor to ask many of the same questions as to admissibility as could be presented to the Trial Court at later times in the proceedings. *See infra* notes 127–30 and accompanying text.

124. *Id.* art. 14.

125. *See* ROME STATUTE art. 13.

126. *See id.* art. 15.

Court has been or is being committed.”¹²⁷ The Prosecutor must also evaluate the potential admissibility of the case and therefore the willingness of any state with jurisdiction to investigate and prosecute the matter. The Prosecutor’s assessment also must take into account the “interests of justice.”¹²⁸ With regard to matters not referred by a state party or the Security Council, if the Prosecutor concludes that a full investigation is warranted, the approval of the Pre-Trial Chamber is an additional prerequisite for further action.¹²⁹ Indeed, in all cases the Pre-Trial Chamber exercises tight supervisory control over the Prosecutor and is available to hear complaints of states interested in the Prosecutor’s activities.¹³⁰

The Prosecutor’s investigation is required by the Statute to be balanced: incriminating and exonerating circumstances are to be investigated with equal vigor.¹³¹ Moreover, the Prosecutor is required to respect the procedural rights of persons connected with the investigation; any such persons are protected from being compelled to confess guilt and are protected from coercion or duress, arbitrary arrest, or detention; and all questioning must be conducted in a language the person understands.¹³² Suspects are entitled to notification of their status as targets, and their right to assistance of counsel and to remain silent.¹³³ Notwithstanding these important limitations, the Prosecutor is given broad investigatory authority, including the authority to conduct on-site investigations,¹³⁴ and, with the approval of the Pre-Trial Chamber, to initiate arrest proceedings.¹³⁵ The Prosecutor may gather information from states, inter-governmental organizations, including U.N. organs,

127. *Id.* art. 53. For a description of the scope of the powers of the Prosecutor anticipated in the draft, see Pejic, *supra* note 49, at 304–05.

128. Note that article 53(c) of the Rome Statute provides,

A prosecution is not in the interest of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

129. *See id.* art. 15(4).

130. *See, e.g., id.* arts. 15, 18, 19, 54, 58, 61 & 72.

131. *See id.* art. 54(1).

132. *See id.* art. 55(1). In addition to the explicit rights described herein, the Statute generally requires the organs of the ICC to act in a manner consistent with “internationally recognized human rights.” *Id.* art. 21(3).

133. *See id.* art. 55(2). Many of these rights attach whether the investigation is carried out by the Prosecutorial staff directly or by national authorities acting at the Prosecutor’s behest. Similar rights attach at later stages of the proceedings, and evidence obtained in violation of these rules is generally subject to exclusion. *See id.* arts. 55(2), 67; *see generally* Kenneth Gallant, *Individual Human Rights in a New International Organization: A First Look at the Statute of the International Criminal Court* (forthcoming) (describing the systemic inclusion of these important rights in the Statute).

134. *See* ROME STATUTE art. 54(2).

135. *See id.* art. 58.

non-governmental organizations, and "other reliable sources."¹³⁶ In order to facilitate these efforts, the Prosecutor may enter into agreements necessary to facilitate state cooperation;¹³⁷ the Statute anticipates that confidentiality may be a necessary component of such agreements.¹³⁸

F. *The Role of the Security Council*

The Statute anticipates an independent court, with only a limited role performed by the Security Council. This approach rejects earlier suggestions that a permanent tribunal be established solely to accept referrals by the Security Council—a "permanent *ad hoc* tribunal." The Rome Statute permits state parties, the Security Council, and others to bring matters to the attention of the Prosecutor. Referrals by the Council are not privileged, but subject to the same prosecutorial requirements as any other referral.¹³⁹

Respecting questions of law, the Statute provides the Court with true independence. The Court may be capable to decide the scope of its jurisdiction and powers, and it is empowered to resolve disputes concerning the interpretation of the Statute that implicate the Court's judicial functions.¹⁴⁰ This independence builds on the model provided by the Yugoslavia Tribunal, that, over the objections of the United States, determined that the Court, and not the Security Council which created it, should resolve questions of jurisdiction and authority.¹⁴¹

One very important power has been reserved to the Council. Pursuant to Article 16, the Council has the authority to delay an investigation or prosecution for renewable periods of twelve months, if so ordered by a resolution adopted under Chapter VII of the U.N. Charter.¹⁴² Accordingly, the Council must determine that there exists a

136. *Id.* art. 58.

137. *See id.* art. 54(3)(d). This article also authorizes the Prosecutor to enter into agreements with intergovernmental organizations.

138. *See id.* art. 54(3)(e).

139. *See supra* Part I.G. (describing limitations on Prosecutorial investigations); *see also* Brown, *supra* note 114, at 427–29 (describing suggested models in the draft Statute for the role of the Security Council).

140. *See* ROME STATUTE art. 119(1). Other disputes are to be settled through negotiation, reference to the Assembly of States Parties, and, if necessary, reference to the World Court.

141. *See* International Criminal Tribunal for the Former Yugoslavia: Decision in Prosecutor v. Tadic (Establishment of the International Tribunal), Oct. 2, 1995, 35 I.L.M. 32, 40–41 (1996) [hereinafter *Tadic Case*] (holding the tribunal may "examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own 'primary' jurisdiction over the case before it"). *See also* Jose Alvarez, *Nuremberg Revisited: The Tadic Case*, 7 EUR. J. INT'L L. 245 (1996) (discussing case and implications of judgment).

142. *See* ROME STATUTE art. 16

“threat to the peace, breach of the peace, or act of aggression,” under Chapter VII¹⁴³ and that the situation will best be served by delaying the proceedings of the Criminal Court.¹⁴⁴ Rejected was a provision that would have automatically stayed the Court’s hand in any circumstance being dealt with by the Council under Chapter VII, *unless* the Council specifically authorized action by the Criminal Court.¹⁴⁵ Like all Chapter VII resolutions, Council action will be subject to the veto of one of the permanent members.¹⁴⁶ Notably, the request will expire without further action by the Council; this provision requires that the political consensus in favor of delay be maintained if the jurisdiction of the Court is to be preempted for additional periods.¹⁴⁷

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Id.

143. U.N. CHARTER art. 39.

144. Articles 40 and 41 of the U.N. Charter permit the Council to take action which will “prevent . . . aggravation of the situation,” and to “give effect to its decisions;” it is further empowered to require states not party to the dispute to comply with decisions so enacted. *See id.* arts. 40, 41 & 48, respectively.

The Statute’s provision may be an indirect response to questions raised in the International Court of Justice (“ICJ”) about the competing jurisdiction of the ICJ and Security Council. In *The Lockerbie Cases*, the question presented was whether the Council should act in a manner inconsistent with the jurisdiction of the ICJ: Libya requested a judicial determination as to whether it had a right under an international aviation safety convention, to try the suspected suspects in an incident of aircraft terrorism itself; the Security Council subsequently ordered Libya to extradite the suspects to the United States or United Kingdom. *See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, 1998 I.C.J., *reprinted in* 37 I.L.M. 587 (1998).

While it has the beneficial aspect of removing any ambiguity in times of international crisis, one might question the appropriateness of the privilege granted to the Council in the Rome Statute. Savvy parties negotiating with the Council with regard to an international dispute might attempt to bargain for deferral of Criminal Court proceedings as part of the settlement. Furthermore, nations with significant political power (or allied with those with political power) might use this mechanism to avoid criminal liability. Either scenario creates, or, some would say, exacerbates, the undesirable impression that immunity from criminal liability is for sale. *See M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 11 (1996) (“justice is all too frequently bartered away for political settlements”).

145. *See* Pejic, *supra* note 49, at 321–22.

146. *See* U.N. CHARTER art. 27(3) (“Decisions [under Chapter VII] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”).

147. Notably, certain long-standing sanctions imposed by the Council have come under criticism because removal of the sanctions requires unanimity amongst the permanent five members. For example, it is unclear that all of the permanent members of the Council would vote today to continue the crushing economic sanctions imposed on Iraq’s populace in re-

G. Court Jurisdiction over Non-Signatory States and Nationals

Articles 12 and 13 determine the necessary state consent to Court jurisdiction that is required to proceed in each case. These articles, working together, permit the Court to exercise jurisdiction over the nationals of non-state parties under limited circumstances. If the matter is not one referred to the Court by the Security Council pursuant to Article 13,¹⁴⁸ then the Court may exercise jurisdiction over the matter even if all of the states involved in the conflict are not parties to the Statute, and thereby presumed to have consented to jurisdiction.¹⁴⁹ All that is required is that either the state where the alleged crime was committed be a party to the Statute,¹⁵⁰ or the state of which the accused is a national be a party to the Statute.¹⁵¹ The latter permits states not party to the Statute to bring cases before the Court, while the former provision permits State Parties to bring cases before the Court against the nationals of non-state parties, if the crime was committed on its territory.

Preliminarily, the U.S. objects to the Statute's purported effect of "binding" the states, even if they are not party to the Statute. That objection is a mischaracterization of the effect of the Statute. It is true that nationals of the U.S. may fall under the jurisdiction of the Court, even if the U.S. is not party to the Statute, under certain circumstances. However, if that happens, the U.S., unlike parties to the Statute, will be under no obligation to assist or cooperate with the prosecution; accordingly, the exercise of jurisdiction over an American national is simply not equivalent to creating obligations for the United States.¹⁵² Furthermore, this exercise of jurisdiction with respect to the serious crimes defined by the Statute is consistent with long-settled principles of universal jurisdiction and with state jurisdiction over crimes committed within its territory or against its nationals. The only true innovation

sponse to Iraq's invasion of Kuwait—notwithstanding the continued intransigence of the Iraqi leadership. However, because of the way the sanctions are structured, an affirmative vote of the Council is arguably required for their suspension. The United States has vowed to veto any such measure until Iraqi President Saddam Hussein is removed from power.

148. A more positive gloss on this condition would be: if the matter is referred by a state party or whether the Prosecutor has initiated an investigation pursuant to information provided to her about the matter. See ROME STATUTE arts. 13(a), 13(c) & 15. If the Security Council refers the matter to the Court under Article 13(b), Article 12 sets no preconditions implicating consent to the exercise of jurisdiction.

149. See *id.* art. 12 (2).

150. See *id.* The territorial jurisdictional basis includes vessels or aircraft registered to the state.

151. *Id.*

152. The author thanks Professors Bartram Brown and Doug Cassell for these insights, and the symposium organizers of *Stand Together for Human Rights: A Midwest Celebration of the Universal Declaration of Human Rights* (Dec. 4–5, 1998) for providing a stimulating forum to interact with those and other scholars.

provided by the Statute is the ability of the state exercising jurisdiction to refer the matter to the Court for prosecution.¹⁵³

More controversially, Article 12 appears to permit the Court to hear cases even if *neither* of the states that are party to the underlying dispute have ratified the Statute. It provides that the Court may exercise jurisdiction over cases where neither state is party to the Statute, as long as one of the states has “accept[ed] the exercise of jurisdiction of the Court with respect to the crime in question.”¹⁵⁴ American objections have highlighted this provision by vociferously denouncing the “absurdity” of Saddam Hussein invoking the jurisdiction of the Criminal Court for crimes committed by American troops in northern Iraq, while the Court could not “prosecute Saddam for massacring his own people.”¹⁵⁵

As the world community digests and interprets the import of the Statute, some have wondered if this language accurately reflects the intent of the drafters, or if it merely reflects the unfortunate result of sloppy drafting. If it is the latter, it may be easily corrected by amendment. It is also possible that, even if not “corrected,” other provisions of the Statute can blunt the impact of this language. For example, the Court could expansively interpret the complaining state’s acceptance of jurisdiction over the “crime” as including the power to investigate and prosecute the complaining state’s own actions. Or the Prosecutor might foreclose prosecution as not being “in the interests of justice,” under an expansive reading of that provision.¹⁵⁶

However, it is this author’s view that the result abhorred by the United States, whether unintended or not, is not unfortunate at all. On the contrary, it embraces the high principles which form the basis of humanitarian law, which privilege the rights of the people over the rights of the state. Suppose, for example, U.S. forces were guilty of gross violations of crimes against humanity, and further suppose that the complaining state, guilty of similar crimes and not a party to the Statute, presented to the Prosecutor charges against the U.S. forces involved in the criminal activity. To permit the case to proceed might not be “fair” to the United States nationals involved, but to ignore the crimes in order to equalize the political impact on the governments involved would hardly be fair to the victims of the United States’ actions—those to whom the protections of the Statute are intended to flow: “[o]bjectively

153. It is again worth emphasizing that, if the U.S. elects to initiate its own investigation and prosecution by exercising its jurisdiction over its nationals. Then even as a non-party, the U.S. will be permitted to invoke the Statute’s provisions for complementary jurisdiction.

154. ROME STATUTE art. 12 (2) & (3).

155. Scheffer, *supra* note 63.

156. *See supra* note 128.

and quantitatively, they constitute the category of human beings for whom the law of war was most found lacking."¹⁵⁷ Moreover, there is precedent to such a lopsided approach: the Nuremberg and Tokyo Tribunals. In particular, in the Tokyo Tribunals the claim was made that the Tokyo defendants should be able to present, as part of their defense, evidence relating to alleged war crimes violations by the U.S., including the U.S. bombing of Tokyo, Hiroshima and Nagasaki.¹⁵⁸ That argument was rejected.

H. The "Opt-Out" Provision

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 its nationals.¹⁵⁹ The Article additionally anticipates that it will be reviewed seven years after the Statute is entered into force, at which time the privilege may no longer be extended to joining states.¹⁶⁰ Thus, taken together, these provisions provide a powerful incentive for states to join the Statute, and sooner rather than later.

The objections to this provision come from all sides, and are based on moral, legal, and practical grounds. If war crimes are sufficiently

157. GEOFFREY BEST, *HUMANITY IN WARFARE* 285 (1980). The current administration's commitment to the idea of privileging the rights of civilians is at best equivocal, as evidenced by the following comments by President Clinton with regard to the American bombing of Sudan:

Mr. Clinton said today that he stayed awake "till 2:30 in the morning trying to make absolutely sure that at that chemical plant there was no night shift." He added: "I didn't want some person who was a nobody to me, but who may have a family to feed and a life to live, and probably had no earthly idea what else was going on there, to die needlessly."

Tim Weiner and Steven Myers, *After the Attacks: The Overview: Flaws in U.S. Account Raise Questions on Strike in Sudan*, N.Y. TIMES, Aug. 29, 1998, at A1.

158. See HILLAIRE MCCOUBREY & NIGEL WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 334 (1992) (noting that in both the Nuremberg and Tokyo trials this defense was rejected).

159. Even though the U.S. proposal was for an op-out period of ten years, article 124 of the Rome Statute provides,

Transitional Provision: . . . [A] State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to . . . [war crimes] . . . when a crimes is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. . . .

160. See *ROME STATUTE* arts. 123 & 124.

serious as to give rise to international criminal liability, can there be any moral justification for permitting states to avoid these obligations through the mechanism of the Criminal Court's own statute? Given that the definitions of war crimes borrows heavily from previous treaties and long-standing customary law, is it legally appropriate to restrict jurisdiction over those crimes—suggesting that the states that so elect may avoid responsibility for violations of those obligations? On practical grounds, it seems unlikely that the purpose of Article 124, to entice states otherwise reluctant to submit to the Court's jurisdiction, will succeed. How will parties benefit from the opportunity to evaluate the Court's application of these standards if the states most at risk—the very states most likely to engage in conduct constituting war crimes—elect to invoke Article 124 and are therefore not subject to the Court's jurisdiction?¹⁶¹

These objections are serious and present important policy questions. However, they are objections which are solely dependent upon the operation of Article 124. By contrast, the objections of the United States (which lobbied for a *ten* year opt-out period) arises from the operation of this article in concert with Article 12, which permits the Court to exercise war crimes jurisdiction over nationals of states not party to the Statute, when the complaining state may be a party to the Statute, but has opted out of the Court's jurisdiction over war crimes.¹⁶² In other words, the U.S. again objects to the political inequity of one state finding another's nationals culpable when the actions of its own nationals go unchallenged. In some ways this objection misses the point. Article 124 is intended to provide an incentive to join the Statute; it would be a sorry incentive if states derived no substantial benefit from joining over not joining, here temporary immunity from war crimes prosecution. The critical question is whether the potential benefits of providing this option (increased participation) outweigh the perceived detriment (possible unfairness).

Perhaps more importantly, the principles that privilege the vindication of the interests of injured civilians over abstract notions of "fair-play" between states¹⁶³ would favor proceeding in these circumstances. From the perspective of the injured civilians—those intended to benefit from the prohibitions against war crimes—the fact that the complaining

161. It can hardly be presumed that the full participation by states such as, for example, Liechtenstein, Switzerland or Japan will provide meaningful examples by which more militarily active states can assess the Court's fairness and effectiveness.

162. See *supra* Part I.G. (describing Court's jurisdictional reach).

163. See *supra* notes 157–58 and accompanying text.

state might escape prosecution for its own bad actions does not render the prosecution illegitimate, only incomplete.

A full discussion of the powers of the Court is omitted because the objections of the U.S. seem to embody the concept of absolute immunity—that is to say, the U.S. objects to the possibility of being subjected to the Court's jurisdiction at all, and not the eventual vindication at later stages in the proceedings. Accordingly, this analysis has focused on the powers of the Prosecutor, the gatekeeper of the Court. Other provisions not described in detail here might also implicate the objections raised by the United States, including the procedural mechanisms which permit state participation in the proceedings, and the process by which states can lodge objections to the Court's jurisdiction and the authority of the Prosecutor.

PART II—THE ROME STATUTE AT WORK: POLITICAL TOOL OR TOOL OF JUSTICE?

Current and Recent Peacekeeping Operations

The United States has recently participated in a number of high-profile, politically charged peacekeeping and joint-security operations,¹⁶⁴ as well as a number of controversial unilateral military operations.¹⁶⁵ Within the last fifteen years,¹⁶⁶ the United States has participated in peacekeeping missions in Iraq (1990),¹⁶⁷ Somalia (1992) and Haiti (1992); in joint-security operations in Grenada (1983),¹⁶⁸ the Persian

164. As used herein, "peacekeeping operations" refers to U.N. authorized operations, whether the forces deployed are authorized to use force, as in the 1990 Gulf War, or deployed merely as observers. "Joint-security operations" refers to NATO or other joint operations.

165. Excluded from consideration are the numerous covert operations launched by the United States; excluded as well are U.S. operations in support of guerrilla or rebel factions, such as the Kurds in Iraq, the Contras in Nicaragua, or the rebel groups of Afghanistan, which may or may not be considered uses of force. *See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 7) (concluding that such activities may constitute armed forced in violation of international law) [hereinafter *Nicaragua Case*].

166. The selection of any time period is, to some extent, arbitrary. The fifteen year figure is useful because the American approach to peace-keeping operations underwent some revisions in the mid-1980s in light of the losses suffered in the Beirut barracks bombing.

167. It is a matter of some controversy as to whether current U.S. operations in Iraq are undertaken as representatives of the U.N.-sponsored coalition or in response to U.S. political and security interests. *See infra* notes 208–16 and accompanying text.

168. The United States asserted that it was legitimately acting on behalf of a coalition of Caribbean states; however, that assertion has been capably challenged. *See Schacter, supra* note 19.

Gulf (1987-88)¹⁶⁹ and the Balkans (1996-present);¹⁷⁰ 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).

Because the objections identified by the United States emphasize the risk of specious, politically motivated charges, the focus of this analysis will be the three most recent or continuing situations most open to political dispute are the U.S. operations in: (a) Iraq, (b) Bosnia, and (c) the Sudan. After a brief synopsis of the relevant facts and an explanation of the possible charges arising from those facts, each situation will be evaluated against the concerns raised by the United States, assuming a hypothetical case brought to the attention of the International Criminal Court by the state against which the U.S. military action was targeted.¹⁷¹ In this evaluation the following questions will be posed: if the Rome Statute was currently in effect, would the United States be: (1) unfairly required to defend against politically motivated charges of aggression;¹⁷² (2) unfairly required to defend against politically-motivated charges of war crimes violations; and (3) subject to conflicting obligations arising from the Security Council and Criminal Court?

169. The United States, together with Great Britain, France, and Italy, deployed naval forces to protect and regulate shipping endangered by the Iraq-Iran war. Although not pursuant to a pre-existing security agreement, the efforts were coordinated to some extent. See A. Gioia & N. Ronzitti, *The Law of Neutrality: Third States' Commercial Rights and Duties, in THE GULF WAR OF 1980-88*, at 237-40 (Ige Dekker & Harry Post eds., 1992); see also U.S. Report of Activities in Gulf, 26 I.L.M. 1458 (1987). This operation was notable in part for the "mistaken" Iraqi attack on the U.S.S. Stark, which left thirty-seven dead, and for the attack by the U.S.S. Vincennes on Iran Air flight 655, which left 290 civilians dead. See Neüther "Negligent" Nor "Culpable": *The Pentagon Rules out Punishment for the Iran Airbus Shootdown*, TIME, Aug. 29, 1988 (describing both incidents).

170. Under the auspices of the North Atlantic Treaty Organization ("NATO"), the U.S. is participating in the Stabilization Force ("SFOR") deployed in Bosnia in support of the December 1995 General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Agreement").

171. This exercise is hypothetical in that the jurisdiction of the Court provided in the Rome Statute does not extend to crimes committed before the Statute's entry into force. See ROME STATUTE art. 11. Moreover, with regard to the instances arising from operations in Iraq, that government, like the United States, has announced its opposition to the Rome Statute.

172. For reasons set forth more fully in text, the assumed definition for aggression is that of Option 2, set forth in *infra* notes 257-60 and accompanying text. See also appendix A in Draft Statute, *supra* note 88 (setting forth the three options considered at the Rome Conference).

United States Participation in the Peacekeeping Mission in Iraq

On August 2, 1990, Iraqi troops invaded the tiny nation of Kuwait.¹⁷³ Iraq's President Saddam Hussein announced that this "re-annexation" of Kuwait was justified by past colonial practices that had unlawfully separated this "province" from Iraq,¹⁷⁴ a situation made critical by an ongoing controversy concerning the exploitation of oil fields extending beneath the territory of both nations.¹⁷⁵ Iraq's action was universally decried as an illegal act of aggression;¹⁷⁶ the U.N. Security Council, acting with new-found unanimity and effectiveness, demanded Iraq's unconditional withdrawal and the restoration of Kuwait's "sovereignty, independence and territorial integrity."¹⁷⁷ The Security Council imposed severe economic sanctions and authorized the government of Kuwait and member states to use "all necessary means" to secure Iraq's withdrawal.¹⁷⁸ At the request of Kuwait and Saudi Arabia, U.S. forces had been in the region since August 7.¹⁷⁹ The Council set a deadline of January 15, 1991 for Iraq's withdrawal;¹⁸⁰ no satisfactory resolution of the crisis was forthcoming,¹⁸¹ and military operations led by U.S. command commenced. A relentless air campaign,¹⁸² followed by ground assault into Iraqi territory, had the desired effect, and Kuwait was quickly liberated. Hostilities terminated soon after, and a cease-fire was incorporated

173. See THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT, 1990-1996, at 14 (1996) [hereinafter IRAQ-KUWAIT CONFLICT].

174. Both Iraq and Kuwait had a long-standing relationship with the United Kingdom, which administered Iraq as a Mandatory Territory under the auspices of the League of Nations until Iraq's independence in 1932 and administered Kuwait as a self-governing protectorate until its independence in 1961. Prior to that, both Iraq and Kuwait had been part of the Ottoman Empire. *Id.* at 89. Iraq has long maintained that Kuwait is both "historically and legally an integral part of [its] Basrah province." *Id.* at 8. At other times however, Iraq has implicitly recognized Kuwait's independence. *Id.* at 9, 13.

175. *Id.* at 14.

176. *Id.* at 15.

177. S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990) (expressing alarm at Iraq's declaration of a "comprehensive and eternal merger with Kuwait"); see also S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990) (denouncing Iraq's action and demanding withdrawal); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990) (same); see generally IRAQ-KUWAIT CONFLICT, *supra* note 173, at 15-17.

178. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

179. IRAQ-KUWAIT CONFLICT, *supra* note 173, at 16. Kuwait and Saudi Arabia, which borders Kuwait, requested assistance from several nations as a measure of collective self-defense permitted under the U.N. Charter. See *id.*; see also U.N. CHARTER art. 51.

180. See S.C. Res. 678, *supra* note 178.

181. The coalition forces, headed by United States President George Bush, rejected a last-minute offer by Iraq to withdraw as unacceptable because of Iraq's refusal to leave behind major weapons and military machinery.

182. Over two thousand sorties per day targeted Iraq.

into Security Council Resolutions 686 and 687.¹⁸³ Resolution 687 laid the future basis for Iraq's relations with Kuwait, including borders and reparations;¹⁸⁴ it also set requirements intended to ensure Iraq's future good behavior as an international citizen.¹⁸⁵ Operations up to the promulgation of Resolution 687 will be considered the *Phase I* of U.S. operations in Iraq.

If Iraq were to bring charges against U.S. forces related to the *Phase I* activities, it could present¹⁸⁶ evidence of *prima facie* violations of the crime of aggression, which outlaws the "invasion or attack" or bombardment of the territory of another state,¹⁸⁷ and war crimes, including (1) "intentionally directing attacks against the civilian population,"¹⁸⁸ and (2) "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or . . . which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated."¹⁸⁹ These charges could be lodged against the United States command for actions taken by American forces themselves, as well as those taken by other forces at the direction of the United States central command.¹⁹⁰

183. See S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1991) (establishing cease fire and requiring cooperation); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991) (establishing Iraq-Kuwait border).

184. In this regard the actions of the Council were somewhat controversial in that Resolution 687 legislated formal territorial boundaries. See Keith Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27 N.Y.U. J. INT'L L. & POL. 103 (1994) (exploring the possible problems arising from Council exercise of powers traditionally reserved to the World Court).

185. The Security Council secured Iraq's agreement, albeit under duress, to destroy and not rebuild its stockpile of chemical and nuclear weapons: "Iraq shall unconditionally accept the destruction, removal or rendering harmless, under international supervision, of . . . [a]ll chemical and biological weapons and all stockpiles of agents [and] . . . [a]ll ballistic missiles with a range greater than 150 kilometers." S.C. Res. 687, *supra* note 183, ¶ 8.

186. Conceivably Iraq could supply information to the Prosecutor alleging violations of every element of every crime, regardless of the legal basis. For the purposes of this analysis, only those crimes with a reasonable factual basis will be identified. See, e.g., MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR (1991) [hereinafter NEEDLESS DEATHS] (providing a careful review of incidents which arguably were war crimes—including actions by Iraq); cf. *Initial Complaint Charging George Bush et al with Crimes Against Peace, etc.*, in WAR CRIMES: A REPORT ON UNITED STATES WAR CRIMES AGAINST IRAQ 9 (Ramsey Clark ed., 1992) ("indicting" former President George Bush and a variety of military and executive leaders with nineteen counts of crimes against humanity, war crimes and American Constitutional violations); see generally RAMSEY CLARK, THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF (1994) (alleging numerous incidents of war crimes violations by the U.S.).

187. This definition described fully *infra*, is based on one of the optional definitions proposed in the draft statute. See *infra* notes 257–60 and accompanying text.

188. ROME STATUTE art. 8(2)(b)(i).

189. *Id.* art. 8(2)(b)(iv).

190. The United States has acknowledged that forces acting under U.N. authority are bound to adhere to *jus in bello*. See DOD Iraq Report, *supra* 54, at 615–17 (acknowledging

Most certainly the list of potential war crimes violations would include the bombing of the Amariyah air-raid shelter in Baghdad by U.S. forces—the single attack which produced the greatest number of civilian casualties.¹⁹¹ At 4:00 am Baghdad time on February 13, 1991, U.S. bombers targeted the shelter, located in a residential neighborhood of Baghdad, with particularly destructive laser-guided bombs. According to reports by the Iraqi government, approximately 400 Iraqi civilians, mostly women and children, perished in the resulting fire.¹⁹² The status of the target is a contested fact:

Originally constructed during the Iran-Iraq War as an air raid shelter, it had been converted to a military C2 bunker in the middle of a populated area. . . . [B]arbed wire had been placed around [it] its entrances secured to prevent unauthorized access, and armed guards had been posted. . . . Iraqi authorities permitted selected civilians . . . to use the former air raid shelter part of the bunker on a level above the C2 center. Coalition authorities were unaware of these civilians in the bunker complex. The 13 February attack of the . . . bunker—a legitimate military target—resulted in the unfortunate deaths of those Iraqi civilians who had taken refuge above the C2 center.¹⁹³

Journalists on the scene saw no evidence of the structural reinforcements the U.S. described, and neighbors reported the regular use of the shelter by civilians.¹⁹⁴

the applicability of the rules of war, including the Geneva and Hague Conventions, on the conduct of the Gulf War); cf. Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283 (1995) (describing instances of possible war crimes violations by U.N. peacekeepers in Bosnia and Somalia and arguing that U.N. peacekeepers should adhere to the standards of international law—indeed, that the U.N. should affirmatively adopt those obligations).

191. See NEEDLESS DEATHS, *supra* note 186, at 128–47 (describing the attack and possible legal consequences); PETER ARNETT, LIVE FROM THE BATTLEFIELD 410–13 (1994) (journalist's account of incident); but see DOD Iraq Report, *supra* note 54, at 626 (asserting that the air-raid shelter had been “converted to a military C2 bunker,” and was therefore a legitimate target); see also Patrick Tyler, *War in the Gulf: Strategy; The U.S. Stands Firm on Bomb Attack and Says Investigation Is Closed*, N.Y. TIMES, Feb. 15, 1991, at A1 (U.S. assessment of target as purely military in character).

192. See NEEDLESS DEATHS, *supra* note 186, at 129–30 (noting conflicting reports putting the death toll at variously 310, of which 130 were children, and 204 by government estimates); see *Eyewitness Report: The Bombing of the Al-Amariyah Shelter, Baghdad, in WAR CRIMES*, *supra* note 182, at 120–22 (describing incident and putting death toll between 400 and 1500, the latter based on civilian estimations); CLARK, *supra* note 182, at 70–72 (same).

193. DOD Iraq Report, *supra* note 54, at 626.

194. See ARNETT, *supra* note 187; see also R.W. Apple, *War in the Gulf: Allies Study New Steps to Avoid Civilians in Bombing*, N.Y. TIMES, Feb. 15, 1991, at A1.

There is some question as to whether or not a single event, even one producing such significant casualties, falls under the definition of war crimes, which requires the incident be "part of a plan or part of a large-scale commission of crimes."¹⁹⁵ A key decision by the Yugoslavia Tribunal suggests that the answer to this question is yes.¹⁹⁶ Whether or not it is indeed appropriate to challenge the legality of this incident alone, an argument could also be made that the target selection process itself violated emerging rules of *jus in bello* by targeting remote contributions to the Iraqi war effort, such as bridges, power stations, and water and sewage plants remote from the Kuwaiti theater of operations,¹⁹⁷ and consequently increasing the risk of collateral civilian casualties.¹⁹⁸ In either case, United States personnel might have to defend the attack if Iraq brought proceedings before the Criminal Court.

Phase II of the U.S. operations began as the Iraq-Kuwait conflict ended. Immediately following the cease fire, two Iraqi dissident coalitions—the northern Kurdish minority and the Shiite faction in the south—erupted in civil war, which Iraq's government quickly moved to crush. Although much of Iraq's military equipment had been destroyed or was unavailable, the deployment of military helicopters proved sufficient to decimate the rebellions,¹⁹⁹ in turn creating a huge refugee, humanitarian and political crisis, particularly with respect to the Kurdish population.²⁰⁰ Concerned that the situation would erupt into a new international crisis, further destabilizing the region, the Security Council

195. See *supra* note 110 and accompanying text (describing limitation on definition of war crimes).

196. See generally Meron, *supra* note 48.

197. See NEEDLESS DEATHS, *supra* note 186, at 95–147, 231–309 (describing the civilian deaths resulting from both attacks on bridges and other military targets located in population centers and attacks on targets of questionable military significance).

198. *Id.* (questioning the targeting selection process). Indeed, immediately following the Amariyah attack, the U.S. command announced that it was engaged in the process of reevaluating the selection of targets. See Apple, *supra* note 190, at A12 (quoting Air Force officers and other officials). Ironically the day before the attack, an Air Force official at a routine briefing described the targeting strategy then in place as setting up "killing boxes." Philip Shenon, *War in the Gulf: War Notebook; Air Force Makes the Killing Methodical*, N.Y. TIMES, Feb. 13, 1991, at A15.

For a consideration of the legal issues connected with the selection of targets and collateral civilian damage, see NEEDLESS DEATHS, *supra* note 186. See also Roger Normand & Chris af Jochnick, *The Legitimization of Violence: A Critical Analysis of Gulf War*, 35 HARV. INT'L L. J. 387 (1994).

199. Later President Hussein resorted to environmental weaponry, draining the marshlands which served as home and cultural and economic touchstone for many Shiites in the south.

200. The political considerations were exacerbated by fear on the parts of Turkey and Iran that Kurdish nationals residing in those countries would participate in the uprising in the hopes of working toward the creation of an independent Kurdish state with territory taken from each of the three countries.

adopted Resolution 688, which condemned “the repression of Iraq’s civilian population,” and ordered Iraq to end the repression and permit humanitarian assistance to reach the affected populations.²⁰¹ The Resolution also authorized Members to “contribute” to the humanitarian relief effort.²⁰² The United States, with France and Britain, implemented Resolution 688 by establishing “no-fly zones,” the first extending from the thirty-sixth parallel to the northern border, over the region inhabited by the Kurdish population.²⁰³ Pursuant to the joint directive, enforced by daily patrols, all Iraqi military aircraft were prohibited from flying in the zones, upon pain of destruction.²⁰⁴ Later, a similar exclusion zone was established in the south, extending from the thirty-second parallel to the southern border, over areas with Shiite population concentrations.²⁰⁵ Neither zone was authorized by any U.N. action; however, a majority of countries involved in the Allied coalition announced support of the U.S.-French-British initiative. The situation remained relatively static until 1993, which marked the next phase in the U.S. operations in Iraq. Few, if any, Iraqi civilian casualties have resulted from these overflights.²⁰⁶ However Iraq could complain that the flights themselves represent an act of aggression.²⁰⁷

Beginning in 1993, the U.S. has attacked targets in Iraq, at times acting unilaterally and at other times acting with the support of, variously, France, Great Britain, Turkey, and Saudi Arabia. This begins *Phase III* of the U.S. operations in Iraq. In January 1993, anti-aircraft installations in southern and northern Iraq were bombed, reportedly in response to hostile maneuvers by Iraq.²⁰⁸ Later that year the U.S., acting alone, fired twenty-three cruise missiles onto Iraq, targeting the intelligence offices located in downtown Baghdad; the U.S. asserted the

201. See S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).

202. *Id.*

203. See Timothy P. McIlmail, *No-Fly Zones: The Imposition and Enforcement of Air exclusion Regimes over Bosnia and Iraq*, 17 *LOY. L.A. INT’L & COMP. L.J.* 35, 48–59 (1994) (describing creation of “no-fly zones” and questioning legal authority for their creation).

204. *Id.* In numerous reported skirmishes, U.S. planes shot down aircrafts “caught” in the “no-fly zones.” In one tragic instance of friendly fire, U.S. planes shot down two helicopters carrying high ranking humanitarian relief officials.

205. *Id.*

206. This is not to belittle the psychological damage caused. When this author traveled in Northern Iraq in 1991, citizens reported their emotional reactions to the daily overflights including fear, anxiety, and nightmares.

207. The crime of aggression includes “any military occupation, however temporary.” See *infra* notes 257–60 and accompanying text (setting forth definition of aggression). See also Convention on International Civil Aviation (Dec. 7, 1944) U.N.T.S. No. 296 (1948) [hereinafter Chicago Convention] (recognizing sovereign rights over territorial airspace).

208. The U.S. government reported that Iraqi weapons systems tracked and locked onto American warplanes patrolling the “no-fly zones.”

attack was made in "self-defense" against a foiled assassination plot against former President George Bush.²⁰⁹ Civilian casualties resulted from this attack: three missiles struck the residential neighborhood near the target.²¹⁰

As the Iraqi situation passed the five-year mark, the political situation in Iraq and neighboring Turkey deteriorated. Disputes within the Kurdish leadership, and opportunism on the part of Turkey (and, no doubt, on the part of Iraq) led Iraq to move ground forces to the region in response to Turkish incursions.²¹¹ The U.S. retaliated against this "violation" of the Northern "no-fly zone" (expansively interpreting "no-fly" as "no-drive") by attacking targets in the south and unilaterally extending the southern "no-fly zone."²¹² At this time international commitment to the coalition began to fracture. At the same time, Iraq, chafing under the stringent sanctions regime and the intrusive weapons monitoring and destruction program, became increasingly uncooperative with U.N. weapons inspectors.²¹³ The inspection team charged that Iraq lied, destroyed and hid evidence and blocked inspections, in violation of Resolution 687.²¹⁴ While the U.N. first responded with a virtual unanimity of purpose to these and other problems, for a variety of reasons the political will no longer favors military responses to violations of the dictates of Resolution 687.²¹⁵ In early 1998, the United States,

209. See Robert Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 594 (1995) (describing incident, evidence pointing to Iraqi involvement and U.S. response).

210. See *id.* at 603.

211. See Stephen Kinzer, *Raid on Iraq: In Turkey: For Ankara, A Chance to Hit Kurdish Rebels*, N.Y. TIMES, Sept. 7, 1996, at Sec. 1, p. 6 (describing Turkish incursions); Stephen Meyers, *Kurds Allied with Iraq Regain Ground*, N.Y. TIMES, Oct. 19, 1996, at Sec. 1, p. 5 (describing Allied response).

212. See Meyers, *supra* note 211.

213. Some believe inopportune statements by the U.S. and other allies led Iraq to conclude that cooperation was futile: American President George Bush and his successor, President Bill Clinton, both stated that they would vote against the repeal of sanctions unless and until Saddam Hussein was removed from power, thus removing any incentive on Hussein's part to cooperate. See Craig Whitney, *France Warns Iraq to Yield on Arms*, N.Y. TIMES, Jan. 31, 1998, at A6 (reporting French and Russian officials arguments that "American implacability" was "driving" Saddam Hussein to defy the U.N. sanctions regime).

214. S.C. Res. 687, *supra* note 183, ¶ 8; see also Barbara Crossette, *Iraqis Still Defying Arms Ban, Departing U.N. Official Says*, N.Y. TIMES, June 25, 1997, at A1 (reporting retiring UNSCOM chief as claiming the Iraqis "refused to operate in good faith").

215. See Whitney, *supra* note 213 (reporting increasing disagreement about the appropriate means to ensure Iraq's compliance); Steven Erlanger, *Russia and U.S. Split over Dealing with Iraq; Moscow Urges More Patience*, N.Y. TIMES, Jan. 31, 1998, at A6 (noting Russian and Chinese disagreement with American threats to use force). Some American officials have argued that financial concerns and international political gamesmanship ex-

frustrated at the erosion of support, made explicit its intention to act unilaterally in its own national security interests.²¹⁶ Late in 1998, following what appears to be the termination of all Iraqi cooperation with the weapons inspection regime, the U.S. and Britain bombarded Iraqi military installations for a period of four days. Beginning in 1999 Iraq has persistently challenged American and British patrols of the “no-fly” zones, leading to repeated targeting and destruction of military, communication, and other installations in Iraq by the challenged fighter jets. Civilians have been killed, injured, and indirectly harmed by damage done to the oil delivery system used to generate funds for humanitarian aid within Iraq. Applying the same standards identified with regard to the *Phase I* and *Phase II*, these actions appear to present a factual basis for Iraq to allege aggression and war crimes violations.

United States Action in the Balkans

Some trace the origins of the Bosnian conflict to the assassination of the heir to Austria-Hungary’s throne, Archduke Francis-Ferdinand in Sarajevo in 1914,²¹⁷ the event recognized as providing the spark for World War I. The modern catalyst for the conflict in Bosnia may be identified as the death of Communist Yugoslavia leader Marshall Tito and the resurgent nationalistic and ethnic pressures which resulted from the sudden liberalization of Yugoslavian society.²¹⁸ In any event, while the attention of the international community was focused on Iraq’s invasion of Kuwait, an equally serious crisis was developing in Yugoslavia. The former Yugoslavia, by popular vote, fractured into the republics of Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Serbia.²¹⁹ The split was encouraged by a number of factors ranging from political (four of the five republics elected democratic governing structures, while one, Serbia, elected to retain its communist identity) to ethnic and religious (suddenly remembered were old hatreds between Slavic Muslims, Croats and ethnic Serbs) to opportunistic nationalism (Croatia and

plain the fracture within the Security Council. A potentially equally compelling justification is the continuing harm suffered by Iraq’s civilian population, already hurt by the sanctions and previous military actions.

216. See generally *CBS News Special Report: President Bill Clinton Explains the U.S. Plan of Action for Dealing with Iraq* (television broadcast, Feb. 17, 1998), available in Lexis, News Lib., Transcript File (describing American interests in the Gulf War).

217. See BURNS WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 3 (3d ed. 1997); NORMAN DAVIES, *EUROPE: A HISTORY* 875–79 (1996).

218. See Christopher Goebel, *Population Transfer, Humanitarian Law, and the Use of Ground Forces in U.N. Peacemaking: Bosnia and Herzegovina in the Wake of Iraq*, 25 N.Y.U. J. INT’L L. & POL. 627, 629–60 (1993) (describing the events in Bosnia and the U.N. response).

219. See WESTON ET AL., *supra* note 217, at 3–4.

Serbia secretly planned to split the Bosnian territory between them).²²⁰ International recognition of the independence of Bosnia-Herzegovina in the face of fierce opposition by Serbians living within Bosnia as well as in Croatia and Serbia was enough to launch hostilities: Bosnian Serb militias, armed and assisted primarily by the Serb Republic, began a campaign intended to create a “greater Serbia,” laying siege to the capital city of Sarajevo.²²¹

The international community was immediately involved in the dispute: as the situation deteriorated, U.N. peacekeepers and observers were deployed to Bosnia,²²² humanitarian assistance was intermittently provided,²²³ and the Security Council passed a resolution prohibiting U.N. members from providing arms to the warring factions.²²⁴ In order to limit the devastation, U.N.-sponsored “no-fly zones” were established in Bosnia, although they were never actively enforced.²²⁵ Because of the former Yugoslavia’s proximity to western European countries (and no doubt recalling the devastating consequences of the Ferdinand assassination in Sarajevo in 1914) the North Atlantic Treaty Organization (“NATO”) also actively sought to defuse the situation.²²⁶ Notwithstanding these efforts, the situation deteriorated. War crimes, genocidal acts, and crimes against humanity were perpetrated by all sides, but significantly by Serbians against Muslims. The catalogue of crimes included ethnic cleansing, mass murder, expulsions, rapes, assaults, and forced pregnancies.

In 1995, after several failed attempts, a peace accord was negotiated in the American city of Dayton, Ohio. The Dayton Peace Accords anticipated a large deployment of NATO forces. American participation in this effort continues to this day, with 6,000-11,000 American soldiers deployed there as a part of a multinational force of averaging 33,000.²²⁷

220. *See id.*

221. *See* Goebel, *supra* note 218, at 629–32.

222. The U.N. forces were intended to stabilize the area in order to facilitate a peaceful settlement of the dispute. *See* Matua, *supra* note 27, at 173.

223. In response to the humanitarian calamity, the U.N. cordoned areas of Bosnia and designated them as “safe havens,” to be free from attack and free to receive humanitarian assistance. More than one “safe haven” was abandoned by the U.N. in the face of Bosnian Serb military advancements.

224. *See* S.C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991) (imposing embargo); S.C. Res. 724, U.N. Doc. S/RES/724 (Dec. 15, 1991) (reaffirming embargo).

225. *See* McIlmail, *supra* note 203, at 37–48.

226. Resort to NATO authority was also justified by some as providing a less politicized alternative to the U.N. Security Council, where close Russia-Serbian ties sometimes stymied Security Council initiatives.

227. *See* General Accounting Office, Report to the Chairman, Committee on Foreign Relations, U.S. Senate: Bosnia Peace Operation: Mission, Structure, and Transition Strategy of NATO’s Stabilization Force, GAO/NSIAD-99-19 Bosnia Peace Operation (Oct. 8 1998),

Although the United Nations subsequently approved these arrangements, American participation in the Bosnia peacekeeping force is in response to NATO and not U.N. responsibilities.²²⁸ The deployment of American troops in the Bosnian territory would present a *prima facie* case of aggression under the objective definition adopted for the purposes of this analysis,²²⁹ except the agreement of the Bosnian government to the deployment of the troops obviates the element of intent required by Option 2, which requires the action be intended to violate the sovereignty, territorial integrity, or political independence of the state.²³⁰

However, another circumstance arising from the Balkan conflict may give rise to liability. Most recently Serbia has acted against its dissident ethnic Albanian minority community in the Serbian province of Kosovo. Reliable eye-witness reports confirm that government troops, apparently acting upon orders, have massacred whole villages, including children. Again it was NATO which acted, threatening to use force in the form of air-strikes if Serbian forces did not withdraw;²³¹ the NATO Secretary-General has concluded that it has authority to act with relation to Kosovo under the Dayton accords.²³² In subsequent resolutions, the U.N. Security Council has endorsed this action.²³³

While no air-strikes have occurred, the threat is being maintained in order to ensure protection of Serbia's Albanian communities as Serbian and Albanian negotiators attempt to reach a long-term compromise.

available at <<http://frwebgate.access.gpo.gov>> [hereinafter GAO Report] (noting fluctuations in force deployed according to temporary needs such as election monitoring).

228. See generally History of the NATO-led Stabilization Force (SFOR) in Bosnia and Herzegovina (Nov. 16, 1998) (visited Nov. 21, 1998) <<http://www.nato.int/sfor/docu/d9811116.htm>>.

229. See *supra* notes 257–60 and accompanying text.

230. Potential changes in the political situation in Bosnia might give rise to a valid claim of aggression. For example, the collapse of the delicate political coalition might lead to the installation of a government hostile to the deployment of NATO troops. If that were to happen, and the NATO forces refused to withdraw when asked, that refusal might constitute intentional interference with the sovereignty of the Bosnian government. Under those conditions, the analysis would be largely similar to that arising from a complaint by Iraq to the Phase II operations of the Gulf conflict.

231. See Mike O'Connor, *Kosovo's Albanians Give Truce Pact Poor Reviews*, N.Y. TIMES, Oct. 15, 1998, at A6 (describing incidents and reaction).

232. See GAO Report, *supra* note 200, at 8; see also Press Statement by the North Atlantic Council on Kosovo, Press Release (98)130 (Nov. 19, 1998), available in <<http://www.nato.int/docu/pr/1998/p98-130e.htm>> (describing the "arrangements being put into place by NATO . . . for verification of compliance with the relevant U.N. Security Council resolutions").

233. See, e.g., S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998) (welcoming and endorsing NATO sponsored agreement); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

Serbia could assert a *prima facie* claim that the threatened air-strikes and deployment of NATO forces (with or without Security Council authorization) in its territory constitute aggression.²³⁴

United States Air-Strike in Sudan

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 areas²³⁵ the casualties were high: in Kenya thousands were injured, including over 150 fatalities; in Tanzania over eighty were injured, including over a dozen fatalities.²³⁶ The vast majority of the casualties were African citizens.²³⁷ The international community condemned the bombings,²³⁸ 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.²³⁹ 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 camps in the war against the United States. Afghanistan, still wracked by civil war, had no government with the power or political will to expel bin Laden.

234. While the Federal Republic of Yugoslavia initialed the Dayton Peace Accord, the accord, by its terms, only contemplated the deployment of NATO forces within the Bosnian territory, and cannot, therefore, be construed as an agreement by Serbia for NATO action in Serbian territory. In the U.N. and NATO agreements regarding Kosovo, the Yugoslav government only agreed to permit the NATO deployment of observers, not enforcers, in Kosovo.

235. For security reasons, new American embassies are isolated, and have extensive protective features which these older facilities did not have. See James Risen, *Bombings in East Africa: Bombed Embassies Did Not Meet Toughened Security Standards*, N.Y. TIMES, Aug. 8, 1998, at A1 (noting that the Kenyan embassy was scheduled for rehabilitation and security improvement in 1999).

236. Tim Weiner, *Bombings in East Africa: The Investigation; Reward is Offered and Clues Studied in African Blasts*, N.Y. TIMES, Aug. 11, 1998 at A1 (describing investigation).

237. *Id.*

238. See *Bombings in East Africa: The Reaction; Around the World, Leaders Express Outrage*, N.Y. TIMES, Aug. 8, 1988, at A8 (collecting statements of outrage by various leaders).

239. Ironically, bin Laden is a creation of the United States. During the Soviet occupation of Afghanistan, bin Laden and many others like him were recruited and trained by the U.S. to fight the Soviets. After the Soviets withdrew, leaving chaos behind in Afghanistan, many were angered by the manipulation of Afghanistan by these outside forces; a fiercely anti-American terrorist organization was created. See James Risen, *Militant Leader Was a U.S. Target Since the Spring*, N.Y. TIMES, Sept. 5, 1998, at Sec. 1, p. 1 (describing bin Laden's history with the U.S. and the development of his anti-American philosophy).

On August 20, ten days after the embassy bombings,²⁴⁰ the United States launched surprise air-strikes aimed at the training camps in Afghanistan,²⁴¹ claiming the move was in self-defense.²⁴² Also targeted was a pharmaceutical plant in Khartoum, Sudan, which was first identified by the U.S. as a heavily guarded secret chemical weapons facility owned by bin Laden and engaged in producing chemical weapons for Iraq.²⁴³ Ten were reported injured in the attack; there were no reported fatalities. Since the attack, Sudan has maintained that the plant had no ties to bin Laden and was not involved in the manufacture of chemical weapons, but rather of needed pharmaceutical products.²⁴⁴ It has invited scores of foreign diplomats to tour the plant and has unsuccessfully called for an U.N.-sponsored international inspection of the facilities and investigation of the attack.²⁴⁵ While retreating from some of its factual assertions and qualifying others, the U.S. continues to maintain that the attack was warranted as legitimate self-defense.²⁴⁶

240. Some critics argue that the timing of the bombing is related to the intensified investigation of American President Bill Clinton's affair with a young intern, Monica Lewinsky. See Jane Perlez, *Unhappy as a 'Pariah' Sudanese Say U.S. Picked the Wrong Target*, N.Y. TIMES, Aug. 23, 1998, at A11 (reporting Sudanese protest banners reading "No War for Monica").

241. The surprise was necessary to ensure the ultimate objective: the death of bin Laden, who was apparently thought to be in the camps when the air-strikes were launched. Secrecy was assisted by the decision to launch the missiles from ships located in international waters. No warning was given to Pakistan, even though the missiles aimed at Afghanistan crossed Pakistani territory. Barton Gellman, *U.S. Strikes Terrorist-Link Sites in Afghanistan, Factory in Sudan*, WASH. POST., Aug. 21, 1988, at A1 (discussing the secrecy and method of attack).

242. See *id.*; see also Steven Meyers, *After the Attacks: U.S. Says Raids Worked and may Stall Terror Attacks*, N.Y. TIMES, Aug. 22, 1998, at A1 (reporting U.S. officials as invoking Article 51 of the U.N. Charter, regarding self-defense).

243. See Meyers, *supra* note 238.

244. *Id.* (reporting Sudan's denials of any connection between the plant and bin Laden or chemical weapons production).

245. See *id.*; Barbara Crossette et al, *U.S. Says Iraq Aided Production of Chemical Weapons in Sudan*, N.Y. TIMES, Aug. 25, 1988 at A1 (reporting U.S. efforts to put off a request for a Security Council investigation submitted to the Council by Kuwait on Sudan's behalf).

246. American intelligence was remarkably incomplete. The government admitted that it did not know the plant was a legitimate pharmaceutical operation (it produced up to fifty percent of Sudanese pharmaceuticals) until three days after the attack. See Crossette et al., *supra* note 241, at A1. The original information linking bin Laden to the plant was found to have been erroneous, although "new and not fully evaluated" information might yet prove an indirect financial link. Tim Weiner, *Pentagon & C.I.A. Defend Sudan Missile Attack*, N.Y. TIMES, Sept. 2, 1998, at A5. The significance of its finding of traces of Empta, a precursor of VX, in a soil sample clandestinely obtained from the plant, has also been disputed. Chemical weapons experts noted that if a sample is not carefully preserved and promptly tested, it can result in misidentification, made more likely by the fact that the compound Empta is chemically similar to certain herbicides and pesticides. See Tim Weiner & Steve Myers, *Flaws in U.S. Account Raises Questions on Strike in Sudan*, N.Y. TIMES, Aug. 28, 1998, at A1 (also

Sudan could obviously present evidence of *prima facie* aggression on the part of the United States forces involved in the attack.²⁴⁷ Sudan could also argue that the decision to target a facility in a residential neighborhood constitutes either a crime against humanity or a war crime. These charges may be further augmented by the United States' insistence that the facility was indeed a chemical weapons plant; if so, the decision to target the facility, notwithstanding the risk of releasing toxins into the surrounding neighborhood may provide an independent basis for indictment on these grounds.²⁴⁸

Under the scenario suggested by the U.S. State Department, Iraqi President Saddam Hussein, Serbian President Milosovic, and the Sudanese government would all present the Court's Prosecutor with charges of aggression and war crimes violations against United States officials and servicemen. The assertion of these claims would not be in good faith; rather, these leaders seek to gain political advantage, either by taking on the United States government, an institution hated by their constituencies, or by deflecting attention from their own violations of international humanitarian and human rights norms. What result?

reporting observations by a British engineer who worked at plant from 1992-96; he stated that the plant did not have facilities that would permit safe handling of chemical weapons).

Even in the days immediately following the attack, before the deficiencies in the U.S. evidence were revealed, most understood the action to be retaliatory and not defensive in nature. See, e.g., Serge Schmemmann, *U.S. Fury on 2 Continents, How Can Terror Best Be Combated*, N.Y. TIMES, Aug. 21, 1998, at A11 (quoting governance scholars and military experts as viewing the attack as retaliatory in nature: "Even if its revenge, it's meant to send a message that there will be a retaliation, and that is deterrence").

247. Taliban, the extremist group which is now the putative governing structure of Afghanistan, has offered varying responses to the attack, at times reporting almost happily that bin Laden had survived the attack, and at others offering to cooperate with American efforts to arrest him. See Colin Lynch, *Taliban Hoping for a Way to Bid Adieu to Bin Laden*, BOSTON GLOBE, Oct. 21, 1998, at A1. Because of the reluctance of the international community to recognize Taliban as the legitimate government of Afghanistan, these offers have been ignored. Taliban's questionable status may render it incapable of joining the Statute and of raising these claims using the jurisdictional bases reserved for states. The Prosecutor's *proprio motu* powers would permit it to consider claims of aggression, which would be indistinguishable from the claims that the Sudanese government could assert under the circumstances. However, any analysis of either crimes against humanity or war crimes liability would have to take into account the undeniably military character of the targets, in contrast to the contested character of the pharmaceutical plant in Sudan.

248. See M. Cherif Bassiouni, *Legal Evaluation of an Attack on a Chem/Bio Facility 4* (unpublished manuscript on file with author) (the destruction of a facility making such weapons may be illegal "because of the possibility of causing extensive harm to nearby non-combatants"). The U.S. attack was not deterred by the possibility that, should the pharmaceutical plant truly prove to be a chemical weapons facility, damage to the civilian casualties might result from toxins released in the air by the attack. While acknowledging the risk, the administration relied on the weapons selected, chosen because they would cause the building to collapse on itself, to prevent a wide release of toxins. See Steven Meyers, *U.S. Offers More Details on Attack in the Sudan*, N.Y. TIMES, Aug. 24, 1998, at A6.

Applying the Statute to American Action

The Automatic Statutory Protections

Before launching a full-scale investigation, the Prosecutor would have to demonstrate that the decision to proceed with an investigation as comporting with the requirements of the Statute, that is to say that there exists “a reasonable basis to believe that a crime within the jurisdiction of the Court has been . . . committed;” that the case is otherwise admissible—which requires an assessment that the crime alleged is “sufficiently grave;” and that furthermore, proceeding will be “in the interests of justice.”²⁴⁹ In the scenarios described above based on these restrictions, if the Prosecutor concurred with an American assessment that the claims had no legal foundation, but rather were brought in bad faith for purely political motives, the Prosecutor should terminate the proceedings on her own initiative.

As a preliminary matter, notwithstanding the complementary jurisdiction provisions in the Statute, it is likely that the U.S. would have to rely on the gatekeeping functions of the Prosecutor, instead of taking a more proactive role to protect itself from frivolous, political charges. The United States could undertake a rigorous investigation of the charges itself, thereby seeking to preempt Court action through the exercise of its complementary jurisdiction.²⁵⁰ However, if interpreted strictly, the shield of complementary jurisdiction may prove thin: a persuasive challenge to the impartiality of American domestic proceedings could be made, especially as it pertains to charges alleging the crime of aggression.²⁵¹ First, in the American military justice system, while deference to superiors may be inappropriate in the conduct of war, *jus in bello*, the command structure’s determinations of *when* to take military action, *jus ad bello*, are intended to be respected.²⁵² In the American domestic court system similar deference is achieved through the application of the political question doctrine, a judicial constitutional

249. See *supra* Part I.E. (describing the duties of the Prosecutor).

250. See *supra* Part I.D. (describing complementary jurisdiction provisions).

251. See Gallant, *supra* note 133 (arguing that for most states the exercise of complementary jurisdiction might be inappropriate).

252. See CHRISTOPHER, *supra* note 9, at 157.

We must take care that we do not too hastily extend our conclusions concerning a soldier’s obligation to disobey orders he or she believes to be immoral under *jus in bello*, with his or her *jus ad bellum* responsibility to carry out the political will of the nation the soldier represents. Determining when a nation ought to resort to the use of force is a difficult matter involving human judgments and political processes.

construct which requires the courts to respect the decisions of the political branches with regard to matters peculiarly reserved to them, including certain foreign relations, military, and security issues.²⁵³ Accordingly, the Criminal Court might fairly conclude it is always inappropriate to defer to complementary jurisdiction as exercised either by American military or domestic courts in cases where they are asked to judge the crime of aggression, which involves the very "political" decision to wage war.

The American track record on judging whether the actions of its military in combat settings constitute war crimes or crimes against humanity does not inspire confidence in its impartiality and fairness. American courts have demonstrated willingness to defer to military judgment on matters implicating security. Thus in 1944 the United States Supreme Court upheld the military exclusion orders establishing Japanese internment camps, and in the 1970s countless challenges to the Vietnam War were rebuffed.²⁵⁴ Although it has in the past prosecuted individual soldiers for their illegal acts,²⁵⁵ the U.S. military, acting on cues provided by the administration, seems equally unable or unwilling to question its own policies which arguably result in war crimes. On countless occasions it has stated its refusal to even investigate instances when military action has resulted in massive casualties or has otherwise been demonstrated as inappropriate, including the bombing of the Amariyah air-raid shelter and the selection of the Sudanese pharmaceutical plant as a valid military target.²⁵⁶

253. See generally THOMAS FRANCK, *POLITICAL QUESTIONS, JUDICIAL ANSWERS* (1992) (discussing limitations of doctrine's application).

254. See *Korematsu v. United States*, 323 U.S. 214 (1944) (noting "military authorities [are] charged with the primary responsibilities of defending our shores" and affording deference to those decisions); see generally TAYLOR, *supra* note 10 (describing rejection of arguments of illegal aggression made by conscientious objectors with regard to the Vietnam conflict).

255. See, e.g., *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973) (prosecution relating to the My Lai massacre).

256. See Patrick Tyler, *War in the Gulf: Strategy; U.S. Stands Firm on Bomb Attack and Says Investigation Is Closed*, N. Y. TIMES, Feb. 15, 1991, at A1 (reporting that administrative and military officials "were closing the books on the [Amariyah] attack without further investigation"); NEEDLESS DEATHS, *supra* note 186, at 145-47 (criticizing the decision to close Amariyah investigation); Meyers, *supra* note 238 (reporting officials rebuffing suggestions on further investigation into Sudan attack); cf. Report of U.S. Department of Defense, *Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on July 3, 1988* (recommending no reprimands or charges be brought against soldiers responsible for shooting down civilian aircraft notwithstanding acknowledged deficiencies in the performance). Over forty years after the event the planned inclusion in a recent exhibit of language suggesting the bombings of Hiroshima and Nagasaki were not justified by military necessity led to protests by active and retired military personnel; high-ranking legislators effected the removal of the "offending" language from the dis-

Given these legal, structural, and political limitations, notwithstanding the integrity of the American military and civilian judicial systems, complementary jurisdiction over charges of aggression or war crimes violations might be precluded on legal and fairness grounds. If so, of the automatic protections anticipated by the Statute, only the well-considered discretion of the Prosecutor would prevent a full investigation and any further appropriate proceedings pertaining to charges brought against the United States.

The Crime of Aggression

For the purposes of this analysis, a modified version of the second optional proposed definition will be applied to each of the incidents. Because of its detail, and its reliance on an objective characterization of war crimes, Option 2 provides the most guidance for this endeavor.²⁵⁷ Further, because of its strong similarity to General Assembly Resolution 3314, this option is most likely to have broad support of the likely constituents of the Court. The relevant portions are as follows:

Option 2

1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing. . . political actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.
2. Acts constituting aggression include the following:²⁵⁸

play. See The Library, *The Enola Gay Controversy* (visited Nov. 7, 1998) <<http://www.exploratorium.edu/nagasaki/Library/enola.html>> (describing the changes in the display). See generally NEEDLESS DEATHS, *supra* note 186 (discussing possible liability arising from honest but mistaken belief of military character); David Linnan, *Iran Air Flight 655 and beyond: Free Passage, Mistaken Self-Defense and State Responsibility*, 16 YALE J. INT'L L. 245 (1991).

257. Each of the other two options might require Security Council approval before the court could proceed with a prosecution based on charges of aggression. The political nature of Council action thus prevents any meaningful analysis relying on these options.

258. This entire paragraph is bracketed for possible exclusion from the definition. The version adopted for the purposes of this analysis will include the language, which adopts the non-exclusive list of examples of aggressive acts first enumerated in General Assembly Resolution 3314. This version omits the following qualifying language as redundant: "Provided that the acts concerned or their consequences are of sufficient gravity." See ROME STATUTE art. 17 (providing lack of "sufficient gravity" as a reason to find the case inadmissible).

- (a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) bombardment by the armed forces of a State against the territory of another State;²⁵⁹ [or]. . .
- (d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State.²⁶⁰

In considering the charges of aggression outlined above, several organizing themes have been rejected in favor of grouping the charges according to the justification for the use of force. This scheme seems appropriate in light of the U.S. objections in that its focus is the validity of the claims: the more compelling the American justification for the resort to force, the less compelling the charges of aggression and the more likely the objection that the Court is being subverted to advance a purely political agenda. Accordingly, the military actions outlined above will be considered in two groups: those for which the U.S. has relied on self-defense or collective self-defense as a basis for action (*Iraq Phases I & III*, and *Sudan*), and those where the American government acts to provide humanitarian assistance (*Iraq Phase II*, and *Bosnia*).

A. *Circumstances of Self-Defense*

Well-settled principles of public international law require nations to respect the political and territorial integrity of other states; indeed respect for the sovereignty and political independence of states is incorporated into the Statute's definition of aggression.²⁶¹ Military action taken in contravention of that basic principle may constitute aggression.²⁶² However, under public international law, as incorporated into the Statute, a charge of aggression is negated by a valid claim of self-defense.²⁶³ Thus, although the *Phase I* military action, which included the bombardment and invasion of Iraq, presents a *prima facie*

259. Omitted is the following: "or the use of any weapons by a State against the territory of another State." Draft Statute, *supra* note 88.

260. The provisions of paragraphs (c), (e)–(g) are omitted as not relevant to this analysis.

261. See Option 2 of Appendix A.

262. *Id.*

263. See U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measure necessary to maintain international peace and security.").

violation of Iraq's political and territorial integrity, Iraqi claims of American aggression would be negated by the valid claim of self-defense. In this circumstance the United States' announced purpose was to participate in an exercise of collective self-defense at the behest of Kuwait;²⁶⁴ in this it garnered the support of the Security Council, and indeed, most of the international community.²⁶⁵

According to the terms of the Statute, the approval or disapproval of the Security Council is not conclusive: an independent analysis by the Prosecutor (and later by the Pre-Trial and Trial Chambers), is nonetheless required to determine if the actions complained of fall under the jurisdiction of the Statute.²⁶⁶ In this circumstance, there is little need for a preliminary investigation, let alone a full investigation: the basic factual scenario is "open and notorious," permitting immediate preliminary review by the Prosecutor. The Prosecutor, taking into account Iraq's own aggression, may determine that in light of the doctrine of self-defense (here collective self-defense) "there is no reasonable basis to believe that a crime within the jurisdiction of the Court has been committed."²⁶⁷ Alternatively, the Prosecutor may determine that there are "substantial reasons to believe that an investigation would not serve the interests of justice" (based on Iraq's own bad action).²⁶⁸ Either determination would end the proceedings before a full investigation.²⁶⁹

264. In this regard the U.S. involvement in Kuwait differs from its involvement in Nicaragua, where, the World Court held, there was no credible evidence that any of Nicaragua's neighbors had even asked for help. See *Nicaragua Case*, 1986 I.C.J. at 14.

265. See S.C. Res. 661, *supra* note 173; see also S.C. Res. 678, *supra* note 178 (authorizing the use of force to restore international peace and security).

266. In this instance the approval of the Security Council might be of questionable probative value. In legal academia there was considerable debate about whether the Security Council had the authority to act in all of the ways that it did, and further whether it impermissibly deviated from the process set forth in the Charter under Chapter VII. See, e.g., Burns Weston, *Security Council Resolutions 678 and Persian Gulf Decisionmaking: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 518 (1991) (remarking that the Council's actions "raise" exceedingly troublesome questions about whether the Council acted in conformity with the Charter); cf. John Quigley, *The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT'L L. 249, 250-61 (1996) (describing certain Council action as falling outside the Charter and thus compromising the integrity of the process); Frederic Kirgis, *The United Nations at Fifty: The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 529-32, 536-37 (1995) (questioning Council action toward Iraq); but see Fernando Téson, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323 (1996) (arguing the action was legitimate).

267. ROME STATUTE art. 53(1)(a); see also *supra* Part I.E.

268. ROME STATUTE art. 53(1)(c); see also *supra* Part I.E. While the explanation of "interests of justice" does not expressly provide for application of the doctrine of "unclean hands," it might be considered a "circumstance" of which note is properly taken.

269. One possible legal argument might convince the Prosecutor to proceed. The day before the Security Council's deadline for withdrawal, Iraq agreed to pull out from Kuwait; this offer was rejected—unless Iraq left behind all of its heavy weaponry. Iraq could argue

Iraq presents a more sympathetic case with respect to *Phase III* of the Iraqi conflict. In those circumstances the United States has invoked self-defense to justify a number of military actions taken which present *prima facie* instances of aggression, including attacking hostile aircraft and anti-aircraft installations violating the “no-fly zones,” as well as Baghdad in self-defense of an alleged foiled assassination attempt on George Bush.²⁷⁰ Here the factual circumstances are not open and notorious; the validity of all claims of self-defense with regard to perceived targeting by Iraqi anti-aircraft weaponry is dependent solely upon U.S. sources.²⁷¹ The June 1993 claim of self-defense depends upon allegations concerning an assassination plot that Iraq has denied, and for which the primary source of information is Kuwait, arguably a biased source. Thus there is no agreed set of facts nor an open and notorious record available for review from which a Prosecutor might conclude either that “there is no reasonable basis to believe that a crime within the jurisdiction of the Court has been committed,” or that further proceedings would be contrary to “interests of justice.”

In this way the air-strikes against Sudan and the *Phase III* operations are indistinguishable; in each instance the air-strikes are *prima facie* instances of aggression,²⁷² and the claim of self-defense cannot be assessed against an objective factual background. The information that the Khartoum plant was connected to bin Laden or in any way involved in chemical weapons production is disputed;²⁷³ at the very least it appears that a preliminary investigation would be required to enable the Prosecutor to determine whether the justification of self-defense is appropriately asserted and that consequently no crime under the Court’s jurisdiction has been committed.

that this proffer ended its aggression and thereby forecloses reliance on the justification of self-defense.

270. See Option 2 of Appendix A, ¶ 2(a), (b) & (d).

271. For example, the U.S. claim that anti-aircraft installations targeted U.S. warplanes is unverifiable by independent sources.

272. See Option 2 of Appendix A, ¶ 2(b).

273. While the circumstances of the embassy bombings have been investigated by a number of governments, and the basic facts known to all, the purported link between Sudan and the embassy bombings or any other current terrorist activity is based on information collected by and known only to the United States, which it refuses to disclose except in the most general terms. Nor does the U.S. assertion that a soil sample tested positively for chemical weapons components resolve the dispute; the U.S. refuses fully to disclose the circumstances of the sample’s collection, and has further refused to release the sample for independent testing. Sudan’s past links to terrorist organizations, including that of Osama bin Laden, do not advance the inquiry. Indeed, Sudan, at the United States’ request, had expelled bin Laden, and thus appears to have moved away from its previous support of terrorism.

In both cases, as troubling as the deficiencies in the factual record may be, the legal complexities of the case are perhaps even more problematic. None of these claims of self-defense present "classic" claims of self-defense, which "is subject to the State concerned having been the victim of an armed attack,"²⁷⁴ and typically requires that the attack triggering the claim of self-defense occurred on the territory, forces or against the nationals of the state.²⁷⁵ With regard to Iraq, the "attacks" were the targeting of U.S. aircraft patrolling the contested "no-fly" zone and a foiled assassination attempt.²⁷⁶ In the case of Sudan there was an attack—but it was not perpetrated by Sudan. While the claims of self-defense are consistent with past American practice,²⁷⁷ the international community has yet to speak to the validity of claiming self-defense in circumstances such as these.²⁷⁸ Thus, important questions are presented by these circumstances even assuming *arguendo* the validity of the American version of the facts.

Is the targeting of weapons, without firing them, an armed attack triggering the right of self defense?²⁷⁹ Is armed force an appropriate response to covert activity in the form of an assassination attempt?²⁸⁰ If so, does the justification extend to attempts on the lives of former heads of

274. See *Nicaragua Case*, 1986 I.C.J. at 14, ¶¶ 193–195 (also acknowledging principles of collective self-defense).

275. For these purposes, the embassies, aircraft and vessels of a state are usually considered part of its "territory" triggering the right to self-defense.

276. With regard to the incidents in the "no-fly zones," a preliminary question is the validity of the U.S. patrols, which in themselves present a *prima facie* case of aggression. If the United States presence in Iraq is itself unlawful, then Iraq's targeting of the aircraft would be permissible self-defense, and the U.S. action in shooting down aircraft and targeting anti-aircraft facilities illegal.

277. See *supra* note 19 (describing U.S. operations actions in Grenada and other places and law review articles critiquing claims of self-defense).

278. The scenario is further complicated by American reliance on suspected Iraqi connections to the plant in Sudan—could that link serve as justification for an attack on another country?

279. International law recognizes the right of preemptive action, but the reasonableness of the use of armed force will depend upon the circumstances. See *Nicaragua Case*, 1986 I.C.J. at 14; see also Bassiouni, *supra* note 244. In this case an important circumstance to be considered would be the legality of the no-fly zones themselves. See *infra* notes Part II.B.

280. The answer suggested by the *Nicaragua Case* is that assassinations, like other covert activity, may give rise to a legitimate claim of self-defense. See *Nicaragua Case*, 1986 I.C.J. ¶ 195 (quoting General Assembly Resolution 3314) ("the sending . . . of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" may constitute an armed attack giving rise to self-defense); see also Option 2 in Appendix A, ¶ 2(g) (incorporating that definition into proposed definition of aggression); Teplitz, Note, *supra* note 209, at 617 ("The U.S. missile attack on Baghdad was legal under international law. The response satisfied the requirements for the legitimate use of force in self-defense under customary international law, since the U.S. action was necessary, in response to an imminent threat, proportionate, and taken after the exhaustion of peaceful means.").

state? If the assassination *fails* (that is to say there is no known *current* threat), is the state whose national was targeted required to explore means short of armed force in the absence of imminent danger? If it does resort to the use of armed force, does it constitute self-defense or retaliation? An equally troubling question is presented by the use of armed force to combat terrorism. Here, the terrorist bombings occurred in Kenya and Tanzania, and were perpetrated by aliens of diverse nationalities. The attack constituting "self-defense" was aimed at a country which was not involved in the attack, occurred ten days after the original bombings, and was not in response to a known, imminent danger. The obvious question is therefore the appropriate selection of a target for purposes of "defending" against terrorism.²⁸¹ All of these questions have been the subject of considerable debate within the international community and academia,²⁸² the applicable law is so unsettled that a Prosecutor should find cause to proceed with an investigation, and likely thereafter to recommend an indictment.²⁸³

Accordingly, a contested factual record and troubling questions of international law would likely mean that the United States would be compelled to defend its nationals against crimes of aggression related to its *Phase III* operations in Iraq and the bombing of Sudan.

However, the implications of this analysis undercut the American objections that, because of its extensive participation in peacekeeping missions, it will be subject to purely political charges of aggression. It is precisely in instances where the United States uses armed force as part of a sanctioned international peacekeeping mission predicated on collective self-defense that it is *not* likely to be subjected to charges of aggression because the international recognition of the need for the mission is likely to be predicated on an open and notorious instance of recognized aggression on the part of the targeted (now complaining)

281. Notably, although Osama bin Laden, the suspected mastermind of the attack, is a Saudi national, there was no question of attacking Saudi Arabia, even though the threat of destruction of his extensive family holdings might be the only effective threat to quiet bin Laden.

282. See, e.g., Robert Beck & Anthony Arend, "*Don't Tread on Us*": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153 (1994) (describing modern responses to international terrorism and evaluating their legality); Loch John, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284 (1992) (considering appropriate response to international terrorism); cf. Lori Damrosch, *The United States Constitution in its Third Century: Foreign Affairs; Distribution of Constitutional Authority; Cover Operations*, 83 AM. J. INT'L L. 795 (1989) (discussing implications for American law concerning presidential war powers).

283. The importance of these questions of international law would normally be expected to preclude a preliminary determination by a Prosecutor not to proceed to indictment; however it might be that an investigation creates a compelling factual record which would suggest that the "interests of justice" requires the matter be closed.

state. Assuming responsible action by the Council in deciding to authorize the use of armed force, the authority of the Council will not be undermined by the Criminal Court, and states will not be discouraged from participating in future peacekeeping missions. However, where the United States unilaterally resorts to armed force on a questionable or contested factual record, or in non-traditional responses to acts of aggression against it, its actions may subject it to scrutiny by the International Criminal Court.

That is not an undesirable result; if a state wants to use armed force in a situation where it considers itself under attack, it will have a greater incentive to seek the assistance of the United Nations.²⁸⁴ Even if the United Nations does not concur with the state's assessment, a public airing of the circumstances will provide a greater factual background against which to judge the appropriateness of the claim of self-defense. Indeed, a public airing might lead to reconciliation between the affected states. In those instances where urgency or secrecy will not permit the state to present the matter to the Security Council (or one of the regional inter-governmental bodies) before the attack, the Criminal Court will step in to provide a *post-hoc* evaluation of the circumstances. Notably, if the Security Council concurs with the state's assessment that the targeted state has acted aggressively and matters of international peace and security are at stake, the Council can take action to delay the Court's consideration of the matter. In conclusion, contrary to the assertion that the Criminal Court will undermine the important role the U.N. and other international governmental organizations play in maintaining international peace and security, it would appear that the Court processes will fulfill their intended goal of supporting and supplementing those functions.

B. *Providing Humanitarian Assistance*

The examples of Iraq, *Phase II*, and Bosnia represent instances when the use of armed force is justified by the desire to provide humanitarian assistance or prevent human rights violations. In the case of Iraq, it was the government's suppression of armed rebellion which instigated the humanitarian crisis; in the case of Bosnia it was civil war, and, later, the Serbian government's treatment of rebellious Albanian communities which gave rise to the humanitarian crisis. Notwithstanding the laudable goal to provide assistance, the use of armed force in instances not constituting self-defense are *prima facie* aggression under the objective standard used in this analysis because it "threaten[s] or

284. As is anticipated by article 51 of the Charter. See *supra* note 263.

violate[s] the sovereignty, territorial integrity or political independence” of the targeted state. Humanitarian action is not properly considered self-defense because the state targeted for armed force has not directed armed force at another state, constituting aggression, but has used force internally, if at all.

The Statute does not address the issue of humanitarian intervention; accordingly, any decision to recognize humanitarian purposes as a defense to charges of aggression will have to be based on customary law. Developing principles of international law recognize the appropriateness of armed force to vindicate international human rights, but the issue is not yet settled.²⁸⁵ Moreover, in those circumstances where humanitarian intervention is warranted, scholars caution that a distinction should be made between unilateral and collective intervention.²⁸⁶ Given the unsettled nature of the question, a Prosecutor should be reluctant to close a matter presenting these issues as not falling within the Court’s jurisdiction, not sufficiently grave to warrant consideration or otherwise against the interests of justice. The United States, acting out of a stated desire to help an oppressed population, might therefore find its nationals haled before the Criminal Court.

However, the U.S. action would not be without defense, if it is acting in cases involving the most serious humanitarian issue: genocide. The Genocide Convention requires state parties to “call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate” in response to genocide.²⁸⁷ In circumstances where the United States deployment of force is in response to a Security Council resolution that a state is engaging in genocide, it could argue that that authorization is a complete defense to charges of aggression. In the case of Iraq’s treatment of the Kurds and Shiites, and the ethnic rivalry at issue in the Balkan crisis, a claim of genocide could be easily supported by the facts.²⁸⁸ If ac-

285. See Téson, *supra* note 266; McCoubrey & White, *supra* note 158, at 317–27. The unsettled nature of the question was tacitly acknowledged by the Security Council. While Resolution 688 “demanded” Iraq “contribute” to the international peace and security of the region by ceasing its “repression” of its civilians and further “insisted” Iraq cooperate with the Secretary-General’s humanitarian relief efforts, it did not authorize the use of force to achieve these goals.

286. See Téson, *supra* note 266, at 336–38; see generally Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention under the Authority of the United Nations*, 67 *IND. L.J.* 887 (1992) (discussing post-cold war ascending of the U.N. and possible implications regarding humanitarian law).

287. Genocide Convention, *supra* note 9, art. VIII.

288. These cases thus present extraordinary circumstances. It is not to be imagined (or hoped) that instances of genocide will frequently arise or that the Council would lightly charge states with engaging in genocide.

cepted,²⁸⁹ this defense would privilege Security Council determinations about this, most grave, humanitarian issue. Even if the defense is rejected as a *legal* defense, the Prosecutor may, using the same flexible approach outlined previously in applying the standards of admissibility, refuse, in the “interests of justice,” to pursue claims of aggression when armed force is authorized by the Security Council in response to genocide. What will be important to her consideration will be the fullness of the factual record and the seriousness of the charges of genocide.

The implications of this are two-fold. First, as is noted by the previous analysis regarding claims of self-defense, states are encouraged to rely on Security Council determinations that a state is engaging in genocide and armed force is warranted, and would undertake unilateral humanitarian operations at its own risk; this would suggest yet another way that the Statute supports rather than undermines one important mission of the United Nations: to encourage states to first seek collective rather than unilateral responses to international crises. Second, states (and by implication, the Security Council) would be encouraged to restrict humanitarian intervention to the most serious circumstances. This potential effect is more troubling in that it privileges the interests of state sovereignty over the interests of swiftly acting to vindicate an important international rights norm. In this way the Statute reflects tensions running through modern international law: to what extent may possible violations of international human rights standards—including genocide—permit intervention in violation of the principles of sovereignty?

For crises not amounting to genocide, or instances where the state has acted unilaterally, the International Criminal Court will be the most appropriate place to question whether the doctrine of *jus ad bello* has developed to such an extent as to permit, on a broad variety of grounds, humanitarian intervention. To the extent that the U.S. is peculiarly at risk for charges of aggression in such circumstances, those charges cannot be dismissed as “purely political” or “malicious” in nature. A genuine question exists as to the state of the law. Moreover, to definitively establish the legal principle that unilateral or collective action to vindicate human rights is appropriate (or not), all that will be required is for a few cases presenting that issue to be decided in a

289. No provision of the Statute sets forth the exact relationship between the Statute and other humanitarian conventions. The definition of war crimes acknowledges the Geneva Conventions of 1949. See *ROME STATUTE* art. 8. Article 10 asserts, rather ambiguously, that nothing in the definitions section “shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” *Id.* art. 10.

thoughtful manner;²⁹⁰ possible American participation in the process of determining either what the law is or what the law should be cannot be considered an unreasonable burden.²⁹¹ Finally, it would be especially appropriate to require the United States—or any other state acting on its own initiative for humanitarian purposes—to defend those actions in some forum.²⁹²

Humanitarian and War Crimes Violations

As discussed previously, the applicable provisions of the war crimes definition are (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 or . . . which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated.”²⁹³ Similar prohibitions, absent the requirement of proportionality, are found in the definition of crimes against humanity.²⁹⁴ Thus the bombing of the Amariyah air-raid shelter and the bombing of the suspected biological weapons plant in Sudan together present common issues: the appropriateness of specific targeting decisions in time of war or armed attack,²⁹⁵ and, more generally, the appropriateness of a bombardment campaign which knowingly risks collateral civilian casualties.²⁹⁶ Because of the virtual identity of

290. The issue of Security Council authority in such circumstances has been presented to the International Court of Justice in the *Bosnia-Herzegovina* case, and to the Yugoslavia Tribunal in the *Tadic* case. However, in the first matter the issue was avoided by the Court, and in the second the authority of the Council to extend Chapter VII to internal matters presenting humanitarian concerns was accepted by the Tribunal without meaningful analysis. See generally Alvarez, *supra* note 141 (discussing the *Tadic* opinion).

291. Indeed, no matter in what forum the issue is raised, and whether or not the United States is party to the case where the issue is being considered, one expects the United States would want to participate in the development of these emerging norms. Notably the U.S. has vigorously participated in cases to which the U.S. was not a party, when international security interests were implicated. See, e.g., *Tadic Case*, *supra* note 141; *Nuclear Weapons*, 1996 I.C.J. at 36.

292. A powerful disincentive will screen out the most frivolous and politically motivated charges of aggression. Presumably a charge would be deemed as such by the United States if its intervention was in response to a severe violation of human rights standards. Yet if a state has treated its citizens so badly, it will be less likely to bring the matter to the International Criminal Court, where its own actions would be exposed and it might incur liability for charges of genocide and crimes against humanity.

293. See *supra* notes 186–89 and accompanying text.

294. See ROME STATUTE art. 7.

295. One could argue whether or not the U.S. bombing of Sudan was part of an international armed conflict (consistent with U.S. claims of self-defense) constituting an act of war in its own right, or whether a reprisal or some other form of armed attack does not amount to an international armed conflict.

296. In addition, the bombing of the Amariyah shelter standing alone, and the bombing of Sudan present the issue of what steps must be taken to reduce the risk of civilian casual-

the issues presented, the analysis which follows largely pertains to both instances.

A. *The Law of Mistake*

The first question to be addressed is whether the U.S. would be liable for intentionally targeting civilian objects—in the case of the Amariyah incident, a civilian air-raid shelter, and in the case of Sudan, a civilian pharmaceutical plant. In each instance the U.S. relies on the defense of mistake, that it in fact did not know the targets were civilian, and it was reasonable in both instances to characterize the facilities as either purely or predominantly military in nature.²⁹⁷ Under this reasoning the U.S. would bear no criminal liability, either under humanitarian or *ius in bello* provisions, for “intentionally directing an attack against the civilian population.”²⁹⁸ The availability of the defense of mistake is predicated on a factual inquiry into the genuineness of the mistake; the law of war also imposes liability for reckless errors.²⁹⁹ Here both the genuineness and reasonableness of the error is asserted. Iraq maintains that the shelter never had a military use, an assertion supported in part by eye-witness accounts that dispute American claims that the structure had been fortified for military use. Even if the U.S. believed the shelter had some military purpose, the argument has also been made that its knowledge of the past civilian use required the U.S. to vigorously investigate before attacking.³⁰⁰ Sudan similarly challenges the U.S. claims by asserting that the pharmaceutical plant did not in fact participate in the manufacture of chemical weapons. Sudan further asserts that the evidence relied upon by the U.S. was so suspect and incomplete as to render the classification of the plant as military reckless. Thus the first step in any analysis must be an assessment of the factual predicates for the U.S. action.

ties when a planned attack places civilians at a great risk of harm. See *NEEDLESS DEATHS*, *supra* note 186 (outlining possible action the U.S. was required to take given its knowledge that the shelter had been used by civilians); *cf.* DOD Iraq Report, *supra* note 54, at 626 (noting duties but claiming the law is “deficient” in this regard).

297. Strictly speaking, the U.S. actually continues to maintain that both targets were military, refusing to “second-guess” their original assessment. See *supra* notes 191–94 and 240–46 and accompanying text.

298. Rome Statute art. 8(2)(b)(i).

299. For a thoughtful and thorough examination of the doctrine of mistake in the law of war, see David Finnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense and State Responsibility*, 16 *YALE J. INT’L L.* 245, 309–77 (1991) (surveying examples of mistaken self-defense asserted in a variety of contexts, including those resulting in attacks on civilians). This analysis, although helpful, must be qualified by the fact that the doctrine of mistake described therein carried no penal sanction.

300. See *NEEDLESS DEATHS*, *supra* note 186, at 137–38.

If we were again to focus exclusively on gatekeeper responsibilities of the Prosecutor, it is difficult to see how she would be able to conclude, from the factual record available, that no crime within the Court's jurisdiction has been committed. The pertinent information is wholly in the control of the United States, which has announced its intent in the case of Iraq "to close the books" on the matter, and in the case of the Sudan bombing to protect its confidential sources. Even assuming American cooperation, an investigation to establish as much corroboration from independent sources might be both appropriate and necessary. Under those circumstances it is difficult to see how the Prosecutor could avoid initiating an investigation.

B. Targeting Strategies and Collateral Civilian Casualties

Bombardment campaigns are conducted pursuant to generally accepted military objectives. The interruption of the communications capability of the enemy and the severance of the lines of supply and reinforcement are well-recognized military objectives.³⁰¹ However, targets which advance those goals are not open to attack without limitation; when civilian casualties are likely, the risk to them must be weighed against the net anticipated gain.³⁰² Accordingly, although the fact that valid military targets are located in population centers will not shield those targets from attack, ordinarily less important targets should not be attacked unless an unusually significant advantage will result.³⁰³ The problems associated with making these necessary distinctions are exacerbated by the realities of modern society and modern warfare: "in any modern society, many objects intended for civilian use may also be used for military purposes. A bridge or highway vital to daily commuter and business traffic can be equally crucial to military traffic or support for a nation's war effort."³⁰⁴ In addition, the availability of more sophisticated

301. See *supra* notes 11–17 and accompanying text (describing general principles of *in bello*); DOD Iraq Report, *supra* note 54, at 615–25; see also McCoubrey, *supra* note 11. For a description of the American military codes or rules of conduct which incorporate these rules, see Normand & Jochnick, *supra* note 198.

302. See generally *supra* note 17 (regarding law of war); FRITS KALSHOVEN, RE-
STRAINTS OF THE WAGING OF WAR (1987) (describing the limitations contained in modern
conventions); GEOFFREY BEST, HUMANITY IN WARFARE (1980) (describing the development
of humanitarian law).

303. See BEST, *supra* note 302, at 262–85 (describing the development of rules relating
to aerial warfare); DOD Iraq Report, *supra* note 54, at 624–25 (acknowledging rule as cus-
tomary law); McCoubrey & White, *supra* note 158.

304. DOD Iraq Report, *supra* note 54, at 623. Advances in technology also account for
the seemingly far-reaching search for military targets. Because Iraq's electrical power sys-
tem operates on a grid, a power plant in the northern reaches of the country could
conceivably contribute to the power supply used in Iraq's southern most regions; that was

weaponry has had the deleterious effect of perhaps *reducing* the self-restraint of nations at war.³⁰⁵ For example, during the Gulf War the United States military asserted that civilian casualties would be minimized by the use of “smart,” laser-guided weapons.³⁰⁶ In fact, statistics released after the war demonstrated a high incidence of error, with each error representing possible civilian casualties. These and other tensions and gaps in application have led the international community to take steps to further develop the law of war.³⁰⁷ As a consequence, the law addressing these issues is in a state of flux.

Under the war crimes provision, two related charges could arise from these facts, first that the individual attacks were not justified by military necessity. In other words, the U.S. wrongly targeted both the shelter and the plant, given the information available and the knowledge that civilian casualties would result for too little of a military gain. The law in this area, as with charges of aggression arising from humanitarian intervention, is not so developed as to present a clear indication of whether the crime falls under the Statute.³⁰⁸ As noted previously, the Statutory definition of war crimes requires that the accused state has engaged in “a plan or policy” to violate the law. On its face, this would seem to permit the United States to argue that these unfortunate isolated incidents do not constitute war crimes falling under the Court’s jurisdiction. However, the Yugoslavia Tribunal has opened the door for isolated incidents that are undertaken as part of a planned military objective to give rise to war crimes liability.

Assuming liability may attach for such an isolated incident, responsibility would then turn on the doctrines of necessity and proportionality: the military objective, the extent of the accused state’s knowledge that the target had a civilian character (past civilian use in the case of the shelter, mixed civilian use in the case of the plant) and its intent to attack

sufficient in the eyes of the Coalition forces to render the power plant in the northern city of Mosul a legitimate military target in the quest to liberate Kuwait.

305. According to Best, the increasing reliance on accuracy as a means of justifying resort to aerial bombardment of cities began with the first military use of aircraft. See BEST, *supra* note 302, at 266–85; see also MCCOUBREY & WHITE, *supra* note 158, at 230–35 (noting modern warfare raises the “difficult” questions about the use of sophisticated weapons).

306. This claim was somewhat misleading; in fact, “smart” weapons represented a fraction of the overall ordinance used. See Normand & Jochnick, *supra* note 198, at 292 n.18.

307. See *supra* note 15 (citing relevant treaties).

308. See DOD Iraq Report, *supra* note 54, at 624–27 (discussing different interpretations arising from the application of Protocol I to the Geneva Conventions); see also MCCOUBREY & WHITE, *supra* note 158, at 230–35.

the target notwithstanding that character.³⁰⁹ The stated military objective in bombing the shelter was to disrupt communications and destroy a link in the command structure. The United States acknowledged its awareness of the prior civilian character of the shelter, but claimed it was ignorant of the current civilian use. An investigation might be required to determine the truth or reasonableness of these assertions, and thus whether a *prima facie* violation of the Statute has occurred.

Assuming the attack constitutes an international armed conflict, the Sudan bombing presents a weaker case for military necessity and proportionality, and therefore a stronger chance of prosecution. The stated military objective in attacking the Khartoum plant was to prevent Sudan from creating weapons that might be used against the U.S. The U.S. has acknowledged its understanding of the risks associated with bombing the plant, located in a civilian neighborhood. An investigation into the reasonableness of proceeding with the attack would be warranted; unlike the Amariyah bombing, which was carried out during a sustained war and conformed to recognized military objectives, the case is not easily made that the Khartoum bombing was necessary. The stated risks to the U.S., that bombs *would* be made there which *likely* would be used against U.S. interests in the region, are attenuated, undermining the claim of necessity. No resort was made to the United Nations, which could have requested an investigation. This request would have obviated the need for force at all and would have completely eliminated the risk to civilians. It would, therefore, be appropriate for a Prosecutor to proceed with an investigation and recommend charges be heard.³¹⁰

C. The Iraq Bombardment Campaign

Alternatively, Iraq might challenge, on a collective basis, the decision to bombard any communications or command facilities, even assuming their military character, given their location in predominantly civilian centers. Were the potential military gains worth the risk of civilian casualties? While the United States can argue that the specific result—civilian casualties—was inadvertent, it cannot deny that in Iraq it elected to bomb targets in heavily populated areas, far from the Ku-

309. It is worth stressing here that the mere fact that civilian casualties resulted will not in and of itself establish liability. Instead, liability must depend on the information actually or reasonably available at the time the decision was made. *See* Finnan, *supra* note 299, at 366–74.

310. Even if considered under the provisions defining crimes against humanity, several troubling questions are raised by the targeting of a suspected chemical weapons plant located in a residential area. An argument could be advanced that the potentially devastating scope of the attack, if indeed toxins were released into the environment, render it effectively an attack on the civilian population.

waiti theater of operations. The Yugoslavia Tribunal's ruling raises the possibility that war crimes liability can arise from general defects in the targeting system;³¹¹ that being so, the Prosecutor might find the case legally sufficient and permit this hypothetical case to proceed, in recognition of the developing state of the law, and to resolve questions of what standards U.N. peacekeeping forces will be judged against.

The conclusion to be drawn is that it is indeed possible that the United States would be required to defend itself against war crimes charges under the Statute. But it is interesting to note what these examples remind us of: that the risk of war crimes liability is primarily dependent upon the U.S. conduct.³¹² Therefore, as was the case with the analysis with respect to aggression, it should provide no disincentive to U.S. participation in peacekeeping operations. This is as it should be. The rules of war are supposed to be applied universally, regardless of the circumstances of the conflict or the identity or characteristics of the population at risk.

PART III: "SO WHERE IS THE EXPOSURE OF THE UNITED STATES?"³¹³

Generalizing from the analysis presented above, the following can be said about the risks to the United States of being unfairly subjected to charges before the Criminal Court. The jurisdiction of the Court is unlikely to interfere with peacekeeping initiatives sponsored by the

311. The questions involved have been summarized as follows with respect to the bombardment of Iraq:

The central question was whether the incidental injury inflicted was "excessive" in relation to the legitimate objective sought. Commentators who objected to any military response to the Iraqi aggression in principle naturally considered the campaign "excessive." Such an absolute view, however, merely transfers the entire burden of suffering to the people of Kuwait through an extended, and possibly permanent, atrocious occupation. In the immediate context a case may be made out that the objectives of the bombardment were lawful and that, notwithstanding some serious apparent errors, it was not conducted indiscriminately. The termination of the bombardment appears to have been decided in accordance with applicable *jus in bello* principles, but it may equally be said that, had the bombardment continued beyond the point of its actual termination, the criticism of "excess" would soon have become unanswerable.

McCoubrey & White, *supra* note 158, at 234 (emphasis added). Were the "errors" excusable? Was the bombardment indeed "excessive"? These are the questions which would be answered by an inquiry, setting clear standards for the inevitable next air campaign.

312. To the extent that the Security Council's role in the crisis is relevant (as in the bombing of the Khartoum plant) the risks of liability arguably decrease as the Council becomes more active.

313. M. Cherif Bassiouni, *quoted in* James Podgers, *War Crimes Court under Fire*, 84 A.B.A. J. 64 (1998).

Security Council under Chapter VII in response to illegal aggression. To the contrary, it is in those circumstances that the precipitating event will be open and notorious, and further that Council action will represent a broad consensus that force is appropriate to maintain or restore international peace (even given the inherently politicized nature of the Council).³¹⁴ Against this rich factual, political, and legal backdrop, with the possible exception of some claims of humanitarian necessity, it is consequently most likely that the Prosecutor will deem the case to be inadmissible and that further proceedings are unwarranted. Charges of illegal aggression which the Prosecutor will be most likely to investigate are those where the United States is acting unilaterally, eschewing resort to the mechanisms of the United Nations for reasons of expediency, or fear of insufficient international support.

On the other hand, with regard to war crimes allegations, the United States' status as either peacekeeper or unilateral actor is largely irrelevant, as is anticipated by the humanitarian law of war, which seeks to protect all involved civilians, regardless of affiliation or fault. Any liability will arise solely from the means by which the war is conducted. However, given the continuing development of the law regarding crimes of this nature, it will be somewhat difficult for the United States to predict in advance what actions are legitimate, and what actions might expose it to charges before the Court.

Thus, both with respect to certain charges of aggression and war crimes violations it is likely the U.S. will have to defend its actions in the Criminal Court. The last question to be addressed is whether this risk is so unreasonable, given the United States' security responsibilities as the only current superpower, as to warrant substantial modification of the Statute or U.S. non-participation.

A. *The Uncertainty Factor*

The United States fairly objects to the failure of the Statute to define aggression and might reasonably object to the possibility that developing standards of the law of war crimes will subject the U.S. to unanticipated liability. The means of addressing the first criticism is within the power of the United States: it can ratify the treaty and thereby participate in the development of the definition of aggression.³¹⁵ A

314. To note agreement that force is "an appropriate" response is not meant to suggest that it represents agreement that it is the *best* response.

315. A colleague wonders if incorporating into the definition of aggression the limitation that only state parties may bring claims to the attention of the Court (foreclosing *proprio motu* jurisdiction by the Prosecutor) will alleviate some of the American concerns. The answer: probably not. As the analysis demonstrates, the risk of U.S. liability for the crime of

similarly effective means is also available with regard to any uncertainty arising from possible unexpected war crimes liability: the U.S. could ratify the Statute and opt out of war crimes jurisdiction for seven years; if a sufficient number of other countries accept war crimes jurisdiction and enough cases with war crimes charges are prosecuted, the United States would have the opportunity to see how the law responds to the challenges of modern warfare. Finally, through ratification the United States would have the ability to participate in the nomination and selection of judges and further influence the jurisprudential development of the Criminal Court. The U.S. could follow this course with little risk to itself, by withdrawing from the Statute if it concludes the Court is diverging from accepted principles of international law.³¹⁶

However, the U.S. refusal to consider any of these alternatives to non-participation might be indicative of a fundamental disagreement the U.S. has with the Criminal Court: its potential to contribute to the development of international common law principles. As many of the American objections reveal,³¹⁷ the U.S. prefers the development of international law be accomplished through the positive actions by states—that is, for treaties to clearly set forth obligations. The Rome Statute is fundamentally incompatible with that view of international law, and minor tinkering will not resolve that irreconcilable difference.

aggression lies in the nature of the incident to which it is responding, whether the international community concurs in its assessment of whether the resort to armed force was appropriate, and whether the injured state considers its sovereignty or territorial or political integrity had been affected. More importantly, as the humanitarian intervention example of the Balkans shows, the receptiveness of the “targeted” state to the deployment of troops will play an important role in the prosecution of charges of aggression. In either case the cooperation of the putative injured state, as the real party in interest, will be crucial to the pursuit of charges; accordingly the requirement that only states may bring charges to the attention of the Prosecutor will make no meaningful difference.

In addition, there are rare but not unforeseeable circumstances in which one might want to permit the prosecution of crimes of aggression to proceed notwithstanding the non-cooperation of the injured state. For example, one could imagine Saddam Hussein being somewhat indifferent to air-strikes by Turkey which decimated the Kurdish opposition in northern Iraq. Should the Prosecutor be estopped from investigating an apparent, serious violation of the law simply because neither state involved values the victims? One might also wish the Prosecutor to investigate and pursue charges of aggression arising from an attack on the Palestinian controlled territories, which are unique in that they have no widely recognized state authority, and therefore would be dependent upon the Prosecutor's *proprio motu* jurisdiction.

316. I would not advocate this course, which would unfairly subvert the goals and principles of the Criminal Court; I mention it only as a preferable alternative to the U.S. announced policy of actively working *against* the Court.

317. Included would be the failure to define aggression before including it the Court's jurisdiction, and the vehement objection to the exercise of jurisdiction over non-parties.

B. *Questions of Equality*

The United States has asserted that it is fundamentally unfair that its role as primary enforcer of international peace and security will subject it to greater scrutiny by the Court. As the analysis suggests, with regard to the charges of illegal aggression, it is when the United States is acting unilaterally or without broad support of the international community that it will most likely be subject to charges of aggression; when it is acting as part of a collective response to open and notorious aggression it will be immunized from prosecution through the Statute's anticipated operation. Thus, if the United States has been called to action by the international community because of its stature and authority as a superpower, it should indeed be immunized from liability. The case has not been made, however, to explain why that immunity should carry over into circumstances when the U.S. is acting to respond to a questionable claim of aggression, or in pursuit of its own national interests. If there is no real or implied precondition of agency, U.S. officials and commanders should indeed be held responsible for breaches of the peace according to the same standards applicable to other states.

The argument is even more compelling with regard to possible war crimes liability, which speaks to how the war is conducted. If the United States is in fact disproportionately called upon to exert its military might in the interests of international peace and security, to immunize the U.S. from strict application of the law of *jus in bello* would undermine, indeed, eviscerate, the law. Moreover, such an exception to liability would be incompatible with the purposes of *jus in bello*, which is to protect civilians and soldiers regardless of the fault (or here, the putative nobility) of the states involved in the conflict.

Finally, in either case, by seriously pursuing these claims in its military and domestic courts, the U.S. could take advantage of the complementary jurisdiction provisions and avoid international liability. This would require the U.S. to recognize the authority and legitimacy of the international community's interest in these matters. To give meaning to those interests, the U.S. would have to incorporate respect for these international norms into its domestic military command structure, and permit the judicial branches to apply those norms without the unquestioning deference to the political and military branches previously displayed. While these changes are significant and advance the interests of the U.N. system, they are not inappropriate.

C. Unresolved Questions

Ultimately, the most compelling concern is one that has not been articulated with any particularity by the U.S.: that U.S. participation in humanitarian missions which are imposed on the targeted state poses a significant risk to the U.S. of unfair liability, and that it may further be subject to liability for civilian casualties in circumstances not clearly covered by *jus in bello*. The question is, what is the most appropriate response to uncertainty under the law—liability or no liability?³¹⁸ There is no way to alleviate this risk through amending the Statute. It would be difficult if not impossible to legislate circumstances of the sort presented by the examples considered in this Article thereby foreclosing amendment of the definitions of crimes. Moreover, any attempt to do so through changes in procedure would eviscerate the principles of Court independence already incorporated into the Court's proposed mechanisms and jurisdiction.

An attempt to explicitly include the exception in the definition of aggression would simply shift the inquiry from "Is there a humanitarian exception to charges of aggression" to "Is this a valid humanitarian crisis?" An inquiry would still be necessary to answer the question. Furthermore, the explicit acknowledgment of humanitarian intervention as an exception to criminal liability would encourage states to cast otherwise illegal or questionable action as humanitarian in intent, much as nations now attempt to cast the use of armed force as valid self defense. In the case of crimes against humanity and war crimes liability, it is worth noting that questions as to the scope of these norms will need to be resolved within or without the ICC system. The definition of war crimes (and other crimes), as well as the resulting confusion from its application, is borrowed from preexisting obligations, with which U.S. armed forces must comport, whether or not it is party to the Statute. In an attempt to provide a procedural solution to these types of problems, the parties might adopt a provision that permanently (rather than temporarily, as the Statute now permits) excludes jurisdiction over charges upon the request of the Council pursuant to a Chapter VII finding of a breach of international peace and security. This exclusion would limit that power both to claims involving charges of aggression, and to those circumstances where "humanitarian considerations require a collective

318. It is worth noting that the American domestic law experience cuts both ways—while there is no liability for *ex post facto* laws, the U.S. Constitution does not prohibit courts (and prosecutors) from interpreting available laws expansively.

response.” This might alleviate the problems of uncertainty, but would be contrary to the principle that the Court is an independent organ.³¹⁹

Non-participation would limit U.S. influence on the development of these norms to cases where it is defending itself; it will not participate in the definition of the crime of aggression, nor the process for selecting the judges who will ultimately make this crucial determination (except to the extent that it can prevail upon its allies). The benefits of contributing to those processes make it imperative that the U.S. join the Statute. While the possibility of criminal liability is an important new risk, U.S. forces are responsible for violations of the norms of *jus ad bello* and *jus in bello*, and the U.S. should be seeking ways to bring its military operations into conformity with emerging standards.

CONCLUSIONS

If we accept that participation in the Statute may pose a valid risk to the United States peculiar to the U.S. because of its duties as the sole superpower, does that risk alone justify the United States' refusal to ratify the Statute? The answer to this question must be no. There is little risk of liability for “malicious” charges: unfounded claims should not survive the preliminary stages. There is a risk of “political” claims, but political claims are not malicious when they are supported by the facts. Because the facts giving rise to valid claims under the Statute necessarily involve human suffering, it is in the interest of all of humanity that such claims be dealt with thoughtfully, regardless of the identity of the complaining state.

The American objections further reveal an important strength of the Statute: it provides incentives for all states, whether or not they are party to the Statute, to respect the intended role of the Security Council in maintaining international peace and security.³²⁰ If the Council rises to the task of responding effectively and fairly to the needs of those who turn to it, there is no need to protect states participating in U.N.-sponsored peacekeeping missions from liability for war crimes; it is the obligation of all states involved in those operations to respect the rules of *jus in bello*. For these reasons it is not only appropriate but imperative that the United States be subject to the Court's jurisdiction, either

319. It might also encourage the Council to find humanitarian concerns where otherwise none might truly exist, simply to immunize a state against liability.

320. Realistically, not every state appealing to the Security Council receives a fair hearing of its complaints or just and appropriate remedy for its injuries—the Council is too politicized for that. However, of the states which might complain about Council non-responsiveness, the United States is not currently one.

voluntarily or by operation of the extended jurisdictional provisions. Who else should be subject to the jurisdiction of the Criminal Court for war crimes and crimes of aggression but the "world's policeman," the state which "constantly [has] troops serving abroad on humanitarian missions, rescue operations or missions to destroy weapons of mass destruction."³²¹

The United States appeared willing to sweep aside all of its objections in favor of inclusion of a provision requiring Security Council approval as a prerequisite to Court jurisdiction. This suggests a sinister motivation for the objections: the refusal to submit to any higher authority. Even if credible information suggests a crime has been committed, only the United States will be permitted to judge that conduct. One can easily imagine the only scenario in which the U.S. will accede to a superior authority: the albeit unlikely circumstance when it loses the war. With this implicit rejection of universal application of the law, the United States does significant damage to the development of international law. Indeed, the U.S. repudiates the principle of Nuremberg by insisting that America (the state with the most political and military power) should be exempt from the law: *it really was victor's justice after all*.

The implications for the international community are troubling. The global international community is fragile, affected by past political differences, economic interdependencies, environmental challenges, and historical baggage. It is already strained by American pronouncements of international law (which the U.S. apparently feels, in many circumstances, no obligation to follow itself); by American use of its political and economic clout to ensure favorable outcomes in situations where its own interests are implicated; by stated lack of respect for the United Nations. To avoid further, perhaps irreparable fracture of the international community, it is time for the United States to embrace, and not repudiate, the ideals of Grotius.

321. David Scheffer, *quoted in Caspar Weinberger, Commentary, FORBES, Aug. 24, 1998, at 41.*

APPENDIX A

[Crime of aggression]

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 10.

Option 1

[For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

- (a) planning,
- (b) preparing,
- (c) ordering,
- (d) initiating, or
- (e) carrying out

[an armed attack] [the use of armed force] [a war of aggression,] [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] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

Option 2

1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]
2. [Acts constituting [aggression] [armed attack] include the following:] [Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

- (a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];
- (c) the blockade of the ports or coasts of a State by the armed forces of another State;
- (d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;
- (f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]]

Option 3

- [1. For the purpose of the present Statute [and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State], the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State:
 - (a) initiating, or
 - (b) carrying out an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest]

contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]

2. Where an attack under paragraph 1 has been committed, the
 - (a) planning,
 - (b) preparing, or
 - (c) ordering thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.]