THIRD JUDICIAL SEMINAR
OF THE INTERNATIONAL CRIMINAL COURT

SUMMARY

What follows is a summary of the seminar that took place on Thursday, 23 January 2020, at the premises of the International Criminal Court (ICC) in The Hague, Netherlands. The ca. 50 participants of the seminar included judges from the ICC, chief justices and other senior judges from several national jurisdictions of the States Parties to the Rome Statute, and presidents and other judges from a number of international or regional courts and tribunals based either in The Hague or elsewhere.

The seminar was held in connection with the Opening of the Judicial Year of the ICC, which took place earlier in the same day, with Commonwealth Secretary-General, Hon. Patricia Scotland QC, as the keynote speaker. Secretary-General Scotland also took part in the proceedings of the judicial seminar.

The summary reflects the overall thematic flow of the discussion and not necessarily the views of any individual speaker, nor the order in which they were presented.

Participants of the Third Judicial Seminar of the ICC (photo: @ICC-CPI)

Working Session 1

Use of Time Limits for Issuance of Decisions in Criminal Proceedings: Experiences and Perspectives

Co-moderators and introductory speakers: Judge Bertram Schmitt, ICC; and Judge Kimberly Prost, ICC

The objective of this session was to as create a platform for an exchange of views and experiences between judges from different jurisdictions on the application of time limits for judicial decisions, particularly against the background of internal guidelines on time limits for the issuance of key judicial decisions recently adopted by judges of the ICC. The session saw lively discussion with interventions from a large number of participants. Judges from national as well as regional and international jurisdictions related their experiences on time limits, their perceived advantages and disadvantages, whether they should take the form of mandatory rules or merely guidance, and how they connect with other measures for enhancing expeditiousness.

The session opened with introductory presentations by Judge Schmitt and Judge Prost on the internal guidelines regarding time limits adopted by the judges of the ICC in October 2019 at an annual judicial retreat. The guidelines, which are incorporated in the publicly available ICC Chambers Practice Manual, provide five specific sets of time frames for rendering various types of decisions or judgments at pre-trial, trial and appeals stages. These are:

1) A decision on the Prosecutor's request to authorise an investigation shall be filed within 120 days.
2) A written decision on conviction or acquittal shall be delivered within 10 months from the date of the end of the closing statements.
3) A sentencing decision shall be delivered within four months of the decision on conviction.
4) A judgment on appeal against conviction or acquittal shall be issued within 10 months of the date of the closing of the oral hearing on appeal or the filing of the response to the appeal brief.
5) A judgment on certain interlocutory appeals shall be rendered within four months of the filing of the response to the appeal brief.

It was stressed that the adoption of the ICC's guidelines did not occur in isolation, but rather in the context of broader efforts at the ICC to enhance the overall efficiency of the Court, comprise diverse initiatives that have been undertaken over several years or are currently under way, whether in the ICC's judiciary or other parts of the institution.

Notably, the guidelines on time limits were adopted in parallel with guidelines on judgment drafting and judgment structure also adopted in October 2019 by the judges of the ICC, with the objective of streamlining and accelerating the preparation of judgments. As such, the different guidelines adopted are mutually supportive.

It was stated that the ICC's self-imposed time limits are first and foremost an expression of the principle of expeditiousness, which is at the heart of good administration of justice, and, more specifically, essential for guaranteeing respect for the rights of the accused. The latter aspect is of heightened importance at the ICC, since many accused are held in custody throughout the proceedings, which can be quite lengthy due to the complexity of most cases before the Court.

The expeditiousness of proceedings was also seen as being highly relevant for the perception and acceptance of the ICC on the part of the affected communities and the public at large. The length and the pace of proceedings has been a frequent point of criticism regarding the Court's work, and it was hoped that the time limits would in part help address this.

At the ICC's judicial retreat, where the time limits were adopted, the majority of judges were of the view that time limits should – at least initially – be set as non-binding guidelines, given the novelty of the concept for the Court; however, the judges all made a firm commitment to respect them. To further strengthen the impact of the guidelines, the judges had decided that any extension of the time limits should be exceptional and accompanied by a public decision of the relevant chamber detailing why it had considered it necessary.

It was emphasised that the judges of the ICC had very consciously decided to set time limits for each of the three divisions of the Court, as it was important to demonstrate – internally as well as externally – a culture of efficiency across divisions, as well as enhance expeditiousness throughout the judicial process. Application of the time limits by the different chambers had commenced immediately upon their adoption, and concrete results of this were already visible. But it was very early days and the judges of the ICC were keen to hear the experiences and views of other jurisdictions, which could be informative on the way forward.

The length of the timelines set for the various decisions represented a balance between realism and ambition; overly demanding limits would lead to them being frequently breached, while on the other hand very generous time limits would risk being meaningless. The question was posed whether consideration had been given to creating a sliding scale system based on complexity of a case; it was clarified in response that the ICC judges had opted against that, as it was considered too difficult to determine which cases require more or less time. But as the time limits were created as guidelines rather than hard norms in the ICC's legal framework, certain flexibility was built into the system.

The adoption of the self-imposed internal time limits by the judges of the ICC was commended by many participants of the Seminar, and it was noted that they represented a

historic step in the international legal environment, as the ICC was the first international court or tribunal to set such time limits.

During the open discussion, judges from many States Parties to the Rome Statute, from several continents, outlined the system of time limits – if any – applicable in their respective jurisdictions, whether in the form of mandatory rules or informal practices. Most national systems referred to in the conversation had some kind of time limits in place.

The discussion revealed many similarities as well as differences between the systems in different jurisdictions. Examples were given of time limits as short as three days (for an oral verdict, with written reasoning to follow later) and as long as one year or more (for the written judgment in a complex case), depending on the jurisdiction.

It was heard that in several jurisdictions, there are different limits in place for different sorts of cases or verdicts, typically with stricter time limits in criminal trials in the first instance (e.g. 15 or 30 days) and longer time limits in Supreme Court or other higher courts, particularly with complex cases (e.g. 30 or 60 days). Some jurisdictions determine time limits based on the number of hearing days; for example, if a hearing lasts only two or three days, then the written judgment must be issued within five weeks and this sliding scale can last up to over one year. In one participant's national jurisdiction, time limits only exist in civil cases, ranging from two weeks in a single-judge case to four weeks if the bench consists of several judges.

It was recognised that time limits work very differently in jurisdictions in which an oral verdict is issued first, followed by written reasoning later, from those in which the written judgment is issued at the time of announcing the verdict.

A recurring issue that came up in many interventions was that despite the existence of time limits in many jurisdictions, these are in practice frequently overstepped due to a variety of reasons, notably the lack of resources and the workload of the judges. Indeed, there was broad agreement during the discussion that time limits are not a solution in and of themselves, and they must be accompanied by other measures to ensure expeditiousness of the judicial system, such as improvement of technical facilities, managing individual judges' workload, adequate staffing, less bureaucratic procedures, creative cooperation among all parties to the proceedings, and usage of alternatives to criminal proceedings. It was recalled that the ICC's guidelines, had been put in place with other, connected measures adopted in parallel, as described above.

Several examples were given also of national jurisdictions that do not have any time limits. It was stated that this may be due to the view that they would infringe on a judge's autonomy and independence; even without time limits, judges do work diligently and strive to issue judgments and decisions within a reasonable time. It was further remarked that in jury trials, time limits do not exist as a judge cannot force a jury to deliver a verdict within a certain period of time.

There was broad support during the discussion for having at least non-binding time limits, or guidelines. On a related note, many speakers stressed the importance of flexibility, particularly to enable adjustments based for instance on the complexity of the case or unforeseen circumstances. As an example of a system that appears too rigid, one national jurisdiction's requirement to issue the verdict within 7 days after the close of evidence was cited; this would seem extremely challenging in a complex case involving charges of genocide, crimes against humanity or war crimes.

The discussion revealed wide differences in terms of consequences for overstepping applicable time limits. Some jurisdictions have no procedures in place; others require the judge to request an extension from the president of the court or at least report the reasons for a delay; in some countries a hearing before a disciplinary committee might be prompted. Finally, an example was given of a jurisdiction with rather draconian consequences, as overstepping the time limit for issuing the judgment even by one day in that jurisdiction leads to the whole case collapsing and starting anew. Many participants spoke in favour of placing emphasis on self-imposed discipline and a judicial culture of integrity and expeditiousness, rather than harsh consequences.

It was noted that in international courts and tribunals, efficiency regarding the issuance of judgments relies in large part on early drafting and the availability of well qualified staff to support the process. Large parts of judgments in complex international cases can be written in parallel with the trial; this requires that during any given court hearing, only a limited part of the team is present in the courtroom, while other legal officers work on judgement drafting. Ultimate control of the judgment naturally rests with judges themselves, who are also solely responsible for deliberations.

Overall, the discussion during the session strongly supported the view that time limits for the issuance of judicial decisions and judgments – even in the form of flexible guidelines – sends a very positive signal both internally and externally, and they can be beneficial especially in criminal proceedings in safeguarding the human rights of the accused. The significance of expeditious proceedings for victims was also stressed, as victims have often waited long to see justice done. Furthermore, in the case of convictions, the sooner the verdict is delivered, the sooner proceedings on reparations for victims can commence, as at the ICC the latter are conditioned by the former.

The session was concluded with thanks to all those who had contributed their views and experiences, which had provided a wealth of insights that would be helpful going forward with the application of time limits at the ICC.

Working Session 2

Separate and dissenting opinions - to do or not to do, and how

Moderator: Judge Chile Eboe-Osuji, ICC President

Panellists: Judge Damijan Florjančič, President of the Supreme Court of Slovenia; and Justice Elizabeth Dunne, Supreme Court of Ireland

This session provided a forum for an exchange of views regarding separate and dissenting opinions: how they are regulated in different jurisdictions; how can separate opinions and dissents benefit the delivery of justice; what are the potential pitfalls; and what are the various considerations that may go into making best use of them where they are allowed. There was rich input from close to fifteen judges from international, regional and national jurisdictions; while views varied, the interventions generally reflected support for a respectful approach and urged use of moderation in issuing dissenting opinions.

While explicit provisions regarding separate opinions – whether concurrent or dissenting – in the context of pre-trial and trial proceedings are absent in the Rome Statute, the established practice is that such opinions (individual or joint) may be issued and annexed to the main decision. There is more explicit language in the Statute concerning appellate proceedings, article 83(4) providing that judges of the Appeals Chamber may deliver a separate or dissenting opinion on a question of law. These, too, are in practice issued as annexes to the main decision. The legal texts of other international and regional courts are more explicit in allowing separate and dissenting opinions, as is evident in article 95 of the Rules of the International Court of Justice, rules 122 and 144 of the United Nations International Residual Mechanism for Criminal Tribunals, rules 74, 88 and 94 of the European Court of Human Rights, articles 65 and 75 of the Rules of Procedure of the Inter-American Court of Human Rights, and rules 60 and 73 of the African Court on Human and People's Rights. Consequently, it can be stated that the practice of the ICC in allowing separate and dissenting opinions is in line with that of international legal practice.

During the discussion, it became evident that national jurisdictions have very divergent provisions and practices concerning separate and dissenting opinions. An example of one national jurisdiction was cited, where the constitution requires each judge individually to express in writing his or her view on the case – although the judge may choose to simply say that he or she agrees with the opinion of another judge in the case. At the other end of the spectrum, in some national jurisdictions the issuance of minority opinions is not allowed at all or is possible only in the constitutional or supreme court. In some countries, the possibility of issuing separate opinions has been introduced or expanded rather recently.

It was suggested by one participant that there may be more need for dissenting opinions at the international level due, as international law is still in its infancy in many respects, and there are many gaps to be filled, as opposed to national jurisdictions with long traditions, detailed laws and an abundance of precedents. That said, another speaker cautioned that in the international context, where judges come from many different countries and legal systems, there may be a temptation on judges to issue separate opinions simply to make their voice heard amidst what may feel like a clash of different legal cultures.

One of the participants highlighted the civil law origins of separate opinions, stating that before the French Revolution, the prevailing practice in many European continental jurisdictions had been that the court issues a ruling, and each judge issues his own separate opinion, in a separate document. This ended with the passing of French statute in 1790, which defined that a judgment had to include not only the outcome but also *les motifs qui auront déterminé le jugement*, i.e. the reasons supporting it. England was not affected by this, and the institution of the dissenting opinion came to be seen as a typically English, common law feature.

Many perceived advantages as well as disadvantages of separate and dissenting opinions were highlighted by various speakers. In some countries, such factors had been carefully studied during the consideration of legislative changes that would allow separate opinions where they had previously not been possible.

The argument that came out most strongly and frequently in favour of separate and dissenting opinions during the discussion was the value that such opinions can have for judicial dialogue and the development of the law, by allowing ideas to be put forward that may represent a minority view at the time, but which may later come to be adopted as mainstream thinking. As an example, Justice Harlan's dissent in the 1896 US Supreme Court case Plessy v Ferguson was cited. His progressive views would eventually be captured in the 1954 landmark ruling in Brown v Board of Education, which banned racial segregation in public schools in the United States.

Another example where a dissenting opinion had acquired more force and value over time concerned the 1983 judgment of the Supreme Court of Ireland in Norris v Attorney General, which held that laws criminalising homosexuality were not unconstitutional. While the ruling itself has become completely outdated, two dissenting opinions in that case, those of Mr Justice Henchy and Mr Justice McCarthy, have stood the test of time, the former being frequently relied upon in the context of the constitutional right to privacy in Ireland.

With reference to an article by former US Supreme Court Justice William J Brennan, one of the speakers noted that dissenting opinions open the judicial marketplace of discussion and encourage the flow of information between judges, the judiciary, and the public at large. It was stated that dissenting opinions challenge existing legal norms and assumptions and give way to more progressive judicial reasoning.

Some speakers argued that separate and dissenting opinions can also play a role in upholding the principle of judicial independence by allowing each judge to express their own view and by protecting them from being forced to ascribe to a judicial decision that may be in strong contrast with their beliefs. It was also argued that exposing the differences of opinion within a judicial panel promotes transparency, which benefits legal culture and may also contribute to fairness of criminal proceedings by giving an opportunity to the parties to use the minority opinion in further proceedings in a higher court.

One speaker noted that it is not uncommon for judges to struggle to agree on the finer points of law, and allowing separate and dissenting opinions is a practical way to bypass such disagreements – while the actual judgment still is what ultimately counts as the final answer.

Beside the arguments in support of allowing, several potential drawbacks of separate and dissenting opinions were also pointed out by the participants.

Several interventions reflected the view that absolute certainty regarding the outcome of a case is particularly important in criminal matters, which may explain why some jurisdictions do not allow dissenting opinions in criminal cases – as they might weaken the persuasiveness of the verdict by exposing disagreements within the bench. Furthermore, it was stated that when there are several separate opinions attached to a judgement, these may cause unclarity as to the legal reasoning behind the outcome. Such perceptions could undermine the legitimacy of a court.

In a recent statement, the president of the constitutional court of a certain country had attributed the high respect enjoyed by that court, among other reasons, to the fact that it had so few dissenting and separate opinions, as the judges always aimed to achieve consensus. This was said to strengthen the perception of unity and contribute to the acceptance of the court and its judgments.

Other possible drawbacks of separate and dissenting opinions mentioned during the discussion included the potential prolongation of the average time needed to adjudicate a case, and potential misuse of separate opinions by the media. Concern was also voiced that the option of resorting to a separate opinion might discourage judges from the necessary process of internal consultation and the exchange of ideas with one another with a view to arriving at agreement.

On a related note, a danger that several participants voiced during the discussion was that of conflicts, divisions and polarisation that could be caused by separate and dissenting opinions, particularly if written in a disrespectful manner toward colleagues. This could have a negative effect on the reputation of a court.

Despite the references made to the pros and cons cited above, rather than debating whether separate opinions should be allowed or prohibited to begin with, the bulk of the discussion in fact focused on *how* and *when* such opinions should be used.

It was noted that there can be different types of separate opinions: those that essentially state how that judge believes the judgment should have been written, and those that rather engage in a dialogue with the majority on specific points of contention. Several speakers expressed preference for the latter as creating more clarity for the outside world. Another important aspect to be considered when writing separate opinions is the length of the opinion – an excessively long document may end up being less informative and will likely be read by fewer people.

Reference was made to a study on dissenting opinions conducted by the European Parliament, which suggested that individual opinions best serve their purpose when they are limited in number, circulated in advance, and drafted in a respectful manner. A dissenting opinion should not be used for the purpose of criticising or attempting to diminish the opinion of the majority, nor should it be a vehicle to attack other members of the court.

Several participants expressed the view that dissenting opinions should be a measure of last resort; self-restraint should be exercised especially in criminal jurisdictions. Judicial panels should always make every effort to achieve agreement. The importance of proper deliberations was stressed: a judge should put his or her views before his colleagues and only if consensus truly could not be reached among the members of the panel, the dissenting judge might proceed to write his or her separate opinion. In this regard, one participant referred to unfortunate instances where another judge had kept their separate opinion secret until the last minute without a genuine effort to communicate their views to the majority.

One of the participants called separate and dissenting opinions "a powerful weapon", which should be used sparingly and with humility. One should always ask oneself whether the separate opinion is truly necessary. The fact that something is allowed does not mean it is necessarily advantageous: separate opinions should never be a tool merely for boosting one's ego. One participant aired the idea that if all separate opinions – whether concurring or dissenting – were anonymous, this would make judges think twice before issuing such opinions, as there would be nothing to be gained in terms of individual prominence. It was also recalled that it is ultimately the actual judgment or majority decision that counts, and this should be respected.

Several interventions emphasised the importance of collegiality and civility; separate and dissenting opinions should not be issued simply to criticise other judges on the bench - this could create serious problems in the long term, particularly in a small institution.

In conclusion, there had been broad agreement that separate and dissenting opinions can be an important tool of dialogue for the progressive development of jurisprudence. The use of such opinions is a reality in most jurisdictions, and indeed during the session no one had advocated the view that they should be disallowed. At the same time, the interventions of the participants had also strongly reflected the view that separate and dissenting opinions should be used with moderation, and in a spirit of humility and collegiality – as a tool of last resort, not as a replacement for genuine efforts to arrive at consensus.