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van der Wilt, H.

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Contemporary Issues Facing the International Criminal Court

Edited by

Richard H. Steinberg



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A Reasonable Request: Requiring Prosecutor Authorization Prior to Any Investigation by the Independent Oversight Mechanism

Harmen van der Wilt

Summary

Article 112, Section 4 of the Rome Statute empowers the Assembly to 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.” Recent proposals to establish an Independent Oversight Mechanism with powers to investigate alleged misconduct of staff members of the Office of the Prosecutor have provoked controversies between the Prosecutor’s Office and the Assembly of States Parties. The major bone of contention has been whether the IOM should have the power to start investigations into the misconduct of staff members of the Office of the Prosecutor without prior authorization of the Prosecutor. The Prosecutor’s Office has vigorously defended the need for such prior authorization. The demand of the Prosecutor is primarily fueled by the fear that investigations might interfere with the Prosecutor’s Office’s independence.

The latest Draft Resolution of the Assembly of States Parties, though more forthcoming towards the Prosecutor’s qualms, does not fully accommodate the latter’s wish that his authorization be required before an investigation can proceed. The present author, however, agrees with the Prosecutor that the requirement of prior authorization fits the current system of dual accountability: staff members are accountable to the Prosecutor, while the Prosecutor is accountable to the Assembly of States Parties. If the Prosecutor were unreasonably to obstruct investigations by the IOM, his accountability towards the ASP could come into question. In this way, the Assembly can exercise control over a Prosecutor who is adamant to cooperate with an investigation into well founded allegations.

Argument

Article 112 of the Rome Statute epitomizes the fact that the International Criminal Court, as a judicial body, operates within an international political environment, slightly analogous to the way national justice systems exist

within the framework of the government of a state.¹ The Assembly of States Parties performs a number of important managerial, administrative, financial, and legislative functions which are enumerated in the provision. As the Assembly, consisting of states’ representatives, convenes only twice a year, it must outsource and delegate its daily functions, including control and oversight of the Court, to a permanent, subsidiary body.² To that purpose, Article 112(4) of the Rome Statute empowers the Assembly to 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.” The final part of the sentence clearly refers to the powers of the Assembly within the realm of management control and oversight, mentioned in Article 112(2)(b). The proper limits of this oversight have been a matter of some controversy from the very start, as any interference with the judicial functions of the Court might impinge on its independence. Adriaan Bos has poignantly observed that “the essential question with regard to this paragraph is the delimitation between the judicial and administrative part of the management.”³

Over recent years, efforts have been made to establish such an independent oversight mechanism.⁴ The bureau of the Assembly of States Parties has launched a study on the issue on the basis of a mandate from the Assembly.⁵ The study identifies the main function of the IOM as “to ensure that staff misconduct does not go unpunished, that staff has a right to due process, and that complaints are investigated and an effective remedy provided.”⁶ The language suggests that mere internal control of staff conduct would not suffice and cannot be trusted, as the Court’s institutions either might be tempted to shield their staff or would not be unbiased in case of a conflict between staff member

1 William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at p. 1117.

2 S. Rama Rao, “Article 112,” in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court—Observers’ Notes, Article by Article* (C.H. Beck/Hart/Nomos, München, 2008), at p. 1680, Margin 10.

3 Adriaan Bos, “Assembly of States Parties,” in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), at p. 305.

4 At its eighth session, the Assembly adopted Resolution ICC-ASP/8/Res.1, by which it announced the establishment of an independent oversight mechanism in accordance with Article 112(4) of the Rome Statute.

5 Report of the Bureau on an Independent Oversight Mechanism, ICC-ASP/7/28 (November 4, 2008).

6 *Id.*, at para. 5.

and institution. And indeed the study candidly avows that, as long as the Court has no independent oversight mechanism, it can only deal with misconduct internally, “which is not objectively credible.”⁷

Obviously, this is a highly sensitive matter. From a broader perspective, the dilemma can be sketched as follows. On the one hand, the Rome Statute is a consensual instrument. It follows that the Court derives its mandate from the States Parties and that it is accountable to the Assembly of States Parties. On the other hand, however, precisely because the core crimes under the jurisdiction of the Court involve system criminality, in which state officials are often implicated as perpetrators, the Court’s organs must possess operational independence. The Court’s organs should enjoy this independence not only in respect of the Assembly of States Parties, but also in respect of the Prosecutor’s position is concerned, this principle is enshrined in Article 42 of the Rome Statute. These opposite interests require delicate balancing.

Recent proposals to establish an Independent Oversight Mechanism have provoked controversies between the Prosecutor’s Office and the Assembly of States Parties.⁸ In the opinion of the present author, the balance of powers, at least initially, shifted strongly, and arguably too strongly, in favor of the IOM (as representative of the Assembly of States Parties) and consequently to the detriment of the Prosecutor’s Office. One of the major bones of contention has been whether the IOM should have the power to start investigations into the misconduct of staff members of the Office of the Prosecutor without prior authorization of the Prosecutor. The Prosecutor’s Office has vigorously defended the need for such prior authorization.⁹ It has even been suggested that it should be left to the discretion of the IOM to decide whether the Prosecutor should be informed about reports on the misconduct of his staff members.¹⁰

To the present author it is not clear why the Prosecutor’s Office is ostracized to such an extent. Such arrangements may run counter to the well-established principle of criminal law that all interested parties should be informed and heard on allegations (*audi et alteram partem*). Besides, they blatantly ignore

7 Id., at para. 15.

8 Bureau of the Assembly of States Parties, The Hague Working Group, Report on the Independent Oversight Mechanism, Draft Report of the Hague Working Group on the Independent Oversight Mechanism, dated November 5, 2010, as adopted by HWG for consideration by the Bureau. The Prosecutor’s Office’s critical response to this Draft Report was summarized in a Legal Memorandum on the IOM mandate, of November 19, 2010 [hereinafter cited as Legal Memorandum].

9 Legal Memorandum, above note 8, at paras. 2 and 17.

10 Id., at para. 19, referring to paras. 11–17 of the IOM mandate.

the fact that the Prosecutor is in the best position to evaluate whether allegations may interfere with the Prosecutor’s Office’s operational independence. After all, such risk is by no means imaginary. Because of the sensitive nature of their work, staff members are exposed to frivolous, biased, and bad faith allegations, made by those who have a stake in obstructing investigations.¹¹ Some states may have an interest in the disruption of the OTP’s activities and may therefore be tempted to sustain accusations against staff members.

To be sure, an ensuing Draft Resolution on the Independent Oversight Mechanism by the Assembly of States Parties strikes a more conciliatory tone and seeks to meet at least a number of the objections of the Prosecutor.¹² The resolution indicates the parameters of the IOM’s mandate, defining the concept of misconduct, on which the IOM may receive and investigate reports, and excluding from the IOM’s ambit “contractual disputes or human resource management issues, including work performance.”¹³ It is not immediately clear what the final sentence entails. Surely it does not imply all the activities which staff members carry out within the context of their appointment, because that would render the IOM largely redundant. Probably, the phrase alludes to disagreements between the Prosecutor and staff members on the proper execution of tasks and assignments which do not reach the level of “misconduct.”

In two respects the resolution endeavors to meet the Prosecutor’s concerns at least half way. Firstly, it stipulates that the Court’s organs, including the Prosecutor, shall be notified “of the receipt of a report that merits an investigation of (serious) misconduct, including possible unlawful acts, by staff and contractors under their respective authority.”¹⁴ Secondly, it acknowledges the Prosecutor’s concerns that investigations by the IOM may jeopardize the Prosecutor’s Office’s independence. It guarantees that the authority of the IOM to initiate a case does not in any way impede “the authority or independence... of the Prosecutor.”¹⁵ It allows the Prosecutor to object to an investigation which

11 This objection is made in para. 5, *id.*

12 Assembly of States Parties, “Draft Resolution on the Independent Oversight Mechanism,” ICC-ASP/9/L.6/Rev.1, December 10, 2010 [hereinafter cited as Draft Resolution].

13 “Misconduct” includes “any act or omission by elected officials, staff members or contractors in violation of their obligations to the Court pursuant to the Rome Statute and its implementing instruments, Staff and Financial Regulations and Rules, relevant administrative issuances and contractual agreements as appropriate”: Draft Resolution, Annex Draft Operational Mandate of the Independent Oversight Mechanism, at para. 2, fn 2.

14 *Id.*, at para. 18.

15 *Id.*, at para. 20.

he considers prejudicial to his independence.¹⁶ Also, it provides for dispute resolution by a “third party with judicial or prosecutorial experience appointed by the Bureau of the Assembly of States Parties.”¹⁷

It remains to be seen whether this compromise—though certainly an improvement when compared with previous proposals—will dispel all the Prosecutor’s qualms. For one thing, the Draft Resolution provides that the identity of the information source should not be revealed.¹⁸ This confidentiality rule may hamper the Prosecutor’s assessment of the reliability of the source or any inquiries into attempts to tarnish the reputation of staff members. However, the protection of identity is lifted when “a staff member or other person...submits a knowingly or willfully reckless report to the office.”¹⁹ Of greater importance is the fact that the Draft Resolution only partially redresses the imbalance. After all, the Resolution, while lending a voice to the Prosecutor, does not accommodate the latter’s wish that his authorization be required before an investigation can proceed.

At first blush, the Prosecutor’s proposition appears to tip the balance of powers and responsibilities in the other direction. However, it is predicated on a two-tier construction of accountability, sustained by the Rome Statute itself: the staff of the Prosecutor’s Office is accountable to the Prosecutor while the Prosecutor is accountable to the Assembly of States Parties.²⁰ The risks that the Prosecutor will abuse his powers or overstep his mandate are slight and can easily be repaired. If he were unreasonably to obstruct investigations by the IOM, his accountability towards the ASP could come into question. Article 47 of the Statute provides that a prosecutor who has committed misconduct of a less serious nature (than that set out in Article 46(1)), shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence. In this way, the Assembly can exercise control over a prosecutor who is adamant to cooperate with an investigation into well-founded allegations.

Seen from this perspective, the Prosecutor’s demand that IOM investigations require his authorization is not too bold, nor too far-fetched.

16 Id., at para. 21.

17 Id.

18 Id., at para. 18.

19 Id., at para. 26 c.

20 Legal Memorandum, above note 8, at para. 37.

PART 4

Deterrence: The Prevention Issue

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