

The ASP Bureau Working Groups' Online Meeting on the Report of the Independent Expert Review

Preliminary Reactions of the ICC President¹

7 October 2020

INTRODUCTION

1. We saw the IER report for the first time on 30 September 2020. It is a rather long document: we continue to read and process its contents.
2. In the meantime, we must congratulate the IER Group for producing their report within the time that the ASP gave to them. At the Court, we were always worried that the time given to them was too short to conduct such a large exercise. Our worry was made worse when the pandemic intervened, just as the Group was about to get going. It is against that background that we congratulate them for conducting their extensive interviews and writing a report that is nearly 400 pages within such a short time.
3. Those of us who write for a living are entirely familiar with the paradox of life captured in Henry David Thoreau's famous aphorism: *'Not that the story need be long, but it will take a long while to make it short.'* Blaise Pascal was even pithier: *'If I had more time, I would write a shorter letter.'* But we should not allow Pascal and Thoreau to detain us now.

THE NEED FOR THE REVIEW

4. As some of you will recall, when first it was broached, the Court fully and warmly embraced the idea of an independent review of the Rome Statute system. We specifically envisaged a review of both the Court and of the ASP, in the hope that the exercise would inspire both the Court and the ASP to perform better the obligations envisaged for each of them in *the Rome Statute that we have*. That is to say, the review was not foisted upon the Court. We welcomed and embraced it.
5. Many of us who have had to think about the system and work with it have a view of many things that could be improved; from time to time we agreed to make the corrections ourselves. In the Judiciary, for instance, it was only last year, under the current Presidency, that judges agreed to adopt guidelines for time limits in decision making; as well as best practices for trial management. There are no other international courts that had such guidelines on time limits – and there are many eminent national judiciaries that still don't have them. So, we do manage to agree to improve the system without external prompting. The difficulty rather is that it was not always easy to agree in-house – or between the Court and the ASP – about what improvements needed priority attention. It was thus felt that knowledgeable professionals operating at arms-length might offer views that could help us along the path of agreement about prioritising the areas of improvement to be undertaken.

¹ Due to time limitations, these remarks were not delivered orally in their entirety during the online meeting of 7 October 2020. And they have been revised and updated.

6. That is why the Court embraced the IER idea and fully supported the process. We made ourselves available to them. We answered every question they asked us, and invited them to ask us more. And we gave them all the information they requested from us.

A NECESSARILY CRITICAL EXERCISE

7. As my colleagues and I were discussing whether or not we should embrace the idea of a review, a colleague said to me: 'This can hurt you know.' I said, 'Yes, I know, but it will be good for the system in the long run – if done right.' Naturally, anyone needing a root canal will find it a painful procedure. But, done right, it is entirely worth the pain. Whether or not the surgeon drilled well enough is a worry to be dealt with on its own merits.
8. On that note pain, I should remind everyone of the well-known phenomenon that psychologists call the 'negativity bias' or 'negativity effect'. According to it, when things are of equal substance or intensity, the things that strike a chord of negativity do much better in arresting imagination and dominating attention than the neutral or positive things. That is why tabloids that peddle salacious gossips about the peccadillos of the high and mighty do better business than magazines that tell the pious stories of angels and saints. But even closer to home, we are all too familiar with how it is that however well the treatment and kind the words, it is the one unkind act or critical word – even in constructive criticism – that resounds the most.
9. We must keep that phenomenon of *negativity bias* firmly in mind as we read and process the IER report. There will be those who will see the report as a litany of negativity about the Court. Observations that suggest shortcomings and wrongful conduct will be latched on to, generating much excitement. Such contents in the IER report will bring obvious joy to the Court's detractors and depress its friends. But that is to misunderstand the point of the whole exercise.

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10. ICC is a strong force for good. It has done much to acquit itself in that regard. Its judges have repeatedly rendered judgments that insist that accountability must not bow to power, even of heads of states, when allegations of crimes that shock the conscience of humanity have been made. It is important to stress that the IER report does not question that. It must also be stressed that the mandate of the IER was not to catalogue the positive aspects of the ICC's work, to give it a pat on the back. Their task was to examine the Rome Statute system as best they could and make suggestions about what could be done to improve the Court's performance as that force for good – within its existing legal framework and without creating danger for its independence.
11. It is therefore in the very nature of the exercise that it *needs* to – not should – be critical. Whether or not particular criticisms are truly constructive or fair or within the terms of reference is a different question. Any such complaints will be dealt with in the proper way later. But the IER group would have failed in their mandate had they produced a report that tells us that all is well with this human institution, 'Just carry on, as you were. It's all wonderful.' That was not what we wanted them to do.

A POINT OF ORDER – THE TITLE 'FINAL REPORT'

12. I should, perhaps, pause at this juncture to place a question for consideration as a point of order, if you will. The difficulty that provokes the question is this. The IER report is titled 'Final Report'. It suggests that there had been either a draft or provisional substantive report that was shared earlier, before it was rendered in the 'final' form.

There was indeed a document issued not long ago under the title of 'interim report'. But that was only a document of 8 pages, which only gave a progress report on the work of the IER Group. In no sense could that document be called a substantive report.

13. The first time that we saw any substantive report of the IER Group comprising more than 8 pages was when it was published on 30 September 2020 as a 'final' report of nearly 400 pages. There are many things in it that are fairly put and are quite correct, notwithstanding that they may make uncomfortable reading. But there are also many things in it that were not put to those at the Court best placed to throw light on the particular point or subject; and there are important observations that are not quite accurate.
14. The question then becomes this: would it be possible to agree to treat this document as a provisional 'final' report; receive the reactions of the Court; and allow the IER Group to then produce a *truly* 'final' report? This exercise is too important to not follow that procedure.
15. That is a normal process in many instances of an exercise of this kind.² It is a due diligence procedure that keeps avoidable impurities to a minimum.³ Such a process doesn't compromise the independence of the exercise, it is rather a quality control measure that enhances the integrity of the work.
16. But I leave that question to the ASP and the IER Group for consideration.

APPRAISING THE APPRAISERS

17. We also will have our turn to appraise the IER. The Court is entitled to do so for a number of reasons including the following. First, the exercise is much too important in its potentials for good or bad results to be received without a reaction from the Court, especially at this stage in the Court's life when it is facing serious detractors. Second, the Court was not afforded an opportunity to review the report in draft or provisional form and make observations. And, finally, the exercise is meant to hold up a mirror to the system. In the nature of things, some mirrors are unquestionably impeccable; while others can have distortions, mists, hackles and fractures of various sizes – while the mirror may still remain useful in the good parts. Users are entitled to appraise their mirrors.
18. As observed earlier, the IER report is a large document. We are still reading and digesting its contents. In due course, there may be fuller reactions from the Presidency, the Judiciary, the Office of the Prosecutor, the Registrar and individuals.

The Experts and their Report

19. In evaluating the report in the most preliminary way, I must begin by saying that the IER members are people many of whom the Court proposed. We did not propose them

² See, for instance, the '[Report on the Special Court for Sierra Leone](#)' (2006), paragraphs 18 and 25.

³ For instance, in paragraph 25 of the Report of the Special Court for Sierra Leone – a much smaller institution than the ICC – Professor Cassese, the expert reviewer, correctly captured the utility of the draft-and-comments approach in helping to reduce inaccuracies and uneven portrayals. As he put it: 'The Judges and other Court officials have also been cooperative in commenting on the Draft Report I circulated to them on 24 November 2006 so as to elicit comments, criticisms and suggestions (an indication of those who have commented on the Draft Report is found in Annex F). *I have taken all these comments into account when revising the 24 November Draft. I have thus been able to remove a few misapprehensions or inaccuracies, to spell out observations already set out in the Draft, as well as more fully highlight the merits of the Court and its major achievements.*' [Emphasis added.]

because we considered them to be infallible human beings. They are fellow professionals who are no strangers to the various disciplines that the Court must grapple with in the subject matter and processes of its work. They were selected because they would not need too much time to come to grips with their task of conducting the review and writing their report.

20. No one expected them to write the holy book.

The Pluses

21. There are very many pluses in the report. It contains many important observations and recommendations that we should embrace – and some of which in my view we must embrace – even in the short term. In that regard, the following may be mentioned.

22. We may begin with sexual harassment and bullying. They are pernicious social maladies all over the world. There is hardly any country in the world where harassment and bullying are not an issue, notably in the workplace. The ICC as an international institution draws its officials and personnel from its States Parties and other States. Potential perpetrators come to the Court with that potential to bully or harass or both. And potential victims come with varying aptitudes towards reporting such behaviours. In the nature of these social ills, underreporting is always a problem – even in the most egalitarian national cultures, let alone in the more hierarchical or patriarchal ones, where even persons (men and women) in very senior positions will do their best to avoid confrontation with those perceived to have superior powers, priding ‘likeability’ above all. As a workplace, the ICC is a microcosm of all those cultures. But that is not an excuse for inadequate action when we are confronted with concerns about sexual harassment and bullying. It is necessary therefore that we must leave no stone unturned in ensuring that within this institution, there is no room for bullying and sexual harassment. That obligation rests upon the institution itself, not on the victims. It is no excuse to say that we are dealing with it or have begun to do so. It is more important to accept that we must do all that is reasonably possible to ensure that there is no room for bullying and harassment at the ICC. Notwithstanding how the IER report describes the perceived or resulting atmosphere, we must never reject any call upon the institution to push harder against the incidence or the tendency to bully or harass. And we welcome the IER recommendation that insists that we must find ways to do better in this regard.

23. We also welcome the recommendation for an enhanced grievance system which recognises that there is a place for amicable resolution of human relations issues and conflicts, before they boil over and reach the point of no return along the path of poisoned environment or adversarial litigation. Conflicts and difficulties are inevitable in every human relation in which there are expectations for performance and proper behaviour. But such conflicts need not result in poisoned environments and emotionally costly litigation, which are also costly for the institution in productivity and money. We welcome the IER recommendation in this regard.

24. Also to be fully welcomed is the recommendation for judges to reform without delay the process of election of members of the Presidency. It is not enough for judges to complain about infelicities associated with campaigning in judicial elections at the ASP. The judiciary also has to ensure that we, too, must eliminate the feature of campaigning during ICC Presidency elections. It is easier for judges to do that, as it requires no amendment of the Rome Statute. I am bound, of course, to observe immediately that some of the stories told to support that recommendation are factually incorrect – and that is a matter which I shall address through other means. But, the baby must not be thrown out with the bath water. In my view, that particular recommendation itself has

much merit. Notably, before the IER report was published, I had already tabled before my colleagues a proposal of that kind. And the Judges are considering it.

25. It is also encouraging to see that the IER Group has recommended the implementation of the idea of Judicial Council. It is a wonderful idea indeed. It will go a long way towards increasing trust in the system of accountability of judges and other elected officials. But I must stress immediately that the Judicial Council must be truly independent of the Court – and the ASP. It should not be created as a subsidiary body of the ASP, as that will be inconsistent with the idea of judicial independence. It is never a good idea for Judicial Councils to be (or perceived to be) subordinated to a political body⁴ – and the ASP is a political body. The Judicial Council for the ICC should rather be created on the basis of article 40(1) of the Rome Statute, which guarantees judicial independence at the Court.
26. We are happy to see in the report a recommendation for instituting proper induction course for new judges, and continuing professional development for judges (and their staff). It is a recommendation that all judges would welcome. I have been urging this for quite some time now. It is an idea that has met approval with every State delegate with whom I have discussed the matter. But it requires adequate budgetary appropriations. When I arrived at the Court in 2012, ICC Judges did not even have retreats. The culture of annual judicial retreats was introduced only in 2015 – by the Presidency immediately past. The current Presidency has continued the culture, and has lately expanded it to include staff within the judiciary. But occasional retreats as we now have them are inadequate as a format for continuing professional development of judges and induction course for new colleagues. We look forward to working with the ASP to implement this particular idea without delay.
27. We also would support the idea of transition management for the judiciary, in the event that a judge is for any reason permanently unable to continue sitting in an ongoing case. At the moment, the case would have to start all over again or be permanently discontinued. The utility of the recommended reform will go beyond the foreseeable situation when a judge dies or suffers permanent physical disability in the middle of a trial. It will also assist in dealing with the much fraught anxiety about extension of mandate of a judge who must remain behind to finish a part-heard trial, though the judge's tenure has come to its statutory end. The report recommends that this matter must be given serious attention.
28. These are only a few of the very many pluses in the report that we fully welcome and embrace. The report also contains other important observations and recommendations that give much food for thought.

The Minuses

29. But, there are minuses, too. After all, as observed earlier, the members of the IER Group are only human – just like their peers at the Court – and are also prone to mistakes of acts and omissions and analyses. That means there are some observations and recommendations that should be difficult to endorse or support. For instance, the idea of structural re-imagining of the Rome Statute system in a manner that accentuates any dimension of this *court of law* as any other international organisation whose member

⁴ The European Commission for Democracy [the Venice Commission] has repudiated an arrangement that would 'lead to a [National Council for the Judiciary] dominated by political nominees. Even if several "minority candidates" are elected, their election by Parliament will inevitably lead to more political influence on the composition of the NCJ and this will also have immediate influence on the work of this body, which will become more political in its approach': Opinion No 904/2017 of 11 December 2017, see para 24.

States should ‘reasonably expect to guide and shape,’⁵ especially through a Registrar with the enhanced powers of Chief Executive Officer – from his current status as ‘the principal administrative officer’⁶ – who will report to the ASP as its ‘Secretary-General’. We understand the temptation toward that view. Some may even see some logic in it. But, a great American jurist, Oliver Wendell Holmes, once observed that the life of the law is *experience* and not merely *logic*. This is one instance where we must reject the *logic* of those who are attracted to this new idea. Rather, we must heed the lessons of *experience*. For one thing, it is quite a dangerous proposition for any court of law, a Trojan horse from whose bowels will emerge, in future, forces that will ultimately destroy the Court’s judicial and prosecutorial independence in both reality and perception. But, it is also a recipe that will give formal credence to an uncharitable view of the Court as a ‘political’ body that is already being ‘guided’ or ‘shaped’ by powerful political players or determined subgroups of States. As a matter of experience, the Court has thus far battled against precisely that unfair labelling, at every turn. Notably, the present political attack against the Court is directly premised on the concern of Mr John Bolton and his colleagues, who have relentlessly levelled precisely that allegation against the Court, although they had no credible basis for it. So, too, have some leaders within the African Union, who until 2018 had been preparing to orchestrate a mass withdrawal of African States Parties, a project that they have not entirely abandoned. This is to say that the logic of seeing this *court of law* as just another international organisation, whose member States ‘reasonably expect to guide and shape’ will also bring with it the logic of seeing this Court as just another international ‘political’ entity that powerful States or a sufficiently determined subgroup of States can control to do their biddings or heed their forbearances. It is truly a difficult idea to endorse or support.

30. The idea is also dangerous given the current experience on the world stage today, when the tide of politics can go in startling directions, possibly fanning within nations the flames of ultra-nationalism, in ways that are inconsistent with the rule of law and shared ideas of what is good for the multilateral international order. That phenomenon can occur in any country that is party to the Rome Statute.
31. It is for the foregoing reasons that the records of the negotiations of the Rome Statute would show that States wanted to create a court of law – and not just another international organisation. The preamble of the Rome Statute makes that clear. And that is what they did in the very first article of the Rome Statute. They *created* a court of law. It was not until more than one hundred articles later that they *created* an Assembly of States Parties, which is needed to provide funding, ensure cooperation, serve as parliament and give parliamentary oversight over management and administration. Oversight is just that. It does not import the takeover of governance.

Surprising Gaps

32. Still on the minus column, the report also has worrying gaps. One gap is made more acute by the proposal discussed immediately above, which is to promote the idea of an international organisation like any other. According to that reorientation, the Registrar is effectively to be seen as the Secretary-General to whom would be devolved some of the important powers of the President and the Prosecutor, making the Registrar accountable only to the ASP as their Secretary-General and the President of the Court only giving general guidance to the Registrar, even in the parts of the Court’s function that are unquestionably judicial. Quite apart from the structural incongruity of the idea

⁵ See IER report, paragraph 26.

⁶ See article 43(2) of the Rome Statute.

and what this ultimately means for judicial or prosecutorial independence, the proposal even betrays a huge gap in the report.

33. To discuss that gap, I must discuss the current Registrar first, and pay him due compliments. We are truly lucky to have him. He is a true professional and thoughtful manager who cares about the wellbeing of all staff under him and wants all of them to get along as members of one family, and who does not behave as if it is all about him. But, he is only the fourth Registrar of the Court. Having known three of the four Registrars, I am in a position to say that the current Registrar is the gem amongst the three. As a comparative statement, however, that is something of an understatement. Until the recent past, the management of the Registry had brought much heartache and grief to that organ, to the institution and to the people who worked in it, as well as to States Parties. Notably, between 2015 – 2018, a certain operation called *ReVision* was carried out in the Registry, because of an agreed need for reform. Regrettably, the exercise turned out in a most unfortunate way. It cost the institution upwards of €6 million – with no net benefit that many can point to – and shattered morale of staff within the organ. But, there is not a word of any or that mentioned in the IER report, so that we may see what lessons it may hold. I might have been persuaded to follow the IER example and also say nothing at all about the matter. But, the *ReVision* experience has now been *directly* put in issue by the IER report, because of the proposals to enhance powers within the Registry at the expense of the Presidency and the OTP. Will those mistakes that prevailed in prior years up until 2018 now be considered a thing of the past? If so, how? There is silence in the IER report. Once more, I must stress that this is no adverse comment on the current Registrar. We are grateful to fate that we do have him now. But this Court will not have him forever. Are we truly sure that we will not in future see again the difficulties we had until 2018?

34. Another major gap in the Report, which makes the IER recommendation difficult, relates to a review of the ASP side of the Rome Statute system. The report reveals evident reluctance to discuss that issue in any obvious way. That is a major gap. To the extent that it indirectly gets to the matter in a very limited way, the IER only hints at possible shortcomings of the ASP, by refracting those shortcomings against officials of the Court: such as that the ASP may not have done all that it could have done to protect the Court against political attacks;⁷ or that judges of the court are elected by the ASP through a process that prides ‘horse-trading.’⁸ Also as regards the political attacks against the Court, some States have always been robust and unflinching in defending the Court in their individual capacities⁹ and have also sought to organise their peers to the same end.¹⁰ But self-interest and political circumstances have made it a struggle for more of them to do so. We also have been concerned about reports that some States Parties even appear reluctant to support measures to counter the political attacks against the Court. Such circumstances can pose a serious problem at the ASP, in future, were the IER recommendation in this regard to be accepted. It must be foreseen that representatives of such States can influence or obstruct the ASP as they see fit. The IER report omitted to capture these difficulties sufficiently and clearly in their significance. But, it is necessary to do so, before proposing the re-imagining of the ICC as an international organisation whose member States – including those whose political

⁷ See IER report, paragraph 400, recommendation 169.

⁸ *Ibid*, para 961. It may be noted in this respect that there are some States Parties that do not engage in ‘horse-trading’ during elections.

⁹ States Parties that have recently spoken up publicly in the Court’s defence include, but are not limited to, Austria, Belgium, Canada, Costa Rica, Czech Republic, Denmark, Ecuador, Finland, France, The Gambia, Germany, Ireland, Italy, Lesotho, Liechtenstein, Luxembourg, The Netherlands, New Zealand, Nigeria, Slovakia, Slovenia, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom and Uruguay.

¹⁰ The initiatives led by Costa Rica, Liechtenstein and Switzerland are particularly notable in this respect.

circumstances have not allowed to stand up robustly for the Court – should ‘reasonably expect to guide and shape.’ States Parties must enjoy the presumption of good faith, and many have certainly shown it over the years. But the shifting winds of politics – and they can shift in countries from election to election or through military coups as the case may be – must make that a truly rebuttable presumption. And that requires that the *functioning* of the International Criminal Court must – at all times – be separated from the ASP. The fusion now being recommended is entirely difficult to support.

CONCLUSION

35. Despite the very short deadline they were given to conduct their review, the IER has given us much food for thought. I encourage everyone to approach the report with an open mind.
36. There are good ideas in it that will truly help us improve as we intend to do. We will embrace and work with those without delay.
37. But, there are also proposals and recommendations that contain pitfalls which we worry would make the system worse, not better, and this would make it difficult for us to support them.