A tour of the Hague recalls history’s ambitions for international courts. Andrew Carnegie’s Victorian “Peace Palace,” with its formal gardens and imposing roof, houses the International Court of Justice. The ICJ’s docket of state-to-state complaints in civil cases includes matters such as maritime boundaries, land borders, and questions of state responsibility. There is no compelled jurisdiction; states must agree to the methods by which cases are referred, and the court must rely on the United Nations Security Council to enforce its decisions. But the ICJ is useful to states parties as a way to turn down the volume in fractious disputes, giving governments an occasion to defer provocative issues and yield to compromise. The civil court and its predecessor have not stopped wars; the international court’s forebear – a “permanent” court of justice – collapsed in World War II. But the Peace Palace survived the war, and the ICJ has since done an increasing volume of business.

A less magnificent venue up the road houses the UN Tribunal for the former Yugoslavia, established nine years ago to address the crimes of the Balkan wars. The UN Security Council used its extraordinary powers to create this special-purpose tribunal to prosecute the atrocities committed in Bosnia, Croatia, and as it later turned out, Kosovo. The court has enjoyed strong American backing and has made measured progress, convicting 31 defendants. The centerpiece is the trial of Slobodan Milosevic for terrorist attacks against civilians in three nationalist wars. Handed over by Serbian Prime Minister Zoran Dinodić after Belgrade’s defeat in the NATO air campaign in 1998, Milošević has since tried to use the courtroom for his own political purposes. But he is clearly flailing in the face of changed regional politics. The Yugoslav tribunal has had to create a distinctive procedure acceptable to both civil-law and common-law countries and has explored a number of thorny legal and moral issues. One such question involves the degree to which factors like duress and state of mind contribute to the commission of war crimes. Yet the Yugoslav tribunal’s work did not deter the ongoing atrocities of the Balkan conflicts; the autocrats who sponsored the Srebrenica massacre and ethnic cleansing in Kosovo were fully aware of the tribunal’s jurisdiction. The hope is that the prosecutions will have an effect on other leaders contemplating a career in nationalist violence. Charged by the UN Security Council with the further task of supervising prosecutions connected to the
1994 genocide in Rwanda, the Hague tribunal tries to craft common standards for the Yugoslav trial chambers and a UN sister court in Tanzania.

The Hague also hosted a trial involving the 1988 Libyan-sponsored bombing of Pan Am Flight 103. With terrorism, as with war crimes, “giving it to the lawyers” has been part of a strategy of deterrence. After years of negotiation with Libya and sanctions imposed through the UN Security Council, an agreement was reached to convene a so-called “mixed” tribunal to try two suspects in the bombing. The eight-month trial began in May 2001 at a nearby military base, with Scottish judges applying Scottish law (since the bomb had detonated in Scottish airspace over the town of Lockerbie). A vigorous trial defense and the court’s split verdict demonstrated just how hard it is to gather usable courtroom evidence on terrorist networks. Even as the conviction of Abdelbaset Ali Mohmed al Megrahi, a Libyan intelligence agent, made it clear that Tripoli was involved in the civilian murders, Col. Muammar el-Qaddafi was effectively protected.

Finally, The Hague has now offered to take aboard yet a fourth tribunal, the so-called permanent International Criminal Court, created by a treaty agreement negotiated at Rome in 1998. The revival of a permanent criminal court, a fifty-year-old idea, is rooted in our shared dismay at the decade past. Ethnic cleansing and deliberate attacks upon civilians seemed unimaginable in a post-Maastricht Europe. The genocide in Rwanda rattled a world that had supposed such ethnic ferocity was irrational. The ICC is designed to hear cases of serious war crimes, genocide, crimes against humanity, and – in the future – cases of alleged aggression. The court came into formal existence in July 2002. European capitals were busily culling their ranks of law professors, prosecutors, ministers, and judges to propose candidates for judges of the ICC. It should come as no surprise that politics has something to do with the choices, even for a court that purports to abolish politics.

ICC participants also discovered that voice votes in the midst of a UN conference are easier to win than formal treaty ratifications. A significant number of major military powers and regional leaders remain outside the treaty regime, including China, India, Pakistan, Indonesia, Malaysia, Egypt, Israel, Kenya, and Chile. The Russian Federation is “studying” the matter. Relatively few countries in Asia and Africa have ratified. The commitment to govern national military operations by the decision making of an as-yet unknown court has inspired caution in more than a few capitals.

This leaves the question of the United States, which has not ratified the treaty. Some unhappy critics have attributed American skepticism about the court to supposed ambitions for empire or hegemony, or a headstrong pursuit of unilateralism. The inference is unfair. Washington has well-grounded and rational concerns about the ICC, its structure, and how its operations could affect the execution of America’s responsibilities around the globe, particularly its efforts to maintain strategic stability in key regions, including (in the long term) Europe. Parliamentarians who talk in private to their own military lawyers and senior commanders may discover that even some Europeans share concerns about the effect of the court on military planning.

In war fighting and peace enforcement, there is an acknowledged need to balance restraint and efficacy. Military law is designed to spare civilians from war’s cruelties, while permitting countries to protect their citizens. There are some clear “no-go” lines in the conduct of any conflict – “red lines” that any responsible com-