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## Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare

W. C. Austin

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## Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare

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### ABSTRACT

*The United States is engaged in a war on terror against enemies who wage "asymmetric war" through terrorism, media manipulation, and "law-fare"—exploiting judicial processes to achieve political or military objectives.*

*This Article explores whether the fledgling International Criminal Court (ICC) could eventually be exploited by these groups as a tool of asymmetric "law-fare." It briefly traces the history of the ICC and recounts why the United States opposes the Court. Examining the methods of asymmetric war, the Authors then explore whether the ICC could be exploited by future asymmetric warriors.*

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*The Authors describe three asymmetric methods that could be used to exploit the Court: (1) misusing the Court's investigative processes, (2) filing questionable or fraudulent complaints, and (3) manipulating mass media. They then discuss three terrorist objectives that could be obtained through asymmetric tactics.*

*The Authors conclude that, at its current stage, the Court does not pose a large threat from this exploitation. A future, more stable ICC, however, could pose a greater danger—especially if the United States ratifies the Rome Treaty.*

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## I. INTRODUCTION

The United States is fighting a global war on terror with battlefields in such distant lands as Afghanistan, Iraq, and the Philippines.<sup>1</sup> U.S. enemies in this war are not nation-states, but a network of terrorist groups; they seek to put “Satan’s empire”<sup>2</sup> in decline by dividing the United States from the international community, destroying U.S. hegemony, and reducing the influence of U.S. social values. It is not on the conventional field of battle, however, that these enemies expect victory. Instead, through a campaign of intimidation and terror they hope to drive the United States into economic, political, and social recession.<sup>3</sup> They wage an asymmetric war.

Asymmetric warfare—engaging a superior enemy by using alternative means to achieve political or military objectives—is not a new concept; some cite the Biblical story of David and Goliath as the classic example of such asymmetry.<sup>4</sup> Considering the military might of the modern U.S. Goliath, it is no surprise its enemies have turned to other methods—hijackings, suicide bombings, and computer network attacks—to catapult the stone that will bring down the world’s only remaining superpower. But those who oppose the United

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1. See President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Feb. 7, 2005), in PUB. PAPERS, available at <http://www.whitehouse.gov/news/releases/2005/02/print/20050202-11.html>. (last visited Feb. 5, 2006) (explaining where U.S. troops are fighting the War on Terror).

2. See Sheikh Usamah Bin-Muhammad Bin-Ladin, *Fatwah Urging Jihad Against Americans*, in AL-QUAS AS-‘ARABI (London), Feb. 23, 1998, (providing the English translation of Osama Bin Laden’s *fatwah*: “We also call on Muslim ulema, leaders, youths, and soldiers to launch raids on Satan’s U.S. troops and the devil’s supporters allying with them . . . .”), available at <http://www.ict.org.il/articles/fatwah.htm> (last visited 2/5/06).

3. Osama bin Laden, Pre-recorded Speech Sent to and Televised by Al-Jazeera (Oct. 30, 2004), (threatening to bleed America “to the point of bankruptcy”), transcript available at Full transcript of bin Laden’s speech, Aljazeera.net, Nov. 1, 2004, <http://english.aljazeera.net/NR/exeres/79C6AF22-98FB-4A1C-B21F-2BC36E87F61F.htm>.

4. See BRAD ROBERTS, INSTITUTE FOR DEFENSE ANALYSIS, ASYMMETRIC CONFLICT 2010, IDA DOC. D-2538, at 1 (2000) (using David and Goliath analogy).

States also seek non-violent means to advance their agenda. When possible, they will exploit both domestic and international judicial institutions to influence U.S. policy; this practice is known as “law-fare.”<sup>5</sup>

This Article explores whether the fledgling International Criminal Court (ICC) could eventually be used as a weapon of asymmetric “law-fare” against the United States. Part II briefly traces the history of the ICC and recounts the reasons the United States opposes the court. Part III examines the purpose and methods of asymmetric war, including past uses of “law-fare.” Part IV discusses whether the ICC could be exploited in the future to cow the U.S. Goliath into a defensive posture and disrupt its war on terror. Is the ICC—or will it become—the “Big Bad Wolf?”<sup>6</sup> The Article concludes that this threat is unlikely in the court’s early development; however, the ICC’s evolving mechanisms may make it vulnerable to asymmetric exploitation in the future.

## II. THE INTERNATIONAL CRIMINAL COURT: HISTORY AND CONTROVERSY

### A. *All Roads Lead to Rome*

Throughout the twentieth century the international community flirted time and again with the concept of a standing criminal court. At the conclusion of World War I, the victorious nations begrudgingly allowed Germany to prosecute its own nationals for war crimes.<sup>7</sup> The

5. See *infra* notes 92–114 and accompanying text.

6. See, e.g., JOSEPH JACOBS, ENGLISH FAIRY TALES AND MORE ENGLISH FAIRY TALES (Donald Haase ed., ABC-CLIO 2002) (1890). The “Big Bad Wolf” refers to an adaptation of Joseph Jacob’s English fairy tale about “three little pigs” who are terrorized by a wolf who threatens to blow their houses down. *Id.* This Article explores whether the exploitation of the ICC would be a true threat to the United States or merely “huffing and puffing.” See *id.*

7. Nearly nine million people from thirty-two nations died during World War I. See HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 17 (1999) (describing international experience in World War I that led to desire for a standing criminal court). After the War, the Allied victors pushed for prosecution of the Germans and Central Powers for their violations of the Hague Conventions of 1899 and 1907. *Id.* at 19. Due to practical considerations, the victorious nations allowed the Germans to prosecute their own accused. See Regina Horton, *The Long Road to Hypocrisy: The United States and the International Criminal Court*, 24 WHITTIER L. REV. 1041, 1044 (2003) (explaining that Germany refused to surrender any accused and how the United States rejected the idea of prosecuting Kaiser Wilhelm to avoid infringing on Germany’s sovereignty); see also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 3–4 (2001) (noting Germany never accepted military tribunals proposed by the Allies); Gerard E. O’Connor, Note, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment Of An International Criminal Court*, 27 HOFSTRA L. REV. 927, 936 (1999) (explaining the need to stabilize the Weimar Republic).

victors soon regretted that decision, however, as Germany conducted little more than show trials and nearly all violators went unpunished.<sup>8</sup> Between the two World Wars, the League of Nations contemplated an international criminal court, but that idea proved too bold as politics and the outbreak of World War II squandered the opportunity.<sup>9</sup> After the Treaty of Paris, the World War II victors applied the lessons learned from past mistakes; they established the Nuremberg Tribunal and the International Tribunal for the Far East.<sup>10</sup> Although met with accusations of “victor’s justice,”<sup>11</sup> the tribunals created a new paradigm of international criminal jurisprudence<sup>12</sup>—the accused were charged with crimes against peace, war crimes, and crimes against humanity.<sup>13</sup> These two tribunals constituted the first real efforts of the modern era to establish a valid and powerful international court.<sup>14</sup> But with the fall of the “Iron Curtain,” the dream of a standing international court remained relatively undisturbed until the 1990s.<sup>15</sup>

The eruption of ethnic conflict and slaughter in Rwanda and Yugoslavia during the 1990s starkly reminded the world of its need for an international criminal court. In response, the U.N. Security Council created two ad hoc tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International

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8. Of nearly 900 potential defendants, only twelve were tried, several were acquitted, and those found guilty were sentenced to modest terms of imprisonment. See SCHABAS, *supra* note 7, at 4 (“The trials looked rather more like disciplinary proceedings of the German Army than any international reckoning.”).

9. See *id.* at 4–5 (noting failure of the League of Nations to get sufficient number of ratifying states); see also Horton, *supra* note 7, at 1044 (noting that after World War I the League established an advisory committee to create plans for a Permanent Court of International Justice); O’Connor, *supra* note 7, at 937 (discussing how World War II marked an end of such efforts).

10. At the Nuremberg Tribunal, nineteen of twenty-two defendants were found guilty. See BALL, *supra* note 7, at 44–85. At the International Military Tribunal for the Far East, of the twenty-five defendants who were tried, all were found guilty and seven were sentenced to death by hanging. See *id.* See generally ARIEH J. KOCHAVI, *PRELUDE TO NUREMBURG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT* (1998); REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS (1949).

11. BALL, *supra* note 7, at 49, 85 (noting also that “*Nullem crimen et nulla poena sine lege*” [No crime and no punishment without law] was the cry of defense counsel for Japanese and Nazi defendants); see also SCHABAS, *supra* note 7, at 6 (observing ex post facto criminalization threatened tribunals’ legitimacy); O’Connor, *supra* note 7, at 941 (describing perception that the victorious Allies sat in judgment over defeated Germans and Japanese).

12. These tribunals gave birth to the doctrines of command responsibility, individual criminal responsibility, and the rejection of the defenses of “state doctrine” and “superior orders.” See O’Connor, *supra* note 7, at 942–43.

13. See SCHABAS, *supra* note 7, at 6 (explaining the court’s jurisdiction is limited to three categories of crimes).

14. O’Connor, *supra* note 7, at 941.

15. See Horton, *supra* note 7, at 1046 (explaining how Cold War politics hindered efforts to establish a court).

Criminal Tribunal for Rwanda (ICTR).<sup>16</sup> Drawing upon precedents set forth in the Nuremberg and Far East Tribunals, the courts went to work—with great expense and many challenges.<sup>17</sup> And though the tribunals significantly contributed to international jurisprudence,<sup>18</sup> they also highlighted anew the need for a standing criminal court.<sup>19</sup>

Meanwhile, the United States continued to advocate for the creation of the proposed ICC;<sup>20</sup> its support continued well into the Rome Conference.<sup>21</sup> But when the Conference convened in Rome on

16. See U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993) (creating the ICTY) [hereinafter ICTY Statute]; U.N. SCOR, 49th Sess., 3453d mtg., at 3, U.N. Doc S/Res/955 (1993) (creating the ICTR) [hereinafter ICTR Statute].

17. For example, the 2004–2005 budget of the ICTY was \$298,226,300, see G.A. Res. 255, U.N. GAOR, 58th Sess., U.N. Doc A/RES/58/255 (2004), and the 2004–2005 budget for the ICTR was \$235,324,200, see G.A. Res. 253, U.N. GAOR, 58th Sess., U.N. Doc A/RES/58/253 (2004); see also Horton, *supra* note 7, at 1049 (noting that it took time to establish the tribunals, to find a place to hold court, and to select judges and a prosecutor).

18. See Horton, *supra* note 7, at 1050 (citing Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in THE UNITED STATES AND INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 56 (Sarah B. Sewell & Carl Kaysen eds., 2000)).

19. See Horton, *supra* note 7, at 1046. Some might argue that the pending case of Iraqi dictator, Saddam Hussein, again highlights the need for such a court. *Saddam Didn't Confess to Mass Killings: Lawyer*, REUTERS, Sept. 8, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-09/08/content\\_476200.htm](http://www.chinadaily.com.cn/english/doc/2005-09/08/content_476200.htm) (last visited Feb. 5, 2006). Saddam's defense team has questioned the ability to have a fair trial within Iraq. *Id.* Saddam's defense attorney, Khalil Dulaimi, has complained, "There is no chance of holding a just and honest trial in such an atmosphere . . . ." *Id.* Meanwhile, Iraq's neighbor, Iran, is preparing its own charges against Saddam for fear that "Iraqi prosecutors had failed to lay sufficient charges against him . . ." *Iran Slams Saddam Trial Plans as 'Insufficient,'* THE DAILY STAR, Sept. 6, 2005, available at [http://www.dailystar.com.lb/article.asp?edition\\_ID=10&article\\_ID=18246&categ\\_id=2](http://www.dailystar.com.lb/article.asp?edition_ID=10&article_ID=18246&categ_id=2) (last visited Feb. 5, 2006).

20. See John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 86–87 (2000) (recounting how the United States joined the worldwide call for the creation of a permanent international criminal court). The original vision for the ICC looked quite different from the court that emerged from the Rome Conference in 1998. See SCHABAS, *supra* note 7, at 97. In a draft prepared in advance of the conference by the International Law Commission (ILC), the proposed statute denied the Chief Prosecutor the ability to initiate prosecution *proprio motu*. See *id.* The ILC conceived of the Court as "a facility available to States Parties to its Statute, and in certain cases to the Security Council who alone were empowered to initiate a case." *Id.* (citing *Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May – 22 July 1994*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 89-90 (1994)).

21. See Seguin, *supra* note 20, at 87 ("Indeed, American support for the creation of an international criminal court continued throughout the drafting and revising process as the United States participated in the Preparatory Committee sessions."); see also David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 531 (1999).

The U.S. Delegation [at the Rome Conference] insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements and intent of military objectives during combat. We had long

June 15, 1998, it quickly became apparent—thanks largely to the concerted efforts of numerous non-governmental organizations (NGOs)<sup>22</sup>—that the ICC would look far different than originally envisioned by the United States.<sup>23</sup> When it came time to vote<sup>24</sup> for establishment of the Court, the statute overwhelmingly passed: 120 States voted in favor, 21 States abstained, and 7 States (including the United States, Libya, China, and Iraq) voting against.<sup>25</sup>

While partly defeated at the Rome Conference, the Clinton administration remained engaged in the development of the Court for the next two years, addressing many of its concerns.<sup>26</sup> The United States eventually signed the treaty on December 31, 2000,<sup>27</sup> however, on May 6, 2002—under the direction of President Bush—the United States formally notified the United Nations that it no longer intended

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sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC.

22. NGOs such as Amnesty International helped ensure that modifications such as the *proprio motu* power made it into the final version of the treaty. See Christopher Keith Hall, *Challenges Ahead for the United Nations Preparatory Committee Drafting a Statute for a Permanent International Criminal Court* AMNESTY INTERNATIONAL, AI Index: IOR 40/03/96 (1996), [http://web.amnesty.org/library/pdf/IO400031996ENGLISH/\\$File/IO4000396.pdf](http://web.amnesty.org/library/pdf/IO400031996ENGLISH/$File/IO4000396.pdf). During the drafting process at the Rome Conference, “like minded countries” and NGOs made the *proprio motu* prosecutor one of their battle cries. SCHABAS, *supra* note 7, at 97. But “[s]ome powerful States vigorously opposed the idea, fearful that the position might be occupied by an NGO-friendly litigator with an attitude.” *Id.* See generally David Davenport, *The New Diplomacy*, POLICY REVIEW ONLINE (Dec. 2002 & Jan. 2003) (detailing role of NGOs and their efforts to shape ICC), [www.policyreview.org/DEC02/davenport.html](http://www.policyreview.org/DEC02/davenport.html).

23. Concerns arose on the part of the U.S. representatives regarding the role of the U.N. Security Council, the list of “core crimes” over which the Court would have jurisdiction, and the scope of jurisdiction over persons who were not nationals of State Parties. SCHABAS, *supra* note 7, at 17. In its final form, the Court emerged with jurisdiction over genocide, crimes against humanity, war crimes, and the “crime of aggression.” Rome Statute of the International Criminal Court, July 17, 1998, art. 1, U.N. Doc. A/CONF.183/9\* (1998), reprinted in 37 I.L.M. 999 (1998), corrected through May 8, 2000, by U.N. Doc. CN.177.2000.TREATIES-5 [hereinafter Rome Statute].

24. The United States exercised its procedural right that a vote should be taken rather than allowing adoption by consensus. See SCHABAS, *supra* note 7, at 18.

25. See Seguin, *supra* note 20, at 86–87.

26. The United States took an active role in the preparatory commissions and in drafting the elements of crimes and procedures for operation of the Court. Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies (May 6, 2002), <http://www.state.gov/p/us/rm/9949.htm> (last visited 2/5/06).

27. In signing the treaty, President Clinton affirmed the United States’ “strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes and crimes against humanity.” *Statement on the Rome Treaty on the International Criminal Court*, 37 PUB. PAPERS 1 (Jan. 8, 2001). But he also reiterated that the United States was not abandoning its concerns about significant flaws in the treaty. *Id.*



to become a party to the Rome Statute.<sup>28</sup> This notification was negatively characterized by critics as an “unsigning” of the treaty, contrary to international law.<sup>29</sup> When the ICC began its “legal life” on July 1, 2002, the United States sat on the sidelines.<sup>30</sup>

### B. *Conflict and Controversy: Objections to the International Criminal Court*

The United States justified its rejection of the Rome Statute on various grounds.<sup>31</sup> The United States objected to ICC jurisdiction over nationals of a non-party state,<sup>32</sup> contested the article that prohibited State Parties from making reservations to the Rome Treaty,<sup>33</sup> and disagreed with including the “crime of aggression” within the ICC’s purview.<sup>34</sup> Moreover, the United States opposed the

28. Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT’L L.J. 415, 422 (2004); see also Grossman, *supra* note 26 (stating that U.S. policymakers believed the Rome Statute undermined the role of the U.N. Security Council, created an unchecked prosecutorial system, and had flaws open for exploitation and politically motivated prosecutions).

29. The United States did not literally “unsign” the treaty, but the European Union expressed its concern “that this unilateral action may have undesirable consequences on multilateral Treaty-making and generally on the rule of law in international relations.” Orentlicher, *supra* note 28, at 422 (citing the declaration of the European Union).

30. *Id.* at 415.

31. President Clinton originally opposed the framework of the ICC on the basis that the Court might not operate in accordance with the Rome Statute. *Id.* at 420. Others have suggested that even after a war is won, the ICC could “defer reconciliation” by initiating a period of finger-pointing and the “blame game” that could “render a peace impossible.” Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 186 (2001) (quoting Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 672 (1996)).

32. See SCHABAS, *supra* note 7, at 61; see also Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 63 SASK. L. REV. 275, 278 (2000) (discussing U.S. opposition to Article 12(2) of the Rome Treaty); Seguin, *supra* note 20, at 98. But see Michael P. Scharf, *ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROB. 67, 98 (2001) (arguing that the Rome Treaty does not bind non-parties but simply confirms individuals are subject to laws applicable in territories in which they travel).

33. See Rome Statute, *supra* note 23, art. 120 (“No reservations may be made to this Statute”); Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(a), 1155 U.N.T.S. 331 (noting that a state has liberty to make reservations to a multilateral treaty unless all reservations are prohibited); Horton, *supra* note 7, at 1070.

34. The “crime of aggression” has not yet been defined under the statute. See Rome Statute, *supra* note 23, art. 5(2) (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise

push to grant the ICC universal jurisdiction and remained unhappy with the compromise that established the principle of “complementarity,” which allowed the Court to prosecute crimes over the objection of the relevant State Party in certain circumstances.<sup>35</sup> The United States believed complementarity would cede too much sovereignty to an international body.<sup>36</sup>

Most significantly, the United States resisted the Chief Prosecutor’s *proprio motu*<sup>37</sup> power, which gave him the ability to independently initiate investigations based on information from virtually any source, as long as he had the approval of the Court’s Pre-Trial Chamber.<sup>38</sup> Policymakers worried that if the Office of the Prosecutor became politicized, the Court might be inundated with frivolous litigation.<sup>39</sup> The United States also feared that these politicized powers could be abused to the detriment of U.S. national interests, considering the unpopular world opinion of the U.S. military and accompanying anti-U.S. sentiment.<sup>40</sup>

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jurisdiction with respect to this crime.”); *see also* Seguin, *supra* note 20, at 97 (discussing opposition to the crime).

35. *See* Rome Statute, *supra* note 23, art. 17. The ICC was given the power to initiate investigations and prosecutions even where a State Party had decided not to prosecute one of its nationals—but only if the Court determined that the state was “unwilling or unable” to undertake an investigation or prosecution. *See generally infra* notes 258–67 and accompanying text (discussing ramifications of complementarity).

36. *See* Seguin, *supra* note 20, at 92–93 (highlighting the U.S. argument).

37. *Proprio motu* is a Latin phrase that literally means “by one’s own motion.” HUTCHINSON ENCYCLOPAEDIA (2000). In the context of the ICC, it refers to the Chief Prosecutor’s ability to initiate an investigation on his own accord, with the approval of two Judges of the Court’s Pre-Trial Chamber. *See infra* notes 120–43 and accompanying text (discussing ramifications of the power).

38. Mysak, *supra* note 32, at 278 (discussing opposition). Originally, the Chief Prosecutor was to have no *proprio motu* power. *See* SCHABAS, *supra* note 7, at 97. The broad powers included in the final version, however, required the Chief Prosecutor “to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.” *Id.* at 103 (citing Rome Statute, *supra* note 23, art. 19(6)).

39. Mysak, *supra* note 32, at 279. *But see* SCHABAS, *supra* note 7, at 99 (quoting Justice Louise Arbour, “In my experience based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.”).

40. Mysak, *supra* note 32, at 285–86; *see also* Seguin, *supra* note 20, at 94 (quoting the then-U.S. Ambassador to the United Nations, Bill Richardson: “We must not turn the International Criminal Court—or its Prosecutor—into a human rights ombudsman open to, and responsible for responding to, any and all complaints from any source.”). During the Rome Conference, the United States declared that an independent prosecutor “not only offers little by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor’s central task of thoroughly and fairly investigating the most egregious of crimes.” SCHABAS, *supra* note 7, at 97.

Supporters of the ICC provide persuasive academic rebuttals to these U.S. objections, arguing primarily that the Court's built-in procedural safeguards should soothe any U.S. fears.<sup>41</sup> But while there *currently* may be little to fear, none of these arguments can address U.S. concerns of a future situation arising under a more powerful ICC. Indeed, the "tenacious commitment" of some countries to the framework agreed upon at the Rome Conference may have been "driven by a desire to constrain the American behemoth" and control U.S. forces abroad.<sup>42</sup> In the end, only one result can fully satisfy the United States' desire—full immunity for U.S. military forces and their civilian leadership.<sup>43</sup> With forces deployed around the world in numbers exceeding 250,000,<sup>44</sup> the risk is deemed too great to the national security and safety of U.S. soldiers.<sup>45</sup> This same

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41. See SCHABAS, *supra* note 7, at 85; Remigius Chibueze, *United States Objections to the International Criminal Court: A Paradox of "Operation Enduring Freedom"*, 9 ANN. SURV. INT'L & COMP. L. 19, 37 (2003) (contending that the U.S. fear is unfounded due to checks in the statute); Horton, *supra* note 7, at 1041; Mysak, *supra* note 32, at 286 (arguing that Americans have no grounded fear of politics taking over the Chief Prosecutor's office due to procedural safeguards); see also Rome Statute, *supra* note 23, art. 1 (stating that ICC jurisdiction "shall be complementary to national criminal jurisdictions").

42. Orentlicher, *supra* note 28, at 427 (questioning motives of those who supported ICC). Constraining "the American behemoth" with the ICC may also have been a goal of our "allies"—the "like-minded states" at the Rome Conference—to give them greater political parity with the United States. Damir Arnaut, *When in Rome . . . ? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INT'L L. 525, 535–37 (2003).

43. David Scheffer, the Ambassador-at-Large during the ICC negotiations, has remarked:

I spent many years seeking full immunity for our military forces and their civilian leadership in negotiations that quite frankly sometimes seemed the theater of the absurd. I was given nothing to offer—certainly not signature or ratification—in return for an absolutist carve-out that other governments, particularly our closest allies, found arrogant and hypocritical.

David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiators Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 7–8 (2001); see Alisha D. Telci, Note, *The International Criminal Court: Is the United States Overlooking an Easier Way to Hold Saddam Hussein and Osama bin Laden Accountable for Their Actions?*, 38 NEW ENG. L. REV. 451, 464 (noting that the national security strategy of the United States is to protect its citizens from ICC jurisdiction).

44. As of January 2005, there were approximately 250,000 soldiers, sailors, airmen, Marines, and Coast Guardsmen deployed in support of combat, peacekeeping, and deterrence operations. GlobalSecurity.org, *Where are the Legions? Global Deployments of U.S. Forces*, <http://www.globalsecurity.org/military/ops/global-deployments.htm> (last visited 2/5/06) (compiling statistics on reputable website).

45. Ambassador Scheffer has remarked,

In the eight years of my deliberations in Washington on the International Criminal Court—beginning with the work of the International Law Commission in 1993 and 1994—I do not recall hearing any senior Defense Department official refer to the core purpose of the Court, namely to advance international justice and enforce the Law of Armed Conflict. Every single

concern led Congress to pass the internationally unpopular<sup>46</sup> American Service-Members Protection Act (ASPA).<sup>47</sup>

Thus, despite the long and difficult road to the ICC, the United States ultimately rejected the Rome Treaty due to fears that the Court could be misused to harm national interests.<sup>48</sup> In other words, policymakers were concerned about asymmetric tactics and the potential for adversaries of the United States to use the Court as a tool of "law-fare."

### III. ASYMMETRIC WARFARE AND THE PRACTICE OF "LAW-FARE"

#### A. Historical Underpinnings

Exploiting an enemy's weakness on the battlefield has always been a goal of superior militaries, from the time of Genghis Khan to today.<sup>49</sup> But discussion of asymmetric warfare usually focuses on the weaker adversary engaging the stronger by exploiting alternative means of achieving its objectives.<sup>50</sup> It is often associated with

discussion was dominated by how the Court would impact the United States military.

Scheffer, *supra* note 43, at 9.

46. See Telci, *supra* note 43, at 472–73 (discussing how the American Service-Members Protection Act (ASPA) caused concern to U.S. allies). NGOs and the European Parliament also critiqued the ASPA isolationistic themes as harmful to U.S. interests. See *id.* at 474.

47. In the Act's findings, Congress found,

[U.S.] Armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations.

American Service-Members' Protection Act of 2002, § 5, Priv. L. No. 107-206m, 116 Stat. 820 (2002). For further discussion about ASPA, see Sasha Markovic, *The Modern Version of the Shot Heard Round the World: America's Flawed Revolution Against the International Criminal Court and the Rest of the World*, 51 CLEV. ST. L. REV. 263, 269–79 (2004).

48. See Markovic, *supra* note 47, at 269.

49. See STEVEN METZ & DOUGLAS V. JOHNSON II, ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITION, BACKGROUND, AND STRATEGIC CONCEPTS 2 (2001) (citing Genghis Khan's use of "superior mobility, operational speed, intelligence, synchronization, training, and morale to crush enemies in lightning campaigns"); see also William J. Hartman, *Globalization and Asymmetrical Warfare* 25 (Apr. 2002) (unpublished graduate thesis, No. AU/ACSC/053/2001-4, Air Command and Staff College) (on file with Authors) (citing frequent American military use of asymmetric tactics); Michael O'Halloran, *A Kill is a Kill: Asymmetrically Attacking U.S. Airpower* 6 (Jun. 1999) (unpublished graduate thesis, School of Advanced Airpower Studies) (on file with Authors) (noting that "underdogs" are not alone in using asymmetric warfare).

50. See ROBERTS, *supra* note 4, at 1 (discussing asymmetric warfare).

“unconventional war,” where a warring party thinks and acts “in a manner that is not defensible with a conventional military force.”<sup>51</sup> Some advantages to using asymmetric warfare include its efficiency<sup>52</sup> and its ability to be a “force multiplier.”<sup>53</sup>

In one notable example of asymmetric tactics, Hannibal used raids and threats in 218 B.C. to outlast an overwhelming force of Roman soldiers on the Italian peninsula, causing the Romans to employ such a large army that it almost bankrupted the Republic.<sup>54</sup> More recent examples include the eighteenth- and nineteenth-century Native American campaigns against British and U.S. troops,<sup>55</sup> the German use of submarine warfare in World War II to offset British sea supremacy,<sup>56</sup> and the Chechen insurgency against Russia in the 1990s.<sup>57</sup> Thus, ancient tactics have been brought into modern times to achieve political objectives.

### B. Modern Asymmetric Warriors

For the United States in a post-September 11 world, the war on terror has redefined the importance of asymmetric warfare.<sup>58</sup> “[T]errorism has often been viewed as the weapon of the weak directed at a stronger adversary”<sup>59</sup>—an image Osama bin Laden has nurtured through his speeches.<sup>60</sup> Terrorism has become the method

51. Hartman, *supra* note 49, at 25.

52. DAVID L. GRANGE, RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES, ASYMMETRIC WARFARE: OLD METHOD, NEW CONCERN 1 (2001) (noting that asymmetric warfare may be done “on the cheap” and is part of our enemies’ “economy of force”).

53. See Stephen Sloan, *Terrorism and Asymmetry*, in CHALLENGING THE UNITED STATES SYMMETRICALLY AND ASYMMETRICALLY: CAN AMERICA BE DEFEATED? 175 (Lloyd J. Matthews ed., 1998).

54. See BRITANICA CONCISE ENCYCLOPEDIA, *Punic Wars* (2005).

55. Ike Skelton, *America’s Frontier Wars: Lessons for Asymmetric Conflicts*, COMBINED ARMS CENTER MILITARY REV., Sept.-Oct. 2001, at 22 (discussing the 1763 Native American victory over Colonel Bouquet’s forces marching to Fort Pitt during Pontiac’s War).

56. Steven Metz, *Strategic Asymmetry*, COMBINED ARMS CENTER MILITARY REV., July-Aug. 2001, at 23.

57. Vincent J. Goulding, Jr., *Back to the Future with Asymmetric Warfare*, PARAMETERS, Winter 2000–2001, at 21, available at [http://www.d-n-i.net/fcs/goulding\\_asymmetric.htm](http://www.d-n-i.net/fcs/goulding_asymmetric.htm); see also GRANGE, *supra* note 52, at 1 (citing twentieth century examples like the airplane in World War I, *panzer blitzkrieg* in World War II, and the Strategic Defense Initiative “that helped end the nuclear arms race”).

58. See GRANGE, *supra* note 52, at 1 (“Because no group or state can defeat the U.S. in conventional warfare, America’s adversaries and potential adversaries are turning to asymmetric strategies.”).

59. Sloan, *supra* note 53, at 175. *But see* Metz, *supra* note 56, at 23–3 (noting that terrorism is “low-cost” but also “high-risk” because it “can generate a backlash against users or reinforce rather than erode a target’s resolve”).

60. See Yonat Shimron, *Professor Compiles bin Laden Speeches*, NEWS 4 OBSERVER (Raleigh, N.C.), Jul. 25, 2005, at B1 (“What [Professor] Lawrence finds at the core of bin Laden’s carefully constructed persona is not a terrorist seeking a target,

of choice to carry out asymmetric attacks, and it has been employed with some success. U.S. citizens fear and expect suicide bombings, hijackings, and assassinations at home and abroad.<sup>61</sup> Future “virtual” terror attacks on the U.S. economic system through computer viruses and hacking could severely hamper U.S. economic might.<sup>62</sup> Individual attacks on U.S. citizens abroad could chill international travel. And the decisive tool of terror—the use of weapons of mass destruction—could provide terrorists the ability to carry out devastation in the U.S. heartland, creating the ultimate domestic insecurity.

As the head of the world’s mightiest military, the U.S. Department of Defense began to plan for the menace of asymmetric warfare during the 1990s.<sup>63</sup> This official recognition of the threat came with the dawning of a new era—more U.S. inhabitants had died at the hands of asymmetric assaults in the 1980s and 1990s than in all conventional battles during that same period.<sup>64</sup> The attacks on September 11, 2001, dramatically demonstrated the devastating cost that Americans would pay if the United States did not address the new peril from contemporary asymmetric warfare.

But, unlike the past, modern asymmetric warriors are typically not established nation-states;<sup>65</sup> they are “underdogs” who resort to the tactics of the weak to achieve their aims.<sup>66</sup> This new class of warrior consists of intergovernmental organizations, “transnational guerrilla and terrorists groups, multinational organizations . . . and a rapidly growing number of nongovernmental organizations in a wide

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but a victim seeking redress. Bin Laden portrays the entire Muslim civilization as conquered, subdued and robbed of its resources by the West . . .”).

61. Inciting fear in the United States is, in fact, one goal of terrorists. In a 2001 speech, Osama bin Laden cheered, “There is America, full of fear from its north to its south, from its west to its east. Thank God for that.” *See Text of Osama bin Laden’s Taped Remarks*, ASSOCIATED PRESS, Oct. 7, 2001.

62. *See* Smidt, *supra* note 31, at 231 (discussing an example where the New York Stock Exchange is targeted by a “crippling computer network attack”).

63. *See* Metz, *supra* note 56, at 23–3 (describing the origin of the term “asymmetric warfare” in Department of Defense literature beginning in 1995 and expanding through the 1990s); *see also* U.S. JOINT CHIEFS OF STAFF, JOINT VISION 2020, at 5 (2000) (noting that asymmetric attacks are “perhaps the most serious danger the United States faces in the immediate future”).

64. Hartman, *supra* note 49, at 24–25.

65. *See* Robert D. Steele, *Information Peacekeeping: The Purest Form of War*, in CHALLENGING THE UNITED STATES SYMMETRICALLY AND ASYMMETRICALLY: CAN AMERICA BE DEFEATED? 144 (Lloyd J. Matthews ed., 1998) (describing three “warrior classes” that the U.S. must confront today, including low-tech brutes, low-tech seers, and high-tech seers).

66. *See* Sloan, *supra* note 53, at 173–74; *see also* Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. LEG. STUD. 71, 72 (1997–1998) (“For most potential adversaries, attacking the United States asymmetrically is the only reasonable warfighting strategy.”).

variety of functional areas.”<sup>67</sup> These contemporary enemies “will no more seek to confront U.S. power on U.S. terms than David would have gone out against Goliath with a sword and a shield.”<sup>68</sup>

In this respect, the United States has become a “victim of its own success.”<sup>69</sup> Its enemies have watched the conventional superiority of the U.S. military on the battlefield but have equally “witnessed the U.S. struggles with unconventional operations and warfare in Vietnam, Somalia, Beirut, Kosovo, in the Kobar Towers bombing, the USS *Cole* bombing, the attacks on the U.S. embassies in Nairobi and Dar-es Salaam, and the September 11, 2001 attacks. . . .”<sup>70</sup> Indeed, the United States’ reaction to some attacks may have reinforced the belief that asymmetric tactics are the *only* way to achieve victory:

The 1983 guerilla attack in Lebanon that killed 241 U.S. service members led to the withdrawal of U.S. troops from the region. In 1993, Somali militiamen downed two U.S. helicopters and killed 18 American troops. Though the Somalis lost hundreds of their own in the battle, the stunning reports of dead Americans in a land of little strategic importance completely undercut political support for U.S. presence there. Soon after, the United States packed up and headed home.<sup>71</sup>

Having learned from history, modern asymmetric warriors choose tactics they know can produce desired results.

While “only the most desperate antagonists would rely solely on asymmetric methods,”<sup>72</sup> these adversaries currently lack the ability to wage a conventional-style war against the United States.<sup>73</sup> Yet they must be careful—attacks that become Pearl Harbor equivalents may galvanize the political will of the U.S. public and turn international opinion against the terrorists’ cause. These modern asymmetric warriors realize the need for other armaments to undermine the U.S. Goliath’s political will to wage a long-term war

67. Sloan, *supra* note 53, at 179 (quoting Maurice A. East, *The International System Perspective and Foreign Policy*, in MAURICE A. EAST ET AL., WHY NATIONS ACT: THEORETICAL PERSPECTIVES IN COMPARATIVE FOREIGN POLICY STUDIES 143, 145 (1978)).

68. O’Halloran, *supra* note 49, at 1 (quoting BRUCE W. BENNETT ET AL., NATIONAL DEFENSE RESEARCH INST., THEATER ANALYSIS AND MODELING IN AN ERA OF UNCERTAINTY: THE PRESENT AND FUTURE OF WARFARE xvii (1994)); *see also* Smidt, *supra* note 31, at 222 (“Future opponents of the United States are likely to use ‘asymmetrical’ warfare in order to attempt to defeat the United States and its allies.”).

69. John E. Rhodes, *The US and the Changing Nature of Warfare*, DEF. AND FOREIGN AFF. STRATEGIC POL’Y, Oct. 2001, at 11–12.

70. *Id.*

71. Mark Mazzetti et al., *The Far Horizon*, U.S. NEWS & WORLD REP., Oct. 8, 2001, at 12; *see also* Dunlap, *supra* note 66, at 72 (noting how barbaric treatment of one U.S. soldier “helped destroy the public support that the U.S. military needed to succeed in Somalia”).

72. Metz, *supra* note 56, at 23–3.

73. *See* Bennett, *supra* note 69, at xvi–xviii (discussing the challenges of limited resource adversaries with respect to a developed nation-state like the United States).

on terror. Therefore, the arsenal of asymmetry contains two uniquely useful weapons: the “media war” and “law-fare.”

### C. *Asymmetric Exploitation of Mass Media*

Asymmetric warriors have learned to manipulate the pervasive and powerful tools of the modern mass media to create a dramatic psychological impact<sup>74</sup> on their opponents—a “media war.”<sup>75</sup> This use of the media is a type of “psychological operation” that erodes an adversary’s morale and creates a military advantage.<sup>76</sup> Through the skillful use of the global media, asymmetric warriors can bombard the public with the horrors of war on a daily basis.<sup>77</sup> For instance, terrorists purposely adopt a brutally violent style of warfare without rules that is quite different from that accepted in the United States and other open democracies.<sup>78</sup> They then exploit mass media to intimidate and threaten these societies. “[T]errorists now . . . have the capability to intensify their psychological attacks on a mass audience in ways undreamed of by the most skillful and dedicated terrorists of the past.”<sup>79</sup>

These asymmetric warriors believe that a major superpower such as the United States can be defeated through embarrassment, extending the length of a conflict, and escalating the war “in ways that make it hard for the U.S. to counter-escalate.”<sup>80</sup> The essence of this approach “is that the American public can be made weary of the costs of prolonged war, which will translate into an eventual political

74. Hartman, *supra* note 49, at 26 (“[A]symmetrical attacks seek to have a major psychological impact, an attack on one’s will and ability to act or freedom of action.”); see Metz, *supra* note 56, at 23–2 (“[They] seek a major psychological impact, such as shock or confusion, that affects an opponent’s initiative, freedom of action or will.”).

75. See Phillip Hammond, *The Media War on Terrorism*, 1 J. CRIME, CONFLICT, & MEDIA 23 (2003) (discussing the role of mass media in the war on terror).

76. Hartman, *supra* note 49, at 23–24 (quoting Napoleon Bonaparte, “In war the moral is to the material as three to one”). Another study noted,

We tend to miscalculate the real ability of opponents to devise low-cost, low-tech methods to offset capabilities of technologically superior adversaries. Effective psychological operations, media manipulation, atrocities, genocide, and unrestricted assaults against civilians are familiar methods used by groups that employ widely available technology, but apply to its use a different set of values than those prevailing in the West.

JOHN F. LEHMAN & HARVEY SICHERMAN, FOREIGN POLICY RESEARCH INST., AMERICA THE VULNERABLE: OUR MILITARY PROBLEMS AND HOW TO FIX THEM 220 (2002).

77. See GRANGE, *supra* note 52 at 1.

78. Colonel Dunlap refers to this as “neo-absolutist war” because this “war by any means” approach is “war without rules or scruples”—a different psychology than used by the U.S. warrior. Dunlap, *supra* note 66, at 74.

79. Sloan, *supra* note 53, at 177.

80. See ROBERTS, *supra* note 4, at 18.



willingness to settle the conflict” on favorable terms.<sup>81</sup> This tactic is particularly effective in open societies where “the pain threshold of the population to endure casualties of any appreciable numbers may now be limited. . . .”<sup>82</sup> Skillful use of the tools of mass media can bring the fears of terrorism and the losses of war into the average person’s home.

Additionally, mass media is an effective means of propaganda—using communication to influence the opinions or behavior of groups of people<sup>83</sup>—with a proven track record against the U.S. military.<sup>84</sup> The Vietnam War is frequently held up as a model for using propaganda to strike at the U.S. will to fight.<sup>85</sup> North Vietnam used mass media to severely undermine the moral appeal of the war to the United States.<sup>86</sup> Indeed, the term “Vietnam redux” describes the vulnerability in “the political will of the American public to avoid casualties and quagmires.”<sup>87</sup> As one former North Vietnamese commander said, “The conscience of America was part of its war-making capability, and we were turning that power in our favor. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win.”<sup>88</sup>

#### D. *The Practice of “Law-Fare”*

This Article has thus far discussed physical uses of asymmetric warfare on the battlefield and the exploitation of those methods in mass media. In the contemporary world, however, another asymmetric tactic has emerged—the concept of “law-fare.” This term

81. *Id.* This psychological impact is particularly important where an antagonist “sees its survival or vital interest at stake and the other is protecting or promoting less-than-vital interests” and when the other “can only sustain the will for a short war.” Metz, *supra* note 56, at 23–4.

82. Sloan, *supra* note 53, at 178; *see also* Dunlap, *supra* note 66, at 77 (noting the “growing aversion in both the electorate and in the uniformed ranks” toward any friendly casualties in war). *But see* ROBERTS, *supra* note 4, at 29 (noting that these perceived U.S. weaknesses may actually be pitfalls for the aggressor because Americans have shown a historical willingness to sustain large amounts of casualties where vital national interests are at stake).

83. *See* LEE ANN FUJII, PAPER PREPARED FOR THE ANNUAL CONVENTION OF THE INTERNATIONAL STUDIES ASSOCIATION, NEW ORLEANS, LA, THE DIFFUSION OF A GENOCIDAL NORM IN RWANDA (2002); Internews, Media in Conflict, Case Study: Rwanda (2003), [http://www.internews.org/mediainconflict/mic\\_rwanda.html](http://www.internews.org/mediainconflict/mic_rwanda.html) (both sources outlining how a private Rwandan radio station conducted a media propaganda program over a period of years that “was used to set the scene for the mass killing that later erupted” in the Rwanda genocidal tragedy in 1994).

84. *See* O’Halloran, *supra* note 49, at 11–12 (citing instances such as Vietnam).

85. *Id.*

86. O’Halloran, *supra* note 49, at 13.

87. *See* ROBERTS, *supra* note 4, at S-3.

88. Dunlap, *supra* note 66, at 72 (quoting *How North Vietnam Won the War*, WALL ST. J., Aug. 3, 1995, at A8).

refers to weaker foes employing judicial processes to challenge stronger nations and win advantages otherwise unattainable on the conventional battlefield.<sup>89</sup>

In a nation such as ours, where citizens and rulers alike are subject to the rule of law, judicial processes may be a potent weapon indeed for a foreign state or a nonstate actor seeking redress. Under certain circumstances, even the president may be subject to civil process. The paradigmatic use of lawfare is a "decapitation strike" where, instead of using stealth aircraft with precision bombs, an enemy might use a personal lawsuit against the U.S. commander in Iraq to harass and distract him from his mission. Likewise, enemy partisans might, as the government argues, use legal processes to gather intelligence about U.S. military operations, exploiting the criminal discovery process for their own nefarious purposes.<sup>90</sup>

This tactic is already occurring in countries like Colombia, where peasants may raise false charges in court against military leaders who are making progress against "kingpin rebels."<sup>91</sup>

The strategy of misusing judicial processes to achieve unwarranted victories has existed in the business world since the dawn of the modern litigious society.<sup>92</sup> It may be more expensive for a business to litigate a frivolous tort lawsuit than to simply settle the case out of court.<sup>93</sup> In this way, some businesses have "paid off" undeserving plaintiffs to avoid the greater expense of litigating their "innocence" in a court of law. The concept of "law-fare" is not far removed from this practice; indeed, business has developed various "asymmetric cost models" to plan for these legal tactics.<sup>94</sup> Similarly,

89. See Phillip Carter, *Legal Combat: Are Enemies Waging War in Our Courts?*, SLATE, Apr. 4, 2005.

90. *Id.* (arguing for the United States to join the ICC). Mr. Carter goes on to argue that we should "embrace lawfare, for it is vastly preferable to the bloody, expensive, and destructive forms of warfare that ravaged the world in the 20th century." *Id.* Mr. Carter does not take into account, however, the reality that "law-fare" will be only one tactic used by a ruthless enemy who will also employ the most heinous violence to achieve its political and military aims.

91. Mary A. O'Grady, *What About Colombia's Terrorists?*, WALL ST. J., Oct. 5, 2001, at A17 (arguing that Colombian terrorists have successfully waged a media war that has turned attention on reforming Colombia's military rather than fighting ruthless internal terrorist groups).

92. See Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1323 (2004) ("[T]he current tort litigation system inspires, induces, and rewards baseless, meritless lawsuits: lawsuits that should never should be brought or, if filed, ought to be dismissed before litigation progresses.").

93. *Id.*

94. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 172-73 (2000) (describing various asymmetric cost models to explain frivolous litigation). According to one model,

frivolous litigation persists because the defendant must incur the cost of responding to plaintiff's frivolous complaint . . . . [A] rational plaintiff will file a frivolous complaint because he assumes he will be able to recover a settlement

asymmetric warriors may use this model—when the threat of judicial processes is severe enough—to deter the U.S. Goliath or achieve some other victory.

When combined with the power of mass media, even pseudo-judicial processes can bring about startling results. For instance, in May 1967, Nobel laureate Bertrand Russell began what became known as the “Russell Tribunal”—an independent investigation into the conduct of the United States in Vietnam.<sup>95</sup> North Vietnam had charged the United States with the systematic and intentional bombing of medical facilities, citing maps found on downed U.S. pilots that had specifically marked out these facilities.<sup>96</sup> In a stunning media victory for the North, the Russell Tribunal convicted “the U.S. of a war crime, and later went on with other charges to ‘convict’ on the charge of genocide for attempting to ‘wipe out a whole people and imposing the *Pax Americana* on . . . Vietnam.”<sup>97</sup> This triumph of “law-fare” undermined the moral legitimacy of the United States in its intervention in Vietnam and helped erode the public will to carry on the fight in that faraway land.

Furthermore, when judicial avenues are available to carry out these “law-fare” tactics, litigants will bring cases. For instance, consider the controversial and inconsistent use of universal jurisdiction laws for key international crimes,<sup>98</sup> which are currently on the books in over 120 countries.<sup>99</sup> Universal jurisdiction laws authorize a nation to prosecute “crimes committed outside the state’s territory which are not linked to that state by the nationality of the suspect or of the victim or by harm to the state’s own national

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from the rational defendant up to the amount of the defendant’s cost of responding.

*Id.*

95. O’Halloran, *supra* note 49, at 13.

96. *Id.* at 13–14.

97. *Id.* at 14 (quoting Guenter Lewy, *Deception and Revolutionary Warfare in Vietnam*, in *DECEPTION OPERATIONS: STUDIES IN THE EAST-WEST CONTEXT* 171, 181 (David A. Charters & Maurice A.J. Tugwell eds., 1990)).

98. Universal Jurisdiction—*quasi delicta juris gentium*—applies to a limited number of crimes for which any State, even absent a personal or territorial link to the offence, is entitled to try the offender. In customary international law, these crimes are piracy, the slave trade, and traffic in children and women.

SCHABAS, *supra* note 7, at 60. “The application of universal jurisdiction is also widely recognized for genocide, crimes against humanity and war crimes, that is, for the core crimes of the Rome Statute.” *Id.*

99. Press Release, Amnesty International, AI News Service, Rwanda: Belgian Court Judgment is a Great Step in the Fight Against Impunity (June 8, 2001) (counting countries with some form of universal jurisdiction law), <http://web.amnesty.org/library/Index/ENGAFR470012001?open&of=ENG-RWA>.

interests."<sup>100</sup> Despite criticisms, supporters of these laws contend they are fully acceptable under international law and that there is little evidence these statutes will be hijacked by politically motivated prosecutions.<sup>101</sup> Whatever the merit of these laws, however, it is clear they attract litigants.

When Belgium attempted to enforce its universal jurisdiction law in the mid-1990s,<sup>102</sup> the nation soon garnered over thirty high-profile cases against world leaders, including President George H.W. Bush and Israel's Ariel Sharon, for apparently political motives.<sup>103</sup> Eventually, many of these cases were dismissed by the Belgian Supreme Court, but not before capturing significant media attention.<sup>104</sup> Similarly, universal jurisdiction laws have attracted cases in Switzerland, Belgium, and Germany in response to the 2003 Iraq War.<sup>105</sup> If the ICC were available to adversaries of the United States, it is likely that these "litigants" would also make use of its judicial processes.

100. Legal Memorandum from Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation 4* (2001) [hereinafter *Amnesty International Memorandum*], available at [http://web.amnesty.org/pages/legal\\_memorandum](http://web.amnesty.org/pages/legal_memorandum).

101. See SCHABAS, *supra* note 7, at 61 ("It is true that, in practice, universal jurisdiction is rarely exercised by States, and many would probably prefer not to be pushed into matters that in the past, for diplomatic, or other reasons, they have sought to avoid."). Supporters arguing in favor of universal jurisdiction laws note that sometimes the territorial state that has clear jurisdiction fails to act for various reasons: (1) the legal system may have collapsed, (2) lack of resources or security prevents prosecution in the legal system, (3) lack of political will to bring the case, or (4) the prevention of the case by executive authorities. See *Amnesty International Memorandum*, *supra* note 100.

102. See *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, Feb. 10, 1999, 38 I.L.M. 918, 920 (recognizing "universal competence for the Belgian courts to deal with" numerous international war crimes).

103. "The Court also faced criminal complaints against Cuban President Fidel Castro, Iraqi President Saddam Hussein, former DRC foreign minister Abuldaye Yerodia, former Iranian President Hashemi Rafsanjani, and others." Steven R. Ratner, *Editorial Comment: Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L., 888-90 (2003). "For some targets of criminal complaints, the evidence was, at least to this writer, extremely flimsy, underlying Verhofstadt's claim the motives were strictly political." *Id.* at 892; see Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 370 (2003).

[I]nconsistent standards give states the scope to vex and harass their political opponents. Fear of such politically motivated cases is already a primary ground offered by the United States for remaining outside of the ICC, and has also been raised in objection to the use of universal jurisdiction, most notably by Henry Kissinger.

104. See *Belgium Nixes War-Crimes Charges Against Bush, Powell, Cheney, Sharon*, ASSOCIATED PRESS, Sept. 25, 2003 (noting that the Belgian Supreme Court found that Belgium "no longer has a legal basis to charge" the defendants).

105. See *War Crimes Charges Filed in Switzerland Against Bush, Blair*, AGENCE FRANCE PRESSE, May 3, 2003.

In sum, history will judge whether the United States made the correct choice in rejecting the ICC. Given the long and arduous road that led to the ICC's creation, it is no surprise many nations resent the current U.S. hostility to the Court. Yet the United States now lives in a media-saturated world where asymmetric attacks—especially as employed by terrorists—have become a way of life. The tactics of asymmetry have evolved to exploit even judicial processes; the ICC is not immune. But it remains to be seen whether the Court will become the “Big Bad Wolf” feared by the United States. In other words, can the ICC be manipulated as a tool of asymmetric warfare?

#### IV. EXPLOITING THE INTERNATIONAL CRIMINAL COURT AS A WEAPON OF ASYMMETRIC “LAW-FARE”

The ICC is still in its infancy<sup>106</sup> with new judges and its first Chief Prosecutor.<sup>107</sup> As with most revolutionary institutions, the Court must survive an initial period of instability<sup>108</sup> before firmly establishing its permanence. If, however, it endures this preliminary time of trial—especially if the United States changes course and

106. Within its first year, the Office of the Prosecutor grew “tenfold” from a staff of four to forty-one members. See Luis Moreno-Ocampo, Prosecutor, Address to the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, the Hague (Sept. 6, 2004) [hereinafter Hague Address].

107. On June 16, 2003, Mr. Luis Moreno-Ocampo began his term as the Chief Prosecutor to the ICC. See Biography/*Curriculum Vitae* of Dr. Luis Moreno-Ocampo, www.icc-cpi.int/otp/otp\_bio.html (last visited Feb. 20, 2006). Hailing from Argentina with a broad background in prosecuting military commanders for human rights abuses, Mr. Moreno-Ocampo has an impressive record, although he does not have a personal background in the military. See *id.*

108. For instance, as of September 2005, the Chief Prosecutor has acknowledged opening investigations in only three cases: one in Darfur, Sudan (referred by the U.N. Security Council); one in Uganda; and one in the Democratic Republic of Congo, with one other referral being considered in the Central African Republic. See Situations and Cases, www.icc-cpi.int/cases.html. Moreover, the very existence of the Court is in jeopardy due to an aggressive campaign by the United States to negotiate bilateral “Article 98” to avoid ICC jurisdiction. See Rome Statute, *supra* note 23, art. 98.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

See generally Orentlicher, *supra* note 28, at 425 (arguing that U.S. Article 98 agreements violate the spirit of the treaty); Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT'L. L. REV. 1115 (2004) (discussing how the United States is undermining the Court).

throws its full backing behind the court<sup>109</sup>—it will evolve into a formidable force. At that time, non-state actors seeking to use judicial institutions as a means of “law-fare” against the United States may find the ICC an attractive target to manipulate.

Adversaries of the United States could potentially use three asymmetric tactics to exploit the ICC: (1) misusing the Court’s investigative processes, (2) filing questionable or fraudulent complaints for the Court to investigate, and (3) employing mass media in ICC cases to intensify international pressure against the United States. Future asymmetric warriors could coordinate these tactics as part of a larger strategy to put the United States on the defensive and dampen its international war on terror.

#### A. *Exploiting the Investigative Processes of the International Criminal Court*

Those who oppose U.S. hegemony will find an attractive tool in the processes of the ICC, especially if the United States ratifies the Rome Treaty.<sup>110</sup> History has shown that complaints filed in foreign courts have had little impact on U.S. policymaking; these courts have no teeth.<sup>111</sup> But the ICC is unlike other global courts in both form and substance. Combined with the Chief Prosecutor’s *proprio motu* power and the increasing influence of non-governmental organizations (NGOs), these differences make the ICC a more dangerous weapon of asymmetric “law-fare.”

#### 1. The Broad Mandate of the International Criminal Court

A key difference between the ICC and other global courts is its broad mandate. For example, the ICTR and ICTY were created in response to events that had already occurred, which limited the

109. The Rome Statute requires that all parties to the treaty “accept[] the jurisdiction of the Court.” Rome Statute, *supra* note 23, art. 12(1). Moreover, a State Party has a duty to cooperate with the Court in numerous matters. *See id.* arts. 86 (general obligation to cooperate), 87 (general requests for cooperation), & 93 (other cooperation).

110. Even without ratifying the Rome Treaty, the United States may be in some jeopardy. As Professor Scharf argues:

[T]he refusal of the United States to become a party would not bar the ICC from issuing an indictment charging American citizens with war crimes or crimes against humanity. . . . Such an indictment by an international judicial body could obviously do serious damage to American foreign policy, even if there was no prospect that the accused would ever actually face trial.

Scharf, *supra* note 32, at 69.

111. *See infra* notes 108–19, 157–67 and accompanying text (discussing impact of foreign courts).

jurisdiction of those courts to specified prior crimes.<sup>112</sup> In essence, the tribunals were an extension of the U.N. Security Council's Chapter VII powers, formed to maintain peace and security by delivering justice to particular regions.<sup>113</sup> Parties before the tribunals did not submit to their jurisdiction—it was imposed upon them.<sup>114</sup> Further, the United Nations created the tribunals with the benefit of hindsight, which allowed it to develop a narrow mandate for each court.<sup>115</sup> As a self-contained system with limited jurisdiction, neither tribunal could evolve into a Frankenstein-like creature that acted in ways its master did not intend.<sup>116</sup>

The ICC, on the other hand, is a forward-looking, consent-based court<sup>117</sup> with few built-in restraints to keep its broad mandate in

112. See U.N. SCOR, 49th Sess., 3453rd mtg. arts. 1–4, 7, U.N. Doc. S/Res/955 (1994) [ICTR Statute]; U.N. SCOR, 48th Sess. 3217th mtg. at 2, U.N. Doc. S/Res/827 (1993) (setting forth the tribunals' competence, jurisdictional crimes, and limitations) [ICTY Statute].

113. See Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation*, 78 U. DET. MERCY L. REV. 299, 318 (2001) (discussing the ICTR); David Tolbert, *The Evolving Architecture of International Law: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 9 (2002) (discussing the ICTY).

114. Rancilio, *supra* note 113, at 318–19 (noting the U.N. Security Council-imposed jurisdiction); Tolbert, *supra* note 113, at 7, 9 (same); see also *At a Glance: Hague Tribunal* (BBC television broadcast June 10, 2005). The jurisdiction granted to the ICTY has “primacy over national prosecutions” and has even taken on an independent judicial nature that sets it above its creator, the U.N. Security Council, by allowing it to decide questions related to its own jurisdiction. Jose E. Alvarez, *Nuremberg Revisited: The Tadic Case*, 7 EUR. J. INT'L L. 245 (1996) (citing decisions by Trial and Appellate Chambers of ICTY).

115. The ICTY's territorial jurisdiction is confined to crimes committed on its territory subsequent to 1991; the ICTR's territorial and personal jurisdiction is limited to crimes committed in Rwanda or by Rwandan nationals in neighboring countries during 1994. See SCHABAS, *supra* note 7, at 54.

116. Despite its constraints, the ICTY sustained criticism for the perceived “political prosecution” of Slobodan Milosevic, the former President of Serbia. See Steven Erlanger, *Yugoslav Chief Says Milosevic Shouldn't Be Sent to The Hague*, N.Y. TIMES, Apr. 3, 2001. After Milosevic surrendered for war crime charges, his successor expressed concern at extraditing him to the Hague: “Mr. Milosevic should be brought to trial on war crimes charges, too—but before domestic courts.” *Id.*; see Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY, Winter 2003–2004, at 21–22 (citing a nationwide survey indicating Serbians felt Mr. Milosevic's eventual trial at the Hague was “unjust”); Anthony Deutsch, *Milosevic Challenges Legality of UN Tribunal*, ASSOCIATED PRESS, Aug. 24, 2001 (noting the local perception that the ICTY is a “marionette court” of NATO).

117. As one commentator noted:

The ICC has the formal authority to adjudge the actions of high state officials as criminal and to send them to jail, no matter how lofty the accused's position or undisputed the legality of those acts under domestic law. While the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) also possess this authority, those institutions operate directly

check. Unlike self-contained, finite tribunals, the ICC has broad future jurisdiction in the one hundred countries that have ratified the Rome Treaty<sup>118</sup> and yielded a portion of their sovereignty to the Court. With a bottomless pool of clients, the ICC is like a shop that is open for business but unsure which customer might walk through the door.<sup>119</sup>

Moreover, the ICC does not suffer from the same limitations as other global courts. Foreign courts that rely on universal jurisdiction laws are limited by their lack of international support and political clout to enforce their decisions.<sup>120</sup> Similarly, even global courts such as the International Court of Justice (ICJ) have little enforcement power.<sup>121</sup> Domestic U.S. courts, on the other hand, possess the jurisdiction and power to carry out their decisions but view international law from a distinctly U.S. perspective—with the

under the control of the United Nations Security Council and within narrow territorial limits. The ICC, by contrast, is largely independent of the Council and vests the power to investigate and prosecute the politically sensitive crimes within its broad territorial sweep in a single individual . . .

Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L. L. 510 (2003).

118. See CICC, State Signatures and Ratification Chart, <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> (listing States that have ratified or signed the Rome Treaty).

119. See generally Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, Cato Policy Analysis No. 311 (July 16, 1998) (arguing ICC's jurisdiction could become a "Leviathan"), <http://www.cato.org/pubs/pas/pa-311.pdf>.

120. See *supra* notes 101–07 and accompanying text (discussing universal jurisdiction laws); see also *infra* notes 166–75 and accompanying text (discussing problems with enforcing these laws).

121. Set up to hear grievances between nation-states, the ICJ's judgments can only be enforced by an aggrieved party who appeals to the U.N. Security Council which may, if it deems necessary, make recommendations or decide upon measures to give effect to the judgment. See U.N. CHARTER art. 94, para. 2; see also Orentlicher, *supra* note 28, at 415. When the United States accepted the ICJ's jurisdiction in 1946, it did so with reservations. See WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 408–09 (4th ed. 2003). In 1986, during the bitter case of *Nicaragua v. United States*, the United States withdrew its acceptance of the Court's jurisdiction, in violation of its promise to provide a minimum notice of six months prior to any withdrawal. See *id.* The Court did not recognize the withdrawal and decided the merits of the case. See *id.* In response, the United States terminated its general acceptance of ICJ compulsory jurisdiction. See *id.* at 409; see also *Nicar. v. U.S.*, 1986 I.C.J. 98 (June 27). Many nations, including the United States, routinely fail to abide by the Court's final judgments. See Colter Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, 98 AM. J. INT'L. L. 434, 434–37 (2004) (noting some non-compliance but no direct state defiance to the ICJ); see also Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 37 (2005) (noting 40% state compliance in compulsory jurisdiction cases, 60% compliance for treaty disputes, and 85.7% compliance when jurisdiction comes from special agreement) (citing Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1309–10 (2004)).



ultimate check of the U.S. Supreme Court to prevent anomalous results.<sup>122</sup>

In the end, the ICC is an attractive tool for asymmetric “law-fare” because nations have empowered it with the legitimacy and jurisdiction to carry out its rulings.<sup>123</sup> Were the United States to ratify the Rome Statute, there would be no practical check on those decisions by U.S. judicial institutions. This makes the Court potentially dangerous.

## 2. The *Proprio Motu* Power and the Obligation to “Pre-Investigate”

One feature of the ICC differentiates it from every other court the United States has faced outside its borders—the *proprio motu* power of its Chief Prosecutor.<sup>124</sup> The construction of the ICC system makes it unlikely for the Chief Prosecutor to initiate a frivolous investigation,<sup>125</sup> especially in light of the many heinous violations that occur regularly throughout the world. But when a future claimant comes through the ICC door with a grievance against a U.S. official or military member, the completely independent<sup>126</sup> Chief

122. For example, claims are often filed in U.S. courts under the Alien Torts Claim Act (ATCA), passed in the Judiciary Act of 1789. See 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). Since the war on terror began, ATCA cases have been filed on behalf of detainees held at Guantanamo Bay. See generally Meredith B. Osborn, *Recent Development: Rasul v. Bush: Federal Courts Have Jurisdiction over Habeas Challenges and Other Claims Brought by Guantanamo Detainees*, 40 HARV. C.R.-C.L. L. REV. 265 (2005). While the ATCA might also be a means to attempt asymmetric warfare, it is a creature of U.S. law that the U.S. Supreme Court has severely limited and which could be defeated by various immunities, defenses, and the political question doctrine. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (severely limiting the ATCA to common law violations of international law that existed in 1789).

123. While the ICC does have international legitimacy, it is notable that, in the face of defiance by a country such as the United States, its only true enforcement power would also be recourse to the U.N. Security Council, where the United States has a veto. See Rome Statute, *supra* note 23, arts. 72(7)(a)(ii), 87(7). If the United States ratifies the Rome Treaty, however, this type of “guerilla warfare diplomacy” would create major foreign relations problems since the nation would be seen as defaulting on its treaty obligations.

124. See *infra* notes 128–53 and accompanying text.

125. As a matter of policy, the Chief Prosecutor has said his office will prioritize cases based on its limited resources, the gravity of alleged offenses, and the inherent difficulties in conducting investigations in certain countries. See INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, ANNEX TO THE “PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR”: REFERRALS AND COMMUNICATIONS 1, 4, [http://www.icc-cpi.int/library/organs/otp/policy\\_annex\\_final\\_210404.pdf](http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf) [hereinafter ANNEX]. But see Smidt, *supra* note 31, at 157–58 (“Political prosecutions before the ICC are so probable that the forces of good may be deterred from taking on the forces of evil.”).

126. The Rome Statute makes clear that the Chief Prosecutor “shall act independently as a separate organ of the Court,” with “full authority over the

Prosecutor will be compelled under a *statutory duty* to analyze the seriousness of the information received.<sup>127</sup> There will be no free passes for U.S. citizens,<sup>128</sup> and there lies the opportunity for asymmetric exploitation.

The Chief Prosecutor has a duty to initiate an investigation into worthy allegations of war crimes<sup>129</sup> and crimes against humanity<sup>130</sup>—both of which have been levied against the United States in the past fifteen years.<sup>131</sup> When the Chief Prosecutor is given information of a potential violation, he “*shall* analyse the seriousness of the information received. For this purpose he may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources. . . .”<sup>132</sup> This reality has been set out in the Chief Prosecutor’s policy papers:

In all cases the Office of the Prosecutor must first conduct an analysis of information in order to determine whether the statutory threshold to start an investigation is met: there must be “*a reasonable basis to*

management and administration of the Office” and assisted by “one or more Deputy Prosecutors.” Rome Statute, *supra* note 23, art. 42(1)–(2). The Chief Prosecutor is elected “by secret ballot by an absolute majority of the members of the Assembly of States Parties” for a term of “nine years and shall not be eligible for re-election.” *Id.* art. 42(4). The Chief Prosecutor (and judges) have “immunity from legal process” in any member State—both during and after their terms—for words and acts “in their official capacity.” *Id.* art. 48(2).

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

128. Consider the situation where a U.S. soldier is acquitted of prisoner abuse, as has happened in cases such as *United States v. Sgt. Darin Broady*, an Army reservist accused of beating a detainee in an Afghan military prison camp. See *Another GI Cleared of Afghan Prisoner Abuse*, ASSOCIATED PRESS, Sept. 8, 2005. Should the Chief Prosecutor respect that decision under the principle of complementarity even if military prosecutors did a sloppy job or the military jury nullified the verdict? Would that be considered a “sham” prosecution by the United States?

129. “War crimes” include acts such as “torture or inhuman treatment,” “willfully causing great suffering, or serious injury to body or health,” “willfully depriving a prisoner of war or other protected person from the rights of a fair and regular trial,” and “committing outrages upon personal dignity, in particular humiliating and degrading treatment.” Rome Statute, *supra* note 3, art. 8(2).

130. “Crimes against humanity” include “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law” and “torture,” when “committed as part of a widespread or systematic attack directed against any civilian population.” *Id.* art. 7(1).

131. See Open Letter from Irene Khan, Secretary General, Amnesty International, to President George W. Bush (May 7, 2004), <http://web.amnesty.org/library/index/engamr510782004>.

132. Rome Statute, *supra* note 23, art. 15(2) (emphasis added). The Chief Prosecutor is expected to rely upon non-governmental organizations (NGOs) for information; however, even “neutral and impartial” NGOs may act contrary to their principles. For example, the Italian Red Cross treated and hid four Iraqi insurgents from U.S. forces with the knowledge of the Italian government last year in exchange for the freedom of two kidnapped aid workers. See *Official: Italians Treated, Hid Iraqi Insurgents*, ASSOCIATED PRESS, Aug. 25, 2005. Such a move seriously undermines the credibility of such an organization and affects its reliability. See *id.*

*proceed*". . . Accordingly, the Office will analyse the seriousness of all communications received [from other sources], with the assistance of other information readily available to the Office. The extent of the analysis will be affected by the detail and substantive nature of the available information. . . . [T]he Prosecutor will gather and assess relevant information until such point as he is satisfied that there is, or is not, a reasonable basis to proceed.<sup>133</sup>

The Chief Prosecutor has acknowledged that "in every case" he conducts a "preliminary examination" of all information he receives from individuals or NGOs.<sup>134</sup> In other words, those who have both "information" and an anti-U.S. agenda will always have the ear of a prosecutor who is obliged under the law to consider all allegations.

In February 2006, the Chief Prosecutor gave the world its first glimpse of a potentially controversial preliminary investigation stemming from the *proprio motu* power. Having received over 240 communications regarding the U.S.-led invasion of Iraq in 2003, the Chief Prosecutor posted a ten-page response explaining why his office had chosen not to initiate a formal investigation into the complaints.<sup>135</sup> As part of the preliminary investigation, the Chief Prosecutor contacted the "relevant States" to seek information from them, as well as seeking data from key NGOs.<sup>136</sup> While ultimately concluding that his office did not have jurisdiction with regard to "non-State Party" nationals (i.e., the United States), the Prosecutor did describe a thorough analytical process that his office conducted with regard to those nationals over which jurisdiction existed.<sup>137</sup> Although the Prosecutor found no evidence of genocide or the targeting of civilians—partly due to a lack of information—he did find a "reasonable basis" to believe willful killing and inhuman treatment of civilians had occurred.<sup>138</sup> The Prosecutor ultimately chose, however, not to initiate an investigation into these crimes due to "gravity" considerations under the Rome Statute, which seemed to require more victims than were present in this situation.<sup>139</sup>

Further, unlike the broad discretion to dismiss claims brought under universal jurisdiction laws in countries such as Germany and Belgium,<sup>140</sup> the Chief Prosecutor does not have the luxury to ignore

133. See ANNEX, *supra* note 125, § I(B).

134. International Criminal Court, Office of the Prosecutor, General Organisation, Procedure, <http://www.icc-cpi.int/organs/otp.html>.

135. See INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, LETTER DATED FEB. 9, 2006 [hereinafter IRAQ RESPONSE] (available at [www.icc-cpi.int](http://www.icc-cpi.int)).

136. *Id.* at 2–3.

137. See *id.* at 3, 6, 8.

138. *Id.* at 8.

139. *Id.* at 8–9.

140. See *infra* notes 166–76 and accompanying text (noting Germany and Belgium's restraint in dropping cases brought under universal jurisdiction). Even though Germany's system provides its prosecutors with great discretion, German lawyers have argued that the courts should force the prosecutor to conduct

potential violations for political reasons. Instead, the Rome Statute provides an easily met criterion to trigger the Chief Prosecutor's obligation to initiate a formal investigation: he "shall . . . initiate an investigation unless he or she determines that there is no reasonable basis to proceed under" the statute.<sup>141</sup> This text makes the initiation of investigations the default position except where "no reasonable basis" exists—a low standard indeed.<sup>142</sup> The statute gives the Chief Prosecutor an "out" based on three factors.<sup>143</sup> The third and most interesting factor allows the Chief Prosecutor to refuse to initiate an investigation where it is "not in the interests of justice"—another standardless test.<sup>144</sup> But it is doubtful that "justice" would be served by a prosecutor who determines that trying a U.S. military commander would be bad diplomacy or politically risky.<sup>145</sup> The Chief

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investigations. See Andreas Fischer-Lescano, *Torture in Abu-Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law*, 6 GERMAN L.J. No. 3 (March 2005).

141. Rome Statute, *supra* note 23, art. 53(1) (emphasis added); see also Rules of Procedure and Evidence, UN Doc. PCNICC/2000/INF/3/Add.3, Rules 46–50 (regarding investigative powers under Article 15 of the Rome Statute).

142. According to the Chief Prosecutor's policy papers, when information is received from an individual or NGO, "the test is the same but the starting point is reversed: the Prosecutor shall not seek to initiate an investigation unless he first concludes that there is a reasonable basis to proceed." See ANNEX, *supra* note 125, § I(A). Although this may be a policy determination by the current Chief Prosecutor, nothing in the statute itself supports this distinction.

143. First, the Chief Prosecutor must determine whether the information provides a factual basis to support the allegation that a listed crime has been committed. See Rome Statute, *supra* note 23, art. 53(1); see also ANNEX, *supra* note 125, § I(C). Second, the Chief Prosecutor must resolve whether the case would be admissible before the Court as a matter of complementarity. See Rome Statute, *supra* note 23, art. 53(1); see also ANNEX, *supra* note 125, § I(C). Third, the Chief Prosecutor may dismiss cases "in the interests of justice." See Rome Statute, *supra* note 23, art. 53(1); see also ANNEX, *supra* note 125, § I(C).

144. Rome Statute, *supra* note 3, art. 53(2)(c); see International Criminal Court, Office of the Prosecutor, *Summary of Recommendations Received During the First Public Hearing of the Office of the Prosecutor: Comments and Conclusions of the Office of the Prosecutor* 6 (2003) [hereinafter *Prosecutor Comments*] (noting as a major recommendation the "[d]evelopment of clear criteria according to which decisions to take no further action are taken 'in the interests of justice'"), [http://www.icc-cpi.int/library/organs/otp/ph/ph1\\_conclusions.pdf](http://www.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf).

145. Other situations also call into question what standard should be used. For instance, if a nation chose to form a "Truth and Reconciliation Committee," should the Chief Prosecutor defer investigation in the interests of justice? South Africa's Truth and Reconciliation Committee was formed to negotiate a transition from apartheid to democratic government. See Jeffrie G. Murphy, *The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1347, 1357 (2000). All parties agreed that in most cases there would be no punishment for evil acts under the previous government. See *id.* In making a full confession and accepting responsibility, most wrongdoers were granted amnesty. See *id.*; see also Evelyn Bradley, *In Search of Justice: A Truth in Reconciliation Commission for Rwanda*, 7 J. INT'L L. & PRAC. 129 (1998) (suggesting a symbolic number of prosecutions of those most culpable for committing genocide may satisfy international obligations, especially where an overly extensive trial program

Prosecutor is not a statesman but an independent entity sworn to bring violators of serious international crimes to justice. Information against Americans will not be ignored.

The *proprio motu* structure sets up a system that can be manipulated by future asymmetric warriors to produce the type of judicial meddling that will help achieve their objectives. Is there any doubt that an enemy of the United States could fashion a “reasonable” argument about potential U.S. violations? Examples abound where adversaries have manipulated facts and images to present a compelling image of the U.S. war machine gone astray.<sup>146</sup> How is the Chief Prosecutor to determine whether or not a military commander’s decision to strike a target such as a mosque—allegedly used by terrorists as a hideout—was a valid target? Is it sufficient to find a destroyed mosque that is admittedly a target of U.S. weaponry? Must there be some evidence of wrongdoing beyond this? Will the Prosecutor be required to conduct preliminary interviews with commanders and witnesses? If so, what effect will this type of judicial meddling have on the United States’ ability to wage its war on terror?

Supporters of the Court often cite procedural safeguards that would thwart the efforts of a politicized Chief Prosecutor, implying that U.S. concerns are “much ado about nothing.”<sup>147</sup> For instance, in exercising the *proprio motu* investigation power, the Chief Prosecutor must submit all supporting data that a crime has been committed to a Pre-Trial Chamber of the Court.<sup>148</sup> This chamber, composed of three judges of the Court,<sup>149</sup> must decide by majority vote whether it

will threaten stability). Should the Chief Prosecutor defer investigation if these commissions excuse military and political leaders, also?

146. See *infra* notes 170–75 and accompanying text (discussing examples of NGO allegations).

147. Mysak, *supra* note 32, at 286 (discussing safeguards). The phrase “much ado about nothing” comes from Shakespeare’s same-titled comedy. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* (1598).

148. See Rome Statute, *supra* note 23, art. 15(3). The Chief Prosecutor must involve the Pre-Trial Chamber only when he “concludes that there is a reasonable basis to proceed with an investigation.” *Id.* art. 15(3). Up to that point, the Chief Prosecutor is acting on the duty to “analyze the seriousness of the information received.” *Id.* art. 15(2).

149. See *id.* art. 39(2)(b)(iii). The Pre-Trial Chamber consists of “not less than six judges” from various Member States, none of whom may be sympathetic to aims of the United States in its war on terror. *Id.* art. 39(1) (outlining numbers of judges in each chamber). Indeed, as few as one judge may authorize many decisions under the statute. See *id.* art. 39(2)(b)(iii) (“The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.”). A “majority of its judges” (i.e., two), however, must act on issues “under articles 15 [initiating official investigations], 18 [deferring to a State’s investigation], 19 [jurisdictional issues], 54(2) [conducting investigations on a State’s territory], 61(7)

will authorize the investigation by finding a “reasonable basis” to proceed.<sup>150</sup> This standard, however, is as low for the judges as it is for the Chief Prosecutor. Supporters also cite the requirement that the Chief Prosecutor and judges be of high moral character and possess integrity.<sup>151</sup> Yet these same qualities—coupled with a view of international law that contradicts U.S. standards—could result in a bold and courageous ICC that reaches very different conclusions than U.S. courts.<sup>152</sup> Moreover, for the purposes of asymmetric warfare, the desired objective may be achieved even if the judges eventually decide not to authorize a formal investigation.<sup>153</sup> In the final analysis, the statutory obligation of the Chief Prosecutor to “pre-investigate” may be the aspect of the system most prone to abuse.

### 3. The Dangerous Role of Non-Governmental Organizations

The United States strenuously objected to the *proprio motu* power of the Chief Prosecutor, especially the ability to use information from any source to initiate investigations into alleged war crimes.<sup>154</sup> Instead, the United States would prefer an ICC that relies on States Parties or the United Nations to initiate complaints,<sup>155</sup> which would make it less likely for questionable or politically-motivated investigations to be pursued. The major U.S. concern is that NGOs with an anti-U.S. agenda will have too much access and influence over the Court’s investigative processes.<sup>156</sup>

[whether to confirm charges after a pre-trial hearing], and 72 [protection of national security information].” *Id.* art. 57(b).

150. Compare *id.* art. 57(2)(a), with *id.* art. 15(4).

151. Rome Statute, *supra* note 23, art. 36(3)(a) (stating that judges must have high integrity); see Mysak, *supra* note 32, at 286.

152. See Smidt, *supra* note 31, at 230 (“The danger in all of this is that a politically-motivated ICC may be sympathetic to unconventional warfare groups involved in wars against colonial powers, racist regimes, or alien occupation forces. Such a court may be supportive of national liberation groups as well.”).

153. For instance, during the conduct of the pre-investigation, deterrence of U.S. action may be attained, diversion of U.S. resources may be achieved, or demolition of U.S. credibility in mass media may be accomplished. See *infra* notes 251–67 and accompanying text (discussing objectives of terrorists).

154. See *supra* notes 125–51 and accompanying text (discussing *proprio motu* power).

155. The Rome Statute does contemplate States Parties referring crimes to the Chief Prosecutor, as well as referrals from the U.N. Security Council. See Rome Statute, *supra* note 23, arts. 13(a)–(b), 14(1).

156. See SCHABAS, *supra* note 7, at 97 (noting concern about “an NGO-friendly litigator with an attitude”). This concern has already been realized. As of February, 2006, the Chief Prosecutor had only received four referrals from States-Parties or the U.N. Security Council; however, he had received over 1,700 communications from other sources. See INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, UPDATE ON COMMUNICATIONS RECEIVED BY THE OFFICE OF THE PROSECUTOR OF THE ICC (available at [www.icc-cpi.int](http://www.icc-cpi.int)). Approximately 20% of those complaints warranted “further analysis” by his office. *Id.*

These NGOs may be sympathetic to the political plight of the “weak,” who have resorted to terrorist measures, or they may simply share with these asymmetric warriors a common desire to reduce U.S. hegemony.

As the Court set its course during its first three years in existence, it appears the U.S. concern about NGO access has been realized. Early in the process the Chief Prosecutor formed a special office to coordinate NGO access to the Court.<sup>157</sup> The role of NGOs in bringing “information” for the Chief Prosecutor to “analyse” has also been formalized; indeed, the Chief Prosecutor has encouraged NGOs to do some minor level of investigation prior to bringing complaints to him for the “pre-investigation” stage:

It would not be reasonable to impose upon the senders of communications [NGOs] the burden of investigating for themselves or conducting an extensive inquiry for the purpose of sending detailed information to the Prosecutor. On the other hand, if the information is too broad and unspecific, it might be impossible for the Office to assess its value without launching a full investigation. . . . [T]he preferred basis for analysis is comparatively detailed and credible information.<sup>158</sup>

While these processes are still in a developmental stage, the “key role” of NGOs in the normal process is now built into the institution of the Court itself.<sup>159</sup> The mechanisms are in place for future asymmetric warriors to exploit this NGO access.<sup>160</sup>

A second U.S. concern is that individuals and NGOs—unlike nation-states—have no real incentive to show restraint in bringing complaints to the Chief Prosecutor. As a general rule, fellow nation-states are more cautious when dealing with diplomatically difficult

157. As one of its first acts, the Office of the Prosecutor established the Jurisdiction, Complementarity and Cooperation Division (JCCD), with the mandate to “provide systematic analysis and recommendations on referrals from states and on communications from citizens and organizations.” Hague Address, *supra* note 106, at 2.

158. ANNEX, *supra* note 125, § I(B).

159. *Editorial: ICC Recognizes Key Role of NGOs*, ICC NEWSLETTER (Int’l Criminal Court, the Hague, The Netherlands), Aug. 2005, at 8 (“The ICC also recognizes the key role played by NGOs and the importance of establishing a solid relationship with them. Regular meetings have served as a framework for an institutionalised dialogue on topical issues between the Court and NGOs . . . .”), available at [http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL5-200508\\_En.pdf](http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL5-200508_En.pdf). According to the Chief Prosecutor, “[t]he contribution of non-governmental organizations is crucial to our work. We are very grateful for their continued assistance and commitment.” Hague Address, *supra* note 106, at 2. The “Coalition for the ICC . . . coordinates our [the Prosecutor’s] work with many of these [NGO] organizations.” *Id.*

160. The main concern is that terrorist groups with informal ties to NGOs will feed misinformation to the NGOs, which will bring the claims to a Chief Prosecutor with a statutory duty to conduct a pre-investigation and inform the accused State Party. See *infra* notes 258–67 and accompanying text (discussing the duty to pre-investigate).

cases, for fear of jeopardizing political alliances and world stability. It is unlikely, then, that States Parties would frequently raise questionable claims to the level of the ICC.<sup>161</sup> Several examples demonstrate this unwillingness.

Consider the international response when Belgium attempted to enforce its universal jurisdiction law.<sup>162</sup> Prior to the dismissal of many cases brought under the statute, the small nation felt strong international pressure to reign in its judicial long-arm.<sup>163</sup> Eventually, Belgium agreed to modify its law, allowing questionable cases to be diverted to the accused nations.<sup>164</sup> Belgium has since shown restraint when dealing with new cases. In June 2003, a lawsuit was filed alleging war crimes in the 2003 invasion of Iraq, naming high-ranking officials including President George W. Bush and British Prime Minister Tony Blair.<sup>165</sup> In response, the United States threatened to suspend funding for a new NATO headquarters in Brussels, Belgium, and warned that officials would “shun” the

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161. In a 1996 Amnesty International report, the organization made this same argument, contending that referrals to the ICC by nation-states and the U.N. Security Council would not be enough:

These two methods are likely to lead to only a limited number of the cases within the court's jurisdiction which national courts are unable or unwilling to pursue being investigated or prosecuted by the Prosecutor and to an unbalanced or biased selection of cases to be brought to the Prosecutor's attention. There is a risk that few states would bring complaints against nationals of other states because such complaints might be viewed as infringing the sovereignty of those states or as interfering with diplomatic relations with those states.

HALL, *supra* note 22.

162. See *supra* notes 99–102 and accompanying text (discussing Belgium's universal jurisdiction laws).

163. For instance, U.S. Secretary of State Colin Powell warned Belgium that its “status as an international hub may be jeopardized” by such lawsuits, despite the fact that the law gave immunity to heads of state and prime ministers while in office. See *Powell Warns Belgium as Iraqi's File War Crimes Charges*, INFORMATION CLEARING HOUSE, Mar. 19, 2002, <http://www.informationclearinghouse.info/article2334.htm>. World leaders even sought to avoid travel in Belgium for fear of the potential consequences. See Amnesty International Memorandum, *supra* note 100. For instance, Israel's Prime Minister, Ariel Sharon, refused to travel to Belgium in 2001 due to allegations filed against him for reported war crimes committed in 1982. See *id.*

164. See Bart Crols, *Belgium to Mend Ties with Washington: PM Verhofstadt, Offers to Halt Debate on Iraq*, Reuters, Sept. 2, 2003 (stating that Belgian Prime Minister hopes elimination of “politically abused” universal jurisdiction law would mend damaged relations). See generally Ratner, *supra* note 103 (discussing Belgium's universal jurisdiction law); see also *supra* notes 99–102 and accompanying text. The Belgian law was also modified to require victims of such crimes to live in Belgium for at least three years. See Fischer-Lescano, *supra* note 140, at 719.

165. See *War Crimes Charges*, *supra* note 105.



country.<sup>166</sup> Under the modified law, the Belgian Cabinet referred the case to the United States and Britain to investigate.<sup>167</sup>

A similar pattern of restraint occurred in Germany, which sought to avoid some of Belgium's missteps when passing its own universal jurisdiction law.<sup>168</sup> In November 2004—in the wake of the Abu Ghraib prison abuse scandal<sup>169</sup>—four Iraqis filed a German criminal complaint against U.S. Defense Secretary Donald Rumsfeld and other U.S. officials.<sup>170</sup> The alleged victims claimed Germany's judiciary was a “last resort” because it was “clear the U.S. government is not willing to open an investigation into these allegations against these officials.”<sup>171</sup> Three months later, the German prosecutor dismissed the complaint, allowing the United States to investigate the claim.<sup>172</sup> This was but one of many examples of German restraint—in the first three years after passage of the 2002 universal jurisdiction law, the German prosecutor's office dismissed twenty-six of these types of complaints, refusing to investigate.<sup>173</sup>

166. *Id.*; see also Fischer-Lescano, *supra* note 140, at 118 (noting Rumsfeld's June 2003 comments about removing the NATO headquarters from Belgium).

167. See *War Crimes Charges*, *supra* note 105.

168. See Gesetz zur Einführung des Völkerstrafgesetzbuches [Act to Introduce the Code of Crimes Against International Law] June 26, 2002, BGBl. I at 6 (defining war crimes prosecutable under Germany's universal jurisdiction law).

169. In 2004, photographs of U.S. soldiers allegedly abusing Iraqi prisoners shocked the collective conscience of the world, severely undermining the U.S. war effort in Iraq. See Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42. Numerous subsequent investigations implicated lower ranking personnel in prisoner abuse, but characterized the incidents as isolated and not reflective of U.S. policy. See *id.*

170. See Andreas Fischer-Lescano, *supra* note 140 (describing the German lawsuit brought by an American human rights organization). The criminal indictment and other pleadings filed at the German Federal Prosecutor's Office are available at, [www.ccrny.org/v2/legal/september\\_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472](http://www.ccrny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472). The complaint was ultimately dismissed by German prosecutors on the grounds of subsidiarity. The German prosecutor's decision is also available at, [www.ccrny.org/v2/legal/september\\_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472](http://www.ccrny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472). See also HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (2005) (discussing *CCR v. Rumsfeld*), available at <http://www.hrw.org/reports/2005/us0405/us0405.pdf>.

171. HUMAN RIGHTS WATCH, *supra* note 170 (quoting the complaint). After German prosecutors dismissed the Abu Ghraib case, Iraqi and Afghan civilians who were alleged victims of torture and abuse filed suit against Secretary Rumsfeld and other military commanders in U.S. federal district court. *Id.* They alleged that Rumsfeld “ordered the torture and abuse of detainees in Iraq and Afghanistan and that he failed to stop the torture and cruel, inhuman, and degrading treatment even after credible reports of such treatment began to emerge in the media and in military documents.” *Id.*

172. See Daryl Lindsey, *Dead-End for War Crimes Accusations: German Prosecutor Won't Pursue Rumsfeld Case*, SPIEGEL ONLINE, Feb. 10, 2005, <http://service.spiegel.de/cache.international/0,1518,341131,00.html>.

173. See Fischer-Lescano, *supra* note 140, at 1.

On the other hand, there is virtually no incentive for NGOs to show restraint in raising cases to the Chief Prosecutor of the ICC. Indeed, the already high number of NGO communications to the ICC and the plethora of cases brought under universal jurisdiction laws indicate that individuals and NGOs will use a similar tactic against the United States at the ICC—once it is a stable bureaucracy<sup>174</sup>—if the United States were to consent to the Court's jurisdiction. These groups would have little to lose and everything to gain; their complaints could provide an opportunity to harness world attention through mass media and bring international scrutiny upon U.S. actions, even if the allegations are ultimately unsubstantiated.<sup>175</sup>

An NGO's desire to promote its own reputation should provide some incentive to raise only the most legitimate complaints; yet, major NGOs such as Amnesty International<sup>176</sup> have frequently made allegations of human rights abuses against the United States without regard to the organization's credibility.<sup>177</sup> It recently branded the detention facilities at Guantanamo Bay a human rights failure by calling it "the gulag of our time."<sup>178</sup> In its annual report, the organization went on to accuse the United States of sanctioning interrogation techniques in violation of the Convention Against Torture.<sup>179</sup> Similarly, some Arab and Palestinian advocacy NGOs<sup>180</sup>

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174. See *supra* note 111 (describing fragility of new ICC).

175. See *supra* notes 77–91 and accompanying text (discussing asymmetric exploitation of mass media).

176. Amnesty International is a self-proclaimed "[w]orldwide movement of people who campaign for internationally recognized human rights." Amnesty.org, About Amnesty International, <http://web.amnesty.org/pages/aboutai-index-eng>.

177. See Smidt, *supra* note 31, at 201 ("While certainly the majority of [NGOs] are motivated by just and noble causes, there is room for concern that some may become so personally and politically involved, that their collection and presentation of evidence should be suspect").

178. Paisley Dodds, *Amnesty International Takes Aim at U.S.*, ASSOCIATED PRESS, May 25, 2005.

179. See Amnesty International, Report 2005, United States of America, <http://web.amnesty.org/report2005/usa-summary-eng>. It also criticized the United States' "secret" detentions of detainees and its decision to have the "military investigat[e] itself," charging that investigators lacked the power to examine the highest levels of government. *Id.* Human Rights Watch, another watchdog NGO, has made similar allegations. See, *U.S.: Military Commissions Changes are 'Cosmetic': Commissions Should be Scrapped for Regular Courts*, HUMAN RIGHTS WATCH: HUMAN RIGHTS NEWS, Aug. 31, 2005 (charging that the military commissions established at Guantanamo Bay, Cuba, are fatally flawed as they do not meet international minimums for fair trials), <http://www.hrw.org/english/docs/2005/08/31/usdom11671.htm>.

180. The proliferation of NGOs that have taken an active interest in the "Arab-Israeli" conflict is staggering, as one organization, NGO Monitor, lists over seventy-five NGOs on that one issue alone. See NGO Monitor, Human Rights NGOs, Arab Israeli Conflict, <http://www.ngo-monitor.org/archives/infofile.htm> (last visited Jan. 26, 2006).

are even more willing to make claims that will bring international media attention and potential investigation by the ICC.<sup>181</sup>

In sum, the ICC is empowered with a broad mandate that sets it apart from any global court in history. One hundred nations of the world have entrusted it with a significant slice of national sovereignty and have empowered it to prosecute nationals of any state for crimes that occur any time in the indefinite future.<sup>182</sup> Its Chief Prosecutor has been given the duty to analyze information he receives from individuals and NGOs, and to initiate an investigation whenever there is a reasonable basis to believe a violation has occurred.<sup>183</sup> Finally, NGOs—some with clear anti-U.S. agendas—have unprecedented access<sup>184</sup> to the Chief Prosecutor's ear and little incentive to show restraint before raising complaints for his attention.

This is a recipe for asymmetric warfare; the risk increases every day that the ICC grows in strength and stature. As part of a broad asymmetric strategy, adversaries of the United States could feed the Chief Prosecutor credible misinformation (i.e., exaggerated or false information) through the access given to NGOs by the Court. The chain of exploitation will have begun.

#### B. *Exploiting Questionable or Fraudulent Claims of U.S. Violations*

With the growing possibility that the processes of the ICC can be manipulated, three types of claims against the United States are possible: legitimate, exaggerated, or fraudulent. Clearly, the most compelling complaints that can be brought are those stemming from genuine U.S. violations of international law. The facts and moral high ground would merge in such a case to bring the most pressure to change U.S. policies. For supporters of the ICC, this scenario provides the strongest argument for the United States to ratify the treaty—the Court would provide a real check on the temptation of the United States to abuse its superpower status to achieve national

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181. The Arab (Palestinian)-Israeli conflict has spawned numerous organizations battling to get their political messages out. For example, the Defence for Children International (Palestinian Section) maintains a running tally of children killed and being detained by Israel, yet fails to account for the number of Israeli children killed by Palestinians. Defence for Children International, Palestinian Section, <http://www.dci-pal.org/english/home.cfm> (last visited Jan. 26, 2006).

182. See CICC, *supra* note 118.

183. See Rome Statute, *supra* note 23, arts. 15(2).

184. See *supra* notes 151–55 and accompanying text (analyzing NGO access to Chief Prosecutor); see also *Prosecutor Comments*, *supra* note 144, at 5 (outlining a recommendation to establish a “permanent but flexible framework for interaction with individuals, academics, scholars, lecturers, women’s and children’s rights practitioners and non-governmental organisations” and establish “guidelines to assist non-governmental organisations in determining their appropriate role . . .”).

objectives. Indeed, some have already accused the United States of doing exactly that in its present conduct of the war on terror.<sup>185</sup>

But the potential for misuse is high. In warfare there will always be collateral damage—dead civilians and destroyed infrastructure are inevitable. In the famous words of General Tecumseh Sherman, “War is hell.”<sup>186</sup> But adversaries of the United States are likely to take any opportunity to accuse the United States of committing war crimes, even where political and military leaders have made all necessary efforts to minimize such damage—an ideal asymmetric weapon.<sup>187</sup>

### 1. Investigating Questionable Claims of U.S. War Crimes

U.S. officials do not fear genuine violations of international law; their true concern is that every tragedy of the U.S. war on terror will become the subject of a high-profile international criminal investigation.<sup>188</sup> The Chief Prosecutor also began “analyzing six situations . . . located in four different continents” as well as a thorough analysis of over 240 complaints stemming from the 2003 Iraq War.<sup>189</sup> These statistics will only grow. The Chief Prosecutor’s statutory duty to analyze all information—combined with increasing access by NGOs that have little incentive to show restraint—could be subverted to serve a future asymmetric cause.<sup>190</sup>

Perhaps the greatest U.S. concern involves the collateral damage that will inevitably result in any violent conflict due to the “fog of

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185. See *supra* notes 170–75, 232–34 and accompanying text (noting accusations against the United States).

186. BASIL HENRY LIDDELL HART, *SHERMAN: SOLDIER, REALIST, AMERICAN* 310 (1993).

187. For an excellent discussion of hypothetical situations where States Parties might try to initiate action in the ICC against U.S. personnel, see Joel F. England, *The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?*, 18 ARIZ. J. INT’L & COMP. L. 941, 951–62 (2001).

188. See Smidt, *supra* note 31, at 197 (noting the ICC’s procedure for referring cases was “the most dangerous aspect of the Rome Statute” that would provide “significant opportunity for politically-based prosecutions”); see also England, *supra* note 187, at 975 (arguing that the United States has interest in ensuring U.S. military members serving in foreign lands are not subject to arbitrary or capricious trials that seek to change foreign policy rather than obtain justice).

189. See Hague Address, *supra* note 106 (acknowledging statistics but unable to reveal details due to confidentiality). In January 2005, the Chief Prosecutor acknowledged “analyzing several other situations that have been brought to the attention of the Prosecutor by individuals and groups.” Press Release, International Criminal Court, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005), [www.icc-cpi.int/press/pressreleases/87.html](http://www.icc-cpi.int/press/pressreleases/87.html); see also IRAQ RESPONSE, *supra* note 135.

190. See *supra* notes 125–60 and accompanying text (discussing *proprio motu* power and NGO access).

war.”<sup>191</sup> Asymmetric warriors hiding themselves among the civilian population will often benefit from maximum collateral damage and its accompanying public outcry.<sup>192</sup> Even the bombing of valid targets could be exploited. For instance, in the 2001 coalition attacks in Afghanistan, Osama bin Laden charged the United States with a war crime based on the bombing of a mosque by a malfunctioning guided missile.<sup>193</sup>

A classic example of asymmetrically exploiting the tragedy of collateral damage occurred during the 1991 Gulf War when the United States used precision guided munitions to destroy the Al Firdos bunker in Baghdad—a high-value target considered to be one of ten secondary leadership bunkers.<sup>194</sup> After the bombing, however, Iraqi sources claimed that hundreds of civilians had been killed in the attack, including over 100 children.<sup>195</sup> Unbeknownst to the United States, Iraq had housed the families of high-ranking civilians above the bunker either to provide them extra safety or to use as human shields.<sup>196</sup> Public outrage against the attack—and charges of war crimes—immediately followed.<sup>197</sup> The United States altered its bombing strategy after this incident to avoid such tragedies for the duration of the war,<sup>198</sup> but the damage could not be undone. Exploitation of this tragedy continued to be a tool of asymmetric “law-fare” as late as 2002 in a lawsuit filed under Belgium’s universal jurisdiction laws.<sup>199</sup>

191. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 88–91 (2005) (“Traditionally, collateral damage is a result of weapon system malfunction, human error, desperation in the fog of war or because it was intended.”).

192. See *id.* at 88 (noting a trend in recent conflicts).

193. [The United States] hit what they claimed to be al-Quaida positions in Khost and dropped a guided missile at a mosque. They said that this was a mistake. After investigations, it was confirmed that the ulema were reciting their Ramadan night prayers . . . . They bombarded the mosque while the Muslims were praying, killing 150.

September11News.com, Osama bin Laden Speeches, Dec. 26, 2001 (quoting Mr. bin Laden), <http://www.september11news.com/OsamaSpeeches.htm>. But see John Lancaster & Vernon Loeb, *U.S. Forces Engaging Taliban in Combat*, WASH. POST, Nov. 17, 2001, at A-1 (documenting the bombing and noting that the Pentagon attributed the mishap to a “guidance malfunction”).

194. For a complete discussion of the facts and consequences of the Al Firdos incident, see O’Halloran, *supra* note 49, at 24–25 (outlining facts as reported in this paragraph).

195. *Id.* at 24.

196. *Id.*

197. *Id.* at 25.

198. See *id.* at 26 (“[T]argeting strategies changed literally overnight in the wake of the Al Firdos bombing.”).

199. This was one of the lawsuits ultimately dismissed by the Belgian courts. See *supra* note 106 and accompanying text.

Though collateral damage is inevitable, assessing its probability can be difficult. Even among coalition allies there is often disagreement about what constitutes appropriate targeting; such decisions become even more controversial when considering dual-use facilities,<sup>200</sup> such as the Al Firdos bunker. Moreover, incidents where the expected collateral damage exceeds military necessity could lead to actionable charges under the Rome Statute.<sup>201</sup> But are judges and prosecutors of the ICC—who are not required to possess a military background or expertise in application of the laws of war<sup>202</sup>—in the best position to evaluate these difficult determinations?

If the United States were a party to the ICC, every tragedy of collateral damage could potentially result in allegations of crimes against high-ranking U.S. officials.<sup>203</sup> In practice, to avoid ICC jurisdiction and receive the protection of complementarity,<sup>204</sup> the United States would prudently conduct full investigations in every instance of civilian loss. These internal investigations would require

200. See Reynolds, *supra* note 191, at 84.

201. See Rome Statute, *supra* note 23, art. 8(2)(b)(iv) (defining as a war crime:

[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.)

202. Although the statute does not strictly require this expertise, some expertise in the relevant area is needed. See *id.*, art. 36(3)(b)(i)–(ii) (requiring judges have established competence in relevant areas of criminal law or international law such as international humanitarian law and law of human rights, but not requiring expertise in laws of war); see also SCHABAS, *supra* note 7, at 152:

The Statute requires a degree of expertise in the subject matter of the Court. Here it creates two categories of candidates, those with criminal law experience and those with international law experience . . . . [A] minimum of nine judges must come from the criminal law profile and a minimum of five from the international law profile.

203. Note, however, that “crimes against humanity” require acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Rome Statute, *supra* note 23, art. 7(1). Similarly, “war crimes” require acts “committed as part of a plan or policy or as part of a large-scale commission of such crimes.” *Id.* art. 8(1). This language suggests a high bar for consideration by the Court; however, it is unlikely a U.S. incident will involve a solitary attack in a vacuum. Such acts are often part of a larger plan against an enemy such as Al Qaeda. See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 649 (May 7, 1997). As one ICTY decision has stated, a “single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offenses to be held liable.” *Id.*; see also England, *supra* note 187, at 956–57 (suggesting that NATO’s Kosovo bombing campaign could satisfy the aggregate requirements set forth in the Rome Statute).

204. See *infra* notes 276–84 and accompanying text (discussing complementarity and its ramifications).

interviews with high-level officials (potentially the Secretary of Defense and President) about their role in the attack decision, the intelligence available at the time, and the chain of command's operation during the incident. In many cases, critics would not be satisfied that the United States conducted a truly "impartial" investigation.<sup>205</sup>

Additionally troubling is how the ICC may come to view itself. While ICTY cases are not binding on the ICC, in the *Tadic Appeal on Jurisdiction* the tribunal stated:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. . . . [When an] international tribunal such as the present one is created, it must be endowed with primacy over national courts.<sup>206</sup>

While only dicta, this statement reflects a growing sentiment that international courts must have primacy over state sovereignty. In the future, when the ICC becomes a stable bureaucracy, it may raise enough political capital to confront the world's most sovereign nation—the United States.<sup>207</sup>

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205. For instance, in the Abu Ghraib prisoner abuse scandal, the United States undertook a full investigation. Of the numerous investigations that looked into the prisoner abuse scandal at Abu Ghraib, the report by Major General Antonio Taguba received the most attention. But even after certain individuals were prosecuted, critics charged the United States with conducting a sham investigation. Perhaps the most surprising review came from Captain Lisa Weidenbush, an Army operations officer with the 800th Military Police Brigade—the unit that ran the prison and took the brunt of General Taguba's criticism. See Edward T. Pound, *A Dissent from Within the Ranks*, U.S. NEWS & WORLD REP., June 21, 2004, at 66. In a scathing twenty-five-page report, Captain Weidenbush wrote, "I submit that the report was a conclusion in search of an investigation . . . and not an investigation seeking truth." *Id.* This sentiment was echoed by Sergeant Charles Graner, one of the Army prison guards convicted at a court-martial, who alleged that officers in charge of the prison were aware of the maltreatment and that military intelligence officers were present for the abuse. See *England Sentenced to Three Years*, ASSOCIATED PRESS, Sept. 28, 2005, <http://www.foxnews.com/story/0,2933,170655,00.html>. Human Rights Watch was especially critical of the Taguba Report, calling for a Special Prosecutor. See HUMAN RIGHTS WATCH, *supra* note 170 ("Because there is no realistic possibility that the U.S. Attorney General or the U.S. military will investigate these senior leaders for the crimes described above, the appointment of a special prosecutor is warranted.").

206. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Deference Motion for Interlocutory Appeal on Jurisdiction, ¶ 58 (Oct. 2, 1995).

207. Consider how the Inter-American Commission on Human Rights (IAHCR) of the Organization of American States (OAS) has confronted the United States with regard to the alleged torture of detainees at Guantanamo Bay. Although the United States has ignored rulings from this "court" before—it has never consented to the court's jurisdiction—in 2002 the IAHCR "ordered" the United States to take "precautionary measures" to ensure that detainees were not entitled to status as prisoners of war, and expressed concern that the United States might be torturing the detainees. See Center for Constitutional Rights, Docket: Petition to Inter-American

Confronting the United States will be made easier by the fact that European prosecutors have already investigated potential U.S. war crimes. During NATO operations in Kosovo, Carla Del Ponte,<sup>208</sup> Chief Prosecutor for the ICTY,<sup>209</sup> “looked into complaints regarding NATO’s bombing campaign in Yugoslavia. She met with individuals from the Russian Duma, various non-governmental agencies, and international legal experts to discuss NATO’s actions in Kosovo.”<sup>210</sup> This step came after human rights groups argued that investigation of potential NATO war crimes was “essential if the Hague tribunals were to be seen as impartial.”<sup>211</sup> A similar process is occurring with investigations by the European Parliament and the Council of Europe into the possibility of secret U.S. prisons in Europe.<sup>212</sup>

The ICC’s Chief Prosecutor will experience similar political pressures to investigate questionable claims of war crimes allegedly committed by entities such as NATO or the United States. Unlike the ICTY’s Prosecutor, however, the ICC’s Chief Prosecutor has broad investigative obligations<sup>213</sup> and almost universal international support.<sup>214</sup> This institutional structure might create a global “Ken

Commission on Human Rights on Behalf of the Guantanamo Detainees, [http://www.ccr-ny.org/v2/legal/september\\_11th/sept11Article.asp?ObjID=71t0qaX9CP&Content=134](http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=71t0qaX9CP&Content=134). The U.S. experience with the IAHCR seems to affirm the fear that a ratified and fully empowered ICC could take the same stance.

208. Mrs. Del Ponte is a Swiss lawyer who was the third prosecutor to head the ICTY. *At a Glance*, *supra* note 114. She has stated, “nobody is above the law or beyond the reach of international justice.” *Id.*

209. *See supra* notes 18–21 and accompanying text (explaining the ICTY).

210. *See* Smidt, *supra* note 31, at 220.

211. Robin Oakley, *Del Ponte Condemns Yugoslav Stand*, Jan 26, 2001, <http://archives.cnn.com/2001/WORLD/europe/01/26/davos.un/>. Mrs. Del Ponte initially resisted these requests because she explained that allegations against NATO were “not my priority” compared with the “thousands of bodies” of war crime victims from former Serbian officials such as Slobodan Milosevic. *Id.* A confidential report was prepared by an internal committee of the ICTY that was created to advise the Chief Prosecutor on whether a formal investigation was required. *See* Danner, *supra* note 117, at 539 (discussing the incident). The committee ultimately recommended that an investigation was not required and the Chief Prosecutor chose to follow the report’s recommendation. *See id.* Critics debated whether the preliminary investigation detracted from the impartiality of the ICTY or was biased in favor of NATO. *See id.* The ICC’s Chief Prosecutor will certainly be confronted by these kinds of charges also, and will look to the ICTY experience for guidance.

212. *See* Dan Bilefsky, *EU Terror Chief Lacks Proof of CIA Prisons*, INT’L HERALD TRIBUNE, Apr. 20, 2006.

213. *See supra* notes 128–48 and accompanying text (discussing the Chief Prosecutor’s statutory duty to investigate). Moreover, the Office of the Prosecutor has a broad ability to investigate crimes within other nations’ borders. *See* Int’l Criminal Court, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 9 (2003), [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) [hereinafter *Policy Paper*] (“[A] variable number of investigation teams, the size and composition of which will also fluctuate . . . . Investigation teams will include staff members who are nationals of the countries targeted by the investigations.”).

214. *Policy Paper*, *supra* note 213, at 9.



Starr” problem that could be exploited by modern asymmetric warriors to achieve their objectives.<sup>215</sup>

## 2. Inventing Fraudulent Claims of U.S. War Crimes

While questionable claims may provide the opportunity to exploit the ICC, policymakers also fear a less frequent but more devastating asymmetric tactic: creating fraudulent claims of U.S. violations out of whole cloth. Adversaries of the United States could perpetrate this fraud on the ICC in two ways: (1) placing innocent civilians at high-priority targets to create heavy civilian casualties from U.S. attacks, and (2) committing war crimes while disguised as using troops in order to “frame” the United States, or both.

Regarding the first possibility, consider again the Al Firdos bunker incident during the 1991 Persian Gulf War.<sup>216</sup> Out of malevolence or sheer stupidity, the Iraqis placed families of high-ranking military leaders in harms way in the upper floors of a bunker which was also a high-priority leadership target.<sup>217</sup> Its destruction—and accompanying civilian loss—resulted in both propaganda and legal opportunities.<sup>218</sup> In addition, modern adversaries are willing to use innocent civilians to raise the stakes on U.S. attacks. For instance, Libya “threatened to surround the reported site of an underground chemical plant with ‘millions of Muslims’ in order to ward off attacks.”<sup>219</sup> Since modern terrorists have no regard for innocent human life, they would not hesitate to use this same tactic if an asymmetric gain could be achieved. Indeed, U.S. officials predict that future enemies will likely disperse “military assets into civilian areas in the hopes of causing collateral damage” that can be “trumpeted to the world media . . . all in the hopes of dissuading

215. Professor Michael P. Scharf humorously highlighted this point to the Senate Foreign Relations Committee when he testified that some U.S. officials fear that an independent ICC Prosecutor would lead to an “international Ken Starr problem.” Seguin, *supra* note 20, at 100 (noting that even with safeguards, the United States still fears a politically motivated Prosecutor could unfairly target the United States). Ken Starr is a U.S. lawyer and former judge who was appointed as an Independent Counsel to investigate President Bill Clinton’s Whitewater land transactions. He submitted the Starr Report to Congress, which led to President Clinton’s impeachment on charges arising from the Monica Lewinsky perjury and sex scandal. He was criticised by some for expanding the scope of his investigation too far and abusing prosecutorial powers. For a history and discussion of the role of the independent prosecutor in America, see generally Donald C. Smaltz, *The Independent Counsel: A View From Inside*, 86 GEO. L.J. 2307 (1998).

216. See *supra* notes 197–202 and accompanying text (discussing the Al Firdos incident).

217. See *id.*

218. See *id.*

219. Dunlap, *supra* note 66, at 79 (quoting *Libyans to Form Shield at Suspected Arms Plant*, BALT. SUN, May 17, 1996, at 14).

attacks by compassionate Americans concerned for the fate of those who might be unintentionally killed.”<sup>220</sup>

Regarding the second possibility, the idea of “framing” the United States for war crimes will appeal to asymmetric adversaries, but only if they can achieve it successfully. This is no idle fear: during the 2003 invasion of Iraq, reports surfaced that U.S. military uniforms had been stolen; insurgents intended to use those uniforms to pose as U.S. military members and commit war atrocities.<sup>221</sup> These tactics have also been used in the past. Colombian kingpin rebels may have intimidated peasants to bring false claims against key military leaders.<sup>222</sup> Further, some believe Rwanda and Uganda used this tactic to garner world sympathy by feeding “the media and NGOs false stories on military operations and atrocities in Zaire.”<sup>223</sup> Finally, one fictional account envisions a future U.S. defeat where an unscrupulous enemy detonates a nuclear weapon on his own soil during a conventional U.S. air strike to convince the world media that the United States has engaged in the most grievous of war crimes.<sup>224</sup>

Consider this potential future scenario concerning the ICC. Terrorists posing as U.S. troops would commit war atrocities. These crimes would be witnessed by actual victims who may truly believe that the United States has carried out the offenses. Reports would surface, with the corresponding negative media publicity. When evidence of the crimes reached the ICC, the Chief Prosecutor would have no choice but to conduct an initial inquiry. The media attention and propaganda effort would intensify. Regardless of any U.S. investigation into the incident—which would likely find no evidence of U.S. involvement—the pressure on the ICC to formally investigate this “clear evidence” of U.S. atrocities would be overwhelming. A well-done “framing” of this sort could pose serious threats to international support of the U.S. war on terror. While this scenario is currently but a work of fiction, it is notable that after the dramatic attacks on September 11, 2001, the Pentagon quickly consulted

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220. *Id.* at 79–80.

221. At the start of the invasion, a U.S. military official reported that Iraq was “acquiring military uniforms ‘identical down to the last detail’ to those worn by American and British forces and plans to use them to shift blame for atrocities.” *Official: Iraqis Plan Atrocities in U.S. Uniforms*, FOXNEWS.COM, Mar. 7, 2003, <http://www.foxnews.com/story/0,2933,80332,00.html>. Saddam Hussein was reported to have given his Fedayeen Saddam troops instructions to commit “reprisals against the Iraqi people so that they could pass the atrocities off as the work of the United States and the United Kingdom.” *Id.*

222. See O’Grady, *supra* note 91, at A17.

223. Rhodes, *supra* note 69, at 11.

224. Charles J. Dunlap, Jr., *How We Lost the High-Tech War of 2007*, THE WKLY. STANDARD, Jan. 29, 1996, at 22.

Hollywood to help “dream up terrorist scenarios for the post- 9/11 world.”<sup>225</sup>

Therefore, whether by exaggerating the tragedies of war or by creating fraudulent violations of international law, asymmetric warriors may be able to exploit the processes of the ICC. Whether such claims are eventually substantiated or not, the chain of events that these investigations—or even pre-investigations—will set in motion can help accomplish asymmetric objectives.<sup>226</sup>

### C. *Exploiting the International Criminal Court through Use of Mass Media*

The practice of “media warfare” works hand-in-hand with the type of asymmetric exploitation of the ICC that could occur in the future. As the world’s only remaining superpower, anti-U.S. sentiment is not difficult to stir, especially after the 2003 U.S.-led effort to oust Iraqi dictator, Saddam Hussein. There is little doubt that propaganda throughout the past forty years has fueled international anti-U.S. sentiment. “Among intellectuals and media of Western Europe and the third world, a strong anti-U.S. bias has been prevalent. There is a large and well prepared market for the worst possible stories about American military action.”<sup>227</sup>

This sets the stage for various asymmetric tactics. Those who oppose U.S. policies and actions have a built-in media audience for whom to conduct show trials in the fashion of the resoundingly successful Russell Tribunal during the Vietnam conflict.<sup>228</sup> For instance, a Japanese “International Criminal Tribunal for Iraq”—made up of a four-lawyer panel conducting a “people’s tribunal” with no legal effect—found President Bush and Prime Minister Blair guilty of numerous war crimes.<sup>229</sup> These “show trials” have become

225. Robert F. Howe, *Star Wars to Real Wars*, READERS DIGEST, Oct. 2004, <http://tinyurl.com/zlejz> (“Military analysts were methodical, but proved to be constricted by a slavish devotion to real-world specs. By contrast, the only boundary Hollywood knew was the limit of its imagination.”). “The 9/11 Commission Report” also faulted the government for its “failure of imagination.” NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 336 (2004), available at <http://www.9-11commission.gov/report/index.htm>.

226. See *infra* Part III.D.2 (discussing terrorists’ asymmetric objectives).

227. O’Halloran, *supra* note 49, at 14 (citing JAMES S. CORUM, INFLATED BY AIR: COMMON PERSPECTIVES OF CIVILIAN CASUALTIES FROM BOMBING 25 (1998), <http://research.maxwell.af.mil/papers/ay1998/awc/98-080.pdf>).

228. See *supra* notes 98–100 and accompanying text (explaining the Russell Tribunal).

229. Julian Ryall, *Lawyers’ Panel Indicts Bush, Blair*, AL JAZEERA, Mar. 7, 2005, <http://english.aljazeera.net/NR/exeres/D8C1C363-308C-41F7-8B32-935312621768.htm> (“Bush is guilty of genocide for use of ‘devastating’ economic sanctions, as well as war crimes for attacks against civilians and the use of indiscriminate weapons, such as

common since the war on terror began.<sup>230</sup> But the mass media bedlam that has evolved since the Russell Tribunal of the 1960s makes this type of “show trial” more of a curiosity than a true media event today—such stories often get lost in the chaos. As with complaints filed under universal jurisdiction laws in countries such as Belgium and Germany, these legal feigns lack any real significance because they pose no real threat to the United States or its officials.<sup>231</sup>

But imagine the media interest in a case that could potentially lead to the international criminal prosecution of U.S. military leaders or high-level political figures.<sup>232</sup> If the United States joins the ICC and consents to its jurisdiction, complaints lodged before the Court would pose a true threat—with the corresponding media circus. The Chief Prosecutor would conduct a “pre-investigation” according to his statutory duty, possibly even taking “written or oral testimony at the seat of the Court.”<sup>233</sup> Failure to satisfy the Chief Prosecutor could result in a court order that the United States could not ignore as it has done with lesser courts.<sup>234</sup> The nation could even draw the ire of

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cluster bombs and depleted uranium weapons. The attack on Falluja also makes him guilty of genocide and crimes against humanity.”).

230. For instance, in a lawsuit filed by Filipino and foreign lawyers before another “people’s tribunal” in 2002, President Bush, British Prime Minister Tony Blair, and other world leaders were accused of conducting a “war of aggression” against Iraq. Dabet Castañeda, *GMA, Bush to Face War Crimes Tribunal*, INDEPENDENT MEDIA CENTER, Mar. 20, 2004, <http://wc.open-publishing.be/news/2004/03/282.php>. The lawsuit accused the “defendants” of “undermining the UN and preventing it from carrying through its professed role of establishing and maintaining peace in the world.” *Id.* Similarly, Akira Maeda, a Tokyo Zokei University professor, organized a 2003 civic tribunal with eleven prosecutors that “indicted” President George W. Bush for war crimes against the Afghan people. *Bush ‘Indicted’ Over War Crimes*, THE JAPAN TIMES, July 1, 2003. The “indictment” charged Bush with “aggression, attacks against civilians and nonmilitary facilities, and the torturing and execution of prisoners.” *Id.*

231. See *supra* notes 105–07 and accompanying text (discussing lack of impact of these lawsuits).

232. Many high-profile cases have generated high international media interest. In 1994, there was extensive media coverage when a Singaporean court sentenced a U.S. teenager to six strokes of a rattan cane and four months in prison for spray-painting cars in Singapore. See Charles P. Wallace, *Singapore Blasts Back at Clinton in Caning Case*, LOS ANGELES TIMES, Mar. 9, 1994, at A4. The sentence was considered too harsh by the United States and a war of words erupted between the two nations. See *id.* Saddam Hussein’s upcoming trial has also received much media attention. See, e.g., John Daniszewski, *In Iraq, a Case Without Precedent*, LOS ANGELES TIMES, Mar. 6, 2005, at A1. The Michael Jackson child molestation trial also garnered worldwide attention. See, e.g., Mark Reynolds, *Jacko Will Face Trial: Star on Sex Charges “Looks Forward to His Day in Court”*, DAILY MAIL (London), Apr. 23, 2004, at 31.

233. Rome Statute, *supra* note 23, art. 15(2); see also *supra* notes 128–48 and accompanying text (discussing statutory duty of Prosecutor).

234. See *supra* note 123 (discussing U.S. treatment of the ICJ).

the ICC in the form of sanctions<sup>235</sup> if the United States were to impede the duties of a Court official.<sup>236</sup> Picture the inherent drama that would result if the United States chose to defy the ICC—the headline in USA Today might read: “United States Refuses to Obey World Court!” Indeed, such a turn of events could jeopardize the very legitimacy and survival of the Court.<sup>237</sup> As an asymmetric strategy, then, raising alleged grievances before the ICC might prove to be an effective means to challenge U.S. policy in the “court of mass media.” It could result in the deterrence of U.S. action and the decline of U.S. prestige.

Even now, critics of the United States have exploited mass media to take advantage of the unpopular U.S. opposition to the ICC. Those U.S. critics argue that by the United States’ failure to participate in the Court, it no longer champions the cause of international justice.<sup>238</sup> In the world’s eyes, U.S. actions have had a “corrosive effect” on diplomacy.<sup>239</sup> Fueling this fire, the United States’ attempt to secure Article 98 agreements<sup>240</sup> with many countries<sup>241</sup> has led to a perception exploited in the world media that the United States is affirmatively acting to undermine the ICC.<sup>242</sup> Attempts to secure these controversial agreements have garnered negative media attention and contributed to the image of the U.S. “bully.”<sup>243</sup> For example, President Alfredo Palacios of Ecuador, in refusing to sign an

235. See Rules of Procedure and Evidence, *supra* note 141, Rule 166 (allowing sanctions to be imposed for violations of Article 70 of Rome Statute).

236. See Rome Statute, *supra* note 23, art. 70(1)(d).

237. This conflict is akin to a U.S. constitutional crisis where the executive branch refuses to carry out an order of the judicial branch.

238. The role of the United States as a promoter of global human rights has been called into question because of this opposition. Telci, *supra* note 43, at 484. Given this intense anti-U.S. campaign, one might question whether opposition to the Court is even more damaging to U.S. interests than if it were a party.

239. Orentlicher, *supra* note 28, at 430.

240. See *supra* note 108 (explaining Article 98). See generally David Shorr, *Hegemony and its Ideological Blind Spots*, 19 CONN. J. INT’L L. 399, 402–03 (2004) (discussing the U.S. attempt to secure Article 98 agreements). Pursuant to these bilateral agreements, each country would agree not to surrender a U.S. national to the ICC if requested to do so by the Court. Telci, *supra* note 43, at 474.

241. By December 2003, sixty-six countries had signed Article 98 agreements with the United States. Orentlicher, *supra* note 28, at 425. Many did so under the threat of losing U.S. aid if the agreements were not signed. *Id.*

242. The European Community and Council of Europe have raised concerns that these immunity deals sought by the United States violate the spirit, if not the express letter, of Article 98 of the Rome Statute. *Id.* at 424; see also Jeffrey S. Dietz, Comment, *Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court with U.S. Article 98 Agreements?*, 27 HOUS. J. INT’L L. 137, 179 (2004) (observing that the ICC may find Article 98 agreements invalid); Telci, *supra* note 43, at 479 (arguing Article 98 agreements legally unenforceable). *But see* Telci, *supra* note 43, at 466 (noting the idea for agreements encouraged by the European Union as way for the United States to resolve concerns over the ICC).

243. See generally Telci, *supra* note 43.

Article 98 agreement stated, "Absolutely nobody is going to make me cower."<sup>244</sup> Not surprisingly, the forces of NGOs have mobilized to monitor and comment in the media on U.S. efforts to secure Article 98 agreements, even influencing ICC State Parties to not sign them.<sup>245</sup>

The current media campaign to soil the reputation of the United States as a champion of international rights may only be a prelude to the media symphony that can be conducted to asymmetrically harm U.S. interests, especially if the United States ratifies the Rome Treaty.<sup>246</sup> This concern has been affirmed by the Court's outreach to mass media by constructing a two-level "media centre" located adjacent to the ICC courtrooms at the Hague.<sup>247</sup>

#### D. *Asymmetric Objectives of Exploiting the International Criminal Court*

Future asymmetric warriors will use various methods to exploit the ICC,<sup>248</sup> but these techniques are not employed for their own sake. Instead, adversaries of the United States will coordinate these asymmetric tactics to achieve three main objectives to combat the war on terror: (1) creating risk-averse behavior by U.S. policymakers and military leaders, (2) diverting resources and attention from the primary mission of fighting terrorism, and (3) splitting up international coalitions that support the war on terror.

##### 1. Creating Risk-Averse Policymakers and Commanders

The primary aim of future asymmetric "law-fare" attacks will be to deter the United States from "doing good" and aggressively fighting its war on terror.<sup>249</sup> Terrorist groups such as Al-Qaeda would relish

244. *Ecuador Refuses to Sign ICC Immunity Deal for US Citizens*, SCHOOL OF THE AMERICAS WATCH, AFP NEWS, June 22, 2005, <http://www.soaw.org/new/article.php?id=1135>. Ecuador's refusal to sign the Article 98 agreement will likely cost Ecuador seventy million dollars of U.S. military aid each year. *Id.*

245. See Telci, *supra* note 43, at 477 (describing the role of NGOs in Article 98 analysis).

246. Of course, even if the United States never ratifies the treaty, it can experience similar negative media publicity if the Court chooses to indict a U.S. citizen despite the nation's "non-party" status. See *supra* note 110 (pointing out that the ICC may indict American citizens even if the United States refuses to become a party). The distinction, however, is that the United States will not have promised to cooperate with the Court as part of its treaty obligations. See *id.*

247. See *Media Centre Ready to Accommodate Journalists*, ICC NEWSLETTER (International Criminal Court, the Hague, Neth.), Aug. 2005, at 8 (highlighting completed construction of new facility), available at [http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL5-200508\\_En.pdf](http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL5-200508_En.pdf).

248. See *supra* Part III.A-C (discussing three methods to exploit the ICC).

249. See Smidt, *supra* note 31, at 222 ("Future opponents of the United States are likely to use 'asymmetrical' warfare in order to attempt to defeat the United States and its allies."). The United States, however, must be careful in its attempt to "do

the ability to cow the United States into a defensive posture or one of complete international isolation.<sup>250</sup> If these groups can prevent U.S. attacks against them by creating risk-averse decisionmakers, they will have gone far in neutralizing their primary threat.

Risk-averse behavior begins with the fear of taking risks and exposing oneself to danger. With regard to the ICC, United States policymakers are most concerned about the danger to U.S. civilian and military leadership posed by investigations or prosecutions.<sup>251</sup> While testifying in favor of the ASPA, U.S. Ambassador John Bolton stated:

Now let us be clear here. Our main concern under the Rome Statute should not be that the prosecutor will indict the occasional American soldier who contrary to his or her training and doctrine allegedly commits a war crime. Our main concern should be for the President . . . and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable prosecutor.<sup>252</sup>

The mere possibility of an ICC investigation could curtail U.S. military and peacekeeping activities.<sup>253</sup> Military and civilian leaders may adopt stricter interpretations of proportionality, reducing the speed, mass, and dominance that have characterized U.S. military operations. Considering the relatively subjective nature of wartime decisions, the United States could choose to operate a conservative war-fighting plan for fear it will need to defend its decisions to a civilian court composed of members who may have very different

good" so that policy makers avoid adopting the same tactics used by terrorists, such as arbitrary detention and the use of aggressive interrogation techniques. *See supra* notes 181–82 and accompanying text and *infra* note 286 (discussing complaints about alleged U.S. tactics against detainees at Guantanamo Bay).

250. The United States may be "so averse to taking any casualties that it will hesitate to react in the face of aggression or massive violations of international humanitarian law, unless U.S. interests are directly at risk." Smidt, *supra* note 31, at 224.

251. This concern is clearly warranted: "[The Office of the Prosecutor] will initiate prosecutions of the leaders who bear most responsibility for the crimes." *Policy Paper, supra* note 213, at 3; *see also Prosecutor Comments, supra* note 144, at 2 (noting that this concept received "strong support" at the 2003 Public Hearing).

252. *The International Criminal Court: Hearings before the Comm. on International Relations H.R.*, 106th Cong. 6 (2000); *see* Christopher M. Van de Kieft, *Uncertain Risk: The United States Military and the International Criminal Court*, 23 CARDOZO L. REV. 2325, 2347 (2002) (discussing comments by John Bolton). Mr. Bolton testified while serving as a Senior Vice President at the American Enterprise Institute. He currently serves as U.S. Ambassador to the United Nations.

253. *See* Van de Kieft, *supra* note 252, at 2336–37 (quoting 1998 comments by Ambassador David J. Scheffer, arguing that complementarity "is not the answer" to investigations of peacekeeping operations that have been approved by the U.N. to enforce international law). *But see* England, *supra* note 187, at 958–59 (noting the argument that bombing in the name of humanitarian intervention is not consistent with self defense).

perspectives on the parameters of proportionality.<sup>254</sup> Some might argue these operational constraints would be a positive development; however, history has shown that piecemeal efforts in warfare increase risks to all parties involved and are more harmful in the long run.<sup>255</sup> For instance, the slow buildup of NATO's air campaign in Kosovo may have contributed to the length of the war and resulting loss of life—an unintended consequence of proportionality.<sup>256</sup>

Recent history provides examples of how asymmetric tactics can achieve a response from military and political leaders hoping to avoid negative media publicity.<sup>257</sup> During the 1991 Gulf War, the United States changed its targeting strategy after the Al Firdos bunker tragedy resulted in hundreds of civilian deaths.<sup>258</sup> After the massive civilian casualties, General Norman Schwarzkopf required all Baghdad targets to be personally approved by him; he also sharply limited attacks against other National Command Authorities.<sup>259</sup> Similar concerns led to military decisions during the December 1998 air strikes in Iraq, dubbed Operation Desert Fox. U.S. military commanders feared the media's use of images of the air strikes during the Muslim holy month of *Ramadan* and thus allowed only four days to strike key Iraqi targets; this mission was almost "undoable."<sup>260</sup> Moreover, when Belgium and other countries began to use universal jurisdiction laws, U.S. officials modified their diplomatic travel schedules to avoid those countries.<sup>261</sup>

These examples reflect an underlying concern repeatedly raised by officials in the Clinton Administration: "The Rome Statute imposes a formal equality of law in the face of a radical inequality of exposure: [w]ith vastly larger military commitments than any other country, the United States is more likely to have soldiers deployed in conflicts that may give rise to war crimes charges."<sup>262</sup> This concern is well-

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254. See *supra* note 202 (discussing qualifications of the ICC judges).

255. William S. Nash, *The ICC and the Deployment of U.S. Armed Forces*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 161 (Sarah B. Sewall & Carl Kaysen eds., 2000).

256. *Id.*

257. See O'Halloran, *supra* note 49, at 12 ("The United States' sensitivity to anti-American propaganda can result in changing viable strategies in order to preemptively defuse enemy propaganda opportunities.")

258. See *supra* notes 197–202 and accompanying text (discussing the Al Firdos incident).

259. See MICHAEL R. GORDON & BERNARD E. TRAINOR, *THE GENERALS' WAR* 326 (1995) ("[T]he Al Firdos raid had accomplished what the Iraqi air defenses could not: downtown Baghdad was to be attacked sparingly, if at all."); Dunlap, *supra* note 66, at 78 (citing the Al Firdos bunker incident as the cause of U.S. leaders foregoing further operations against Baghdad).

260. O'Halloran, *supra* note 49, at 12.

261. See Ratner, *supra* note 103, at 891 (discussing the possibility of U.S. officials being barred from traveling to Belgium); see also *supra* note 167 (discussing limited travel by other world leaders including Israel's Prime Minister, Ariel Sharon).

262. Orentlicher, *supra* note 28, at 417.



founded: the Rome Statute expressly subjects military commanders and other “superiors” to criminal responsibility for crimes “committed by forces under his or her effective command and control.”<sup>263</sup> It also holds soldiers criminally responsible for following “manifestly unlawful” orders, which include “orders to commit genocide or crimes against humanity”<sup>264</sup>—charges recently raised against the United States.<sup>265</sup>

Human nature indicates that exposing military and political leaders to criminal liability will modify how they make decisions. While those who oppose war for any reason may applaud such a change, those who prey on the weak and divided would also rejoice, for they would have attained through legal processes that which they could not achieve on the battlefield.

## 2. Diverting Resources from the War on Terror

Even where U.S. policymakers and commanders do not become risk-averse, asymmetric exploitation of the ICC could betray secrets,<sup>266</sup> waste resources, and distract leadership. Osama bin Laden himself has advocated these methods to bankrupt the United States in its war on terror.<sup>267</sup> Diverting resources could have a significant impact on military operations:

263. Rome Statute, *supra* note 23, art. 28 (further requiring that commander and superior “knew or . . . should have known” about crimes and “failed to take all necessary and reasonable measures” to prevent them).

264. *Id.* art. 33. By the Statute’s own terms, a U.S. soldier may be criminally responsible for following an order that involves “[t]orture,” “[i]mprisonment . . . in violation of fundamental rules of international law,” or “[o]ther inhumane acts . . . causing great suffering . . .” *Id.* art. 7(1)(e), (f), (k).

265. See *supra* notes 233–34 and accompanying text (discussing recent allegations).

266. One concern of military commanders and policy makers must be to protect capabilities and plans in the U.S. war on terror. The Chief Prosecutor may require access to sensitive classified information to conduct some ICC investigations. See Rome Statute, *supra* note 23, art. 72(5) (giving nation-states control over information they wish to keep secret, but requiring cooperation). If a state refuses disclosure, see *id.* arts. 72(6), 93(4) (allowing nation-states to refuse disclosure), the only ICC remedy is to find the state “not acting in accordance with its obligations under the Statute,” *id.* art. 72(7)(a)(ii), and refer the case to the Assembly of States Parties or the U.N. Security Council, see *id.* arts. 72(7)(a)(ii), 87(7). Although the treaty indicates classified information will be handled in a secure ICC environment, the reality is that U.S. national interests could be compromised when sensitive information comes into the hands of the Chief Prosecutor, judges, and their staffs. See Steele, *supra* note 65, at 143. This concerns policy makers because “intelligence is indeed a virtual substitute for violence, for capital, for labor, for time, and for space.” *Id.*

267. In a speech given on November 1, 2004, Mr. bin Laden stated:

[It is] easy for us to provoke and bait this [Bush] administration. All that we have to do is to send two mujahidin to the furthest point east to raise a piece of cloth on which is written al-Qaida, in order to make the generals race there to cause America to suffer human, economic, and political losses . . . This is in

It is foreseeable that groups opposed to all use of military force could tie up military resources and man hours by making allegations of war crimes, no matter how frivolous. United States policy makers may find themselves before the court having to defend United States actions in the use of force against blatantly aggressive nations.<sup>268</sup>

A major concern from an asymmetric warfare standpoint is that commanders in the field would be forced to thoroughly investigate every civilian death or wayward bomb to avoid potential ICC jurisdiction. Though such investigations are unlikely to comfort the victims of collateral damage, they will disrupt the mission and raise costs.

The very structure of the ICC inexorably leads to this result.<sup>269</sup> In an effort to limit the Court's jurisdiction and placate objections by the United States,<sup>270</sup> diplomats incorporated the principle of complementarity into the treaty. Complementarity would prevent the ICC from taking jurisdiction over a case that has been, or is being, investigated by a State Party, leaving national jurisdictions with primacy in prosecutions.<sup>271</sup> While promising in theory, this principle leads to undesired results when combined with the Chief Prosecutor's *proprio motu* power.<sup>272</sup>

Under the Rome Statute, the Chief Prosecutor is obliged to inform any State when a formal investigation into an alleged

addition to our having experience in using guerilla warfare and the war of attrition to fight tyrannical superpowers, as we, alongside the mujahidin, bled Russia for 10 years, until it went bankrupt and was forced to withdraw in defeat . . . . So we are continuing this policy in bleeding America to the point of bankruptcy . . . . [E]very dollar of al-Quaida defeated a million dollars . . . . [T]he mujahidin recently forced Bush to resort to emergency funds to continue the fight in Afghanistan and Iraq, which is evidence of the success of the bleed-until-bankruptcy plan.

*Full Transcript of bin Laden's Speech, supra* note 3.

268. Smidt, *supra* note 31, at 201 (citation omitted).

269. Amnesty International, while arguing for changes to the 1994 draft of the Rome Statute, pointed out that the ICC was meant to do this very mission. See HALL, *supra* note 24 ("[The ICC] would serve as a spur to national courts to assume their responsibility to bring to justice those responsible for such crimes . . . ."). Similarly, the Chief Prosecutor himself has stated that one purpose for the ICC is to "encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means." *Policy Paper, supra* note 213, at 3.

270. Despite these attempts at compromise, the United States remains unsatisfied with the level of protection afforded to national sovereignty. See Seguin, *supra* note 20, at 94.

271. See Rome Statute, *supra* note 23, pmb1. ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions . . . .").

272. See *supra* notes 127–50 and accompanying text (discussing *proprio motu* power).

violation has been opened.<sup>273</sup> This “heads up” provides the State an opportunity to start its own investigation, triggering the protection of complementarity—the Chief Prosecutor must defer to the State unless he is convinced the state is unwilling or unable to carry out an investigation or prosecution.<sup>274</sup> But pronouncements from the Chief Prosecutor have added to this obligation: the normal practice of his office is to inform the state in the “pre-investigation” phase<sup>275</sup> when he is “analyzing” information to determine whether to initiate an investigation.<sup>276</sup>

[T]he Prosecutor will generally seek to alert the relevant State of the possibility of taking action itself very early in the process. For this reason, when the Office receives sufficiently detailed and credible information about alleged crimes, the Office will in general consult with and seek additional information from the States that would normally exercise jurisdiction, unless there is reason to believe that such consultations may prejudice the future conduct of an analysis or investigation or jeopardize the safety of persons.<sup>277</sup>

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273. See Rome Statute, *supra* note 23, art. 18(1) (“When a situation has been referred to the Court . . . or the Prosecutor initiates an investigation . . .”). In reality, the Office of the Prosecutor intends to inform States of “future investigations” in order to “alert” them to the “possibility of taking action.” *Policy Paper*, *supra* note 213, at 5.

274. Article 17 of the Rome Statute requires the Court to find a case “inadmissible” where a state is conducting a “genuine” investigation or prosecution. But if a state is “unwilling” to investigate or prosecute the alleged crime, the Court may take jurisdiction. Rome Statute, *supra* note 23, art. 17(1)(a)–(b). A state will have up to a month after being informed of an open investigation to tell the Court “that it is investigating or has investigated” the crime. *Id.* art. 18(1)–(2). If the state contests jurisdiction, “the Prosecutor shall suspend the investigation” until the Court makes a determination. *Id.* art. 19(7). Non-state parties may also submit their “observations to the Court” on whether the Court should have jurisdiction. *Id.* art. 19(3). Ultimately, the ICC itself will decide whether it has jurisdiction over the case. *Id.* art. 19(1); Seguin, *supra* note 20, at 92.

275. According to provisional regulations, the Information and Evidence Unit (IEU) of the Chief Prosecutor’s office will prepare reports “on a weekly basis, or more frequently as required by the number of communications received,” analyzing the communications received. See ANNEX, *supra* note 125, reg. 4.1. This regulation anticipates large numbers of complaints and continual reports, which inevitably will be reported to the States that are targeted by allegations. See *id.*

276. The Office of the Prosecutor has stated, “In deciding whether to investigate or prosecute, the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular crimes within the jurisdiction of the Court. The Prosecutor can proceed only where States fail to act. . . .” *Policy Paper*, *supra* note 213, at 4. To “first assess” this issue, the Chief Prosecutor must ask the targeted State whether it has investigated or intends to investigate. *Id.* The Chief Prosecutor’s investigation of over 240 communications regarding the 2003 Iraq War demonstrates that his office will indeed carry out this policy of asking “relevant States” for information during the preliminary phase. See IRAQ RESPONSE, *supra* note 135 and accompanying text.

277. ANNEX, *supra* note 125, § I(C). In its provisional regulations, the Office of the Prosecutor also indicates that it will “contact the State or States that would normally exercise jurisdiction and seek additional information about *inter alia* the existence and progress of national proceedings.” *Id.* reg. 5.3(b).

This notice will, in practice, force the state to conduct an investigation to avoid jurisdiction, even where it believes it has acted properly.<sup>278</sup> In the end, the Chief Prosecutor will exercise substantial political influence over States Parties simply by raising the specter of an investigation. Any state that fails to conduct an "independent" or "impartial" investigation of the allegations would foolishly risk the Court's meddling, even where the case is still in its pre-investigation phase.

The very conduct of these state-led investigations could create risk-averse behavior and divert the attention of both leaders and subordinates from accomplishing the anti-terror mission. For instance, to conduct a thorough and timely inquiry, an investigation should begin close in time to the incident. Subordinates and commanders alike will need to be questioned. Classified intelligence will need to be examined. Command and control issues will need to be explored. Each day, this will consume time from the busy schedules of personnel up and down the chain of command. Because the ICC is most interested in complaints against high-level officials, the President, Secretary of Defense, and other public figures may need to be interviewed about their thoughts, actions, and motivations for command decisions and policies.

Furthermore, even if the state undertakes an investigation and determines no wrongdoing occurred, it runs the risk the Chief Prosecutor may determine the state was unwilling or unable to genuinely carry out the investigation.<sup>279</sup> No standards are set forth in the Statute to define what "unwilling" means,<sup>280</sup> although it is likely that over time the Court will develop its own standards and precedents for making this evaluation.<sup>281</sup> Faced with the uncertainty

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278. Van de Kieft, *supra* note 252, at 2336 (arguing that if a state believes its action is legitimate, it would have no will to investigate when faced with a complaint).

279. Even when investigations are undertaken, critics of U.S. policy are rarely satisfied. For example, in light of the scandal at Abu Ghraib and the subsequent investigations, Amnesty International called for an "independent and public inquiry into all allegations of the torture of Iraqi prisoners by U.S. and coalition troops." *Amnesty VOA News, International Calls for Inquiry into Abuse of Iraqi Prisoners*, THE EPOCH TIMES, May 4, 2004, <http://english.epochtimes.com/news/4-5-4/21248.html>. Amnesty International claims to have received scores of complaints of ill treatment. *Id.*

280. Presumably, only circumstantial evidence of unwillingness needs to be shown as the statute is silent on the need for any direct evidence of unwillingness. Also, the Office of the Prosecutor has suggested that a State is "unwilling" if it specifically decides to "shield[]" the suspect, if it has an "unjustified delay" in the process, or if the proceedings are not "conducted independently or impartially." *Policy Paper*, *supra* note 213, at 4. This definition, however, is ultimately standardless and thoroughly within the Prosecutor and Pre-Trial Chamber's subjective assessments. Defining this standard was raised as a recommendation at the first Public Hearing of the Chief Prosecutor in 2003. See *Prosecutor Comments*, *supra* note 144, at 4.

281. In a critique of the ICC, the Cato Institute has argued:

of how a Chief Prosecutor will view a case,<sup>282</sup> then, it is easy to foresee the United States investigating far more issues than it would normally deem necessary. In short, there is potential for inefficiency and distraction, which would play well into the overall strategies of asymmetric warriors.

### 3. Splitting International Coalitions

To truly weaken efforts to win the war on terror, it is not enough for adversaries of the United States to frighten policymakers and distract commanders in the field. A major prong of an effective asymmetric strategy must be to isolate the United States from the rest of the international community and to split international coalitions. The United States relies on coalitions to carry out its war on terror;<sup>283</sup> yet, coalitions can be fragile. Some weaknesses of coalitions include “the political process by which the decision in Washington to use force is made after a period of intense and open debate,” “the casualty aversion of coalition publics,” and “the powerful role of the news media in magnifying fears and anxieties and in motivating U.S. actions.”<sup>284</sup>

Saddam Hussein demonstrated a classic method of asymmetric coalition-splitting when he masterfully divided the former Gulf-War

The ICC will also become an unavoidable participant in the national legal process. Indeed, because it will set precedents regarding what it considers “effective” and “ineffective” domestic criminal trials, the ICC will indirectly force states to adopt those precedents or risk having cases called up before the international court. That constitutes an unprecedented change in the sources of national lawmaking, one that diminishes the traditional notion of state sovereignty.

Dempsey, *supra* note 119, at 6. The Office of the Prosecutor itself has acknowledged that “detailed, exhaustive guidelines for [the Office of the Prosecutor’s] operation will probably be developed over the years.” *Policy Paper*, *supra* note 213, at 5.

282. For instance, what would happen if a state does not have a criminal code that exactly replicates the range of offenses under the Rome Statute? Conceivably, the Chief Prosecutor might consider such a state “unable” to prosecute the crimes. Further, the state may have a different interpretation of what constitutes one of the crimes defined by the Rome Statute. For example, the Rome Statute prohibits torture as a crime against humanity. Rome Statute, *supra* note 23, art. 7(1)(f). While U.S. military leaders have deemed torture forbidden at Guantanamo Bay, organizations such as Amnesty International and the International Red Cross have expressed concerns that torture is occurring. If the issue were considered by the Court, whose argument would the Court find more convincing? Similarly, the Statute forbids “[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Rome Statute, *supra* note 23, art. 8(2)(a)iv). Is the leadership of the U.S. military prepared to allow a civilian court to evaluate the concept of military necessity in relation to U.S. activities?

283. ROBERTS, *supra* note 4, at 4.

284. *Id.*

coalition that had kept Iraq in check after it invaded Kuwait.<sup>285</sup> In the mid-1990s, Iraq began entering into lucrative international contracts with coalition partners such as France, Russia, and China.<sup>286</sup> The contracts would only take effect when international economic sanctions were lifted, giving these allies an incentive to disagree with the United States on the sanctions issue.<sup>287</sup> Iraq also alienated Arab nations from the coalition by pitting them against Israel; Iraq argued that there was a “double standard” that allowed Israel the possession of many nuclear weapons while denying an Arab nation such as Iraq even a single one.<sup>288</sup> When Iraq banned U.N. weapons inspections for a period of three months in 1997—almost provoking “coalition” military intervention—France, Russia, and China distanced themselves from the coalition and no Arab nation but Kuwait stood with the United States.<sup>289</sup> The United States was denied over-flight rights by some Arab nations, while others refused to allow the United States to use their bases as an origin of attack.<sup>290</sup> The danger never materialized, however, when Iraq backed away from the brink of war and allowed U.N. weapons inspections again in December 1997.<sup>291</sup>

Modern asymmetrical warriors may attempt to use the ICC to drive a wedge between the United States and the international community. There is no doubt that terrorist groups seek to split the international coalition fighting the war on terror. Taking a page from Saddam Hussein’s playbook, Osama bin Laden has been using this same tactic in an attempt to alienate Muslim nations from the United States.<sup>292</sup> Many U.S. allies have already joined the ICC and now have a vested interest in the Court’s success. If the United States

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285. This paragraph’s discussion of Saddam Hussein’s coalition-splitting activity is drawn from O’Halloran, *supra* note 49, at 17–18.

286. *Id.* at 18.

287. *Id.*

288. *Id.*

289. *Id.* at 17.

290. *Id.* at 18.

291. *Id.* at 17.

292. In a speech released November 1, 2004, Mr. bin Laden stated:

[I]t had never occurred to us to strike the [Twin] towers. But after it became unbearable and we witnessed the oppression and tyranny of the American/Israeli coalition against our people in Palestine and Lebanon, it came to my mind . . . . [It] started in 1982 when America permitted the Israelis to invade Lebanon and the American Sixth Fleet helped them in that. This bombardment began and many were killed and injured and others were terrorized and displaced . . . . And that day, it was confirmed to me that oppression and the intentional killing of innocent women and children is a deliberate American policy . . . . [E]very [U.S.] state that doesn’t play with our security [by voting for President Bush] has automatically guaranteed its own security.

*Full Transcript of bin Laden’s Speech, supra* note 3.

were to join the Court and then, for example, fail to comply with a request from the Chief Prosecutor,<sup>293</sup> intense international pressure may be levied attempt to force compliance. Moreover, even unsubstantiated ICC cases against U.S. officials may cause other nations to politically back away from coalitions, handing terrorists a major victory. For instance, if a coalition partner were to deny the United States access to its bases for specific operations in the war on terror, the mission could be seriously hampered.

If asymmetric warriors can exploit the ICC to garner international opinion against the United States, they will have gone far in nullifying offensive operations in the war on terror. Sidetracked by coalition-preserving, the United States might take a more defensive posture and minimize potentially offending operations. More important, if nations deny the United States access to foreign bases, overfly rights, or use of their facilities to launch operations, the capability of the United States to conduct an effective war on terror will be impaired.

## V. CONCLUSION

The ICC is currently a fledgling institution struggling for its own identity, legitimacy, and survival. If it endures, it will emerge from this time of trial as an emboldened institution, fully empowered by the consent of nation-states who have given up a portion of their national sovereignty to the Court—a potential “Big Bad Wolf.”

The Court’s developing processes and policies have created a structure that can be asymmetrically exploited in the future, especially if the United States ratifies the Rome Treaty. NGOs are innumerable and each has its own political agenda; they will have formalized avenues of access to the Office of the Prosecutor, where they may present allegations against the United States with little restraint. The Chief Prosecutor’s *proprio motu* power will require him to seriously analyze all allegations of U.S. war crimes—some potentially exaggerated or fraudulent. During a pre-investigation phase, the Chief Prosecutor will inform the United States of the claim, which will prompt a U.S. investigation to gain the protection of complementarity. Mass media will play havoc with such a scenario, broadcasting the complaints that expose high-level U.S. politicians and military leaders to jeopardy.

For the United States—a nation at war against terrorism and the world’s only superpower—misuse of the ICC could provide asymmetric warriors the sling with which David can slay Goliath. A

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293. See Rome Statute, *supra* note 23, art. 15(2) (“The Prosecutor . . . may seek additional information from States . . .”).

nation built on law can be undone by law. Given these allegations, U.S. officials may cease to press the offensive and take a risk-averse posture that could ultimately jeopardize the national security of the United States. Even principled acts of war could be exploited through the processes of the ICC to force the diversion of precious resources in the battle against terror, split up international coalitions, and reduce the dominance of U.S. hegemony throughout the world.

When deciding in the future whether to join the ICC, the United States must consider the potential for asymmetric warfare built into the Court's processes. Only then will it be able to plan to avoid this landmine. If the nation chooses to accept these risks for the cause of international justice, at least it will have done so with both eyes wide open.



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