1. International tribunals and political accountability

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International tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC), are closely connected to accountability concerns, but it is not generally the type of accountability that is the basis of this chapter. These courts and tribunals are designed to hold individuals to account for their international misdeeds such as grave breaches of the Geneva Conventions and crimes against humanity. Rather than examining the responsibility of international tribunals to hold individuals to account—the dominant mode of discussing accountability in transitional justice—I will be analyzing the degree to which these tribunals are themselves held to account by their political masters. What makes this type of accountability fascinating and worthy of theoretical development is the diversity, evolution, and consequences of the legal and political instruments used to check the reach and power of these courts. Oversight of the international tribunals has variously been the responsibility of the United Nations Security Council (the ICTY and the International Criminal Tribunal for Rwanda, or ICTR); a hybrid model of the United Nations and local government (the Special Court for Sierra Leone, or SCSL; the Extraordinary Chambers in the Courts of Cambodia, or ECCC); and treaty signatories (the ICC and its Assembly of States Parties that signed and ratified the Rome Statute).[1] The extent of their formal oversight powers has increased over the years since the establishment of the ICTY in 1993, while the level of engagement by the principals with their judicial agents has waxed and waned depending on the degree to which their own political interests have been implicated. My goal for this chapter is to develop a model of political accountability of the international tribunals that highlights key features of the actual and practical degree of oversight of these institutions by their designers.

Surprisingly, the international tribunals' political accountability has received comparatively little scholarly attention, although there has been increasing interest in the relationship between the Assembly of States Parties and the ICC (Danner 2003; Woolaver and Palmer 2017). Given these courts' power to intrude upon the sovereignty of states and the fear by many powerful international actors, such as the United States, China, and Russia, that the ICC Prosecutor would use her extensive powers to engage in politically charged investigations, we might have expected more focused inquiry into the nature of the relationships between principals and actors, the degree of independence enjoyed by these courts, and the type and level of oversight in which the authorizing parties engage. The manner in which such issues are addressed on paper and in practice by these courts and their political masters is critical for the legitimacy and success of these institutions,

[1] In the interests of time and space I will not delve into accountability and the World War II tribunals or some of the other less productive tribunals such as the Special Panels for East Timor and the Lebanon Tribunal.

as well as for national interests and sovereignty. Indeed, if there is one observation on which scholars and practitioners can all agree, it is that international courts' ability to perform their functions is dependent upon a productive relationship with their international overseers (Mariniello 2015; Roche, Meernik and Ingadottir 2013). Absent effective oversight of these courts, their legitimacy in the eyes of people around the world may diminish. And as deGuzman writes (2012, 268), "the globalization of communications increasingly means that an institution's legitimacy depends on the opinions of ordinary citizens around the world." Absent productive engagement and support from the principal, there is little these judicial agents can do to fulfill their primary function to hold trials and dispense justice. An effective system of international justice requires that those who demanded it take responsibility for it and provide a foundation of accountability, oversight, and partnership.

If the ultimate goal of international justice is to hold individuals to account for their violations of international law, while at the same time states are still wary of infringements upon national sovereignty, the tension between these two values will play out in the relationship between principal and agent. On the one hand, we would assume that the principal (e.g. the UN Security Council, the Assembly of States Parties) will expect the agent (e.g. the ICTY, the ICC) to target those bad actors who jeopardize international peace and security. Effective prosecution would require, inter alia, support from the principals, and prosecutorial and judicial independence so that trials can be held and are perceived to be fair. On the other hand, we would also expect that many states might be reluctant to grant too much independence and support to such a court for fear that its prosecutorial tools might be turned against them someday. Hence, the tension between close supervision and control and the independence of these courts engages fundamental values regarding sovereignty, judicial independence, human rights, and more generally the role of international tribunals in providing justice and peace.

In section 1 of this chapter I provide background information on the relationship between the principals, who oversee international courts, and the key actors in these judicial institutions. In section 2, I describe and analyze critical elements of the oversight and accountability relationships between principals and agents and how the nature of these relationships has changed over time. To be sure, the nature of the accountability relationship between principals and agents is complex and multifaceted, and it would not be possible to touch upon all aspects of these interactions. Hence, I focus on three elements in this relationship—budgetary oversight, legal oversight, and political oversight regarding the risks of infringements upon sovereignty. In section 3 I conclude with thoughts on the likely evolution of these relationships in an increasingly fractured world. I also suggest where future research in this line of inquiry might take us.

1 BACKGROUND: POLITICAL ACCOUNTABILITY OF INTERNATIONAL TRIBUNALS

States and other international actors have experimented with a variety of structures for monitoring and holding to account the international tribunals they created. Their structures have continually evolved as state principals have sought to provide justice with sufficient judicial independence so as to avoid charges of political interference and

bias, while at the same time ensuring that these institutions do not impinge upon critical, national interests. For example, given the enormity of the crimes committed by the Nazis and the Japanese empire and the overwhelming evidence against their ringleaders, there was little chance that the judges and prosecutors of the Nuremberg and Tokyo tribunals, who were appointed by the victorious allies, would stray into uncharted and dangerous political waters. The criticism against the World War II tribunals centered mostly on their lack of judicial independence, which rendered them tools of victor's justice and made their legacy correspondingly qualified. The subsequent design of oversight and accountability mechanisms for the tribunals of the post Cold War era reflects a continuing effort to avoid the taint of victor's justice while at the same time ensuring sufficient oversight to rein in costs, judicial lawmaking, and prosecutorial overreach.

There have been three basic types of bodies that have been central in overseeing the work of international tribunals—the United Nations Security Council (ICTY and ICTR); the United Nations General Assembly and Secretary General, along with a host government (SCSL and ECCC) and the Assembly of States Parties (ICC). The UN Security Council structure is both a reflection of the post World War II balance of power, while at the same time the ad hoc progeny of the Security Council have enjoyed perhaps the greatest level of freedom from their political authors. The permanent five members of the Security Council used their substantial powers to ensure international peace and security to create the ICTY and ICTR and provided them with a fair degree of judicial independence. Because the UNSC was obviously not established to provide oversight of the ad hoc tribunals, and has numerous responsibilities regarding peace and security beyond judicial oversight, its model remains unique and arguably more limited than later modes of accountability.

The Assembly of States Parties has been the one institution established expressly to oversee the activities of a court, and as such has provided fairly rigorous and continual oversight of the ICC. Its level of oversight has been the deepest of all the models of accountability and is more akin to the legislative bodies that typically provide oversight of the courts in domestic criminal justice systems. Oversight of the smaller tribunals for Sierra Leone and Cambodia by both the United Nations and the host country represents a hybrid model of joint oversight that hinges on the degree and nature of involvement by the state host. Where such involvement has been largely positive (i.e. Sierra Leone and the SCSL), the Court has functioned satisfactorily and concluded its business expeditiously (Sawyer and Kelsall 2007), but when the host government has been accused of political interference (i.e. Cambodia and the ECCC) the Court has struggled with gaining legitimacy and conducting fair trials (Nielsen 2010). Tribunals have typically sought to limit the involvement of the host state in judicial processes given concerns about regime actors and allies, who may have violated international law and whose continuing presence can interfere with the administration of justice.

These different structures have each led to diverse outcomes regarding oversight, judicial independence, and the overall effectiveness of the tribunals. Rather than analyzing each mode of accountability to assess how oversight of international justice has shaped its administration, I focus on assessing the role played by three essential aspects of oversight in court operations and outcomes. This model of accountability of international tribunals highlights: (1) budgetary oversight and control of funding; (2) the development and application of international law and rules of procedure and evidence; and (3) the degree

of political risk of prosecution to the states involved in oversight. There are other elements in oversight, such as the role of the principal in selecting judges and other key leaders, but I focus on these critical components.

Before proceeding, it is important to emphasize that the factors motivating oversight and accountability on the part of the principals are premised on two concerns. First, and most obviously, principals seek accountability and oversight in order to improve performance. To the extent that oversight improves the efficiency of these courts, reduces their costs, and enhances their legitimacy in the eyes of their stakeholders, it serves the traditional interests of all principals in insuring their agents are delivering the expected outcomes. And as long as such oversight does not interfere with the work of the tribunal, we might expect these institutions to welcome, or at least accept the necessity of, such oversight. The principals are also motivated by a concern for at least monitoring the degree to which tribunals are involved in actions that might undermine state sovereignty, if not preventing what might be perceived as egregious interference in the internal affairs of states. Regardless of their motivating reasons, the principals have become increasingly engaged in such oversight, as I describe below.

2 A MODEL OF ACCOUNTABILITY AND OVERSIGHT OF INTERNATIONAL JUSTICE

2.1 Budgetary Oversight and Spending

The means by which funding for the international tribunals is provided is critical for understanding the type of oversight desired by the principals. Budgetary resources are never infinite and hence tribunals will likely never possess sufficient funds to prosecute all worthy cases. Nonetheless, the different types of funding mechanisms for the tribunals can set the broad parameters of the caseload these institutions are capable of managing. Furthermore, we should expect to find that the greater the level of budgetary oversight and the greater the scarcity of resources, the greater the degree of control the principals can exercise over their judicial agents. Hence, budgets and funding mechanisms provide a key instrument in the tool box of political accountability.

The ICTY and ICTR were funded as items in the budget of the General Assembly of the United Nations.[2] To be sure, the United Nations has a reputation as an unwieldy bureaucracy that hampers the timely and effective use of resources, but the tribunals mostly did not starve for cash. In fact, they were among the largest items in the UN budget for many years (Wippman 2006). And for most of their existence the ad hoc tribunals were largely able to fund an increasing number of trials, without, it would appear, significant budgetary limitations. There were complaints regarding adequate funding of the tribunals, especially at the beginning, as they each struggled to establish their existence. Nonetheless, the escalating costs of conducting so many large and complex trials, with their strenuous demands on resources for investigations, prosecution, witness testimony, translation,

[2] See the ICTY's depiction of its funding at www.icty.org/en/about/tribunal/the-cost-of-justice as visited on July 31, 2018.

document maintenance, detention, and so forth, led to several key developments in the oversight of the ad hoc tribunals and the larger international justice enterprise.

First, these increasing costs (the cost of the ICTY alone from its inception in 1993 through 2007 was 1.2 billion dollars; see Wippman 2006), coupled with what seemed to be neverending trials, created sufficient unease among the Security Council members, the Secretary General, and the General Assembly that they instructed the tribunals to devise completion strategies (Pocar 2008). The tribunals identified numerous ways to speed up the trials, dispense with some cases better left to local courts, and impose other costcutting measures. Hence, while budgetary oversight did not create significant impediments to the delivery of justice for most of the early years of the ad hoc tribunals' histories, ultimately the tribunals reached a sort of financial ceiling beyond which the principals were reluctant to authorize additional spending. While one may argue that some of the cost saving measures were not optimal for justice (e.g. the increasing use of witness statements rather than in-person testimony), ultimately the ICTY and ICTR were able to clear all or nearly all of their caseloads, declare victory and close up shop. The financial concerns that arose as a result of the increasing costs of the ad hoc tribunals, however, had a more important impact on the creation and funding of other international courts.

There was no shortage of violent conflicts in the 1990s and beyond in which major human rights atrocities occurred, and thus no slackening of demand for justice. The establishment of the ICTY and ICTR demonstrated that concerns regarding sovereignty and noninterference in states' internal affairs had been breached and that justice was desirable and possible. But as the costs of the ICTY and ICTR ratcheted up during the 1990s (Dougherty 2004), the international community sought alternative solutions beyond the ad hoc tribunal model that did not entail an ever increasing, expensive number of conflict specific courts. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia were both funded principally through voluntary contributions. This funding model was also intimately linked to their *ratione personae* jurisdiction as each court was created to address a small number of cases involving high ranking individuals alleged to be most responsible for the violation of international law. Limited and voluntary funding ensured that these tribunals could not stray beyond this mandate, and as such served as an additional check on the powers of the courts and their accountability to the host government and the United Nations.

The International Criminal Court is funded through voluntary contributions as well from the states that constitute the Assembly of States Parties (ASP), albeit by a more formula driven funding model than the SCSL and ECCC where the expectation was that regional and major power funding (e.g. the US and the UK for SCSL and Japan for the ECCC) would provide the bulk of the contributions. The ICC uses a method similar to that utilized by the United Nations to assess dues in which a country's contribution is based on its income. The ICC also draws funding from voluntary contributions and NGOs, as well as from the United Nations when the Security Council refers a case. While this budget model should allow for more predictable levels of funding over time, the permanency of the court and the chronic number of violent conflicts across the globe may also limit the appetite of the ASP to fund an increasing caseload. There are already signs that states are concerned about costs, especially in light of their own domestic budgetary problems and priorities, and have sought to rein in the ambitions of the ICC to a degree (Woolaver and Palmer 2017).

The chief concern has been that (the threat of) reduced funding could be used to hamper the initiation of new investigations and prosecutions where some states' political preferences might conflict with such involvement by the Office of the Prosecutor (OTP). The ICC has already experienced funding difficulties with regard to its investigation into the situation in Libya. And while, strictly speaking, the ASP is to exercise oversight with regard to the OTP (to preserve the judicial independence of the trial chambers), there is always the possibility that unpopular verdicts may produce adverse outcomes. Woolaver and Palmer (2017, 659) quote Justice Robertson: "Courts which are so starved of funds that they cannot do justice should close themselves down rather than continue under the expectation that sufficient funding will be forthcoming only if they render verdicts acceptable to the funding body." Indeed, the possibility exists that the major state funders of the ICC might limit its investigations and interfere with its work through the ostensibly neutral budgetary process by reducing the Court's funds while claiming domestic austerity and other such objectively "reasonable" arguments. Budgets loom large as one of the most direct methods by which the ASP can hold the ICC to account.

2.2 Substantive and Procedural International Law

Domestic and international courts are granted jurisdiction over cases involving legislatively derived laws, and are generally not given the authority to expand their legal jurisdiction as they see fit. Rather, this responsibility is typically a legislative function designed to avoid *nullen crimen sine lege* and judicial overreach. Hence, a key element of political accountability is the extent to which the principal has power over judicial agents to determine the applicability of substantive international law. The jurisdiction of the international tribunals has been limited to three types of crimes—war crimes (including grave breaches of the Geneva Conventions and violations of the laws and customs of war), crimes against humanity, and genocide. At the dawn of the reemergence of international justice, the UN Secretary General, in alignment with the preferences of the major powers, sought to limit judicial lawmaking at the ad hoc tribunals. He stated that "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law."[3] While this reassured states that may have feared these courts could expand the scope of international law, given that no international tribunal had applied these laws since the World War II tribunals (and no international court had ever applied the Genocide Convention), it should come as no surprise that the judges were forced to issue numerous judgments that reinterpreted law or expanded its reach in novel and creative ways. The ICTY Appeals Chamber ruled on the legality of its own existence; the ICTY and ICTR put forward numerous, and sometimes competing, definitions of crimes, such as sexual assault, and interpreted the "protected groups" provision of the Genocide Convention in several diverse ways (Aloisi and Meernik 2017; Darcy and Powderly 2010), to name but a few examples.

There have been several controversies regarding perceptions of judicial activism that have broken out on the pages of law reviews and academic conferences, but these tribunal

[3] As found at www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf on January 16, 2018.

decisions did not generate such intense opposition that the principals intervened to limit the jurisdiction of the courts. Indeed, curtailing the jurisdiction of the court would likely have led to accusations of judicial interference. ICTY decisions regarding the applicability of the Geneva Conventions to internal conflicts, and its recent decisions regarding the doctrine of "specific direction" (Ventura 2014), as well as the SCSL's judgments regarding child soldiers did arouse debate over whether judges had gone too far, or, in the case of specific direction, whether they were anticipating the preferences of the United States and Israel.[4]

Nonetheless, there were sufficient general concerns regarding judicial activism and creativity (Aloisi and Meernik 2017; Darcy and Powderly 2010) to induce the drafters of the Rome Statute to provide an extensive definition of crimes and their elements, doctrines of liability, protection of information pertaining to states' national security, and other key aspects of judicial decision making so as to limit the potential for judicial lawmaking. The Assembly of States Parties possesses the power to further delineate these elements as needed. The norm of noninterference in judicial decision making would imply that the ASP should not utilize this power to sway the preferences and outcomes of the trial chambers, although there is some evidence to suggest that such interference has occurred in the Kenya case (Woolaver and Palmer 2017). The ability of the ASP to define the elements of crimes does represent a potentially important check on the power of the ICC judges and a key element of political accountability. Given the level of detail found in the Rome Statute, however, the ability of the judges to address ambiguities and contradictions in international law and creatively interpret this law was already limited.

The key difference between the ad hoc tribunals and the ICC, as well as a critical distinguishing factor in assessing the degree of political accountability in the relationship between principal and judicial agent, is the level of detail in their founding statutes. To use a pertinent if somewhat rough analogy, where the work of the judges of the ad hoc tribunals more closely resembled judicial decision making in common law systems (not surprising given the dominance of English speaking personnel throughout the ICTY in particular), ICC judges labor under something more akin to a civil law system where original legislation is quite detailed and limits judicial discretion.

The differences in how the founding statutes approach the issue of sentencing is illustrative. The language of the ICTY and ICTR statutes, and to a lesser extent the SCSL statute on sentencing, is quite limited and provides judges with enormous discretion in how they determine the goals of punishment and the relative importance of sentencing determinants. There are 99 words in the ICTY statute regarding sentencing and 542 words in the ICC treaty. Not a few commentators have argued that this lack of attention to sentencing resulted in disparate outcomes (Drumbl 2007; Harmon and Gaynor 2007;

[4] The specific direction doctrine refers to whether there is a requirement, in proving a superior aided and abetted international crimes, that the individual specifically ordered subordinates to commit a crime. Given that few commanders would risk directly communicating such orders in writing, such a requirement would set a fairly high bar for demonstrating the liability of political and military leaders for the actions of their subordinates. Because many states work through proxy forces that are not as concerned about international laws and courts, some feared the announcement of this doctrine was an attempt to protect governments such as those of the US and Israel that have worked closely with some bad actors.

Henham 2003, 2007; Sloane 2007). The ICTY and ICTR judges were given free rein to determine punishments; the only significant limitation was the lack of the death penalty, which is also absent from the ICC treaty. The ICC Statute, however, informs judges that sentences are not to exceed 30 years except under exceptional circumstances. ICC judges must pronounce a penalty for every count on which an individual is convicted, while the ad hoc tribunals were given no such instructions. The ICC Statute provides that judges may hold additional hearings for the purpose of hearing evidence regarding sentencing before announcing their verdict, while the ad hoc tribunals were not so instructed. Hence, where the judges of the ad hoc tribunals in particular were given significant discretion in interpreting the sparse language in their statutes on virtually all matters that came before them, the ICC judges are more constrained by the detailed Rome Statute and by the Assembly of States Parties.

A second element of distinction pertaining to legal matters and the law that characterizes the varying levels of political accountability across the international tribunals is the level of control enjoyed by the judges over their rules of procedure and evidence. The rules of procedure and evidence (RPE) describe in greater detail the management of the judicial enterprise, and especially the investigations and trials. While not as potentially consequential as the interpretation and development of the substantive laws at issue, the RPE had been left to the judges at the ad hoc and hybrid tribunals to develop and revise as black letter laws confronted reality.

The judges were not reticent to revise the RPE. In fact, the ICTY judges revised their RPE 50 times while the ICTR judges revised their RPE 23 times. Judges were treated more as legal practitioners who were entrusted with ensuring the smooth functioning of their courtrooms without need for micromanagement by their principals. The permanent ICC was established more like a traditional criminal justice enterprise in which a legislative body—the ASP—is in charge of developing the procedural as well as substantive law. The ICC judges were given no such power to unilaterally revise their rules of procedure and evidence but must work in conjunction with the ASP to change this language. Whether this structure was engineered specifically because the ASP wished to create a more traditional legislative–judicial relationship, or whether it was wary of giving judges such power, may be irrelevant. In general, the RPE have not provoked nearly the same amount of discussion as have interpretations and expansions of the substantive law. Nonetheless, this ASP oversight gives that body yet one more check on the ICC that stands in contrast to the level of discretion granted the judges of the ad hoc and hybrid tribunals.

2.3 Political Oversight and State Risk of Prosecution

I save the most important element for last. It is the level of risk that states perceive and assume when establishing international tribunals that their political and military leaders might one day stand trial in these very same courts. I contend that the greater the probability that state leaders may be held to account, the greater the degree of accountability states will demand over the work of an international court. I would hasten to add, however, that if the risk reaches a critical threshold, states will not support the creation of such a tribunal. For example, the risk that their leaders might be hauled before the International Criminal Court led a number of major powers, such as the United States, Russia, India, and China, to refuse to become members. Indeed, the United States was so

opposed to the ICC that the George W. Bush administration "unsigned" the agreement and took a number of steps, such as the conclusion of Article 98 agreements with many states that had signed the treaty to ensure that US governmental personnel working in those countries would never be extradited to The Hague.[5]

Given the limited temporal and geographic mandate of the ad hoc and hybrid tribunals, there was little likelihood that the principals had any significant exposure in these conflicts. To be sure, there was some slight risk for the French given their involvement in Operation Turquoise in Rwanda, and for the British because of their military involvement in Sierra Leone (deGuzman 2012). The ICTY did investigate whether NATO might have committed war crimes during its 1999 air war in Kosovo, which I address later. Nonetheless, given the focus of the ICTR on genocide and that of the SCSL on a small number of major leaders of human rights atrocities, there was little actual prospect that their government personnel might find themselves in the crosshairs of these tribunals. There have been ongoing concerns, however, that the Cambodian government has interfered in the affairs of the ECCC, given the prior history of regime leaders during the period of Khmer Rouge rule (Nielsen 2010).

The one exception to this state risk determinant of political accountability is the ICTY. The temporal jurisdiction of the ICTY was left wide open, which did create a theoretical possibility that actors beyond the former Yugoslavia could potentially be held to account one day. The very first sentence of the first article of the ICTY statute states, "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law *committed in the territory of the former Yugoslavia since 1991*" (emphasis added).[6] Given that the war in Bosnia was ongoing at the time of the creation of the ICTY in May of 1993, this made perfect sense. As well, the Bosnian war was the third conflict that resulted from the breakup of the former Yugoslavia, and hence there was a very real possibility that more war might break out. In fact, it was the war in Kosovo that occurred six years after the establishment of the ICTY and resulted in the 1999 NATO air war that caught the attention of the OTP, which examined whether NATO military actions that resulted in the deaths of civilians and the destruction of civilian infrastructure constituted war crimes. The OTP ultimately determined that the case was sufficiently weak that charges would not be brought.

In retrospect we can see how the chain of events that occurred in the former Yugoslavia led to the NATO air war and the risk that its actions might come under investigation, but at the time that the ICTY was created the focus was on the local actors who were committing international crimes and not the various international forces (UNPROFOR, IFOR, SFOR) that were attempting to provide peace and security in the former Yugoslavia. In 1993 there seemed to be little to no chance the ICTY might turn its attention to the actions of the states most involved in these international operations—the United States,

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[5] While President Clinton did sign the ICC Treaty at the very end of his administration in 2000, there was never any prospect that the agreement would be ratified by the US Senate. Rather, he signed the treaty in the hopes that the US might retain some influence in shaping the ICC and to diminish the prospects that US personnel might be subject to trial if the US were to become a full member.

[6] Article 1 of the ICTY Statute as found at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf on January 19, 2018.

the United Kingdom, France, and to a lesser extent some of the smaller European states. Viewed in this light, the ICTY's openended temporal jurisdiction makes sense, and we can understand how this unanticipated risk of prosecution came about. But while this case is an anomaly in many respects, it also served as a warning to states, especially those involved in military interventions and even humanitarian operations, that they should not assume the focus of international trials would always remain on the local bad actors.

The Rome Conference that produced the ICC Statute in 1998 occurred before NATO forces faced the risk of prosecution at the ICTY, but the type of concerns that surfaced during the ICTY investigation of the NATO states were forcefully debated in Rome. There was general agreement that the international community should not continually create new, specialized tribunals (although more have been created since 1998), but needed a more streamlined and cost effective international justice system. Chief among the concerns regarding the accountability of a permanent international tribunal was the power of the Prosecutor to independently pursue investigations. The United States pushed for a model that would lodge such power principally with the United Nations Security Council. There was great concern, especially among the Americans, that prosecutors might embark upon politically motivated investigations to demonstrate that international laws were not only applied to weak and poor regimes, or to make an example out of an unpopular leader or government. The Chinese and the Russians were similarly afraid that the ICC might seek to become involved in their internal affairs or those of their allies. Not a few supporters of the ICC treaty viewed the US position as hypocritical—international justice for thee, but not for me. Ultimately, the British and the French, among the P5, broke with the American position and along with the group of "like-minded states" pushed for an independent prosecutor, albeit with some checks.

While the perceived risk of prosecution was substantial enough that the US and other major powers declined to support the ICC treaty, that agreement did contain a number of checks on the independence of the Prosecutor. First, the ICC is designed to supplement, not supplant, national investigations and prosecutions. Unlike the ad hoc tribunals that were given authority over national criminal justice processes, the states parties to the ICC treaty are supposed to police their own personnel and use their own legal systems to prosecute those who violate international law. Only in the absence of genuine, national efforts to investigate and prosecute is the Prosecutor allowed to consider launching her own investigation. Such investigations must also be approved by a pretrial chamber and can only concern crimes committed on the territory of an ICC member state or crimes committed by nationals of an ICC state. The UN Security Council has the power to refer cases to the ICC (as it has done with the situations in Sudan and Libya), and can also ask for a delay in investigations when such efforts might hamper peace and security. The Prosecutor must also consider whether, "[t]aking 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."[7]

The ASP states retain considerably more power over the caseload of the ICC than the other principals exercised over the ad hoc and hybrid tribunals. I would suggest, however,

[7] ICC Statute, Article 53(1)(c) as found at www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf on January 19, 2018.

that more important than these de jure powers are the more informal powers and political influence that states can use or threaten to employ, which may constrain the quantity and type of investigations pursued by the Prosecutor. This is the ultimate trump card in holding the ICC accountable to ASP interests, although some of this communication of preferences and influence is likely exercised indirectly and out of sight. I would argue that the most powerful method which states can and have employed to check the reach of the Prosecutor, and thereby the ICC, has been the refusal to cooperate. We have seen this in cases that were either referred to the Prosecutor by the Security Council (Sudan and Libya) and the Kenyan case where the Prosecutor proceeded with an investigation into Kenyan election on his own initiative (*proprio motu*). In the case of the Security Council referrals the ICC has been unable to apprehend suspects, most prominently Sudanese President Omar al-Bashir. African states have vociferously opposed ICC efforts to gain custody of Bashir and have complained mightily that the ICC has been overly focused on Africa (it should be noted that most of the ICC's caseload from Africa has been in the form of states referring crimes committed on their own territory to The Hague) (see Du Plessis et al (2013) and Glasius (2009) for an overview of the issues). South Africa, which hosted Bashir in 2015, refused to arrest him despite the fact that it was obligated under the Rome Statute to apprehend him. Other states have similarly refused to arrest Bashir. The ICC had to drop its case against the Kenyan leaders altogether, principally because of witness intimidation, disappearances, and death, but here too the ICC was undermined by the willingness of member states to manipulate the prosecutorial process to protect the Kenyan leadership, as described by Woolaver and Palmer (2017). Overt and sub rosa political interference can damage and prevent ICC jurisdiction in politically sensitive areas.

Indeed, the lack of state cooperation on the aforementioned cases suggests that the ICC will be most likely to effectively proceed with a case when it is supported by the states on whose territory crimes have been committed (i.e. the state referral cases). State refusal to cooperate with the ICC is the ultimate check on international justice if control over budgets and the law is insufficient to impede the ICC. States are still reluctant to put the ICC on a "long leash" and run the risk that the Court may one day intrude upon matters they consider to infringe upon their sovereignty. Hence, they use their sovereign rights as states, whether members of the ICC or not, to counteract the power of the Court. International justice is not yet a system where the law reigns supreme over national interests. As long as sovereignty and national interest dominate international relations, they will remain the most powerful check on international tribunals and ensure their political accountability. These tribunals can provide justice in the context of engaged and perhaps even an overly intrusive system of bureaucratic checks and balances. But if international courts are so ignored or their efforts to investigate and prosecute so deliberately thwarted, the whole notion of accountability, and even their raison d'être, becomes open to question.

3 CONCLUSION

I have argued that systems of political accountability for the international criminal tribunals are characterized by their varying levels of budgetary, legal, and political oversight regarding state risk of prosecution. The first international tribunals of the

post Cold War world—the ICTY and the ICTR—were characterized by relatively less oversight while the states principally responsible for their establishment faced relatively little risk of prosecution. The hybrid tribunals—the SCSL and ECCC—have faced greater budgetary constraints, but, like the ad hoc tribunals, were given significant autonomy in the application of the law and the development of their rules of procedure and evidence. There was little prospect that their principals would be at risk of prosecution. The ICC labors under the most extensive budgetary and legal accountability system, while at the same time its caseload is most likely to impinge on the national interests of its principals. Indeed, numerous, powerful states have not joined the ICC because of these risks of prosecution of their nationals and those of key allies. De jure and de facto mechanisms of accountability have generally increased over time.

The evolution of international justice is really a story of states seeking to pursue one goal—justice—while ensuring the primacy of another—sovereignty. Budgetary accountability has been modified over time as a check against actual (ICTY and ICTR) and potential (SCSL, ICC, ECCC) expansive and expensive caseloads while oversight of substantive and procedural law has been used to guard against expansion of the meaning and application of international law, especially at the ICC. And lurking in the background shaping the broad parameters of state oversight and engagement with international justice have been states' concerns regarding the risks of prosecution. As states have learned more over time regarding their exposure to international justice (e.g. the ICTY investigation of NATO, the *proprio motu* powers of the ICC Prosecutor), they have developed and utilized various tools to reduce this risk. Where this risk has been greatest—in the ICC—states have either not joined that organization or have thwarted ICC prosecution where they perceive its actions are antithetical to their national interests. In effect, oversight of international justice is still a work in progress as states come to learn more about the costs of such justice and its benefits in comparison to the achievement of other state objectives. Three of the four ad hoc and hybrid tribunals have shuttered their doors and thus no longer contribute to the development of the system of international justice, while the ECCC struggles to fairly prosecute its geriatric suspects. The evolution of oversight and accountability of international justice is really now the story of the ICC.

We should expect that in the coming years the ICC will face significant challenges that will determine whether international justice can survive and thrive in a world where oversight is rigorous at times and neglected on other occasions. The ICC has succeeded in providing justice only when states have a vested interest in cooperating with it because they themselves referred a situation to the Court. It has yet to successfully prosecute a case when the target state is opposed to its involvement. Until the ICC can provide justice even when it conflicts with national interests, it will be a tool of states, not the law. Such a court is not so much independent yet accountable, but rather dependent and subservient.

This future is not, however, written in stone. Scholars should be encouraged to more fully investigate the more specific formal and informal types of accountability for international justice. I have painted this picture of accountability with fairly broad brush strokes, but often the real substance of this oversight takes place in the ongoing interactions over laws, budgets, and cases. Historical research on the ad hoc and hybrid tribunals, especially now that the three critical courts have concluded their work, is essential in understanding the goals and motivations of the principals and agents. More indepth, comparative analysis of the evolution of accountability across these tribunals is also critical for understanding

the impact of oversight on the selection and prosecution of cases, and most especially what lessons have been drawn from these tribunals by states that have then shaped their approach toward the ICC. The ICC is now at a critical turning point, where its efforts to prosecute individuals from Sudan, Libya, and Kenya have largely failed. Can the ICC recover from these problems and yet provide independent, international justice? Or have these failures exposed such a critical shortcoming of international justice that there is little prospect that the Court can realize its mission? Research into these developments and their implications for international justice are critical in helping us understand whether independent and impartial justice is possible, or if states are not yet ready to entrust these institutions with the power to make decisions that may conflict with their interests. To paraphrase Robert Jackson: will power pay tribute to justice? We must continue to explore these fundamental questions.

REFERENCES

Rosa Aloisi and James Meernik *Judgment Day* (Cambridge University Press 2017).

Allison Marston Danner "Prosecutorial Discretion and Legitimacy" (2003) *American Journal of International Law* 97: 510.

Shane Darcy and Joseph Powderly *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press 2010).

Margaret deGuzman "Choosing to Prosecute: Expressive Selection at the International Criminal Court" (2012) *Michigan Journal of International Law* 33: 265–320.

Beth K. Dougherty "Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone" (2004) *International Affairs* 80(2): 311–328.

Mark A. Drumbl *Atrocity, Punishment and International Law* (Cambridge University Press 2007).

Max DuPlessis, Tiyanjana Maluwa and Annie O'Reilly "Africa and the International Criminal Court" (International Law, Chatham House).

Marlies Glasius "'We ourselves, we are part of the functioning': The ICC, Victims, and Civil Society in the Central African Republic" (2009) *African Affairs* 108.430: 49–67.

Mark Harmon and Fergal Gaynor "Ordinary Sentences for Extraordinary Crimes" (2007) *Journal of International Criminal Justice* 5: 683–712.

Ralph Henham "The Philosophical Foundations of International Sentencing" (2003) *Journal of International Criminal Justice* 1: 64–85.

Ralph Henham "Developing Contextualized Rationales for Sentencing in International Criminal Trials" (2007) *Journal of International Criminal Justice* 5: 757–78.

Triestino Mariniello (ed.) *The International Criminal Court in Search of Its Purpose and Identity* (Routledge 2015).

Elizabeth Nielsen "Hybrid International Criminal Tribunals: Political Interference and Judicial Independence" (2010) *UCLA Journal of International Law and Foreign Affairs* 15: 289.

Fausto Pocar "Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY" (2008) *Journal of International Criminal Justice* 6: 655–65.

Dawn Roche, James Meernik and Thordis Ingadottir *The Realities of International Criminal Justice* (Martinus Nijhoff Publishers 2013).

Edward Sawyer and Tim Kelsall "Truth vs. Justice? Popular Views on the Truth and Reconciliation Commission and the Special Court for Sierra Leone" (2007) *The Online Journal of Peace and Conflict Resolution* 7.1: 36–68.

Robert D. Sloane "Sentencing for the Crime of Crimes: The Evolving Common Law of Sentencing of the International Criminal Tribunal for Rwanda" (2007) *Journal of International Criminal Justice* 5: 713–34.

Manuel Ventura "Farewell 'Specific Direction': Aiding and Abetting War Crimes and Crimes against Humanity in *Perišić*, *Taylor*, *Šainović et al.*, and US Alien Tort Statute Jurisprudence' in 'The War Report'" (Geneva Academy of International Humanitarian Law and Human Rights 2014).

David Wippman "The Cost of International Justice" (2006) *American Journal of International Law* 100: 4.

Hannah Woolaver and Emma Palmer "Challenges to the Independence of the International Criminal Court from the Assembly of States Parties" (2017) *Journal of International Criminal Justice* 15: 641–55.