



**one world trust**

# Any good reasons to cry wolf?

Understanding and strengthening independence and accountability of the International Criminal Court in a political world

**Elodie Aba and Michael Hammer**

Briefing paper number 121, October 2009

The One World Trust promotes education and research into changes required in global governance to achieve the eradication of poverty, injustice, environmental degradation and war. We develop recommendations on practical ways to make powerful organisations more accountable to the people they affect now and in the future, and how the rule of law can be applied to all. We educate political leaders, decision makers and opinion-formers about the findings of our research.

Elodie Aba is a researcher and Michael Hammer Executive Director and project leader on international law and sovereignty at the One World Trust.

To contact the authors please email [eaba@oneworldtrust.org](mailto:eaba@oneworldtrust.org)

International Law & regulation

## **Open access – some rights reserved.**

Our work and resources are protected by Creative Commons License. You are free to copy, distribute and display work and resources of the One World Trust under condition of full attribution, non-commercial use, and no derivative works. If you wish to alter, transform or build on our work, please do not hesitate to contact us at [license@oneworldtrust.org](mailto:license@oneworldtrust.org).

In probably the most emblematic incident of its kind with regard to the work of the ICC so far the African Union Assembly decided in a resolution in early July 2009 that African Union member states should not implement the arrest warrant issued by the International Criminal Court (ICC) following the formal indictment of Sudanese President Hassan Al Bashir in March 2009. Underlying this decision, which since then many African countries in fact disowned, were a range of arguments of lack of accountability of both the ICC and the UN Security Council. In essence the African Union Assembly cried wolf over what they see to be an act of unaccountable, politicised justice, and asked for the ICC to be reigned in. Sudan called the ICC nothing less than a tool of western powers seeking to re-establish neo-colonial patterns of domination over Africa.

But aside from political posturing and unwarranted abuse of global governance institutions and their representatives, is there a real danger of politicised justice at global level, can the ICC strengthen its ability to demonstrate accountability and independence, and where are the limits to what it can do by itself to ensure its independence in a political world?

The paper analyses these questions from the perspective of the Rome Statute for the ICC, the relationships of the Prosecutor, the Pre Trial Chamber, and of the Court overall with the Assembly of State Parties and the Security Council. It reviews briefly how the accountability issues that these bodies face themselves impact on the ICC and perceptions of its independence. The paper concludes that the case of the ICC indeed shows that it is subject to power and is part of a web of political accountabilities which affect the exercise of international criminal justice. Yet in itself it faces limitations on the choices it can make to safeguard its independence as it is not solely in control of the accountability relationships in which it is tied in. The paper closes with four propositions for how the ICC itself can strengthen to some degree its accountability and independence, including

- the development of a Prosecutorial Code,
- the establishment of an independent monitoring mechanism by the Assembly of State Parties,
- encouragement of both case related support and watchdog functions by NGOs, and
- improved communication of existing accountability mechanisms in place to guarantee independence and prevent political abuse of power within the ICC.

3 Whitehall Court  
London SW1A 2EL  
Tel +44 (0) 20 7766 3470  
Fax +44 (0) 20 7219 4879  
Email [info@oneworldtrust.org](mailto:info@oneworldtrust.org)  
[www.oneworldtrust.org](http://www.oneworldtrust.org)  
Charity Commission No 210180

## Introduction

In early July 2009 the African Union (AU) Assembly, in session in Tripoli / Libya, passed a resolution<sup>1</sup> which decided that African Union member states, even if signatories to the Rome Statute for the International Criminal Court (ICC), should not implement the arrest warrant issued by the ICC following the formal indictment of Sudanese President Hassan Al Bashir in March 2009 on five counts of crimes against humanity and two counts of war crimes.<sup>2</sup>

Underlying this decision were arguments of lack of accountability, including concerns about the conduct of the ICC Prosecutor, concerns about lack of contextual sensitivity in relation to the peace process in Sudan, and dissatisfaction with requests for use of powers of the UN Security Council under Article 16 of the ICC Statutes to halt the ICC investigation remaining unanswered.

In essence the African Union Assembly complained against what they see to be an act of unaccountable, politicised justice, and asked for the ICC and its Prosecutor, tasked with ending impunity for the gravest crimes, to be reigned in politically. But aside from political posturing, is this danger real, can the ICC strengthen its ability to demonstrate accountability and independence, and where are the limits to independence in a political world?

The resolution followed up on a statement by the African Union Peace and Security Council also expressing concern at the political impact of the indictment on the peace process in Sudan<sup>3</sup>. The African Union visibly considered the lack of response by the UN Security Council as an act of disrespect, including in view of its role to ensure regional peace and security. The Sudanese Government itself also defied the ICC regarding the indictment, accusing it of being politically subservient to powers who wished to subject African countries to neo-colonial domination. Yet not all African countries, including some of those represented in Tripoli, proved inclined to reject the arrest warrant outright and some reiterated their commitment to the ICC Statute.<sup>4</sup>

While probably the most emblematic incident of its kind with regard to the work of the ICC so far, and aside from the use of language on the side of Sudan certainly constituting conscious and unwarranted political abuse of the ICC and other global governance institutions, the case highlights the difficulties that present themselves when seeking to establish a clear picture of the accountability of a range of global governance institutions, and in this case the ICC.

Several overlapping drivers for accountability and targets for accountability challenges are evoked prominently in this case: to the African Union, the accountability of the UN Security Council is in question, as it did not respond to the request it put to it by an organisation that is arguably one of its primary stakeholders. To those concerned with the peace process in Sudan, fears about a potential detrimental impact of the indictment led to its criticism as being bereft of sensitivity to the context in country.<sup>5</sup> To the Government of Sudan, the accountability of the ICC, and indeed any global institution, to itself and other UN members states is in question when its own interpretation of state sovereignty is being challenged.

On the other side, defenders of the indictment would argue that the accountability of the ICC, and of the community of states supporting it (as members of the ICC Assembly of State Parties) to its mission, "to help end impunity for the perpetrators of the most serious crimes of concern to the international community"<sup>6</sup> is paramount, and requires the independence of its proceedings from political considerations. The fact that it is the UN Security Council which initially referred the case of Darfur/Sudan to the ICC was not only the way to overcome the limitations of the ICC to act on its own in cases of countries which have not ratified the Rome Statute, but also suggested that questions regarding political accountability for the investigation and indictment should be directed at the UN Security Council and not the ICC. Yet while the ICC Statute clearly emphasises its independence, including by consciously not making it part of the UN system, the UN Security Council retains a formal 'stop and go' power over investigations and trials through Article 16 of the Rome Statutes.

Luis Moreno-Ocampo, the Prosecutor of the ICC, lays down the issue of the independence and accountability of the ICC Prosecutor from an inside perspective: “*An attentive reading of the Rome Statute and its supplementary instruments reveal that the architects of the International Criminal Court were wise in accompanying the powers of the Prosecutor with an adequate system of checks and balances apt to prevent abuse of power or arbitrary decisions.*”<sup>7</sup> With this Moreno-Ocampo goes immediately to the heart of the matter, which is power. As Robert Keohane maintains: “[...] *although accountability-based criticisms in world politics are often misplaced, accountability is a meaningful concept. Properly applied, it can be a useful tool to limit abuses of power.*”<sup>8</sup> The case of the ICC shows indeed that it is subject to power and part of a web of political accountabilities which affect the exercise of international criminal justice. Yet in itself it faces limitations on the choices it can make to safeguard its independence as it is not solely in control of the accountability relationships into which it is tied in.

This paper explores the challenges that arise from this question of how to limit abuse of power in the work of the ICC in a highly political environment, and whether the Al Bashir indictment in fact warrants crying wolf, i.e. suggesting that the ICC is not accountable and ought to be reigned in politically.

We try to do this by analysing the accountability issues facing the Court and any existing safeguards from the perspective of its own statutes, the link to the UN Security Council, the options available to the ICC to protect its independence in view of external pressures, and what subjecting the ICC to external influence means for accountability requirements on those that hold power over it.

The paper is published ahead of the first review conference of the Rome Statute that will take place early 2010 in Kampala, Uganda where amendments to the Statute will be discussed. Based on the analysis we develop some proposals for reform to contribute to thinking on how accountability and independence of the ICC can be strengthened already by its own means to render it more effective in pursuit of its mission.

The paper begins by elaborating on the features that make the ICC Prosecutor an independent organ of the Court, and then analyses the checks and balances to this independence. Then, we focus on other actors which are part of the constitution of the ICC - the Assembly of States Parties and the UN Security Council.

We will conclude by advocating how independence and accountability can be reinforced at the ICC. This paper will argue that the Prosecutor, though being independent in formal terms and consciously defined as a counterweight to state power, the ICC depends seriously on state support to discharge its mandate effectively. The complementarity principle, cornerstone of the Rome Statute, impairs the discretion of the Prosecutor to investigate or prosecute and has been seen as a way for states to control the Prosecutor. At the same time, the accountability of some of the actors, who demand accountability from the Prosecutor and the ICC as a whole and subject it to pressure and scrutiny, is far from satisfactory itself. Yet this is a situation which cannot be addressed by the Court or the Prosecutor alone. To mitigate detrimental impact of politically motivated pressures on the ICC and improve public confidence in the Court the paper concludes that key mechanisms for accountability at the ICC should be strengthened. In particular:

- The OTP should pursue its attempt to **establish Prosecutorial guidelines** to strengthen its ability to use its *proprio motu* power in a defined framework to help avoid criticism when a controversial case occurs.

- The Assembly of State Parties should move ahead and **establish an oversight body** to ensure public confidence in the ICC based on a mechanism that can test and demonstrate transparency and accountability of the Court, as already agreed in principle by the Assembly of State Parties.
- The ICC should reiterate its invitation to NGOs and other organisations to **submit qualified written and oral evidence for instance in the form of *amicus curiae* briefs**, and similarly **encourage and support monitoring and evaluation of its work by civil society organisations** to help balance potentially conflicting interests arising in the relationship between the ICC and the NGO community.
- The ICC should undertake greater efforts to **communicate the accountability mechanisms in place that ensure the impartiality and non-discriminatory nature of the OTP's decision making**, both on what cases to begin investigations, and which ones to eventually propose for prosecution. In view of the particular challenges posed by a heavy workload on African cases, communications could usefully focus on demonstrating the existence and reasoning behind other cases.

## **An independent Prosecutor...**

### ***The Rome Statute***

From its preamble, the Rome Statute of the International Criminal Court (ICC) highlights the independence of the Court that it establishes.<sup>9</sup> It then clearly recalls this principle for the components of the Court.<sup>10</sup> Article 42 of the Rome Statute states that *“the Office of the Prosecutor shall act independently as a separate organ of the Court.”*

Furthermore, the discretion of the Prosecutor in deciding not to investigate a crime because it would not be in the interest of justice demonstrates the independence granted to him in deciding to proceed or not.<sup>11</sup> Nevertheless, as it will be discussed below, this decision is subject to review by the Pre-Trial Chamber.<sup>12</sup> Luis Moreno-Ocampo has made strong declarations to clarify this topic and reaffirms the independence of the Office of the Prosecutor (OTP).<sup>13</sup> He specifies that the interests of justice and the interests of peace are two different concepts. The latter is not part of his mandate but is vested in other international institutions such as the United Nations Security Council.<sup>14</sup> The Prosecutor of the ICC continues by saying that his interpretation of the interests of justice will rather be narrow so as not to incorporate all international peace and security issues. Thus, the OTP will *“pursue its own judicial mandate independently”*<sup>15</sup> and will not submit to the political pressure of those trying to mislead the ICC in the face of other conflicting questions.<sup>16</sup>

### ***Proprio motu power***<sup>17</sup>

Allowing the Prosecutor to initiate investigations independently of any request by the UN Security Council or a state party is a fundamental element in guaranteeing his independence. This *proprio motu* power is the most significant achievement of the Rome Statute and therefore reinforces the judicial and non-political status of the ICC.<sup>18</sup> The Prosecutors of the *ad hoc* tribunals do not have such power. Indeed, they have been created by the UN Security Council to respond to specific situations. By deciding on the appropriateness to create the International Tribunal for Rwanda (ICTR) and the International Tribunal for ex-Yugoslavia (ICTY), the Security Council vested in itself the powers of a Prosecutor.<sup>19</sup> Thus, the Prosecutor of the *ad hoc* tribunals can solely start an investigation for crimes and situations contained in the Security Council Resolution.

When the Security Council is referring a situation to the Prosecutor of the ICC,<sup>20</sup> the Prosecutor enjoys a great deal of independence as he is not subjected to an authorisation by the Pre-Trial Chamber to initiate investigation.<sup>21</sup> Furthermore, the Prosecutor does not have to notify the states that should exercise jurisdiction over the crimes concerned as conveyed by Article 18 (1) of the Rome Statute.<sup>22</sup> The advantage of a referral of a situation by the Security Council is that the ICC has a wider jurisdiction (territory and nationality).<sup>23</sup> Indeed, as the Security Council is acting under a Chapter VII Resolution, it is binding on all UN member states. Therefore, the Court can exercise its jurisdiction even on non-states party to the ICC. Besides, the powers vested in the ICC Prosecutor are similar to the ones of the *ad hoc* tribunals.<sup>24</sup>

Originally, the draft<sup>25</sup> prepared by the International Law Commission did not allow for *proprio motu* powers. It only provided for referral of a situation by a state party or the UN Security Council. Many states feared the existence of an independent Prosecutor who remained accountable only to the mandate and rules of the ICC itself. It was argued that without some form of checks and balances in place the risk existed that the Prosecutor might target nationals of a state party for political reasons and that trials would be easily politicised without any recourse.<sup>26</sup> Taking into account these fears but also the need for an independent Prosecutor, Germany and Argentina tabled a proposal. One of the main consequences of this proposal was the establishment of a “legal-technical” control on the Prosecutor by the Pre-Trial Chamber.<sup>27</sup> Eventually, building-up on the proposed compromise, strong advocacy for an independent Prosecutor during the debates lead to the adoption of what is now Article 15 of the Rome Statute. The Prosecutor is independent with *proprio motu* power but is nevertheless controlled. This is exercised by the Pre-trial Chamber and is therefore a judicial control, not a political one.<sup>28</sup>

### ***Election of the Prosecutor***

The way the ICC Prosecutor is elected also acts as a safeguard for its independence and from political pressure. Article 42 (4) of the Rome Statute specifies that the Prosecutor is elected by secret ballot and by an absolute majority of the members of the Assembly of States Parties. Moreover, the Statute of the ICC indicates the Prosecutor should have notable pragmatic experience in criminal prosecution or trials.<sup>29</sup> Thus, it has been put forward that when states nominate their candidate, this should be purely based on expertise, independence and impartiality.<sup>30</sup>

It can thus be said that the Prosecutor of the ICC is independent in theory but that his powers are limited in practice. As the next part of this paper will demonstrate, there are a lot of checks and balances to his powers in place as he is accountable to several bodies. This is a means of avoiding injustice and partiality.

## **... but accountable to various other actors**

### ***The Pre-Trial Chamber***

The Prosecutor can only carry out preliminary examinations without referring to the Pre-Trial Chamber in order to assess whether reasonable grounds to proceed with an investigation exist.<sup>31</sup> Once he has demonstrated that there are sufficient elements to proceed and that the crimes fall within the jurisdiction of the Court, the Pre-Trial Chamber grants him the authorisation to start an investigation.<sup>32</sup> This mechanism reveals that the ICC Prosecutor is in fact accountable to the Pre-Trial Chamber since the beginning of the proceedings.

Furthermore, the Pre-Trial Chamber also plays a role in controlling the power of the Prosecutor not to prosecute when he considers that this would not be in the interests of

justice. In this case, Article 53 (3) of the Rome Statute provides for a review by the Pre-Trial Chamber.<sup>33</sup> This organ of the ICC will confirm or not the decision of the Prosecutor. If the Pre-Trial Chamber requests the Prosecutor to reconsider his decision, he can still maintain it. However, the same procedure of judicial review can be launched. Note that when the decision of the Prosecutor was exclusively based on the reason that an investigation would not serve the interests of justice, and that the Pre-Trial Chamber reached a different conclusion, the Prosecutor has therefore the obligation to begin the investigation, otherwise, his decision not to investigate is not valid.<sup>34</sup> Rule 110 (2) of the Rules of Procedure and Evidence of the ICC confirms this analysis.<sup>35</sup> Here as well it is shown that the independence and power of the Prosecutor are curbed by the Pre-Trial Chamber.

It is worth mentioning that also at the international *ad hoc* tribunals and the Special Court for Sierra Leone (SCSL), the discretionary power of the Prosecutor has been controlled by the judges. A UN Security Council Resolution<sup>36</sup> requested both the ICTR and the ICTY to ensure that new indictments focus on the most senior leaders. In this regard, the judges of the ICTY amended Rule 28 of the Rules of Procedure and Evidence.<sup>37</sup> This amendment sparked opposition from the Prosecutor that considered it *ultra vires*, i.e. to go beyond the powers of the judges to do so.<sup>38</sup> In contrast, the ICTR Prosecutor adopted a document with the criteria he would apply to target the most senior leaders.<sup>39</sup> The Statute of the SCSL states that the Court has been established to “prosecute persons who bear the greatest responsibility” in the crimes committed in Sierra Leone since 30 November 1996.<sup>40</sup> In the Fofana case, the Prosecutor considered that this formulation aimed at guiding him in his prosecutorial strategy as provided for in the report of the Secretary General.<sup>41</sup> However, the Court ruled that it was a key element of personal jurisdiction.<sup>42</sup>

### ***The United Nations Security Council***

#### **Referral power**

The UN Security Council is entitled to refer a situation to the Prosecutor of the ICC.<sup>43</sup> So far, it has only used this power once on the situation in Darfur.<sup>44</sup> This power restricts the independence of the ICC Prosecutor in selecting a situation. If the Security Council adopts a Chapter VII Resolution referring a matter to the Court, the Prosecutor will be seized.<sup>45</sup> Then, he may decide not to proceed but as explained in the previous section, this decision will be reviewed by the Pre-Trial Chamber that may ask the Prosecutor to reconsider his decision.<sup>46</sup>

A referral limits also the discretion of the Prosecutor as to who should be held accountable before the ICC. For instance, in Resolution 1593, the Security Council excluded peacekeepers operating in Sudan from being subjected to investigations and prosecution by the ICC.<sup>47</sup> It has been argued that, although there are few chances that peacekeepers would commit crimes under the jurisdiction of the ICC, the fact remains that through political intervention a category of people can be excluded from prosecution.<sup>48</sup> This demonstrates the broad powers enjoyed by the Security Council under Chapter VII and the consequences they entail for the ICC.

#### **Deferral power**

Article 16 of the Rome Statute<sup>49</sup> which allows the Security Council to defer the investigation or prosecution of a situation for a renewable period of 12 months has been widely discussed. The deferral not only allows the Security Council to prevent an investigation or a prosecution to be commenced but concerns also proceedings already initiated. However, it does not affect the conduct of preliminary investigations in a particular situation.

Initially, the draft of the International Law Commission stated that “no prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.”<sup>50</sup> The ‘like-minded caucus’ opposed this provision on the grounds that it would impede the judicial independence of the Court.<sup>51</sup> Moreover, the list of items that falls under these circumstances is broad and could be similar to breaches of international humanitarian law.<sup>52</sup> Thus, a proposal by Singapore, a member of the ‘like-minded’ states was tabled and gave birth to the current Article 16 of the ICC Statute. It has been argued that this wording was a compromise between political concerns and judicial independence.<sup>53</sup> Though the Council has a broad margin of discretion in deciding what constitutes a threat to and a breach of international peace and security, there should be a nine-vote majority and no veto from the five permanent members of the Security Council for a situation to be deferred.<sup>54</sup>

To date, the Security Council has not used its deferral power. However, this issue has been mentioned with regards to Darfur, Uganda and the Central African Republic.<sup>55</sup> As further action by the African Union showed Human Rights Watch was right to expect the issue of a deferral of the situation in Darfur to be raised with the Security Council in the forthcoming months following the request of the ICC Prosecutor for an arrest warrant against Sudanese President. If ever accepted, the use of Article 16 by the Security Council would weaken the commitment of the Security Council to bring justice to Darfur as it is this organ that referred the situation in this part of Sudan to the ICC.

## **Enforcement mechanism**

The Security Council also plays a role as an enforcement mechanism to make sure State will cooperate with the ICC. In case of non-cooperation by a State, this matter may be referred by the Court to the Security Council when the Security Council referred the situation to the Prosecutor.<sup>56</sup> However, the Rome Statute does not specify the consequences of such refusal to cooperate and whether the UN Security Council would apply all the measures provided for by Chapter VII of the UN Charter.<sup>57</sup>

It has also been argued that the Security Council would control access to the Court for crimes of aggression. A provision of a draft proposal states that for the Court to proceed with such crimes, the Security Council would have to pre-determine that there had been an act of aggression by the State concerned.<sup>58</sup> This would be risky for the independence of the ICC because of the political nature of the decisions made by the Security Council. Therefore, the definition and the conditions for the ICC to exercise jurisdiction over the crime of aggression should ensure the independence and integrity of the Court and protect it from political interference.<sup>59</sup> Following the second resumption of the 7<sup>th</sup> session of the Assembly of States Parties in February 2009, the Special Working Group on the Crime of Aggression concluded its discussions on the definition of the crime of aggression and the conditions for the ICC to exercise jurisdiction over this crime. Disagreement remained on whether a determination of an act of aggression by the Security Council should prevent the Prosecutor from proceeding with an investigation.<sup>60</sup>

## **States**

The Prosecutor functions are a counterweight to state power but the ICC depends seriously on state support to discharge its mandate effectively.<sup>61</sup> The complementarity principle, cornerstone of the Rome Statute, impairs the discretion of the Prosecutor to investigate or prosecute and has been seen as a way for states to control the Prosecutor.<sup>62</sup> The Rome Statute is based on the principle that the state concerned bears primary jurisdiction. It is only when it is unwilling or unable genuinely to investigate or prosecute that a case is admissible

before the ICC.<sup>63</sup> If a state really wants to remove a case from the ICC, it has the possibility to do so but must prove that it is able and willing to proceed with the case. For instance, the initiative of Sudan to appoint a special Prosecutor to investigate crimes that occurred in Darfur from 2003, and the establishment of a Special Criminal Courts in Sudan on the Events in Darfur can be interpreted as attempts by this state to hinder the ICC proceedings.

The obligation of the Prosecutor to notify all state parties and the states that would normally exercise jurisdiction when a situation has been referred to by a state party or when the Prosecutor has initiated an investigation *proprio motu*<sup>64</sup> appears among the checks and balances to the Prosecutor's independence. It may lead the Prosecutor to defer to the state concerned the investigation.<sup>65</sup>

States can also curb the independence of the Prosecutor. The Statute of the ICC specifies that the Prosecutor can conduct investigations on the territory of a state party only with its consent.<sup>66</sup> States have a general obligation to cooperate with the Court<sup>67</sup> and this is a way for them to exercise strong control over the ICC.<sup>68</sup> Their failure to cooperate will be referred to the Assembly of States Parties that will consider the issue.<sup>69</sup> Nevertheless, states are allowed to deny access to documents dealing with national security.<sup>70</sup> In specific circumstances, the Pre-Trial Chamber may nevertheless authorise the Prosecutor to carry out investigations without the consent of the state concerned.<sup>71</sup> It appears that this would only be the case where a collapse in public order affects the state concerned.<sup>72</sup> A lack of cooperation from states is problematic for carrying out the proceedings. For instance, the ICC does not have its own police force and thus relies on states to execute arrests warrants.<sup>73</sup> Currently, a number of arrests warrants remain unexecuted. Regarding states which are not party to the ICC, the Prosecutor can only carry out investigations on their territory after the conclusion of an *ad hoc* agreement.<sup>74</sup> Therefore, if the state party concerned refuses to enter in this agreement, the Prosecutor remains in fact powerless.<sup>75</sup> The Prosecutor is thus significantly bound in his actions by the political intentions of concerned states.

### ***The Assembly of States Parties***<sup>76</sup>

The role of the Assembly of States Parties is another example of the restrictions weighing on the Prosecutor. The ICC Prosecutor is formally accountable to the Assembly of States Parties in the sense that this body is the one that may remove him from Office in case of misconduct or serious breach of his duties.<sup>77</sup> The majority needed to do so is an absolute one, while in contrast judges can be removed by a two-thirds majority of the states parties.<sup>78</sup> This difference has been justified by the *proprio motu* power of the Prosecutor and hence a need to be more accountable than the judges, as it is also often the case in domestic judicial systems.<sup>79</sup> To some however, the difference made in treating the Prosecutor and judges contains the risk of the Assembly of States Parties removing the Prosecutor from Office when it disagrees on his policy.<sup>80</sup>

The Prosecutor is said to be independent in organising his office<sup>81</sup> but the Assembly of States Parties can exercise some control in this area as well. If the Assembly of States Parties decides to cut part of the budget allocated to the OTP, this decision would have implications on the work of the Prosecutor.<sup>82</sup> Indeed, investigations carried out by his Office, often in remote locations, are costly. Nevertheless, this would clearly violate Article 42 of the Rome Statute.<sup>83</sup> In this regard, the Prosecutor may take part in the meetings of the Assembly of States Parties.<sup>84</sup> States can also make voluntary contributions to the ICC.<sup>85</sup> In order to avoid any political pressure, they have to declare that the contribution will not affect the independence of the ICC.<sup>86</sup> The *ad hoc* tribunals have been submitted to states' pressure through the financing of the tribunals.<sup>87</sup> The SCSL experienced under-financing and total

reliance on volunteer contributions as an issue that can be a threat to the integrity of a major process of international justice.<sup>88</sup>

### ***The Victims***

The ICC has been hailed for its unique feature of enabling victims to take part in the proceedings when their interest is at stake.<sup>89</sup> The Rome Statute and Rule 91 of the Rules of Procedure and Evidence specify that the participation at stages of the proceedings will be determined by a ruling of the Chamber. This form of accountability was adopted in order to address the shortcomings of the *ad hoc* tribunals where victims felt alienated because they were left out of the proceedings.<sup>90</sup> Nevertheless, following a decision of the Pre-Trial Chamber, the participation of victims in the preliminary stages proceedings turned out to be a thorny issue.

On 17 January 2006,<sup>91</sup> the Pre-Trial Chamber ruled that victims could participate in the proceedings during the investigation phase. This means that even when no case has been opened against a specific person and when the crimes remain to be determined.<sup>92</sup> This decision has raised serious concern on the independence of the Prosecutor. The Prosecutor has argued that victims' participation at the investigation stage could threaten the integrity and objectivity of the Prosecutor and also impact the efficiency and security of the investigation because of their requests.<sup>93</sup> This decision of the Pre-Trial Chamber unexpectedly impedes the powers of the Prosecutor and demonstrates once again the limits of his independence.

## **Accountability of other actors interfering with the functioning of the Court**

The previous section demonstrates that while the ICC Prosecutor enjoys independence not only in formal terms but also to a certain degree in reality, he remains nevertheless dependent on the political support of several other bodies for his actions. These dependencies translate into formal and informal accountability relationships. However, the legitimacy of these other bodies to exercise influence in result of these accountability relationships is also to be seen as a function of their own accountability to their stakeholders. In the following we are briefly reviewing the situation of two of the bodies that are, by virtue of the Rome Statute, part of the constitution of the ICC: the Assembly of State Parties and the Security Council.

### ***The Assembly of States Parties***

The Assembly of States Parties is the ultimate oversight mechanism of the ICC but there are doubts on its efficiency because of the internal policy disputes that may occur.<sup>94</sup> Indeed, comparable bodies in other international organisations have proven to be rather weak.<sup>95</sup>

One of the main concerns remains about what could be perceived as a lack of inclusiveness in the sense that nationals of states which are not party to the Rome Statute and hence are not represented in the Assembly of States Parties can still be subject to the ICC's jurisdiction in the case of a referral of a case by the UN Security Council.

Furthermore, the Assembly of States Parties has been criticised for not reflecting the appropriate weight of various states in its voting procedure based on the one-state, one-vote principle.<sup>96</sup>

Finally, the Assembly of States Parties does not play any role in relation to Article 16 of the Rome Statute, leading to the situation that a political decision of the Security Council to defer

proceedings before the ICC is not subjected to any oversight, including for instance by a mechanism of the Court.

At the current stage, the Assembly of State Parties therefore suffers from both internal and external weakness regarding its own accountability. This impedes its ability to act on its own as a legitimate accountability mechanisms for instance vis à vis the OTP.

### ***The Security Council***

The accountability of the Security Council is an issue that has already been discussed at great length in the past.<sup>97</sup> The breadth of this debate cannot be reflected here and we will only focus on Resolutions adopted by the Security Council which interfere with the ICC.

Security Council Resolution 1422,<sup>98</sup> excluding peacekeepers from states which are not party to the ICC from the jurisdiction of the Court has been said to hamper the ICC's legitimacy.<sup>99</sup> This decision was a compromise after the United States vetoed the renewal of the UN Peacekeeping Mission in Bosnia and Herzegovina (UNMIBH), and threatened to veto the renewal of all peacekeeping missions because it opposes the jurisdictional regime of the ICC.<sup>100</sup> Then, Resolution 1497<sup>101</sup> was adopted and was no longer a request but a decision *"that current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing state."*<sup>102</sup>

These Resolutions sparked heavy criticism among the international community because of their inconsistency with the Rome Statute<sup>103</sup> and international law.<sup>104</sup> The Security Council acted under Chapter VII and concerns were that the existence of a threat to peace and security that legitimises the authorisation of exclusive jurisdiction was not clearly established.<sup>105</sup> Furthermore, it meant that a whole category of persons was granted blanket immunity. The argument of proponents of the resolution was that it was very unlikely that peacekeepers would commit crimes within the jurisdiction of the Court. Nevertheless, there have been allegations that peacekeepers were involved in acts of sexual violence in the context of armed conflict which could potentially be prosecuted as war crimes.<sup>106</sup> It has also been argued that the cumulative effect of these Resolutions could create an exception from the Rome Statute for members of peacekeeping operations whose State is not a party to the ICC. Thus, this would amount to a de facto amendment to the Rome Statute and therefore would breach international law.<sup>107</sup> The difficulties faced by the UN member states to move forward the process of UN security Council reform therefore impacts also directly on to the ICC, illustrating well the tension that exists between politics and justice.

### **Ways to improve independence and accountability of the ICC**

The sections above have explored the web of accountabilities and issues of power that affect the ICC in the day to day conduct of its work, and also its external perceptions and understanding of the legitimacy of its decisions. The Rome Statute contains a carefully built system of checks and balances that should prevent the abuse of power within the ICC, especially by seeking to guarantee independence and accountability through a well tuned balance of powers between Prosecutor and the Pre Trial Chamber. In contrast, the role and rules that govern the work of the Assembly of State Parties are only a weak component in the accountability system of the ICC, and the influence of the Security Council can exercise over the Court is unchecked by any mechanisms of the Court itself, and arguably not subject to effective oversight externally either.

In conclusion, the ICC faces limitations in establishing and controlling its accountability by its own means and the dependencies on political processes outside the Court remain significant. However, the analysis of the accountability challenges and dependencies the Court is subject to also reveal that there are a few things the Court can do to strengthen independence and effectiveness in pursuing its important mandate.

### ***Prosecutorial guidelines for the Office of the Prosecutor***

As this paper demonstrates, the OTP is, despite its often quoted independence, a body which is in fact dependent on several other actors within the wider ICC constitution that can influence its activities and potentially take remedial action on cases and people. In consequence, the OTP is bound in accountability relationships which it needs to balance appropriately in order to increase his legitimacy and receive widespread and strong support by states for his work.<sup>108</sup> One of the ways in which the OTP can do this is for the Prosecutor to make greater use of all the powers given by the Rome Statute, and start acting more visibly *proprio motu*.

However, using his *proprio motu* powers will only then escape the already present accusations of arbitrariness if based in a defined framework for its application to help avoid politically motivated criticism in controversial cases. The OTP should therefore urgently pursue its attempt to establish Prosecutorial guidelines.<sup>109</sup> They would enable a certain impartiality and consistency in the decision-making of the Prosecutor.<sup>110</sup> They could also serve to hold the Prosecutor accountable to his own policies and emphasise his legitimacy.<sup>111</sup>

### ***An independent monitoring mechanism for the work of the Court***

The option for the Assembly of States Parties to create an independent oversight mechanism is conveyed in Article 112 (4) of the Rome Statute.<sup>112</sup> The Assembly of States parties has already begun considering setting up such mechanism. The latest report of the Bureau on an independent oversight mechanism<sup>113</sup> identifies the scope of an oversight mechanism and elaborates recommendations for its operationalisation. It concludes that so far it was too early for this issue to be considered in details by states. Nevertheless, states agree to a light and cost-effective mechanism in principle.<sup>114</sup>

The establishment of an oversight body would be a tool to improve the transparency and accountability of the Court and therefore, ensure public confidence in the ICC.<sup>115</sup> The Coalition for the International Criminal Court highlighted that this type of independent monitoring mechanism is the only way to deal with issues concerning the most senior level officials of the Court because current procedures are not adequate.<sup>116</sup>

### ***Ensuring well balanced roles for NGOs: encouraging amicus curiae briefs and watchdog functions***

NGOs have pushed for the creation of an independent international criminal court. Therefore, their relationship with the Court is complicated – especially when it comes to criticising its shortcomings – and has to be balanced. However, lobbying for the Court or monitoring its proceedings and institutional development is not the only way they can engage with the ICC. The ICC Rules of Procedure for instance directly open up the possibility for the submission of oral or written observations from a wide range of sources.<sup>117</sup> Submitting independent *amicus curiae* briefs to a Chamber for instance is a way to guarantee that it has the widest range of information at its disposal to make a decision over a Prosecutor's decision not to investigate or to prosecute. At the same time it has been alleged that NGOs were reluctant to submit *amicus curiae* because they want to keep good relations with the OTP.<sup>118</sup> While the Court

may wish to reiterate its openness to qualified submissions, NGOs should make a greater use of this tool while continuing critical monitoring.

### ***Communicating core principles ensuring accountability and independence***

Trust from victims and from the general public in the ICC is important to strengthen the legitimacy and credibility of the Court. Given the involvement of civil parties in the ICC proceedings, it is fundamental for the Court to carry on a very strong outreach and communications approach. Communicating with concerned stakeholders on independence, impartiality, objectivity - the core principles guiding the work of the Court, including the OTP - would enable them to have a better understanding of certain decisions taken. This is especially true with regards to the selection of situations by the OPT that may be seen as biased and not independent, often because of misinformation from opponents to the ICC.<sup>119</sup> In this regard it has been suggested that the Court should emphasise OTP's non-discrimination in the selection of situations by highlighting situations outside Africa that are being examined, such as Colombia and Afghanistan.<sup>120</sup>

Another way to strengthen the Court is making sure that states express publicly and strongly their support for the work of the ICC. They should also fully cooperate with the Court during the investigating phase and in the execution of arrests warrants it has issued so that criminals can be held accountable.

---

## **Notes**

<sup>1</sup> Assembly of the African Union. 2009. "Decisions and Declarations Assembly/AU/Dec. 243-267 (XIII) and Assembly/AU/Decl.1- 5(XIII)."

<sup>2</sup> ICC-02/05-01/09 The Prosecutor v. Omar Hassan Ahmad Al Bashir, arrest warrant issued on 4 March 2009, <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>

<sup>3</sup> African Union. 2008. "Communique of the 142nd meeting of the Peace and Security council."

<sup>4</sup> Ghanaian foreign minister Mohammed Mumuni is quoted that "Certainly that's not the position that we take...for us in Ghana there is absolutely no equivocation at all about our acceptance and respect for the jurisdiction, the integrity and high honor of dignity of the ICC," in: Tesfaye, Mehret. 2009. "African Union ministers endorse draft resolution opposing arrest of Bashir." In Ethiopian Review 3 July 2009. Similarly, South Africa underlines its loyalty to its international obligations (Africanpress. 2009. "South Africa reverses course on ICC arrest warrant for Bashir." In African Press International 13 August 2009. Also more broadly there is evidence that the AU Assembly resolution cannot be considered to be representative of both government or popular views of the legitimacy of the indictment (see Greenberg, David. 2009. "African Union Declaration Against the ICC Not What it Seems." In Foreign Policy in Focus 6 August 2009.

<sup>5</sup> Bernard Membe for instance reiterates African Union concerns about the impact on the situation in Sudan. (Membe, Bernard K. 2009. "Opening Statement by the Chairperson of the Executive Council, Minister for Foreign Affairs and International Cooperation of the United Republic of Tanzania, at the 14th Ordinary Session of the African Union Executive Council." Addis Ababa.)

<sup>6</sup> See "About the Court", <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>, last accessed 30 September 2009

<sup>7</sup> Statement of Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court (ICC) at the Assembly of States Parties, 22 April 2003. Full text available at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Press+Releases/Press+Releases+2003/> (last accessed on 24/02/2009).

<sup>8</sup> Keohane, Robert O. 2005. "Abuse of Power - Assessing Accountability in World Politics " Defining power 27(2).

<sup>9</sup> "The States Parties to this Statute [...] determined [...] to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole."

<sup>10</sup> Articles 40 (judges) and 42 (Office of the Prosecutor) of the Rome Statute.

---

<sup>11</sup> Article 53 (1) (c) of the Rome Statute: “The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether [...] taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”

<sup>12</sup> Article 53 of the Rome Statute.

<sup>13</sup> Office of the Prosecutor, “Policy Paper on the Interests of Justice,” September 2007. Available at: <http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf> (last accessed on 02/02/2009)

<sup>14</sup> *Ibid*, p. 1.

<sup>15</sup> *Ibid*, p. 8.

<sup>16</sup> Human Rights Watch, “Courting History: The landmark International Criminal Court’s five years”, July 2008, p. 35. Available at: <http://www.hrw.org/en/reports/2008/07/10/courting-history-0> (last accessed on 02/02/2009).

<sup>17</sup> Article 15 of the Rome Statute.

<sup>18</sup> Stojanka Mirceva, “Why the International Court is different?”, 26 January 2004. Available at: <http://www.globalpolicy.org/intljustice/icc/2004/0126different.htm> (last accessed on 02/02/2009).

<sup>19</sup> Luc Côté, “Justice pénale internationale: vers un resserement des règles du jeu”, *Revue internationale de la Croix-Rouge* No 861, p. 133-144. Available at: [http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/review-861-p133?OpenDocument&style=custo\\_print](http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/review-861-p133?OpenDocument&style=custo_print) (last accessed on 02/02/2009).

<sup>20</sup> Article 13 (b) of the Rome Statute: “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if [...] a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations [...]”

<sup>21</sup> Stojanka Mirceva, “Why the International Court is different?”, 26 January 2004. Available at: <http://www.globalpolicy.org/intljustice/icc/2004/0126different.htm> (last accessed on 02/02/2009).

<sup>22</sup> “When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those states which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such states on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to states.”

<sup>23</sup> Stojanka Mirceva, “Why the International Court is different?”, 26 January 2004. Available at: <http://www.globalpolicy.org/intljustice/icc/2004/0126different.htm> (last accessed on 02/02/2009).

<sup>24</sup> *Ibid*.

<sup>25</sup> Available at: [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1994.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf) (last accessed on 02/02/2009).

<sup>26</sup> Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 279.

<sup>27</sup> *Ibid*, p. 280.

<sup>28</sup> William A. Schabas, “United States hostility to the International Criminal Court: it’s all about the Security Council”, *The European Journal of International Law (EJIL)* 15 (2004), p. 716.

<sup>29</sup> Article 42 (3) of the Rome Statute.

<sup>30</sup> Stojanka Mirceva, “Why the International Court is different?”, 26 January 2004. Available at: <http://www.globalpolicy.org/intljustice/icc/2004/0126different.htm> (last accessed on 02/02/2009).

<sup>31</sup> *Ibid*; Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 281.

<sup>32</sup> Article 15 (4) of the Rome Statute.

<sup>33</sup> “(a) At the request of the state making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision. (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to

---

proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.”

<sup>34</sup> Article 53 (3) (b). Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 302.

<sup>35</sup> “When the Pre-Trial Chamber does not confirm the decision by the Prosecutor referred to in sub-rule 1, he or she shall proceed with the investigation or prosecution.” Available at: [http://www2.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www2.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf) (last accessed on 06/02/2009).

<sup>36</sup> S/RES/1534, 26 March 2004.

<sup>37</sup> “The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. [...]” Available at: [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev41\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev41_en.pdf) (last accessed on 06/02/2009).

<sup>38</sup> Luc Côté, “Justice pénale internationale: vers un resserement des règles du jeu”, *Revue internationale de la Croix-Rouge* No 861, p. 133-144. Available at: [http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/review-861-p133?OpenDocument&style=custo\\_print](http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/review-861-p133?OpenDocument&style=custo_print) (last accessed on 02/02/2009).

<sup>39</sup> Ibid.

<sup>40</sup> Available at: <http://www.sc-sl.org/LinkClick.aspx?fileticket=9Hkc4T%2FCbgU%3D&tabid=71> (last accessed on 06/02/2009).

<sup>41</sup> Luc Côté, “Justice pénale internationale: vers un resserement des règles du jeu”, *Revue internationale de la Croix-Rouge* No 861, p. 133-144. Available at: [http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/review-861-p133?OpenDocument&style=custo\\_print](http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/review-861-p133?OpenDocument&style=custo_print) (last accessed on 02/02/2009).

<sup>42</sup> Ibid.

<sup>43</sup> Article 13 (b) of the Rome Statute.

<sup>44</sup> S/RES/1593, 31 March 2005.

<sup>45</sup> Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 283.

<sup>46</sup> Article 53 (3) of the Rome Statute.

<sup>47</sup> S/RES/1593, 31 March 2005, paragraph 6.

<sup>48</sup> Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 285.

<sup>49</sup> “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 same conditions.”

<sup>50</sup> “Report of the International Law Commission on the work of its forty-sixth session”, 2 May- 22 July 1994, UN Doc. A/49/10, p. 43. Available at: [http://untreaty.un.org/ilc/documentation/english/A\\_49\\_10.pdf](http://untreaty.un.org/ilc/documentation/english/A_49_10.pdf) (last accessed on 09/02/2009).

<sup>51</sup> William A. Schabas, “United States hostility to the International Criminal court: it’s all about the Security Council”, *EJIL* 15 (2004), p. 715.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid; Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 282.

<sup>55</sup> African Union, Communique of the 142<sup>nd</sup> meeting of the Peace and Security Council, PSC/MIN/Comm(CXLII), 21 July 2008. Human Rights Watch, “Memorandum for the 7<sup>th</sup> session of the International Criminal Court Assembly of States parties”, November 2008, footnote 6. Available at: <http://www.hrw.org/en/reports/2008/12/03/human-rights-watch-memorandum-seventh-session-international-criminal-court-assembly> (last accessed on 02/02/2009).

<sup>56</sup> Article 87 (5) and (7) of the Rome Statute.

- 
- <sup>57</sup> Vera Gowlland-Debbas, "The relationship between the Security Council and the International Criminal Court", 2001. Available at: <http://www.weltpolitik.net/Sachgebiete/Globale%20Zukunftsfragen/Internationaler%20Strafgerichtshof/Analysen/The%20Relationship%20between%20the%20Security%20Council%20and%20the%20International%20Criminal%20Court.html> (last accessed on 09/02/2009).
- <sup>58</sup> Ibid; Fédération Internationale des Ligues des Droits de l'Homme (FIDH), position paper No. 13: "Recommendations to the seventh Assembly of States Parties to the Rome Statute", November 2008. Available at: [http://www.fidh.org/IMG/pdf/FIDHPositionPaperASP7\\_Nov2008.pdf](http://www.fidh.org/IMG/pdf/FIDHPositionPaperASP7_Nov2008.pdf) (last accessed on 09/02/2009).
- <sup>59</sup> Ibid, FIDH.
- <sup>60</sup> For more information on the options considered, please see: <http://www.icc-cpi.int/Menu/ASP/Press+Releases/Press+Releases+2009/Assembly+of+States+Parties+concludes+the+second+resumption+of+its+seventh+session.htm> (last accessed on 24/02/2009).
- <sup>61</sup> Allison Marston Danner, "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court", *The American Journal of International Law*, Vol. 97:510, 2003, p. 528.
- <sup>62</sup> Ibid, p. 526.
- <sup>63</sup> Article 17 of the Rome Statute.
- <sup>64</sup> Article 18 of the Rome Statute.
- <sup>65</sup> Article 18 (2) and (3) of the Rome Statute.
- <sup>66</sup> Article 54 (2) and Article 87 of the Rome Statute.
- <sup>67</sup> Article 86 of the Rome Statute.
- <sup>68</sup> Gilbert Bitti, "The evolving role of NGOs in international criminal justice", 2 October 2006, p. 2. Available at: <http://www.prio.no/upload/1107/gb.pdf> (last accessed on 17/02/2009).
- <sup>69</sup> Article 87 (7) and Article 112 (2) (f) of the Rome Statute.
- <sup>70</sup> Article 72 and 93 (4) of the Rome Statute. Wouters, Verhoeven and Demeyere, "The International Criminal Court's Office of the Prosecutor between independence and accountability?", *International Criminal Law Review* 8 (2008), p. 285. Allison Marston Danner, "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court", *The American Journal of International Law*, Vol. 97:510, 2003, p. 529.
- <sup>71</sup> Article 57 (3) (d) of the Rome Statute.
- <sup>72</sup> Allison Marston Danner, "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court", *The American Journal of International Law*, Vol. 97:510, 2003, p. 529.
- <sup>73</sup> Human Rights Watch, "Memorandum for the 7<sup>th</sup> session of the International Criminal Court Assembly of States parties", November 2008, p. 8. Available at: <http://www.hrw.org/en/reports/2008/12/03/human-rights-watch-memorandum-seventh-session-international-criminal-court-assembly> (last accessed on 02/02/2009).
- <sup>74</sup> Article 87 (5) of the Rome Statute.
- <sup>75</sup> Wouters, Verhoeven and Demeyere, "The International Criminal Court's Office of the Prosecutor between independence and accountability?", *International Criminal Law Review* 8 (2008), p. 285. Allison Marston Danner, "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court", *The American Journal of International Law*, Vol. 97:510, 2003, p. 528.
- <sup>76</sup> Article 112 of the Rome Statute.
- <sup>77</sup> Article 46 (1) of the Rome Statute.
- <sup>78</sup> Article 46 (2) of the Rome Statute.
- <sup>79</sup> Stephanie Godard and David Tolbert, "Removal from Office: Article 46", in "commentary on the Rome Statute of the International Criminal Court: Observer's notes, article by article", 1999, p. 655 and 660.
- <sup>80</sup> Allison Marston Danner, "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court", *The American Journal of International Law*, Vol. 97:510, 2003, p. 524.
- <sup>81</sup> Article 42 (2) of the Rome Statute: "The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof.[...]"

---

<sup>82</sup> Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 288.

<sup>83</sup> *Ibid.*

<sup>84</sup> Article 112 (5) of the Rome Statute.

<sup>85</sup> Article 116 of the Rome Statute.

<sup>86</sup> Speech by Judge Sang-Hyun Song, “The independence of the ICC and safeguards against political influence”, 3-4 February 2007. Available at:

<http://www.icclr.law.ubc.ca/Site%20Map/ICC/IndependenceofICC.pdf> (last accessed on 06/02/2009).

<sup>87</sup> The US announced that it will not fund the ICTR and the ICTY beyond 2008, thus obliging the tribunals to use a strategy to end their work before that date. Allison Marston Danner, “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court”, *The American Journal of International Law*, Vol. 97:510, 2003, p. 527.

<sup>88</sup> Speech by Judge Sang-Hyun Song, “The independence of the ICC and safeguards against political influence”, 3-4 February 2007. Available at:

<http://www.icclr.law.ubc.ca/Site%20Map/ICC/IndependenceofICC.pdf> (last accessed on 06/02/2009).

<sup>89</sup> Article 68 (3) of the Rome Statute: “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.” Note that the Extraordinary Chambers in the Courts of Cambodia (ECCC) also enables victims of the Khmer Rouge regime to participate in the proceedings as civil parties. See Rule 23 of the Internal Rules, available at: [http://www.eccc.gov.kh/english/cabinet/fileUpload/88/IR\\_Revision2\\_05-01-08\\_En.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/88/IR_Revision2_05-01-08_En.pdf) (last accessed on 24/02/2009).

<sup>90</sup> Fiona McKay, “Victim participation in proceedings before the International Criminal Court”, 28 June 2008. Available at: <http://www.wcl.american.edu/hrbrief/15/3mckay.pdf?rd=1>.

<sup>91</sup> Situation in the Democratic Republic of Congo, “Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, Pre-Trial chamber I, 17 January 2006 (ICC-OI/04-IOI-tEN-Corr). Available at:

[http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-101\\_tEnglish-Corr%20Decision,%2017%20January%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-101_tEnglish-Corr%20Decision,%2017%20January%202006.pdf) (last accessed on 04/02/2009).

<sup>92</sup> Fiona McKay, “Victim participation in proceedings before the International Criminal Court”, 28 June 2008. Available at: <http://www.wcl.american.edu/hrbrief/15/3mckay.pdf?rd=1>.

Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 287.

<sup>93</sup> *Ibid.*

<sup>94</sup> Allison Marston Danner, “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court”, *The American Journal of International Law*, Vol. 97:510, 2003, p. 524.

<sup>95</sup> Harold K. Jacobson, “Networks of interdependence: international organisations and the global political system”, 1984, p. 119 :” “representative bodies [of international organisations] often find it hard to frame coherent policies.”

<sup>96</sup> Article 112 (7) of the Rome Statute. Allison Marston Danner, “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court”, *The American Journal of International Law*, Vol. 97:510, 2003, p. 525.

<sup>97</sup> See for example, Global Policy Forum and the World Federalist Movement, “Increasing the transparency and accountability of the Security Council”, 25 November 1996. Available at:

<http://www.globalpolicy.org/security/ngowkgrp/brief96.htm> (last accessed on 09/03/2009).

<sup>98</sup> S/RES/1422, 12 July 2002. Subsequently renewed by S/RES/1487, 12 June 2003. Note that Resolution 1487 was not renewed in May 2004 after the withdrawal of the US proposal due to an extensive lack of support for the Resolution from members of the Security Council.

<sup>99</sup> Neha Jain, “A separate law for peacekeepers: the clash between the Security Council and the International Criminal Court”, *EJIL*, 2005, Vol. 16 No. 2, p. 240.

---

<sup>100</sup> Ibid. Human Rights Watch, “Closing the door to impunity: Human Rights watch recommendations for renewing Resolution 1422”, May 2003. Available at: <http://www.iccnw.org/documents/HRW1422April2003.pdf> (last accessed on 16/02/2009).

<sup>101</sup> S/RES/1497, 1<sup>st</sup> August 2003.

<sup>102</sup> Ibid, paragraph 7. Note that in contrast to Resolution 1422, this Resolution does not recall the responsibility of States under international law to prosecute these crimes.

<sup>103</sup> As explained in a previous section, the debate around the drafting of Article 16 of the Rome Statute demonstrates that this provision aims at limiting the interference of the Security Council with the Court in order to preserve its independence.

<sup>104</sup> See for instance the letter from the Representative of Canada to the UN President of the Security Council (3 July 2002), UN Doc. S/2002/723 before the adoption of Resolution 2241: ‘ . . . the issue is a potentially irreversible decision negatively affecting the integrity of the Rome Statute of the International Criminal Court, the integrity of treaty negotiations more generally, the credibility of the Security Council, the viability of international law with respect to the investigation and prosecution of grievous crimes, and the established responsibilities of states under international law to act on such crimes.’ Similar views were expressed by other countries such as Argentina, Brazil, Cameroon, China, Colombia, Costa Rica, Cuba, France, Germany, Guinea, Ireland, Islamic Republic of Iran, Jordan, Liechtenstein, Malaysia, Mauritius, Mexico, New Zealand, Samoa, South Africa, Switzerland, Syrian Arab Republic, United Kingdom, and Venezuela: UN Doc. S/PV.4568; in Neha Jain, “A separate law for peacekeepers: the clash between the Security Council and the International Criminal Court”, *The EJIL*, 2005, Vol. 16 No. 2, footnote 13.

<sup>105</sup> Stahn, C., “The ambiguities of Security Council Resolution 1422 (2002)”, 14 *EJIL* (2003), p. 86-88. Human Rights Watch, “Closing the door to impunity: Human Rights watch recommendations for renewing Resolution 1422”, May 2003. Available at: <http://www.iccnw.org/documents/HRW1422April2003.pdf> (last accessed on 16/02/2009). Neha Jain, “A separate law for peacekeepers: the clash between the Security Council and the International Criminal Court”, *EJIL*, 2005, Vol. 16 No. 2, p. 244.

<sup>106</sup> Save the Children, “No one to turn to: the under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers”, 2008. Available at: [http://www.savethechildren.org.uk/en/docs/No\\_One\\_to\\_Turn\\_To.pdf](http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf) (last accessed on 16/02/2009); Human Rights Watch, “We will kill you if you cry”, 15 January 2003. Available at: <http://www.hrw.org/en/reports/2003/01/15/well-kill-you-if-you-cry> (last accessed on 16/02/2009); Jean-Marie Ghéhenno, Under UN Secretary-General for Peacekeeping Operations, “Presentation to the Security Council”, 31 May 2005. Available at: <http://www.un.org/Depts/dpko/dpko/articles/article310505.htm> (last accessed on 16/02/2009).

<sup>107</sup> Article 40 of the 1969 Vienna Convention on the Law of Treaties provide that treaties may only be amended in the way provided for in their constitutive instruments. No provisions of the UN Charter allow the Security Council to act in a way leading to the modification of a treaty.

<sup>108</sup> Wouters, Verhoeven and Demeyere, “The International Criminal Court’s Office of the Prosecutor between independence and accountability?”, *International Criminal Law Review* 8 (2008), p. 289.

<sup>109</sup> Draft Regulations of the Office of the Prosecutor, 3 June 2003. Available at: [http://www.icc-cpi.int/NR/rdonlyres/197E8B50-11E8-41C3-BB2C-ED962ED59FCD/143619/draft\\_regulations.pdf](http://www.icc-cpi.int/NR/rdonlyres/197E8B50-11E8-41C3-BB2C-ED962ED59FCD/143619/draft_regulations.pdf) (last accessed on 16/02/2009).

<sup>110</sup> Allison Marston Danner, “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court”, *The American Journal of International Law*, Vol. 97:510, 2003, p. 541.

<sup>111</sup> Ibid.

<sup>112</sup> “The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.”

<sup>113</sup> 4 November 2008, ICC-ASP/7/28. Available at: [http://www2.icc-cpi.int/iccdocs/asp\\_docs/ICC-ASP-7-28%20English.pdf](http://www2.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-28%20English.pdf) (last accessed on 17/02/2009).

<sup>114</sup> Ibid, p. 6.

<sup>115</sup> Coalition for the International Criminal Court – Independent Oversight mechanism Team, “Comments and recommendations to the 7<sup>th</sup> session of the Assembly of States Parties”, 31 October 2008, p. 1. Available at:

---

[http://www.iccnw.org/documents/CICC\\_Oversight\\_Draft\\_Team\\_Paper\\_ASP7\\_31Oct08.pdf](http://www.iccnw.org/documents/CICC_Oversight_Draft_Team_Paper_ASP7_31Oct08.pdf) (last accessed on 17/02/2009).

<sup>116</sup> Ibid.

<sup>117</sup> Article 103 (1) of the ICC Rules of Procedures and Evidence: “At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.” Available at: [http://www2.icc-cpi.int/NR/ronlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www2.icc-cpi.int/NR/ronlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf) (last accessed on 17/02/2009).

<sup>118</sup> Gilbert Bitti, “The evolving role of NGOs in international criminal justice”, 2 October 2006, p. 5. Available at: <http://www.prio.no/upload/1107/gb.pdf> (last accessed on 17/02/2009).

<sup>119</sup> Human rights Watch, “Courting History: The landmark International Criminal Court’s five years”, July 2008. Available at: <http://www.hrw.org/en/reports/2008/07/10/courting-history-0> (last accessed on 02/02/2009).

<sup>120</sup> Ibid.

---

This paper is part of the One World Trust's research on international law and sovereignty. With our work in this area we aim at developing greater understanding amongst parliamentarians, political decision makers and members of the community of research and practice for the role of global institutions, the accountability challenges they face, and how these can be overcome in the wider context of advancing accountability in global governance.

---