Establishing a Transparent and Effective Oversight Machinery and the Need for Constructive Dialogue between the Assembly, Court Officials, and Civil Society

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Summary

What is the proper balance between the independence of the International Criminal Court and the oversight role of the Assembly of States Parties regarding the Court’s administration is still a work in progress and will continue to remain so until the functions envisioned under Article 112 are fully activated. However, it is important for the Assembly to articulate fully what it expects to achieve by implementing the full range of oversight functions envisioned under Article 112. In doing so, a constructive dialog should be established between the Court, the Assembly, and civil society to determine how best to achieve and implement a transparent and effective oversight machinery that strengthens governance, is developed in the best interests of the Court, and which respects judicial and prosecutorial independence while serving as a key defense to the Court when challenged by its critics that it is an institution without any adequate checks and balances.

Argument

The starting point for this discussion turns on the proper construction of Article 112 of the Rome Statute which provides the constitutional basis for the independent oversight of the International Criminal Court (the “Court”) by the Assembly of States Parties (the “Assembly”). Two specific subsections are of vital importance; subsection 2(b) of Article 112 requests the Assembly to provide management oversight to the Presidency, the Prosecutor, and the

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1 The views expressed in this brief essay are personal to the author and are not necessarily shared by the Commonwealth Secretariat or any other organization of the author’s affiliation.
Registrar regarding the administration of the Court, while subsection (4) provides that 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.

To date the Assembly has established incrementally a number of subsidiary bodies pursuant to Article 112(4) to fulfill specific functions, namely, a Committee on Budget and Finance (CBF), an Oversight Committee on Permanent Premises, and most recently an Independent Oversight Mechanism (IOM) with a narrow mandate to investigate the alleged misconduct of staff, elected officials, and contractors. In consequence, Article 112 (4) has not yet been fully activated by the Assembly to embrace fully the complete range of oversight functions envisioned by the Rome Statute, such as evaluation and inspection of the Court, although there is an increasing call by some members of the Assembly to do so sooner rather than later.

With the prospect of Article 112 likely to become fully developed in due course, this would seem an opportune moment to pause and consider what is the proper balance between the independence of the Court and the oversight role of the Assembly regarding the Court's administration, particularly given the intense growing pains recently experienced during the establishment of the mandate of the IOM relating to investigating misconduct.

In order to answer this question effectively, it would seem prudent briefly to review the background to the establishment of the investigative function of the IOM to help inform how Article 112 might evolve in practice.

The impetus behind the establishment of the investigative function of the IOM can be found in the strong desire by the Assembly to ensure: (a) the protection of the Court's image from public scandal; (b) that impunity would not be tolerated with respect to misconduct of staff; (c) that all staff would have their right to due process fully respected; and (d) all complaints would be investigated and an effective remedy provided, including through national prosecution.

With regard to the risk of public scandal, many states were aware that in recent years the United Nations had faced an increasing number of incidents of criminal misconduct, including sexual exploitation and abuse by UN staff and personnel in peacekeeping operations. In this context, and in view of the increase in the Court's field operations, the possibility and/or necessity for an independent oversight mechanism for the Court to deal with criminal accountability of the Court's staff deployed in the field was raised in 2005 during the fourth session of the Assembly which subsequently adopted resolution ICC-ASP/4/Resolution 4 that mandated the Assembly to invite the Court,