



**Digital Commons@**  
Loyola Marymount University  
LMU Loyola Law School

## Loyola of Los Angeles International and Comparative Law Review

---

Volume 22 | Number 4

Article 5

---

8-1-2000

### Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice

William Miller

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

---

#### Recommended Citation

William Miller, *Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice*, 22 Loy. L.A. Int'l & Comp. L. Rev. 553 (2000).

Available at: <https://digitalcommons.lmu.edu/ilr/vol22/iss4/5>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# SLOBODAN MILOSEVIC'S PROSECUTION BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A HARBINGER OF THINGS TO COME FOR INTERNATIONAL CRIMINAL JUSTICE

## I. INTRODUCTION

The idea of an international criminal justice system equipped to deal with war crimes has intrigued the United Nations since its inception in 1946.<sup>1</sup> At the time the U.N. Charter was drafted, the General Assembly resolved "to study the desirability and possibility of establishing an international judicial organ . . . ."<sup>2</sup> Since that time, however, the United Nations' efforts to establish a permanent international criminal court have been ineffective. The two most significant obstacles to establishing such a court have been state sovereignty and cooperation.<sup>3</sup> As a result, this pursuit remained relatively inactive for several decades. In the early 1990s,<sup>4</sup> however, the United Nations renewed its efforts to establish an international criminal justice system. These new efforts coincided with the escalation of the Balkan conflict, which necessitated the first large scale, ad hoc criminal tribunal since Nuremberg.<sup>5</sup>

---

1. See *Rome Statute of the International Criminal Court Overview* (visited Sept. 3, 1999) <<http://www.un.org/law/icc/general/overview.htm>> [hereinafter *ICC Statute Overview*].

2. *Id.* (referring to G.A. Res. 260, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948)).

3. See generally Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL'Y SYMP. 37 (1999) (discussing the general problems and conflicts encountered in establishing both courts and tribunals to adjudicate international criminal justice issues).

4. See *ICC Statute Overview*, *supra* note 1.

5. See Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 220-221 (1998). See also AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS POWERS AND CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Aug. 8, 1945, 54 Stat. 1544, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945) [hereinafter *NUREMBERG CHARTER*].

In 1994, the U.N. Security Council passed a resolution establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>6</sup> Immediately, the ICTY encountered difficulty capturing and prosecuting its suspects. This was due, in part, to state sovereignty, which is one of the main components of international law and a significant roadblock to the successful prosecution of war criminals.<sup>7</sup> Although the ICTY enjoys some limited success, the problems with the ICTY call into question the viability of a permanent international criminal court (ICC). This issue has become more important with the passage of the ICC Statute, which, if ratified, would establish the world's first ICC.<sup>8</sup>

In 1998,<sup>9</sup> eighty-four nations signed the draft that, if ratified by sixty countries, will set up the ICC.<sup>10</sup> Questions remain, however, as to whether an ICC should exist. Some of these questions bring attention to the ICTY and its successes and failures—as predictors of the viability of a permanent ICC

The ICTY's relationship with the ICC has become crucial with Slobodan Milosevic's recent ICTY indictment for war crimes committed in Kosovo in 1998 and 1999.<sup>11</sup> Milosevic, as sitting President of the Federal Republic of Yugoslavia, could be the highest-ranking state official to be indicted by a war crimes tribunal since Nuremberg.<sup>12</sup> His prosecution will be the litmus

---

6. See United Nations: Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law and Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 84th Sess., 3217th mtg., U.N. Doc. S/RES/827, *reprinted in* 32 I.L.M. 1159, 1203 (1993) [hereinafter ICTY Statute].

7. See Arbour, *supra* note 3, at 38–41. Arbour, a former ICTY Chief Prosecutor, describes the problems the Tribunal faced in bringing those indicted to justice. See *id.*

8. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

9. See ICC Statute Overview, *supra* note 1.

10. See Rome Statute of the International Criminal Court: Ratification Status (visited Sept. 3, 1999) <<http://www.un.org/law/icc/statute/status.htm>> [hereinafter *Ratification Status*].

11. See Statement by Louise Arbour, ICTY Prosecutor (visited Aug. 24, 1999) <<http://www.un.org/icty/pressreal/p404-e.htm>> [hereinafter Arbour Statement]. Prosecutor Arbour gave an official statement confirming the ICTY's indictment of Milosevic and five other Serbian Officials. See *id.*

12. See generally Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457, 459–462 (1998) (describing Nuremberg as the last court to try high-ranking state officials prior to the ICTY's prosecution of Milosevic). “Nuremberg” was the victors court set up by the Allies in the wake of World War II to prosecute war criminals (predominately those from Nazi Germany). See *id.*

test for the ICTY. More importantly, the problems encountered during Milosevic's attempted prosecution expose the inherent weaknesses, strengths, and dangers inherent in the proposed ICC.

This Comment discusses the relationship between the ICTY and the ICC and explores how the ICTY's prosecution of Milosevic exposes some of the most dangerous potential problems with the ICC. Part II discusses the history of the ICTY and recognizes that its successes and failures reveal the difficulties inherent in any system of international criminal justice. Part III demonstrates how the ICTY reveals the dangers present in the proposed ICC. Specifically, the ICC poses a significant threat to state sovereignty if used as a tool of political persuasion and has the potential to subvert fair judicial process. Finally, Part IV concludes by providing suggestions regarding the future of international criminal tribunals and the ICC.

## II. THE ICTY'S PROSECUTION OF SLOBODAN MILOSEVIC

### A. *The History and Structure of the ICTY*

Since its inception in 1993, the ICTY has been responsible for the investigation, indictment, and prosecution of war criminals in the area of the former Yugoslavia.<sup>13</sup> The ICTY, seated in the Hague, consists of eleven judges elected for a term of four years;<sup>14</sup> no two judges may be from the same country.<sup>15</sup> The judges rotate between sitting at the Trial and Appellate Chambers.<sup>16</sup>

The Tribunal limits its subject matter jurisdiction to crimes that occurred in the former Yugoslavia since January 1, 1991.<sup>17</sup> The *ICTY Rules of Evidence and Procedure*,<sup>18</sup> which govern the

---

13. See ICTY Statute Introduction, *supra* note 6, at 1164.

14. See *id.* arts. 11–12, at 1178–1179.

15. See *id.* art. 12, at 1178.

16. See AMERICAN SOCIETY FOR INTERNATIONAL LAW, INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991: RULES OF EVIDENCE AND PROCEDURE R. 27, 33 I.L.M. 484, 505 (1994) [hereinafter ICTY RULES OF EVIDENCE AND PROCEDURE]. The ICTY Trial and Appellate Chambers sit in the same fashion as do U.S. criminal trial and appellate courts, with the exception being that the Appellate Chamber is the ICTY's highest court of appeal. See *id.*

17. See ICTY Statute art. 8, *supra* note 6, at 1176.

18. See ICTY RULES OF EVIDENCE AND PROCEDURE, *supra* note 16.

ICTY's operation, became effective on March 14, 1994.<sup>19</sup> These rules form the modern blueprint for international criminal justice<sup>20</sup> and establish the first large-scale, ad hoc criminal court since Nuremberg.<sup>21</sup> This comprehensive set of rules spawned debate over the viability and legality of an international criminal court. The four controversial aspects of the ICTY discussed below are central to the debate over whether a permanent international criminal court should, in fact, be established.

### 1. The ICTY's Jurisdiction

The ICTY has concurrent personal and subject matter jurisdiction over the countries within the former Yugoslavia in which alleged war crimes occurred.<sup>22</sup> The ICTY Statute provides that "[t]he International Tribunal shall have primacy over national courts."<sup>23</sup> The concept of primacy allows the ICTY to request jurisdiction when appropriate. As a result, the ICTY prosecutor can ask that the Trial Chamber "formally request national courts to defer to the competence of the International Tribunal. . . ."<sup>24</sup> This, however, can only occur under the proper circumstances—primarily, when the prosecutor believes that the national courts cannot, or will not, be impartial.<sup>25</sup> Jurisdictional problems with this system occur when the country in question refuses to defer to the ICTY. Even though the ICTY Statute mandates that "[s]tates shall cooperate with International Tribunal in the investigation and prosecution of persons accused of committing serious

---

19. See *id.* Introductory Note, at 484.

20. See generally *id.* at 484–490 (discussing the significance of the ICTY Rules of Evidence and Procedure and how the ICTY uses them).

21. See Hwang, *supra* note 12, at 459–462.

22. See ICTY Statute art. 8, *supra* note 6, at 1176.

23. *Id.*

24. *Id.*

25. See ICTY RULES OF EVIDENCE AND PROCEDURE R. 9, *supra* note 16, at 497. Rule 9 states that where it appears to the prosecutor that:

(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime; (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the [t]ribunal. The prosecutor can then ask the Trial Chamber for the State to defer to the competency of the court.

*Id.* R. 9, at 497.

violations of international humanitarian law,"<sup>26</sup> the fact that some states refuse to cooperate is almost predictable.<sup>27</sup>

## 2. State Cooperation and the Execution of Warrants

Voluntary and full state cooperation with the Trial Chamber's orders is essential to the functioning of the ICTY. Accordingly, "all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber. . . ." <sup>28</sup>

The idea of state cooperation is not new to the international community. For example, Rule 61 of the *ICTY Rules of Evidence and Procedure* gives the ICTY power to order states to assist in the capture of alleged war criminals by issuing international arrest warrants.<sup>29</sup> Once the arrest warrant issues, states must "act promptly and with all due diligence to ensure proper and effective execution. . . ." <sup>30</sup> Pursuant to Rule 61, the ICTY can request that U.N. Member Nations take active roles in the arrest and capture of indicted war criminals, including the freezing of assets.<sup>31</sup> Rule 61 is controversial because it allows the ICTY to compel international assistance, even when it may be against a complying state's interest to cooperate.

## 3. The Office of the Prosecutor

The Office of the Prosecutor plays a crucial role in the ICTY's functioning. The Chief Prosecutor is appointed by the U.N. Security Council for a term of four years to "act independently as a separate organ of the International Tribunal."<sup>32</sup> As a result, the prosecution, while acting as a

---

26. ICTY Statute art. 61, *supra* note 6, at 1189.

27. See *Arbour*, *supra* note 3, at 39 (discussing the fact that most states under investigation will at least attempt to avoid the Court's jurisdiction, especially when it is against the state's self interest to submit to the Court's jurisdiction).

28. ICTY RULES OF EVIDENCE AND PROCEDURE R. 61, *supra* note 16, at 519–520. Rule 61 is an example of a request for state cooperation. See *id.*

29. See *id.*

30. *Id.* at 517.

31. See *id.* at 519–520.

32. ICTY Statute arts. 15–16, *supra* note 6, at 1181–1182.

separate office, does not receive instruction from any state or political entity.<sup>33</sup>

Furthermore, the prosecutor is responsible for conducting investigations and submitting indictments to the Trial Chamber.<sup>34</sup> This gives the prosecutor almost complete discretion as to whom the ICTY does and does not prosecute. Thus, the prosecutor plays a key role in the ICTY's successes and failures.

#### 4. The ICTY Statute's Definition of "War Crime"

The definition of "war crime," which has evolved since World War II, encompasses several different acts. The International Law Commission (ILC), established by the United Nations to study war crimes, initially defined "war crime" as one occurring only during an armed conflict.<sup>35</sup> This definition governed for several decades.<sup>36</sup> The ICTY Statute, however, takes a different approach and, as a result, expands the definition of a war crime.<sup>37</sup>

The text of the ICTY Statute breaks down the traditional notion of a war crime into four categories.<sup>38</sup> First, the ICTY has the power to prosecute persons responsible for "committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949,"<sup>39</sup> including willful killing and unlawful deportation or transfer, among other crimes.<sup>40</sup> Second, the ICTY may prosecute violations of the "Laws and Customs of War,"<sup>41</sup> including employing chemical weapons and purposefully

---

33. *See id.*

34. *See id.* art. 15, at 1181.

35. *See* Hwang, *supra* note 12, at 460–461 (describing the evolving definition of "war crimes," specifically, how war crimes are defined in the statutes establishing the ICTY and the ICC, and the problems with these definitions).

36. *See id.*

37. *See* ICTY Statute arts. 2–5, *supra* note 6, at 1171–1174.

38. *See id.*

39. *Id.* art. 2, at 1171. The ICTY Statute defines "grave breaches" as including: (a) willful killing (b) torture or inhuman treatment, including biological experiments; (c) willfully causing great suffering or serious injury to body of health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully or wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

*Id.*

40. *See id.* art. 2(a), (g), at 1171.

41. *Id.* art. 2, at 1171–1172.

destroying civilian targets.<sup>42</sup> The third category of war crime is genocide, which is defined as “acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group. . . .”<sup>43</sup> Finally, the fourth and most important category, crimes against humanity, expands the definition of an ICTY war crime.<sup>44</sup>

Crimes against humanity were first defined and recognized during the Nuremberg trials in 1946.<sup>45</sup> The ICTY Statute’s definition is particularly important because it broadens the ILC’s initial notion that only those crimes committed during armed conflict constituted crimes against humanity.<sup>46</sup> Pursuant to the ICTY Statute, “[c]rimes against humanity are [those] aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”<sup>47</sup> The Statute further defines crimes against humanity as, “murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts.”<sup>48</sup>

The ICTY’s expansion of the war crimes definition to include crimes against humanity that occur regardless of an armed conflict has significant implications. For example, an international criminal court could prosecute government officials for imprisoning people for perceived subversive political speech. The

---

42. See *id.* art. 3, at 1172, defining the “Laws and Customs of War” as:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings; (d) seizure of, destruction or wil[l]ful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, and works of art and science; (e) plunder of public or private property.

*Id.* art. 3 (a)–(e), at 1172.

43. *Id.* art. 4, at 1172. Article 4 defines “Genocide” as including:

(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within a group; (e) forcibly transferring children of the group to another group.

*Id.* art. 4, at 1173.

44. See *id.*

45. See Hwang, *supra* note 12, at 459–460 & n.32.

46. See *id.* at 461–462.

47. ICTY Statute art. 4, *supra* note 6, at 1173.

48. *Id.* art. 4, at 1173–1174.



ICTY has yet to truly test the "unarmed" conflict language, however, because the conflict within its jurisdiction has been armed.<sup>49</sup> Therefore, the extent of the definition's effect is not yet clear.

### *B. The ICTY in Kosovo and Milosevic's Indictment*

Since the early 1990s, the Balkans<sup>50</sup> have been in political and ethnic turmoil. The area of the former Yugoslavia has been a focus of international concern regarding human rights violations.<sup>51</sup> Through the ICTY, this turmoil has become a testing ground for the viability of a permanent system of international criminal justice. Although the conflict in Kosovo is the latest in a long line of conflicts in the region, it will be of crucial importance in establishing the ICTY's legitimacy and the feasibility of a permanent international criminal court.

#### 1. The Conflict in Kosovo

The Kosovo region has historically been of particular political and ethnic importance in the former Yugoslavia. It is a place of interest for both Serbians and Albanians.<sup>52</sup> The Serbians see Kosovo as a place of great ethnic significance as it is the site of the defeat of the Ottoman Empire in the Fourteenth Century.<sup>53</sup> Before the present Kosovo conflict, however, the region was more than ninety percent Albanian and enjoyed great autonomy from the communist-era Yugoslavia.<sup>54</sup> As a result, the area that is present day Kosovo is at the center of a conflict that existed before the recent fighting in the Balkans.

---

49. See generally U.S. Department of State, Fact Sheet, *Kosovo Chronology* (visited May 21, 1999) <[http://www.state.gov/www/regions/eur/fs\\_kosovo\\_timeline.html](http://www.state.gov/www/regions/eur/fs_kosovo_timeline.html)> (describing the events in Kosovo and the nature of the armed conflict) [hereinafter *Kosovo Chronology*].

50. See generally Eurasia Research Center, *Balkans News Page* (visited Aug. 29, 2000) <<http://eurasianews.com/erc/balkan.htm>> (describing each of the countries in the Balkans and providing maps of the region as a whole).

51. See generally *Kosovo Chronology*, *supra* note 49 (discussing the timeline for the modern conflict in the Balkan region).

52. See *id.*

53. See *A Kosovo Primer*, TIME DAILY (visited Oct. 1, 1999) <<http://www.pathfinder.com/time/daily/special/kosovo/primer.html>> (providing a detailed description of the specific events leading up to the crisis in Kosovo).

54. See *id.*

The recent conflict in Kosovo began in 1989 when then-Serbian President Slobodan Milosevic called for the Kosovo Assembly to relinquish the province's autonomous status.<sup>55</sup> The Serbian majority then immediately passed legislation resulting in Kosovo Albanians losing their jobs and homes.<sup>56</sup> Thereafter, the Serbian majority dissolved the independent Kosovo Assembly.<sup>57</sup> In response to these acts, Kosovo Albanians created the little-recognized Republic of Kosovo in 1991.<sup>58</sup> The ongoing conflict between Serbians and Kosovo-Albanians was overshadowed, for several years, by wars in Slovenia, Croatia, and Bosnia-Herzegovina.<sup>59</sup> Fighting in those countries dominated the landscape in the Balkans until 1997, when Serbians and Kosovo Albanians began to clash again, thus disturbing the relative peace of the era.<sup>60</sup>

Throughout 1998, the Serbians continued raids and offensives against Albanians in Kosovo.<sup>61</sup> In March, the United Nations publicly condemned the Serbians' excessive use of force in Kosovo thereby beginning its non-active involvement in Kosovo.<sup>62</sup> By Fall 1998, both the United Nations and the North American Treaty Organization (NATO) actively called for withdrawal of Serbian forces from Kosovo and a complete cease-fire.<sup>63</sup>

After a brief cease-fire in early 1999, the conflict again escalated with a full scale Yugoslav Serbian attack on Kosovo that forced more than 4,000 ethnic Albanians from their homes.<sup>64</sup> On March 24, 1999, NATO air strikes began as thousands of Kosovo Albanians fled the region or were expelled by advancing Yugoslav Serbian forces.<sup>65</sup> By April, the Kosovo exodus reached close to 20,000 people per day.<sup>66</sup> By the time the heavy fighting ended in

---

55. See *Kosovo Chronology*, *supra* note 49.

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*

May, over 491,000 Kosovo Albanians fled or were deported to Albania and Macedonia.<sup>67</sup>

As a result of these mass deportations, consistent offensives on the region, and the discovery of several mass graves, the ICTY leveled indictments against Milosevic and four other Serbian leaders.<sup>68</sup> Although all fighting stopped in June and the parties reached a tentative peace agreement, the region remains unstable.<sup>69</sup> The ICTY's problems in prosecuting Milosevic added to the instability.<sup>70</sup> In fact, several violent protests erupted calling for Milosevic's resignation.<sup>71</sup> It is against this background and these pressures that the ICTY tried to bring to justice one of the most infamous alleged war criminals prosecuted by an international criminal tribunal since Nuremberg.

## 2. The ICTY's Indictment and Prosecution of Slobodan Milosevic

On May 27, 1999, ICTY Chief Prosecutor Louise Arbour presented the indictments of Milosevic and four other Serbian leaders to the ICTY Trial Chamber.<sup>72</sup> Judge David Hunt promptly confirmed the indictments.<sup>73</sup> In the indictments, Arbour laid out the *prima facie* case against Milosevic and four others charging them with crimes against humanity and violations of the laws and customs of war.<sup>74</sup> Specifically, Milosevic was charged with several crimes against humanity, including the killing of unarmed civilians and deportation of 740,000 Kosovo Albanians.<sup>75</sup> The indictment further alleged that:

---

67. *See id.*

68. *See* Arbour Statement, *supra* note 11.

69. *See* Kosovo Chronology, *supra* note 49.

70. *See* Judge Gabrielle Kirk McDonald, Address to the United Nations General Assembly (Nov. 8, 1999), available at <<http://www.un.org/icty/pressreal/p445-e.htm>> [hereinafter McDonald Address].

71. *See generally* Misha Savic, *Kosovo Serbs Resume Protests*, ASSOCIATED PRESS, Sept. 10, 1999, available in 1999 WL 22042662 (discussing the general unrest and reaction to Milosevic remaining in power); *Yugoslav Prince Aleksanadar Calls for End of Belgrade Regime with Anti-Belgrade Call*, AGENCE FRANCE PRESSE (Paris), Jan. 26, 2000, available in 2000 WL 2720843.

72. *See* Prosecutor v. Milosevic, No. IT-99-37, Decision on Review of Indictment and Application for Consequential Orders, (Int'l Crim. Trib. Former Yugo., Trial Chamber, May 24, 1999), available at (visited Aug. 29, 2000) <<http://www.un.org/icty/ind-e.htm>> [hereinafter Prosecutor v. Milosevic].

73. *See id.* para. 38.

74. *See id.* para. 1.

75. *See id.* para. 7.

these operations targeting Kosovo Albanians were undertaken with the objective of removing a substantial portion of the Kosovo Albanian population from Kosovo, in an effort to ensure continued Serbian control over the province. If these pleaded facts are accepted, they establish that the forces from the Federal Republic of Yugoslavia and Serbia persecuted the Kosovo Albanian civilian population on political, racial or religious grounds, and that there was both deportation and murder, constituting crimes against humanity and violations of the laws or customs of war.<sup>76</sup>

The prosecution's major obstacle in obtaining Milosevic's indictment was connecting him to the alleged war crimes.<sup>77</sup> Arbour established this connection by showing that Milosevic was the "President of the Federal Republic of Yugoslavia and the Supreme Commander of the Armed Forces. . . with the power to implement the National Defence Plan. . . ." <sup>78</sup> The Armed Forces came under Milosevic's control in March 1999 when he first declared an imminent state of war, and then declared war on March 20, 1999.<sup>79</sup> As a result, Milosevic placed himself at the top of the military chain of command, and became responsible for the actions of his troops.<sup>80</sup> Milosevic's position in the chain of command provided the requisite causal link Arbour needed to connect him to the crimes pursuant to the ICTY Statute.<sup>81</sup> Thus, Arbour satisfied the elements of the *prima facie* case against Milosevic and the ICTY executed his indictment.<sup>82</sup>

### 3. Problems with Prosecuting Milosevic

After the indictment, Arbour was adamant that the ICTY prosecute Milosevic; the only issue was "when and how."<sup>83</sup> According to Arbour, the ICTY's indictment of Milosevic, "set in

---

76. *Id.* para. 8.

77. See David S. Cloud & Carla Anne Robbins, *Tribunal Readies War-Crimes Indictment of Milosevic*, WALL ST. J., May 27, 1999, at A21.

78. Prosecutor v. Milosevic, No. IT-99-37, Decision on Review of Indictment and Application for Consequential Orders, para. 10(1) (Int'l Crim. Trib. Former Yugo., Trial Chamber, May 24, 1999).

79. See Cloud & Robbins, *supra* note 77, at A21.

80. See *id.*

81. See *id.*

82. See *id.*

83. See *War Crimes Prosecutor: Milosevic Will Face Prosecution*, DOW JONES INT'L NEWS SERV., July 12, 1999, available in WL 7/12/99 DJINS 14:49:00.

motion a process that is completely irrevocable.”<sup>84</sup> The ICTY’s commitment to prosecuting Milosevic makes bringing him to justice crucial to the Tribunal’s legitimacy.<sup>85</sup>

Herein lies the conflict: even though the ICTY is clearly committed to prosecuting Milosevic, it faces several significant problems endemic to international criminal justice. Its first obstacle is capturing the indicted criminal.<sup>86</sup> If the territory in which the indicted criminal resides does not submit to the ICTY’s jurisdiction, then the Tribunal has limited means of capturing the suspect. The prosecutor, however, may compel the international community’s help pursuant to Rule 61 of *ICTY Rules of Evidence and Procedure*.<sup>87</sup>

Arbour submitted a Rule 61 request to the Trial Chamber requesting the international community’s assistance, which formally served international arrest warrants for all five men on all the members of the United Nations. Further, the Trial Chamber sought orders to compel each member of the United Nations and Switzerland to: “(i) make inquiries to discover whether any of the accused have assets located in their territory, and (ii) if any such assets are found, adopt provisional measures to freeze those assets . . . until the accused are taken into custody.”<sup>88</sup> The warrants were also served upon the International Criminal Police Organization (INTERPOL) requesting its assistance.<sup>89</sup>

Even with these powerful tools, the prosecution is still limited in what it can do to capture a suspect. Most importantly, a prosecutor cannot directly breach state sovereignty to capture a suspect.<sup>90</sup> In Milosevic’s case, as long as he stays within the borders of the Federal Republic of Yugoslavia, or any state not submitting itself to U.N. jurisdiction, he is relatively safe from ICTY prosecution. This reality is an embarrassment to the

---

84. *Id.*

85. See McDonald Address, *supra* note 70.

86. See *id.*

87. See ICTY RULES OF EVIDENCE AND PROCEDURE R. 61, *supra* note 16, at 516, 519 (establishing that the prosecutor has the authority to request warrants pursuant to Rule 61 in order to compel states to comply with the ICTY’s requests and induce international assistance to that end).

88. Prosecutor v. Milosevic, No. IT-99-37, Decision on Review of Indictment and Application for Consequential Orders, para. 26(ii) (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 24, 1999).

89. See *id.* para. 24.

90. McDonald Address, *supra* note 70.

ICTY's legitimacy.<sup>91</sup> Further, ICTY officials feel that Milosevic's "[l]iberty makes a mockery of [the ICTY's] pledge to would-be tyrants that they will be indicted, arrested and made to answer for their alleged criminal acts and violations of human rights."<sup>92</sup> Hence, state sovereignty must be understood, and a workable solution found, before a viable system of international criminal justice is established.

State sovereignty, which is one of the fundamental bases of international law,<sup>93</sup> allows each state to govern its own affairs.<sup>94</sup> "[S]overeignty is frequently the justification for states to demand the non-intervention of other states in matters they consider to be within their exclusive jurisdiction."<sup>95</sup> As a byproduct of this independence, "[u]nder international law[,] states and other international legal persons enjoy certain immunities from the exercise of jurisdiction."<sup>96</sup> This means that states themselves can either expand or limit jurisdiction.<sup>97</sup> Accordingly, "in determining jurisdictional immunities to which an international legal person is entitled, both international and municipal law"<sup>98</sup> must be considered. Therefore, in theory, the Federal Republic of Yugoslavia, or any other nation opposed to an international tribunal's jurisdiction, may simply grant immunity to its citizens and thereby limit the tribunal's ability to act.<sup>99</sup>

Issues concerning jurisdiction are the logical outgrowth of the notion that all states are sovereign entities.<sup>100</sup> In the context of

---

91. *See id.*

92. *Id.*

93. *See* LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* LVII (1980) (explaining the rules and principles behind international law and the concept of state sovereignty).

94. *See generally id.* (noting that states may allow international entities to gain jurisdiction; the inverse conclusion is that they may also refuse to recognize international entities' exercise of jurisdiction).

95. Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.J.U. J. INT'L L. & POL. 417, 421 (1999) (proffering that state sovereignty is an essential element to international law and is frequently cited as the justification for a non-intervention policy).

96. HENKIN ET AL., *supra* note 93, at 490.

97. *See id.*

98. *Id.*

99. *See generally id.* (noting that the principle of state sovereignty does not allow for nations or political agencies to breach that sovereignty without consent; thus, if a country will not allow the ICTY to enter and further refuses to punish the suspect in accordance with domestic law there is little the ICTY can do to capture or prosecute the suspect).

100. *See id.*

war crimes, where jurisdiction is crucial, a state's exercise of sovereign immunity can be a complete roadblock. Therefore, it is important to understand the manner in which jurisdiction is established. The problem is that "[i]nternational law has not yet developed a comprehensive set of rules defining with reasonable precision all forms of jurisdiction that may be exercised by states and other international legal persons."<sup>101</sup> Thus, the meaning and scope of jurisdiction is dynamic and changes with the circumstances. What is more established is that "[u]nder international law, the jurisdiction of a state depends on the interest that state, in view of its nature and purposes, may reasonably have in exercising the particular jurisdiction asserted. . . ."<sup>102</sup>

For example, in the case of a state facing prosecution for war crimes, that state's interests in limiting the international court's jurisdiction and reserving prosecution for its own national courts may be very high. Thus, when cooperation conflicts with the state in question's self-interest, it is unlikely that the state will cooperate with a tribunal or international criminal court. Such is the case with the ICTY's stand off with the Federal Republic of Yugoslavia over Milosevic's prosecution.

It is often in a state's self-interest to invoke sovereign immunity in war crimes prosecutions, thus presenting the prosecuting entity with the frequently encountered and troublesome dilemma of obtaining jurisdiction. The fact that states almost always act out of self-interest is a major contributing factor to the ICTY's problems with enforcing jurisdiction. Because it is impossible to request that states act against their respective interests without defeating the idea of state sovereignty, problems with establishing jurisdiction will continue to plague any system of international criminal justice.

### *C. The General Problems with the ICTY: A Lesson and Warning for the ICC*

Milosevic's prosecution demonstrates the problems inherent in an international criminal justice system. ICTY Chief Prosecutor Arbour recognizes these "inevitable limits imposed on the Tribunals" as a result of their dependency on state cooperation in

---

101. *Id.* at 421.

102. *Id.*

order to function.<sup>103</sup> Indeed, state cooperation is the key in all aspects of the ICTY's operation, including conducting arrests and gathering evidence.<sup>104</sup> Arbour believes that both the Office of the Prosecutor and the ICTY have a "duty to advance every plausible, credible, legal argument . . . to break the unhealthy dependency on State cooperation."<sup>105</sup> Clearly, Arbour views resolution of the conflicts between state cooperation and sovereignty as key to establishing an effective international criminal justice system.<sup>106</sup>

Even before Milosevic's formal indictment, the political process affected Milosevic's treatment by the ICTY.<sup>107</sup> At the 1994 Dayton Peace Accords,<sup>108</sup> which aimed to bring a truce and eventual peace to the Balkans, "Milosevic was given de facto immunity in exchange for his signature on the Dayton Peace Accords."<sup>109</sup> Milosevic's later military actions in the Balkans hurt the peace process and negated his immunity.<sup>110</sup> Still, Milosevic's political importance remains an issue in his capture and prosecution. The absence of ICTY action against Milosevic, gives credibility to the idea that "Milosevic is only on notice because he still may be needed to prevent harm to NATO forces and to make yet another political settlement regarding Kosovo."<sup>111</sup> Clearly, international politics play a significant role in Milosevic's prosecution.

These political dealings with Milosevic demonstrate the "vulnerability of the Tribunals which are dependent on political

---

103. Arbour, *supra* note 3, at 38 (discussing recent ad hoc tribunals, their successes, failures, strengths and inherent limitations).

104. *See id.*

105. *Id.* at 40–41.

106. *See id.*

107. M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 418–419 (noting that Milosevic was the center of special attention during the Dayton Peace Accords, where he was given special de facto immunity in exchange for his signature).

108. *See* General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, U.N. Doc. A/50/810-S/1995/1021, *reprinted in* 35 I.L.M. 175 (1996) [hereinafter Dayton Peace Accords]. *See also* University of Minnesota Human Rights Library, Office of the Spokesman, *Summary of the Dayton Peace Agreement on Bosnia-Herzegovina* (Nov. 30, 1995) <<http://www1.umn.edu/humanrts/icty/dayton/daytonsum.html>> (summarizing the political agreements and truces achieved at the Dayton Peace Accords and discussing the requirements and conditions of the cease-fire).

109. Bassiouni, *supra* note 107, at 419.

110. *See id.*

111. *Id.*



interests.”<sup>112</sup> This exposes a second problem with the ICTY: that as an organ of the U.N. Security Council, which relies on each individual state’s political institutions for cooperation and enforcement, it is constantly confronted with international political issues.<sup>113</sup>

Although the ICTY has taken steps to minimize its dependency on the international community, there are limits to the ICTY’s self-sufficiency.<sup>114</sup> The ICTY depends on the U.N. Security Council for assistance in executing warrants and gathering evidence.<sup>115</sup> The ICTY has no independent ability to enforce its instruments other than issuing orders, which are ineffective without enforcement.<sup>116</sup> Thus far, the ICTY and the U.N. Security Council have encountered significant problems gaining full cooperation with and enforcement of ICTY orders.<sup>117</sup> This lack of enforcement power “sets a very dangerous precedent if the [U.N. Security] Council, to which the maintenance of peace has been entrusted, allows its orders to be flouted with impunity.”<sup>118</sup>

Effective enforcement is especially crucial in an international community that is often hostile to cooperation.<sup>119</sup> According to Arbour, “[w]hat States say pales in comparison to States’ deeds, and their deeds are exclusively dictated by their perceived self interest[s].”<sup>120</sup> This overriding self-interest leads to lack of state cooperation—especially for states under investigation for alleged war crimes. This fact is reflected in the sentiment that, “we should not expect any better from States because of their clear self interest in not seeing criminal justice succeed.”<sup>121</sup>

In his address to the United Nations in November 1999, then-retiring ICTY President, Judge Gabrielle Kirk McDonald

---

112. *Id.* at 418.

113. *See id.* at 418–420.

114. *See id.* at 419.

115. *See id.*

116. *See id.* at 418.

117. *See Ferencz, supra* note 5, at 222 (discussing the evolution of the International Criminal Court and specifically the problems with, and prospects of, the current system of ad hoc tribunals).

118. *Id.* (discussing the problems concerning the U.N. Security Council’s lack of effective enforcement of the ICTY’s orders as part of the larger problem of political co-dependence that significantly restrains the Court’s efforts).

119. *See Arbour, supra* note 3, at 38–39.

120. *Id.* at 39.

121. *Id.*

acknowledged the conflict between compliance and state self-interest.<sup>122</sup> According to McDonald, “the important work of the Tribunal is being hindered by the non-compliance of the Federal Republic of Yugoslavia, Republic of Croatia and the Republika Srpska.”<sup>123</sup> Echoing Arbour’s sentiments, McDonald noted that “[t]here is simply no substitute for compliance.”<sup>124</sup>

In assessing the consequences of failing to effectively address compliance and enforcement issues,<sup>125</sup> McDonald stated:

Make no mistake about it: if the international community does not ensure that the orders of the [ICC] are enforced, it is bound to go the way of the League of Nations. . . . No court can function effectively without meaningful methods of enforcing its Orders and Decisions. The Tribunal is no different.”<sup>126</sup>

McDonald’s point is well taken. The prospect of establishing an ICC is a noble one—its purpose full of promise but with potentially broad powers that could be misdirected or misappropriated. The ICTY’s relationship with the U.N. Security Council illustrates that if careful thought is not given to the ICC’s powers—to both expanding and limiting them—the ICC may be an experiment in which the idea is the only positive component in its operation.

Understanding the considerable difficulties international criminal justice faced with the ICTY,<sup>127</sup> questions now arise as to what improvements, if any, can be made to make the system more effective and efficient; whether the proposed ICC Statute advances these goals; and finally, whether the ICC, in its present form, is a desirable mechanism to replace the current system of ad hoc criminal justice.

### III. PROBLEMS WITH THE ICTY ILLUSTRATE THAT THE ICC STATUTE IS NOT A DESIRABLE IN ITS PRESENT FORM

In June and July 1998, 164 Nations met in Rome to finalize the Rome Statute of the International Criminal Court (ICC

---

122. See McDonald Address, *supra* note 70 (summarizing the Court’s achievements and making observations regarding the challenges the ICTY and international criminal justice in general face).

123. *Id.*

124. *Id.*

125. See *id.*

126. *Id.*

127. See *supra* Part II (discussing some of the principal problems facing the ICTY).

Statute or Rome Treaty).<sup>128</sup> If ratified by sixty nations by January 2001, the ICC Statute will establish the world's first permanent international criminal court.<sup>129</sup> Proponents of the ICC Statute believe that it is the solution to the problems inherent in prosecuting war criminals, which have plagued criminal courts since Nuremberg.<sup>130</sup>

The ICC Statute establishes "the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law."<sup>131</sup> According to the Statute's drafters:

Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment—to heads of State and commanding officers as well as the lowliest soldiers in the field or militia recruits—it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in armed conflict; or use children for barbarous medical experiments will no longer find willing helpers.<sup>132</sup>

This proposal seems to describe a system of enforcement based on principles of deterrence. This goal reflects the optimism of the ICC, purportedly embodies the long sought-after ideals of international criminal justice. The question now, however, is what price the international community is willing to pay for this kind of justice and whether the ICC has the power and authority to accomplish its lofty goals.

#### *A. The ICC Statute Does Not Solve the Inherent Conflict Between State Sovereignty and Cooperation*

The proposed ICC will be comprised of eighteen judges and a prosecutor who, together, will be responsible for prosecuting alleged war criminals.<sup>133</sup> The ICC will have jurisdiction in cases of

---

128. See ICC Statute, *supra* note 8. See also *ICC Statute Overview*, *supra* note 1 (providing a general overview of the events leading up to the creation of the ICC Statute and describing the purpose and ideological focus of the ICC); Brown, *supra* note 156, at 856.

129. See ICC Statute art. 126, *supra* note 8, at 1068.

130. See *ICC Statute Overview*, *supra* note 1.

131. *Id.*

132. *Id.*

133. See ICC Statute arts. 35–36, 42, *supra* note 8, at 1020–1026.

genocide,<sup>134</sup> crimes against humanity,<sup>135</sup> war crimes,<sup>136</sup> and the crime of aggression.<sup>137</sup> The definitions of these crimes were clarified and simplified from their applications in the ICTY Statute,<sup>138</sup> but their basic provisions remain the same.<sup>139</sup>

The ICC will have jurisdiction over crimes committed in any state submitting to its jurisdiction by signing or ratifying the Rome Treaty.<sup>140</sup> If a state wherein alleged war crimes occurred is not a party to the ICC Statute, the state can submit to the ICC's jurisdiction for that offense only.<sup>141</sup> The ICC can also refuse jurisdiction and demand that the state prosecute its own nationals.<sup>142</sup> The ICTY Statute contains the same principle.<sup>143</sup> Unlike the ICTY, however, the ICC does not have the express

134. *See id.* art. 6, at 1004.

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

*Id.*

135. *See id.* art. 7, at 1004–1005. "Crimes against humanity," under the ICC Statute, means:

systematic attack directed against any civilian population" that results in: '(a) Murder; (b) Extermination; (c) Enslavement (d) Deportation or the forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (f) Torture (g) Rape, sexual slavery . . . ' among other crimes including the crime of apartheid.

*Id.*

136. *See id.* art. 8, at 1006. "War Crimes" include:

(i) Willful killing (ii) Torture or inhumane treatment, including biological experiments; (iii) Willfully causing great suffering, or serious bodily injury to body or health (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial; (vii) Unlawful deportation. . . ; (viii) Taking of hostages.

*Id.* These war crimes must occur as part of a "plan or policy." *Id.*

137. *See id.*

138. *Compare id.* arts. 5–8, at 1003–1006 with ICTY Statute arts. 2–5, *supra* note 6, at 1171–1174.

139. *See* ICC Statute art. 8, *supra* note 8, at 1006.

140. *See id.* art. 12, *supra* note 8, at 1010.

141. *See id.*

142. *See id.*

143. *See* ICTY RULES OF EVIDENCE AND PROCEDURE R. 9, *supra* note 16, at 497.

power to request a deferral of jurisdiction by a non-signatory state.<sup>144</sup>

Limiting the ICC's jurisdiction begs the question of whether the ICC will do anything to improve the functioning and efficacy of ad hoc tribunals like the ICTY. Proponents of the ICC claim that one of its improvements is that it has increased latitude over when and where it can punish war crimes because the ICC's jurisdiction is not "subject to the limits of time or place."<sup>145</sup> Although an ad hoc tribunal's jurisdiction is generally limited, for instance the ICTY's jurisdiction is limited to the area of the former Yugoslavia,<sup>146</sup> this does not support the contention that these limits will hinder a tribunal's overall effectiveness. In fact, limited jurisdiction may have distinct advantages.

Indeed, the ad hoc tribunal system has some distinct advantages when it comes to conflicts between state sovereignty and jurisdiction. First, the ICTY relationship with the U.N. Security Council is a symbiotic one—the latter providing the former with political and foreign policy support.<sup>147</sup> This relationship has not proven totally effective or desirable, but at least it is in place. Conversely, the ICC's relationship with the U.N. Security Council has yet to be determined.<sup>148</sup> Establishing and defining the roles in this relationship is crucial because the ICC has no other mode of enforcement.<sup>149</sup> Yet, the United Nations been unable to resolve the ICTY's jurisdiction difficulties because it, too, must adhere to established international law and thus is subject to the same constraints.

Resolving state sovereignty issues will be essential in the effective implementation of any international criminal justice system. It is also necessary to examine how the ICC, with jurisdiction broader than that of the ICTY, could be used for purposes other than those for which it was explicitly designed.

---

144. Compare *id.* R. 61, at 516 with ICC Statute art. 12, *supra* note 8, at 1010.

145. ICC Statute Overview, *supra* note 1.

146. See ICTY Statute art. 8, *supra* note 6, at 1176.

147. See *id.* Introduction, at 1167–1169.

148. See ICC Statute art. 2, *supra* note 8, at 1003.

149. See *id.* The ICC Statute does not specify modes of enforcement—it only indicates that the ICC will rely on the U.N Security Council.

## 1. The Dangers Political Enforcement Poses to a Fair System of Justice and the Role of the U.N. Security Council.

Currently, the ICTY interacts with the U.N. Security Council to facilitate execution and enforcement of its orders.<sup>150</sup> As discussed above, co-dependence leads to political problems, which have been troublesome for the ICTY.<sup>151</sup> Interaction between the ICTY and the U.N. Security Council, however, is unavoidable and, in fact, imperative to the effective functioning of any international criminal court.<sup>152</sup> This is because “the Tribunal lacks the independent coercive mechanisms and relies on the Security Council to adopt effective measures to compel state cooperation.”<sup>153</sup>

Although the role of the U.N. Security Council is of the utmost importance in establishing an effective ICC, the ICC Statute is largely silent on the Security Council’s role with regard to enforcing ICC orders and compelling state cooperation.<sup>154</sup> There are indications in the ICC Statute that its drafters envisioned an important role for the United Nations, but its specific duties and responsibilities remain largely undefined.<sup>155</sup> One of the few places where the Security Council is specifically mentioned, in the ICC Statute Article 16 veto provisions, presents an issue that some critics consider troublesome.<sup>156</sup>

## 2. The Article 16 Veto—Jurisdiction and Compliance

The ICC Statute gives the Security Council the ability to delay the prosecution or investigation of a suspected war criminal for twelve months.<sup>157</sup> The delay process can be repeated

---

150. See ICTY Statute art. 8, *supra* note 6, at 1176.

151. See Arbour, *supra* note 3, at 38.

152. See McDonald Address, *supra* note 70.

153. *Id.*

154. See ICC Statute art. 2, *supra* note 8, at 1003.

155. See *id.* art. 2, at 1003.

156. See generally Bantram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT’L L. & POL. 855, 858 (1999) (describing the United State’s objection to the ICC).

157. See ICC Statute art. 16, *supra* note 8, at 1012. Article 16, entitled “Deferral of investigation or prosecution,” provides:

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

indefinitely.<sup>158</sup> This provision represents an attempted compromise with the United States at the Rome Conference.<sup>159</sup>

The United States' reaction to the possibility of ICC jurisdiction may be representative of the attitudes of other permanent members of the U.N. Security Council,<sup>160</sup> none of which have ratified the ICC Statute.<sup>161</sup> Although the United States is a supporter of international justice, the U.S. Government demanded that it receive veto power over all actions involving U.S. citizens.<sup>162</sup> This demand comes from the United States' concern over "possible ICC prosecution of U.S. personnel after U.S. military activity abroad."<sup>163</sup> The Article 16 veto power, known as the "Helms Standard,"<sup>164</sup> is a major point of contention in the possible enactment of the ICC Statute.<sup>165</sup>

Even though the United States generally supports the concept of an ICC,<sup>166</sup> U.S. Government Officials declared the ICC Statute "fatally flawed" and announced that the U.S. Government "will neither sign nor ratify the treaty in its present form."<sup>167</sup> This is because the veto power is neither absolute nor specific to the

same conditions.

*Id.*

158. *See id.* Article 16 does not provide any temporal or quantitative restrictions on the renewal of a stay of prosecution. *See id.*

159. *See Brown, supra* note 156, at 857-860.

160. *See generally* Security Council, *Members* (visited Sept. 3, 1999) <<http://www.un.org/Overview/Organs/sc.html>> (listing the five permanent member of the U.N. Security Council: China, France, the United Kingdom, Russian Federation and the United States).

161. *See Ratification Status, supra* note 10. As of August 2000, only fifteen countries had ratified the ICC Statute. Also, of the five permanent members of the U.N. Security Council, only France and the United Kingdom signed the Rome Statute—China, Russia and the United States did not participate. *See id.*

162. *See Brown, supra* note 156, at 858.

163. *See id.* at 865.

164. *Id.* at 858. The "Helms Standard" is the name given to the United State's ultimatum regarding its absolute veto of the ICC's exercise of jurisdiction over U.S. citizens. *See id.* U.S. Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, sent a letter to Secretary of State, Madeleine Albright, stating that with regard to the ICC Statute "[w]ithout a clear U.S. veto [the ICC Statute] . . . will be dead-on-arrival at the Senate Foreign Relations Committee." *Id.*

165. *See generally id.* (discussing the United States' demands for an absolute veto on all prosecutions of U.S. citizens and the political ramifications thereof).

166. *See id.*

167. *Id.* at 856.

United States.<sup>168</sup> This U.S. stance caused a rift with the smaller states that participated in the Rome Conference.<sup>169</sup> In fact:

the security council veto privilege, so cherished by the United States and other permanent members of the Council, is resented by many developing countries of the south. Even many U.S. allies believed that extending veto privileges to ICC investigations and prosecutions would compromise the principle of a uniform global standard of justice.<sup>170</sup>

The United States' insistence on receiving the absolute veto power illustrates the fact that states act almost solely out of self interest. This is a seemingly unavoidable consequence of the fundamental principle of state sovereignty.<sup>171</sup> Further, the veto issue demonstrates that the conflicts between non-compliance and self-interest are not, and will not, be limited solely to states under investigation. By demanding the Helms Standard, the United States effectively declared that it supports the ICC's efforts to exercise jurisdiction over other nations but will not allow the Court to exercise jurisdiction over U.S. citizens. Consequently, the ICC Statute, in its present form, will not hold the U.S. military accountable in the same manner as it will the military forces of other countries' that ratify the ICC. Whether there can be an effective international system of justice in which some nations are basically immune from prosecution is decidedly questionable.

### 3. The Article 16 Veto and the Politicization of a Fair Judicial Process

Although the ICC Statute does not presently include an *absolute* veto provision, Article 16 of the ICC Statute provides for a limited renewable veto.<sup>172</sup> This provision is just as troublesome as an absolute veto because it represents the same policy threat—namely, that any veto is seemingly contrary to a system of equitable justice. Moreover, this veto power may be more dangerous than if the United States were given exclusive veto power over all prosecutions and investigations of U.S. citizens

---

168. *See id.* at 858. *See also* ICC Statute art. 16, *supra* note 8, at 1012.

169. *See* Brown, *supra* note 156, at 857.

170. *Id.* at 858–859.

171. *See generally* Arbour, *supra* note 3, at 38–41 (noting that difficulties with jurisdiction are part of the ICTY's problems in capturing alleged war criminals).

172. *See id.*



because it will allow the political process to further invade this system of justice. This is true because to promote their interests, the more powerful states will have to coerce smaller states to vote with them. The more political the system becomes, the harder it will be to administer impartial justice.

Moreover, the veto provides that the U.N. Security Council can pass a resolution delaying a prosecution or investigation for one year.<sup>173</sup> This allows the Security Council to maintain some control over who the ICC prosecutes. This control is problematic because the ICC relies on the Security Council to execute and enforce the ICC's orders.<sup>174</sup> Essentially the Security Council is the ICC's police force—and the veto provision allows the “police” to dictate when the ICC may do its job.

Additionally, this control creates a situation wherein politics play a central role in the ICC's operation; this may create a conflict with the ICC's purported role as an independent judiciary.<sup>175</sup> For example, it is conceivable that the ICC will have to consider objections from Members of the Security Council each time it decides to prosecute a war criminal. Instead of the Security Council becoming an enforcement organ of the ICC, the ICC may become an organ of the Security Council.

Potentially more troublesome is how this relates to the ICC's state sovereignty and jurisdiction issues. Any member of the Security Council, or signatory state, may initiate investigations at anytime.<sup>176</sup> This may allow at least the five permanent members of the Security Council to use their political sway to either initiate or prevent the ICC's prosecution of other states.<sup>177</sup> The only

---

173. *See id.*

174. *See* ICC Statute art. 53–54, *supra* note 8, at 1029–1030.

175. *See id.* art. 40, at 1023.

176. *See id.* art. 14, at 1011. Article 14, entitled “Referral of a situation by a State Party,” provides:

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

*Id.*

177. *See* Security Council, *supra* note 160. “Decisions on substantive matters require nine votes including the concurring votes of all five permanent members. This is the rule of ‘great Power unanimity,’ often referred to as the ‘veto’ power.” *Id.* This means that in order to enforce their respective wills, each permanent member must sway the other members to vote with it—thus clearly, politics will invade this process.

significant deterrent to this political subversion of the fair judicial process is the structure of the ICC's jurisdiction.<sup>178</sup> Unlike the ICTY, the "jurisdiction of the ICC, as set out in the Rome [Treaty], is built upon the unquestioned right of States to prosecute crimes committed on their territory or by their nationals."<sup>179</sup> Although this is not "universal jurisdiction"<sup>180</sup> allowing the ICC to penetrate state sovereignty to capture war criminals without fear of retribution, it is more expansive in that it is not limited to a specific area like the ICTY's jurisdiction. The ICC Statute allows any signatory state to be subject to the ICC's jurisdiction upon request. This process could potentially be used for political leverage and gain.

Supporters of the ICC, however, believe that just because the ICC could be used for an improper or political purpose, this should not defeat the establishment of the Court.<sup>181</sup> They further contend that "[p]ossibilities for corruption, venality and inefficiency can be found in courts everywhere, but to suggest that because abuses are imaginable courts should not exist is to doubt the rule of law itself."<sup>182</sup> ICC supporters ask the international community to support the Court based on the integrity of the legal process and its goals for establishing international justice.<sup>183</sup>

Unfortunately, the international community's actions do not reflect the ICC supporters' optimism. As some admit, "[p]owerful nations are surely tempted to retain the advantages of power just as less powerful states understandably resent being deprived of democratic equality."<sup>184</sup> As a result, it can at least be said that although the kind of justice that the ICC proposes to create is desirable, many of the most powerful and influential nations do

---

178. See generally Brown, *supra* note 156, at 858–859 (noting that the ICC would be limited to prosecuting the crimes enumerated in the ICC Statute, and doing so only in the countries that ratified the Statute).

179. *Id.* at 874.

180. *Id.*

181. See generally Ferencz, *supra* note 5, at 231–235 (recognizing that any court or system of criminal justice has the potential for corruption or abuse, but the compelling need to facilitate prosecution of war criminals far outweighs any dangers the ICC may pose to state sovereignty).

182. *Id.* at 232.

183. See *id.* at 231–235.

184. *Id.* at 232.

not want the ICC Statute enforced against them or their interests.<sup>185</sup>

Whether the United States or any of the permanent members of the U.N. Security Council decide to ratify the ICC Statute, it will still exist in the ICC's system of justice. For example, if the ICC is ratified and goes into effect, the permanent members will still have the power to stay prosecutions even if they themselves are not bound to the ICC's jurisdiction.<sup>186</sup> This seems to be a probable result because the United States vowed not to ratify the ICC Statute.<sup>187</sup> Thus, similar to the effect of the ICTY, the institution of state sovereignty will be weakened for most states but will, in effect, be strengthened for the five permanent members of the Security Council.<sup>188</sup>

#### IV. CONCLUSION: THE AD HOC TRIBUNAL SYSTEM SHOULD REMAIN IN PLACE UNTIL A MORE COMPREHENSIVE, AND LESS POLITICALLY BASED SYSTEM OF INTERNATIONAL CRIMINAL LAW CAN BE DEVELOPED.

When the ICC Statute, as a whole, is analyzed, it becomes clear that it may not do enough to improve on the current ad hoc tribunal system to justify its adoption at this time. The ICTY's prosecution of Slobodan Milosevic exposes this fact. Even though the ICTY knows his capture and prosecution are essential to its legitimacy, and that of an ICC, it has been unable to bring him to justice. This is not a failure of the ICTY, but rather an indication of the difficulties inherent in international criminal justice.

The crucial question for the ICC is whether the proposed ICC Statute could bring Milosevic to justice with more speed or ease than could the ICTY. The answer is no because the ICC Statute does not effectively solve the principle problems with the ICTY, namely state sovereignty and cooperation. Further, the ICC would be unable to escape the inevitable political obstacles it faces. The reasons for this conclusion are simple: no system of international criminal justice can accomplish more than has the ICTY without participating states' consent and cooperation. The

---

185. See generally Brown, *supra* note 156, at 858 (discussing the United States' demand that it be entirely immune from the ICC Statute).

186. See ICC Statute art. 16, *supra* note 8, at 1012.

187. See Brown, *supra* note 156, at 856.

188. See Bodley, *supra* note 95, at 469-470.

problem is that states view the Court's jurisdiction as an invasion of sovereignty—a situation that the ICC cannot, and does not, change.

Moreover, the debate surrounding the ratification of the ICC Statute makes clear that not all nations want international justice at any price. The United States has unequivocally states that it will only accept the ICC Statute on its own terms.<sup>189</sup> Additionally, because of the way the ICC is set up, the permanent members of the U.N. Security Council will retain a controlling interest in the ICC regardless of whether they ratify the ICC Statute.<sup>190</sup> Thus, the idea that “[n]o court can be effective unless it can rely on the good faith of nations prepared to be bound by its terms”<sup>191</sup> is critical to understanding the ICC Statute's greatest flaw because clearly not all nations are prepared to submit to the ICC's jurisdiction.

Further, the ICC may be dangerous in its operation. Beyond possible judicial or prosecutorial corruption is the probability that the ICC would quickly be used as a political tool. The ICC Statute facilitates politicization by providing the limited renewable veto power to the Security Council.<sup>192</sup> It is not difficult to imagine how the ability to stay prosecutions could be used as a political tool.

On the other hand the ICTY, and indeed ad hoc tribunals in general, are not as susceptible to these problems for one simple reason—they are limited in scope and jurisdiction.<sup>193</sup> Further, they have proven successful. Although politics clearly play a part in the ICTY,<sup>194</sup> and the ICTY has problems with state sovereignty and cooperation, both issues are seemingly unavoidable and endemic to any international criminal court. The danger of the ICTY being used as a political tool, however, is not as broad or potent as it is with the ICC and its broad powers and jurisdiction. Because the ICC Statute does little to significantly improve on the

---

189. See Brown, *supra* note 156, at 856.

190. See ICC Statute art. 16, *supra* note 8, at 1012.

191. See Ferenecz, *supra* note 5, at 232 (explaining that it is imperative for the international community to support the ICC—otherwise, it cannot function effectively).

192. See *supra* Part III (discussing the potential effect of granting a veto power to the five permanent members of the U.N. Security Council).

193. See ICTY Statute arts. 8–9, *supra* note 6, at 1176–1177.

194. See *supra* Part III (discussing the potential and actual involvement of political issues in the arrest and capture of Slobodan Milosevic and other alleged war criminals).

ad hoc international criminal justice system, the international community should continue to rely on the tribunal system.

Establishing a functioning, effective international criminal law system is a noble and worthy goal. The international community has gone to great lengths to establish the precepts of such a system through the ICTY and its progeny, the International Criminal Tribunal for Rwanda.<sup>195</sup> The fact that the international community even indicted Slobodan Milosevic is a significant step. The reasons why Milosevic has not been brought to justice are crucial to the future of international criminal justice. The problems encountered in his prosecution by the ICTY, namely sovereignty, politics, and state cooperation, are just a few of the issues facing the ICC.<sup>196</sup> Further, many states, including the United States through its unwillingness to accept several concepts that are central to the ICC's operation, have shown that the international community is not ready to accept an ICC that operates without prejudice. As a result, the International Criminal Court is an idea and an institution whose time has yet to come.

*William Miller\**

---

195. See Ferencz, *supra* note 5, at 223. The Criminal Tribunal for Rwanda, which followed the ICTY, is ineffective due to problems locating those responsible for alleged war crimes. See *id.* See also Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

196. See *supra* Part II (discussing four of the dominant problems with the ICTY). This Comment primarily focuses on the sovereignty and state cooperation issues with regard to enforcement of orders. There are, however, countries with significant reservations about the ICC based on its definitions of crimes and the breath of the prosecutor's powers. See Brown, *supra* note 156, at 563-571. Although, not discussed herein, these reservations must be considered in completing a full analysis of the potential problems confronting the ICC.

\* J.D. candidate, 2001, Loyola Law School; B.A., History, University of Oregon, 1997. I would like to thank the editors and staff of the *Loyola of Los Angeles International and Comparative Law Review* for their tireless efforts on this Comment, as well as my fiancée, friends, and family for their support and encouragement.