Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance?

By Ronli Sifris*

INTRODUCTION

In his opening statement before the International Military Tribunal at Nuremburg, Justice Robert H. Jackson asserted:

> The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.[1]

In the sixty years since the Nuremburg War Crimes Trials, crimes against humanity and genocide continue to be perpetrated. At the same time, however, international criminal law has developed the firm notion that the perpetrators of such human rights abuses should be held accountable in an international institutional setting according to the rule of law and not the rule of men. The International Criminal Court ("ICC"), a permanent international institution, has been established for this very purpose; to hold such perpetrators accountable. The focus of this article is not the legal accountability of the perpetrators of egregious human rights violations, but rather the democratic accountability of the ICC itself.

Part I of this article briefly considers the concept of accountability as an element of the broader concept of legitimacy in international law. Part II addresses the normative question of whether the ICC should in fact meet standards of accountability by exploring the concept of judicial independence, the relationship between the independence and the effectiveness of

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[1] Justice Robert H. Jackson, Chief Counsel for the United States at Nuremburg, *Opening Statement before the International Military Tribunal* (Nov. 21, 1945), http://www.roberthjackson.org/Man/theman2-7-8-1/.

international tribunals, and the relationship between independence and accountability. Part III questions whether the ICC meets the appropriate standards of accountability by briefly setting out the United States objections to the ICC as a way of broadly establishing the context of the debate, and then by considering the relationship between the ICC and the Security Council, the role of the Prosecutor, the function of the Assembly of States Parties ("ASP"), and a few other less contentious accountability mechanisms. Ultimately, this article concludes that the Rome Statute of the International Criminal Court has managed to strike the correct balance between judicial independence and judicial accountability. [2]

I. ACCOUNTABILITY AND INTERNATIONAL LAW

A. *Concerns Relating to the Legitimacy of International Law*

In recent years a deluge of discussion and literature relating to the legitimacy of international law and international institutions has been produced. This gush of dialogue has focused on various interrelated issues which represent differing concerns relating to the fundamental issue of whether there is a democratic deficit in international law. Some have attempted to bypass this obstacle-ridden road by suggesting, for example, that the legitimacy of international law is based on common values rather than democratic norms.[3] Others have tackled the traffic head on and suggested, for example, the establishment of a Global Peoples Assembly to rectify the democratic deficit in the international legal system.[4]

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[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
[3] Christian Tomuschat, *Obligations Arising for States without or against their Will*, 241 RECUEIL DES COURS 4, 199 (1993), *cited in* Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 232 (2006).
[4] Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191 (2000).

Mattias Kumm has developed a constitutionalist model for assessing the legitimacy of international law based on democratic principles.[5] According to this model, there are four distinct principles which should be considered when determining the legitimacy of international law: international legality, the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability, and the substantive principle of achieving reasonable outcomes which respect fundamental rights.[6] This article will focus on the procedural aspect of accountability as it relates to the ICC.

B. *The Concept of Accountability as a Component of Legitimacy*

Those challenging the legitimacy of international law frequently pose this question: Does international law grant decision making authority to international actors who are not accountable? Accountability, it seems, is viewed as being a fundamental component of democratic legitimacy. The view that international actors are not sufficiently accountable for their decisions and actions is frequently expounded as a ground for challenging the legitimacy of international law.

The meaning of accountability is itself extremely complex and, of necessity, dependent on the nature of the particular organization in question. Thus it is difficult, when discussing the general concept of accountability in international law, to articulate a specific definition of accountability. It has been suggested that there are seven accountability mechanisms which apply in different circumstances and to different organizations: hierarchical accountability, supervisory accountability, fiscal accountability, legal accountability, market accountability, peer

[5] Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 917 (2004).
[6] *Id*.

accountability, and public reputational accountability.[7] Some of these forms of accountability rely on delegation theories of accountability, while others rely on participatory theories of accountability.[8] Moreover, some organizations are subject to more than one form of accountability. For example, it is arguable that the World Bank is subject to hierarchical accountability, supervisory accountability, and fiscal accountability.[9] Thus it seems that the way in which the notion of accountability can be understood is to a large extent dependent on the nature of the specific organization which is being considered.

To add an additional layer of complexity to the matter, it is not possible to consider whether an organization is accountable without determining to whom it should be accountable. There are those who claim that international organizations should be accountable to a "hypothetical global polity."[10] It is in this context that the concept of a Global Peoples Assembly has been developed.[11] However, it is submitted that in the absence of a global *demos*, in the absence of democratic institutions such as a Global Peoples Assembly, accountability to a global polity is a lofty ideal which is not likely to become a reality in the near future. A more down-to-earth question is whether a particular organization is imbued with internal accountability mechanisms and whether it is accountable to the international regime itself. Just as accountability in the domestic realm concerns accountability to the people who form the State, accountability to

[7] Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 36-37 (2005).
[8] *Id.* at 36. According to the participation model of accountability, people with power ought to be accountable to those who are affected by their decisions. According to the delegation model of accountability, people with power ought to be accountable to those who have entrusted them with it. *Id.* at 31-32.
[9] *Id*. at 36-37.
[10] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 29 (2004).
[11] *See* Falk & Strauss, *supra* note 4.

the international legal regime concerns accountability to the States that form the international legal regime.[12]

II. SHOULD THE ICC MEET STANDARDS OF ACCOUNTABILITY?

A. *Judicial Independence*

The concept of judicial independence encapsulates what is arguably the most compelling reason why the ICC should not be held to the same standards of accountability as other international organizations. In most democratic States, judicial independence is viewed as being an essential component of the democratic character of the State. It is "rooted in unwritten conventions and traditions of judicial integrity" and is also often enshrined in the State's Constitution or another form of written law.[13] For example, in both the United States and Australia, the legislative, executive, and judicial powers are all contained in separate chapters of their Constitutions, thereby indicating that each of these is a separate and independent arm of government.

The concept of judicial independence is also supported by international law. For example, Article 10 of the Universal Declaration of Human Rights states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[14] Furthermore, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders established "Basic Principles on the Independence of the Judiciary,"

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[12] *See* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel,* 17 EUR. J. INT'L L. 15 (2006); Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization and International Law*, 15 EUR. J. INT'L L. 885, 897 (2004)("the principle of democracy translates in the international realm into the principle of sovereign equality").

[13] Theodor Meron, *Editorial Comment: Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 360 (2005).

[14] Universal Declaration of Human Rights art. 10, G.A. res. 217A (III), at 71, U.N. Doc A/810 (Dec. 12, 1948).

which include the assertion that judicial independence shall be guaranteed by States and enshrined in law, and the pronouncement that the judiciary shall decide matters impartially without any restrictions, improper influences, inducements, pressures, threats, or interferences.[15]

The core of judicial independence has been defined as "the capacity to decide cases in a lawful and impartial manner free from improper control and influence."[16] Such independence is essential if courts are to properly perform their role. Judicial independence is critical if judges are to uphold the rule of law, protect fundamental rights, and ensure that those who do wrong are held accountable.[17] According to John Ferejohn, 'independence' has at least two meanings.[18] First, a person, such as a judge, is independent if he or she is able to act without fear of interference by another.[19] This is an essential component of judicial independence. Second, a person or an institution is independent if it is able to do its job without relying on some other institution or group.[20] This notion of independence does not fully accord with notions of judicial independence as courts generally are to some extent reliant on other institutions.[21] For example, in the United States the federal judiciary is institutionally dependent on Congress for jurisdiction, rules, and execution of judicial orders.[22] Thus the concept of judicial independence does not necessarily represent the view that courts should be absolutely independent and unaccountable.

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[15] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, Aug. 26, 1985 – Sept. 6, 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59, *available at* http://www1.umn.edu/humanrts/instree/i5bpij.htm.

[16] Paul Gewirtz, *Independence and Accountability of Courts*, 24 GLOBAL L. REV. 7 (2002) (in Chinese). An English translation of the article is available from the China Law Center at Yale Law School at http://islandia.law.yale.edu/chinalaw/pdf/independence%20_eng.pdf, 1-2 (all subsequent citations are to the English translation).

[17] Meron, *supra* note 13, at 359-360.

[18] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999).

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

This concept of judicial independence applies in equal measure to the ICC. At the Rome Conference, where the international community decided to establish the ICC,[23]

> [t]here was broad agreement that the Court should be an independent, fair, impartial, effective and broadly representative international criminal judiciary, and that it should be free from political or other influences. It was also emphasized that the Court should not become a tool of political struggles or a means of interfering in other countries' internal affairs.[24]

Furthermore, it should be noted that early suggestions that only the Security Council should be able to authorize prosecutions were rejected on the basis that the ICC must have an independent Prosecutor free of political influence.[25] Thus it seems that the ICC was established with the aim of preserving the essential quality of judicial independence that is enshrined in both international law and the domestic law of all democracies.

B. *The Relationship between the Independence of an International Tribunal and its Effectiveness*

Eric Posner and John Yoo have propounded the theory that there is no relationship between the independence of an international tribunal and its effectiveness, and that independence may in fact be detrimental to the effectiveness of international tribunals.[26] In relation to the ICC, Posner and Yoo assert that it will not be an effective tribunal because its jurisdiction "strikes at the heart of state interests."[27] They further contend that the United States'

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[23] Pursuant to General Assembly resolutions adopted in 1996 and 1997, the Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court convened on 15 June 1998 in Rome. This conference is hereafter referred to as the "Rome Conference."

[24] Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Doc. L/ROM/22 (Jul. 17, 1998).

[25] Benjamin B. Ferencz, *Misguided Fears about the International Criminal Court*, 15 PACE INT'L L. REV. 223, 232 (2003).

[26] Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 28 (2005). It should be noted that this article was in part a response to the 1997 article by Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

[27] Posner & Yoo, *supra* note 26, at 69.

boycott of the ICC can be traced directly to the independence of the Court, thus directly implying that the ICC will not succeed without United States support.[28]

Laurence Helfer and Anne-Marie Slaughter responded to this proposition by offering a counter-theory "of 'constrained independence' in which States establish independent international tribunals to enhance the credibility of their commitments in specific multilateral settings and then use more fine-grained structural, political, and discursive mechanisms to limit the potential for judicial overreaching."[29] Helfer and Slaughter present four key objections to the theory put forward by Posner and Yoo. First, Posner and Yoo proceed on the assumption that independence is the fundamental factor in determining an international tribunal's success or failure. However, it is clear that independence is simply one of a range of factors that contribute to the effectiveness of an international tribunal.[30] Second, Posner and Yoo conduct an empirical analysis which "suffers from serious selection bias and omitted variable bias."[31] For example, they fail to note that the majority of recently established international tribunals are highly independent. Additionally, they ignore the increased use that States are making of independent international tribunals. Finally, the tribunals selected for analysis are predominantly interstate tribunals rather than supranational tribunals and quasi-judicial review bodies. Essentially, Posner and Yoo ignore much of the abundance of information relevant to this issue and therefore obtain skewed results from their empirical analysis. Third, Posner and Yoo's empirical results are inconsistent with their own theory.[32] For example, the international tribunals which scored the highest on effectiveness were also the tribunals which scored the highest on independence.

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[28] *Id.* at 69-70.
[29] Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 901 (2005).
[30] *Id.* at 902.
[31] *Id.* at 902-903.
[32] *Id.* at 903. These tribunals were the European Court of Justice, the European Court of Human Rights, and the World Trade Organization Appellate Body.

Fourth, contrary to Posner and Yoo's theory, States are in fact establishing more independent tribunals and are using them more frequently.[33]

Helfer and Slaughter ultimately (and, it is submitted, correctly) conclude based on the available evidence that the independence of an international tribunal does in fact enhance its effectiveness. However, they are careful to note that States face a choice not between dependent and independent tribunals but between complete dependence and constrained independence,[34] or, put another way, the relationship between independence and accountability.

C. *The Relationship between Independence and Accountability*

While judicial independence is a core component of democracy, a perhaps equally fundamental democratic idea is that there must be checks on the exercise of power, because unchecked power frequently results in abuse of power.[35] These two concepts of judicial independence and judicial accountability are not necessarily in conflict. Indeed, "[m]ature legal systems are characterized by both judicial independence and judicial accountability."[36] As is alluded to in the above discussion regarding Helfer and Slaughter's view of the relationship between independence and effectiveness, and the definition of independence put forward by Ferejohn, the aim of judicial independence is not unconstrained independence. Rather, the aim is to ensure a level of independence such as to enable judges to decide cases "in a lawful and impartial manner free from improper control and influence."[37] Thus the challenge is to balance these two concepts so that an appropriate level of judicial constraint is cultivated without

[33] *Id*. at 904.
[34] *Id.* at 905.
[35] Jamie Mayerfeld, *The Democratic Legitimacy of the International Criminal Court*, 28 FLETCHER FORUM WORLD AFFAIRS 147, 155 (Summer 2004).
[36] Gewirtz, *supra* note 16, at 1.
[37] *Id*. at 2.

undermining the essence of judicial independence.[38] Judges must be able to make decisions free of inappropriate control by others, but at the same time there must be some level of control by others in the exercise of judicial decision making.[39]

III. DOES THE ICC MEET THE APPROPRIATE STANDARDS OF ACCOUNTABILITY?

A. *The United States' Objections to the ICC*

The United States has been an extremely vocal opponent of the ICC and has steadfastly refused to ratify the Rome Statute. Among the objections of the United States include those relating to the accountability mechanisms in place. Thus it is useful to briefly consider the United States' allegations before launching into an analysis of the ICC's existing accountability mechanisms. While the United States has challenged the ICC on many grounds, it has four main objections: the ICC's jurisdiction over non-party States, the inclusion of the crime of aggression in the Rome Statute, the role of the Security Council, and the Prosecutor's discretion to initiate investigations.

Pursuant to Article 12(2) of the Rome Statute, the ICC can exercise its jurisdiction where either the "State on the territory of which the conduct in question occurred" or the "State of which the person accused of the crime is a national" accepts the ICC's jurisdiction. A major concern of the United States is the jurisdiction of the Court to prosecute American nationals overseas, particularly American servicemen.[40] Consequently, the United States has alleged that the ICC lacks democratic legitimacy over the nationals of States that have not ratified the Rome

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[38] *Id.*
[39] Scott H. Bice, *Judicial Independence and Accountability Symposium: Forward*, 72 S. CAL. L. REV. 311, 312 (1999).
[40] William A. Schabas, *United States Hostility to the International Criminal Court: It's all about the Security Council*, 15 EUR. J. INT'L L. 701, 711 (2004).

Statute.[41] According to the United States' position, the ICC should only have jurisdiction over a non-party national if the "State of which the person accused of the crime is a national" accepts the ICC's jurisdiction.[42]

Under Article 5(1) of the Rome Statute, the ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. However, whereas the first three categories are all defined in later Articles, the crime of aggression has for the time being been left undefined. The United States, clearly anxious that its own military activities will be viewed as constituting aggression, has expressed intense concern over the way in which the crime of aggression will be defined and has asserted that issues relating to State aggression fall within the exclusive ambit of the Security Council.[43]

The United States has also been particularly vehement in its view that the current function of the Security Council as regards the ICC is inadequate. According to John Bolton, the former United States Ambassador to the United Nations, a "significant failing is that the Rome Statute substantially minimized the Security Council's role in ICC affairs."[44] The United States has argued that it is the Security Council's responsibility to maintain international peace and security, and thus the Security Council should play a significant role in the work of the ICC.[45] A skeptic may point out that the United States' role as a permanent member, and hence a holder of the veto power, may in some way be influencing this argument.

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[41] Diane F. Orentlicher, *Judging Global Justice: Assessing the International Criminal Court*, 21 WIS. INT'L L.J. 495, 510 (2003).
[42] Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court,* 63 SASK. L. REV. 275, 278 (2000).
[43] *Id.* at 279.
[44] John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROBS. 167, 177 (Winter 2001). This article was written by John Bolton when he was Senior Vice President of the American Enterprise Institute and Assistant Secretary of State for International Organization Affairs.
[45] Mysak, *supra* note 42, at 279.

Article 15 of the Rome Statute essentially provides for an independent Prosecutor. The United States has expressed concern over the independence of the Prosecutor, ostensibly on the basis that a *proprio motu* Prosecutor might be politically motivated. Arguably, in light of the United States' contention that the Security Council should have a stronger influence over the ICC, the United States' concern is not actually whether the Prosecutor is politically motivated, but rather whether it can control the decisions of the Prosecutor.[46]

While the United States' concerns about the prosecution of non-party nationals and the definition of the crime of aggression do not directly address issues of accountability, a brief mention of them is useful in gaining a sense of the context of the discussion at hand and the possible political motivations which lie behind the views of States towards the ICC and the way in which the Rome Statute eventually balanced the need for independence with the need for accountability. However, the United States' concerns about the role of the Security Council and the independence of the Prosecutor relate directly to accountability issues. "True political accountability," according to John Bolton, "is almost totally absent from the ICC, which lacks both any semblance of democratic accountability or effective governmental oversight and control."[47] The following sections consider the correctness of this statement.

B. *The Relationship between the ICC and the Security Council*

The debate regarding the relationship between the ICC and the Security Council is primarily focused on two specific Articles of the Rome Statute: Article 13 and Article 16. Article 13 deals with the exercise of jurisdiction and states that the ICC may exercise jurisdiction pursuant to a State Party referral, a Security Council referral, or at the Prosecutor's own

[46] Schabas, *supra* note 40, at 717.
[47] Bolton, *supra* note 44, at 174.

discretion. Article 16 entitles the Security Council to pass a resolution deferring an investigation or prosecution.

1. *Article 13: The Exercise of Jurisdiction*

The United States has argued that the Rome Statute conflicts with the Security Council's "primary responsibility for the maintenance of international peace and security."[48] According to this argument, the fact that the ICC can instigate an investigation or prosecution without express Security Council authorization constitutes an undermining of the role of the Security Council as envisaged by the United Nations Charter.[49]

Such an argument, however, flies in the face of the very purpose of a Court. Indeed, the delegates at Rome decided that to formally subordinate the ICC to political institutions, and the Security Council in particular, would be incompatible with the purpose of the ICC.[50] To assert that the Court should have no independent discretion regarding its own investigations and prosecutions is to treat the ICC like a non-judicial international agency. Such a failure to take into account the judicial nature of the organization exhibits a complete disregard for the fundamental democratic concept of judicial independence. As such, the very push towards 'democratic accountability' threatens to totally undermine one of the fundamental concepts enshrined in all true democracies. It is correct that the United Nations Charter envisages the Security Council as being responsible for the maintenance of international peace and security, and it is for this reason that the Security Council plays a role in referring cases to the ICC.

[48] U.N. Charter art. 24, para. 1.
[49] Cassandra Jeu, *A Successful, Permanent International Criminal Court … "Isn't it Pretty to Think So?,"* 26 HOUS. J. INT'L L. 411, 425 (2004).
[50] Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 515 (2003).

Nevertheless, for the Security Council to have full control over case referrals to the ICC would result in it exercising a dominating function rather than merely a significant one.[51]

2. *Article 16: Deferral of Investigation / Prosecution*

Pursuant to the Rome Statute, the Security Council has both the power to refer a case to the ICC and the power to suspend an investigation or prosecution. At the Rome Conference there were three primary submissions regarding whether the Security Council should have the right to veto an investigation. The first proposal mirrored the original version of Article 16 as was contained in the draft Statute put forward by the International Law Commission.[52] Pursuant to this proposal, the Prosecutor could only launch an investigation upon express authorization by the Security Council.[53] This proposal was viewed by the majority of States as seriously undermining the ICC's judicial independence.[54] Eleven States posited that the Security Council should have absolutely no veto power.[55] This position would clearly have helped to preserve the judicial independence of the ICC but would not have provided even a minimum level of accountability to the Security Council. Singapore submitted a compromise proposal which, subject to a few minor changes, became the final version of Article 16.[56]

The Rome Statute strikes the correct balance between judicial independence and judicial accountability as regards the capacity of the Security Council to suspend an investigation or prosecution. The Security Council is not the "gatekeeper to the Court," as envisaged by the draft statute of the International Law Commission, but where the Security Council believes that

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[51] Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 113 (1999).
[52] Schabas, *supra* note 40, at 714-715.
[53] Hafner et al., *supra* note 51, at 114.
[54] Schabas, *supra* note 40, at 715.
[55] Hafner et al., *supra* note 51, at 114.
[56] Schabas, *supra* note 40, at 715 -716.

intervention is necessary in a particular case it can pass a resolution deferring an investigation or prosecution. The international structure of the Security Council renders it unlikely that this power to defer will be abused because, for a deferral to occur, a nine vote majority and the concurrence of all five permanent members of the Security Council is required.[57]

C. *Role of the Prosecutor*

The European Union has expressed its support for "a strong, effective, highly-qualified prosecutor, independent of governments."[58] Similarly, Amnesty International has asserted that without an independent Prosecutor "the ICC stands a very real chance of being 'crippled at birth'."[59] While the United States has adopted a very different approach and has frequently asserted that the ICC Prosecutor is largely unconstrained and unaccountable,[60] according to Benjamin Ferencz, "no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute."[61]

The issue of the independence of the Prosecutor is perhaps even more complicated than the issue of the independence of the ICC as a whole, because, while it is clearly important to have a Prosecutor who is free of State control, a Prosecutor, unlike a court, is not traditionally viewed as an independent entity and is frequently answerable to the executive. As the Committee of Ministers of the Council of Europe has observed:

> [T]he public prosecutor holds in most countries a position which is unique on two different counts. On the one hand he/she sets an often delicate balance between the executive and the judicial powers of the State. On the other hand, his own powers reflect

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[57] Schabas, *supra* note 40, at 716.
[58] Tony Lloyd, *Statement on Behalf of the European Union*, June 15, 1998, http://www.un.org/icc/speeches/615uk.htm.
[59] Amnesty International, *The International Criminal Court: Making the Right Choices – Part I,* http://web.amnesty.org/library/Index/ENGIOR400011997?open&of=ENG-385.
[60] Orentlicher, *supra* note 41, at 511.
[61] Ferencz, *supra* note 25, at 231.

> another often delicate balance, this time between independence from and subordination to the executive.[62]

Therefore, while the ICC Prosecutor should be independent in the sense that he or she is not politically motivated, a higher level of accountability is required in the case of the Prosecutor than in the case of the Court as a whole, and, pursuant to the Statute of the Court, the Prosecutor is in fact subject to this higher level of accountability.

1. *Article 13: Initiation of Investigations*

Pursuant to Article 13(c) of the Rome Statute, the Prosecutor may initiate an investigation in respect of a crime falling with the jurisdiction of the ICC. However, under Article 15, the Prosecutor can only conduct such an investigation if he or she has obtained the authorization of the Pre-Trial Chamber to do so. In addition, the Prosecutor can only investigate crimes that fall within the subject matter and temporal jurisdiction of the ICC.[63] At the Rome Conference the United States circulated a document which opposed allowing the Prosecutor to conduct investigations based on information provided by non-State entities on the grounds that such broad powers of investigation would result in the Prosecutor being inundated with frivolous complaints.[64] The ostensible point of this argument was the assertion that the Security Council should screen all non-State requests to determine which should be dealt with by the ICC. However, given the irrational fear of the United States that an independent Prosecutor would use his or her power to achieve political ends, it seems clear that the real goal of the United States in

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[62] Council of Europe, *What Public Prosecution in Europe in the 21st Century* 6 (2000), *cited in* Danner, *supra* note 50, at 523-524.

[63] Pursuant to Article 5 of the Rome Statute the ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Pursuant to Article 11 of the Rome Statute the ICC "has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

[64] "Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor" (June 22, 1998), *cited in* Danner, *supra* note 50, at 514.

putting forward this proposal was not to protect the ICC from frivolous claims but rather to protect the United States from investigations which were against its national interests. The reality is that the Prosecutor is subject to numerous accountability mechanisms under the Rome Statute in the exercise of his or her function as initiator of investigations. The most significant accountability mechanisms in this regard are the requirements of Pre-Trial Chamber authorization and the pragmatic necessity of State cooperation.

(a) Article 15: Pre-Trial Chamber Authorization

The Prosecutor may only initiate an investigation if two out of three judges of the Pre-Trial Chamber authorize such an investigation. Yet despite this check on the Prosecutor's discretion, the United States has nevertheless insisted that the Prosecutor is unaccountable.[65] This seems incongruent given that David Scheffer, who was at that time the United States Ambassador-at-large for war crimes issues, commended the "rigorous qualifications for judges" and the requirements of Article 36(3)(a) of the Rome Statute that judges be "of high moral character, impartiality and integrity."[66] One wonders why the United States is so opposed to the Prosecutor having the power to investigate crimes when this power is clearly checked by the Pre-Trial Chamber which, by the admission of the United States, consists of judges with outstanding qualifications and personal integrity. Furthermore, it is interesting that the United States representative, while using words such as "impartiality and integrity" which are traditionally associated with notions of judicial independence, nevertheless balked at the actual concept of an independent court. Thus, because of the "impartiality and integrity" and the "rigorous qualifications" of the judges of the Pre-Trial Chamber, the Article 15 requirement that the Pre-

[65] Mysak, *supra* note 42, at 286.
[66] August 1998 statement by David Scheffer, *cited in* Mysak, *supra* note 42, at 286-287.

Trial Chamber authorize an investigation constitutes an effective internal accountability mechanism which will help safeguard the ICC against a politicized Prosecutor.

(b) State Cooperation

Article 86 of the Rome Statute imposes a general obligation on States to cooperate with the ICC in respect of investigations and prosecutions. The ICC Prosecutor is essentially dependent on State cooperation in the performance of investigations. Where a State refuses to cooperate with a Prosecutor's investigation, there are only extremely limited circumstances in which the Pre-Trial Chamber may authorize the Prosecutor to investigate within the territory of an uncooperative State Party.[67] If a State fails to comply with such an order, the ICC is limited to making a finding of non-compliance and referring the matter to the ASP or the Security Council, depending on the circumstances.[68] In this way, the ICC is clearly reliant on States.

The Rome Statute does not empower the Pre-Trial Chamber to authorize the Prosecutor to investigate within the territory of an uncooperative non-State party. This reality goes some way towards addressing United States' concerns that its nationals will be prosecuted despite the fact that it is not a State party. A pragmatic approach suggests that in many cases it would be difficult for the ICC to obtain the requisite evidence to prosecute a non-State party national without the cooperation of the State.[69] Furthermore, pursuant to Article 93(4) of the Rome Statute, a State may refuse to cooperate on national security grounds. Arguably, it would be

[67] Article 57(3)(d) states that the Pre-Trial Chamber may: "Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9."
[68] Danner, *supra* note 50, at 528-529.
[69] *Id*. at 528. Danner illustrates the point by referring to an ICTY case where the Prosecutor was not able to gain enough evidence to prosecute certain Croats for crimes committed in Bosnia until the Croatian government agreed to disclose the information in its possession.

extremely difficult for the ICC to challenge a claim of national security. In this way, the ICC is heavily reliant on the honesty of States and their desire to cooperate.[70]

In addition, if the Prosecutor decides to investigate a conflict which is ongoing, it is likely that either United Nations security forces or the security forces of a particular regional body would be present in the region. In practical terms, if the forces on the territory were United Nations forces, the Security Council would have to mandate the cooperation of the forces with the Prosecutor's investigation. If the forces on the territory belonged to a regional organization or some other multi-lateral organization, for the Prosecutor to conduct such an investigation it would be necessary to obtain the agreement of the members of that organization. Thus State cooperation is clearly crucial if the Prosecutor is to effectively discharge his / her duties.[71]

2. *Article 17: Issues of Admissibility – The 'Complementarity' Principle*

Under Article 17 of the Rome Statute, a case is admissible only where national court systems are "unwilling or unable genuinely" to carry out an investigation or prosecution. It has been alleged that this principle gives too much discretion to the Prosecutor in deciding whether a State is unwilling or unable to prosecute.[72] It has also been suggested that this discretion enables the Prosecutor to act in a manifestly political way.[73] In other words, whether the Prosecutor decides that a State is unwilling or unable to prosecute may, in some instances, be regarded as a political decision.

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[70] It should be noted that NGO cooperation is another significant issue, but is beyond the scope of this article given that the focus of this article is essentially accountability to States rather than to individuals within the States. NGOs represent individuals rather than States.

[71] Mahnoush H. Arsanjani & W. Michael Reisman, *Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 399 (2005).

[72] Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 275 (2004).

[73] Danner, *supra* note 50, at 522.

According to Louise Arbour, former Prosecutor of the International Criminal Tribunal for the former Yugoslavia, "there is more to fear from an impotent than from an overreaching Prosecutor … an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith for improper purposes."[74] Furthermore, the Prosecutor has much to lose by instigating a purely political prosecution as such motivation would come to the fore in the court room, in full public view. It is therefore possible to posit that the "complementarity regime provides the most obvious locus of state control over the Prosecutor's ability to pursue particular investigations and prosecutions."[75] As long as a State instigates a "genuine" investigation into a matter, the ICC is barred from investigating. Thus a State such as the United States need not fear that hostile States may make unsubstantiated referrals to the ICC, as the United States would only have to launch its own genuine investigation to prevent an ICC investigation. The complementarity principle is an example of deference to national sovereignty. It is a practical manifestation of the fact that the ICC was established as a court of last resort.[76] Thus the supra-national powers of the ICC are only meant to be invoked where a State is unable to perform its duty to hold criminals accountable or is unwilling to do so.[77] The Court does not exist to usurp the powers of a law-abiding State that is genuinely fulfilling its obligations under international criminal law; it exists to circumvent the shielding of criminals by States. Thus the complementarity principle allows the Rome Statute to again strike the correct balance between

[74] Press Release, International Criminal Tribunal for the former Yugoslavia, *The Prosecutor of the International Tribunals for the former Yugoslavia and for Rwanda Urges that the International Permanent Court "Be Strong and Well Equipped to Operate as an Authoritative Mechanism,"* U.N. Doc CC/PIO/271-E (Dec. 8, 1997).
[75] Danner, *supra* note 50, at 526.
[76] Jeu, *supra* note 49, at 441-442.
[77] Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591, 593-594 (2002).

according deference to national sovereignty and maintaining the independence of the Prosecutor of "the most serious crimes of concern to the international community as a whole."[78]

D. *Assembly of States Parties*

Each State party has a representative on the Assembly of States Parties ("ASP"). The ASP provides an important check on the ICC. The ASP elects the Prosecutor and, pursuant to Article 46 of the Rome Statute, has the power to remove a judge, Prosecutor, or Deputy Prosecutor from office in case of "serious misconduct or a serious breach of his or her duties" or where the person is "unable to exercise the functions required by this Statute." Moreover, the ASP has control over both administrative and substantive matters. For example, under Article 9 of the Rome Statute, the ASP may by a two-thirds majority vote to amend the elements of crimes as set out in the Rome Statute.[79] In this way, States maintain significant control over the law applied by the ICC and hence over the ICC itself.

It is arguable that the ASP will not act as a significant check on the Court just as similar bodies in other international organizations have not proven to be strong oversight mechanisms.[80] However, while the ASP on its own may not constitute a sufficient accountability mechanism, it must be viewed as simply one part in the overall system of accountability set up by the Rome Statute. Furthermore, there are those who allege that, given that the ASP consists only of State parties to the Rome Statute, the institutional structure does not take into account the fact that the nationals of non-State parties may still be prosecuted.[81] This argument fails to recognize that the ICC should not be accountable to a specific State, but rather to the international community as a

[78] Rome Statute, Preamble.
[79] Art. 112(7) of the Rome Statute sets out the procedures for amending the elements of the crimes.
[80] Danner, *supra* note 50, at 524.
[81] *Id*. at 524-525.

whole. Given that there are approximately 100 States parties to the Rome Statute who are therefore members of the ASP, it is suggested that this is sufficient to constitute accountability to the international regime.

E. *Miscellaneous Accountability Mechanisms*

While the preceding discussion has dealt with the most important accountability mechanisms, there are numerous other accountability mechanisms which have not yet been discussed in this article. In the interests of brevity I will confine myself to mentioning three additional accountability mechanisms: fiscal accountability, means of enforcement, and transparency. The ICC is funded by States parties and the United Nations, subject to General Assembly approval.[82] Thus it seems that, like organizations such as the World Bank, the ICC is subject to fiscal accountability. In addition, the ICC has no direct powers of enforcement. It cannot execute arrest warrants, search homes or buildings, or compel witnesses to attend trial. It is dependent on States to assist in enforcement. In this way, the ICC is not independent in the way that national courts are independent but is reliant on the cooperation of States to perform its functions.[83] Finally, proceedings must be open to public view[84] and the judges must produce written, reasoned decisions delivered in open court.[85] This form of transparency significantly reduces the risk of politically motivated or otherwise unjustified prosecutions.[86]

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[82] Rome Statute, art. 115.
[83] Louise Arbour, *Statement to the Preparatory Committee on the Establishment of the International Criminal Court*, (Dec. 8, 1997), *cited in* Amnesty International, *The International Criminal Court - Fact Sheet 10 – State Cooperation with the ICC*, http://web.amnesty.org/library/Index/ENGIOR400102000?open&of=ENG-385 (Aug. 1, 2000).
[84] Rome Statute, art. 67.
[85] Rome Statute, art. 74.
[86] Ferencz, *supra* note 25, at 232.

CONCLUSION

In a critique directed at the ICC, John Bolton stated that "our main concern … has everything to do with the fundamental American fear of unchecked, unaccountable power."[87] Yet at the same time, as Louise Arbour has pointed out, "a weak and powerless institution will betray the very human rights ideals that will have inspired its creation, and may be considered a retrograde development."[88] This article has demonstrated that the correct balance between an "unchecked, unaccountable power" and "a weak and powerless institution" has been struck under the provisions of the Rome Statute. Let us just hope that Arbour's fear that "it is more likely that the prosecutor of the permanent court could be chronically enfeebled by inadequate enforcement powers combined with a chronic and widespread unwillingness of States parties to co-operate" does not eventuate.[89]

[87] Bolton, *supra* note 44, at 175.
[88] Press Release, International Criminal Tribunal for the former Yugoslavia, *The Prosecutor of the International Tribunals for the former Yugoslavia and for Rwanda Urges that the International Permanent Court "Be Strong and Well Equipped to Operate as an Authoritative Mechanism,"* U.N. Doc CC/PIO/271-E (Dec. 8, 1997).
[89] *Id.*