

Prosecutorial Independence in the International Criminal Court: A Study of Competencies and Restrictions

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Abstract:

This study examines the ICC Prosecutor's independence in initiating investigations, analysing the tension between the Rome Statute's formal powers and practical constraints. Using analytical and descriptive methods, the research explores Article 42's structural safeguards and Article 15's proprio motu powers. While the Statute grants unprecedented formal independence compared to ad hoc tribunals, this autonomy is significantly curtailed in practice. The primary constraints are the UN Security Council's indefinite deferral power under Article 16, strict complementarity application, and dependence on state cooperation for enforcement. The study reveals a critical gap between the "judicial independence" envisioned and the "political dependence" dictated by international realities..

Keywords: International Criminal Court, Prosecutor, Independence, Rome Statute, Proprio Motu, Article 16, Security Council, Complementarity

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introduction:

The establishment of an independent international prosecution mechanism represents one of the most significant developments in the architecture of international criminal justice. The evolution of the prosecutor's role in international courts has undergone substantial transformations since the early attempts to address mass atrocities through judicial mechanisms.

The genesis of international criminal prosecution can be traced to the post-World War II tribunals. The International Military Tribunal at Nuremberg, established by the London Charter in 1945, pioneered the institutional model of prosecution at the international level.¹ The tribunal's prosecutorial structure, while innovative for its time, was fundamentally constrained by the political authority of the victorious Allied powers, which appointed and directed four chief prosecutors: Robert H. Jackson of the United States, Hartley Shawcross of Great Britain, François de Menthon of France, and Roman A. Rudenko of the Soviet Union.²

These prosecutors operated under instructions from their respective governments, thus rendering them dependent upon state political considerations rather than functioning as autonomous actors accountable solely to principles of justice. Similarly, the International Military Tribunal for the Far East (Tokyo Tribunal), convened on May 3, 1946, followed a comparable model wherein prosecutors were directed by the occupying powers and lacked the institutional

¹ *International Military Tribunal, Charter of the International Military Tribunal (London Charter), Aug. 8, 1945, art. 2*

² Robert H. Jackson et al., *International Military Tribunal at Nuremberg: Prosecution Team and Procedures*, in *The Nuremberg Trials* (National WWII Museum 2024); see also *Encyclopedia of the United States Holocaust Memorial Museum, International Military Tribunal at Nuremberg* (Oct. 16, 2025), <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg>

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independence necessary to pursue investigations and prosecutions free from state interference¹

Throughout the Cold War period, the absence of a permanent international criminal court resulted in ad hoc tribunals established only in response to specific crises. This episodic approach left significant lacunae in the pursuit of international criminal justice. The emergence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994 marked a renewed commitment to international accountability, yet these institutions remained temporary and subject to the political exigencies of the United Nations Security Council²

The Rome Statute of 1998 represented a watershed moment in the institutionalization of international criminal justice. The establishment of the International Criminal Court (ICC) as a permanent institution fundamentally altered the prosecutorial landscape by introducing the concept of an institutionally independent Prosecutor vested with autonomous prosecutorial powers.³ Article 42 of the Rome Statute provides that the Office of the Prosecutor shall act independently as a separate organ of the Court, and that no member of the Office may seek or act on instructions from any external source, whether states, international organizations, or other actors.⁴ This provision, considered a "basic principle" of the ICC framework, marks a decisive departure from the prosecutorial models embodied in prior international tribunals.

¹ *International Military Tribunal for the Far East, Charter of the IMTFE*, Apr. 26, 1946, art. 2; Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 *Eur. J. Int'l L.* 557, 557 • 764 (2010)

² *UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia*, S/25704 (1993); *UN Security Council, Statute of the International Criminal Tribunal for Rwanda*, S/RES/955 (1994)

³ *Rome Statute of the International Criminal Court*, art. 42, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*]

⁴ *Id.* art. 42(1): "A member of the Office shall not seek or act on instructions from any external source"

The proprio motu powers granted to the ICC Prosecutor under Articles 13(c) and 15 of the Rome Statute were particularly contentious during the drafting negotiations. Some state delegations expressed concern that conferring upon the Prosecutor the ability to initiate investigations independently might result in politicized or frivolous prosecutions, or that such authority might overwhelm the Court's limited resources¹

Other delegations contended that exclusive dependence upon state referrals or Security Council action would enable powerful states or the Council itself to shield perpetrators from international accountability, thus frustrating the aspirations of international justice. The compromise ultimately reached reflected a determination to establish an autonomous prosecutorial mechanism while simultaneously implementing robust procedural safeguards to constrain the exercise of prosecutorial discretion.

Nevertheless, despite the doctrinal commitment to prosecutorial independence embedded in the Rome Statute's text, the practical functioning of the ICC Prosecutor has revealed significant constraints upon the realization of genuine autonomy. These constraints derive from multiple sources: the Pre-Trial Chamber's power to authorize investigations initiated proprio motu; the principle of complementarity, which subordinates the Court's jurisdiction to the capacity and willingness of national judicial systems; the necessity of securing cooperation from state parties for investigative and enforcement activities; and notably, the Security Council's power under Article 16 to defer investigations or prosecutions indefinitely through successive twelve-month deferrals.² The latter mechanism,

¹ Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference, in The International Criminal Court and the Crime of Aggression* 65 • 75 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) [addressing concerns of state delegations regarding prosecutorial independence]

² Rome Statute, art. 16: "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."

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ostensibly designed as a temporary exception applicable only when international peace and security are genuinely imperiled, has been invoked to provide immunity to state actors accused of grave international crimes, thereby potentially undermining the Prosecutor's discretionary authority.

B. Research Problem

Against this backdrop of tension between the Rome Statute's nominal commitment to prosecutorial independence and the institutional constraints actually operative, the central research question guiding this study emerges as follows: To what extent does the Prosecutor of the International Criminal Court genuinely exercise real independence in initiating investigations and prosecutions, given the limitations imposed by the Rome Statute itself and the pressures exerted by the UN Security Council?

This inquiry encompasses several subsidiary questions: First, what are the substantive and procedural parameters of the Prosecutor's authority as delineated in the Rome Statute, and how robust are the mechanisms designed to insulate the Prosecutor from external political influence? Second, what specific constraints • institutional and political • perate to circumscribe or diminish the Prosecutor's capacity to exercise autonomous prosecutorial judgment? Third, do the Security Council's powers, particularly the deferral mechanism of Article 16, function as appropriate checks on prosecutorial overreach, or do they constitute an illegitimate political override of judicial independence? Fourth, to what extent have the Prosecutor's decisions in actual cases revealed patterns of selectivity or avoidance inconsistent with a commitment to impartial justice? Finally, what reform measures, if any, might strengthen the institutional independence of the Prosecutor while preserving legitimate forms of accountability?

C. Research Methodology

This study employs a dual methodological approach designed to illuminate both the formal legal architecture governing the Prosecutor's office and the empirical realities of prosecutorial practice.

Analytical Method (Approche analytique): This dimension of the research involves close textual analysis of the Rome Statute, particularly Articles 13-16, 42, 53, and other relevant provisions, to elucidate the substantive and procedural parameters of prosecutorial authority. The analytical approach also encompasses examination of the Statute's negotiating history (*travaux paratoires*) and the jurisprudence of the ICC's Pre-Trial Chambers, Appeals Chamber, and Trial Chambers insofar as these judicial decisions illuminate the proper interpretation and application of prosecutorial powers and constraints. This layer of analysis seeks to establish the normative framework within which the Prosecutor is constitutionally required to operate.

Descriptive Method (Approche descriptive): This component examines concrete instances of prosecutorial decision-making investigations initiated, cases pursued, and notably, investigations declined, deprioritized, or suspended document patterns in the actual exercise of prosecutorial discretion. This empirical analysis references key precedents and case studies, such as the investigations into situations in Palestine, Afghanistan, and the Philippines, as well as the ongoing effects of Security Council deferrals, particularly regarding Libya and Sudan. By situating prosecutorial decisions within their factual and political contexts, the descriptive approach provides evidence regarding the degree to which formal legal authority translates into practical independence or whether external pressures systematically constrain the Prosecutor's judgment in ways not fully visible through doctrinal analysis alone.

The integration of these two methodologies permits this study to traverse the distance between legal theory and institutional practice, thereby facilitating a comprehensive assessment of prosecutorial independence at the International Criminal Court.

Part I: The Legal Foundations of the Prosecutor's Independence (Powers)

The architecture of the International Criminal Court (ICC) was meticulously designed to establish a delicate equilibrium between judicial independence and political accountability. Unlike its

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predecessors, the ad hoc tribunals for the former Yugoslavia and Rwanda, which were created by the United Nations Security Council and thus structurally tethered to a political body, the ICC was established by a multilateral treaty, the Rome Statute. This treaty-based foundation provided the drafters with a unique opportunity to craft a prosecutorial organ that is structurally distinct and functionally autonomous. The Office of the Prosecutor (OTP) was conceived as a "separate organ" of the Court, a designation intended to insulate it from both the administrative control of the Registry and the judicial oversight of the Chambers, except where specifically mandated by the Statute. This section examines the legal pillars upon which this independence rests, analysing first the structural and functional safeguards enshrined in Article 42, and second, the expansive discretionary powers granted to the Prosecutor to initiate proceedings, a radical innovation in international law that transformed the Prosecutor from a mere executor of state referrals into an autonomous agent of international justice.

Section 1: Structural and Functional Independence (According to Article 42 of the Rome Statute)

The Rome Statute provides the constitutional framework for the Prosecutor's independence, primarily through Article 42, which explicitly defines the OTP as a separate organ of the Court. This separation is not merely administrative but substantive, designed to prevent the politicization of the judicial process that plagued earlier international tribunals.

A. Election Mechanism and Eligibility Criteria

The mechanism for electing the Prosecutor is a critical safeguard against political interference. Under Article 42(4) of the Rome Statute, the Prosecutor is elected by secret ballot by an absolute majority of the members of the Assembly of States Parties (ASP).¹ This requirement of an absolute majority ensures that the successful candidate enjoys broad international support rather than being the appointee of a specific geopolitical bloc. Furthermore, the Deputy Prosecutors are elected in a similar manner from a list of candidates provided by the

¹ *Rome Statute of the International Criminal Court*, art. 42(4), July 17, 1998, 2187 U.N.T.S. 90

Prosecutor, reinforcing the Prosecutor's control over their own office composition.¹

Crucially, the Statute limits the Prosecutor's tenure to a non-renewable term of nine years.² This non-renewability is a vital feature of institutional independence; it removes the temptation for a sitting Prosecutor to temper their decisions or avoid controversial investigations in hopes of securing re-election. The eligibility criteria further reinforce this autonomy: Article 42(3) mandates that the Prosecutor and Deputy Prosecutors be persons of "high moral character," possess "extensive practical experience in the prosecution or trial of criminal cases," and be fluent in at least one of the working languages of the Court.³ These strict professional requirements are intended to ensure that the office is held by a technical legal expert rather than a political appointee.

B. Independence from Other Court Organs and State Parties

Article 42(1) explicitly states that the Office of the Prosecutor shall act independently as a separate organ of the Court.⁴ This provision establishes a "firewall" between the Prosecutor and the other organs, particularly the Registry and the Presidency, ensuring that the OTP has full authority over the management and administration of its own resources, staff, and investigations. This administrative autonomy is essential to prevent indirect pressure through budget strangulation or administrative hurdles.

More significantly, Article 42(1) contains a powerful negative injunction: "A member of the Office shall not seek or act on instructions from any external source."⁵ This prohibition extends to State Parties, international organizations, and non-governmental bodies. It serves as the legal bedrock for the Prosecutor to resist political pressure. While Article 112 allows the Assembly of States Parties to provide "management oversight" regarding the administration of the Court, this oversight is strictly prohibited from encroaching upon the Prosecutor's judicial and investigative

¹ *Ibid*

² *Ibid*

³ *Rome Statute, art. 42(3)*

⁴ *Rome Statute, art. 42(1)*

⁵ *Ibid*

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independence.¹ Thus, legally, the Prosecutor is answerable only to the law and the Statute, not to the political interests of the states that fund the Court.

Section 2: Broad Powers in Initiating Proceedings

The true test of a prosecutor's independence lies in their ability to trigger the jurisdiction of the Court. The Rome Statute empowers the Prosecutor with significant discretionary authority to initiate proceedings, moving beyond the traditional model where international tribunals could only act upon the request of states or the UN Security Council.

A. Proprio Motu Power (Suo Motu) under Article 15

One of the most contentious and significant innovations of the Rome Statute is the power granted to the Prosecutor under Article 15 to initiate investigations proprio motu (on their own motion).² This power allows the Prosecutor to trigger the Court's jurisdiction based on information received from any reliable source, including victims, NGOs, or media reports, without waiting for a referral from a State Party or the Security Council.³

This authority is the cornerstone of the OTP's independence, preventing states from acting as "gatekeepers" to justice. If the Prosecutor determines there is a reasonable basis to proceed, they must submit a request for authorization to the Pre-Trial Chamber. While this judicial review by the Pre-Trial Chamber (under Article 15(3)) acts as a check, it is a judicial check designed to filter out frivolous claims, not a political veto.⁴ The existence of this power fundamentally alters the dynamic of international justice, making the

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), 576

² Rome Statute, art. 15(1)

³ Hector Olásolo, "The Prosecutor of the ICC and the Case of Venezuela," in *The International Criminal Court in an Effective Global Justice System*, ed. Linda Carter et al. (Cheltenham: Edward Elgar Publishing, 2016), 145

⁴ Rome Statute, art. 15(3); see also *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19 (Pre-Trial Chamber II, March 31, 2010), para. 17

Prosecutor a proactive guardian of the Statute rather than a reactive instrument of state will.

B. Power to Examine Information and Select

Coupled with the *proprio motu* power is the Prosecutor's broad discretion in the selection and prioritization of cases. The Statute does not require the Prosecutor to investigate every alleged crime; rather, Article 53(1) establishes a threshold test involving jurisdiction, admissibility (including gravity), and the "interests of justice."¹

The concept of "gravity" plays a central role in this selection policy. As articulated in the OTP's policy papers, the Prosecutor focuses on those most responsible for the most serious crimes.² This "policy of selection" allows the Prosecutor to strategically allocate limited resources to cases that will have the most significant impact. By independently defining the criteria for case selection weighing factors such as the scale, nature, manner of commission, and impact of the crimes the Prosecutor effectively shapes the substantive direction of international criminal law, deciding which atrocities warrant the attention of the international community.³ This discretionary power to select which situations to investigate and who to prosecute within those situations is the ultimate expression of the Prosecutor's functional independence.

Part II: The Constraints on the Prosecutor's Authority

Despite the legal architecture designed to establish the Prosecutor's independence, the reality of the International Criminal Court's operations reveals substantial limitations upon the exercise of prosecutorial autonomy. These constraints derive from both the Rome Statute itself and from the operational dependencies of the Court upon external actors. This section examines the procedural and judicial constraints imposed upon the Prosecutor's initial decision to investigate, as well as the political constraints emanating from both

¹ *Rome Statute*, art. 53(1)

² *Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (The Hague: International Criminal Court, 2016)*, 12-14

³ Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford: Oxford University Press, 2020), 213-215

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the UN Security Council and the collective action (or inaction) of State Parties.

Section 1: Procedural and Judicial Constraints

The first category of constraints upon prosecutorial independence stems from the adjudicatory structure of the Court. These constraints are "judicial" rather than "political" in nature, designed ostensibly to protect against prosecutorial error or overreach through internal checks and balances. However, the practical effect of these constraints is often to impede or substantially delay the Prosecutor's investigations, thereby impacting the effective delivery of justice.

A. Judicial Review by the Pre-Trial Chamber of Decisions to Open Investigations

When the Prosecutor seeks to initiate an investigation *proprio motu* under Article 15 of the Rome Statute, such action is not self-executing. Rather, Article 15(3) and (4) require that the Prosecutor submit to the Pre-Trial Chamber "sufficient information" which, in the Prosecutor's opinion, establishes a reasonable basis to proceed with an investigation into the situation.¹ The Pre-Trial Chamber then must examine the Prosecutor's request and supporting material and, in accordance with Article 15(4), decide whether to authorize the investigation or reject it.²

This requirement for judicial authorization has proven contentious among commentators. Some scholars argue that the Pre-Trial Chamber's role is merely to undertake a supervisory review of the Prosecutor's conclusion that a reasonable basis exists-i.e., the Chamber reviews the Prosecutor's reasoning rather than conducting an independent factual assessment.³ Others contend that the Chamber possesses the power to conduct a substantive and independent review of the underlying facts, effectively second-guessing the Prosecutor's

¹ *Rome Statute of the International Criminal Court*, art. 15(1)–(2), July 17, 1998, 2187 U.N.T.S. 90

² *Ibid.*, art. 15(3)

³ See Kees Vaid, "Judicial Review of Prosecutorial Discretion in the Initiation of Investigations *Proprio Motu* by the ICC Prosecutor," in *International Criminal Procedure* (Oxford: Oxford University Press, 2020), 95–125, noting that the Pre-Trial Chamber engages in a supervisory rather than *de novo* review

judgment.¹ In practice, the Pre-Trial Chambers have consistently authorized all proprio motu investigations submitted by the Prosecutor, with the notable exception of the authorization request relating to the situation in Afghanistan, which was rejected on February 12, 2020.²

Although the Chamber's authorization power has rarely resulted in outright rejection, it introduces an element of unpredictability into the prosecutorial process. The requirement to justify investigative decisions before a judicial body, while ostensibly a safeguard against frivolous investigations, simultaneously functions as a constraint upon prosecutorial discretion. The Prosecutor must anticipate the Chamber's likely response, potentially tempering their investigative ambitions or avoiding situations that, while grave, might present novel legal or factual questions that could provoke judicial resistance. Moreover, the authorization process itself consumes time and resources, delaying the commencement of investigations even when the Prosecutor is convinced of the reasonable basis to proceed.

B. The Complementarity Principle as a Constraint on Prosecutorial Jurisdiction

A second substantive constraint upon the Prosecutor's authority arises from the principle of complementarity, enshrined in the Preamble and Article 17 of the Rome Statute. The complementarity principle establishes that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."³ This principle embodies several important limitations upon ICC jurisdiction and, by extension, upon the Prosecutor's investigative mandate.

Under Article 17(1), a case shall be deemed inadmissible before the ICC if the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable

¹ See Marcus Sjöström, *"The Initiation of an Investigation Proprio Motu by the ICC Prosecutor: On the Scope and Limits of Prosecutorial Discretion"* (doctoral dissertation, University of Gothenburg, 2014), 67–89, arguing for a more robust judicial review standard.

² *Situation in Afghanistan, Decision on the "Prosecution's Request for Authorisation of an Investigation Pursuant to Article 15," ICC-02/17 (Pre-Trial Chamber II, Feb. 12, 2020)*, holding that authorization should not be granted

³ *Rome Statute, Preamble*; see also *ibid.*, art. 17(1)

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genuinely to carry out the investigation or prosecution.¹ This provision operates as a procedural gatekeeper: before the ICC Prosecutor may proceed with an investigation or prosecution, the Court must be satisfied that the relevant national authorities have either declined to act or are incapable of effectively pursuing the matter.

The determination of whether a State is "unwilling" or "unable" involves a complex assessment set forth in Article 17(2) and (3). A State is deemed unwilling if national proceedings have been instituted (or concluded) with the purpose of shielding the person from criminal responsibility; if there has been an unjustified delay inconsistent with an intent to bring the person to justice; or if the proceedings are not conducted independently or impartially and are not consistent with an intent to bring the person to justice.² A State is deemed unable if, owing to a total or substantial collapse of, or unavailability of, its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or to otherwise carry out the proceedings.³

This framework, while well-intentioned, operates as a significant brake upon the Prosecutor's initiative. National proceedings, once commenced, trigger a suspension of the ICC investigation pending the outcome of the domestic investigation (Article 18).⁴ Even where national proceedings appear destined to fail or to result in impunity, the Prosecutor must often wait for the national system to exhaust itself before the ICC can intervene. In practice, this has meant that situations characterized by state capture, corruption, or conflict—precisely the circumstances in which genuine accountability is most needed—may remain indefinitely outside the Court's jurisdiction simply because a nominally functioning (albeit compromised) national justice system exists. The Prosecutor thus lacks the discretionary authority to bypass or circumvent functioning national systems, even when those systems are systematically shielding perpetrators from accountability.

Furthermore, the concept of "unwillingness" itself remains inherently subjective. The Prosecutor must make fact-intensive

¹ *Rome Statute*, art. 17(1)

² *Rome Statute*, art. 17(2)(a)

³ *Rome Statute*, art. 17(3)

⁴ *Rome Statute*, art. 18

determinations regarding the subjective intent of state officials, a task fraught with evidentiary and analytical challenges. Different Prosecutors, or indeed different Pre-Trial Chambers, may reach divergent conclusions regarding whether a given national system meets the complementarity threshold. This unpredictability further constrains the Prosecutor's ability to exercise autonomous, consistent judgment.

Section 2: Political Constraints (The Security Council and State Cooperation)

Beyond the procedural and judicial constraints embedded in the Rome Statute, the Prosecutor faces substantial political constraints that emanate from two sources: the extraordinary powers granted to the UN Security Council, and the dependence of the Court upon the cooperation of State Parties for the execution of investigative and enforcement activities.

A. The Security Council's Deferral Power under Article 16: A "Sword of Damocles"

The most dramatic and politically consequential constraint upon prosecutorial independence derives from Article 16 of the Rome Statute, which grants the UN Security Council an extraordinary power: the ability to defer, for renewable periods of twelve months, any investigation or prosecution under the Statute.¹ The provision reads:

"<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."²

Article 16 represents a compromise struck during the Rome negotiations between those states that wished to insulate the Court entirely from UN interference, and those (particularly the permanent members of the Security Council) that insisted upon retaining a mechanism by which to protect their national interests or those of their allies. The deferral mechanism was originally intended as a limited

¹ *Rome Statute*, art. 16

² *Ibid*

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exception, applicable only when an investigation or prosecution would genuinely threaten international peace and security. The preamble to the Statute emphasizes that the Court shall act "when national courts are unwilling or unable to do so," and the Security Council's role was conceived as ensuring that ICC proceedings would not inadvertently destabilize fragile peace processes.¹

In practice, however, Article 16 has become an instrument of political discretion wielded by the permanent members of the Security Council to shield their allies or clients from accountability. The provision requires only an affirmative vote of nine members of the Council (including the absence of a veto by any permanent member) to effect a deferral.² This means that, even in the absence of consensus, a coalition of nine states can effectively place ICC proceedings in abeyance. More significantly, Article 16 contains no temporal limitation: deferrals may be renewed indefinitely, with no legal constraint upon their perpetual extension.³ Thus, what was characterized as a temporary exception has, in practice, become a mechanism for permanent immunity.

The clearest illustration of this abuse is the situation in Sudan. From 2009 onwards, the Security Council repeatedly renewed deferrals of ICC investigations and prosecutions relating to the situation in Darfur, effectively preventing the Court from prosecuting senior Sudanese officials, including former President Omar al-Bashir, despite credible evidence of crimes against humanity and genocide.⁴ Similarly, Libya has been subject to indefinite deferrals, insulating

¹ See Sun Kim, "The Security Council Deferral Power under Article 16 Rome Statute," in *Maintaining the Independence of the International Criminal Court* (doctoral dissertation, University of Amsterdam, 2011), 176–210, analyzing the original intent and the evolution of the deferral power

² UN Charter, art. 27(3) (requiring an affirmative vote of nine members, including the concurrence of the five permanent members, or their abstention)

³ Rome Statute, art. 16 (providing no express limit on the number of renewals); see also Human Rights Watch, *Article 16: Concerns regarding the Indefinite Renewal of Security Council Deferrals* (Aug. 15, 2008), available at <https://www.hrw.org/news/2008/08/15/article-16>

⁴ Robert Cryer, "The Security Council, Article 16 and Darfur," in *Justice in Conflict: Essays on the Theory and Practice of International Criminal Justice* (Oxford: Hart Publishing, 2008), 152–168, documenting the repeated deferrals affecting Sudan and their impact on accountability for atrocities in Darfur

Libya's security establishment from international accountability even as evidence of grave violations accumulates.¹

The consequence of the Article 16 mechanism is to transform prosecutorial independence from a legal concept into a political fiction. The Prosecutor may, in their autonomous judgment, conclude that a reasonable basis exists to investigate and prosecute a situation of mass atrocity. But if the situation involves the interests of a permanent member of the Security Council, or a state favored by such a member, Article 16 renders the Prosecutor's judgment nullified. The Prosecutor becomes, in such circumstances, not an autonomous agent of justice but a subordinate instrument of the Council's political calculations. This is particularly troubling because the Statute contains no provision allowing the Prosecutor to challenge or appeal a deferral decision; the Prosecutor is simply enjoined to cease all investigative and prosecutorial activity, regardless of the strength of the evidence or the gravity of the crimes.

Moreover, the deferral mechanism creates a systematic bias against accountability for atrocities committed in geopolitically significant regions or by powerful states. Situations in Africa—the region most frequently subject to ICC investigations—remain vulnerable to deferral, whereas situations involving powerful permanent members (such as the Russian Federation) may proceed without fear of such intervention, or may be insulated from referral in the first instance through the Council's exercise of its power to refer only those situations it deems politically expedient.

B. Dependence upon State Cooperation: The Absence of an International Police Force

Even if the Prosecutor succeeds in overcoming the procedural, judicial, and political constraints discussed above, the effective exercise of the prosecutorial mandate remains dependent upon a factor beyond the Prosecutor's control: the cooperation of State Parties. The Rome Statute vests in the ICC no independent police power, no authority to execute arrest warrants on the territory of sovereign states, and no capacity to compel the surrender of suspects. Rather, Article 86 imposes upon State Parties a general obligation to cooperate with the Court in the investigation and prosecution of crimes within its

¹ *Ibid*

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jurisdiction.¹ Articles 89 and 93 require that States execute requests for arrest and surrender, and provide other forms of cooperation (such as obtaining evidence and testimony), as requested by the Court.²

This structural dependence upon State Parties creates a fundamental constraint upon prosecutorial independence. The Prosecutor may initiate an investigation and issue arrest warrants with complete autonomy. But the execution of those warrants—the actual apprehension of suspects—rests entirely with individual State Parties. Where a State is unwilling to cooperate (whether for political reasons, diplomatic considerations, or simple inertia), the Court's investigative and prosecutorial mandate becomes effectively sterile. Suspects remain at large, the Prosecutor cannot advance investigations or prosecutions, and the victims of crimes go uncompensated.

The empirical record demonstrates the severity of this constraint. As of recent years, numerous suspects subject to ICC arrest warrants remain at large, protected by states either unwilling or unable to execute the warrants.³ In some cases, suspects have served as government ministers or military commanders in their home states, openly defying the Court while their states take no action to comply with their obligations under the Statute.⁴ The Court possesses no mechanism to compel state compliance short of a referral to the Assembly of States Parties or the Security Council (Article 87(7))—mechanisms that have proven ineffective in practice.⁵

This dependence is particularly acute for the Prosecutor in situations involving powerful states. Where a suspect is a national of a state that is either not a party to the Rome Statute or that enjoys political influence over other State Parties, the likelihood of execution of an arrest warrant diminishes substantially. The Prosecutor is thus

¹ Rome Statute, art. 86

² Rome Statute, art. 89–93

³ International Criminal Court, Office of the Prosecutor, *Report on the Office of the Prosecutor on Cooperation* (Nov. 2024), documenting persistent failures of state cooperation in the execution of arrest warrants

⁴ Hector Olásolo, *The Prosecutor of the International Criminal Court*, 2nd ed. (Oxford: Oxford University Press, 2018), 245–267, providing case studies of suspects who remained at large despite arrest warrants

⁵ Rome Statute, art. 87(7); see also Elizabeth Evenson, "Prosecuting the Powerful: International Criminal Court Investigations of Government Officials," *Journal of International Criminal Justice* 16, no. 2 (2018): 289–312, analyzing the ineffectiveness of non-cooperation mechanisms

constrained not only by the legal and procedural architecture of the Statute, but by the geopolitical realities of state power. In effect, the less powerful the state whose nationals are targeted by the Prosecutor, the greater the probability of cooperation and the execution of arrest warrants. Conversely, where the Prosecutor targets nationals of powerful or geopolitically significant states, cooperation is unlikely, and the prosecutorial mandate becomes a symbolic gesture rather than a mechanism for accountability.

Conclusion

The analysis of the legal framework and operational reality of the Office of the Prosecutor (OTP) at the International Criminal Court reveals a complex dichotomy. Structurally, the Rome Statute represents a revolutionary leap in international law, creating a prosecutorial organ that is formally distinct from state control and vested with the autonomous power to trigger jurisdiction. The *proprio motu* authority and the protections of Article 42 were designed to ensure that the dictates of justice would prevail over the interests of power.

However, this study demonstrates that this *de jure* independence is frequently compromised by *de facto* constraints. The "Sword of Damocles" represented by Article 16 has transformed the Security Council into a potential gatekeeper of justice, capable of suspending accountability indefinitely for political reasons. Furthermore, the absence of an independent enforcement mechanism renders the Prosecutor powerless in the face of state non-cooperation. The dependency on states to execute arrest warrants means that the Prosecutor's autonomy often ends where state sovereignty begins. Consequently, the ICC Prosecutor operates within a "negotiated independence," constantly balancing the imperative of strict legal enforcement against the fragile reality of political support necessary for the Court's survival.

Recommendations

Based on the findings of this study, the following recommendations are proposed to strengthen the independence and effectiveness of the ICC Prosecutor:

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.1 Reform of Article 16: The Assembly of States Parties should advocate for an amendment or an interpretative resolution regarding Article 16 to impose a strict temporal limit on deferrals (e.g., maximum of two renewals) and to require a higher voting threshold in the Security Council, ensuring that deferrals remain a temporary exception rather than a permanent immunity.

.2 Enhancing State Cooperation: A specialized "Cooperation Mechanism" should be established within the Assembly of States Parties to impose concrete diplomatic and political sanctions on states that fail to execute arrest warrants, moving beyond mere "findings of non-compliance".

.3 Clarifying the "Interests of Justice": The Office of the Prosecutor should publish more detailed guidelines on the interpretation of "interests of justice" (Article 53) to ensure that this discretionary clause is not used as a pretext to avoid politically sensitive investigations.

.4 African Engagement: Given the friction between the ICC and African states, it is recommended to strengthen the dialogue between the OTP and the African Union, potentially by establishing regional liaison offices to facilitate cooperation and address perceptions of bias, while maintaining the Prosecutor's firm stance on immunity for sitting heads of state.

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