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## THE INTERNATIONAL CRIMINAL COURT: FAR FROM PERFECT

Brian D. Keats

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# THE INTERNATIONAL CRIMINAL COURT: FAR FROM PERFECT

## I. INTRODUCTION

Since early in the twentieth century, the international community has discussed the possibility of creating a court to handle the most serious international crimes.<sup>1</sup> That possibility is about to become reality.<sup>2</sup> At a June 1998 convention in Rome, an overwhelming majority of nations approved the creation of an International Criminal Court (ICC).<sup>3</sup> Passed by a vote of 120 to 7,<sup>4</sup> this treaty contains guidelines for the formation of the ICC, which will be dedicated to the issues of genocide, crimes against humanity, serious war crimes, and international aggression.<sup>5</sup>

One would think this to be a significant step in bringing to justice those who commit these acts. However, loopholes in the current agreement, many of which were created to appease the United States, which voted against the ICC, may lead to an ineffective court.<sup>6</sup> While the treaty it suffers from some inconsistencies, many of which can be attributed to the attempts to appease the United States, whose withdrawal results from fears that the ICC will hear cases in which its soldiers are prosecuted.<sup>7</sup>

The problems with the ICC statute lie in the judicial process.<sup>8</sup> For example, under the current guidelines of the ICC, each country involved in a potential case would have the opportunity to take jurisdiction of the case

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1. See Secretariat of the Coalition for an International Criminal Court, *The CICC International Criminal Court Home Page* (visited Mar. 13, 2000) <<http://www.igc.org/icc/>> [hereinafter *CICC Home Page*]. Discussions for creating an international criminal court have been taking place on and off since the end of World War I. *Id.* The most recent rounds of discussion began at the end of the 1980's. *Id.*

2. *Rome Statute of the International Criminal Court*, United Nations Conference on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 1002 (1998) [hereinafter *Rome Statute*].

3. Thomas W. Lippman, *War Crimes Court Approval Gives U.S. a Dilemma*, WASH. POST, July 23, 1998, at A22.

4. Douglass W. Cassell, Jr., *U.S. Fears Undercut Tribunal*, CHI. DAILY L. BULL., Aug 18, 1998, at 5. There were twenty-one abstentions. *Id.*

5. *CICC Home Page*, *supra* note 1.

6. *Id.*

7. Lippman, *supra* note 3, at A22.

8. *Id.*

before the ICC prosecutor could proceed, so long as that country was capable of making a fair and honest effort to seek justice.<sup>9</sup> Furthermore, although the United Nations Security Council does not have to approve ICC investigations and cannot veto them, it can postpone the investigations indefinitely on a year by year basis.<sup>10</sup>

Additionally, signatory nations to the treaty may opt out of war crimes for seven years, meaning they would not fall under the ICC's jurisdiction.<sup>11</sup> These loopholes will lead to extensive delays in the judicial process or, even worse, prevent justice from being served against those who commit the acts the ICC is attempting to deter.

To see the potential problems one need only look at the recent ad hoc war tribunal in the former Yugoslavia and apply the ICC's standards to the case. For example, *Prosecutor v. Dusko Tadic*,<sup>12</sup> the first international war crimes trial since World War II,<sup>13</sup> was tried by a United Nations tribunal to adjudicate serious crimes against humanity in the former Yugoslavia.<sup>14</sup> The tribunal charged Tadic with thirty-one counts of various crimes against humanity involving the torture and murder of prisoners at Serbian prison camps during 1992.<sup>15</sup> The tribunal convicted Tadic of eleven counts and acquitted him of the remaining twenty.<sup>16</sup> His appeal regarding the jurisdiction and authority of the international tribunal was denied by a vote of four to one.<sup>17</sup>

Had Tadic been tried by the rules governing the ICC, the issue may never have appeared before the international community.<sup>18</sup> However,

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9. *Rome Statute*, *supra* note 2, art. 12.

10. *Id.* art. 15.

11. *See id.* pt. 2, Jurisdiction, Admissibility and Applicable Law.

12. *Prosecutor v. Dusko Tadic*, 35 I.L.M. 32 (1996).

13. *Id.*

14. *Prosecutor v. Tadic*, Case No. IT-94-1-T, (Oct. 1997), *reprinted in* 91 A.J.I.L. 718 at 720-721. The court hearing this case consisted of judges from Australia, Malaysia, and the United States. *Id.*

15. *Id.* at 718. 125 witnesses testified at the trial, which lasted seven months. *Id.* at 718.

16. *Id.* at 718. The convictions included ten specific counts related to "beatings," and a single general persecution count. In the majority of circumstances, the indictment assigned three counts to each charged act, which consisted of: 1) "a grave breach of the Geneva Conventions as recognized by Article 2 of the Statute of the Tribunal," 2) "an offense against the laws of war as recognized by Article 3 of the Statute of the Tribunal," and 3) "a crime against humanity as recognized by Article 5 of the Statute of the Tribunal." Tadic was unanimously acquitted of all nine of the specific murder charges because the evidence was deemed to be insufficient. *Id.* at 718.

17. *Dusko Tadic*, 35 I.L.M. at 75.

18. Cassell, *supra* note 4, at 5.

assuming that the case would have reached the jurisdiction of the ICC, the UN Security Council could still have postponed it.<sup>19</sup> Because there is no limit to this process,<sup>20</sup> the UN Security Council has the power to postpone indefinitely a case under this procedure.<sup>21</sup>

While significant progress has been made toward creating the ICC, and the idealistic purposes behind it are laudable, further improvements are required to increase its effectiveness.<sup>22</sup> The remaining loopholes represent problems that could seriously impede years of hard work. Unfortunately, it may take a few cases slipping through these loopholes to convince the parties to close them. However, it need not come to that. Adjustments to the procedures involved in trying these criminals would help ensure an effective ICC, bring to justice those who offend notions of humanity, and deter others from doing the same.

Part II of this Note discusses the history of the ICC and explores the Rome Convention's debates over the ICC. Part III examines war crimes under the ICC and takes the recent ad hoc tribunal for the former Yugoslavia<sup>23</sup> as an example of the current ICC statute's weaknesses. Part IV makes some suggestions for improvement for the ICC statute. Finally, this Note concludes by offering a summary of the current condition of the ICC, highlighting its weaknesses and offering solutions to them.

## II. THE HISTORY OF THE ICC

To understand what the United Nations is trying to accomplish in creating the ICC, it is necessary to review the ICC's origins.<sup>24</sup> Following World War I, there was a modest attempt by the international community to establish an international tribunal to handle matters similar to those being reviewed under the current ICC.<sup>25</sup> After the world learned of the atrocities

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19. *Id.*

20. *Id.*

21. *Id.*

22. Francisco Soberon, representative of APRODEH at the Rome Conference, *Perspectives on the Rome Treaty from Around the World*, <<http://www.perspectives.txt@gopher.igc.apc.org>> (visited on 10/11/98). (This source on file with the *New York Law School Journal of International and Comparative Law*).

23. Prosecutor v. Tadic, Case No. IT-94-1-T, (Oct. 1997), reprinted in 91 A.J.I.L. 718.

24. See Secretariat of the Coalition for an International Criminal Court, *The CICC International Criminal Court Home Page, Timeline* (visited Mar. 13, 2000) <<http://www.igc.org/icc/html/timeline.htm>> [hereinafter *CICC Timeline*].

25. *Id.*

committed during the war by the German leader, Kaiser Wilhelm,<sup>26</sup> there was an outcry for justice.<sup>27</sup> However, because no legal precedent existed, how was justice to be served? The depression soon hit the United States, and shortly thereafter the world was preparing for another world war.<sup>28</sup>

### *A. The Nuremburg Trial and the Genocide Convention*

The next effort to create the ICC came after World War II.<sup>29</sup> That effort began with the Nuremburg Trial<sup>30</sup> and culminated in 1948 when the UN adopted the Genocide Convention.<sup>31</sup> The Genocide Convention outlawed any acts that were intended to extinguish a racial, national, ethnic or religious group.<sup>32</sup> Also, the Convention declared the need for establishing a permanent court to handle these matters.<sup>33</sup> However, numerous countries would not agree to an international legal jurisdiction.<sup>34</sup> Therefore, the establishment of the International Criminal Court was delayed.<sup>35</sup>

The ideas set forth during the Nuremburg Trial began to evolve during the 1950s.<sup>36</sup> During that time, the International Law Commission was authorized to codify the principles incorporated within the Nuremburg Charter and began drafting a statute that would ultimately create an international criminal court.<sup>37</sup> That effort, however, never got off the ground, as the world began to settle into the cold war while the United Nations turned its attention to other matters.<sup>38</sup> It would be decades before the idea would resurface.<sup>39</sup>

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26. *Establishing an International Criminal Court Major Unresolved Issues in the Draft Statute*, May 1998 Revised, Vol. 1 Num. 1 at 1.

27. See *CICC Timeline*, *supra* note 24.

28. *Id.* However, the horrors of war would soon remind the world that something was necessary to deter these atrocities and bring the perpetrators to justice. *Id.*

29. *Id.*

30. SEE *CICC TIMELINE*, *SUPRA* NOTE 24.

31. *Convention on the Prevention and Punishment of the Crime of Genocide*, Jan. 12, 1951, 78 U.N.T.S. 277 (1951).

32. *Id.*

33. *Id.*

34. See *CICC Timeline*, *Supra* note 24..

35. See *CICC Timeline*, *supra* note 24.

36. *Id.*

37. The International Law Commission is a United Nations General Assembly body. *Id.*

38. *Id.*

39. *Id.*

### B. Resurgence of the International Criminal Court

The idea of establishing an international criminal court resurfaced in the late 1980's.<sup>40</sup> In 1989 Trinidad and Tobago reintroduced the idea to the UN General Assembly for the purposes of combating drug trafficking.<sup>41</sup> The request was given great consideration, perhaps because of the timing.<sup>42</sup> The cold war had come to an end and war was beginning in the former Yugoslavia.<sup>43</sup> The General Assembly once again asked the International Law Commission to create a draft statute for the purpose of creating a permanent ICC.<sup>44</sup>

During the 1990s the United Nations created an ad hoc War Crimes Tribunal for the former Yugoslavia.<sup>45</sup> In addition, six sessions of the Preparatory Committee (created by the General Assembly) have been held to draft and discuss various issues involved in creating the ICC.<sup>46</sup> Thus, we have seen some major developments in the recent past toward establishing the ICC.

### C. The Rome Convention

In June of 1998, during the Rome Convention, an overwhelming majority of nations voted to approve the treaty that would create the ICC.<sup>47</sup> The final vote was 120 to 7, with only the United States, China, Iraq, Israel, Libya, Qatar, and Yemen opposing the treaty.<sup>48</sup>

The treaty must be ratified by sixty nations by the end of the year 2000 before it enters into force.<sup>49</sup> Initially, several human rights groups felt this number was too high given the fact that it exceeds the number required by

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. See United Nations, *International Criminal Tribunal of the Former Yugoslavia*, (visited Mar. 13, 2000) <<http://www.un.org/icty/>>.

46. See *CICC Timeline*, *supra* note 24.

47. Lippman, *supra* note 3, at A22.

48. *Id.*

49. *Bonino Wants Speedy ICC Ratification*, INT'L PRESS SERVICE Oct. 1, 1998, at 1.

most other treaties.<sup>50</sup> However, it appears likely that the treaty will be ratified by the necessary number of states.<sup>51</sup> As of March 8, 2000 ninety-five nations had signed the treaty and seven had ratified it.<sup>52</sup> Ratification is normally accomplished when a treaty meets the approval of the national legislature.<sup>53</sup>

## 1. United States Opposition to the ICC

Although seventy-seven nations have signed the Rome Statute, the United States is not among them.<sup>54</sup> The United States is primarily concerned with the power of the ICC's independent counsel to conduct investigations and the jurisdiction the ICC would have over nations that did not sign the treaty.<sup>55</sup> The United States fears prosecution of its soldiers overseas, feeling this would be an opportunity for anti-American sentiments to be acted

50. *Id.* at 1. Emma Bonino, Chief of the European Commission's Humanitarian Office, pointed out that after opening for signature in December of 1997, the Land Mines Convention was ratified by forty-five nations by the end of September 1998. She emphasized that this example proves that the sixty votes needed to ratify the ICC Statute by December 31, 2000 is easily within reach.

51. See Secretariat of the Coalition for an International Criminal Court, *Rome Statute Signature and Ratification Chart*, (visited Mar. 13, 2000) <<http://www.igc.org/icc/rome/html/ratify.html>>. Rome Statute Ratifications: Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, and Norway. Rome Statute Signatories: Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bangladesh, Belgium, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Congo (Brazzaville), Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Georgia, Ghana, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Kenya, Kyrgyzstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Portugal, Poland, Republic of Korea, Romania, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, St. Lucia, Sweden, Switzerland, Tajikistan, Trinidad and Tobago, Uganda, Ukraine, United Kingdom, Venezuela, Zambia, and Zimbabwe.

52. *Id.* The ratifying countries are Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, and Norway. *Id.*

53. United Nations Department of Public Information, *Setting the Record Straight: The International Criminal Court*. <[Gopher://gopher.igc.apc.org//00/orgs/icc/undocs/faq\\_dpi.txt](http://gopher://gopher.igc.apc.org//00/orgs/icc/undocs/faq_dpi.txt)> (This source is on file with the *New York Law School Journal of International and Comparative Law*).

54. Lippman, *supra* note 3, at A22.

55. *Id.*

upon.<sup>56</sup> However, others have argued that the safeguards provided for within the ICC would prevent any such persecution.<sup>57</sup> Some have even gone so far as to blame President Clinton for American refusal to accept the treaty.<sup>58</sup> They claim Clinton is afraid to stand up to the Secretary of Defense, who opposes the treaty.<sup>59</sup> Still others have warned that the United States may stand to become a "safe haven" for criminals who are being sought after by the ICC since they would not be subject to its authority.<sup>60</sup>

## 2. Support for the ICC

Despite the current stance of the United States, an overwhelming majority of the world,<sup>61</sup> including non-governmental organizations (NGO) within the United States itself, are in support of the ICC.<sup>62</sup> The Lawyers Committee of Human Rights<sup>63</sup>, Amnesty International<sup>64</sup>, the NGO

56. *Id.* According to David Schaffer, United States Ambassador-at-Large, the power of a permanent independent prosecutor to initiate investigations prompted concerns that U.S. soldiers could be subjected to politically motivated prosecutions. In addition, the U.S. objected to the ICC's jurisdiction over citizens of non-signatory countries. This concern was highlighted by the belief that the U.S. Senate would not ratify the treaty any time soon, making the U.S. a non-participatory country and yet still subject to the ICC's jurisdiction. *Id.*

57. Bartram S. Brown, *International Prosecutor, Independent Counsel*, CHI. DAILY L. BULL., Sept. 10, 1998, at 1.

58. Cassell, *supra* note 4, at 5.

59. *Id.*

60. See Alvin P. Adams, *USA Statement on the United States' Position*, UNITED NATIONS ASS'N, July 23, 1998, at 5 (taken from *Perspectives on the Rome Treaty from Around the World*, <<http://www.perspectives.txt@gopher.igc.apc.org>>), wherein the President of UNA-USA, states: "by staying outside the treaty, the United States risks making itself into the industrialized world's haven for accused war criminals, since America's European allies, Canada, and Japan are all united in strong support of the court." *Id.*

61. Lippman, *supra* note 3, at A22.

62. *CICC Home Page*, *supra* note 1.

63. See *CICC Home Page*, *supra* note 1. The Lawyers Committee of Human Rights feels the ICC is needed to achieve the following goals: "end impunity, afford redress, counter the failure of national systems, remedy the limitations of ad hoc tribunals, provide an enforcement mechanism, and serve as a model." *Id.*

64. Amnesty International, *The Court: Why Is It Necessary?* (visited Oct. 10, 1998) <<http://icc.amnesty.it/en/index.html>> (This source is on file with the *New York Law School Journal of International and Comparative Law*). Amnesty International feels the ICC is necessary for the following reasons:

"1) Bringing perpetrators to justice sends a clear message that violations of human rights will not be tolerated and that those who commit such acts will be held fully accountable. 2) National governments are often unwilling or unable to investigate gross human rights violations and bring those responsible to justice. 3) Respect for

Coalition<sup>65</sup>, and UN Secretary General Kofi Annan<sup>66</sup> have all provided persuasive reasons for the creation of the ICC. Indeed, Annan has called the ICC treaty "a giant step forward in the march towards universal human rights and the rule of law."<sup>67</sup>

Also, for the first time within any treaty of this type, victims under the ICC will be allowed to claim reparations.<sup>68</sup> Those convicted may be liable for restitution, compensation and rehabilitation.<sup>69</sup> This power allows the court to determine the scope of the harm.<sup>70</sup> This element may serve as a deterrent to some who may consider violating the principles of the ICC.

the rule of law, national and international, cannot be maintained unless those who violate the most basic norms of civilized behavior are brought to justice. 4) An international criminal court will provide a mechanism to enforce international criminal law. 5) People who commit grave human rights violations must be brought to justice if they are not to benefit from their crimes and if the cycle of impunity and further violations is to be broken. 6) The victims, their relatives and society at large need and deserve to know the truth. Only the attribution of personal responsibility for human rights crimes can prevent whole groups being blamed and sectional hatreds intensifying. 7) Without justice and truth there can be no lasting and effective reconciliation." *Id.*

65. *CICC Home Page*, *supra* note 1. Over three hundred participating organizations are listed on this site as of August 1998. This coalition performs the following activities in an effort to advocate the creation of the ICC:

"1) Convene the Coalition and its working groups, such as the ad hoc Tribunal/ICC funding working group, information/media working group, and a working group on U.S. strategies. 2) Maintain a World Wide Web page, international computer conferences and listserv email lists to facilitate the exchange of NGO and expert documentation and information concerning the ad hoc Tribunals and the ICC negotiations and to foster discussion and debate about substantive issues arising from the negotiations for establishing a permanent International Criminal Court. 3) Facilitate meetings between the Coalition and representatives of governments, UN officials and others involved in the ICC negotiations. 4) Promote education and awareness of the ICC proposals and negotiations at relevant public and professional conferences—including UN conferences, committee, commission and preparatory meetings. 5) Produce newsletters, media advisories, reviews and papers on the developments and negotiations." *Id.*

66. Kofi Annan, *Opening Remarks: Advocating for an International Criminal Court*, 21 *FORDHAM INT'L L.J.* 363 (Dec. 1997).

67. *United Nations Department of Public Information*, *supra* note 53.

68. *Rome Statute*, *supra* note 2, art. 75.

69. *Id.*

70. Fiona McKay, Legal Officer, Redress, *Perspectives on the Rome Treaty from Around the World*, <perspectives.txt at gopher.icg.apc.org> (This source is on file with the *New York Law School Journal of International and Comparative Law*).

### 3. Loopholes in the ICC

Loopholes in the construction of the ICC present a very real obstacle to its effectiveness. These loopholes include the opportunity of an affected nation to take a case instead of the ICC prosecutor,<sup>71</sup> the unlimited veto power of the UN Security Council,<sup>72</sup> and the “opt out” provision for signatory nations with respect to war crimes.<sup>73</sup>

First, under the ICC as it currently stands, a country that is involved in an ICC investigation may have the option of taking the case before it reaches the ICC.<sup>74</sup> In effect, this provision takes away any jurisdiction the ICC may have, provided that a court within the country accepts the case and is capable of conducting an honest investigation.<sup>75</sup> What then, is the purpose of having an International Criminal Court when it may not even be able to try the accused war criminals whose sentencing was a major purpose of creating the court?

Some view the treaty as a “substantial retreat” from the jurisdiction originally foreseen.<sup>76</sup> The results of such a retreat will seriously impede the court’s effectiveness by shrinking its jurisdiction.<sup>77</sup>

A second glaring loophole in the treaty involves the UN Security Council. Under the treaty, investigations by the ICC prosecutor may be conducted without Security Council approval, and in fact, the Security Council cannot even veto such investigations.<sup>78</sup> However, provided each of the five members agree, the Security Council may delay the investigation for a period of twelve months.<sup>79</sup> In addition, the Security Council may renew this postponement each year for an indefinite period of time.<sup>80</sup> In other words, the Security Council can effectively block any investigations it does not want conducted for an unlimited amount of time; an extremely powerful position to hold.<sup>81</sup>

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71. *Rome Statute*, *supra* note 2, art. 17.

72. *Rome Statute*, *supra* note 2, art. 16.

73. *Rome Statute*, *supra* note 2, pt. 2.

74. *Rome Statute*, *supra* note 2, art. 17.

75. *Id.*

76. Lawyers Committee for Human Rights, *Perspectives on the Rome Treaty from Around the World*, <perspectives.txt atgopher.igc.apc.org> (This source is on file with the *New York Law School Journal of International and Comparative Law*).

77. *Id.*

78. *Rome Statute*, *supra* note 2, art. 16.

79. *Id.*

80. *Id.*

81. *Id.*

This provision has caused concern around the world. Some opponents, such as Fransisco Soberon of the Asociacion Pro Derechos Humanuos (APRODEH) have gone so far as to insist that the Security Council not intervene in the ICC at all.<sup>82</sup> Recently, Indian Professor Usha Ramanathan presented an interesting theory on why this provision was included in the treaty.<sup>83</sup> Ramanathan suggests that the world has not yet grown accustomed to the post-cold-war world we now live in and thus reverts to the traditional way of doing things<sup>84</sup> by deferring to Security Council decisions.<sup>85</sup> Whatever the reason, the negative potential of such a provision is too great to allow its endurance.

A final loophole in the treaty allows signatory nations to opt out for war crimes under the ICC's jurisdiction for up to seven years.<sup>86</sup> However, inexplicably, non-signatory nations do not have that right.<sup>87</sup> This logic has been questioned.<sup>88</sup> Here again, the treaty has created a loophole where it was trying to compromise.<sup>89</sup>

### III. WAR CRIMES UNDER THE ICC

To help illustrate the effect these loopholes may have, one need only apply them to recent incidents in the former Yugoslavia.<sup>90</sup> Reviews on the success of this ad hoc tribunal have been mixed. Kofi Annan has pointed to it as an example of success and a stepping stone that has established a valuable precedent for the ICC.<sup>91</sup> Others, however, have pointed to it as a

82. Fransisco Soberon, APRODEH, *Perspectives on the Rome Treaty from Around the World*, <gopher.igc.apc.org> (perspectives.txt) (This source is on file with the *New York Law School Journal of International and Comparative Law*).

83. Usha Ramanathan, *Perspectives on the Rome Treaty from Around the World*, <gopher.igc.apc.org> (perspectives.txt). (This source is on file with the *New York Law School Journal of International and Comparative Law*).

84. *Id.*

85. *Id.*

86. *Rome Statute*, *supra* note 73, pt. 2.

87. *Id.*

88. Cassell, *supra* note 4.

89. *Rome Statute*, *supra* note 17, art. 17.

90. While tribunals dealt with cases in the Former Yugoslavia like the Tadic case (See *Prosecutor v. Tadic*, 35 I.L.M. 32 (1996)), trouble arose again in the Kosovo region in 1998. Serbian leader Slobodan Milosevic prompted NATO attacks with accusations of "ethnic cleansing" of ethnic Albanians. On March 23, 1999 NATO ordered airstrikes against Serbia. The air campaign lasted seventy-seven days. *NATO's Role in Relation to the Conflict in Kosovo* <<http://www.nato.int/kosovo/history.htm>> (visited March 20, 2000) at 4.

91. Annan, *supra* note 66, at 6.

model of ineffectiveness.<sup>92</sup> Proponents of the ICC stress that the lack of speed with which the war crimes trials got under way indicates the need for the ICC.<sup>93</sup> Additionally, ICC proponents note that ad hoc tribunals do not have the power to award reparations to victims of international crimes, unlike the current ICC treaty.<sup>94</sup>

The case of *Dusko Tadic*<sup>95</sup> is an example of potential problems associated with the ICC. Tadic was indicted for committing violations of international humanitarian law in the former Yugoslavia and appealed the jurisdiction of the ad hoc tribunal created for the former Yugoslavia.<sup>96</sup> Though he was convicted on eleven counts and lost his appeal by a vote of four to one,<sup>97</sup> the case brings up an interesting scenario for demonstrating the potential effects of the aforementioned loopholes in the current treaty. If, at the time of the tribunal, the Former Yugoslavia had a national government with a capable judicial system it would have had an option to hear the case instead of the ICC.<sup>98</sup> This scenario may pose some problems. One could foresee the possibility of a somewhat biased trial or perhaps a lenient sentence handed down if a government, particularly one that was going through some turmoil, were trying one of its own officials. Potential bias aside, some countries' courts may not be capable of proceeding as quickly with the case as the ICC would. For example, their case load for courts may be backed up or their court system may not be organized enough to handle a case of this magnitude.

The power of the UN Security Council to delay investigations indefinitely poses another problem.<sup>99</sup> Suppose the five member Security Council had a particular interest in a case like Tadic, or perhaps they had no significant interest but simply decided to delay the investigation for twelve months. And again, a year later, they chose to do the same thing.<sup>100</sup> And so on, and so on. Someone like Tadic may never face trial or his trial may be significantly delayed. Regardless of the unlikelihood of this happening, it

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92. *War Crimes: The Need For a Strong International Court*, STATESMAN (INDIA), August 18, 1998, at 2 [hereinafter *War Crimes*].

93. *Id.*

94. *Rome Statute*, *supra* note 2, art. 75.

95. *Tadic*, 35 I.L.M. 32.

96. *Id.*

97. *Id.* at 75.

98. *Rome Statute*, *supra* note 2, art. 17.

99. *Rome Statute*, *supra* note 2, art. 16.

100. *Id.*

puts the power of justice in the hands of five nations.<sup>101</sup> Surely, the purpose of the ICC cannot be to place the fate of the world's worst criminals in the hands of so few.

Finally, suppose the former Yugoslavia was a signatory nation to the current ICC treaty. Such status would permit them to opt out of a war crime case for seven years.<sup>102</sup> The *Tadic* case involved war crimes, and therefore Tadic could have escaped trial for seven years if the former Yugoslavia chose to opt out.<sup>103</sup> Once again, the criminal wins because of a loophole, and justice and the international community suffer.

#### IV. SUGGESTIONS FOR IMPROVEMENT

So what can be done? The best method to answer that question is to examine the loopholes one by one. First, the provision allowing a nation involved to take the case ahead of the ICC should be eliminated.<sup>104</sup> As noted by the Lawyers Council For Human Rights,<sup>105</sup> an independent prosecutor should have the ability to prosecute cases on his or her own accord.<sup>106</sup> Furthermore, nations like the United States, who are concerned about biased prosecutions should be comforted by proposed checks and balances involved in those prosecutions.<sup>107</sup> The proposal of a judicial pre-screening of all investigations is an example of an effective check.<sup>108</sup> This neutral panel would provide an effective safeguard against biased prosecutions.<sup>109</sup> With such a provision in place there would be no need to keep the provision allowing involved nations to take a case.<sup>110</sup> To allow this would only complicate the judicial process by providing an unnecessary jurisdictional option.

Furthermore, the provision allowing the UN Security Council to delay investigations<sup>111</sup> must be removed. Although the complete removal of this

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101. *Id.*

102. Cassell, *supra* note 4, at 5.

103. *Id.*

104. *Rome Statute*, *supra* note 1, art. 17.

105. Lawyers Committee For Human Rights, *International Criminal Court Call to Action*, (visited Mar. 13, 2000) <<http://www.lchr.org/lchr/feature/50th/main.htm>>.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Rome Statute*, *supra* note 2, art. 17.

111. *Rome Statute*, *supra* note 2, art. 16.

provision may not be immediately realistic, the procedures outlined in the Singapore Compromise<sup>112</sup> would be an acceptable alternative. Under the Singapore Compromise, the Security Council would still be allowed to prevent an investigation of the independent prosecutor provided all five of its members were in agreement.<sup>113</sup> However, this block could only last for a limited time period.<sup>114</sup> Such a time period remains undefined.<sup>115</sup> At least under this proposal the delay of potential investigations and trials would be limited.<sup>116</sup> Because an investigation under the Singapore Compromise could not be put off indefinitely, this is a step in the right direction.<sup>117</sup> In fact, Great Britain, a member of the Security Council, has already thrown its support behind the idea.<sup>118</sup> While the Singapore Compromise is the best alternative currently available, it is far from ideal because it still allows for a Security Council postponement under certain conditions.<sup>119</sup>

Additionally, the “opt out” provision for signatory nations regarding war crimes needs to be addressed.<sup>120</sup> The absurdity of this provision is highlighted by the fact that non-signatory nations do not have this option.<sup>121</sup> Some have viewed this provision as a “backward step,” by extending jurisdiction over countries not a party to it.<sup>122</sup> The solution here may be somewhat clear cut. Those nations that have signed the treaty presumably have agreed to be subject to its jurisdiction and abide by its laws.<sup>123</sup>

However, there should be no reason why a nation should not be subject to rules they profess to hold others to. The proper solution is to do away with the “opt-out” clause. This “opt-out” clause was originally included to allow signatory nations time to amend their laws and policies so that they comply

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112. *War Crimes*, *supra* note 92, at 2.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* In December of 1997 Great Britain announced it would support an effort to enact the Singapore Compromise. *Id.*

119. *Id.*

120. *Rome Statute*, *supra* note 2, pt. 2.

121. *Id.*

122. Julia Gorin, *The Dark Side of the U.N. War Crimes Court*, WASH. TIMES, Aug. 31, 1998, at 4.

123. *Rome Statute Signature and Ratification Chart*, *supra* note 51.

with the statute.<sup>124</sup> The declared intent behind the "opt-out" clause does not correspond to the purposes behind the ICC, but serves to undermine them. In the interest of justice and fairness, the opt-out provision should be eliminated.

## V. CONCLUSION

Despite the glaring loopholes highlighted in this Note,<sup>125</sup> the ICC is not likely to be amended in the near future. It may even take a case or two to escape through the loopholes before action is taken. Hopefully, that situation can be avoided and alterations made to the treaty to make it a more effective tool for seeking justice.

Perhaps these steps will be taken. After all, significant progress has been made since the idea of the ICC was once again brought to life at the beginning of this decade.<sup>126</sup> Although great strides have been made, it is difficult to enthusiastically support the view of those like Gustavo Gallno of the Columbian Commission of Jurists who, while acknowledging that the treaty has many "serious weaknesses," said that "this court is better than no court."<sup>127</sup> The Secretary General of Amnesty International, Pierre San, was correct when he stated the treaty ". . . needs work to make the court truly effective."<sup>128</sup>

This Note offers suggestions that can play a significant role in the crafting of a better court. First, the international community should eliminate the provision allowing a nation involved in a case to take it instead of the ICC.<sup>129</sup> In place of that provision, the international community should move towards expanding the independent prosecutor's powers to pursue a case and

124. United Nations Department of Public Information, *Setting the Record Straight: The International Criminal Court*. <Gopher://gopher.icg.apc.org/00orgs/icc/undocs/faq\_dpi.txt> (visited October 15, 1998) at 3 (This source is on file with the *New York Law School Journal of International and Comparative Law*).

125. *See supra* Part II.C.3.

126. *CICC Home Page*, *supra* note 1.

127. Richard Dicker, Human Rights Watch, *Perspectives on the Rome Treaty from Around the World*, (visited ???) <perspectives.txt at gopher.icg.apc.org> (This source is on file with the *New York Law School Journal of International and Comparative Law*).

128. Pierre Sane, Amnesty International Secretary General, *Perspectives on the Rome Treaty from Around the World*, (visited ???) <perspectives.txt at gopher.icg.apc.org> (This source is on file with the *New York Law School Journal of International and Comparative Law*). Sane added that Amnesty International would ". . . continue to push for a court that could have a real impact in protecting millions of future victims."

129. *Rome Statute*, *supra* note 2, art. 17.

rely on proposed checks and balances, such as judicial pre-screening of investigations.<sup>130</sup>

Second, the international community should remove the provision allowing the UN Security Council to delay investigations indefinitely.<sup>131</sup> Instead, the international community should move in favor of a plan such as the Singapore Compromise that would at least put more stringent conditions on this provision,<sup>132</sup> if not do away with it entirely.

Finally, the “opt out” provision must be modified or eliminated.<sup>133</sup> It is unnecessary and unfair. Nations that have agreed to the terms of a treaty should be made to abide by its terms.<sup>134</sup>

Hopefully these changes can be made before any criminals escape justice. If even one person is able to avoid prosecution for crimes that offend the human race, that is one person too many.

*Brian D. Keatts*

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130. Lawyers Committee For Human Rights, *supra* note 105.

131. *Rome Statute*, *supra* note 72, art. 16.

132. *War Crimes*, *supra* note 92, at 2.

133. *Rome Statute*, *supra* note 2, pt. 2.

134. *Id.*



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EDITORIAL AND GENERAL OFFICES: 57 WORTH STREET, A806, NEW YORK, NEW YORK 10013-2960. TELEPHONE: (212) 431-2113. FACSIMILE: (212) 966-9153.