IER Presentation – 7 October 2020
CLUSTER 2 Judiciary

Notes drafted in preparation for the meeting. Content might slightly differ from oral presentation.

Ms Anna Bednarek

Question regarding the availability of judicial decisions. Do R210 and R222 encompass ensuring the availability of judicial decisions in a language understood by victims and affected communities?

1. No, in the recommendations being referred to, the focus was on the question of access to jurisprudence for the judiciary, rather than on public access.
2. Although, availability of judicial decisions in a language understood by victims and affected communities is a matter that has not been not addressed in the mentioned recommendations, we are of the view that it is indeed an area that should be resolved by the Court.

Question regarding a special procedure involving the parties that would apply in case of a departure from previous practice or jurisprudence. This could lead to a very time consuming procedure and delay, whereas this departure from standing jurisprudence and or practice could also get necessary attention in the regular sessions. Could the experts clarify why they suggest this particular additional procedure?

1. The aim is not to recommend or to introduce a new procedure, instead it is to emphasise the necessity for the parties to the proceedings to be aware that the Chamber might take a decision which might not follow what was considered established practice thus far. The intention therefore was to give to the parties the opportunity to express their views and opinions before such a decision is taken.
2. It was thus recommended to deal with the question during a regular session. There is no need to depart from the routine. The Court could give notice to the parties on this point and apply time limits for submissions through which the parties can address this question.
3. The expression ‘special procedure’ used in para 614 of the Report implied simply addressing the issue during the course of proceedings and allowing the parties to express their opinion on that matter.
4. Another option for improving the coherence of the jurisprudence as indicated in the Report could be to increase the Appeals Chamber to seven judges in order to address important issues dealt with in previous decisions.
5. It is up to the Court to decide which of these to follow.
6. The recommendation is aimed at avoiding a situation where the Court issues an unexpected decision in which it departs from established jurisprudence without explaining the reasons that led to this.

Question concerning to what extent the recommendation that there must be respect for the decisions of other Chambers, differs from the current theoretical practice at the Court?

1. As we understand this question refers to R216 which states: Pre-Trial and Trial Chambers should accord respect to the decisions of other Chambers.
2. As it is placed as the first of a set of recommendations referring to the part of the Report regarding the Development of Coherent Jurisprudence, it was meant to be an introduction to recommendations that follow, namely R217 and R218 that I have just spoken about.
3. It also points out the approach towards the decisions of other chambers that is required.
4. An underlying factor for this was that for example, the same procedural matters were dealt with by different Chambers differently, even in situations where the practice seemed to be already established. But also that recommendation refers to decisions of Chambers belonging to different Divisions.

Mr Iain Bonomy

Question regarding the recommendations on improvements in how States Parties could nominate Judges for election to the ICC bench, and whether the experts' discussions in this area reflect on the need for compulsory Rome Statute training for all elected ICC judges prior to the start of their term?

It was assumed that all candidates will have a sound basic knowledge of the Rome Statute system. In order to enhance and strengthen, an intensive and comprehensive induction programme is proposed for new judges on arrival at the Court in March. Although some of the topics proposed in the Section of the Report dealing with Induction and Continuing Professional Development are likely to become core subjects, the list of topics and ideas for the induction programme is not intended to be exhaustive or prescriptive for all future inductions. They are examples of the type of content that would be appropriate, parts of which should be varied from induction to induction depending on what is significant and controversial at that time.

Question concerning the new procedure for amendment of the Rules of Procedure and Evidence and whether the experts could elaborate on why there should not be a more formal consultation of States Parties prior to the judicial plenary meeting where amendments are adopted (as proposed for the Registrar and Prosecutor at R382)?

States Parties were not listed among those who should be consulted before a proposal is voted upon, because it was felt that that would not be consistent with the aim of producing an agile system that had the ability to respond appropriately to the need for amendment to ensure that proceedings are conducted as expeditiously as is consistent with fairness. The important role of States Parties is recognised by giving them, in the six month period after the amendment comes into force, the right to object to the amendment continuing in force. Should it be decided to change that and give States the right to make observations before the proposal is voted upon, then it might not be considered appropriate to retain the right to object after the amendment is approved and in force.

Question concerning asset seizure and freezing, and whether the experts consider that the defence and victims should be involved in the ongoing asset management by the Court, given that both parties have an interest in the process being carried out efficiently?

Although the matter was not specifically addressed in the course of the Review, my own personal view is that neither the property-owner accused nor the victims entitled to seek reparations should be involved in the ongoing management of assets seized or frozen. An

important consideration may be the fact that freezing and seizure would usually be effected at the hand of the authorities of a State Party.

Question concerning Victim perspective in ICC trainings and whether the Experts envision Court-wide expert training on engaging with victims to be included in R99 and if so, how would they propose this aspect of the recommendation be implemented?

This is a perceptive question in relation to another matter that the Review did not specifically address. R 99 referred to relates to training in the skills required for staff who are newly assigned to a particular section or task and not to the type of thematic training envisaged by the question. However, it goes without saying that all staff at whatever level, the Principals and the Judges have a duty to treat victims with dignity and respect. It is undoubtedly desirable that Court-wide training in awareness of the features of the lives of victims that require to be considered when dealing with them to ensure that dignity and respect is available. That is something for which I hope, and I am sure that I speak for the whole IER, it is possible to make financial provision.

Question concerning the means through which the availability of legal aid for participating victims should be extended to investigative or even pre-investigative phases of cases? How, in practice, do the experts envisage this to happen; by application of victims? By recommendation of the Prosecutor or Registrar or by order of the Chamber acting *proprio motu*?

The modalities of applying for and authorising legal aid for legal representatives of victims at stages in cases earlier than is recently possible were not specifically addressed in the course of the Review. However, there was no suggestion in the course of our enquiries that some special arrangement should be put in place for this.

Question concerning several recommendations, mostly of technical nature, to improve the role of victims in investigations and during trial and as to which of these would the experts prioritise in implementation for this purpose?

It is not possible to do more than refer to the Summary of Prioritised Recommendations which identifies the Recommendations within the group R 342 et seq, and indeed the group at R336-342 also relating to the role of victims, which I and my colleagues considered ought to be given priority.

Question concerning how the 'standing coordination body' recommended to review victim participation be constituted? Does the IER agree that independent/external victims' counsel should be represented in that body?

The Standing Coordination Body is referred to in two different contexts - at R339 and R359/360. It may be appropriate for the Body to be differently constituted, depending on the context, possibly by providing for co-option of a part of its membership. In the context of R339 it would seem appropriate to have a representative of the Defence Office with experience of representing victims as external counsel and a representative of the OPCV. Other possible members of the Body in addressing R339 would be representatives of the various Registry entities with an interest, including country offices, a suitably experienced representative of the OTP, and two representatives of Civil Society Organisations who have extensive direct experience of the victim participation scheme.

Mr Mohamed Chande Othman

Question concerning what immediate measures the Registrar can take for increasing diversity, in particular geographic representation?

1. One is that it must be continuous, along with proactive recruitment and outreach including with regional judicial institutions.
2. So this is something that the Registry will take the lead on and it is the same process in terms of increased gender diversity.

Question concerning the accountability of judges and whether the IOM can play an oversight role in supervising the recruitment processes?

1. This is really a layer three responsibility where the lead will be taken by the Registrar.
2. Challenges affecting accountability:

(a) Structural (b) procedural (c) prevailing high perception by staff on non-accountability of elected officials as well as serious doubts on IOM capacity to effectively investigate elected officials;

3. One of the Experts' principle view is that to the *maximum* extent possible the disciplinary scheme for staff and elected officials should be the same; not advantage one or disadvantage the other; and should also follow and incorporate international standards for judicial accountability and best national judicial practices.
4. Another principle view that ought to be underscored is that the ultimate disciplinary authority for elected officials in the Rome Statute and Rules of Procedure and Evidence would remain intact: ASP, ASP Bureau, Plenary and Presidency (sanctions) (Articles 46-47 and Rules 29 and 20).
5. A suite of integrated disciplinary mechanisms: anchored with the IOM (para 311); the backstop arm of the accountability arrangements for elected officials.
6. Revised role of the IOM: acknowledge the experience gained by the IOM in investigating and dealing with staff-to-staff complaints.
7. Because of this experience therefore, conduct preliminary assessments of complaints (para 313) – the continuous building of confidence and trust; advisory services concerning alleged complaints, clarifying whistle blower policies, etc.
8. Phase I involves the Ad Hoc Investigation Panel, which will have an investigative role; but would also hear the parties. Key role will be **judicial determination of threshold** i.e., whether a complaint is manifestly unfounded but also whether it is *prima facie* established. The Ad Hoc Investigation Panel (Elected Officials) mirrors First Instance Investigation Judge for Staff.
9. Phase II involves an Ad Hoc Adjudication Panel.
10. To conclude therefore on whether the IOM could have a role; yes but a revised and integrated role. It is something for the ASP to consider.

Question concerning whether the right of audience for Counsel should be restricted to Counsel with high professional experience in order to promote Courtroom excellence and effective legal representation?

1. The Rules of Procedure and Evidence provide in Rule 22(1) the area of competence and the requirements for Counsel. This is currently 10 years for Counsel and 8 years for Associate Counsel.

2. So the issue here really is whether one is to increase the competence of Counsel.
3. We recognize that practicing before the Court is a specialized area, as we have recommended for other organs, there should be continuous professional development and training provided to improve this.